SMU | Dedman School of Law

SMU Law Review

Volume 61
Issue 3 *Annual Survey of Texas Law*

Article 7

January 2008

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CIVIL PROCEDURE: PRE-TRIAL AND TRIAL

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

I. SUBJECT MATTER JURISDICTION

Once again during the Survey period, the Texas Supreme Court issued several significant decisions regarding subject matter jurisdiction and governmental immunity. In *City of Galveston v. State*, a sharply divided supreme court ruled that Texas cities have immunity even from claims brought by the State itself.[1] Despite the supreme court's recent pronouncement "that 'all governmental immunity derives from the State,'"[2] the majority rejected the idea that the State "gave" immunity to cities.[3] Rather, cities were created by the Constitution and the consent of their inhabitants, and their immunity "arose as a common-law creation of the judiciary."[4] Thus, while the State has the power to waive cities' immunity from suit, the majority held that it has no authority to do so without the unequivocal consent of the legislature.[5]

Texas A & M University System v. Koseoglu addressed a plaintiff's right to cure jurisdictional pleading defects following an interlocutory appeal.[6] The supreme court found that the plaintiff was entitled to stand on his pleadings in the face of a plea to the jurisdiction until the appellate court ruled against him, at which time he would ordinarily be granted an opportunity to amend his pleadings.[7] But the supreme court went on to hold

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1. City of Galveston v. State, 217 S.W.3d 466, 474 (Tex. 2007).
2. *Id.* at 474 (quoting Tooke v. City of Mexia, 197 S.W.3d 325, 345 (Tex. 2006)).
3. *Galveston*, 217 S.W.3d at 473.
4. *Id.*
5. *Id.* at 471. The dissent argued that the city's immunity was derivative of the State's and, therefore, "[l]ike a teenager's allowance, [it] rises or falls (or disappears) on the sovereign's whim and benevolence." *Id.* at 480 (Willett, J., dissenting).
6. Tex. A & M Univ. Sys. v. Koseoglu, 233 S.W.3d 835, 837 (Tex. 2007).
7. *Id.* at 839-40.

that a plaintiff need only be afforded this opportunity if it is possible to cure the pleading defect; in this case the defect was incurable, and it would serve no purpose to order a remand.[8]

In a case involving the jurisdictional limits of a county court at law, *United Services Auto Association v. Brite* posed the question of whether the amount in controversy excludes damages that are speculative or uncertain.[9] Having obtained a judgment in his age-discrimination suit for approximately $1 million, the plaintiff argued that his suit nevertheless fell within the $100,000 jurisdictional limit of the county court because, at the time he filed suit, certain elements of the damages he claimed were speculative and should have been excluded from the calculation of the amount in controversy.[10] The Texas Supreme Court disagreed, holding instead that the amount in controversy includes all damages the plaintiff seeks to recover unless expressly excluded by the jurisdictional statute itself.[11]

The Texas Supreme Court also explored the role of civil courts in adjudicating tort actions arising out of church discipline in *Westbrook v. Penley*.[12] The plaintiff in this case sued the pastor of her church, who was also a licensed professional counselor, for negligence and various intentional torts after he disclosed the plaintiff's extramarital affair to the church congregation. The plaintiff claimed she provided this information to the defendant as part of a purely secular counseling session, a claim which the supreme court accepted as true for purposes of its decision. The defendant nevertheless argued that the disclosure was in accordance with church's internal disciplinary procedures, and therefore the plaintiff's claims were not within the jurisdiction of the civil court system. While recognizing that the line between the secular and the religious might be difficult to draw in this type of fact situation, the supreme court ultimately concluded that the secular confidentiality interest advanced by the plaintiff's cause of action was insufficient "to override the strong constitutional presumption that favors preserving the church's interest in managing its affairs."[13]

II. SERVICE OF PROCESS

The Texas Supreme Court reversed a default judgment based on substituted service in *Hubicki v. Festina*.[14] The plaintiff unsuccessfully attempted to serve the defendant by certified mail, as authorized by Rules

8. *Id.* at 840. *Accord* Tex. Parks & Wildlife Dep't v. E.E. Lowrey Realty, Ltd., 235 S.W.3d 692, 694-95 (Tex. 2007).

9. United Serv. Auto Ass'n v. Brite, 215 S.W.3d 400, 401 (Tex. 2007).

10. *Id.* at 402.

11. *Id.* at 402-03.

12. Westbrook v. Penley, 231 S.W.3d 389, 389 (Tex. 2007).

13. *Id.* at 402.

14. Hubicki v. Festina, 226 S.W.3d 405, 405 (Tex. 2007).

106(a)(2)[15] and 108a(1)[16] at an address in Mexico.[17] The plaintiff then moved for substituted service by first class mail to the same address. The motion was supported by the process server's affidavit stating that the defendant had failed or refused to claim the certified mailing, but that he was currently in Mexico and could usually be found at that address. The trial court ordered substituted service and when the defendant failed to answer, entered a default judgment, which the Dallas Court of Appeals affirmed.[18] The supreme court reversed, holding that the record failed to demonstrate the alternative service was reasonably calculated to provide the defendant with notice of the proceedings.[19] In doing so, the supreme court relied on the fact that the plaintiff made only one unsuccessful attempt to serve the defendant by certified mail and failed to provide any evidence that the defendant was actually receiving mail at the address provided.[20]

Wachovia Bank of Delaware, N.A. v. Gilliam also emphasizes the importance of strict compliance with the rules regarding substituted service.[21] The plaintiff in this case alleged in his petition that the defendant bank could be served at a Delaware address by either personal service or service on the Texas Secretary of State. The constable's return showed that service was in fact made on the Secretary of State. The file also contained the Secretary's certificate that the process was forwarded to the bank at the Delaware address specified by plaintiff and that a return receipt "'bearing the Signature of Addressee's Agent'" was received.[22] When the bank did not answer, the trial judge entered a default judgment, and the bank subsequently filed a restricted appeal.[23]

Noting that it had never addressed the issue before, the Texas Supreme Court adopted the prevailing rule in the intermediate appellate courts that, on a restricted appeal, the record must indicate that service on the Secretary of State was indeed forwarded to the statutorily-required address.[24] The Secretary's certificate was conclusive that the process was forwarded to the address provided, but it did not certify that address was the bank's "home office" as required by the Texas Long-Arm statute.[25] Because the record otherwise failed to show that the Secretary had for-

15. TEX. R. CIV. P. 106(a)(2).
16. TEX. R. CIV. P. 108.
17. *Festina*, 226 S.W.3d at 406-07.
18. *Id.*
19. *Id.* at 408.
20. *Id.* The supreme court also noted that because service by first class mail was not attempted until a month after the plaintiff's motion, and plaintiff's petition also alleged that defendant had a Dallas residence, there was no evidence that the defendant was in Mexico at the time the substituted service was attempted. *Id.*
21. Wachovia Bank of Del., N.A. v. Gilliam, 215 S.W.3d 848 (Tex. 2007).
22. *Id.* at 849.
23. *Id.*
24. *Id.* at 850.
25. *Id. See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 17.045(a) (Vernon 2008) (requiring plaintiff to provide the Secretary of State with the nonresident's home or home office address).

warded the process to the proper address, the court found that the default judgment could not stand.[26]

In *Proulx v. Wells*, the Texas Supreme Court held that there was a fact question as to whether the plaintiff exercised reasonable diligence in effecting service, and, therefore, the trial court's summary judgment based on the expiration of limitations was inappropriate.[27] The plaintiff filed suit shortly before limitations ran but did not succeed in serving defendant until more than eight months later. The trial court granted a summary judgment on limitations grounds, and the court of appeals affirmed. Acknowledging that its "jurisprudence has at times been less than clear in explaining the summary-judgment burden"[28] in these types of cases, the supreme court reversed. The supreme court clarified that once the defendant pleads limitations and shows that service was effected after the statute ran, the burden shifts to the plaintiff to explain the delay.[29] If the plaintiff's evidence and explanation are insufficient for some legal reason, or if the evidence fails to raise a fact question as to reasonable diligence, then the defendant is entitled to summary judgment.[30] If the plaintiff succeeds in raising a fact question, however, the burden shifts back to the defendant to demonstrate conclusively the lack of diligence.[31] In *Wells*, the supreme court held that, while there were some short delays between the plaintiff's many and varied efforts to serve defendant, the defendant did conclusively establish a lack of diligence.[32]

III. VENUE

In re Texas Department of Transportation addressed the proper venue over a state agency in a personal injury case arising out of a motor vehicle accident.[33] The accident occurred in Gillespie County, and the plaintiffs sued the Texas Department of Transportation ("TxDOT") and Gillespie County in Travis County. The plaintiffs claimed venue was proper because part of the cause of action, specifically TxDOT's alleged negligence in designing, maintaining, and inspecting the roadway, arose in Travis County where TxDOT maintained its offices.[34] Distinguishing claims for negligent conduct from those for premises defects, the Texas Supreme Court held that the plaintiffs pleaded only the latter, and therefore had not alleged a negligence claim that would support venue over TxDOT in Travis County.[35]

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26. *Gilliam*, 215 S.W.3d at 850-51.
27. Proulx v. Wells, 235 S.W.3d 213, 214 (Tex. 2007).
28. *Id.* at 215.
29. *Id.* at 216.
30. *Id.*
31. *Id.*
32. *Id.*
33. *In re* Tex. Dep't of Transp., 218 S.W.3d 74, 74 (Tex. 2007).
34. *Id.* at 76. The plaintiffs alleged venue was proper as to Gillespie County under TEX. CIV. PRAC. & REM. CODE ANN. § 15.005 (Vernon 2002), because it was properly joined as a defendant with TxDOT. *Id.*
35. *Id.* at 77-78.

The Texas Supreme Court enforced the forum selection clause in an employment contract in *In re AutoNation, Inc.*[36] Although the contract stipulated that all disputes be litigated in Florida under Florida law, the employee sued in Texas, and the trial court both refused to dismiss the action and enjoined the employer from pursuing its first-filed Florida lawsuit. On mandamus, the supreme court held this was error and that the dispute should be heard in the Florida courts as the parties had expressly agreed.[37] The supreme court distinguished its prior decision in *DeSantis v. Wackenhut Corp.*,[38] which had held that Texas law would govern a claim for breach of a covenant not to compete despite the contract's choice-of-law provision specifying Florida law. The supreme court noted that *DeSantis* involved only a choice-of-law question and not a forum selection clause or prior pending litigation in the parties' chosen jurisdiction.[39] Moreover, the supreme court explained that principles of interstate comity, while not requiring a Texas court to defer to a first-filed action in another state, were particularly significant in circumstances such as these.[40]

Section 15.062(a) of the Texas Civil Practice and Remedies Code provides that venue of the main action shall also establish venue over third-party claims filed in that action.[41] Moreover, if a third-party defendant is properly joined, section 15.062(b) provides that venue is also proper over the plaintiff's claims directly against the third-party defendant that arise out of the same subject matter.[42] This latter provision came into conflict with section 15.015,[43] which provides for mandatory venue in a suit against a county, in *In re County of Galveston.*[44] In this scenario, the Houston Fourteenth Court of Appeals held that section 15.062(b) prevails, and venue is proper in the county where the main suit is pending.[45]

Killeen v. Lighthouse Electrical Contractors, L.P. involved a dispute between a Travis County homeowner and a Travis County contractor which ended up in court in Bexar County.[46] The contractor claimed that, through an exchange of letters with its San Antonio counsel, the homeowner had agreed to a settlement of the dispute. The contractor filed suit to enforce the settlement agreement in Bexar County, and the homeowner moved to transfer venue to Travis County. The San Antonio Court of Appeals held that there was some probative evidence to support

36. *In re* AutoNation, Inc., 228 S.W.3d 663, 663 (Tex. 2007).
37. *Id.* at 669.
38. DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 675 (Tex. 1990).
39. *AutoNation*, 228 S.W.3d at 669.
40. *Id.* at 670.
41. TEX. CIV. PRAC. & REM. CODE ANN. § 15.062(a) (Vernon 2002).
42. TEX. CIV. PRAC. & REM. CODE ANN. § 15.062(b) (Vernon 2002).
43. TEX. CIV. PRAC. & REM. CODE ANN. § 15.015 (Vernon 2002).
44. *In re* County of Galveston, 211 S.W.3d 879, 881 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding).
45. *Id.* at 882-83.
46. Killeen v. Lighthouse Elec. Contractors, 248 S.W.3cd 343, 345 (Tex. App.—San Antonio 2007, pet. denied).

a finding that a substantial part of the events giving rise to the claim occurred in Bexar County through the homeowner's exchanges with the contractor's attorney, and venue was therefore proper in Bexar County.[47]

IV. PARTIES

In *Farmers Group, Inc. v. Lubin*, the Texas Supreme Court reviewed the certification requirements for a class action suit brought by the Texas attorney general on behalf of insurance buyers.[48] The Texas Insurance Code authorizes three types of class actions, one of which may be brought by the attorney general.[49] The issue in this case was whether the attorney general must strictly comply with all requirements for class certification and, therefore, name individual class members as representatives. The trial court held strict compliance was not necessary and certified the class. The court of appeals disagreed and reversed, finding that the attorney general must strictly comply with the certification requirements. On appeal to the Texas Supreme Court, the State argued that the attorney general may file a class action under the doctrine of *parens patriae* (which literally means "parent of the country") without meeting the normal certification requirements. The intervenors, on the other hand, claimed that the attorney general must meet all of the certification requirements, even though this would require recruiting policyholders (such as themselves) as class representatives.

As an initial matter, the supreme court declined to adopt the *parens patriae* doctrine, which would allow the attorney general to represent a class without designating representative parties whose claims are typical and who will adequately protect the interest of the class. The supreme court found that the doctrine did not appear in the Texas Insurance Code's class action provision, that the doctrine was not a type of class action tool, rather an alternative to it, and that the supreme court had previously invoked that doctrine solely with respect to persons unable to protect themselves, such as children or those who were mentally ill.[50]

Although the supreme court held that the doctrine of *parens patriae* did not exempt the attorney general from meeting the class certification requirements, it refused to demand compliance with those requirements in such a way that would in effect make attorney general class actions impossible. Accordingly, the supreme court held that the attorney general

47. *Id.* at 348-49 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a) (1) (Vernon 2002)).

48. Farmers Group, Inc. v. Lubin, 222 S.W.3d 417, 417 (Tex. 2007).

49. TEX. INS. CODE ANN. art. 541.251(a) (Vernon 2008). "Unlike any other state statute, the Insurance Code contains its own set of class action rules." *Lubin*, 222 S.W.3d at 422. However, they are almost identical to those currently in Texas Rule of Civil Procedure 42. *Id.* "Both include the same four prerequisites for all class actions (numerosity, commonality, typicality, and adequacy of representation) and the same four types of maintainable class actions (those involving a risk of inconsistent adjudications, those that might impair non-parties' interests, those seeking injunctive or declaratory relief, and those in which common questions predominate)." *Id.*

50. *Id.* at 423-24.

need not meet the certification requirements typically applied to a class representative but would still be required to meet the remaining certification requirements.[51]

In *In re State of Texas*,[52] the Houston First District Court of Appeals held that a motion for new trial filed by a non-party does not extend the trial court's plenary power under Rule 329b(c).[53] In this case, the motion for new trial was filed by the arrestee's father, who had not intervened in the suit. Accordingly, the court held that the trial court's order granting his motion for new trial was signed outside of its plenary power.[54]

V. PLEADINGS

In *Low v. Henry*,[55] the Texas Supreme Court analyzed the propriety of sanctions under Chapter 10 of the Texas Civil Practice & Remedies Code ("Chapter 10").[56] In this medical malpractice case, the plaintiff filed suit against the alleged manufacturers, designers, and distributors of a drug known as Propulsid, as well as two physicians who allegedly prescribed that drug. Shortly after the case was filed, the physicians filed a motion for sanctions against the plaintiff and her counsel for alleged violations of Chapter 10. The physicians claimed that, at the time the suit was filed, the plaintiff's counsel possessed medical records that proved the physicians had not prescribed or administered the drug at issue. The trial court granted the physicians' motion and ordered the plaintiff's counsel to pay sanctions in the amount of $50,000. The plaintiff's counsel appealed, and the court of appeals held that the plaintiff's pleadings were not sanctionable under Chapter 10 because the claims against the physicians had been asserted in the alternative. The Texas Supreme Court reversed.[57]

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51. *Id.* at 426.
52. *In re* State, 221 S.W.3d 713, 713 (Tex. App.—Houston [1st Dist.] 2006, no pet.).
53. TEX. R. CIV. P. 329b(c).
54. *State*, 221 S.W.3d at 714.
55. 221 S.W.3d 609, 612 (Tex. 2007).
56. Chapter 10 provides that:

> The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:
>
> (1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

TEX. CIV. PRAC. & REM. CODE ANN. § 10.001 (Vernon 2002).
57. *State*, 221 S.W.3d at 612.

First, the supreme court noted that under Chapter 10, the signer of a pleading certifies that each claim and allegation is based on the signatory's best knowledge, information and belief formed after reasonable inquiry.[58] The statute dictates that each claim and allegation be individually evaluated for support. Thus, the fact that an allegation or claim is alleged against several defendants—so called "group pleading"—does not relieve the party from meeting the express requirements of Chapter 10. Rather, each claim against each defendant must satisfy Chapter 10.[59]

Second, the supreme court found that alternative pleading under Rule 48[60] does not excuse compliance with Chapter 10.[61] Although pleading in the alternative allows multiple—and possibly conflicting—allegations to be alleged against a defendant, there still must be a reasonable basis for each alternative allegation. Each alternative allegation and factual contention in a pleading must have or be likely to have evidentiary support after a reasonable inquiry. Applying this standard, the supreme court held that plaintiff's counsel had violated Chapter 10 because, prior to filing suit, he was in possession of medical records that indicated neither physician had prescribed or administered Propulsid to the plaintiff.[62]

Finally, the supreme court reviewed the amount of sanctions awarded by the trial court under Chapter 10. The supreme court first reiterated the general maxim that a sanction cannot be excessive and should not be assessed without appropriate guidelines.[63] Although the supreme court acknowledged that it had never specifically identified factors for a trial court to consider when assessing penalties under Chapter 10, it held that the absence of any explanation by the trial court for such severe sanctions amounted to reversible error. The supreme court found that the trial court should have considered at least some of the factors set forth by the American Bar Association in its 1988 report regarding sanctions under federal Rule 11.[64] Accordingly, the supreme court held that although the

58. TEX. CIV. PRAC. & REM. CODE ANN. § 10.001 (Vernon 2002).
59. *Low*, 221 S.W.3d at 615.
60. TEX. R. CIV. P. 48.
61. *Low*, 221 S.W.3d at 615.
62. *Id.* at 616-17.
63. *Id.* at 620 (citing TransAmerican Nat'l Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991)).
64. FED. R. CIV. P. 11. The ABA's 1988 report was designed, in part, to help bring uniformity to the uneven application of sanctions under Rule 11. American Bar Association, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, *reprinted in* 121 F.R.D. 101, 104 (1988). The non-exclusive list of factors include:

a. the good faith or bad faith of the offender;
b. the degree of willfulness, vindictiveness, negligence, or frivolousness involved in the offense;
c. the knowledge, experience, and expertise of the offender;
d. any prior history of sanctionable conduct on the part of the offender;
e. the reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct;
f. the nature and extent of prejudice, apart from out-of-pocket expenses, suffered by the offended person as a result of the misconduct;

trial court was within its discretion to award sanctions under Chapter 10, it could not determine the basis of the $50,000 penalty from the record, and it remanded the amount of the sanctions back to the trial court for further review.[65]

In *Bay Area Healthcare Group, Ltd. v. McShane*, the Texas Supreme Court considered whether statements from a superseded pleading were admissible at trial.[66] In this medical malpractice case, the trial court admitted evidence that the plaintiffs had originally sued two physicians involved in the incident but had non-suited the physicians before trial. The supreme court first noted that "statements from pleadings, depending on their content, could potentially be excluded as irrelevant or unfairly prejudicial."[67] Here, however, the supreme court held that the plaintiffs were estopped from making this complaint "because their attorney was the first to allude to the doctors' party status by telling the jury panel that [the doctors'] conduct 'could have been brought before this [court],' but 'both sides have not done that at this trial.'"[68]

Next, the supreme court held that the court of appeals had erred by holding that "statements from [superseded] pleadings would only be admissible if they contained 'some statement relevant to a material issue in the case' that is 'inconsistent with [the] position taken by [the] party against whom it is introduced.'"[69] The supreme court noted that before the Texas Rules of Evidence were promulgated, Texas case law required an inconsistency between the superseded pleading and the party's position at trial. However, the supreme court went on to explain that the Texas Rules of Evidence no longer required inconsistency when it comes to admissibility of superseded pleadings.[70] Thus, the supreme court held that there was no requirement that the statement from the superseded pleading be inconsistent with the party's position at trial, and therefore,

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g. the relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that area;
h. the risk of chilling the specific type of litigation involved;
i. the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction;
j. the impact of the sanction on the offended party, including the offended person's need for compensation;
k. the relative magnitude of sanction necessary to achieve the goal or goals of the sanction;
l. burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs;
. . . .
n. the degree to which the offended person's own behavior caused the expenses for which recovery is sought . . . .

Id. at 125-26 (cited in *Powell*, 811 S.W.2d at 920-21).

65. *Low*, 221 S.W.3d at 621-22.
66. Bay Area Healthcare Group, Ltd. v. McShane, 239 S.W.3d 231, 233 (Tex. 2007).
67. *Id.* at 234.
68. *Id.*
69. *Id.* at 235.
70. *See* TEX. R. EVID. 801(e)(2) (admissions by a party opponent are admissible).

the trial court had not erred in allowing that evidence.[71]

In *Simmons v. McKinney*, the Amarillo Court of Appeals reviewed the propriety of granting a default judgment after the party obtaining a default had received notice by facsimile that the opposing party was filing an answer and counterclaim.[72] In this construction case, the homeowners sued their contractor for breach of contract. Although the defendant did not timely file an answer, approximately three weeks after its answer date, at 10:30 p.m., defendant's counsel faxed a general denial and counterclaim to plaintiffs' counsel. The next morning, plaintiffs appeared before the trial court, proved up their damages, and were granted a default judgment. Later that day, the defendant filed his answer and counterclaim. The defendant did not receive notice of the default judgment until approximately one month later and filed a motion for new trial, which the trial court denied. The defendant then appealed.

Relying on Rule 21a,[73] the defendant argued that since he had faxed the answer and counterclaim to plaintiffs' counsel, plaintiffs could not subsequently obtain a default. The court of appeals rejected the defendant's argument, noting that "to answer a lawsuit, a defendant must make an appearance in the suit or file an answer [in the trial court] seeking a judgment or decision by the court on some question."[74] An appearance ordinarily means the process of submission of a person to the jurisdiction of the court. The court held that simply faxing an answer to opposing counsel after hours was not the same as filing an answer with the court via the "mail box" rule.[75]

The court also rejected the defendant's claim that he was entitled to notice of the default judgment hearing. Rather, the court held that parties are only entitled to notice after they have appeared in the lawsuit. Since no such appearance had occurred, defendant and his counsel were not entitled to notice.[76]

Finally, the court held that the defendant's motion for new trial was properly denied because defendant's counsel had only generally claimed that his failure to timely file an answer was due to accident or mistake with no evidence on the record supporting that allegation.[77]

VI. DISCOVERY

The Texas Supreme Court issued a number of decisions on discovery issues during the Survey period. In *In re Christus Spohn Hospital Kleberg*,[78] the supreme court was presented with a conflict between Rule

71. *McShane*, 239 S.W.3d at 235.
72. Simmons v. McKinney, 225 S.W.3d 706, 706 (Tex. App.—Amarillo 2007, no pet.).
73. TEX. R. CIV. P. 21a.
74. *Simmons*, 225 S.W.3d at 708.
75. *Id.*
76. *Id.* at 709.
77. *Id.*
78. *In re* Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 435 (Tex. 2007).

192.3(e)(6),[79] which makes all materials provided to a testifying expert discoverable, and Rule 193.3(d),[80] which mandates the return of privileged documents that have been inadvertently produced. The hospital in this case mistakenly provided a privileged memorandum to its expert, who acknowledged having "glanced" at all the documents provided to her. The supreme court began by noting that under the current discovery rules, it was irrelevant whether the expert actually read the privileged memorandum; because it was provided to her, it was discoverable.[81] The supreme court went on to hold that, in this scenario, the disclosure rule prevails over the so-called snap-back provision as long as the expert intends to testify at trial.[82]

In re Bexar County Criminal District Attorney's Office involved a district attorney's work-product privilege in the context of a subsequent civil action.[83] After the district attorney's office had investigated and dropped charges against David Crudup ("Crudup"), the real party in interest, he sued the complaining parties for malicious prosecution. Pursuant to a subpoena, the district attorney's office turned over its entire prosecution file to Crudup, but it refused to comply with subpoenas for the depositions of its prosecutors and investigator. The Texas Supreme Court held that the district attorney's office had a work-product privilege to refuse to give testimony in the malicious prosecution case.[84] Moreover, the supreme court held that the district attorney had not waived this privilege by turning over its prosecution file without objection.[85]

The Texas Supreme Court enforced the parties' agreed protective order in *In re Ford Motor Co.*[86] Ford produced documents designated as confidential in this case, as well as in a similar case in Florida. The clerk of the Florida court mistakenly allowed access to the confidential documents, portions of which were then submitted to a governmental agency, which then posted the documents on its website for some period of time. The Texas trial court granted a motion to designate the documents as non-confidential, notwithstanding the agreed confidentiality order, because they had been made publicly available on the Internet. The supreme court conditionally granted mandamus relief, holding that "[n]o matter how many people eventually saw the materials, disclosures by a third-party, whether mistaken or malevolent, do not waive the privileged na-

79. TEX. R. CIV. P. 192.3(e)(6).

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

81. *In re Christus Spohn Hospital Kleburg*, 222 S.W.3d at 438 (citing TEX. R. CIV. P. 192.3(e)(6)).

82. *Id.* at 440. The court also noted that, if a party is required to obtain leave of court to designate a new expert in order to preserve its privilege, the trial court "should carefully weigh the alternatives available to prevent what may be akin to death-penalty sanctions for the party forced to trial without a necessary expert." *Id.* at 445.

83. *In re* Bexar County Criminal Dist. Attorney's Office, 224 S.W.3d 182, 182 (Tex. 2007).

84. *Id.* at 187.

85. *Id.* at 189.

86. *In re* Ford Motor Co., 211 S.W.3d 295, 295 (Tex. 2006).

ture of the information."[87]

The Texas Supreme Court continued to intervene during the Survey period when it perceived the discovery process as being manipulated in an abusive manner. In *In re Allied Chemical Corp.*, a mass tort case, the court granted mandamus relief to prevent a trial court from setting the claims of one of 1,900 plaintiffs for trial, where none of the plaintiffs had ever provided basic discovery regarding which products manufactured by which of the thirty defendants were allegedly responsible for which plaintiffs' injuries.[88] In *In re Allstate County Mutual Insurance Co.*, a suit to enforce a $13,500 settlement agreement, the supreme court held that the trial court erred in compelling the defendant to respond to 213 discovery requests seeking "everything the plaintiffs could imagine asking in any unfair insurance practice case."[89]

Texas courts continued to struggle with whether to allow pre-suit depositions of health care providers under Rule 202.[90] *In re Kiberu*[91] noted that the courts of appeals are split on whether the health care liability statute, which requires a plaintiff to provide a preliminary expert report before he can take the oral deposition of another party,[92] trumps the Rule 202 pre-suit deposition procedure.[93] The Fort Worth Court of Appeals sided with those cases that have allowed the Rule 202 deposition, at least where such deposition is intended to investigate whether or not a party even has a health care liability claim to assert.[94] Conversely, the Texarkana Court of Appeals allowed a pre-suit deposition of a doctor only to the extent necessary to investigate potential claims against a prosthetic manufacturer but not to address whether the doctor himself was negligent, in *In re Temple*.[95] Finally, *In re Emergency Consultants, Inc.* involved a doctor's request for a pre-suit deposition, which the relators resisted on the ground that the doctor had no private right of action under a certain statute.[96] The court rejected the relators' argument, holding that "Rule 202 does not require that a potential litigant expressly state a viable claim before being permitted to take a pre-suit deposition."[97]

In re General Agents Insurance Co. of America[98] and *In re Madrid*[99]

87. *Id.* at 301.
88. *In re* Allied Chem. Corp., 227 S.W.3d 652, 656-58 (Tex. 2007).
89. *In re* Allstate County Mut. Ins. Co., 227 S.W.3d 667, 670 (Tex. 2007).
90. TEX. R. CIV. P. 202. However, following the Survey period, the Texas Supreme Court resolved the appellate court conflict in *In re* Jorden, 249 S.W.3d 416 (Tex. 2008).
91. 237 S.W.3d 445, 449-50 (Tex. App.—Fort Worth 2007, orig. proceeding [mand. pending]).
92. TEX. CIV. PRAC. & REM. CODE §§ 74.351(a), (s) (Vernon Supp. 2007).
93. *Kiberu*, 237 S.W.3d at 449 (citing cases).
94. *Id.* at 449-50.
95. 239 S.W.3d 885, 890 (Tex. App.—Texarkana 2007, orig. proceeding).
96. *In re* Emergency Consultants, Inc., No. 14-07-00002-CV, 2007 WL 64217, at *1, 2 (Tex. App.—Houston [14th Dist.] Jan. 10, 2007, orig. proceeding).
97. *Id.* at *1.
98. 224 S.W.3d 806 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding).
99. 242 S.W.3d 563, 568-69 (Tex. App.—El Paso 2007, orig. proceeding).

should be of interest to the liability insurance bar. In the former case, after suffering an adverse judgment, the insured party assigned its claim and its attorney-client privilege to the judgment creditor. In the judgment creditor's subsequent suit against the insurer, the court held that the insurer could not assert the attorney-client privilege to protect its communications with the insurer-retained counsel for the insured in the underlying suit.[100] In *Madrid*, the court held that an insurance company's reservation of rights letter, prepared after suit was filed and sent to the insured and his counsel, was both irrelevant to the plaintiff's negligence claim against the insured and protected by the work-product privilege.[101]

Finally, *Johnson ex rel. Johnson v. Chesnutt* addressed a trial court's power to invoke "death penalty" sanctions even after the plaintiff has nonsuited the case.[102] Plaintiff, a lawyer herself, actively monitored her lawsuit and hired and fired three sets of lawyers over approximately two years while the case was pending. Nevertheless, she did not answer the defendant's written discovery requests, and as a result, the defendant filed a motion to compel and for sanctions. As one of the alternative sanctions requested, the defendant asked the trial court to preclude plaintiff from presenting any evidence of the factual basis for her claims, or the amount and method of calculation of damages, on the ground that this information should have been provided in the unanswered discovery. Before the defendant's motion was heard, however, plaintiff nonsuited the case. Noting that a Rule 162[103] dismissal does not affect a defendant's right to be heard on a pending motion for sanctions, the Dallas Court of Appeals held the trial court was authorized to proceed on the motion for sanctions despite the nonsuit.[104] Moreover, the court affirmed the trial court's imposition of the sanction of dismissal with prejudice, even though it had not been expressly requested because the evidence preclusion sanction the defendant had requested would have been case determinative as well.[105]

VII. SUMMARY JUDGMENT

The Texas Supreme Court in *Ford v. Exxon Mobil Chemical Co.* held that a summary judgment order that included a lump-sum dollar amount for the plaintiff was final, even though the trial court did not segregate the damages between attorneys' fees and expert witness expenses.[106] The court reasoned that trial courts have never been required to itemize each element of damages pleaded or specify in their rulings each element of

100. *Gen. Agents Ins.*, 224 S.W.3d at 813-15.

101. *Madrid*, 242 S.W.3d at 569.

102. Johnson *ex. rel* Johnson v. Chestnutt, 225 S.W.3d 737, 741, 744 (Tex. App.—Dallas 2007, pet. denied).

103. TEX. R. CIV. P. 162.

104. *Johnson*, 225 S.W.3d at 742.

105. *Id.* at 742, 744.

106. Ford v. Exxon Mobil Chem. Co., 235 S.W.3d 615, 617 (Tex. 2007).

duty, breach, or causation for a summary judgment order to be final and appealable.

The Houston First District Court of Appeals in *Fabio v. Ertel* reversed and remanded a take-nothing judgment entered against a law firm in a fee dispute where the trial court had first granted a partial summary judgment for the law firm.[107] The trial court advised the parties that it was not reconsidering that decision, and consequently, the law firm did not present evidence at trial regarding the subject matter of the partial summary judgment ruling. Thereafter, following a bench trial, the court entered findings of fact and conclusions of law that conflicted with the original summary judgment ruling. The court of appeals held that since the trial court had previously advised the parties that it was not revisiting its summary judgment ruling, the law firm had been deprived of proper notice of the trial court's intent to reconsider its ruling and hence, did not have the opportunity to present any evidence on those issues at trial.[108]

In *Dallas County v. Rischon Development Corp.*, the Dallas Court of Appeals affirmed a summary judgment decision against Dallas County where the trial court held that the county's summary judgment response was untimely.[109] The parties had entered into a Rule 11[110] agreement that established certain deadlines for summary judgment materials to be filed, but the county filed its response the day after the agree deadline which was still more than seven days before the ultimate summary judgment hearing.

Finally, the Tyler Court of Appeals in *Pierce v. Washington Mutual Bank* reversed and remanded a summary judgment in favor of a bank where, after answering sworn interrogatories about the location of his homestead, the plaintiff then tendered an affidavit in response to a summary judgment motion that contradicted those interrogatory answers.[111] The appellate court held that since conflicting inferences could be drawn from a deposition and an affidavit filed by the nonmovant, a fact issue remained, thereby precluding summary judgment.[112] The court rejected the bank's argument that the plaintiff's subsequent affidavit should be ignored as a "sham affidavit," concluding instead that "these inconsistencies and conflicts create a fact issue that should be resolved by a jury."[113]

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107. Fabio v. Entel, 226 S.W.3d 557, 563 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

108. *Id.* at 561-62.

109. Dallas County v. Rischon Dev. Corp., 242 S.W. 3d. 90, 90 (Tex. App.—Dallas 2007, pet. denied).

110. TEX. R. CIV. P. 11.

111. Pierce v. Wash. Mut. Bank, 226 S.W.3d 711, 717, 718 (Tex. App.—Tyler 2007, pet. denied).

112. *Id.* at 716 (quoting Randall v. Dallas Power & Light Co., 752 S.W.2d 4, 5 (Tex. 1988)).

113. *Id.* at 717-18.

VIII. DISMISSAL

In *Cappetta v. Hermes*, an *en banc* San Antonio Court of Appeals held that the standards for motions to reinstate provided in Rule 165a(3) apply regardless of whether a case is dismissed under Rule 165a(1) or (2), or pursuant to the trial court's inherent power.[114] In reaching this conclusion, the court first reasoned that the plain language of Rule 165a(3) did not suggest applying differing standards for a statutory dismissal than for a dismissal under the court's inherent authority. Second, the court noted that the intent behind the amendments to Rule 165a[115] was for the standard to be the same for both types of dismissals. Finally, the court concluded that no valid purpose would be served by creating different standards for the two types of dismissals.

Two appellate court decisions during the Survey period held that in the absence of a signed order of reinstatement, a dismissal for want of prosecution is final even if the parties and the court subsequently treat the litigation as active. In *Wallingford v. Trinity Universal Insurance Co.*, the trial court granted a motion to reinstate a case that had been dismissed for want of prosecution, and noted the reinstatement determination on the printed docket sheet.[116] However, the court never signed an order of reinstatement. For the next year, the parties and the trial court treated the case as if it had been reinstated, with the trial court granting a motion for continuance and entering an amended scheduling order. Over a year after the trial court had orally pronounced its reinstatement decision, the plaintiff's counsel submitted a proposed written order of reinstatement, prompting the defendant to move to dismiss based on lack of subject-matter jurisdiction. The trial court dismissed the case. The Amarillo Court of Appeals affirmed, holding that neither the trial court's oral pronouncement of reinstatement, its docket sheet entry, nor the parties' subsequent conduct was sufficient to overcome the absence of a written order reinstating the case.[117]

Similarly, in *Davis v. Smith*, the trial court dismissed the case for want of jurisdiction when the plaintiff failed to appear at a scheduled status conference despite receiving a letter from her attorney reminding her to attend.[118] The plaintiff moved to reinstate the case, which the trial court took under advisement but did not rule upon. Thereafter, the plaintiff appeared for her deposition and moved for mediation. The trial denied the motion to mediate because the case had been dismissed. The First District Court of Appeals upheld the dismissal and denied the bill of review because the plaintiff had failed to obtain a written order regarding

114. Capetta v. Hermes, 222 S.W.3d 160, 162 (Tex. App.—San Antonio 2006, no pet.).

115. TEX. R. CIV. P. 165a.

116. Wallingford v. Trinity Universal Ins. Co., 253 S.W.3d 720, 722 (Tex. App.—Amarillo 2007, pet. denied).

117. *Id.* at 726.

118. Davis v. Smith, 227 S.W.3d 299, 301 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

her motion to reinstate.[119] The appellate court also rejected the argument that the trial court was required to notify the plaintiff of its decision regarding the motion to reinstate, noting that nothing in either Rules 165a[120] or 306a[121] requires the trial court to give notice to the parties when, by its inaction, a motion to reinstate is deemed overruled by operation of law.

In *Salas v. State Farm Mutual Automobile Insurance Co.*, the El Paso Court of Appeals construed the effect of dismissal pleadings that included more parties than the plaintiff intended.[122] In this automobile collision case, the plaintiff settled with one defendant but then signed a motion to dismiss that erroneously indicated that the dismissal applied to all parties. The trial court signed an order dismissing all of the plaintiff's claims against all defendants. Because the plaintiff failed to file her notice of appeal within thirty days after the entry of the dismissal order, the court of appeals dismissed the appeal for lack of jurisdiction.[123] In so holding, the appellate court noted that, while the plaintiff may not have intended to dismiss her claims against all parties, the dismissal order clearly indicated that the trial court's intent was to dismiss all claims of all parties, making the order final and appealable.[124]

In *Fox v. Hinderliter*,[125] the San Antonio Court of Appeals addressed the interplay between Rule 162's[126] right to non-suit and a motion to dismiss and for sanctions challenging the adequacy of a plaintiff's expert report in a medical malpractice action. After the plaintiffs filed suit and submitted their expert report, one of the defendants moved to dismiss the claims against him with prejudice and requested attorneys' fees and costs based on defects in the expert report. The day before that hearing was set, the plaintiffs filed their notice of nonsuit without prejudice, and the trial court therefore refused to hear the defendant's motion. Approximately one year later, the plaintiffs amended their pleadings and rejoined that defendant but with a different expert report from a new doctor. The defendant then filed an amended motion to dismiss, challenging deficiencies in the new report and reurging his request for a dismissal and sanctions based on the original report, which the trial court denied. On appeal, the court of appeals held that although the non-suit was effective immediately, it did not prejudice the defendant's then-pending motion to dismiss and for sanctions.[127] After determining that the original expert report was defective, the appellate court held that the trial court could

119. *Id.* at 304.
120. TEX. R. CIV. P. 165a.
121. TEX. R. CIV. P. 306a.
122. Salas v. State Farm Mut. Auto. Ins. Co., 226 S.W.3d 692, 695, (*mand. denied*, *In re* Salas, 228 S.W.3d 774, 775 (Tex. App.—El Paso 2007, no pet.).
123. *Id.* at 697.
124. *Id.*
125. 222 S.W.3d 154, 155 (Tex. App.—San Antonio 2006, pet. struck).
126. TEX. R. CIV. P. 162.
127. *Fox*, 222 S.W.3d at 158.

have ruled upon that motion despite the non-suit.[128] The appellate court therefore concluded that the trial court abused its discretion in failing to dismiss the suit based upon defects in the original report.[129]

Similarly, in *Crites v. Collins* the plaintiffs filed their medical malpractice suit against the doctor but failed to file their expert report within the mandated 120-day period.[130] After the deadline to file their expert report expired, the plaintiffs filed their notice of nonsuit. The defendant then moved for a dismissal with prejudice and to recover attorneys' fees and costs, which the trial court denied. The appellate court affirmed, holding that when the plaintiffs filed their nonsuit pleadings, no such motion was pending.[131] Had the defendant's motion to dismiss and for sanctions been pending before the plaintiffs filed their nonsuit, the trial court would have been required to rule on it. However, because the nonsuit was effective immediately, and the defendant's motion was not on file at the time, the defendant had effectively waived his right to seek that relief.[132]

IX. JURY PRACTICE

In *In re Hearst Newspapers Partnership, L.P.*, the Houston First District Court of Appeals held that a trial court's gag order, entered following a pre-verdict settlement, was unconstitutional where it prohibited jurors from speaking to the press, media, or others about the evidence and what their votes would have been if the case had proceeded to verdict.[133] The dispute arose out of a refinery explosion at British Petroleum's plant in Texas City in March 2005, and the trial court had anticipated that there would be many other suits arising out of the same event. The appellate court weighed the competing interests between the rights of free speech and press versus the need to protect the sanctity of jury deliberations, a juror's right to privacy and to be free from harassment, and a defendant's right to a fair trial. The court held that the lower court erred in failing to use the least restrictive means possible to obtain its objective of not tainting future jury pools about the same incident.[134] Specifically, protecting the secrecy of jury deliberations was not a concern since the case settled. In addition, there were no concerns about a criminal defendant's right to a fair trial. The court of appeals concluded that the trial court's concern about selecting future jurors in related cases was insufficient to outweigh the competing rights to free speech, especially since that issue could be remedied through voir dire.[135]

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128. *Id.* at 160.
129. *Id.*
130. Crites v. Collins, 215 S.W.3d 924, 925 (Tex. App.—Dallas 2007, pet. filed).
131. *Id.* at 926.
132. *Id.*
133. *In re* Hearst Newspapers P'ship, L.P., 241 S.W.3d 190, 198 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding).
134. *Id.* at 195-96.
135. *Id.*

The same court of appeals addressed the issue of improper jury argument in *Jones v. Republic Waste Services of Texas, Ltd.*[136] In this breach of contract and fraud case, one of the appellees' attorneys suggested during her closing remarks that the opposing counsel had suborned perjury. The attorney further attacked the integrity of opposing counsel by, among other things, suggesting that the appellant's theory of the case was simply an after-the-fact construct manufactured by the attorneys in meetings, although there was no evidence of any such meetings. The appellants argued that these statements constituted incurable and reversible error. The appellate court, while severely admonishing the appellees' counsel for her conduct both at trial and in her appellees' brief, ultimately disagreed, holding that improper argument is not *per se* incurable and must be evaluated on the facts and circumstances of the case.[137] Here, the court concluded that attorneys' remarks, while "reprehensible," were curable and not preserved by a timely objection.[138] The court noted that the comments at issue were short in duration, not repeated, and occurred at the end of a nearly three-week long trial, which included evidence that was contrary to the statements made during closing argument.

The Fort Worth Court of Appeals held in *Mikey's Houses, LLC v. Bank of America, N.A.* that a contractual waiver of trial by jury provision was unenforceable because there was insufficient evidence that the waiver was knowingly and voluntarily made with full awareness of the legal consequences.[139] The contractual waiver stated: "Waiver of Trial by Jury. Seller and Buyer knowingly and conclusively waive all rights to trial by jury in any action or proceeding relating to this Contract."[140] Notwithstanding this plain language, the court held that it was incumbent upon the bank to prove that the waiver was enforceable, rather than requiring the party challenging it to prove it was unenforceable.[141] Next, the court examined seven factors in determining whether the waiver provision was enforceable including the parties' experience in negotiating the type of contract involved, whether the parties were represented by counsel, whether the parties had an opportunity to examine the agreement, the overall negotiations between the parties, the conspicuousness of the provision, and the relative bargaining position of the parties. The court focused heavily on the conspicuousness of the provision and the lack of any discussions between the parties about it. Although the title of the provision as it appeared in the record was underlined, and notwithstanding the fact that the appellant admitted she could have read it if she had chosen to, could have retained counsel, and was not rushed into signing it,

136. 236 S.W.3d 390, 405 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

137. *Id.* at 403.

138. *Id.*

139. Mikey's Houses, LLC v. Bank of Am., N.A., 232 S.W.3d 145, 157 (Tex. App.—Fort Worth 2007, no pet.).

140. *Id.* at 148.

141. *Id.* at 152-53.

the court concluded that the bank had not proved the provision was enforceable.

The court in *Sharpless v. Sim* held that although a juror violated the court's instructions against conducting an independent investigation of an automobile collision outside of trial, the judgment for the plaintiff should still be affirmed because the information obtained by the juror was not material.[142] The juror found the driving record of the driver on the Internet, but did not uncover his prior drug conviction, which had been excluded from evidence. Moreover, because the verdict was 10-2 and the juror who conducted the independent investigation was one of the two dissenting jurors, no harm resulted.

Finally, in *Smith v. Dean*, the Fort Worth Court of Appeals addressed the topic of rehabilitating venire members during voir dire when several jurors raised their hand in response to a question to indicate agreement with a potentially disqualifying statement made by another panel member.[143] The court held that such conduct did not show unequivocal bias as a matter of law and as a result, those jurors could have been rehabilitated through subsequent questioning.[144] The appellate court concluded that the trial court was in the best position to evaluate the conduct and intent of the panel members and ultimately to determine if they had been rehabilitated.

X. JURY CHARGE

The Texas Supreme Court in *Bed Bath & Beyond, Inc. v. Urista* addressed whether submission of an inferential rebuttal instruction on unavoidable accident resulted in reversible error, warranting a new trial.[145] This suit emanated from an accident at the defendant's retail store where a plastic trash can fell from a twelve foot shelf. At trial, the jury received a broad form liability submission and, over the plaintiff's objection, an unavoidable accident instruction. The jury found no liability, and the trial court entered a take-nothing judgment in defendant's favor. The supreme court found no reversible error in the jury charge.[146] In so holding, the court distinguished this case from the situation in *Crown Life Insurance Co. v. Casteel*, which involved the use of a single, broad-form question that incorporated both valid and invalid theories of liability thereby creating a presumption of reversible error.[147] The court declined to extend the holding of *Casteel* to this case, which involved only the inclusion of an unsupported inferential rebuttal instruction.

The Texas Supreme Court addressed a similar issue in *Equistar Chemicals, L.P. v. Dresser-Rand Co.* relating to the "economic loss rule."[148] In

142. Sharpless v. Sim, 209 S.W.3d 825, 828 (Tex. App.—Dallas 2006, pet. denied).
143. Smith v. Dean, 232 S.W. 3d 181, 192 (Tex. App.—Fort Worth 2007, pet. denied).
144. *Id.* at 759.
145. Bed Bath & Beyond, Inc. v. Urista, 211 S.W.3d 753, 754 (Tex. 2006).
146. *Id.* at 759.
147. Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 392 (Tex. 2000).
148. Equistar Chems., L.P. v. Dresser-Rand Co., 240 S.W.3d 864, 865 (Tex. 2007).

this commercial dispute, the plaintiff submitted both tort and contract theories of liability, but the jury only received a single damage question for all liability theories. The supreme court held that the economic loss rule was a part of the plaintiff's cause of action and not an affirmative defense that needed to be pleaded.[149] Moreover, the court held that if the defendant contended that a single damage question was error, it should have objected to that question to preserve error for appeal.[150] Because it did not, the supreme court reversed and remanded the case to the court of appeals for further proceedings consistent with its ruling.[151]

In *Schrock v. Sisco*, which involved claims of assault and intentional infliction of emotional distress in the employment context, the Eastland Court of Appeals faced a similar situation where the jury received, over the objection of defendant's counsel, liability issues on both assault and intentional infliction of emotional distress.[152] The jury found for the plaintiff on both liability theories and awarded her compensatory damages of $40,000 on her intentional infliction claim, $25,000 on her assault claim, and $50,000 in exemplary damages. During the post-verdict proceedings, the plaintiff offered to remit the damages for her intentional infliction claim, which the trial court accepted; however, the punitive damage award remained intact. On appeal, the defendant complained that the submission of both liability theories was still error and was not cured by the remittitur because of the unchanged exemplary damage award. The appellate court agreed.[153] The court first concluded that the defendant had preserved its objection to the exemplary damage question because it had objected to the underlying liability theory of intentional infliction of emotional distress to which the exemplary damage award was tied.[154] The court then concluded that the jury could have been improperly influenced by the inclusion of the intentional infliction liability question in its deliberations, based on which it then may have then improperly awarded exemplary damages. Thus, the court reversed and remanded the case for a new trial.[155]

XI. JUDGMENTS

In *Titan Indemnity Co. v. Old South Insurance Group, Inc.*, the San Antonio Court of Appeals addressed the situation where default judgments were entered against a party after its general counsel failed to open two of three emails sent to him containing three separate suits because he assumed that he had been sent three copies of the same suit based on

149. *Id.* at 868.
150. *Id.*
151. *Id.* at 868-69.
152. Schrock v. Sisco, 229 S.W.3d 392, 393 (Tex. App.—Eastland 2007, no pet.).
153. *Id.* at 394.
154. *Id.* at 395.
155. *Id.* at 396.

prior litigation in another state involving the same parties.[156] The appellate court held that appellant's failure to answer two of the suits was negligent, but not the result of conscious indifference.[157] In reaching this conclusion, the court of appeals considered the evidence presented at the motions for new trial, including expert testimony, but still found that there was no evidence contradicting the testimony of the general counsel that he had not opened all three emails when they came in, and thus concluded that the general counsel's testimony about his conduct and decisions was unrefuted.

In *Liberty Mutual Fire Insurance Co. v. Laca*, the El Paso Court of Appeals dealt with the unusual situation where after a bench trial, the trial judge was asked but failed to enter findings of fact and conclusions of law.[158] The original judge was then replaced following an election. Since entering findings of fact and conclusions of law was required under Rule 297,[159] the appellate court determined that reversal was required. Because the original trial judge had been replaced, however, the court of appeals could not remand the case to him for entry of findings and conclusions but instead had no choice but to order a new trial.[160]

XII. MOTIONS FOR NEW TRIAL

Phillips v. Phillips addressed an unusual interplay between a motion to show authority under Rule 12[161] filed by a party's original attorney and a motion for new trial filed by her new attorney.[162] After the parties signed a divorce decree in this case, the appellant asked her original attorney to file a motion for new trial or notice of appeal. He refused. The appellant then engaged new counsel who did file a motion for new trial prior to filing a motion to substitute counsel. The prior attorney then filed a motion to show authority under Rule 12,[163] claiming he was still counsel of record. The trial court granted the Rule 12[164] motion and struck the motion for new trial. The First District Court of Appeals held that because a Rule 12[165] motion must be brought by a party, and the original attorney did not meet that definition, his motion to show authority was void.[166] Therefore, the appellate court concluded that the trial court abused its discretion in striking the motion for new trial.

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156. Tital Indem. Co. v. Old South Ins. Group, Inc., 221 S.W.3d 703, 707 (Tex. App. — San Antonio 2006, no pet.).
157. *Id.* at 711.
158. Liberty Mut. Fire Ins. Co. v. Laca, 243 S.W.3d 791, 793 (Tex. App.—El Paso 2007, no pet.).
159. TEX. R. CIV. P. 297.
160. *Liberty Mut.*, 243 S.W.3d at 796.
161. TEX. R. CIV. P. 12.
162. Phillips v. Phillips, 244 S.W.3d 433, 434 (Tex. App.—Houston [1st Dist.] 2007, no pet.).
163. TEX. R. CIV. P. 12.
164. *Id.*
165. *Id.*
166. *Phillips*, 244 S.W.3d at 435.

XIII. DISQUALIFICATION OF JUDGES

Yorkshire Insurance Co. v. Seger was an appeal from a *Stowers* action.[167] The insurers claimed the underlying judgment was not the result of a fully adversarial trial, inasmuch as the insured defendant was not represented by counsel at trial and presented no evidence or argument. The insurers argued that the trial judge should be recused as a material witness because he also presided over the underlying liability case.[168] The Amarillo Court of Appeals rejected this contention, noting that the complete transcript of the underlying proceeding was admitted as evidence in the *Stowers* case and that the insurers "fail[ed] to identify any specific knowledge of disputed evidentiary facts" held by the judge.[169]

XIV. DISQUALIFICATION OF COUNSEL

In re Basco arose out of doctor's suit against a hospital for wrongful termination of his privileges.[170] The doctor sought to disqualify the hospital's attorney on the ground that the attorney would have to question the work product of his former law partner, who had advised the doctor in a previous medical malpractice case. The hospital had cited the doctor's failure to report the earlier suit against him as one of the grounds for termination of his privileges, but the doctor claimed his attorney had advised him the suit was unmeritorious and that he should not report it until it was resolved.[171] Under these circumstances, the Texas Supreme Court held that the hospital's attorney could not adequately defend the termination case without challenging his former law partner's advice in the malpractice case, and disqualification was therefore mandatory.[172]

XV. MISCELLANEOUS

In *In re Merrill Lynch Trust Co.*, the Texas Supreme Court, in a matter of first impression, ruled that the doctrine of "substantially interdependent and concerted misconduct" did not permit third parties to invoke an arbitration clause.[173] In this case, the plaintiffs engaged Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch") to provide certain financial services. The plaintiffs' contract with Merrill Lynch contained an arbitration clause. In connection with providing those services, Merrill

167. Yorkshire Ins. Co. v. Seger, No. 07-05-00188-CV, 2007 WL 1771614, at *1 (Tex. App.—Amarillo Aug. 9, 2007, pet. filed) (citing G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544, 548 (Tex. Comm'n App. 1929, holding approved)).

168. *Id.* at *14.

169. *Id.* at *14-15. The court of appeals also upheld the trial court's denial of the insurers' motion to disqualify their opposing counsel, who were also counsel for plaintiffs in the underlying case. *Id.* at *15-16. The court assumed without deciding that the attorneys were in fact material witnesses, but held the insurers failed to show how they were harmed. *Id.* at *15.

170. *In re* Basco, 221 S.W.3d 637, 638 (Tex. 2007).

171. *Id.* at 638.

172. *Id.* at 639.

173. *In re* Merrill Lynch Trust Co., 235 S.W.3d 185, 191 (Tex. 2007).

Lynch recommended that the plaintiffs set up an irrevocable life insurance trust with Merrill Lynch Trust Company ("ML Trust") as trustee, which then purchased a life insurance policy from Merrill Lynch Life Insurance Company ("ML Life"). Both of these Merrill Lynch affiliates had their own independent contracts with the plaintiffs, neither of which contained an arbitration provision.

The plaintiffs subsequently sued ML Trust, ML Life, and a single Merrill Lynch employee, asserting claims based on their alleged mismanagement and misconduct. ML Trust and ML Life moved to stay the litigation pursuant to the arbitration clause in plaintiffs' contract with Merrill Lynch. ML Life and ML Trust argued that they could invoke Merrill Lynch's arbitration provision through an estoppel theory because plaintiffs' claims were based on "substantially interdependent and concerted misconduct" between them and Merrill Lynch, which had not been sued.[174] The supreme court rejected the plaintiffs' argument and held that plaintiffs' claims against ML Life and ML Trust could not be compelled to arbitration.[175]

First, the court noted that the Federal Arbitration Act did not compel or require arbitration merely because two claims arose from the same transaction or occurrence.[176] The court did recognize that, in some circumstances, other courts have compelled arbitration when a non-signatory defendant had a "close relationship" with one of the signatories and the claims were intertwined with the underlying contract obligations.[177] However, the court further noted that the "close relationship" requirement had generally been limited to instances where a signatory, instead of "suing the other party for breach," sues the "party's non signatory principals or agents" for the alleged misconduct.[178] Here, the court found the "concerted misconduct" test had no "close relationship" requirement and therefore, could improperly "sweep independent entities and even complete strangers into arbitration agreements."[179]

Second, the court held that the "concerted misconduct" theory could not be used to compel arbitration as a matter of contract law:

> [W]hile Texas law has long recognized that nonparties may be bound to a contract under traditional contract rules like agency or alter-ego, there has never been such a rule for concerted misconduct. Conspiracy is a tort, not a rule of contract law. And while conspirators consent to accomplish an unlawful act, that does not mean they impliedly consent to each other's arbitration agreements. As other contracts do not become binding on nonparties due to concerted misconduct, allowing arbitration contracts to become binding on that basis would make them easier to enforce than other contracts, con-

174. *Id.*
175. *Id.* at 195.
176. *Id.* at 191.
177. *Id.* at 193-94.
178. *Id.* at 194.
179. *Id.*

trary to the Arbitration Act's purpose.[180]

In *Miller v. Prosperity Bank*, the Dallas Court of Appeals considered whether a trial court had properly denied a motion to continue a summary judgment hearing on the ground that the party had not received the required twenty-one days' notice of the hearing.[181] In this case, the appellee's attorney had sent a timely notice of the hearing by certified mail, which the appellant did not claim. The court held that this notice was sufficient because the appellant admitted being aware that service had been attempted and that it was from the attorney's office, although she purposely decided not to claim the mail and was not aware of the contents.[182]

180. *Id.* (footnotes omitted).
181. Miller v. Prosperity Bank, 239 S.W.3d 440, 441 (Tex. App.—Dallas 2007, no pet.).
182. *Id.* at 442-44.