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Donald Colleluori

Gary D. Eisenstat

Bill E. Davidoff

CIVIL PROCEDURE: PRE-TRIAL AND TRIAL

*Donald Colleluori**
*Gary D. Eisenstat***
*Bill E. Davidoff****

I. SUBJECT MATTER JURISDICTION

THE Texas Supreme Court issued a number of opinions dealing with subject matter jurisdiction during the Survey period, including two important decisions on sovereign immunity. In *Tooke v. City of Mexia*, the Texas Supreme Court held that the Local Government Code provision that a home-rule city may "plead and be impleaded" in court does not reflect a clear legislative intent to waive immunity from suit.[1] Overruling its prior decision in *Missouri Pacific Railroad v. Brownsville Navigation District*,[2] the supreme court held that statutory language that a city may "sue and be sued" or "plead and be impleaded" is not sufficient, by itself, to waive sovereign immunity.[3] Rather, the meaning of these phrases depends on the context in which they are used; they "can mean that immunity is waived, but they can also mean only that a governmental entity, like others, has the capacity to sue and be sued in its own name."[4] The supreme court concluded that the section of the Local Government Code containing the provision that home-rule cities may "plead and be impleaded" gives no other indication that the legislature intended to waive sovereign immunity, and the City was therefore immune from the plaintiffs' breach of contract claim.[5]

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* Donald Colleluori received his B.A. from Dickinson College and his J.D. from New York University School of Law. Don is currently practicing as a partner with the Dallas law firm Figari & Davenport, L.L.P.

** Gary D. Eisenstat received his B.S. from the University of Colorado, and his J.D. from Boston University School of Law. Gary is a partner at the Dallas firm, Figari & Davenport, L.L.P.

*** Bill Davidoff received a B.B.A. from the University of Texas, and his J.D. from Southern Methodist University Dedman School of Law. Bill is a partner at Figari & Davenport, L.L.P. in Dallas, Texas.

1. 197 S.W.3d 325, 342 (Tex. 2006) (citing TEX. LOC. GOV'T CODE ANN. § 51.075 (Vernon 1999)).

2. 453 S.W.2d 812 (Tex. 1970).

3. *Tooke*, 197 S.W.3d at 342.

4. *Id.* at 337. The supreme court noted, for example, that section 76.04 of the Education Code provides that the Board of Regents of the University Texas System "may sue and be sued" in the name of one of its component institutions *and* that legislative consent to suits against that institution are granted. *Id.* at 340 (citing TEX. EDUC. CODE ANN. § 76.04 (Vernon 2002)).

5. *Tooke*, 197 S.W.3d at 342-43.

The supreme court also rejected the other arguments advanced in *Tooke* for finding a waiver of sovereign immunity.[6] First, because the plaintiffs in *Tooke* had already received full payment under the contract for the work they performed, and were only suing for lost profits on additional work they alleged they should have been given, the supreme court brushed aside their argument that the doctrine of partial performance should operate to waive immunity.[7] Second, the plaintiffs sought to invoke the distinction between a city's governmental and proprietary functions, which is used in determining a municipality's immunity from suit in tort, to argue there was a waiver of immunity.[8] The supreme court noted that it had never held that the same distinction determines immunity from suit in contract, but held that it did not need to decide the issue because the subject matter of the contract in *Tooke* was in fact a governmental function.[9]

Finally, the *Tooke* plaintiffs argued that the city's own home-rule charter operated to waive immunity, where it provided that the city "may sue and be sued, may contract and be contracted with, [and] implead and be impleaded in all courts."[10] The supreme court disagreed, noting that whether to waive sovereign immunity is a policy question that should be left to the legislature, and questioned, therefore, whether a city even has the authority to waive its own immunity by ordinance or charter.[11] Once again, however, the supreme court did not have to answer this question, since it concluded this charter language, like the Local Government Code provision it had previously considered, speaks only to the city's capacity to act as a corporate body, not its immunity from suit.[12]

Following *Tooke*, and decided the same day, *Reata Construction Corp. v. City of Dallas* also rejected the arguments that the Local Government Code or its own charter operated to waive the City of Dallas' immunity from suit.[13] *Reata* also held, however, that a city does not have immunity from claims that are related to, and are properly asserted as an offset against, claims asserted by the city.[14] Although the Texas Supreme Court noted that it must generally defer to the legislature to determine whether sovereign immunity should be waived, it "remains the judiciary's responsibility to define the boundaries of that common-law doctrine and to determine under what circumstances sovereign immunity exists in the first instance."[15] Discharging this responsibility, the supreme court held that the policies underlying immunity would not be served, and it would be fundamentally unfair to litigants, if a governmental entity were allowed to

6. *Id.* at 343-44.
7. *Id.* at 343.
8. *Id.* at 343-44.
9. *Id.*
10. *Id.* at 344 (*quoting* MEXIA, TEX. CITY CHARTER, art. II, sec. 1).
11. *Id.*
12. *Tooke*, 197 S.W.3d at 197.
13. 197 S.W.3d 371 (Tex. 2006).
14. *Id.* at 373.
15. *Id.* at 375.

assert affirmative claims against a party while at the same time claiming it had immunity as to the party's related claims against it.[16] Absent a broader waiver of immunity by the legislature, however, a trial court would not acquire jurisdiction over any claim for damages against the city in excess of damages sufficient to offset the city's own recovery, if any.[17]

Thomas v. Long involved the Harris County Sheriff's interlocutory appeal from the denial of a jurisdictional plea made as part of his summary judgment motion.[18] The court of appeals concluded that, notwithstanding the Texas statute authorizing interlocutory appeals from an order granting or denying a governmental entity's plea to the jurisdiction,[19] it lacked jurisdiction over the Sheriff's appeal because his objection to jurisdiction was included in a motion for summary judgment.[20] The Texas Supreme Court held that an interlocutory appeal was authorized whenever a trial court denies a governmental unit's challenge to subject matter jurisdiction, irrespective of the procedural vehicle used.[21] Turning then to the merits of the jurisdictional argument, the supreme court held that the Harris County Civil Service Commission had exclusive jurisdiction over the employment dispute at issue and that the plaintiff had failed to exhaust her administrative remedies, thereby depriving the district court of jurisdiction over her claim for reinstatement.[22]

Similarly, the Texas Supreme Court held in *Blue Cross Blue Shield of Texas v. Duenez* that the Employee Retirement System of Texas (ERS) had exclusive jurisdiction over the insurance coverage dispute in that case and that the trial court therefore lacked jurisdiction based on the plaintiffs' failure to exhaust their administrative remedies.[23] In doing so, the supreme court noted that a party cannot circumvent the legislature's intent to vest exclusive jurisdiction in the ERS by filing a declaratory judgment action.[24] The supreme court also rejected the plaintiffs' argument that their failure to exhaust administrative remedies should be excused because they were threatened with "irreparable harm."[25] Even if such an exception existed—a question that the supreme court did not reach—the plaintiffs failed to demonstrate that the ERS could not have provided

16. *Id.* at 377.
17. *Id.*
18. 207 S.W.3d 334 (Tex. 2006).
19. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 54.014(a) (Vernon Supp. 2006).
20. *Thomas*, 207 S.W.3d at 339-40.
21. *Id.*
22. *Id.* at 342. The supreme court also reiterated the rule that, if the trial court has jurisdiction over at least one claim, the proper course is for a trial court to dismiss the claims it lacks jurisdiction over and retain those over which it has jurisdiction, once again disapproving of those cases that had held otherwise. *Id.* at 338-39.
23. 201 S.W.3d 674, 676 (Tex. 2006).
24. *Id.* The supreme court explained that, despite the plaintiffs' contention that their suit did not implicate the "payment of a claim," they sought a declaration that the medical services were covered by the plan and an injunction compelling the insurer to pay for the care. *Id.*
25. *Id.* at 666-67 (citing Houston Fed'n of Teachers, Local 2415 v. Houston Indep. Sch. Dist., 730 S.W. 2d 444, 646 (Tex. 1987)).

immediate relief.[26]

Finally, the Texas Supreme Court addressed the standing and mootness components of subject matter jurisdiction in *Allstate Indemnity Co. v. Forth*[27] and *Marshall v. Housing Authority of San Antonio*,[28] respectively. In *Forth*, a breach of contract suit, the supreme court held that the insured plaintiff lacked standing to complain of the manner in which the defendant insurer settled her medical bills, where the insured did not claim that she had any unreimbursed expenses or that any of her medical providers withheld any service or threatened to sue her for any deficiency.[29] In *Marshall*, the supreme court held that the forcible detainer action became moot where the tenant relinquished possession of the premises and her lease expired.[30] The supreme court rejected the tenant's arguments that there was still a live controversy because she would still be liable for court costs and would suffer "collateral consequences" in the form of future lost rent subsidies due to her eviction, since the underlying judgment would be vacated based on the finding that the case was moot.[31]

II. SERVICE OF PROCESS

The Texas Supreme Court set aside a ten-million-dollar default judgment because the defendant was never served in *Ross v. National Center for the Employment of the Disabled*.[32] In this bill of review, the supreme court rejected the argument that the defendant was at fault because he received a postcard notice of the default judgment against him and did not file an out-of-time motion for new trial.[33] *Ross* re-emphasizes that proper service is not a mere technicality, and "'[a] party who becomes aware of the proceedings without proper service of process has no duty to participate in them.'"[34] The defendant filed his bill of review within the applicable limitations period, and he had no further duty to act diligently in pursuing a motion for new trial in a case in which he was never served.[35]

In several cases involving restricted appeals during the Survey period, the intermediate appellate courts continued to strictly enforce the requirements for valid service. Thus, in *Mansell v. Insurance Co. of the*

26. *Id.* at 677.
27. 204 S.W.3d 795, 795 (Tex. 2006).
28. 198 S.W.3d 782, 782 (Tex. 2006).
29. *Forth*, 204 S.W.3d at 796.
30. *Marshall*, 198 S.W.3d at 787.
31. *Id.* at 788-90.
32. 197 S.W.3d 795, 795 (Tex. 2006).
33. *Id.* at 797 (citing TEX. R. CIV. P. 306(a).
34. *Ross*, 197 S.W.3d at 797 (quoting Caldwell v. Barnes, 154 S.W.3d 93, 97 n.1 (Tex. 2004)). *But see* City of Tyler v. Beck, 196 S.W.3d 784, 786-87 (Tex. 2006) (formal service of process on landowners was not required in condemnation proceeding where landowners had already filed objection to the special commissioners' award).
35. *Ross*, 197 S.W.3d at 798. The supreme court also rejected the argument that the default could be upheld as a discovery sanction or based on the defendant's failure to appear at the trial of his bill of review after receiving a subpoena. *Id.*

West, the Fourteenth District Court of Appeals held that a citation was fatally defective where it misstated the date of filing of the plaintiff's petition.[36] The court rejected the plaintiff's argument that it should apply a "more practical, lenient approach" to the rule, instead requiring strict compliance with the statutory requirements for valid service.[37] The Tyler Court of Appeals likewise refused to loosen the strict-compliance standard in *In re Z.J.W.*, holding that the process server's failure to endorse the citation with the date and hour he received it was a fatal defect.[38] And the Dallas Court of Appeals held, in *Reed Elsevier, Inc. v. Carrollton-Farmers Branch Independent School District*, that a default judgment had to be set aside where the return of service did not reflect that the individual served was authorized to act on behalf of the defendant's corporate registered agent.[39]

III. VENUE

In *In re Applied Chemical Magnesias Corp.*,[40] the Texas Supreme Court held that a declaratory judgment suit seeking to determine the contractual rights of parties to surface and mineral leases was an "action involving an interest in real property thus making it subject to the mandatory venue provision of Section 15.011 of the Texas Civil Practice & Remedies Code."[41] In reaching this conclusion, the supreme court rejected the argument that *Smith v. Hall*[42] stands for the broad proposition that a suit for construction or enforcement of an executory contract for the sale of land is not a suit for the recovery of land or to quiet title within the meaning of Section 15.011.[43] First, the supreme court noted that the *Smith* decision was based on the predecessor statute, which provided a more complex scheme for venue in real property cases and was less inclusive with regard to mandatory venue than the current statute.[44] Second, the supreme court found that, even under the prior statute, venue was determined by the essence of the relief sought and not by the cause of action that was pled.[45] In this instance, the supreme court determined that the appellant was using the declaratory judgment mechanism as an indirect means of quieting title to the mineral estate in real property.[46] Thus, the essence of the dispute was whether the appellant had a right to mine on the appellee's land, which involved an interest in real property subject to the mandatory venue provision.[47]

36. 203 S.W.3d 499, 501-02 (Tex. App.—Houston [14th Dist.] 2006, no pet.).
37. *Id.* at 501.
38. 185 S.W.3d 905, 907-08 (Tex. App.—Tyler 2006, no pet.).
39. 180 S.W.3d 903, 905-06 (Tex. App.—Dallas 2005, pet. denied).
40. 206 S.W.3d 114, 115 (Tex. 2006).
41. TEX. CIV. PRAC. & REM. CODE ANN. § 15.011 (Vernon 2002).
42. 147 Tex. 634, 219 S.W.2d 441 (1949).
43. *Applied Chem.*, 206 S.W.3d at 117.
44. *Id.* at 118.
45. *Id.* at 118-19.
46. *Id.* at 119.
47. *Id.* at 119.

In *Toliver v. Dallas/Fort Worth Hospital Council*, the Dallas Court of Appeals considered whether a party had waived its motion to transfer venue by first filing several pleadings in federal court. Toliver sued the Council in state court and, in response, the Council removed the case to the Fort Worth Division of the United States District Court for the Northern District of Texas. Several days later, the Council filed a motion to transfer venue to the Dallas Division, together with its answer in federal court. The federal court denied the motion to transfer venue and, thereafter, granted Toliver's motion to remand the case to state court. Fourteen days after the remand order was filed with the Tarrant County district clerk, the Council filed a "renewed motion to transfer venue" to Dallas County. The trial court granted the motion and transferred the case to Dallas County, where the Council prevailed on summary judgment. On appeal, Toliver argued that the Council had waived its state court motion to transfer venue because it was filed after the Council had removed the case to federal court and filed a motion to transfer and answer in that court.[48] The court of appeals rejected Toliver's argument, holding that a party does not waive its motion to transfer venue by filing a notice of removal, motion to transfer venue, and answer in federal court.[49] Rather, because the state court motion to transfer venue was the Council's first pleading filed in state court, it comported with the due order of pleadings requirement,[50] and no waiver had occurred.[51]

IV. PARTIES

In *Ray Malooly Trust v. Juhl*,[52] the Texas Supreme Court held that a trust could not be sued without including the trustee as a party. But the supreme court ultimately found that the trust had waived the point at trial. On appeal, Juhl primarily argued that the Code Construction Act permitted suing a trust without including the trustee.[53] The supreme court rejected the argument that the Code Construction Act permitted a trust to be sued as a separate entity because it specifies that a "person" includes a "trust."[54] First, the supreme court held that the Code Construction Act only addresses the construction of codes and not the capac-

48. 198 S.W.3d 444, 446 (Tex. App.—Dallas 2006, no pet.).

49. *Id.* at 447-48.

50. *See* TEX. R. CIV. P. 86(1):

> 1. *Time to File.* An objection to improper venue is waived if not made by written motion filed prior to or concurrently with any other plea, pleading or motion except a special appearance motion provided for in Rule 120a. A written consent of the parties to transfer the case to another county may be filed with the clerk of the court at any time. A motion to transfer venue because an impartial trial cannot be had in the county where the action is pending is governed by the provisions of Rule 257.

51. *Toliver*, 198 S.W.3d at 447-48.

52. 186 S.W.3d 568, 570-71 (Tex. 2006).

53. *Id.* at 571.

54. TEX. GOV'T CODE ANN. § 311.005(2) (Vernon 2005).

ity to be sued.[55] Second, the supreme court explained that the definitions in the Code Construction Act only apply if other statutes do not require a different definition.[56] In this case, the Texas Trust Code defines a "trust" as a relationship rather than a legal entity and provides that only trustees "may compromise, contest, arbitrate, or settle claims" against a trust.[57]

The supreme court also rejected the argument that the Texas Trust Code allowed trusts to be sued without including the trustee as a party because it permits, but does not require, a plaintiff to sue the trustee in his representative capacity.[58] The supreme court held that the use of the word "may" only meant that claimants had permission to sue the trustee, but did not authorize suits solely against the trust.[59] Despite all of the foregoing, the supreme court entered judgment against the trust because it found that the trust had waived its capacity argument by not filing a verified answer until the day of trial.[60]

In *In re Lumberman's Mutual Casualty Co.*,[61] the Texas Supreme Court had the rare opportunity to consider when a party can intervene pursuant to the "virtual-representation" doctrine. Initially, the supreme court reiterated that "[g]enerally only parties of record may appeal a trial court's judgment."[62] In some rare circumstances, however, a person or entity, who was not named as a party in the trial court, "may pursue an appeal in order to vindicate important rights."[63] The supreme court further explained that under the virtual-representation doctrine,

> an unnamed litigant is deemed to be a party if it will be bound by the judgment, its privity of interest appears from the record, and there is an identity of interest between the litigant and the named party to the judgment.[64] Because one who is virtually represented is already deemed to be a party, theoretically it "is not required to intervene in order to appeal."[65] However, as a practical matter, one who seeks to invoke the virtual-representation doctrine to assert an interest on appeal must take some timely, appropriate action to attain name-party status.[66]

In this case, the insurer had posted a twenty-nine million-dollar bond to supersede an adverse judgment against its insured and later sought to

55. By way of example, the supreme court noted that the Code Construction Act includes "estates" as statutory "persons," but an estate is not a legal entity and may not properly sue or be sued. *Juhl*, 186 S.W.3d at 570.

56. *Id.* at 570.

57. TEX. PROP. CODE ANN. §§ 111.004(4), 113.019 (Vernon 2003).

58. *See* TEX. PROP. CODE ANN. § 114.084(a) (Vernon 2003) ("the plaintiff may sue the trustee in his representative capacity, and a judgment rendered in favor of the plaintiff is collectable by execution against the trust property").

59. *Juhl*, 186 S.W.3d at 570-711.

60. *Id.* at 571.

61. 184 S.W.3d 718, 722 (Tex. 2006).

62. *Id.* at 723.

63. *Id.*

64. *Id.* at 722.

65. *Id.*

66. *Id.*

intervene in the insured's appeal after the appellate briefing had been completed. The insurer sought to intervene to assert a potentially dispositive argument that its insured had abandoned in order to settle certain uninsured claims in another pending lawsuit. The court of appeals denied the motion to intervene, and the insurer petitioned the supreme court for mandamus relief.[67] As a threshold matter, the supreme court determined that the insurer had met the requirements necessary to assert the virtual-representation doctrine.[68]

First, the supreme court rejected the argument that the "identity of interest" requirement was not met because the insured had waived an argument that its insurer wanted to bring forward on appeal.[69] Rather, the supreme court found that a party seeking to invoke the virtual-representation doctrine to appeal will often, if not always, have concluded that its interests have diverged to some extent from the party that formerly represented its interests.[70] Here, the supreme court held that the insurer and insured's interests had not materially diverged because they both still had the same ultimate aim of reversing the underlying judgment.[71]

The supreme court also rejected the argument that the virtual-representation doctrine should not apply because the insurer could attempt to recover on its supersedeas bond from the insured under the noncooperation provision of its insurance policy.[72] Rather, the supreme court found that the insurer's immediate and binding obligation to pay the underlying judgment was sufficient to invoke the doctrine.[73]

The supreme court then considered the court of appeals' determination that the application of the virtual-representation doctrine would be inequitable because: (1) the insurer did not attempt to invoke the doctrine until the trial court's judgment became final; (2) the insurer did not attempt to invoke the doctrine until all the briefing in the court of appeals had been completed; and (3) if the insurer was permitted to appeal in this case, then all insurers would be entitled to intervene on appeal, potentially conflicting with the insured's appellate strategy or raising issues contrary to their insured's interests.[74]

First, the supreme court held that the virtual-representation doctrine could be used for post-judgment interventions.[75] Specifically, as long as the need to invoke those rights occurred after the judgment, the failure to raise them before judgment was not dispositive.[76] Similarly, the supreme court also found that attempting to intervene after the appellate briefing was completed was not fatal to the insurer's attempt to invoke the doc-

67. *Id.* at 720.
68. *Id.* at 729.
69. *Id.* at 724.
70. *Id.*
71. *Id.* at 724-25.
72. *Id.* at 725.
73. *Id.*
74. *Id.* at 723.
75. *Id.* at 726.
76. *Id.*

trine.[77] The supreme court first noted that it had never set forth any standard for the timeliness of attempting to invoke the doctrine and accordingly, adopted the following factors that had been recently set forth by the Fifth Circuit:

> (1) the length of time during which the would-be intervenor should have known of its interest in the case before attempting to intervene; (2) the extent of prejudice that the existing parties may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it actually knew or should have known of its interest in the case; (3) the extent of prejudice the would-be intervenor would suffer if intervention is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.[78] After a lengthy consideration of these factors, the supreme court concluded that, under the facts of the present case, the insurer's intervention was timely.[79]

Finally, the supreme court rejected the public policy arguments regarding the potential conflicts between the insurer and insured, noting that the same concerns would exist if the insurer had intervened at the trial court level, which the parties agreed would have been permitted.[80] Nonetheless, the supreme court was careful to note that the application of the virtual-representation doctrine should be decided on a case-by-case basis.[81]

V. PLEADINGS

During the Survey period, several cases addressed a party's right to amend its pleadings under Rule 63.[82] In *Dunnagan v. Watson*, the Fort Worth Court of Appeals considered whether Watson's second amended petition, which was filed seven days before the trial setting and added a new cause of action for judicial dissolution of a limited partnership, operated to surprise and prejudice the opposing party. At the time of the proposed amendment, Watson and Dunnagan had asserted claims against each other for breach of fiduciary duty. The trial court allowed Watson's amendment, and Dunnagan appealed.[83]

The court of appeals considered the following factors in determining whether the proposed amendment constituted surprise:

> (1) how long the suit had been on file before the amendment was filed; (2) how soon before trial the amendment was made; (3) whether the amendment presented a substantially new claim or

77. *Id.* at 727.
78. *Id.* at 726 (citing Ross v. Marshall, 426 F.3d 745, 754 (5th Cir. 2005)).
79. *Lumberman's*, 184 S.W.3d at 726-28.
80. *Id.* at 728-29.
81. *Id.* at 728-29.
82. TEX. R. CIV. P. 63 provides that "a party may amend its pleadings at any time unless the amendment will operate as a surprise; however, any pleadings offered for filing within seven days of trial shall be filed only after leave of court is obtained."
83. 204 S.W.3d 30, 34 & 37 (Tex. App.—Fort Worth 2006, pet. denied).

> cause of action; (4) whether the new cause of action was based on recently discovered matters; and (5) whether the resisting party alleged surprise and that he was not prepared to try the new claim.[84]

In this instance, the court held that the third and fifth factors were dispositive, and the trial court had correctly allowed the amendment.[85]

First, the court found that when analyzing whether the amendment presented a substantially new claim or cause of action, the test was not whether any new claim was added but rather whether the new cause of action constituted a "wholesale revision" of the suit.[86] Under these circumstances, since no additional damages were sought by the amendment and the fiduciary duty claims had previously been pled, the court found that the amended pleading did not constitute a "wholesale revision" of the suit.[87] Second, the court held that, although Dunnagan had alleged surprise, he had not claimed that he was not prepared to try the new cause of action.[88] The court found that failure to make this allegation was fatal to his appeal.[89]

In *Zeecon Wireless Internet, LLC v. McEwen*,[90] the Austin Court of Appeals held that the trial court had improperly granted a motion to strike an amended answer, which was filed seven days before trial, and asserted, for the first time, a statute-of-frauds defense. The court held that the amended answer did not constitute surprise or prejudice because, although the party had not previously asserted that defense in its answer, it had disclosed the defense in its responses to request for disclosures approximately five months before the trial.[91]

In *Roskey v. Continental Casualty Co.*, Roskey alleged she had suffered an occupational injury. In response, the defendants filed a plea to the jurisdiction on May 15, 2003, alleging that primary jurisdiction over the disputed medical benefits was vested in the Texas Worker's Compensation Commission and that Roskey had failed to exhaust her administrative remedies. The defendants did not, however, initially set the plea for hearing. On June 22, 2004, the trial court entered an agreed scheduling order, which provided that amended pleadings were to be filed no later than October 7, 2004. The plea to the jurisdiction was finally argued on October 13, 2004, at which point Roskey, for the first time, made an oral request to amend her pleadings to demonstrate jurisdiction.[92] The trial court denied Roskey's motion to amend, and the Dallas Court of Appeals affirmed, holding that, although a party should generally be permitted to amend to address jurisdictional issues, Roskey had failed to take advan-

84. *Id.* at 38 (citing Stevenson v. Koutzarov, 795 S.W.2d 313, 321 (Tex. App.—Houston [1st Dist.] 1990, writ denied)).
85. *Dunnagan*, 204 S.W.3d at 38-39.
86. *Id.* at 39.
87. *Id.*
88. *Id.*
89. *Id.*
90. 212 S.W.3d 764 (Tex. App.—Austin 2006, no pet.).
91. *Id.* at 767.
92. 190 S.W.3d 875 (Tex. App.—Dallas 2006, pet. denied).

tage of the opportunity by waiting approximately seventeen months after the plea was filed to request leave to amend.[93]

VI. DISCOVERY

In re Graco Children's Products, Inc. was a vehicle rollover case involving an infant car seat manufactured by Graco. Two weeks before trial, the "Consumer Products Safety Commission announced a provisional settlement with Graco imposing a $4 million civil penalty" for failure to report defects in more than a dozen products—including high chairs, swings, and strollers—which did not include car seats. Plaintiffs' attorneys immediately requested a deposition and documents regarding the subject of this settlement, and Graco objected on relevance and burdensomeness grounds. The trial court allowed the requested discovery, and the court of appeals denied mandamus relief.[94] The Texas Supreme Court held, however, that there was no connection between the alleged defect in the car seat and the discovery sought.[95] The supreme court rejected the plaintiffs' arguments that the discovery was needed to show that Graco did not test any of its products for rollovers (which Graco conceded as to the car seat) and to refute Graco's defense that it works in partnership with the government agencies, during which time it had never heard of children slipping from a five-point car seat harness in a rollover.[96] Although the supreme court acknowledged that a corporate defendant's state of mind about a particular product may be discoverable, the court refused to allow that inquiry to extend to every product the defendant ever manufactured.[97]

Depositions were the subject of an unusual number of appellate decisions during the Survey period. In *In re Toyota Motor Corp.*, a personal injury case arising out of a head-on collision, Toyota sought to depose two minor children who were in the vehicle, one of whom was a plaintiff and the other a former plaintiff in the case. Toyota sought testimony regarding the position of the children in the car, including a third child who was severely injured, and whether they were wearing safety belts. The plaintiffs objected, relying on a psychiatrist who examined the children and testified that, although they both had memories of the collision, they suffered from post-traumatic stress disorder and would be traumatized if they were required to give an oral deposition regarding the collision. The trial court ordered that the depositions be taken only by written questions, without Toyota's attorney present, and the Waco Court of Appeals denied Toyota's writ of mandamus.[98] The court of appeals dismissed Toyota's argument that this procedure was "indistinguishable from writ-

93. *Id.* at 881.
94. 210 S.W.3d 598 (Tex. 2006).
95. *Id.* at 601.
96. *Id.*
97. *Id.*
98. 191 S.W.3d 498, 500-01 (Tex. App.—Waco 2006, orig. proceeding [mand. denied]).

ten interrogatories," noting that attorneys may not answer written deposition questions for clients, and that a court reporter, not plaintiffs' counsel, would record the children's answers to Toyota's questions.[99]

Oral depositions were also precluded by the Beaumont Court of Appeals in *In re Exxon Corp.*[100] and *In re Burroughs.*[101] In *Exxon*, the court of appeals concluded that the trial court abused its discretion in ordering the deposition of a corporate representative to testify regarding the efforts undertaken to search for documents sought in requests for production that Exxon had previously responded to.[102] Surveying the procedural history of the case, the court of appeals held that the plaintiffs had not produced any evidence of discovery abuse that would justify an investigation into Exxon's compliance with its production obligations but were instead engaged in a fishing expedition into matters that were either privileged or irrelevant.[103] In *Burroughs*, the court of appeals extended its previous holding that compelling a deposition of an opposing party's attorney of record is generally inappropriate, holding that the deposition of a non-party witness's attorney should not be allowed either.[104]

The availability of pre-suit depositions under Rule 202[105] was the subject of several cases decided during the Survey period. *In re Allan*[106] and *In re Raja*[107] reached different conclusions on whether a Rule 202 deposition is allowed to investigate a medical-liability claim governed by Chapter 74 of the Civil Practice and Remedies Code,[108] with the Tyler Court of Appeals allowing the deposition in *Allan*,[109] and the Eastland Court of Appeals refusing to do so in *Raja*.[110] In *In re Hewlett-Packard*,[111] the Austin Court of Appeals held that Dell could not take Rule 202 depositions of its former employees, now employed at Hewlett-Packard, in order to investigate a potential claim that the employees misappropriated Dell's trade secrets, where the depositions themselves would likely reveal Hewlett-Packard's trade secrets and confidential information.[112]

Since the new discovery rules were adopted in 1999, several courts of appeals have held that Rule 192.3(e)(5),[113] which specifically allows for discovery of the bias of an expert witness, does not make an expert's fi-

99. *Id.* at 502-03.
100. 208 S.W.3d 70, 71 (Tex. App.—Beaumont 2006, orig. proceeding [mand. granted]).
101. 203 S.W.3d 858, 858-59 (Tex. App.—Beaumont 2006, orig. proceeding [mand. granted]).
102. *Exxon*, 208 S.W. 3d at 76-77.
103. *Id.* at 76-77.
104. *Burroughs*, 203 S.W.3d at 860.
105. TEX. R. CIV. P. 202.1.
106. 191 S.W.3d 483 (Tex. App.—Tyler 2006, orig. proceeding [mand. denied]).
107. 216 S.W.3d 404, 409 (Tex. App.—Eastland 2006, orig. proceeding [mand. granted]).
108. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001 (Vernon 2005).
109. *Allan*, 191 S.W.3d at 488-89.
110. *Raja*, 216 S.W.3d at 409. .
111. 212 S.W.3d 356 (Tex. App.—Austin 2006, orig. proceeding [mand. denied]).
112. *Id.* at 361-62.
113. TEX. R. CIV. P. 192.3(e)(5) (Vernon 2006).

nancial records discoverable for the sole purpose of showing bias.[114] In *In re Plains Marketing, L.P.*, the Beaumont Court of Appeals followed a similar line of reasoning in holding that it was error for the trial court to compel an expert witness to produce all of the reports he had prepared as a medical expert for the last ten years.[115] The court noted that the expert had already testified that he derived significant income from medical consulting work for litigation defense firms, and that he had worked for relator's counsel's firm on fourteen prior occasions.[116] Because there was no suggestion as to what other information regarding bias would be revealed by the expert's prior expert reports and there were legitimate concerns about the confidentiality of third parties' medical information, the court held it was an abuse of discretion for the trial court to order the reports produced.[117]

In re BP Products North America Inc. arose out of the 2005 explosion at BP's refinery in Texas City. Several days after the incident, BP reported that it had established a $700 million reserve to resolve its estimated liabilities for the resulting personal injuries and fatalities. The plaintiffs in this case sought discovery of the documents used by BP's in-house counsel to compute this reserve figure.[118] Based on the attorney's affidavit, however, the First District Court of Appeals concluded that the requested information was protected by the attorney-client and work-product privileges.[119] The court also held, in what it believed to be an issue of first impression in Texas, that BP had not waived any privileges with respect to the supporting documentation by virtue of having reported the reserve figure itself to the SEC and to the media.[120]

Texas courts also addressed the procedure for claiming privilege during the Survey period. In *In re Crestcare Nursing & Rehabilitation Center*, a nursing home objected to producing any personnel files of its employees on "privacy" grounds.[121] The Tyler Court of Appeals concluded that, while some information in personnel files might come within a protected zone of privacy, the party asserting such a privacy right must present particularized evidence regarding what information should be shielded and why.[122] Because the nursing home failed to meet this evidentiary standard, the court of appeals held that the trial court did not err in ordering the files produced without conducting an in-camera inspection.[123] In *In re Strategic Impact Corp.*, on the other hand, the Fourteenth District

114. *See, e.g., In re* Makris, 217 S.W.3d 521, 523-24 (Tex. App.—San Antonio 2006, orig. proceeding [mand. granted]).
115. 195 S.W.3d 780, 784 (Tex. App.—Beaumont 2006, orig. proceeding [mand. granted]).
116. *Id.* at 781.
117. *Id.* at 782-84.
118. No. 01-06-00679-CV, 2006 WL 2973037, at *1 (Tex. App.—Houston [1st Dist.] Oct. 13, 2006, orig. proceeding [mand. granted]).
119. *Id.* at *6.
120. *Id.* at *8-9.
121. 222 S.W.3d 68, 70 (Tex. App.—Tyler 2006, orig. proceeding [mand. denied]).
122. *Id.* at 74.
123. *Id.* at 74-75.

Court of Appeals held that it was an abuse of discretion for the trial judge to refuse to review allegedly privileged documents in camera based on the fact that the documents, which had come into the relators' possession anonymously, had been stolen by an unknown party.[124]

Once again, the sanction of exclusion of witnesses or evidence based on a failure to supplement discovery was an oft-litigated subject during the Survey period. In *Harris County v. Inter Nos, Ltd.*, the First District Court of Appeals affirmed a trial court's exclusion of any evidence regarding a damage theory in a condemnation case, where the County had failed to supplement its response to the landowner's request for disclosure.[125] Moreover, the court of appeals also rejected the County's argument that it was nevertheless entitled to cross-examine the landowner's expert with respect to the damage theory that it was precluded from offering through its own witnesses' direct testimony.[126] Conversely, where the plaintiff cross-designated her opponents' expert witness in discovery, albeit arguably untimely, the Fourteenth District Court of Appeals held in *Hooper v. Chittaluru* that the trial court erred in preventing the plaintiff from calling the opponents' expert to testify at trial.[127]

Lopez v. La Madeleine of Texas, Inc. was a personal injury case in which, as the Dallas Court of Appeals described it, the trial court was "presented . . . with a dilemma."[128] The defendant used a surveillance videotape and photos at trial to show that the plaintiff had apparently testified falsely about the extent of his injuries. However, defendant's counsel had intentionally failed to disclose the existence of the videotape and photos during discovery in response to a specific request for the same.[129] Thus, the case presented the question of whether a party may "impeach a witness and refute possibly perjured testimony by introducing evidence that was withheld from disclosure in violation of the rules regarding discovery."[130] The court of appeals answered this question in the negative, reasoning that the rules do not allow a party to "impugn the sanctity of the judicial process by violating the rules of discovery" in order to defend the sanctity of that same process from the opposing party's allegedly false testimony.[131]

Finally, two cases during the Survey period addressed whether an expert witness's modification or refinement of his opinion must be excluded where a party fails to timely supplement its discovery responses. In *Vela v. Wagner & Brown, Ltd.*,[132] the San Antonio Court of Appeals affirmed the trial court's decision to allow a defense expert's testimony on valua-

124. 214 S.W.3d 484, 488-89 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding [mand. granted as to first cause; mand. denied as to second cause]).
125. 199 S.W.3d 363, 368 (Tex. App.—Houston [1st Dist.] 2006, no pet.).
126. *Id.* at 368-69.
127. 222 S.W.3d 103, 108-11 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).
128. 200 S.W.3d 854, 856 (Tex. App.—Dallas 2006, no pet.).
129. *Id.*
130. *Id.*
131. *Id.* at 861.
132. 203 S.W.3d 37, 52, 53-54 (Tex. App.—San Antonio 2006, no pet.).

tion, over plaintiffs' objection that the expert was testifying to a new damages model or new critique of plaintiffs' expert's damages model. The court of appeals noted that the defendant's expert did not materially change his opinion but, instead, merely expanded on the plaintiff's expert's model by performing a mathematical calculation using factors that were already in evidence.[133] In *State v. Target Corp.*,[134] the Waco Court of Appeals held that the trial court erred in excluding the State's expert testimony on damages. Even assuming the State's supplementation of its discovery responses, in which it provided one page of the expert's calculations and the identity of consultants on whom he relied, was untimely, the court of appeals noted that the expert had been timely designated and deposed and, therefore, Target was not unfairly surprised or prejudiced by the late supplementation.[135]

VII. SUMMARY JUDGMENT

Texas courts, including the Texas Supreme Court, continued to struggle with the question of admissible expert testimony in the context of "no-evidence" motions for summary judgment during the Survey period. In *LMB, Ltd. v. Moreno*[136] and *Mack Trucks, Inc. v. Tamez*,[137] the Texas Supreme Court reversed the lower appellate courts' and affirmed the trial courts' decisions granting no-evidence summary judgments. In both cases, the supreme court disregarded the plaintiffs' expert's affidavits and reports because they failed to meet the required degree of reliability under *Robinson*.[138] Thus, the supreme court held there was no evidence proving liability.[139]

In *Rich v. Mulupuri*,[140] the Dallas Court of Appeals affirmed a no-evidence summary judgment in a medical malpractice suit where the plaintiff had failed to timely designate its medical experts. The trial court had issued a scheduling order that required the designation of the plaintiff's experts by a certain date. Although the plaintiff had previously disclosed two non-treating experts in response to requests for disclosure, the plaintiff had not provided any of the other requested expert information. Two weeks after the expert-designation deadline, the defendants filed their no-evidence summary judgment motion based, in large part, upon the plaintiff's failure to timely designate any expert witnesses under the trial court's scheduling order. The plaintiff's summary judgment response then included an expert report, which the defendants moved to strike as

133. *Id.* at 53-54.
134. 194 S.W.3d 46, 48 (Tex. App.—Waco 2006, no pet.).
135. *Id.* at 48, 50.
136. 201 S.W.3d 686 (Tex. 2006).
137. 206 S.W.3d 572 (Tex. 2006).
138. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995).
139. *LMB*, 201 S.W.3d at 689; *Tamez*, 206 S.W.3d at 584; *see also* Gonzales v. Shing Wai Brass & Metal Wares Factory, Ltd., 190 S.W.3d 742 (Tex. App.—San Antonio 2005, no pet.).
140. 205 S.W.3d 1 (Tex. App.—Dallas 2006, pet. filed).

untimely under the trial court's scheduling order. In affirming the trial court's decision to strike the expert report and grant the summary judgment motion, the court of appeals noted that the plaintiff's responses to the summary judgment motion and motion to strike failed to address whether the discovery rules could be used to preclude the use of late-designated expert testimony as summary judgment evidence. Because the plaintiff failed to preserve this point on appeal, the court held that it was waived.[141]

The preservation of error regarding evidentiary objections in the summary judgment context continued to plague the appellate courts during the Survey period. In *Hogan v. J. Higgins Trucking, Inc.*,[142] the Dallas Court of Appeals noted a split of authority among the courts of appeals regarding whether a ruling on evidentiary objections must be reduced to writing or can be implied from the record. In *Hogan*, although the defendants objected to an affidavit submitted in a response to their summary judgment motion as a "sham affidavit" that directly contradicted the affiant's prior deposition testimony, the record did not show that the trial court expressly sustained the defendants' objection. The court of appeals refused to imply from the record that the trial court had sustained the defendants' objection and held that "the better practice is for the trial court to disclose, in writing, its ruling on all evidence before it enters the order granting or denying summary judgment."[143] The court went on to note that, because the defendants' objection was one of "form" (as opposed to "substance"), it could not be raised for the first time on appeal.[144]

In *Delfino v. Perry Homes*,[145] involving defects in the sale a of residential home, the First District Court of Appeals likewise criticized the Fort Worth Court of Appeals' holdings in *Blum v. Julian*[146] and *Frazier v. Yu*[147] that a ruling on objections to summary judgment evidence may be implied from the record and also concluded that the better practice is to obtain express rulings on those objections.[148] Nonetheless, in this case, because the plaintiffs failed to prove there was any fact question regarding the damages they claimed to have suffered, the court of appeals affirmed the summary judgment.[149]

Taking the opposite view, the Fort Worth Court of Appeals held in *Residential Dynamics, LLC v. Loveless*[150] that rulings on evidentiary objections in summary judgment practice are properly preserved if they are

141. *Id.* at 4.
142. 197 S.W.3d 879 (Tex. App.—Dallas 2006, no pet.).
143. *Id.* at 883 (quoting Breadnax v. Kroger Texas, L.P., No. 05-04-01306-CV, 2005 WL 2031782 (Tex. App.—Dallas 2005, no pet.) (mem. op)). .
144. *Id.*
145. 223 S.W.3d 32 (Tex. App.—Houston [1st Dist.] 2006, no pet.).
146. 977 S.W.2d 819, 823-24 (Tex. App.—Fort Worth 1998, no pet.).
147. 987 S.W.2d 607, 610 (Tex. App.—Fort Worth 1999, pet. denied).
148. *Delfino*, 223 S.W.3d at 34-35.
149. *Id.*
150. 186 S.W.3d 192 (Tex. App.—Fort Worth 2006, no pet.).

either express or implied from the record. Based upon the record before it, the court of appeals held that the trial court's judgment implicitly overruled the objections to the respondent's affidavit when it granted the movant's no-evidence summary judgment motion.[151] The court went on to reject an argument that the affidavit's jurat was defective where the affidavit contained an acknowledgement and recited that the affiant, "duly sworn upon his oath, deposed and stated the information that followed."[152]

In *Heil Co. v. Polar Corp.*,[153] the Fort Worth Court of Appeals affirmed a summary judgment in part and reversed and remanded in part where one of the parties did not expressly move for summary judgment, but the trial court's summary judgment order included that party as well. Noting that a trial court may not render summary judgment in favor of a party who has not moved for its entry, the court of appeals reversed the summary judgment as to that defendant.[154]

In *Bean v. Reynolds Realty Group*,[155] the Texarkana Court of Appeals reversed a summary judgment where the defendant's motion failed to properly articulate any grounds for summary judgment. Rather, the defendant filed a proforma motion simply alleging that "there is no evidence to support the plaintiff's causes of action and allegations." The court of appeals held that such a statement was an insufficiently specific ground for a no-evidence motion for summary judgment as a matter of law.[156]

Finally, in *Reyes v. Credit Based Asset Servicing & Securitization*,[157] the San Antonio Court of Appeals affirmed a summary judgment order where the movant amended its pleading after it filed its summary judgment motion. Although the non-movant timely objected to the movant's pleading amendment, which was filed fewer than twenty-one but more than seven days before the summary judgment hearing, the non-movant failed to show any type of unfair surprise as required under Rule 63.[158] The court of appeals therefore held that it was not fundamentally unfair for the movant to amend its original petition before the summary judgment hearing.[159]

VIII. DISMISSAL

The Texas Supreme Court in *Guest v. Dixon*[160] held that Rule 165a(3)'s[161] requirement that a motion to reinstate be verified was satis-

151. *Id.* at 195.
152. *Id.* at 197.
153. 191 S.W.3d 805 (Tex. App.—Fort Worth 2006, pet. denied).
154. *Id.* at 818-19.
155. 192 S.W.3d 856 (Tex. App.—Texarkana 2006, no pet.).
156. *Id.* at 859-60.
157. 190 S.W.3d 736 (Tex. App.—San Antonio 2005, no pet.).
158. TEX. R. CIV. P. 63.
159. *Reyes*, 190 S.W.3d at 739.
160. 195 S.W.3d 687 (Tex. 2006).
161. TEX. R. CIV. P. 165a(3).

fied when the motion was supported by the affidavit of an attorney who worked on the case, even in the absence of a proper verification attached to the motion itself.[162] Accordingly, the supreme court reversed and remanded the case for further review in light of its holding.[163]

In *University of Texas Medical Branch at Galveston v. Estate of Blackman*,[164] the Texas Supreme Court held that a nonsuit under Rule 162[165] was still effective when it was filed during the pendency of the petitioner's interlocutory appeal, because the filing of the nonsuit extinguished any case or controversy and thus deprived the appellate court of jurisdiction over the appeal.[166] Similarly, in *Regent Care Center v. Hargrave*,[167] the San Antonio Court of Appeals affirmed the dismissal of an action based on a nonsuit taken during an interlocutory appeal, because at the time the nonsuit was filed, the appellant did not have any pending claim for relief that might have otherwise precluded the entry of the nonsuit.[168]

In *Bazan v. Canales*,[169] the Corpus Christi-Edinburg Court of Appeals held that the trial court erred in dismissing a case for want of prosecution when it had previously entered a default judgment in favor of the plaintiff, even though that default judgment had never been reduced to writing.[170] Although normally four steps must occur for the entry of a final judgment ((1) the announcement of the judgment, either orally in open court or by some memorandum filed with the clerk; (2) the notation on the docket; (3) the signing of the judgment; and (4) the entry of the judgment in the court's minutes), the trial court's oral rendition of a default judgment was nonetheless deemed to be final because it disposed of all parties and issues. At that point, even though the default judgment had only been rendered orally, the appellate court held, "there is nothing left to be done except the memorialization of the judgment."[171]

The Waco Court of Appeals in *Oscar Renda Contracting, Inc. v. H & S Supply Co.*[172] determined when a judgment entered by prior appellate court based upon a dismissal "becomes final" for limitation purposes under section 16.064 of the Texas Civil Practices and Remedies Code.[173]

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162. *Guest*, 195 S.W.3d at 689. *See also* Andrews v. Stanton, 198 S.W.3d 4, 7-9 (Tex. App.—El Paso 2006, no pet.).

163. *See* Guest v. Dixon, 223 S.W.3d 531 (Tex. App.—Amarillo Sept. 5, 2006, no pet.) (affirming the dismissal for want of prosecution on remand because the case had been on file more than fifteen months and had not been diligently pursued during that time).

164. 195 S.W.3d 98 (Tex. 2006).

165. TEX. R. CIV. P. 162.

166. *Blackmon*, 195 S.W.3d at 100. The supreme court noted, however, that the trial court could still address the opposing party's request for costs before signing an order of dismissal. *Id.* at 100-01.

167. 202 S.W.3d 807 (Tex. App.–San Antonio 2006, pet. filed).

168. *Id.* at 810.

169. 200 S.W.3d 844 (Tex. App.–Corpus Christi 2006, no pet.).

170. *Id.* at 848.

171. *Id.*

172. 195 S.W.3d 772 (Tex. App.–Waco 2006, pet. denied).

173. TEX. CIV. PRAC. & REM. CODE § 16.064 (Vernon 1997).

In this construction dispute, the jury found in favor of both parties on their respective claims against the other, and the trial court entered a judgment in favor of the appellant for the net difference between the amounts awarded by the jury. The Fort Worth Court of Appeals (which heard the first appeal) reversed the judgment in favor of the appellant, since the amount awarded on its counterclaims exceeded the jurisdictional limits of the county court in which the action had been filed, and rendered a judgment of dismissal for want of jurisdiction. Within sixty-eight days of that opinion, the appellant filed a second action in district court. The appellee then successfully moved for summary judgment based on limitations. For purposes of calculating limitations under section 16.064, the Waco Court of Appeals concluded that the Fort Worth Court of Appeals' judgment of dismissal became final when it disposed of all issues and all parties in the case, and that court's power to alter the judgment, had ended. That occurred when the Fort Worth court's plenary power over the judgment of dismissal expired under Rule 19.1(a).[174] Accordingly, the Waco Court of Appeals held that the appellant's newly filed claims were not barred by limitations, as they were filed only eight days after the prior appellate judgment of dismissal became final.[175]

Finally, in *WMC Mortgage Corp. v. Starkey*,[176] the Dallas Court of Appeals held that the trial court properly dismissed the appellant's claims for want of prosecution under its inherent authority. The appellant originally sued in Tarrant County. Following an exchange of three Rule 11[177] letter agreements between the parties that extended the defendant's answer deadline, the suit was eventually transferred from Tarrant to Dallas County. Nothing further happened for a substantial period of time. Subsequently, the trial court issued a notice advising that the case would be dismissed for want of prosecution on a specified date. In response, the appellant's counsel contacted the court administrator to request a trial setting and was told that the case would be taken off the dismissal docket and set for jury trial. But, four days later, the trial court signed an order dismissing the case for want of prosecution, even though it had already been set on the jury docket after counsel's telephone conversation with the administrator. The appellant then filed its verified motion to reinstate the case, contending that its failure to appear was not intentional nor the result of conscious indifference but rather was the result of the court administrator's assurance that the case had been removed from the dismissal docket and was set for jury trial. Nevertheless, the court of appeals affirmed the trial court's dismissal of the action for want of prosecution under the trial court's inherent authority because nearly three years had passed since the suit had been filed, and very little activity had occurred in the case other than the filing of the three Rule 11 agreements

174. TEX. R. APP. P. 19.1(a).
175. *Oscar Renda*, 195 S.W.3d at 776-77.
176. 200 S.W.3d 749 (Tex. App.–Dallas 2006, pet. denied).
177. TEX. R. CIV. P. 11.

and the transfer of the case from Tarrant to Dallas County.[178]

IX. JURY PRACTICE

In *Hyundai Motor Co. v. Vasquez*, the Texas Supreme Court addressed the propriety of questions from counsel during voir dire that preview relevant evidence and inquire of prospective jurors whether that evidence would be outcome determinative.[179] In this automobile accident case, a four-year-old who was seated, unbelted, in the front seat of her aunt's Hyundai died in a low-speed collision after the passenger-side air bag deployed. The trial judge dismissed the original two jury panels after numerous prospective jurors stated during voir dire that the absence of a seat belt on the child would determine their verdict. By the time the trial court empaneled the third jury panel, it instructed the attorneys that only general questions about seat belting and the jurors' personal habits about wearing seatbelts could be asked. The trial court stated it would not allow the attorneys to specifically disclose that the child was not belted at the time of the accident. Following a three-week trial, the jury returned a verdict in favor of Hyundai, from which the plaintiffs appealed.

The supreme court began by noting that trial courts should generally allow broad latitude to counsel in voir dire to discover bias or prejudice and to allow them to intelligently exercise peremptory challenges. The supreme court explained, however, that questions about the juror's opinions regarding the facts of the case do not go to the issue of a disqualifying bias or prejudice and are improper. Similarly, excluding jurors who reveal whether they would give specific evidence great or little weight is aimed at guessing the likely verdict of the jurors, not seating a fair jury. Thus, the supreme court held that if the voir dire includes a preview of the evidence, a trial court does not abuse its discretion in refusing to allow questions that seek to determine the weight that prospective jurors will give (or not give) to a particular fact or set of relevant facts.[180] Moreover, if the trial judge permits questions about the weight jurors would give relevant case facts, then the jurors' responses to such questions are not per se disqualifying because "while such responses reveal a fact-specific opinion, one cannot conclude they reveal an improper subject-matter bias."[181]

The Texas Supreme Court in *In re General Electric Capital Corp.*[182] held that a party who did not receive notice of a jury demand did not waive its contractual right to strike the jury demand by failing to object to the case's placement on the jury docket at the time the demand was made.[183] In this contract dispute, the agreement between the parties con-

178. *Starkey*, 200 S.W.3d at 752-53.
179. 189 S.W.3d 743 (Tex. 2006).
180. *Id.* at 753.
181. *Id.* at 743.
182. 203 S.W.3d 314 (Tex. 2006).
183. *Id.* at 316.

tained a jury-waiver provision. The plaintiff subsequently filed a jury demand and paid the jury fee, but the defendant claimed it did not receive notice of that filing. Subsequently, the defendant learned of the jury demand and sought to strike it, which the trial court denied. Finding that the jury-waiver provision was valid and enforceable and had not been waived, the supreme court held that the trial court abused its discretion in failing to enforce that contractual provision.[184]

In *Perez v. Kleinert*,[185] the Corpus Christi-Edinburg Court of Appeals held that it was reversible error for the trial court to allow an insurer's attorney to participate at trial under false pretenses. Specifically, Michael Perez was a passenger in Maria Garza's automobile when it was involved in an automobile accident. State Farm was Garza's insurer. Perez subsequently joined State Farm to the suit, seeking underinsured or uninsured motorists benefits. After the relationship between State Farm and Garza became antagonistic, State Farm sued Garza in a separate declaratory judgment action and obtained a judgment that it had no duty to defend or indemnify Garza for the accident in question. Nonetheless, at the trial of the underlying accident case, State Farm's attorney appeared and addressed the jury as if he were Garza's attorney, without revealing that he was actually counsel for State Farm and not Garza. The court of appeals held that such conduct represented a fatal conflict of interest and was reversible error.[186]

X. JURY CHARGE

In *Shupe v. Lingafelter*,[187] the Texas Supreme Court reiterated that the omission of an instruction is reversible error only if it caused the rendition of an improper judgment. *Shupe* arose out of a multi-car accident, where the plaintiffs sued a truck driver, among other parties, for negligence and his employer for negligent entrustment. Instead of requesting a separate jury question on negligent entrustment, however, the plaintiffs requested the following instruction:

> As to [the employer], "negligence" means entrusting a vehicle to an incompetent or reckless driver if the entrustor knew or should have known that the driver was incompetent or reckless. Such negligence is a proximate cause of a collision if the negligence of the driver to whom the vehicle was entrusted is a proximate cause of the collision.[188]

The trial court refused to submit the requested instruction and, instead, provided definitions of negligence, ordinary care, proximate cause, sole proximate cause, and sudden emergency. After the jury found that the truck driver and his employer were not negligent, the plaintiffs appealed

184. *Id.* at 316-17.
185. 211 S.W.3d 468 (Tex. App.—Corpus Christi 2006, no pet.).
186. *Id.* at 474.
187. 192 S.W.3d 577 (Tex. 2006).
188. *Id.* at 578-79.

the trial court's refusal to submit its negligent-entrustment instruction. The supreme court held that any error in refusing to submit the instruction was harmless because, under a negligent-entrustment theory, the plaintiff must prove, among other elements, that the driver was negligent and that his negligence proximately caused the accident.[189] Here, because the jury had already found that the driver was not negligent, the jury had provided its answer to the negligent-entrustment issue.[190]

In *City of Houston v. Levingston*, the First District Court of Appeals held that the trial court had not committed error by refusing to submit, as a separate question in the jury charge, a statutory affirmative defense that was also an element of the plaintiff's cause of action.[191] In this case, a veterinarian brought an action against his municipal employer, alleging wrongful termination under the "whistle blower act."[192] Under that statute, the defendant may raise, as an affirmative defense, that it "would have taken the action against the employee that forms the basis of the suit based solely on information, observation, or evidence that is not related to the fact that the employee made a report protected under this chapter of a violation of law."[193] Here, the trial court did not include a separate question concerning this affirmative defense but instead, submitted the following liability question and instruction:

> Were [the whistle blower's] reports to BARC, if any . . . made in good faith and a cause of the City of Houston's terminating his employment when it did?
>
> [The whistle blower's] reports were not a cause if the City of Houston would have terminated him based solely on information, observation, or evidence that is not related to the fact that he made the reports.

The court of appeals held that this manner of submission was not an error and, even if it were, any error was harmless because the affirmative defense also negates the causation element of the plaintiff's cause of action.[194]

XI. JUDGMENTS

In *F.F.P. Operating Partners, L.P. v. Duenez*,[195] a case brought under the Dram Shop Act, the Texas Supreme Court addressed the issue of proportionate responsibility under Chapter 33 of the Texas Civil Practice and Remedies Code.[196] Roberto Ruiz, who had spent the day cutting firewood and consuming a case and a half of beer, drove his vehicle to a convenience store and purchased an additional twelve-pack of beer. Ruiz

189. *Id.* at 580.
190. *Id.* at 580.
191. 221 S.W.3d 204, 209 (Tex. App.—Houston [1st Dist.] 2006, no pet.).
192. TEX. GOV'T CODE ANN. § 554.002 (Vernon 2004).
193. TEX. GOV'T CODE ANN. § 554.004(b) (Vernon 2004).
194. *Levingston*, 221 S.W.3d at 218.
195. 50 Tex. Sup. Ct. J. 102, 2006 WL 3110426 (Tex. Nov. 3, 2006).
196. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon Supp. 2006).

opened a can of beer, apparently placed it between his legs, and then entered the highway, where he caused a head-on car crash, injuring all five members of the Duenez family. The plaintiffs sued Ruiz and others, including F.F.P., the entity that owned the convenience store. F.F.P. filed a cross-action against Ruiz, naming him as a responsible third party and a contribution defendant. The plaintiffs then non-suited all of the defendants except F.F.P. and proceeded to trial, but the trial court severed F.F.P.'s cross-action against Ruiz and refused to submit questions to the jury regarding Ruiz's negligence or proportionate responsibility. The jury found against F.F.P., and the court of appeals affirmed that judgment.

The Texas Supreme Court held that the trial court abused its discretion by severing F.F.P.'s claims against Ruiz and proceeding to trial with F.F.P. as the only defendant, and further, by refusing to submit F.F.P.'s jury questions for determination of Ruiz's negligence and proportionate responsibility.[197] In so holding, the court noted that the Dram Shop Act does not make a provider of alcohol vicariously liable for the conduct of an intoxicated person. Rather, F.F.P.'s liability arose from the actions of its employees and agents in serving an intoxicated person. Thus, F.F.P.'s claim against Ruiz was not one for indemnification that could be severed, but was instead one for contribution, and Ruiz's percentage of responsibility should have been determined by the jury.[198]

In *Pilgrim's Pride Corp. v. Cernat*, the Texarkana Court of Appeals addressed the application of the Texas proportionate-responsibility statute[199] in the context of an automobile accident, where the jury found each of the two plaintiffs to be twenty-five percent responsible for the accident and the defendant to be fifty-percent responsible.[200] The court of appeals held that, although the most each plaintiff would be entitled to receive would be seventy-five percent of the total amount awarded to them, the defendant's liability exposure was capped at fifty percent of the entire award.[201] Therefore, the court of appeals affirmed the judgment but reduced the amount of the award assessed against the defendant to half of the total amount awarded by the jury.[202]

The Amarillo Court of Appeals in *B.T. Healthcare, Inc. v. Honeycutt* held that the trial court erred by failing to apply the applicable settlement credits after the plaintiff settled with one defendant.[203] Specifically, the settlement agreement between the plaintiff and the settling defendant did not expressly segregate the amounts to be excluded or included in the calculation of the settlement credit. The court of appeals held that the better practice is to expressly specify the division of settlement proceeds as contemplated by the Texas Supreme Court in *Mobil Oil Corp. v. El-*

197. *Duenez*, 50 Tex. Sup. Ct. J. at 111.
198. *Id.*
199. TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.012-.013 (Vernon Supp. 2006).
200. 205 S.W.3d 110 (Tex. App.—Texarkana 2006, pet. denied).
201. *Pilgrim's Pride*, 205 S.W.3d at 118-19.
202. *Id.* at 122.
203. 196 S.W.3d 296 (Tex. App.—Amarillo 2006, no pet.).

lender.[204] The court noted that no magic words are required to effectuate that division if the face of the agreement makes clear the parties' intent. Here, however, the language of the settlement agreement was not sufficient to show how the dollars received from a settling defendant should be allocated; therefore, the defendant was entitled to a dollar-for-dollar settlement credit.[205]

The San Antonio Court of Appeals in *Emeritus Corp. v. Ofczarzak* held that the trial court did not abuse its discretion in ordering a post-judgment injunction that enjoined the appellant from dissipating or transferring its assets during the pendency of its appeal.[206] In this wrongful death suit, the jury entered a judgment for the plaintiff of approximately $1.5 million in compensatory damages and $18 million in punitive damages. After the defendant first moved to suspend enforcement of the judgment without bond and submitted multiple affidavits showing its negative net worth, the plaintiffs filed a motion for an injunction pursuant to Rule 24.2(d) of the Texas Rules of Appellate Procedure.[207] Thereafter, although the defendant posted a cash deposit of $1.7 million and moved to quash all post-judgment discovery served on it, the appellate court held that Rule 24.2(d)(2) specifically authorized the trial court to enjoin the judgment defendant from dissipating or transferring assets to avoid satisfaction of the judgment pending appeal, even in the face of a cash deposit covering the actual or compensatory damages.[208]

In *Metropolitan Transit Authority v. Jackson*,[209] the First District Court of Appeals held that the initial rendition of a judgment that was void as a matter of law did not deprive the trial court of its plenary power to subsequently dispose of the case by rendering a valid final judgment. In this workers' compensation case, the trial court originally entered a judgment that failed to comply with section 410.258(f) of the Texas Labor Code, which provides that "a judgment entered for a settlement approved without complying with the requirements of this section is void."[210] Accordingly, the rendition of this void judgment did not terminate the trial court's jurisdiction over the action, and the trial court still had plenary power when it signed a subsequent, valid judgment.[211]

Two courts of appeals addressed the issue of taxable costs during the Survey period. In *Custom Corporates, Inc. v. Security Storage, Inc.*, the Fourteenth District Court of Appeals conditionally granted a writ of mandamus where the trial court assessed certain expenses and attorneys'

204. 968 S.W.2d 917 (Tex. 1998) (holding that the settling party must tender to the trial court a settlement agreement allocating between actual and punitive damages as a condition precedent to limiting dollar-for-dollar settlement credits to settlement amounts representing actual damages).
205. *Honeycutt*, 196 S.W.3d at 299.
206. 198 S.W.3d 222, 228 (Tex. App.—San Antonio 2006, no pet.).
207. TEX. R. APP. P. 24.2(d).
208. *Emeritus Corp.*, 198 S.W.3d at 226-28.
209. 212 S.W.3d 797 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).
210. TEX. LABOR CODE ANN. § 410.258(f) (Vernon 2006).
211. *Jackson*, 212 S.W.3d at 803-04.

fees of a non-party as "costs" against the parties to the lawsuit, after the judgment had been rendered and the trial court's plenary power had lapsed.[212] Specifically, over three years after judgment was entered, a non-party filed a motion to assess costs of approximately twenty thousand dollars against the parties to the suit, which the trial court allowed. In granting the writ, the court of appeals rejected the arguments that the trial court's actions constituted a proper use of either its post-judgment discovery powers under Rule 621(a)[213] or its statutory and inherent power to enforce its judgment under Rule 308,[214] as the trial court had no authority to assess costs of a non-party against entities who were parties to the original proceeding.[215]

In *Sterling Bank v. Willard M, L.L.C.*,[216] the First District Court of Appeals reversed the trial court's assessment of unpaid payroll, federal payroll taxes, state tax liability, and other unpaid obligations as "taxable costs" against the prevailing party on a suit on a note. In reaching this conclusion, the court of appeals held that those items did not constitute the statutorily permissible costs, which a successful party is entitled to recover under Rule 131.[217]

XII. MOTION FOR NEW TRIAL

Rule 306a allows for the extension of post-judgment deadlines when a party first receives notice of a judgment more than twenty, but less than ninety days, after the judgment is signed.[218] In *In re The Lynd Co.*,[219] the Texas Supreme Court held that, where the trial court does not make a specific written finding confirming the date a party received actual notice of the judgment, the deadlines may nonetheless be extended under Rule 306a if the date may be implied from the trial court's judgment, unless there is no evidence supporting the implied finding or the party challenging the judgment establishes as a matter of law an alternative notice date.[220] To the extent that lower courts have held otherwise, the supreme court disapproved of those decisions.[221] The supreme court went on to recommend that trial courts remove such ambiguities about the date a party received notice by following the procedures mandated by Rule 4.2(c) of the Texas Rules of Appellate Procedure[222] and issuing a specific finding of the notice date as a matter of course.[223] The court also suggested that practitioners consider requesting such a finding from the trial

212. 207 S.W.3d 835 (Tex. App.—Houston [14th Dist.] 2006, pet. dism'd).
213. TEX. R. CIV. P. 621(a).
214. TEX. R. CIV. P. 308.
215. *Custom Corporates*, 207 S.W.3d at 840.
216. 221 S.W.3d 121 (Tex. App.—Houston [1st Dist.] 2006, no pet.).
217. TEX. R. CIV. P. 131; *Willard*, 221 S.W.3d at 124-25.
218. TEX. R. CIV. P. 306a.
219. 195 S.W.3d 682 (Tex. 2006).
220. *Id.* at 686.
221. *Id.*
222. TEX. R. APP. P. 4.2(c).
223. *Lynd*, 195 S.W.3d at 686.

court, as it would help circumvent unnecessary appeals where the actual date of notice is determined by implication rather than by judicial declaration.[224]

The Texas Supreme Court in *Fidelity & Guaranty Insurance Co. v. Drewery Construction Co.* held that, in the context of a motion for new trial to set aside a default judgment where the defaulted party had actually been served but failed to answer, affidavits submitted to prove the three-part *Craddock*[225] test are sufficient to prove or disprove that a party's failure to answer was not intentional or the result of conscious indifference if the affidavits are sufficiently detailed and not conclusory.[226] Thus, if the defaulted party claims the process served on him was "lost," such affidavits need not specify who actually lost the papers or how because "[p]eople often do not know where or how they lost something—that is precisely why it remains 'lost.'"[227] In this case, the movant's affidavits showed its efforts to establish a system that would avoid legal papers being lost and the normal process that would have been followed to avoid the same occurring. The supreme court held that these statements were not conclusory and presented enough detail of that party's normal processes to warrant granting the motion for new trial.[228]

XIII. DISQUALIFICATION OF JUDGES

In *Tesco American, Inc. v. Strong Industries, Inc.*, the Texas Supreme Court addressed whether an appellate judge was "vicariously" disqualified under the Texas Constitution based on her previous association with a law firm that represented one of the parties to the case.[229] The supreme court noted that Rule 18b(1)(a) of the Texas Rules of Civil Procedure specifically requires disqualification of trial judges in such circumstances,[230] but Rule 16.1 of the Texas Rules of Appellate Procedure states only "that disqualification is 'determined by the Constitution and laws of Texas.'"[231] The supreme court held that the Constitution does in fact require vicarious disqualification of appellate judges.[232] The supreme court explained that Rule 18b(1)(a) was not intended to expand the grounds for disqualification beyond what the Constitution required, and its prior interpretation of that rule recognized that the underlying basis for vicarious disqualification emanated from the Constitution itself.[233]

224. *Id.*
225. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939) (requiring a new trial if the defendant shows (1) default was neither intentional nor conscious indifference, (2) meritorious defense, and (3) new trial would cause neither delay nor undue prejudice).
226. 186 S.W.3d 571 (Tex. 2006).
227. *Drewery Constr.*, 186 S.W.3d at 575.
228. *Id.* at 576.
229. 221 S.W.3d 550 (Tex. Mar. 17, 2006).
230. *Id.* at 449 (citing TEX. R. CIV. P. 18b(1)(a)).
231. *Tesco*, 221 S.W.3d at 551-52 (quoting TEX. R. APP. P. 16.1).
232. *Tesco*, 221 S.W.3d at 551-52.
233. *Id.* (citing *In re* O'Connor, 92 S.W.3d 446, 449 (Tex. 2002)).

Moreover, the supreme court noted that, in an attorney-disqualification case, there is an irrebuttable presumption that one attorney's knowledge is imputed to all attorneys in a firm.[234] The court concluded that the same considerations should apply in cases of judicial disqualification, since proving misuse of confidential information would be just as difficult, and the damage to the legal profession just as extensive, if the rule were otherwise.[235]

Tesco also presented another question of first impression: what happens when an appellate opinion issues before it is discovered that one of the appellate justices is disqualified?[236] The supreme court noted that, while a disqualified appellate justice obviously cannot cast the deciding vote,[237] there is little consensus on what should occur if the disqualified justice's vote was not necessary to the decision.[238] Because the disqualified justice authored the court of appeals' unanimous opinion in *Tesco*, the supreme court held that the judgment would have to be reversed and the case remanded to the court of appeals, where the two remaining justices could consider the case without the disqualified justice's participation.[239] The supreme court refused to decide whether the result would have been the same if the disqualified judge had not authored the opinion or whether the remaining justices, who were not constitutionally disqualified, should nevertheless be recused.[240]

XIV. DISQUALIFICATION OF COUNSEL

In re Parnham addressed the interplay between disqualification and the inadvertent production of privileged documents.[241] The plaintiff in the underlying suit obtained an order disqualifying defendants' counsel based on the latter's having examined privileged documents. While the factual background was disputed, the documents were apparently inadvertently produced by plaintiff in discovery. The First District Court of Appeals rejected plaintiff's argument that, because her attorneys identified, by bates number, the documents they intended to produce for inspection, the privileged documents were actually obtained by opposing counsel outside the course of normal discovery.[242] The court noted that the inadvertent disclosure took place in the course of plaintiff's formal document production, and plaintiff could not limit the concept of normal scope of

234. *Tesco*, 221 S.W.3d at 552.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at 553.
239. *Id.* at 553. Justice Hecht dissented from this portion of the majority's opinion, noting that the remaining two panel members had already denied a motion for rehearing without the disqualified justice's participation, and reasoning that the majority was therefore requiring the parties to engage in a futile exercise. *Id.* at 557 (Hecht, J., dissenting).
240. *Id.* at 457.
241. 01-06-00236-CV, 2006 WL 2690306 (Tex. App.—Houston [1st Dist.] Sept. 21, 2006, orig. proceeding) [mand. granted] (not designated for publication).
242. *Id.* at *5.

discovery to just her intended scope of production.[243] The court of appeals further held that this situation is now addressed in the so-called "snap-back" provision of Rule 193.3,[244] which provides a procedure for reclaiming inadvertently produced privileged documents.[245] The court concluded that, although this rule impliedly prevents the other party from using information for which a privilege is successfully reclaimed, it does not provide any authority for disqualifying an attorney who reviewed the documents before they were snapped- back.[246]

Disqualification under the former-attorney rule was the subject of two cases during the Survey period.[247] In *Cimarron Agricultural, Ltd. v. Guitar Holding Co.*, the El Paso Court of Appeals held that, where a party sought to disqualify an attorney who previously represented it in a substantially related matter, it was not required to also prove actual prejudice.[248] However, the court of appeals reversed the trial court's order disqualifying the attorney from all future matters involving the two parties, reasoning that the test for whether the future representations would be both adverse and substantially related are fact-specific inquiries.[249] Similarly, in *In re Drake*, the San Antonio Court of Appeals held it was error to disqualify an attorney from representing the landowner in an ad valorem tax dispute simply because he had previously represented the appraisal district for twenty-two years in similar lawsuits.[250] The appraisal district admitted that the facts in those prior representations had nothing to do with the case under consideration but argued that all such cases are substantially related because they raise the same claims and defenses. The court of appeals held that the fact that valuation issues exist in all tax cases would not support the disqualification order.[251]

XV. MISCELLANEOUS

During the Survey period, the Texas courts once again had the opportunity to review and analyze arbitration provisions. In *In re Palacios*, the Texas Supreme Court reviewed whether an order granting a motion to compel arbitration under the Federal Arbitration Act could be reviewed by mandamus.[252] Although the supreme court had previously held that such an order could be reviewed by mandamus,[253] federal law had changed since its last opinion on the subject. Specifically, the United States Supreme Court had held that the Federal Arbitration Act allowed

243. *Id.*
244. TEX. R. CIV. P. 193.3.
245. *Parnham*, 2006 WL 2690306 at *7 (quoting TEX. R. CIV. P. 193.3(d)).
246. *Id.* at *7-8.
247. TEX. DISC. R. PROF. CONDUCT 1.09.
248. 209 S.W.3d 197, 204-05 (Tex. App.—El Paso 2006, no pet.).
249. *Id.* at 202-03.
250. 195 S.W.3d 232, 234 (Tex. App.—San Antonio 2005, orig. proceeding [mand. denied]).
251. *Id.* at 237.
252. 221 S.W.3d 564, 564 (Tex. 2006).
253. *See* Freis v. Canales, 877 S.W.2d 283, 284 (Tex. 1994).

mandamus review of orders granting arbitration if the underlying case had been dismissed but did not allow review if the case was merely stayed pending arbitration.[254] Subsequently, however, the Fifth Circuit held that a party could seek federal mandamus review of an order staying a case for arbitration if the movant met the "particularly heavy" burden of "clearly and indisputably" demonstrating that the district court did not have discretion to stay the proceedings pending arbitration.[255] Noting that it was important for federal and state law to be as consistent as possible in this area, especially since both federal and state courts have concurrent jurisdiction to enforce the Federal Arbitration Act, the supreme court followed the standards articulated by the federal courts in finding the relator was not entitled to mandamus relief.[256]

In *In re Vesta Insurance Group, Inc.*, the Texas Supreme Court reviewed whether a party had waived an arbitration provision "by litigating for more than two years, engaging in written discovery, and taking a total of four depositions."[257] After noting that there was a strong presumption against waiver under the Federal Arbitration Act, the supreme court found that the arbitration provision had not been waived.[258]

In *In re Heritage Building Systems, Inc.*,[259] the Beaumont Court of Appeals held, as a matter of first impression, that a trial court lacks discretion under the Federal Arbitration Act to order mediation before ruling on a motion to compel arbitration. Rather, the court held that the Federal Arbitration Act contemplates not just a stay of trial, but a stay of all trial proceedings, except for threshold issues, such as whether the parties entered into a valid and enforceable arbitration agreement.[260]

In *In re BP Products North America, Inc.*,[261] the First District Court of Appeals considered whether a Galveston trial court had properly issued an order allowing the broadcasting and photographing of a trial under Rule 18c, which provides:

> A trial court may permit broadcasting, televising, recording, or photographing of proceeds in the courtroom only in the following circumstances:
>
> (a) in accordance with guidelines promulgated by the Supreme Court for civil cases, or
>
> (b) when broadcasting, televising, recording, or photographing will not unduly distract participants or impair the dignity of the proceedings and the parties have consented, and consent to being depicted or recorded is obtained from each witness whose testimony will be broadcast, televised, or photographed, or

254. Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 87 n.2 (2000).
255. Apache Bohai Corp. v. Texaco China, B.V., 330 F.3d 307, 310-11 (5th Cir. 2003).
256. *Palacios*, 221 S.W.3d at 565-66.
257. 192 S.W.3d 759 (Tex. 2006).
258. *Id.* at 763.
259. 185 S.W.3d 539 (Tex. App.—Beaumont 2006, orig. proceeding [mand. granted]).
260. *Id.* at 542.
261. No. 01-06-00980-CV, 2006 WL 3230760 (Tex. App.—Houston [1st Dist.] Nov. 9, 2006, pet. granted) (not designated for publication).

(c) the broadcasting, televising, recording, or photographing of investiture, or ceremonial proceedings.[262]

In this case, some of the parties had not consented to broadcasting, and, accordingly, the court of appeals had to determine whether the trial court's decision was in accordance with guidelines promulgated by the Texas Supreme Court. Because the supreme court had not yet adopted or published rules for photographing and broadcasting court proceedings in Galveston County courts, the trial court applied the Harris County rules, which had been approved by the supreme court. The court of appeals reversed, however, holding that the Harris County local rules do not apply in Galveston County courts and therefore could not serve as guidelines for the photographing and broadcasting of the trial proceedings.[263]

262. TEX. R. CIV. P. 18c.
263. *BP Products*, 2006 WL 3230760 at *2.