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CIVIL PROCEDURE: APPELLATE PRACTICE AND PROCEDURE

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I. APPELLATE REVIEW BEFORE FINAL JUDGMENT

A. MANDAMUS

THE Survey period saw a host of mandamus decisions by the Texas Supreme Court.[1] In granting mandamus relief, the supreme court repeatedly relied on—and arguably expanded—the two-part test of *In re Prudential Insurance Co. of America*, decided in 2004.[2] The sheer number of decisions by the supreme court granting mandamus relief suggests that mandamus relief may now be more easily obtained under the standards laid down in *Prudential*.

1. Pre-2003 Challenges to Expert Reports in Health Care Cases

In possibly the most important procedural opinion of the Survey period, the Texas Supreme Court in *In re McAllen Medical Center* expounded on the "costs and benefits" analysis of *Prudential* to determine the propriety of interlocutory (mandamus) review.[3] That case involved a medical malpractice lawsuit by 400 plaintiffs representing 224 patients against a single doctor. The hospital that had credentialed the doctor to perform thoracic surgery moved to dismiss, challenging expert reports on the grounds that the expert was not qualified. The trial court sat on the motion for four years, then denied it.[4] At the time, this was not an order subject to interlocutory review,[5] meaning the ruling would not be reviewed until after the considerable time and expense of a mass tort lawsuit.

On mandamus, the Texas Supreme Court first agreed that the expert reports were deficient and then considered whether the hospital had an adequate remedy by appeal.[6] The supreme court found mandamus justified.[7] The specific basis for the supreme court's finding was to enforce the purpose behind the legislature's enactment of the health care liability statute—to meet the crisis in the costs and availability of medical care created by the traditional rules of litigation.[8] With the health care liabil-

1. The Survey period is Nov. 1, 2007, to Oct. 31, 2008.
2. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 135-36 (Tex. 2004).
3. 275 S.W.3d 458, 464-69 (Tex. 2008) (orig. proceeding).
4. *Id.* at 462.
5. In 2003, the legislature enacted Chapter 74 of the TEX. CIV. PRAC. & REM. CODE, which provides for interlocutory review. *See id.* at 466.
6. *Id.* at 463, 467.
7. *Id.* at 470.
8. *Id.* at 461-62.

ity statute, the legislature "declared that plaintiffs must support health care claims with expert reports shortly after filing."[9] Unless enforced by Texas courts, "[t]his expedited deadline will of course never accomplish the purposes of the Texas Legislature."[10] Accordingly, the supreme court held that "mandamus relief is available when the purposes of the health care statute would otherwise be defeated."[11]

In reaching this conclusion, the supreme court reinforced the *Prudential* analysis: "Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of interlocutory review. As this balance depends heavily on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories."[12] In *In re McAllen Medical Center*, the supreme court found that the legislature had already balanced the majority of the relevant costs and benefits: "the Legislature found that the cost of conducting plenary trials of claims as to which no supporting expert could be found was affecting the availability and affordability of health care—driving physicians from Texas and patients from medical care they need."[13] According to the supreme court, "denying mandamus review would defeat everything the Legislature was trying to accomplish."[14]

As proof that not every pre-2003 case involving a challenge to a deficient expert report is subject to review by mandamus, the Texas Supreme Court held mandamus relief inappropriate in *In re Roberts*, where the alleged error was the trial court's grant of a thirty-day grace period to the plaintiffs to amend their allegedly deficient expert reports.[15] "Because a 30-day extension—even if unjustified—does not substantially prolong litigation or allow for extensive discovery," and therefore does not frustrate the purpose of the health care liability statute, the error was not subject to mandamus review.[16]

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9. *Id.* at 461.

10. *Id.*

11. *Id.* at 462.

12. *Id.* at 464.

13. *Id.* The dissent (Wainwright, J., Jefferson, C.J., and O'Neill, J.) opened its opinion with the theme song in Disney's Aladdin: "*A whole new world . . . A new fantastic point of view . . . No one to tell us no Or where to go . . . .*" *Id.* at 470. According to the dissent,

> "[t]he Court creates a whole new world today, jettisoning the well-established precept that delay and expense alone do not justify mandamus review. While such costs are undesirable and should be avoided when appropriate, the requirement of an inadequate remedy on appeal served as a check on appellate entanglement in incidental trial rulings and as a guide to the bench and bar on when to seek mandamus review."

Id. at 473-74. *See also In re* Methodist Healthcare Sys. of San Antonio, Ltd., 256 S.W.3d 263, 264 (Tex. 2008) (per curiam) (orig. proceeding) (directing court of appeals to reconsider, in light of *In re McAllen Med. Ctr.*, its refusal of mandamus review of expert report).

14. *McAllen Med. Ctr.*, 275 S.W.3d at 466.

15. *In re* Roberts, 255 S.W.3d 640, 641-42 (Tex. 2008) (per curiam) (orig. proceeding) (directing court of appeals to vacate order compelling withdrawal of thirty-day grace period).

16. *Id.* at 641.

2. Venue

In *In re Team Rocket, L.P.*, the Texas Supreme Court was faced with a trial court's improper refusal to enforce a prior venue ruling by another trial court.[17] There, the plaintiffs filed suit in a Harris County court, which granted defendants' motion to transfer venue to Williamson County. To avoid the venue transfer, the plaintiff nonsuited and refiled the case in a Fort Bend County court, which refused to enforce the prior venue ruling. The supreme court granted mandamus relief, concluding that the Fort Bend County court's refusal to enforce the Harris County's venue determination was improper because "a final determination fixing venue in a particular county" is "conclusive as to those parties and claims."[18]

In granting mandamus relief, the supreme court analyzed the availability of such relief under *Prudential*. First, the supreme court determined the adequacy of appeal "by balancing the benefits of mandamus review against the detriments."[19] Would mandamus "preserve important substantive and procedural rights from impairment or loss?"[20] The supreme court concluded it would because, by defying the Harris County court's venue ruling through nonsuit and refiling of the case, the plaintiffs disrupted the balance created by the venue statutes—a plaintiff has the first choice of venue and a defendant has one motion to transfer venue.[21] By shifting the balance in their favor, the plaintiffs impaired the defendant's procedural rights.[22]

The supreme court next considered whether mandamus would "allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments."[23] This test was met because the legal issue involved—"the construction of Texas venue statutes and related rules in the context of voluntary nonsuit"—was "likely to recur," as demonstrated by the courts of appeal that had already addressed the issue.[24]

Finally, the Texas Supreme Court considered whether mandamus would "spare litigants and the public 'the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.'"[25] Concluding that it would, the supreme court noted that "extraordinary relief can be warranted when a trial court subjects taxpayers, defendants, and all of the state's district courts to meaningless proceedings and trials."[26] "To say that the Fort Bend County trial court . . . committed re-

17. 256 S.W.3d 257, 258 (Tex. 2008) (orig. proceeding).
18. *Id.* at 258-60.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 262.
23. *Id.* (quoting *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004)).
24. *Id.*
25. *Id.* (quoting *Prudential*, 148 S.W.3d at 136).
26. *Id.*

versible error while declining to correct the injustice would compromise the integrity of the venue statute and result in an irreversible waste of resources."[27]

3. *Pre-suit Depositions in Health Care Lawsuits*

Discovery in health care cases is limited by statute until the plaintiff serves an expert report.[28] On mandamus review, the Texas Supreme Court considered whether this statutory prohibition applies to pre-suit depositions pursuant to Rule 202 of the Texas Rules of Civil Procedure.[29] In deciding whether mandamus was appropriate to resolve the issue, the supreme court held that a conflict among the courts of appeals was a factor "we must consider," because that indicated the issue was recurring.[30] The supreme court also noted that correction after final judgment was unlikely, "as it is hard to imagine how allowing discovery a little too early could ever be harmful error—either by causing rendition of an improper judgment or preventing the presentation of an appeal."[31] Further, pre-suit depositions, if inappropriate, could not be "untaken," so error could not be cured on appeal after final judgment.[32] The supreme court concluded that, given the unique circumstances of the case and unquestionable loss of substantive and procedural rights, mandamus relief was available.[33]

4. *Recusal*

In 1998, the Texas Supreme Court held that mandamus is not available for the denial of a motion to recuse.[34] The supreme court revisited this issue during the Survey period, openly acknowledging that "[o]ur mandamus standards have evolved since [1998]. We now ask whether 'any benefits to mandamus review are outweighed by the detriments.'"[35] Regardless, even under this standard, the supreme court concluded there is still no significant benefit to mandamus relief in the recusal context.[36]

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27. *Id.* at 263. Justice Wainwright, joined by Justice O'Neill and Chief Justice Jefferson, filed a concurring opinion, disagreeing with the Court's "expansion of its mandamus jurisdiction beyond established legal tenets." *Id.* Because the supreme court "has indeed crossed that bridge," Justice Wainwright reluctantly joined the supreme court's opinion. *Id.*

28. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s) (Vernon 2005 & Supp. 2008).

29. *In re* Jorden, 249 S.W.3d 416, 418 (Tex. 2008) (orig. proceeding).

30. *Id.* at 419.

31. *Id.*

32. *Id.* at 419-20.

33. *Id.* at 420; *see also In re* Kiberu, 262 S.W.3d 806, 806 (Tex. 2008) (per curiam) (orig. proceeding) (directing court of appeals to reconsider petition for writ of mandamus in light of *Jorden*).

34. *In re* Union Pac. Res. Co., 969 S.W.2d 427, 428-29 (Tex. 1998) (orig. proceeding).

35. *In re* McKee, 248 S.W.3d 164, 165 (Tex. 2007) (per curiam) (orig. proceeding) (quoting *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (2004)).

36. *Id.*

5. Forum Selection Clauses and Forum Non Conveniens

In *In re Lyon Financial Services, Inc.*, the Texas Supreme Court confirmed that "mandamus is available to enforce a forum selection clause" because "[t]here is no adequate remedy by appeal when a trial court refuses to enforce" such a clause.[37] Then, relying on the availability of mandamus relief to enforce forum-selection clauses, the supreme court in *In re Pirelli Tire, L.L.C.* held that mandamus relief is also available to review an order denying a motion to dismiss based on forum non conveniens.[38] An erroneous denial of a forum-non-conveniens motion "is closely analogous" to a forum-selection clause, and "for the same reasons cannot be adequately rectified on appeal."[39]

6. Arbitration

As in *In re Palacios* two years ago, the Texas Supreme Court again faced the issue during this Survey period of the propriety of mandamus relief in the context of an order *compelling* arbitration—but this time with a different result.[40] In *In re Poly-America, L.P.*, the supreme court first determined that the *Prudential* standard for granting mandamus relief in the context of an order compelling arbitration (the benefits of mandamus outweigh the detriments) "is similar" to the standard in federal court (the movant has a "clear and indisputable" right to issuance of the writ).[41] The supreme court then concluded, without expressly applying these standards, that mandamus relief is appropriate to compel arbitration where portions of the arbitration agreement are unconscionable and void but severable from the remainder of the agreement to arbitrate.[42]

Along these same lines, the Texas Supreme Court also confirmed during the Survey period that an order compelling arbitration may be reviewed post-arbitration. "[P]arties waive nothing by foregoing interlocutory review and awaiting a final judgment to appeal."[43] Further, a prior denial of mandamus relief, "without comment on the merits," from an order compelling arbitration "cannot deprive another appellate court from considering the matter in a subsequent appeal."[44]

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37. 257 S.W.3d 228, 231 (Tex. 2008) (per curiam) (orig. proceeding).

38. 247 S.W.3d 670, 679 (Tex. 2007) (orig. proceeding).

39. *Id.*

40. The supreme court faced this issue last Survey period in *In re Palacios*. *See In re* Palacios, 221 S.W.3d 564, 564-65 (Tex. 2006) (orig. proceeding).

41. 262 S.W.3d 337, 346-47 (Tex. 2008) (orig. proceeding).

42. *Id.* at 360-61. The dissent disagreed, noting that "[t]he hard thing about granting mandamus relief is knowing when to stop." *Id.* at 361 (Brister, J., dissenting). The dissent argued that the majority's departure from its position just two years ago in *Palacios*—"that mandamus review was available for 'orders that *deny* arbitration, *but not* orders that *compel* it'"—brought the supreme court "full circle." *Id.* "Apparently, so long as one expresses qualms, *Palacios* is a dead letter." *Id.*

43. Perry Homes v. Cull, 258 S.W.3d 580, 586 (Tex. 2008); *see* Chambers v. O'Quinn, 242 S.W.3d 30, 30-31 (Tex. 2007) (per curiam).

44. *Chambers*, 242 S.W.3d at 32. During the Survey period, the Texas Supreme Court confirmed the availability of mandamus relief in other contexts as well: when a political party officer refuses to perform a duty imposed by law in connection with an election, *In re*

7. Mandamus Procedure

As a general rule, a party must seek mandamus relief in the court of appeals before seeking it in the Texas Supreme Court. In *In re Baylor Medical Center at Garland*, the supreme court clarified that this step is unnecessary when the court of appeals has already considered the order at issue and denied relief, albeit in a prior proceeding.[45]

B. Interlocutory Appeals

1. Post-2003 Review of Expert Reports in Health Care Cases

During the Survey period, the Texas Supreme Court resolved a split among the courts of appeal regarding appellate jurisdiction to conduct interlocutory review of allegedly inadequate expert reports pursuant to section 51.014(a)(9) of the Texas Civil Practice and Remedies Code (Code).[46] Since the enactment in 2003 of the provision providing for such interlocutory appeals, twelve of the fourteen courts of appeal had routinely conducted interlocutory review of allegedly inadequate expert reports in health care cases. However, the Fort Worth and Waco Courts of Appeal had refused to conduct such appeals, holding that they had no jurisdiction to do so.[47]

The supreme court resolved this conflict in *Lewis*. In that case, when the defendant doctor "moved to dismiss the case for failure to serve an expert report, [the plaintiff] pointed to a thank-you-for-your-referral letter in the medical records."[48] The letter contained none of the requisites for an expert report. "[T]he trial court refused to dismiss, instead granting [the plaintiff] a 30-day extension" to file an adequate report, which he did.[49] The doctor "again moved to dismiss, and the trial court again denied his motion."[50] The Waco Court of Appeals then denied the doctor's appeal for want of jurisdiction.[51]

The supreme court reversed, concluding that a defendant in a medical malpractice suit may bring an interlocutory appeal if the trial court denies a motion to dismiss when a plaintiff has failed to timely file an expert report or when defects in a timely filed deficient expert report have not been cured within the statutory timeframe.[52] The supreme court held that a motion seeking dismissal and attorney's fees on the ground that an

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Torry, 244 S.W.3d 849, 850-51 (Tex. 2008) (per curiam) (orig. proceeding); when a trial court issues an order after its plenary power has expired, *In re* Brookshire Grocery Co., 250 S.W.3d 66, 68 (Tex. 2008) (orig. proceeding); and when a trial court issues a non-appealable order that is procedurally void, *In re* Office of the Attorney Gen., 257 S.W.3d 695, 696 (Tex. 2008) (per curiam) (orig. proceeding).

45. 280 S.W.3d 227, 229 (Tex. 2008) (orig. proceeding).

46. Lewis v. Funderburk, 253 S.W.3d 204, 205-06 (Tex. 2008).

47. *Id.* at 206.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 206-07 (citing Lewis v. Funderburk, 191 S.W.3d 756, 761 (Tex. App.—Waco 2006), *rev'd*, 253 S.W.3d 204 (Tex. 2008)).

52. *Id.* at 207-08.

expert report is inadequate is a motion pursuant to section 74.351(b) of the Code, and is accordingly reviewable by interlocutory appeal pursuant to section 51.014(a)(9).[53]

As demonstrated in *Lewis*, a trial court's denial of a motion to dismiss an allegedly deficient expert report is subject to interlocutory review.[54] However, what if the trial court denies the motion to dismiss but contemporaneously grants a thirty-day extension to cure the deficiency in the report? In *Ogletree v. Matthews*, the Texas Supreme Court held that a defendant may not immediately seek interlocutory review when a trial court both denies a motion to dismiss and grants a thirty-day extension to cure a deficient report.[55] The supreme court rested its decision on the provision in Chapter 74 of the Texas Civil Practice and Remedies Code that expressly prohibits an interlocutory appeal from a trial court's order granting a thirty-day extension to cure a deficient report.[56] The supreme court reasoned that the legislative prohibition on such an appeal is "both logical and practical."[57] "If 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."[58] Accordingly, "when a[n expert] report has been served, the actions denying the motion to dismiss and granting an extension are inseparable," and permitting appeal from denial of the motion to dismiss would render meaningless the legislative ban on interlocutory appeals from orders granting extensions to cure a deficient report.[59]

2. *Orders Relating to Arbitration*

Under the Texas Arbitration Act, an order denying an application to compel arbitration is appealable.[60] However, appellate jurisdiction over interlocutory appeals is generally final in the courts of appeal.[61] As confirmed by the supreme court in *Forest Oil Corp. v. McAllen*,[62] the only bases for supreme court jurisdiction over an interlocutory appeal from

53. *Id.* For the reasons stated in *Lewis*, the supreme court also disposed of Bismar v. Morehead, 262 S.W.3d 805 (Tex. 2008) (per curiam); Moore v. Gatica, 253 S.W.3d 219 (Tex. 2008) (per curiam); Diaz-Rohena v. Melton, 253 S.W.3d 218 (Tex. 2008) (per curiam); Ctr. for Neurological Disorders, P.A. v. George, 253 S.W.3d 217 (Tex. 2008) (per curiam); Collini v. Pustejovsky, 253 S.W.3d 216 (Tex. 2008) (per curiam); Hill Reg'l Hosp. v. Runnels, 253 S.W.3d 213 (Tex. 2008) (per curiam); Metwest Inc. v. Rodriguez, 253 S.W.3d 212 (Tex. 2008) (per curiam); Graham Oaks Care Ctr., Inc. v. Farabee, 251 S.W.3d 63 (Tex. 2008) (per curiam).

54. *Lewis*, 253 S.W.3d at 208.

55. 262 S.W.3d 316, 321 (Tex. 2007).

56. *Id.* at 320-21 (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.351(c), 51.014(a)(9) (Vernon 2008)).

57. *Id.*

58. *Id.*

59. *Id.* at 321.

60. TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1) (Vernon 2008).

61. TEX. GOV'T CODE ANN. § 22.225(b)(3) (Vernon Supp. 2008).

62. 268 S.W.3d 51, 55 n.8 (Tex. 2008) (citing Certain Underwriters at Lloyd's of London v. Celebrity, Inc., 988 S.W.2d 731, 733 (Tex. 1998)).

the denial of arbitration include (1) when there is a dissenting opinion in the court of appeals or (2) when a conflict exists between the decision of the court of appeals and a prior decision of the supreme court or another court of appeals.[63]

3. *Agreed Interlocutory Appeals*

The same limitations on the Texas Supreme Court's jurisdiction over an interlocutory appeal from the denial of arbitration apply to an agreed interlocutory appeal pursuant to section 51.014(d) of the Texas Civil Practice and Remedies Code. In *Allstate Insurance Co. v. Fleming*, the supreme court clarified that "the Legislature allows petitions for review from interlocutory appeals only when the court of appeals issue[s] a dissenting opinion or when the court of appeals' decision conflict[s] with a prior decision of the supreme court or . . . another court of appeals."[64]

4. *Orders Granting or Denying Transfer of Venue for Convenience of the Parties*

Under section 15.002(b) of the Texas Civil Practice and Remedies Code, a court may transfer venue of a case for the convenience of the parties and witnesses and in the interest of justice.[65] The court's decision to grant or deny transfer under section 15.002(b) "is not grounds for appeal or mandamus and is not reversible error."[66] This is so, even if the motion to transfer venue is based only in part of section 15.002(b) and there is nothing in the record to support a transfer under that section.[67] If the motion "sufficiently invoke[s section 15.002(b)] in requesting a transfer, it [is] statutorily beyond review."[68] Accordingly, "it is irrelevant whether a transfer for convenience is supported by any record evidence."[69]

II. PRESERVATION OF ERROR IN THE TRIAL COURT

There are few errors that are "fundamental"—preserved for appeal despite the lack of timely objection at the trial court. One is "incurable" jury argument, where "the argument by its nature, degree, and extent constituted such error that an instruction from the court or retraction of the argument" cannot "eliminate the probability that it resulted in an im-

63. TEX. GOV'T CODE ANN. §§ 22.001(a)(1)–(2), 22.225(c). There are some exceptions to this limitation on the supreme court's jurisdiction, which are not relevant in the arbitration context. *See id.* § 22.225(d); TEX. CIV. PRAC. & REM. CODE ANN. §§ 51.014(a)(3), (6), (11) (Vernon 2008).

64. 248 S.W.3d 166, 166 (Tex. 2007) (per curiam) (failing to find requisite conflict or dissent and dismissing for want of jurisdiction); *see also* Liberty Mut. Ins. Co. v. Griesing, 251 S.W.3d 471, 472 (Tex. 2007) (per curiam) (same).

65. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(b) (Vernon 2002).

66. *Id.* § 15.002(c).

67. Trend Offset Printing Servs., Inc. v. Collin County Cmty. Coll. Dist., 249 S.W.3d 429, 430 (Tex. 2008) (per curiam).

68. *Id.*

69. *Id.*

proper verdict."[70] Because such argument harms both the litigants and the judicial system, it "is not subject to the general harmless error analysis."[71] The Texas Supreme Court found incurable jury argument in *Living Centers*, a nursing home wrongful death case where liability was stipulated.[72] There was no need to preserve the error made by plaintiff's counsel in closing argument on damages, where he compared the defense's attempts to minimize damages to a World War II German program (the T-4 Project) in which elderly and infirm persons were used for medical experimentation and killed.[73] The supreme court was livid: "[T]he jury argument was designed to incite passions of the jury and turn the jurors against defense counsel for doing what lawyers are ethically bound to do: advocate clients' interests within the bounds of law."[74]

Also during the Survey period, the Texas Supreme Court endorsed a variant of "stock objections" in *Arkoma Basin Exploration Co. v. FMF Associates 1990-A, Ltd.*[75] After an adverse jury verdict, the defendant filed a post-trial motion asserting that "there is no evidence . . . to support the jury's answers to each part of Question 4," the damages question.[76] The plaintiffs claimed the objection was deficient because it did not specify why the evidence was legally deficient. The supreme court rejected that argument, holding that "[g]enerally, a no-evidence objection directed to a single jury issue is sufficient to preserve error without further detail," and in fact is "what careful practitioners should do."[77] However, the supreme court cautioned that the same single objection made to a number of jury answers is too general, and if a single jury question involves many issues, it is possible that a general objection might not be sufficient.[78] The supreme court justified the stock post-trial objection "because time is short . . . and the trial court is already familiar with the case" at this point.[79]

III. JUDGMENTS

A. Formation of the Judgment

House Bills 2415 and 4 lowered the minimum and maximum judgment interest rates in Texas.[80] The new interest rates apply to final judgments that are "signed or subject to appeal on or after [September 1, 2003]."[81] In *Columbia Medical Center of Las Colinas, Inc. v. Hogue*, the trial court

70. Living Ctrs. of Tex., Inc. v. Penalver, 256 S.W.3d 678, 680-81 (Tex. 2008) (per curiam).
71. *Id.* at 681.
72. *Id.* at 682.
73. *Id.* at 680-81.
74. *Id.* at 682.
75. 249 S.W.3d 380, 387-88 (Tex. 2008).
76. *Id.* at 387.
77. *Id.*
78. *Id.* at 388.
79. *Id.*
80. Tex. H.B. 2415 & 4, 78th Leg., R.S. (2003).
81. *Id.*

signed its final judgment on December 3, 2002, before the effective date of the amendments.[82] The Texas Supreme Court held that, contrary to the appellant's argument, "subject to appeal" means "capable of being appealed," not "on appeal."[83] Thus, the amended interest rates did not apply.[84]

"Once a trial court loses plenary power over a judgment, only clerical errors may be corrected by judgment nunc pro tunc."[85] During the Survey period, a court of appeals confirmed that "[i]f the written judgment accurately reflects the judgment actually rendered by the trial court, the written judgment cannot be corrected through judgment *nunc pro tunc* signed after the trial court's plenary power expires."[86]

B. Finality of the Judgment

Whether a trial court's judgment is final, and thus within the jurisdiction of the court of appeals, has vexed Texas courts for decades. In the 2001 opinion of *Lehmann v. Har-Con Corp.*, the supreme court enunciated a rule that sought to simplify the issues.[87] However, the appellate courts continue to grapple with whether a particular order disposes of all parties and all issues in a cause. This year was no exception. Here are some of the highlights:

- In 2006, the supreme court held that in probate cases "multiple judgments final . . . can be rendered on certain discrete issues."[88] During the Survey period, the Dallas Court of Appeals extended the rule to divorce cases, deciding that after a divorce is final, various post-judgment petitions (such as for enforcement of contractual alimony) can be filed under the same cause number as the underlying divorce.[89] Each petition is a distinctly different action and is prosecuted separately, with separate citations served on the respondent.[90] Thus, when the summary judgment disposes of all claims and all parties in one of the post-judgment petitions, it is final for purposes of appeal.[91]
- An order denying a request to take a pre-suit deposition under Rule 202 is final and appealable "only if the deposition sought is against a third party against whom suit is not contemplated."[92] During the Survey period, the Houston Court of Appeals, First District, fol-

82. 271 S.W.3d 238, 256 (Tex. 2008).
83. *Id.*
84. *Id.* at 257.
85. *In re* Dickerson, 259 S.W.3d 299, 301 (Tex. App.—Beaumont 2008, orig. proceeding [mand. denied]).
86. *Id.* (emphasis added).
87. 39 S.W.3d 191, 195 (Tex. 2001).
88. Brittingham-Sada de Ayala v. Mackie, 193 S.W.3d 575, 578 (Tex. 2006).
89. Eberstein v. Hunter, 260 S.W.3d 626, 628-29 (Tex. App.—Dallas 2008, no pet.).
90. *Id.*
91. *Id.*
92. *In re* Alexander, 251 S.W.3d 798, 799 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

lowed the Dallas and Waco Courts of Appeal, concluding that an order denying the pre-suit deposition of a deponent who was the target of a contemplated legal malpractice suit was not final, and therefore not appealable.[93]

- An order denying a party's motion to vacate an arbitration panel's determination to certify a class is an interlocutory order not subject to appeal.[94]

IV. EXTENDING THE APPELLATE TIMETABLE

In an important decision for appellate practitioners, the Texas Supreme Court held, in *Arkoma Basin Exploration Co. v. FMF Associates 1990-A, Ltd.*, that a trial court's order suggesting a remittitur modifies a judgment and restarts the appellate timetables.[95] Under the rules of procedure, "[i]f a judgment is modified . . . in any respect" the deadlines run from the date of the modified judgment.[96] A remittitur order is a rather strange beast that does not fit within the rule, as it does not actually change the judgment, but only suggests a change—the court suggests that the plaintiff take a lesser amount of damages on the condition that a new trial will be granted if it is refused.[97] In *Arkoma Basin*, the supreme court concluded that such an order *does* change the judgment because it "allows only two options: a smaller judgment or a new trial."[98] "While it may not be clear when the order is signed which option a claimant will select, it is immediately clear that the original judgment will change."[99] The order thus "modifies" the original judgment and restarts the appellate clock.[100]

V. FINDINGS AND CONCLUSIONS

When a party submits a timely request for written findings of fact and conclusions of law, the trial court has a mandatory duty to prepare such findings and conclusions.[101] "[The] court's failure to respond to a timely request is presumed to be harmful error, unless the appellate record affirmatively shows that the complaining party has suffered no harm."[102] In *Liberty Mutual Fire Insurance v. Laca*, the trial court failed to respond to Liberty Mutual's timely request for findings and conclusions, even after Liberty Mutual notified the court that they were past due.[103] The court of appeals held that the trial court's failure to respond was harmful

93. *Id.*
94. John M. O'Quinn, P.C. v. Wood, 244 S.W.3d 549, 552-53 (Tex. App.—Tyler 2007, no pet.).
95. 249 S.W.3d 380, 390-91 (Tex. 2008).
96. TEX. R. CIV. P. 329b(h).
97. *Arkoma*, 249 S.W.3d at 390.
98. *Id.* at 391.
99. *Id.*
100. *Id.*
101. *See* TEX. R. CIV. P. 297.
102. Liberty Mut. Fire Ins. v. Laca, 243 S.W.3d 791, 794 (Tex. App.—El Paso 2007, no pet.).
103. *Id.* at 793-94.

error, since it "forced [Liberty Mutual] to guess at the underlying basis for the trial court's judgment."[104]

During the pendency of the *Liberty Mutual* appeal, the trial judge was replaced as a result of an election. Thus, the appellate court reversed and remanded the case for a new trial,[105] even though the preferable remedy for such a situation is abatement of the appeal and remand to the trial court for entry of findings and conclusions.[106]

VI. SUPERSEDING THE JUDGMENT

By statute, supersedeas bonds, which provide security for a money judgment while on appeal, must not exceed 50% of the judgment debtor's net worth or $25 million.[107] During the Survey period, the en banc Houston Court of Appeals, First District, agreed with its sister Houston appellate court and the Dallas Court of Appeals that "net worth" means "current assets minus current liabilities."[108] Specifically, the judgment debtor in *EnviroPower, L.L.C. v. Bear, Stearns & Co.*, had, under this definition, a net worth of minus $12 million. But because there was a contingent contract to purchase the company for $10 million, its market value was potentially much higher. The trial court set a $200,000 supersedeas bond, after concluding that the market value was $8 million and that a bond for the full amount of the judgment ($1.3 million) would cause substantial economic harm, but a bond of $200,000 would not.[109] The en banc court held that the trial court used the wrong measure of net worth and remanded to determine the amount of the bond, if any.[110] In its opinion, the court of appeals focused on the practical realities—the possibility of a future sale does not provide funds for the purchase of a supersedeas bond.[111]

VII. PLENARY POWER OF THE TRIAL COURT

At last, the Texas Supreme Court has changed the rule found "nowhere but Texas" that previously prevented trial courts from "ungranting" a motion for new trial more than seventy-five days after it was signed.[112] The problem occurs when a trial judge (1) renders judgment on a verdict, (2) grants a new trial motion, and (3) then reconsiders and sets aside (or

104. *Id.* at 795.
105. *Id.* at 796.
106. *Id.*; *see, e.g.*, *In re* Marriage of Palacios, No. 07-08-0006-CV, 2008 WL 4346714, at *1 (Tex. App.—Amarillo Sept. 23, 2008, no pet.) (per curiam) ("Thus, the appropriate remedy is to abate the appeal for entry of proper findings and conclusions.").
107. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b)(1)-(2) (Vernon 2008); TEX. R. APP. P. 24.2(a)(1).
108. EviroPower, L.L.C. v. Bear, Stearns & Co., 265 S.W.3d 1, 5 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).
109. *Id.* at 4-5, 9.
110. *Id.* at 7.
111. *Id.* at 5-6.
112. *In re* Baylor Med. Ctr. at Garland, 280 S.W.3d 227, 229, 232 (Tex. 2008).

vacates) the new trial order and reinstates the original judgment.[113] In *Baylor Medical Center*, the procedural history was more complicated, due to there being three different judges holding the office of judge of the 160th District Court over the course of the case. The first judge signed a take-nothing judgment, then granted a new trial. The second judge vacated the new trial order and reinstated judgment on the verdict, then reconsidered and again reinstated the new trial order. A third judge was elected to the bench after the mandamus on the merits of the reinstated new trial order was pending.[114]

In these circumstances, Rule 7.2 of the Texas Rules of Civil Procedure would ordinarily compel the court of appeals to abate the mandamus to allow the new judge to reconsider the order.[115] But under the rule of *Porter v. Vick*,[116] the trial court would have no power to reconsider the order because more than seventy-five days had passed since the order was signed.[117] The *Porter* rule is based upon a notion that a trial court's plenary power over the original judgment ends, thus limiting the trial court's power to do as it wishes when it grants a motion for new trial.[118] Recognizing that this rule simply does not fit with the concepts of trial court plenary power now articulated in the appellate rules, the supreme court in *Baylor Medical Center* overruled *Porter*.[119] Now, when a trial court grants a new trial, "the case stands on the trial court's docket the same as though no trial had been had. Accordingly, the trial court should then have the power to set aside a new trial order any time before a final judgment is entered."[120] Under *Baylor Medical Center*, "[a] trial court's plenary jurisdiction gives it not only the authority but the responsibility to review any pre-trial order upon proper motion."[121]

Rule 306a(4) allows the trial court to restart the appellate and plenary power clocks when a party receives late notice of judgment.[122] If the party has not learned of the judgment "within twenty days after the judgment," the date of actual notice of the judgment is treated as the date to start the clock ticking, so long as it does not begin more than ninety days after the date original judgment was signed.[123] In *Wells Fargo Bank, N.A. v. Erickson*, the bank suffered a default judgment due to a lawyer's mistake.[124] The clerk failed to send notice of the judgment, and the bank learned of the judgment more than thirty days after the judgment was signed, when it was already final and the appellate deadlines had run.

113. *Id.* at 228-29.
114. *Id.*
115. *Id.* at 228.
116. 888 S.W.2d 789 (Tex. 1994).
117. *Baylor Med. Ctr.*, 280 S.W.3d at 228.
118. *See id.* at 230.
119. *Id.* at 230-32.
120. *Id.* at 230-31 (internal quotations omitted).
121. *Id.* at 231.
122. TEX. R. CIV. P. 306a(4).
123. *Id.*
124. 267 S.W.3d 139, 141-43 (Tex. App.—Corpus Christi 2008, no pet.).

The bank filed a motion for new trial and asked the trial court to restart the clock, but the trial court denied the motion due to a failure of proof—the bank proved that the clerk did not send timely notice, but did not prove that the bank did not receive actual notice from any other source.[125] The bank then filed a second motion to extend deadlines and a supplemental motion for new trial, which the trial court granted.[126]

The issue on appeal was whether the trial court's order granting the new trial was within its plenary jurisdiction.[127] The plaintiff argued that once the trial judge denied the motion to extend deadlines, its plenary power expired, and it could not consider any further motions. The court of appeals disagreed, correctly, because the fundamental nature of a motion to extend deadlines is to restart the trial court's plenary power after it has expired according to the usual deadlines.[128]

> There is no deadline for filing a rule 306a motion, except that the motion must be filed and ruled upon while the court retains plenary power, and the time for the court's plenary power is counted from the date of notice of the judgment as alleged in the rule 306a motion.[129]

When does a second motion for new trial—made within thirty days of judgment—*not* extend the appellate deadlines? The Texas Supreme Court confronted this issue in *In re Brookshire Grocery Co.* and concluded that a second motion for new trial filed after a first timely motion is overruled does not extend plenary power deadlines.[130] In *Brookshire*, the first motion for new trial was filed before the judgment was signed and was overruled by order the day after the judgment was signed. At that point the trial court's plenary power was set to expire thirty days after the date the motion for new trial was overruled. But then a second motion for new trial was filed on the twenty-ninth day after judgment, within the thirty days that a party has to file a motion for new trial, which would ordinarily extend the court's plenary power deadlines. The trial judge granted the motion more than thirty days after the first motion was overruled, but within its plenary power if the second motion extended deadlines.[131]

Relying on the language and long history of Rule 329b of the Texas Rules of Civil Procedure, the Texas Supreme Court held that the second motion was "timely" in that it was filed within the thirty-day deadline, but it was not "timely" for purposes of extending plenary power because it was filed after the first motion was overruled.[132] A party is not precluded from filing a second motion for new trial, but the court must grant it

125. *Id.* at 143-44.
126. *Id.* at 145.
127. *Id.* at 146.
128. *Id.* at 146, 148.
129. *Id.* at 148.
130. 250 S.W.3d 66, 69 (Tex. 2008).
131. *Id.* at 68.
132. *Id.* at 70-71.

within thirty days after the first is overruled.[133] The supreme court distinguished the situation from one where the party files a different type of Rule 329b motion ("such as a motion to modify, correct, or reform the judgment") after the first motion for new trial is overruled.[134] The motion to modify would extend the trial court's plenary power, as Rule 329b(e) provides that plenary power expires thirty days after all such motions are overruled.[135]

VIII. PERFECTING THE APPEAL

During the Survey period, the Texas Supreme Court confirmed that "'[i]f the appellant timely files a document in a bona fide attempt to invoke the appellate court's jurisdiction, the court of appeals, on appellant's motion, must allow the appellant an opportunity to amend or refile the instrument.'"[136] Thus, where an insurer filed a notice of appeal in its insured's name but clearly listed its subrogation interest on the docketing statement, the insurer should have been permitted to amend the notice to name itself as appellant.[137]

IX. APPELLATE JURISDICTION

A. Advisory Opinions

Appellate courts are not to give advisory opinions and, in fact, have no jurisdiction to do so. Nevertheless, because early advice from an appellate court can be extremely valuable, litigants and trial judges try to figure out ways to disguise their requests. In *Clark & Co. v. St. Paul Fire & Marine Insurance Co.*, the Dallas Court of Appeals determined that a severance order was merely an attempt at an unauthorized interlocutory appeal of a particular ruling in the trial court, contrary to the limitations on appellate jurisdiction.[138] The trial court struck the defendant's amended answer that alleged various affirmative defenses and counterclaims. After the defendant refused to agree to an interlocutory appeal, the trial court severed the counterclaims at plaintiff's request, forcing the defendant to immediately appeal the order striking the counterclaims. The court also abated the trial on the remaining claims.[139] The court of appeals held that the severance order "was an improper attempt to obtain

133. *Id.* at 72.
134. *Id.*
135. *Id.* A vigorous dissent decried "tricky procedural rules" that threaten substantive rights, and argued that a second motion for new trial should have the same result as a subsequent motion to modify. *Id.* at 74 (Hecht, J., dissenting, joined by Wainwright, J., Brister, J., and Green, J.).
136. Warwick Towers Council of Co-Owners v. Park Warwick, L.P., 244 S.W.3d 838, 839 (Tex. 2008) (per curiam) (alteration in original) (quoting Grand Prairie Indep. Sch. Dist. v. S. Parts Imp. Inc., 813 S.W.2d 499, 500 (Tex. 1991) (per curiam)).
137. *Id.* at 839-40.
138. No. 05-07-01097-CV, 2008 WL 4635852, at *3 (Tex. App.—Dallas 2008, no pet.) (mem. op.).
139. *Id.* at *2.

an advisory opinion" and reversed the severance order and ordered the trial court to proceed on the whole case.[140] Noting that the plaintiff conceded that the claims were so interwoven that they could not proceed separately when it requested abatement of the remaining claims pending determination of the appeal, the court concluded that "the severance was illusory [and] done solely to effectuate an interlocutory appeal . . . not authorized by statute."[141]

B. Motion for Sanctions after Nonsuit

In *Villafani v. Trejo*, the Texas Supreme Court considered whether a defendant's motion for sanctions under the Medical Liability Insurance Improvement Act (MLIIA) survives a motion for nonsuit.[142] In that case, the plaintiff took a nonsuit for its claims against a defendant medical provider after the trial court denied the defendant's motion to dismiss and for sanctions due to plaintiff's failure to serve an expert report. The medical provider appealed the denial of the motion for sanctions. The court of appeals held that the nonsuit mooted the order denying the motion for sanctions, thus depriving the court of appeals of jurisdiction.[143] The supreme court reversed, reminding that while a plaintiff has an absolute right to a nonsuit, the decision to nonsuit does not control the fate of another party's independent claims for affirmative relief.[144] Whether a particular claim for sanctions is "a claim for affirmative relief that survives a nonsuit" depends upon the sanction's purpose, and the motion for sanctions under the MLIIA survives a nonsuit because the purpose of the statute is to deter meritless claims.[145] Moreover, the fact that the motion was ruled upon and was no longer a "pending" claim for relief at the time of nonsuit does not prevent appeal of the order denying the relief.[146]

X. WAIVER ON APPEAL

An appellant may not "assert new grounds for reversal in a reply brief after the omitted grounds have been pointed out in a response."[147] Any new grounds asserted in this manner are waived.[148] During the Survey period, the Houston Court of Appeals, Fourteenth District, made it clear that this rule applies equally to traditional appeals and original

140. *Id.* at *3.
141. *Id.*
142. 251 S.W.3d 466, 467 (Tex. 2008).
143. *Id.* at 467-68.
144. *Id.* at 469.
145. *Id.* at 470.
146. *Id.* at 469; *see* Regent Care Ctr. of San Antonio II v. Hargrave, 251 S.W.3d 517, 518 (Tex. 2008) (per curiam) (holding court of appeals has jurisdiction over sanctions order regardless of whether nonsuit was with or without prejudice); Barrera v. Rico, 251 S.W.3d 519, 520 (Tex. 2008) (per curiam) (remanding to court of appeals to consider the merits in light of *Villafani*).
147. *In re* TCW Global Project Fund II, Ltd., 274 S.W.3d 166, 171 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *see* Tex. R. App. P. 38.3.
148. *See TCW Global*, 274 S.W.3d at 171.

proceedings.[149]

"[A] litigant who has obtained a favorable judgment and has no reason to complain in the trial court is not required to raise an issue regarding an alternative ground of recovery until an appellate court reverses the judgment."[150] Thus, the Texas Supreme Court rejected the argument that the buyer had waived his alternative theory of recovery, refund of earnest money, by failing to file a notice of appeal.[151] Because the buyer had obtained a favorable judgment for specific performance, he was not required to raise the earnest money issue until the judgment about which he had no complaint was reversed.[152]

XI. STANDARDS OF REVIEW

During the Survey period, the Texas Supreme Court expounded on the harmless error analysis in cases involving the improper admission of evidence of the defendant's wealth. In *Reliance Steel & Aluminum Co. v. Sevcik,* a car crash lawsuit, the trial judge allowed the plaintiffs' lawyer to ask questions about the defendant's size and wealth—it was a large California company with almost $2 billion in revenues and 3,000 employees.[153] The suit did not involve punitive damages, so the supreme court easily concluded that the evidence was inadmissible.[154] In evaluating whether the erroneous admission of evidence was harmless, the supreme court cautioned that "[a] reviewing court must evaluate the whole case from voir dire to closing argument, considering the 'state of the evidence, the strength and weakness of the case, and the verdict.'"[155] The supreme court focused on four criteria: (1) the effect of the evidence on the verdict, (2) the evidence's role in the context of the trial, (3) counsel's emphasis upon the evidence, and (4) the party's effort to get the evidence admitted.[156] The supreme court concluded the wealth evidence played a crucial role on a key issue at trial because parts of the damage findings were not supported by the evidence and the only real issue in the case was damages.[157]

The Survey period also found the Texas Supreme Court deeply divided on the application of the principles of statutory construction. In *City of Rockwall v. Hughes*, the supreme court struggled over how to interpret the arbitration provision of a Texas annexation statute.[158] Both the majority and the dissent purported to "ascertain and give effect to the Legislature's intent as expressed by the language of the statute," and to accord

149. *Id.*; *see also* TEX. R. APP. P. 52.5.
150. DiGiuseppe v. Lawler, 269 S.W.3d 588, 603 (Tex. 2008).
151. *Id.*
152. *Id.*
153. Reliance Steel & Aluminum Co. v. Sevcik, 267 S.W.3d 867, 869 (Tex. 2008).
154. *Id.* at 873.
155. *Id.* at 871 (quoting Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 841 (Tex. 1979).
156. *Id.* at 871-74.
157. *Id.* at 871-75.
158. 246 S.W.3d 621, 621-31 (Tex. 2008).

the statute's words "their plain and common meaning."[159] The majority admitted that its interpretation was not especially logical, but "our standard for construing statutes is not to measure them for logic."[160] The dissent found the majority's interpretation to cross the line from illogical to absurd and urged that the statute be interpreted "in context."[161]

XII. DISPOSITION ON APPEAL

During the Survey period, the Amarillo Court of Appeals confirmed that only appellate courts have the authority to dismiss an appeal.[162] Thus, when parties asked that their appeal be abated and remanded so that the trial court could order dismissal, the court of appeals dismissed the appeal itself.[163]

In a health care liability case, the plaintiff must serve its expert reports "not later than the 120th day after the date the original petition was filed."[164] If "the report[s] are found deficient, the court may grant one 30-day extension to the [plaintiff] in order to cure the deficiency."[165] In *Leland v. Brandal*, the Texas Supreme Court held that when the *court of appeals* (as opposed to the trial court) finds that an expert report is deficient, it is statutorily authorized to remand the case for consideration of whether a thirty-day extension should be granted to the plaintiff.[166]

In another health care liability case, the supreme court followed its holding in *Leland* and held that the plaintiff was entitled to a remand for consideration of the extension issue. It also held that the court of appeals' decision to reverse and render judgment in favor of the defendant due to deficiencies in the plaintiff's expert reports was error.[167]

The Texas Supreme Court confirmed that under certain circumstances, a party is entitled to have his case remanded for a new trial on attorney's fees when compensatory damages are reduced on appeal.[168] In *Bossier Chrysler-Dodge II, Inc. v. Rauschenberg*, a divided court of appeals "reduced the trial court's damage award by eighty-seven percent" but affirmed the trial court's attorney's fees award.[169] The Texas Supreme Court reversed the appellate court's decision regarding attorney's fees,

159. *Id.* at 625; *see id.* at 633-34.
160. *Id.* at 629.
161. *Id.* at 631-34 (Willet, J., dissenting, joined by Hecht, J., O'Neill, J., and Brister, J.).
162. *See* Golovko v. Woodard, No. 07-06-0442-CV, 2007 WL 3254429, at *1 (Tex. App.—Amarillo Nov. 5, 2007, no pet.) (per curiam).
163. *Id.*
164. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon 2005 & Supp. 2008).
165. *Id.* § 74.351(c).
166. 257 S.W.3d 204, 207-08 (Tex. 2008).
167. Martinez-Partido v. Methodist Specialty & Transplant Hosp., 267 S.W.3d 881, 882 (Tex. 2008) (per curiam). Health care liability cases decided under the prior statute will not necessarily command the same result, as the prior statute allowed a thirty-day extension to correct deficient expert reports only if the deficiency was the result of an accident or mistake. *See In re* McAllen Med. Ctr., Inc., 275 S.W.3d 458, 469 (Tex. 2008).
168. Bossier Chrysler-Dodge II, Inc. v. Rauschenberg, 238 S.W.3d 376, 376 (Tex. 2007) (per curiam).
169. *Id.*

holding that "the issue of attorney's fees should ordinarily be retried under these circumstances unless the appellate court is reasonably certain that the jury was not significantly influenced by the erroneous [damage award]."[170]

In *Ford Motor Co. v. Ledesma*, the Texas Supreme Court held that the Pattern Jury Charge's definition of "manufacturing defect," which had been submitted to the jury by the trial court, was incorrect.[171] Noting that "trial courts routinely rely on the Pattern Jury Charges in submitting cases to juries," and that "the interests of justice would not be served by reversing and rendering judgment in favor of [the defendant]," the supreme court reversed and remanded the case for a new trial.[172]

170. *Id.* (internal quotations omitted) (alteration in original).
171. 242 S.W.3d. 32, 41 (Tex. 2007).
172. *Id.* at 45.