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## **Appellate Practice and Procedure**

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# APPELLATE PRACTICE AND PROCEDURE

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## I. INTRODUCTION

THIS *Annual Survey* period saw an uprising by several Texas courts of appeals against the “Mother Hubbard finality rule” of *Mafrige v. Ross*<sup>1</sup> and its progeny.<sup>2</sup> Calling the rule of *Mafrige* and *English*<sup>3</sup> “harsh” and “unfair,” one court of appeals enforced the rule but urged the Texas Supreme Court to reconsider the rule, and even recommended that parties to a summary judgment proceeding *never* use a Mother Hubbard clause.<sup>4</sup> Several courts found unique ways “around” the rule.<sup>5</sup> One of the more severe critics of the rule characterized it as a “benign growth [in *Mafrige*] allowing review of unripe claims on appeal” that “became a

1. 866 S.W.2d 590 (Tex. 1993).

2. See Harris County Flood Control Dist. v. Adam, 988 S.W.2d 423, 427 (Tex. App.—Houston [1st Dist.] 1999, no pet.); Lehmann v. Har-Con Corp., 988 S.W.2d 415 (Tex. App.—Houston [14th Dist.] 1999, no pet.); Midkiff v. Hancock East Texas Sanitation, Inc., 996 S.W.2d 414 (Tex. App.—Beaumont 1999, no pet. h.); Rodriguez v. NBC Bank, 5 S.W.3d 756 (Tex. App.—San Antonio 1999, no pet.).

3. English v. Union State Bank, 945 S.W.2d 810 (Tex. 1997).

4. See Lehmann, 988 S.W.2d at 418 (emphasis added).

5. See Midkiff, 996 S.W.2d 414; NBC Bank, 5 S.W.3d 756.

malignant cancer [in *English*] cutting off causes of action before trial.”<sup>6</sup> Given the pervasiveness of the complaints about *Mafrige* and *English* among the courts of appeals, perhaps the supreme court should, as suggested by one jurist, “lock Mother Hubbard in the cupboard and return to the rule . . . that a judgment is final and appealable only if it expressly disposes of all parties and all claims in the case.”<sup>7</sup>

In the mandamus arena, the supreme court continued to apply the “exceptional circumstances” standard developed in past years,<sup>8</sup> but a rising conflict apparently exists among the current members of the court over when to apply the standard. Indeed, the court’s decision in *In re Masonite*<sup>9</sup> highlighted this conflict. In *Masonite*, the court found exceptional circumstances and granted mandamus relief from a trial court’s incidental venue ruling to avoid wasting judicial resources.<sup>10</sup> Significantly, four justices dissented in *Masonite*, complaining that mandamus jurisdiction should not extend to such incidental venue rulings. Since one justice did not participate in the decision, the future application of the “exceptional circumstances” standard is uncertain.

## II. APPELLATE REVIEW BEFORE FINAL JUDGMENT

### A. MANDAMUS

#### 1. *Mandamus Relief Available: Exceptional Circumstances*

In recent years, the court has granted mandamus relief based on “exceptional” or “unique” circumstances even where an appellate remedy may normally be available.<sup>11</sup> In *Masonite*, a narrow majority of the court found exceptional circumstances warranting mandamus relief from a trial court order that improperly and *sua sponte* transferred venue of non-residents to sixteen different counties.<sup>12</sup>

In *Masonite*, the plaintiffs conceded that their choice of venue for the non-residents was not proper. Because plaintiffs’ first choice of venue was improper, the trial court had to “transfer venue to the county specified in the defendant’s motion to transfer venue, provided that the defendant ha[d] requested transfer to another county of proper venue.”<sup>13</sup> *Masonite* had requested such a transfer. Had the trial court transferred venue to Dallas, as *Masonite* requested, the non-resident plaintiffs’ claims could have been resolved in a single lawsuit. Instead, the trial court, on its own initiative, transferred venue for the non-resident plaintiffs to each

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6. *Adam*, 988 S.W.2d at 427-48 (Taft, J., concurring).

7. *Id.*

8. *See, e.g.*, *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996) (orig. proceeding); *Tilton v. Marshall*, 925 S.W.2d 672, 681-82 (Tex. 1996) (orig. proceeding).

9. 997 S.W.2d 194 (Tex. 1999) (orig. proceeding).

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

11. *See e.g.*, Alan Wright et al., *Appellate Practice and Procedure*, 50 SMU L. REV. 899, 903-10 (1997).

12. *See Masonite*, 997 S.W.2d at 198-99.

13. *Id.* at 197.

of their respective counties of residence, resulting in sixteen separate trials.

The court acknowledged that “venue determinations as a rule are not reviewable by mandamus” and rejected Masonite’s efforts to characterize the trial court’s improper transfer of venue as void.<sup>14</sup> Nonetheless, the majority found that “exceptional circumstances” justified mandamus relief, basing its decision on the tremendous waste of judicial resources, which would result from sixteen separate trials that would have to be conducted with built-in reversible error.<sup>15</sup> The court noted that “[a]ppeal may be adequate for a particular party, but it is no remedy at all for the irreversible waste of judicial and public resources that would be required here if mandamus does not issue.”<sup>16</sup>

In the dissent, Justice Baker, joined by Chief Justice Phillips, and Justices O’Neill and Gonzales, strongly criticized the majority for rejecting “precedent on this specific issue, circumvent[ing] public policy, retreat[ing] to where the law was before *Walker*, and reinstat[ing] a principle of law *Walker* specifically disapproved.”<sup>17</sup> The dissent warned that by granting mandamus relief in this case the court had eviscerated the standards set forth in *Walker* in favor of granting mandamus relief “in each case where reversible error exists, because doing so would certainly preserve judicial and public resources.”<sup>18</sup> The dissent further cautioned that “mandamus should not issue simply because we disagree with the trial court’s ruling.”<sup>19</sup>

Notably, only three supreme court justices, including Justices Hecht, Owen and Abbott, joined Justice Enoch in the majority opinion, while four justices dissented. Justice Hankinson did not participate in the decision. Instead, the Honorable David Chew, Justice for the Eighth Court of Appeals District, sat by commission and joined the majority. As a result, it is unclear how the current court will apply the exceptional circumstances standard in the future.

## 2. *Mandamus Relief Available: Mandatory Venue*

In a case of first impression, the court recognized its original mandamus jurisdiction to enforce mandatory venue under section 15.0642 of the Texas Civil Practice and Remedies Code.<sup>20</sup> The court found in *Continental Airlines* that the mandatory venue provisions did not apply and that no abuse of discretion occurred in denying the motions to transfer

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14. *Id.* at 197-98.

15. *Id.* at 198.

16. *Id.* at 198.

17. *Masonite*, 997 S.W.2d at 200 (Baker, J., dissenting).

18. *Id.* at 200-01.

19. *Id.* at 202.

20. See *In re Continental Airlines, Inc.*, 988 S.W.2d 733, 735 (Tex. 1998) (orig. proceeding). Section 15.0642 provides in relevant part: “A party may apply for a writ of mandamus with an appellate court to enforce the mandatory venue provisions of this chapter.” TEX. CIV. P. & REM. CODE ANN. §15.0642 (Vernon Supp. 2000).

venue.<sup>21</sup> The court, therefore, did not consider "whether Section 15.0642 requires the Relators to establish any other of the usual prerequisites for mandamus review."<sup>22</sup> In *In re Missouri Pacific Railroad Co.*,<sup>23</sup> however, the court reached the question and held that "adequacy of an appellate remedy is not a requisite of a mandatory venue mandamus under section 15.0642."<sup>24</sup>

### 3. *Mandamus Relief Available: No Adequate Remedy by Appeal*

#### a. Orders on Motions to Disqualify Opposing Counsel

In several cases before the court during this *Annual Survey* period, the court granted mandamus to require disqualification of counsel. Consistent with its opinion in *National Medical Enterprises, Inc. v. Godbey*,<sup>25</sup> the supreme court held in *In re Epic Holdings, Inc.* that there was no adequate remedy by appeal for a trial court's failure to disqualify plaintiff's counsel, who had formerly represented the defendant in a substantially related case.<sup>26</sup> Plaintiff's counsel's actions violated rule 1.09 of the Texas Disciplinary Rules of Professional Conduct.<sup>27</sup>

Mandamus will also issue to correct a trial court's failure to disqualify plaintiff's counsel after the plaintiff hired a legal assistant who had formerly worked on the same case for the defendants.<sup>28</sup> In *American Home*, plaintiff's counsel hired Diana Palacios to serve as a freelance consultant/paralegal after confirming with her former employer (defense counsel) that Ms. Palacios had not previously worked on matters related to the Norplant litigation. Defendants subsequently sought to disqualify plaintiff's counsel because Ms. Palacios had in fact worked on the Norplant litigation and possessed confidential and privileged information about the defendants in that lawsuit. The court held that there was an irrebuttable presumption that Ms. Palacios, by working on the Norplant litigation for the defendants' counsel, obtained confidential information about the defendants and their defense.<sup>29</sup> The court concluded that plaintiff's counsel did not take "sufficient precautions . . . to guard against any disclosure of confidences,"<sup>30</sup> such as prohibiting Ms. Palacios from working on the Norplant litigation. The court, therefore, conditionally granted manda-

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21. See *Continental Airlines*, 988 S.W.2d at 734-35.

22. *Id.* at 737.

23. 998 S.W.2d 212 (Tex. 1999) (orig. proceeding).

24. *Id.* at 216.

25. 924 S.W.2d 123, 133 (Tex. 1996) (orig. proceeding).

26. 985 S.W.2d 41, 54 (Tex. 1998) (orig. proceeding).

27. See *id.* at 54.

28. See *In re American Home Prods. Corp.*, 985 S.W.2d 68, 82 (Tex. 1998) (orig. proceeding).

29. See *id.* at 75.

30. *Id.* (quoting *Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 467 (Tex. 1994) (orig. proceeding)). Sufficient precautions include (1) instructing the legal assistant "not to work on any matter on which the paralegal worked during the prior employment, or regarding which the paralegal has information relating to the former employer's representation," and (2) "[taking] other reasonable steps to ensure that the paralegal does not work in connection with matters on which the paralegal worked during the prior employment,

mus after finding that the trial court abused its discretion in denying the defendants' motion to disqualify plaintiff's counsel.<sup>31</sup>

In the dissent, Justice Spector complained that the court's decision to disqualify plaintiff's counsel was improper because "we cannot say that the facts and the law in this case permit [the trial court] to reasonably reach but one conclusion concerning Palacios' status."<sup>32</sup>

Mandamus will also issue where a firm is improvidently disqualified from representing a litigant.<sup>33</sup> Rule 4.02(a) of the Texas Disciplinary Rules of Professional Conduct prohibits an attorney from speaking with a person that the "lawyer knows to be represented by another lawyer . . . ."<sup>34</sup> In *Users System Services*, the court of appeals found that plaintiff's counsel violated rule 4.02(a) and disqualified her because she met with one of the defendants after that defendant stated in writing that he was no longer represented by counsel.<sup>35</sup> The supreme court disagreed, finding that plaintiff's counsel appropriately relied on the defendant's representation that he was no longer represented by counsel. Therefore, plaintiff's counsel did not violate any disciplinary rules.<sup>36</sup> The court also noted that defense counsel's seven month delay in seeking disqualification could be construed as waiver, but failed to address this issue because plaintiff's counsel did not argue waiver and defense counsel had some explanation for his delay.

Although mandamus will issue to correct a trial court's failure to disqualify counsel, a trial court does not abuse its discretion in refusing to disqualify counsel after counsel lists the opposing party's former consulting expert as a testifying expert.<sup>37</sup> The court noted in *American Home* that "if communications with an expert may be discovered during the course of litigation by opposing counsel, that information cannot be considered confidential, and the fact that it has been shared with opposing counsel cannot be the basis for disqualification."<sup>38</sup>

#### b. Failure to Rule on a No-Evidence Summary Judgment

It is well-settled in Texas jurisprudence that mandamus is not available from the denial of a motion for summary judgment, even under the new no evidence summary judgment rules.<sup>39</sup> While recognizing this rule of

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absent client consent.'" *Id.* (quoting *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 835 (Tex. 1994)).

31. *See id.* at 82. The court refused, however, to disqualify plaintiff's co-counsel because defendants had failed to prove the relationship between plaintiff's co-counsel and either Palacios or the disqualified counsel. *See id.*

32. *Id.* (citing *Walker v. Packer*, 827 S.W.2d 822, 840 (Tex. 1992)).

33. *See In re Users Sys. Servs., Inc.*, No. 98-0806, 1999 WL 417312 (Tex. June 24, 1999) (orig. proceeding).

34. TEX. DISC. R. PROF. CONDUCT 4.02(a).

35. *See Users*, 1999 WL 417312 at \*1-2.

36. *See id.* at \*3-5.

37. *See American Home*, 985 S.W.2d at 73-74.

38. *Id.* at 73.

39. *See Abor v. Black*, 695 S.W.2d 564, 566-67 (Tex. 1985); *In re Mission Consol. Indep. Sch. Dist.*, 990 S.W.2d 459, 460 (Tex. App.—Corpus Christi 1999, orig. proceeding).



law, the Texarkana Court of Appeals nonetheless found in *Mohawk* that the trial court had applied the wrong standard to the no evidence summary judgment. And “for the guidance of the trial court in ruling on future motions for summary judgment” (which the court urged the parties to file), the court “set out the proper application and interpretation of the no-evidence summary judgment rule in the context of this case.”<sup>40</sup> As a result, the court effectively granted the defendants the relief they requested without expressly exercising its mandamus jurisdiction.

Moreover, although mandamus relief is not available from the denial of summary judgment, mandamus will issue to order a trial court to rule on a no evidence motion for summary judgment “within a reasonable time.”<sup>41</sup> In *Mission*, the Corpus Christi Court of Appeals noted that the new no evidence summary judgment’s purpose of enabling “the movant to file the equivalent of a motion for directed verdict at the pretrial stage of the lawsuit” is thwarted “unless the trial court rules on the motion.”<sup>42</sup> Accordingly, the court concluded that the trial court’s failure to rule on a no evidence motion eight months after the motion was filed and seven months after the court heard the motion was unreasonable, especially where the plaintiff failed to respond to the motion.<sup>43</sup>

### c. Orders Requiring Production of Trade Secrets

Reaffirming its holding in *Walker v. Packer*,<sup>44</sup> the court concluded that a party has no adequate remedy by appeal for an order requiring the party to “produce privileged, trade secret information.”<sup>45</sup> Rule 507 of the Texas Rules of Evidence protects a party’s trade secrets from discovery.<sup>46</sup> In *Continental General Tire*, the court held that “when a party resisting discovery establishes that the requested information is a trade secret under Rule 507, the burden shifts to the requesting party to establish that the information is necessary for a fair adjudication of its claim or defense.”<sup>47</sup> Because the party seeking disclosure of Continental General Tire’s trade secrets did not prove necessity of disclosure of the privileged information, the trial court abused its discretion in ordering disclosure and mandamus was conditionally granted.<sup>48</sup>

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See also *In re Mohawk Rubber Co.*, 982 S.W.2d 494, 497 (Tex. App.—Texarkana 1998, orig. proceeding).

40. *Mohawk*, 982 S.W.2d at 497.

41. *Mission*, 990 S.W.2d at 461.

42. *Id.*

43. See *id.*

44. 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

45. *In re Continental Gen. Tire, Inc.*, 979 S.W.2d 609, 615 (Tex. 1998) (orig. proceeding).

46. Rule 507 provides: “A person has a privilege . . . to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person . . .” TEX. R. EVID. 507.

47. 979 S.W.2d at 610.

48. See *id.* at 615.

d. Orders Entered Without Jurisdiction

i. *Orders Entered after Plenary Power Expires*

Mandamus will also issue to correct a trial court order granting a new trial, entered fifteen days after the court's plenary power has expired, because there is no adequate remedy by appeal for "a subsequent retrial" over which the trial court has no jurisdiction.<sup>49</sup>

ii. *Orders Assuming Continuing and Exclusive Jurisdiction under the Texas Family Code*

The district courts in Bexar County operate under a centralized docket system that allows for "serial assignment of different judges to hear multiple matters in the same suit affecting the parent-child relationship."<sup>50</sup> The Texas Family Code requires that a single court maintain continuing, exclusive jurisdiction over suits affecting the parent-child relationship (SAPCR).<sup>51</sup> In *Garza*, the San Antonio Court of Appeals decided the question of whether the Family Code's requirement that a single court maintain continuing, exclusive jurisdiction over a SAPCR rendered an order signed by a judge from a non-SAPCR court void under Bexar County's centralized docket system.<sup>52</sup>

In *Garza*, Judge Specia assumed exclusive jurisdiction over a SAPCR after another judge had entered a final judgment in the case. On mandamus, relators complained that because Judge Specia was not the judge in the court where the final judgment was entered, he lacked authority under the Family Code to assume jurisdiction over the SAPCR post-judgment. The San Antonio Court of Appeals concluded that the rotating docket system in Bexar County complies with the Texas Constitution<sup>53</sup> and the Government Code<sup>54</sup> provisions permitting the presiding judge to

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49. See *In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998) (orig. proceeding) (per curiam). See *In re Rollins Leasing, Inc.*, 987 S.W.2d 633 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding).

50. *In re Garza*, 981 S.W.2d 438, 442 (Tex. App.—San Antonio 1998, orig. proceeding).

51. See TEX. FAM. CODE ANN. §155.001(a) (Vernon 1996 & Supp. 2000). Specifically, §155.001(a) provides in relevant part:

(a) Except as otherwise provided by this section, a court acquires continuing, exclusive jurisdiction over the matters provided for by this subtitle in connection with a child on the rendition of a final order . . . . (c) If a court of this state has acquired continuing, exclusive jurisdiction, no other court of this state has jurisdiction with regard to that child . . . .

*Id.*

52. See *Garza*, 981 S.W.2d at 438.

53. Article V, section 11 of the Texas Constitution provides in relevant part that "the District Judges may exchange districts or hold courts for each other when they may deem it expedient . . ." TEX. CONST. art. V, §11.

54. Section 24.139(c) of the Government Code gives the district courts in Bexar County concurrent jurisdiction. See TEX. GOV'T CODE ANN. § 24.139(c) (Vernon 1988 & Supp.). Section 74.094(a) provides:

A district . . . court judge may hear and determine a matter pending in any district . . . court in the county regardless of whether the matter is preliminary or final or whether there is a judgment or order in the matter. The judgment,

assign cases to available judges.<sup>55</sup> The court further held that Judge Specia was acting as judge for the court that entered the final judgment and that, therefore, he had authority to act under the Family Code.<sup>56</sup> Because Judge Specia had jurisdiction, mandamus would not issue.<sup>57</sup> Nonetheless, the San Antonio Court of Appeals expressed grave concern for the effect of the Bexar County rotating docket system on SAPCRs, stating that “[w]hile the Bexar County system appears to be quite efficient in moving cases, it has not adapted to the spirit of the Family Code’s exclusive jurisdiction statute and the public policy purposes intended to be served by it.”<sup>58</sup>

iii. *Failure to Recognize Jurisdiction to Grant a New Trial*

Mandamus will also issue where a trial court refuses to grant a new trial solely because the court incorrectly believes that its plenary jurisdiction has expired.<sup>59</sup> In *Barber*, the parties submitted an agreed order to set aside a default judgment and grant a new trial. After granting the new trial, the original judge suffered a heart attack and was replaced as presiding judge. A dispute arose as to whether the original judge ever signed the order granting a new trial. The successor judge concluded that the order granting a new trial had not been signed and that he did not have jurisdiction to grant a new trial because plenary power had expired.

Finding that a rubber-stamped signature on a file-stamped copy of the order granting a new trial, entered by the trial court’s clerk at the direction of the trial court, constitutes a “signature” by the trial court, the Texas Supreme Court held that the trial court abused its discretion in finding that the judge did not timely sign the agreed order.<sup>60</sup> Moreover, the court noted that although the signed copy was not placed in the court’s file, the date of signing rather than the date of entry controls whether the order is timely signed.<sup>61</sup>

The court recognized that the proper means of attacking a default judgment after plenary power expires by restricted appeal or equitable bill of review. But, the court acknowledged that the relator in this case did not seek to overturn a default judgment: they had already accomplished that task. Rather, relators challenged the “trial court’s refusal to acknowledge the validity of its own order.”<sup>62</sup> The court held that “[u]nder these unique circumstances, because [relators] had no other means of obtaining

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order, or action is valid and binding as if the case were pending in the court of the judge who acts in the matter.

*Id.*

55. See *Garza*, 981 S.W.2d at 442.

56. See *id.*

57. See *id.*

58. See *id.*

59. See *In re Barber*, 982 S.W.2d 364 (Tex. 1998) (orig. proceeding).

60. See *id.* at 367.

61. See *id.*

62. *Id.* at 368.

this specific review, mandamus relief is appropriate.”<sup>63</sup>

In the dissent, Justice Baker, joined by Justice Spector, complained that the court had ignored the disputed facts regarding whether the trial court had authorized its signature on the order granting a new trial and warned that the court was substituting its own judgment for that of the trial court.<sup>64</sup>

e. Orders Denying Arbitration

Consistent with a decision reviewed in last year's *Annual Survey*,<sup>65</sup> the Texas Supreme Court reconfirmed that there is no adequate remedy by appeal for the improper denial of a motion to compel arbitration under the Federal Arbitration Act.<sup>66</sup>

f. Orders to Reinstate

The Corpus Christi Court of Appeals granted mandamus relief to correct a trial court's void orders that reinstated a case against a non-suited defendant and sanctioned that defendant for discovery abuses.<sup>67</sup> In *Simon*, the plaintiffs dropped certain defendants from the pleadings based on an affidavit from defendants' counsel that they did not own any part of the property at issue in the case. Six months later and more than thirty days after the final judgment was signed, plaintiffs sought to reinstate their case against the defendants after learning that the non-suited defendants may have lied about their interests in the property. The trial court granted the motion to reinstate.

On mandamus, the court of appeals found that the amended pleading omitting the non-suited defendant “eliminated the need for an order dismissing [the defendant] pursuant to the nonsuit.”<sup>68</sup> Accordingly, the court concluded that a motion to reinstate filed six months after the nonsuit was untimely.<sup>69</sup> As a result, the trial court's orders reinstating the non-suited defendant and imposing sanctions were entered without jurisdiction and were, therefore, void.<sup>70</sup> The court rejected claims that mandamus relief should be denied because the non-suited defendant committed fraud in inducing the plaintiffs to dismiss it from the lawsuit because the allegations of fraud were disputed and the subject of appeal. The court also rejected plaintiffs' claims of laches, even though the defendants waited a year and a half after the reinstatement to file the mandamus petition, because the plaintiffs had failed to show “any detrimental

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63. *Id.*

64. *See id.* at 369-70.

65. *See* Alan Wright et al., *Appellate Practice and Procedure*, 52 SMU L. REV. 717, 723-24 (1999).

66. *See* *Okayed Mobile Homes, Inc.*, 987 S.W.2d 571, 575 (Tex. 1999) (orig. proceeding) (per curiam).

67. *See In re Simon Prop. Group (Delaware), Inc.*, 985 S.W.2d 212 (Tex. App.—Corpus Christi 1999, orig. proceeding).

68. *Id.*

69. *See id.*

70. *See id.* at 215.

good faith change in their position resulting from the delay.”<sup>71</sup>

g. Orders Overruling Objections to Visiting Judges

As in the previous *Annual Survey* periods,<sup>72</sup> the court continues to resolve by mandamus the scope of a party's right to object to a visiting judge under section 74.053(b) of the Texas Government Code.<sup>73</sup> In *Perritt*, the court decided whether chapter 74 of the Government Code gives a party the right to object to the assignment under rule 18a of the Texas Rules of Civil Procedure to the assignment of a judge to hear a recusal motion. The court concluded that even though the presiding judge's procedure for assigning a judge to hear a recusal motion derives from Texas Rule of Civil Procedure 18a (which does not address objections to the assigned judge), the authority to assign judges to hear such motions is derived from chapter 74 of the Government Code.<sup>74</sup> Accordingly, the Texas Supreme Court held that the trial judge abused its discretion in overruling the timely objection to his assignment to hear the recusal motion and conditionally granted mandamus.<sup>75</sup>

h. Case Management and Discovery Orders

Quoting *In re American Optical Corp.*,<sup>76</sup> the court acknowledged in *In re Alford Chevrolet-Geo*,<sup>77</sup> that “an order compelling discovery that is well outside the proper bounds is reviewable by mandamus.”<sup>78</sup> But, the court found that the trial court's failure to issue a protective order and discovery plan that limited pre-class certification discovery to information necessary for the class certification issue was not an abuse of discretion because the defendants failed to show that the requested discovery raised issues that were clearly segregable from the question of class certification.<sup>79</sup> In the dissent, Justice Hecht, joined by Justice Owen, warned that the majority opinion in *Alford* improperly placed the burden on the defendant to identify what discovery is appropriate in the class certification phase of the proceedings.<sup>80</sup>

In *In re Mohawk Rubber Co.*,<sup>81</sup> the Texarkana Court of Appeals granted mandamus relief directing “the trial court to issue a new case

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71. *Id.* at 216. Mandamus will also issue to correct a county court judge's reinstatement of a justice court's judgment from which defendants had appealed to the county court. See *In re Garza*, 990 S.W.2d 372, 374 (Tex. App.—Corpus Christi 1999, orig. proceeding).

72. See Wright, *supra* note 65, at 725-26.

73. See *In re Perritt*, 992 S.W.2d 444 (Tex. 1999) (orig. proceeding) (per curiam).

74. See *id.* at 447.

75. See *id.*

76. 988 S.W.2d 711 (Tex. 1998) (orig. proceeding).

77. 997 S.W.2d 173 (Tex. 1999) (orig. proceeding).

78. *Id.* at 176 (quoting *In re American Optical Corp.*, 988 S.W.2d at 713).

79. See *id.* at 185.

80. See *id.* at 190 (Hecht, J., concurring in part and dissenting in part) (“This Court has never before today assigned the responsibility for determining appropriate discovery to a defendant filing a motion for protection.”).

81. 982 S.W.2d 494 (Tex. App.—Texarkana 1998, orig. proceeding).

management order” because its initial order arbitrarily lengthened “the time for a group of plaintiffs to file a discovery response on the issue of causation without a showing of good cause.”<sup>82</sup>

i. Abatement of Proceedings

In *Vanguard Underwriters Insurance Co. v. Smith*,<sup>83</sup> the Amarillo Court of Appeals granted mandamus relief to enforce a contractual agreement to submit an insurance claim for appraisal and to abate the lawsuit pending the appraisal.<sup>84</sup>

j. Elections

Although appellate courts lack mandamus jurisdiction over county officials,<sup>85</sup> the legislature has expressly extended mandamus jurisdiction “to resolve election questions.”<sup>86</sup> Nonetheless, mandamus will not issue to require the commissioners court to place a proposal on the election ballot where the proposal arguably exceeds its statutory limits.<sup>87</sup>

k. Orders Denying Legislative Continuance

Section 30.003 of the Texas Civil Practice and Remedies Code mandates that a court continue a case “in which a party applying for the continuance or the attorney for that party applying for the continuance or the attorney for that party is a member of the legislature and will be or is attending a legislative session” within thirty days.<sup>88</sup> Although courts have applied a narrow due process exception to section 30.003 where the continuance will cause irreparable harm to the opposing party, this exception should be applied only in narrow instances.<sup>89</sup> Thus, even where a party may have hired an attorney who is also a legislator for the purpose of obtaining a continuance, mandamus will issue to correct a trial court’s denial of the application for the mandatory legislative continuance.<sup>90</sup>

4. *Mandamus Relief Unavailable: Adequate Remedy by Appeal*

a. Orders Denying Summary Judgment

As a general rule, mandamus relief is not available for the denial of a motion for summary judgment.<sup>91</sup> In *In re Lee*,<sup>92</sup> the relator attempted to circumvent this general rule by claiming an absolute privilege from suit

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82. *Id.* at 499.

83. 999 S.W.2d 448 (Tex. App.—Amarillo 1999, orig. proceeding).

84. *See id.*

85. *See* TEX. GOV’T CODE ANN. §22.221(b) (Vernon Supp. 1998 & Supp. 2000).

86. *In re Bailey*, 975 S.W.2d 430, 432 (Tex. App.—Waco 1998, orig. proceeding).

87. *See id.*

88. TEX. CIV. PRAC. & REM. CODE ANN. § 30.003 (Vernon 1997).

89. *See In re Star Produce Co.*, 988 S.W.2d 808, 811-12 (Tex. App.—San Antonio 1999, orig. proceeding).

90. *See id.* at 811-12.

91. *See Abor v. Black*, 695 S.W.2d 564, 566 (Tex. 1985).

92. 995 S.W.2d 774 (Tex. App.—San Antonio 1999, orig. proceeding).

warranting immediate mandamus relief. The San Antonio Court of Appeals rejected this argument, finding that the attorneys' privilege from defamation claims for statements made during the representation of a client is in the nature of an affirmative defense and does not serve as an absolute privilege against suit.<sup>93</sup> Moreover, the court noted that in cases of absolute privilege from suit, the legislature has provided for interlocutory appeal, not mandamus.<sup>94</sup> As a result, mandamus will not issue from the denial of a motion for summary judgment.

b. Orders Sustaining a Contest to an Affidavit of Indigence

Mandamus is no longer the appropriate means of challenging a trial court's order sustaining a contest to an affidavit of indigence.<sup>95</sup> Prior to 1997, the Texas Supreme Court consistently held that because a party had to pay appellate costs in advance to invoke the appellate court's jurisdiction, an indigent party had no adequate remedy by appeal from an order sustaining a contest to the affidavit of indigence.<sup>96</sup> In *Arroyo*, however, the supreme court held that the 1997 amendments to the Texas Rules of Appellate Procedure created an adequate remedy by appeal for the indigent party.<sup>97</sup> Specifically, the court noted that Texas Rule of Appellate Procedure 25.1(a) provides for perfection of the appeal with a simple filing of notice of appeal; no cost bond is required.<sup>98</sup> An indigent party cannot afford to pay the costs of preparation of the clerk's record and reporter's record, and the rules provide that the appeal may be dismissed if a party required to arrange for payment and preparation of the appellate record fails to do so.<sup>99</sup> Nonetheless the court noted that (consistent with previous mandamus practice) the court of appeals "can and should, on motion or its own initiative, require the clerk and the court reporter under Rules 34.5(c)(1) and 34.6(d), respectively, to prepare and file the portions of the record necessary to review an order sustaining a contest to an affidavit of indigence."<sup>100</sup> If the court of appeals reverses the order sustaining a contest to an affidavit of indigence, the indigent appellant may "obtain a full record under Rules 34.5(c)(1) and 34.6(d)" and supple-

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93. See *id.* at 776.

94. Compare *In re Mohawk Rubber Co.*, 982 S.W.2d 494, 498 (Tex. App.—Texarkana 1998, orig. proceeding) (finding no mandamus jurisdiction over denial of motion for summary judgment but nonetheless reaching merits of trial court's ruling) and *In re Mission Consol. Indep. Sch. Dist.*, 990 S.W.2d 459 (Tex. App.—Corpus Christi 1999, orig. proceeding) (recognizing lack of jurisdiction over no evidence summary judgment but exercising mandamus jurisdiction over the trial court's failure to rule on summary judgment motion).

95. See *In re Arroyo*, 988 S.W.2d 737 (Tex. 1998) (orig. proceeding) (per curiam).

96. See, e.g., *In re Jones*, 966 S.W.2d 492, 493 (Tex. 1998) (per curiam).

97. See *Arroyo*, 988 S.W.2d at 739.

98. See also *In re Price*, 998 S.W.2d 897 (Tex. App.—Waco 1999, orig. proceeding) (finding adequate remedy by appeal for district court's denial of relator's petition for writ of mandamus from Justice of Peace court's refusal to permit appeal to district court without posting appeal bond).

99. See *Arroyo*, 988 S.W.2d at 738 (citing TEX. R. APP. P. 35.3; 37.3(b)).

100. *Arroyo*, 988 S.W.2d at 739.

ment the briefing under rule 38.7.<sup>101</sup>

c. Orders Denying Motion to Compel Privileged Documents

The Houston First District Court of Appeals denied mandamus relief from the denial of a motion to compel production of privileged documents because the relator failed to prove that exclusion of the requested evidence prohibited it from establishing its claim and that a trial would, therefore, waste judicial resources.<sup>102</sup>

5. *Mandamus Relief Unavailable: Non-Judicial Acts*

a. Acts by the Unauthorized Practice of Law Committee

The Texas Supreme Court does not have direct mandamus jurisdiction over the refusal by a member of the Unauthorized Practice of Law (UPL) Committee to produce information.<sup>103</sup> In *Nolo Press*, UPL subcommittee refused to produce certain information regarding its investigation of Nolo Press's publication of certain legal related software. Nolo Press filed a petition for writ of mandamus with the Texas Supreme Court seeking to compel the UPL Committee to produce certain information. The court held that it lacked mandamus jurisdiction over the UPL Committee.<sup>104</sup> Specifically, the court noted that the court's mandamus jurisdiction under article V, section 3 of the Texas Constitution did not apply unless "a lower court's action threatens to impair [the Court's] appellate jurisdiction or nullify the effect of our judgments."<sup>105</sup> The court further concluded that UPL Committee members did not fall "within the small circle [of officers of the state government] to which Section 22.002(a) [of the Texas Government Code] refers."<sup>106</sup> Finally, the court concluded that its inherent powers to regulate the bar were administrative rather than jurisdictional and such administrative powers "imply no mandamus jurisdiction."<sup>107</sup> Accordingly, mandamus relief was denied.<sup>108</sup>

b. Acts by the District Clerk

In *In re Simpson, Jr.*,<sup>109</sup> the Waco Court of Appeals held that it lacked jurisdiction over a writ of mandamus seeking to compel the district clerk to accept a motion for filing.<sup>110</sup> After reviewing section 22.221 of the Government Code, the court concluded that the "Government Code

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101. *Id.*

102. *See In re Kellogg Brown & Root*, 7 S.W.3d 655 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding).

103. *See In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 776 (Tex. 1999) (orig. proceeding).

104. *See id.* at 775-76.

105. *Id.* at 775.

106. *Id.* at 776.

107. *Id.*

108. *See id.*

109. 997 S.W.2d 939 (Tex. App.—Waco 1999, orig. proceeding).

110. *See id.*



does not confer mandamus jurisdiction over District Clerks upon the courts of appeals.”<sup>111</sup>

c. Acts by the City Attorney

The Houston First District Court of Appeals similarly denied a petition for writ of mandamus seeking to “compel the city attorney of Pasadena, Texas to comply with [a] request under the Texas Open Records Act”<sup>112</sup> because it does not have “original mandamus authority against a city attorney,” or “original mandamus jurisdiction under the Open Records Act.”<sup>113</sup>

6. *Mandamus Practice and Procedure*

a. Standard of Review

In the mandamus context, the trial court’s actions are traditionally reviewable only for an abuse of discretion. Under this standard, the court does not engage in a factual sufficiency review. In *Epic*,<sup>114</sup> the Texas Supreme Court examined whether former members of a law firm who were working for the firm at the time it represented Epic Holdings, Inc. in its formation were disqualified from representing an Epic employee against Epic’s CEO. On the tenth day of trial, defendants reurged their motion to disqualify after plaintiff’s counsel stated that he intended to make an issue at trial of the former law firm’s representation of EPIC’s directors. Based on this statement by plaintiff’s counsel, the court found that the former law firm had represented EPIC and the individual directors, that the present lawsuit was adverse to that previous representation, and that the former representation was substantially related to the matters in the present lawsuit.<sup>115</sup> The court further concluded that because plaintiff’s counsel did not place the question of the former law firm’s representation of EPIC and the directors at issue until trial, defendants had not waived their right to seek disqualification by filing their motion to disqualify during trial.<sup>116</sup>

In the dissent, Justice Baker, joined by Justices Gonzalez and Spector, complained that the majority had improperly engaged in a factual sufficiency review of the evidence in overruling the trial court’s finding of waiver of the disqualification issue. Justices Enoch and Hankinson did not participate in the opinion, leaving, therefore, only four of the current justices in accord with the opinion and three dissenting from it.

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111. *Id.*

112. TEX. GOV’T CODE ANN. § 552.021 (Vernon Supp. 1999).

113. *In re Turner*, 998 S.W.2d 935 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding) (per curiam).

114. 985 S.W.2d 41 (Tex. 1998).

115. *See id.* at 50-52.

116. *See id.* at 52-53.

b. Alternative Administrative Relief

In *Nolo Press*,<sup>117</sup> relators requested that in the alternative to mandamus relief the court consider relators' petition as an administrative matter and either (1) direct the UPL Committee to produce the requested information or (2) declare that the court's 1986 order regarding the authority of the UPL Committee to maintain the confidentiality of certain information confidential does not preclude production of information to relators. The court held that it lacked mandamus jurisdiction over relators' petition and denied mandamus relief. But it accepted relators' invitation to clarify its 1986 order regarding retention of confidential information by the UPL Committee, analyzed the effect of the 1986 order in light of the court's recent promulgation of rule 12 of the Rules of Judicial Administration governing the confidentiality of all judicial records, and vacated its 1986 order.<sup>118</sup> In a concurring opinion, Justice Enoch warned that vacating the court's 1986 order in response to relators' mandamus petition was premature because it (1) allowed relators to "pretermitt a plaintiff's suit and the orderly application of the discovery rules through a mandamus action" and (2) altered an administrative rule "without any comment on the proposed changes from the UPL Committee members or any other interested persons."<sup>119</sup>

B. INTERLOCUTORY APPEALS

1. *Appeal From Order on Motion to Transfer Venue and/or Order Granting/Denying Joinder or Intervention When Venue Is a Factor*

In *Surgitek v. Abel*,<sup>120</sup> the Texas Supreme Court held that a court of appeals may exercise jurisdiction under section 15.003(c)<sup>121</sup> to review a venue transfer order that necessarily rested on the trial court's determination of the propriety of joinder under section 15.003(a). Ordinarily, a court of appeals may not immediately review a trial court order transferring venue. Section 15.003(c), however, allows any party aggrieved by a trial court's determination of a section 15.003(a) joinder issue to contest the decision by an interlocutory appeal.

An issue arises when the order appealed is a venue transfer order following a motion to transfer venue. The Texarkana Court of Appeals

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117. *In re Nolo Press/Folk Law, Inc.* 991 S.W.2d 768 (Tex. 1999).

118. *See id.* at 778-79, 783-85.

119. *Id.* at 782.

120. 997 S.W.2d 598 (Tex. 1999).

121. Section 15.003(c) provides:

Any person seeking intervention or joinder, who is unable to independently establish proper venue, or a party opposing intervention or joinder of such a person may contest the decision of the trial court allowing or denying intervention or joinder by taking an interlocutory appeal to the court of appeals district in which the trial court is located under the procedures established for interlocutory appeals.

TEX. CIV. PRAC. & REM. CODE § 15.003(c) (Vernon Supp. 2000).

adopted a formalistic approach in *Shubert v. J.C. Penney Co.* and held that, even if the lower court's decision to transfer venue was based on the propriety of the plaintiffs' joinder, a venue order is not appealable.<sup>122</sup> The supreme court disapproved of this approach because it "would allow defendants to dictate at the outset, simply by how they style their request for relief, whether a plaintiff could pursue an interlocutory appeal."<sup>123</sup> Reasoning that "[w]e should not be so constrained by the form or caption of a pleading," the court held that "[b]ecause the trial court's venue transfer order in this case was predicated on its decision about the propriety of the plaintiff's joinder under section 15.003(a), the court of appeals had jurisdiction over the plaintiff's appeal."<sup>124</sup>

## 2. *Appeal From Order Allowing or Denying Intervention*

During the *Annual Survey* period, two courts of appeals have interpreted section 15.003(c)<sup>125</sup> to permit interlocutory appeal from a decision allowing or denying joinder only when a plaintiff is unable to independently establish proper venue.<sup>126</sup> If a plaintiff establishes venue independently from section 15.003(a), no interlocutory appeal is permitted under section 15.003(c). For example, in *American Home Products Corp. v. Clark*, the district court's order denying the defendants' motions challenging joinder and venue failed to state whether the plaintiffs had independently established proper venue under section 15.002 or were properly joined under section 15.003. Accordingly, the court of appeals abated the cause and directed the lower court to prepare a revised order specifying the basis for its decision so that it could evaluate the plaintiff's jurisdictional challenge.<sup>127</sup> The revised order stated that the plaintiffs had independently established venue under sections 15.002(a)(2) and 15.005 of the Texas Civil Practice and Remedies Code. Accordingly, the court held that "[b]ecause the court found that each plaintiff had independently established venue and because the court did not reach the joinder question, section 15.003(c) cannot be the jurisdictional basis for this appeal."<sup>128</sup>

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122. See 956 S.W.2d 634, 636 (Tex. App.—Texarkana 1997, pet. denied).

123. *Surgitek*, 997 S.W.2d at 601.

124. *Id.*

125. TEX. CIV. PRAC. & REM. CODE § 15.003(c) (Vernon Supp. 2000).

126. See *American Home Prods. Corp. v. Clark*, 999 S.W.2d 908, 910 (Tex. App.—Waco 1999, pet. filed); *Bristol-Myers Squibb Co. v. Goldston*, 983 S.W.2d 369, 374 (Tex. App.—Fort Worth 1998, pet. dismissed by agr.).

127. See *American Home*, 999 S.W.2d at 909.

128. *Id.* at 910; see also *Bristol-Myers*, 983 S.W.2d at 374 ("Section 15.003(c) does not provide for an interlocutory appeal from the trial court's determination that a person seeking intervention or joinder has independently established proper venue."). The dissent in *American Home* would not have dismissed the appeal because the defendant asked for and was denied relief under section 15.003. See *American Home*, 999 S.W.2d at 911.

### 3. Appeal From Order Granting or Refusing a Temporary Injunction

As confirmed by the Austin Court of Appeals in *Qwest Communications International v. AT&T Corp.* “[a]n appeal cannot be taken from an otherwise non-appealable order by seeking to disguise it as a temporary injunction.”<sup>129</sup> The use of words such as “desist and refrain” does not compel a finding that the order is a temporary injunction.<sup>130</sup> Accordingly, because the order at issue in *Qwest* did not satisfy the traditional criteria for a temporary injunction, it was more properly characterized as an unappealable interlocutory order enforcing an agreement of compromise and settlement between the parties.<sup>131</sup>

Similarly, in *Bobbitt v. Cantu*, the Austin Court of Appeals held that a party does not make an otherwise unappealable interlocutory order reviewable by piggy-backing it onto an appeal of an order granting or refusing a temporary injunction.<sup>132</sup> The order in that case granted partial summary judgment for the appellee and temporarily enjoined the appellant from going onto the appellee’s property until after trial. Because the substance of appellant’s points of error attacked the grant of partial summary judgment and not the temporary injunction, the court held that the appellant had “attempt[ed] to appeal an otherwise unappealable order by joining it with an appeal of a temporary injunction” and, therefore, the issue would not be resolved until final judgment.<sup>133</sup>

### 4. Appeal From Order Denying a Governmental Unit’s Motion Challenging Subject Matter Jurisdiction

Section 51.014(a)(8) of the Civil Practice and Remedies Code permits an interlocutory appeal from the denial of a governmental unit’s plea to the jurisdiction challenging the court’s subject matter jurisdiction.<sup>134</sup> In *Harlandale Independent School District v. Hernandez*,<sup>135</sup> the San Antonio court of appeals exercised its appellate jurisdiction to review the denial of a school district’s motion to dismiss based on the plaintiff’s failure to comply with existing grievance procedure before filing a whistleblower action against the school district. The court reasoned that the denial of the interlocutory motion to dismiss was appealable under section

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129. 983 S.W.2d 885, 889 (Tex. App.—Austin 1999, pet. filed); see also *Elm Creek Villas Homeowner Ass’n, Inc. v. Beldon Roofing & Remodeling Co.*, 940 S.W.2d 150, 154 (Tex. App.—San Antonio 1996, no writ). See also TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4) (“A person may appeal from an interlocutory order of a district court . . . that . . . appoints a receiver or trustee.”).

130. See *Qwest*, 983 S.W.2d at 888.

131. See *id.* at 889.

132. See 992 S.W.2d 709, 712-13 (Tex. App.—Austin 1999, no pet.); see also *Browne v. Bear, Stearns & Co.*, 766 S.W.2d 823, 824 (Tex. App.—Dallas 1989, writ denied); *City of Arlington v. Texas Elec. Serv. Co.*, 540 S.W.2d 580, 582 (Tex. Civ. App.—Fort Worth 1976, writ ref’d n.r.e.) (citing *Hastings Oil Co. v. Texas Co.*, 234 S.W.2d 389 (Tex. 1950)).

133. *Id.* at 713.

134. See TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (Vernon Supp. 2000).

135. 994 S.W.2d 257 (Tex. App.—San Antonio 1999, no pet.).

51.014(a)(8) because the motion challenged to the court's subject matter jurisdiction.

#### 5. *Appeal From Order Denying Class Decertification*

In Texas, an interlocutory appeal is available from an order certifying or refusing to certify a class action.<sup>136</sup> If a party fails to appeal an original order of class certification, however, it may not thereafter seek immediate appellate review of subsequent orders overruling its motion for decertification and motion to withdraw the original order.<sup>137</sup> Moreover, although an order that fundamentally restructures a class can be appealed under section 51.014(a)(3),<sup>138</sup> an order granting partial summary judgment on liability cannot be said to fundamentally restructure a class when it neither changes the class members' ability to opt-out nor creates a conflict among class members.<sup>139</sup>

#### 6. *Appeal From Order Granting New Trial*

A trial court's order granting a new trial during the plenary period is not subject to review either by direct appeal from the order or from a final judgment after further proceedings in the trial court.<sup>140</sup> Likewise, a party is not entitled to interlocutory review of that order when the point is raised as a cross-appeal.<sup>141</sup>

#### 7. *Appeal From Order Denying Motion to Terminate Temporary Conservatorship*

The Texas Family Code permits the appeal of a "final order" in a suit affecting the parent-child relationship.<sup>142</sup> A final order is one that determines the rights of the parties and disposes of all the issues involved so that no further action will be necessary in order to settle and determine the case.<sup>143</sup> *In re N.J.G.* involved the appeal of an order denying a motion to terminate a temporary conservatorship of a child. Although neither party challenged the appellate court's jurisdiction, the San Antonio Court of Appeals held that because the trial court's order effectively continued the temporary appointment of a managing conservator and left open the question of permanent conservatorship, that order was interlocutory.<sup>144</sup> Accordingly, the *N.J.G.* court dismissed the appeal for

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136. See TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3) (Vernon Supp. 2000).

137. See *Bally Total Fitness Corp. v. Jackson*, 2 S.W.3d 327, 330 (Tex. App.—San Antonio May 12, 1999, pet. filed).

138. See *De Los Santos v. Occidental Chem. Corp.*, 933 S.W.2d 493, 495 (Tex. 1996).

139. See *Bally*, 2 S.W.3d at 330-31.

140. See *Wolk v. Life Partners, Inc.*, 994 S.W.2d 934 (Tex. App.—Waco 1999, no pet.) (quoting *Cummins v. Paisan Const. Co.*, 682 S.W.2d 235, 236 (Tex. 1984)).

141. See *id.* at 935 (granting appellant's motion to dismiss cross-appeal but denying appellant's motion seeking sanctions for frivolous appeal).

142. See TEX. FAM. CODE § 109.002(b) (Vernon 1999).

143. See *In re N.J.G.*, 980 S.W.2d 764 (Tex. App.—San Antonio 1998, no pet.) (quoting *Kelley v. Kelley*, 583 S.W.2d 671, 673 (Tex. Civ. App.—Austin 1979, writ dismissed)).

144. See *In re N.J.G.*, 980 S.W.2d at 767.

lack of jurisdiction.

### 8. *Supreme Court Jurisdiction Over Interlocutory Appeals*

In *Certain Underwriters at Lloyd's of London v. Celebrity, Inc.*, the Texas Supreme Court held that the Texas Arbitration Act does not independently grant the supreme court jurisdiction to hear an appeal from an interlocutory order denying arbitration.<sup>145</sup> Supreme court jurisdiction over interlocutory orders is governed by section 22.225(b)(3) of the Government Code, which allows review only when there is a dissent or conflict in the court of appeals.<sup>146</sup> Although the Texas Legislature can enact exceptions to that rule, the Texas Arbitration Act is not such an exception.<sup>147</sup> The Texas Arbitration Act provides that an appeal from an order denying a motion to compel arbitration "shall be taken in the manner and to the same extent as an appeal from an order or judgment in a civil action."<sup>148</sup> The court held that, because "this language does not expressly or implicitly grant this Court jurisdiction[,] . . . we do not have jurisdiction over appeals under the Texas Arbitration Act in the absence of either a dissent in the court of appeals or the court of appeals holding differently than a prior decision of another court of appeals or this Court."<sup>149</sup>

Because there was no dissent in the court of appeals, appellate review of that case was proper only if there was a conflict. The appellant argued that the court of appeals' decision conflicted with the Dallas Court of Appeals' decision in *Gaulden v. Johnson* and "the well-recognized policy of Texas courts in favor of arbitration."<sup>150</sup> The court rejected both arguments, however, holding that the court of appeals did not hold differently than the *Gaulden* court and that "a conflict with a general 'policy' is not sufficient to establish that the court of appeals held differently than another court of appeals or this Court."<sup>151</sup>

### 9. *Appeal From Order Appointing a Receiver*

In *Swate v. Johnson*, the Houston First District Court of Appeals confirmed that "an interlocutory order appointing a successor to a permanent receiver is not appealable" under section 51.014(a)(1) of the Texas Civil Practice and Remedies Code.<sup>152</sup>

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145. See *Celebrity*, 988 S.W.2d 731, 732 (Tex. 1998).

146. See TEX. GOV'T CODE § 22.225(b)(3) (Vernon Supp. 2000).

147. See *Celebrity*, 988 S.W.2d at 732-33.

148. TEX. CIV. PRAC. & REM. CODE § 171.098(b) (Vernon Supp. 2000).

149. *Celebrity*, 988 S.W.2d at 733.

150. *Id.* (citing *Gaulden v. Johnson*, 801 S.W.2d 561, 563-65 (Tex. App.—Dallas 1990, writ denied)).

151. *Id.*

152. 981 S.W.2d 923, 925 (Tex. App.—Houston [1st Dist] 1998, no pet.).

### III. PRESERVATION OF ERROR

#### A. TRIAL COURT

##### 1. *Timely Complaints to the Trial Court*

###### a. *Objections in the Trial Court*

Rule 33.1 of the Texas Rules of Appellate Procedure provides that a party must make a timely complaint to the trial court as a "prerequisite to presenting a complaint for appellate review."<sup>153</sup> As a result, a party must expressly object or move to strike expert testimony and explain the reasons for the motion or objection "before trial or when the evidence is offered" or any complaint about the expert evidence is waived.<sup>154</sup> A party must also raise objections to the form of an affidavit, including objections to the lack of personal knowledge to support statements in an affidavit, in the trial court or the objection is waived.<sup>155</sup> Moreover, a party who fails to object to the lack of verification of a supplemental interrogatory answer for thirteen months and before the commencement of trial waives any objection.<sup>156</sup>

To complain on appeal that the trial court failed to submit instructions to the jury on necessary elements of a claim, at least one court has held that it is sufficient for the complaining party to object to the omission and refer to the proper instruction from the Texas Pattern Jury Charges, without submitting the instruction in writing and obtaining a written ruling.<sup>157</sup>

Similarly, the Texas Supreme Court held that a lessor in an oil and gas lease properly preserves its complaint that a breach of duty to protect against drainage on leases must be predicated on a finding that the pooling of units was in bad faith by: (1) moving to bifurcate the issues of drainage and pooling; (2) objecting to the trial court's proposed charge and suggesting a proper submission; and (3) objecting at the formal charge conference and reurging the request for bifurcation of the issues.<sup>158</sup> Notably, the court found that the objections raised in response to the trial court's request for a proposed charge "alone would be insufficient to preserve the issue," but concluded that reurging these objections during the formal charge conference "properly preserved error on the issue."<sup>159</sup>

A party need not raise issues of law at the charge conference, however, to satisfy the preservation requirements of rule 33.1.<sup>160</sup> Issues of law,

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153. TEX. R. APP. P. 33.1 (Vernon 1997).

154. *Reliance Ins. Co. v. Denton Cent. Appraisal Dist.*, 999 S.W.2d 626, 630 (Tex. App.—Fort Worth 1999, no pet.).

155. *See Harris v. Spires Council of Co-Owners*, 981 S.W.2d 892, 896 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

156. *See State Farm Fire & Cas. Co. v. Morua*, 979 S.W.2d 616, 621 (Tex. 1998).

157. *See Green Tree Fin. Corp. v. Garcia*, 988 S.W.2d 776, 781 (Tex. App.—San Antonio 1999, no pet.).

158. *See Southeastern Pipe Line Co., Inc. v. Tichacek*, 997 S.W.2d 166, 173 (Tex. 1999).

159. *Id. Compare Green Tree*, 988 S.W.2d at 782 (finding it sufficient to raise the absence of an instruction on the record at the informal charge conference).

160. *See Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278 (Tex. 1999).

such as the question of whether a party is legally entitled to recover compensatory and punitive damages in a wrongful discharge case, are preserved if raised in a written response to the plaintiff's motion for judgment on the verdict.<sup>161</sup> Similarly, a "no evidence" challenge to the jury's findings of DTPA violations is sufficient to preserve an argument that no implied warranty arose under the facts.<sup>162</sup> Moreover, a party does not invite error by seeking limiting instructions or otherwise objecting to the form of the jury submission that the party believes should not be submitted as a matter of law.<sup>163</sup>

Finally, although a party who delays in seeking disqualification may waive the right to disqualify opposing counsel, a party's failure to urge a motion that should have been denied at the time it was filed will not prohibit that party from "reurg[ing] the motion when it should have been granted."<sup>164</sup>

#### b. Obtaining a Ruling

Rule 33.1 does not require a party to obtain a *written* ruling from the trial court in order to preserve an issue for appeal. Rather, rule 33.1 "relaxes the former requirement of an express ruling and codifies case law that recognized implied rulings."<sup>165</sup> Thus, where a party raises specific objections and moves to strike plaintiff's evidence filed in response to a no evidence summary judgment motion and the trial court states in its order that it reviewed all *competent* summary judgment evidence, there is an "inference that the court implicitly sustained the objections to the evidence."<sup>166</sup>

#### c. Requesting Findings of Fact and Conclusions of Law

During the *Annual Survey* period, the Houston First District Court of Appeals reaffirmed in *Frommer v. Frommer*<sup>167</sup> the dire consequences on appeal of failing to request findings of fact and conclusions of law. When findings of fact and conclusions of law are not requested, the court held, "the appellate court presumes that the trial court made all necessary findings to support its judgment."<sup>168</sup> In determining whether some evidence supports the judgment, the court of appeals considers *only* the evidence most favorable to the judgment, disregarding all evidence opposed or

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161. See 997 S.W.2d at 776. See also *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91 (Tex. 1999) (finding that the "availability of attorney's fees under a particular statute is a question of law for the court," which is properly preserved through a motion for j.n.o.v. "A jury can determine the amount of attorney's fees whether or not they can be recovered under the theory of law submitted to the jury.").

162. *Rocky Mountain Helicopters, Inc. v. Lubbock County Hosp. Dist.*, 987 S.W.2d 50, 52 (Tex. 1998).

163. See *Holland*, 1 S.W.3d at 91.

164. *In re Epic Holdings*, 985 S.W.2d 41, 54 (Tex. 1998) (orig. proceeding).

165. *Frazier v. Yu*, 987 S.W.2d 607, 610 (Tex. App.—Fort Worth 1999, pet. denied).

166. *Id.*

167. 981 S.W.2d 811 (Tex. App.—Houston [1st Dist.] 1998, n. pet. h.).

168. *Id.* at 813.



contrary to it. If any legal theory is supported by the evidence, the court of appeals must affirm the trial court's judgment.<sup>169</sup>

Findings of fact contained in a judgment do not change the analysis, particularly where no findings or conclusions were ever requested by the appellant. Rule 299a of the Texas Rules of Civil Procedure clearly provides that "findings of fact and conclusions of law *shall not* be recited in a judgment."<sup>170</sup> If they are, "they cannot form the basis of a claim on appeal."<sup>171</sup> Accordingly, an appellant cannot attempt to circumvent rule 299a by arguing that findings of fact in the trial court's judgment can be used to support his claim on appeal.<sup>172</sup>

## 2. *Timely Complaints on Appeal*

Although rule 33.1 refers only to preservation of error in the trial court, the Texas Supreme Court cited rule 33.1 in holding that the court of appeals lacked authority to reverse and remand a judgment based on a claim disposed of by the trial court on summary judgment and not complained of on appeal.<sup>173</sup> Specifically, the court concluded that a party who does not "complain in the court of appeals about the trial court's adverse judgment disposing of his claim" fails to preserve error.<sup>174</sup>

Moreover, under rule 33.1, the argument raised on appeal must reflect the objection raised in the trial court. Thus, a party seeking a remittitur in the trial court based on principles of comparative negligence may not urge remittitur on appeal based on the plaintiff's failure to prove his damages.<sup>175</sup>

Finally, under broad form submission of jury issues, a party should challenge every element supporting the finding or risk waiver. According to the Beaumont court of appeals, "[w]hen a damage issue is submitted in broad form, it is difficult to ascertain the amount the jury awarded for

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169. See *id.* The Fort Worth Court of Appeals in *Reliance Ins. Co. v. Denton Cent. Appraisal Dist.*, 999 S.W.2d 626 (Tex. App.—Fort Worth, 1999, no pet. h.) similarly held that "[u]nchallenged findings of fact are binding unless the contrary is established as a matter of law or there is no evidence to support the findings." *Id.* at 629. If there is any evidence to support them, the *Reliance* court concluded, they "will be sustained." *Id.*

170. TEX. R. CIV. P. 299a (emphasis added). *Frommer*, 981 S.W.2d at 814.

171. *Frommer*, 981 S.W.2d at 814 (citing *R.S. v. B.J.J.*, 883 S.W.2d 711, 715 n.5 (Tex. App.—Dallas 1994, no writ); *Sutherland v. Cobern*, 843 S.W.2d 127, 131 n.7 (Tex. App.—Texarkana 1992, writ denied)).

172. See *Frommer*, 981 S.W.2d at 814. The first court of appeals in *Frommer* refused to adopt or reject the Amarillo Court of Appeals' decision in *Hill v. Hill*, 971 S.W.2d 153 (Tex. App.—Amarillo 1998, no pet.). In *Hill*, the Amarillo court concluded that, if there is no conflict between separate findings of fact and conclusions of law and findings contained in a judgment, then those contained in the judgment should still be given effect. See *Hill*, 971 S.W.2d at 155-56. The *Frommer* court noted that this conclusion in *Hill* presumes findings of fact were actually requested and received. See *Frommer*, 981 S.W.2d at 814. Without approving or disapproving of the *Hill* "no conflict analysis," the *Frommer* court rejected the appellant's argument that, because no findings of fact were requested, there was no conflict with those in the judgment. See *id.*

173. See *Brewerton v. Dalrymple*, 997 S.W.2d 212, 217 (Tex. 1999).

174. *Id.*

175. See *Brookshire Bros., Inc. v. Lewis*, 997 S.W.2d 908, 923 (Tex. App.—Beaumont 1999, pet. filed).

each element of damages.”<sup>176</sup> As a result, the court concluded, “to successfully challenge a multi-element damage award on appeal, an appellant must address all of the elements [of damages] and show the evidence is insufficient to support the entire damage award.”<sup>177</sup> Because the appellant attacked only the mental anguish portion of the damage award, the court held that the appellant had waived its sufficiency challenge to the damage award.<sup>178</sup>

### 3. Charge Error

As part of an instruction on a lost profits measure of damages based on breach of contract, it is reversible error to fail to instruct the jury that it should not consider any costs or loss that the plaintiff avoided by not having to perform.<sup>179</sup> Similarly, it is harmful error to fail to instruct the jury on causation, especially where the jury sent out a note reflecting its confusion over which standard to apply and was deadlocked “before being given an Allen charge.”<sup>180</sup>

Moreover, where the controlling issues for multiple claims (such as strict liability and breach of warranty claims in a crashworthiness case) are “functionally identical,” the trial court is not required to submit separate questions on the claims.<sup>181</sup>

## IV. JUDGMENTS

### A. FINALITY OF JUDGMENTS

In this season’s installment of the continuing saga of “what constitutes a final judgment,” the Houston court of appeals held that when a trial court enters a severance order with the stated intention of making a partial summary judgment final and appealable, “the Mother Hubbard clause in [such a] severance order [creates] a final and appealable judgment *only* as to the parties and claims in the severed cause.”<sup>182</sup> In *Adam*, the appellants argued that a Mother Hubbard clause in a severance order severing a partial summary judgment that disposed of two parties resulted in a final judgment of the original cause. In response to this argument, the court first restated the general principles governing finality in the summary judgment context. If the order granting summary judgment contains a Mother Hubbard clause, the judgment is final and appealable.<sup>183</sup> As a result, when a partial summary judgment is entered, “the

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176. *Id.* at 921-22.

177. *Id.*

178. *See id.*

179. *See Lafarge Corp. v. Wolff, Inc.*, 977 S.W.2d 181, 188 (Tex. App.—Austin 1998, pet. denied).

180. *Toennies v. Quantum Chem. Corp.*, 998 S.W.2d 374, 379 (Tex. App.—Houston [1st Dist.] 1999, pet. filed).

181. *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 665 (Tex. 1999).

182. *Harris County Flood Control Dist. v. Adam*, 988 S.W.2d 423, 427 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (emphasis added).

183. *See id.* at 426 (citing *Mafrige v. Ross*, 866 S.W.2d 590, 591 (Tex. 1993)).

judgment becomes final and appealable if one of the following occurs: (1) the order granting summary judgment includes a Mother Hubbard clause; or (2) the trial court signs an order severing the parties and claims addressed by the summary judgment motion into a separate case.”<sup>184</sup> The court went on to explain that when a partial summary judgment order erroneously disposes of a party who was not addressed by the motion for summary judgment, that party has two alternatives: (1) while it has plenary jurisdiction, ask the trial court to correct the judgment, or (2) perfect a timely appeal from the erroneous judgment. Failure to do either of these alternatives results in the erroneous summary judgment becoming final and unappealable as to that party.<sup>185</sup>

Unlike when a partial summary judgment order includes a Mother Hubbard clause, when the order severing the partial summary judgment from the main case includes such a clause, it does *not* operate to create a final judgment as to all parties in both the original case and the severed case. It operates only to create a final and appealable judgment as to the parties and claim in the severed cause.<sup>186</sup>

Reflecting what is probably a pervasive feeling of frustration among practitioners and courts, Justice Taft filed a concurring opinion in *Adam*, suggesting “lock[ing] Mother Hubbard in the cupboard and return[ing] to the rule . . . that a judgment is final and appealable only if it expressly disposes of all parties and all claims in the case.”<sup>187</sup> In Justice Taft’s words, “[w]hat began as a benign growth allowing review of unripe claims on appeal, in *Mafrige*,<sup>188</sup> became a malignant cancer cutting off causes of action before trial, in *English*.”<sup>189</sup>

Further disenchantment with the supreme court’s decisions in *Mafrige* and *English* is seen in the Houston court of appeals’ opinion in *Lehmann v. Har-Con Corp.*<sup>190</sup> In that case, only one of two defendants moved for summary judgment. The summary judgment order granting the defendant summary judgment, however, contained a Mother Hubbard clause. Under *English*, the judgment was final and appealable even though it granted more relief than requested.<sup>191</sup>

Embarking on a serious critique of *Mafrige* and *English*, the *Lehmann* court asserted that the case before it “demonstrates the unfairness” of the

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184. *Adam*, 988 S.W.2d at 426.

185. *See id.*

186. *See id.* at 427. As learned the hard way by the appellants in *Diversified Financial Systems, Inc. v. Hill, Heard, O’Neal, Gilstrap & Goetz, P.C.*, 3 S.W.3d 616, 618 (Tex. App.—Fort Worth 1999, no. pet. h.), “a partial summary judgment becomes final and appealable upon the severing of the parties and claims disposed of by the partial summary judgment into a separate cause; the trial court is not required to enter another judgment to make the severed cause final and appealable.” *Id.*

187. *Adam*, 988 S.W.2d at 427 (Taft, J., concurring).

188. *Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993).

189. *Adam*, 988 S.W.2d at 427-48 (Taft, J., concurring) (citing *English v. Union State Bank*, 945 S.W.2d 810 (Tex. 1997)).

190. 988 S.W.2d 415 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

191. *See id.* at 417 (citing *English*, 945 S.W.2d at 811).

finality rule of *English* and *Mafrige*.<sup>192</sup> The court pointed out in *Lehmann* that the second defendant who did not move for summary judgment would not have been entitled to it under the summary judgment rule. "Yet, under the 'bright line rule' established in *Mafrige* and *English*, the second defendant was able to get a judgment 1) that it did not ask for and 2) to which the *Lehmann*'s did not have an opportunity to respond."<sup>193</sup> The *Lehmann* court said this was not only "unfair," but also in apparent contradiction of the high standard set out in rule 166a(b) for obtaining summary judgment.<sup>194</sup> It "exalts form over substance" and mandates final judgment "when neither the parties nor the trial judge contemplated one."<sup>195</sup>

The *Lehmann* court further urged that "*Mafrige* is not as clear to litigants as the supreme court believes it is."<sup>196</sup> For example, what if a summary judgment entitled "Interlocutory Judgment" states in the judgment itself that only one of the defendants has moved for judgment and the judgment contains a Mother Hubbard clause? Under *Mafrige*, the judgment would "very arguably" be final.<sup>197</sup> In short, the court explained, "*Mafrige* has created several problems: 1) it is catching the parties by surprise—we have had more than a few appeals dismissed on the basis of *Mafrige*; 2) it exalts form over substance; and 3) in more than a few situations, it ignores common sense."<sup>198</sup>

Frustrated with the situation, the *Lehmann* court went so far as to recommend that "parties to a summary judgment proceeding should never use a Mother Hubbard Clause" because, by using one, "they may inadvertently dismiss parties and/or causes of action never addressed or intended to be addressed in the motion."<sup>199</sup> Dismissing the appeal for lack of jurisdiction, the court urged the Texas Supreme Court "to reconsider the harshness of its bright line rule imposed by *Mafrige* and its progeny."<sup>200</sup>

Faced with a similar situation in *Midkiff v. Hancock East Texas Sanitation, Inc.*<sup>201</sup>—an appeal involving a partial summary judgment erroneously made final through the inclusion of a Mother Hubbard clause—the resourceful Beaumont Court of Appeals devised a unique solution to the problem. First, the Beaumont court refused to read *Mafrige* as holding that the mere inclusion of a Mother Hubbard clause automatically ren-

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192. *Lehmann*, 988 S.W.2d at 417.

193. *Id.*

194. *See id.*; see also TEX. R. CIV. P. 166a(b).

195. *Lehmann*, 988 S.W.2d at 417.

196. *Id.*

197. *Id.* at 418.

198. *Id.*

199. *Id.*

200. *Id.*; see also *In re Cobos*, 994 S.W.2d 313, 315 (Tex. App.—Corpus Christi 1999, no pet.) where the Corpus Christi Court of Appeals dismissed an appeal for want of jurisdiction because of the finality of a partial summary judgment due to the presence of a Mother Hubbard clause, calling the rule of *Mafrige* and *English* "harsh."

201. 996 S.W.2d 414 (Tex. App.—Beaumont 1999, no pet.).

ders all orders final for appellate purposes. "The summary judgment order," the court explained, "must be taken as a whole and what it purports to do is critical to the inquiry."<sup>202</sup> If the intent of the order, as manifested in its language, does not embrace all claims and all parties, and a "claim logically cannot be brought within the grasp of the Mother Hubbard clause, the order is interlocutory."<sup>203</sup> Because the summary judgment order in *Midkiff* spoke specifically to one defendant and there was no mention of the other defendant's motion for summary judgment, the order, taken as a whole, logically implicated the merits of the plaintiff's claims only as applicable to the defendant expressly mentioned in the order.

Given this determination, the Beaumont court noted that it could dismiss the appeal for want of jurisdiction, or find the summary judgment final as to all parties pursuant to the Mother Hubbard clause. Instead of doing either, the court essentially side-stepped *Mafrige* and invoked rule 44.3 of the Texas Rules of Appellate Procedure, which "provides that a court of appeals must not affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities."<sup>204</sup> The court accordingly abated the appeal and remanded the cause to the trial court with directions to either sever the claims disposed of in the summary judgment order from those apparently still pending as to the second defendant, or enter an order or judgment disposing of all of the plaintiff's claims against the second defendant.<sup>205</sup> In a footnote, the Beaumont court noted the considerable comments that *Mafrige* has engendered.<sup>206</sup>

The San Antonio Court of Appeals in *Rodriguez v. NBC Bank*<sup>207</sup> likewise found a creative way to avoid the harshness of *Mafrige* and *Inglish*. In *NBC Bank*, the court determined that the Mother Hubbard clause in the summary judgment, stating that "[a]ll relief not expressly granted herein is denied," was ambiguous because it was unclear what "herein" referred to.<sup>208</sup> One interpretation of "herein," the court explained, would include the latest plaintiff's petition, resulting in the disposition of all causes of action against all parties. But the court concluded a more logical interpretation, and one that made "infinitely more sense," was that "herein" referred to the motion being relied on and thus applied to the movant, not the respondent.<sup>209</sup> "Herein," the court held, "refers to the motion and the interpretation is to be made by referencing the four

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202. *Id.* at 416.

203. *Id.*

204. *Id.*; TEX. R. APP. P. 44.3.

205. See *Midkiff*, 996 S.W.2d at 416.

206. See *id.* at 415 n.1 (quoting Clinard J. "Buddy" Hanby, *Texas Civil Appellate Update*, XII THE APPELLATE ADVOCATE 3 (Tex. St. B. Appellate Sec. Rep.), June 1999, at 32-33).

207. 5 S.W.3d 756 (Tex. App.—San Antonio 1999, no pet.).

208. *Id.* at 763.

209. *Id.*

corners of the document.”<sup>210</sup> Accordingly, where the movant asked for and was granted a summary judgment and a certain amount of fees, this was the entirety of the movant’s relief “expressly granted.”<sup>211</sup> Any other relief to the movant that had not been expressly granted was denied. The words “[a]ll relief not expressly granted herein is denied” thus applied *only* to the movant’s requests for relief.<sup>212</sup> Like the other Texas appellate courts discussed above, the San Antonio court also noted the “pitfalls” of the *Mafrige* rule.<sup>213</sup>

The Dallas Court of Appeals in *Lowe v. Teator*<sup>214</sup> refused to characterize the rule of *Mafrige* as a “bright line” test and criticized the Houston court’s opinion in *Lehmann* for doing so. The *Lowe* court asserted that, under *Mafrige*, the inclusion of a Mother Hubbard clause does not automatically render a judgment final. Rather, the language must be read “from the context of the document in which it appears.”<sup>215</sup> Accordingly, “[i]f the language in the order preceding the Mother Hubbard clause is broad and inclusive enough to encompass all issues and parties before the court, then the clause may be read to dispose of all claims in the case not otherwise specifically addressed in the order.”<sup>216</sup> However, if “the language preceding the Mother Hubbard clause is limited in its scope, such that it evidences the intent of the trial court not to dispose of all the claims in the case before it, a Mother Hubbard clause will not convert the otherwise interlocutory summary judgment order into a final judgment.”<sup>217</sup> In other words, a partial summary judgment is not a final and appealable order solely because of the inclusion of a Mother Hubbard clause irrespective of any other language in the judgment evidencing an intent that the judgment not be final. “Such a rule,” the *Lowe* court held, “would offend fundamental concepts of justice” and would be a result never intended by *Mafrige*.<sup>218</sup>

## B. JUDGMENTS NUNC PRO TUNC

“After the trial court loses its plenary jurisdiction over a judgment, it can correct only clerical errors by judgment nunc pro tunc.”<sup>219</sup> A clerical error is any error not resulting from judicial reasoning or determination.<sup>220</sup> “A judicial error is an error which occurs in the rendering as

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210. *Id.*

211. *Id.*

212. *Id.*

213. *NCB Bank*, 5 S.W.3d at 761 n.3. Dissenting, Justice Green argued that the majority’s attempt to distinguish *NBC Bank* to avoid the harshness of the *Mafrige* rule “cannot honestly be done.” *Id.* at 768 (Green, J., dissenting).

214. 1 S.W.3d 819 (Tex. App.—Dallas 1999, pet. filed).

215. *Id.* at 823.

216. *Id.*

217. *Id.*

218. *Id.*

219. *In re Rollins Leasing Inc.*, 987 S.W.2d 633, 636 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding).

220. *See id.* at 636.

opposed to the entering of a judgment.”<sup>221</sup>

To determine whether a correction is a judicial or clerical error, the court of appeals looks not to the judgment that should have been rendered, but to the judgment actually rendered, which is a question of fact.<sup>222</sup> In other words, to demonstrate a clerical error, a relator or appellant must be able to point to evidence reflecting that the trial judge actually rendered a judgment different from the judgment entered. Thus, for example, a judgment entered erroneously dismissing all defendants instead of just one is a *judicial* error where the relators are unable to direct the court of appeals to any evidence (like discussions among the parties and judge at a hearing) reflecting that the dismissal was to apply to only one defendant.

## V. EXTENDING THE APPELLATE TIMETABLE

### A. MOTIONS FOR NEW TRIAL

A motion for rehearing filed within the time period for filing a motion for new trial may extend the appellate timetable if it “seek[s] to set aside an existing judgment and request[s] relitigation of the issues.”<sup>223</sup> Accordingly, where a motion for rehearing requests the trial court to “‘grant a rehearing’” and “‘deny defendants’ motion for summary judgment,’” the motion seeks to set aside the existing judgment for the purpose of litigating the issues.<sup>224</sup> Such a motion may be considered a request for a new trial because, if granted, a trial would have resulted.

During the Survey period, the Houston court of appeals in *Finley v. J.C. Pace Ltd.* faced the issue of whether the appellate timetable is extended if the filing fee for a motion for new trial is paid *after* the trial court loses plenary jurisdiction.<sup>225</sup> The court held that a timely tendered motion for new trial extends the appellate timetable regardless of when the filing fee is paid.<sup>226</sup> In reaching this conclusion, the court concurred with the reasoning of the Waco, Corpus Christi, and San Antonio Courts of Appeals that, while an untimely payment may deprive the trial court of the ability to rule on the motion for new trial, “the appellate timetable would nevertheless be extended, given the supreme court’s policy of liberally interpreting rules in favor of permitting appeal.”<sup>227</sup>

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221. *Id.*

222. *See id.*

223. *Finley v. J.C. Pace Ltd.*, 4 S.W.3d 319, 320 (Tex. App.—Houston [1st Dist.] 1999, no pet. h.).

224. *Id.*

225. In 1996, the Texas Supreme Court in *Tate v. E.I. DuPont de Nemours & Co.* extended the appellate timetable when the appellant paid the filing fee for the motion for new trial after the motion was overruled, but before the trial court lost plenary jurisdiction. *See Tate v. E.I. DuPont de Nemours & Co.*, 934 S.W.2d 83 (Tex. 1996). The supreme court, however, expressly refused to decide whether the appellate timetable is extended if the filing fee is paid after the trial court loses plenary jurisdiction.

226. *See Finley*, 4 S.W.3d, at 321.

227. *Id.* (citing *Polley v. Odom*, 937 S.W.2d 623, 625-26 (Tex. App.—Waco 1997, no writ); *Ramirez v. Get “N” Go # 103*, 888 S.W.2d 29, 31 (Tex. App.—Corpus Christi 1994, writ

## B. REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

“A request for findings of fact and conclusions of law extends the appellate timetable if findings and conclusions are either required by the Rules of Civil Procedure or, if not required, could properly be considered by the appellate court.”<sup>228</sup> Because findings of fact and conclusions of law have no place in a summary judgment hearing, a request for such findings and conclusions will not extend the timetable for perfecting appeal from a summary judgment.<sup>229</sup> However, if part of the judgment is based upon an evidentiary hearing in which the trial court heard testimony, a request for findings and conclusions will extend the appellate timetable.<sup>230</sup>

What about a request for findings and conclusions following a trial on agreed facts? Does such a request extend the appellate timetable? According to the Beaumont Court of Appeals in *Port Arthur*, it does not. In reaching this conclusion, the *Port Arthur* court noted that the only issue on appeal after a trial on agreed facts is whether the trial court correctly applied the law. “The issue decided by the trial court,” the court of appeals reasoned, “is as much a matter of law as any summary judgment.”<sup>231</sup>

## VI. SUPERSEDING THE JUDGMENT

When a district clerk is sued in his or her official capacity, the clerk’s notice of appeal operates as a supersedeas bond, thereby superseding the trial court’s judgment until all appellate rights are exhausted.<sup>232</sup> In a case involving the imposition of fines against a clerk for violating an injunction, the supreme court held that the clerk could not be held in contempt for violating an injunction “until *all appeals relating to the judgment* were exhausted” and a mandate enforcing the injunction issued.<sup>233</sup> The fact that the clerk did not seek appellate review in the supreme court and the fact that the opposing party’s appeal to the supreme court was unrelated to the injunction did not compel a finding that the clerk was in contempt starting from the date the clerk’s motion for rehearing was overruled in the court of appeals.

Ordinarily, a judgment debtor is entitled to supersede a judgment

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denied); *Spellman v. Hoang*, 887 S.W.2d 480, 482 (Tex. App.—San Antonio 1994, no writ)). Despite being given time to pay the filing fee, the appellant in *Finley* failed to do so and the court ultimately dismissed the appeal. See *Finley v. J.C. Pace Ltd.*, No. 01-99-00662-CV, 1999 WL 997788, at \*1 (Tex. App.—Houston [1st Dist.] Nov. 4, 1999, no pet.) (per curiam) (not designated for publication).

228. *Port Arthur Indep. Sch. Dist. v. Port Arthur Teachers Ass’n*, 990 S.W.2d 955, 956 (Tex. App.—Beaumont 1999, pet. filed).

229. See *id.* at 957.

230. See *id.*

231. *Id.* at 958.

232. See TEX. CIV. PRAC. & REM. CODE ANN. § 6.001(b)(4) (Vernon Supp. 2000); *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999).

233. *Long*, 984 S.W.2d at 626 (emphasis added).



pending appeal, thereby suspending its enforcement.<sup>234</sup> But when the judgment creditor is a governmental entity that has no pecuniary interest in the case, rule 24.2(a)(5) instructs that the trial court must determine whether to suspend enforcement by weighing the harm that is likely to result if the enforcement is not suspended with the harm that is likely to result to others if enforcement is suspended.<sup>235</sup> In *In re South Texas College of Law*, the Texas Supreme Court denied a petition for writ of mandamus in which the South Texas College of Law and Texas A & M University sought suspension of the trial court's judgment that permanently enjoined them from continuing to operate under an Affiliation Agreement.<sup>236</sup> Justice Hecht, dissenting, would have granted the mandamus petition because in his view, "no evidence was adduced to the district court that any harm from continued operations under the Affiliation Agreement pending appeal would ever outweigh the economic and noneconomic injuries to South Texas and Texas A & M from enforcement of the district court's judgment."<sup>237</sup>

## VII. PLENARY POWER OF THE TRIAL COURT

During the *Annual Survey* period, the Texas Supreme Court issued its opinion in *In re Dickason*,<sup>238</sup> detailing the well-established timeframe for expiration of the trial court's plenary jurisdiction. In that case, the appellant filed a timely motion for new trial on December 19, 1996, and an amended motion for new trial on December 26, 1996. On December 27, 1996, the trial judge, who was leaving the bench at the end of the year, overruled appellant's motion for new trial by written order. Despite this order, on February 10, 1997, an assigned judge signed an order granting appellant's amended motion for new trial. Holding that the trial court did not have plenary power to grant the new trial on February 10, 1997, the Texas Supreme Court explained that "[w]hen a party files a motion for new trial within thirty days of a judgment, the trial court has plenary power for seventy-five days following the date the court signed the judgment to act on that motion."<sup>239</sup> Once the trial court overrules a timely-filed motion for new trial—even if well within the seventy-five day time period—the court retains plenary power for only another thirty days.<sup>240</sup> Filing an amended motion for new trial, the court noted, does not extend the trial court's plenary power.<sup>241</sup> Because the trial court overruled the

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234. See TEX. R. APP. P. 24.1.

235. See TEX. R. APP. P. 24.2(a)(5).

236. See 4 S.W.3d 219, 219 (Tex. 1999). After the Texas Higher Education Coordinating Board had questioned the validity of the Affiliation Agreement, South Texas sued the Board for a judicial declaration of the issue, and Texas A & M intervened.

237. *Id.* at 222 (Hecht, J., dissenting).

238. 987 S.W.2d 570 (Tex. 1998) (per curiam) (orig. proceeding).

239. *Id.* at 571; see also TEX. R. CIV. P. 329b(c).

240. *Id.*; see also TEX. R. CIV. P. 329b(e).

241. See TEX. R. CIV. P. 329b. The court quoted the historical note to rule 329b, which states that "[a]n amended motion for new trial gains no additional time." *Dickason*, 987 S.W.2d at 571 n.4.

appellant's motion for new trial on December 27, 1996, the court retained plenary power for only the next thirty days, until January 26, 1997. Accordingly, the February 10, 1997 ruling purporting to grant a new trial was issued by the new trial judge when the trial court no longer had jurisdiction over the case, rendering the February order void.<sup>242</sup>

In another case challenging the trial court's plenary jurisdiction to grant a new trial, the supreme court construed Texas Civil Procedure rule 329b(c) liberally. The court held in *In re Barber*<sup>243</sup> that a document bearing the trial judge's rubber-stamped signature constitutes a "written order signed" under rule 329b(c) if the judge directed another person who is under the judge's immediate authority to affix the judge's signature using the rubber stamp.<sup>244</sup> Significantly, the court expressly determined that the person affixing the judge's facsimile signature need not be in the presence of the judge at the time the rubber stamp is affixed. The court reasoned that it may be unrealistic to require the judge's actual physical presence at the time the signature is affixed in every case. Requiring that the signature be affixed by someone under the judge's immediate authority and at the judge's direction, the court concluded, "should provide sufficient safeguards."<sup>245</sup> Since the rubber-stamped signature in *Barber* was affixed to the order granting new trial during the trial court's plenary jurisdiction, the order was timely and effective to grant a new trial.<sup>246</sup>

The San Antonio Court of Appeals considered issues relating to the trial court's plenary jurisdiction in *In re Montemayor*<sup>247</sup> in the context of a dismissal for want of prosecution. When a case is dismissed for want of prosecution, the court of appeals explained, "a party seeking reinstatement must file a verified motion to reinstate within thirty days after the date on which the order of dismissal was signed."<sup>248</sup> If no verified motion to reinstate is filed, the trial court's plenary power expires thirty days after the date on which the dismissal order was signed.<sup>249</sup> An exception to the rule that procedural timetables run from the date the dismissal order is signed exists, pursuant to rule 306a(4) of the Texas Rules of Civil Procedure, for a party who learns of the order more than twenty, but less than ninety, days after it was signed.<sup>250</sup> However, to benefit from the

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242. See *Dickason*, 987 S.W.2d at 571.

243. 982 S.W.2d 364 (Tex. 1998) (orig. proceeding).

244. See *id.* at 366-67.

245. *Id.* at 367.

246. The court noted that, for purposes of determining whether an order granting a new trial is timely, "the date of signing (not the date of entry) controls." *Id.*; see also TEX. R. CIV. P. 3296(c). Dissenting, Justice Baker disagreed with the majority's decision to "write[ ] out" the requirement established in *Stork v. State*, 114 Tex. Crim. 398, 23 S.W.2d 733, 735 (1929), that a facsimile stamped signature must be made in the judge's presence. See *In re Barber*, 982 S.W.2d at 369 (Baker, J., dissenting, joined by Justice Spector). Justice Baker also argued that the majority reconciled conflicting evidence concerning whether the court coordinator had the trial judge's authority to place a stamped signature on the order, which is improper in a mandamus proceeding.

247. 2 S.W.3d 542 (Tex. App.—San Antonio 1999, orig. proceeding).

248. *Id.* at 545 (citing TEX. R. CIV. P. 165a(3)).

249. See *Montemayor*, 2 S.W.3d at 545.

250. See TEX. R. CIV. P. 306a(4); TEX. R. APP. P. 4.2.

exception found in rule 306a(4), "the party must prove in the trial court, on sworn motion and notice, the date he or his attorney first received notice or acquired actual knowledge of the signing."<sup>251</sup>

### VIII. STANDING TO APPEAL

Generally, only parties of record in the trial court are entitled to appeal the trial court's judgment. However, as recognized by the Texas Supreme Court in *Motor Vehicle Board of the Texas Department of Transportation v. El Paso Independent Automobile Dealers Ass'n*,<sup>252</sup> "an exception exists when the appellant is deemed to be a party under the doctrine of virtual representation."<sup>253</sup> In that case, the attorney general appealed a judgment declaring certain Texas Blue Laws unconstitutional, despite the attorney general's nonparticipation in the case prior to entry of judgment. Both the court of appeals and supreme court held that the attorney general had the right to appeal under the doctrine of virtual representation.<sup>254</sup> As explained by the supreme court, to claim virtual representation, an appellant must show that: "(1) it is bound by the judgment; (2) its privity of estate, title, or interest appears from the record; and (3) there is an identity of interest between the appellant and a party to the judgment."<sup>255</sup> In *Motor Vehicle*, the appellant satisfied all of these requirements and, accordingly, was permitted to appeal the judgment.<sup>256</sup>

The supreme court in *Motor Vehicle* also rejected the respondent's argument that the petitioner lacked standing to bring the petition for review because the appeal was filed in the name of the "Motor Vehicle Division" rather than the "Motor Vehicle Board."<sup>257</sup> Calling the discrepancy "a case of misnomer that does not affect the Board's standing," the supreme court noted its policy "to construe the Rules of Appellate Procedure liberally, so that decisions turn on substance rather than procedural technicality."<sup>258</sup> Because no confusion resulted from the petition, the error did not affect the petitioner's standing to bring the petition for review.

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251. *Montemayor*, 2 S.W.3d at 545. As the appellant in *Montemayor* learned, substantial compliance with the dictates of rule 306a will not suffice. According to the San Antonio court, rule 306a(4) is not self-implementing. "Unless the procedures of rule 306a(5) are followed, the trial court's plenary power is not restarted, and it is without authority to act more than thirty days after the date the appealable order is signed." *Id.* at 546 (citing *In re Jones*, 974 S.W.2d 766, 768 (Tex. App.—San Antonio 1998, orig. proceeding)). Moreover, an order reinstating a case, even if made within the timeframes articulated in rule 306a, is ineffective if it is not *written*—an oral ruling, even in open court, is ineffective to reinstate the case. A trial court's inherent authority is limited by the requirement of a timely written order of reinstatement.

252. 1 S.W.3d 108 (Tex. 1999) (per curiam).

253. *Id.* at 110.

254. *Id.*

255. *Id.*

256. *See id.* The supreme court, however, disagreed with the court of appeals' conclusion that the appellant had waived its right to appeal by sending a letter prior to judgment allowing local officials to defend the statute at issue. The letter, the supreme court held, was not "an express renunciation of a known right" establishing waiver. *Id.* at 111.

257. *Id.* at 111 (emphasis added).

258. *Motor Vehicle*, 1 S.W.3d at 111.

## IX. PERFECTING THE APPEAL

## A. "REASONABLE EXPLANATION"

Consistent with the cases decided during the preceding *Annual Survey* period,<sup>259</sup> a motion for extension of time is implied when an appellant files a notice of appeal beyond the deadline prescribed by Texas Rule of Appellate Procedure 26.1(a) but within the fifteen-day period allowed under rule 26.3.<sup>260</sup> Although the motion for extension may be implied, the appellant is not relieved of the obligation to provide a reasonable explanation for its failure to file a timely notice of appeal or other perfecting document.<sup>261</sup>

A "reasonable explanation" may be that the default was the result of "inadvertence, mistake or mischance" (i.e., negligence), but it may not be "deliberate or intentional."<sup>262</sup> Two decisions published during the Survey period found the excuse to be deficient. In the first, *Kidd v. Paxton*,<sup>263</sup> the appellant was likely surprised to learn that his negligence-based excuses were unacceptable. The court held that the appellant's excuse that he "misunderst[ood] . . . the law" by "erroneously calculat[ing] the perfection deadline by adding thirty days to the date the trial court overruled the Motion for New Trial" to be "implausible and, therefore, unreasonable."<sup>264</sup> Additionally, counsel's explanation that he was preoccupied with other duties was deficient because he did not establish how those other matters interfered with his duty to perfect this appeal. The court explained that "[s]aying that one has a plethora of other work alone is not sufficient. A causative nexus . . . must be established through fact."<sup>265</sup>

The second decision, *Weik v. Second Baptist Church of Houston*,<sup>266</sup> found that the default was the product of a deliberate choice. The court

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259. See *Dimotsis v. Lloyds*, 966 S.W.2d 657, 657 (Tex. App.—San Antonio 1998, no pet.); *Verburgt v. Dörner*, 959 S.W.2d 615, 617 (Tex. 1997).

260. See *Kidd v. Paxton*, 1 S.W.3d 309 (Tex. App.—Amarillo 1999, rule 53.7(f) motion filed); *Coronado v. Farming Tech., Inc.*, 994 S.W.2d 901, 901 (Tex. App.—Houston [1st Dist.] 1999) (per curiam) *dismissed by* No. 01-99-00171-CV, 1999 WL 548703 (Tex. App.—Houston [1st Dist.] July 29, 1999, no pet.) (per curiam); see also *Weik v. Second Baptist Church*, 988 S.W.2d 437, 438-39 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (concerning late-filed appeal bond); cf. *Bixby v. Bice*, 992 S.W.2d 615, 616 (Tex. App.—Waco 1999, no pet.) (dismissing the appeal because the Notice of Appeal was not filed until ninety-two days after appellants received notice of the signed judgment).

261. See *Kidd*, 1 S.W.3d at 310; *Coronado*, 994 S.W.2d at 902 (ordering that appellant has fifteen days to file an explanation); *Weik*, 988 S.W.2d at 439.

262. *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 670 (Tex. 1989) (interpreting former rule 41(a)(2)).

263. 1 S.W.3d at 310-11.

264. *Id.* at 310.

265. *Id.* at 311. Justice Johnson, dissenting, argued that the standard by which the majority tests appellants' explanation for internal consistency, detailed factual support, and evidence showing that the circumstances relied upon as an excuse caused the default was too strict. Therefore, the dissent would have held that the supreme court requires only a statement of circumstances indicating that appellant's failure to comply with the deadline was not intentional or deliberate.

266. 988 S.W.2d 437 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

held that no good cause exists for extending the filing deadline when the appellant intentionally delayed the filing of the appeal bond based on his attorney's advice that "if he appealed the case while the trial court still had the authority to reinstate the case, . . . the trial court would reinstate the case and [appellant] would have a difficult time prosecuting his claim because of the trial court's displeasure with [the appellant]."<sup>267</sup>

### B. DETERMINING THE DATE OF FILING

The Texas Supreme Court confirmed in *Coastal Banc SSB v. Helle* that "[w]hen a dispute arises as to the filing date of an instrument essential to a courts [sic] appellate jurisdiction, the date the instrument is tendered to the clerk controls, and not the file-stamp date."<sup>268</sup> The evidence the court deemed sufficient to establish that the appellant had filed the required materials<sup>269</sup> included affidavits from appellant's counsel, an affidavit from the county clerk who had received the filing, and copies of shipping receipts.<sup>270</sup>

### C. RULE 306A

To establish a prima facie case for late notice of judgment necessary to postpone the start date of appellate timetables under Texas Rule of Civil Procedure 306a,<sup>271</sup> appellant should file a verified motion, thereby invoking the trial court's jurisdiction for the limited purpose of holding a hearing to determine the date of notice.<sup>272</sup> Although several courts of appeals require that such a motion be filed within thirty days of receiving notice,<sup>273</sup> the Austin Court of Appeals allows parties to file the motion at any time within the court's plenary power counted from the date of no-

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267. *Id.* at 439.

268. 988 S.W.2d 214, 216 (Tex. 1999) (per curiam) (citing *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993)).

269. At issue was the timeliness of the filing of appellant's certificate of cash deposit in lieu of bond within the six-month deadline under the former writ of error procedure. *See* TEX. R. APP. P. 45(e) (repealed). Bond is not a specific requirement under the restricted appeal, which replaced the writ of error. *See* TEX. R. APP. P. 30.

270. *See Coastal Banc*, 988 S.W.2d at 215-16.

271. Rule 306a(4) provides:

If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) of this rule nor acquired actual knowledge of the order, then with respect to that party all the periods mentioned in paragraph (1) shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed.

TEX. R. CIV. P. 306a(4).

272. *See Grondona v. Sutton*, 991 S.W.2d 90, 91-92 (Tex. App.—Austin 1998, pet. denied). However, the rules do not require appellant to move for a determination of late notice.

273. *See Gonzalez v. Sanchez*, 927 S.W.2d 218, 221 (Tex. App.—El Paso 1996, no writ); *Montalvo v. Rio Nat'l Bank*, 885 S.W.2d 235, 237 (Tex. App.—Corpus Christi 1994, no writ); *Womack-Humphreys Architects, Inc. v. Barrasso*, 886 S.W.2d 809, 816 (Tex. App.—Dallas 1994, writ denied).

tice.<sup>274</sup> However, regardless of which deadline applies, the motion cannot be amended beyond the deadline to add facts necessary to establish a *prima facie* case on the notice issue, and a failure to obtain a ruling during that period is fatal to the appellant's attempt to extend the timetable for appeal.<sup>275</sup>

#### D. AFFIDAVIT OF INABILITY TO PAY COSTS

An affidavit of inability to pay costs on appeal must be filed in the trial court with or before the notice of appeal.<sup>276</sup> A court of appeals may extend the time to file the affidavit if, within fifteen days after the date the notice of appeal is filed, the party files a motion to extend time.<sup>277</sup> An affidavit of indigence or motion to proceed *in forma pauperis* filed after the notice of appeal and after the expiration of the deadline to file an extension is ineffective; consequently, appellant's failure to pay for the record and for appellate filing fees results in dismissal under rule 37.3(b) of the Texas Rules of Appellate Procedure.<sup>278</sup>

In *In re Sosa*,<sup>279</sup> the appellant timely filed her affidavit of indigence, but the trial court sustained a contest challenging the affidavit. The appellant successfully sought a writ of mandamus to compel the trial judge to withdraw the order sustaining the contest. Following the supreme court's decision in *Griffin Industries, Inc. v. Honorable Thirteenth Court of Appeals*,<sup>280</sup> the San Antonio court held that "the fact that [the appellant] was contractually responsible for court costs does not preclude her from appealing" a judgment and that the trial court should not have based its decision in part on its perception that the appellant's attorney had abused the indigency provisions in past cases involving other clients.<sup>281</sup> Holding that "[m]andamus is the appropriate remedy when a contest to an affidavit of indigence is improperly sustained," the court of appeals conditionally granted the writ.<sup>282</sup>

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274. See *Grondona*, 991 S.W.2d at 92; *Vineyard Bay Dev. Co. v. Vineyard on Lake Travis*, 864 S.W.2d 170, 172, n.1 (Tex. App.—Austin 1993, writ denied).

275. See *Grondona*, 991 S.W.2d at 92; *Montalvo*, 885 S.W.2d at 237-38; *Barrasso*, 886 S.W.2d at 816; *Owen v. Hodge*, 874 S.W.2d 301, 303 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Conaway v. Lopez*, 843 S.W.2d 732, 733 (Tex. App.—Austin 1992, no writ).

276. See TEX. R. APP. P. 20.1(c)(1).

277. See TEX. R. APP. P. 20.1(c)(3); *Holt v. F.F. Enters.*, 990 S.W.2d 756, 759 (Tex. App.—Amarillo 1998, pet. denied).

278. See *Mikkilineni v. City of Houston*, 4 S.W.3d 298, 299 (Tex. App.—Houston [1st Dist.] 1999, no pet. h.) (warning that appellant's appeal will be subject to dismissal if 45 days pass and payment for the record has not been made and appellant has not made arrangements for payment); *Negrini v. Smith, Nelson & Clement P.C.*, 998 S.W.2d 362, 363 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (dismissing the appeal for failure to pay filing fees).

279. 980 S.W.2d 814 (Tex. App.—San Antonio 1998, orig. proceeding).

280. 934 S.W.2d 349, 353-54 (Tex. 1996).

281. See *Sosa*, 980 S.W.2d at 816. Justice Hardberger concurred, arguing that, although *Griffin* controlled the outcome of this case, it is not good public policy to order the public to pay the costs of appeal when an appellant has a contingency fee arrangement with an attorney who refuses to pay the costs of the appeal.

282. *Id.* at 817.

Two weeks after the *Sosa* case was decided, however, the Texas Supreme Court issued its per curiam opinion in *In re Arroyo*, in which the court held that under the amended rules, appeal is an adequate remedy from an order sustaining a contest to an affidavit of indigence.<sup>283</sup> Under rule 25.1(a), a party may perfect an appeal merely by filing a notice of appeal.<sup>284</sup> Providing security for costs is no longer a prerequisite for invoking an appellate court's jurisdiction. Therefore, an indigent party "is no longer precluded from perfecting appeal and challenging the trial court's order sustaining a contest to the party's affidavit of indigence."<sup>285</sup> To ensure the adequacy of this avenue of appeal, "[t]he court of appeals can and should, on motion or its own initiative, require the clerk and court reporter under Rules 34.5(c)(1) and 34.6(d), respectively, to prepare and file the portions of the record necessary to review an order sustaining a contest to an affidavit of indigence."<sup>286</sup>

#### E. WHO MUST FILE A NOTICE OF APPEAL?

If an appellee is satisfied with the relief granted by the trial court, but wants to raise alternate grounds for the denial of any recovery by the appellant, must the appellee perfect its own appeal? The Houston First District Court of Appeals answered this question in the negative in *Dean v. Lafayette Place (Section One) Council of Co-Owners, Inc.*<sup>287</sup> The court explained that, under the new rules of appellate procedure, "if an appellee is satisfied with the relief granted by the trial court, but merely wants to present additional, independent grounds for affirming the trial court's judgment," he need not file a notice of appeal, but may raise the independent grounds for affirmance in a cross-point.<sup>288</sup>

#### X. THE RECORD ON APPEAL

Under Texas Rule of Appellate Procedure 34.6(f), when a significant portion of the recording of the trial proceedings is inaudible, a party is entitled to a new trial if: (1) the appellant timely requests a reporter's record; (2) the inaudible recording occurred without the appellant's fault; (3) the inaudible portion is necessary to the appeal's resolution; and (4) the parties cannot agree on a complete reporter's record.<sup>289</sup> With regard to the second requirement, the new appellate rules now place the duty on the court recorder to "ensure that the recording system functions properly throughout the proceeding and that a complete, clear, and transcribable recording is made."<sup>290</sup> Thus, appellant's failure to make sure that

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283. See 988 S.W.2d 737, 738 (Tex. 1998).

284. See TEX. R. APP. P. 25.1(a).

285. *Arroyo*, 988 S.W.2d at 738.

286. *Id.* at 739.

287. 999 S.W.2d 814 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

288. *Id.* at 818.

289. See TEX. R. APP. P. 34.6(f); *In re G.M.S.*, 991 S.W.2d 923, 924 (Tex. App.—Fort Worth 1999, pet. filed).

290. TEX. R. APP. P. 13.2(a).

the tape is functioning properly will not negate his right to a new trial.<sup>291</sup>

Although an appellant is entitled to a complete statement of facts, appellant's failure to object to the court reporter's absence during a witness's testimony will negate the appellant's right to a new trial. In *Garza v. Guerrero*,<sup>292</sup> appellants argued that because counsel met with the judge during part of the proceedings in which the jury heard oral videotape deposition testimony, they should be excused from the requirement to object to the court reporter's failure to make a record of the testimony heard by the jury. The court rejected that argument and found waiver, concluding that there was nothing in the record showing that counsel was never present in the courtroom while the videotape was played.<sup>293</sup>

A court reporter's failure to file a complete reporter's record by a date specified by court order can result in criminal contempt charges, a fine, disgorgement of the fee collected as payment for the reporter's record, and costs.<sup>294</sup>

## XI. THE BRIEF ON APPEAL

The Rules of Appellate Procedure allow briefs to be supplemented or amended upon whatever reasonable terms the court may prescribe when justice requires.<sup>295</sup> When a party expressly limits his original brief to two claims and one of those claims is weakened by a supreme court decision handed down two months after oral argument, an appellate court does not abuse its discretion when it refuses to consider a new claim asserted in a supplemental brief.<sup>296</sup> A party "cannot wait more than six months and then argue that 'justice' requires that he be permitted post-argument to resurrect an abandoned claim."<sup>297</sup>

Additionally, when an appellant's amended brief contains no facts of the case, no argument section, and no citation to the record, a court of appeals may proceed as if appellant failed to file a brief. And if appellee did file a responsive brief, the appellate court may affirm the judgment of the trial court.<sup>298</sup>

## XII. MOOT APPEALS

In *National Collegiate Athletic Ass'n v. Jones*,<sup>299</sup> the Texas Supreme Court reaffirmed the principles governing appellate review of moot ap-

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291. See *G.M.S.*, 991 S.W.2d at 925. But cf. *Richardson v. Richardson*, 969 S.W.2d 534, 536-37 (Tex. App.—Beaumont 1998, no pet.) (applying former Texas Rule of Appellate Procedure 50(e)).

292. 993 S.W.2d 137 (Tex. App.—San Antonio 1999, no pet.).

293. See *id.* at 141.

294. See *In re Ryan*, 993 S.W.2d 294, 295-96 (Tex. App.—San Antonio 1999, no pet.).

295. See TEX. R. APP. P. 38; former TEX. R. APP. P. 74(o) (superseded Sept. 1, 1997).

296. See *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 65 (Tex. 1998).

297. *Id.* at 65.

298. See TEX. R. APP. P. 39.9(a), 38.8(a); *Harkins v. Dever Nursing Home*, 999 S.W.2d 571, 572-73 (Tex. App.—Houston [14th Dist.] 1999, no pet. h.).

299. 1 S.W.3d 83 (Tex. 1999).



peals. Appellate courts are prohibited from deciding moot controversies, the court held, because the separation of powers doctrine in the Texas and United States Constitutions prohibits courts from rendering advisory opinions.<sup>300</sup> A case becomes moot "if at any stage there ceases to be an actual controversy between the parties."<sup>301</sup> In the temporary injunction context, which was the issue before the court in *National Collegiate*, an appeal becomes moot when the injunction becomes inoperative due to a change in the status of the parties or the passage of time. Considering the validity of such an injunction, the court explained, would constitute an "impermissible advisory opinion."<sup>302</sup>

A dismissal of an appeal for mootness "is not a ruling on the merits," while a dismissal with prejudice "functions as a final determination on the merits."<sup>303</sup> It follows that in dismissing a cause as moot, an appellate court cannot dismiss the appeal with prejudice.

### XIII. SPECIAL APPEALS

#### A. APPEALS FROM JUSTICE COURT

Jurisdiction over an appeal of a justice court judgment lies in the court or district court, not in the court of appeals.<sup>304</sup> As the appellant in *Tejas Elevator Co. v. Concord Elevator, Inc.*<sup>305</sup> discovered, rule 2 of the Texas Rules of Appellate Procedure does not provide an alternate avenue of appeal to the court of appeals.<sup>306</sup> Recognizing an appellate court's authority under rule 2 to suspend a rule's operation in a particular case to expedite a decision or for other good cause, the Dallas Court of Appeals nonetheless held that nothing in rule 2 authorizes a court of appeals to exercise jurisdiction over an appeal if none exists.<sup>307</sup>

On appeal to county court from a justice court judgment, the cause is tried de novo.<sup>308</sup> Regardless, the plaintiff on appeal may not assert any

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300. See *id.* at 86. See also TEX. CONST. Art. II, § 1.

301. 1 S.W.3d at 86.

302. *Id.* The court rather liberally construed the facts of *National Collegiate* to conclude that a student athlete's appeal from a temporary injunction enjoining the NCAA from enforcing its player eligibility requirements to play football was not moot despite the student's graduation from college, where there was evidence that he would be personally adversely affected by possible retroactive penalties against the university. Under such circumstances, "a tangible and substantial controversy" existed between the parties with respect to the portion of the injunction enjoining the NCAA from enforcing its restitution rights. *Id.* at 88.

303. *Ritchey v. Vasquez*, 986 S.W.2d 611, 612 (Tex. 1999) (per curiam) (quoting *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991) (per curiam) and *Speer v. Presbyterian Children's Home and Serv. Agency*, 847 S.W.2d 227, 229 (Tex. 1993)).

304. TEX. CIV. PRAC. & REM. CODE ANN. §§ 51.001, 51.002 (Vernon 1997); TEX. R. CIV. P. 574b.

305. 982 S.W.2d 578 (Tex. App.—Dallas 1998, no pet.).

306. Texas Rule of Appellate Procedure 2 provides that "On a party's motion or on its own initiative an appellate court may—to expedite a decision or for other good cause—suspend a rule's operation in a particular case and order a different procedure; . . . ." TEX. R. APP. P. 2.

307. *Tejas Elevator Co.*, 982 S.W.2d at 579.

308. TEX. R. CIV. P. 574b.

new ground of recovery and the defendant may not set up any set-off or counterclaim which was not pleaded in the court below.<sup>309</sup> The proper disposition of a counterclaim improperly pleaded in an appeal to county court is not, however, dismissal, but rather severance.<sup>310</sup> If the improperly raised counterclaim was a compulsory counterclaim that should have been raised in the justice court proceeding, it may be barred under the doctrine of *res judicata* in the severed suit.

“When an appeal from a justice court judgment is perfected in a county court, the judgment of the justice court is annulled,” and the case is tried *de novo* in the county court.<sup>311</sup> Because the judgment of the justice court is nullified, the burden is on the *appellee* to obtain a new judgment. Accordingly, if the *appellant* fails to take any steps in the county court after the case has been appealed, the appellee should not move to dismiss the case for want of prosecution, as any dismissal by the county court will effect a dismissal of the entire cause of action, leaving the matter standing as if no suit had been filed. The dismissal will *not* effect a reinstatement of the justice court’s judgment against the appellant.

## B. BILLS OF REVIEW

Several cases during this *Annual Survey* period reflect the inevitable truth that courts do not look on bills of review with favor.<sup>312</sup> It is well settled that a plaintiff seeking to invoke a bill of review to set aside a final judgment must establish three elements: (1) a meritorious defense; (2) an excuse justifying the failure to make that defense which is based on the fraud, accident, or wrongful act of the opposing party; and (3) an excuse unmixed with the fault or negligence of the plaintiff.<sup>313</sup> The distinguishing characteristic among each of the bill of review cases reviewed during this Survey period is that, in each, the bill of review plaintiffs did not have a good excuse for failing to exhaust adequate legal remedies, and, accordingly, the third element proved fatal to the parties’ attempts to set aside a prior judgment after the time for appeal had expired.<sup>314</sup> For example, in *Williamson* and *Ortmann*, the failure to file a motion for new trial or regular appeal was fatal to the bill of review. In *Dispensa*, the court found that the bill of review plaintiff knew of the judgment at least “within thirty to thirty-five days” after its entry and, therefore, “had notice at a

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309. TEX. R. CIV. P. 574a.

310. D\*Tel Communications v. Roadway Package Svc., Inc., 987 S.W.2d 213, 214 (Tex. App.—Eastland 1999, no pet.).

311. *In re* Garza, 990 S.W.2d 372, 374 (Tex. App.—Corpus Christi 1999, orig. proceeding).

312. See *Williamson v. Williamson*, 986 S.W.2d 379, 380 (Tex. App.—El Paso 1999, no pet.).

313. See *Beck v. Beck*, 771 S.W.2d 141, 141 (Tex. 1989); *Baker v. Goldsmith*, 582 S.W.2d 404, 406-07 (Tex. 1979).

314. See *Power v. Chapman*, 994 S.W.2d 331, 335 (Tex. App.—Texarkana 1999, no pet.); *Dispensa v. Univ. State Bank*, 987 S.W.2d 923, 926-28 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Ortmann v. Ortmann*, 999 S.W.2d 85, 91 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *Williamson*, 986 S.W.2d at 381.

time when he could have had the judgment set aside simply by showing that he was not served with citation" under Texas Rules of Civil Procedure 306a(4) and 329b or under Texas Rule of Appellate Procedure 30, governing restricted appeals.<sup>315</sup> And finally, the *Power* court held that the trial court properly granted summary judgment against the bill of review plaintiff because he failed to pursue legal remedies such as a statutory bill of review in section 31 of the Probate Code.<sup>316</sup>

### C. WRITS OF ERROR/RESTRICTED APPEALS

As petitioner learned in *Quaestor Investments, Inc. v. State of Chiapas*, the six-month time limit for filing writs of error is mandatory and jurisdictional.<sup>317</sup> In this case, Quaestar took a default judgment against Chiapas and began proceedings to collect the judgment. Chiapas removed the lawsuit fourteen days before its six-month time limit for filing a writ of error had expired. The federal court remanded the case, but Chiapas did not file a writ of error with the court of appeals until after its Fifth Circuit appeal of the remand order was dismissed.

Although both parties acknowledged that the removal suspended the appellate timetable, they disagreed over when it began again. If it recommenced when the federal court entered its remand order, the writ of error was untimely; conversely, if it began again after the Fifth Circuit dismissed the appeal of the remand order, the writ of error was timely. The supreme court held that, because remanding a case to state court automatically terminates the federal court's jurisdiction and because there is no requirement that the state court take any action to reassert jurisdiction after it receives a remand order, "jurisdiction revests in the state court when the federal district court executes the remand order and mails a certified copy to the state court."<sup>318</sup> Accordingly, the time for appealing by writ of error expired fourteen days after the date jurisdiction was reinvested in the state court, and the writ of error filed by Chiapas was filed too late.<sup>319</sup>

### D. LIMITED APPEALS

Under Texas Rule of Appellate Procedure Rule 34.6, an appellant may request a partial reporter's record to minimize the expense and delay of the appellate process. The rule requires appellant to file and request for the partial record and also mandates that the notice include a statement of the issues to be appealed. In *Jaramillo v. Atchison, Topeka & Santa Fe Railway Co.*,<sup>320</sup> the appellant sought to appeal a discrete evidentiary er-

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315. *Dispensa*, 987 S.W.2d at 928.

316. *See Power*, 994 S.W.2d at 335.

317. *See* 997 S.W.2d 226, 227 (Tex. 1999) (citing *Linton v. Smith*, 154 S.W.2d 643, 645 (Tex. 1941)).

318. *Id.* at 229.

319. *See id.* at 229.

320. *See* 986 S.W.2d 701 (Tex. App.—Eastland, 1998, no pet.).

ror, and presumably desired to rely on a partial reporter's record on appeal. But she neither filed and served a request for a partial reporter's record on the opposing party nor stated the points of error on which she would be relying. In light of the fact that appellant failed to comply with rule 34.6, appellant was not entitled to the presumption that nothing omitted from the record is relevant to the disposition of the appeal. Accordingly, because it was "unable to determine whether the errors complained of by Jaramillo were harmful in the context of the entire case," the Eastland court refused to find error and affirmed the trial court's decision.<sup>321</sup>

#### E. DIRECT APPEALS TO THE SUPREME COURT

Section 22.001(c) of the Government Code permits parties to appeal directly to the supreme court "an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state."<sup>322</sup> Direct appeal was sought in *Owens Corning v. Carter*,<sup>323</sup> a case that involved the challenge of the constitutionality of several statutes that had been recently enacted or amended to: (1) curb forum shopping by nonresidents with claims arising out of state, and (2) repeal the law that had prohibited courts from dismissing asbestos claims under the doctrine of forum non conveniens. In particular, section 71.052(b) of the Texas Civil Practice and Remedies Code required courts to grant all motions to dismiss asbestos claims filed after January 1, 1997 by plaintiffs who resided outside of Texas when they were exposed to asbestos outside of the state, as long as the defendant stipulated that the filing of a claim in another forum would relate back to the Texas filing for limitations purposes.<sup>324</sup>

Owens Corning filed the requisite stipulations and moved to dismiss the claims of several plaintiffs who resided outside of Texas when they were allegedly exposed to asbestos.<sup>325</sup> The plaintiffs filed a suit for declaratory and injunctive relief challenging the constitutionality of the statutes on their own behalf and on behalf of the class of "all non-Texas residents who have filed asbestos-related personal injury lawsuits in Texas state courts on or after January 1, 1997."<sup>326</sup> The trial court declared section 71.031(a)(3) unconstitutional as applied and section 71.052(b) unconstitutional on its face and issued an order enjoining defendants from

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321. *Id.* at 702.

322. TEX. GOV'T CODE § 22.001(c) (Vernon 1988); see TEX. CONST. art. V, § 3-b.

323. 997 S.W.2d 560, 564-65 (Tex. 1999), *cert. denied*, 120 S. Ct. 500 (Nov. 15, 1999). Senate Bill 220, which became effective May 29, 1997, addressed these concerns by amending sections 71.031 and 71.051 of the Texas Civil Practice and Remedies Code and creating section 71.052. See *id.* at 566.

324. See TEX. CIV. PRAC. & REM. CODE § 71.052(b).

325. Owens Corning filed a counterclaim and motion for class certification involving plaintiffs in four other suits. In response, the plaintiffs in those four suits sought an injunction to prevent defendants from attempting to enforce the statutes. Class certification was denied, but all five cases were tried together. See *Owens Corning*, 997 S.W.2d at 567.

326. *Id.*

seeking to enforce those provisions.<sup>327</sup> Additionally, the court declared section 71.052(c) unconstitutional as to a certain subset of plaintiffs and enjoined the defendants from seeking to enforce that provision against those plaintiffs.<sup>328</sup>

Owens Corning filed a direct appeal to the supreme court, arguing that the Government Code gave that court jurisdiction to review the trial court's order enjoining defendants from seeking to enforce sections 71.031(a)(3), 71.052(b), and 71.052(c). Plaintiffs argued that the supreme court did not have jurisdiction because "the purported injunctive relief granted by the trial court below was actually no more than declaratory judgment under another name."<sup>329</sup> They reasoned that the injunctions had no force and effect independent of the trial court's interlocutory declaratory judgments, and were, therefore, insufficient to confer direct appeal jurisdiction.

The supreme court held that it had jurisdiction over the direct appeal.<sup>330</sup> It reasoned that, although the plaintiffs received the injunction only on their own behalf, they sought that relief on their own behalf *and* on behalf of the putative class. The court held: "The trial court issued orders granting and denying injunctive relief on the grounds of the constitutionality of Senate Bill 220, and each party has appealed. As such, the requirements of section 22.001(c) are satisfied."<sup>331</sup>

#### F. ADMINISTRATIVE APPEALS

During the *Annual Survey* period, the Texas Supreme Court held that a party seeking judicial review of a Texas Workers' Compensation Commission Appeals Panel decision complies with the Texas Labor Code's appeal procedure by sending their petition for judicial review to the Commission by first-class United States mail on the day it is due.<sup>332</sup> In reaching this conclusion, the court ruled that rule 5 of the Texas Rules of Civil Procedure—the "mailbox rule"—applies to the provision of the Texas Labor Code governing judicial review actions involving compensability or eligibility for income or death benefits, despite a Commission rule dictating that documents are timely filed with the Commission only if the Commission receives them "before or during business hours on the last permissible day to file."<sup>333</sup> The court reasoned that the Commission rules did not apply because the Workers' Compensation Act specifically directs that judicial review actions involving "compensability or eligibility for or the amount of income or death benefits" are governed by subchapter G of the Labor Code, and the Labor Code expressly states that,

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327. *See id.*

328. *See id.*

329. *Id.*

330. *See Owens Corning*, 997 S.W.2d at 568.

331. *Id.*

332. *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 960-61 (Tex. 1999) (per curiam).

333. *Id.* at 960. *See also* TEX. LAB. CODE § 410.301 (Vernon 1996); 28 TEX. ADMIN. CODE § 102.7 (Vernon 1999).

when subchapter G conflicts with the Texas Rules of Civil Procedure, subchapter G controls.<sup>334</sup> Because the mailbox rule did not conflict with subchapter G, the court concluded, "it applies to subchapter G judicial review actions."<sup>335</sup>

#### XIV. STANDARDS OF REVIEW

In *G.E. American Communication v. Galveston Central Appraisal District*,<sup>336</sup> a taxpayer appealed to seeking review of a local appraisal board's determination of the valuation of some of the taxpayer's property. The court of appeals discussed the proper standard of review to be applied by the trial court in its review of an appraisal board's disposition of a taxpayer's correction motion<sup>337</sup> brought under section 25.25 of the Texas Tax Code.<sup>338</sup>

After the appraisal district valued the taxpayer's property, the taxpayer disagreed with the valuation and challenged it by filing a motion to correct a substantial error. After holding a hearing, the appraisal review board denied the taxpayer's motion. The taxpayer then filed suit in district court to compel the appraisal review board to order a change in the appraisal roll. The appraisal district and appraisal review board moved for and were granted summary judgment on the ground that the taxpayer "could not raise the issue of valuation in a section 25.25(g) lawsuit."<sup>339</sup>

On appeal, the taxpayer argued that section 25.25 of the Tax Code<sup>340</sup> provides for a trial de novo and that the trial court erred by failing to conduct any substantive review of the appraisal review board's decision. The court of appeals identified and discussed the four types of review from administrative decisions recognized under Texas law:

- (1) pure trial de novo (in which the reviewing tribunal conducts an independent factfinding proceeding where new evidence is taken and all issues are determined anew, and the reviewing body substitutes its discretion for that of the agency);<sup>341</sup>

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334. *Albertson's*, 984 S.W.2d at 960-61. See 28 TEX. ADMIN. CODE § 102.7 (Vernon 1999); TEX. LAB. CODE §§ 410.301, 410.305 (Vernon 1996); TEX. R. CIV. P. 5.

335. *Albertson's*, 984 S.W.2d at 960-61. The court further held that, while timely filing with the Commission is mandatory, it is not jurisdictional. See *id.* at 961-62. *Accord* Ector County Indep. Sch. Dist. v. Adkins, 989 S.W.2d 363, 363 (Tex. 1999) (per curiam); Benavidez v. Travelers Indem. Co., 985 S.W.2d 458, 458 (Tex. 1999) (per curiam); Ortiz v. Insurance Co. of State of Pa., 988 S.W.2d 882, 883-84 (Tex. App.-El Paso 1999, no pet.).

336. 979 S.W.2d 761 (Tex. App.-Houston [14th Dist.] 1998, no pet.).

337. A correction motion is "designed to correct clerical errors and *substantial* judicial errors which resulted in the appraised value of the property exceeding by more than one-third the correct market value of the property." *Id.* at 763-64, (citing TEX. TAX CODE ANN. § 25.25(d) (Vernon 1992)).

338. TEX. TAX CODE ANN. § 25.25 (Vernon 1992).

339. See *G.E. American*, 979 S.W.2d at 763.

340. TEX. TAX CODE ANN. § 25.25 (Vernon 1992).

341. See *Sanchez v. Huntsville Indep. Sch. Dist.*, 844 S.W.2d 286, 289 (Tex. App.-Houston [1st Dist.] 1992, no writ); *Gilder v. Meno*, 926 S.W.2d 357, 365 (Tex. App.-Austin 1996, writ denied).

- (2) pure substantial evidence (in which the agency's decision is presumptively legal and valid and the reviewing tribunal looks only at the record made before the agency or board to determine whether the agency's findings are supported by substantial evidence);<sup>342</sup>
- (3) substantial evidence de novo (in which the agency's decision is presumed legal and valid, but the reviewing tribunal may hear any evidence in existence at the time of the administrative hearing regardless of whether it was introduced at the administrative hearing);<sup>343</sup> and
- (4) a special rate-case classification referred to as de novo fact trial (which is similar to trial de novo, but the agency's decision is admissible at trial).<sup>344</sup>

The taxpayer in contending that pure trial de novo is the applicable standard of review, relied on a recent amendment to section 42.01 of the Tax Code,<sup>345</sup> effective on January 1, 1998. The significance of the amendment, the taxpayer argued, was that it clarified the legislature's intent that district court review of motions to correct under chapter 42 of the Tax Code was intended to be by trial de novo.

The court of appeals, observing that the legislature did not intend the amendment to apply retroactively to review proceedings occurring prior to the amendment, concluded that the legislature intended for proceedings brought under section 25.25 to function "as traditional appeal[s] and not merely as safeguard[s] insuring the observance of procedural due process."<sup>346</sup> As a result, the court held, in reversing the trial court's grant of summary judgment, that "an appeal under Section 25.25(g) requires a substantive review of the proceedings and decision of the appraisal review board."<sup>347</sup> Rejecting the taxpayer's argument that pure trial de novo was the appropriate standard of review before the Tax Code amendment, the court of appeals held that the correct standard of review for proceedings under section 25.25(g) is substantial evidence de novo:

We conclude, therefore, that a district court must review an appraisal review board's order to ensure the board reached a reasonable decision. In conducting this review, the court may hear any and all evidence in existence at the time of the administrative hearing. The reviewing tribunal may also examine the order to ensure it was not tainted by fraud, bad faith or abuse of discretion, and to ensure that

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342. See *Imperial Am. Res. Fund, Inc. v. Railroad Comm'n*, 557 S.W.2d 280, 285 (Tex. 1977); *Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986).

343. See *Board of Trustees of Big Spring Firemen's Relief and Retirement Fund v. Firemen's Pension Comm'r*, 808 S.W.2d 608, 612 (Tex. App.-Austin 1991, no writ).

344. See James R. Eissinger, *Judicial Review of Findings of Fact in Contested Cases Under APTRA*, 42 BAYLOR L. REV. 1, 11 (1990).

345. TEX. TAX CODE ANN. § 42.01 (Vernon Supp. 1998) ("A property owner is entitled to appeal: (1) an order of the appraisal review board determining: (A) a protest by the property owner as provided by Subchapter C of Chapter 41; or (B) a determination of an appraisal review board on a motion filed under Section 25.25) . . .").

346. *G.E. American*, 979 S.W.2d at 766.

347. *Id.* at 766.

due process was afforded to the parties.<sup>348</sup>

During the *Annual Survey* period, the Texas Supreme Court in *Rodriguez v. Service Lloyds Insurance Co.*<sup>349</sup> clarified that, in workers' compensation disputes involving compensability or eligibility for or the amount of income or death benefits, the employee may appeal a Commission appeals panel decision to the district court in the employee's county of residence. The court then reviews the decision under "a modified de novo standard."<sup>350</sup> If the dispute concerns something other than compensability or eligibility for or the amount of income or death benefits, an appeal of the decision must be filed in the district court in Travis County under the Administrative Procedure Act, and "substantial evidence" is the standard for judicial review.<sup>351</sup>

It is well-settled that the standard for reviewing a trial court's decision on a motion for reinstatement under Texas Rule of Civil Procedure 165a(3) is whether the plaintiff established that the failure or omission that led to dismissal of the case "was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained."<sup>352</sup> During the *Annual Survey* period, Justice Hecht dissented from the denial of the petition for review in *Rampart Capital Corp. v. Maguire*,<sup>353</sup> stating that he would have granted the petition to clarify the standard for reinstatement that applies when a case is dismissed under the trial court's inherent power. According to Justice Hecht, the standard for reinstatement when dismissal is pursuant to the trial court's inherent power should be the same standard as that applied when the case is dismissed under rule 165a(3), which is essentially the same as that for setting aside a default judgment.<sup>354</sup>

Also during the Survey period, the Beaumont Court of Appeals addressed the availability on appeal of an evidentiary review of an individual element of damages where the jury question called for a total amount as to all elements of damages.<sup>355</sup> The court concluded that the only way a "defendant can successfully attack a multi-element damages award on ap-

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348. *Id.* at 767.

349. 997 S.W.2d 248 (Tex. 1999) (per curiam).

350. *Id.* at 253.

351. *See id.*

352. TEX. R. CIV. P. 165a(3); *Smith v. Babcock & Wilcox Constr. Co., Inc.*, 913 S.W.2d 467, 468 (Tex. 1995).

353. 1 S.W.3d 106 (Tex. 1999) (Hecht, J., dissenting).

354. *See id.* at 106-07. Justice Hecht noted that a number of Texas courts of appeals have held that a different standard applies, but have failed to explain what alternative reinstatement standard should apply. *Id.* at n.7 (citing *Burton v. Hoffman*, 959 S.W.2d 351, 354 (Tex. App.—Austin 1998, no pet.); *Clark v. Yarbrough*, 900 S.W.2d 406, 408-09 (Tex. App.—Texarkana 1995, writ denied); *Eustice v. Grandy's*, 827 S.W.2d 12, 14 (Tex. App.—Dallas 1992, no writ); *Goff v. Branch*, 821 S.W.2d 732, 733 (Tex. App.—San Antonio 1991, writ denied); *Ozuna v. Southwest Bio-Clinical Labs.*, 766 S.W.2d 900, 903 (Tex. App.—San Antonio 1989, writ denied); *Moore v. Armour & Co., Inc.*, 748 S.W.2d 327, 331 (Tex. App.—Amarillo 1988, no writ); *Speck v. Ford Motor Co.*, 709 S.W.2d 273, 275 (Tex. App.—Houston [14th Dist.] 1986, no writ).

355. *See Wal-Mart Stores, Inc. v. Ard*, 991 S.W.2d 518 (Tex. App.—Beaumont 1999, rule 53.7(f) motion filed).



peal is to address each and every element and show that not a single element is supported by sufficient evidence.”<sup>356</sup> If just one element of damages is supported by the evidence, the aggregate award will be affirmed if it is supported by the evidence.<sup>357</sup>

## XV. DISPOSITION ON APPEAL

When a party presents multiple grounds for reversal of a judgment on appeal, “the appellate court should first address those points that would afford the party the greatest relief.”<sup>358</sup> Essentially, this means that the court of appeals should decide rendition issues before reaching issues that would require a remand. In fact, rule 43.3 of the Texas Rules of Appellate Procedure incorporates this principle.<sup>359</sup> According to the supreme court, this principle is mandatory and the courts of appeals are not at liberty to disregard it.<sup>360</sup> Accordingly, a court of appeals errs by not deciding a rendition issue before an issue that would result in a remand.

The nature of the error before the court of appeals, of course, determines whether the appellate court can address the problem itself by modifying and rendering an appropriate judgment, or whether the case must be remanded to the trial court. For example, while a “clerical” error made by the trial court in reducing a settlement agreement to a written judgment may be corrected by modification of that judgment in the court of appeals, a “judicial” error must be reversed and remanded to the trial court for entry of an agreed judgment that conforms to the terms of the parties’ agreement.<sup>361</sup>

## XVI. SUPREME COURT JURISDICTION

The supreme court has jurisdiction to determine whether the court of

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356. See *id.* at 520 (citing *Greater Houston Transp. Co., Inc. v. Zrubeck*, 850 S.W.2d 579, 589 (Tex. App.—Corpus Christi 1993, writ denied).

357. See *id.* The *Ard* court rejected *Texas Indus., Inc. v. Vaughan*, 919 S.W.2d 798 (Tex. App.—Houston [14th Dist.] 1996, writ denied) and *Worsham Steel Co. v. Arias*, 831 S.W.2d 81, 87-88 (Tex. App.—El Paso 1992, no writ) to the extent they are inconsistent with *Zrubeck*. See *Ard*, 991 S.W.2d at 522.

358. *Bradleys’ Elec., Inc. v. Cigna Lloyds Ins. Co.*, 995 S.W.2d 675, 677 (Tex. 1999) (per curiam).

359. Rule 43.3 of the Texas Rules of Appellate Procedure provides:

43.3 *Rendition Appropriate Unless Remand Necessary.* When reversing a trial court’s judgment, the court must render the judgment that the trial court should have rendered, except when:

(a) a remand is necessary for further proceedings; or  
(b) the interests of justice require a remand for another trial.

TEX. R. APP. P. 43.3.

360. See *Bradleys’ Elec.*, 995 S.W.2d at 677.

361. See *Patel v. Eagle Pass Pediatric Health Clinic, Inc.*, 985 S.W.2d 249, 252 (Tex. App.—Corpus Christi 1999, no pet.). Similarly, a trial court’s error in awarding unconditional attorney’s fees on appeal does not require remand; rather, the court of appeals can modify the trial court’s judgment to condition the award of attorney’s fees on appeal to appellees’ success on appeal. See *Stable Energy, L.P. v. Newberry*, 999 S.W.2d 538 (Tex. App.—Austin 1999, pet. denied).

appeals correctly decided its jurisdiction over an appeal.<sup>362</sup> The supreme court also has the power to stay enforcement of a trial court order pending the court of appeals' review of the order to prevent the appeal from becoming moot.<sup>363</sup> A temporary stay of this nature issued by the supreme court does *not* divest the court of appeals of jurisdiction to review the order at issue; rather, the stay preserves the issues from becoming moot so they can be reviewed by that court.<sup>364</sup>

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362. See *H & R Block, Inc. v. Haese*, 992 S.W.2d 437, 439 (Tex. 1999) (per curiam).

363. See *id.* (citing *Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992)).

364. See *id.*

