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## Appellate Practice and Procedure

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# APPELLATE PRACTICE AND PROCEDURE

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## I. INTRODUCTION

IN recent years, the Texas Supreme Court has emphasized that the spirit embodied in the Texas Rules of Appellate Procedure disfavors disposing of appeals based upon harmless procedural defects.<sup>1</sup> The cases decided by the supreme court during this Survey period continue to reflect this spirit. In fact, the Texas Supreme Court refuses to elevate form over substance.

For example, the supreme court held in a series of cases beginning with *Verburgt v. Dorner* that the filing of a motion for extension of time is implied when a perfection instrument is filed without such a motion within the fifteen-day period in which the rules permit parties to seek an extension of time.<sup>2</sup> Moreover, in two mandamus proceedings, the supreme court ensured relief for each relator despite finding no mandamus jurisdiction over the challenged orders.<sup>3</sup> Similarly, the supreme court decisively held during the Survey period that Rule 276 of the Texas Rules of Civil Procedure “is not the exclusive means of preserving error for refusing a charge request.”<sup>4</sup>

Decisions by the courts of appeals mimic the supreme court’s more generous construction of the rules of civil and appellate procedure. During the Survey period, for example, the Houston First Court of Appeals held that a motion for sanctions requesting a substantive change in the judgment that is filed within thirty days after the trial court’s judgment,

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1. See, e.g., *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994); *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993).

2. *Verburgt v. Dorner*, 959 S.W.2d 615 (Tex. 1997); *Holmes v. Home State County Mutual Ins. Co.*, 958 S.W.2d 381 (Tex. 1997); *Harlan v. Howe State Bank*, 958 S.W.2d 380 (Tex. 1997); *Boyd v. American Indemnity Co.*, 958 S.W.2d 379 (Tex. 1997); *Jones v. City of Houston*, 976 S.W.2d 676 (Tex. 1998).

3. See *In re Smith Barney, Inc.*, 975 S.W.2d 593 (Tex. 1998) (orig. proceeding); *In re Colonial Pipeline Co.*, 968 S.W.2d 938 (Tex. 1998) (orig. proceeding) (per curiam).

4. *Dallas Mkt. Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382, 387 (Tex. 1997).

constitutes a "motion to modify or reform [the] judgment" under Rule 329b(g) of the Texas Rules of Civil Procedure, and thereby extends the trial court's plenary power.<sup>5</sup> Similarly, the San Antonio Court of Appeals held that a motion for judgment non obstante veredicto that assails the trial court's judgment and is filed within the time period for filing a motion for new trial operates to extend the appellate timetable.<sup>6</sup>

In other areas, the courts of appeals continue to struggle with the proper standards of review in the wake of the *Daubert-Robinson-Havner* decisions,<sup>7</sup> and in cases where the standard of proof is "clear and convincing" evidence.<sup>8</sup>

Finally, as appellate practitioners experience an ever-increasing number of transferred appeals as a result of the supreme court's effort to equalize appellate court dockets, the courts of appeals are acknowledging the reality of conflicts in holdings between the transferrer and transferring appellate courts. However, at least the Texarkana and San Antonio Courts of Appeals have made it clear that, if a conflict exists between one of their decisions and the *stare decisis* of the appellate district court from which a case has been transferred, "it is for the Texas Supreme Court to resolve."<sup>9</sup>

## II. APPELLATE REVIEW BEFORE FINAL JUDGMENT

### A. MANDAMUS

#### 1. *Mandamus Relief (Effectively) Granted: No Jurisdiction*

The relators in two mandamus proceedings decided in the Survey period found themselves with the mandamus relief they requested despite the Texas Supreme Court's finding of no mandamus jurisdiction. In the case of *In re Smith Barney, Inc.*,<sup>10</sup> the court found no abuse of discretion, but effectively gave the relator its requested relief by overruling the precedent relied upon by the trial court. In the case of *In re Colonial Pipeline Co., Inc.*,<sup>11</sup> the court found that the relators had an adequate remedy by appeal to challenge the trial court's scheduling orders, but nonetheless granted mandamus relief in the "interests of judicial economy."<sup>12</sup>

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5. *Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 981 S.W.2d 302, 303 (Tex. App.—Houston [1st Dist.] 1998, pet. filed).

6. *See Kirschberg v. Lowe*, 974 S.W.2d 844, 847-48 (Tex. App.—San Antonio 1998, no pet.).

7. *See, e.g., Minnesota Mining and Mfg. Co. v. Atterbury*, 978 S.W.2d 183 (Tex. App.—Texarkana 1998, pet. filed) (applying *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995); *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997)).

8. *Spangler v. Texas Dept. of Protective and Regulatory Servs.*, 962 S.W.2d 253, 256 (Tex. App.—Waco 1998, no pet.).

9. *Perez v. Murff*, 972 S.W.2d 78, 86 (Tex. App.—Texarkana 1998, pet. denied); *American Nat'l Ins. Co. v. International Bus. Machs. Corp.*, 933 S.W.2d 685, 688 (Tex. App.—San Antonio 1996, writ denied).

10. 975 S.W.2d 593 (Tex. 1998) (orig. proceeding).

11. 968 S.W.2d 938 (Tex. 1998) (orig. proceeding) (per curiam).

12. *Id.* at 601.

a. No Abuse of Discretion

In *Smith Barney*, relator Smith Barney was sued in Texas by five plaintiffs.<sup>13</sup> Plaintiffs' sole connection with the State was the fact that one of the plaintiff corporations was a Texas corporation.<sup>14</sup> Smith Barney moved to dismiss the Texas lawsuit on grounds of forum non conveniens, arguing that all of the events, alleged wrongdoings, witnesses, and evidence were located in New York, Poland, and Great Britain and that New York law would apply.<sup>15</sup> In response, plaintiffs cited *H. Rouw Co. v. Railway Express Agency*<sup>16</sup> for the proposition that a suit brought in Texas by a corporation qualified to do business in the State cannot be dismissed on the basis of forum non conveniens.<sup>17</sup> The trial court recognized that the case did not belong in Texas, but acknowledged itself bound by the precedent established in *Rouw*.<sup>18</sup> As a result, the trial court reluctantly denied Smith Barney's motion to dismiss.<sup>19</sup>

Smith Barney sought mandamus relief from the supreme court after the court of appeals denied its petition for writ of mandamus.<sup>20</sup> The court found that the trial court did not abuse its discretion by following existing precedent.<sup>21</sup> The court further stated, however, that

although a lower court ordinarily should not be said to have abused its discretion in following existing law, even if that law is no longer valid or should be significantly changed, in denying mandamus relief it is appropriate to state what the correct law is in order to permit the lower court to reconsider its decision.<sup>22</sup>

The court proceeded to overrule *Rouw* and disapprove of those cases adopting *Rouw*, "free[ing] the [trial] court . . . to consider the application of the forum non conveniens doctrine to this case unconstrained by *Rouw*."<sup>23</sup>

Justice Hankinson, joined by three other Justices, filed a concurring opinion questioning the court's authority to overrule binding precedent, while finding no abuse of discretion and denying Smith Barney's mandamus petition.<sup>24</sup> Justice Hankinson warned that "[b]y relaxing mandamus standards to in effect grant Smith Barney relief," the court "retreats from our mandamus standards and contravenes our duty to promote certainty and predictability in the law."<sup>25</sup>

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13. 975 S.W.2d at 594.

14. *See id.*

15. *See id.* at 594-95.

16. 154 S.W.2d 143 (Tex. Civ. App.—El Paso 1941, writ ref'd).

17. *See Smith Barney*, 975 S.W.2d at 595.

18. *See id.*

19. *See id.* at 600.

20. *See id.* at 595.

21. *See id.* at 598.

22. *Id.* at 599.

23. *Id.* at 598.

24. *See id.* at 600 (Hankinson, J., concurring).

25. *Id.* at 601.

b. Adequate Remedy by Appeal

In *Colonial Pipeline*, the relators sought mandamus relief from a discovery order and scheduling orders entered by the trial court.<sup>26</sup> The court concluded that it had jurisdiction to review the discovery order by mandamus, but acknowledged that the defendants had an adequate remedy by appeal to challenge errors in the trial court's scheduling orders.<sup>27</sup> Nonetheless, the court granted mandamus relief on the scheduling orders in the "interests of judicial economy."<sup>28</sup>

2. *Mandamus Relief Granted: Jurisdiction*

a. Sanctions Orders

Appeal is not an adequate remedy if the trial court's sanction order imposes a monetary penalty on the party's prospective exercise of legal rights.<sup>29</sup> In *Ford*, the trial court's order directed Ford Motor Company to pay \$25,000 in attorney's fees to the plaintiffs and an additional \$25,000 if it filed a mandamus proceeding challenging the sanction order.<sup>30</sup> The court found that because Ford had not abused the discovery process, there was no basis for the award of attorney's fees.<sup>31</sup> The court further found that the trial court abused its discretion in awarding appellate attorney's fees without conditioning the fee award on the outcome of the appellate court proceedings.<sup>32</sup>

Although the court found that the trial court abused its discretion in awarding the discovery abuse sanctions, the court noted that Ford had an adequate remedy by appeal to remedy such an abuse.<sup>33</sup> Accordingly, the court denied mandamus relief from the trial court's sanction order. However, the court concluded that appeal was not an adequate remedy when a court imposes a monetary penalty on a party's prospective exercise of its legal rights (here, the right to seek mandamus relief).<sup>34</sup> As a result, the court granted Ford's mandamus petition "as to the unconditional award of appellate attorney's fees," but denied the petition "in all other respects."<sup>35</sup> Notably, the court in *Ford* did not grant mandamus in the interests of judicial economy on those issues for which it found that Ford had an adequate remedy on appeal.<sup>36</sup>

The Corpus Christi and El Paso Courts of Appeals have held that a party does not have an adequate remedy by appeal to challenge an inter-

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26. 968 S.W.2d at 940.

27. *See id.* at 942.

28. *Id.* at 943.

29. *See In re Ford Motor Co.*, No. 97-0430, 1998 WL 387537 (Tex. July 14, 1998) (orig. proceeding).

30. *See id.* at \*3.

31. *See id.* at \*6.

32. *See id.*

33. *See id.* at \*8 (citing TEX. R. CIV. P. 215(2)(b)(3); *Street v. Second Court of Appeals*, 715 S.W.2d 638, 639-40 (Tex. 1986) (orig. proceeding)).

34. *See id.* at \*9.

35. *Id.*

36. *See id.*

locutory order awarding monetary sanctions for discovery abuse unless the trial court either: (1) provides that the sanction be payable upon entry of final order or judgment terminating the litigation or (2) makes express findings that the sanction award does not threaten the continuation of the litigation.<sup>37</sup> In both *McCall* and *Braden*, the appellate courts conditionally granted mandamus relief after finding no indication in the record that the trial court had made any relevant findings related to the effect of the sanction award on the continuation of the litigation.<sup>38</sup>

#### b. Discovery Orders

In the case of *In re American Optical Corp.*,<sup>39</sup> the supreme court granted mandamus relief from a trial court order directing a defendant in mass tort litigation to produce “virtually every document ever generated relating to [the defendant’s] products, without tying the discovery to the particular products the plaintiffs claim to have used.”<sup>40</sup> The court noted that “[a]n order compelling discovery that is well outside the proper bounds is reviewable by mandamus.”<sup>41</sup> The court concluded that the discovery request in the instant case was overbroad, rendering mandamus appropriate.<sup>42</sup>

Similarly, in *Colonial Pipeline*, a mass tort case involving claims by over 3,000 plaintiffs,<sup>43</sup> the supreme court held that the trial court’s order requiring the defendants to create and produce an inventory of all discovery produced by any party in three cases pending in other counties justified mandamus relief.<sup>44</sup> The court noted that under Rule 166b(2)(b) of the Texas Rules of Civil Procedure, “[a] person is not required to produce a document or tangible thing unless it is within the person’s possession, custody or control.”<sup>45</sup> Because the requested inventory did not exist, it was not within the defendants’ “possession, custody or control.”<sup>46</sup> The court reasoned that, while plaintiffs might be entitled to any relevant discovery in related cases “as they are kept in the usual course of business,” the trial court could not force the defendants to prepare an inventory of the documents for the plaintiffs.<sup>47</sup> Thus, the court held that the trial court abused its discretion in ordering creation and production of the

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37. See *In re McCall*, 967 S.W.2d 934, 939-40 (Tex. App.—Corpus Christi 1998, orig. proceeding); *In re Braden*, 960 S.W.2d 834, 837 (Tex. App.—El Paso 1997, orig. proceeding).

38. See *McCall*, 967 S.W.2d at 940; *Braden*, 960 S.W.2d at 838. See also *In re Barnes*, 956 S.W.2d 746, 749 (Tex. App.—Corpus Christi 1997, orig. proceeding) (finding death penalty sanctions unjust and granting mandamus to remedy the unjust sanctions).

39. No. 97-0872, 1998 WL 352962 (Tex. July 3, 1998) (orig. proceeding) (per curiam).

40. *Id.* at \*1.

41. *Id.* at \*2 (citing *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) (orig. proceeding) (per curiam)).

42. See *id.*

43. 968 S.W.2d at 940.

44. See *id.*

45. *Id.* at 942 (citing TEX. R. CIV. P. 166b(2)(b)).

46. *Id.*

47. *Id.* (citing TEX. R. CIV. P. 167(1)(f)).

inventory.<sup>48</sup> The court further concluded that the defendants in *Colonial Pipeline* did not have an adequate remedy by appeal because preparation of the inventory would be overly burdensome.<sup>49</sup>

In another discovery mandamus proceeding decided during the Survey period, the Corpus Christi Court of Appeals granted mandamus relief to correct a trial court order directing an individual without unique or superior personal knowledge to appear for deposition on behalf of a corporate defendant.<sup>50</sup> The court noted that “no adequate remedy by appeal exists because an appellate court cannot cure the trial court’s error in ordering an apex deposition.”<sup>51</sup>

In an additional discovery order case, the San Antonio Court of Appeals granted mandamus relief to correct a trial court order imposing a verification requirement that does not exist under the discovery rules.<sup>52</sup> Contrary to Rule 167 of the Texas Rules of Civil Procedure, the trial court in *Gist* had ordered verification of one party’s response to the other party’s requests for production of documents.<sup>53</sup> The court of appeals conditionally granted mandamus to correct the error without discussing whether the plaintiffs had an adequate remedy by appeal to correct the trial court’s erroneous discovery order.<sup>54</sup>

### c. Order Refusing Supersedeas

In the case of *In re Dallas Area Rapid Transit*,<sup>55</sup> the local Dallas newspaper sought disclosure of certain information from the Dallas Area Rapid Transit Authority (DART) pursuant to the Public Information Act.<sup>56</sup> The trial court ordered production of the requested documents.<sup>57</sup> DART appealed the trial court’s order and filed a motion to stay the production order, “contending that its notice of appeal superseded the judgment based on Section 452.054(b) of the Transportation Code.”<sup>58</sup> The trial court refused to grant a stay regarding the production of documents because it believed that Section 452.054(b) of the Transportation

48. *See id.*

49. *See id.* at 942-43 (citing *Walker v. Packer*, 827 S.W.2d 833, 843-44 (Tex. 1992) (orig. proceeding)).

50. *See In re Daisy Mfg. Co.*, 976 S.W.2d 327, 329 (Tex. App.—Corpus Christi 1998, orig. proceeding).

51. *See id.* at 330 (citing *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding)). *Accord In re El Paso Healthcare System*, 969 S.W.2d 68, 75 (Tex. App.—El Paso 1998, orig. proceeding [mand. granted]). *Cf. In re Columbia Rio Grande Healthcare, L.P.*, 977 S.W.2d 433, 434 (Tex. App.—Corpus Christi 1998, orig. proceeding [mand. Denied]) (denying mandamus relief where party being deposed on behalf of corporation failed to deny his knowledge of relevant facts).

52. *See In re Gist*, 974 S.W.2d 843 (Tex. App.—San Antonio 1998, orig. proceeding).

53. *See id.* at 843.

54. *See id.*

55. 967 S.W.2d 358 (Tex. 1998) (orig. proceeding) (per curiam).

56. *See id.* at 539.

57. *See id.* at 359.

58. *Id.*

Code<sup>59</sup> did not apply to such orders.<sup>60</sup>

On mandamus, the supreme court noted that while former Rule 47(f) of the Rules of Appellate Procedure provided the trial court with some discretion to determine the scope of supersedeas, the rule did not provide the court with the discretion to deny a party any right to appeal.<sup>61</sup> The court stated: "To allow a trial court discretion to refuse to supersede a judgment requiring production of information under the [Public Information] Act is to give that court the power to deny the governmental body any effective appeal, for once the requested information is produced, an appeal is moot."<sup>62</sup> Accordingly, the court held, the trial court erred in refusing to stay its order requiring production of the requested documents pending appeal.<sup>63</sup> The court further concluded that because the trial court's refusal to stay production of the documents deprived DART of its right to appeal, DART had no adequate remedy by appeal.<sup>64</sup>

#### d. Contempt Orders

Mandamus will issue to correct the premature imposition of fines on the court clerk.<sup>65</sup> In *Long*, the Dallas County District Clerk filed a mandamus proceeding seeking relief from a contempt judgment for violation of an order enjoining the clerk from collecting certain filing fees.<sup>66</sup> Although the court upheld the reasonableness of the injunction and the contempt order, the court granted mandamus relief because the trial court abused its discretion by assessing fines against the clerk for actions occurring before the mandate issued.<sup>67</sup>

#### e. Orders Regarding Arbitration

Mandamus will issue to correct a trial court's erroneous denial of a motion to compel arbitration under the Federal Arbitration Act.<sup>68</sup> Reaffirming this general rule and applying a strong presumption against waiver of a party's right to invoke arbitration, the Texas Supreme Court granted mandamus in the case of *In re Bruce Terminix Co.*<sup>69</sup> to correct a

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59. Section 452.054(b) of the Texas Transportation Code provides in relevant part that a transportation authority like DART "may not be required to give a supersedeas or cost bond in an appeal of a judgment." TEX. TRANSP. CODE ANN. § 452.054(b) (Vernon 1998).

60. *Dallas Area Rapid Transit*, 967 S.W.2d at 359, 60.

61. *See id.* at 360.

62. *Id.*

63. *See id.*

64. *See id.*

65. *See In re Long*, No. 97-0373, 1999 WL 3761, at \*4 (Tex. Jan. 7, 1999) (orig. proceeding) (per curiam).

66. *See id.* at \*1.

67. *See id.* Cf. *In re Zenergy, Inc.*, 968 S.W.2d 1, 12 (Tex. App.—Corpus Christi 1997, orig. proceeding) (denying mandamus from contempt order assessing both fines and confinement because contempt orders are more appropriately challenged through habeas corpus).

68. *See In re Gardner Zemke Co.*, 978 S.W.2d 624 (Tex. App.—El Paso 1998, orig. proceeding); *In re Foster Mold, Inc.*, 979 S.W.2d 665 (Tex. App.—El Paso 1998, orig. proceeding).

69. No. 98-0030, 1998 WL 288930 (Tex. June 5, 1998) (orig. proceeding) (per curiam).



trial court's order finding that a party waived its right to arbitration.<sup>70</sup> Mandamus will further issue to remedy a trial court's failure to permit the parties to select their own arbitration panel under the Federal Arbitration Act.<sup>71</sup>

f. Severance Orders

In the case of *In re El Paso County Hospital District*,<sup>72</sup> the El Paso Court of Appeals held that the trial court abused its discretion in severing portions of the lawsuit after submission of the case to the trier of fact.<sup>73</sup> The parties, the court of appeals explained, have a "substantial right to a single judgment and comprehensive appeal of the single complaint," which was "seriously" compromised by the trial court's *sua sponte* election to sever certain parties and claims from the lawsuit.<sup>74</sup> Accordingly, the court concluded that the severed parties had no adequate remedy by appeal and were entitled to mandamus relief to correct the trial court's erroneous severance ruling.<sup>75</sup>

g. Order Denying Motion to Abate

Although the denial of a motion to abate a subsequently filed lawsuit pending the outcome of the first filed lawsuit is not normally reviewable by mandamus, the Corpus Christi Court of Appeals in the case of *In re McCall*<sup>76</sup> applied an exception to this general rule where the failure to abate resulted in the two courts taking directly conflicting positions.<sup>77</sup>

h. Cease and Desist Orders

Mandamus will issue to correct an overly broad cease and desist order that effectively prohibits an attorney from communicating with his own

70. 1998 WL 288930, at \*2. *But see* Turford v. Underwood, 952 S.W.2d 641,643 (Tex. App.—Beaumont 1997, orig. proceeding) (per curiam) (finding waiver of right to compel arbitration and conditionally granting writ of mandamus to vacate order compelling arbitration).

71. *See In re Louisiana-Pac. Corp.* 972 S.W.2d 63 (Tex. 1998) (orig. proceeding) (per curiam).

72. 979 S.W.2d 10 (Tex. App.—El Paso 1998, orig. proceeding).

73. *Id.* at 12.

74. *Id.*

75. *See id.* *See also In re Levi Strauss & Co.*, 959 S.W.2d 700, 705 (Tex. App.—El Paso 1998, orig. proceeding [mand. denied]) (finding no adequate remedy by appeal for trial court's refusal to sever 105 plaintiffs into new and separate causes).

76. 967 S.W.2d 934 (Tex. App.—Corpus Christi 1998, orig. proceeding).

77. *See id.* at 939. *See also In re Foremost Ins. Co.*, 966 S.W.2d 770, 772 (Tex. App.—Corpus Christi 1998, orig. proceeding) (granting mandamus relief to correct trial court's erroneous order denying severance and abatement where such actions were the only means of prohibiting submission of settlement offers and negotiations into evidence); *In re Kimball Hill Homes Tex., Inc.*, 969 S.W.2d 522, 527 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (granting mandamus relief to correct trial court error in denying request for mandatory abatement under the Residential Construction Liability Act). *Compare* Levi, 959 S.W.2d at 705 (Tex. App.—El Paso 1998, orig. proceeding) (finding no clear abuse of discretion regarding trial court's failure to abate 105 causes of action pending resolution of the first five cases to be tried).

clients.<sup>78</sup> In *Hall*, relator Benjamin Hall was lead attorney in a class action (the Hall Action) similar to the underlying lawsuit (the San Benito Action).<sup>79</sup> Several of Hall's clients in the Hall Action were also putative class members in the San Benito Action.<sup>80</sup> Hall contacted numerous plaintiffs (and putative class members) in the San Benito Action and tried to encourage them not to opt into the class.<sup>81</sup> The trial court ordered Hall to cease and desist any contacts with potential members of the class.<sup>82</sup>

On mandamus, the Corpus Christi Court of Appeals found that taken to its logical conclusion, the cease and desist prohibited Hall from contacting his own clients in the Hall Action that were putative class members of the other class action.<sup>83</sup> Under these circumstances, the court of appeals held that Hall had no adequate remedy by appeal because: (1) he was not a party to the underlying lawsuit and could not, therefore, appeal from the trial court's cease and desist order; and (2) as attorney in the Hall Action for some of the putative class members in the underlying lawsuit, he "must be able to initiate contact with his clients throughout the course of the litigation he is retained to pursue."<sup>84</sup> The court of appeals conditionally granted the petition for writ of mandamus and ordered the trial court to narrowly define the cease and desist order to the instant lawsuit.<sup>85</sup>

i. Order Referring Pretrial Matters to the Master

Consistent with the supreme court's holding in 1991 in *Simpson v. Canales*,<sup>86</sup> the Dallas Court of Appeals conditionally granted mandamus relief in the case of *In re Sheets*,<sup>87</sup> ordering the trial court to vacate its order referring all pretrial matters to a master without the consent of all parties to the lawsuit.<sup>88</sup>

j. Refusal of Assigned Judge to Disqualify Himself

In *Mitchell Energy Corp. v. Ashworth*,<sup>89</sup> the supreme court established that mandamus is the appropriate remedy for an assigned judge's refusal to disqualify himself after proper objection is made.<sup>90</sup> In the case of *In re Houston Lighting & Power Co.*,<sup>91</sup> however, the court held that a trial

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78. See *In re Hall*, 972 S.W.2d 793, 794 (Tex. App.—Corpus Christi 1998, orig. proceeding).

79. See *id.*

80. See *id.*

81. See *id.*

82. See *id.*

83. See *id.* at 796.

84. See *id.*

85. See *id.*

86. 806 S.W.2d 802 (Tex. 1991) (orig. proceeding).

87. 971 S.W.2d 745 (Tex. App.—Dallas 1998, orig. proceeding).

88. See *id.* at 748.

89. 943 S.W.2d 436 (Tex. 1997) (orig. proceeding).

90. *Id.* at 437.

91. 976 S.W.2d 671 (Tex. 1998) (orig. proceeding) (per curiam).

court judge did not abuse his discretion in refusing to disqualify himself after the case was transferred (rather than assigned) to his court.<sup>92</sup> Accordingly, the court conditionally granted writ of mandamus against the Corpus Christi Court of Appeals ordering the court to vacate its mandamus judgment finding to the contrary.<sup>93</sup>

k. Order Dismissing Case for Want of Prosecution

In the case of *In re Ray*,<sup>94</sup> the Dallas Court of Appeals granted mandamus relief and ordered a trial court to make findings as to the date upon which the plaintiff first learned of the dismissal of her case.<sup>95</sup> In *Ray*, the trial court signed a written order dismissing the case for want of prosecution on June 25, 1997.<sup>96</sup> On August 22, 1997, the relator filed a sworn motion with the trial court under Rule 306a of the Texas Rules of Civil Procedure stating that neither she nor her attorney received notice of the dismissal order until August 6, 1997.<sup>97</sup> The trial court held a hearing on relator's motion but failed to enter a finding as to when she and her attorney first received notice or actual knowledge of the court's dismissal order.<sup>98</sup> The relator attempted to appeal from the dismissal order, but her appeal was untimely in the absence of a finding as to when she and her attorney received actual knowledge of the dismissal.<sup>99</sup> Having no remedy by appeal, the relator sought mandamus relief from the court of appeals.<sup>100</sup> The Dallas court found that the trial court abused its discretion in failing to make a finding under Rule 306a as to the date the relator and her attorney first learned of the dismissal order.<sup>101</sup> Accordingly, the court conditionally granted mandamus and ordered the trial court to enter "an order finding the specific date on which relator or her attorney received notice" of the dismissal order.<sup>102</sup>

l. Mandamus of Election Officials

In the case of *In re Gibson*,<sup>103</sup> the Waco Court of Appeals reconfirmed that mandamus is the appropriate mechanism to challenge the validity of a candidate's application for public office.<sup>104</sup> In *Gibson*, the democratic candidate for the office of County Commissioner sought mandamus relief against the County Republican Party Chair to remove the republican can-

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92. *Id.* at 674.

93. *See id.*

94. 967 S.W.2d 951 (Tex. App.—Dallas 1998, orig. proceeding).

95. *Id.* at 955.

96. *Id.* at 952.

97. *See id.*

98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.* at 954.

102. *Id.*

103. 960 S.W.2d 418 (Tex. App.—Waco 1998, orig. proceeding).

104. *Id.* at 421.

didate for County Commissioner from the ballot.<sup>105</sup> The Waco Court of Appeals determined that the Republican party candidate had not completed his application to be placed on the Republican Party Primary Election Ballot and accordingly, granted mandamus and ordered the County Republican Party Chair to remove the improper candidate from the ballot.<sup>106</sup>

m. Order Granting Bill of Review

The San Antonio Court of Appeals held that mandamus is the appropriate remedy to correct an erroneously granted bill of review.<sup>107</sup> In *National Unity*, the court reasoned that “[a]n erroneously granted bill of review is effectively a void order granting a new trial and is an abuse of discretion that affords no adequate remedy at law.”<sup>108</sup>

3. *Mandamus Relief Denied*

a. Order Denying Recusal Motion

In the case of *In re Union Pacific Resources Co.*,<sup>109</sup> the supreme court cited Rule 18a(f) of the Texas Rules of Civil Procedure in holding that mandamus relief is not available to challenge the denial of a motion to recuse the trial judge.<sup>110</sup> The court reasoned that mandamus was not appropriate because Rule 18a(f) affords a party an adequate remedy by appeal from a judgment entered after the erroneous denial of a recusal motion.<sup>111</sup> In a concurring opinion, however, Justice Hecht noted that the court’s holding that “appeal affords an adequate remedy for an erroneous denial of a motion to recuse cannot be without exceptions.”<sup>112</sup>

b. Order Consolidating Trials in Mass Tort Litigation

In two cases involving mass tort litigation decided during the Survey period, the Texas Supreme Court refused to find an abuse of discretion by the trial court in setting multiple cases for trial simultaneously.<sup>113</sup> The court held that absent evidence that the proof will differ according to the various plaintiffs, a trial court does not abuse its discretion by setting twenty-three out of thousands of breast implant cases for a single trial.<sup>114</sup>

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105. *Id.*

106. *See id.*

107. *See In re National Unity Ins. Co.*, 963 S.W.2d 876, 877 (Tex. App.—San Antonio 1998, orig. proceeding).

108. *Id.* (citing *Thursby v. Stovall*, 647 S.W.2d 953 (Tex. 1983) (orig. proceeding) (per curiam)).

109. 969 S.W.2d 427 (Tex. 1998) (orig. proceeding).

110. *Id.* at 428-29.

111. *See id.* at 429.

112. *Id.* at 429 (Hecht, J., concurring).

113. *See In re Bristol-Myers Squibb Co.*, 975 S.W.2d 601, 605 (Tex. 1998) (orig. proceeding); *In re Ethyl Corp.*, 975 S.W.2d 606 (Tex. 1998) (orig. proceeding).

114. *See Bristol-Myers*, 975 S.W.2d at 605.

### c. Order Denying Motion to Compel Arbitration

Although mandamus is generally the appropriate remedy for a trial court's failure to compel arbitration,<sup>115</sup> the issue may not be raised prematurely. For example, in the case of *In re Valero Energy Corp.*,<sup>116</sup> the Texas Supreme Court dismissed as premature a mandamus proceeding arising from a trial court order refusing to compel arbitration under the Federal Arbitration Act when the appellate court retained jurisdiction over the interlocutory appeal under that Act.<sup>117</sup> In *Valero*, the parties seeking to compel arbitration filed an interlocutory appeal from the trial court's order denying the motion to compel arbitration under the Texas Arbitration Act, as permitted by Section 171.098 of the Texas Civil Practice and Remedies Code, and filed a petition for writ of mandamus to challenge the refusal under the federal act.<sup>118</sup> The court of appeals retained jurisdiction over the interlocutory appeal, but denied mandamus relief.<sup>119</sup> Although the supreme court dismissed the mandamus proceeding without prejudice, the court noted that the court of appeals should have consolidated the two proceedings and disposed of both simultaneously.<sup>120</sup>

### d. Order Denying Discovery Request

Consistent with supreme court authority denying mandamus relief to remedy scheduling orders,<sup>121</sup> the Texarkana Court of Appeals denied a petition for writ of mandamus challenging a trial court's order denying a party's request to conduct additional discovery through newspaper advertisements.<sup>122</sup> In *Perritt*, the court relied upon the trial court's findings of fact to conclude that the request for additional discovery was an attempt to gain a continuance from trial rather than an attempt at discovery.<sup>123</sup> Accordingly, the court of appeals concluded that the trial court did not abuse its discretion in denying the discovery request.<sup>124</sup>

## 4. Mandamus Sanctions

The new rules of appellate procedure, effective September 1, 1997, provide a mechanism for appellate courts to impose sanctions against attorneys who fail to act in good faith in filing a mandamus petition.<sup>125</sup> In the

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115. See *supra* Part II A(2)(e).

116. 968 S.W.2d 916 (Tex. 1998) (orig. proceeding) (per curiam).

117. *Id.* at 917.

118. *Id.* at 916.

119. See *id.* at 917.

120. See *id.*

121. See *supra* notes 26-28.

122. See *In re Perritt*, 973 S.W.2d 776 (Tex. App.—Texarkana 1998, orig. proceeding).

123. *Id.* at 781.

124. See *id.*

125. See TEX. R. APP. P. 52.11. Rule 52.11 provides that an attorney fails to act in good faith by:

- (a) filing a petition that is clearly groundless;
- (b) bringing the petition solely for delay of an underlying proceeding;

case of *In re Cotton*,<sup>126</sup> the Corpus Christi Court of Appeals imposed sanctions after finding that the relators' attorney violated almost every aspect of Rule 52.11, including filing a groundless petition, grossly misstating or omitting obviously important and material facts and filing a misleading appendix.<sup>127</sup>

In that case, the relators filed a petition for writ of mandamus on December 10, 1997, seeking to unseal certain records.<sup>128</sup> In a lengthy response, the real party-in-interest advised the court that by the time the relators had filed their mandamus petition, the parties had signed an agreement to settle all of the claims in the lawsuit.<sup>129</sup> The settlement was then presented to the trial court the following day and the case was dismissed with prejudice.<sup>130</sup> On December 22, 1997, the parties signed a formal settlement agreement and the relators accepted \$60,000 in full settlement of their claims.<sup>131</sup> The relators never advised the court of appeals of the settlement or the dismissal of the underlying lawsuit.<sup>132</sup>

After a show cause hearing, the Corpus Christi Court of Appeals found that the relators' mandamus petition was groundless because the dismissal of the lawsuit resulted in a "final appealable order" that rendered mandamus unnecessary.<sup>133</sup> Moreover, the settlement agreement rendered moot "the relators' need for the records at issue because there was no longer any controversy."<sup>134</sup> The court further found that by failing to disclose all facts surrounding the sealed records (including the fact that the trial court had already conducted a hearing related to the sealed documents and had indicated that it would permit the relators to have access to the sealed records if their request were more specific) and by failing to disclose the settlement and dismissal of the lawsuit, the relators' counsel "filed a petition in this Court that grossly misstates or omits obviously important material facts."<sup>135</sup> The court found further that the relators' counsel filed a misleading appendix and record by submitting only portions of two Reporter's Records after renumbering the pages to create the appearance of a complete record.<sup>136</sup> Despite the apparent egregious conduct of the relators' counsel, however, the court generously limited its sanction to \$5,000.<sup>137</sup>

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(c) grossly misstating or omitting an obviously important and material fact in the petition or response; or

(d) filing an appendix or record that is clearly misleading because of the omission of obviously important and material evidence or documents.

*Id.*

126. 972 S.W.2d 768 (Tex. App.—Corpus Christi 1998, orig. proceeding) (per curiam).

127. *Id.* at 770.

128. *See id.* at 768.

129. *See id.*

130. *See id.* at 768-69.

131. *See id.* at 769.

132. *See id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *See id.*

137. *See id.* at 770.

In the case of *In re Colonial Pipeline Co.*,<sup>138</sup> the Corpus Christi Court of Appeals also invoked Rule 52.11 and ordered the relators to show cause why the court should not issue sanctions against them for failing to cite controlling contrary authority that rendered their mandamus petition groundless.<sup>139</sup>

## 5. *Mandamus Practice*

### a. Mandamusing Oral Rulings of the Trial Court

In *Perritt*, the Texarkana Court of Appeals held that, unlike the old rules of appellate procedure, the new rules of appellate procedure permit a party to seek mandamus relief from an oral ruling of the trial court if the ruling is adequately shown by the reporter's record.<sup>140</sup>

### b. Alternative Dispute Resolution

Multiple mandamus filings in the court of appeals may result in referral of the case to mediation or some other form of alternative dispute resolution rather than mandamus relief.<sup>141</sup> In *Jensen*, the Waco Court of Appeals stayed all proceedings, including the mandamus proceeding, and ordered mediation of the pending lawsuit pursuant to Section 154.002 of the Texas Civil Practice and Remedies Code.<sup>142</sup>

## B. INTERLOCUTORY APPEALS

### 1. *Stay Pending Interlocutory Appeal*

Under recently enacted Section 51.014(b) of the Texas Civil Practice and Remedies Code, an interlocutory appeal under Section 51.014(a) "shall have the effect of staying the commencement of a trial in the trial court pending resolution of the appeal."<sup>143</sup> Despite the broad language of this statute requiring a stay of "commencement of a trial" while the interlocutory appeal is pending, at least one court of appeals has refused to interpret the statute as requiring the issuance of an order staying *all* proceedings in the court below.<sup>144</sup>

Specifically, in *Gragg*, the defendant appealed the trial court's interlocutory order denying the defendant's plea to the jurisdiction based on the defense of sovereign immunity, which the defendant had asserted against some of the plaintiffs' claims.<sup>145</sup> On appeal, the defendant sought an order from the Waco Court of Appeals staying the trial in the lower court

138. 960 S.W.2d 272 (Tex. App.—Corpus Christi 1997, orig. proceeding).

139. *Id.* at 273-74.

140. See *In re Perritt*, 973 S.W.2d 776, 779 (Tex. App.—Texarkana 1998, orig. proceeding). Compare TEX. R. APP. P. 121(a)(2)(C) (repealed) with TEX. R. APP. P. 52.3(j)(1)(A).

141. See, e.g., *In re Jensen*, 966 S.W.2d 850 (Tex. App.—Waco 1998, orig. proceeding) (per curiam).

142. See *id.* at 851.

143. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (Vernon Supp. 1998).

144. See *Tarrant Regional Water Dist. v. Gragg*, 962 S.W.2d 717 (Tex. App.—Waco 1998, order) (per curiam).

145. See *id.* at 718.

pending resolution of the interlocutory appeal.<sup>146</sup> Noting that the plaintiff had claims, such as inverse condemnation, pending in the court below that were not subject to the defense of sovereign immunity, the court of appeals stated that it was reluctant to issue an order staying *all* proceedings in the trial court.<sup>147</sup> Accordingly, the Waco court interpreted section 51.014(b) as requiring only a stay of “any part of the proceeding that may be affected by our decision in the interlocutory appeal,” and stayed trial only on any claim against which the defendant had asserted the defense of sovereign immunity prior to perfecting the interlocutory appeal.<sup>148</sup> The court of appeals refused to stay trial on *all* claims in the trial court, expressly stating that the trial court was free to proceed with a trial of the claims of inverse condemnation, provided that all claims stayed by the court of appeals’ order had been non-suited or severed.<sup>149</sup>

## 2. Appeals From Particular Orders

### a. Appeal From Order on Motion to Transfer Venue and/or Order Granting/Denying Joinder or Intervention When Venue is a Factor

An order on a motion to transfer venue is by rule and statute not generally an appealable order.<sup>150</sup> As held by the Texarkana Court of Appeals in *Shubert v. J.C. Penney Co.*,<sup>151</sup> section 15.003 of the Texas Civil Practice and Remedies Code does not change this fact.<sup>152</sup>

Section 15.003 permits an interlocutory appeal from an order granting or denying joinder or intervention by plaintiffs in which venue is the factor by which the trial court decides whether to permit joinder or intervention.<sup>153</sup> Despite the fact that a court of appeals’ review of a trial court’s ruling on the propriety of an intervention or joinder will “necessarily require the appellate court to determine the underlying venue question,” an interlocutory appeal is only permitted from “an order granting or denying joinder/intervention and *not* from an order transferring venue.”<sup>154</sup> This conclusion is supported by the fact that a construction of section 15.003 as permitting an interlocutory appeal of a trial court’s venue determination would provide an opposite result from the clear language of Rule 87(6) of the Texas Rules of Civil Procedure and section 15.064(a) of the Texas Civil Practice and Remedies Code, which both expressly forbid an inter-

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146. *See id.*

147. *See id.* at 719.

148. *Id.*

149. *See id.*

150. *See* TEX. R. CIV. P. 87(6) (“There shall be no interlocutory appeals from [venue] determination.”); TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a) (Vernon 1986) (“No interlocutory appeal shall lie from the [venue] determination.”).

151. 956 S.W.2d 634 (Tex. App.—Texarkana 1997, pet. denied).

152. *See id.* at 635-36.

153. *See id.* at 635.

154. *See id.* at 636.



locutory appeal from a venue determination.<sup>155</sup>

A defendant, however, may not defeat a plaintiff's right to interlocutory appeal by the label given to his motion. Accordingly, even if a motion is labeled "motion to transfer venue," an interlocutory appeal will lie if the trial court's venue decision necessarily rests on whether a person, who was unable to independently establish venue, properly established joinder under section 15.003(a) of the Texas Civil Practice and Remedies Code.<sup>156</sup>

#### b. Appeal From Order Allowing or Denying Intervention

Although section 15.003(c) of the Civil Practice and Remedies Code clearly allows an interlocutory appeal to contest the trial court's decision to allow a party to intervene or the trial court's decision precluding a party from intervening, the enactment clause of chapter 15 provides that "this Act applies only to a suit commenced on or after September 1, 1995."<sup>157</sup> Faced with the assertion that the term "suit" used in the enactment clause refers to the *plea in intervention* rather than the pending lawsuit, the Fourteenth Court of Appeals concluded in *Jani-King of Memphis, Inc. v. Yates*<sup>158</sup> that the "suit" to which the enactment clause refers is the original lawsuit filed against the defendant, not the plea in intervention.<sup>159</sup> The *Jani-King* court thus concluded that "section 15.003(c) allows an interlocutory appeal to challenge the decision of the trial court allowing or denying intervention only when the *underlying lawsuit* was filed after September 1, 1995."<sup>160</sup>

#### c. Appeal From Order Denying Special Appearance

In 1997, the Texas Legislature amended section 51.014 of the Civil Practice and Remedies Code to allow an interlocutory appeal of a denial of a special appearance.<sup>161</sup> The new law was to be applied retroactively

155. See TEX. R. CIV. P. 87(6); TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a) (Vernon 1986). See also *Bristol-Myers Squibb Co. v. Barner*, 964 S.W.2d 299, 301 (Tex. App.—Corpus Christi 1998, no pet.) (refusing to address appellants' point of error contesting a decision regarding transfer of venue).

156. See *Abel v. Surgitek*, 975 S.W.2d 30, 36, (Tex. App.—San Antonio 1998, pet. granted). See also *Bristol-Myers Squibb Co. v. Goldston*, 957 S.W.2d 671, 673 (Tex. App.—Fort Worth 1997, pet. denied) (court of appeals has jurisdiction to consider ruling on motion to transfer venue challenging legality of joinder); *Barner*, 964 S.W.2d at 301 (court of appeals has jurisdiction to consider joinder issue raised in motion to transfer venue and for severance which questioned propriety of joinder); *Surgitek, Inc. v. Adams*, 955 S.W.2d 884, 887-88 (Tex. App.—Corpus Christi 1997, pet. requested) (interlocutory appeal is available to review trial court's implicit findings that plaintiffs failed to independently establish venue under section 15.003(a)).

157. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c) historical note (Vernon Supp. 1997).

158. 965 S.W.2d 665 (Tex. App.—Houston [14th Dist.] 1998, no pet. h.).

159. See *id.* at 668.

160. See *id.* (emphasis added).

161. Act of May 27, 1997, 75th Leg., ch. 1296, § 1, 1997 Tex. Sess. Law Serv. 4936, 4937 (Vernon) (codified as TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 1998)).

to causes commenced prior to its June 20, 1997 effective date but which had not gone to trial before that date.<sup>162</sup> Relying on “a plain reading of the statute,” the Waco Court of Appeals in *Allied Erectors Corp. v. Barbara’s Bakery*<sup>163</sup> held that section 51.014 allows an appeal of an order denying special appearance signed over three years before the law’s effective date.<sup>164</sup> Accordingly, the court in *Allied Erectors Corp.* granted the appellant’s motion to extend the time to perfect the appeal from the three-year-old order denying special appearance, holding that the time periods “[t]hereafter” would be governed by the Rules of Appellate Procedure.<sup>165</sup>

Disagreeing with the Texarkana court’s conclusion in *Allied Erectors Corp.*, the Amarillo Court of Appeals held in *Iron Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc.*<sup>166</sup> that the applicability of section 51.014 to pending cases in which there is not an ongoing trial, retrial, or appeal, does not impact the time period within which an appeal governed by that statute must be perfected under the Texas Rules of Appellate Procedure.<sup>167</sup> The Amarillo court concluded that, regardless of the retroactive applicability of the new statute, appeals from interlocutory orders granting or denying special appearances must be perfected “within 20 days after the judgment or order is signed,” as required by the Texas Rules of Appellate Procedure.<sup>168</sup>

d. Appeal from Denial of Motion for Summary Judgment Based on an Assertion of Immunity

Section 51.014(a)(5) of the Civil Practice and Remedies Code permits an interlocutory appeal from the denial of “a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state.”<sup>169</sup> In the past, this statute has been interpreted to permit appellate interlocutory review of the denial of a summary judgment motion based only on

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162. *Id.* at ch. 1296, § 2.

163. 954 S.W.2d 197 (Tex. App.—Waco 1997, order).

164. *See id.* at 197-98.

165. *Id.* at 198.

166. 964 S.W.2d 762 (Tex. App.—Amarillo 1998, no pet. h.).

167. *See id.* at 763.

168. *Id.* As discussed by the *Iron Mountain* court, under Rule 28.1 of the Texas Rules of Appellate Procedure, the interlocutory appeal of matters contemplated by section 51.014(a) of the Civil Practice and Remedies Code is considered an accelerated appeal. *See* 964 S.W.2d at 763; TEX. R. APP. P. 28.1; TEX. CIV. PRAC. & REM. CODE 51.014(a) (Vernon Supp. 1998). Under Rule 26.1(b) of the Texas Rules of Appellate Procedure, a notice of appeal in an accelerated appeal must be filed “within 20 days after the judgment or order is signed.” *Iron Mountain*, 964 S.W.2d at 763; TEX. R. APP. P. 26.1(b). Accordingly, an appeal from an order granting or denying a special appearance must be filed within 20 days of the date the order is signed. *Iron Mountain*, 964 S.W.2d at 763. Presumably, however, a party appealing such an order could obtain a 15-day extension for filing its notice of appeal under Rule 26.3 of the Texas Rules of Appellate Procedure, as the Notes and Comments to Rule 26.3 state “An extension of time is available for all appeals.” TEX. R. APP. P. 26.3 cmt.

169. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5) (Vernon Supp. 1998).

assertions of the state common-law defense of *official immunity*.<sup>170</sup> However, in *Bexar County v. Giroux-Daniel*,<sup>171</sup> the San Antonio Court of Appeals held that section 51.014(5) also allows an interlocutory appeal from the denial of a summary judgment motion based on a *qualified immunity* defense to a federal section 1983 action.<sup>172</sup> In reaching this conclusion, the *Bexar County* court relied on the Texas Supreme Court's decision in *Newman v. Obersteller*,<sup>173</sup> in which the supreme court held that section 51.014(5) [now section 51.014(a)(5)] allows an interlocutory appeal from the denial of a summary judgment motion based on section 101.106 of the Texas Tort Claims Act.<sup>174</sup> Under *Newman's* broadened construction of the statute, the San Antonio Court of Appeals held, interlocutory appeals under section 51.014(5) are not limited to assertions of state common-law official immunity.<sup>175</sup>

After determining that the denial of a motion for summary judgment based on an assertion of qualified immunity fit within section 51.014(5), the *Bexar County* court evaluated its jurisdiction to consider fact-based aspects of a qualified immunity defense.<sup>176</sup> The appellee argued that, as in federal court, fact-related, evidence sufficiency aspects of a qualified immunity defense may not properly be considered on interlocutory appeal.<sup>177</sup> Rejecting this argument, the *Bexar County* court concluded that the considerations of federal appellate procedure upon which the federal limitation is based are not applicable in the state court context, given the express legislative enactment providing for an interlocutory appeal from the denial of summary judgment based on immunity, and the absence of a comparable statute applicable in federal court.<sup>178</sup>

#### e. Appeal from Class Certification Order

The jurisdiction of a court of appeals over an appeal from an interlocutory order "exists only insofar as it is specifically authorized by stat-

170. See *Texas Dep't of Pub. Safety v. Tanner*, 928 S.W.2d 731, 734 (Tex. App.—San Antonio 1996, no writ) (holding that in an appeal under section 51.014(5) [now section 51.014(a)(5)], courts of appeals may only consider arguments based on the state common-law defense of official immunity). The language of section 51.014(5) and its successor—section 51.014(a)(5)—is identical. Compare TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (Vernon 1997) with TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5) (Vernon Supp. 1998).

171. 956 S.W.2d 692 (Tex. App.—San Antonio 1997, no pet.).

172. See *id.* at 694.

173. 960 S.W.2d 621 (Tex. 1997).

174. *Id.* at 622.

175. See *Bexar County*, 956 S.W.2d at 694. The San Antonio court further noted that other courts of appeals have held that section 51.014(5) allows an interlocutory appeal from the denial of a summary judgment motion based on qualified immunity. See *id.* (citing *City of Harlingen v. Vega*, 951 S.W.2d 25, 26-27 (Tex. App.—Corpus Christi 1997, no writ); *Hudson v. Vasquez*, 941 S.W.2d 334, 337 (Tex. App.—Corpus Christi 1997, no writ); *Spacek v. Charles*, 928 S.W.2d 88, 91 (Tex. App.—Houston [14th Dist.] 1996, writ dismissed w.o.j.).

176. See 956 S.W.2d at 695-96.

177. See *id.* at 696 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817 (1985)).

178. See *id.*

ute.”<sup>179</sup> According to the Corpus Christi Court of Appeals, in the class certification context, this means the court of appeals has jurisdiction over *all matters* which pertain to the certification decided by an interlocutory order.<sup>180</sup> In the *Rio Grande* case, this included a determination of whether the judge that originally entered the certification order was subsequently recused rather than disqualified.<sup>181</sup> In that case, the court of appeals found it necessary to determine whether the order before it was entered by a court without jurisdiction due to a disqualifying interest.<sup>182</sup> The court carefully pointed out, however, that, in the interlocutory appeal, it did not have jurisdiction to review, and therefore was not reviewing, the propriety of the lower court’s ruling on the motion to recuse.<sup>183</sup>

f. Appeal from Interlocutory Order Failing to Dispose of all Issues

Under Rule 27.2 of the Texas Rules of Appellate Procedure, a court of appeals may “allow an appealed order that is not final to be modified so as to be made final and may allow the modified order and all proceedings relating to it to be included in a supplemental record.”<sup>184</sup> Instead of dismissing for want of jurisdiction an unappealable interlocutory summary judgment order that left unresolved the plaintiffs’ claim for attorneys’ fees, the First Court of Appeals invoked its authority under this rule, abated the premature appeal, and ordered the parties to coordinate a hearing on fees in the trial court within forty-five days of the abatement order.<sup>185</sup> As permitted by Rule 27.2, the court of appeals concluded that the appeal would be reinstated on its active docket upon the filing of a supplemental clerk’s record containing a signed, final judgment from the trial court disposing of the attorney’s fees issue.<sup>186</sup>

g. Supreme Court Jurisdiction over Interlocutory Appeals

As confirmed by the supreme court in *Gross v. Innes*,<sup>187</sup> and *Coastal Corp. v. Garza*,<sup>188</sup> the Texas Supreme Court has jurisdiction over appealable interlocutory orders only when “the justices of the courts of appeals disagree on a question of law material to the decision or [when] the courts of appeals hold differently from a prior decision of another court of appeals or of the supreme court.”<sup>189</sup> In other words, the supreme

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179. *Rio Grande Valley Gas Co. v. City of Pharr*, 962 S.W.2d 631, 637 (Tex. App.—Corpus Christi 1997, pet. dismissed w.o.).

180. *See id.* *See also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(3) (Vernon Supp. 1998).

181. *See* 962 S.W.2d at 637-38.

182. *See id.* at 638.

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

184. TEX. R. APP. P. 27.2.

185. *See* *State Farm Mutual Auto. Ins. Co. v. Leeds*, 981 S.W.2d 693, 693-94 (Tex. App.—Houston [1st Dist.] 1998, no pet. h.).

186. *See id.* at 694.

187. No. 96-1095, 1998 WL 387516 (Tex. July 14, 1998).

188. 979 S.W.2d 318 (Tex. 1998).

189. *Gross* 1998 WL 387516, at \*1; *see also* *Coastal Corp.*, 979 S.W.2d at 319 (citing TEX. GOV’T CODE § 22.225(c)).

court can exercise jurisdiction over an appeal from an appealable interlocutory order "only when there is a dissent or a conflict."<sup>190</sup>

For the supreme court to have "conflicts" jurisdiction, "it must appear that the rulings in the two cases are so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other."<sup>191</sup> This standard, however, does *not* require factual identity for two cases to conflict.<sup>192</sup> Indeed, "[a] conflict could arise on very different underlying facts if those facts are not important to the legal principle being announced."<sup>193</sup>

### III. PRESERVATION OF ERROR

#### A. CHARGE ERROR

##### 1. Failure to Obtain Endorsement

Under Rule 276 of the Texas Rules of Civil Procedure, when "an instruction, question, or definition is requested . . . and the judge refuses same, the judge shall endorse thereon 'Refused,' and sign the same officially."<sup>194</sup> In *Dallas Market Center Development Co. v. Liedeker*,<sup>195</sup> the Texas Supreme Court stated conclusively that a Rule 276 endorsement of a refused jury charge request "is not the exclusive means of preserving error for refusing a charge request."<sup>196</sup> Instead, the court held, Rule 276 allows for preservation of error by other means.<sup>197</sup> In *Liedeker*, the "other means" consisted of the trial court's admission on the record that he had "considered the requested [jury] question, had refused it, and had meant to endorse it but simply failed to do so, for which he was sorry."<sup>198</sup>

Disapproving of the court of appeals' opinions suggesting that endorsement is the only method of preserving error, the supreme court noted that making endorsement the exclusive means of preserving error for refusing a charge request when the court's refusal is otherwise clear from the record "would promote form over substance and be ill advised."<sup>199</sup> As demonstrated by the facts of *Liedeker*, in which the trial court promised to endorse the refused charge request and then failed to do so, the court explained that "[a] lawyer has no practical way of ensuring that a trial court will actually endorse charge requests as promised . . . ."<sup>200</sup>

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190. *Gross*, 1998 WL 387516, at \*1.

191. *Id.*

192. *See id.*

193. *Id.*

194. TEX. R. CIV. P. 276.

195. 958 S.W.2d 382 (Tex. 1997).

196. *Id.* at 386.

197. *See id.*

198. *Id.*

199. *Id.*

200. *Id.*

## 2. Failure to Make Objection

Even “glaring omissions” in the charge must be objected to or they are waived on appeal. For example, although the damage question in the charge to the jury in *Housing Authority v. Guerra*<sup>201</sup> contained no guidance on what elements—loss of earning capacity, loss of income, physical pain, impairment, mental anguish—the jury should have considered in arriving at an amount payable as actual damages, neither party objected to the question as submitted, and no complaint as to the form of the question was raised on appeal.<sup>202</sup> Accordingly, any complaint as to the measure of damages used by the jury was waived.<sup>203</sup>

Similarly, as held by the Texas Supreme Court in *Kolster v. City of El Paso*,<sup>204</sup> a trial court’s erroneous determination of the standard of care is waived on appeal if the appellant fails to object to the jury charge on the ground that it submits the wrong standard.<sup>205</sup> In *Kolster*, the trial court erroneously concluded that the standard for determining the culpability of a municipal employee’s acts in operating an emergency vehicle in an emergency situation is negligence.<sup>206</sup> In fact, as the supreme court held in *City of Amarillo v. Martin*,<sup>207</sup> to recover damages resulting from the emergency operation of an emergency vehicle, “a plaintiff must show that the operator has committed an act that the operator knew or should have known posed a high degree of risk of serious injury—in other words, that the operator has acted recklessly.”<sup>208</sup> Negligence is not the standard for determining liability in this context. Unlike the City of Amarillo in *Martin*, however, the City of El Paso in *Kolster* did not object to the jury charge on the grounds that negligence was not the correct standard.<sup>209</sup> Accordingly, the trial court’s error in that regard was waived, and the supreme court was bound to review the culpability of the employee under the standard submitted to the jury—simple negligence.<sup>210</sup>

As demonstrated by the defendant in *Waite Hill Services, Inc. v. World Class Metal Works, Inc.*,<sup>211</sup> to preserve error on the issue of a double

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201. 963 S.W.2d 946 (Tex. App.—El Paso 1998, pet. denied).

202. *See id.* at 951.

203. *See id.*

204. 972 S.W.2d 58 (Tex. 1998).

205. *See id.* at 59.

206. *See id.*

207. 971 S.W.2d 426 (Tex. 1998).

208. *Kolster*, 972 S.W.2d at 59. *See Martin*, 971 S.W.2d at 430.

209. *See Kolster*, 972 S.W.2d at 59.

210. *See id.* Justice Hecht, joined by Justice Owen, dissented, disagreeing with the Majority’s position that the heightened liability standard set forth in *Martin* had been waived by the City of El Paso. *See Kolster*, 972 S.W.2d at 60-61 (Hecht, J., dissenting). Justice Hecht pointed to the numerous instances in which the City of El Paso had asserted in the courts below that the standard for measuring the employee’s culpability was whether the employee operated the ambulance “without due regard for others’ safety.” *Id.* Justice Hecht concluded that, notwithstanding the language of the charge and the jury’s finding of negligence, the City of El Paso should not have been held liable to the plaintiff unless the employee acted either with reckless disregard or without due regard for others’ safety. *See id.*

211. 959 S.W.2d 182 (Tex. 1998) (per curiam).

recovery of actual damages, a defendant need only request, before judgment, that the trial court require the plaintiff to elect a remedy.<sup>212</sup> The defendant is not required to object to the submission of more than one acceptable measure of damages to preserve error.<sup>213</sup> Indeed, such an objection would be improper. Although a plaintiff may not obtain more than one recovery for the same injury, he is generally entitled to sue and to seek damages on alternative theories.<sup>214</sup>

Rule 274 of the Texas Rules of Civil Procedure provides that a party's objection to the jury charge "must point out distinctly the objectionable matter and the grounds of the objection" and that any complaint to the charge "is waived unless specifically included in the objections."<sup>215</sup> As the Eastland Court of Appeals reaffirmed during the survey period, under Rule 274, the complaint must be urged prior to the submission of the court's charge to the jury.<sup>216</sup>

#### B. LEGAL AND FACTUAL SUFFICIENCY POINTS

A party that moves for judgment on the jury's verdict is prohibited from taking a position inconsistent with the verdict on appeal insofar as factual sufficiency is concerned.<sup>217</sup> Specifically, a party who asks the trial court to render judgment in accordance with the jury verdict for the amount of damages the jury found, waives error on his challenge to the factual sufficiency of the verdict.<sup>218</sup> As instructed by the supreme court in *First National Bank of Beeville v. Fojtik*,<sup>219</sup> a party moving to accept a judgment must reserve the right to complain of the judgment on appeal by accepting only the form of the judgment or only that part of the judgment he finds acceptable.<sup>220</sup>

In *Ramirez v. State*,<sup>221</sup> the El Paso Court of Appeals reaffirmed the well-established rules regarding preservation of legal and factual suffi-

212. *See id.* at 184.

213. *See id.*

214. *See id.*

215. TEX. R. CIV. P. 274.

216. *See Wal-Mart Stores, Inc. v. McKenzie*, 979 S.W.2d 364, 367 (Tex. App.—Eastland 1998, orig. proceeding).

217. *See Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 321-22 (Tex. 1984); *see also Byrd v. Central Freight Lines, Inc.*, 976 S.W.2d 257, 259 (Tex. App.—Amarillo 1998, no pet. h.).

218. *See Byrd*, 976 S.W.2d at 259. Although the Amarillo court in *Byrd* held that an unqualified motion for judgment waives challenges to the factual sufficiency of the verdict, at least one other court of appeals (the First Court of Appeals) has held that such a motion waives *all* points of error, not just sufficiency of the evidence complaints. *See Casu v. Marathon Ref. Co.*, 896 S.W.2d 388, 391 (Tex. App. — Houston [1st Dist.] 1995, writ denied).

219. 775 S.W.2d 632 (Tex. 1989) (per curiam).

220. *See Byrd*, 976 S.W.2d at 259; *see also Fojtik*, 775 S.W.2d at 633. A party who merely indicates that he does not oppose the *form* of the other party's proposed judgment does not waive his factual sufficiency points. *See Morse v. Delgado*, 975 S.W.2d 378, 381 (Tex. App.—Waco 1998, no pet. h.). Waiver will result, however, if the party approves the opposing party's proposed judgment "as to form *and substance*." *See id.* (emphasis added).

221. 973 S.W.2d 388 (Tex. App.—El Paso 1998, no pet. h.).

ciency complaints. To complain of factual insufficiency of the evidence to support a jury finding and to complain that a jury finding is against the great weight and preponderance of the evidence, a point in a motion for new trial is a prerequisite.<sup>222</sup> Further, while the rules of civil procedure do not expressly require a motion for new trial to complain of legal sufficiency in a jury trial, if the error has not been otherwise preserved, it must be so raised or it is waived on appeal.<sup>223</sup> As a prerequisite to a “no evidence” point on appeal, “an appellant must have presented the complaint to the trial court by motion for instructed verdict, objection to the submission of the jury question, motion for judgment non obstante veredicto, motion to disregard the contested jury finding, or a motion for new trial.”<sup>224</sup>

### C. JUROR DISQUALIFICATION

When a trial court refuses to disqualify a juror for bias or prejudice, the complaining party must show that the error was harmful. To do this, the party, before exercising its peremptory challenges, must advise the trial court that the court’s denial of the challenges for cause would force the party to exhaust its peremptory challenges and, that after exercising its peremptory challenges, specific objectionable jurors would still remain on the panel.<sup>225</sup> In other words, harm occurs only if the party uses all of his peremptory challenges and, as a result, is prevented from striking other objectionable jurors from the list because he has no remaining peremptory challenges.<sup>226</sup> Failure to notify the trial court of these facts “constitutes a waiver of the right to complain of the trial court’s refusal to discharge a juror challenged for cause.”<sup>227</sup>

### D. SANCTIONS ORDERS

A trial court levying sanctions under Rule 13 of the Texas Rules of Civil Procedure is required to specify in its sanctions order the acts or basis for the award.<sup>228</sup> The language of Rule 13 is mandatory and a trial court’s failure to comply constitutes an abuse of discretion.<sup>229</sup> Nonetheless, a trial court’s failure to specify the acts or basis for the sanction cannot be raised on appeal unless the complaining party objects to the form

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222. *See id.* at 390; TEX. R. CIV. P. 324(b)(2) & (3).

223. *See id.*

224. *Id.* (citing *Salinas v. Fort Worth Cab & Baggage Co.*, 725 S.W.2d 701, 704 (Tex. 1987)).

225. *See Shepherd v. Ledford*, 962 S.W.2d 28, 34 (Tex. 1998) (quoting *Goode v. Shoukfeh*, 943 S.W.2d 441, 452 (Tex. 1997)).

226. *See Hallett v. Houston N.W. Med. Ctr.*, 689 S.W.2d 888, 890 (Tex. 1985).

227. *Lucas v. Titus County Hosp. Dist./Titus Mem’l Hosp.*, 964 S.W.2d 144, 158 (Tex. App.—Texarkana 1998, pet. denied). In *Lucas*, the record did not reflect that the plaintiffs had used all of their peremptory challenges or that they notified the trial court that they used all their peremptory challenges. *See id.* As a result, the plaintiffs failed to properly object to the trial court’s failure to strike the juror for cause, and waived any error. *See id.*

228. *See TEX. R. CIV. P. 13.*

229. *See Tarrant County v. Chancey*, 942 S.W.2d 151, 155 (Tex. App.—Fort Worth 1997, no writ).



of the sanctions order in the trial court.<sup>230</sup>

#### E. DENIAL OF CONTINUANCE

To complain on appeal of a trial court's refusal to grant a continuance because a party is unable to be present at trial, the absent party must demonstrate to the trial court that (1) he had a reasonable excuse for his absence and (2) he was prejudiced by the trial proceeding without him.<sup>231</sup> The absent party's testimony must be material.<sup>232</sup> A motion for continuance stating merely that the party "would give vital testimony at the trial" without explaining the substance of the testimony is *not* sufficient to demonstrate that the testimony is material or that he would be prejudiced by the trial proceeding without him.<sup>233</sup>

Similarly, to complain on appeal of the lack of adequate time to prepare for trial, a party must present a written motion for continuance, supported by affidavits, and object on the record to the lack of an opportunity to present evidence resulting from inadequate time to prepare for trial.<sup>234</sup>

#### F. COMPLAINTS RAISED BY CROSS POINT

By cross point on appeal, a party who has secured a judgment n.o.v. at trial is permitted to raise issues or points that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict.<sup>235</sup> The fact, however, that a party is permitted to raise such issues by cross point on appeal does not eliminate the basic requirement that a trial court be given the opportunity to cure any error before appeal is sought.<sup>236</sup> Consequently, a party who accepts a judgment n.o.v. without objecting to the jury's findings, waives his complaint that a particular jury finding is not supported by legally or factually sufficient evidence.<sup>237</sup>

#### G. OBLIGATION TO LODGE OBJECTIONS BASED ON CASE LAW NOT YET ISSUED

The fact that a particular proposition is not yet law at the time a trial court commits error does not relieve a party of its obligation to lodge

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230. See *Alexander v. Alexander*, 956 S.W.2d 712, 714 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

231. See *Richards v. Schion*, 969 S.W.2d 131, 132 (Tex. App.—Houston [1st Dist.] 1998, no pet. h.).

232. See *id.*; see also TEX. R. CIV. P. 252 ("If the ground [for a continuance] be for the absence of a witness, [the movant] shall state what he expects to prove by him.").

233. *Richards*, 969 S.W.2d at 132-33.

234. See *In re J. (B.B.) M.*, 955 S.W.2d 405, 407-10 (Tex. App.—San Antonio 1997, no pet.).

235. See TEX. R. APP. P. 38.2(b)(1). In fact, the language of Rule 38.2(b) is mandatory—a party must raise such issues or points or those complaints are waived in the event the judgment n.o.v. is reversed on appeal. *Id.*

236. See *Rocor Int'l, Inc. v. National Union First Ins. Co.*, 966 S.W.2d 559, 571 (Tex. App.—San Antonio 1998, no pet.); see also TEX. R. CIV. P. 324(c); TEX. R. APP. P. 33.1(a).

237. See *Rocor*, 966 S.W.2d at 571.

timely objections to preserve error. For example, the fact that *Elbaor v. Smith*<sup>238</sup> (which prohibits Mary Carter agreements) had not yet been decided until after the verdict was returned (but before judgment was rendered) in *St. Paul Surplus Lines Insurance Co., Inc. v. Dal-Worth Tank Co., Inc.*<sup>239</sup> did not excuse the defendant's failure to object prior to judgment to a Mary Carter agreement entered into by other parties in the case.<sup>240</sup> Even though *Elbaor* was not yet law, the supreme court held, the defendant was obliged to lodge a timely objection to preserve error.<sup>241</sup>

Further, in *Rocor International, Inc. v. National Union First Insurance Co.*,<sup>242</sup> the San Antonio Court of Appeals held that the defendant had waived its factual sufficiency complaint with respect to the jury's findings on attorneys' fees because it had accepted the trial court's judgment n.o.v. without objecting to the jury's finding on fees even though, at the time the trial court entered judgment, the legal basis for the defendant's complaint as to fees did not exist.<sup>243</sup> Although preservation would have been impossible because the case supporting the defendant's cross point was issued after the trial court entered judgment, the *Rocor* court of appeals refused to consider the cross point on fees, concluding that "the finality of judicial decisions would be seriously undermined if litigants were allowed to raise unpreserved error on appeal on the basis of new case law."<sup>244</sup>

#### IV. JUDGMENTS

Together, the supreme court's decisions in *Mafrige v. Ross*<sup>245</sup> and *English v. Union State Bank*<sup>246</sup> create an exception to the well-established rule that, to be a "final" judgment subject to appeal, a judgment must dispose of all parties and all issues.<sup>247</sup> Under this exception, finality is afforded to "judgments which, though not actually disposing of all parties and issues, appear to do just that."<sup>248</sup>

As the appellant in *Pena* learned the hard way, there can only be one final judgment in a lawsuit and, if that "final judgment" is a summary judgment that contains Mother Hubbard language purporting to dispose of all parties and issues, the appellant must either ask the trial court, during its plenary power, to correct the summary judgment to omit the Mother Hubbard language or perfect a timely appeal of that judgment.<sup>249</sup>

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238. 845 S.W.2d 240 (Tex. 1992).

239. 974 S.W.2d 51 (Tex. 1998) (per curiam).

240. *See id.* at 53.

241. *See id.*

242. 966 S.W.2d 559, 571 (Tex. App.—San Antonio 1998, no pet.)

243. *See id.*

244. *Id.*

245. 866 S.W.2d 590 (Tex. 1993).

246. 945 S.W.2d 810 (Tex. 1997).

247. *See Pena v. Valley Sandia, Ltd.*, 964 S.W.2d 297, 299 (Tex. App.—Corpus Christi 1998, no pet.).

248. *Id.* (emphasis in original).

249. *See id.*

If he does neither, the court of appeals will be without jurisdiction to decide the merits of the appeal.<sup>250</sup>

Similarly, if it disposes of all issues and parties, a trial court's order granting a motion for summary judgment pursuant to a master's recommendation is final and appealable, even if the trial court has been requested to conduct a new hearing on the motion and fails to do so before signing the order.<sup>251</sup> When a matter is decided by a special master, any party who invokes his right by filing a request, is *entitled* to a hearing before the judge of the referring court on the master's ruling. Nonetheless, the district court's failure to hold such a hearing prior to signing a judgment does not render the judgment void and, if it disposes of all issues and parties, the failure to timely appeal from such a judgment creates a jurisdictional defect in the appeal.<sup>252</sup>

## V. EXTENDING THE APPELLATE TIMETABLE

### A. MOTIONS FOR NEW TRIAL

In *Nuchia v. Woodruff*,<sup>253</sup> the Fourteenth Court of Appeals held (on rehearing) that, under Rule 306c of the Texas Rules of Civil Procedure and Rule 58(a) of the Texas Rules of Appellate Procedure, a prematurely filed motion for new trial that "assails" and "can properly be applied" to a subsequently signed judgment operates to extend the appellate timetable.<sup>254</sup> Acknowledging that the supreme court's opinion in *Fredonia State Bank v. General American Life Insurance Co.*,<sup>255</sup> in which the court held that a prematurely filed motion for new trial operated as a preservation document with respect to a subsequently signed judgment, did not resolve the issue of whether such a motion also operates to extend the appellate timetable, the *Nuchia* court found no reason to draw a distinction between preservation and extension of the appellate timetable, and concluded that a prematurely filed motion for new trial that assails a subsequently signed judgment operates to extend the appellate timetable.<sup>256</sup> In support of this conclusion, the Fourteenth court considered the policy that "the Rules of Appellate Procedure . . . should not be read to defeat the right to appeal except when such a construction is absolutely

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250. *See id.* (quoting *English*, 945 S.W.2d at 811).

251. *See Wilson v. Kutler*, 971 S.W.2d 557, 559 (Tex. App.—Dallas 1998, no pet.).

252. *See id.*

253. 956 S.W.2d 612 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (on rehearing).

254. *Id.* at 613-14. Rule 306c provides that "no motion for new trial . . . shall be held ineffective because prematurely filed; but every such motion shall be deemed to have been filed on the date of but subsequent to the time of the signing of the judgment the motion assails. . . ." TEX. R. CIV. P. 306c. Under Rule 58(a), "proceedings relating to an appeal need not be considered ineffective because of prematurity if a subsequent appealable order has been signed to which the premature proceeding may properly be applied." TEX. R. APP. P. 58(a). The "proceedings relating to an appeal" referred to in this rule include motions for new trial. *Nuchia*, 956 S.W.2d at 614 (citing *Harris County Hosp. Dist. v. Estrada*, 831 S.W.2d 876, 878 (Tex. App.—Houston [1st Dist.] 1992, no writ)).

255. 881 S.W.2d 279 (Tex. 1994).

256. *See Nuchia*, 956 S.W.2d at 614.

necessary. . . ."<sup>257</sup>

#### B. MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO

A motion for judgment non obstante veredicto can properly be filed before or after judgment and still preserve error.<sup>258</sup> Historically, however, it did not operate to extend the appellate timetable, regardless of when it was filed.<sup>259</sup> To obtain an extended appellate timetable, a motion for new trial had to be timely filed.<sup>260</sup>

In 1981, however, the Texas Supreme Court amended Rule 329b to provide for an extended appellate timetable if either a motion for new trial or a "motion to vacate, modify, correct, or reform" a judgment was filed within thirty days of judgment.<sup>261</sup> Still, though, the amended rule made no provision for an extended appellate timetable based on a motion for judgment n.o.v. or a motion to disregard jury findings filed within thirty days of judgment.<sup>262</sup> These types of motions, it appeared, continued to be governed solely by Rule 301 of the Texas Rules of Civil Procedure.<sup>263</sup>

Then, in 1995, the Texas Supreme Court held in *Gomez v. Texas Department of Criminal Justice*<sup>264</sup> that a motion filed within thirty days of judgment labeled "bill of review" that assailed the trial court's judgment extended the appellate timetable on the basis of the timely filed "bill of review."<sup>265</sup> In the wake of *Gomez*, "the filing of any postjudgment motion or other instrument that (1) is filed within the time for filing a motion for a new trial and (2) assails the trial court's judgment extends the appellate timetable."<sup>266</sup> As a result, a judgment non obstante veredicto that assails the trial court's judgment and is filed within the time period for filing a motion for new trial extends the appellate timetable.<sup>267</sup>

#### C. MOTION FOR SANCTIONS

Under Rule 329b(g) of the Texas Rules of Civil Procedure, "a motion to modify, correct, or reform a judgment . . ., if filed, shall be filed and determined within the time prescribed by this rule for a motion for new

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257. *Id.* (citing *Fredonia*, 881 S.W.2d at 282).

258. *See* Tex. R. Civ. P. 301; *see also* *Kirschberg v. Lowe*, 974 S.W.2d 844, 846 (Tex. App.—San Antonio 1998, no pet. h.) ("Rule 301 provides for a motion for judgment non obstante veredicto but neither that rule nor any other 'provides a time limit for its filing.'").

259. *See* *Kirschberg*, 974 S.W.2d at 846 (citing *Walker v. S & T Truck Lines, Inc.*, 409 S.W.2d 942, 944-45 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd)).

260. *See id.*

261. *Id.*

262. *See id.* at 846-47.

263. *See id.* This is so despite the similarities between the motion to vacate, modify, correct, or reform, and the motion for judgment n.o.v. and motion to disregard jury findings. *Id.*

264. 896 S.W.2d 176 (Tex. 1995) (per curiam).

265. *See id.* at 176-77.

266. *Kirschberg*, 974 S.W.2d at 847-48.

267. *See id.*

trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial."<sup>268</sup> Can a motion for sanctions filed within thirty days of the signing of a final judgment constitute a "motion to modify or reform" under Rule 329b(g)? Yes, according to the First Court of Appeals' holding in *Lane Bank Equipment Co. v. Smith Southern Equipment, Inc.*<sup>269</sup> In *Lane Bank*, the trial court entered a final judgment<sup>270</sup> on June 5, 1997.<sup>271</sup> On June 26, 1997, the defendant filed a motion for sanctions, requesting an award of more than \$40,000 in attorney's fees and expenses.<sup>272</sup> The trial court granted the defendant's motion for sanctions on July 11, 1997.<sup>273</sup> On appeal, the plaintiff argued that the trial court's plenary power had expired thirty days after the June 5, 1997 judgment was signed, which was before the motion for sanctions was granted.<sup>274</sup>

The First Court of Appeals disagreed with the plaintiff. The First court held that the defendant's June 26, 1997 motion for sanctions was a motion to modify or reform the judgment, because under Texas Rules of Civil Procedure 329b(g) it "requested a substantive change in the judgment, an award of more than \$40,000 in attorney's fees and expenses."<sup>275</sup> As a result, the motion for sanctions "extended the trial court's plenary power."<sup>276</sup>

Notably, in *Lane Bank*, the First Court of Appeals acknowledged that in *Scott & White Memorial Hospital v. Schexnider*,<sup>277</sup> the Texas Supreme Court specifically approved that portion of the Waco Court of Appeals' opinion in *Hjalmarson v. Langley*<sup>278</sup> holding that a sanctions order was void because the trial court's plenary power had expired before it was signed, where the motion for sanctions was filed nine days after judgment and the sanctions order was signed forty days after judgment.<sup>279</sup> The First Court of Appeals, however, determined that the holding in *Schexnider* was on a different basis, and the opinion never specifically

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268. TEX. R. CIV. P. 329b(g).

269. No. 01-97-01032-CV, 1998 WL 418125 (Tex. App.—Houston [1st Dist.] July 23, 1998, pet. filed).

270. The parties in the case apparently disputed whether the summary judgment order entered on June 5, 1997 disposed of all parties and issues. *See id.* at \*1. For purposes of the court of appeals' analysis as to the trial court's plenary power, however, the court of appeals assumed the June 5, 1997 order constituted a final judgment. *See id.*

271. *See id.*

272. *See id.*

273. *See id.*

274. *See Lane Bank*, 1998 WL 418125, at \*1.

275. *Id.*

276. *Id.*

277. 940 S.W.2d 594 (Tex. 1996).

278. 840 S.W.2d 153 (Tex. App.—Waco 1992, no writ).

279. *Lane Bank*, 1998 WL 418125, at \*1-\*2; *Hjalmarson*, 840 S.W.2d at 156; *Schexnider*, 940 S.W.2d at 596. In *Schexnider*, the supreme court stated, "Although the defendant filed the [sanctions] motion while the trial court had plenary jurisdiction, the trial court did not sign the order purporting to grant the motion until after the court's jurisdiction had expired. . . . [T]he court in *Hjalmarson* correctly concluded that the trial court could not grant the motion after its plenary jurisdiction had expired. . . ." *Schexnider*, 940 S.W.2d at 596.

discussed “whether a timely filed sanctions motion extends a trial court’s plenary power.”<sup>280</sup> The court accordingly concluded “that *Schexnider* is not controlling,” and declined to follow *Hjalmarson*.<sup>281</sup>

#### D. FINDINGS OF FACT AND CONCLUSIONS OF LAW

An appellant’s failure to file and serve a “Notice of Past Due Findings of Fact and Conclusions of Law” waives his right to complain on appeal of any error related to the trial court’s failure to make a finding or conclusion.<sup>282</sup> According to the Corpus Christ Court of Appeals in *Salinas*, this is so, even if findings of fact are set forth in the trial court’s judgment. Findings, the *Salinas* court held, “do not belong in the judgment” and “may not be considered on appeal.”<sup>283</sup>

In a concurring opinion, Chief Justice Seerden disagreed with the majority’s conclusion that findings contained in the judgment can never be considered on appeal.<sup>284</sup> He stated that, according to the language of Rule 299a, the court of appeals “may consider findings within the body of the judgment, even if those findings are not in compliance with Texas Rule of Civil Procedure 299a, so long as they are not in conflict with separately-filed findings that are in compliance with the rules.”<sup>285</sup> He pointed out that Rule 299a is not entirely silent on the effect of findings contained in the judgment, but provides only that such findings “are invalid in case of conflict with properly-filed findings.”<sup>286</sup> “If findings incorrectly included in the judgment were to be treated as a nullity,” he concluded, “Rule 299a could easily have stated that. It does not.”<sup>287</sup> As noted by the majority and concurring opinions in *Salinas*, there is a split in the courts of appeals on this issue.<sup>288</sup>

280. 1998 WL 418125, at \*2.

281. *Id.*

282. *See Salinas v. Beaudrie*, 960 S.W.2d 314, 317 (Tex. App.—Corpus Christi 1997, no pet.); *see also* TEX. R. CIV. P. 297.

283. *Salinas*, 960 S.W.2d at 317 (citing *R.S. v. B.J.J.*, 883 S.W.2d 711, 720 (Tex. App.—Dallas 1994, no writ)); *see also* TEX. R. CIV. P. 299a.

284. *See Salinas*, 960 S.W.2d at 320-21 (Seerden, C.J., concurring).

285. *Id.* at 320.

286. *Id.* Rule 299a states:

Findings of fact shall not be recited in a judgment. If there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes. Findings of fact shall be filed with the clerk of the court as a document or documents separate and apart from the judgment.

TEX. R. CIV. P. 299a.

287. *Salinas*, 960 S.W.2d at 320.

288. *Id.* at 317 n.5 & 321. *Compare* *Valley Mechanical Contractors, Inc. v. Gonzales*, 894 S.W.2d 832, 834 (Tex. App.—Corpus Christi 1995, no writ) (findings recited in judgment cannot be considered on appeal); *and* *R.S. v. B.J.J.*, 883 S.W.2d 711, 715-16 (Tex. App.—Dallas 1994, no writ); *and* *Boland v. Natural Gas Pipeline Co.*, 816 S.W.2d 843, 844 (Tex. App.—Fort Worth 1991, no writ); *and* *Sutherland v. Cobern*, 843 S.W.2d 127, 131 n.7 (Tex. App.—Texarkana 1992, writ denied) *with* *McElwee v. McElwee*, 911 S.W.2d 182, 190 n.6 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (Rule 299a does not bar the effect of findings included in the judgment when there are no properly-filed conflicting findings);

## VI. SUPERSEDING THE JUDGMENT

Under the new rules of appellate procedure, no cost bond is required to perfect an appeal. In fact, the new rules do not authorize the imposition of a cost bond on appeal. Nonetheless, the trial court in the case of *In re Richards*,<sup>289</sup> a divorce case, ordered the appellant to post a "cost bond" in the amount of \$2,000 to cover "the cost of the record on appeal, the transcript, paying the court reporter, and all that stuff."<sup>290</sup>

On the appellant's motion to the court of appeals to review the "appeal bond," the appellee in *Richards* argued that Rule 24.2(a)(3) of the Texas Rules of Appellate Procedure authorized the bond set by the trial court.<sup>291</sup> Rule 24.2(a)(3) provides that when a judgment is for something other than money or an interest in property "the trial court must set out the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause."<sup>292</sup> Holding that Rule 24.2(a)(3) was inapplicable and therefore could not provide authority for the bond, the court of appeals noted that the judgment on appeal simply declared the status of the parties (as divorced) and divided the community party according to a property division agreement entered into by both parties.<sup>293</sup> Accordingly, the appellee/husband was not a judgment creditor, the appellant/wife was not a judgment debtor, there was nothing under the judgment upon which the appellee/husband could obtain a writ of execution, and there was no judgment for the appellant/wife to perform. "Consequently," the court concluded, "the bond could never become payable and its attempted imposition is an exercise in futility."<sup>294</sup>

Can a judgment creditor obtain a turnover order to collect that part of a judgment that has been affirmed by the supreme court before the supreme court issues its mandate and while a supersedeas bond is in place? The Texarkana Court of Appeals answered this question in the affirmative in *The Universe Life Insurance Company v. Giles*.<sup>295</sup> With respect to the mandate issue, the court of appeals reasoned that the issuance of a mandate by an appellate court is not necessary to render a judgment final.<sup>296</sup> Under the rules of civil procedure, the issuance and return of the mandate subsequent to an appellate court's remand "are procedural and not necessary to the jurisdiction of the trial court."<sup>297</sup> Accordingly, irregularities in a proceeding in trial court on a turnover order,

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and *Kondos Entertainment, Inc. v. Quinney Electric, Inc.*, 948 S.W.2d 820, 825 (Tex. App.—San Antonio 1997, writ requested) (Duncan, J., dissenting).

289. No. 07-98-0038-CV, 1998 WL 396424 (Tex. App.—Amarillo July 15, 1998, no pet.).

290. *Id.* at \*1. The appellee requested a bond in the amount of \$24,150. *Id.*

291. See TEX. R. APP. P. 24.2(a)(3).

292. *Id.*

293. See *Richards*, 1998 WL 396424, at \*2.

294. *Id.*

295. No. 06-97-00112-CV, 1998 WL 691372 (Tex. App.—Texarkana Sept. 15, 1998, no pet. h.).

296. See *id.* at \*3.

297. *Id.*

before an appellate court mandate issues, may be waived.<sup>298</sup> Since the judgment debtor failed to object in the trial court to entry of the turnover order on the basis that the supreme court's mandate had not yet been received, that error was waived.<sup>299</sup> Moreover, the court of appeals explained, the entry of the turnover order did not interfere with the supreme court's active power and authority because the supreme court's judgment became final when no motion for rehearing was filed within fifteen days after rendition and entry of the judgment.<sup>300</sup> As a result, the trial court's entry of the turnover order was not premature.<sup>301</sup>

The court of appeals also rejected the judgment debtor's argument that the turnover order was improper because a supersedeas bond had been filed.<sup>302</sup> Under the turnover statute, a judgment creditor is entitled to a turnover order to reach property to obtain satisfaction of a judgment if the judgment debtor "owns property . . . that (1) cannot readily be attached or levied on by ordinary legal process; and (2) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities."<sup>303</sup> In *Giles*, the judgment creditor asserted that the filing of a supersedeas bond precludes, "as a matter of law, any inference that the judgment debtor is the owner of property that could not readily be attached by ordinary legal process because the plaintiff may always resort to the supersedeas bond in satisfaction of her judgment."<sup>304</sup>

Rejecting this argument, the court of appeals pointed out that a supersedeas bond is a contract for the benefit of the judgment creditor; it is not property owned by the judgment debtor.<sup>305</sup> Accordingly, the turnover statute does not apply to supersedeas bonds.<sup>306</sup> Under the turnover statute, the judgment creditor need only establish that nonexempt property cannot readily be attached.<sup>307</sup> "A judgment creditor," the court concluded, "need not first exhaust other legal remedies prior to seeking relief under the turnover statute if the statutory requirements are met."<sup>308</sup>

## VII. PLENARY POWER OF THE TRIAL COURT

Under the Texas Supreme Court's decision in the case of *In re Bennett*,<sup>309</sup> a trial court has jurisdiction to *sua sponte* sanction counsel after a notice of nonsuit has been filed *and* after the suit has been removed to

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298. *See id.* (citing *Continental Cas. Co. v. Street*, 364 S.W.2d 184, 186-87 (Tex. 1963)).

299. *See id.*

300. *See id.*

301. *See Giles*, 1998 WL 691372, at \*3.

302. *See id.* at \*4.

303. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a) (Vernon 1998).

304. 1998 WL 691372, at \*4.

305. *See id.*

306. *See id.*

307. *See id.*

308. *Id.*

309. 960 S.W.2d 35 (Tex. 1997) (orig. proceeding) (per curiam), *cert denied*, 119 S. Ct. 66 (1998).



federal court and the federal court has dismissed the nonsuited case.<sup>310</sup>

In a flagrant example of conduct constituting an abuse of the judicial process, counsel for the plaintiffs in *Bennett* filed sixteen separate lawsuits in Nueces County, each having no more than five plaintiffs, which were randomly assigned to one of the eight district courts in the county.<sup>311</sup> The first suit was assigned to Judge Bennett's court.<sup>312</sup> Plaintiffs' counsel instructed the clerk of the court not to prepare citation for service in any of the sixteen cases that had been filed.<sup>313</sup> None of the sixteen suits was assigned to the 105th District Court.<sup>314</sup> However, the seventeenth case was.<sup>315</sup> Two hours after that assignment, plaintiffs' counsel filed an amended petition in the 105th District Court adding approximately 700 plaintiffs, though none of the claimants in the other sixteen suits were ever joined.<sup>316</sup> Five days later, plaintiffs' counsel filed notices of nonsuit in all sixteen previously filed suits.<sup>317</sup>

Judge Bennett did not sign an order of nonsuit in the case pending in his court, but instead, signed a *sua sponte* order abating the dismissal and setting a hearing on sanctions against plaintiffs' counsel.<sup>318</sup> Prior to the hearing on sanctions before Judge Bennett, the defendants removed all seventeen cases to federal court, including the case pending before Judge Bennett.<sup>319</sup> Nevertheless, Judge Bennett went forward with the sanctions hearing at which plaintiffs' counsel admitted that the filing process he used was designed to get his clients' claims before a particular judge.<sup>320</sup> At the close of the hearing, Judge Bennett announced that he intended to enter an order requiring plaintiffs' counsel each to pay \$10,000 as a sanction.<sup>321</sup>

Shortly thereafter, before Judge Bennett had reduced his rulings to a written order, the federal district court consolidated all seventeen cases that had been removed and dismissed those that had been nonsuited, including the case removed from Judge Bennett's court.<sup>322</sup> (This left pending only the case removed from the 105th District Court.<sup>323</sup>) Thereafter, Judge Bennett memorialized his rulings from the sanctions hearing in formal written orders.<sup>324</sup> Judge Bennett never signed an order dismissing the case pursuant to the notice of nonsuit.<sup>325</sup>

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310. *See id.* at 37-40.

311. *See id.* at 36.

312. *See id.*

313. *See id.*

314. *See id.*

315. *See id.*

316. *See id.* at 36-37.

317. *See id.* at 37.

318. *See id.*

319. *See id.*

320. *See id.*

321. *See id.*

322. *See id.*

323. *See id.*

324. *See id.*

325. *See id.*

In a mandamus proceeding brought by plaintiffs' counsel, the Corpus Christi Court of Appeals conditionally issued a writ of mandamus directing Judge Bennett to vacate his order and to sign an order dismissing the case pursuant to the notice of nonsuit.<sup>326</sup>

In the mandamus proceeding thereafter instituted by Judge Bennett in the Texas Supreme Court, the supreme court first considered whether Judge Bennett had the authority to sanction counsel after the notice of nonsuit was filed.<sup>327</sup> Concluding that he did, the supreme court held that "the signing of an order dismissing a case, not the filing of a notice of nonsuit, is the starting point for determining when a trial court's plenary power expires."<sup>328</sup> "Appellate timetables," the court explained, "do not run from the date a nonsuit is filed, but rather from the date the trial court signs an order of dismissal."<sup>329</sup> While acknowledging that, generally, a trial court has no discretion to refuse to sign an order of dismissal once notice of a nonsuit has been filed, the court concluded that "this broad principle necessarily has exceptions."<sup>330</sup> One of those exceptions is stated in Rule 162, which provides that "a dismissal under the rule 'shall have no effect on any motion for sanctions . . . pending at the time of dismissal.'"<sup>331</sup> Further, the court held, "a trial court is free to 'impose[ ] sanctions while it retain[s] plenary jurisdiction' even when a motion for sanctions is filed after the notice of nonsuit is filed."<sup>332</sup> Only after plenary jurisdiction has expired is a trial court precluded from sanctioning counsel for pre-judgment conduct.<sup>333</sup> As a result, the court concluded, Judge Bennett was well within his authority to defer signing the order of dismissal pending the disposition of the sanctions issues.<sup>334</sup>

However, the fact that but for the removal, Judge Bennett would have had plenary power when he signed the order imposing sanctions did not mean he had the power to do so after the case had been removed and after the federal court had dismissed the case at the request of the plaintiffs.<sup>335</sup> The court next considered that issue.

Finding little guidance in Texas law on the question, the supreme court looked to federal case law, which precludes state courts from taking any action on the merits of a removed case, but permits federal courts to sanction counsel for post-removal conduct that occurred in federal court even after a case has been remanded to state court.<sup>336</sup> The court also

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326. *See id.* at 37-38.

327. *See id.* at 38.

328. *Id.*

329. *Id.* (citing *Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995)).

330. *Id.*

331. *Id.*; TEX. R. CIV. P. 162.

332. *Bennett*, 960 S.W.2d at 38 (quoting *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996)).

333. *See id.*

334. *See id.*

335. *See id.* at 39.

336. *See id.*; 28 U.S.C. § 1446(d); *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 445-46 (9th Cir. 1992).

noted that Judge Bennett's determinations had no bearing whatsoever on the merits of the plaintiffs' claims that were removed to federal court, and that abuse of the state judicial process "may be placed beyond the reach of any court, state or federal, were we to conclude that state courts should not go forward after removal with an adjudication of sanctions for pre-removal conduct of counsel."<sup>337</sup>

Having reviewed federal precedent and the practical ramifications of the court of appeals' conclusion, the supreme court conditionally granted the writ of mandamus, holding that "state courts retain jurisdiction after removal of a case to federal court to sanction lawyers for pre-removal conduct so long as the sanction does not operate upon the merits of the underlying action."<sup>338</sup>

### VIII. PERFECTION OF APPEAL

During the Survey period, the Texas Supreme Court issued a series of significant opinions—including *Verburgt v. Dorner*,<sup>339</sup> *Holmes v. Home State County Mutual Insurance Co.*,<sup>340</sup> *Harlan v. Howe State Bank*,<sup>341</sup> *Boyd v. American Indemnity Co.*,<sup>342</sup> and *Jones v. City of Houston*,<sup>343</sup>—reemphasizing that the policy embodied in the appellate rules "disfavors disposing of appeals based upon harmless procedural defects."<sup>344</sup> In that line of cases, the Texas Supreme Court held that a motion for extension of time to file a cost bond, cash deposit in lieu of bond, or affidavit of indigency in lieu of cost bond is implied when a party, acting in good faith, files such instrument or cash deposit within the fifteen-day period in which the rules of appellate procedure permit parties to file a motion to extend the time period for filing such instruments or cash deposit to perfect an appeal.<sup>345</sup> The court reasoned in the lead case, *Verburgt*, that it "has never wavered from the principle that appellate courts should not dismiss an appeal for a procedural defect whenever any arguable interpretation of the Rules of Appellate Procedure would preserve the appeal."<sup>346</sup> The court noted that it has repeatedly held that a court of appeals has jurisdiction over any appeal in which the appellant files an instrument in a bona fide attempt to invoke the appellate court's jurisdic-

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337. *Bennett*, 960 S.W.2d at 39-40.

338. *Id.* at 40. The supreme court also concluded that Judge Bennett did not abuse his discretion in imposing sanctions against plaintiffs' counsel for their inappropriate conduct. *See id.*

339. 959 S.W.2d 615 (Tex. 1997).

340. 958 S.W.2d 381 (Tex. 1997).

341. 958 S.W.2d 380 (Tex. 1997).

342. 958 S.W.2d 379 (Tex. 1997).

343. 976 S.W.2d 676 (Tex. 1998).

344. *Verburgt*, 959 S.W.2d at 616.

345. *See Verburgt*, 959 S.W.2d at 616-17 (applying implied motion for extension to filing of cost bond); *see also Holmes*, 958 S.W.2d at 381-82; *Harlan*, 958 S.W.2d at 381; *Boyd*, 958 S.W.2d at 380 (applying implied motion for extension to filing of cash deposit in lieu of cost bond); *Jones*, 976 S.W.2d at 677 (applying implied motion for extension to filing of affidavit in lieu of bond).

346. 959 S.W.2d at 616.

tion, and that the rules of appellate procedure should be construed reasonably, “yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule.”<sup>347</sup> Refusing to elevate form over substance, the court held that a motion for extension of time is necessarily implied when an appellant acting in good faith files a bond beyond the time allowed by the rules of appellate procedure, but within the fifteen-day period in which he would be entitled to move to extend the filing deadline under the rules.<sup>348</sup>

Justice Enoch, joined by Justices Abbott and Hankinson, dissented, stating at the outset that “[f]rom today forward, one need no longer timely appeal to invoke an appellate court’s jurisdiction.”<sup>349</sup> Justice Enoch contended that the majority’s “implied motion” is not a “arguable interpretation” of the rules of appellate procedure, which, he agreed, is permissible to preserve an appeal, but, rather, a contradiction to the plain language of the rules.<sup>350</sup> “When next,” he asked, “will the Court ‘imply’ filings that were never made?”<sup>351</sup>

Justice Baker also dissented, arguing that the decision reached by the court of appeals in *Verburgt* was the decision required by applying the plain and unambiguous language of the rules.<sup>352</sup> According to Justice Baker, “[t]he Court’s opinion dispenses with [the rule’s] requirements, and amends the rule by judicial fiat.”<sup>353</sup>

Although the supreme court has applied the *Verburgt* implied-motion doctrine only in the context of the old rules of appellate procedure, there is no reason to think the court would not similarly imply a motion for extension to a late notice of appeal filed under the new rules of appellate procedure. Indeed, the supreme court expanded the implied-motion doctrine of *Verburgt*, a late-filed cost bond case, to a late-filed affidavit in lieu of bond in *Jones* on the rationale that an affidavit in lieu of bond “is simply an alternate device for perfecting appeal under former Rule 41.”<sup>354</sup> In fact, at least one court of appeals has published an opinion applying the *Verburgt* implied-motion doctrine to a late notice of appeal

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347. See *id.* at 616-17 (citing *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994); *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993)).

348. See *id.* at 617.

349. *Id.* at 617 (Enoch, J., dissenting). Justice Enoch also dissented to *Verburgt*’s companion cases, *Boyd*, *Harlan*, and *Holmes*. *Id.* at 619 n.3.

350. See *id.*

351. *Id.* at 619. Three months after the supreme court’s opinion in *Verburgt*, Justice Enoch found out “[w]hen next” the court would “‘imply’ filings that were never made.” In *Miller v. Metro Health Foundation*, 968 S.W.2d 337 (Tex. 1998), the supreme court applied the *Verburgt* implied-motion doctrine to the filing of the appellate record. *Id.* at 338. (As noted by the court in *Miller*, “the new rules of appellate procedure have repealed the requirement that the appellant file a motion for extension of time if the record is not timely filed, and instead place the burden on the trial and appellate court to ensure that the record is timely filed.” *Id.* at 338 n.1 (citing TEX. R. APP. P. 35.3(c)).

352. See *Verburgt*, 959 S.W.2d at 619 (Baker, J., dissenting).

353. *Id.* Justice Baker also dissented to *Verburgt*’s companion cases, *Boyd*, *Harlan*, and *Holmes*. See *id.* at 619 n.1.

354. *Jones*, 976 S.W.2d at 677.

filed under the new rules.<sup>355</sup>

Under *Verburgt* and its progeny, to be entitled to an implied motion for extension of time, the appellant must offer a "reasonable explanation" for his failure to timely file his notice of appeal.<sup>356</sup> What is a "reasonable explanation"? A "reasonable explanation" is "[a]ny plausible statement of circumstances indicating that failure to file . . . was not deliberate or intentional, but was the result of inadvertence, mistake, or mischance . . . even though counsel or his secretary may appear to have been lacking in the degree of diligence which careful practitioners normally exercise."<sup>357</sup> In short, the standard encompasses the negligence of counsel as a reasonable explanation.<sup>358</sup>

### IX. THE RECORD ON APPEAL

When the complaint on appeal is that the evidence is factually or legally insufficient to support the jury's verdict, "this burden cannot be discharged in the absence of a complete or an agreed statement of facts."<sup>359</sup> A statement of facts (or, reporter's record) is not complete if portions of a videotaped deposition were played for the jury but the statement of facts does not contain either the videotape or a transcription of the testimony played.<sup>360</sup>

As an alternative to producing a complete reporter's record, of course, an appellant may limit the appeal by complying with rule 34.6(c) of the Texas Rules of Appellate Procedure, which requires an appellant who

355. See *Dimotsis v. Lloyds*, 966 S.W.2d 657, 657 (Tex. App.—San Antonio 1998, no pet. h.) ("A motion for extension of time is necessarily implied when an appellant, acting in good faith, files a *notice of appeal* beyond the time allowed by *Rule 26.1* but within the fifteen-day grace period provided by *Rule 26.3* for filing a motion for extension of time." (emphasis added)); *Kaliski v. State*, 963 S.W.2d 786, 786-87 (Tex. App.—San Antonio 1998, no pet.) (per curiam) ("We recognize that the Supreme Court has held 'that a motion for extension of time is necessarily implied when an appellant acting in good faith files a [perfecting instrument] beyond the time allowed . . . but within the fifteen-day period in which the appellant would be entitled to move to extend the filing deadline.'"). Moreover, a review of several unpublished opinions of the Fourteenth Court of Appeals reveals that that court considers the implied-motion doctrine of *Verburgt* applicable to a late notice of appeal filed under the new rules of appellate procedure. See *Kutcher v. Vega*, No. 14-98-00238-CV, 1998 WL 470382, at \*1 (Tex. App.—Houston [14th Dist.] Aug. 13, 1998, no pet. h.) (per curiam) (not designated for publication); see also *Wade v. Commission for Lawyer Discipline*, No. 14-98-00682-CV, 1998 WL 506226, at \*1 (Tex. App.—Houston [14th Dist.] Aug. 20, 1998, no pet. h.) (per curiam) (not designated for publication).

356. *Verburgt*, 959 S.W.2d at 617; *Dimotsis*, 966 S.W.2d at 657.

357. *Dimotsis*, 966 S.W.2d at 657 (quoting *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 670 (Tex. 1989)).

358. See *id.* In *Dimotsis*, the San Antonio Court of Appeals accepted as a "reasonable explanation" counsel for appellant's erroneous calculation of the perfection deadline (he calculated the perfection deadline by adding 30 days to the date the trial court overruled the appellant's motion for new trial). See 966 S.W.2d at 657-58. Because the late filing was not intentional or deliberate, but, instead, due to the attorney's misunderstanding of the law, the explanation offered was a "reasonable" one. See *id.*

359. *Wal-Mart Stores, Inc. v. McKenzie*, 979 S.W.2d 364, 368 (Tex. App.—Eastland 1998, orig. proceeding) (citing *Englander Co. v. Kennedy*, 428 S.W.2d 806, 807 (Tex. 1968)).

360. See *id.*

intends to appeal with a partial reporter's record to include in its request a statement of the points or issues to be presented on appeal.<sup>361</sup> However, when an appellant appeals with a partial reporter's record but does not provide the list of points as required by Rule 34.6(c), a presumption arises that the omitted portions support the trial court's findings.<sup>362</sup>

Is a party entitled to a new trial if, during trial, the court reporter's machine becomes inoperable and the parties agree to continue with a tape recorder but, unbeknownst to either party, within minutes, the tape recorder begins to malfunction rendering the tape recorded portions of the trial partially inaudible? The answer depends on which court of appeals you are in and whether your case is governed by the old rules of appellate procedure.

Under old Rule 50(e), an appellant is entitled to a new trial if (1) he has made a timely request for a statement of facts, (2) the court reporter's notes and records "have been lost or destroyed," and (3) the parties do not agree on a statement of facts.<sup>363</sup> According to the Beaumont Court of Appeals' opinion in *Richardson*,<sup>364</sup> the second requirement contemplates that testimony "was actually memorialized by some method and that the existing memorialized testimony was either lost or destroyed."<sup>365</sup> Under this interpretation of the second requirement, a party who fails to ensure that a tape recording device is working properly—even though no one in the court room is aware that the recorder is faulty and, in fact, the tape recorder is being used to remedy a previous problem with the court reporter's machine—fails to meet the second requirement and is not entitled to a new trial.<sup>366</sup>

The Fourteenth Court of Appeals has held to the contrary<sup>367</sup> and, notably, the new rules of appellate procedure expressly state that a new trial is appropriate where a significant portion of an electronically recorded proceeding is *inaudible*.<sup>368</sup>

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361. See *Richards v. Schion*, 969 S.W.2d 131, 133 (Tex. App.—Houston [1st Dist.] 1998, no pet.); TEX. R. APP. P. 34.6(c)(1).

362. See *Richards*, 969 S.W.2d at 133.

363. *Richardson v. Richardson*, 969 S.W.2d 534, 536 (Tex. App.—Beaumont 1998, no pet. h.); TEX. R. APP. P. 50(e) (repealed).

364. 969 S.W.2d at 536.

365. *Id.*

366. *Id.* at 536-37. Justice Stover dissented, noting that, while litigants have a duty to ensure that a proper record is made for appellate review, "a certain amount of reliance must be placed upon professional court reporters during trial proceedings." *Id.* at 537 (Stover, J., dissenting). In the dissent's view, the appellant in *Richardson* was sufficiently diligent in protecting the record for appeal, and entitled to a remand for new trial. See *id.*

367. See *Gillen v. Williams Bros. Constr. Co., Inc.*, 933 S.W.2d 162, 164 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

368. See TEX. R. APP. P. 34.6(f)(2). Rule 34.6(f) provides:

(f) *Reporter's Record Lost or Destroyed*. An appellant is entitled to a new trial under the following circumstances:

- (1) if the appellant has timely requested a reporter's record;
- (2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or—if the proceedings were electronically recorded—a significant portion of the recording has been lost or destroyed or is inaudible;

## X. STAY OF APPEAL

Disagreeing with its own precedent, the San Antonio Court of Appeals held in *Burns v. Burns*<sup>369</sup> that, under Rule 8.2 of the Texas Rules of Appellate Procedure, the bankruptcy of a debtor who is both appellant and plaintiff in a pending lawsuit suspends the appeal and all appellate periods.<sup>370</sup> Rule 8.2 provides that “[a] bankruptcy suspends the appeal and all periods in these rules from the date when the bankruptcy petition is filed until the appellate court reinstates or severs the appeal in accordance with federal law.”<sup>371</sup> The San Antonio Court of Appeals previously held in *Thiel v. Thiel*<sup>372</sup> that “the stay does not apply” if the debtor was the plaintiff in the court below.<sup>373</sup> In reaching this conclusion in *Thiel*, the San Antonio court relied on the language of the bankruptcy code, which provides that a bankruptcy automatically stays all judicial proceedings “against the debtor.”<sup>374</sup> In *Burns*, the San Antonio court reached the opposite conclusion by noting that Rule 8.2 of the Texas Rules of Appellate Procedure applies “to any party to the trial court’s judgment.” “Because [Rule 8.2] applies to any party to the trial court judgment,” the court reasoned, “we read the . . . phrase ‘in accordance with federal law’ as modifying the reinstatement and severance procedures more fully described in Rule 8.3 [of the Texas Rules of Appellate Procedure].”<sup>375</sup> The court accordingly refused to read the phrase “in accordance with federal law” as requiring congruency between the application of Rule 8.2’s stay of the appeal and the application of the automatic stay under bankruptcy law.

## XI. CONDUCT OF COUNSEL BEFORE COURTS OF APPEAL

The Disciplinary Rules governing the conduct of a lawyer provide that “[a] lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.”<sup>376</sup> As vividly demonstrated by the Texas Supreme Court during last year’s Survey period in *Merrell Dow Pharmaceuticals, Inc. v. Havner*,<sup>377</sup> courts possess inherent power to discipline an attorney who violates this rule. In *Havner*, the supreme court found that the motion for rehearing filed by three of the respondents’ attorneys rose to the level of “judicial denigra-

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(3) if the lost, destroyed, or inaudible portion of the reporter’s record, or the lost or destroyed exhibit, is necessary to the appeal’s resolution; and

(4) if the parties cannot agree on a complete reporter’s record.

TEX. R. APP. P. 34.6(f).

369. 974 S.W.2d 820 (Tex. App.—San Antonio 1998, no pet. h.) (per curiam).

370. *See id.* at 820.

371. TEX. R. APP. P. 8.2.

372. 780 S.W.2d 930 (Tex. App.—San Antonio 1989, no writ).

373. *Id.* at 930.

374. 11 U.S.C. § 362(a)(1).

375. *Burns*, 974 S.W.2d at 820-21.

376. TEX. DISCIPLINARY R. PROF’L CONDUCT preamble ¶ 4, reprinted in TEX. GOV’T CODE ANN., tit.2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

377. 953 S.W.2d 706 (Tex. 1997), *cert. denied*, 118 S. Ct. 1799 (1998).

tion” and “personal insult.”<sup>378</sup> Finding the tenor of the motion highly inappropriate, the supreme court agreed with the San Antonio Court of Appeals’ comments in the case of *In re Maloney*<sup>379</sup> regarding attacks on the integrity of that court:

A distinction must be drawn between respectful advocacy and judicial denigration. Although the former is entitled to a protected voice, the latter can only be condoned at the expense of the public’s confidence in the judicial process. Even were this court willing to tolerate the personal insult levied by [counsel], we are obligated to maintain the respect due this court and the legal system we took an oath to serve.<sup>380</sup>

Accordingly, the supreme court ordered the attorneys who drafted the motion for rehearing to show why the court should not refer them to disciplinary authorities, preclude one of the out-of-state attorneys from practicing in Texas courts, and impose monetary penalties as sanctions.<sup>381</sup>

On December 11, 1997, the supreme court entered an order referring the matter for disciplinary proceedings.<sup>382</sup> Although not disputing that the motion for rehearing was “an intemperate attack on the members of this Court,” Justice Spector dissented from the order of referral.<sup>383</sup> In her dissent, Justice Spector stated that she did not believe the writing could possibly form the basis for lawyer discipline.<sup>384</sup> She argued that “attempts to stifle criticism of judges and our courts may, in fact, be counterproductive.”<sup>385</sup> In support of this belief, she quoted the comments of Justice Black from more than fifty years ago in the context of a contempt proceeding for statements published in a newspaper:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all published institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.<sup>386</sup>

## XII. FRIVOLOUS APPEALS

If an appellant pursues a frivolous appeal, the court of appeals may award each prevailing party “just damages.”<sup>387</sup> As discussed by the Four-

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378. *Id.* at 732-33.

379. 949 S.W.2d 385 (Tex. App.—San Antonio 1997, no writ) (en banc) (per curiam).

380. *Havner*, 953 S.W.2d at 732 (quoting *Maloney*, 949 S.W.2d at 388).

381. *See id.* at 733.

382. *See Merrell Dow Pharm., Inc. v. Havner*, 956 S.W.2d 532 (Tex. 1997) (Spector, J., dissenting).

383. *See id.* at 532.

384. *See id.*

385. *Id.*

386. *Id.* (quoting *Bridges v. California*, 314 U.S. 252, 270-71 (1941)).

387. In relevant part, Rule 45 of the Texas Rules of Appellate Procedure provides: “If the court of appeals determines that an appeal is frivolous, it may—on motion of any party



teenth Court of Appeals in *Tate v. E.I. Du Pont de Nemours & Co.*,<sup>388</sup> factors to be considered in deciding whether to impose sanctions for a frivolous appeal include: "(i) the failure to present a complete record, (ii) the raising of certain issues for the first time on appeal, (iii) the failure to file a response to a cross-point requesting sanctions, (iv) and the filing of an inadequate appellate brief."<sup>389</sup> Finding all of these factors present in the appeal taken in *Tate*, the Fourteenth Court accordingly awarded the appellee five times the taxable costs of the appeal.<sup>390</sup>

### XIII. STANDARDS OF REVIEW

In *Minnesota Mining and Manufacturing Co. v. Atterbury*,<sup>391</sup> a products liability and negligence action brought by users of silicone gel breast implants against 3M, the implant manufacturer, the Texarkana Court of Appeals analyzed the legal sufficiency of the evidence to support the jury's findings that the breast implants had marketing, manufacturing, and design defects when they left the manufacturer<sup>392</sup> and that the defects found by the jury constituted the producing cause of the illness or injury to the plaintiffs.<sup>393</sup> The court of appeals held that the trial court's exclusion of scientific testimony, even though such a determination must be based on the objective factors enunciated in *Daubert*,<sup>394</sup> *Robinson*<sup>395</sup> and *Havner*,<sup>396</sup> is reviewable for abuse of discretion,<sup>397</sup> while the sufficiency of scientific evidence admitted at trial is reviewed under a traditional "sufficiency of the evidence" standard.<sup>398</sup> The court of appeals reversed the trial court's judgment for the plaintiffs and rendered judgment for the defendant manufacturer, holding that the scientific opinions of three expert witnesses who had testified that the plaintiffs' injuries and illnesses were caused by silicone implants were not "scientifically reliable" under the *Daubert-Robinson-Havner* standards<sup>399</sup> and were therefore legally in-

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or on its own initiative, after notice and a reasonable opportunity for response—award each prevailing party just damages." TEX. R. APP. P. 45. Damages for frivolous appeals were also available under Rule 84 of the old rules of appellate procedure. New Rule 45 alters Rule 84 in only two respects: Rule 45 repealed old Rule 84's limit on the amount of the sanction that may be imposed by the court of appeals, and includes the requirement of notice and opportunity to respond.

388. 954 S.W.2d 872 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

389. *Id.* at 875.

390. *See id.*

391. 978 S.W.2d 183 (Tex. App.—Texarkana 1998, pet. filed).

392. *See id.* at 186.

393. *See id.*

394. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

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

396. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997).

397. *See Atterbury*, 978 S.W.2d at 192.

398. *See id.* The court of appeals did note, however, that this type of review is under "an almost de novo standard because the 'in the light most favorable to the judgment' standard appears to be all but eviscerated" under *Robinson* and *Havner*. *Atterbury*, 978 S.W.2d at 192.

399. As stated by the *Atterbury* court:

[T]he factors to which a reviewing court should look in determining the reliability of scientific testimony are: 1) the extent to which the theory has been or

sufficient to support the jury's causation findings.<sup>400</sup> In its discussion of the defendant's "no evidence" points, the court of appeals followed the standard of review for scientific evidence set forth in *Havner*.<sup>401</sup> Among other things, the court of appeals stated that (1) a single reliable epidemiological study that demonstrates a statistically significant association will not, absent verification of its results by another study, be enough to satisfy a legal sufficiency review; (2) abstracts that reanalyze other epidemiological evidence and that do not state the methodologies used, including the significance level, the confidence level, and the choice of control group, will not be considered; (3) an expert's prior unpublished and undocumented experience will not be enough to support a finding of causation; (4) even published, peer reviewed case reports are legally insufficient to support causation unless the reports could be considered unisolated and detail their methodology so that there can be further scientific evaluation of them; and (5) an expert's assertion that a physical examination confirmed causation should not be accepted at face value.<sup>402</sup>

In *Maritime Overseas Corp. v. Ellis*,<sup>403</sup> a gross negligence and unseaworthiness maritime law case brought under the Jones Act<sup>404</sup> and the Federal Employers' Liability Act<sup>405</sup> for damages for delayed neurotoxic effects allegedly caused by exposure to the toxic chemical pesticide Diazinon, the supreme court recognized that the standard of appellate review for sufficiency of the evidence as to liability is less stringent in Jones Act and FELA cases than under the common law, but that traditional appellate sufficiency review applies to damages review.<sup>406</sup> This is so because the causation burden is not the common law proximate causation standard, but rather is a "featherweight" burden under which the claimant need only show that "employer negligence played any part, even the

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can be tested; 2) the extent to which the technique relies upon the subjective interpretation of the expert; 3) whether the theory has been subjected to peer review and/or publication; 4) the technique's potential rate of error; 5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; 6) the nonjudicial uses which have been made of the theory or technique; and 7) any other factor which is helpful to determine the reliability of the scientific evidence.

978 S.W.2d at 199-200 (quoting *Havner*, 953 S.W.2d at 714 (citing *Robinson*, 923 S.W.2d at 557)).

400. See *Atterbury*, 978 S.W.2d at 199-202.

401. Courts must make a determination of reliability from all the evidence. Courts should allow a party, plaintiff or defendant, to present the best available evidence, assuming it passes muster under *Robinson*, and only then should a court determine from a totality of the evidence, considering all factors affecting the reliability of particular studies, whether there is legally sufficient evidence to support a judgment.

*Id.* at 198 (quoting *Havner*, 953 S.W.2d at 720).

402. See *id.* at 198-99.

403. 971 S.W.2d 402 (Tex. 1998), cert. denied, 119 S. Ct. 541 (1998).

404. 46 U.S.C. § 861 (1998).

405. 45 U.S.C. § 51 et seq. (1998).

406. See *Maritime Overseas*, 971 S.W.2d at 406 (citing *Texas & Pac. Ry. v. Roberts*, 481 S.W.2d 798, 800 (Tex. 1972) and *Brown & Root, Inc. v. Wade*, 510 S.W.2d 408, 410 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.)).

slightest, in producing the injury for which the claimant seeks damages."<sup>407</sup>

In such cases, Texas appellate courts must apply a less stringent federal standard of liability review, under which appellate sufficiency review is complete and the jury's liability verdict stands "once the appellate court determines that some evidence about which reasonable minds could differ supports the verdict" as to liability.<sup>408</sup> Texas courts of appeals may not conduct a traditional factual sufficiency review as to liability under Texas' "weight and preponderance" standard in Jones Act and FELA cases.<sup>409</sup>

With respect to damages, however, the supreme court held that Texas courts of appeals have the power to review excessiveness of damages and to order remittitur in FELA actions and, by implication, in Jones Act cases.<sup>410</sup> The court of appeals is required to "make its own 'detailed appraisal of the evidence bearing on damages.'"<sup>411</sup> The standard of review for an excessive damages complaint is the traditional factual sufficiency of the evidence review, which requires the court of appeals to consider and weigh all of the evidence, not just that supporting the verdict,<sup>412</sup> and, when reversing for factual insufficiency, to "detail all the evidence relevant to the issue and clearly state why the jury's finding is factually insufficient or so against the great weight and preponderance of the evidence that it is manifestly unjust."<sup>413</sup> The supreme court rejected the defendant's argument that the court of appeals used the wrong standard of review regarding the actual damages award, holding that the traditional factual sufficiency review of damages was correct and that the defendant had waived its *Daubert-Robinson-Havner* argument that a higher standard of review should apply by failing to timely object to the admission of scientific testimony supporting the actual damages award.<sup>414</sup>

In *Spangler v. Texas Dept. of Protective and Regulatory Services*,<sup>415</sup> an appeal from a jury verdict and judgment terminating parental rights, the Waco Court of Appeals articulated an "intermediate" standard of factual sufficiency review (between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings) applicable to trial court factual determinations made under the "clear and convincing evidence" standard.<sup>416</sup> The court of appeals recognized that

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407. *Maritime Overseas*, 971 S.W.2d at 406 (quoting *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506-07 (1957)).

408. *Maritime Overseas*, 971 S.W.2d at 406.

409. *See id.*

410. *See id.*

411. *See id.* (quoting *Nairn v. National R.R. Passenger Corp.*, 837 F.2d 565, 567 (2d Cir. 1988)).

412. *Id.* at 406, 407 (citing *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) and *Lofton v. Texas Brine Corp.*, 720 S.W.2d 804, 805 (Tex. 1986)).

413. *Id.* at 407 (citing *Ellis County State Bank v. Keever*, 888 S.W.2d 790, 794 (Tex. 1994) and *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986)).

414. *Id.* at 408-411.

415. 962 S.W.2d 253 (Tex. App.—Waco 1998, no pet.).

416. *See id.* at 257.

the ordinary factual sufficiency standard of review, which applies to factual findings made under a "preponderance of the evidence" standard,<sup>417</sup> does not take into account the heightened "clear and convincing" standard of proof applied in parental termination cases.<sup>418</sup> Stating that it did not believe "that the Texas Supreme Court intends to require trial courts to adhere to a higher standard of proof in termination cases while allowing the courts of appeals to use the same standard of review as in cases decided by a preponderance of the evidence,"<sup>419</sup> the court of appeals adopted the following rule:

When the trier of fact is required to make a finding by clear and convincing evidence, the court of appeals will only sustain a point of error alleging insufficient evidence if the trier of fact could not reasonably find the existence of the fact to be established by clear and convincing evidence.<sup>420</sup>

This rule, the court of appeals stated, is consistent with the treatment of the issue by other intermediate courts of appeals.<sup>421</sup> The court of appeals also stated that its intermediate rule is reconcilable with supreme court cases refusing to apply a third standard of review.<sup>422</sup> While the policy supporting the intermediate rule adopted by the *Spangler* court may be reconcilable with the policy behind the supreme court's holding in *Meadows v. Green*, the court of appeals' adoption of an intermediate standard of review appears inconsistent on its face with the supreme court's holding that "[i]n Texas there are but two standards of review by which evidence is reviewed: factual sufficiency and legal sufficiency."<sup>423</sup> Indeed, the supreme court reversed the court of appeals in *Meadows*, holding that the court of appeals' adoption of a third standard of review conflicted with prior supreme court decisions on point.<sup>424</sup> If, as the supreme court held in *Meadows*, "clear and convincing evidence is but another way of describing factual sufficiency of the evidence,"<sup>425</sup> then the necessity or validity of the intermediate rule adopted in *Spangler* must be questioned.

The San Antonio Court of Appeals applied established standards of review in affirming the trial court's exclusion of evidence in *Pace v. Sadler*,<sup>426</sup> a medical malpractice action in which the trial court excluded evidence proffered by the plaintiff to show misrepresentations by the

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417. The *Spangler* court stated that "In preponderance cases, insufficient evidence points should be sustained when: (1) the evidence is factually insufficient to support a finding by the preponderance of the evidence; or (2) a finding is contrary to the great weight and preponderance of the evidence." *Id.* (citing Robert W. Calvert, "No Evidence" and *Insufficient Evidence*" *Points of Error*, 38 TEXAS L. REV. 361, 366 (1960)).

418. *See id.* at 257.

419. *Spangler*, 962 S.W.2d at 257.

420. *Id.*

421. *See, e.g., In re L.R.M.*, 763 S.W.2d 64, 65 (Tex. App.—Fort Worth 1989, no writ); *Neiswander v. Bailey*, 645 S.W.2d 835, 835-36 (Tex. App.—Dallas 1982, no writ).

422. *See Spangler*, 962 S.W.2d at 257 (quoting *Meadows v. Green*, 524 S.W.2d 509, 510 (Tex. 1975) (per curiam)).

423. *Meadows*, 524 S.W.2d at 510.

424. *See id.* (citing *Omohundro v. Matthews*, 161 Tex. 367, 341 S.W.2d 401 (1960)).

425. *Meadows*, 524 S.W.2d at 510.

426. 966 S.W.2d 685 (Tex. App.—San Antonio 1998, no pet. h.).

defendants about her husband's medical records.<sup>427</sup> The court of appeals held that the exclusion of evidence is reviewed under an abuse of discretion standard,<sup>428</sup> and that to justify reversal, "the trial court's error must have amounted to such a denial of the rights of the appellant as was reasonably calculated to cause the rendition of an improper judgment."<sup>429</sup> The appellate court makes its determination on this issue by reviewing the entire record.<sup>430</sup>

In *Bocquet v. Herring*,<sup>431</sup> the supreme court clarified the abuse of discretion standard of review applicable to attorney fee awards under Texas' Declaratory Judgments Act.<sup>432</sup> Reversing the court of appeals' decision ordering reversal and remand for a new trial unless the defendants remitted a substantial portion of the attorney fees awarded them by the trial court, the supreme court held that the court of appeals must undertake a "multi-faceted review involving both evidentiary and discretionary matters" to "determine whether the trial court abused its discretion by awarding fees when there was insufficient evidence that the fees were reasonable and necessary, or when the award was inequitable or unjust."<sup>433</sup> According to the supreme court, the court of appeals' error was in reversing for factual insufficiency of the evidence of the reasonableness and necessity of the attorney fees awarded by the trial court without detailing all the relevant evidence and explaining in its opinion why the evidence was factually insufficient.<sup>434</sup>

In two cases decided during the survey period, the supreme court addressed the quantum of circumstantial evidence required to survive a "no evidence" challenge. In *Hammerly Oaks, Inc. v. Edwards*,<sup>435</sup> a suit by a tenant against his landlord for negligence and gross negligence in connection with an assault on the tenant by two contract employees of the landlord, the supreme court reversed the court of appeals' punitive damage award against the corporate landlord based on a jury finding that the landlord's leasing agent was a "vice principal" under Texas law such that the leasing agent's alleged misconduct in failing to respond appropriately to threats made by the contract employees was properly imputed to the corporation in order to support an award of punitive damages.<sup>436</sup>

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427. *See id.* at 687.

428. *See id.*

429. *See id.* (citing TEX. R. APP. P. 44.1(a)).

430. *See id.* (citing *McCraw v. Maris*, 828 S.W.2d 756, 758 (Tex. 1992)).

431. 972 S.W.2d 19 (Tex. 1998).

432. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1997).

433. *Bocquet*, 972 S.W.2d at 21.

434. *See id.* (citing *Rose v. Doctors Hospital*, 801 S.W.2d 841, 848 (Tex. 1990)).

435. 958 S.W.2d 387 (Tex. 1997).

436. *See id.* at 391 (citing *Fort Worth Elevators Co. v. Russell*, 123 Tex. 128, 70 S.W.2d 397 (1934), *overruled on other grounds* by *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712 (Tex. 1987)); *see also* *Chronister Lumber Co. v. Williams*, 116 Tex. 207, 288 S.W. 402 (1926). As stated in *Fort Worth Elevators*, the term "vice principal" encompasses four classes of corporate agents: "(a) Corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and (d) those to whom a master has con-

Agreeing with the trial court's disregard of the jury's findings of gross negligence and award of punitive damages,<sup>437</sup> the supreme court held that the plaintiff's sole evidence of the leasing agent's corporate authority, the fact that she was alone in the leasing office when the contract employee voiced a threat to harm the plaintiff, was no evidence "that Montgomery [the leasing agent] was in charge at that moment in time" or that "Montgomery was a vice principal."<sup>438</sup> Where the plaintiff relies on "'meager circumstantial evidence' which could give rise to any number of inferences, none more probable than another,"<sup>439</sup> such evidence is legally insufficient to support a judgment.<sup>440</sup>

The *Hammerly Oaks* holding was cited with approval by the supreme court in *Wal-Mart Stores, Inc. v. Gonzalez*,<sup>441</sup> a slip-and-fall case in which the trial court's damage award to the plaintiff of over \$96,000.00, affirmed by the San Antonio Court of Appeals, was reversed and a take nothing judgment rendered for the defendant.<sup>442</sup> The central issue in *Wal-Mart* was whether testimony by the plaintiff and her daughter that the cooked macaroni salad on the floor of Wal-Mart on which the plaintiff slipped and fell had mayonnaise in it, was "fresh," "wet," "still humid," contaminated with "a lot of dirt," had footprints and cart track marks in it and "seemed like it had been there a while" was legally sufficient to charge Wal-Mart with constructive notice necessary of the spill adequate to support the jury's verdict and the trial court's judgment.<sup>443</sup>

The supreme court stated the settled rule that its duty when considering a legal sufficiency point is to "consider only the evidence and inferences tending to support the trial court's finding, disregarding all contrary evidence and inferences."<sup>444</sup> The supreme court also noted the rule in *Hammerly Oaks*, that "meager circumstantial evidence from which equally plausible but opposite inferences may be drawn is speculative and thus legally insufficient to support a finding."<sup>445</sup>

After noting that no witnesses testified that they had seen or were aware of the spilled macaroni salad before the plaintiff slipped on it,<sup>446</sup> the court surveyed the spilled macaroni cases decided by the courts of appeals<sup>447</sup> and held that the evidence of causation was legally insufficient

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fided the management of the whole or a department or division of his business." *Fort Worth Elevators*, 70 S.W.2d at 406.

437. *See id.* at 390.

438. *Id.* at 392.

439. *Id.* (quoting *Blount v. Bordens, Inc.*, 910 S.W.2d 931, 933 (Tex. 1995)) (quoting *Litton Indus. Prods. v. Gammage*, 668 S.W.2d 319, 324 (Tex. 1984)).

440. *See id.*

441. 968 S.W.2d 934 (Tex. 1998).

442. *See id.* at 935-36.

443. *See id.* at 936-37.

444. *Id.* at 936 (quoting *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996)).

445. *Id.* (citing *Hammerly Oaks*, 958 S.W.2d at 392).

446. *See id.*

447. *See id.* at 937 (citing, *inter alia*, *Furr's Supermarkets, Inc. v. Arellano*, 492 S.W.2d 727 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.) and *H.E. Butt Grocery Co. v. Heaton*,

to support the judgment.<sup>448</sup> The court held that the plaintiff's testimony that the macaroni salad had "a lot of dirt" and tracks through it was "no evidence of the length of time the macaroni had been on the floor,"<sup>449</sup> that the presence of footprints and cart tracks in the macaroni salad "equally supports the inference that the tracks were of recent origin as it supports the opposite inference, that the tracks had been there a long time,"<sup>450</sup> and that the testimony that the macaroni salad "seemed like it had been there awhile [sic]" was "mere speculative, subjective opinion of no evidentiary value."<sup>451</sup> This evidence, the court concluded, was not legally sufficient to establish that Wal-Mart had constructive notice of the dangerous condition.<sup>452</sup>

In *McCain v. McCain*,<sup>453</sup> the Fort Worth Court of Appeals applied an abuse of discretion standard in affirming the trial court's modification of child support payments.<sup>454</sup> The appellant argued unsuccessfully on appeal that, absent evidence of the proven needs of the children at the time of the divorce decree, the trial court could not find that the needs of the children had materially and substantially changed,<sup>455</sup> as required by Section 154.126 of the Texas Family Code.<sup>456</sup> The court of appeals disagreed with appellant's interpretation of Section 154.126, holding that the trial court must only consider the income of the parties and the proven needs of the child, and that no showing need be made of an *increase* in the proven needs of the child.<sup>457</sup> The court noted that, while the appellee testified that the children's needs were \$4,241.00 per month, the trial court found that the proven needs of the children were only \$3,835.00 per month and that appellant's net resources exceeded \$6,000.00 per month, which allowed the trial court to award additional support.<sup>458</sup> In overruling the appellant's factual and legal sufficiency points, the court of appeals observed that "legal and factual sufficiency are not independent grounds for review, but are only relevant factors in assessing whether the

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547 S.W.2d 75, 76 (Tex. Civ. App.—Waco 1977, no writ)). The supreme court also considered slip-and-fall cases involving grapes, syrup and jelly, and dirty water in its analysis. *Id.* (citing *H.E. Butt Grocery Co. v. Rodriguez*, 441 S.W.2d 215, 217 (Tex. Civ. App.—Corpus Christi 1969, no writ) (grapes); *H.E. Butt Grocery Store v. Hamilton*, 632 S.W.2d 189, 191 (Tex. App.—Corpus Christi 1982, no writ) (grapes); *Kimbell, Inc. v. Roberson*, 570 S.W.2d 587, 590 (Tex. Civ. App.—Tyler 1978, no writ) ("a syrupy or jellylike substance"); *Robledo v. Kroger Co.*, 597 S.W.2d 560, 560-61 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.) (dirty water); *Kimbell, Inc. v. Blount*, 562 S.W.2d 10, 13 (Tex. Civ. App.—Austin 1978, no writ) (puddle of liquid)).

448. *See id.* at 938.

449. *Id.*

450. *Id.*

451. *Id.*

452. *See id.*

453. 980 S.W.2d 800 (Tex. App.—Fort Worth Sept. 24, 1998, no pet. h.).

454. *See id.* at 89.

455. *See id.*

456. TEX. FAM. CODE ANN. § 154.126 (West 1996).

457. *See McCain*, 980 S.W.2d at 801 (West 1996).

458. *See id.*

lower court abused its discretion.”<sup>459</sup>

The trial court’s imposition of “death penalty” discovery sanctions is reviewed under an abuse of discretion standard. In *Chasewood Oaks Condominiums Homeowners Association, Inc. v. Amatek Holdings, Inc.*,<sup>460</sup> the Fort Worth Court of Appeals affirmed the trial court’s dismissal of a products liability action as a sanction for the plaintiff’s repeated failure to answer interrogatories and respond to requests for production, despite being ordered to do so at least four times over the course of a year.<sup>461</sup> The court of appeals held that, under its abuse of discretion review, the trial court abuses its discretion by dismissing a case unless such an extreme sanction is “just.”<sup>462</sup> This determination, the court held, is made by reference to the *TransAmerican* factors, *i.e.*, if the record reveals that:

1. There exists a direct relationship between the offensive conduct and the sanction imposed;
2. The sanction imposed is not excessive in the circumstances, *i.e.* “The punishment must fit the crime”;
3. The trial court first imposed lesser sanctions to test their effectiveness at securing compliance, deterrence, and punishment of the offense;<sup>463</sup> and
4. The sanctioned conduct justifies a presumption that the party’s claim or defense lacks merit.<sup>464</sup>

In *Magnolia Gas Co. v. Knight Equip. & Manufacturing Corp.*,<sup>465</sup> an interlocutory appeal from the denial of a special appearance pursuant to Section 51.014(a)(7) of the Texas Civil Practice and Remedies Code,<sup>466</sup> the San Antonio Court of Appeals disagreed with the contention of the parties to the appeal that the evidence should be reviewed under a factual sufficiency standard, holding instead that abuse of discretion is the appropriate standard of review, “at least in the interlocutory setting.”<sup>467</sup> Con-

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459. *Id.* (citing *In re G.J.S.*, 940 S.W.2d 289, 293 (Tex. App.—San Antonio 1997, no writ) and *D.R. v. J.A.R.*, 894 S.W.2d 91, 95 (Tex. App.—Fort Worth 1995, writ denied) (op. on reh’g)).

460. 977 S.W.2d 840 (Tex. App.—Fort Worth 1998, pet. denied).

461. *See id.* at 844-45.

462. *See id.* at 841 (citing TEX. R. CIV. P. 215(2)(b)); *see also* *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992); *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 916-17 (Tex. 1991).

463. The “lesser sanctions” imposed by the trial court consisted of (i) three threats of dismissal and (ii) the abatement of plaintiff’s propounded discovery until the plaintiff fully complied with the defendant’s outstanding discovery. *See id.* at 845.

464. *Id.* at 842 (citing *Chrysler Corp.*, 841 S.W.2d at 849-50) (citing *TransAmerican*, 811 S.W.2d at 917, 918); *Andras v. Memorial Hosp. Sys.*, 888 S.W.2d 567, 571 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

465. No. 04-98-00156-CV, 1998 WL 652548 (Tex. App.—San Antonio 1998, no pet. h.).

466. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 1999).

467. *Magnolia Gas Co.*, 1998 WL 652548, at \*2-\*3. The court of appeals expressed no opinion “about the propriety of factual sufficiency review in post-trial appeals of special appearances.” *Id.* at \*3, n. 5, *comparing* *NCNB Texas Nat’l Bank v. Anderson*, 812 S.W.2d 441, 442-43 (Tex. App.—San Antonio 1991, no writ) (applying factual sufficiency standard) *with* *Thorpe v. Volkert*, 882 S.W.2d 592, 596-97 (Tex. App.—Houston [1st Dist.] 1994, no writ) (applying abuse of discretion standard).



clusions of law are reviewed *de novo*.<sup>468</sup> The court of appeals noted its obligation to apply the following factors in its review and reversal of the trial court's denial of a special appearance:

- (1) the burden on the defendants; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental social policies.<sup>469</sup>

As an aside, both the majority and the dissent noted that, while the defendants had requested findings of fact and conclusions of law, the trial court entered none.<sup>470</sup> As a result, the court of appeals held, all questions of fact were "presumed to support the judgment."<sup>471</sup>

This legal conclusion is erroneous and unsupported by the authorities cited by the court of appeals for the proposition, which hold that questions of fact will be presumed and found in support of the judgment only when findings of fact and conclusions of law are neither requested of nor filed by the trial court.<sup>472</sup> Where a proper request for findings of fact and conclusions of law is made, the trial court's duty to file findings and conclusions is mandatory, and the trial court's failure to respond "is presumed harmful, unless 'the record before [the] appellate court affirmatively shows that the complaining party has suffered no injury.'"<sup>473</sup>

In *Jackson v. Golden Eagle Archery, Inc.*,<sup>474</sup> the Beaumont Court of Appeals held that jury misconduct is reviewed under an abuse of discretion standard.<sup>475</sup> The determination of whether jury misconduct occurred is a question of fact for the trial court, and if there is conflicting evidence on the issue, the trial court's finding must be upheld on appeal.<sup>476</sup>

In *Jackson*, the plaintiff/appellant complained of two types of jury misconduct: the failure of a juror to disclose bias or prejudice during voir dire (a juror concealed that she had previously served on a jury in a personal injury case that awarded no damages, and she "did not believe in 'awarding money in stuff like that'")<sup>477</sup> and the failure of the same juror to follow court instructions to refrain from, among other things, discuss-

468. *See id.* at \*6 (citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)).

469. *Id.* at \*7 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) and *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 231 (Tex. 1991)).

470. *See id.* at \*3 (majority) and \*8 (dissent).

471. *Id.* at \*3 (citing *Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 666 (Tex. 1987), *cert. denied*, 484 U.S. 1063 (1988) and *Hawsey v. Louisiana Dep't of Soc. Servs.*, 934 S.W.2d 723, 725 (Tex. App.—Houston [1st Dist.] 1996, writ denied)).

472. *Zac Smith & Co.*, 734 S.W.2d at 666 (citing *Lassiter v. Bliss*, 559 S.W.2d 353, 358 (Tex. 1977)).

473. *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989) (quoting *Wagner v. Riske*, 142 Tex. 337, 343, 178 S.W.2d 117, 120 (1944)).

474. 974 S.W.2d 952 (Tex. App.—Beaumont 1998, pet. granted).

475. *See id.* at 953.

476. *See id.* (citing *Pharo v. Chambers County*, 922 S.W.2d 945, 948 (Tex. 1996)).

477. *Id.* at 956.

ing the case with other jurors prior to the beginning of jury deliberations.<sup>478</sup> The court of appeals reviewed cases construing Texas Rules of Civil Procedure 327(a)<sup>479</sup> and 327(b)<sup>480</sup> and Texas Rule of Evidence 606(b),<sup>481</sup> which govern the review of jury misconduct. The court of appeals then held that the provisions of Rule 327(b) excluding testimony regarding evidence of jury misconduct if the only evidence of misconduct is that which “emanates from jury deliberations”<sup>482</sup> render Rule 327(b) unconstitutional as a violation of the right to trial by jury guaranteed by the Sixth<sup>483</sup> and Fourteenth<sup>484</sup> Amendments to the United States Consti-

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478. See *id.* at 957.

479. Rule 327(a) states:

When the ground of a motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of them, or because of any communication made to the jury, or that a juror gave an erroneous or incorrect answer on voir dire examination, the court shall hear evidence thereof from the jury or others in open court, and may grant a new trial if such misconduct proved, or the communication made, or the erroneous or incorrect answer on voir dire examination, be material, and if it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party.

TEX. R. CIV. P. 327(a).

480. Rule 327(b) states:

A juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

TEX. R. CIV. P. 327(b).

481. Rule 606(b) states:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental process, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes.

TEX. R. EVID. 606(b).

482. *Jackson*, 974 S.W.2d at 956.

483. The Sixth Amendment to the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

484. The Fourteenth Amendment to the United States Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

tution, as well as Article I section 15 of the Texas Constitution,<sup>485</sup> because it "literally makes it impossible to satisfy the constitutional mandate that the purity of the composition of the jury was maintained."<sup>486</sup>

The dissent, disagreeing with the majority's conclusion that all of the evidence of jury misconduct was barred by Rule 327(b), was not of the view that Rule 327(b) was "even implicated in the trial court's decision on the voir dire misconduct issue."<sup>487</sup> According to the dissent, the majority's holding that Rule 327(b) is unconstitutional "burns the house to roast the pig,"<sup>488</sup> particularly since the record reflected that the juror whose conduct the plaintiff complained of had voted favorably for the plaintiff in a 10-2 verdict.<sup>489</sup>

In *General Motors Corp. v. Castaneda*,<sup>490</sup> a negligence and products liability case, the San Antonio Court of Appeals reiterated the settled standards of review of legal sufficiency points and venue determinations. The defendant, General Motors, challenged the legal sufficiency of the evidence to support the jury's findings on causation (on which it did not have the burden of proof) and comparative negligence (on which it did) as well as venue in Duval County.<sup>491</sup>

As the court of appeals held, a party challenging the legal sufficiency of the evidence to support a finding on which the party did not have the burden of proof at trial must demonstrate that there is no evidence to support the finding.<sup>492</sup> In deciding a "no evidence" issue, the court of appeals "consider[s] all of the evidence in the light most favorable to the prevailing party, indulging every reasonable inference in that party's favor,"<sup>493</sup> and must uphold the finding of the trial court if it "encounter[s] any evidence of probative force to support it."<sup>494</sup>

A party challenging the legal sufficiency of the evidence to support a finding on which the party bore the burden of proof at trial must show that the evidence "conclusively established all vital facts in support of the issue."<sup>495</sup> The court of appeals employs a two-part test, first examining the entire record for evidence supporting the jury finding, while ignoring

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U.S. CONST. amend. XIV § 1.

485. Article I § 15 of the Texas Constitution states: "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency." TEX. CONST. art. I, § 15.

486. *Jackson*, 974 S.W.2d at 957.

487. *Id.* at 961.

488. *Id.* at 959.

489. *See id.* at 961, n. 2.

490. 980 S.W.2d 777 (Tex. App.—San Antonio Sept. 16, 1998, pet. filed).

491. *See id.* at 779-80.

492. *See id.*

493. *Id.* (citing *Formosa Plastics Corp. USA v. Presidio Eng'rs*, 960 S.W.2d 41, 48 (Tex. 1998) and *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

494. *Castaneda*, 980 S.W.2d at 780 (citing *Southern States Transp., Inc. v. State*, 774 S.W.2d 639, 640 (Tex. 1989)). *Accord* *General Motors Corp. v. Saenz*, 966 S.W.2d 545, 549 (Tex. App.—San Antonio 1998, pet. granted).

495. *Castaneda*, 980 S.W.2d at 780 (citing *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989)).

all contrary evidence.<sup>496</sup> If this examination produces no evidence to support the jury's answer, the court of appeals then examines the record to determine whether the contrary proposition is established as a matter of law.<sup>497</sup> The *Castaneda* court found the evidence legally sufficient to support the jury's findings of causation and comparative negligence,<sup>498</sup> but reversed the trial court's \$10 million judgment in favor of the plaintiff because of improper venue.<sup>499</sup>

In reviewing a venue point in an appeal from a final judgment, the court of appeals looks at the entire record, including the actual trial.<sup>500</sup> If there is any probative evidence that the defendant maintained an agency or had a representative in the county of suit, the court of appeals must defer to the trial court's venue determination.<sup>501</sup> If the record is devoid of any such evidence, the court of appeals must remand the case to be transferred to a county of proper venue.<sup>502</sup> Noting that the venue facts bore "a striking resemblance"<sup>503</sup> to those in the supreme court's recent *Miles* decision,<sup>504</sup> the court of appeals held that the only fact tying venue to Duval County, the existence of a General Motors dealership in the county,<sup>505</sup> was "not evidence that that dealership is an agent or representative of the manufacturer whose product it sells,"<sup>506</sup> and that, as a result, there was no evidence to support the trial court's conclusion that the dealership was the agent or representative of General Motors under the venue statute<sup>507</sup> then applicable, section 15.037 of the Texas Civil Practice and Remedies Code.<sup>508</sup>

In *Gammill v. Jack Williams Chevrolet, Inc.*,<sup>509</sup> the supreme court, following its decision in *Broders v. Heise*,<sup>510</sup> reaffirmed that the trial court's exclusion of expert testimony, whether based on the factors enunciated in

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496. *See id.*

497. *See id.*

498. *See id.* at 780(causation) and 782 (comparative negligence).

499. *See id.* at 782-83.

500. *See id.* at \*4 (citing *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 758 (Tex. 1993)).

501. *See id.* (citing *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 380 (Tex. 1998)). In *Castaneda*, the plaintiff and the individual defendant driver who collided with her resided in Nueces County, where the collision occurred. *See Castaneda*, 980 S.W.2d at 782.

502. *See id.*

503. *Id.*

504. *Ford Motor Co. v. Miles*, 967 S.W.2d at 377 (Tex. 1998).

505. *Castaneda*, 980 S.W.2d at 782.

506. *Id.* (citing *Miles*, 967 S.W.2d at 382).

507. *See id.*

508. TEX. CIV. PRAC. & REM. CODE ANN. § 15.037 (West 1986), repealed effective August 28, 1995, states, in pertinent part:

Foreign corporations . . . not incorporated by the laws of this state, and doing business in this state, may be sued in any county in which all or a part of the cause of action accrued, or in any county in which the company may have an agency or representative, or in the county in which the principal office of the company may be situated, or, if the defendant corporation has no agent or representative in this state, then in the county in which the plaintiff or either of them reside.

509. 972 S.W.2d 713 (Tex. 1998).

510. 924 S.W.2d 148 (Tex. 1996).

*Daubert*,<sup>511</sup> *Robinson*<sup>512</sup> and *Havner*<sup>513</sup> or on Texas Rule of Evidence 702,<sup>514</sup> is reviewed on appeal under an abuse of discretion standard.<sup>515</sup>

In *Operation Rescue-National v. Planned Parenthood, Inc.*,<sup>516</sup> an appeal from a judgment awarding damages and permanent injunctive relief against Operation Rescue arising from its activities against abortion providers during the 1992 Republican National Convention in Houston, the supreme court reviewed the trial court's error in refusing to instruct the jury that the "act" required to be found in furtherance of a civil conspiracy must be "overt and unlawful"<sup>517</sup> under the standard for reversible error set forth in Texas Rule of Appellate Procedure 61.1(a).<sup>518</sup> The supreme court held that, in view of the undisputed evidence of overt, unlawful acts by petitioners,<sup>519</sup> the jury's findings that petitioners committed certain enumerated wrongful acts,<sup>520</sup> and the absence of "evidence or argument that any conspiracy among the petitioners was confined to lawful means or purposes or that the actions of petitioners in furtherance of the conspiracy were not overt,"<sup>521</sup> the error was held to be harmless.<sup>522</sup>

The supreme court then turned to petitioners' complaint that the permanent injunction entered by the trial court, which limited petitioners' access to the clinics and the homes of physicians who worked at the clinics,<sup>523</sup> violated their right to free expression protected by the First Amendment to the United States Constitution<sup>524</sup> and by Article I, Section 8 of the Texas Constitution.<sup>525</sup> The court followed the decisions of the U.S. Supreme Court in *Madsen v. Women's Health Center, Inc.*<sup>526</sup> and *Schenck v. Pro-Choice Network*<sup>527</sup> in its analysis of the standard of review applicable to First Amendment claims, holding that the permanent in-

511. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

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

513. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997).

514. TEX. R. EVID. 702. Rule 702, effective March 1, 1998, states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." The supreme court referred to Rule 702 throughout its opinion in *Gammill* despite the fact that the former Texas Rules of Civil Evidence (effective at the time of trial in *Gammill*) were replaced by the Texas Rules of Evidence on March 1, 1998, noting that "none of the changes in the new rules affect this case." *Gammill*, 972 S.W.2d at 718, n. 8.

515. *Gammill*, 972 S.W.2d at 719, n.11 (citing *Brodgers*, 924 S.W.2d at 151).

516. 975 S.W.2d 546 (Tex. 1998).

517. *See id.* at 553.

518. TEX. R. APP. P. 61.1(a). Rule 61.1(a) states: "No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the Supreme Court concludes that the error complained of: (a) probably caused the rendition of an improper judgment."

519. *See Operation Rescue*, 975 S.W.2d at 553.

520. *See id.*

521. *See id.* at 553-54

522. *See id.* at 554

523. *See id.*

524. U.S. CONST. amend. I.

525. TEX. CONST. art. I, § 8.

526. 512 U.S. 753 (1994).

527. 519 U.S. 357 (1997).

junction passes First Amendment scrutiny only if it “burden[s] no more speech than necessary to serve a significant government interest.”<sup>528</sup> The reviewing court must apply this test by considering “the injury asserted, the relief requested, and the underlying evidence.”<sup>529</sup>

The supreme court then addressed the standard of review governing claims under Article I, Section 8 of the Texas Constitution.<sup>530</sup> Conceding that certain of the court’s prior decisions had said that Article I, Section 8 of the Texas Constitution is “broader” or affords “greater” protection of speech than the First Amendment,<sup>531</sup> the court noted that in none of those decisions was a different standard applied under the state constitutional provision than required by the First Amendment.<sup>532</sup>

Admitting that, in its decision in *Tucci*, the court “misunderstood the First Amendment test for injunctive restrictions on speech, as we now know from *Madsen*,”<sup>533</sup> the court stated:

We know of nothing to suggest that injunctions restricting speech should be judged by a different standard under the state constitution than the First Amendment.

\* \* \*

The considerations relevant to determining the protection to be afforded speech in the present context are the same under both the federal and state constitutions. Accordingly, we conclude, as the Supreme Court has in *Madsen* and *Schenck*, that an injunction in these circumstances must burden no more speech than necessary to serve a significant government interest.<sup>534</sup>

The court then reaffirmed the settled rule that a trial court’s issuance of injunctive relief is reviewable for abuse of discretion,<sup>535</sup> observing that “[O]f course, a trial court has no discretion to grant injunctive relief violative of constitutional guarantees or without supporting evidence.”<sup>536</sup>

In *Ford Motor Co. v. Miles*,<sup>537</sup> the supreme court followed the standard stated in its decision in *Ruiz v. Conoco, Inc.*<sup>538</sup> and held that the reviewing court considering a complaint that the trial court erred in failing to grant a motion to transfer venue must review the entire record:

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528. *Operation Rescue*, 975 S.W.2d at 560.

529. *Id.* at 562 (quoting *Ex Parte Tucci*, 859 S.W.2d 1, 6 (Tex. 1993) (Doggett, J., plurality opinion)).

530. *See id.* at 557-60.

531. *See id.* at 558, n.41 (quoting *Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex. 1992) (“[A]rticle one, section eight of the Texas Constitution provides greater rights of free expression than its federal equivalent.”) and *Ex Parte Tucci*, 859 S.W.2d at 5 (Doggett, J., plurality opinion) (quoting *Davenport*, 834 S.W.2d at 62) (Gonzalez, J., concurring) (“[T]he free speech guarantees of the Texas Constitution are greater than the guarantees provided by the First Amendment.”)).

532. *See id.* at 558.

533. *Id.*

534. *Id.* at 560.

535. *See id.* (citing *Clark v. Salinas*, 628 S.W.2d 51, 51 (Tex. 1982) (per curiam); *Big Three Indus., Inc. v. Railroad Comm’n*, 618 S.W.2d 543, 548-49 (Tex. 1981); and *Repka v. American Nat’l Ins. Co.*, 143 Tex. 542, 186 S.W.2d 977, 981 (1945)).

536. *Id.* (footnotes omitted).

537. 967 S.W.2d 377 (Tex. 1998).

538. 868 S.W.2d 752 (Tex. 1993).

If there is any probative evidence in the entire record that Ford [the defendant] maintained an agency or had a representative in Rusk County, even if the preponderance of the evidence is to the contrary, we must defer to the trial court's determination that venue was proper in the county of suit. If there is no such evidence, venue did not lie in Rusk County, and the case must be transferred to Dallas County where it is undisputed that venue is proper.<sup>539</sup>

In *Mayhew v. Town of Sunnyvale*,<sup>540</sup> an action by landowners challenging the town's denial of their application for planned development of their property as an unconstitutional taking, the supreme court followed the standards of review from its prior decisions on ripeness and state and federal constitutional claims in finding the claims ripe for review but affirming the court of appeals' take nothing judgment against the landowners.<sup>541</sup> The supreme court held as an initial matter that ripeness, which is an element of subject matter jurisdiction, is "a legal question subject to de novo review that a court can raise sua sponte."<sup>542</sup>

After determining that the landowners' claims against the town were ripe, the supreme court considered the effect on appeal of the trial court's findings of fact and conclusions of law, holding that "the ultimate question of whether a zoning ordinance constitutes a compensable taking or violates due process or equal protection is a question of law, not a question of fact."<sup>543</sup> Accordingly, the reviewing court must "consider all of the surrounding circumstances"<sup>544</sup> and "depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property"<sup>545</sup> even though "the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law"<sup>546</sup> under both state and federal law.

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539. *Miles*, 967 S.W.2d at 380 (citing *Ruiz*, 868 S.W.2d at 758) (citations omitted).

540. 964 S.W.2d 922 (Tex. 1998), *petition for cert. filed*, 67 U.S.L.W. 3149 (U.S. Aug. 6, 1998) (No. 98-249).

541. *See Mayhew*, 964 S.W.2d at 925. The trial court determined that the landowners' case was ripe for adjudication and that the landowners were entitled to judgment on their procedural and substantive due process and equal protection claims under the federal and state constitutions, rendering a money judgment of over \$8.5 million for the landowners. *Id.* at 927-28. The court of appeals reversed the judgment and dismissed the landowners' claims, holding that none of the claims was ripe for review. *Town of Sunnyvale v. Mayhew*, 905 S.W.2d 234 (Tex. App.—Dallas 1994). In a supplemental opinion, the court of appeals addressed the landowners' claims in light of the supreme court's decision in *Taub v. City of Deer Park*, 882 S.W.2d 824 (Tex. 1994), *cert. denied*, 513 U.S. 1112 (1995) and concluded that, even if the claims were ripe, the evidence was factually insufficient to support the trial court's findings. 905 S.W.2d at 259-68.

542. *Mayhew*, 964 S.W.2d at 928 (citing, *inter alia*, *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444-45 (Tex. 1993)).

543. *Id.* at 932-33 (citing *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984); *Hunt v. City of San Antonio*, 462 S.W.2d 536, 539 (Tex. 1971); and *DuPuy v. City of Waco*, 396 S.W.2d 103, 110 (Tex. 1965)).

544. *Id.* at 933 (citing *City of College Station*, 680 S.W.2d at 804; *Hunt*, 462 S.W.2d at 539; *City of Bellaire v. Lamkin*, 159 Tex. 141, 317 S.W.2d 43, 45 (1958); and *City of Waxahachie v. Watkins*, 154 Tex. 206, 275 S.W.2d 477, 481 (1955)).

545. *Id.* (citing *Republican Party v. Dietz*, 940 S.W.2d 86, 91 (Tex. 1997)).

546. *Id.*, n. 3 (citing *United States v. Causby*, 328 U.S. 256, 259 (1946)).

The application of a general zoning law to a particular property constitutes a regulatory taking if “the ordinance ‘does not substantially advance legitimate state interests’ or it denies an owner all ‘economically viable use of his land.’”<sup>547</sup> The supreme court also held that a compensable regulatory taking can occur when “governmental agencies impose restrictions that either (1) deny landowners of [sic] all economically viable use of their property, or (2) unreasonably interfere with landowners’ rights to use and enjoy their property.”<sup>548</sup> “A restriction denies the landowner all economically viable use of the property or totally destroys the value of the property if the restriction renders the property valueless.”<sup>549</sup>

In contrast, the determination of whether the government has unreasonably interfered with a landowner’s right to use and enjoy property requires consideration of two factors: “the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations.”<sup>550</sup> In determining the economic impact of a regulation, the reviewing court “merely compares the value that has been taken from the property with the value that remains in the property,”<sup>551</sup> and consideration is not usually given to the “loss of anticipated gains or future profits.”<sup>552</sup> In determining the investment-backed expectation of the landowner, the court must examine the “existing and permitted uses of the property,”<sup>553</sup> which “constitute the ‘primary expectation’ of the landowner that is affected by regulation.”<sup>554</sup> The court should also consider “knowledge of existing zoning . . . in determining whether the regulation interferes with investment-backed expectations.”<sup>555</sup>

The standard of review for substantive due process challenges is deferential, and a court should not set aside a zoning determination for a substantive due process violation “unless the action ‘has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.’”<sup>556</sup> The zoning decision must be upheld if it is “at least fairly debatable that the decision was rationally related to legitimate government interests.”<sup>557</sup>

The standard of appellate consideration of whether a zoning decision constitutes an “as-applied” equal protection violation is whether “the

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547. *Id.* (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

548. *Id.* at 935 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-19 & n. 8 (1992)).

549. *Id.*

550. *Id.* (citing *Lucas*, 505 U.S. at 1019 n. 8; and *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

551. *Id.* at 936 (citing *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987)).

552. *Id.* (citing *Andrus v. Allard*, 444 U.S. 51, 66 (1979)).

553. *Id.*

554. *Id.* (quoting *Penn Central*, 438 U.S. at 136).

555. *Id.* (citing *Pompa Constr. Corp. v. City of Saratoga Springs*, 706 F.2d 418, 424-25 (2d Cir. 1983)).

556. *Id.* at 938 (quoting *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928)).

557. *Id.* (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981)).



government treat[s] the claimant different[ly] from other similarly-situated landowners without any reasonable basis.”<sup>558</sup> Unless the ordinance discriminates against a suspect class, it must only be “rationally related to a legitimate state interest to survive an equal protection challenge.”<sup>559</sup>

The standard of review for procedural due process takings claims requires only that, “[i]f an individual is deprived of a property right, the government must afford an appropriate and meaningful opportunity to be heard to comport with procedural due process.”<sup>560</sup>

#### XIV. DISPOSITION ON APPEAL

A court of appeals may not render judgment on liability in a summary judgment proceeding unless both parties have sought final relief on the claim in cross motions for summary judgment.<sup>561</sup> Specifically, in *CU Lloyd's v. Feldman*, an insurance coverage dispute, Lloyd's, an insurer, moved for final summary judgment on Feldman's, an alleged insured, breach of contract claims, claiming it had no duty to defend because Feldman was not an insured under the policy.<sup>562</sup> In response, Feldman moved for partial summary judgment on the issues of the existence and breach of the duty to defend.<sup>563</sup> The trial court granted Lloyd's motion for final summary judgment and denied Feldman's motion for partial summary judgment.<sup>564</sup>

On appeal, the First Court of Appeals concluded that Feldman was an insured under the policy, and that Lloyd's therefore owed Feldman a duty to defend.<sup>565</sup> Accordingly, the court of appeals reversed the trial court's grant of summary judgment in favor of Lloyd's, and then, after determining Lloyd's had breached its duty to defend, rendered judgment in favor of Feldman.<sup>566</sup>

The supreme court reversed. Recognizing that, when considering cross motions for summary judgment, “a court of appeals may reverse and render the judgment that the trial court should have rendered,”<sup>567</sup> the supreme court nonetheless held that, “before a court of appeals may reverse summary judgment for one party and render judgment for the other party, both parties must ordinarily have sought final judgment relief in

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558. *Id.* at 939 (citing *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir.), *cert. denied*, 502 U.S. 810 (1991)).

559. *Id.* (citing *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993); and *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991)).

560. *Id.* (citing *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542 (1985); and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)).

561. *See* *CU Lloyd's v. Feldman*, 977 S.W.2d 568, 569 (Tex. 1998) (per curiam).

562. *See id.* at 568.

563. *See id.* at 568-69.

564. *See id.* at 569.

565. *See id.*

566. *See id.*

567. *Id.*

their cross motions for summary judgment.”<sup>568</sup>

## XV. TRANSFERRED APPEALS

Under section 73.001 of the Texas Government Code, “[t]he supreme court may order cases transferred from one court of appeals to another at any time that, in the opinion of the supreme court, there is good cause for the transfer.”<sup>569</sup> When a case is transferred from one court of appeals to another, is the transferee court required to follow the holdings of the court in which district the appeal arose? This question was posed to the Texarkana Court of Appeals in *Perez v. Murff*,<sup>570</sup> an appeal that was transferred from the Fort Worth Court of Appeals to the Texarkana court.<sup>571</sup> Rejecting this proposition, the Texarkana court stated:

The theory of our law is that the State of Texas has but one law on any given subject, and that the law is as proclaimed by the courts of appeals and finally, in civil cases, by the Texas Supreme Court.

This theory acknowledges that there may be differences of opinion among the courts of appeals as to what that law is. The remedy for such conflicts or errors is an appeal to the Texas Supreme Court.<sup>572</sup>

The court explained that conflicts of law rules make sense when applied to separate sovereigns because, in those instances, there really can be conflicts in the law from one sovereign state to the other.<sup>573</sup> “Where, however, there is only one sovereign,” the court reasoned,

a court of appeals’ duty is to decide and apply the law of that sovereign, not to ascertain the law as stated in a given district, whether its own or the district from which a case has been transferred. The State of Texas consists of only one sovereign state, not fourteen.<sup>574</sup>

While acknowledging that Texas is a large and diverse state, and that cases are transferred from one district to another where the justices’ views of what the law of Texas is may differ from the justices of the court from which the case arose, the court concluded that “the answer to those difficulties lies in an appeal to the Texas Supreme Court, . . . rather than in an effort on our part to be parochial in our application of the law to the facts presented us.”<sup>575</sup> In sum, the Texarkana court held, if the conflict exists between its decision and the stare decisis of the Fort Worth court, “it is for the Texas Supreme Court to resolve.”<sup>576</sup>

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568. *Id.* The court acknowledged that the court of appeals could have properly rendered judgment on liability alone if the relief sought is a declaratory judgment. *See id.* In *Lloyd’s*, however, Feldman sought no declaratory relief and no evidence of damages was submitted or considered. *See id.*

569. TEX. GOV’T CODE ANN. § 73.001 (Vernon 1998).

570. 972 S.W.2d 78 (Tex. App.—Texarkana 1998, pet. denied).

571. *Id.* at 85-86 (on rehearing).

572. *Perez*, 972 S.W.2d at 85-86 (quoting *American Nat’l Ins. Co. v. International Bus. Machs. Corp.*, 933 S.W.2d 685, 688 (Tex. App.—San Antonio 1996, writ denied)). *See* TEX. GOV’T CODE ANN. § 22.001(a)(2)(6) (Vernon 1988).

573. *See id.* at 86.

574. *Id.*

575. *Id.* (citing *American Nat’l Ins. Co.*, 933 S.W.2d at 688).

576. *Id.*

