



January 2009

Civil Procedure: Pre-Trial and Trial

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Recommended Citation

Donald Colleluori et al., *Civil Procedure: Pre-Trial and Trial*, 62 SMU L. REV. 971 (2009)
<https://scholar.smu.edu/smulr/vol62/iss3/8>

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CIVIL PROCEDURE: PRE-TRIAL AND TRIAL

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

I. SUBJECT MATTER JURISDICTION

The Texas Supreme Court was called upon to venture once more into the thicket of the Texas courts' jurisdiction over cases involving the free exercise of religion in *Pleasant Glade Assembly of God v. Schubert*.¹ The plaintiff brought suit against her church and various individuals for, among other claims, assault, battery, and false imprisonment, arising out of several encounters in which she alleged she was forcibly restrained by church members and suffered physical and emotional injuries. The de-

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1. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1 (Tex. 2008).

fendants moved to dismiss the “lawsuit as an unconstitutional burden on their religious practices, describing the litigation as a dispute regarding how services should be conducted within a church, including the practice of ‘laying on of hands.’”²

The supreme court held that, “[b]ecause providing a remedy for the very real, but religiously motivated emotional distress in this case would require us to take sides in what is essentially a religious controversy,” it lacked jurisdiction to resolve the dispute.³ Although the First Amendment did not protect the church from claims of physical injury, the court concluded that the case was not about the “scrapes and bruises” plaintiff sustained during the events in question, but rather her subsequent psychological and emotional injuries.⁴ Thus, for jurisdictional purposes, the supreme court was unable to distinguish the claims in this case from a claim for intentional infliction of emotional distress, which it had previously held would necessarily and impermissibly “require an inquiry into the truth or falsity of religious beliefs.”⁵

The Texas Supreme Court addressed an unusual question involving a district court’s subject matter jurisdiction over condemnation actions in *PR Investments and Specialty Retailers, Inc. v. State*.⁶ In this case, the Texas Department of Transportation (TxDOT) changed its road design plans after the special commissioners made their award, but before the trial de novo in the county court. The property owner complained that the county court’s jurisdiction in condemnation cases is “appellate” in nature, and it therefore should not have considered the changed plan that was not before the special commissioners.⁷ The supreme court disagreed, holding that the county court was not divested of jurisdiction.⁸ While the trial court proceeding is appellate in the sense that the special commissioners first consider the matter, its review is by trial de novo, and the governing property code provision states the trial court shall “try the case in the same manner as other civil causes.”⁹ Moreover, the supreme court rejected the landowner’s alternative argument that the trial court had discretion to dismiss, stating that a court possessed of jurisdiction must generally exercise it.¹⁰

Cadle Co. v. Bray involved a suit to revive a dormant judgment.¹¹ The defendant argued that such a suit was a *scire facias* claim that had to be

2. *Id.* at 5 (internal quotations omitted).

3. *Id.* at 13.

4. *Id.* at 8.

5. *Id.* at 9 (quoting *Tilton v. Marshall*, 925 S.W.2d 672, 682 (Tex. 1996)). In dissent, Chief Justice Jefferson noted that the plaintiff alleged she suffered physical injuries, and the jury’s award was for unsegregated physical pain and mental anguish. *Id.* at 15 (Jefferson, C.J., dissenting). Thus, the dissent argued, “at its core the case is about secular, intentional tort claims squarely within our jurisdiction.” *Id.*

6. 251 S.W.3d 472 (Tex. 2008).

7. *Id.* at 475.

8. *Id.* at 476.

9. *Id.* (citing TEX. PROP. CODE ANN. § 21.018(b) (Vernon 2004)).

10. *Id.* at 479.

11. 264 S.W.3d 205 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

filed in the same court and, because the clerk assigned the suit to a different county court, subject matter jurisdiction was lacking even after it was transferred, at plaintiff's request, to the county court that issued the original judgment. The First District Court of Appeals in Houston rejected this argument, holding that plaintiff's pleading included an express statement regarding the proper court for the case to be assigned to, and the failure of the clerk to assign the case to that court originally did not deprive it of subject matter jurisdiction.¹²

In *White v. Robinson*, citizens who sponsored a referendum proposition brought suit, after the proposition was passed by voters, seeking a declaration that it was valid and must be enforced.¹³ The Fourteenth District Court of Appeals in Houston held that the plaintiffs lacked standing to sue.¹⁴ The court reasoned that the "dispute ha[s] moved beyond the election process," and the referendum sponsors' legal interest in the subject matter was now no different than that of any other voter, taxpayer, or citizen.¹⁵ Moreover, the court held that a provision in the proposition that purported to grant standing to any citizen who voted on it was ineffective because municipalities, whether acting through their legislative bodies or by citizen referenda, may not confer standing by legislation.¹⁶

II. SERVICE OF PROCESS

In *Kao Holdings, L.P. v. Young*, the Texas Supreme Court was called upon to construe two statutes that seemingly authorized the entry of a judgment against individual partners who have been served with process in a suit against the partnership.¹⁷ Section 17.022 of the Texas Civil Practices and Remedies Code (TCP) provides that: "Citation served on one member of a partnership authorizes a judgment against the partnership and the partner actually served."¹⁸ Similarly, section 3.05(c) of the Texas Revised Partnership Act (TRPA) states: "A judgment against a partnership is not by itself a judgment against a partner, but a judgment may be entered against a partner who has been served with process in a suit against the partnership."¹⁹ The supreme court held, however, that neither of these statutes allows for a judgment to be rendered against a partner who has not been named as a defendant, even if he has been served.²⁰ The supreme court explained that TCP 17.022 dates back decades before partnerships were recognized as separate entities that could be sued and, therefore, was intended to authorize a judgment against the partnership when an individual partner is sued and served, not vice

12. *Id.* at 213.

13. 260 S.W.3d 463 (Tex. App.—Houston [14th Dist.] 2008, pet. granted).

14. *Id.* at 466.

15. *Id.* at 472-73.

16. *Id.* at 473.

17. 261 S.W.3d 60 (Tex. 2008).

18. TEX. CIV. PRAC. & REM. CODE ANN. § 17.022 (Vernon 2008).

19. TEX. REV. CIV. STAT. ANN. art. 6132b-3.05(c) (Vernon Supp. 2008).

20. *See Young*, 261 S.W.3d at 62.

versa.²¹ The purpose of TRPA 3.05 is less clear, the supreme court acknowledged, but in its view that provision also means only that service of process is necessary, not sufficient.²² Thus, the supreme court has now made clear that “[p]artners against whom judgment is sought should be both named and served so that they are on notice of their potential liability and will have an opportunity to contest their personal liability for the asserted partnership obligation.”²³

In *Cebcor Service Corp. v. Landscape Design & Construction, Inc.*, the plaintiffs sued Consolidated Employment Benefits Corporation and served the Secretary of State under the long-arm statute.²⁴ When no answer was filed, plaintiffs moved for a default. On the day of the default hearing, plaintiffs filed an amended petition that was nearly identical to the original petition, except it alleged that the defendant was Consolidated Employment Benefit Service Corporation a/k/a Cebcor Service Corporation. No party was served with the amended petition, and the trial court awarded a default judgment. Cebcor Service Corporation filed a bill of review several years later, arguing that it was never served with process. Following a jury trial, the trial court declared the judgment valid on the ground that Cebcor Service Corporation was the alter ego of Consolidated Employment Benefits Corporation. The Dallas Court of Appeals affirmed, holding that service of process on one entity constitutes valid service on its alter ego as well.²⁵

In order to reverse a default judgment on a restricted appeal based on a defect in service of process, “the error complained of must be apparent on the face of the record.”²⁶ Two cases decided by the Dallas Court of Appeals came to opposite conclusions regarding whether this requirement was satisfied in cases involving seemingly minor defects. In *Goodman v. Wachovia Bank, N.A.*, the appellant complained that the verification on the return of service did not show strict compliance with Texas Rule of Civil Procedure (TRCP) 107,²⁷ because the notary’s acknowledgment did not recite that “she personally knew the process server” or “had satisfactory evidence of his identity.”²⁸ The court of appeals rejected this argument, reasoning that TRCP 107 requires verification to “establish the truth of the information in the return, not to establish the identity of the person signing the return.”²⁹ In *Lytle v. Cunningham*, on the other hand, the court vacated a default judgment where

21. *See id.* at 62-63.

22. *Id.* at 62-64.

23. *Id.* at 64.

24. 270 S.W.3d 328, 330 (Tex. App.—Dallas 2008, no pet.); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 17.044(b) (Vernon 2008).

25. *Cebcor*, 270 S.W.3d at 333.

26. *See Goodman v. Wachovia Bank, N.A.*, 260 S.W.3d 699, 701 (Tex. App.—Dallas 2008, no pet.).

27. TEX. R. CIV. P. 107.

28. *Goodman*, 260 S.W.3d at 701-02 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 121.005 (Vernon 2005) (detailing requirements of notary’s acknowledgment)).

29. *Id.* at 702.

the petition alleged that service could be made upon “Mr. Chris Lytle,” but the return recited that service had been made by delivery to “Christopher Lytle.”³⁰ The court held that it could not tell if these were the same or different persons, and that the difference between “Chris” and “Christopher” was not a “slight variance” similar to the “omission of a middle initial.”³¹

III. SPECIAL APPEARANCE

Haaksman v. Diamond Offshore (Bermuda) Ltd. presented “the novel question of whether or not a trial court presented with a foreign-money judgment must establish in personam jurisdiction over the judgment debtor prior to domesticating the judgment.”³² Finding no relevant Texas authority, the Fourteenth District Court of Appeals in Houston followed the lead of courts in other states in holding that in personam jurisdiction is not required under either the judgment recognition statute or the United States Constitution.³³ The court of appeals also rejected the judgment-debtor’s argument that, if personal jurisdiction is lacking, the judgment creditor must present evidence that the judgment debtor has property in Texas subject to execution.³⁴ The court reasoned that, even if the judgment debtor does not currently have property in Texas, the judgment creditor should be granted recognition of his judgment so that he can later pursue enforcement if and when it comes to pass that the judgment debtor is maintaining assets in this state.³⁵

Langston, Sweet & Freese, P.A. v. Ernster demonstrates that establishing personal jurisdiction over a partnership does not, without more, establish jurisdiction over each of its partners.³⁶ Richard Freese, a partner in the defendant law firm that had entered into a fee sharing agreement involving claims originating in Texas, among other places, argued that he individually had no minimum contacts with Texas. The Beaumont Court of Appeals agreed, holding that the law firm’s contacts could not be imputed to Freese for personal jurisdictional purposes, regardless of whether he might ultimately be liable for the partnership’s obligations.³⁷

IV. VENUE

In *In re Transcontinental Realty Investors, Inc.*, the Texas Supreme Court considered whether “an amendment to the permissive venue statute . . . should be interpreted to eliminate businesses from” the ambit of

30. 261 S.W.3d 837, 839-40 (Tex. App.—Dallas 2008, no pet.).

31. *Id.* at 840 (citing *Westcliffe, Inc. v. Bear Creek Constr., Ltd.*, 105 S.W.3d 286, 290 (Tex. App.—Dallas 2003, no pet.)).

32. 260 S.W.3d 476, 478 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

33. *Id.* at 479-80.

34. *Id.* at 480.

35. *Id.* at 481.

36. 255 S.W.3d 402 (Tex. App.—Beaumont 2008, pet. denied).

37. *Id.* at 410.

“every venue statute that refers to where a party ‘resides.’”³⁸ In this case, the North Texas Municipal Water District filed suit against Transcontinental in Kaufman County, seeking to condemn a 30-foot easement on land located in both Kaufman and Dallas Counties. Section 21.013 of the Texas Property Code requires that condemnation suits be filed where the owner “resides” if the property is at least partly located in the county of residence.³⁹ Accordingly, Transcontinental moved to transfer venue to Dallas County on the basis that its principal place of business and registered agent are in Dallas County, and it had no offices in Kaufman County. The Water District argued that corporations do not “reside” in any particular county, because they have no residence. Specifically, the Water District claimed that the supreme court’s prior holding that the registered office and agent “shall constitute a statutory place of residence of the corporation,” was no longer controlling “because the Legislature amended the permissive-venue statute in 1983 to limit [the] ‘residence’ [provision] to natural persons.”⁴⁰ The supreme court disagreed and held that “when the Legislature amended the permissive-venue statute to distinguish between a natural person’s ‘residence’ and a business’s ‘principal office,’” it did not intend “to eliminate corporations and other legal entities from all statutes that refer to a place where one ‘resides.’”⁴¹

In *In re Team Rocket, L.P.*, the Texas Supreme Court considered whether a plaintiff, who is denied his initial choice of venue, can subsequently refile in a third county after nonsuiting the case in the transferee county.⁴² Here, the plaintiff initially filed his lawsuit in Harris County and the defendant moved to transfer venue to Williamson County. The trial court granted the defendant’s motion to transfer venue, and the plaintiff then nonsuited the case and immediately filed the same claims against the same defendant in Fort Bend County. Defendant once again moved to transfer venue to Williamson County, which was denied by the Fort Bend County trial court. On mandamus, the supreme court held “that only one venue determination may be made” in a civil proceeding and that TRCP 87⁴³ “specifically prohibits changes in venue after . . . [that] . . . initial venue ruling.”⁴⁴ Otherwise, parties would be allowed to forum shop, a practice that the supreme court has repeatedly condemned.⁴⁵

In *In re Boehme*, the Fourteenth District Court of Appeals in Houston considered whether a party had waived its contractual forum selection clause.⁴⁶ The court first noted that when analyzing the issue of waiver,

38. 271 S.W.3d 270, 271 (Tex. 2008).

39. TEX. PROP. CODE ANN. § 21.013 (Vernon 2004).

40. *Transcontinental*, 271 S.W.3d at 271 (quoting *Ward v. Fairway Operating Co.*, 364 S.W.2d 194, 195 (Tex. 1963)).

41. *Id.* at 272.

42. 256 S.W.3d 257 (Tex. 2008).

43. TEX. R. CIV. P. 87.

44. *Team Rocket*, 256 S.W.3d at 259.

45. *Id.* at 260.

46. 256 S.W.3d 878 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding).

the Texas Supreme Court has repeatedly relied on cases involving arbitration agreements.⁴⁷ Further, the supreme court had recently announced that the issue of waiver (in the context of arbitration provisions) should be “decided on a case-by-case basis by employing a ‘totality of the circumstances’ test.”⁴⁸ In this case, the movant contended that the other party had waived the forum selection clause by: “(1) deposing three witnesses; (2) producing two witnesses for deposition;” (3) exchanging document production; and (4) “participating in a temporary injunction hearing.”⁴⁹ However, the court of appeals found that this level of activity did not amount to a waiver of the forum selection clause.⁵⁰

V. PARTIES

In *In re Union Carbide Corp.*, the Texas Supreme Court considered whether the trial court abused its discretion when it refused to rule on the defendant’s “motion to strike before considering whether to sever the intervention.”⁵¹ In this personal injury suit, plaintiff Kenneth Moffett claimed that he was exposed to toxic chemicals while working at Union Carbide. The surviving family members of John Hall, who had worked at Union Carbide and died from myelodysplastic syndrome, intervened in Moffett’s suit. Union Carbide filed a motion to strike the intervention because the Halls had failed to show they possessed a justiciable interest in Moffett’s suit. Instead of ruling on the motion to strike, the trial court severed the Halls’ claims into a separate suit, which was docketed and maintained in the same trial court.⁵² Union Carbide sought mandamus relief.⁵³

The Texas Supreme Court first noted that TRCP 60 permits a party with a justiciable interest in a pending law suit to intervene in the law suit “as a matter of right.”⁵⁴ Therefore, the supreme court continued, “the ‘justiciable interest’ requirement is of paramount importance [because] it defines the category of non-parties who may, without consultation with or permission from the original parties or the court, interject their interests into a pending suit to which the intervenors have not been invited.”⁵⁵ The supreme court concluded that “[t]o constitute a justiciable interest, ‘[t]he intervenor’s interest must be such that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought’ in the original suit.”⁵⁶ Here, the court

47. *Id.* at 884.

48. *Id.* at 885 (quoting *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008) (listing factors to be considered)).

49. *Id.*

50. *Id.* at 886.

51. 273 S.W.3d 152, 154 (Tex. 2008).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 154-55 (internal quotation omitted).

56. *Id.* at 155 (quoting *King v. Olds*, 71 Tex. 729, 12 S.W. 65 (Tex. 1888)).

found that the Halls had not shown they had a justiciable interest in Moffett's suit, and the trial court had no discretion to deny Union Carbide's motion to strike.⁵⁷

VI. PLEADINGS

In *Sells v. Drott*, the Texas Supreme Court considered whether the trial court had properly struck facially valid answers and entered a default judgment without prior notice to the defendant.⁵⁸ In this case, the eighty-two-year old defendant ostensibly filed both an answer and amended answer pro se. At a severance hearing, which was attended by the defendant's daughter, but not the defendant, the trial court and plaintiff learned that the daughter had actually signed the defendant's name on the answer and amended answer. At that same hearing, the trial court ruled that the answers should be stricken because the daughter was not authorized to sign, prepare, or file documents on behalf of the defendant, her mother. However, the Texas Supreme Court held that the *pro se* answers were facially valid, and the extrinsic evidence showing that the daughter had signed those answers on behalf of her mother were merely pleading defects.⁵⁹ Accordingly, "[b]y appearing in the suit, even with potentially defective answers, [the defendant] had the right to notice of a[ny] 'challenge to the validity of the answers' and an opportunity to present evidence and argument[s] before th[ose] answers were stricken and a default judgment granted."⁶⁰

In *Adams v. State Farm Mutual Automobile Insurance Co.*, the Dallas Court of Appeals considered whether State Farm had been properly identified as a plaintiff in prior petitions, so as to avoid a limitations defense.⁶¹ On March 28, 2003, the individual plaintiff filed his original petition arising out of a December 11, 2002, car accident. Although State Farm was not identified as a plaintiff in the caption or preamble, the petition contained the following provision: "This action is brought in part by State Farm Mutual Auto Ins[urance] Co[mpany], subrogee to all recovery in excess of \$250.00 and who prays for judgment in its name."⁶² The first amended petition, filed September 23, 2004, also contained this paragraph, but still did not list State Farm in the caption or preamble. Finally, the second amended petition filed on March 9, 2005, did identify State Farm in the caption and preamble, this time as the sole plaintiff. In response, one of the defendants asserted that State Farm had not formally appeared as a plaintiff until the second amended petition was filed, and that its claims were now barred by limitations. The Dallas Court of Ap-

57. *Id.* The court also held that mandamus relief was appropriate since the procedure for random assignment of cases, which is designed to prevent forum shopping, would be circumvented otherwise. *Id.* at 157.

58. 259 S.W.3d 156 (Tex. 2008).

59. *Id.* at 159.

60. *Id.*

61. 264 S.W.3d 424 (Tex. App.—Dallas 2008, pet. denied).

62. *Id.* at 426-27.

peals disagreed and held that State Farm was sufficiently identified as a plaintiff in the body of the petition to invoke its causes of action.⁶³

VII. DISCOVERY

Depositions were the topic of several significant opinions during the Survey period. *In re BP Products North America, Inc.* involved the enforcement of an agreement “governing what is commonly referred to as an ‘apex’ deposition.”⁶⁴ In the continuing litigation saga arising out of an explosion at BP Products’ Texas City refinery, the plaintiffs sought to take the depositions of two high-ranking corporate officers of BP Products’ parent company, including its chief executive officer, John Browne. After two trial court orders on motions for protection and one prior mandamus proceeding, the parties reached an agreement to produce one officer for a four-hour deposition, in return for which the notice of Browne’s deposition would be withdrawn and would not be re-noticed unless the agreed-upon deposition revealed that he had “unique and superior personal knowledge.”⁶⁵ Moreover, the agreement provided that, if Browne’s deposition was required, it would only be for one hour and would be taken by telephone. After the first officer’s deposition was taken, however, Browne made several public comments about the Texas City explosion, and the plaintiffs once again noticed his deposition to take place in Galveston. BP Products filed another motion for protective order, which was denied by the trial court.⁶⁶

On petition for writ of mandamus, the Texas Supreme Court noted that it had never before addressed the scope of a trial court’s power to set aside a discovery agreement that was otherwise valid under TRCP 191.1.⁶⁷ The supreme court stated that “[d]iscovery agreements serve an important role in efficient trial management” and should not be lightly set aside, particularly when one party has already performed its obligations thereunder.⁶⁸ Finding that Browne’s public statements did not support a finding that the TRCP 191.1 agreement was fraudulently induced, or that BP Products was estopped from enforcing it, the supreme court held that the trial court abused its discretion by setting it aside.⁶⁹

The Texas Supreme Court also resolved a split in the courts of appeal

63. *Id.* at 427.

64. 244 S.W.3d 840 (Tex. 2008). The apex doctrine protects high corporate officials from depositions unless they have “unique or superior personal knowledge of relevant facts” or the requesting party demonstrates that the deposition may “lead to the discovery of admissible evidence” and “less intrusive methods of discovery are . . . inadequate.” *Id.* at 843 n.2 (quoting *In re Alcatel U.S.A., Inc.*, 11 S.W.3d 173, 176 (Tex. 2000)).

65. *Id.* at 843.

66. *Id.*

67. TEX. R. CIV. P. 191.1; *BP Products*, 244 S.W.3d at 846.

68. *BP Products*, 244 S.W.3d at 846.

69. *Id.* at 847-48. The court went on to explain that the trial court would have been authorized to order the one-hour telephone deposition of Browne contemplated by the parties’ agreement, based on the other officer’s inability to answer certain questions posed to him. *Id.* at 848. The trial court could not, however, order Browne’s deposition to proceed without the agreed-upon limitations. *Id.*

on the availability of presuit depositions under TRCP 202⁷⁰ in health care liability cases.⁷¹ Under the 2003 tort reform legislation, discovery with respect to a “health care liability claim” is generally stayed until the plaintiff has filed an expert report, with the exception of specified discovery for the purpose of obtaining medical or hospital records.⁷² The supreme court held that this stay provision applies to TRCP 202 depositions as well, rejecting the argument that the term “health care liability claim” refers only to claims that have already been filed.⁷³ Instead, the supreme court construed the statute to extend to causes of action, whether filed or unfiled, and held that a presuit deposition to “investigate a potential claim against a health-care provider” is prohibited by section 74.351(s) of the Texas Civil Practice and Remedies Code.⁷⁴ Moreover, the supreme court rejected the real party in interest’s argument that this construction would lead to absurd results and deter attorneys from filing such suits, reasoning that these issues were part of the policy judgment made by the Texas Legislature in enacting the statute.⁷⁵

In *In re Turner*, the Eastland Court of Appeals held that the trial court abused its discretion in ordering a party to the underlying lawsuit, Paul Turner, to travel from his home in Hong Kong to Dallas for a deposition.⁷⁶ The court of appeals stated that “a party cannot be forced to travel internationally when alternative means of taking the deposition are adequate.”⁷⁷ In this case, a telephone deposition would have been adequate.⁷⁸ Practitioners would be wise, however, not to read this ruling too broadly. The court of appeals appears to have been influenced heavily by the fact that Turner was a nominal, albeit necessary, party, and that only one of the numerous other parties to the suit was seeking his deposition for reasons that were vague at best.⁷⁹

Discovery of electronic “metadata” was at issue in *In re Honza*.⁸⁰ In this case, the plaintiff sought discovery of the metadata on defendants’ computer hard drives, which it alleged was relevant to its claim that defendants had altered a written assignment after the parties reached agreement, but before the document was executed. The trial court entered an

70. TEX. R. CIV. P. 202.

71. *In re Jorden*, 249 S.W.3d 416 (Tex. 2008).

72. *Id.* at 420 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s) (Vernon Supp. 2008)).

73. *Jorden*, 249 S.W.3d at 421-22.

74. *See id.* at 422.

75. *Id.* at 424. Justice O’Neill separately concurred, stating that she would leave open the possibility that a trial judge has the discretion to order a TRCP 202 deposition if the discovery methods available under section 74.351(s) are utilized, but fail to yield the necessary information, e.g., if the medical records are missing or indecipherable. *See id.* (O’Neill, J., concurring).

76. *In re Turner*, 243 S.W.3d 843 (Tex. App.—Eastland 2008, orig. proceeding).

77. *Id.* at 847.

78. *Id.*

79. *See id.*

80. *In re Honza*, 242 S.W.3d 578 (Tex. App.—Waco 2008, orig. proceeding). Metadata is electronically stored information that describes “the history, tracking, or management of an electronic file.” *Id.* at n.4 (quoting FED. R. CIV. P. 26(f) advisory committee’s note).

order requiring the defendants to permit a forensic expert to create a mirror image of the hard drives that he could then inspect to locate two specific documents or iterations of those documents. Finding no Texas cases on point, the Waco Court of Appeals looked to federal and other states' case law, from which it concluded a fairly uniform approach to this type of discovery request had emerged.⁸¹ Specifically, the court first noted that courts have consistently held that this type of metadata is discoverable.⁸² Second, the court adopted the generally-followed protocol of allowing a third-party expert to make a mirror image of the hard drive and, subject to the terms of a protective order prohibiting disclosure of confidential or privileged information, to compile the documents or partial documents retrieved from the hard drive.⁸³ These materials are then provided first to the party resisting discovery, who has the opportunity to review them, produce what is responsive, and create a privilege log for those it withholds.⁸⁴

In *In re Does 1-10*, the plaintiff filed suit against ten John Does it claimed had defamed it by posting comments on an internet blog set up by Doe 1.⁸⁵ At the same time it filed suit, the plaintiff filed an ex parte request for a trial court order directing Doe 1's internet service provider (ISP) to disclose the identity of the Does. The trial court granted this request and entered an order agreed to by plaintiff and the ISP. Doe 1 then filed a petition for writ of mandamus, which the Texarkana Court of Appeals conditionally granted. In doing so, the court of appeals first held that the federal Cable Communications Policy Act of 1984, which contains a safe harbor for a cable operator's disclosure of information pursuant to a court order, does not itself provide a procedural vehicle by which a party can obtain such an order from a Texas state court.⁸⁶ The court then examined whether there was any basis for the trial court's order under state law. After a thorough review of the history of bills of discovery in Texas, the court concluded that Texas courts generally do not have inherent authority to order discovery outside the procedures provided by the Texas Rules of Civil Procedure.⁸⁷

The confidentiality of arbitration materials was at issue in *Knapp v. Wilson N. Jones Memorial Hospital*.⁸⁸ The defendant-hospital in this employment case alleged that the plaintiff had been terminated for cause due to financial improprieties. The hospital had previously filed an arbitration claim against its auditors based on these same improprieties and obtained an arbitration award. On appeal, the plaintiff argued that the trial court erred in ruling that documents and testimony from the arbitra-

81. *Id.* at 581.

82. *Id.*

83. *Id.* at 582.

84. *Id.*

85. 242 S.W.3d 805 (Tex. App.—Texarkana 2007, orig. proceeding).

86. *Id.* at 814.

87. *Id.* at 817-18.

88. 281 S.W.3d 163 (Tex. App.—Dallas 2009, no pet.).

tion proceeding were confidential and not discoverable. The Dallas Court of Appeals agreed, holding that the trial court abused its discretion in refusing to allow discovery of the depositions, testimony, and witness statements from the arbitration.⁸⁹ The court held that, “despite the public policy favoring arbitration” and the rules protecting its confidentiality, “there is an equally important public policy to preserve significant . . . procedural and substantive rights” of litigants.⁹⁰ Because the plaintiff was not seeking to disturb the arbitration award or establish any further liability on the part of the auditors, but instead sought the information only to adequately represent his interests in separate litigation with the hospital, the confidentiality protection normally accorded arbitration would yield.

VIII. DISMISSAL

In *Forrester v. Ginn*, the trial court sent a notice of intent to dismiss for want of prosecution, following which the appellants filed a motion to retain.⁹¹ The trial court granted the motion to retain, but stated in the retention order that the case would only be retained for sixty days. Approximately five months later, the trial court dismissed the action on its own motion for want of prosecution without notice to the appellants. The Fourteenth District Court of Appeals in Houston held that even though the retention order stated a sixty-day retention limitation, the appellants were nonetheless entitled to notice before the trial court dismissed the case for want of prosecution.⁹²

In *DC Controls v. UM Capital L.L.C.*, the Dallas Court of Appeals set aside default judgments against two defendants where the trial court had previously dismissed the case for want of prosecution, and then reinstated it.⁹³ The court of appeals noted that at the time one defendant was served, the case had been dismissed and not yet reinstated, and it was impossible to serve citation in a case that had been dismissed.⁹⁴ Moreover, although the other defendant was served before the case was dismissed, she had no reason to answer the suit, absent a notice that the trial court intended to reinstate the case.⁹⁵

The Amarillo Court of Appeals addressed the interplay between a notice of nonsuit in one case, and the defense of res judicata in a subsequent action between the same parties involving the same facts, in *Joachim v. The Travelers Insurance Co.*⁹⁶ In this dispute, the plaintiff sued Travelers, asserting an uninsured motorist claim. The plaintiff then nonsuited his

89. *Id.* at 177.

90. *Id.* at 173.

91. 282 S.W.3d 513 (Tex. App.—Houston [14th Dist.] 2008), *rev'd*, 282 S.W.3d 430 (Tex. 2009).

92. *Id.* at 518.

93. No. 05-07-1728-CV, 2008 WL 4648422 (Tex. App.—Dallas Oct. 22, 2008, no pet.).

94. *Id.* at *2.

95. *Id.* at *3.

96. 279 S.W.3d 812 (Tex. App.—Amarillo 2008, pet. filed).

case without prejudice while no claims for affirmative relief, sanctions, or fees had been asserted by Travelers. The trial court did not enter an order granting the nonsuit as it should have, but subsequently signed an order dismissing the action *with* prejudice for want of prosecution. The plaintiff claimed it did not receive notice of the trial court's intent to dismiss for want of prosecution, or of the order of dismissal with prejudice. The plaintiff then filed a new action against Travelers based on the same facts, and Travelers successfully moved for summary judgment based on *res judicata*. The court of appeals reversed, holding that the dismissal with prejudice for want of prosecution was void because the prior nonsuit was effective when filed, and the entry of the dismissal order without prejudice was strictly ministerial.⁹⁷

IX. JURY PRACTICE

In *Davis v. Fisk Electric Co.*, the Texas Supreme Court revisited the issue of *Batson* challenges.⁹⁸ In this race discrimination case, the supreme court reversed a defense verdict, finding that the defendant's stated reasons for striking minority jurors were pretextual. The supreme court first held that the trial court erred in overruling the plaintiff's challenge to the defendant's peremptory strikes without providing the plaintiff an opportunity to rebut the defendant's proffered race-neutral reasons for striking six panel members, five of whom were African American, and all of whom were minorities.⁹⁹ The supreme court held that *Batson* requires the trial court to provide the challenging party with an opportunity to contest the stated reasons for striking a juror before ruling on the challenge.¹⁰⁰

As to the substance of the *Batson* challenge itself, the supreme court first undertook a statistical analysis of the defendant's peremptory strikes as compared to the entire jury pool, noting that the defendant struck 83% of the eligible African American panel members (five), but only 5.5% of the eligible non-black prospective jurors (one), which statistic the supreme court found troubling in itself.¹⁰¹ The supreme court next addressed the subject of nonverbal behavior as a ground for striking jurors, holding that where such behavior is relied upon, the conduct at issue should be proved and reflected in the appellate record where it can be reviewed.¹⁰² This proof can come from the bench, if observed by the trial court, the juror's own acknowledgment, or "may be otherwise borne out by the record" with a detailed explanation of the nonverbal conduct at issue; however, the record must contain some evidence to support or confirm the veracity of the challenged nonverbal conduct.¹⁰³ Finally, the su-

97. *Id.* at 816-18.

98. 268 S.W.3d 508 (Tex. 2008).

99. *Id.* at 514-15.

100. *Id.* at 515.

101. *See id.* at 516.

102. *Id.* at 516-18.

103. *Id.* at 518.

preme court observed that the defendant did not strike several non-minority panel members who had voiced opinions similar to those of the stricken minority panel-members on points articulated by the defendant as the bases for making its strikes.¹⁰⁴

In *Living Centers of Texas, Inc. v. Penalver*, the Texas Supreme Court held that an uninvited argument made during closing argument by the plaintiffs' counsel, which analogized the defendant's treatment of patients in a nursing home to treatment of prisoners in World War II concentration camps, constituted harmful and incurable error.¹⁰⁵ Accordingly, the supreme court reversed and remanded the case for a new trial.¹⁰⁶

In *Murff v. Pass*, the appellant claimed that the trial court erred in refusing to disqualify a jury panel member who stated during voir dire that he would hold the plaintiff to a higher burden of proof than the law required, *i.e.*, "clear and convincing" versus "preponderance of the evidence."¹⁰⁷ The Texas Supreme Court affirmed, holding that the trial court did not abuse its discretion in refusing to disqualify the potential juror because he had been asked confusing questions in voir dire about the proper standard of proof.¹⁰⁸ Additionally, the record did not demonstrate that the panel member "harbored bias or prejudice in favor of or against a party or claim," or that he was "unable or unwilling to follow the court's instructions."¹⁰⁹

In *Siller v. LPP Mortgage, Ltd.*, involving allegations of a wrongful foreclosure, the San Antonio Court of Appeals held that the trial court erred in refusing to grant a new trial where one of the jurors advised the court after the close of evidence that she had been present during the disputed foreclosure at the courthouse steps.¹¹⁰ During voir dire, none of the jurors admitted to having had any knowledge of the case; however, after hearing the facts of the dispute, one juror's memory was apparently "jolted" into recalling that she had been present when the foreclosure sale occurred.¹¹¹ The trial court refused to disqualify the juror or order a new trial, and the court of appeals reversed, holding that the juror was a fact witness to a key factual dispute and, therefore, met the definition of a disqualified juror. Because the verdict was ten to two and the juror in question had been one of the ten, the error was harmful, thus warranting a new trial.¹¹²

The Dallas Court of Appeals in *In re State Farm Lloyds* granted a writ of mandamus, holding that the trial court abused its discretion in entering an order prohibiting counsel from interviewing jurors discharged after a

104. *Id.* at 523-24.

105. 256 S.W.3d 678 (Tex. 2008).

106. *Id.* at 681-82.

107. 249 S.W.3d 407 (Tex. 2008).

108. *Id.* at 409.

109. *Id.* at 411.

110. 264 S.W.3d 324 (Tex. App.—San Antonio 2008, no pet.).

111. *Id.* at 330.

112. *Id.*

mistrial.¹¹³ The court found the trial court's order constituted an unconstitutional prior restraint of free speech in the absence of any findings of "imminent and irreparable harm to the judicial process," and that the trial court's order did not constitute the least restrictive means possible to prevent any perceived harm.¹¹⁴

X. JURY CHARGE

In *Ford Motor Co. v. Ledesma*, the Texas Supreme Court reversed a plaintiff's verdict, holding that the Texas Pattern Jury Charge's (PJC) definition of "producing cause" in a product defect case is incorrect.¹¹⁵ Specifically, the current PJC asks only if a condition of the product renders it unreasonably dangerous, but fails to distinguish between design and manufacturing defects.¹¹⁶ It fails to include a requirement that a manufacturing defect must deviate from its specifications or planned output in a manner that renders the product unreasonably dangerous for the manufacturer to be held liable.¹¹⁷ Without further evidence, therefore, a jury could conclude that any defect in a product when it leaves the manufacturer satisfies the PJC's test for a manufacturing defect, without distinguishing between deficiencies in the design versus the manufacturing process.¹¹⁸ This omission presents a danger that the jury could impose liability for what now, in effect, was a design defect, without any evidence or finding of a safer alternative design.¹¹⁹

In *DiGiuseppe v. Lawler*, the Texas Supreme Court held that to succeed on a claim for specific performance, the buyer must both plead and prove that he is "ready, willing, and able" to perform under the contract.¹²⁰ Although the appellant-buyer in this case had pled he was "ready, willing, and able" to perform under the contract, the facts adduced at trial were contested regarding whether the buyer actually had the ability to purchase the property, and the jury was not asked to make a determination on that issue. The supreme court held that, absent conclusive proof or a finding that the buyer was ready, willing, and able to perform, the buyer was not entitled to specific performance under the contract.¹²¹ Moreover, the supreme court rejected the buyer's argument that such a finding could be deemed in his favor under TRCP 279,¹²² reasoning that the jury's express finding that he complied with the contract was not "necessarily referable" to his specific performance ground of recovery.¹²³

113. 254 S.W.3d 632 (Tex. App.—Dallas 2008, orig. proceeding.).

114. *Id.* at 636.

115. 242 S.W.3d 32 (Tex. 2007).

116. *Id.* at 42.

117. *Id.*

118. *Id.*

119. *Id.*

120. 269 S.W.3d 588 (Tex. 2008).

121. *Id.* at 598.

122. TEX. R. CIV. P. 279.

123. *Lawler*, 269 S.W.3d at 598-99.

XI. JUDGMENTS

In a case of first impression, the Texas Supreme Court addressed the res judicata effect of an administrative decision by the Texas Workforce Commission (TWC) under the Texas Payday Law¹²⁴ in *Igal v. Brightstar Information Technology Group, Inc.*¹²⁵ In this employment dispute the plaintiff claimed that his employer had breached an employment agreement and owed him post-termination salary. Rather than filing suit, the plaintiff initially filed a claim for unpaid wages under the Texas Payday Law. Ultimately, the TWC concluded that the plaintiff's claims failed on the merits, and that the TWC lacked jurisdiction over the dispute because the claims were untimely. The plaintiff then filed an action in state district court, and the defendant successfully moved for summary judgment based on res judicata. The supreme court affirmed, holding that, although the Texas Payday Law is an alternative (albeit not an exclusive) mechanism for seeking recovery of unpaid wages, when an administrative agency such as the TWC acts in a judicial capacity and resolves the dispute before it, res judicata bars relitigation of the claim.¹²⁶

In *Motient Corp. v. Dondero*, the Dallas Court of Appeals declined to give res judicata effect to a prior federal judgment in a case involving the same facts as the state action.¹²⁷ In this dispute, Motient filed two suits the same day against Dondero, the first in federal court, alleging violations of federal securities laws in connection with a proposed proxy battle, and the second in state court, alleging breach of fiduciary duty by Dondero as a director of Motient. The federal district court granted Dondero's motion to dismiss for failure to state a claim. Dondero then successfully moved for summary judgment in the state court action based on res judicata. Although the appellate court agreed that both the state and federal actions arose out of the same facts, it nonetheless concluded that res judicata did not apply. After examining several opinions of the federal district court judge on the subject of supplemental jurisdiction, the court divined that, had Motient not split its claims against Dondero and instead filed both its breach of fiduciary duty and securities law claims against him in federal court, the federal judge would have declined to exercise supplemental jurisdiction over the fiduciary duty claims once he dismissed the federal securities law claims.¹²⁸ Therefore, the federal court was not a court of competent jurisdiction for res judicata purposes.¹²⁹

Finally, in *Baylor College of Medicine v. Camberg*, the Fourteenth District Court of Appeals in Houston addressed the interplay between a high-low agreement, under TRCP 11,¹³⁰ and the entry of a final judgment

124. TEX. LAB. CODE ANN. §§ 61.001-.095 (Vernon 2008).

125. 250 S.W.3d 78 (Tex. 2008).

126. *Id.* at 88-89.

127. 269 S.W.3d 78 (Tex. App.—Dallas 2008, no pet.).

128. *Id.* at 89-90.

129. *Id.* at 90.

130. TEX. R. CIV. P. 11.

that did not comply with that agreement.¹³¹ In this wrongful death case, the parties reached an agreement during jury deliberations under which the plaintiff would receive \$500,000 if the jury awarded less than that amount, the actual amount of the award if between \$500,000 and \$1.1 million, and \$1.1 million if the jury awarded that amount or more. The agreement was dictated into the record and approved by the trial court. The jury entered a verdict for just under \$900,000, and the plaintiff then moved for an entry of a judgment in that agreement plus prejudgment interest.¹³² The defendant filed a motion to enforce the Rule 11 agreement and submitted its own proposed judgment, which excluded any prejudgment interest. The trial court entered the plaintiff's judgment based upon the jury's verdict to include pre-judgment interest.

The defendant appealed, contending that the trial court erred in entering a judgment that varied from the Rule 11 agreement. The court of appeals affirmed, holding that, by the parties' pleadings, the trial court was notified that the parties no longer consented to the Rule 11 agreement, and, therefore, that it was not authorized to enter a judgment based upon that agreement.¹³³ The court also noted that although the defendant had filed a motion to enforce the Rule 11 agreement, the record did not indicate that it had taken any additional steps to enforce the agreement, such as filing a motion for summary judgment, or seeking to correct or reform the judgment.¹³⁴ Thus, the defendant did not establish "that the trial court was precluded from rendering judgment on the jury's verdict."¹³⁵

XII. MOTIONS FOR NEW TRIAL

In *Arkoma Basin Exploration Co., Inc. v. FMF Associates 1990-A, Ltd.*, the Texas Supreme Court held that a trial court's order suggesting a remittitur restarts the appellate timetables.¹³⁶ In this oil and gas dispute, the jury found that the defendant had committed fraud, and awarded the plaintiffs damages, which were reduced following the trial court's remittitur order. Both sides appealed. The Dallas Court of Appeals affirmed, except that it held that a part of the remittitur order was improper. The defendant argued that the court of appeals lacked jurisdiction to reinstate the original verdict because the plaintiff's notice of cross appeal had not been timely filed relative to the date of the original judgment. The supreme court disagreed, holding that, unlike a voluntary remittitur, an order that properly suggests a remittitur restarts the appellate deadlines because it "allows only two options: a smaller judgment or a new trial."¹³⁷ While it may not be immediately known "which option a claimant will

131. 247 S.W.3d 342 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

132. *Id.* at 344.

133. *Id.* at 346-48.

134. *Id.* at 348.

135. *Id.* at 349.

136. 249 S.W.3d 380 (Tex. 2008).

137. *Id.* at 391.

select, it is immediately clear that the original judgment will change” at the instance of the court.¹³⁸ Accordingly, such orders must restart the appellate timetables.¹³⁹

In *In re Baylor Medical Center at Garland*, the Texas Supreme Court overruled one of its prior decisions and held that, so long as a trial court maintains plenary jurisdiction, it may “ungrant” a prior order granting a new trial.¹⁴⁰ In this medical malpractice suit, the jury found for the defendant-hospital. Eighty-two days after signing the judgment, the trial judge granted a motion for new trial based on juror affidavits that the defendant claimed were inadmissible. Following a tortuous procedural path, the issue presented to the supreme court was whether the trial judge had jurisdiction to later vacate that new trial order. Specifically, the supreme court had to decide whether to perpetuate the judicially created rule that a trial court is precluded from vacating a new trial order after “a deadline based on a purely hypothetical event: the expiration of plenary power assuming that a vacated judgment had instead become final.”¹⁴¹ Finding no sound reason for the unusual rule that had grown up in Texas, the supreme court held that, as with any other order, a trial court may reconsider an order granting a new trial as long as a case is still pending.¹⁴²

In another mandamus proceeding regarding appellate timetables, *In re Brookshire Grocery Co.*, the Texas Supreme Court held that a motion for new trial filed within thirty days of a judgment, but after a preceding motion for new trial has been overruled, does not extend a trial court’s plenary power.¹⁴³ In this tort action, the defendant filed a motion to disregard the verdict or for a new trial. Thereafter, the trial court entered judgment on the verdict. The next day, the trial court denied the defendant’s motions to disregard and for a new trial. Within thirty days after the judgment was entered, the defendant filed a second, more detailed motion for new trial. The trial court granted this second motion more than thirty days after denying the original motion. The supreme court noted that TRCP 329b(b) allows amended motions for new trial to be filed without leave of court provided that “(1) no preceding motion for new trial has been overruled, and (2) it is filed within thirty days of judgment.”¹⁴⁴ Under TRCP 329b(e),¹⁴⁵ however, only a “timely filed” motion will operate to extend the trial court’s plenary power.¹⁴⁶ Thus, an amended motion filed after the original motion for new trial has been

138. *Id.*

139. *Id.*

140. 280 S.W.3d 227 (Tex. 2008) (overruling *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994)). The court noted that “[n]owhere but Texas can one find a single appellate opinion discussing when a court can ‘ungrant’ a motion.” *Id.* at 229.

141. *Id.* at 230.

142. *Id.* at 231.

143. 250 S.W.3d 66 (Tex. 2008).

144. *Id.* at 69 (citing TEX. R. CIV. P. 329b(b)).

145. TEX. R. CIV. P. 329b(e).

146. *Brookshire Grocery Co.*, 250 S.W.3d at 70.

overruled does not extend that trial court's plenary power beyond thirty days from the date the original motion was denied.¹⁴⁷

Finally, in *Wells Fargo Bank, N.A. v. Erickson*, the Corpus Christi Court of Appeals dismissed a restricted appeal for lack of jurisdiction where the trial court had entered a default judgment against the appellant, and denied its original motion to extend the appellate deadlines under TRCP 306a,¹⁴⁸ but then granted its second TRCP 306a motion and motion for new trial.¹⁴⁹ Because these latter motions were granted while the trial court retained plenary jurisdiction over the case, the court of appeals concluded there was no final judgment. Specifically, the court held that nothing in the TRCP "precludes a trial court from reconsidering its prior ruling" on a TRCP 306a motion, or from granting a second such motion, while it retains plenary power.¹⁵⁰

XIII. DISQUALIFICATION OF JUDGES

TRCP 18a(c) provides that a judge subject to a motion to recuse "shall either recuse himself or request the presiding judge of the administrative judicial district to assign [another] judge to hear such motion."¹⁵¹ If the judge voluntarily recuses, he must ask "the presiding judge . . . to assign another judge to sit" and must "take no further action in the case except for good cause stated in the order" taking such action.¹⁵² *In re McKee* presented the issue of the "validity of an administrative action taken by a presiding judge of an administrative judicial region after he had voluntarily recused [himself] from the case."¹⁵³

In this legal malpractice case, the original trial judge voluntarily recused and Judge Ovard, the presiding judge of the administrative region, also voluntarily recused and asked the Chief Justice of the Texas Supreme Court to assign a replacement judge. The Chief Justice did so, but when the original trial judge retired and a new judge (Judge Blake) was elected, the Chief Justice's appointment was withdrawn.¹⁵⁴ The defendant law firm then moved to recuse Judge Blake, who declined to recuse herself and referred the matter to Judge Ovard to assign a judge to hear the motion. Despite his prior voluntary recusal, Judge Ovard assigned yet another judge to hear the recusal motion, which was granted. The plaintiff then brought this mandamus proceeding, complaining that Judge Ovard's prior recusal rendered his assignment order and, in turn, the assigned judge's recusal order void.¹⁵⁵

147. *Id.* at 69.

148. TEX. R. CIV. P. 306a.

149. 267 S.W.3d 139, 141 (Tex. App.—Corpus Christi 2008, no pet.).

150. *Id.* at 149.

151. TEX. R. CIV. P. 18a(c).

152. *Id.*

153. 248 S.W.3d 164 (Tex. 2007) (per curiam).

154. *Id.* at 165.

155. *Id.*

The Texas Supreme Court denied the writ of mandamus.¹⁵⁶ The supreme court noted that, “absent extraordinary circumstances, a presiding judge’s order appointing a judge to hear a recusal motion is administrative,” not judicial, as “it simply transfers the power to decide the recusal motion to another judge.”¹⁵⁷ TRCP 18a(c) provides the authority for such an assignment, but only if the presiding judge’s order contains the requisite finding of “good cause.”¹⁵⁸ Although Judge Ovard apparently failed to make any express finding of good cause, the supreme court held that “‘good cause’ will ordinarily be inherent in the administrative nature of that assignment.”¹⁵⁹ Thus, the supreme court declined to grant mandamus relief, stating that, unless there were extraordinary circumstances requiring Judge Ovard’s recusal, he needed only to revise his order to reflect that the assignment was purely administrative in nature.¹⁶⁰

The ruling in *McKee* should be contrasted with *Guilbot v. Estate of Gonzalez y Vallejo*, which held that the presiding judge’s order ruling on his own motion to recuse was void.¹⁶¹ In *Guilbot*, a probate court judge referred a motion to recuse to Judge Herman, the presiding judge of the statutory probate courts. When Judge Herman assigned another probate judge, Judge Burwell, to hear the motion, the same parties then moved to recuse both Judge Herman and Judge Burwell.¹⁶² Judge Herman then set all three motions for hearing before himself and, after hearing, denied all three.¹⁶³

Although the Fourteenth Court of Appeals in Houston was sympathetic to Judge Herman’s frustration with the multiple recusal motions, it nevertheless held that he lacked the authority to decide them, and that he should have instead referred them to the Chief Justice of the Texas Supreme Court for assignment.¹⁶⁴ The court rejected the appellee’s argument analogizing Judge Herman’s action to those cases that have authorized an appellate court to “fashion a remedy” when a party moves to recuse all of the appellate judges, since in this case Judge Herman had the readily available alternative of referring the motions to the Chief Justice.¹⁶⁵ Moreover, the court held that Judge Herman’s order was not saved by the statutory provision allowing a trial judge to continue to act when faced with a so-called tertiary recusal motion, as that statute applies only to a third recusal motion filed against the same judge, not three different judges.¹⁶⁶

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. 267 S.W.3d 556 (Tex. App.—Houston [14th Dist.] 2008, pet. filed).

162. *Id.* at 559.

163. *Id.*

164. *Id.* at 561-62.

165. *Id.* at 562.

166. *Id.* at 562-63 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 30.016 (Vernon 2008)).

XIV. DISQUALIFICATION OF COUNSEL

In *In re Lopez*, the Corpus Christi Court of Appeals granted a writ of mandamus from a disqualification order that was entered without an evidentiary hearing.¹⁶⁷ After the plaintiff moved to recuse the trial judge, the presiding judge of the administrative judicial district, Judge Banales, presided over the recusal hearing, at which plaintiff's attorney, Richard Zayas, made his first appearance in the case. Defendant's counsel orally moved to disqualify Zayas, asserting that Zayas's current law partner had previously been partners with defendant's attorney during the time the defendant's attorney was representing defendant. Judge Banales took these representations by an officer of the court as "facts" and concluded he did not need any additional evidence before disqualifying Zayas. In fact, Judge Banales specifically denied plaintiff's request for an evidentiary hearing.¹⁶⁸

The court of appeals vacated the disqualification order. The court stated that, if proven, the alleged disqualifying conflict was a significant one.¹⁶⁹ Nevertheless, noting that an attorney's unsworn statements are not evidence, the court held that the severity of the disqualification remedy, and the "exacting standards that the trial court must consider," demanded that plaintiff be "afforded notice and a[n evidentiary] hearing prior to a ruling on the disqualification of her counsel."¹⁷⁰

XV. MISCELLANEOUS

In *re Poly-America, L.P.*, the Texas Supreme Court considered, as a matter of first impression, whether discovery limits in arbitration agreements were substantively unconscionable.¹⁷¹ In this employment dispute, the arbitration agreement provided that each party may serve a single set of twenty-five interrogatories (including subparts) and one set of twenty-five requests for production or inspection of documents or tangible items. Additionally, the arbitration agreement included the following limitations:

- (1) Each party was limited to a single, six hour deposition;
- (2) A prohibition on requests for admissions;
- (3) A ban on inquiry into the company's finances; and
- (4) A requirement that the parties and their attorneys keep all aspects of the arbitration confidential.

167. No. 13-08-00518-CV, 2008 WL 4883052 (Tex. App.—Corpus Christi Nov. 12, 2008, orig. proceeding).

168. *Id.* at *5.

169. *Id.*

170. *Id.* & n.1. The court also rejected a challenge to its mandamus jurisdiction over Judge Banales as the presiding judge of the administrative district, reasoning that the relevant question was the capacity in which Judge Banales was proceeding. Because Judge Banales was hearing the motion to recuse himself, he was acting in his capacity as a district judge, not his administrative capacity. *Id.* at *2.

171. 262 S.W.3d 337 (Tex. 2008).

The employee contended that these limitations made it impossible for him to prove his claim of retaliatory discharge and, therefore, rendered the arbitration agreement unconscionable. The supreme court held that discovery limitations in arbitration agreements are unenforceable if they prevent effective presentation of the employee's claims.¹⁷² However, the supreme court also held that because the relevant inquiry depends upon the facts of a given case and the particular discovery-limitations effect on the asserted claims, it was doubtful that any trial court—assessing claims and discovery limitations before arbitration—is in the best position to accurately determine which limits on discovery will have such impermissible effect.¹⁷³ Thus, the court held that the “assessment of particular discovery needs in a given [arbitration] and, in turn, the enforceability of [those] limitations,” is a determination that should be made by the “arbitrator as the case unfolds.”¹⁷⁴

In *Knapp Medical Center v. De La Garza*, the Texas Supreme Court reaffirmed the rule that oral settlement agreements are unenforceable under TRCP 11.¹⁷⁵ In this case, a physician reached a purported settlement of his claims against a hospital during trial. The physician's attorney claimed that the parties had agreed to settle for the hospital's insurance policy limits of \$1,000,000, and an additional \$200,000 which the hospital would contribute.¹⁷⁶ The hospital's attorneys claimed that, although they had discussed that the hospital would contribute an additional \$200,000, no agreement had been reached and, in fact, the hospital was not willing to do so. Despite this disagreement, the physician's attorney agreed on the record to settle the underlying claims for \$1,000,000 while purporting to reserve his right to collect the additional \$200,000 from the hospital in another lawsuit. The trial court accepted the judgment and discharged the jury.

Thereafter, the physician sued the hospital for the disputed \$200,000, alleging fraud and breach of oral agreement. The trial court found in favor of the physician, and the hospital appealed. The Corpus Christi Court of Appeals affirmed, holding that the oral testimony “was sufficient to support the existence and breach of the settlement agreement.”¹⁷⁷ The Texas Supreme Court reversed and rendered, however, finding that the purported settlement was barred by TRCP 11.¹⁷⁸ The supreme court also held, relying on its prior statute of frauds jurisprudence, that TRCP 11 likewise barred the physician's fraud claim because he sought the same benefit of the bargain damages under that claim as he did on his contract claim.¹⁷⁹

172. *Id.* at 358.

173. *Id.*

174. *Id.*

175. TEX. R. CIV. P. 11; *Knapp Med. Ctr. v. De La Garza*, 238 S.W.3d 767 (Tex. 2007).

176. *Knapp*, 238 S.W.3d at 767-78.

177. *Id.*

178. *Id.*

179. *Id.* at 769.

In *Quinn v. Nafta Traders, Inc.*, the Dallas Court of Appeals considered whether parties could contractually expand the scope of [judicial] review of an arbitrator's decision to include grounds not expressly identified in the Texas General Arbitration Act (TAA).¹⁸⁰ In this case, a company and its former employee had an arbitration agreement which provided that "the arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law."¹⁸¹ On appeal, the employee argued that the arbitration award should be vacated "under the agreement's expanded judicial review because (1) the arbitrator applied the wrong law, (2) there was no or insufficient evidence of sexual discrimination, (3) it was an abuse of discretion to award attorney's fees, (4) the award of special damages was incorrect, and (5) there was no or insufficient evidence of mental anguish."¹⁸² In other words, the employee argued that the arbitrator made several errors of law that were subject to judicial review.

Under the TAA, a court must confirm an arbitrator's award on application unless an opposing party establishes a statutory ground under the Act for vacating, modifying, or correcting the award.¹⁸³ These grounds include "(1) corruption, fraud, or other undue means, (2) prejudice resulting from arbitrator partiality, corruption, misconduct, or wilful misbehavior, (3) arbitrators exceeding their powers, refusing to postpone a hearing after a showing of good cause, refusing to hear material evidence, or conducting a hearing contrary to enumerated statutory provisions resulting in substantial prejudice to a party, and (4) absence of an agreement to arbitrate."¹⁸⁴ The court of appeals noted that these grounds "reflect severe departures from an otherwise proper arbitration process and are of a completely different character than ordinary legal error."¹⁸⁵ The court held that under these circumstances, and because the statute did not provide any provision for expansion of judicial review, "parties seeking judicial review of an arbitration award covered under the TAA cannot," by agreement, "expand the scope of that review."¹⁸⁶

180. 257 S.W.3d 795 (Tex. App.—Dallas 2008, pet. granted).

181. *Id.* at 797.

182. *Id.* at 797-98.

183. TEX. CIV. PRAC. & REM. CODE ANN. § 171.087 (Vernon 2005).

184. *Quinn*, 257 S.W.3d at 798 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.088 (Vernon 2005)).

185. *Id.*

186. *Id.* at 799.

