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Civil Evidence

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THIS article is intended to provide an updated summary of the relevant Texas law regarding civil evidentiary issues and to highlight the most significant developments in this area of law during the Survey Period.[1] Since the last Survey, the Texas Supreme Court addressed important issues concerning the collateral, consistent, and contemporaneous agreement exception to the parol evidence rule, the right to an interlocutory appeal under Civil Practice and Remedies Code section 74.351, and sanctions. Also, several courts of appeals issued important decisions regarding the waiver of attorney-client privilege, the offensive-use doctrine, and the business and public records exceptions to the hearsay rule.

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1. The Survey Period runs from November 1, 2007, to October 31, 2008. This article is not intended to analyze all Texas cases dealing with civil evidence issues.

I. PAROL EVIDENCE

In several important opinions during the Survey Period, the Texas Supreme Court and the courts of appeals addressed the collateral, consistent, and contemporaneous agreement exception to the parol evidence rule, providing valuable direction to future Texas litigants on the confines of this evidentiary rule.

In *David J. Sacks, P.C. v. Haden*, the Texas Supreme Court held that parol evidence of an oral agreement to cap attorneys' fees was inadmissible to modify the terms of an open-ended hourly fee agreement.[2] In so doing, it reversed a decision of the Houston Court of Appeals highlighted in last year's Civil Evidence article.[3]

A law firm sued its former client to collect on unpaid invoices for services rendered in connection with an appeal to the Fifth Circuit.[4] The client signed a written engagement letter—which recited the attorneys' and paralegals' hourly rates—and paid the retainer called for by the agreement.[5] When the firm billed the client for $35,000, the client refused to pay any amount over $10,000.[6] In the breach of contract action that ensued, the client submitted an affidavit indicating that it had reached an oral agreement with the law firm to cap the fees of the representation at $10,000.[7]

After the trial court granted summary judgment to the firm on its breach of contract claims, the client appealed, arguing that its affidavit involved evidence of a collateral, consistent, and contemporaneous agreement consistent with the engagement letter and was therefore admissible as an exception to the parol evidence rule.[8] The First District Houston Court of Appeals agreed, reasoning that the written fee agreement shed no light on the terms in dispute, specifically, whether the parties had agreed to an open account or a flat maximum fee.[9] Because the engagement letter did not clarify whether the agreement was to "pay billing *as accrued* . . . at the hourly rates acknowledged in the engagement-letter contract," the majority of the court of appeals determined that the parol evidence rule allowed the client to assert the existence of an additional agreement with the law firm for a flat maximum fee.[10]

On review, the Texas Supreme Court reversed the First District Houston Court of Appeals and held that parol evidence of the putative oral agreement to cap attorneys' fees was inadmissible to modify the terms of

2. David J. Sacks, P.C. v. Haden, 266 S.W.3d 447, 451 (Tex. 2008).
3. *See* Angela C. Zambrano et al., *Civil Evidence*, 61 SMU L. Rev. 611, 631-32 (2008).
4. *Sacks*, 266 S.W.3d at 449.
5. *Id.* at 448-49.
6. *Id.* at 449.
7. Haden v. David J. Sacks, P.C., 222 S.W.3d 580, 590 (Tex. App.—Houston [1st Dist.] 2007), *rev'd*, 266 S.W.3d 447 (Tex. 2008).
8. *Id.* at 592-93.
9. *Id.* at 593.
10. *Id.* at 591.

the parties' open-ended hourly fee agreement.[11] Observing that the written agreement was "explicit as to the services to be rendered and the manner that would be used in determining the price," the supreme court determined that the plain language of the engagement letter demonstrated that the client agreed to pay an hourly fee and that no cap had been set.[12] The supreme court recited the long-standing rule that *only* "where a contract is ambiguous may a court consider the parties' interpretation and admit extraneous evidence to determine the true meaning of the instrument" and held that the collateral and consistent exception to the parol evidence rule did not apply because the evidence of the oral agreement would have altered the written agreement.[13] Accordingly, the supreme court reversed and rendered judgment to reinstate the holding of the trial court.[14]

In *DeClaire v. G & B McIntosh Family Ltd. Partnership*, the payee of a promissory note, McIntosh, brought suit against the maker of a promissory note, DeClaire, for nonpayment.[15] DeClaire defended the claim by submitting that the promissory note stated that McIntosh would look solely to DeClaire's 100,000 shares of common stock in a corporation as repayment for the debt.[16] McIntosh contended that there was no language limiting the recourse for nonpayment in the original draft of the promissory note, that DeClaire had orally agreed to repay his obligation in cash, and that he never read the final version of the promissory note containing the recourse-limiting language.[17] At a bench trial, the trial court admitted McIntosh's parol evidence and held that the oral agreement was the contract and that there was no meeting of the minds with regard to the sole recourse language.[18]

The First District Houston Court of Appeals reversed, holding that the written promissory note barred introduction into evidence of the supposed prior oral agreement.[19] The court found the collateral and consistent agreement exception to the parol evidence rule inapplicable because the promissory note contained the sole recourse language, which was inconsistent with McIntosh's claim that DeClaire orally agreed to repay the debt in cash.[20] Accordingly, the First District Houston Court of Appeals held that the trial court was precluded from enforcing the putative oral

11. *Sacks*, 266 S.W.3d at 451.

12. *Id.* at 450.

13. *Id.* at 450-51 (internal quotations omitted).

14. *Id.* at 451.

15. DeClaire v. G&B McIntosh Family Ltd. P'ship, 260 S.W.3d 34, 39 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

16. *Id.*

17. *Id.* at 39-41.

18. *Id.* at 42.

19. *Id.* at 46.

20. *Id.* The court held that the promissory note was a valid contract even though it was not signed by McIntosh because he manifested his assent to the contract through his actions, including "taking possession of the [n]ote, acting on it, and not objecting to any part of it." *Id.* at 45.

agreement, and it reversed.[21]

In *Fieldtech Avionics & Instruments, Inc. v. Component Control.com, Inc.*, the Fort Worth Court of Appeals held that proof of oral negotiations in connection with the sale of software should have been admitted as evidence where the written contract stated only that software would be provided but not what the software would do.[22] Fieldtech alleged that Component Control failed to provide it with software that was compatible with its business operations.[23] The parties' transaction involved two pertinent documents: a one-page proposal stating that software, installation, and training would be provided for a certain price; and an electronic "clickwrap"[24] agreement that contained disclaimers of warranties, which Fieldtech had to accept before it could install the software on its systems.[25]

Component Control filed a no-evidence summary judgment motion on Fieldtech's breach of contract claim, arguing that there was no evidence that it breached its agreement with Fieldtech because it agreed only to provide (and did provide) software to Fieldtech but did not agree to provide software that would necessarily be useful to Fieldtech.[26] The trial court agreed and granted summary judgment for Component Control.[27]

On appeal to the Fort Worth Court of Appeals, Fieldtech argued that the trial court should have considered evidence of its oral negotiations with Component Control to explain the parties' true agreement.[28] Addressing this contention, the court of appeals engaged in a two-step parol evidence analysis under UCC Article 2:[29] (1) whether the proposal and clickwrap agreement were meant to be a complete and exclusive statement of the terms of the parties' agreement; and (2) if not, whether the parol evidence explained or supplemented rather than contradicted the terms of the written agreement.[30] With regard to the first issue, the Fort Worth Court of Appeals held that the proposal and clickwrap agreements were not final expressions of the parties' agreement because neither document contained a merger or integration clause and because the clickwrap agreement omitted crucial elements, such as a price term.[31] Turning to the second inquiry, the Fort Worth Court of Appeals determined that

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21. *Id.* at 46.
22. Fieldtech Avionics & Instruments, Inc. v. Component Control.com, Inc., 262 S.W.3d 813, 826 (Tex. App.—Fort Worth 2008, no pet.).
23. *Id.* at 818.
24. A clickwrap agreement is a software license that requires the user who is installing the program to click on a box signifying his acceptance of the license agreement before the software can be installed. *Id.* at 818 n.1, 819.
25. *Id.* at 819.
26. *Id.* at 818.
27. *Id.*
28. *Id.* at 825.
29. The court engaged in an analysis of the parol evidence rule under Article 2 of the UCC because the contract stated that both parties agree that the contract was to be governed by Article 2A of the Uniform Commercial Code. *Id.* at 820, 825.
30. *Id.* at 825.
31. *Id.* at 826.

the parol evidence that Fieldtech offered supplemented but did not contradict the terms of the agreements.[32] Specifically, the court held that the proposal merely stated that Component Control would provide the software, while Fieldtech's parol evidence explained what the parties allegedly agreed that the software would do.[33] Accordingly, the Fort Worth Court of Appeals determined that a fact issue remained on the nature of the parties' agreement, which precluded summary judgment for Component Control.[34]

II. SANCTIONS

A. Setting Aside Rule 11 Agreements

In *In re BP Products North America, Inc.*, the Texas Supreme Court addressed for the first time the scope of a trial court's power to set aside an otherwise enforceable agreement under Texas Rule of Civil Procedure 11 and held that the trial court erred in so doing without a hearing or sufficient evidence of the supposedly violative conduct.[35] The *BP Products* case stemmed from the explosion at BP's Texas City refinery in 2005, in which fifteen people died and hundreds more were injured.[36] After several discovery disputes involving apex depositions, BP Products agreed to produce the head of refining and marketing for a deposition, and the plaintiffs agreed to forgo the deposition of BP Products' CEO.[37] Following the parties' entry of the Rule 11 agreement, the BP Products CEO made several public statements about the explosion.[38]

The plaintiffs renoticed his deposition, and BP Products filed a motion for protection.[39] At the hearing, the plaintiffs argued that BP Products fraudulently induced them to enter into the Rule 11 agreement by misrepresenting the CEO's lack of knowledge about the explosion.[40] The trial court set aside the parties' Rule 11 agreement and ordered the CEO's deposition."[41]

The Texas Supreme Court granted mandamus and described the case as presenting "an issue of first impression, involving an important issue of public policy."[42] The supreme court noted that "[w]herever possible, a trial court should give effect to agreements between the parties" because they "serve an important role in efficient trial management."[43] This is especially true, the court cautioned, "after one party has acted in reliance

32. *Id.*
33. *Id.*
34. *Id.*
35. *In re* BP Prods. N. Am., Inc., 244 S.W.3d 840, 848-49 (Tex. 2008).
36. *Id.* at 842.
37. *Id.* at 842-43.
38. *Id.* at 843.
39. *Id.* at 844.
40. *Id.*
41. *Id.* at 844-45.
42. *Id.* at 849.
43. *Id.* at 846.

on the agreed procedure and performed its obligations under the agreement."[44] With these principles in mind, the supreme court held that, under Texas Rule of Civil Procedure 191.1,[45] a trial court may disturb a Rule 11 agreement only for good cause.[46]

In the case at bar, good cause did not exist to set aside the parties' agreement because, first and foremost, the plaintiffs failed to submit evidence of any specific misrepresentations upon which they claimed to have relied prior to entering into the Rule 11 agreement.[47] Accordingly, without "evidentiary support for the assertion that BP Products made a material, false representation that could have reasonably induced the plaintiffs to enter the discovery agreement," the supreme court determined that good cause did not exist.[48] Additionally, the supreme court held that good cause could not exist because the plaintiffs did not explicitly move for sanctions, and the trial court did not hold a hearing specifically on the subject of sanctions.[49] Rather, without "a motion for sanctions, proper notice and opportunity to be heard, or the trial court's invocation of the court's power to sanction, the order striking the discovery agreement [was] not supportable as a sanctions order."[50] Accordingly, the supreme court held that the trial court abused its discretion in setting aside the parties' Rule 11 agreement.[51]

B. Reversing Sanctions Determined to be Too Harsh

In *PR Investments and Specialty Retailers, Inc. v. State*, the Texas Supreme Court held that dismissal and the award of expenses and fees was an inappropriate sanction in a condemnation action brought by the Texas Department of Transportation (TxDOT) and remanded the case to the trial court for consideration of evidence of appropriate sanctions.[52] TxDOT filed the proceeding, seeking to condemn a developed tract of land as part of its project to widen a highway in Houston.[53] Before trial, TxDOT failed to supplement its discovery responses timely and failed to apprise the affected lessor before trial that it was abandoning one road development plan in favor of another.[54]

In response to TxDOT's request for a continuance and the lessor's and property owner's motions for sanctions, the trial court dismissed the case

44. *Id.*
45. Texas Rule of Civil Procedure 191.1 provides that "[e]xcept where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order for good cause." Tex. R. Civ. P. 191.1.
46. *BP Prods.*, 244 S.W.3d at 842.
47. *Id.* at 847.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 848.
52. PR Invs. & Specialty Retailers, Inc. v. State, 251 S.W.3d 472, 479-80 (Tex. 2008).
53. *Id.* at 473.
54. *Id.* at 474.

without prejudice, awarded the lessor and property owner $650,651.47 (representing all their expert witness and attorneys' fees and expenses), and ordered TxDOT to surrender possession of the subject property.[55] The Fourteenth District Houston Court of Appeals, sitting en banc, held that the award of fees was unjust and excessive and remanded the case for the trial court's consideration of what amount of monetary sanctions would be just and not excessive.[56]

The Texas Supreme Court agreed with the court of appeals, reiterating that "a discovery sanction 'should be no more severe than necessary to satisfy its legitimate purposes,' and 'courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance.'"[57] The supreme court suggested that a more appropriate response would have been "a continuance as requested by TxDOT, together with monetary sanctions for whatever additional preparation [the lessor and property owner] needed to present evidence on their damages" under the alternate road development plan TxDOT had adopted.[58]

Thus, while recognizing that TxDOT failed to meet court-established deadlines or "establish good cause for its failure to timely amend discovery responses," the supreme court observed that, under Texas Rule of Civil Procedure 193.6(c),[59] the trial court should have granted TxDOT a continuance "to allow for supplementation of discovery responses or for further discovery in response to the supplementation."[60] Thus, because dismissal of the case and an award of all the lessor's and property owner's fees and expenses was an "extreme" punishment that did not "fit the crime," and because such sanctions were not necessary to "remedy 'the prejudice caused the innocent party,'" the supreme court affirmed the decision of the Fourteenth District Houston Court of Appeals to remand the case to the trial court for consideration of evidence of an appropriate level of sanctions.[61]

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55. *Id.*
56. *Id.* at 475.
57. *Id.* at 480 (citing Trans Am. Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991)).
58. *Id.*
59. Texas Rule of Civil Procedure 193.6(c) provides that

> [e]ven if the party seeking to introduce the evidence or call the witness fails to [establish good cause for the failure to timely supplement discovery responses], the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response.

TEX. R. CIV. P. 193.6(c).

60. *PR Invs.*, 251 S.W.3d at 480 n.35.
61. *Id.* at 480 (citing *Trans Am.*, 811 S.W.2d at 917).

C. Reversing Awards of Sanctions Due to Procedural Errors or Lack of Evidence

The general trend among intermediate level Texas courts during the Survey Period was to reverse an award of sanctions where there was insufficient evidence to support the award or where the trial court failed to hold an evidentiary hearing or otherwise allow litigants to develop the evidence required to support the award.

In *Darya, Inc. v. Christian*, the Dallas Court of Appeals vacated the trial court's award of attorneys' fees, finding that: (1) there was no evidence in the record to support the dollar amount of the fees awarded by the trial court, (2) there was no evidence in the record as to the amount of attorneys' fees reasonably incurred as a result of the supposedly violative conduct, and (3) the trial court improperly prohibited appellants' counsel from examining the appellee's counsel regarding the amount of the fees that were supposedly incurred.[62]

In *R.M. Dudley Construction Co.*, the Waco Court of Appeals reversed an award of attorneys fees—granted by the trial court under Chapter 10 of the Civil Practice and Remedies Code[63]—because the trial judge did not hold an evidentiary hearing to make factual determinations about the plaintiff's or its attorneys' motives or credibility for filing allegedly frivolous pleadings.[64]

In *Scott Bader, Inc. v. Sandstone Products, Inc.*, the First District Houston Court of Appeals reversed sanctions imposed by the trial court where the record did not reflect that "the trial court considered lesser sanctions or indicate why lesser sanctions would not deter [the offender] while preserving the rights of [the aggrieved party]."[65] The court stated that "[l]ike other courts before us, we give no deference to such unsupported conclusions regarding the trial court's consideration of lesser sanctions."[66]

In a child custody case, the First District Houston Court of Appeals in *Taylor v. Taylor* reversed a sanction, which prevented a father from offering any evidence except his testimony, reasoning that it "probably caused the rendition of an improper judgment" and was more severe than that which the evidence could support.[67] Because the father did not have exhibits or a witness list prepared at a pre-trial conference scheduled a few days before the custody trial, the trial court did not permit him to offer

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62. Darya, Inc. v. Christian, 251 S.W.3d 227, 229, 232 (Tex. App.—Dallas 2008, no pet.).

63. Section 10.0001 of the Texas Civil Practice and Remedies Code provides, among other things, that pleadings must not be presented for an improper purpose. Tex. Civ. Prac. & Rem. Code Ann. § 10.001(1) (Vernon 2002).

64. R.M. Dudley Constr. Co. v. Dawson, 258 S.W.3d 694, 709-11 (Tex. App.—Waco 2008, pet. denied).

65. Scott Bader, Inc. v. Sandstone Prods., Inc., 248 S.W.3d 802, 815 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (internal quotations omitted).

66. *Id.* at 814 (internal quotations omitted).

67. Taylor v. Taylor, 254 S.W.3d 527, 535 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

any evidence at trial except his own testimony.[68] The court of appeals evaluated the sanctions and concluded that they were excessive because there was no evidence of abusive conduct on the father's part or prejudice to the opposing side.[69] The First District Houston Court of Appeals also criticized the trial court because the sanctions prevented the parties from presenting all evidence related to the best interests of the child, which resulted in a less than well-informed jury and "patent" harm and prejudice to the father.[70]

III. EXPERT REPORT REQUIREMENT OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE

During the Survey period, the Texas Supreme Court addressed two important issues relating to the right to an interlocutory appeal under Civil Practice and Remedies Code section 74.351. Section 74.351 requires a health care liability claimant to serve an expert report on providers within 120 days after filing suit.[71] If the claimant does not serve the report within 120 days, the trial court must grant the affected party's motion to dismiss the claim, and failure to do so is subject to interlocutory appeal.[72] If, however, the claimant's report is timely but deficient, the trial court may grant a single, thirty day extension to cure that deficiency, and the order granting that extension may not be appealed.[73] Recent supreme court cases addressing these provisions determine the availability of interlocutory appeal under circumstances not provided for by the Texas Civil Practice and Remedies Code.

In *Lewis v. Funderburk*, the Texas Supreme Court resolved a split among the intermediate courts, where twelve of the fourteen courts of appeals conducted interlocutory review of the denial of a defendant's motion to dismiss based on the inadequacy of the plaintiff's expert report, while the Waco and Fort Worth Courts of Appeals refused interlocutory review.[74] In *Lewis*, the supreme court confirmed that interlocutory appeal is in fact available.[75] The father of a minor patient alleged that the defendant doctor was negligent in his treatment of the minor patient's broken wrist.[76] After the plaintiff failed to serve an expert report, the trial court denied the doctor's motion to dismiss and gave the plaintiff thirty days to serve a report.[77] When the plaintiff finally served his expert report, the doctor again moved to dismiss the case on the ground that the

68. *Id.* at 530-32 (listing excluded evidence, including document list father attempted to introduce for impeachment purposes).
69. *Id.* at 533-34.
70. *Id.* at 533-35.
71. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon Supp. 2008).
72. *Id.*
73. *Id.*
74. Lewis v. Funderburk, 253 S.W.3d 204, 205-06 (Tex. 2008).
75. *Id.* at 208.
76. *Id.* at 206.
77. *Id.*

report was deficient.[78] The trial court denied the motion, and the doctor sought an immediate appeal.[79]

The Waco Court of Appeals dismissed the doctor's appeal for a want of jurisdiction.[80] The court of appeals reasoned that, under the Civil Practice and Remedies Code, the right to interlocutory review is available only where the trial court fails to grant a motion to dismiss that is based on the plaintiff's failure to serve an expert report.[81] By contrast, the court determined, the doctor's motion to dismiss was based on the *inadequacy* of plaintiff's expert report and, thus, no right to immediate appeal existed.

The Texas Supreme Court overruled the Waco Court of Appeals, holding that, even though the plaintiff had in fact served the doctor with an expert report, the doctor's motion to dismiss fell under section 74.351(b) of the Civil Practice and Remedies Code, which requires the trial court to dismiss a claim if an expert report has not been served by the statutory deadline,[82] and if such a motion is denied, the right to an immediate appeal is allowed.[83] The supreme court reasoned that section 74.351(c) "defines a timely but deficient report as one that has not been served" for purposes of section 74.351.[84] Therefore, the supreme court reversed and held that the court of appeals had jurisdiction to consider the alleged inadequacy of the report.[85]

In *Ogletree v. Matthews*, the Texas Supreme Court held that a defendant may not immediately appeal when the trial court denies the defendant's motion to dismiss and instead grants the claimant a thirty day extension to cure a timely filed but deficient expert report.[86] In *Ogletree*, the plaintiffs brought suit against a urologist, who they alleged negligently inserted a catheter during a procedure.[87] As required by Civil Practice and Remedies Code section 74.351, the plaintiffs filed an expert report; however, their report was prepared by a radiologist rather than a urologist.[88] The defendant urologist objected to the sufficiency of the expert report—arguing that a radiologist is incapable of opining on a urologist's standard of care—and filed a motion to dismiss.[89] The trial court agreed and held that the expert's report was deficient.[90] However, the trial court denied the motion to dismiss and granted the plaintiffs a thirty-day exten-

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78. *Id.*
79. *Id.*
80. *Id.* at 206-07.
81. *See generally* Lewis v. Funderburk, 191 S.W.3d 756 (Tex. App.—Waco 2006), *rev'd*, 253 S.W.3d 204 (Tex. 2008); TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(10) (Vernon 2008).
82. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b) (Vernon Supp. 2008).
83. *Lewis*, 253 S.W.3d at 207; TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9).
84. *Lewis*, 253 S.W.3d at 207-08; TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(c).
85. *Lewis*, 253 S.W.3d at 208.
86. Ogletree v. Matthews, 262 S.W.3d 316, 321 (Tex. 2007).
87. *Id.* at 317.
88. *Id.* at 317-18.
89. *Id.* at 318.
90. *Id.*

sion to cure the deficiency.[91]

The urologist brought an interlocutory appeal of the trial court's order.[92] The Austin Court of Appeals held that it lacked jurisdiction over the appeal because the trial court's denial of the urologist's motion to dismiss was coupled with the grant of an extension to cure the deficient report.[93] The Texas Supreme Court agreed, reasoning that the urologist could not sever the denial of the motion to dismiss from the grant of the extension because allowing an appeal to the denial of the motion to dismiss would contravene the language in the Civil Practice and Remedies Code that prohibits an appeal from an order granting an extension.[94] Additionally, the court observed, "[i]f a defendant could immediately (and prematurely) appeal, the court of appeals would address the report's sufficiency while its deficiencies were presumably being cured at the trial court level, an illogical and wasteful result."[95]

IV. RELEVANCE

In *PPC Transportation v. Metcalf*, the Tyler Court of Appeals held that the trial court erred by excluding evidence of a driver's alcohol consumption before a traffic accident because it was relevant to the jury's determination of comparative negligence and more probative than prejudicial.[96]

After consuming a large amount of alcohol, the plaintiff, Metcalf, struck defendant Weatherly's tractor trailer with his vehicle.[97] Metcalf and his passengers sued Weatherly and his employer, arguing that Weatherly's trailer was negligently protruding into the lane intended for oncoming traffic.[98] As an affirmative defense, the defendants alleged that Metcalf had caused the accident and, in support thereof, attempted to introduce evidence of his alcohol consumption.[99] The trial court excluded the evidence—holding that its prejudicial impact substantially outweighed its probative value—and the jury returned a verdict in the plaintiffs' favor.[100]

On appeal, the plaintiffs argued that evidence regarding Metcalf's alcohol consumption was irrelevant or, in the alternative, more prejudicial than probative.[101] The Tyler Court of Appeals disagreed with the plaintiffs' first contention, noting that "evidence of a driver's intoxication is probative evidence to be considered in connection with that driver's driving ability, vigilance, judgment, reactions, and similar matters."[102] Ac-

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 320-21.
95. *Id.* at 321.
96. PPC Transp. v. Metcalf, 254 S.W.3d 636, 643-44 (Tex. App.—Tyler 2008, no pet.).
97. *Id.* at 639.
98. *Id.*
99. *Id.*
100. *Id.* at 639-40.
101. *Id.* at 640.
102. *Id.* at 642.

cordingly, "[a]lthough intoxication alone does not mean that the driver was negligent, when combined with another act, it can be an evidentiary fact to be considered by the jury in determining whether the driver committed an act of comparative negligence."[103] Thus, the court held, evidence of Metcalf's intoxication, in conjunction with the other evidence that was presented indicating that Metcalf could have avoided the accident if he had maneuvered his vehicle to avoid Weatherly's trailer, was relevant to the causation element of the defendants' comparative negligence defense.[104]

Having determined that the evidence was relevant, the Tyler Court of Appeals next concluded that the trial court had abused its discretion in excluding it pursuant to Texas Rule of Evidence 403.[105] The court reasoned that "Metcalf's ability to control his vehicle was critical to the issue of probable cause, and as it relates thereto, evidence of his consumption of alcohol was highly probative on that issue as well."[106] Additionally, the court determined,

> the danger that the jury may derive unfair negative connotations from such evidence does not substantially outweigh the probative value of the evidence because it serves to provide the jury with a clearer understanding of the evidence of Metcalf's driving ability, vigilance, judgment, and ability to react at the time of the accident.[107]

Accordingly, the Tyler Court of Appeals concluded that the evidence's probative value was not substantially outweighed by the danger that the jury might derive "unfair negative connotations" from it and remanded the case for a new trial.[108]

V. SPOLIATION

In *Whirlpool Corp. v. Camacho*, the plaintiffs brought a product liability suit against Whirlpool, alleging that one of its dryers malfunctioned and started a fire that destroyed plaintiffs' home and killed one of their children.[109] At trial, Whirlpool argued that the plaintiffs spoliated the scene by not "photograph[ing] obviously critical areas until after they removed all the fire debris," and requested that the trial court dismiss the plaintiffs' suit or offer a spoliation instruction.[110] The court denied both requests.

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103. *Id.*
104. *Id.* at 642-43.
105. *Id.* at 643. Texas Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. EVID. 403.
106. *PPC Transp.*, 254 S.W.3d at 643.
107. *Id.*
108. *Id.* at 644.
109. Whirlpool Corp. v. Camacho, 251 S.W.3d 88, 93 (Tex. App.—Corpus Christi 2008, pet. granted).
110. *Id.* at 101.

The Corpus Christi Court of Appeals affirmed, applying a three-factor test to evaluate the trial court's decision.[111] It considered, first, whether the alleged spoliator had a duty to preserve the evidence; second, whether the alleged spoliator either negligently or intentionally spoliated evidence; and third, whether the alleged spoliation prejudiced the non-spoliator's ability to present its case or defense.[112] The court, assuming that the plaintiffs had a duty to preserve the evidence, stated that the record contained numerous photographs and diagrams of the scene and held that the plaintiffs had "preserved the scene as practicably as possible."[113] Moreover, it noted that the "scene was initially altered not by the Camachos, but by the fire department in its suppression and investigation efforts."[114] Finally, the Corpus Christi Court of Appeals held that Whirlpool had not suffered any prejudice because it was able, regardless of any alteration of the scene, to "marshal the services of several experts to rebut the Camachos' expert testimony."[115]

VI. ALTERNATIVE DISPUTE RESOLUTION

The Dallas Court of Appeals addressed the enforceability of mediated settlement agreements in child custody cases in *In re L.M.M.*, holding that, where the agreement meets the requirements of the Texas Family Code, the party seeking enforcement does not need to plead and offer proof of a breach of contract.[116] The parents of L.M.M. reached a mediated agreement providing that the father would be the joint managing conservator.[117] Despite the mother's subsequent attempts to withdraw her consent to the agreement, the trial court entered a final order incorporating the terms of the agreement.[118]

On appeal to the Dallas Court of Appeals, the mother argued that the trial court erred in rendering judgment based on the agreement because, after she withdrew her consent, the father failed to plead and prove an underlying claim for breach of contract.[119] The court of appeals, in evaluating her argument, looked to sections 153.0071(d) and (e) of the Texas Family Code. Section 153.0071(d) provides the following requirements for a binding settlement agreement: (1) the agreement states that it is not subject to revocation, (2) the agreement is signed by each party to it, and (3) the agreement is signed by each party's attorney, if any, who is present at the time the agreement is signed.[120] Section 153.0071(e) further provides that, if the requirements of subsection (d) are met, then a party

111. *Id.* at 102.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *In re* L.L.M, 247 S.W.3d 809, 811 (Tex. App.—Dallas 2008, pet. denied).
117. *Id.*
118. *Id.*
119. *Id.*
120. Tex. Fam. Code Ann. § 153.0071(d) (Vernon 2008).

is "entitled to judgment on the mediated settlement agreement."[121]

Applying this test, the Dallas Court of Appeals determined that each of section 153.0071(d)'s requirements were met in this case.[122] Accordingly, the court held that once the requirements of section 153.0071(d) were met, the agreement was binding, even though the mother later withdrew her consent, and, thus, it was unnecessary for the father to bring a separate suit for breach of contract to enforce the agreement.[123]

VII. PRIVILEGE

A. Waiver of Privilege

In *In re Hicks*, the Fourteenth District Houston Court of Appeals rejected the contention that the assignment of a legal claim, agreement to cooperate, and authorization of release of documents and information to a third party waives the attorney-client privilege.[124] Hicks was sued by one of his employees, Taylor, for a job-related injury, and was defended by counsel assigned to him by his insurance carrier.[125] During the pendency of the Taylor case, Hicks filed for bankruptcy.[126]

In the course of the bankruptcy proceedings, Hicks assigned to the bankruptcy trustee all "claims, rights, and causes of action . . . whether perpetrated upon, resulting to, or incurred by Michael Porter Hicks, Sr."[127] Hicks also signed an agreed order, which stated that he:

> shall . . . cooperate with the Trustee . . . to execute instruments so that the Trustee or his assignee is able to receive and be provided information, testimony, documentation, and such rights as may exist for establishing liability and determining damages for the claims assigned.[128]

Additionally, Hicks authorized the insurance carrier to release information and documents by signing a document that stated the following:

> You are hereby fully authorized and requested to permit the examination of, and copying or reproduction . . . [of] any and all portions of the following: [t]he full contents of any file[s] compiled concerning any insurance policies or coverage extended to me personally . . . and concerning the defense provided me during the [Taylor suit], including communications with my counsel.[129]

The bankruptcy trustee and Taylor later sought to obtain a copy of Hicks' counsel's litigation file for use in the Taylor suit.[130] Hicks refused,

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121. *Id.* § 153.0071(e).
122. *L.L.M.*, 247 S.W.3d at 812.
123. *Id.*
124. *In re* Hicks, 252 S.W.3d 790, 796 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding).
125. *Id.* at 791.
126. *Id.* at 792.
127. *Id.*
128. *Id.*
129. *Id.* at 795.
130. *Id.* at 792.

arguing that producing the requested information would violate his attorney-client privilege.[131] In return, Taylor and the bankruptcy trustee argued that Hicks' assignment of rights to the trustee, and authorization of the insurance carrier's release of information constituted a waiver of Hicks' privilege.[132] The trial court agreed and ordered the production of the litigation file; Hicks and his attorney sought a writ of mandamus vacating the order.[133]

The Fourteenth District Houston Court of Appeals issued the writ and vacated the trial court's order.[134] Rejecting the contention that Hicks' assignment of rights to the bankruptcy trustee constituted a waiver, the court held that an "assignment of rights and claims does not automatically include a waiver of attorney-client privilege unless specifically stated in the language of the assignment."[135] Thus, the court held, the language in the agreed bankruptcy order requiring Hicks to cooperate in obtaining documentation to support his assigned claim "alone is not sufficient to waive the attorney-client privilege."[136] Rather, the court of appeals observed, "specific language addressing the attorney-client privilege" is necessary for a waiver to be found.[137]

With regard to the statement in the authorization of release of information that Hicks would permit examination of files "concerning the defense provided me during the [Taylor suit], including communications with my counsel," the Houston Court of Appeals interpreted it to "clear[ly] from [the] context" extend only to the insurance files compiled by the insurance carrier and not to the litigation file kept by his counsel.[138] As with Hicks' assignment of claims and agreement to cooperate, the authorization of release of information did not contain an explicit waiver of the attorney-client privilege. Accordingly, there could be no such waiver, and the Fourteenth District Houston Court of Appeals vacated the trial court's order.[139]

B. The Offensive-Use Doctrine

In *In re Beirne, Maynard & Parsons LLP*, the Texarkana Court of Ap-

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131. *Id.* at 792-93.

132. *Id.* at 793.

133. *Id.*

134. *Id.* at 796.

135. *Id.* at 794 (citing *In re* Cooper, 47 S.W.3d 206, 209 (Tex. App.—Beaumont 2001, orig. proceeding)). In *In re Cooper*, the Beaumont Court of Appeals held that an assignment of a claim did not constitute a *de facto* waiver of attorney-client privilege. 47 S.W.3d at 209. In reaching this holding, the court looked to the "assignment's language," stating that it "does not provide for Cooper to waive or assign any right he had to assert his attorney-client privilege . . . . Nor does it even provide for Cooper to cooperate as to matters giving rise to his claims against his insurers." *Id.*

136. *Hicks*, 252 S.W.3d at 795.

137. *Id.*

138. *Id.* at 795-96.

139. *Id.*

peals addressed the "offensive use" of the work-product privilege.[140] Beirne, Maynard, and Parsons LLP sued its clients' insurers for unpaid legal fees.[141] The insurers contested the amount due and sought discovery of the records underlying the billings, which the trial court granted.[142]

Bernie claimed that the records were protected by the work-product privilege and sought a writ of mandamus.[143] The Texarkana Court of Appeals disagreed:

> Beirne filed suit to recover fees . . . . It now attempts to prevent the real parties from examining documentation underlying those invoices—to determine whether they are accurate—and which is the critical defensive issue in the lawsuit. This constitutes an offensive use of what Beirne categorizes as work-product privilege. Simply put, you cannot deny a party the right to review documents supporting your claim for reimbursement.[144]

Accordingly, the Texarkana Court of Appeals denied the petition for mandamus.[145]

VIII. HEARSAY

In *Martinez v. Midland Credit Management, Inc.*, the El Paso Court of Appeals addressed the business records exception to the hearsay rule in the context of predecessor and successor companies.[146] A credit card company brought an action against a credit card holder to recover an unpaid debt that was originally issued by its predecessor.[147] The company filed a summary judgment motion supported by an affidavit, which attached a record created by its predecessor.[148] The affidavit at issue provided, in relevant part, that:

> I am employed by Plaintiff, and I am custodian of records of Plaintiff. Attached hereto are [sic] 1 page of records kept by Plaintiff in the regular course of business concerning account(s) # 4405600400097218. It was the regular business of Plaintiff and/or its Predecessor for an employee of Plaintiff and/or its Predecessor, with knowledge of the act, event, condition, opinion, or diagnosis recorded; and the record was made at or near the time of the event recorded or [reasonably] soon thereafter.[149]

140. *In re* Beirne, Maynard & Parsons LLP, 260 S.W.3d 229, 230 (Tex. App.—Texarkana 2008, orig. proceeding).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 231.

145. *Id.* at 233.

146. Martinez v. Midland Credit Mgmt., Inc., 250 S.W.3d 481, 485 (Tex. App.—El Paso 2008, no pet.).

147. *Id.* at 482.

148. *Id.* at 482-83.

149. *Id.* at 484.

The trial court granted summary judgment for the company, and the credit card holder appealed.[150]

On appeal to the El Paso Court of Appeals, the credit card holder asserted that the company's affidavit was defective under the business records hearsay exception contained in Texas Rule of Evidence 803(6) because the affiant did not have personal knowledge of the underlying events at the predecessor company.[151] In analyzing the issue, the court of appeals started with the premise that "[b]usiness records that have been created by one entity, but which have become another entity's primary record of the underlying transaction may be admissible pursuant to rule 803(6) . . . if the second business determines the accuracy of the information generated by the first business."[152] However, the El Paso Court of Appeals also observed, "[d]ocuments received from another entity are not admissible under rule 803(6), if the witness is not qualified to testify about the entity's record keeping."[153]

In the case at bar, the El Paso Court of Appeals determined that the affidavit did not satisfy the requirements of Rule 803(6) because the affiant did not provide any information to indicate that he had any knowledge of (1) the predecessor company's record-keeping policies or (2) the trustworthiness of the predecessor's records.[154] Indeed, the court observed, the affiant failed to identify the predecessor company by name or provide any information concerning the acquisition by the credit card company of the predecessor's records.[155] Accordingly, the El Paso Court of Appeals concluded that the affidavit did not satisfy the requirements of Rule 803(6)'s business records exception to the hearsay rule and held that the trial court erred by admitting it into evidence.[156]

In *Benefield v. State*, the First District Houston Court of Appeals rejected a claim that the public records exception to the hearsay rule under Texas Rule of Evidence 803(8) eliminates the need to authenticate a document under Rule 901.[157] In *Benefield*, the plaintiff introduced into evidence correspondence between a nonprofit organization and the United States Department of Health and Human Services but failed to introduce certified copies of the correspondence or provide any other evidence to authenticate the documents.[158] The trial court admitted the documents into evidence over the defendants' objections that the correspondence constituted hearsay and was not properly authenticated.[159]

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150. *Id.* at 483.
151. *Id.* at 484.
152. *Id.* at 485.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. Benefield v. State, 266 S.W.3d 25, 34 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (comparing Tex. R. Evid. 803(8) and 902(4)).
158. *Id.* at 33-34.
159. *Id.* at 34.

On appeal to the Houston Court of Appeals, the plaintiff argued that it was not required to authenticate the documents because Texas Rule of Evidence 803(8)[160] creates a presumption of admissibility for public records, and the burden is placed on the party opposing the admission of the records to show the documents' untrustworthiness.[161] The court of appeals disagreed, observing that the presumption under Rule 803(8) "does not exempt the offered document from satisfying other requirements of the rules," including the requirement that documents be properly authenticated under Rule 901(a).[162] Thus, because the contested exhibits were not properly authenticated by certification or extrinsic evidence, the Houston Court of Appeals reversed, holding that the trial erred by admitting the documents into evidence.[163]

160. Texas Rule of Evidence 803 provides:

> The following are not excluded by the hearsay rule, even thought the declarant is available as a witness: . . . (8) Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth: (A) the activities of the office or agency; (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or (C) in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law; unless the sources of information or other circumstances indicate lack of trustworthiness.

TEX. R. EVID. 803.

161. *Benefield*, 266 S.W.3d at 34.

162. *Id.*

163. *Id.*