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Civil Procedure: Pre-Trial & Trial

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CIVIL PROCEDURE: PRE-TRIAL & TRIAL

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

I. SUBJECT MATTER JURISDICTION

In *De Gonzalez v. Guilbot* the Texas Supreme Court addressed when jurisdiction over a removed action revests in state court following a federal court's remand order.[1] The supreme court previously held that revesting of jurisdiction happens "when the federal district court executes the remand order and mails a certified copy to the state court."[2] The *Guilbot* defendants advocated a literal interpretation of this rule, arguing that because plaintiffs' counsel hand-delivered a certified copy of the remand order for filing, jurisdiction did not revest in state court.[3] The supreme court rejected this "unduly rigid reading" of its prior opinion and held that hand-filing the removal order sufficiently transferred jurisdiction from federal to state court.[4]

The Texas Supreme Court's opinion in *In re United Services Automobile* began by lamenting the "antiquated jurisdictional patchwork" in which trial courts operate in Texas.[5] The supreme court noted that one safety net for trial practitioners navigating this complex scheme is the statute that tolls limitations if a case is dismissed for lack of jurisdiction, so long as it is refiled in the proper court within sixty days.[6] In *United*

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1. DeGonzalez v. Guilbot, 315 S.W.3d 533, 534 (Tex. 2010), *cert. denied*, 131 S. Ct. 951 (2011).
2. Quaestor Invs., Inc. v. Chiapas, 997 S.W.2d 226, 229 (Tex. 1999).
3. *Guilbot*, 315 S.W.3d at 536–37.
4. *Id.* at 537–38. Defendants did not help their cause by further asserting that it was also too late for the federal court to act, and therefore neither the federal nor the state court had jurisdiction over the case. *Id.* The supreme court curtly disposed of this argument, rejecting the idea that "the case now exists in a strange procedural twilight zone." *Id.* at 538.
5. *In re* United Servs. Auto. Ass'n, 307 S.W.3d 299, 302–04 (Tex. 2010).
6. TEX. CIV. PRAC. & REM. CODE ANN. § 16.064(a) (West 2008); *United Servs.*, 307 S.W.3d at 304.

Services, the supreme court held this statute applied to a claim for violations of the Texas Commission on Human Rights Act, rejecting the contention that the statute's two-year deadline for filing suit is "jurisdictional" and that tolling is therefore unavailable.[7] Nevertheless, the plaintiff was not able to avail himself of the statute's tolling because his attorney intentionally filed his case in county court with full knowledge that the damages sought exceeded the court's jurisdictional limit, not because of a good faith, mistaken belief as to the court's jurisdiction.[8]

During the Survey period, sovereign immunity became the subject of two notable decisions. The Texas Supreme Court held several years ago that a governmental entity can waive its immunity from suit by asserting its own affirmative claims for monetary damages.[9] In *Texas Department of Criminal Justice v. McBride*; however, the supreme court clarified that a governmental entity does not waive immunity when the entity is sued, merely by asserting a defensive claim to recover attorneys' fees.[10]

The Texas Supreme Court addressed the effect of the federal Family and Medical Leave Act (FMLA) on Texas's sovereign immunity in *University of Texas at El Paso v. Herrera*.[11] Although the supreme court recognized the FMLA expressly provides that states are subject to claims under the FMLA, it held that Congress exceeded its constitutional authority when it attempted to abrogate the states' sovereign immunity with respect to claims under the so-called "self-care" provision, which entitles workers to leave due to their own serious health conditions.[12] The majority specifically explains that Congress's authority to abrogate immunity under the Fourteenth Amendment is limited to situations where it is necessary to remedy a specific constitutional injury by the states.[13] The supreme court concluded that, unlike the FMLA provisions protecting workers (often female) who take leave to care for family members, nothing in the legislative record suggested that Congress intended the self-care provision to remedy gender discrimination with respect to personal medical leave.[14]

Finally, the Dallas Court of Appeals in *In re Marriage of J.B. & H.B.* held that the Texas courts lack subject matter jurisdiction over same-sex divorce cases.[15] The parties here were lawfully married in Massachusetts two years before moving to Texas. Because both the Texas Constitution

7. *Id.* at 310–11.
8. *Id.* at 313.
9. Reata Constr. Corp. v. City of Dallas, 197 S.W.3d 371, 378 (Tex. 2006).
10. Tex. Dep't of Criminal Justice v. McBride, 317 S.W.3d 731, 732 (Tex. 2010).
11. Univ. of Tex. at El Paso v. Herrera, 322 S.W.3d 192, 193 (Tex. 2010).
12. *Id.* at 201.
13. *Id.* at 195 (citing Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003)).
14. *Herrera*, 322 S.W.3d at 198–99. The supreme court also rejected the plaintiff's contention that a single sentence in the university's employee handbook stating that an eligible employee may bring a FMLA action sufficiently waived sovereign immunity. *Id.* at 201.
15. *In re* Marriage of J.B. & H.B., 326 S.W.3d 654, 659 (Tex. App.—Dallas 2010, pet. filed).

and Family Code declare same-sex marriages void;[16] however, the court of appeals held the district court was prohibited from giving any legal effect to the parties' marriage, thereby depriving it of subject matter jurisdiction over proceedings to dissolve such marriages.[17] The court of appeals also held that Texas law in this regard does not violate the Equal Protection Clause of the Fourteenth Amendment.[18]

II. SERVICE OF PROCESS

The Dallas Court of Appeals rejected a defaulting defendant's novel challenge to the sufficiency of service in *Tucker v. Tucker*.[19] Specifically, the defendant argued the record failed to show valid service because a copy of the petition was not attached to the return of service filed in the trial court.[20] However, the court of appeals found no authority requiring the petition to be attached to the return and, because it was already in the record, no reason to require another copy of the petition to accompany the return.[21] The court of appeals also summarily rejected the defendant's complaint that he did not sign the return of service, noting there is no such requirement in Texas Rules of Civil Procedure 107.[22]

III. SPECIAL APPEARANCE

The Texas Supreme Court also clarified the burdens of pleading and proof on special appearance in *Kelly v. General Interior Construction, Inc.*[23] The supreme court reiterated the rule that where a plaintiff fails to adequately plead jurisdictional facts, an out-of-state defendant can satisfy his burden on special appearance by proving he does not reside in Texas.[24] Here, although the plaintiff alleged tortious conduct on the defendants' part, the plaintiff did not allege (or offer proof) that such conduct occurred in Texas.[25] The supreme court explained the mere fact that

16. TEX. CONST. art. I, § 32; TEX. FAM. CODE ANN. § 6.204(b) (West 2006).
17. *J.B.*, 326 S.W.3d at 659.
18. *Id.* The court refused to consider other constitutional challenges in a supplemental opinion on motion for en banc reconsideration, including those based on the rights to free association and travel, that the parties failed to raise in the trial court. *Id.* at 681.
19. Tucker v. Tucker, No. 05-09-01203-CV, 2010 Tex. App. LEXIS 9272, at *3 (Tex. App.—Dallas Nov. 22, 2010) (mem. op.), *pet. denied*, 2011 Tex. LEXIS 367 (Tex. May 6, 2011).
20. *Id.* at *3–4.
21. *Id.* at *4.
22. TEX. R. CIV. P. 107; *Tucker*, 2010 Tex. App. LEXIS 9272, at *4.
23. Kelly v. Gen. Interior Constr., Inc., 301 S.W.3d 653, 658 (Tex. 2010).
24. *Id.* at 658–59. The supreme court also noted that a plaintiff should amend in order to allow the special appearance to be determined based on the evidence where jurisdictional allegations are wholly lacking in the plaintiff's original pleading. *Id.* at 659. In *Alliance Royalties, LLC v. Boothe*, 329 S.W.3d 117 (Tex. App.—Dallas 2010, no pet.); however, the Dallas Court of Appeals held that *Kelly* does not restrict a trial court to looking only to a plaintiff's petition, but the trial court may also consider the plaintiff's response to a special appearance in determining whether the plaintiff met his initial burden of alleging facts supporting the exercise of personal jurisdiction over the defendant. *Id.* at 120.
25. *Kelly*, 301 S.W.3d at 659–60.

a plaintiff may possess a cause of action "does not automatically satisfy jurisdictional due process concerns."[26]

Two additional Texas Supreme Court cases during the Survey period provide guidance on sufficiency of a foreign manufacturer's contacts with Texas for purposes of specific jurisdiction. In *Spir Star AG v. Kimich*, the supreme court held a manufacturer who specifically targets the Texas market for its products, such as utilizing a distributor based in Texas, will be subject to jurisdiction in cases arising out of products sold in this state.[27] In *Zinc Nacional, S.A. v. Bouche Trucking, Inc.*, on the other hand, the supreme court held a plaintiff failed to establish that a Mexican manufacturing company had the requisite minimum contacts with Texas where the manufacturer merely knew its products would be shipped through Texas by a third-party trucking company.[28]

Finally, *IRN Realty Corp. v. Hernandez* concerned the nature and extent of discovery a trial court should allow a plaintiff prior to ruling on a special appearance.[29] In this case, the trial court granted the plaintiff's motions to postpone the special appearance hearing and to compel a deposition of the defendant's corporate representative in Texas. When the defendant failed to appear for the deposition, the trial court refused to hear the special appearance, and instead struck the defendant's pleading and entered a default judgment. Although careful to note that it did not condone the defendant's refusal to obey the trial court's order compelling the deposition, the Eastland Court of Appeals nevertheless held the trial court abused its discretion in abating the special appearance hearing, compelling the deposition, and sanctioning the defendant.[30] The court of appeals explained that while Rule 120a[31] would have allowed the plaintiff to obtain a continuance of the special appearance hearing if she demonstrated by affidavit a need for jurisdictional discovery to respond to the special appearance, the plaintiff made no such showing.[32]

IV. VENUE

As most practitioners are aware,

> A trial court abuses its discretion in refusing to enforce a forum-selection clause unless the party opposing enforcement of the clause can clearly show that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3)

26. *Id.* at 660.

27. Spir Star AG v. Kimich, 310 S.W.3d 868, 874 (Tex. 2010). The supreme court also rejected the defendant's arguments that it was not subject to jurisdiction because it transferred title to the products in Europe and did not directly receive any profits realized by the Texas distributorship upon the distributorship's sale of its products in Texas. *Id.* at 875–76.

28. Zinc National, S.A. v. Bouche Trucking, Inc., 308 S.W.3d 395, 397–98 (Tex. 2010).

29. IRN Realty Corp. v. Hernandez, 300 S.W.3d 900, 903 (Tex. App.—Eastland 2009, no pet.).

30. *Id.*

31. TEX. R. CIV. P. 120a.

32. *Hernandez*, 300 S.W.3d at 903.

enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial.[33]

During the Survey period, the Texas Supreme Court twice confirmed that, barring exceptional circumstances, it would continue to enforce forum selection clauses. In *In re ADM Investor Services, Inc.*, the plaintiff sued two defendants, one which was subject to a contractual forum selection clause.[34] The trial court denied the defendant's motion to dismiss based on the forum selection clause, concluding it was unreasonable to require the plaintiff to pursue the same cause of action against two defendants in different states. The Texas Supreme Court disagreed; however, holding the plaintiff failed to meet her "heavy burden" of establishing that enforcing the forum selection clause would be "unreasonable or unjust, or seriously inconvenient."[35] The supreme court found that if forum selection clauses could be avoided by merely adding other defendants not subject to the clause, they would have very little to no value.[36] Similarly, in *In re Laibe Corp.*, the Texas Supreme Court rejected the plaintiff's argument that the forum selection clause should not be enforced because it would cause significant financial hardship.[37] The supreme court again explained that "'[i]f merely stating that financial and logistical difficulties will preclude litigation in another state suffices to avoid a forum-selection clause, the clauses are practically useless.'"[38]

V. PARTIES

In *McKnight v. Meller*, the Dallas Court of Appeals held the statute of limitations was not equitably tolled under the "misidentification" doctrine.[39] The plaintiff filed suit against Meller asserting claims arising out of a car accident. In response to written discovery requests, and approximately one month before limitations ran, Derek L. Meller disclosed that his son, Derek B. Meller, was the person actually driving the car. Approximately six months later, the plaintiff amended his petition to add Derek B. Meller as a defendant. The trial court granted Derek B. Meller's motion for summary judgment on the grounds that the claims were barred by limitations. The plaintiff appealed, arguing that limitations should be equitably tolled under the doctrine of "misidentification."

The court of appeals first explained the difference between "misidentification" and "misnomer."[40] In cases of misidentification, "two separate legal entities exist and a plaintiff mistakenly sues an entity with a name

33. *See, e.g.*, *In re* Lyon Fin. Servs., Inc., 257 S.W.3d 228, 231–32 (Tex. 2008).
34. *In re* ADM Investor Servs., Inc., 304 S.W.3d 371, 373 (Tex. 2010).
35. *Id.* at 375.
36. *Id.*
37. *In re* Laibe Corp., 307 S.W.3d 314, 317–18 (Tex. 2010).
38. *Id.* at 318 (quoting *In re* AIU Ins. Co., 148 S.W.3d 109, 113 (Tex. 2004)).
39. McKnight v. Meller, No. 05-09-00596-CV, 2010 Tex. App. LEXIS 2120, at *3–5 (Tex. App.—Dallas Mar. 25), *pet. denied*, 2010 Tex. LEXIS 660 (Tex. Sep. 3, 2010).
40. *Id.* at *3–4.

similar to that of the correct entity," and the limitations period is not tolled.[41] In "misnomer" cases, the plaintiff has merely misnamed the correct defendant, and limitations is tolled.[42] Here, the plaintiff argued that limitations should be tolled because Derek B. Meller had actual knowledge of the lawsuit, was not misled by the misidentification, and suffered no prejudice. The court of appeals rejected this argument, holding that, while prejudice is a relevant factor where the defendant is a corporate or other entity that had a business relationship with the plaintiff, it is not a relevant factor in cases involving individuals.[43]

In *In re Guetersloh*, the Amarillo Court of Appeals held an individual trustee could not represent himself *pro se* in that capacity.[44] The trustee argued that because claims against a trust must be asserted against the trustee, Rule 7[45] allows an individual trustee to appear *pro se*. The court of appeals disagreed, holding that the situation was more akin to a corporation because the trustee appeared in a representative capacity; thus the trustee was not entitled to the right of personal representation.[46]

VI. PLEADINGS

In *Shutter v. Wells Fargo Bank, N.A.*, the Dallas Court of Appeals considered the effect of a defective verification in a forcible entry and detainer action.[47] Here, the plaintiff's petition was supported by a verification stating the facts in the petition were true and correct "to the best of my knowledge."[48] The trial court granted possession to the plaintiff, and the defendant appealed arguing that (1) the defective verification made the petition "invalid" and therefore deprived the court of jurisdiction, and (2) the trial court should have granted his request for a plea in abatement.

The court of appeals first determined that the defendant's jurisdictional argument failed because the defective verification "did not deprive the county court of jurisdiction to hear the forcible detainer action."[49] The court then held that to prevail on a plea in abatement, the moving party must "identify any impediment to the continuation of the suit, identify an effective cure, and ask the court to abate the suit until the defect is corrected."[50] The defendant must also demonstrate some harm if the suit is not abated. Applying these factors, the court of appeals held the defen-

41. *Id.*
42. *Id.* at *4.
43. *Id.* at *4–5.
44. *In re* Guetersloh, 326 S.W.3d 737, 740 (Tex. App.—Amarillo 2010, orig. proceeding).
45. TEX. R. CIV. P. 7 provides that "[a]ny party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court."
46. *Guetersloh*, 326 S.W.3d at 740.
47. Shutter v. Wells Fargo Bank, N.A., 318 S.W.3d 467, 469 (Tex. App.—Dallas 2010, pet. filed).
48. *Id.*
49. *Id.*
50. *Id.* at 470.

dant failed to show how the defective verification was an impediment to continuation of the suit or how he had been harmed.[51]

VII. DISCOVERY

The Texas Supreme Court continued to encourage trial courts to guard against overbroad discovery requests in *In re Deere & Co.*[52] In this product liability case, the supreme court held that, while a trial court properly limited the plaintiff's document requests regarding the defendant's backhoes to those models equipped with the allegedly defective feature, the trial court abused its discretion by failing to include a reasonable time limit on the request.[53]

A request for an apex deposition was at issue in *In re Continental Airlines, Inc.*[54] Following a no-fatality accident, Continental's chief executive officer (CEO) and chairman of the board held a press conference where the CEO promised a full investigation and subsequently sent a letter of apology to the flight's passengers. The trial court granted the plaintiffs' request to depose the CEO, but limited the deposition to two hours and restricted the subject matter to his actions and statements relating to the crash. The Fourteenth District Court of Appeals held that allowing this limited deposition was an abuse of discretion.[55] The court of appeals explained that the CEO had no unique or personal knowledge of the crash or investigation because the information he provided at the press conference was conveyed to him by other Continental employees; furthermore, the plaintiffs had not shown that less intrusive discovery, such as deposing other employees more directly involved with the crash investigation, would be inadequate.[56]

In *Heerden v. Heerden*, a divorce action, an appellant-wife complained of the trial court's exclusion of three witnesses based on her failure to adequately describe their connection to the case in responding to her husband's requests for disclosure.[57] The husband objected that her disclosures failed to give any information of what the witnesses knew or would testify to. The Fourteenth District Court of Appeals held the husband read an "unnecessarily onerous" requirement into the disclosure rule.[58] The court of appeals explained that Rule 194.2(e)[59] requires only a brief statement of a person's connection to the case; in the context of this divorce proceeding, identifying the potential witnesses as the wife's father

51. *Id.*
52. *In re* Deere & Co., 299 S.W.3d 819, 820 (Tex. 2009).
53. *Id.* at 821.
54. *In re* Cont'l Airlines, Inc., 305 S.W.3d 849, 853 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding).
55. *Id.* at 859.
56. *Id.* at 858–59.
57. Heerden v. Heerden, 321 S.W.3d 869, 875 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing TEX. R. CIV. P. 194.2(e)).
58. *Id.* at 876.
59. TEX. R. CIV. P. 194.2(e).

or sister was sufficient to satisfy this requirement.[60]

As Texas courts continue to struggle with the procedures for and limitations on electronic discovery, *In re Harris* illustrates that such discovery is now a common feature of modern litigation that does not alone justify appointment of a special master.[61] The trial court in this case ordered a defendant to produce his computer hard drive and external drives for an independent forensic examination by the plaintiff's consultant.[62] The First District Court of Appeals held this was an abuse of discretion because the trial court failed to follow standards for entry of this type of order set forth in the rules of procedure and Texas Supreme Court precedent.[63] Moreover, the court of appeals explained that a forensics examiner is not the same as a special master appointed under Rule 171.[64] Thus, the trial court's order conferring certain powers of a special master on plaintiff's retained consultant was also error.[65]

The Beaumont Court of Appeals held that the identity of a defendant's jury consultant was protected work product in *In re Jefferson County Appraisal District*.[66] Through deposition of one of defendant's testifying experts, the plaintiff learned that the defendant conducted a mock trial using a jury consultant. The defendant allowed the testifying expert to answer numerous questions about his recollection of the mock trial, but objected when the plaintiff then asked for supplemental discovery responses identifying the jury consultant and allowing him to be deposed. The court of appeals held the trial court's order compelling this discovery was in error.[67] Specifically, the court explained that the defendant did not waive the work product privilege by allowing the expert to testify about his own knowledge of the mock trial because the expert had not seen a copy of the jury consultant's report and was not otherwise given any privileged information in connection with his attendance at the mock trial.[68]

Another discovery rule, Rule 192.3(g), allows a party to discover the existence and contents of settlement agreements.[69] In *In re Univar USA, Inc.*, the Beaumont Court of Appeals held this rule means what it says, rejecting the plaintiffs' argument that their settlement amounts with other

60. *Heerden*, 321 S.W.3d at 876.

61. *In re* Harris, 315 S.W.3d 685, 705 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding).

62. *Id.* at 700.

63. *Id.* at 700–02 (citing TEX. R. CIV. P. 196.4 and *In re* Weekley Homes, 295 S.W.3d 309 (Tex. 2009)).

64. TEX. R. CIV. P. 171.

65. *Harris*, 35 S.W.3d at 704–05.

66. *In re* Jefferson Cnty. Appraisal Dist., 315 S.W.3d 229, 233–34 (Tex. App.—Beaumont 2010, orig. proceeding).

67. *Id.* at 230–31.

68. *Id.* at 235. The court also held the plaintiff's interrogatory asking for identity of other persons who attended the mock trial was irrelevant and outside the permissible scope of discovery. *Id.* at 237.

69. TEX. R. CIV. P. 192.3(g).

defendants were confidential.[70] The court of appeals explained the rule does not make terms of a settlement conditionally discoverable only after a verdict solely to compute applicable settlement credits, thereby implicitly recognizing the relevance of this information for other reasons as well, and requiring its production before trial.[71]

Finally, the Fourteenth District Court of Appeals rejected the use of an order disqualifying a party's counsel as a discovery sanction in *In re Vossdale Townhouse Ass'n.*[72] In this nuisance suit, the plaintiffs' attorney served 31,448 requests for admissions and 1,136 requests for production on eight defendants. Although the court of appeals agreed the plaintiffs' discovery requests were sanctionable and expressed "great empathy" for the trial court's frustration with such tactics, the court of appeals held even the most egregious discovery abuse should not override a party's fundamental right to counsel of its choice.[73]

VIII. DISMISSAL

The Texas Supreme Court in *Travelers Insurance Co. v. Joachim* held a trial court's accidental entry of a dismissal order for want of prosecution with prejudice, after the plaintiff filed a notice of nonsuit without prejudice, barred a subsequent suit by the plaintiff under the doctrine of res judicata.[74] The plaintiff filed his notice of nonsuit without prejudice the day before trial. Several months later, however, the trial court sent a notice stating the case would be dismissed for want of prosecution if a final order was not filed. The plaintiff claimed to have not received either the dismissal notice or the ensuing order, and therefore did not perfect an appeal or challenge the dismissal order while the trial court retained jurisdiction. When the plaintiff refiled suit, the defendant successfully moved for summary judgment on the basis of res judicata, but the Amarillo Court of Appeals reversed. The supreme court then reversed the court of appeals, holding the dismissal with prejudice—though erroneously entered after the plaintiff filed his nonsuit—was only voidable and not void.[75] Because the plaintiff did not timely challenge the original dismissal with prejudice, res judicata barred the second suit.[76]

In *Christensen v. Chase Bank USA, N.A.*, the Dallas Court of Appeals held that "Mother Hubbard" language ("[a]ll relief prayed for but not expressly granted herein is denied") in an order dismissing a case for want of prosecution did not constitute a dismissal with prejudice for pur-

70. *In re* Univar USA, Inc., 311 S.W.3d 175, 179-81 (Tex. App.—Beaumont 2010, orig. proceeding).

71. *Id.* at 181.

72. *In re* Vossdale Townhouse Ass'n, 302 S.W.3d 890, 896 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding).

73. *Id.* at 895.

74. Travelers Ins. Co. v. Joachim, 315 S.W.3d 860, 861, 866 (Tex. 2010).

75. *Id.* at 863–65.

76. *Id.* at 865–66.

poses of res judicata.[77] The court of appeals recognized that while a number of its sister courts had reached the opposite conclusion, it declined to follow them because they failed to explain their rationale.[78]

Upon timely notice, a plaintiff has an absolute right to nonsuit a case if the defendant has not asserted a claim for affirmative relief.[79] In *In re Riggs*, the Fort Worth Court of Appeals held a plaintiff retained this right to nonsuit his claims without prejudice, even where the trial court already granted a motion compelling arbitration.[80] The court of appeals reasoned a motion to compel arbitration is not an independent, affirmative claim for relief, and therefore did not affect the plaintiff's right to nonsuit.[81]

In *Dao v. Le*, the Fourteenth District Court of Appeals held the trial court erred in dismissing a case for want of prosecution where the plaintiffs' counsel appeared at trial ready to prosecute their case, but the plaintiffs did not personally appear.[82] The court of appeals held that appearance of plaintiffs' counsel as their agent was sufficient and allowed them to proceed with their case.[83] Moreover, the fact that the plaintiffs were subpoenaed to appear and testify was irrelevant because dismissal of their case was not a recognized sanction for violating a subpoena.[84]

IX. JURY PRACTICE

In *Showbiz Multimedia, LLC v. Mountain States Mortgage Centers, Inc.*, the First District Court of Appeals held that statements made by defense counsel during closing argument—that plaintiff's use of the courts was "judicial terrorism" and extortion and that a witness was "scared to death" of the plaintiff because of "cultural issues"—constituted incurable jury argument.[85] The plaintiff in this case was a naturalized American citizen born in India. The court of appeals held this type of improper appeal to race or nationalism "strikes at the heart of the jury trial system and [is] incurable."[86]

The Tyler Court of Appeals held in *McKenna v. W & W Services, Inc.* that the trial court did not abuse its discretion when it denied the plain-

77. Christensen v. Chase Bank USA, N.A., 304 S.W.3d 548, 553–54 (Tex. App.—Dallas 2010), *pet. denied*, 2010 Tex. LEXIS 530 (Tex. July 30, 2010).

78. *Id.* at 554.

79. TEX. R. CIV. P. 162; *see, e.g.*, *Joachim*, 315 S.W.3d at 862.

80. *In re* Riggs, 315 S.W.3d 613, 615–16 (Tex. App.—Fort Worth 2010, orig. proceeding).

81. *Id.* at 616.

82. Dao v. Le, No. 14-08-01113-CV, 2010 Tex. App. LEXIS 473, at *5 (Tex. App.—Houston [14th Dist.] Jan. 26, 2010, no pet.) (mem. op.).

83. *Id.* at *4–5.

84. *Id.* at *5 (citing TEX. R. CIV. P. 176.8).

85. Showbiz Multimedia, LLC v. Mountain States Mortgage Ctrs., Inc., 303 S.W.3d 769, 771–72 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

86. *Id.* at 772. *But cf.* Cottman Transmission Sys., L.L.C. v. FVLR Enters., L.L.C., 295 S.W.3d 372, 379–80 (Tex. App.—Dallas 2009) (holding that referring to the plaintiff's president as a "Philadelphia Lawyer" during closing argument was not reversible error where the witness testified he was an attorney who graduated from Temple University's law school in Philadelphia), *pet. denied*, 2010 Tex. LEXIS 5 (Tex. Jan. 8, 2010).

tiff's Batson challenge after the defendant used all of its peremptory challenges to strike six females from the venire in a gender discrimination case.[87] The defendant's attorney was able to articulate gender-neutral reasons for each of his strikes, including sufficiently specific "demeanor" explanations, and the court of appeals held that the plaintiff could not meet her burden of proving these reasons were pretextual merely by expressing disbelief.[88] Neither side "elicited detailed information" about the venire members during jury selection, nor did they introduce the "jur[y] questionnaires, the jury list, or the strikes of either party into evidence"; accordingly, the court of appeals could not conduct a "comparative juror analysis."[89] Finally, the court of appeals noted that, although "17 of the 24 potential jurors within the strike zone" were female, the defendant did not request a jury shuffle or ask the male and female venire members conflicting questions on the same subject.[90]

X. JUDGMENTS

The Texas Supreme Court again addressed the question of when a judgment is final in *In re Daredia*.[91] In this mandamus proceeding, the plaintiffs sued both a corporate defendant and its individual owner over a credit card debt. The plaintiffs obtained a default judgment against the corporate defendant when it failed to answer. Although the individual defendant filed an answer, the trial court's default judgment against the corporate entity stated it disposed all parties and all claims, and was a final judgment. After the trial court's plenary jurisdiction expired, the plaintiffs successfully moved for a judgment *nunc pro tunc* to restyle it as interlocutory because it was not meant to dispose of the claims against the individual defendant who had answered. The supreme court granted mandamus relief, holding the clear and unequivocal language of the judgment made it final.[92] Moreover, the trial court's error in rendering the judgment was a judicial, rather than a clerical error; thus, the trial court could not use a judgment *nunc pro tunc* to modify the final judgment after its plenary power expired.[93]

A judgment becomes dormant if no writ of execution is issued within ten years after it is rendered,[94] but it can be revived if a petition for writ

87. McKenna v. W & W Servs., Inc., 301 S.W.3d 336, 345 (Tex. App.—Tyler 2009), *pet. denied*, 2010 Tex. LEXIS 518 (Tex. July 16, 2010).

88. *Id.* at 343–44.

89. *Id.* at 344.

90. *Id.*

91. *See In re* Daredia, 317 S.W.3d 247, 249 (Tex. 2010).

92. *Id.*; *see also* Vaughn v. Drennon, 324 S.W.3d 560, 561 (Tex. 2010) (reaffirming the rule that a judgment entered following "conventional trial on the merits" is presumed to be final, even if it fails to address claims against certain parties).

93. *Daredia*, 317 S.W.3d at 249–50; *see also* Rawlins v. Rawlins, 324 S.W.3d 852, 855–57 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding that error in agreed final divorce decree signed by trial court, which specified child support payments begin on a date before the parents separated and divorce suit was filed, was judicial and not clerical error).

94. TEX. CIV. PRAC. & REM. CODE ANN. § 34.001(a) (West Supp. 2010).

of *scire facias* is filed within two years after the judgment becomes dormant.[95] In *Cadles of Grassy Meadow, II, LLC v. Herbert*, the Amarillo Court of Appeals determined whether a writ of *scire facias* was timely filed within twelve years of the date the written judgment was entered; but not within twelve years of an earlier date shown on the docket sheet as the date the parties advised the trial court they had settled and would present an agreed judgment.[96] Because there was no reporter's record reflecting whether the trial court actually rendered judgment orally on the earlier date, the appellate court deemed the writ of *scire facias* timely based upon the date of the written judgment.[97]

In *PNS Stores, Inc. v. Rivera*, the San Antonio Court of Appeals allowed a default judgment against a defendant to stand even though a federal district court had previously granted summary judgment for the defendant on the same claims.[98] The defendant removed the plaintiff's original personal injury suit to federal court where summary judgment was entered in the defendant's favor. However, the federal court's order stated it was dismissing the plaintiff's claims without prejudice. The plaintiff then refiled the case in state court. Although the plaintiff served the defendant's registered agent in the second suit (just as she had the first time), the defendant failed to answer and the trial court entered a default judgment in favor of the plaintiff for approximately $1.4 million. The defendant did not timely move for a new trial or appeal the default judgment. When the plaintiff initiated collection efforts nine years later, the defendant filed a bill of review challenging the default judgment based on the federal court's prior summary judgment order. The defendant also obtained an order *nunc pro tunc* from the federal court, correcting its summary judgment to reflect a dismissal with prejudice. The trial court still granted summary judgment in favor of the plaintiff. The court of appeals affirmed, holding that even if the federal court judgment were preclusive (an issue the court of appeals did not reach), it would not render the state court default judgment void.[99] In the absence of evidence of extrinsic fraud, therefore, the defendant's bill of review was untimely.[100]

XI. MOTIONS FOR NEW TRIAL

In *In re United Scaffolding, Inc.*, the Texas Supreme Court reiterated that a trial court abuses its discretion in granting a motion for new trial

95. TEX. CIV. PRAC. & REM. CODE ANN. § 31.006 (West 2008).

96. Cadles of Grassy Meadow, II, LLC v. Herbert, No. 07-09-00190-CV, 2010 Tex. App. LEXIS 3147, at *1 (Tex. App.—Amarillo Apr. 27, 2010, no pet.) (mem. op.).

97. *Id.* at *17. *But cf.* Greene v. State, 324 S.W.3d 276, 280–81, 285 (Tex. App.—Austin 2010, no pet.) (holding that where a letter ruling issued before a judge retired expressly stated she was rendering judgment, the judge had authority to perform a clerical duty of signing a written judgment after expiration of her term).

98. PNS Stores, Inc. v. Rivera, No. 04-09-00561-CV, 2010 Tex. App. LEXIS 8769, at *1–3 (Tex. App.—San Antonio Nov. 3, 2010, pet. filed).

99. *Id.* at *14–18.

100. *Id.* at *21–26.

that disregards a jury verdict when it fails to articulate a reason for that decision beyond "the interest of justice and fairness."[101] Following the supreme court's decision, the trial court entered a second order granting a new trial stating four reasons for its decision. However, the trial court separated the four grounds with the phrase "and/or" and gave as its last reason "the interest of justice and fairness."[102] The Beaumont Court of Appeals denied the defendant's petition for mandamus relief, which contended that the trial court failed to adequately articulate the bases for its decision.[103] While critical of the trial court's use of the phrase "and/or" between the grounds because of its propensity to create ambiguity, the court of appeals concluded the stated grounds were sufficiently detailed and complied with the supreme court's mandate of specificity in granting motions for new trial.[104] The court of appeals also held the trial court was not required to make specific references to evidence adduced at trial in its order granting a new trial.[105]

In *McClellan v. HICA Education Loan Corp.*, the Dallas Court of Appeals dismissed an appeal from an order denying a second motion for new trial because the trial court already denied the original new trial motion before the second motion was filed.[106] The court of appeals held the second motion was untimely and did not extend the trial court's plenary power.[107] The order denying the second motion, entered after the trial court's plenary power expired, was therefore void, and the court of appeals lacked jurisdiction over the attempted appeal therefrom.[108]

Finally, the San Antonio Court of Appeals in *In re Northern Natural Gas Co.* faced an unusual situation in which a trial court timely granted a motion for new trial on damages, but attempted to defer a ruling on the part of the motion regarding liability to a date after its plenary power would ordinarily expire.[109] The court of appeals granted a writ of mandamus, noting a trial court's jurisdiction to rule on a motion for new trial under Rule 329b[110] cannot be extended beyond the time period prescribed in that rule.[111] Therefore, the court of appeals held the portion of the trial court's order setting a hearing on the new trial motion's liability grounds for a date after the trial court's plenary power expired was

101. *In re* United Scaffolding, Inc., 301 S.W.3d 661, 662 (Tex. 2010) (citing *In re* Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 206 (Tex. 2009)).

102. *In re* United Scaffolding, Inc., 315 S.W.3d 246, 247–48 (Tex. App.—Beaumont 2010, orig. proceeding).

103. *Id.* at 247.

104. *Id.* at 248–49.

105. *Id.* at 249–51.

106. McClellan v. HICA Educ. Loan Corp., 312 S.W.3d 291, 293–94 (Tex. App.—Dallas 2010, no pet.).

107. *Id.*

108. *Id.* at 294.

109. *In re* N. Natural Gas Co., 327 S.W.3d 181, 184–85 (Tex. App.—San Antonio 2010, orig. proceeding [mand. denied]).

110. *See* TEX. R. CIV. P. 329b.

111. *N. Natural Gas*, 327 S.W.3d at 186.

void.[112] However, the holding appears inconsistent with the Texas Supreme Court's decision in *In re Baylor Medical Center at Garland*, which overturned the old Texas rule prohibiting a trial court from "ungranting" a prior order that granted a new trial after the date where its plenary power would have expired if the original judgment had instead become final.[113] As discussed in that case, a trial court's plenary power does not expire after a vacated judgment, only after a final judgment, and the supreme court therefore rejected imposition of a hypothetical deadline calculated from the date of the original, vacated judgment.[114] This reasoning points toward the opposite conclusion from that reached by the San Antonio Court of Appeals in *Northern Natural Gas*.

XII. DISQUALIFICATION OF JUDGES

In *De Gonzalez v. Guilbot*, the Texas Supreme Court addressed the meaning of the term "tertiary recusal motion."[115] Section 30.016(a) of the Civil Practice and Remedies Code states a "'tertiary recusal motion' means a third or subsequent motion for recusal or disqualification filed against a district court or statutory county court judge by the same party in a case."[116] Unlike the procedure for other recusal motions, if a judge declines to recuse herself in response to a tertiary recusal motion, she may continue to preside in the case while the motion is determined by another judge.[117] In *Guilbot*, the supreme court rejected the argument that only a third motion filed against the same judge is considered a tertiary recusal motion, holding such an interpretation is unsupported by the statutory text and would lead to the absurd result of allowing a party to file endless recusal motions against successive judges in one case.[118]

XIII. DISQUALIFICATION OF COUNSEL

More than fifteen years ago, the Texas Supreme Court held a law firm is not necessarily disqualified from a matter when it hires a nonlawyer employee, such as a legal assistant, who previously worked on the same

112. *Id.* at 186–87, 189.
113. *In re* Baylor Med. Ctr. at Garland, 280 S.W.3d 227, 228 (Tex. 2008).
114. *Id.* at 230–31.
115. De Gonzalez v. Guilbot, 315 S.W.3d 533, 534 (Tex. 2010), *cert. denied*, 131 S. Ct. 951 (2011).
116. TEX. CIV. PRAC. & REM. CODE ANN. § 30.016(a) (West 2008).
117. *See id.* § 30.016(b)–(c).
118. *Guilbot*, 315 S.W.3d at 540. *Guilbot* was decided under a prior version of section 30.016(a), which included statutory probate court judges within its ambit. *Id.* In 2007, section 30.016(a) was amended to delete any reference to probate judges, and a similar provision governing tertiary recusal motions against probate judges was added to the Government Code at the same time. *Id.* The new Government Code provision is explicit that the term "tertiary recusal motion" is not limited to the motions filed against the same judge. TEX. GOV'T CODE ANN. § 25.00256(a) (West Supp. 2010). Nevertheless, the supreme court rejected the defendants' argument in *Guilbot* that the addition of this language to the Government Code provision demonstrates section 30.016(a) encompasses only recusal motions filed against the same judge. *Guilbot*, 315 S.W.3d at 540.

matter for the opposing law firm.[119] To avoid disqualification, however, the firm must demonstrate the employee was "instructed not to work on [the] matter" and that the firm took "other reasonable steps" to ensure he or she did not do so.[120] In *In re Columbia Valley Healthcare System, L.P.*, the Texas Supreme Court announced its intent to clarify what types of "reasonable steps" a firm must take to effectively screen a nonlawyer employee to satisfy the second prong of this test.[121] The supreme court specifically noted mere admonitions to the employee, even accompanied by a threat of termination, are not sufficient.[122] Instead, the firm must implement "formal, institutionalized screening measures that render the possibility of the nonlawyer having contact with the file less likely."[123] Other than noting that the screened employee should not be directed to perform even clerical tasks relating to the matter, the opinion unfortunately offers little guidance to the trial bar as to what these screening measures look like in practice.[124]

The San Antonio Court of Appeals held one of its former justices was disqualified from representing a party in a mandamus proceeding in *In re de Brittingham*.[125] The former justice had served on the panel that heard a prior appeal arising out of the same probate case, and Texas Disciplinary Rule of Professional Conduct 1.11(a) provides that a "lawyer shall not represent" a party in "a matter" in which she has previously served "as an adjudicatory official."[126] Noting that it was an issue of first impression in Texas, the court of appeals held that the term "matter" was not limited to a particular discrete appeal or mandamus, but instead included the entire underlying probate proceeding.[127] Moreover, the court of appeals held that the party seeking disqualification was not required to establish that he had been prejudiced.[128]

XIV. MISCELLANEOUS

In *East Texas Salt Water Disposal Co., Inc. v. Werline*, the Texas Supreme Court considered whether under the Texas General Arbitration Act (TAA)[129] a party can "appeal from a trial court's order that denies confirmation of an arbitration award and instead, vacates the award and directs that the dispute be arbitrated anew."[130] In this employment dis-

119. Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831, 833 (Tex. 1994).
120. *Id.* at 835.
121. *In re* Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819, 825 (Tex. 2010).
122. *Id.* at 826.
123. *Id.*
124. *See id.* at 828.
125. *In re* de Brittingham, 319 S.W.3d 95, 97–98 (Tex. App.—San Antonio 2010, orig. proceeding).
126. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.11(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (Tex. State Bar R. art. X § 9).
127. *de Brittingham*, 319 S.W.3d at 98–99.
128. *Id.* at 100–01.
129. TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001–.098 (West 2011).
130. E. Tex. Salt Water Disposal Co., Inc. v. Werline, 307 S.W.3d 267, 268 (Tex. 2010).

pute, the arbitrator found for the ex-employee. On cross-motions in the trial court, the employee sought confirmation of the award, and the employer moved to vacate the award on the ground that it was so contrary to the evidence that it was arbitrary and capricious and the arbitrator must have been biased. The trial court denied the employee's request for confirmation and vacated the arbitration award, holding that "the material factual findings in the Award are so against the evidence . . . that they manifest gross mistakes in fact and law."[131] Indeed, the trial court made its own factual findings adverse to the employee, and entered judgment requiring the matter be submitted to a new arbitrator with the "sole issue before that Arbitrator being whether or not there was a material breach of the Employment Agreement . . . consistent with the findings in this Judgment."[132] The employee appealed and the court of appeals reversed the trial court's judgment confirming the arbitration award.[133] In response, the employer petitioned the supreme court, arguing that the court of appeals did not have jurisdiction under section 171.098(a) of the TAA.[134] Although it appeared the appellate court's judgment expressly fell within section 171.098(a)(3), the employer argued that section 171.098(a)(5) implied "that a court order vacating an award and directing a rehearing [was] *not* appealable," thereby creating "an exception to subsection (3)."[135] The supreme court, however, rejected the company's argument and found the trial court's judgment was appealable, and the court of appeals therefore had jurisdiction over the matter.[136]

XV. CONCLUSION

The Texas Supreme Court demonstrated during the Survey period a continued willingness to address recurring procedural issues faced by trial and appellate courts. While most of these decisions did not break significant new ground, the supreme court created an expanding body of procedural precedent to guide lower courts in coming years.

131. *Id.* at 269 (alteration in original).
132. *Id.*
133. *Id.* at 269–70.
134. *Id.* at 270. Section 171.098(a) provides that:
A party may appeal a judgment or decree entered under this chapter or an order:
(1) denying an application to compel arbitration . . . ;
(2) granting an application to stay arbitration . . . ;
(3) confirming or denying confirmation of an award;
(4) modifying or correcting an award; or
(5) vacating an award without directing a rehearing. *Id.* (citing § 171.098(a)).
135. *Id.*
136. *See id.* at 274.