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## Civil Evidence

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# CIVIL EVIDENCE

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**T**HIS Article is intended to provide an updated summary of the relevant Texas law regarding civil evidentiary issues and to highlight the most significant developments in this area of law during the Survey period.<sup>1</sup> Since the last Survey, the Texas Supreme Court decided issues related to qualifications of experts under *Robinson*,<sup>2</sup> medical privileges, sanctions imposed as a result of discovery abuses, voir dire questions regarding a potential juror's weighing of the evidence at trial, and the admissibility of previous insurance policies when interpreting insurance policies.

## I. EXPERT TESTIMONY

The Texas Supreme Court handed down two opinions demonstrating a demand for increased training, skill, and experience to qualify experts in highly technical areas. Multiple cases during this Survey period analyzed the expert report and affidavit requirements outlined by Texas Civil Practices and Remedies Code section 74. In particular, a number of courts analyzed what types of claims qualified as "Health Care Liability Claims" and therefore required the filing of a section 74.351 expert report.

### A. *Robinson* Cases

#### 1. *Texas Supreme Court Cases*

The Texas Supreme Court analyzed whether experts were qualified to give testimony under *Robinson* in two cases during this Survey period.

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1. The Survey period runs from October 1, 2005 to September 30, 2006. This Article is not intended to analyze all Texas cases dealing with civil evidence issues.

2. See *E.I. DuPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

The first such opinion was in *Larson v. Downing*,<sup>3</sup> in which the supreme court looked at expert testimony in the area of medical malpractice. The trial court determined the plaintiff's expert was unqualified to testify because it had been fifteen years since he had performed a surgery similar to the one at issue. Subsequently, a divided court of appeals reversed.<sup>4</sup> The Texas Supreme Court reaffirmed its position that the trial court exercises discretion in the area of permitting or excluding expert testimony, and since this was a close case, the trial court's judgment should stand.<sup>5</sup> The supreme court noted, as it did in *Broders v. Heise*,<sup>6</sup> that because the modern realities of medical specialization need to be accounted for in this analysis, not every medical doctor should be qualified to testify as an expert on every medical question.<sup>7</sup>

In *Cooper Tire & Rubber Co. v. Mendez*,<sup>8</sup> the Texas Supreme Court analyzed whether an expert was qualified to testify in a products liability case. The supreme court determined that expert testimony presented by all three of the plaintiff's experts was insufficient to meet the *Robinson* standard.<sup>9</sup> At issue was testimony providing theories as to why a tire failed and caused an accident. The supreme court held that the first expert's theory of "wax contamination" was nothing more than a "naked hypothesis untested and unconfirmed by the methods of science and was legally insufficient to establish a manufacturing defect."<sup>10</sup> In finding that the expert's testimony was unreliable, the supreme court pointed out that the expert, who was not a chemist, tire designer, or engineer, relied on a testing report that ultimately undermined his hypothesis.<sup>11</sup> Other factors making the testimony unreliable included the expert's failure to visit an American tire manufacturing plant since 1980, his stated lack of understanding of chemistry, and the fact that his testimony lacked proof that the type of wax in question could ultimately cause the defect claimed by the plaintiff.<sup>12</sup>

The second expert testified that the defect in the tire was not caused by a nail hole or under-inflation of the tire. This expert only spent enough time on testimony concerning actual causation to make up "one and one-half pages of transcript, including questions and an objection."<sup>13</sup> The supreme court stated that trying to establish the cause of the manufacturing defect by process of elimination was legally insufficient.<sup>14</sup> Additionally, any conclusions he did make were subjective and unsupported by mea-

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3. 197 S.W.3d 303 (Tex. 2006).

4. *Id.*

5. *Id.* at 303-04.

6. 924 S.W.2d 148, 152 (Tex. 1996).

7. *Larson*, 197 S.W.3d at 305.

8. 204 S.W.3d 797, 800-01 (Tex. 2006).

9. *Id.* at 799.

10. *Id.* at 805.

11. *Id.* at 801, 804.

12. *Id.* at 803-04.

13. *Id.* at 805.

14. *Id.*

surements, testing, references to other studies, or proof that his techniques were generally accepted in the field.<sup>15</sup>

Finally, in addressing the third expert's testimony, the supreme court, similar to its language in *Larson*, emphasized the need for more specialized knowledge to testify on scientific processes.<sup>16</sup> The third expert rendered testimony on his theory of wax migration and contamination, but, unlike the first expert, he had a bachelor's degree in chemistry and a master's degree in polymer science and engineering.<sup>17</sup> The supreme court found the expert was unqualified to give testimony because he was not an expert in the "highly specialized" field of tire chemistry.<sup>18</sup> Therefore, "without more specialized education, training, or experience in tire chemistry, [the expert] was not qualified to testify on the subject of wax migration and contamination in tires and their effect on tire adhesion."<sup>19</sup>

## 2. Courts of Appeals Cases

Appellate courts in Texas also addressed expert testimony during the Survey period. The Beaumont Court of Appeals found that the plaintiff's experts did not meet the *Havner*<sup>20</sup>/*Robinson* reliability standards in attempting to show causation between asbestos and lung cancer in a case involving a heavy smoker.<sup>21</sup> The experts tried to show a "synergism" between heavy smoking and asbestos that caused an increased risk of lung cancer. The court of appeals held that the experts failed to show that the scientific community had generally accepted the "synergism" theory.<sup>22</sup> Additionally, the court of appeals felt that the experts did not offer evidence excluding other plausible causes of the injury, in this case the heavy smoking, with reasonable certainty as required by *Havner*.<sup>23</sup> The court of appeals also felt that the causation experts did not include any "careful exploration and explication" of reliable methodology in studies "linking asbestos exposure to a subsequent lung cancer diagnosis in a heavy smoker who is otherwise asymptomatic with regard to additional 'typical' asbestos related maladies" as noted in *Havner*.<sup>24</sup> In dissent, Justice Gaultney highlighted that the real dispute on appeal was not whether asbestos is a carcinogen capable of causing cancer; rather, the dispute

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15. *Id.* at 806

16. *Id.* at 807.

17. *Id.* at 806.

18. *Id.* at 807.

19. *Id.*

20. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997). In *Havner*, a products liability case, the Texas Supreme Court incorporated the admissibility standards enunciated in *Robinson* into the standard of review for no-evidence appellate issues. *Id.* at 712, 714. Importantly, as noted by the court in *Mobil Oil Corp. v. Bailey*, 187 S.W.3d 265 (Tex. App.—Beaumont 2006, pet. denied), *Havner* takes a "stricter approach" than the traditional no-evidence review when analyzing toxic tort cases. *Id.* at 268.

21. *Bailey*, 187 S.W.3d at 273-75.

22. *Id.* at 274-75.

23. *Id.*

24. *Id.* at 274.

concerned the circumstances in which causation occurs.<sup>25</sup> Justice Gaultney believed that the case should be remanded so that the jury could be instructed on contributory negligence, but, based on the trial record, the expert's testimony was sufficiently reliable to help the jury resolve the fact issue of causation.<sup>26</sup>

In *Wyndham International, Inc. v. Ace American Insurance Co.*,<sup>27</sup> the Dallas Court of Appeals decided a case involving a hotel owner who brought suit against property insurers to recover for income lost due to the terrorist attacks of September 11, 2001. The court of appeals found that the hotel's expert testimony supporting the amount of loss was not based upon a reliable foundation and was therefore irrelevant.<sup>28</sup> The opinion was unreliable and flawed for three reasons: (1) it was based entirely upon the hotel's predictions of revenues compared to actual revenues; (2) it was taken for only 101 hotels and then extrapolated to an additional 62 properties; and (3) it failed to consider any additional issues or events that may have occurred after September 11 that may also have affected revenues.<sup>29</sup>

Basing the opinion solely on monthly room-revenue forecasts prepared by the hotel compared to actual room revenues flawed the expert's opinion for two reasons.<sup>30</sup> First, the forecasts were not prepared according to any "hard and fast" rules; instead, they were prepared at each of the 163 properties by employees who were not required to follow any set procedure in forecasting, and were not reviewed by employees trained in forecasting.<sup>31</sup> Moreover, the forecasts did not "adhere to any economic model" or "have a consistent reference point."<sup>32</sup> The court of appeals rejected the hotel's assertions that managers at each property had training and had used forecasting software that incorporated local economic conditions.<sup>33</sup> Second, basing the expert's opinion solely on monthly room-revenue forecasts prepared by the hotel compared to actual room revenues was unreliable because "the August 2001 forecasts, used by [the expert] as his basis for calculating lost income, were significantly flawed"—less than a third of these projections actually fell within the hotel's "liberal" five percent accuracy standard.<sup>34</sup>

The court of appeals also found the expert's opinion flawed because it extrapolated forecasts for sixty-two properties based on the forecasts of 101 other properties.<sup>35</sup> In short, "[e]xtrapolated projections premised upon unreliable and flawed forecasts merely compounds the unreliability

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25. *Id.* at 275.

26. *Id.* at 280-81.

27. 186 S.W.3d 682, 684 (Tex. App.—Dallas 2006, no pet.).

28. *Id.* at 689.

29. *Id.* at 686-88.

30. *Id.* at 689.

31. *Id.* at 687, 689.

32. *Id.* at 687.

33. *Id.* at 687, 689.

34. *Id.* at 689.

35. *Id.*

of [the expert's] opinion," and is not cured by the hotel's argument that the extrapolated data accounted for only a small portion (thirteen percent) of the total losses.<sup>36</sup>

Finally, the court of appeals called the expert's opinion "little more than speculation" since it did not carefully consider and explain away alternate causes for the losses.<sup>37</sup> In fact, the hotel's own Annual Report explained losses to its shareholders as "affected during the year by the 'recent economic downturn' and 'decreased consumer confidence.'"<sup>38</sup> The insurance company also presented a report prepared by the hotel's accountants in which the "83% of decreased demand for lodging services" was attributed to "economic factors."<sup>39</sup> The insurance company suggested that the expert should have considered whether the cancelled reservations were "moved" to a later date or actually cancelled.<sup>40</sup> Damaging to the reliability of the witness's opinion was *Robinson* hearing testimony, in which he acknowledged that he "made no effort to compensate for" the causes affecting the hotel's profitability after September 11, regardless of their significance.<sup>41</sup>

## B. TEXAS CIVIL PRACTICE AND REMEDIES CODE § 74.351

### 1. *What Constitutes a "Health Care Liability Claim?"*

Section 74.351 provides, in part, "[i]n a health care liability claim, a claimant shall. . . serve on each party or the party's attorney one or more expert reports. . . ." <sup>42</sup> In a series of cases decided during the Survey period, Texas courts broadly interpreted the definition of "health care liability claims" as defined by Texas Civil Practice and Remedies Code section 74.001(a)( 13), implicating the expert-report requirements of section 74.351.<sup>43</sup>

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36. *Id.*

37. *Id.*

38. *Id.* at 688.

39. *Id.*

40. *Id.* ("In fact, [the hotel] issued a press release . . . which said, in part, that many of the bookings cancelled for the relevant period had been rebooked for a later time."). Interestingly, the *Robinson* hearing testimony suggested that the expert was aware of the rebookings and yet still did not include them in his analysis. *Id.*

41. *Id.* at 688-89.

42. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon 2005).

43. In one case, also involving the definition of "health care liability claim," the Texas Supreme Court held that a claim of sexual assault by a nursing home resident against a fellow resident would be considered a health care liability claim under the, now repealed, Medical Liability Insurance Improvement Act ("MLIIA"). *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 845 (Tex. 2005). In so holding, the Texas Supreme Court looked to the supreme courts of three other states for guidance and also reasoned that, as in a health care liability claim, expert testimony would be required to establish a standard of care in training and certifying nursing home employees. *Id.* at 851-52. Even though the MLIIA has since been repealed and replaced, the definition of health care liability claim remains substantially the same, and the two-year statute of limitations also remains part of the Texas Civil Practice and Remedies Code. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)( 13) (defining health care liability claim); § 74.251 (setting forth the two-year statute of limitations on health care liability claims).

a. Negligence Claims

In one such case, the Eastland Court of Appeals reversed the trial court in finding that a patient's negligence claim was in fact a "health care liability claim."<sup>44</sup> The claim arose from injuries sustained when a health care facility failed to protect the patient from a psychological patient who was allowed to be in the facility's common area. The court of appeals determined that the decision to allow a psychological patient to be in a common area—as opposed to keeping the patient separate from others—was a decision that required the use of professional judgment. Accordingly, the patient's claim was a health care liability claim.<sup>45</sup> Therefore, since the plaintiff failed to file an expert report upon initiation of his suit, his claims were dismissed with prejudice.<sup>46</sup>

The Corpus Christi Court of Appeals also addressed the scope of health care liability claims under section 74. In *Valley Baptist Medical Center v. Azua*,<sup>47</sup> an amputee sued a medical center for negligence when she fell out of a wheelchair, causing further injuries to her injured limb, after an orderly failed to "block the wheels" of her wheelchair.<sup>48</sup> The court of appeals felt that an employee's negligence in assisting the patient in and out of the wheelchair was "an inseparable part of the rendition of medical services."<sup>49</sup> Therefore, because the patient had not filed an expert report within the 120-day period mandated by section 74.351, the court of appeals dismissed the claim with prejudice.<sup>50</sup>

In another case, also involving an injury sustained in a wheelchair accident, the Waco Court of Appeals determined that the doctrine of *res ipsa loquitur* was not applicable and therefore an expert report was required under section 74.351.<sup>51</sup> The patient argued that no expert report was needed because her injury—breaking her leg after catching it on a wheelchair—fell into one of the three categories of medical malpractice cases that allows for the application *res ipsa loquitur*: (1) negligence in the use of mechanical instruments, (2) operating on the wrong portion of the body, and (3) leaving surgical instruments or sponges in the body.<sup>52</sup> The court of appeals disagreed and stated that since no authority was presented to suggest a wheelchair is considered a "medical instrument," the case did not fit into the first category, the only possible category available to the plaintiff.<sup>53</sup> Therefore, since the doctrine could not be applied,

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44. *Oak Park, Inc. v. Harrison*, 206 S.W.3d 133, 135 (Tex. App.—Eastland 2006, no pet.).

45. *Id.* at 141.

46. *Id.*

47. 198 S.W.3d 810 (Tex. App.—Corpus Christi 2006, no pet.).

48. *Id.* at 814.

49. *Id.*

50. *Id.* at 815-16.

51. *Belcher v. Scott & White Clinic*, No. 10-05-00324-CV, 2006 WL 2067981, at \*1-2 (Tex. App.—Waco 2006, no pet.).

52. *Id.*

53. *Id.* at \*2.

the plaintiff was required to file an expert report.<sup>54</sup> The court of appeals found the case was properly dismissed by the trial court because the only report filed was by a registered nurse who was not qualified to testify on causation.<sup>55</sup>

In *NCED Mental Health, Inc. v. Kidd*,<sup>56</sup> the El Paso Court of Appeals reversed the trial court on a number of issues, finding that a patient's claim for negligent hiring, vicarious liability for sexual assault, sexual exploitation, and premises liability were all health care liability claims requiring expert reports to be filed under section 74.351.<sup>57</sup> The court of appeals stated that expert testimony would be needed to establish a breach of the standard of care in hiring and supervision of a mental health care technician who provides care to vulnerable and fragile patients.<sup>58</sup> Consequently, the court of appeals viewed the claim for negligent hiring in the health care setting as a health care liability claim.<sup>59</sup> Discussing the claim for vicarious liability for sexual assault, the court of appeals stated that the recasting of a "claim based upon physician or health care provider negligence in the garb of some other cause of action will not be allowed" to avoid the expert-report requirements.<sup>60</sup> In a similar fashion, the court of appeals concluded that the claims for sexual exploitation and premises liability were based on departure from the standards of care related to health care, safety, and professional and administrative services directly related to health care.<sup>61</sup> Thus, all of the plaintiff's claims were health care liability claims.<sup>62</sup>

Texas courts' expansive view of what constitutes health care liability claims was demonstrated by the Dallas Court of Appeals as well. In *MacPete v. Bolomey*,<sup>63</sup> the court of appeals determined that a claim against a psychologist for "negligently fail[ing] to determine she had no right to treat" the child and a claim against the psychologist's employer for negligent training and supervision were both health care liability claims that required the filing of expert reports.<sup>64</sup> After the trial court dismissed the plaintiff's claims for failing to file a section 74.351 expert report, the plaintiff appealed, contending that the trial court erred because the psychologist was not a health care provider and that his causes of action for negligence were not within the scope of health care liability claims. The court of appeals overruled his first point of error and found that the psychologist was under contract with Medical City, and, even assuming a psychologist does not independently satisfy the definition of

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54. *Id.*

55. *Id.*

56. 214 S.W.3d 28 (Tex. App.—El Paso 2006, no pet.).

57. *Id.* at 37.

58. *Id.* at 33.

59. *Id.* at 34.

60. *Id.* at 35.

61. *Id.* at 36.

62. *Id.* at 37.

63. 185 S.W.3d 580 (Tex. App.—Dallas 2006, no pet.).

64. *Id.* at 582-83.



“health care provider,” she was covered under the act as an “employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship.”<sup>65</sup> Secondly, the court of appeals found that the negligence was, in fact, based on a “claimed departure from accepted standards of medical care, or health care, or safety” of the patient, and therefore constituted a “health care liability claim.”<sup>66</sup> The court of appeals determined that the psychologist’s services were an inseparable part of the treatment of the child’s medical condition, and that those services fell within the ambit of “health care” as defined by section 74.<sup>67</sup> Additionally, the court of appeals found that the training and supervision of a psychologist to provide appropriate care “implicate[d] the acceptable standard of ‘health care, or safety or professional care within the health care industry,’” thus making the claim against the psychologist’s employer a “health care liability claim.”<sup>68</sup>

#### b. DTPA Claims

Two separate courts of appeals found that Deceptive Trade Practices Act (“DTPA”) claims were health care liability claims and subject to the statutory expert report requirements of section 74.351.<sup>69</sup> In both cases the courts agreed with the defendants/appellees that the plaintiffs/appellants had tried to recast medical negligence claims in an effort to avoid dismissal based on the expert-report requirements.<sup>70</sup> Because the claims in both cases arose out of alleged differences in care and what was communicated to the patients, section 74 applied.<sup>71</sup>

### 2. Procedural Issues for Health Care Liability Claims

In *In re Allan*,<sup>72</sup> the Tyler Court of Appeals addressed an issue of first impression by examining whether section 74.351 conflicted with Texas Rule of Civil Procedure 202, thereby prohibiting pre-suit depositions in the health care liability context. Rule 202 permits a person to petition a court for an order authorizing an oral or written deposition before suit is

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65. *Id.* at 583-84 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(12)(B)(ii) (Vernon 2005)).

66. *Id.* at 585 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(3)).

67. *Id.* at 584-85.

68. *Id.* at 586.

69. *Boothe v. Dixon*, 180 S.W.3d 915, 916-17 (Tex. App.—Dallas 2005, no pet.); *De La Vergne v. Methodist Healthcare Sys.*, No. 04-05-00307-CV, 2005 WL 3340250, at \*1 (Tex. App.—San Antonio 2005, no pet.).

70. *Boothe*, 180 S.W.3d at 919; *De La Vergne*, 2005 WL 3340250, at \*3.

71. *See Boothe*, 180 S.W.3d at 919 (holding that plaintiff’s claims of fraud, breach of fiduciary duty, and violation of the DTPA as a result of laser eye surgery were intertwined with defendant’s rendition of medical services and, thus, were medical negligence claims); *De La Vergne*, 2005 WL 3340250, at \*2-3 (holding that plaintiff’s claims of false imprisonment, misrepresentation under the DTPA, and intentional infliction of emotional distress as a result of improper sedation during MRI necessarily involved health care of plaintiff and, thus, were medical negligence claims requiring expert report).

72. 191 S.W.3d 483 (Tex. App.—Tyler 2006, orig. proceeding [mand. denied]).

filed for the use in an anticipated suit or to investigate a possible claim.<sup>73</sup> Section 74.351 provides that, in a health care liability claim, a claimant must provide one or more expert reports and a curriculum vitae for each expert.<sup>74</sup> Until this report is served, “all discovery in a health care liability claim is stayed except for the acquisition by the claimant of information, including medical or hospital records or other documents or tangible things.”<sup>75</sup> The plaintiff in the case contended that the stay of discovery included Rule 202 depositions as well, thus potentially creating a conflict between Rule 202 and section 74.351. In the mandamus proceeding, the court of appeals looked at the statutory language to see that a “health care liability claim” is defined as a “cause of action.”<sup>76</sup> Ultimately, the court of appeals decided that implicit in the definition of “cause of action” is that essential facts are known.<sup>77</sup> The court of appeals determined that the plaintiff’s cause of action was “potential” because he did not know the facts relating to his mother’s care, and when those facts were ascertained he might conclude that he, in fact, had no cause of action.<sup>78</sup> Using this rationale, the court of appeals concluded that the “plain language of Subsection 74.351(s) does not support a conclusion that the legislature intended to characterize a potential cause of action as a ‘health care liability claim.’”<sup>79</sup> For additional support, the court of appeals analyzed the legislative history surrounding Rule 202. The court of appeals found that the Texas Legislature initially considered a complete prohibition of Rule 202 depositions to investigate claims involving health care providers and then considered restricting depositions for those types of claims. Ultimately, however, the legislature did not restrict, limit, or prohibit Rule 202 depositions in this area.<sup>80</sup> Important to the court’s analysis was the fact that during these deliberations the definition of “health care liability claim” remained the same.<sup>81</sup> Thus, if the legislature saw these types of claims as included in the definition of “health care liability claim,” its actions in this area would have been completely unnecessary. Accordingly, the court of appeals determined that it was reasonable to assume the legislature did not intend for a potential claim or cause of action to be characterized as a health care liability claim.<sup>82</sup> Thus, the court of appeals held that a “health care liability claim” does not include a *potential* cause of action, which in turn establishes that the stay of discovery found in section 74.351(s) does not preclude pre-suit Rule 202

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73. *Id.* at 485 (citing TEX. R. CIV. P. 202.1 & cmt. 1). Rule 202.1 provides that “[a] person may petition the court for an order authorizing the taking of a deposition . . . (a) to perpetuate or obtain the person’s own testimony or that of any other person for use in an anticipated suit, or (b) to investigate a potential claim or suit.” TEX. R. CIV. P. 202.1.

74. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon 2005).

75. *Id.* § 74.351(s).

76. *In re Allan*, 191 S.W.3d at 486.

77. *Id.* at 486-87.

78. *Id.* at 487.

79. *Id.*

80. *Id.* at 488.

81. *Id.*

82. *Id.*

depositions.<sup>83</sup>

The limited discretion of courts to grant extensions to the expert-report deadline was addressed by various Texas appellate courts. In one case, the Texarkana Court of Appeals recognized that section 74.351 provided for only two means of obtaining an extension: the two parties' mutual agreement or the trial court's discretion provided in section 74.351(c), allowing for only one thirty-day extension to the claimant in order to cure a deficient report.<sup>84</sup> In *Brennan*, the report had not been served in a timely fashion and therefore the court of appeals found that the trial court was bound by the mandatory dismissal provision of section 74.351(b).<sup>85</sup> In a similar case, the Beaumont Court of Appeals held that section 74.351 did not provide the same accident-or-mistake exception to grant an extension that former article 4590(i) provided.<sup>86</sup> There, the claimant filed the report 121 days after filing the health care liability claim and argued successfully to the trial court that it had discretion to grant an extension upon a finding of accident or a diligent attempt to timely serve the report.<sup>87</sup> The court of appeals found that the trial court had no such discretion because section 74.351 mandates an order dismissing the suit with prejudice when the claimant fails to serve the defendant an expert report within 120 days of filing the claim.<sup>88</sup>

### C. USING AN OPPONENT'S EXPERT OPINION

In *Hooper v. Chittaluru*,<sup>89</sup> a medical malpractice case brought by a patient's estate against his internist and cardiologist, the Houston Court of Appeals for the Fourteenth District addressed calling an opponent's expert adversely. In this case, the defendant-doctor's expert witness issued an initial report which was favorable to the defendant, but subsequent deposition testimony revealed opinions "largely favorable" to the plaintiff.<sup>90</sup> The day after the deposition, the plaintiff supplemented his designation to refer to the expert's deposition testimony.<sup>91</sup> The trial court sustained the defendant's objections that the plaintiff had not disclosed the doctor's opinions in a timely manner and refused to allow the expert to testify in trial.<sup>92</sup> The court of appeals found that supplementing the designation only one day after the deposition was "reasonably promptly

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83. *Id.*

84. *Thoyakulathu v. Brennan*, 192 S.W.3d 849, 852 (Tex. App.—Texarkana 2006, no pet.).

85. *Id.* at 853-54.

86. *Soberon v. Robinson*, No. 09-06-067 CV, 2006 WL 1781623, at \*2 (Tex. App.—Beaumont 2006, pet. denied).

87. *Id.* at \*1.

88. *Id.* at \*3.

89. No. 14-05-00058-CV, 2006 WL 1766002 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

90. *Id.* at \*1.

91. *Id.*

92. *Id.* At trial, the jury found that the plaintiff alone was negligent for "failing to comply with some of [the defendants'] treatment recommendations and refusing to change his lifestyle." *Id.*

after the party discover[ed] the need for . . . a response” as required by Texas Rule of Civil Procedure 193.5(b).<sup>93</sup> That is, the plaintiff could not have known the nature of the witness’s favorable opinions before hearing them in the deposition, and, moreover, exclusion is not appropriate when there “is no surprise to the opposing parties.”<sup>94</sup>

The trial court implied that it believed it “inherently improper to call an opponent’s expert adversely” when it repeatedly stated that the plaintiff “cannot hijack [the opponent’s] expert.”<sup>95</sup> The court of appeals noted that the Texas Supreme Court “has disapproved of attempts to assert ownership over an expert” and called the practice “inconsistent with the primary objective of discovery—to seek the truth.”<sup>96</sup> Ultimately, the court of appeals compared expert testimony to any other type of evidence, such as documents, that may “unquestionably . . . be used against the producing party.”<sup>97</sup>

Finally, the court of appeals noted that the exclusion of the evidence, if cumulative and not concerning an issue of material importance dispositive to the case, would not be harmful and therefore not reversible.<sup>98</sup> The court of appeals found that the evidence was not cumulative as the witness’s testimony, as “damaging testimony against a party by its own expert, . . . would have added substantial weight” to the plaintiff’s case.<sup>99</sup> Further, the court of appeals found that the testimony was material to a dispositive issue in the case: the doctors’ negligence.<sup>100</sup> The exclusion was harmful, and, as such, the court of appeals reversed the trial court’s order striking the expert’s testimony as an abuse of discretion.<sup>101</sup>

## II. PRIVILEGES

In the original mandamus proceeding *In re Living Centers of Texas, Inc.*,<sup>102</sup> the Texas Supreme Court addressed the scope and availability of four medical privileges: (1) the medical committee privilege, (2) the medical peer review committee privilege, (3) the nursing peer review committee privilege, and (4) the quality assessment and assurance privilege. In doing so, it articulated that nursing homes are protected by the medical committee, medical peer review, and nursing peer review privileges “to the same extent as hospitals.”<sup>103</sup>

The plaintiff brought a medical malpractice action against a nursing home, alleging that negligent care caused the death of her relative.<sup>104</sup>

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93. *Id.* at \*3-4 (internal quotation marks omitted).

94. *Id.* (citing TEX. R. CIV. P. 193.6(a)(2)).

95. *Id.* at \*3 (internal quotation marks omitted).

96. *Id.* (citing *Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 559–60 (Tex. 1990)).

97. *Id.*

98. *Id.* at \*1.

99. *Id.* at \*5.

100. *Id.* at \*6-7.

101. *Id.* at \*3.

102. 175 S.W.3d 253 (Tex. 2005) (orig. proceeding).

103. *Id.* at 259.

104. *Id.* at 255.

The nursing home withheld several documents from production in discovery, asserting the above-described privileges.<sup>105</sup> The documents withheld concerned the licensing and investigation by state agencies of non-physicians and physicians, such as incident logs, patient reports, governing body meeting minutes, personnel records, and documents used by the nursing home to resolve rule changes.<sup>106</sup> In support of the privileges' application, the nursing home presented the trial court with, among other things, a privilege log listing the names of the documents, a supporting affidavit from the nursing home's director of nursing, and a copy of its Quality Assessment & Assurance Plan, which stated that reports generated by the nursing home's committees should be stamped with a confidentiality statement. After reviewing a sample of the documents *in camera*, the trial court ordered the nursing home to produce any of the *in camera* documents that (1) did not have the word "committee" in the name listed in the privilege log, or (2) did not have the nursing home's Quality Assessment & Assurance Plan's prescribed confidentiality stamp. The nursing home challenged the trial court's order to produce documents, and the supreme court conditionally granted the writ.

The supreme court held that the trial court abused its discretion by using only superficial indicators to deny the nursing home's privilege claim and held that the nursing home's inadvertent failure to use its own internal procedure as set forth in the Quality Assessment & Assurance Plan for identifying privileged documents did not automatically waive the quality assessment and assurance privilege.<sup>107</sup> Instead, the trial court could use the nursing home's failure to stamp the documents with the prescribed confidentiality statement *in conjunction with* other evidence to determine whether the nursing home met its burden to demonstrate that the documents at issue were part of the peer review process.<sup>108</sup>

Further, the supreme court held that the medical peer review privilege, which promotes free discussion in the evaluation of health care professionals and health services, only applies to physicians insofar as employment-evaluation documentation is concerned.<sup>109</sup> The supreme court relied on the statutory definition of "practitioner" in section 151.002(a)(8) of the Texas Occupational Code, which includes physicians but not nurses, and section 160.007 of the code, which authorizes a medical peer review committee to evaluate "the competence of physicians."<sup>110</sup> However, the supreme court clarified that a medical peer review committee could also retrospectively review the services provided by non-physicians as well, "such as the administration of drugs by a nurse at the instruction of a physician," presumably because section 160.007 authorizes such com-

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105. *Id.*

106. *Id.* at 259.

107. *Id.* at 260-61.

108. *Id.* at 260.

109. *Id.* at 257.

110. *Id.* at 256-58.

mittees to evaluate “the quality of medical and health care services.”<sup>111</sup>

Although the nursing home asserted that the nursing peer review committee privilege protected some of the documents from production, the supreme court held that the nursing peer review committee privilege did not apply under the circumstances.<sup>112</sup> Under section 303.003(b) of the Texas Occupational Code, to assert the privilege, the peer review committee must consist of at least three-fourths nurses.<sup>113</sup> Because the nursing home’s committee did not, it could not assert the privilege.<sup>114</sup>

Finally, the supreme court held that many of the documents were not protected by the peer review privilege because they were “contemporaneous patient records made in the ordinary course of treatment and not created for committee review, evaluation, or investigation.”<sup>115</sup> The supreme court noted that “[t]he peer review privilege is intended to extend far enough to foster candid internal discussions for the purpose of making improvements in the quality of care, but not so far as to permit the concealment of ‘routinely accumulated information.’”<sup>116</sup> Thus, the supreme court held that the peer review privilege protects the products of the peer review process and the fact that the committee reviewed certain documents, but it does not protect the underlying documents that the committee reviewed, if those documents are available from another source.<sup>117</sup>

### III. RELEVANCE

The most noteworthy opinions relating to issues of relevance involved (1) Occupational Safety and Health Administration (“OSHA”) reports and (2) newly discovered evidence introduced on appeal from an administrative decision.

#### A. OSHA REPORTS

On mandamus in *In re Brookshire Grocery Co.*,<sup>118</sup> the Tyler Court of Appeals addressed issues of admissibility and relevance in a grocery store slip-and-fall case. The Tyler Court of Appeals reviewed the trial court’s decision to overrule several objections to discovery requests as overly broad. The defendant argued that the trial court impermissibly rewrote a discovery request when it sustained part of an objection by limiting a request for “any and all videos and photographs for the *entire* existence of the store. . . [and] *all* design drawings for the building” to information pertaining only to the “current layout *at time of the incident*.”<sup>119</sup> The court of appeals disagreed and did not find the trial court’s ruling reached

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111. *Id.*

112. *Id.* at 259.

113. *Id.* at 258.

114. *Id.*

115. *Id.* at 261.

116. *Id.* at 260.

117. *Id.*

118. No. 12-06-00065-CV, 2006 WL 2036569 (Tex. App.—Tyler 2006, no pet.) (mem.).

119. *Id.* at \*2–3 (last emphasis added).

the “level of judicial assistance in *In re Sears*” and, as such, did not find an abuse of discretion.<sup>120</sup> Since the court of appeals found the modification to the plaintiff’s request for production not an abuse of discretion, it did not reach the question as to whether the initial request was overly broad.<sup>121</sup>

In another objection, the defendant argued that the OSHA evaluations and documents sought focused on employee safety, making them irrelevant to a slip-and-fall case involving a nonemployee.<sup>122</sup> The court of appeals disagreed, reasoning that “[o]nce the proper predicate is established, the evidence is probative” and that evidence of similar accidents, whether they involve employees or nonemployees, is reasonably calculated to lead to admissible evidence.<sup>123</sup>

In another case involving OSHA documents, *Carrillo v. Star Tool Co.*,<sup>124</sup> a wrongful death suit was brought against an equipment company whose alleged negligence caused the death of an operator. In this case, the Houston Court of Appeals for the Fourteenth District faced the issue of whether to admit an OSHA letter written by an investigator to a codefendant.<sup>125</sup> The trial court excluded the letter as irrelevant.<sup>126</sup> The court of appeals acknowledged that OSHA regulations are admissible as relevant to establish standards of conduct that “should have been employed by a defendant.”<sup>127</sup> Further, the court acknowledged that expert testimony on OSHA standards and their application is relevant and admissible.<sup>128</sup> However, the court of appeals distinguished the letter as “declar[ing] that no citation would issue and specifically stat[ing] no OSHA regulation or standard applied to the occurrence” and as giving the opinion of one nontestifying OSHA investigator.<sup>129</sup> The court of appeals further reasoned that the letter was not reliable as a government-adopted safety standard.<sup>130</sup> The injured employee argued that the OSHA letter should have been admitted as relevant, since it “tend[ed] to prove employees of [the co-defendant] complained to investigators shortly af-

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120. *Id.* (citing *In re Sears, Roebuck & Co.*, 123 S.W.3d 573, 575–79 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (writing sixty-four-page discovery request at hearing, in some cases requiring discovery beyond that requested by plaintiff, in some cases limiting requests or overruling them altogether)).

121. It may be noted, however, that the court almost certainly would have found the initial request for production to be overly broad. That is, the court, in discussing the scope of discovery, noted that “[a]lthough the [scope] is broad . . . [a] discovery request that is unlimited as to time, place, or subject matter is overly broad as a matter of law.” *Id.* at \*2 (citations omitted).

122. *Id.* at \*5.

123. *Id.*

124. No. 14-04-00104-CV, 2005 WL 2848190 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (mem.).

125. *Id.*

126. *Id.* at \*2.

127. *Id.* (citing *Wal-Mart Stores, Inc. v. Seale*, 904 S.W.2d 718, 720 (Tex. App.—San Antonio 1995, no writ)).

128. *Id.* at \*2 (citing *Lyondell Petrochemical Co. v. Fluor Daniel, Inc.*, 888 S.W.2d 547, 555 (Tex. App.—Houston [1st Dist.] 1994, writ denied)).

129. *Id.*

130. *Id.*

ter” the occurrence.<sup>131</sup> The court of appeals, however, rejected this argument, reasoning that it was not an abuse of discretion to exclude evidence that “trial witnesses *may* have complained to an OSHA investigator.”<sup>132</sup>

## B. NEWLY DISCOVERED EVIDENCE

On appeal from the Texas Workforce Commission, *Shiolen Industries, Inc. v. Texas Workforce Commission*<sup>133</sup> presents an issue of the admissibility of evidence discovered after an administrative hearing. In this case, the Fort Worth Court of Appeals reviewed the Workforce Commission’s decision to award a terminated employee unemployment compensation.<sup>134</sup> The appellant-employer argued that the trial court erred in excluding evidence discovered after the Commission’s decision to award compensation benefits.<sup>135</sup> The trial court excluded the evidence, which proved that the employee was under the influence of alcohol and cocaine, as irrelevant to its review of the Commission’s decision, since “[it] had not been presented to the Commission as a reason to deny benefits to” the employee.<sup>136</sup>

The employer argued that “the trial court must admit and consider all evidence in existence at the time of the administrative hearing. . . .”<sup>137</sup> The court of appeals rejected that interpretation of Texas law and upheld the trial court’s decision affirming the Commission.<sup>138</sup> The court of appeals reasoned that the proposition appeared only as dicta in the Texas Supreme Court case, and the proposition “describes the standard by which the court reviews evidence once it is offered and admitted, not the rules governing the admission of evidence.”<sup>139</sup> The court of appeals also refused to admit the evidence as “newly-discovered,”<sup>140</sup> or as “necessary to the due administration of justice.”<sup>141</sup>

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131. *Id.*

132. *Id.* at \*3 (emphasis in original).

133. No. 2-05-227-CV, 2006 WL 1452642 (Tex. App.—Fort Worth May 25, 2006, no pet.).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at \*2 (citing *Collingsworth Gen. Hosp. v. Hunnicutt*, 988 S.W.2d 706, 708 (Tex. 1998)).

138. *Id.*

139. *Id.*

140. *Id.* (citing *Black v. Wills*, 758 S.W.2d 809 (Tex. App.—Dallas 1988, no writ) (involving new trial on basis of newly-discovered evidence in appeal of summary judgment in legal malpractice case)).

141. *Id.* at \*3 (internal quotation marks omitted). The court rejected this statement and the argument that failing to admit the evidence “makes a mockery of the [unemployment] benefits system,” reasoning that the due administration of justice would require the evidence to have been presented in the first instance to the Commission. *Id.* (internal quotation marks omitted) (alteration in original).



## IV. SANCTIONS

## A. ATTORNEY-ONLY SANCTIONS

In *American Flood Research, Inc. v. Jones*,<sup>142</sup> the Texas Supreme Court addressed the appropriateness of imposing discovery sanctions against an attorney, rather than both the attorney and the represented party.<sup>143</sup> In this case, attorney Harry Jones represented three former, non-English speaking employees who were sued by their former employer, American Flood Research (“AFR”), for trade secret violations and destruction of company property.<sup>144</sup> The employees responded by suing AFR in federal court, alleging employment discrimination. As discovery commenced, the parties disagreed over the order of depositions. After AFR noticed the employees’ depositions, the employees responded with motions to quash, which were later withdrawn. A few weeks later, AFR moved to compel, and the state trial court ordered that the depositions begin January 6, 2003. The employees then moved for reconsideration of the order and to recuse the trial judge, arguing bias against Jones. A hearing on these motions was scheduled, but, in the interim, Jones notified AFR that the employees would not appear for depositions until the two motions were ruled upon. January 6 passed without any depositions, and the employees withdrew their motion for recusal and abandoned their motion for reconsideration.<sup>145</sup>

On January 15, 2003, the employees terminated Jones’s representation in both the federal and state cases.<sup>146</sup> Alleging discovery abuses against both the employees and Jones, AFR moved for sanctions pursuant to Texas Rules of Civil Procedure 13 and 215, as well as Texas Civil Practice

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142. 192 S.W.3d 581 (Tex. 2006).

143. In another case, the Texas Supreme Court also addressed a sanctions order in connection with post-judgment net-worth affidavits. In *In re Smith*, 192 S.W.3d 564 (Tex. 2006), Richard and Ginger Honaker obtained a judgment against Ron Smith and Main Place Custom Homes, Inc. Judgment debtors Smith and Main Place filed notices of appeal and also filed cash deposits in lieu of bonds in the amount of \$10.00 each and net worth affidavits to supersede enforcement of the trial court’s judgment and to stay post-trial discovery. *Id.* at 566. Convinced that Smith’s affidavit of net worth of negative \$167,206.00 and Main Place’s affidavit of zero net worth were “manipulative and false,” the Honakers immediately filed a contest, a motion to compel discovery responses, and a motion for sanctions. Upon hearing, the trial court sustained the Honakers’ contest, granted the motion to compel, ordered Smith and Main Place to respond to the post-trial discovery, and sanctioned Smith \$11,275 for expenses and attorneys’ fees. *Id.* at 567. Smith appealed pursuant to Texas Rule of Appellate Procedure 24.4. *Id.* The court of appeals denied the motion. Smith then appealed to the supreme court by filing motions pursuant to Rule 24.4, which the supreme court treated as petitions for a writ of mandamus. *Id.* at 568. Addressing other issues first, the supreme court turned to review of the discovery sanctions order. Although a sanctions order is appealable when the judgment is signed, Smith and Main Place filed a separate appeal of the trial court’s sanctions order. *Id.* at 569. Accordingly, they had an adequate remedy at law—by way of appeal to the court of appeals—and a writ of mandamus was inappropriate. *Id.* For this reason—and also because Rule 24.4 does not provide a basis for reviewing such an order—the supreme court refused to address the appropriateness of the sanctions order. *Id.*

144. *Am. Flood Research*, 192 S.W.3d at 582.

145. *Id.*

146. *Id.*

and Remedies Code sections 9.012 and 10.002. After a hearing, the trial court sanctioned only Jones, ordering payment of \$15,000 to AFR.<sup>147</sup> The court of appeals reversed the award, finding that it was improper to award sanctions against an attorney when Rule 215.3 reserves sanctions for abuse by “a party.”<sup>148</sup> AFR appealed this reversal.<sup>149</sup>

The supreme court began its review with a reiteration of the appellate test for the determination of appropriateness of sanctions set forth in *TransAmerican Natural Gas Corp. v. Powell*.<sup>150</sup> Noting that appellate courts must examine the record independently, the supreme court admonished the court of appeals for relying on the trial court’s findings of facts and conclusions of law rather than examining the entire record when determining whether the award of sanctions was appropriate.<sup>151</sup> The supreme court next turned to the issue of whether the trial court abused its discretion when sanctioning Jones only, and not Jones in conjunction with the employees. Because the trial court’s order did not track the language of any particular rule, Rule 215.2—and not merely 215.3, as interpreted by the court of appeals—could be used in analyzing the appropriateness of sanctions.<sup>152</sup> Because this rule provides for sanctions against the attorney advising the party and there was “ample evidence” supporting the issuance of sanctions—including the fact that Jones merely informed AFR that the employees would not be attending the depositions, rather than moving to stay the discovery pursuant to Rule 199.4, the employees never rescheduled their depositions, and the motion to reconsider was continued immediately after the ordered deposition date passed—the trial court did not abuse its discretion in ordering sanctions, and the court of appeals erred in reversing the order.<sup>153</sup>

In addition, the supreme court stated that attorney-only sanctions are appropriate in circumstances where the evidence demonstrates that the sanctionable conduct is attributable to the attorney alone.<sup>154</sup> The supreme court found that, since the employees did not speak English and required a translator during court appearances, they were “particularly dependent on Jones’s advice during the course of litigation.”<sup>155</sup> Based on this fact and Jones’s conduct, the employees’ noncompliance with the

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147. *Id.*

148. *Id.* at 583.

149. *Id.*

150. 811 S.W.2d 913, 916 (Tex. 1991). In *TransAmerican*, the supreme court held that appellate courts must engage in a two-part inquiry to determine whether the sanctions imposed by the trial court were appropriate or just: (1) the court must ensure that there is a direct relationship between the improper conduct and the sanction imposed (for example, determining whether sanctions should be imposed on the party, its counsel, or both); and (2) the court must make certain that less severe sanctions would not have been sufficient to promote compliance. *Id.* at 917.

151. *Am. Flood Research*, 192 S.W.3d at 583.

152. *Id.* at 583-84.

153. *Id.* at 584-85.

154. *Id.* at 584.

155. *Id.*

court's discovery order was attributable to Jones's advice.<sup>156</sup> Accordingly, the trial court was within its discretion in imposing sanctions on Jones alone.<sup>157</sup> The supreme court did find, however, that the court of appeals erred in not completing the second part of the *TransAmerican* inquiry: making a determination of whether less severe sanctions would not promote compliance. The supreme court therefore remanded to the court of appeals to complete this analysis and determine whether the \$15,000 sanction order was excessive.<sup>158</sup>

#### B. DISQUALIFICATION

In *In re Parnham*,<sup>159</sup> the Houston Court of Appeals for the First District examined whether an order disqualifying attorneys was an appropriate sanction for examining and attempting to copy privileged documents inadvertently disclosed during discovery. In the underlying suit, Clara Harris sued George J. Parnham and his firm for alleged breaches of fiduciary duty.<sup>160</sup> Parnham's counsel requested inspection of certain documents, and Harris's counsel permitted inspection at his office. Because he was out of town on that day, Harris's counsel allowed his law clerk to supervise the inspection. Unfortunately, rather than producing only the items authorized for inspection, the law clerk inadvertently placed the entire litigation file, including the complete attorney/client correspondence file, on the table in front of opposing counsel.<sup>161</sup> Parnham's counsel sorted through the documents they wanted copied, including the allegedly privileged documents, and gave them to the law clerk to be sent to Harris's counsel's copy service. Harris's counsel returned to town and immediately realized that privileged documents without Bates stamps were included in the documents copied by his copy service.<sup>162</sup> A series of communications between opposing counsel then followed, attempting to reach a Rule 11 agreement concerning the use of any privileged information. A consensus was not reached, Harris moved for disqualification of the attorneys involved, and the trial court granted this motion.<sup>163</sup>

The court of appeals determined that Texas Rule of Civil Procedure 193.3 governed whether counsel should be disqualified when a party reviews privileged documents.<sup>164</sup> Rule 193.3, also known as the "snap-back

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156. *Id.*

157. *Id.* at 584-85.

158. *Id.* at 585.

159. No. 01-06-00236-CV, 2006 WL 2690306 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

160. *Id.* at \*1.

161. Harris was incarcerated at the time, and the facility did not permit communication with her attorney via telephone. Importantly, therefore, the entirety of Harris's discussions with her attorney was contained in this correspondence file. *Id.* at \*2 n.6.

162. *Id.* at \*2.

163. *Id.*

164. *Id.* at \*7. The court of appeals also analyzed both *In re Meador*, 968 S.W.2d 346 (Tex. 1998) and *In re Nitla*, 92 S.W.3d 419 (Tex. 2002) to determine what standard was applicable when reviewing an order of disqualification. *Parnham*, 2006 WL 2690306, at \*3-6. Despite the parties' arguments, the court found neither standard applicable as the docu-

rule,” provides that a party may retrieve arguably privileged materials it has inadvertently produced in the normal course of discovery.<sup>165</sup> Here, Parnham’s counsel was never in possession of the documents, so there was nothing to “snap-back.”<sup>166</sup> There was, however, a concern about the use of the information in the privileged documents. Importantly, though, Rule 193.3 “does not provide for, nor does it appear to contemplate, disqualification of the recipient party’s counsel.”<sup>167</sup> Rather, because disqualification is such a “severe remedy that ‘can result in immediate and palpable harm, disrupt trial court proceedings, and deprive a party of the right to have counsel of choice,’” an “exacting standard” must be used when determining whether disqualification is appropriate.<sup>168</sup> Therefore, because Rule 193.3 does not provide authority for disqualification, the trial court abused its discretion, and the court of appeals directed the lower court to vacate its order of disqualification.<sup>169</sup>

## V. HEARSAY

In the medical malpractice case *Daniels v. Yancey*,<sup>170</sup> the Texarkana Court of Appeals upheld the exclusion of a very probative statement because it was hearsay and did not meet the present-sense-impression exception to the hearsay rule.<sup>171</sup> The plaintiff, who alleged that a doctor botched her hysterectomy, sought to proffer testimony of another doctor who had told her when she had returned to the hospital with complications that the doctor who had performed the original surgery “is scared to death that he’s done something wrong to you.”<sup>172</sup> The court of appeals found that the trial court could have reasonably found that the statement was hearsay and that it had been offered to prove the truth of the matter asserted—that the surgeon was afraid that he had done something wrong to the plaintiff.<sup>173</sup> Further, the court of appeals held the statement was not admissible under the present-sense-impression exception to the hear-

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ments were inadvertently produced during the normal course of discovery, rather than outside the usual scope or given directly to opposing counsel by the court following *in camera* inspection.

165. Rule 193.3 provides, in part:

A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if—within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

TEX. R. CIV. P. 193.3(d).

166. *Parnham*, 2006 WL 2690306, at \*7.

167. *Id.*

168. *Id.* at \*8.

169. *Id.*

170. 175 S.W.3d 889 (Tex. App.—Texarkana 2005, no pet.).

171. *Id.* at 895-96.

172. *Id.* at 895.

173. *Id.*

say rule because there was no probative evidence in the record establishing the amount of time between the doctor's statement and his meeting with the original surgeon.<sup>174</sup> As a result, because there was no evidence that the statement occurred contemporaneously with the event or condition it described or explained, the court of appeals reasoned that it was properly excluded.<sup>175</sup> Further, the court of appeals noted that "it is not readily apparent" that the original surgeon's alleged fear that he had caused harm to plaintiff would meet the standard definition of "event" or "condition" required to fall under the present-sense-impression exception.<sup>176</sup>

## VI. MISCELLANEOUS DECISIONS OF NOTE

### A. SPOILIATION

In *Walker v. Thomasson Lumber Co.*,<sup>177</sup> the Houston Court of Appeals for the Fourteenth District held that a plaintiff, who fell from a utility pole while training as a power line technician and then sued the pole's manufacturer and distributor for products liability, was not entitled to a spoliation presumption based on the fact that the pole had been destroyed, when the pole had been destroyed by the plaintiff's employer, who was not a defendant.<sup>178</sup> The court of appeals reasoned that the defendant-distributor had no duty to preserve the pole, as it had been in the possession and control of the plaintiff's employer.<sup>179</sup> The court of appeals also noted that the pole was destroyed by the employer in the ordinary course of business pursuant to its normal disposal policy.<sup>180</sup>

### B. VOIR DIRE

In a noteworthy case for questions of voir dire in Texas, *Hyundai v. Vasquez*,<sup>181</sup> the Texas Supreme Court faced issues including voir dire inquiry over the facts of a case. Although previous supreme court cases held that it was improper to inquire of a potential juror whether, when presented with all the evidence, one party would be "starting out ahead," the *Vasquez* court was faced with the issue of whether it was proper to inquire as to the *weight* jurors would give certain pieces of evidence.

On appeal from the San Antonio Court of Appeals, the tragic circumstances giving rise to the litigation involved the death of a four-year-old child.<sup>182</sup> The young girl was riding in the front seat of a car without a seatbelt when the impact of a "low-speed neighborhood traffic collision"

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174. *Id.* at 895-96.

175. *Id.*

176. *Id.* at 896 n.3 (internal citations omitted).

177. 203 S.W.3d 470 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

178. *Id.* at 477.

179. *Id.*

180. *Id.*

181. 189 S.W.3d 743 (Tex. 2006).

182. *Id.* at 747.

caused the passenger-side airbag to deploy “with enough force to catch [the child’s] chin and break her neck.”<sup>183</sup> The parents of the child brought suit against the car company, alleging that the airbag was placed incorrectly and that it deployed with unreasonable force for a low-impact accident.<sup>184</sup> The car company named the drivers of both cars involved in the collision as responsible third parties.<sup>185</sup> At trial, the jury<sup>186</sup> returned a verdict for the car company, finding no defect in design and assigning liability to the two drivers alone.<sup>187</sup>

The substance of the case before the supreme court involved only the voir dire of the suit.<sup>188</sup> The plaintiff appealed the trial court’s refusal to allow a voir dire inquiry as to whether the jurors’ “preconceived notion [was] that if there is no seat belt in use, no matter what else the evidence is, that [the juror] could not be fair and impartial.”<sup>189</sup> The court of appeals agreed with the plaintiff, holding that the trial court, in fact, abused its discretion in excluding the question.<sup>190</sup> On appeal to the supreme court, the decision was reversed, and the trial court’s ruling was upheld.<sup>191</sup>

The supreme court<sup>192</sup> first noted that voir dire is a process seeking to eliminate jurors who have prejudice or bias in favor of or against a party in a case.<sup>193</sup> Second, fair and impartial jurors will decide a case based on the evidence and not based on their bias or prejudice.<sup>194</sup> As a result, voir dire inquiries should be based on bias and prejudice in an effort to eliminate poor candidates, rather than on their opinions of the evidence.<sup>195</sup> Recognizing that the issue was an open one after *Cortez v. HCCI-San Antonio, Inc.*,<sup>196</sup> the supreme court considered whether the “weight a ju-

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183. *Id.*

184. *Id.*

185. *Id.*

186. The judge dismissed two jury panels before finally seating a jury out of the third panel. *Id.* at 747-48. The first two were dismissed after numerous jurors indicated that the fact that the child was not wearing her seat belt alone would determine the verdict. *Id.* at 748. With the third panel, the trial judge limited voir dire questioning to general “belting” habit questions, disallowing any disclosure that the plaintiff in the case was not wearing her seat belt at the time of the accident. *Id.*

187. *Id.* at 749.

188. *Id.* at 750.

189. *Id.* at 755.

190. *Vasquez v. Hyundai Motor Co.*, 119 S.W.3d 848 (Tex. App.—San Antonio 2003, pet. granted), *rev’d*, *Vasquez*, 189 S.W.3d at 743.

191. *Vasquez*, 189 S.W.3d at 760.

192. The Honorable Jane Bland, Justice of the Houston Court of Appeals for the First District, sitting by commission of the Governor, delivered the opinion of the court. *Id.* at 746. Justice Hecht, Justice O’Neill, Justice Brister, Justice Willett, and Justice John Cayce, Chief Justice of the Second District Court of Appeals in Fort Worth, all joined in the majority opinion. *Id.*

193. *Id.* at 750.

194. *Id.* at 752.

195. *Id.*

196. 159 S.W.3d 87 (Tex. 2005). In *Cortez*, the supreme court held that it is improper to inquire of a potential juror whether, when presented with all the evidence, one party would be “starting out ahead” because such a question seeks “an opinion about the evidence.” *Id.* at 94. Accordingly, *Cortez* stands for the proposition that “it is improper to ask pro-

ror would give a relevant piece of the evidence could be objectionable.”<sup>197</sup>

The supreme court first reasoned that inquiring as to the weight a juror would afford relevant evidence is comparable to the situation in *Cortez*, in which the supreme court found that “excluding jurors who weigh summarized facts in a particular way infringes upon the right to trial by a fair and impartial jury.”<sup>198</sup> When parties engage in questioning that pre-tests a juror’s opinion about relevant evidence, “the effort is aimed at guessing the verdict, not at seating a fair jury.”<sup>199</sup>

Second, the supreme court reasoned that isolating a relevant fact for jurors and asking if they can be fair is as confusing as an “inquiry that previews all the facts” and may render a voir dire response unreliable.<sup>200</sup> Third, the supreme court reasoned that in order to be consistent with the Court of Criminal Appeals, its “sister court,” it must be improper to ask a juror to assume one fact but not others.<sup>201</sup> Finally, the supreme court distinguished *Babcock v. Northwest Memorial Hospital*,<sup>202</sup> in which the Texas Supreme Court held that questions about bias resulting from societal influence—tort reform—were within the scope of proper questioning.<sup>203</sup> *Babcock*, the supreme court reasoned, did not involve a question inquiring as to the weight a juror would give evidence, but rather general bias and prejudice.<sup>204</sup>

Ultimately, the supreme court held “that a trial court does not abuse its discretion in refusing to allow questions that seek to determine the weight to be given . . . a particular fact or set of relevant facts.”<sup>205</sup> Notably, the supreme court held that if the questions are permitted, the jurors’ opinions are not disqualifying, as they reveal but a fact-specific opinion and not necessarily an improper bias.<sup>206</sup>

The supreme court acknowledged the broad discretion afforded to trial courts in conducting voir dire, as an “attorney’s question is easier to parse

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spective jurors what their verdict would be if certain facts were proved.” *Vasquez*, 189 S.W.3d at 751. However, because “*Cortez* involved a general summary of all the evidence, [and not the propriety of] a voir dire question address[ing] the weight a juror would give a relevant piece of the evidence,” the *Vasquez* court distinguished *Cortez* from the dispute at issue. *Id.* at 752.

197. *Vasquez*, 189 S.W.3d at 752.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 752–53 (citing *Standefer v. State*, 59 S.W.3d 177, 183 (Tex. Crim. App. 2001) (“holding it was improper to ask jurors ‘[w]ould you presume someone guilty if he or she refused a breath test on their refusal alone?’”). The supreme court further reasoned that since the statutory standards for bias and prejudice are the same in the civil and criminal contexts, the voir dire standards, too, should remain the same. *Id.* at 753.

202. 767 S.W.2d 705 (Tex. 1989).

203. *Vasquez*, 189 S.W.3d at 753 (citing *Babcock*, 767 S.W.2d at 706).

204. *Id.*

205. *Id.*

206. *Id.*

in the courtroom than it is in an appellate record.”<sup>207</sup> In fact, before *Vasquez*, neither the Texas Supreme Court nor any intermediate appellate court “had held that a trial court abuses its discretion in excluding a voir dire question that incorporates isolated facts in a case.”<sup>208</sup>

In his dissent, in which Justices Johnson and Wainwright joined, Justice Medina criticized the majority for framing the issue as whether the trial court abused its discretion in excluding the question during voir dire.<sup>209</sup> Medina believed the issue was better framed as whether the trial court erred in “barring counsel from inquiring about an entire and admittedly relevant subject during voir dire.”<sup>210</sup> He agreed that the specific question objected to in this case would be considered “an impermissible attempt to pre-test the weight jurors would attach” to the fact that the child was not wearing her seat belt.<sup>211</sup> However, he believed that excluding that question should not allow the trial court to exclude all questions, if properly stated, regarding seat belt usage.<sup>212</sup>

### C. PAROL EVIDENCE

#### 1. Insurance Policies

During the Survey period, the Texas Supreme Court also addressed a certified question from the Fifth Circuit Court of Appeals. In *Fiess v. State Farm Lloyds*,<sup>213</sup> the supreme court was faced with determining the scope of insurance policies in effect in Texas. In 2001, the plaintiffs sustained flood damage as a direct result of Tropical Storm Allison.<sup>214</sup> In the process of recovery, they discovered black mold growing throughout the house, later identified as hazardous *stachybotrys* mold, which rendered their home dangerous to inhabit. Although the flooding from the storm caused some of the mold contamination, it was determined that the majority of it was caused by roof and other leaks existing before the flood. The plaintiffs’ insurance carrier determined that it was not obligated to pay for mold damage. The plaintiffs filed suit in Texas state court, the insurance carrier removed to federal court, and the district court granted summary judgment in favor of the insurer.<sup>215</sup> The plaintiffs appealed, arguing that their coverage for the mold remediation at issue was extended under the policy’s “ensuing-loss” provision. Because this was an unresolved question of state law, important to Texas homeowners and insur-

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207. *Id.* at 754 (giving example from trial record of ambiguous response to attorney’s question).

208. *Id.* at 753.

209. *Id.* at 764 (Medina, J., dissenting); *see also id.* at 761 (Wainwright, J., dissenting) (“By so framing the issue, the Court makes a hard case easier.”).

210. *Id.* at 761 (Wainwright, J., dissenting) (restating issue as proposed by Justice Medina).

211. *Id.* at 766 (Medina, J., dissenting).

212. *Id.* at 766 (“[T]his improper question did not authorize the trial court to foreclose the entire area of properly-phrased seat belt usage questions.”).

213. 202 S.W.3d 744 (Tex. 2006).

214. *Id.* at 754.

215. *Id.*



ers, the Fifth Circuit certified the question to the Texas Supreme Court.<sup>216</sup>

The supreme court specifically limited its inquiry to the contractual interpretation and did not provide an opinion as to whether insurers should provide mold coverage in Texas in response to a “mold crisis.”<sup>217</sup> The supreme court addressed the language of the policy, stating that if a policy has only one reasonable interpretation, it is unambiguous as a matter of law.<sup>218</sup> Although the dissent contended that previous policies informed the interpretation of the current policy—therefore making the current policy ambiguous—the majority concluded that previous policies were extrinsic evidence and thus inadmissible, unless the current policy *itself* was ambiguous.<sup>219</sup> Thus, because ambiguity cannot be created by introducing parol evidence of intent, previous policies would not be considered in the current policy’s construction. Instead, “policies must be construed one policy at a time.”<sup>220</sup> Because it is difficult “to find any ambiguity in the ordinary meaning of ‘We do not cover loss caused by mold,’” the supreme court concluded that there was no ambiguity in the policy and mold could therefore never be a covered “ensuing loss.”<sup>221</sup>

It should be noted that the supreme court was careful in detailing its limited role in the dispute, stating, “[i]f the political branches of Texas government decide that mold should be covered in Texas insurance policies, they have tools at their disposal to do so; Texas courts must stick to what those policies say, and cannot adopt a different rule when a ‘crisis’ arises.”<sup>222</sup>

## VII. CONCLUSION

This Article is intended to update litigants on recent developments in the field of civil evidence and to provide litigants with tools helpful in navigating evidentiary issues in Texas. During this Survey period, the Texas Courts of Appeals broadly construed the definition of health care liability claims in regard to section 74.351 of the Texas Civil Practice and Remedies Code, although, at present, the Texas Supreme Court has yet to cement their constructions. The Texas Supreme Court defined the scope of three medical privileges and articulated that nursing homes are protected by them to the same extent as hospitals. Also, important decisions regarding qualifications of experts, discovery sanctions, and admissibility of past insurance policies were issued by the Texas Supreme Court.

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216. *Id.*

217. *Id.* at 745.

218. *Id.* at 746.

219. *Id.* at 747.

220. *Id.*

221. *Id.* at 747, 753.

222. *Id.* at 753.