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A. Erin Dwyer

Donald Colleluori

Gary D. Eisenstat

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TEXAS CIVIL PROCEDURE

*A. Erin Dwyer**
*Donald Colleluori***
*Gary D. Eisenstat****

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* B.A., University of Notre Dame; J.D., University of Texas. Partner, Figari & Davenport, L.L.P., Dallas, Texas.
** B.A., Dickinson College; J.D., New York University. Partner, Figari & Davenport, L.L.P., Dallas, Texas.
*** B.S., University of Colorado; J.D., Boston University. Partner, Figari & Davenport, L.L.P., Dallas, Texas.

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

I. SUBJECT MATTER JURISDICTION

On rehearing in *Smith v. Clary Corp.*,[1] the Texas Supreme Court reaffirmed its prior holding that the aggregating statute,[2] which allows multiple plaintiffs to aggregate their claims for purposes of the minimum jurisdictional amount in district court,[3] will not defeat the subject matter jurisdiction of a county court at law over counterclaims brought by multiple defendants that exceed, in the aggregate, the maximum jurisdictional limit of that court.[4] In doing so, the court assumed, without deciding, that the aggregating statute would even be applicable to county courts at law.[5] The court's initial opinion, in contrast, expressly concluded that the statute applies only in the district courts.[6]

In *Chenault v. Phillips*,[7] the supreme court held that the district court was the proper forum for several attorneys' constitutional challenge to the Attorney Occupation Tax[8] and, therefore, refused to grant the attorneys leave to file an original petition for writ of mandamus in the high court.[9] The court distinguished *State Bar of Texas v. Gomez*,[10] in which it had held that its own supervisory authority over attorneys practicing in Texas precluded the district court's jurisdiction over a suit to require attorneys to provide mandatory pro bono services,[11] on the basis that the plaintiffs in *Gomez* sought to have the district court usurp the supreme court's "*administrative* powers, not *jurisdictional* powers," whereas the attorneys in *Chenault* were levelling a constitutional challenge to a statute that affects them.[12]

Flores v. Peschel[13] presented the question of how far a district court may go to protect its dominant jurisdiction over a matter that is also the subject of another, later-filed action pending in a different county. The court of appeals noted that the usual procedure in such a circumstance is to file a plea in abatement in the second-filed action or, in some "rare circumstances," to seek an injunction from the court with dominant juris-

1. 917 S.W.2d 796 (Tex. 1996).
2. TEX. GOV'T CODE ANN. § 24.009 (Vernon 1988).
3. *Smith*, 917 S.W.2d at 797.
4. Smith v. Clary Corp., 38 Tex. Sup. Ct. J. 1026, 1027 (July 7, 1995), *opinion superseded and rehearing overruled*, 917 S.W.2d 796 (Tex. 1996) (discussed in A. Erin Dwyer et al., *Texas Civil Procedure, Annual Survey of Texas Law* 49 SMU L. REV. 1371, 1372 (1996) [hereinafter *1996 Annual Survey*]).
5. *Smith*, 917 S.W.2d at 798.
6. *Smith*, 38 Tex. Sup. Ct. J. at 1027.
7. 914 S.W.2d 140 (Tex. 1996) (orig. proceeding).
8. TEX. TAX CODE ANN. §§ 191.141-.145 (Vernon 1992 & Supp. 1997).
9. *Chenault*, 914 S.W.2d at 141-42.
10. 891 S.W.2d 243 (Tex. 1994).
11. *Id.* at 244-45.
12. *Chenault*, 914 S.W.2d at 142 (emphasis original).
13. 927 S.W.2d 209 (Tex. App.—Corpus Christi 1996, orig. proceeding).

diction to prevent the parties from proceeding in the other case.[14] In *Flores*, however, the dominant jurisdiction court ordered that the second action be transferred to it from the court in another county.[15] The court of appeals held that such a transfer order was the equivalent of an injunction prohibiting the second court from proceeding, and the dominant jurisdiction court therefore lacked authority to enter such an order.[16]

II. SERVICE OF PROCESS

A failure to strictly comply with all of the requirements of Rule 109a[17] governing substituted service resulted in the reversal of a default judgment in *Isaac v. Westheimer Colony Ass'n*.[18] The plaintiff in that case was unsuccessful in attempting to serve the defendant at the residence address listed on his driver's license. Moreover, although the person who answered the door claimed to be the defendant's father, he refused to confirm the defendant's whereabouts. Unable to confirm a home or business address for the defendant, plaintiff was unable to move for the substituted service permitted under Rule 106(b)[19] and instead sought permission for substituted service under Rule 109a.[20] The court found that plaintiff had exercised due diligence in attempting service and authorized service by leaving the petition with anyone over sixteen at defendant's last known address.[21] However, Plaintiff did not ask for, and the trial court did not appoint, an attorney ad litem, as required by Rule 109a, to represent the defendant when he did not appear.[22] Therefore, the court of appeals reversed plaintiff's default judgment.[23]

Practitioners often face the dilemma of how to serve a non-appearing defendant with papers filed subsequent to the original petition. *In re R.D.C.*[24] provides guidance on this issue. In *R.D.C.*, the plaintiff amended her petition and served the non-appearing defendant with a copy by certified mail.[25] The court of appeals acknowledged the general rule that a non-appearing defendant is entitled to service of a new "cita-

14. *Id.* at 212.
15. *Id.* at 211.
16. *Id.* at 212-13.
17. TEX. R. CIV. P. 109a.
18. 933 S.W.2d 588 (Tex. App.—Houston [1st Dist.] 1996, writ denied).
19. TEX. R. CIV. P. 106(b) (court may on motion authorize service by leaving copy of citation and petition with anyone over sixteen years of age at defendant's usual place of business or usual place of abode or other place where he can probably be found).
20. TEX. R. CIV. P. 109a (authorizing court on motion to prescribe different method of substituted service of process when service by publication would be authorized). *Isaac*, 933 S.W.2d at 589-90.
21. *Isaac*, 933 S.W.2d at 591. *See also* G.F.S. Ventures, Inc. v. Harris, 934 S.W.2d 813 (Tex. App.—Houston [1st Dist.] 1996, writ requested) (finding sufficient diligence in service to authorize substituted service on Secretary of State where corporation's registered agent was no longer at address given and current resident did not know agent's whereabouts).
22. TEX. R. CIV. P. 109a; *Isaac*, 933 S.W.2d at 590.
23. *Isaac*, 933 S.W.2d at 591.
24. 912 S.W.2d 854 (Tex. App.—Eastland 1995, no writ).
25. *Id.* at 855.

tion" when an amended petition alleges a new claim or seeks a more onerous judgment, but noted that no cases discussed the impact of Rule 21a[26] allowing service of papers other than the original citation by mail.[27] Concluding that Rule 21a expressly and unambiguously permitted what plaintiff had done, and finding no express requirement in the Rules for issuance and service of a new citation, the court held that a plaintiff can serve an amended petition on a non-appearing defendant by mail regardless of whether it adds a cause of action or seeks a more onerous judgment.[28] Because Rule 106(a)(2)[29] authorizes service of the citation and petition by certified mail, return receipt requested, the cautious practitioner should still consider, notwithstanding the decision in *R.D.C.*, having a new citation issued and having an authorized private process server mail the citation and amended petition to the non-appearing defendant.

Potential pitfalls in service of process extend even to the filing of the return of citation. In *Verlander Enterprises, Inc. v. Graham*,[30] the plaintiff filed an amended return as permitted by Rule 118[31] to correct an error on the original return.[32] The court of appeals reversed plaintiff's default judgment because the corrected return was not endorsed on or attached to the original citation or another validly issued citation, which the court held was required.[33] Plaintiff State of Texas fared better in *Regalado v. State*,[34] where its return of a citation directed to "Maria Regalado, d/b/a Fred Regalado Bail Bonds" reflected that service was delivered to "'Name: c/o Maria Regalado.'"[35] Noting that strict compliance with the service rules "does not require 'obeisance to the minutest detail,'"[36] the court held that the fair and reasonable interpretation of the return was that the citation was personally served on Maria Regalado.[37]

III. SPECIAL APPEARANCE

In *CSR Ltd. v. Link*,[38] the Texas Supreme Court once again allowed a defendant to obtain immediate appellate review of the denial of its special appearance under Rule 120a.[39] Relying on the exception it first articulated in *Canadian Helicopters Ltd. v. Wittig*[40] that an ordinary appeal

26. TEX. R. CIV. P. 21a.
27. *Id.*; *R.D.C.*, 912 S.W.2d at 855.
28. *R.D.C.*, 912 S.W.2d at 856.
29. TEX. R. CIV. P. 106(a)(2); *accord* P & H Transp., Inc. v. Robinson, 930 S.W.2d 857, 859 (Tex. App.—Houston [1st Dist.] 1996, writ requested).
30. 932 S.W.2d 259 (Tex. App.—El Paso 1996, n.w.h.).
31. TEX. R. CIV. P. 118.
32. *Graham*, 932 S.W.2d at 260.
33. *Id.* at 262.
34. 934 S.W.2d 852 (Tex. App.—Corpus Christi 1996, n.w.h.).
35. *Id.* at 854.
36. *Id.* (quoting Herbert v. Greater Gulf Coast Enter., 915 S.W.2d 866, 871 (Tex. App.—Houston [1st Dist.] 1995, no writ).
37. *Id.*
38. 925 S.W.2d 591 (Tex. 1996) (orig. proceeding).
39. TEX. R. CIV. P. 120a; *CSR, Ltd.*, 925 S.W.2d at 597.
40. 876 S.W.2d 304 (Tex. 1994) (orig. proceeding).

is an adequate remedy for the erroneous denial of special appearance,[41] the court held that the defendant in this asbestos case had demonstrated the type of "extraordinary circumstances" that justified mandamus relief.[42] The court reasoned that the burdens of mass tort litigation on the resources of the defendant, which could potentially be exposed to numerous lawsuits, create a great incentive to settle regardless of the merits and therefore supported the conclusion that an appellate remedy was inadequate.[43] The court also considered the efficient use of the state's limited judicial resources, a significant percentage of which are devoted to asbestos litigation, as a factor favoring a right to mandamus relief.[44]

Both the concurring[45] and dissenting[46] opinions in *CSR Ltd.* complained that the supreme court's recent decisions in this area provide little guidance for practitioners regarding what other types of situations will be deemed to present sufficiently extraordinary circumstances to justify mandamus relief.[47] Their proposed solutions, however, differ. Justice Gonzalez would overrule *Walker v. Packer*[48] and its progeny "to the extent they hold that a foreign defendant with no ties to Texas must make a separate showing of harm before mandamus will issue to correct an order denying a special appearance."[49] Justice Baker, on the other hand, would relegate the defendant to the ordinary appellate process except in cases involving sovereign immunity, comity, or the parent-child relationship.[50]

IV. VENUE

Numerous cases decided during the Survey period involved the question of whether a trial court abused its discretion in denying a continuance of a venue hearing to permit one of the parties to conduct discovery. This issue arose in *City of LaGrange v. McBee*[51] in the context of a motion to transfer pursuant to Rule 257.[52] A hearing on McBee's motion to transfer venue was scheduled only ten days after the motion was filed. The City responded with a motion for continuance seeking additional time to obtain and file controverting affidavits on the issue of local prejudice. At the subsequent hearing, the trial court denied both the motion for continuance and McBee's motion to transfer. Instead, the court took judicial notice of the alleged local bias and granted the change of venue

41. *Id.* at 307.
42. *CSR, Ltd.*, 925 S.W.2d at 596.
43. *Id.* at 596.
44. *Id.* at 596-97.
45. *Id.* at 597 (Gonzalez, J., concurring).
46. *Id.* at 599 (Baker, J., dissenting).
47. *Id.* at 598, 601.
48. 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).
49. *CSR, Ltd.*, 925 S.W.2d at 598-99 (Gonzalez, J., concurring).
50. *Id.* at 599, 601 (Baker, J., dissenting).
51. 923 S.W.2d 89 (Tex. App.—Houston [1st Dist.] 1996, no writ).
52. TEX. R. CIV. P. 257(c) permits a change of venue upon motion of either party where an "impartial trial cannot be had in the county where the action is pending."

on its own motion.[53] The court of appeals reversed, holding that the trial court abused its discretion by denying the City reasonable discovery.[54] Rule 258 expressly permits the parties to conduct reasonable discovery in support of, or in opposition to, a motion to transfer venue on the basis of local prejudice.[55] By refusing to continue the hearing, the trial court denied the City reasonable discovery.[56]

Beard v. Gonzalez[57] involved facts analogous to those in *McBee*. A hearing on plaintiff's motion to transfer venue under Rule 257 was scheduled a mere twenty-one days after the motion was filed. Although defendant moved for a continuance, the trial court denied that motion and transferred the case on the basis of the affidavit and deposition evidence filed by the plaintiff. Like the *McBee* court, the court of appeals in *Beard* also held that the trial judge abused its discretion in denying the requested continuance.[58] The *Beard* decision went one step further, however, holding that mandamus was appropriate because the trial court's order conflicted with Rule 87,[59] which requires at least forty-five days notice of the hearing.[60]

In *Bridgestone/Firestone, Inc. v. Thirteenth Court of Appeals*,[61] the Texas Supreme Court addressed similar circumstances in the context of a garden-variety motion to transfer venue that did not involve issues of local prejudice under Rule 257. A hearing on the defendant's motion to transfer venue was scheduled with more than forty-five days notice. At this hearing, the trial court granted plaintiffs' motion for continuance and reset the hearing twenty-four days later in order to allow additional discovery. When the second hearing date arrived, the plaintiffs again moved for a continuance, alleging that the defendant had failed to respond appropriately to the discovery they had initiated during the interim. The trial court denied this second motion for continuance and ordered the case transferred. Like the courts in the two cases discussed above, the court of appeals concluded that the trial court's actions deprived the

53. *McBee*, 923 S.W.2d at 90 n.1. The court of appeals in *McBee* noted that a trial court has no authority to change venue in a civil suit on its own motion. *Id.* (citing Robertson v. Gregory, 663 S.W.2d 4, 5 (Tex. App.—Houston [14th Dist.] 1983, orig. proceeding); Humphrey v. Rawlins, 88 S.W.2d 776, 776 (Tex. Civ. App.—Dallas 1935, orig. proceeding)). Nevertheless, it did not reach the issue whether the order of transfer was void on this basis alone. *Id.*

54. *McBee*, 923 S.W.2d at 91 (citing Union Carbide Corp. v. Moye, 798 S.W.2d 792, 793 (Tex. 1990) (orig. proceeding) (mandamus available to correct abuse of discretion in failing to afford party seeking transfer under Rule 258 a reasonable opportunity before hearing to supplement the record with affidavits and discovery products)).

55. TEX. R. CIV. P. 258.

56. *McBee*, 923 S.W.2d at 91.

57. 924 S.W.2d 763 (Tex. App.—El Paso 1996, no writ).

58. *Id.* at 765.

59. TEX. R. CIV. P. 87(1).

60. *Beard*, 924 S.W.2d at 765 (citing Henderson v. O'Neill, 797 S.W.2d 905, 905 (Tex. 1990) (orig. proceeding) (mandamus available when trial court fails to follow procedural requirements of TEX. R. CIV. P. 87 concerning party's right to sufficient notice of the venue hearing)).

61. 929 S.W.2d 440 (Tex. 1996).

plaintiffs of their opportunity for reasonable discovery on the venue issue.[62] Accordingly, it held the plaintiffs lacked an adequate remedy by appeal, thus entitling them to mandamus.[63]

The supreme court disagreed and conditionally granted a writ of mandamus directing the court of appeals to withdraw its mandamus judgment.[64] In reaching this decision, the court contrasted its earlier holding in *Union Carbide Corp. v. Moye*,[65] a case which, like *McBee* and *Beard*, involved a motion to transfer venue under Rule 257.[66] Rule 258 provides that "reasonable discovery" in support of a Rule 257 venue motion "shall be permitted."[67] No parallel provision, however, exists with respect to venue motions under Rule 87.[68] Moreover, the court observed that there were no extraordinary circumstances in the case akin to those in *Union Carbide*; the venue hearing was set five months after the lawsuit was filed, the plaintiffs had not undertaken any discovery until the date their response to the venue motion was due, and the trial court gave them one continuance of the venue hearing.[69] In conclusion, the court reiterated that venue determinations generally are not reviewable by mandamus,[70] and noted that to make an exception whenever a trial court limits a party's opportunity for reasonable discovery would "swallow the rule."[71]

A peculiar turn of events led to the decision in *Orion Enterprises, Inc. v. Pope*.[72] The defendants' motions to transfer venue were originally set for hearing by the court in November. By agreement of all parties, the hearing was first reset to January 8 and later to January 29. By that time, the case had been transferred for purely administrative reasons to another court. Consequently, when the district clerk sent a notice to the parties confirming the second resetting to January 29, she also confirmed that the venue motions would be heard by the new court. At the hearing on January 29, however, the newly-assigned judge announced, to everyone's surprise, that the original judge had denied the venue motions by a written order dated January 8, apparently because the motions had never been removed from his docket despite the agreed, second resetting. The defendants immediately moved for reconsideration, but by the date of the

62. Woods v. Alvarez, 925 S.W.2d 119, 122-23 (Tex. App.—Corpus Christi), *writ of mandamus conditionally granted sub nom*, Bridgestone/Firestone, Inc. v. Thirteenth Court of Appeals, 929 S.W.2d 440 (Tex. 1996) (orig. proceeding) (per curiam).

63. *Id.* at 123.

64. *Bridgestone/Firestone*, 929 S.W.2d at 442.

65. 798 S.W.2d 792 (Tex. 1990).

66. *Bridgestone/Firestone*, 929 S.W.2d at 441-42.

67. *Id.* at 441. *See* TEX. R. CIV. P. 258.

68. *Bridgestone/Firestone*, 929 S.W.2d at 442. *Compare* TEX. R. CIV. P. 87 *with* TEX. R. CIV. P. 257, 258.

69. *Bridgestone/Firestone*, 929 S.W.2d at 442.

70. *Id.* One case decided during the Survey period, KJ Eastwood Inv., Inc. v. Enlow, 923 S.W.2d 255 (Tex. App.—Fort Worth 1996, orig. proceeding), correctly identifies at least one exception to this general rule, which was recently enacted by statute. Pursuant to TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (Vernon Supp. 1996), mandamus is available to enforce a mandatory venue provision. *Id.* at 258.

71. *Bridgestone/Firestone*, 929 S.W.2d at 442.

72. 927 S.W.2d 654 (Tex. App.—San Antonio 1996, orig. proceeding).

hearing on that motion, more than thirty days had expired since entry of the written order denying the venue motions. On that basis, the judge reluctantly denied the motion to reconsider.

The court of appeals, however, conditionally granted a writ of mandamus directing the trial court to reconsider the first judge's order denying the motions to transfer venue.[73] Although the appellate court disagreed with defendants' argument that their venue motions were not actually "heard" because there was never an oral hearing on January 8,[74] it still concluded that they did not receive the notice required by Rule 87[75] inasmuch as no one had notice the motions would be decided by the originally-assigned judge on January 8.[76] Analogizing to cases decided in the summary judgment context,[77] the court acknowledged that "reasonable" notice of the resetting is probably sufficient when the rule-required period of notice was given of the initial hearing date.[78] But this relaxation of the notice rule does not permit the trial court to decide the motion without any notice or hearing after the initial hearing date is passed by agreement.[79] The court also held that the newly-assigned judge had jurisdiction to reconsider the order denying the venue motions notwithstanding the passage of thirty days.[80] Unlike an order granting a motion to transfer venue,[81] the order denying the venue motions was interlocutory both with respect to the parties and with respect to the trial court until a final judgment had been rendered in the case.[82]

Three other cases deciding miscellaneous venue issues are worthy of note. In *Wichita County, Texas v. Hart*,[83] the Texas Supreme Court held

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73. *Id.* at 661.

74. *Id.* at 657. According to the court, "[n]othing in Rule 87 indicates that an oral hearing is required on a motion to transfer venue" and the rule "appears to contemplate the possibility of a hearing by written submission." *Id.*; *see* TEX. R. CIV. P. 87(3)(b) (court shall determine motion on basis of pleadings, stipulations and such affidavits and attachments as may be filed); TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a) (Vernon 1986). *See also* Gulf Coast Inv. Corp. v. NASA 1 Business Ctr., 754 S.W.2d 152, 153 (Tex. 1988) (term "hearing" does not necessarily contemplate either an appearance before court or oral presentation). Because of the other bases for its decision, the court decided it need not actually decide whether Rule 87 always requires an oral hearing on a motion to transfer. *Orion*, 927 S.W.2d at 658.

75. TEX. R. CIV. P. 87(1) provides that "[e]xcept on leave of court each party is entitled to at least 45 days notice of a hearing on the motion to transfer."

76. *Orion*, 927 S.W.2d at 658.

77. *See, e.g.*, Birdwell v. Texins Credit Union, 843 S.W.2d 246, 250 (Tex. App.—Texarkana 1992, no writ); Int'l Ins. Co. v. Herman G. West, Inc., 649 S.W.2d 824, 825 (Tex. App.—Fort Worth 1983, no writ).

78. *Orion*, 927 S.W.2d at 658.

79. *Id.*

80. *Id.* at 659.

81. When a trial court grants a motion to transfer venue, the order is interlocutory as to the parties but final as to the transferring court; accordingly, the transferring court's plenary power over its order expires thirty days after it is signed. HCA Health Servs. of Texas, Inc. v. Salinas, 838 S.W.2d 246, 248 (Tex. 1992).

82. *Orion*, 927 S.W.2d at 659.

83. 917 S.W.2d 779 (Tex. 1996).

that the Whistleblower Act's venue provision[84] is merely permissive and does not override the mandatory provision for suits against counties contained in the venue statute.[85] In *Glover v. Moser*,[86] the court of appeals concluded that a trial court must hear and determine a motion to transfer venue prior to hearing a motion for default judgment, even though the defendant never has filed an answer,[87] so long as the defendant has properly filed his motion and obtained a hearing thereon.[88] Finally, in *GeoChem Tech Corp. v. Verseckes*,[89] the court decided an issue expressly left open by the supreme court in *Ruiz v. Conoco, Inc.*,[90] holding that venue is fixed in the county to which transfer is sought whenever a plaintiff voluntarily nonsuits his case while a motion to transfer is pending.[91] Numerous decisions under the pre-existing venue statute and rules had held that venue was fixed in the county named in a plea of privilege[92] whenever a plaintiff nonsuited his action before the trial court made its venue determination.[93] Although it has been generally thought that this "venue-fixing" rule survived the 1983 venue amendments[94] despite the *Ruiz* court's refusal to address the issue, the decision in *GeoChem* appears to be the

84. TEX. GOV'T CODE ANN. § 554.007(a) (Vernon 1994 & Supp. 1997) ("A public employee of a state governmental entity may sue under this chapter in a district court of the county in which the cause of action arises or in a district court of Travis County.").

85. TEX. CIV. PRAC. & REM. CODE ANN. § 15.015 (Vernon 1986) ("An action against a county shall be brought in that county."); *Hart*, 917 S.W.2d at 782.

86. 930 S.W.2d 940 (Tex. App.—Beaumont 1996, n.w.h.).

87. *Id.* at 944. The court observed that, while an answer may be filed concurrently with or after the motion to transfer venue without risking waiver, neither the rules nor the case law require the filing of an answer prior to the trial court's determination on the motion to transfer venue. *Id.* at 943-44. *See* TEX. R. CIV. P. 86(1); TEX. CIV. PRAC. & REM. CODE ANN. § 15.063 (Vernon 1986).

88. *Glover*, 930 S.W.2d at 944. The court thereby distinguished the situation presented in Duplantis v. Noble Toyota, Inc., 720 S.W.2d 863 (Tex. App.—Beaumont 1986, no writ), where the defendant, who filed a motion to transfer venue but no answer, never attempted to obtain a hearing on its motion and thereby failed to comply with TEX. R. CIV. P. 87. *Glover*, 930 S.W.2d at 944.

89. 929 S.W.2d 85 (Tex. App.—Eastland 1996, writ requested).

90. 868 S.W.2d 752 (Tex. 1993).

91. *GeoChem*, 929 S.W.2d at 89-90. According to the court, the plaintiff in these circumstances waives not only the right to contest the merits of the motion but also the right to require proof under TEX. R. CIV. P. 87 that venue is proper in the county to which transfer is sought. *Id.*

92. Prior to the amendment in 1983, the rules of procedure governing venue hearings provided for the filing of a "plea of privilege" as the procedural mechanism for challenging a plaintiff's choice of venue. *See* TEX. R. CIV. P. 84, 86, 87, 88, 89, 93, 120a, 385, 527 (1983). Complementing the legislature's 1983 overhaul of the Texas venue statute, Act of June 17, 1983, 68th Leg., R.S., ch. 385, § 1, 1983 Tex. Gen. Laws 2119, 2119-24 [now codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.001-.100 (Vernon 1986 & Supp. 1997)], the Texas Supreme Court promulgated amended procedural rules in 1983 that eliminated all references to the plea of privilege. *See* Order of June 15, 1983, *reprinted in* 46 Tex. B.J. 858-59 (1983).

93. *See, e.g.*, Royal Petroleum Corp. v. McCallum, 134 Tex. 543, 135 S.W.2d 958, 967 (1940); Wilson v. Wilson, 601 S.W.2d 104, 105 (Tex. Civ. App.—Dallas 1980, no writ).

94. *See* Conoco, Inc. v. Ruiz, 818 S.W.2d 118, 123 (Tex. App.—San Antonio 1991), *aff'd.*, 868 S.W.2d 752 (Tex. 1993); Hendrick Medical Ctr. v. Howell, 690 S.W.2d 42 (Tex. App.—Dallas 1985, no writ), discussed in Ernest E. Figari, Jr. et al., *Texas Civil Procedure, Annual Survey of Texas Law*, 40 Sw. L.J. 491, 501-02 (1986).

first to squarely decide the matter.[95]

V. PARTIES

Questions about interlocutory appeals from class certification orders continue to plague Texas courts. Section 51.014 of the Texas Civil Practice & Remedies Code, which authorizes the taking of interlocutory appeals in limited instances, allows a party to appeal from an interlocutory order that "certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure."[96] Several years ago, the court in *Pierce Mortuary Colleges, Inc. v. Bjerke*[97] held that section 51.014 authorized an interlocutory appeal only with respect to the original order certifying the class and not a later amendment of that order.[98] For this reason, the court of appeals in *St. Louis Southwestern Railway Co. v. Voluntary Purchasing Groups, Inc.*[99] held that it had jurisdiction over an interlocutory appeal of a class certification order entered less than thirty minutes after plaintiffs filed their original petition. The defendants argued that the order's language suggested that some other ruling may eventually be made about the propriety of proceeding as a class and the order therefore lacked finality.[100] The court observed, however, that *Pierce* requires a party to appeal from the first version of the order, and a later amended order expanding the class might not be appealable.[101] Having decided this jurisdictional issue, the court then reversed the trial court's order because it was entered without a hearing[102] and "no notice of the proposed mandatory class certification was given to admittedly known parties already engaged in sixteen other lawsuits" against the defendants.[103]

Also relying on *Pierce*, the court of appeals in *De Los Santos v. Occidental Chemical Corp.*[104] refused to entertain an interlocutory appeal of

95. *GeoChem*, 929 S.W.2d at 89-90.

96. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(3) (Vernon 1986 & Supp. 1997).

97. 841 S.W.2d 878 (Tex. App.—Dallas 1992, no writ) (discussed in Ernest E. Figari, Jr. et al., *Texas Civil Procedure, Annual Survey of Texas Law*, 47 SMU L. REV. 1677, 1686-87 (1994)).

98. *Pierce*, 841 S.W.2d at 881.

99. 929 S.W.2d 25 (Tex. App.—Texarkana 1996, n.w.h.).

100. *Id.* at 29.

101. *Id.* at 29. The court also pointed out that defendants' argument about the "preliminary" nature of the certification order ignored TEX. R. CIV. P. 42(c), which states that the "'determination [of the propriety of proceeding as a class] may be altered, amended, or withdrawn at any time before final judgment.'" *Id.*

102. *Id.* at 31; *see* TEX. R. CIV. P. 42(c)(1) ("As soon as practicable after the commencement of an action brought as a class action, the court shall, after hearing, determine by order whether it is to be so maintained.").

103. *St. Louis*, 929 S.W.2d at 31. Finding that this precise issue had not yet been addressed by Texas courts, the appellate court relied on federal authorities in concluding that certification of a mandatory class action absent notice to those who might contest its nature or creation constitutes a denial of due process. *Id.* at 31 and n.6. *See, e.g., In re* Temple, 851 F.2d 1269, 1272 (11th Cir. 1988); *In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 306 (6th Cir. 1984).

104. 925 S.W.2d 62 (Tex. App.—Corpus Christi), *rev'd*, 933 S.W.2d 493 (Tex. 1996).

an order changing a previously certified class from opt-out to mandatory for settlement purposes. The court reasoned that the order certifying a mandatory class only enlarged the size of the existing opt-out class and, therefore, was no different than the situation addressed in *Pierce*.[105] The supreme court reversed, however, finding that a fundamental difference existed between the situations in *Pierce* and *De Los Santos*.[106] Although new members were added to the class prior to trial in *Pierce*, the supreme court noted that the relationship of class members to each other and their attorneys in that case was not affected by the expansion.[107] In contrast, changing the class from opt-out to mandatory in *De Los Santos* did not simply enlarge its membership, it altered the fundamental nature of the class.[108] To deny an interlocutory appeal in this situation, said the court, would aggravate the concerns it had recently expressed in *General Motors Corp. v. Bloyed*[109] about the conflicts that may arise between the class and its counsel, especially in relation to settlement.[110]

Due in part to those concerns, the court in *Bloyed* affirmed the reversal of a court-approved settlement of a class action involving over 645,000 owners of certain pickup trucks manufactured by GM.[111] Although much of the opinion in *Bloyed* is devoted to a discussion of the supreme court's concerns about the potential for abuse of the class action procedure, particularly in the settlement context,[112] it ultimately concluded that the court of appeals erred when it held that the settlement was not fair, adequate, or reasonable to the class members as a whole.[113] In discharging its responsibility to determine whether a class action settlement is fair, adequate, and reasonable,[114] "the trial court must examine both the substantive and procedural aspects of the settlement: (1) whether the terms of the settlement are fair, adequate, and reasonable; and (2) whether the settlement was the product of honest negotiations or of collusion."[115] Based on its review of the record, the supreme court determined that the trial court correctly analyzed the fairness of the settlement[116] according to the six factors enumerated in *Ball v. Farm & Home Savings Ass'n*.[117] Therefore, it held that the court of appeals improperly substituted its own judgment for that of the trial court when it decided that the "potential windfall" to GM outweighed the reasons supporting the class compro-

105. *Id.* at 65.
106. *De Los Santos*, 933 S.W.2d at 493.
107. *Id.*
108. *Id.*
109. 916 S.W.2d 949 (Tex. 1996).
110. *De Los Santos*, 933 S.W.2d at 493.
111. *Bloyed*, 916 S.W.2d at 951.
112. *Id.* at 952-55.
113. *Id.* at 956.
114. TEX. R. CIV. P. 42(e) provides that a "class action shall not be dismissed or compromised without the approval of the court . . . ."
115. *Bloyed*, 916 S.W.2d at 955.
116. *Id.*
117. 747 S.W.2d 420, 423-24 (Tex. App.—Fort Worth 1988, writ denied).

mise.[118] Nevertheless, the supreme court affirmed the court of appeals' judgment setting aside the settlement on the basis that class members did not receive adequate notice of all of the material terms of the proposed settlement, specifically the projected amount of attorney's fees and expenses.[119] According to the court, it was simply irrelevant that these fees and expenses were to be paid directly by GM in an otherwise noncash settlement, as opposed to being subtracted directly from the fund to be distributed among the class members, because the combination of those fees and the benefits conferred on the class by the settlement represented a total dollar figure that the defendant was willing to pay to avoid litigation.[120] Observing that the potential conflict between absent class members and class counsel in these circumstances is "one of the serious problems with class action settlements," the court held that class action settlement notices must contain the maximum amount of attorney's fees sought by class counsel and specify the proposed method of calculating the award.[121] The court also announced, as a general rule, that trial courts in the future should not simply rely on affidavits in approving a proposed settlement, but should conduct a plenary hearing with the opportunity for questioning by the court and vigorous cross-examination by counsel representing objecting class members.[122]

During the time it retains plenary power, a trial court may grant a new trial even on its own motion.[123] According to the court in *State & County Mutual Fire Insurance Co. v. Kelly*,[124] however, only a motion for new trial filed by a party of record operates to automatically extend the trial court's plenary power.[125] In contrast, a "'motion for new trial' filed by a nonparty is simply an unofficial plea to the trial court to exercise its discretion under Rule 320 to set aside the judgment during the court's plenary power."[126] Therefore, the court held that a trial court's order granting a motion for new trial filed by a prospective intervenor was void because neither it nor the order granting intervention was signed until more than thirty days after the judgment was entered.[127]

VI. PLEADINGS

Rule 63[128] provides that an amended pleading may be filed within seven days of trial only upon leave of court. Prior decisions of the Texas Supreme Court make clear that a summary judgment hearing is a "trial"

118. *Bloyed*, 916 S.W.2d at 955, 957.
119. *Id.* at 957.
120. *Id.* at 957-58.
121. *Id.* at 957.
122. *Id.* at 958.
123. TEX. R. CIV. P. 320.
124. 915 S.W.2d 224 (Tex. App.—Austin 1996, orig. proceeding).
125. *Id.* at 227.
126. *Id.*
127. *Id.*
128. TEX. R. CIV. P. 63.

for purposes of this rule.[129] Two recent cases provided the court with new opportunities to consider the rule's application in the summary judgment context.

The question in *Sosa v. Central Power & Light*[130] was whether Rule 4[131] governs the computation of the time period set forth in Rule 63. Concluding that it does, the court held that a party need not obtain leave of court when the amended pleading is filed exactly seven days before the summary judgment hearing.[132] In its opinion, the court acknowledged that it had never before specifically dealt with this issue, and it appeared to admit that the language of the rule was ambiguous.[133] The court pointed out, however, that its comment to Rule 63 clearly evidences "our intent to authorize amendment without leave of court if it is filed 'seven days or more before the date of trial.'"[134] The court also emphasized, consistent with one of its prior decisions,[135] that Rule 4 "'applies to any period of time prescribed by the rules of procedure.'"[136] As a result of this analysis, the *Sosa* court expressly disapproved the decisions of a number of courts of appeals[137] that have held Rule 63 requires a full seven days to elapse between the date of filing and the date of hearing.[138]

In *Continental Airlines, Inc. v. Kiefer*,[139] the second amended petition was filed only five days before the summary judgment hearing, so there was no question the amendment was untimely unless filed with leave of court. Reiterating the rule it announced in *Goswami*,[140] the supreme court held that leave of court is presumed when a summary judgment states that all pleadings were considered and when, as was the case in *Kiefer*, "the record does not indicate that an amended pleading was not considered, and the opposing party does not show surprise."[141] With respect to the first condition, the court found it was satisfied by the "*Kiefer* judgment's recital that the court, 'after examining the pleadings,' concluded that Continental was entitled to summary judgment."[142]

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129. *See, e.g.*, Goswami v. Metro. Sav. & Loan Ass'n, 751 S.W.2d 487, 490 (Tex. 1988).

130. 909 S.W.2d 893 (Tex. 1995) (per curiam).

131. TEX. R. CIV. P. 4 provides: "In computing any period of time prescribed or allowed by [the Texas Rules of Civil Procedure], . . . the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included."

132. *Sosa*, 909 S.W.2d at 895.

133. *Id.*

134. *Id.*; *see* TEX. R. CIV. P. 63, cmt.

135. Lewis v. Blake, 876 S.W.2d 314, 316 (Tex. 1994).

136. *Sosa*, 909 S.W.2d at 895.

137. *See, e.g.*, Volvo Petroleum, Inc. v. Getty Oil Co., 717 S.W.2d 134, 137 (Tex. App.—Houston [14th Dist.] 1986, no writ); Sweeny Bank v. Ritchie, Hopson & Assocs., Inc., 628 S.W.2d 175, 176 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.); Dillingham v. Lynch, 516 S.W.2d 694, 704 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.); Oehler v. Oehler, 422 S.W.2d 240, 244 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

138. *Sosa*, 909 S.W.2d at 895.

139. 920 S.W.2d 274 (Tex. 1996).

140. *Goswami*, 751 S.W.2d at 490.

141. *Kiefer*, 920 S.W.2d at 276.

142. *Id.*

Rule 93 requires that pleadings setting up a defect in parties must be verified, "unless the truth of such matters appear of record."[143] Consistent with earlier decisions by other courts of appeals, *Cantu v. Holiday Inns, Inc.*[144] holds that the required verification may be supplied by an attorney, where he or she has knowledge of the facts,[145] and that although no recital of personal knowledge is necessary, there must at least be some showing that the affidavit was based on personal knowledge.[146] The *Cantu* decision is noteworthy because of its additional holding that verification of the pleading is unnecessary if the asserted defect in parties appears of record in the summary judgment evidence, as opposed to the pleading record.[147] The court observed that there "is a dearth of case law in Texas dealing with the 'of record' exception to the verification requirement in Rule 93."[148] Nonetheless, it agreed with the decision in *Lechuga v. Texas Employers' Insurance Ass'n*,[149] the only case it could apparently locate that had previously addressed the issue.[150] In *Lechuga*, the Amarillo court of appeals rejected an argument that the "of record" exception to the rule's verification requirement was limited to the pleadings in the case in chief and did not encompass the summary judgment pleadings and evidence or other evidence in the record.[151]

VII. DISCOVERY

A. PROCEDURES AND SCOPE

Since the Texas Supreme Court's decision in *Loftin v. Martin*,[152] practitioners have routinely faced the objection that their Rule 167[153] document requests are not specific enough unless they are phrased as requests for particular documents or types of documents. During the Survey period, however, the Supreme Court in *K Mart Corp. v. Sanderson*,[154] clarified the *Loftin* rule in a way that should relieve much of the burden on drafting document requests that are sufficiently specific when the requesting party does not know what types of documents her opponent maintains. In *K Mart*, the court held that a request for "all documents 'which relate to, touch or concern the allegations of this lawsuit,'" as well as requests for all documents "reflecting" or "relat[ing] in any way" to

143. TEX. R. CIV. P. 93(4).
144. 910 S.W.2d 113 (Tex. App.—Corpus Christi 1995, writ denied).
145. *Id.* at 116. *See* Gorrell v. Tide Prods., Inc., 532 S.W.2d 390, 395 (Tex. Civ. App.—Amarillo 1975, no writ); TEX. R. CIV. P. 14.
146. *Cantu*, 910 S.W.2d at 116. *See* Reyna v. Nat'l Union Fire Ins. Co. of Pittsburgh, 883 S.W.2d 368, 371 (Tex. App.—El Paso 1994), *rev'd on other grounds*, 897 S.W.2d 777 (Tex. 1995).
147. *Cantu*, 910 S.W.2d at 117.
148. *Id.* at 116.
149. 791 S.W.2d 182 (Tex. App.—Amarillo 1990, writ denied).
150. *Cantu*, 910 S.W.2d at 116-17.
151. *Lechuga*, 791 S.W.2d at 185-86.
152. 776 S.W.2d 145 (Tex. 1989).
153. TEX. R. CIV. P. 167 (concerning discovery and production of documents).
154. 40 Tex. Sup. Ct. J. 50 (Oct. 18, 1996).

the incident in which the plaintiff was injured were not improper.[155] The court distinguished its decision in *Loftin*, which it characterized as involving a request for all documents that supported a party's position or related to the claims and defenses.[156] The court found that in the case before it the requests were for documents relating to a discrete incident and that, while it would be better to be more specific, "a reasonable person would understand from the request what documents fit the description."[157] The court also took the opportunity in *K Mart* to disabuse practitioners of the impression, which they understandably received from *Loftin*, that although document requests may not be used for the proverbial "fishing expedition," interrogatories and depositions may be used for that purpose.[158] The court made clear that no discovery device can be used merely to "fish."[159]

Many practitioners have also wrestled with the propriety of interrogatories asking not only for the identity of persons with knowledge of relevant facts, but also a statement of the facts known to such persons. Several years ago, in *Housing Authority of El Paso v. Rodriquez-Yepez*,[160] the El Paso Court of Appeals held that an interrogatory requesting this additional information was inappropriate, and that the burden should be on the opposing party to depose the individuals named to determine what knowledge they possess.[161] In denying the application for writ of error, however, the Supreme Court expressly disclaimed that it was approving this aspect of the lower court's holding.[162] In *Tjernagel v. Roberts*,[163] the Amarillo Court of Appeals suggested a reasonable compromise approach to this issue. The court found that the objecting party had not sustained its burden of proving that the interrogatory was overly broad or unduly burdensome.[164] The court added in dicta that it did not read the supreme court's comments in *Housing Authority* as mandating that a party answering such an interrogatory must undertake an investigation of the knowledge possessed by each person it identifies as having knowledge of relevant facts.[165] Instead, the court offered that "[i]f the answering party is aware of that information, he should state it; if not, he may so state."[166]

155. *Id.* at 51.
156. *Id.*
157. *Id.*; *see also* Davis v. Pate, 915 S.W.2d 76, 79 (Tex. App.—Corpus Christi 1996, orig. proceeding) (mandamus filed) (holding that requests for any and all documents pertaining in any way to subject matter of litigation were improper, while requests for any and all documents pertaining to particular aspects or elements of claims, such as damages, were proper).
158. *K Mart*, 40 Tex. S. Ct. J. at 52 (quoting *Loftin*, 776 S.W.2d at 148).
159. *Id.*
160. 828 S.W.2d 499 (Tex. App.—El Paso), *writ denied per curiam*, 843 S.W.2d 475 (Tex. 1992).
161. *El Paso*, 828 S.W.2d at 501.
162. *El Paso*, 843 S.W.2d at 476.
163. 928 S.W.2d 297 (Tex. App.—Amarillo 1996, orig. proceeding).
164. *Id.* at 302.
165. *Id.* at 301-02.
166. *Id.* at 302.

The supreme court addressed the withdrawal of Rule 169[167] admissions in *Stelly v. Papania*.[168] One of the defendants in that case admitted that it owned certain premises on which the plaintiff fell.[169] The trial court allowed the defendant to withdraw this admission when a survey later revealed that he had been mistaken, but the court of appeals reversed and remanded for trial.[170] The supreme court noted that it had never before addressed the question of party's attempted withdrawal of an express admission, and that all of the courts of appeals' decisions dealt with the withdrawal of deemed admissions.[171] The court concluded that the trial court did not abuse its discretion in allowing the defendant's mistaken admission to be withdrawn because the defendant had shown "good cause" for the withdrawal, and the plaintiff was not prejudiced.[172]

Requests for admissions were also at issue in *Carrasco v. Texas Transportation Institute*.[173] The defendant in that case, part of the Texas A&M University System, argued that answers to requests for admissions prepared by the Texas attorney general's office on its behalf were not binding in light of Section 402.004 of the Texas Government Code.[174] That statute provides that any admission or waiver made by the attorney general in a lawsuit in which the state is a party cannot prejudice the rights of the state.[175] The court of appeals rejected this argument, holding that the statute did not exempt the defendant from compliance with the rules of procedure.[176] The court reasoned that the purpose of requests for admissions is to clarify the facts, which would not prejudice the state.[177] If a party did attempt to use requests for admissions for some improper purpose that would prejudice the state, the attorney general would be entitled to file a specific, timely objection under Rule 169.[178]

In 1990, the Texas Rules of Civil Procedure were amended to require a party to give notice if it intended to have persons other that the witness, parties, spouses of parties, counsel, employees of counsel, and the court reporter attend a deposition.[179] One of the few cases interpreting this rule is *Burrhus v. M&S Supply, Inc.*[180] The *Burrhus* court held that Rule 200(2)(a) does not contain any provision exempting expert witnesses from its notice requirement, and a party must therefore provide notice if an expert who is an independent contractor, rather than an employee of

167. TEX. R. CIV. P. 169 (involving requests for admissions).
168. 927 S.W.2d 620 (Tex. 1996).
169. *Id.* at 621.
170. *Id.*
171. *Id.* at 621-22 (citations omitted).
172. *Id.* at 622.
173. 908 S.W.2d 575 (Tex. App.—Waco 1995, no writ).
174. TEX. GOV'T CODE ANN. § 402.004 (Vernon 1990); *Carrasco*, 908 S.W.2d at 578.
175. TEX. GOV'T CODE ANN. § 402.004 (Vernon 1990).
176. *Carrasco*, 908 S.W.2d at 578.
177. *Id.*
178. TEX. R. CIV. P. 169(1); *Carrasco*, 908 S.W.2d at 579.
179. TEX. R. CIV. P. 200(2)(a).
180. 933 S.W.2d 635 (Tex. App.—San Antonio 1996, writ denied).

counsel, will attend a deposition.[181] The court went on to hold, however, that the district court did not abuse its discretion in refusing to exclude the expert from testifying at trial as a sanction for the violation of Rule 200(2)(a).[182] The court recognized that, even if notice had been given and a motion for protective order filed, the district court would have likely allowed the expert to attend the deposition in any event.[183]

Rule 167a allows a court, upon motion and for good cause shown, to compel a party to submit to a mental examination if that party's mental condition is in controversy.[184] The supreme court has held that merely pleading mental anguish damages is not sufficient to entitle the defendant to a compulsory mental examination of the plaintiff.[185] *Laub v. Millard*[186] holds, however, that if a plaintiff intends to offer her own expert testimony of her mental condition, then the defendant has good cause to compel an examination under Rule 167a.[187]

B. Privileges and Exemptions

The supreme court addressed the issue of "whether the attorney-client privilege protects communications between a trustee and his or her attorney relating to trust administration from discovery by a trust beneficiary" in *Huie v. DeShazo*.[188] The court held that the trust beneficiary may not discover otherwise privileged communications, notwithstanding the trustee's fiduciary duties to the beneficiary.[189] The court rejected the beneficiary's argument that the trustee's duty of full disclosure extended to such privileged communications, but noted that it is only the communications themselves, and not the facts known to the trustee or the attorney, that are protected from disclosure.[190] The court acknowledged that its holding is at odds with a number of commentators and courts in other jurisdictions,[191] but concluded that any exception to the privilege based on the client's status as a fiduciary should be accomplished by amendment to Rule 503[192] rather than judicial decision.[193]

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181. *Id.* at 640.
182. *Burrhus*, 933 S.W.2d at 643.
183. *Id.* at 643 n.8.
184. Tex. R. Civ. P. 167a.
185. Coates v. Whittington, 758 S.W.2d 749, 753 (Tex. 1988) (orig. proceeding).
186. 925 S.W.2d 363 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding).
187. *Id.* at 364. The court also noted that, while a compelled mental examination might not be particularly useful in determining the plaintiff's mental condition during the earlier time period at issue in the lawsuit, plaintiff's own expert had only examined her afterwards as well, and fundamental fairness required that defendant be entitled to rebut plaintiff's expert with expert testimony of his own. *Id.* at 365.
188. 922 S.W.2d 920, 920 (Tex. 1996) (orig. proceeding).
189. *Id.*
190. *Id.* at 923.
191. *Id.* at 924 (citations omitted).
192. Tex. R. Civ. Evid. 503.
193. *Huie*, 922 S.W.2d at 924-25. The court further held that the work-product privilege can also be asserted by the trustee against the beneficiary. *Id.* at 927. Indeed, since the work-product privilege protects only materials prepared in anticipation of litigation, the

Volkswagen, A.G. v. Valdez[194] involved a conflict between the Texas discovery rules and German privacy laws.[195] The plaintiff sought production of Volkswagen's current corporate telephone book, which the evidence adduced in the trial court demonstrated was protected by Germany's privacy law.[196] The trial court ordered the telephone book produced.[197] The supreme court, adopting the approach of the Restatement (Third) of Foreign Relations Law, held that the trial court should have balanced the competing interests, taking into account such factors as the specificity of the request, whether there are alternative means of securing the information, and the importance of the information to the litigation.[198] The high court concluded that the trial court abused its discretion in failing to balance these interests.[199] Moreover, upon balancing the interests itself, the court held that the corporate phone book should not be produced.[200]

In a series of three opinions issued the same day, the Texas Supreme Court discussed at length the medical peer review committee privilege.[201] The first case, *Memorial Hospital-The Woodlands v. McCown*,[202] involved a defamation claim by a physician in which the defendant sought records from several hospitals relating to the physician's initial applications for state privileges.[203] The court held that the peer review privilege extended to this initial credentialing review.[204] The court carried this holding a step further in *Irving Healthcare System v. Brooks*.[205] There, a physician sued for defamation, claiming that the defendants intentionally and maliciously supplied false information about him to the medical peer review committees.[206] The court held that *Memorial Hospital-The Woodlands* was controlling and that, absent a statutory waiver or exception, the communications to the committee were not discoverable in this situation either.[207] Finally, the court followed *Memorial Hospital-The Woodlands* in *Brownwood Regional Hospital v. Eleventh Court of Appeals*[208] as well, holding that the records relating to the hospital's grant of staff privileges

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policy reasons supporting a trustee's claim of confidentiality even as against the beneficiary are stronger in the work-product context than the attorney-client privilege context. *Id.*

194. 897 S.W.2d 458 (Tex. App.—Corpus Christi 1995, orig. proceeding), *overruled sub nom.* Volkswagen, A.G. v. Valdez, 909 S.W.2d 900 (Tex. 1995).

195. *Id.* at 901.

196. *Id.* at 901-02.

197. *Id.* at 902.

198. *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 442(1)(a), (c) (1987)).

199. *Valdez*, 909 S.W.2d at 903.

200. *Id.* at 902-03.

201. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 161.031, .032 (Vernon 1992); TEX. REV. CIV. STAT. ANN. art. 4495b, §§ 5.06(g), (j) (Vernon Supp. 1997).

202. 927 S.W.2d 1 (Tex. 1996).

203. *Id.* at 2-3.

204. *Id.* at 4.

205. 927 S.W.2d 12 (Tex. 1996).

206. *Id.* at 14-15.

207. *Id.* at 15-16.

208. 927 S.W.2d 24 (Tex. 1996).

to a physician were privileged even in a suit alleging malpractice against the physician and negligent credentialing against the hospital.[209]

On rehearing in *Tilton v. Marshall*[210], the supreme court avoided ruling on evangelist Robert Tilton's claim of a First Amendment privilege[211] with respect to his tithing records.[212] In its original opinion, discussed in the *1996 Annual Survey*,[213] the court held that production of the tithing records would not violate Tilton's right of free exercise of religion or freedom of association.[214] The court did not reach this issue on rehearing, however, because it granted a writ of mandamus directing the trial court to dismiss all of the claims against Tilton except for a narrow fraud claim and then concluded that the tithing records had no potential relevance to this remaining claim.[215] Although lack of relevance will not normally satisfy the strict standard for obtaining a writ of mandamus, the court concluded that the highly sensitive nature of the tithing records justified the relief in this case.[216]

The physician-patient privilege was at issue in two noteworthy cases decided during the Survey period. In *Bristol-Myers Squibb Co. v. Hancock*,[217] the court held that Rule 509(d)(4)[218] creates an exception to the privilege "whenever *any* party relies upon the condition of a patient as a part of that party's claim or defense."[219] The peculiar feature of *Hancock* was that the patient was not a party to the suit; instead, a physician was suing a manufacturer of breast implants claiming loss of income and injury to reputation in connection with the allegedly defective implants.[220] The court discussed that the patient records sought by the defendant seemingly fell within the exception to the privilege, since the condition of the doctor's implant patients appeared to be directly at issue.[221] The court held, however, that the trial court had not abused its discretion in denying the defendant access to these records because it could not predict in advance how the physician intended to present his case, or what evidence the trial court would admit, and therefore it could not rule out the possibility that a fair trial could be conducted without the requested information.[222]

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209. *Id.* at 25. The court noted that it was not deciding whether a cause of action for negligent credentialing exists in Texas. *Id.* at 26 n.1.

210. 925 S.W.2d 672 (Tex. 1996).

211. U.S. CONST. amend. I.

212. *Tilton*, 925 S.W.2d at 682.

213. *See 1996 Annual Survey*, *supra* note 4, at 1385.

214. Tilton v. Marshall, 38 Tex. Sup. Ct. J. 1140, 1146 (Aug. 1, 1995), *withdrawn and superseded*, 925 S.W.2d 672 (Tex. 1996).

215. *Tilton*, 925 S.W.2d at 682.

216. *Id.* at 682-83.

217. 921 S.W.2d 917 (Tex. App.—Houston [14th Dist.] 1996, orig. proceeding).

218. TEX. R. CIV. EVID. 509(d)(4).

219. *Hancock*, 921 S.W.2d at 921 (emphasis added).

220. *Id.* at 919.

221. *Id.* at 922-23.

222. *Id.* at 923.

The court in *Buchanan v. Mayfield*[223] also examined the express language of Rule 509,[224] as well as the Medical Practice Act,[225] in concluding that a dentist is not a physician under Texas law and cannot, therefore, claim a privilege for communications with his patients.[226] The court brushed aside the dentist's arguments that he should be considered a physician for purposes of Rule 509 because he performs some of the same functions as a medical doctor, such as prescribing drugs and performing oral surgery.[227] All of these functions are also properly the province of dentists under Texas law, the court noted, and did not make the defendant a doctor.[228]

General Motors Corp. v. Gayle[229] and *Dillard Department Stores, Inc. v. Sanderson*[230] addressed the application of two of the litigation privileges under Rule 166b.[231] In *General Motors*, the court held that a trial court's order that the plaintiffs be allowed to attend any crash test performed by General Motors' consulting experts if General Motors intended to use that test, or any similar test performed later with plaintiffs in attendance, impinged the fundamental policy behind the consulting expert privilege.[232] In *Dillard Department Stores*, the court looked to federal authority in concluding that a witness's lack of recollection of events about which she gave a statement to counsel for the defendant (her former employer) five years before satisfied the substantial need and undue hardship exception to the witness statement privilege.[233]

As discussed in the *1996 Annual Survey*,[234] the Texas Supreme Court held in *Texaco, Inc. v. Sanderson*[235] that a party's obligation to specifically plead and prove privilege objections is triggered only by "an appropriate discovery request"; thus, a privilege objection is not waived by failing to assert it in response to an overbroad document request.[236] *Young v. Ray*[237] clarifies that this decision does not create a "'good cause per se' rule" for late privilege objections.[238] Instead, *Texaco* envisions a

223. 925 S.W.2d 135 (Tex. App.—Waco 1996, orig. proceeding [leave denied]).
224. TEX. R. CIV. EVID. 509.
225. TEX. REV. CIV. STAT. ANN. art. 4495b (Vernon Supp. 1997).
226. *Buchanan*, 925 S.W.2d at 138.
227. *Id.* at 138.
228. *Id.* The court also noted that the dentist's public policy arguments should be directed to the legislature or supreme court, who would have the authority to amend the applicable statutes or rules of evidence. *Id.* at 140.
229. 924 S.W.2d 222 (Tex. App.—Houston [14th Dist.] 1996, orig. proceeding [leave denied]) (per curiam).
230. 928 S.W.2d 319 (Tex. App.—Beaumont 1996, orig. proceeding [leave denied]).
231. TEX. R. CIV. P. 166b.
232. TEX. R. CIV. P. 166b(3)(b); *General Motors*, 924 S.W.2d at 230-31. The court held, however, that General Motors had not demonstrated that any error could not be remedied on appeal and, therefore, denied mandamus relief. *Id.* at 231.
233. TEX. R. CIV. P. 166b(3)(c), (e); *Dillard Department Stores*, 928 S.W.2d at 321-22.
234. *1996 Annual Survey*, *supra* note 4, at 1385.
235. 898 S.W.2d at 813 (Tex. 1995).
236. *Id.* at 815.
237. 916 S.W.2d 1 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding [leave denied]).
238. *Id.* at 3.

two-step procedure: first, the responding party must timely object to the overbroad request; and second, once the court determines the appropriate scope of the request, the party must assert its privilege objection.[239] The responding party in *Young* did not timely assert any objections that the requests were improper, and all such objections, including its privilege objections, were therefore waived.[240]

C. Duty to Supplement

The Texas Supreme Court strongly suggested in *Collins v. Collins*[241] that there is no general duty to supplement a fact witness's deposition testimony.[242] The court of appeals in this divorce case had held that the husband's and his partner's testimony regarding the value of their corporations should have been excluded because: (1) they were not designated as experts; (2) they testified in their depositions that they had no opinions as to value and would offer none at trial; and (3) the husband's attorney agreed to notify the wife's attorney if they changed their minds.[243] The dissent in the lower court argued, however, that the valuation testimony was lay opinion, not expert opinion, and that the husband therefore had no duty to supplement his or his partner's deposition testimony.[244] The supreme court stated that it did not read the court of appeals' opinion "to require supplementation of a fact witness' deposition testimony generally, or in any situation other than when a witness renders an expert opinion," and on that basis denied the application for writ of error.[245]

The Corpus Christi Court of Appeals held in *Garza v. Murray*[246] that a trial resetting has the effect of nullifying a deadline for designating expert witnesses imposed by a docket control order, unless the deadline was imposed as a sanction for prior discovery abuse.[247] The court also provided some comfort for practitioners concerned about how much detail they must provide in answering expert witness interrogatories. The defendant in *Garza* responded to a standard expert witness interrogatory by stating that his expert would opine that the plaintiff's claimed repressed memories were invalid and untrue, and that this opinion was based on the ex-

239. *Id.* at 4.
240. *Id.*
241. 923 S.W.2d 569 (Tex. 1996) (per curiam).
242. *Id.*
243. Collins v. Collins, 904 S.W.2d 792, 799-802 (Tex. App.—Houston [1st Dist] 1995)(en banc), *writ denied per curiam,* 923 S.W.2d 569 (Tex. 1996).
244. *Id.* at 806-07 (Hedges, J., dissenting). The dissent also dismissed the apparent breach of the agreement by the husband's attorney to notify the wife's attorney if the husband or his partner were going to testify as to value by noting that such agreement was unenforceable under Rule 11. *Id.* at 807-08; Tex. R. Civ. P. 11 (agreement between attorneys touching on subject matter of suit will not be enforced unless it is in writing, signed, and filed with the court, or made on the record in open court).
245. *Collins*, 923 S.W.2d at 569.
246. 915 S.W.2d 548 (Tex. App.—Corpus Christi 1995, orig. proceeding).
247. *Id.* at 550; *accord* Revco, D.S., Inc. v. Cooper, 873 S.W.2d 391, 396 (Tex. App.—El Paso 1994, orig. proceeding); Pope v. Davidson, 849 S.W.2d 916, 919 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

pert's knowledge of the plaintiff's psychological background and the defendant's personality and character.[248] The court of appeals concluded that this was a sufficient response, notwithstanding that it did not identify the specific facts on which the expert was relying.[249]

D. SANCTIONS

The supreme court once again spoke on the issue of "death penalty" sanctions (*e.g.*, striking pleadings, default judgments) in *Hamill v. Level*.[250] Utilizing the standard it first articulated in *TransAmerican National Gas Corp. v. Powell*,[251] the court held that the sanction imposed in *Hamill* was more severe than necessary, and the sanctioned conduct did not justify the presumption that the plaintiff's claims lacked merit.[252] Significantly, in doing so, the court specifically disapproved of the court of appeals' conclusion that a trial court need not, as a general rule, actually test the efficacy of lesser sanctions before imposing death penalty sanctions.[253]

The court in *Marshall v. Ryder System, Inc.*[254] acknowledged that death penalty sanctions normally may not be imposed until lesser sanctions have been tried.[255] The court was faced, however, with a plaintiff who had deliberately and systematically tampered with crucial evidence by pouring diesel fuel down groundwater monitoring wells installed by the defendant, and who then invoked his Fifth Amendment[256] privilege in refusing to answer questions relating to his conduct.[257] Because this "spiking" of the monitoring wells went to the heart of plaintiff's claim, the court held that this particular species of discovery abuse was so extraordinary that no sanction apart from dismissal would have been appropriate.[258]

VIII. DISMISSAL

In *Smith v. Babcock & Wilcox Construction Co.*,[259] the supreme court, in a *per curiam* opinion, held that the trial court abused its discretion in dismissing the plaintiffs' case for want of prosecution where their counsel properly justified his failure to appear at trial.[260] The *Smith* case involved

248. *Garza*, 915 S.W.2d at 551.
249. *Id.*
250. 917 S.W.2d 15 (Tex. 1996).
251. 811 S.W.2d 913 (Tex. 1991).
252. *Hamill*, 917 S.W.2d at 16.
253. *Id.* at 16 n.1. *Compare In Re* Estate of Riggins, 937 S.W.2d 11 (Tex. App.—Amarillo, 1996, n.w.h.) (sanction of excluding all witnesses other than proponents of will, without lesser sanction first having been imposed, was not a death penalty sanction and would satisfy *TransAmerican* standard in any event).
254. 928 S.W.2d 190 (Tex. App.—Houston [14th Dist.] 1996, writ denied).
255. *Id.* at 197 (citing Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 850 (Tex. 1992)).
256. U.S. CONST. amend. V.
257. *Marshall*, 928 S.W.2d at 194.
258. *Id.* at 197.
259. 913 S.W.2d 467 (Tex. 1995) (per curiam).
260. *Id.* at 468.

a suit by an injured employee and his wife as plaintiffs, and his employer's workers' compensation carrier as intervenor, against the employer. After requesting and obtaining a trial setting, the plaintiffs' attorney then requested a trial setting for the same date in an unrelated case.[261] Twelve days before trial, the plaintiffs' attorney filed an unverified motion for continuance in *Smith* that incorrectly represented that the competing case was older and preferentially set.[262] The trial court denied the continuance, and the plaintiffs' attorney never requested another continuance or mentioned the conflict to the other trial court.[263]

Neither the plaintiffs nor their counsel appeared for trial; however, the attorney for the workers' compensation insurer appeared and re-urged the continuance.[264] Still unpersuaded, the trial court again denied the continuance and dismissed the case on the defendant's motion.[265] Finding that the trial court abused its discretion, the supreme court reversed, noting that the conduct at issue did not violate Rule 165a(3).[266] The court held that, while the plaintiffs' counsel was not as conscientious as he should have been, his failure to appear was not intentional or the result of conscious indifference, but was instead reasonably explained by his attendance at another trial.[267] While the court did not condone the misstatements of plaintiffs' counsel in his motion for continuance regarding the other trial setting being older and preferential, it held that sanctions were the proper remedy for such conduct, not dismissal or denial of reinstatement.[268]

Neither the plaintiff nor his counsel fared as well in *Spearman v. Texas Department of Corrections*.[269] In *Spearman*, the plaintiff's counsel requested a jury trial and obtained a trial setting approximately five months later.[270] The plaintiff's counsel then moved for a continuance, which it appears the court did not receive until the day after the case was called for trial.[271] After the trial court apparently denied the continuance and dismissed the case, the plaintiff's counsel moved for reinstatement and/or new trial and attached as an exhibit evidence of a conflicting trial due to an "agreed setting" in another criminal case on the same date.[272] Finding no evidence that the plaintiff's counsel had immediately brought the conflict to the attention of the trial court as required under the local rules, the court of appeals held that the trial court did not abuse its discretion in dismissing the case for want of prosecution, especially since the plaintiff's

261. *Id.* at 467.
262. *Id.*
263. *Id.*
264. *Id.* at 468.
265. *Id.*
266. TEX. R. CIV. P. 165a(3); *Smith*, 913 S.W.2d at 468.
267. *Id.*
268. *Id.*
269. 918 S.W.2d 23 (Tex. App.—Eastland 1996, no writ).
270. *Id.* at 24.
271. *Id.*
272. *Id.*

counsel created the conflict by agreeing to the competing trial setting.[273]

Plaintiffs in *Scott & White Memorial Hospital v. Schexnider*[274] filed medical malpractice claims against numerous doctors among others. Shortly after all defendants moved for summary judgment, plaintiffs nonsuited twenty-nine of the defendants. The trial court subsequently granted a final summary judgment in favor of the remaining defendants, whereupon all of the defendants, including those who had been nonsuited, filed a motion for sanctions pursuant to Rule 13.[275] The trial court, still acting within its plenary jurisdiction, granted the motions and ordered plaintiff's counsel to pay $25,000 in sanctions to the nonsuited defendants. The court of appeals reversed, reasoning that a trial court does not have jurisdiction over a post-nonsuit sanctions motion because Rule 162 speaks only to the effect of a nonsuit on a motion for sanctions pending at the time of dismissal.[276] The supreme court disagreed, holding that the time period during which the trial court has authority to impose sanctions does not expire until thirty days after the judgment has been signed.[277] Although any action taken by the trial court after its jurisdiction has expired is null and void,[278] a trial court's power to decide a motion for sanctions is no different than its power to decide any other motion during its plenary jurisdiction.[279] According to the court, "Rule 162 merely acknowledges that a nonsuit does not affect the trial court's authority to act on a pending sanctions motion; it does not purport to limit the trial court's power to act on motions filed after a nonsuit."[280]

In another sanctions case, *Hilliard v. Bennett*,[281] the court conditionally granted a writ of mandamus and reversed a sanction award where the trial court had, *sua sponte*, sanctioned attorneys who filed sixteen cases against the same defendants, on behalf of different individual plaintiffs, allegedly injured in the same accident. Before serving the defendants, the attorneys nonsuited all of the cases, except one.[282] However, the trial court in which the first of the sixteen cases had been filed refused to grant the nonsuit and, instead, issued an order abating dismissal.[283] The trial court also ordered the attorneys to appear and show cause why they should not be sanctioned for violating the local rules regarding the ran-

273. *Id.* at 24-25.
274. 40 Tex. Sup. Ct. J. 198 (Dec. 13, 1996).
275. TEX. R. CIV. P. 13.
276. 906 S.W.2d 659 (Tex. App.—Austin), *rev'd in part, aff'd in part*, 40 Tex. Sup. Ct. J. 198, 198 (Dec. 13, 1996). TEX. R. CIV. P. 162, which permits a nonsuit anytime before the plaintiff has introduced all of his evidence other than rebuttal evidence, also provides that: "[a] dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court."
277. *Scott*, 40 Tex. Sup. Ct. J. at 199; *see* TEX. R. CIV. P. 329b(d), (e) (trial court's plenary power to act in a case lasts until thirty days after the judgment has been signed).
278. *Scott*, 40 Tex. Sup. Ct. J. at 199; *see also* First Alief Bank v. White, 682 S.W.2d 251, 252 (Tex. 1984); *Ex parte* Olivares, 662 S.W.2d 594, 595 (Tex. 1983).
279. *Scott*, 40 Tex. Sup. Ct. J. at 199.
280. *Id.*
281. 925 S.W.2d 338 (Tex.App.—Corpus Christi 1996, orig. proceeding).
282. *Id.* at 340.
283. *Id.*

dom assignment of cases.[284] Following a hearing in which the trial court questioned witnesses and overruled challenges to the court's jurisdiction, as well as the attorneys' assertions of their Fifth Amendment[285] rights, the trial court sanctioned the attorneys $10,000 under Rule 13.[286]

In conditionally granting the writ of mandamus, the court of appeals first held that a party's right to nonsuit is absolute, and the trial court therefore erred in denying that request.[287] The court further held, albeit based upon precedent since overruled in *Schexnider*,[288] that the trial court lost its jurisdiction to sanction the attorneys upon the filing of the nonsuit.[289] Finally, the court further found that the trial judge violated the attorneys' due process rights when he *sua sponte* convened the hearing, examined witnesses, and issued the sanction order, thereby depriving the relators of a "neutral and detached judge"[290] who should be "fair and impartial and should act neither as an advocate for any party nor as an adversary."[291]

In *Harris v. Moore*,[292] the court held that a trial court erred in dismissing a bill of review for pleading defects. In this case, the trial court originally entered a default judgment against the appellant who challenged that judgment by a bill of review.[293] Finding defects in the appellant's pleadings, the trial court dismissed the bill.[294] The court of appeals reversed, noting that the proper mechanism to challenge such pleading defects is normally a special exceptions hearing and that petitioners should have been given the opportunity to amend their pleadings to cure any pleading defects.[295]

The court in *Harris* also held that the trial court erred in dismissing the bill of review at the pretrial hearing stage where the petitioner was only required to present *prima facie* proof of a meritorious defense to obtain a trial on the merits of the bill.[296] The trial court's decision to dismiss the bill of review at the pretrial hearing phase was, said the court, "akin to a track-meet official barring a sprinter from a race for running a slow warmup lap."[297]

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284. *Id.*
285. U.S. CONST. amend V.
286. TEX. R. CIV. P. 13; *Hilliard*, 925 S.W.2d at 340.
287. *Id.*
288. *Schexnider*, 40 Tex. Sup. Ct. J. at 199 n.2.
289. *Hilliard*, 925 S.W.2d at 341. The *Hilliard* trial court, however, did not issue its sanction award until well after its plenary jurisdiction had expired following the nonsuit. *Id.*
290. *Id.* (citing Metzger v. Sebek, 892 S.W.2d 20, 38 (Tex. App.—Houston [1st Dist.] 1994, writ denied)).
291. *Id.*
292. 912 S.W.2d 860 (Tex. App.—Austin 1995, no writ).
293. *Id.* at 862.
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.* at 863.

IX. SUMMARY JUDGMENT

When a trial court grants summary judgment on specific grounds, the supreme court has held that its consideration on appeal is limited to the grounds upon which the trial court granted summary judgment and the court of appeals affirmed.[298] Texas courts of appeals have similarly limited their review of summary judgments.[299] One justification offered by the courts for such a limited consideration has been that "[a]ffirming a summary judgment on an independent ground not specifically considered by the trial court usurps the trial court's authority to consider and rule on issues before it and denies the appellate court of the benefit of the trial court's decision on the issue."[300]

Cincinnati Life Insurance Co. v. Cates[301] announces a significant change in this longstanding appellate practice. In *Cates*, the defendants moved for summary judgment on several grounds. The trial court granted the motions on the basis of certain of the enumerated grounds, but denied them as to the others. The judgment, however, disposed of all grounds and was final. The court of appeals reversed the summary judgment as to the grounds relied upon by the trial court. Based on the existing appellate practice, the court of appeals refused to consider the defendants' cross-points asking it to affirm the judgment on the basis of the grounds the trial court had expressly denied. The Texas Supreme Court reversed, holding that appellate courts "should consider *all* summary judgment grounds the trial court [expressly] rules on and the movant preserves for appellate review that are necessary for final disposition of the appeal."[302] In dictum, the court further concluded that the appellate court may, in the interest of judicial economy, consider other grounds that the movant preserved for appellate review and that the trial court did not address.[303]

To arrive at this result, the supreme court was required to distinguish several of its own prior decisions. In *Novak v. Stevens*,[304] for example, the court referred to the general rule that a denial of a summary judgment is not reviewable on appeal because it is not a final judgment.[305] The *Cates* court contrasted the situation where a trial court grants summary judgment on grounds that dispose of all the non-movant's claims: there the judgment becomes final, regardless of whether the trial court

298. State Farm Fire & Casualty Co. v. S.S., 858 S.W.2d 374, 380 (Tex. 1993) (plurality opinion); Delaney v. University of Houston, 835 S.W.2d 56, 58 (Tex. 1992).

299. *See, e.g.*, Maley v. 7111 Southwest Freeway, Inc., 843 S.W.2d 229, 234 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *In re* Estate of Canales, 837 S.W.2d 662, 668 (Tex. App.—San Antonio 1992, no writ).

300. *State Farm*, 858 S.W.2d at 381.

301. 927 S.W.2d 623 (Tex. 1996).

302. *Id.* at 626 (emphasis added); *see* TEX. R. APP. P. 90(a) (court of appeals' opinion shall address every issue raised and necessary to final disposition of the appeal).

303. *Cates*, 927 S.W.2d at 626.

304. 596 S.W.2d 848 (Tex. 1990).

305. *Id.* at 849.

rules on the other grounds.[306] Accordingly, the general rule should not apply under those circumstances.[307] In *Delaney v. University of Houston*,[308] the supreme court had also limited its consideration to the grounds upon which the trial court actually granted the summary judgment.[309] The *Cates* court pointed out that it had declined to address the additional grounds raised in *Delaney*[310] only because it believed them immaterial and the record was not well developed on those issues.[311] But, the court hastened to add that it had not in that case considered whether the court of appeals could dispose of the case on summary judgment grounds that the trial court did not rule on.[312] The *Cates* court further observed that *State Farm Fire & Casualty Co. v. S.S.*,[313] another case in which it had limited its review to the summary judgment grounds granted by the court, was merely a plurality opinion that was not binding precedent on the court.[314] It also noted that the concurring and dissenting opinions in that case[315] supported the view that an appellate court may consider other grounds not addressed by the trial court in the interest of judicial economy.[316] Finally, the court in *Cates* also cited various procedural rules as additional support for its newly-announced, broader form of review.[317]

Two cases decided during the Survey period involved issues of summary judgment evidence. In *Noriega v. Mireles*,[318] the court held that an expert's affidavit was competent summary judgment proof even though it was sworn to as "true and correct to my best knowledge and belief."[319] Although the court acknowledged the general rule that affidavits must be based on the affiant's personal knowledge,[320] it observed that the special evidentiary rules governing experts[321] contemplate that an expert may rely on certain types of inadmissible facts or data in forming an opinion that are not within his "personal knowledge" in the truest sense of the words.[322] By detailing the voluminous medical records he reviewed, which in a medical malpractice case is often times the only means by which an expert can gain knowledge regarding the patient's treatment, the expert "showed . . . he had [sufficient] 'personal knowledge' of the

306. *Cates*, 927 S.W.2d at 625.
307. *Id.*
308. 835 S.W.2d 56 (Tex. 1992).
309. *Id.* at 58.
310. *Id.* at 58-59.
311. *Cates*, 927 S.W.2d at 626.
312. *Id.*
313. 858 S.W.2d 374 (Tex. 1993) (plurality opinion).
314. *Cates*, 927 S.W.2d at 626.
315. *State Farm*, 858 S.W.2d at 382, 387 (Phillips, C.J., concurring; Cornyn, J., concurring; Hecht, J., dissenting).
316. *Cates*, 927 S.W.2d at 625.
317. *Cates*, 927 S.W.2d at 626; *see* TEX. R. APP. P. 80(b), 81(c), 180, 182(a).
318. 925 S.W.2d 261 (Tex. App.—Corpus Christi 1996, writ requested).
319. *Id.* at 264-65.
320. *Id.* at 263. *See* Humphreys v. Caldwell, 888 S.W.2d 469, 470 (Tex. 1994).
321. *See* TEX. R. CIV. EVID. 702, 703.
322. *Noriega*, 925 S.W.2d at 264-65.

facts to meet the requirements of Rule 166a(f)."[323] The court also brushed off the defendant's complaint that the affidavit was defective because it failed to attach the medical records referenced in the affidavit.[324] Declining to follow one of its sister courts,[325] the *Noriega* court held that this was merely a formal defect that could not be asserted for the first time on appeal because there was no dispute regarding the contents of those records.[326] In *Lara v. Tri-Coastal Contractors, Inc.*,[327] however, the same court reiterated the general rule that "expert testimony comprised of wholly conclusory statements is insufficient to support summary judgments."[328]

As discussed in a previous section of this Survey,[329] the supreme court in *Sosa v. Central Power & Light*[330] held that an amended pleading filed exactly seven days before a summary judgment hearing is timely under Rule 63.[331] *Glasscock v. Frost National Bank*[332] makes clear that *Sosa's* holding also extends to summary judgment responses filed under Rule 166a.[333] The question in *Thomas v. Medical Arts Hospital of Texarkana, Inc.*[334] was whether a defendant who initially failed to respond to a motion for summary judgment obtained a second opportunity to do so when the hearing originally scheduled was postponed because of one party's bankruptcy filing.[335] After the bankruptcy case was dismissed, the trial court rescheduled the motion for hearing. The defendant filed his written response to the motion more than seven days before the date of the rescheduled hearing, but the trial court refused to consider the response. The court of appeals decided that the trial judge had erred in this regard, and held that the response was timely-filed in accordance with Rule 166a(c).[336] The purpose of the filing time requirement, said the court, "is to give a party adequate time to prepare for the summary judg-

323. *Id.* at 265. *See* TEX. R. CIV. P. 166a(f) (affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein).

324. TEX. R. CIV. P. 166a(f) provides: "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

325. *See* Ceballos v. El Paso Health Care Sys., 881 S.W.2d 439, 445 (Tex. App.—El Paso 1994, writ denied) (failure to attach sworn or certified copies of medical records to expert affidavit was defect in substance, not form).

326. *Noriega*, 925 S.W.2d at 265. Consonant with *Ceballos*, however, the court agreed that the affidavit would have been substantively defective if there had been a dispute as to what the medical records contained. *Id.*

327. 925 S.W.2d 277 (Tex. App.—Corpus Christi 1996, no writ).

328. *Id.* at 279. *See also* Anderson v. Snider, 808 S.W.2d 54, 55 (Tex. 1991); Mercer v. Daoran Corp., 676 S.W.2d 580, 583 (Tex. 1984).

329. *See supra* note 130-38 and accompanying text.

330. 909 S.W.2d 893 (Tex. 1995).

331. *Id.* at 895; TEX. R. CIV. P. 63 (pleading offered within seven days of trial shall be filed only after leave of court is obtained).

332. 928 S.W.2d 599 (Tex. App.—San Antonio 1996, writ denied).

333. *Id.* at 600; TEX. R. CIV. P. 166a(c) provides that, except on leave of court, the adverse party may file and serve opposing affidavits or other written response not less than seven days prior to the day of hearing.

334. 920 S.W.2d 815 (Tex. App.—Texarkana 1996, writ denied).

335. *Id.* at 817.

336. *Id.* at 818; TEX. R. CIV. P. 166a(c).

ment hearing," not to snare the unwary or merely punish the dilatory.[337] Because the defendant filed his response more than seven days before the hearing, the plaintiff had adequate opportunity to prepare.[338]

The plaintiffs in *Grant v. Wood*[339] sued HBO, Time Warner and others for defamation and other harm allegedly suffered as a result of a television documentary. Defendants moved for summary judgment based in part on the free speech and free press clauses of the state and federal constitutions[340] and § 73.002 of the Civil Practice and Remedies Code.[341] Although the legislature has authorized interlocutory appeals from summary judgment determinations in these circumstances,[342] the trial court refused to rule on the defendants' motion for summary judgment thereby preventing any interlocutory appeal.[343] Finding that the trial court's refusal to rule was expressly intended to prevent an interlocutory appeal,[344] the appellate court conditionally granted a writ of mandamus and ordered the district judge to rule on the motion before trial.[345] The court's opinion admits that a district judge "unquestionably has some discretion in the manner in which it rules on [summary judgment] motions," and that an appellate court may not prescribe the manner in which this discretion is exercised.[346] Nevertheless, the court held that a trial court's refusal to rule on a timely submitted motion for summary judgment for the express purpose of precluding a statutory interlocutory appeal constitutes a clear abuse of discretion.[347]

X. JURY PRACTICE

Two appellate courts addressed the issue of *Edmonson*[348] challenges to peremptory strikes in jury selection based upon race. In *Price v. Short*,[349] which involved an altercation between a white film crew worker and an African-American Dallas County Commissioner, the court held that the prohibitions against race-based juror selection apply to all races, and not just minorities.[350] The plaintiff in *Price* successfully sued the Dallas County Commissioner for a broken ankle sustained during a fight and

337. *Thomas*, 920 S.W.2d at 818.
338. *Id.*
339. 916 S.W.2d 42 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding).
340. U.S. CONST. amend. I; TEX. CONST. art. I, § 8.
341. TEX. CIV. PRAC. & REM. CODE ANN. § 73.002 (Vernon 1986).
342. *Id.* § 51.014(6) (Vernon Supp. 1995).
343. *Grant*, 916 S.W.2d at 45.
344. *Id.* The trial court's underlying motivation is apparently of no consequence as the court observed that the district judge's refusal was "well-intentioned and based on her legitimate concern [over] not losing a trial setting on a case that was apparently difficult to manage." *Id.*
345. *Id.* at 46.
346. *Id.* at 45.
347. *Id.*
348. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 615 (1991) (extending to civil suits the holding in Batson v. Kentucky, 476 U.S. 79 (1986) that a party may not use its peremptory strikes in a racially discriminatory manner).
349. 931 S.W.2d 677 (Tex. App.—Dallas 1996, no writ).
350. *Id.* at 683.

received an award of $113,838.01 in damages.[351] The defendant appealed arguing, among other things, that the trial court erred in granting the plaintiff's *Edmonson* challenges to certain of his peremptory strikes of white veniremembers because *Batson*[352] and its progeny do not apply to the striking of white or "majority" veniremembers.[353] The court disagreed on two separate bases. First, because the defendant had only raised this argument for the first time on appeal, the court ruled that he had waived any error on that point.[354] Second, considering the merits of the argument, the court noted that the Supreme Court did not expressly limit its holding regarding improper peremptory strikes in *Batson* to racial minorities.[355] The court examined the intent and history of *Batson* and concluded that its goal was to ensure that parties used nondiscriminatory criteria in selecting jurors.[356] Thus, while *Batson* arose in the context of a response to historical prejudice against racial minorities, its holding remained applicable to the selection of jurors of all races.[357] Therefore, the court concluded, the trial court did not abuse its discretion in sustaining the plaintiff's challenges where the defendant's proffered reason for his peremptory strikes of white veniremembers, while facially neutral, could have been determined to be a sham or pretext for a discriminatory purpose.[358]

Focusing on the evidentiary aspect of an *Edmonson* challenge, the court in *Goode v. Schoukfeh*,[359] upheld the trial court's decision to overrule a plaintiff's challenge to the defendants' four peremptory strikes of three African-Americans and one Hispanic veniremembers.[360] The court noted that to succeed on an *Edmonson* challenge, the challenging party must first make a *prima facie* showing of intent to discriminate.[361] The burden then shifts to the striking party to articulate its reasons for the strike.[362] The challenging party must then prove that the stated reason is

351. *Id.* at 680.

352. Batson v. Kentucky, 476 U.S. 79 (1986).

353. *Price*, 931 S.W.2d at 682.

354. *Id. See* TEX. R. APP. P. 52(a) ("In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context.").

355. *Price*, 931 S.W.2d at 682.

356. *Id.* at 683.

357. *Id.* at 684. The court also noted its disagreement with what it termed as "dicta" in the ruling of two other courts that *Batson* only applies to racial minority veniremembers. *Id.* at 683.

358. *Id.* at 684-85. The trial court found the defendant's stated reasons of striking two venirepersons based on their employment to be pretextual because the defendant's attorney never questioned those prospective jurors about their occupations, which can be considered as some evidence of racial discrimination. *Id.* at 685; *see* Esteves v. State, 859 S.W.2d 613, 615 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd.).

359. 915 S.W.2d 666 (Tex. App.—Amarillo 1996), *aff'd*, 40 Tex. Sup. Ct. J. 487 (Apr. 18, 1997).

360. *Id.* at 668.

361. *Id.* at 669 n.3.

362. *Id.*

a pretext or sham.[363] On appeal, the standard of review is a deferential one that will allow the trial court's decision to stand unless it is "clearly wrong."[364]

In this case, upon reviewing the evidence, the court concluded that the trial court did not err because the plaintiff's attorney offered only his own unsworn personal observations and conclusions and did not offer any substantive evidence to prove his allegation of discriminatory intent.[365] Moreover, even accepting the statements of the plaintiff's counsel as true, the court nonetheless noted that defendants' counsel properly articulated nondiscriminatory reasons for their strikes and had not excluded from the jury other minority veniremembers.[366] Therefore, the court affirmed the trial court's decision overruling the *Edmonson* challenges.[367]

Several courts explored the bounds of a party's right to a jury trial during the Survey period. Most significantly, in a case of first impression, the supreme court in *Mercedes-Benz Credit Corp. v. Rhyne*[368] held that a trial court abused its discretion in denying a defendant's right to a jury trial where the plaintiff had requested a jury trial but never paid the fee, and the trial court had previously issued an order, which it never rescinded, setting the case on the jury docket.[369] The court held that where one party demands a jury trial but fails to pay the fee, the other party may not rely upon the demand in expecting a jury trial.[370] However, a party may, as a matter of law, rely upon a trial court's order setting a case for jury trial.[371] Accordingly, if a trial court vacates or changes its order setting a case on the jury docket, it must then give the parties "a reasonable time to comply with Rule 216 requirements for making a jury demand and paying the fee."[372]

In *General Motors Corp. v. Gayle*,[373] on the other hand, the court held that a defendant's petition for writ of mandamus was not a proper mechanism to obtain a continuance in order to allow its request for a jury trial to become timely.[374] In *Gayle*, another party had requested a jury but had not paid the jury fee, following which the trial court refused a continuance and called the case to trial on its non-jury docket.[375] Noting that while under certain circumstances a trial court could err in denying a continuance to allow a jury request to become timely, *e.g.*, where the trial court's personnel contributed to a party's misunderstanding that a case

363. *Id.*
364. *Id.* at 669.
365. *Id.* at 671.
366. *Id.* at 671-72.
367. *Id.* at 673.
368. 925 S.W.2d 664 (Tex. 1996).
369. *Id.* at 665.
370. *Id.* at 666; *see* TEX. R. CIV. P. 220.
371. *Rhyne*, 925 S.W.2d at 666.
372. *Id.*; TEX. R. CIV. P. 216(a).
373. 924 S.W.2d 222 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding [leave denied]).
374. *Id.* at 225.
375. *Id.*

was set for jury trial, in this case the evidence did not support such a conclusion.[376] Therefore, noting that it was "aware of no Texas case in which mandamus had been granted for the denial of a continuance to allow a jury request to become timely," the court denied the writ of mandamus, concluding that the petitioner had not demonstrated that its remedy on appeal would be inadequate.[377]

Regarding the required number of jurors, the court in *City of Jersey Village v. Campbell*[378] held that a trial court erred in denying a party its constitutional right to a jury trial[379] when it denied a motion for mistrial and forced a case to trial with only eleven jurors.[380] In this case, because one of the parties objected to less than twelve jurors, and the dismissed juror was not "disabled" as defined under Rule 292,[381] the court should have granted a mistrial.[382]

The court in *Branham v. Brown*[383] held that a trial court erred in returning a jury to re-deliberate after it had issued its verdict, announced it in court, and been polled and then released.[384] Originally, the jury reached an 11-1 verdict for the defendant, which the trial court accepted.[385] Immediately after releasing the jury, the judge invited the jurors into his chambers to greet them.[386] The judge also invited the parties and attorneys to remain so the jurors could ask questions if they so desired.[387] In the context of this setting, one juror volunteered that she "made a mistake during the polling [and] . . . had mistakenly signed the verdict because of a misunderstanding."[388] The trial court immediately stopped the conversation, advised the attorneys, and returned the jurors to the jury room to re-deliberate and sign the verdict consistent with their decision.[389] The jury then returned with a 10-2 verdict in favor of the defendant, following which the plaintiff unsuccessfully moved for a new trial.[390] Affirming the take-nothing judgment against the plaintiff, the appellate court reformed the verdict, holding that the trial court erred in causing the jury to re-deliberate:

> [A]fter a verdict is returned and is officially received by the court and the jury is discharged, it is not permissible to thereafter establish jury misconduct and impeach the verdict by presenting evidence that the verdict was not unanimous or that a non-unanimous verdict was

376. *Id.* at 226.
377. *Id.* at 227.
378. 920 S.W.2d 694 (Tex. App.—Houston [1st Dist.] 1996, writ denied).
379. TEX. CONST. art. V., § 13.
380. *Campbell*, 920 S.W.2d at 697, 698.
381. TEX. R. CIV. P. 292.
382. *Campbell*, 920 S.W.2d at 698.
383. 925 S.W.2d 365 (Tex. App.—Houston [1st Dist.] 1996, no writ).
384. *Id.* at 368.
385. *Id.* at 367.
386. *Id.*
387. *Id.*
388. *Id.* at 368.
389. *Id.*
390. *Id.*

returned by different or 'shifting' majorities.[391]

In examining the issue of potential juror misconduct in light of Rule 226,[392] the supreme court in *Pharo v. Chambers County, Texas*[393] held that the trial court properly denied a motion for new trial for alleged juror misconduct when a juror socialized with her boyfriend, a deputy sheriff, during the trial in which his employer, the county, was a defendant. During the trial, the juror dined with her boyfriend at least three times and met for coffee with other employees of the sheriff's department on two of the mornings of a four-day trial.[394] Both the juror and her boyfriend testified that they never discussed the case with each other, and the juror further testified that she did not discuss the case with any other county employees.[395] Since the fact of the meetings was undisputed, the appellate court focused its review on whether the boyfriend's status with the county alone rendered his conduct improper under Rule 226a(II).[396]

In affirming the trial court's ruling, the court reasoned that "not every employee of a county is automatically [deemed] 'interested' in a case in which the county is a party."[397] Moreover, as the juror's boyfriend had no personal involvement in the underlying incident or subsequent investigation of the matters made the subject of the dispute, the juror did not violate Rule 226[398] in associating with her boyfriend during trial.[399]

The court also briefly addressed a stray remark made by the bailiff to the veniremembers during voir dire.[400] While the court found the bailiff's conduct violative of Rule 283,[401] the court ruled that the comment did not result in probable injury to the plaintiff so as to justify a new trial.[402]

XI. JURY CHARGE

In a pair of *per curiam* opinions handed down the same day, the supreme court acknowledged a flaw in the Texas Pattern Jury Charge for premises liability.[403] In both cases, the trial court instructed the jury that it could find liability if the defendant "failed to adequately warn [the plaintiff] of the [dangerous] condition *or* to make the condition reason-

391. *Id.* (citing Jones v. Square Deal Cab Co., 501 S.W.2d 746, 747-48 (Tex. App.—Houston [14th Dist.] 1973), *writ ref'd n.r.e. per curiam*, 506 S.W.2d 855 (Tex. 1974)).

392. TEX. R. CIV. P. 226.

393. 922 S.W.2d 945 (Tex. 1996).

394. *Id.* at 947.

395. *Id.*

396. *Id.* at 949; TEX. R. CIV. P. 226a(II). Under this rule, jurors receive the following admonishment immediately after selection: "Do not mingle with nor talk to the lawyers, witnesses, the parties, or any other *person who might be connected with or interested in this case* . . . ." TEX. R. CIV. P. 226a(II) (emphasis added).

397. *Pharo*, 922 S.W.2d at 949.

398. TEX. R. CIV. P. 226.

399. *Pharo*, 922 S.W.2d at 949.

400. *Id.* at 949-50.

401. TEX. R. CIV. P. 283.

402. *Pharo*, 922 S.W.2d at 950.

403. 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 66.05 (1994); State v. Williams, 40 Tex. Sup. Ct. J. 61 (Oct. 18, 1996) (per curiam); City of San Antonio v. Rodriguez, 40 Tex. Sup. Ct. J. 48 (Oct. 18, 1996) (per curiam).

ably safe."[404] Although this instruction tracked the pattern jury charge, the court agreed that it misstated the substantive law, which requires the defendant either to warn or to make the premises safe, but not both.[405] In one case, the court concluded that this error was harmless because, while the defendant disputed whether there was an obstruction in the roadway at all, it conceded that, if there was, it did nothing to warn plaintiff or make the condition reasonably safe.[406] In the other case, however, the court held that the erroneous instruction amounted to a directed verdict because it allowed the jury to find liability based upon the undisputed failure to warn, without considering whether the defendant made the condition reasonably safe.[407]

In recent years, the supreme court has evinced a more lenient attitude toward preservation of error with respect to the jury charge.[408] In *Munoz v. Berne Group, Inc.*,[409] the San Antonio Court of Appeals noted that, even under this more relaxed standard, the real question is whether the complaining party made its objection known to the trial court in a timely and clear manner and obtained a ruling.[410] While the appellant's proposed instruction in *Munoz* may have been proper, the court found three reasons for ruling that any error had been waived: the instruction was submitted only as part of the appellant's complete charge; the appellant failed to obtain a written notation that the submission had been refused; and, she failed to object to its omission.[411]

Rule 277[412] directs trial judges not to comment on the weight of the evidence in the jury charge, but provides that an appropriate instruction or definition will not be objectionable merely because it can be construed as an incidental comment on the evidence.[413] *Maddox v. Denka Chemical Corp.*[414] teaches that the mere fact that a jury instruction correctly states the law does not mean it is appropriate and cannot be considered an impermissible comment.[415] The trial court in *Maddox* instructed the jury that, as a "general rule," a property owner does not have a duty to ensure that an independent contractor performs its work safely.[416] The court of appeals concluded that this was error because the owner's duty

404. *Williams*, 40 Tex. Sup. Ct. J. at 61 (emphasis added); *Rodriguez*, 40 Tex. Sup. Ct. J. at 48.
405. *Williams*, 40 Tex. Sup. Ct. J. at 61; *Rodriguez*, 40 Tex. Sup. Ct. J. at 48.
406. *Williams*, 40 Tex. Sup. Ct. J. at 62.
407. *Rodriguez*, 40 Tex. Sup. Ct. J. at 48. The supreme court remanded, rather than rendering judgment, because the district court had followed the erroneous pattern jury charge. *Id.*
408. *See, e.g.*, Alaniz v. Jones & Neuse, Inc., 907 S.W.2d 450 (Tex. 1995) (discussed in *1996 Annual Survey*, *supra* note 4 at 1397).
409. 919 S.W.2d 470 (Tex. App.—San Antonio 1996, no writ).
410. *Id.* at 472.
411. *Id.* at 472-73.
412. TEX. R. CIV. P. 277.
413. *Id.*
414. 930 S.W.2d 668 (Tex. App.—Houston [1st Dist.] 1996, no writ).
415. *Id.* at 671-72.
416. *Id.* at 670.

was an issue of law for the court to decide.[417] According to the appellate court, not only was this type of instruction unnecessary, but, in a suit by an injured employee of the independent contractor, such an instruction was tantamount to telling the jury that, "'[g]enerally, owners win cases like this because they have no duty.'"[418] Moreover, reasoning that few jurors would not be influenced by the trial judge's pronouncement of the "'general rule,'" the court held that the error was reasonably calculated to cause, and probably did cause, the rendition of an improper verdict.[419]

XII. JUDGMENTS

Texas courts, including the supreme court, addressed several interesting points regarding judgments during the Survey period. In *Walnut Equipment Leasing Co. v. Wu*,[420] a case involving the Uniform Enforcement of Judgments Act (UEJA),[421] the supreme court reversed the judgment of an intermediate appellate court and dismissed the appeal for want of jurisdiction because the defendants had not timely filed their motion for new trial. In this case, the plaintiff obtained a judgment against the defendants in a Pennsylvania court and filed a petition in a Texas state district court to domesticate that judgment.[422] The defendants failed to make an appropriate challenge to the Pennsylvania judgment; and, after both parties had amended their pleadings, the trial court tried the case as an action to enforce a judgment under the UEJA.[423] The trial court then entered a final judgment enforcing the Pennsylvania judgment, following which the defendants unsuccessfully moved for a new trial.[424] The supreme court held that, when the plaintiff properly filed the foreign judgment under the UEJA, that pleading comprised both an original petition and a final judgment on the date it was filed.[425] Consequently, the defendants' motion for a new trial, filed approximately three years and three months after the plaintiff filed the foreign judgment in Texas under the UEJA, was untimely.[426] The amended pleadings and "second judgment" entered by the trial court were nullities and did not extend the defendants' deadline to move for a new trial.[427]

In *Zamarripa v. Sifuentes*,[428] the plaintiffs took a default judgment against the defendant the same day he filed his answer. Thereafter, the

417. *Id.* at 671.
418. *Id.*
419. *Id.* at 672.
420. 920 S.W.2d 285 (Tex. 1996).
421. TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001-35.008 (Vernon 1986).
422. *Wu*, 920 S.W.2d at 285.
423. TEX. CIV. PRAC. & REM. CODE ANN. § 35.008 (Vernon 1986).
424. *Wu*, 920 S.W.2d at 285.
425. *Id.* at 286; *see also* Bahr v. Kohr, 928 S.W.2d 98 (Tex. App.—San Antonio 1996, writ denied) (holding that a trial court lacks jurisdiction to modify a properly-filed foreign judgment if the foreign judgment has been on file more than thirty days).
426. *Wu*, 920 S.W.2d at 286.
427. *Id.*
428. 929 S.W.2d 655 (Tex. App.—San Antonio 1996, no writ).

parties exchanged discovery on the merits and settlement offers until the defendant learned of the default judgment and sought to have it reconsidered.[429] As approximately eight months had passed since the judgment had been entered, the trial court concluded that its plenary power had expired and denied the motion to reconsider. The defendant appealed;[430] however, the appellate court dismissed the appeal for lack of jurisdiction over an interlocutory appeal.[431] Specifically, the appellate court noted that it could not determine from the face of the judgment when prejudgment interest would begin to accrue, and the judgment did not contain a "Mother Hubbard clause."[432] The court seemed further persuaded that the judgment was not final because the parties had conducted merit-based discovery.[433] Thus, without addressing the merits of a motion for new trial, the appellate court concluded that the trial court had jurisdiction to consider such a motion.[434]

The court in *Dezso v. Harwood*[435] held that where the plaintiff had named the incorrect defendant in his petition but had actually and properly served the correct defendant, a trial court did not err in entering a default judgment against the defendant who failed to timely appear. The *Dezso* court distinguished its ruling from those cases[436] in which default judgments were reversed when a plaintiff had correctly named the proper defendant but served an incorrect person (i.e., not the named defendant).[437] Reasoning that the plaintiff had served the correct defendant, who actually knew or should have known from the plain language of the petition that the claims at issue actually related to her, the court concluded that it was incumbent upon the defendant, in those circumstances, to appear in the lawsuit.[438]

In *Home Savings of America, FSB v. Harris County Water Control & Improvement District No. 70*,[439] the court reversed a default judgment for unpaid property taxes where the appellant responded by serving and filing a letter advising that the appellant had no interest in the land allegedly in tax default. The court ruled that, while the letter was defective as an answer, it did constitute a sufficient appearance to preclude a default judgment.[440] Although the letter had not been signed by a named party or an attorney, the court held that it constituted a response precluding the

429. *Id.* at 656.
430. *Id.*
431. *Id.*
432. *Id.* at 657.
433. *Id.* at 658.
434. *Id.*
435. 926 S.W.2d 371 (Tex. App.—Austin 1996, writ denied).
436. Callan v. Bartlett Elec. Coop., 423 S.W.2d 149, 156 (Tex. Civ. App.—Austin 1968, writ ref'd n.r.e.); Thomas v. Cactus Drilling Corp., 405 S.W.2d 214, 216 (Tex. Civ. App.—Austin 1966, no writ).
437. *Dezso*, 926 S.W.2d at 373-74.
438. *Id.* at 374.
439. 928 S.W.2d 217 (Tex. App.—Houston [14th Dist.] 1996, no writ).
440. *Id.* at 218.

entry of a default judgment.[441]

Finally, in *Woosley v. Smith*,[442] an appeal from a summary judgment in a proceeding for adoption and the termination of parental rights, the court addressed whether an original decree was final or interlocutory when followed by a second decree. In this case, a baby's biological mother and father executed affidavits waiving their interests in the child incident to an adoption proceeding.[443] Based on those affidavits, the trial court first entered a decree terminating the rights of the biological parents.[444] As the biological mother was married to someone other than the biological father, the trial court entered a second decree terminating any parental relationship between the baby and the biological mother's husband a week after entry of the first decree. The biological father then filed suit to set aside the adoption order and the decree terminating his parental rights.[445] The court of appeals held that the first decree, terminating the rights of the biological parents, was a final, non-interlocutory order in that it disposed of all the issues of the case.[446] However, inasmuch as the court retained its plenary power under Rule 329b[447] to modify, the court could correct the error in the first decree regarding the presumptive status of the child's parents.[448] Thus, the second decree did not render the first void, but rather, the second decree incorporated the first, leaving it intact. The court concluded that the decree terminating the biological father's rights was valid as a matter of law.[449]

XIII. MOTIONS FOR NEW TRIAL

Construing the interplay between subsections of Rule 329b[450] regarding motions for new trial and motions to modify a judgment, the supreme court in *L.M. Healthcare, Inc. v. Childs*[451] held in a *per curiam* opinion that the denial of a party's timely-filed motion for new trial does not shorten the time a trial court retains plenary power to resolve a timely-filed motion to modify judgment. In *Childs*, the petitioner filed suit on a sworn account against an estate.[452] Concluding that the petitioner had not properly proved its claim as required under the Texas Probate Code,[453] the trial court entered judgment for the respondent and, on the same date, denied the petitioner's first motion for new trial.[454] The peti-

441. *Id.* at 218-19.
442. 925 S.W.2d 84 (Tex. App.—San Antonio 1996, no writ).
443. *Id.* at 86.
444. *Id.*
445. *Id.*
446. *Id.*
447. TEX. R. CIV. P. 329b.
448. *Woosley*, 925 S.W.2d at 87.
449. *Id.*
450. TEX. R. CIV. P. 329b.
451. 929 S.W.2d 442 (Tex. 1996).
452. *Id.* at 443.
453. TEX. PROB. CODE ANN. § 301 (Vernon Supp. 1997).
454. *Childs*, 929 S.W.2d at 443.

tioner then successfully moved the trial court to modify its judgment to reflect a dismissal of its claim without prejudice.[455] In affirming the trial court's ruling in part, the court reasoned that, although a party must file its motion for new trial within thirty days after the trial court signs the judgment, Rule 329b[456] does not reduce the seventy-five day period in which a trial court retains plenary power to adjudicate a motion to modify a judgment.[457] However, "[a] trial court's plenary jurisdiction cannot extend beyond 105 days after the trial court signs the judgment."[458]

Construing the interplay between Texas Rule of Civil Procedure 5[459] and Texas Rule of Appellate Procedure 4(b), the supreme court, in *Stokes v. Aberdeen Insurance Co.*,[460] held that a party properly preserved its appellate rights when it timely sent the district judge a copy of its motion for new trial, even though the party did not timely file a copy of its motion with the district clerk. In *Stokes*, the district court entered a summary judgment on June 16, 1994.[461] The district clerk's postcard, however, erroneously listed June 19, 1994, as the date of the judgment's entry.[462] On July 18, 1994, the appellant sent two copies of its motion for new trial, one to the district clerk by Federal Express, and the other to the district court judge at her proper address by regular mail.[463] The supreme court held that the appellant's act of mailing a copy of its motion to the district judge at her proper address was "conditionally effective" as if it were mailed to the clerk's proper address because the clerk serves as a ministerial servant of the court and is neither separate from nor above the court itself.[464] Although noting that the cautious practitioner should ensure that the clerk actually receives its copy of the pleading at issue, the court rejected as too restrictive the argument that the clerk must receive the "same" piece of paper that the party actually mailed.[465]

Two other appellate courts also addressed the scope of a trial court's power to grant motions for new trial during the Survey period. In *Townes v. Wood*,[466] the court held that a party must obtain a written order granting its motion for new trial within the time provided under Rule 329b(e)[467] for the order to be effective. In this case, the defendant moved for a new trial, which the trial court orally granted at the hearing; after

455. *Id.* The trial court also modified its judgment to note that a properly authenticated claim had been filed and served, and that the date to answer the claim expired on June 13, 1994.
456. TEX. R. CIV. P. 329b.
457. *Childs*, 929 S.W.2d at 444.
458. *Id.*
459. TEX. R. CIV. P. 5.
460. 917 S.W.2d 267 (Tex. 1996).
461. *Id.*
462. *Id.*
463. *Id.*
464. *Id.* at 268.
465. *Id.* ("We construe the words 'the same' in the rules to mean an original or any copy of the motion sufficient for filing.").
466. 934 S.W.2d 806 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding).
467. TEX. R. CIV. P. 329b(e).

noting the decision on its docket sheet, the court issued an order setting the case for trial.[468] The court, however, never reduced its order granting the motion for new trial to writing. After the plaintiff sought to enforce the original judgment entered in its favor, the defendant filed a petition for writ of mandamus.[469] The court denied the writ, holding that neither the oral ruling nor the docket entry complied with Rule 329b(e).[470] Moreover, the subsequent order setting a new trial date, which did not mention the motion for new trial, was insufficient to constitute a "written order" as required by Rule 329b(c).[471]

In *Kvanvig v. Garcia*,[472] however, the court reached a more equitable result where the plaintiff timely moved for, and the trial court granted, a new trial before the plaintiff had paid the statutorily required[473] fifteen dollar filing fee. Although the defendant did not lodge an objection regarding the plaintiff's nonpayment of the filing fee in the district court, it subsequently filed a mandamus proceeding challenging the district court's jurisdiction to order a new trial because of the unpaid fee.[474] In connection with its response to the petition, the plaintiff finally tendered the filing fee.[475] The court denied the writ of mandamus, holding that, although the trial court was under no obligation to rule upon a motion for new trial until the movant tendered the filing fee, the trial court did not abuse its discretion in granting such a motion so long as it did so while it retained its plenary power over the case.[476]

In *In re Simpson*,[477] the court dismissed an appeal where the appellant had filed his motion for new trial and appeal bond more than thirty days after the trial court entered judgment against him. The appellate court held that the appeal was not timely and granted the appellant ten days to show grounds to continue the appeal.[478] In response, the appellant moved the trial court to extend the effective date of the judgment under Rule 306a,[479] arguing that he had not received actual notice of the judgment until after the deadline to move for a new trial had expired.[480] In support of this motion to extend, the appellant's current counsel signed a verification page attesting to the truth of the motion as "to the best of [his] knowledge."[481] The appellant also attached two other affidavits from his past and present attorneys; these affidavits had been signed

468. *Townes*, 934 S.W.2d at 806.
469. *Id.*
470. *Id.*; TEX. R. CIV. P. 329b(e).
471. *Townes*, 934 S.W.2d at 806; TEX. R. CIV. P. 329b(c).
472. 928 S.W.2d 777 (Tex. App.—Corpus Christi 1996, orig. proceeding).
473. TEX. GOV'T CODE ANN. § 51.317(b)(2) (Vernon Supp. 1997).
474. *Kvanvig*, 928 S.W.2d at 778.
475. *Id.*
476. *Id.* at 779.
477. 932 S.W.2d 674 (Tex. App.—Amarillo 1996, no writ).
478. *Id.* at 675.
479. TEX. R. CIV. P. 306a.
480. *Simpson*, 932 S.W.2d at 675.
481. *Id.* at 677.

before a notary, but were unverified.[482] The appellant did not file an affidavit stating that he personally was unaware of the date on which the judgment had been entered against him.[483] Finding that the appellant had not presented evidence sufficient to invoke the exception to Rule 329[484] provided for in Rules 5[485] and 306a,[486] the court dismissed the appeal holding that the averment by the attorney that included the caveat of "to the best of my knowledge" was defective under Rule 306a(5).[487] The court further ruled that the unverified affidavits could not be considered as competent evidence.[488] The court also expressed dissatisfaction with the absence of any evidence from the appellant himself attesting to his lack of personal knowledge of the date of the entry of the judgment. Moreover, although Rule 306a[489] does not expressly set a time for filing a motion under that rule, the court relied upon the holding of at least one other court[490] that a motion under Rule 306a[491] must be filed within thirty days after the party or his attorney received notice of the signing of the judgment.[492] Since the appellant waited until 99 days after learning of the entry of judgment against him, the court rejected his motion for this reason as well.[493]

XIV. SEALING OF COURT RECORDS

The court in *General Tire, Inc. v. Kepple*[494] addressed the interplay between motions for protective orders under Rule 166b(5)[495] and the requirements for sealing of "court records" under Rule 76a.[496] The court held that a trial judge presented with a request for protection of unfiled discovery materials under the former rule should "proceed without regard to rule 76a until the non-movant alleges and establishes that the documents are 'court records.'"[497] Acknowledging that there is some disagreement among the intermediate courts of appeals on the proper standard of review of a trial court's determination of this issue, the court in *Kepple* applied an abuse of discretion standard in upholding the trial court's decision that the discovery in question constituted "court

482. *Id.*
483. *Id.* at 678.
484. TEX. R. CIV. P. 329.
485. TEX. R. APP. P. 5.
486. TEX. R. CIV. P. 306a.
487. *Simpson*, 932 S.W.2d at 677; TEX. R. CIV. P. 306a(5).
488. *Id.* at 678.
489. TEX. R. CIV. P. 306a.
490. Womack-Humphreys Architects, Inc. v. Barrasso, 886 S.W.2d 809, 813 (Tex. App.—Dallas 1994, writ denied); *contra* Vineyard Bay Dev. Co., Inc. v. Vineyard on Lake Travis, 864 S.W.2d 170, 172 (Tex. App.—Austin 1993, writ denied).
491. TEX. R. CIV. P. 306a.
492. *Simpson*, 932 S.W.2d at 678.
493. *Id.*
494. 917 S.W.2d 444 (Tex. App.—Houston [14th Dist.] 1996, writ granted).
495. TEX. R. CIV. P. 166b(5).
496. TEX. R. CIV. P. 76a.
497. *Kepple*, 917 S.W.2d at 448.

records."[498]

XV. DISQUALIFICATION AND RECUSAL OF JUDGES

Section 74.053 of the Texas Government Code permits a litigant to disqualify an assigned or visiting judge if he objects before the first hearing or trial over which the assigned judge is to preside.[499] In *Texas Employment Commission v. Alvarez*,[500] a defendant timely filed his "Objection to Visiting Judge" before the case was called to trial, but the objection failed to identify the challenged judge by name. Because the case was not reached for trial that day, the objection was never presented to the assigned judge nor served on opposing counsel. Three months later, when the case was called for trial a second time, it was again assigned to the same visiting judge. On this occasion, however, the defendant did not oppose the visiting judge's assignment, so it neither reurged its original objection nor filed a new one. On appeal from an adverse judgment rendered after trial, the plaintiff attempted to rely on the objection originally filed by the defendant, claiming that the visiting judge's disqualification was mandatory and automatic once the objection was filed.

The court of appeals disagreed for two reasons. First, it held that the defendant's failure to specifically name the judge was an omission that rendered the objection ineffective.[501] The court distinguished the situation presented in *Amateur Athletic Foundation v. Hoffman*,[502] in which the Dallas Court of Appeals recently held that a "blanket" objection to a visiting judge was sufficient.[503] There the litigant actually presented his "blanket" objection to the assigned judge, unlike the case in *Alvarez*, so there could not have been any question as to whom the objection was targeted.[504] Second, the court in *Alvarez* decided that the defendant's objection would not have automatically disqualified the visiting judge, even if he had been named in the objection, because it was never presented to the court for ruling.[505] An objection under section 74.053 does not present constitutional grounds for disqualification;[506] therefore,

498. *Id.* at 448, 451 (citations omitted). The court also rejected the appellant's argument that the trial court erred in conducting a public hearing under TEX. R. CIV. P. 76a before it determined that the documents in question were, in fact, court records. *Id.* at 452. The court acknowledged that holding separate hearings is the better practice, so that the allegedly confidential documents are not discussed in a public hearing (which would potentially compromise their confidential nature) before the trial judge decides whether the documents are court records. The court concluded, however, that any error was harmless because the judge ultimately did find that the documents were court records and the details contained therein were not discussed at the hearing. *Id.*

499. TEX. GOV'T CODE ANN. § 74.053(c) (Vernon Supp. 1997).

500. 915 S.W.2d 161 (Tex. App.—Corpus Christi 1996, no writ).

501. *Id.* at 164.

502. 893 S.W.2d 602 (Tex. App.—Dallas 1994, no writ) (discussed in *1996 Annual Survey*, *supra* note 4, at 1404-05).

503. *Hoffman*, 893 S.W.2d at 603.

504. *Alvarez*, 915 S.W.2d at 164.

505. *Id.* at 166.

506. TEX. CONST. art. V, § 11 requires disqualification when the judge has an interest in the case, has been counsel in the case, or is connected with either of the parties, by affinity

the court concluded, a party can waive its objection to an assigned judge by proceeding to trial without first presenting the objection and obtaining a ruling from the assigned judge.[507]

A subsequent decision of the Texas Supreme Court arguably calls into question both of the *Alvarez* holdings. In *Flores v. Banner*,[508] the court held that an assigned judge's disqualification was mandatory when one of the parties timely filed an objection to the assignment of "any former judge," without specifically identifying the assigned judge. Although this holding seems at odds with *Alvarez*, the supreme court did not disapprove of *Alvarez*, but instead simply distinguished the facts of the case. With respect to the identification issue, the court pointed out that Flores learned a visiting judge would hear her motion only an hour before the hearing, and she did not know who the assigned judge would be until he took the bench.[509] Moreover, like the litigant in *Amateur Athletic*, Flores actually presented her objection to the assigned judge for determination, so he knew he was the subject of her objection.[510] In light of these facts, the decisions in *Flores* and *Alvarez* are easily reconcilable. Although the *Flores* court held that disqualification is "mandatory" once an objection is timely filed, that may not mean that the disqualification is "automatic" or self-operative absent a presentation of the objection.

Numerous decisions have held that an objection under section 74.053 is too late if it comes after the assigned judge makes any ruling in the case, even on a motion for continuance.[511] After reviewing these cases, the court in *Perkins v. Groff*[512] concluded that none had decided whether an objection was timely if it was filed after the assigned judge had already made rulings in the case without actually conducting a "hearing" in open court at which counsel presented oral argument.[513] Although section 74.053 permits the filing of an objection before "the first hearing or trial,"[514] the court held that the objection must precede *any* rulings in the case by the assigned judge, even those not made in open court.[515] In reaching this conclusion, the court relied heavily on the supreme court's decision in *Gulf Coast Investment Corp. v. NASA 1 Business Center*[516] that the term "hearing" does not necessarily contemplate either a per-

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or consanguinity, within the degree prescribed by law. These three mandatory grounds for disqualification are jurisdictional, cannot be waived, and may be raised for the first time after judgment. Fry v. Tucker, 146 Tex. 18, 202 S.W.2d 218, 221-22 (1947).

507. *Alvarez*, 915 S.W.2d at 166.

508. 932 S.W.2d 500 (Tex. 1996) (orig. proceeding) (per curiam).

509. *Id.* at 501.

510. *Id.*

511. *See, e.g.*, Morris v. Short, 902 S.W.2d 566, 569 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (discussed in *1996 Annual Survey*, *supra* note 4, at 1386, 1404); Money v. Jones, 766 S.W.2d 307, 308 (Tex. App.—Dallas 1989, writ denied) (discussed in Ernest E. Figari et al., *Texas Civil Procedure, Annual Survey of Texas Law*, 44 Sw. L.J. 541, 551-52 (1990)).

512. 936 S.W.2d 661 (Tex. App.—Dallas 1996, writ denied).

513. *Id.* at 665-66.

514. TEX. GOV'T CODE ANN. § 74.053(c) (Vernon Supp. 1997).

515. *Perkins*, 936 S.W.2d at 664.

516. 754 S.W.2d 152, 153 (Tex. 1988).

sonal appearance before the court or an oral presentation.[517]

Republic Royalty Co. v. Evins[518] involved an unseemly "tug of war" over jurisdiction of cases that had been consolidated and ordered transferred back and forth between two courts in the same county. Republic filed the first lawsuit in Hidalgo County against Shell. The second suit, filed against Fina four months later by a different plaintiff, was randomly assigned to a different court in Hidalgo County. Republic filed a motion to recuse the judge in the first suit and, together with the plaintiff in the second suit, filed a joint motion to transfer requesting that the judge in the second suit consolidate both actions in his court. Before the motion to recuse in the first suit was decided, the judge in the second suit granted the plaintiffs' motion and ordered the first suit transferred to his court for consolidation with the second. When the judge in the first suit nevertheless proceeded with a hearing on the motion to recuse, Republic attempted to withdraw the motion as moot due to the intervening transfer. The first court therefore signed an order granting withdrawal of the motion to recuse "with prejudice to its refiling," whereupon the defendants in the two suits immediately filed a motion asking the judge in the first suit to transfer the consolidated suits back to her court. This latter motion was granted without hearing, and the first judge signed an order transferring the cases back to her court. On the same day, however, the judge in the second suit entered an order requested by the plaintiffs enjoining the transfer.

The Texas Constitution, the Texas Government Code, and the Texas Rules of Civil Procedure authorize district courts within the same county to transfer cases and exchange benches.[519] The court of appeals in *Republic* observed that all of these provisions were intended as a convenience for the courts and parties, with an underlying assumption that the courts, if not the parties, would communicate and cooperate with one another.[520] Absent such collegiality, however, there is no mechanism to prevent transfers between courts involved in a dispute over jurisdiction aside from the intervention of either the local administrative judge or the appellate court by mandamus.[521] Accordingly, the court conditionally granted a writ of mandamus returning to the first court the suit originally filed there.[522] Although the first suit could have been transferred to another court within the same county for some legitimate reason involving judicial convenience or equalization of dockets, the appellate court held that principles of dominant jurisdiction[523] dictate that the first case not be

517. *Perkins*, 936 S.W.2d at 666.
518. 931 S.W.2d 338 (Tex. App.—Corpus Christi 1996, orig. proceeding).
519. *See* TEX. CONST. art. V, § 11; TEX. GOV'T CODE ANN. §§ 24.303, 74.093 (Vernon 1988 & Supp. 1997); TEX. R. CIV. P. 330(e).
520. *Republic*, 931 S.W.2d at 342.
521. *Id.*
522. *Id.* at 344.
523. "The general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts." *Id.* at 342 (citing Curtis v. Gibbs, 511 S.W.2d 263, 267 (Tex. 1974)).

transferred arbitrarily once it was randomly assigned to a particular court.[524] The court also concluded that the mere filing of the motion to recuse the first judge provided no rational basis for the case's transfer to the second court; any other holding would mean the first judge could be effectively recused without requiring the moving party to prove his grounds for recusal.[525] The court further disagreed with the plaintiffs' contention that the first judge was precluded from ordering the cases transferred back to her court due to the motion to recuse.[526] Rule 18a(a) provides only for recusal of "the judge before whom the case is pending,"[527] so the issue of recusal would not ripen until the case was returned to the first court.[528] Although the first judge was justified in transferring the consolidated case back to her court in order to correct the initial abuse of discretion by the second judge, the appellate court believed she should retain only the lawsuit initially filed in her court and must sever and return the other lawsuit to the second court.[529] The court opined that trial judges are discouraged, and perhaps even prohibited, from unilaterally transferring a case where the judge from whose court the case is to be transferred objects, even if a rational basis for the transfer might otherwise exist.[530] Despite the machinations of the parties, therefore, the lawsuits ultimately remained in the courts in which they were originally filed.

Blanchard v. Krueger[531] concerned a peculiar set of circumstances of a different sort. In response to a father's motion to modify in a child custody dispute, the mother filed a motion to recuse alleging that the trial judge had *ex parte* communications about the father's motion with the father's attorney and the court appointed ad litem. The trial judge forwarded the motion to recuse to the presiding judge of the administrative judicial district, as required under Rule 18a,[532] where it was assigned to another judge for hearing. Immediately before that hearing, the judge facing recusal filed a general denial in the underlying suit and asked the assigned judge to award him attorney's fees and court costs against the mother. The mother then requested leave to amend her motion to include as additional grounds for recusal that the trial judge now had an interest in the lawsuit. The assigned judge denied the requested trial amendment and the motion to recuse. After the case was returned to the trial judge, the mother filed a second motion to recuse, reasserting the grounds she had included in her earlier motion to amend the pleadings. This second motion was likewise denied.

524. *Id.* The court observed that arbitrary transfers within a county would undermine the random assignment system and encourage improper forum or judge shopping by the parties. *Id.*
525. *Id.* at 343.
526. *Id.*
527. TEX. R. CIV. P. 18a(a).
528. *Republic*, 931 S.W.2d at 343.
529. *Id.*
530. *Id.*
531. 916 S.W.2d 15 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding).
532. TEX. R. CIV. P. 18a(d).

The court of appeals held that the trial judge's disqualification was mandatory under the Texas Constitution[533] "when he took the extraordinary step of filing a general denial and became a party to the underlying suit."[534] The trial judge argued that mandamus was unavailable because Rule 18a[535] provides that denial of a motion to recuse may only be reviewed on appeal from a final judgment. The court of appeals disagreed, however, observing that a disqualification on constitutional grounds renders any order involving judicial discretion void.[536]

XVI. MISCELLANEOUS

A. SANCTIONS

In *Bisby v. Dow Chemical Co.*,[537] the court reversed and remanded a judgment in which the trial court had imposed sanctions against the appellant that included an unconditional award of appellee's attorneys' fees on appeal. The appellant in this action had originally sued Dow Chemical in another suit in Harris County, Texas, relative to her breast implants.[538] In response to adverse discovery rulings entered against her in the breast implant case, the appellant had filed an $18 million dollar lien in Brazoria County on all property of the district court judge, Dow Chemical, and Dow Chemical's executives and attorneys. Dow filed this second action to remove the lien and enjoin the appellant from refiling it. The appellant responded by refiling the lien against the district court judge in the second action, the Brazoria County district clerk and her husband, a deputy district clerk and her husband, and Dow's attorneys in the second case. Following a trial at which the appellant did not appear, the trial court invalidated the liens and enjoined the appellant from filing any further liens.[539] The trial court also awarded Dow, as a sanction against the appellant under Rule 13, $25,000 in unconditional attorneys' fees on appeal.[540] The appellate court reversed the sanction against the appellant and remanded the case, holding that the trial court erred in awarding sanctions against the appellant without first providing her notice of its intent to award sanctions and in failing to conduct an evidentiary hearing to determine whether the appellant's pleadings were in bad faith or made with the intent to harass.[541]

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533. TEX. CONST. art. V, § 11 provides: "No judge shall sit in any case wherein he may be interested . . . ."

534. *Blanchard*, 916 S.W.2d at 18.

535. *See* TEX. R. CIV. P. 18a(f).

536. *Blanchard*, 916 S.W.2d at 19 (citing Buckholts Indep. Sch. Dist. v. Glaser, 632 S.W.2d 146, 148 (Tex. 1982)). The court also noted several federal decisions which suggested that the judge should not have participated in the mandamus action that challenged his refusal to recuse himself. *Id.* at 19 n.9; *see, e.g.*, Rapp v. Van Dusen, 350 F.2d 806, 810 (3rd Cir. 1965); United States v. Craig, 875 F. Supp. 816, 818 (S.D. Fla. 1994).

537. 931 S.W.2d 18 (Tex. App.—Houston [1st Dist.] 1996, no writ).

538. *Id.* at 19.

539. *Id.* at 20.

540. *Id.*

541. *Id.* at 21.

The plaintiffs in *Rich v. Elliot*[542] originally filed suit in 1985. The defendants answered and moved to transfer venue. Before the trial court could rule on the venue motion, however, the plaintiffs each filed for bankruptcy, but failed to notify the district court of the termination of their bankruptcies as required under the district court's local rules.[543] When they finally emerged from bankruptcy, the plaintiffs obtained new counsel who, in 1995, filed a certificate of readiness for trial.[544] Thereafter, the trial court held a hearing on the defendant's motion to transfer venue, which plaintiff's new counsel did not attend.[545] Accordingly, the trial court dismissed the entire action as a sanction for, among other things, the lengthy delay in prosecuting the action and subsequently refused to reinstate it after a full evidentiary hearing.[546] Notwithstanding numerous incidents of extreme delay and lack of diligence by the plaintiffs, the court of appeals reversed the dismissal sanction because the trial court had not made any evidentiary determinations as to whether the delays were caused by the plaintiffs, their attorneys, or both.[547] The supreme court, however, interpreted the trial court's order as a dismissal for want of prosecution rather than as a sanction for discovery abuse and reversed the court of appeals holding that the trial court did not act arbitrarily or unreasonably in finding that the delays unreasonably prejudiced the defense and that the plaintiffs failed to show good cause for reinstatement of the suit.[548]

B. BIFURCATION

In *Texas Farmers Insurance Co. v. Cooper*,[549] the court denied a petition for writ of mandamus and held that while bifurcation of a contract claim and a bad faith claim is desirable where evidence of settlement offers is relevant to the latter claim, there is no requirement that the contract claim proceed first. Rather, after reviewing several factors, the court concluded that it is the insurer's burden to prove that it will be prejudiced by the conflicts inherent in the continuation of all claims absent an abatement, and that the insurer must adduce evidence on the specifics of those conflicts.[550] In this case, the insurer sought not only to bifurcate the contractual and extra-contractual claims for trial, but for all of the pretrial proceedings as well.[551] Since the insurer had not presented any evidence supporting this request, the court denied its writ of mandamus, holding that "although a trial court must try contractual claims sepa-

542. 932 S.W.2d 83 (Tex. App.—El Paso 1996), *rev'd sub nom.* MacGregor v. Rich, 40 Tex. Sup. Ct. J. 298 (Jan. 31, 1997).
543. *Id.* at 86; 168TH (TEX.) DIST. CT. LOC. R. 3.10 (El Paso County).
544. *Rich*, 932 S.W.2d at 85.
545. *Id.*
546. *Id.* at 85-86.
547. *Id.* at 87-88.
548. *McGregor*, 40 Tex. Sup. Ct. J. at 298.
549. 916 S.W.2d 698 (Tex. App.—El Paso 1996, orig. proceeding).
550. *Id.* at 701.
551. *Id.* at 700.

rately from extracontractual claims where settlement negotiations are prohibited in the first and critical to the second, that does not mean we will intrude upon the trial court's discretion in deciding at what pretrial stage such separation must occur."[552]

C. MAILBOX RULE

Ruling that the delivery of a petition by Federal Express on the last date to file suit did not constitute a filing by the U.S. Mail under Rule 5,[553] the court in *Fountain Parkway, Ltd. v. Tarrant Appraisal District*[554] affirmed the dismissal of a petition challenging a tax appraisal as untimely. In so holding, the court rejected an argument that the language in the Texas Tax Code,[555] that a suit to compel a review of an appraisal court's ruling "may" be filed on the forty-fifth day after the board's ruling, was permissive rather than mandatory.[556] The court then held that the appellant could not invoke Rule 5[557] and argue that the delivery of its petition by Federal Express on the 45th day constituted a filing under the mailbox rule.[558] The court rejected the argument that a Federal Express drop box is a branch of the district court clerk's office for purposes of the mailbox rule.[559]

D. VISITING JUDGES

In *Taiwan Shrimp Farm Village Ass'n, Inc. v. U.S.A. Shrimp Farm Development, Inc.*,[560] the court rejected an argument that a county court judge, sitting in a district court, could not hear a case where the amount in controversy exceeded $100,000. The court ruled that the terms "judge," "statutory county court," and "county court at law" as used under the Texas Government Code[561] were not synonymous, and that the statutory language setting the jurisdictional limits of a court applied only to the court and not the judge.[562] Thus, a county court judge could properly preside over a district court case by assignment.[563]

E. ATTORNEYS' FEES

In *Travelers Indemnity Co. v. Mayfield*,[564] the supreme court granted a

552. *Id.* at 703.
553. TEX. R. CIV. P. 5.
554. 920 S.W.2d 799 (Tex. App.—Fort Worth 1996, writ denied).
555. TEX. TAX CODE ANN. § 25.25(g) (Vernon 1992) ("[w]ithin 45 days after receiving notice of the appraisal review board's determination of a motion under this section, the property owner or the chief appraiser may file suit to compel the board to order a change in the appraisal roll as required by this section.").
556. *Fountain Parkway*, 920 S.W.2d at 801.
557. TEX. R. CIV. P. 5.
558. *Fountain Parkway*, 920 S.W.2d at 803.
559. *Id.* at 802-03.
560. 915 S.W.2d 61 (Tex. App.—Corpus Christi 1996, writ denied).
561. TEX. GOV'T CODE ANN. §§ 25.0004, .0006, .0332(a) (Vernon 1988).
562. *Taiwan Shrimp*, 915 S.W.2d at 66-67.
563. *Id.* at 67.
564. 923 S.W.2d 590 (Tex. 1996) (orig. proceeding).

writ of mandamus and held that the trial court erred when, after appointing an attorney to represent the plaintiff, it also ordered the defendant to pay the fees for the plaintiff's attorney. Noting that although the Texas Government Code[565] authorizes district courts to appoint counsel to represent indigent parties, that statute does not authorize shifting the fees for such appointed counsel to the opposing party.[566]

F. ADR AND RULE 11 AGREEMENTS

During the Survey period, appellate courts further explored a trial court's power to enforce judgments resulting from mediated settlements where one party seeks to renege on its agreement. For example, in *Cadle Co. v. Castle*,[567] the court, sitting *en banc*, reversed and remanded a judgment entered by the trial court enforcing a written settlement agreement reached in a mediation. In this borrower-lender dispute, the parties reached a settlement agreement during a court-ordered mediation that was "subject to" final approval of the senior management of one of the prior lenders.[568] Pending that approval, some of the parties filed motions regarding the enforceability of the settlement agreement.[569] The trial court held a non-evidentiary hearing and concluded that the terms of the written settlement agreement should be incorporated into a final judgment.[570] The appellate court reversed, noting that the parties had not filed the settlement under Rule 11[571] and holding that, contrary to a suggestion by the dissent, section 154.071(b) of the Texas Civil Practice and Remedies Code[572] does not authorize a "summary" proceeding to enforce written settlement agreements.[573] Therefore, while a trial judge should have discretion to tailor a judgment that accomplishes the goals of a mediated settlement, that discretion did not translate into a summary, non-evidentiary proceeding that would "effectively deprive[ ] a party of the right to be confronted by appropriate pleadings, assert defenses, conduct discovery, and submit contested fact issues to a judge or jury."[574] Declining to treat the parties' pleadings regarding the enforceability of the settlement agreement as either evidence or judicial admissions, the court concluded that, because the trial court did not hear any evidence there was no record sufficient to support its judgment.[575] Therefore, the court reversed and remanded the case for further proceedings consistent

565. TEX. GOV'T CODE ANN. § 24.016 (Vernon 1988).
566. *Mayfield*, 923 S.W.2d at 593.
567. 913 S.W.2d 627 (Tex. App.—Dallas 1995, writ denied).
568. *Id.* at 630.
569. *Id.*
570. *Id.*
571. TEX. R. CIV. P. 11 ("Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.").
572. TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(b) (Vernon Supp. 1997).
573. *Cadle*, 913 S.W.2d at 631.
574. *Id.* at 632.
575. *Id.* at 632-34.

with its opinion.[576]

Similarly, in *Clopton v. Mountain Peak Water Supply Corp.*,[577] the court reversed the trial court's summary dismissal of a suit after one party announced its intent to renege on a hand-written settlement reached during a court-ordered mediation. In this case, the defendant's attorney informed the trial court that the plaintiff had decided to renege on the mediated settlement. Without conducting for a hearing, the trial court entered an order of dismissal and subsequently declined to set aside the order.[578] The appellate court reversed, holding that the trial court erred in dismissing the plaintiff's claims absent notice or a hearing.[579] As in *Cadle*,[580] the court in *Clopton* went on to hold that "[t]he same procedures used to enforce other contracts should apply to mediated settlement agreements."[581] Thus, without deciding the enforceability issue, the court remanded the action, noting that the party seeking to enforce a settlement agreement must provide proper pleading and proof to support enforcement of the agreement under contract law.[582]

In *Clanin v. Clanin*,[583] on the other hand, the court affirmed a portion of a final divorce decree entered pursuant to a valid agreement under Rule 11,[584] in which the parties announced on the record at a hearing that they had entered into a settlement agreement and then dictated its terms into the record "by direct and cross-examination of the parties."[585]

Similarly, the court in *Kosowska v. Khan*[586] held that a valid Rule 11[587] agreement barred a second suit on that same subject. In this case, the plaintiff sued over defective repairs to her car's engine.[588] The parties agreed to settle that suit for $10,000 and memorialized their agreement in a statement which was recorded in the defendant's attorney's office before a certified court reporter and filed with the trial court.[589] The plaintiff then orally repudiated the agreement.[590] Eventually, the trial

576. *Id.* at 635; *see also In re* McIntosh, 918 S.W.2d 87, 88 (Tex. App.—Amarillo 1996, no writ) (holding that a trial court does not err in refusing to enforce a settlement regarding a divorce reached during mediation where the parties' "agreement" included language that they were "to take the agreement to their respective attorneys to review and to meet within ten days . . . to finalize the agreement.").

577. 911 S.W.2d 525 (Tex. App.—Waco 1995, no writ).

578. *Id.* at 526.

579. *Id.* at 527.

580. *Cadle*, 913 S.W.2d at 627.

581. *Clopton*, 911 S.W.2d at 527.

582. *Id.*

583. 918 S.W.2d 673 (Tex. App.—Fort Worth 1996, no writ).

584. TEX. R. CIV. P. 11.

585. *Clanin*, 918 S.W.2d at 675. *But see* Davis v. Wickham, 917 S.W.2d 414 (Tex. App.—Houston [14th Dist.] 1996, no writ) (holding that the trial court erred in entering an agreed order on a parent's motion to enforce judgment based on a mediated settlement concerning child custody where the other parent repudiated the agreement).

586. 929 S.W.2d 505 (Tex. App.—San Antonio 1996, writ requested).

587. TEX. R. CIV. P. 11.

588. *Kosowska*, 929 S.W.2d at 506.

589. *Id.*

590. *Id.*

court dismissed the case with prejudice;[591] the appellate court, however, reformed the order to "without prejudice." The plaintiff then filed a second suit on the identical subject matter.[592] The trial court entered summary judgment against the plaintiff based upon the settlement agreement.[593] The appellate court affirmed, finding that the settlement agreement "[was] in substantial compliance with Rule 11 as a matter of law" because it was a signed writing that was filed with the court.[594]

G. ANTI-SUIT INJUNCTIONS

In *Golden Rule Insurance Co. v. Harper*,[595] the supreme court reversed an injunction that precluded an insurer from pursuing a parallel action in a different state against its insured, holding that a single parallel proceeding does not justify an anti-suit injunction. The insurer in this case had denied coverage to its insured for medical treatment it deemed to be experimental and, therefore, excluded under its policy.[596] The insured subsequently died, and her husband brought suit in Harris County under the policy.[597] The insurer originally moved to transfer venue, but then withdrew its motion and instituted a declaratory judgment action in Illinois where the insured's husband lived and the policy had been issued.[598] The district court enjoined the insurer from pursuing its competing action and the court of appeals affirmed.[599] The supreme court reversed and dissolved the injunction holding that the Illinois action did not constitute "special circumstances" and hence did not fall within any of the four situations in which an anti-suit injunction was proper: "(1) to address a threat to the court's jurisdiction; (2) to prevent the evasion of important public policy; (3) to prevent a multiplicity of suits; or (4) to protect a party from vexatious or harassing litigation."[600] In reaching its holding, the court disapproved of the language in *Admiral Insurance Co. v. Atchison, Topeka & Santa Fe Railway*[601] that discussed the potential problems associated with parallel legal proceedings.[602] Thus, the court held that neither parallel nor mirror image proceedings warrant the entry of an anti-suit injunction.[603]

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591. *Id.*
592. *Id.*
593. *Id.* at 507.
594. *Id.* at 508.
595. 925 S.W.2d 649 (Tex. 1996).
596. *Id.* at 650.
597. *Id.*
598. *Id.*
599. *Id.*
600. *Id.* at 651 (citing Christensen v. Integrity Ins. Co., 719 S.W.2d 161 (Tex. 1986) and Gannon v. Payne, 706 S.W.2d 304 (Tex. 1986)).
601. 848 S.W.2d 251, 255-56 (Tex. App.—Fort Worth 1993, writ denied).
602. *Harper*, 925 S.W.2d at 651.
603. *Id.* at 651-52.