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APPELLATE PRACTICE AND PROCEDURE

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I. APPELLATE REVIEW BEFORE FINAL JUDGMENT

A. MANDAMUS

1. Mandamus Relief Available

a. Discovery Rulings

AS in previous Survey periods, the Texas courts of appeals continue to grant mandamus relief from orders compelling discovery of privileged information.[1] The courts also consistently grant mandamus relief to compel production of documents that have been erroneously protected by an invalid claim of privilege.[2]

b. Orders Compelling Apex Deposition

Mandamus will issue to compel the court of appeals to vacate its order

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1. *See, e.g.*, *In re* NationsBank, N.A., No. 01-99-00278-CV, 2000 WL 960274 (Tex. App.—Houston [1st Dist.] June 19, 2000, orig. proceeding) (issuing mandamus to correct trial court order ordering production of privileged documents); *In re* Osteopathic Med. Ctr. of Tex., 16 S.W.3d 881 (Tex. App.—Fort Worth 2000, orig. proceeding) (issuing mandamus to compel trial court to modify its discovery order to the extent the order compelled production of privileged medical peer review documents); *In re* Fontenot, 13 S.W.3d 111 (Tex. App.—Fort Worth 2000, orig. proceeding) (issuing mandamus to protect disclosure of attorney-client communications); *In re* Doe, 22 S.W.3d 601 (Tex. App.—Austin 2000, orig. proceeding) (finding trial court abused its discretion in requiring plaintiff to produce mental health records at early stage of discovery); *In re* Arras, 24 S.W.3d 862 (Tex. App.—El Paso 2000, orig. proceeding) (conditionally granting mandamus to prevent deposition of claims representative who was not party to lawsuit); *In re* Guzman, 19 S.W.3d 522, 525 (Tex. App.—Corpus Christi 2000, orig. proceeding) (ordering trial court to vacate order compelling relator to execute authorizations for release of personal information to third parties; authorizations did not exist at time of ruling).

2. *See, e.g.*, *In re* Jimenez, 4 S.W.3d 894 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding) (ordering the trial court to compel production of a witness statement after finding that such statements are not protected by the work product privilege).

allowing an apex deposition.[3] The standards for an apex deposition were adopted in *Crown Cent. Petroleum Corp. v. Garcia*,[4] and followed by the Texas Supreme Court in *In re Daisy Mfg. Co.*.[5] Under *Crown Central*, a party seeking to compel the deposition of a specific high-level corporate official must show not only that less-intrusive discovery methods were employed, but must also articulate how the less-intrusive discovery was unsatisfactory, insufficient, or inadequate.[6] In *Daisy*, the plaintiff sought to depose the CEO of Daisy Manufacturing based on statements made by the CEO in a television interview.[7] In seeking to compel the CEO's deposition, the plaintiff showed that it had deposed other officers of Daisy Manufacturing and still desired additional information.[8] Because the plaintiff failed to show how the less-intrusive discovery of the other corporate officials was inadequate or insufficient and failed to show that the CEO of Daisy had any unique information that could not be obtained by less-intrusive means, the Court conditionally granted mandamus relief compelling the court of appeals to vacate its order allowing the apex deposition.[9]

In another mandamus proceeding involving apex depositions, the Court also relied on *Crown Central* in denying mandamus relief for a party seeking to compel an apex deposition.[10] In *In re Alcatel USA, Inc.*, the Court reasoned that a party seeking to depose a high ranking executive cannot establish the executive's unique or superior knowledge by showing that the executive possesses knowledge of company policies or by showing that he has *some* knowledge of discoverable information, such as the contents of a report.[11] A party fails to show that less-intrusive means of discovery are inadequate when the party neither (1) identifies information it attempted and failed to obtain from other deponents, nor (2) issues interrogatories, requests for admission, or other forms of discovery regarding information it seeks to obtain from the executive.[12] The dissent agreed that a showing of ultimate policy authority is insufficient evidence of an executive's unique or superior knowledge, but would have held that the standard was met by a showing that an executive received a written and oral presentation and several reports on the information sought.[13]

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3. *See In re* Daisy Mfg. Co., 17 S.W.3d 654 (Tex. 2000) (orig. proceeding) (per curiam).
4. 904 S.W.2d 125, 128 (Tex. 1995).
5. *See Daisy*, 17 S.W.3d at 656-57.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *See In re* Alcatel USA, Inc., 11 S.W.3d 173 (Tex. 2000) (orig. proceeding).
11. *Id.* at 179.
12. *Id.*
13. *Id.* at 181 (Enoch, J. dissenting).

c. Orders Compelling Production of Trade Secrets

In *In re Leviton Mfg. Co.*,[14] the Waco Court of Appeals found that the trial court abused its discretion in ordering the relator to produce privileged trade secret information.[15] Once the court found that the trade secret privilege is established, the burden shifted under Rule 507 of the Texas Rules of Evidence to the party seeking disclosure to show that the information was necessary to a fair adjudication of the claim.[16] Because the trial court ordered the production of privileged trade secret information, the court of appeals conditionally granted mandamus ordering the trial court to vacate its order requiring production of the privileged materials.[17]

d. Orders Governing Access to Court Records

Rule 76a of the Texas Rules of Civil Procedure governs the sealing of court records, including discovery not filed with the court. In *In re The Dallas Morning News, Inc.*,[18] the underlying parties in a suit against an HMO entered into a Rule 11 agreement whereby the plaintiffs agreed not to disclose any documents produced and designated by the HMO as confidential.[19] After those parties settled, The Dallas Morning News intervened and moved for access to some of the unfiled discovery subject to the Rule 11 agreement.[20] The trial court set a hearing to determine whether those materials were "court records."[21]

The court of appeals granted mandamus relief to have the order set aside, concluding that absent a Rule 76a order sealing court records the trial court was without jurisdiction.[22] Without analysis, the supreme court concluded that "the court of appeals should not have granted mandamus relief," and the court granted mandamus ordering the court of appeals to withdraw its order.[23]

Justice Abbott, joined by Justices Enoch, Hankinson and O'Neill, filed a concurring opinion, holding that the court of appeals should not have granted mandamus relief because the trial court had jurisdiction to set a hearing on the motion.[24] Justice Gonzales, joined by Justices Phillips, Hecht, and Owen, would have held that mandamus was not proper because there was an adequate remedy by appeal.[25] Justice Baker, concurring and dissenting, would have held that there is an adequate remedy by

14. 1 S.W.3d 898 (Tex. App.—Waco 1999) (orig. proceeding).
15. *Id.* at 903.
16. *Id.* at 902.
17. *Id.* at 903.
18. 10 S.W.3d 298 (Tex. 1999) (orig. proceeding) (per curiam).
19. *Id.* at 298.
20. *Id.* at 299.
21. *Id.*
22. *Id.*
23. *Id.*
24. 10 S.W.3d at 299-303 (Abbott, J., concurring).
25. *Id.* at 303-06 (Gonzales, J., concurring).

appeal and that the order was immediately appealable.[26]

e. Orders Sustaining Relevance Objection

In *In re Union Pac. Resource Co.*,[27] the supreme court held that the trial court acted within its discretion in partially sustaining relevance objections to discovery. Although no evidence was presented in support of objections, no evidence was necessary to resolve the issue of relevance of settlement agreements in another lawsuit.[28] Because the court of appeals erroneously granted mandamus relief compelling the trial court to order production of the irrelevant documents, the supreme court issued mandamus against the court of appeals ordering the court to vacate its ruling.[29]

f. Orders Refusing to Compel Arbitration Under the Federal Arbitration Act

As in previous Survey periods, the courts continue to grant mandamus relief where a trial court refuses to compel arbitration under the Federal Arbitration Act.[30] In *In re L&L Kempwood Assocs., L.P.*, the Court held that an arbitration clause in a contract between parties residing in different states involves interstate commerce and invokes the Federal Arbitration Act.[31] Because there is no adequate remedy by appeal for a party denied the right to arbitrate under the Federal Arbitration Act, the Court granted mandamus and ordered the trial court to issue an order compelling arbitration.[32]

In an issue of first impression, the Houston First Court of Appeals was asked to determine whether a trial court may abate its ruling on arbitration until after discovery is completed.[33] The answer, according to the First Court of Appeals, is a resounding "no."[34] The court reasoned that "[d]elaying a decision on the merits of arbitrability until *after* discovery substantially defeats the policy behind [Texas Civil Practice and Remedies Code] section 171.021's[35] abbreviated procedure [for determining

26. *Id.* at 306-08 (Baker, J., concurring).
27. 22 S.W.3d 338 (Tex. 1999) (orig. proceeding) (per curiam).
28. *See id.* at 338.
29. *Id.*
30. *See In re* L&L Kempwood Assocs., L.P., 9 S.W.3d 125 (Tex. 1999) (orig. proceeding) (per curiam). *See also In re* Alamo Lumber Co., 23 S.W.3d 577 (Tex. App.—San Antonio 2000) (orig. proceeding); *Cf. In re* Van Blarcum, No. 13-99-281-CV, 2000 WL 374817 (Tex. App.—Corpus Christi, Apr. 6, 2000, orig. proceeding) (issuing mandamus to vacate trial court order compelling arbitration because the Federal Arbitration Act was superceded by Magnusson Moss Warranty Act, which bars the use of binding arbitration clauses in written warranties).
31. *Id.* at 127-28.
32. *Id.* at 128.
33. *See In re* MHI Partnership, Ltd., 7 S.W.3d 918 (Tex. App.—Houston [1st Dist.] 1999) (orig. proceeding).
34. *Id.* at 923.
35. Section 171.021 provides in relevant part:
(a) A court shall order the parties to arbitrate an application of a party showing:
(1) an agreement to arbitrate; and

when arbitration is mandated], and it violates section 171.021's mandate to decide the issues summarily."[36]

g. Orders Granting Injunctive Relief

In *In re Univ. Interscholastic League*,[37] the supreme court conditionally granted the petition for writ of mandamus and ordered the trial court to vacate orders "(1) requiring the UIL to hold a baseball playoff game . . . (2) finding the UIL in contempt because [it] did not schedule the game as ordered; and (3) declaring Robstown, rather than Roma, the winner of the unplayed game."[38] Finding that there was no evidence that the UIL's rulings violated any constitutional rights of the parents or children denied the right to play in the playoff game and finding no adequate remedy at law because the baseball tournament was currently in progress, the Court issued mandamus relief directing the "trial court to immediately vacate its orders."[39]

h. Orders Disqualifying Counsel

A trial court does not abuse its discretion in disqualifying a testifying attorney from participating at trial, but mandamus will issue to correct the trial court's improper disqualification of an attorney on pretrial matters.[40]

i. Orders Entered Without Jurisdiction

Mandamus will issue where the trial court enters orders without jurisdiction. In *In re Southwestern Bell Tel. Co.*,[41] the supreme court granted mandamus relief to correct a trial court's order vacating a venue ruling made one year earlier.[42] The court noted that the trial court's plenary jurisdiction over the case had expired thirty days after the transfer order was entered,[43] making the order vacating the venue ruling untimely and void.[44] In *In re Cornyn*,[45] the First Court of Appeals sitting in Houston

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(2) the opposing party's refusal to arbitrate.

(b) If a party opposing an application made under Subsection (a) denies the existence of the agreement, the court shall summarily determine that issue.

TEX. CIV. PRAC. & REM. CODE ANN. § 171.021(b) (Vernon Supp. 2000).

36. *MHI*, 7 S.W.3d at 923.

37. 20 S.W.3d 690 (Tex. 2000) (orig. proceeding) (per curiam).

38. *Id.* at 691.

39. *Id.* at 692.

40. *See In re* Bahn, 13 S.W.3d 865 (Tex. App.—Fort Worth 2000) (orig. proceeding).

41. No. 99-1212, 2000 WL 854253 (Tex. June 29, 2000) (orig. proceeding) (per curiam)

42. *Id.*

43. *Id.* at *2.

44. *Id.* at *2. *See In re* Wal-Mart Stores, Inc., No. 08-99-00257-CV, 2000 WL 10608 (Tex. App.—El Paso Jan. 6, 2000) (orig. proceeding) (holding mandamus will issue to compel trial court to vacate order setting case for trial after the case was dismissed for want of prosecution and after plenary expired; although issuance of dismissal order was a clerical mistake, trial court failed to issue a timely written order of reinstatement). *See also In re* Ramsey, 28 S.W.3d 58, 64 (Tex. App.—Texarkana 2000) (orig. proceeding) (finding mandamus will issue where one court directly interferes with the jurisdiction of another court).

45. 27 S.W.3d 327 (Tex. App.—Houston [1st Dist.] 2000) (orig. proceeding).

held that TRO's orders entered by a trial court prohibiting further examination and retention of property seized pursuant to criminal search warrants were entered without jurisdiction and in direct violation of the Texas Code of Criminal Procedure.[46] Mandamus would issue because the trial court lacked jurisdiction to enter the temporary orders.[47]

j. Ministerial Acts

In many cases during this Survey period, the courts of appeal granted mandamus relief to order trial courts to perform ministerial acts mandated by statute. For instance, in *In re Bridges*,[48] the Fort Worth Court of Appeals granted mandamus ordering the trial court to enter a judgment *nunc pro tunc* to reflect the dismissal only of the nonsuited defendant. Noting that the trial court has a ministerial duty to dismiss any party that has been voluntarily nonsuited but has no authority to dismiss parties not subject to the voluntary nonsuit, the court found that the trial court abused its discretion in refusing to correct its order mistakenly dismissing all defendants.[49]

Appellate courts generally do not have mandamus jurisdiction over district court clerks.[50] In *In re Washington*,[51] however, the First Court of Appeals held that it had jurisdiction "to issue a writ of mandamus against a district clerk for failure to forward to the appropriate court of appeals a notice of appeal delivered to him for filing because such is necessary to enforce [the appellate court's] jurisdiction."[52]

Mandamus will also issue to compel a city secretary to withdraw an administrative declaration of ineligibility to be named as a candidate in a city council election.[53] The Waco Court of Appeals reasoned that a city secretary has no fact-finding authority, and the fact that the candidate cast a ballot in another precinct does not conclusively establish that the

46. *Id.* at 335.

47. *Id. See also In re* Sensitive Care Inc., 28 S.W.3d 35 (Tex. App.—Fort Worth 2000) (orig. proceeding) (finding exceptional circumstances warranting mandamus relief despite final, appealable turnover order because order entered in violation of temporary bankruptcy stay and without jurisdiction).

48. 28 S.W.3d 191 (Tex. App.—Fort Worth 2000) (orig. proceeding).

49. *Id.* at 195. *See also In re* Vorwerk, 6 S.W.3d 781 (Tex. App.—Austin 1999) (orig. proceeding) (finding that trial court abused its discretion by ignoring a party's request to transfer a case from a constitutional county court to a statutory probate court in contravention to the mandatory provisions of section 5(b) of the Texas Probate Code); *In re* Kramer, 9 S.W.3d 449 (Tex. App.—San Antonio 1999) (orig. proceeding) (stating that mandamus will issue to correct trial court's failure to transfer venue in a suit affecting the parent-child relationship under the Family Code's mandatory venue provision); *In re* Middlebrook, 7 S.W.3d 262 (Tex. App.—Waco 1999) (orig. proceeding); *In re* Bishop, 8 S.W.3d 412 (Tex. App.—Waco 1999) (orig. proceeding) (issuing a mandamus to correct a trial court's failure to dismiss a DPRS suit that had expired under the Texas Family Code §263.401(a)).

50. *See In re* Carson, 12 S.W.3d 886 (Tex. App.—Texarkana 2000) (orig. proceeding) (finding court of appeals did not have jurisdiction to issue a writ of mandamus against the operating officer of the Inmate Trust Fund because officer was not a judge).

51. 7 S.W.3d 181 (Tex. App.—Houston [1st Dist.] 1999) (orig. proceeding) (per curiam).

52. *Id.* at 182.

53. *In re* Jackson, 14 S.W.3d 843, 849 (Tex. App.— Waco 2000) (orig. proceeding).

candidate failed to meet the residency requirements under the city charter.[54]

k. Interlocutory Orders

Mandamus will issue where a trial court attempts to circumvent appellate review of its judgment through interlocutory orders. In *In re Tarrant County*, Tarrant and Denton counties disputed the location of a county line.[55] To maintain continuing jurisdiction over the resurveying process the trial court refused to enter final judgment in the case, choosing instead to enter an interlocutory judgment permitting Denton county to mark and monument the county line before final judgment was entered.[56] Noting that municipalities have the authority to supersede a judgment simply by filing a notice of appeal but that no notice of appeal could be filed until there was a final judgment, the Fort Worth Court of Appeals found that the trial court abused its discretion in entering an interlocutory order that deprived Tarrant county of its right to supersede the judgment.[57] Accordingly, mandamus would issue to order the trial court to enter a final, appealable judgment from which Tarrant county could appeal and supersede.[58]

2. Mandamus Relief Unavailable.

In numerous cases during this Survey period where the supreme court denied mandamus relief without issuing a written opinion, Justices Hecht and Owen issued dissenting opinions highlighting the court's increased unwillingness to grant mandamus relief.[59] For instance, in *In re Gaylord Broad. Co.*,[60] Justice Hecht, joined by Justice Owen, criticized the court for summarily denying mandamus against a judge who refused to allow a television station to film courtroom proceedings solely because the sta-

54. *Id.*
55. *Id.* at 916.
56. *Id.* at 917.
57. *Id.* at 918.
58. *Id.*
59. *See In re* Texas Farmers Ins. Exch., 12 S.W.3d 807 (Tex. 2000) (orig. proceeding) (Hecht, J. dissenting) (arguing in support of mandamus relief from trial court's refusal to issue a protective order to prevent discovery of the results of an attorney's investigation of client's claim, which the dissent would have held to be an attorney-client privileged communication); *In re* Avila, 22 S.W.3d 349 (Tex. 2000) (orig. proceeding) (Hecht, J. dissenting) (Justice Hecht, not joined by Justice Owen, would have granted mandamus relief from trial court order compelling relator to answer whether her attorney referred her to a physician for treatment, which Justice Hecht believed was a privileged attorney-client communication); *In re* Rio Grande Valley Gas Co., 8 S.W.3d 303 (Tex. 1999) (orig. proceeding) (Hecht, J. dissenting) (dissenting from denial of mandamus from a ruling upholding local rules that permit transfers from one court to another court in the same county because the transfer would circumvent statute and state court rules and nullify the assignment of judges); *In re* GNC Franchising, Inc., 22 S.W.3d 929 (Tex. 2000) (orig. proceeding) (Hecht, J. dissenting) (dissenting from the denial of petition for writ of mandamus from order refusing to enforce contractual forum-selection clauses); *In re* Kennedy Funding, Inc., No. 00-0533, 43 Tex. Sup. Ct. J. .899 (June 22, 2000) (orig. proceeding) (same).
60. 22 S.W.3d 848 (Tex. 2000) (orig. proceeding) (Hecht, dissenting).

tion had broadcast news stories critical of the judge, while allowing other television stations to film the proceedings. Justice Hecht noted that by denying mandamus, the court allowed the trial judge to violate the press's constitutional right of access to criminal proceedings.[61]

Justices Hecht and Owen would also support mandamus relief where the trial court grants a new trial without stating the basis for its ruling.[62] According to the dissent, it was not sufficient that the trial court stated in its order granting new trial that a new trial is "in the interest of justice and fairness."[63]

In *In re Living Ctrs. of Am.*,[64] Justice Owen, joined by Justice Hecht, dissented to the denial of a petition for writ of mandamus because the proceedings in the trial court were automatically stayed under 11 U.S.C. § 362(a) after one of the defendants filed Chapter 11 bankruptcy.

a. Attorney Disqualification

In the previous Survey period, in *In re EPIC Holdings* (EPIC I), the supreme court ordered the disqualification of certain law firms because the firm's previous representation of the opposing party was substantially related to the present litigation and the firms questioned the validity of the work previously performed in the current litigation.[65]

In a related proceeding during this Survey period, the court was asked to resolve the novel question of whether the law firm hired by the plaintiff after the disqualifications in *EPIC I* could have access to the disqualified law firms' work product.[66] In *In re George*, the court of appeals found that the relators had waived their rights by failing to timely move to restrict the successor firm's access to the former law firms' work product.[67] The supreme court rejected the court of appeals' finding of waiver and found that while the successor firm should have access to public records the successor firm's access to work product may be restricted or prohibited to the extent necessary to protect the purposes underlying the disqualification.[68]

Specifically, with respect to access to public records, the court held that "when an attorney is disqualified, successor counsel is presumptively entitled to obtain the pleadings, discovery, correspondence and all other

61. *Id.* at 848.

62. *See, e.g.*, *In re* Volkswagen of Am., Inc., 22 S.W.3d 462 (Tex. 2000) (orig. proceeding) (Hecht, J. dissenting) (supporting mandamus relief from trial court order granting new trial without stating a reasoned basis for its ruling).

63. *See In re* Bayerische Motoren Werke, AG, 8 S.W.3d 326, 326 (Tex. 2000) (orig. proceeding) (Hecht, J. dissenting).

64. No. 99-0772, 2000 WL 373920, *1 (Tex. April 13, 2000).

65. *See In re* EPIC Holdings, 985 S.W.2d 41 (Tex. 1998) (orig. proceeding); *Cf.* Rubin v. Enns, No. 07-99-0385-CV, 2000 WL 12900 (Tex. App.—Amarillo, Jan. 7, 2000, orig. proceeding) (finding no abuse of discretion in denial of motion to disqualify firm that employed a legal assistant who had previously worked for relator's law firm based on tripartite test).

66. *See In re* George, 28 S.W.3d 511 (Tex. 2000, orig. proceeding).

67. *George*, 28 S.W.3d at 512.

68. *Id.*

materials in the public record or exchanged by the parties."[69]

With respect to work product, however, the court held that the successor firm's access to the former firm's work product must be restricted to the extent necessary to protect the purpose of the disqualification.[70] In fashioning a standard for determining the extent to which the new law firm's access to work product should be restricted, the court rejected the standards established by other jurisdictions in favor of its own test.[71] The court held that once a former client establishes that the two representations are substantially related, there is a "rebuttable presumption that the work product contains confidential information."[72] To rebut the presumption, the current client must show that there is "not a substantial likelihood that the desired items of work product contain or reflect confidential information."[73]

Because the current client must meet its burden without having access to the work product, the court fashioned a specific procedure for reviewing the work product.[74] First, once "successor counsel moves for access to the work product or the former client moves to restrict access, the trial court should order the disqualified attorneys to produce an inventory of work product . . . describ[ing] the type of work, the subject matter, the claims it relates to and any other factor the court considers relevant."[75] Although the court found that the trial court abused its discretion by granting access to all work product, it noted that it established a new standard regarding access to work product of disqualified counsel and accordingly, denied the petition for writ of mandamus without prejudice "to afford Relators an opportunity to reurge their motions to the trial court in light of this opinion."[76]

Justice Owen concurred in the court's conclusion that successor counsel should not have blanket access to the former counsel's work product but criticized the court's proposed standard for resolving the problem.[77] Specifically, Justice Owen noted that under the court's procedure the burden falls on the parties who have no access to the work product.[78]

The dissent warned against the complexities of the test created by the majority, arguing that "[b]ecause there is no practical way short of banning the transfer of work product to make sure the policies behind disqualification are fulfilled" mandamus should be granted to prohibit

69. *Id.* at 514.
70. *Id.*
71. *Id.* at 516-17.
72. *George*, 28 S.W.3d at 518.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 520.
77. *George*, 28 S.W.3d at 520 (Owen, J. concurring).
78. *Id.*

disclosure of any work product.[79]

b. Injunctive Relief

Although mandamus will usually issue to resolve the question of dominant jurisdiction between two district courts and decide which of conflicting orders are controlling, mandamus is not available where the order in question is a temporary injunction that is subject to immediate interlocutory appeal.[80]

c. Orders for Sanctions

An order for the payment of sanctions is subject to mandamus relief only where such sanctions threaten the party's willingness or ability to continue the litigation.[81]

3. Untimely Petition for Writ of Mandamus.

In *In re Wise*,[82] the Waco Court of Appeals denied a mandamus petition from a trial court order denying an individual free access to the court record because the individual waited two years after the trial court's order to file the mandamus petition without any explanation for the delay in filing.[83]

B. INTERLOCUTORY APPEALS

1. Appeal of Denial of Motion to Transfer Venue and Objection to Attempted Joinder

Under Section 51.003(c) of the Texas Civil Practice & Remedies Code, an interlocutory appeal is allowed from a trial court's decision "allowing or denying . . . joinder" in cases where a party is "unable to independently establish proper venue."[84] As interpreted by the Waco Court of Appeals in *Am. Home Prods. Corp. v. Clark*, if the trial court determines that each joined plaintiff has independently established proper venue, Section 51.003(c) cannot be the jurisdictional basis for an appeal from the trial court's denial of the defendants' challenge to venue and/or joinder.[85]

79. *Id.* at 526. (Brister, J., assigned, dissenting). Justice Brister was joined in the dissent by Justices Hecht and Ramey (assigned). Justices Enoch, Hankinson and Gonzalez all recused themselves from the decision in this case.

80. *See In re* Gorman, 1 S.W.3d 894 (Tex. App.—Fort Worth 1999, orig. proceeding).

81. *See In re* Onstad, 20 S.W.3d 731, 733 (Tex. App.—Texarkana 2000) (orig. proceeding).

82. 20 S.W.3d 894 (Tex. App.—Waco 2000) (orig. proceeding) (per curiam).

83. *Id.* at 895.

84. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c).

85. 999 S.W.2d 908, 910 (Tex. App.—Waco 1999), *aff'd*, 38 S.W.3d 92 (Tex. 2000). After the Survey period, the Texas Supreme Court affirmed the Waco court's analysis of the jurisdiction issue. Am. Home Prods. Corp. v. Clark, 38 S.W.3d 92 (Tex. 2000). The Fort Worth Court of Appeals in *Am. Home Prods. Corp. v. Adams*, 22 S.W.3d 121 (Tex. App.—Fort Worth 2000, pet. filed) concurred with the Waco court's analysis of the statute, concluding that an interlocutory appeal is available only from the trial court's determination whether joinder is proper based on the four joinder factors under section 15.003(a) of

The dissent in *American Home* disagreed, rejecting the argument that the court of appeals only has jurisdiction if it is first determined by the trial court that the party seeking joinder is unable to independently establish proper venue.[86] According to the dissent, the court of appeals has jurisdiction to review the determination of whether each party seeking joinder is able to independently establish proper venue because the court of appeals has jurisdiction to determine whether it has jurisdiction.[87]

2. *Appeal of Denial of Motion to Transfer Venue Based on Newly Joined Defendant*

Does section 15.003 of the Texas Civil Practice & Remedies Code apply to situations involving multiple defendants? This was the question the Amarillo Court of Appeals faced in *Labrador Oil Co. v. Norton Drilling Co.*,[88] where the defendant appealed from the trial court's denial of its motion to transfer venue based on the plaintiff's addition of a new defendant where, according to the original defendant, there was no basis in law or in the record to allow or permit a joinder of the claims against the original defendant and the newly added defendant.[89] The court of appeals construed section 15.003 as a whole and concluded that the section deals only with situations in which there are multiple plaintiffs, and subsection (c) only permits an interlocutory appeal from decisions of the trial court with regard to whether or not additional plaintiffs correctly belong in the lawsuit.[90] Accordingly, it is only in such instances that the statute permits a defendant an interlocutory appeal.[91]

3. *Appeal of Order Permitting Pre-Suit Discovery*

Rule 202 of the Texas Rules of Civil Procedure permits a person to petition the court for an order authorizing the taking of an oral or written deposition to either (1) perpetuate testimony for use in an anticipated

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the Texas Civil Practice & Remedies Code and that an interlocutory appeal is not available from the trial court's determination that a plaintiff can independently establish proper venue apart from the four joinder factors. *Id.* at 123-24. In support of this conclusion, the Fort Worth court quoted the Texas Supreme Court's holding in *Surgitek v. Abel*, 997 S.W.2d 598, 601 (Tex. 1999) that an interlocutory appeal under section 15.003(c) is available "[w]hen a trial court's order necessarily determines the propriety of a plaintiff's joinder under section 15.003(a)." *Id.* By its express terms, the Fort Worth court concluded, section 15.003(c) only provides an appeal from the trial court's joinder determination as to plaintiffs who are "unable to independently establish proper venue." *Id.* (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c)).

86. Am. Home Prods. Corp. v. Clark, 999 S.W.2d at 911-12 (Gray, J., dissenting).

87. *Id.* The supreme court expressly rejected this argument, holding that "[n]either the court of appeals nor this Court can review the propriety of the trial court's venue decision." *Am. Home*, 38 S.W.3d at 96.

88. 10 S.W.3d 717 (Tex. App.—Amarillo 1999, no pet.).

89. *Id.* at 717-18.

90. *Id.* at 719.

91. *Id.* at 720. The court of appeals determined that the intent of the legislature in enacting section 15.003 was to restrict the joinder of multiple plaintiffs, particularly in tort cases, in order to prevent forum shopping by multiple plaintiffs. *Id.* (citing Bristol-Myers Squibb Co. v. Goldston, 957 S.W.2d 671, 673 (Tex. App.—Fort Worth 1997, writ denied)).

suit, or (2) to investigate a potential claim or suit.[92] As a general rule, any order relating to discovery in aid of a pending or contemplated cause, even when filed in a separate action, are considered interlocutory and are not appealable except in connection with an appeal from the final disposition of the main cause on the merits.[93] The finality of such an order, for purposes of appeal, depends on the context in which the order is entered.[94] The rule relating to such orders is that when a pre-trial discovery order is ancillary to or essentially a part of another suit, whether ongoing or contemplated, the bill is an interlocutory order and not appealable.[95] When the discovery order is a separate suit having as its sole object the obtaining of the information requested, the order granting discovery is final for appeal.[96] The question is whether an order for pre-suit discovery should be treated as a discovery order or as a separate lawsuit.[97]

Addressing these issues in *Valley Baptist*, the Corpus Christi Court of Appeals concluded that a direct appeal from a pre-suit discovery order should be limited to situations where the discovery order sought is clearly a separate action against a third party.[98] This is so because, when the discovery is directed against third parties against whom suit is not pending and not contemplated, the discovery order resolves all discovery issues between the requested discovery and the discovery defendant. "It is an end in itself and becomes a final and appealable judgment against the discovery defendant."[99]

4. *Appeal of Order Denying Summary Judgment Based on Assertion of Immunity*

Under section 51.014 of the Texas Civil Practice & Remedies Code, "a person" may appeal from an interlocutory order "that denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state."[100] The Texas Supreme Court recently held that this applies to the denial of a motion for summary judgment that merely asserts immunity as a defense—even if the defendant wholly fails to present

92. TEX. R. CIV. P. 202.1.

93. Valley Baptist Med. Ctr. v. Gonzalez, 18 S.W.3d 673, 676 (Tex. App.—Corpus Christi 1999), *vacated as moot*, 33 S.W.3d 821, 822 (Tex. 2000).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Gonzalez*, 18 S.W.3d at 676-77.

99. *Id.* at 677 (adopting the analysis of Jacintoport Corp. v. Almanza, 987 S.W.2d 901, 902 (Tex. App—Houston [14th Dist.] 1999, no pet.). After the Survey period, the Texas Supreme Court vacated the court of appeals' judgment and opinion because the party previously resisting the presuit discovery complied with the discovery order, rendering the court of appeals' decision an impermissible advisory opinion. Valley Baptist Med. Ctr. v. Gonzalez, 33 S.W.2d 821, 822 (Tex. 2000).

100. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5).

evidence in support of his affirmative defense of immunity.[101] Regardless of whether or not the motion was properly denied because it was not supported by evidence, a motion that is "based on an assertion of immunity" is an interlocutory order over which the court of appeals has jurisdiction to consider whether the trial court erred in denying the motion.[102]

5. *Appeal of Order Denying Confirmation of Arbitration Award*

Under section 171.098(a)(5) of the Texas Civil Practice & Remedies Code, a party may appeal an order confirming or denying confirmation of an arbitration award or vacating an award without directing a rehearing.[103] The question of first impression before the Fourteenth Court of Appeals in *Prudential Sec., Inc. v. Vondergoltz*[104] was whether a trial court's order denying confirmation of an arbitration award was appealable when the order also granted the application to vacate the award and ordered rehearing before a new arbitration panel.[105] Determining that an order denying confirmation of an arbitration award is the functional equivalent of an order vacating an award, the Houston court concluded that, construed logically, the statute does not permit an appeal from orders denying confirmation or vacating an award where rehearing is directed as to either.[106]

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101. Univ. of Texas Southwestern Med. Ctr. of Dallas v. Margulis, 11 S.W.3d 186, 187-88 (Tex. 2000) (per curiam).

102. *Id.* at 188. Interestingly, the supreme court made a point of noting that, although only two of the four defendants had moved for summary judgment, all defendants filed a notice of appeal from the trial court's interlocutory ruling denying the summary judgment. *Id.* at 187. Section 51.014 provides that "a person" may appeal an interlocutory order denying summary judgment based on an assertion of immunity. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5).

103. TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(3), (5).

104. 14 S.W.3d 329 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

105. *Id.* at 330.

106. *Id.* at 331. The First Court of Appeals reached a similar conclusion in Stolhandske v. Stern, 14 S.W.3d 810 (Tex. App.—Houston [1st Dist.] 2000, pet. denied), where the trial court made no ruling on a motion to confirm the arbitration award but vacated the award and ordered a new arbitration. *Id.* at 813. Concluding that it had no jurisdiction over the appeal, the *Stolhandske* court reasoned that, while subsection (5) of the Texas Arbitration Act provides for an interlocutory appeal of an order "vacating an award without directing a rehearing," that grant of interlocutory review is *limited* to cases in which the trial court fails to order a rehearing. *Id.* *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(5). Under the rule of statutory construction that a statute's inclusion of a specific limitation excludes all others, the limitation express in subsection (5) excludes review of cases in which the trial court vacates an arbitration award, but does, in fact, order a new arbitration. *Stolhandske*, 14 S.W.3d at 813. The *Stolhandske* court also rejected the appellant's argument that the trial court's order vacating the arbitration award constituted an *implicit* denial of his motion to confirm the award, which would be an appealable interlocutory order under subsection (3) of the Texas Arbitration Act. *Id.* at 813-14. TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(3). The court concluded that such a construction of subsection (3) would render subsection (5) meaningless because all orders vacating awards would be appealable under subsection (3), with or without an order for rehearing, and the limitation in subsection (5) would cease to be effective. *Stolhandske*, 14 S.W.3d at 814. The court refused to presume that the legislature intended for subsection (5) to be without effect. *Id.*

6. Appeal of Order Granting Temporary Injunction

An interlocutory order granting or refusing to grant a temporary injunction is appealable.[107] The issue is whether the order appealed constitutes a "temporary injunction." As noted by the First Court of Appeals in *Swanson v. Community State Bank*,[108] "[a]n injunction is a coercive order that is equitable in nature. . . . [Its] purpose . . . is to maintain the status quo pending trial on the merits."[109] Where, as in *Swanson*, the order complained of is *permissive* in nature, the order is not the equivalent of a temporary injunction, and is not appealable.[110]

7. Appeal of Probate Order

Under the Texas Probate Code, "[a]ll final orders of any court exercising original probate jurisdiction shall be appealable to the courts of appeals."[111] To be final and appealable, a probate order need not fully dispose of the entire proceeding.[112] The test for appealability is "if there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of, then the probate order is interlocutory."[113] Where, as in *Estate of Navar*, the order at issue is part of a portion of the estate's administration dealing with satisfying creditor's claims, and nothing in the record indicates that such claims have been fully disposed of and no severance has been made, the order is not final and appealable.[114]

8. Appeal of Denial of Summary Judgment

As a general rule, the denial of summary judgment is interlocutory and not appealable. However, the Texas Supreme Court reaffirmed in *Baker Hughes, Inc. v. Keco R. & D., Inc.*[115] its holding in *Cincinnati Life Ins. Co. v. Cates*[116] that this rule does not apply when a movant seeks summary

107. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4).
108. 12 S.W.3d 163 (Tex. App.—Houston [1st Dist.] 2000, no pet.).
109. *Id.* at 164.
110. *Id.* at 165-66. The order in *Swanson* stated that a certain number of shares of stock were to be sold by the appellee bank and the proceeds applied to the appellants' debt owed to the bank. Regardless of the word "ordered," however, the court of appeals held that the order was permissive in nature—and, therefore, not a temporary injunction—because, after the order was entered, the bank could have chosen not to liquidate the stock. *Id.* at 166.
111. TEX. PROB. CODE ANN. § 5(f) (Vernon Supp. 2000).
112. Estate of Navar v. Fitzgerald, 14 S.W.3d 378, 379 (Tex. App.—El Paso 2000, no pet.) (citing Crowson v. Wakeham, 897 S.W.2d 779, 782 (Tex. 1995)). As explained by the El Paso court in *Estate of Navar*, this is so because probate administration is a continuing process and its nature contemplates that future decisions must be based on intermediate decisions. 14 S.W.3d at 379. Interlocutory appeals are necessary to provide practical review of erroneous, controlling intermediate decisions before their consequences become irreparable. *Id.*
113. *Estate of Navar*, 14 S.W.3d at 379 (quoting *Crowson*, 897 S.W.2d at 783).
114. *Id.* at 380.
115. 12 S.W.3d 1 (Tex. 1999).
116. 927 S.W.2d 623 (Tex. 1996).

judgment on multiple grounds, and the trial court grants the motion on one or more grounds but denies the motion or fails to rule on one or more other grounds presented in the motion and urged on appeal.[117] On appeal from a summary judgment, the court of appeals must review "all of the summary judgment grounds on which the trial court actually ruled, whether granted or denied, and which are dispositive of the appeal, and may consider any grounds on which the trial court did not rule."[118]

9. Supreme Court Jurisdiction Over Interlocutory Appeals

Ordinarily, the Texas Supreme Court does not have jurisdiction to review a court of appeals' decision on an interlocutory appeal unless there is a dissent in the court of appeals, conflicts jurisdiction, or a specific statute granting jurisdiction.[119] However, even when an appeal is interlocutory, the supreme court has jurisdiction "to determine whether the court of appeals has jurisdiction of the appeal."[120]

With respect to conflicts jurisdiction over an interlocutory appeal, the Texas Supreme Court in *Southwestern Ref. Co. v. Bernal*[121] recently analyzed what it takes to demonstrate a conflict in the law sufficient to invoke the jurisdiction of the supreme court. *Southwestern Refining* involved an interlocutory appeal of a trial court's order certifying a class action.[122] The order directed that the class proceed in multiple phases, with evidence relating to punitive damages, including the defendants' net worth, to be introduced before the jury would be asked to decide causation and actual damages for the nonrepresentative members of the class.[123] After an unsuccessful interlocutory appeal to the court of appeals, the defendants sought review by the supreme court, arguing that the court of appeals' approval of the multi-phase trial plan directed by the certification order conflicted with the supreme court's dictate in *Transportation Ins. Co. v Moriel*[124] that, upon a party's request, a trial court must bifurcate the trial and obtain jury findings on liability and actual damages before allowing evidence—including evidence of a defendant's net worth—on the amount of punitive damages.[125]

Analyzing its jurisdiction over the interlocutory appeal, the supreme court noted that it "has jurisdiction over interlocutory appeals when the

117. *Baker*, 12 S.W.3d at 5 (citing *Cincinnati Life*, 927 S.W.2d at 624-26).

118. *Id.* (citations omitted). This is so regardless of the number of summary judgment motions filed, when they were presented to the trial court, or when the trial court ruled. *Id.*

119. University of Texas Southwestern Med. Ctr. of Dallas v. Margulis, 11 S.W.3d 186, 187 (Tex. 2000) (per curiam).

120. *Id. See also* Waco Indep. Sch. Dist. v. Gibson, 22 S.W.3d 849 (Tex. 2000) ("Although jurisdiction over interlocutory appeals is generally final in the court of appeals, this Court has jurisdiction to consider whether the court of appeals properly determined its own jurisdiction.").

121. 22 S.W.3d 425 (Tex. 2000).

122. *Id.* at 428.

123. *Id.* at 430.

124. 879 S.W.2d 10 (Tex. 1994).

125. *Southwestern Ref.*, 22 S.W.3d at 430.

court of appeals' decision conflicts with a prior decision of another court of appeals or this Court on a question of law material to the decision of the case."[126] The standard for conflicts jurisdiction "is whether the rulings in two cases are so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other."[127] The Court emphasized that conflicts jurisdiction does *not* "require that the two cases be identical either on the facts underlying the causes of action nor on the procedural facts."[128] The key issue is whether the ruling in one case is necessarily conclusive in the other on a question of law material to the decision in the case.[129]

Because the Court in *Moriel* said that the standards articulated therein "apply to all punitive damage cases tried in the future" without excepting class actions, the supreme court determined, in *Southwestern Refining*, that conflicts jurisdiction existed because "[i]f *Moriel* is good law, the court of appeals' holding cannot be sustained."[130] The Court further pointed out that once a conflict confers jurisdiction on the Court, the case is before the Court for all purposes.[131]

Also during the Survey period, the supreme court upheld the constitutionality of the provision of the Texas Motor Vehicle Commission Code enacted in 1997 that confers jurisdiction on the supreme court to review interlocutory orders granting or denying class certification in motor vehicle licensee cases, even in the absence of a conflict or dissent.[132] In *Ford Motor*, the supreme court rejected the plaintiffs' argument that the Motor Code's provision vesting the supreme court with jurisdiction is unconstitutional because it violates the prohibition against special laws, denies equal protection of the laws, and has an insufficient title.[133] The Court ultimately concluded that it had jurisdiction over the interlocutory appeal under the Motor Code's provision without considering whether jurisdiction existed under Texas Government Code Section 22.001(a)(2).[134]

II. PRESERVATION OF ERROR

With one exception, the decisions handed down during this Survey period involved strict enforcement of preservation rules.

In several instances, the Texas Supreme Court found waiver. With regard to charge error, the supreme court reaffirmed the rule that a party who properly objects to the charge in the trial court may nevertheless waive that objection by failing to raise the issue on appeal.[135] With re-

126. *Id.* at 430-31.
127. *Id.* at 430 (citing Coastal Corp. v. Garza, 979 S.W.2d 318, 319 (Tex. 1998)).
128. *Id.* at 431.
129. *Id.*
130. *Southwestern Ref.*, 22 S.W.3d at 432.
131. *Id.*
132. Ford Motor Co. v. Sheldon, 22 S.W.3d 444, 452 (Tex. 2000). *See* TEX. REV. CIV. STAT. ART. 4413(36), § 6.06(g) (Vernon Supp. 1999).
133. *Ford Motor*, 22 S.W.3d at 451-52.
134. *Id.* at 452.
135. *See In re* V.L.K., 24 S.W.3d 338, 343-44 (Tex. 2000); TEX. R. APP. P. 278-79.

gard to defects or omissions in the pleadings, the Supreme Court strictly applied the rule that a party waives its objection to pleading deficiencies by failing to object before submission of the charge to the jury.[136] With regard to the trial court's failure to obtain a jury finding on all issues, the supreme court held that by failing to object when the jury did not return an answer in the charge, a party "waived any benefit from the jury question, waived any right to have the trial judge supply his own factfinding or grant a new trial on the issue, and waived his right to appeal a judgment on the issue."[137]

The Fourteenth District Court of Appeals also found waiver in *United Parcel Serv. v. Tasdemiroglu.*[138] The court held that an appellant seeking to bring a no evidence or a matter of law point of error does not preserve that issue by obtaining an order denying its motion for summary judgment. As a general rule, the denial of a motion for summary judgment is not appealable.[139] If the case is ultimately tried on the merits, the party must again raise the legal issue by filing a motion for directed verdict, a motion for judgment notwithstanding the verdict, a motion to disregard a jury finding, a motion for new trial, or by objecting to the charge.[140] Moreover, the denial of summary judgment against one party does not operate as an "effective" grant of summary judgment for the other party.[141] Thus, appellant cannot avoid waiver by construing its appeal as an appeal from a fictitious grant of summary judgment in favor of its opponent.[142]

The Texarkana Court of Appeals held that a party waived its complaint when the party waited until one day after a witness testified at trial until moving to strike the testimony for discovery abuse. In *Aluminum Chems. (Bolivia), Inc. v. Bechtel Corp.*,[143] appellant argued that the trial court erred by failing to strike the testimony of an opposing witness in light of appellee's failure to supplement interrogatory responses.[144] However, when the witness testified, appellant failed to object, and, indeed, cross examined the witness at length.[145]

The court acknowledged that most motion to strike cases deal with pretrial testimony, not testimony at trial. Consequently, the court had never before addressed the issue of the effect of a one-day delay before filing a

136. *See* City of Fort Worth v. Zimlich, 29 S.W.3d 62, 73 (Tex. 2000); TEX. R. CIV. P. 274; TEX. R. APP. P. 33.1.

137. Osterberg v. Peca, 12 S.W.3d 31, 56 (Tex. 2000) (citing Fleet v. Fleet, 711 S.W.2d 1 (Tex. 1986) (holding that a trial court will not be reversed for rendering judgment on an incomplete verdict unless the party who would benefit from answers to the unanswered issues objects to the incomplete verdict before the jury is discharged)).

138. 25 S.W.3d 914, 917 (Tex. App.—Houston [14th Dist.] 2000, rule 53.7(f) motion filed Sept. 21, 2000).

139. *Id.* at 916 (citing Ackermann v. Vordenbaum, 403 S.W.2d 362, 365 (Tex. 1966)).

140. *Id.* (citing Cecil v. Smith, 804 S.W.2d 509, 510-11 (Tex. 1991)).

141. *Id.* at 917.

142. *Id.*

143. 28 S.W.3d 64, 69 (Tex. App.—Texarkana 2000, no pet.).

144. *See id.*

145. *See id.*

motion to strike. The court concluded that, because it had "found no instance where a claim of error is preserved when a party waits until the witness completes her testimony, without objection, and then asks the court on the next day to strike the testimony[,] [t]he claim of error has not been preserved for appellate review."[146]

The one exception to the emergence of cases strictly construing preservation rules is the supreme court's decision in *El Paso Natural Gas Co. v. Minco Oil & Gas Co.*[147] In that case, the trial court found a release provision in an agreement to be ambiguous, but never resolved the ambiguity because it found the agreement to be unconscionable.[148] Because the appellant failed to object to the ambiguity finding, the court of appeals found waiver on the release issue.[149] The supreme court disagreed, holding that the trial court's controlling conclusion of unconscionability rendered the ambiguity finding unnecessary to its judgment, and the failure to specifically challenge the finding therefore did not constitute waiver.[150]

Finally, this Survey period saw the development of a split among courts of appeals regarding the scope of the 1997 amendment to Texas Rule of Appellate Procedure 33.1. Rule 33.1 does not require that a party obtain a *written* ruling from the trial court in order to preserve an issue for appeal. Indeed, Rule 33.1 "relaxes the former requirement of an express ruling and codifies case law that recognized implied rulings."[151] Thus, a trial court's order granting defendants' motion to disregard certain jury findings constitutes an implicit denial of the plaintiffs' motion for judgment on those findings.[152]

However, appellate courts disagree about whether a trial court's ruling on a party's motion for summary judgment impliedly disposes of objections to summary judgment evidence.[153]

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146. *Id.*

147. 8 S.W.3d 309 (Tex. 1999).

148. *See id.* at 315.

149. *See id.*

150. *See id.* at 316.

151. Frazier v. Yu, 987 S.W.2d 607, 610 (Tex. App.—Fort Worth 1999, pet. denied). Even so, a docket sheet notation does not satisfy the requirements of Rule 33.1. *See* Guyot v. Guyot, 3 S.W.3d 243, 246-47 (Tex. App.—Fort Worth 1999, rule 53.7(f) motion filed Nov. 22, 1999) (docket sheet notation reflecting appellant's pre-judgment desire to withdraw consent to agreed decree of divorce could not be relied on to preserve error).

152. *See* Salinas v. Rafati, 948 S.W.2d 286, 288 (Tex. 1997).

153. *Compare Frazier*, 987 S.W.2d at 610 (trial court impliedly sustained defendant's objections when it granted summary judgment for defendant), Taylor-Made Hose, Inc. v. Wilkerson, 21 S.W.3d 484, 493 (Tex. App.—San Antonio 2000, pet. denied) *and* Blum v. Julian, 977 S.W.2d 819, 823-24 (Tex. App.—Fort Worth 1998, no pet.) (trial court implicitly overruled plaintiff's objections when it granted summary judgment for defendant) *with* Well Solutions, Inc. v. Stafford, 32 S.W.3d 313, 317 (Tex. App.—San Antonio 2000, pet. denied) (rejecting the Fort Worth court of appeals' findings of implicit rulings because rulings on summary judgment motions and objections to summary judgment proof are not alternatives).

III. JUDGMENTS

The Survey period brought yet another onslaught of cases reflecting the struggle among the Texas courts of appeals to determine when a judgment rendered without a conventional trial on the merits is final for purposes of appeal in light of the supreme court's decisions in *Mafrige v. Ross*[154] and *Inglish v. Union State Bank*.[155] Under *Mafrige* and *Inglish*, "the intent of the trial court is not the controlling consideration in determining whether a judgment is final. . . . Rather, if a judgment contains language purporting to grant or deny relief that disposes of all claims or parties, regardless of the intent of the parties or the trial court, that judgment is final as to all claims and all parties."[156] However, prior to this article going to print, the Texas Supreme Court issued *Lehmann v. Har-Con Corp.*,[157] and did away with its previous stance that a Mother Hubbard clause indicates finality for purposes of appeal.

In *Lehmann*, the Court held that:

> in cases in which only one final and appealable judgment can be rendered, a judgment issued without a conventional trial is final for purposes of appeal if and only if either it actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and all parties.[158]

In reaching this holding, the supreme court stated that it no longer believed "that a Mother Hubbard clause in an order or in a judgment issued without a full trial can be taken to indicate finality," and overruled *Mafrige* to the extent it states otherwise.[159] The Court reasoned that, in an order on an interlocutory motion like a motion for partial summary judgment, language to the effect that "all relief not granted is denied" is ambiguous because it may mean only the relief requested in the motion (not all the relief requested by anyone in the case) and not granted by the order is denied.[160] The Court even acknowledged that a Mother Hubbard clause may have no intended meaning at all, "having been inserted for no other reason than that it appears in a form book or resides on a

154. 866 S.W.2d 590 (Tex. 1993).

155. 945 S.W.2d 810 (Tex. 1997). Cases issued during the Survey period reflecting this struggle include: Harris County v. Nash, 22 S.W.3d 46 (Tex. App.—Houston [14th Dist.] 2000, rule 53.7(f) motion filed Sept. 6, 2000)); John v. Marshall Health Serv., Inc., 12 S.W.3d 888 (Tex. App.—Texarkana 2000, rule 53.7(f) motion filed Apr. 3, 2000)); Kistler v. Stran, 22 S.W.3d 103 (Tex. App.—Houston [14th Dist.] 2000, rule 53.7(f) motion filed July 28, 2000); Curtis v. Ziff Energy Group, Ltd., 12 S.W.3d 114 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); Scott v. Poindexter, No. 04-98-00101-CV, 2000 WL 4540 (Tex. App.—San Antonio 1999, no pet.); Postive Feed, Inc. v. Guthmann, 4 S.W.3d 879 (Tex. App.—Houston [1st Dist.] 1999, no pet.); Guajardo v. Conwell, 30 S.W.3d 15 (Tex. App.—Houston [14th Dist.] 2000, pet. filed).

156. *Nash*, 22 S.W.3d at 49.

157. 39 S.W.3d 191 (Tex. 2001).

158. *Id.* at 192-93.

159. *Id.* at 192.

160. *Id.* at 203-04.

word processor."[161] The Court concluded that the standard Mother Hubbard clause is used in interlocutory orders so frequently "that it cannot be taken as any indication of finality."[162]

Instead, to be final, an order of judgment must actually dispose of every pending claim and party or clearly and unequivocally state that it finally disposes of all claims and all parties.[163] There must be some "clear indication that the trial court intended the order to completely dispose of the entire case."[164] "Language that the plaintiff take nothing by his claims in the case, or that the case is dismissed, shows finality if there are no other claims by other parties; but language that 'plaintiff take nothing by his claims against X' when there is more than one defendant or other parties in the case does not indicate finality."[165]

In *Lehmann*, the supreme court also emphasized that, "[a]n order must be read in light of the importance of preserving a party's right to appeal."[166] Accordingly, if the court of appeals "is uncertain about the intent of the order, it can abate the appeal to permit clarification by the trial court."[167] However, the Court concluded, if the order is clear and unequivocal, it must be given effect even if one or more parties did not intend for the judgment to be final.[168] "An express adjudication of all parties and claims in a case is not interlocutory merely because the record does not afford a legal basis for the adjudication. In those circumstances, the order must be appealed and reversed."[169]

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161. *Id.*

162. *Id.*

163. *Lehmann*, 39 S.W.3d at 205. Accordingly, "[a]n order that adjudicates only the plaintiff's claims against the defendant does not adjudicate a counterclaim, cross-claim, or third party claim, nor does an order adjudicating claims like the latter dispose of the plaintiff's claims. An order that disposes of claims by only one of multiple plaintiffs or against one of multiple defendants does not adjudicate claims by or against other parties. An order does not dispose of all claims and all parties merely because it is entitled 'final,' or because the word 'final' appears elsewhere in the order, or even because it awards costs. Nor does an order completely dispose of a case merely because it states that it is appealable, since even interlocutory orders may sometimes be appealable." *Id.*

164. *Id.*

165. *Id.* To make the finality determination, the court of appeals may need to look to the record in the case, because the record may reveal whether an order is made final by its own language. *Id.* at 205-06.

166. *Id.* at 206.

167. *Id.* *See* TEX. R. APP. P. 27.2. *See* Wilson v. Lott, No. 07-99-0484-CV, 2000 WL 1285421, *1 (Tex. App.—Amarillo Aug. 31, 2000, no pet.) (abating appeal and remanding for the trial court to conduct a hearing to determine whether a final judgment had been rendered).

168. *Lehmann*, 39 S.W.3d at 206.

169. *Id.* The supreme court's holding in *Lehmann* will likely all but eliminate the occurrence of appellate court review of interlocutory partial summary judgments—a procedure that has emerged over the past few years as a result of the appealability of partial summary judgments rendered final for appeal pursuant to a Mother Hubbard clause resulting in an judgment that grants more relief than requested. *See* Postive Feed, Inc. v. Guthmann, 4 S.W.3d 879, 881 (Tex. App.—Houston [1st Dist. 1999, no pet.) (when a trial court grants more relief by summary judgment than requested by disposing of issues never presented to it, the court of appeals reverses and remands as to those issues, but addresses the merits of the properly presented claims); Curtis v. Ziff Energy Group, Ltd., 12 S.W.3d 114, 119-20 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (same). Under *Lehmann*, claims and

IV. EXTENDING THE APPELLATE TIMETABLE

A. POST-JUDGMENT MOTIONS SEEKING A SUBSTANTIVE CHANGE IN THE JUDGMENT

The Texas Supreme Court and courts of appeals continue their trend of placing substance over form when it comes to the type of document that needs to be filed to extend the trial court's plenary jurisdiction and the appellate timetable. For example, in *Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*,[170] the supreme court concluded that a motion filed within 30 days of an existing judgment that seeks to add an award of sanctions to the judgment qualifies as a motion to modify, correct, or reform a judgment under Texas Rule of Civil Procedure 329b(g), thus extending the trial court's plenary jurisdiction and appellate timetable.[171] The Court rejected the appellee's argument that a motion requesting sanctions after judgment is entered should not be construed as a Rule 329b(g) motion to modify because a sanctions motion concerns matters that are distinct from the substantive issues in the case.[172] The supreme court held that a motion made after judgment to incorporate a sanction as part of the final judgment *does* propose a change to that judgment. Accordingly, such a motion is, "on its face, a motion to modify, correct or reform the existing judgment within the meaning of Rule 329b(g)."[173] The supreme court concluded that a timely filed post-judgment motion that seeks a substantive change in an existing judgment qualifies as a motion to modify under Rule 329b(g) of the Texas Rules of Civil Procedure, thus extending the trial court's plenary jurisdiction and the appellate timetable.[174]

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parties not addressed by the movant in his or her motion for summary judgment are not summarily disposed of pursuant to the presence of a Mother Hubbard clause in the order. Only if the trial court clearly states that it is disposing of all parties and claims will the order be final for purposes of appeal (and, if the order renders more relief than requested, presumably the same procedure on appeal will apply, to-wit: the interests of judicial economy will demand that the court of appeals reverse and remand as to the issues never properly presented, but address the merits of the properly presented claims). *See* Bandera Elec. Co-op., Inc. v. Gilchrist, 946 S.W.2d 336, 337 (Tex. 1997).

170. 10 S.W.3d 308 (Tex. 2000).

171. *Id.* at 313.

172. *Id.* at 311-12.

173. *Id.* at 312.

174. *Id.* at 313. In its analysis, the Court carefully distinguished between the language of Rule 329b(h)—"[i]f a judgment is modified, corrected or reformed in any respect," which pinpoints the time from which the appellate timetable runs, from the language of Rule 329b(g)—"[a] motion to modify, correct, or reform a judgment," which describes the type of motion required to extend the trial court's plenary power and the appellate deadlines. *Id.* The Court concluded that "[s]ubpart (g)'s omission of the 'in any respect' language found in subpart (h) and its pointed distinction between motions to modify and motions seeking purely clerical corrections indicate that the respective provisions have different triggers. Thus, any change to a judgment made by the trial court while it retains plenary jurisdiction will restart the appellate timetable under Rule 329b(h), . . . but only a motion seeking a substantive change will extend the appellate deadlines and the court's plenary power under Rule 329b(g)." *Id.* Stated another way, a judgment nunc pro tunc that is entered to merely correct a clerical error *will* operate to restart the appellate timetable under Rule 329b(h), but a postjudgment motion for judgment nunc pro tunc will not

Notably, a motion filed by the appellant seeking sanctions for the appellees' refusal to comply with the judgment is distinguishable from the type of sanctions motion the supreme court held in *Lane Bank* extends appellate deadlines.[175] Such a motion does not seek to *alter* the judgment but instead seeks sanctions for the failure to comply with the judgment and, therefore, does not extend appellate deadlines.[176]

The First Court of Appeals in *Finley v. J.C. Pace Ltd.*[177] similarly looked to the substance rather than the caption or introduction of the appellant's "motion for rehearing" to determine whether the appellate deadlines had been extended. The court of appeals concluded that, in substance, the motion for rehearing qualified as a motion for new trial because it sought to set aside the summary judgment that disposed of the case and, if it had been granted, a trial would have resulted.[178]

B. Failure to Pay Filing Fee

During the Survey period, the First Court of Appeals in *Finley v. J.C. Pace Ltd.*[179] addressed an issue left unresolved by the supreme court in *Tate v. E.I. DuPont de Nemours & Co.*[180]: whether the appellate timetable is extended if the filing fee for the motion for new trial is paid after the trial court loses plenary jurisdiction.[181] Relying on the supreme court's dictate that the rules of procedure be construed "reasonably but liberally, when possible, so that the right to appeal is not lost by creating a requirement not absolutely necessary from the literal words of the rule,"[182] the court in *Finley* held that a timely tendered motion for new trial extends the appellate timetable regardless of when the filing fee is paid (even if the trial court's plenary jurisdiction has long expired and the case is pending on appeal).[183]

C. Late Notice of Judgment

The Corpus Christi Court of Appeals in *Straitway Transp., Inc. v. Mundorf*[184] addressed the issue of the timeliness of appeal in the face of late notice of judgment. In that case, the trial court made a fact finding that the appellant did not receive actual notice of its December 5 judg-

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qualify under Rule 329b(g) and will not extend the appellate deadlines and the trial court's plenary power. *Id.* at 313-14.

175. Guajardo v. Conwell, 30 S.W.3d 15, 16 (Tex. App.—Houston [14th Dist.] 2000, pet. filed).

176. *Id.*

177. 4 S.W.3d 319, 320 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

178. *Id.* at 320.

179. *Id.* at 319.

180. 934 S.W.2d 83 (Tex. 1996).

181. *Tate*, 934 S.W.2d at 84 n.1.

182. *Finley*, 4 S.W.2d at 321 (quoting Jamar v. Patterson, 868 S.W.2d 318, 319 (Tex. 1993).

183. *Id.* at 321. The *Finley* court then ordered the appellant to pay the filing fee within 15 days of the date of its opinion. *Id.*

184. 6 S.W.3d 734 (Tex. App.—Corpus Christi 1999, pet. denied).

ment until January 6, but then denied the appellant's motion to restart appellate deadlines.[185] Ignoring the trial court's conclusion that appellate deadlines began on the date of judgment, the court of appeals affirmed that, under Rule 306a of the Texas Rules of Civil Procedure, if a party opposing the judgment claims to have failed to receive either notice from the clerk or actual notice of the judgment more than 20 but less than 90 days from the date of judgment, he must seek a fact finding from the trial court on the earliest day he received notice.[186] Then, the trial court must enter a finding that the party did or did not prove that date and, if he did, the appellate timetable automatically restarts.[187]

D. Motions for New Trial in Mental Health Context

Must a person appealing from a temporary mental health commitment order comply with Texas Rule of Civil Procedure 324's motion-for-new-trial requirement in order to complain about factual insufficiency on appeal? This was the issue facing the Texas Supreme Court in *Johnstone v. State of Texas*.[188] The Texas Rules of Civil Procedure apply generally to mental health commitment proceedings, and, to preserve factual insufficiency error, Rule 324 of those rules requires that a motion for new trial be filed within 30 days from the date of judgment.[189] However, section 574.070 of the Texas Health and Safety Code requires a proposed mental health patient to file a notice of appeal 10 days after the trial court signs the commitment order and does not contemplate the filing of a motion for new trial.[190] Accordingly, Rule 324 of the Texas Rules of Civil Procedure and section 574.070 conflict.[191] When a rule of procedure conflicts with a statute, the statute prevails unless the rule has been passed subsequent to the statute and repeals the statute as provided by Texas Government Code section 22.004.[192] Because the mental health statutory scheme supersedes the appellate timetable established by Rule 324 in conjunction with Rule 329b and Texas Rule of Appellate Procedure 26.1, the supreme court in *Johnstone* concluded that "a person appealing a temporary mental commitment order need not file a motion for new trial as a prerequisite to challenging the factual sufficiency of the evidence" on appeal.[193]

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185. *Id.* at 737.

186. *Id.*

187. *Id.*

188. 22 S.W.3d 408, 409 (Tex. 2000).

189. *Id.* at 410; Tex. R. Civ. P. 324(b)(2).

190. Tex. Health & Safety Code Ann. § 574.070 (Vernon 1992). *See Johnstone*, 22 S.W.3d at 410. The Health & Safety Code provisions governing appeals from orders requiring court-ordered mental health services reflect an intention by the Legislature for appeals from commitment orders to proceed expeditiously because the orders result in confinement. *See id.*

191. *See Johnstone*, 22 S.W.3d at 410.

192. Tex. Gov't Code Ann. § 22.004 (Vernon 1988). *See Johnstone*, 22 S.W.3d at 409.

193. *Johnstone*, 22 S.W.3d at 411.

E. Withdrawal or "Ungrant" of Motion for New Trial

"If a party withdraws a motion for new trial, the period of time for the trial court's plenary power reverts back to thirty days from the date the judgment is signed."[194] An oral motion to modify the judgment made in open court after the 30-day period does not change this fact, even if the trial court grants the motion to modify on the record.[195] Not only is the oral motion improper under Rule 329b(g), it is untimely filed. Accordingly, regardless of the relief the trial court clearly tries to grant, it has no effect. Once the motion for new trial is withdrawn, which is effective immediately, the trial court has no jurisdiction to modify or amend the judgment.[196]

Further, if a trial court is going to "ungrant" a previously granted motion for new trial, it must do so within 75 days of judgment. In *Ferguson v. Globe-Texas Co.*,[197] the judgment was entered February 8, 2000, and a motion for new trial was timely filed on March 3, 2000. The trial court granted the motion for new trial on April 20, 2000 (which was before the 75th day after judgment when the motion would otherwise have been overruled by operation of law). Then, on May 19, 2000, well past 75 days after judgment, but still within 105 days after judgment, the trial court "ungranted" the motion for new trial.[198]

On appeal from the trial court's "ungrant" of the motion for new trial, the Amarillo court held that it had no jurisdiction over the matter because the trial court's "ungrant" occurred after its power for doing so had expired. In reaching this conclusion, the court of appeals held that a trial court may only vacate an order granting a new trial during the period when it continues to have plenary power, which, according to the court, continues in effect for only 75 days after the date the judgment is signed unless the exceptions provided for in Texas Rule of Civil Procedure 329b(e) apply.[199]

The *Ferguson* court reasoned that, by its express terms, Rule 329b(e) applied to the granting of a new trial, or the vacation, modification, correction, or reformation of a judgment after a motion for new trial was previously overruled. It does *not* apply to the "ungranting" of a new trial motion.[200]

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194. *In re* Dilley Indep. Sch. Dist., 23 S.W.3d 189, 191 (Tex. App.—San Antonio 2000, no pet.). Tex. R. Civ. P. 329b.

195. *Dilley Indep. Sch. Dist.*, 23 S.W.3d at 191.

196. *Id.* at 191-92.

197. 35 S.W.3d 688 (Tex. App.—Amarillo 2000, pet. filed).

198. *Id.* at 690.

199. *Id.* at 690-96. Rule 329b(e) provides:

> If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

Tex. R. Civ. P. 329b(e).

200. *Ferguson*, 35 S.W.3d at 691. The court of appeals also pointed out that this application of the rules is consistent with the conclusions reached by the majority of the Texas

The court of appeals in *Ferguson* rejected the argument that Rule 329b(e) need not specifically state that the trial court may "ungrant" a motion for new trial during the 30-day extension period provided by the rule for the trial court to have power to do so because, once the trial court grants a new trial motion, the court invests itself with full authority over the case until a final judgment is entered. Because this is true, the trial court may at any time "ungrant" its previous grant of the new trial motion. The *Ferguson* court acknowledged the logic of this argument, but believed that the better reasoning is to interpret Rule 329b(e) according to its plain meaning.[201]

V. SUPERSEDING THE JUDGMENT

In order to stay enforcement of a monetary judgment pending appeal, appellate rule 24.2(a) requires appellant to post security in at least the amount of the judgment plus estimated interest and costs.[202] However, courts can order a lesser amount of security if the appellant establishes that: (1) posting security for the full amount of the judgment would cause irreparable harm to the judgment debtor, and (2) failing to post the full bond will not substantially harm the judgment creditor.[203]

In *McDill Columbus Corp. v. Univ. Woods Apartments, Inc.*, the court of appeals affirmed the trial court's refusal to reduce the amount of the bond because appellant failed to show that it would be irreparably harmed if forced to post bond in the full amount of the judgment.[204] In that case, the trial court found appellants to be jointly and severally liable for approximately $8 million, which the court noted was "not an astronomically high judgment."[205] At the hearing on the motion, appellants presented evidence that their liquidity was low, but the court held that low liquidity was not enough to warrant a reduction.[206] The record demonstrated that, "at least from a dollar valuation point of view, appellants have sufficient assets to cover the amount of the judgment," so the trial court therefore did not abuse its discretion in refusing to reduce the bond.[207]

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courts of appeals that have addressed the issue. *Id.* at 690 (citing *In re* Marriage of Wilburn, 18 S.W.3d 837, 843 n.3 (Tex. App.—Tyler 2000, no pet.); Hunter v. O'Neill, 854 S.W.2d 704, 705 (Tex. App. Dallas—1993, no writ); Homart Dev. Co. v. Blanton, 755 S.W.2d 158, 159 (Tex. App.—Houston [1st Dist.] 1988, no writ); Smith v. Caney Creek Estates Club, Inc., 631 S.W.2d 233, 235 (Tex. App.—Corpus Christi 1982, no writ). The Fourteenth Court of Appeals has disagreed with this position. *See* Biaza v. Simon, 879 S.W.2d 349, 357 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (holding that trial court has 105 days to "ungrant" a motion for new trial because plenary authority continues until a final judgment is entered).

201. *Ferguson*, 35 S.W.3d at 691.
202. TEX. R. APP. P. 24.2(a)(1).
203. *Id.* 24.2(b).
204. 7 S.W.3d 923, 926 (Tex. App.—Texarkana 2000, no pet.).
205. *Id.* at 925-26.
206. *Id.* at 926.
207. *Id.*

Before an appellate court can review a trial court's discretion in ordering the amount of security, however, "the record must demonstrate that a request was presented to the trial court to decide the sufficiency of the bond and that the trial court made a ruling" on the request.[208] In *Hamilton v. Hi-Plains Truck Brokers, Inc.*, the appellant petitioned the appellate court to increase the amount required to supersede the judgment after it had filed its brief.[209] The court of appeals overruled the appellant's request because the record did not establish that a motion to increase the amount of the supersedeas bond was presented to the trial court or approved by the trial court clerk.[210]

VI. STANDING TO APPEAL

During the last Survey period, the Texas Supreme Court held that an appellant who is not named as a party of record may nevertheless appeal under the doctrine of virtual representation if it shows: "(1) it is bound by the judgment; (2) privity of estate, title, or interest appears from the record; and (3) there is an identity of interest between appellant and a party to the judgment."[211] In *Gulistan Carpet, Inc. v. Porter*,[212] the appellate court found the first and third elements to be lacking and dismissed an appeal by a successor in interest to the party against whom judgment was rendered.

Faced with an unusual standing issue, the appellate court in *Tallyho Plastics, Inc. v. Big M Constr. Co.*[213] held that appellant had standing to appeal negative jury findings against other parties. In that case, the plaintiff sued three defendants, alleging joint and several liability for damage caused to its equipment during transport.[214] The jury found only one of the defendants (Big M) liable.[215] The plaintiff did not appeal the findings of zero liability against the remaining defendants, but Big M did, arguing that the other two should share the liability.[216] On appeal, the remaining defendants argued that, because the contribution statute did not apply, and because Big M did not assert a cross claim against them, Big M did not have standing.[217] The court of appeals rejected that argument, holding that, because it could find no authority mandating that an appellant may only appeal findings against itself, Big M had standing to appeal the

208. Hamilton v. Hi-Plains Truck Brokers, Inc., 23 S.W.3d 442, 443 (Tex. App.—Amarillo 2000, no pet.) (citing Lowe v. Monsanto Co., 965 S.W.2d 741, 742 (Tex. App.—El Paso 1998, no pet.).

209. *Id.* at 442.

210. *Id.* at 443.

211. Motor Vehicle Bd. of the Texas Dept. of Transp. v. El Paso Indep. Auto. Dealers Ass'n, Inc., 1 S.W.3d 108, 110 (Tex. 1999).

212. 4 S.W.3d 891, 894 (Tex. App.—Dallas 1999, no pet.).

213. 8 S.W.3d 789, 795 (Tex. App.—Tyler 1999, no pet.).

214. *Id.* at 791-92.

215. *Id.* at 792.

216. *Id.* at 791.

217. *Id.* at 794-95.

issue.[218]

VII. JURISDICTION OF THE COURT OF APPEALS

A. APPEALS FROM SMALL CLAIMS COURT

Under the Texas Government Code, an appeal from a small claims court judgment to a county court is in a *de novo* proceeding, and the judgment of the county court on appeal "is final."[219] Does this mean there is no further appeal to the court of appeals from a judgment of the county court after a trial *de novo* appeal from the small claims court? Before 1998, the law was uniform that, despite the "is final" language of the government code, "a judgment from a county court in a *de novo* appeal from the small claims court could be appealed to the court of appeals."[220] However, in 1998, the First Court of Appeals in *Davis v. Covert*[221] held that there is no appeal to the court of appeals from a judgment of the county court after a trial *de novo* appeal from the small claims court.[222] The *Davis* court reasoned that "final" means there is no further appeal, regardless of the provision of the Texas Civil Practice and Remedies Code giving a court of appeals jurisdiction over cases in which the amount in controversy exceeds $100.[223] The specific provisions of the Texas Government Code, the court held, control over the more general Civil Practice and Remedies Code.[224]

During the Survey period, the Waco, Houston Fourteenth, Corpus Christi and Dallas Courts of Appeals adopted the reasoning of the *Davis* court, agreeing that there can be no further appeal from a county court judgment after an appeal through a trial *de novo* of a small claims court judgment.[225]

B. APPEALS FROM JUSTICE OF THE PEACE COURT IN CONCEALED HANDGUN CASES

Under the Concealed Handgun Act of the Texas Government Code,[226] an appeal from the justice of the peace is to the county court for trial *de*

218. *Id.* at 795.
219. TEX. GOV'T CODE ANN. §§ 28.053(b), (d) (Vernon 1988).
220. A-Rocket Moving & Storage v. Gardner, No. 14-99-01380-CV, 2000 WL 796058, *1 (Tex. App.—Houston [14th Dist.] 2000, mand. denied) (citing Gaskill v. Sneaky Enters., Inc., 997 S.W.2d 296, 297 (Tex. App.—Fort Worth 1999, pet. denied)).
221. 983 S.W.2d 301 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd w.o.j.).
222. *Id.* at 303.
223. *Id. See* TEX. CIV. PRAC. & REM. CODE. ANN. § 51.012 (Vernon 1997).
224. *Davis*, 983 S.W.2d at 303.
225. *A-Rocket*, 2000 WL 796058 at *1; Lederman v. Rowe, 3 S.W.3d 254, 256 (Tex. App.—Waco 1999, no pet.); Williamson v. A-1 Elec. Auto Serv., 28 S.W.3d 731, 731-32 (Tex. App.—Corpus Christi 2000, pet. dism'd w.o.j.) (per curiam); Howell Aviation Servs. v. Aerial Ads, Inc., 29 S.W.3d 321, 323 (Tex. App.—Dallas 2000, no pet.). "The legislature could not have been more clear when it stated that such an appeal in the county court is 'final.'" *A-Rocket*, 2000 WL 796058 at *1.
226. TEX. GOV'T CODE §§ 411.174(a)(6), 411.183(b) (Vernon 1988).

novo without a jury.[227] May a party pursue a further appeal to the court of appeals from a judgment of the county court after a trial *de novo* appeal from the justice of the peace? The court of appeals in *Texas Dep't of Pub. Safety v. Tune Safety*[228] held that it had jurisdiction over such an appeal because "there are no restrictions or regulations on [a party's] appeal from the county court at law."[229] The supreme court agreed that the court of appeals had jurisdiction over the appeal, but disagreed that there are no restrictions or regulations on a party's ability to bring such an appeal.[230]

Specifically, the supreme court noted that the court of appeals' jurisdiction over any appeal must be based on either (1) the general constitutional grant found in Article V, section 6 of the Texas Constitution,[231] subject to any restrictions or regulations imposed by the Legislature; or (2) a specific statutory grant of jurisdiction.[232] Since the Handgun Act does not contain a specific grant of jurisdiction to the courts of appeals, the Court concluded that there is no specific statutory basis for jurisdiction in the court of appeals.[233] The Court determined, however, that the general constitutional grant of jurisdiction provides a basis for jurisdiction subject to two statutes limiting that jurisdiction to causes in which the amount in controversy or the judgment exceeds $100.[234] The Court then concluded that the court of appeals had jurisdiction over the appeal in *Tune* because the $140 licensing fee for a concealed-handgun license established the amount in controversy, which exceeded $100.[235]

C. Appeals from Administrative Law Court in Driver's License Suspension Cases

There is a split among the Texas courts of appeals as to whether they have jurisdiction over appeals from a license suspension appeal. Specifically, the Fort Worth, Corpus Christi and Beaumont courts of appeals have concluded that the courts of appeals have general jurisdiction over appeals from a license suspension appeal heard in a county court, county court at law or district court.[236] The Houston Fourteenth and Waco

227. *Id.* § 411.180(e).
228. 977 S.W.2d 650 (Tex. App.—Fort Worth 1998), *aff'd*, 23 S.W.3d 358 (Tex. 2000).
229. *Id.* at 652.
230. Texas Dep't of Pub. Safety v. Tune, 23 S.W.3d 358, 361 (Tex. 2000).
231. Under the constitution, the courts of appeals have general jurisdiction over all cases "of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law." Tex. Const. art. V, § 6; *see Tune*, 23 S.W.3d at 361.
232. The Texas Constitution also vests courts of appeals with "such other jurisdiction, original and appellate, as may be prescribed by law." Tex. Const. art. V, § 6.
233. *Tune*, 23 S.W.3d at 361. *See* Tex. Gov't Code § 411.180(e) (Vernon 1988).
234. *Tune*, 23 S.W.3d at 361; *see* Tex. Gov't Code § 22.220(a); Tex. Civ. Prac. & Rem. Code Ann. § 51.012 (Vernon 1986).
235. *Tune*, 23 S.W.3d at 361.
236. *See* Texas Dep't of Pub. Safety v. Harris, 33 S.W.3d 406, 408 (Tex. App.—Fort Worth 2000, no pet. h.); Texas Dep't of Pub. Safety v. Pucek, 22 S.W.3d 63, 67 (Tex. App.—Corpus Christi 2000, no pet.); Texas Dep't of Pub. Safety v. Thompson, 14 S.W.3d 853, 854 (Tex. App.—Beaumont 2000, no pet.).

courts of appeals disagree, however, holding that the courts of appeals do not have jurisdiction over such an appeal.[237]

Chapter 724 of the Texas Transportation Code provides that a person who receives a notice of suspension of their driver's license from the Texas Department of Public Safety may obtain a review of the suspension before an administrative law judge.[238] If the suspension is affirmed by the judge, Chapter 524 of the code provides for an appeal of the license suspension to the county court at law.[239] If there is no county court at law in the county in which the person was arrested, then the decision may be appealed to the county court. If the county judge is not a lawyer, then the case must be transferred to the district court upon the motion of either party or the judge.[240] The transportation code further provides that the Texas Department of Public Safety's right to an administrative appeal is limited to issues of law.[241] While the transportation code does not provide for further appeal from the initial appeal to county court, it expressly states that the Administrative Procedure Act ("APA") applies to appeals from administrative license suspensions to the extent consistent with Chapter 524.[242]

The APA grants a person who has exhausted their administrative remedies and received a final decision in a contested case the right to judicial review.[243] The APA, however, states that "[a] party may appeal a final district court judgment under this chapter in the manner provided for civil actions generally."[244] This language is the point of contention among the courts of appeals because, read literally, a case heard in the district court would be appealable, but one heard in the county court would not.[245] The courts of appeals finding jurisdiction over license suspension appeals conclude that such an interpretation would not produce the just and equitable result the legislature is presumed to have intended in enacting the statute.[246] The courts finding no jurisdiction over these appeals point to the "plain language" of the pertinent statutes.[247] Some of these courts also rely on the fact that a Chapter 524 case does not involve an amount in controversy.[248]

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237. *See* Tex. Dep't of Pub. Safety v. Callender, 14 S.W.3d 319, 324 (Tex. App.—Houston [14th Dist.] 1999, pet. filed); Tex. Dep't of Pub. Safety v. Barlow, 992 S.W.2d 732, 741 (Tex. App.—Waco 1999, pet. granted).

238. TEX. TRANSP. CODE ANN. § 724.041 (Vernon 1999).

239. *Id.* § 524.041.

240. *Id.* § 524.041(b).

241. *Id.* § 524.041(d).

242. *Id.* § 524.002(b).

243. TEX. GOV'T CODE ANN. § 2001.171 (Vernon 1988).

244. *Id.* § 2001.901(a).

245. *See Pucek*, 22 S.W.3d at 66.

246. *See, e.g., Harris*, 33 S.W.3d at 408. *See also* Shirley v. Texas Dept. of Pub. Safety, 974 S.W.2d 321, 323 (Tex. App.—San Antonio 1998, no pet.).

247. *See Barlow*, 992 S.W.2d at 739-40.

248. *See, e.g., Callender*, 14 S.W.3d at 324-25; *Pucek*, 22 S.W.3d at 66-67 (discussing this issue, but finding jurisdiction over the license suspension appeal regardless of the amount in controversy dispute); *see* TEX. GOV'T CODE ANN. § 22.220(a) (Vernon 1988); TEX. CIV. PRAC. & REM. CODE ANN. § 51.012 (Vernon 1986).

Significantly, in December 1999, the Texas Supreme Court exercised jurisdiction over a license suspension appeal where the San Antonio Court of Appeals had exercised appellate jurisdiction.[249] Although the supreme court did not address the jurisdictional issue, the fact that it took jurisdiction of the appeal has been noted by several of the intermediate courts concluding they have jurisdiction over license suspension appeals.[250]

VIII. PERFECTING THE APPEAL

A. WHEN IS A CASE "APPEALED"?

Upon completion of what act is a case considered appealed? The Texas Supreme Court decided that issue during this Survey period in the context of determining whether a law firm was entitled to an additional 5% contingency fee under a contract that provided for the fee in the event that the case was "appealed to a higher court."[251] In *Lopez*, which was governed by the old appellate rules, the case settled just twelve days after the defendant filed a cash deposit in lieu of a cost bond.[252] The plaintiffs sued their law firm for, *inter alia*, breach of contract, arguing that "appealed to a higher court" means something more than initiating the appellate process by filing a cash deposit in lieu of a cost bond.[253]

The supreme court rejected that argument as unworkable, holding that, according to the plain language of old appellate rule 40(a)(1),[254] an appeal is "taken" and the appellate court's jurisdiction is invoked when the appellant makes its cash deposit.[255] The court reasoned that "[t]he appellate process involves many steps, such as transmitting the trial court record, preparing and responding to the briefs, and presenting oral argument," but this does not mean that the contract language providing for payment upon "appeal" is ambiguous.[256] The court therefore concluded that when appellant made its cash deposit, the case was 'appealed to a higher court' under the contract's terms.[257]

The cost bond procedure has been replaced with notices of appeal. Under the current appellate rules, "[a]n appeal is perfected when a written notice of appeal is filed with the trial court clerk."[258] A notice of appeal is generally due within 30 days after a final judgment is signed or within 90 days after final judgment if certain post-judgment motions are

249. Mireles v. Texas Dept. of Pub. Safety, 993 S.W.2d 426 (Tex. App.—San Antonio), *aff'd*, 9 S.W.3d 128 (Tex. 1999).
250. *See, e.g.*, *Thompson*, 14 S.W.3d at 854; *Pucek*, 22 S.W.3d at 66.
251. *See* Lopez v. Munoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 859 (Tex. 2000).
252. *See id.* at 859-60.
253. *Id.* at 860-61.
254. TEX. R. APP. P. 40(a)(1), amended, 1997.
255. *Lopez*, 22 S.W.3d at 861.
256. *Id.*
257. *Id.* at 862.
258. TEX. R. APP. P. 25.1.

filed.[259]

B. Motions for Extension of Time to File Notice of Appeal

Under appellate rule 26.3, an appellant may obtain an extension of time to file its notice of appeal if the party files, within 15 days after the deadline for filing, (1) a notice of appeal, and (2) a motion for extension that reasonably explains the need for an extension.[260] Additionally, a motion for extension of time is necessarily implied when an appellant acting in good faith files a notice of appeal within the 15-day period in which appellant would be entitled to move to extend the filing deadline.[261] However, when a motion for extension is implied, it is still necessary for appellant to reasonably explain the need for an extension.[262] A failure to do so will result in a dismissal of the appeal for want of jurisdiction.[263]

Moreover, according to the Amarillo Court of Appeals, if appellant undertakes to explain why the appeal was not timely perfected, that explanation must be both "reasonable" and "plausible."[264] In *Kidd v. Paxton*, the appellants stated that their notice was untimely because (1) "counsel misunderstood the law by erroneously calculating the perfection deadline by adding 30 days to the date the trial court overruled the motion for new trial," and (2) counsel was "preoccupied by other work."[265] The court rejected both excuses. The court held that the first excuse was "implausible, and, therefore, unreasonable," because counsel failed to abide by the deadline he allegedly miscalculated.[266] Moreover, the second excuse was found to be deficient because counsel failed to establish a causal nexus between his other work and the default.[267] The dissent found the majority's standard of evaluating appellants' explanation to be too strict in light of the principle that appeals should not be dismissed for

259. Tex. R. App. P. 26.1(a).

260. Tex. R. App. P. 26.3. *See also id.* 10.5(b).

261. Verburgt v. Dorner, 959 S.W.2d 615, 617 (Tex. 1997).

262. *Id.*; Chilkewitz v. Winter, 25 S.W.3d 382, 383 (Tex. App.—Fort Worth 2000, no pet.); Indus. Servs. U.S.A., Inc. v. Am. Bank, N.A., 17 S.W.3d 358, 359 (Tex. App.—Corpus Christi 2000, no pet.); Smith v. Houston Lighting & Power Co., 7 S.W.3d 287, 288 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

263. *See Chilkewitz*, 25 S.W.3d at 383; *Indus. Servs.*, 17 S.W.3d at 359.

264. *See* Kidd v. Paxton, 1 S.W.3d 309, 312 (Tex. App.—Amarillo 1999, pet. denied). Ordinarily, the explanation "need only consist of a plausible statement of circumstances indicating that the failure to comply with the deadline was neither deliberate nor intentional, 'but . . . [rather] the result of inadvertence [sic], mistake, or mischance.'" *Id.* at 310 (quoting Garcia v. Kastner Farms, Inc., 774 S.W.2d 668, 670 (Tex. 1989)). For example, a statement that appellant was represented on a contingency fee basis at trial and that it took a while to find pro bono appellate counsel is a reasonable explanation. *See Smith*, 7 S.W.3d at 288.

265. *Id.* at 310. Counsel explained in his motion that he was preoccupied with other duties, including a contested probate matter "immediately prior to and following the original deadline," a heavy criminal and civil docket, and "several matters set in both the District and County courts of Crosby and Lubbock count[ies] [and] . . . the Federal Bankruptcy Court." *Id.*

266. *Id.*

267. *Id.* at 311.

procedural defects "whenever any arguable interpretation of the appellate rules would preserve the appeal."[268]

C. Extension of Time Due to Delayed Notice of Judgment

Last Survey period saw the development of a split among the courts of appeals regarding when a party must move for a determination of late notice of judgment necessary to postpone the appellate timetable under Texas Rule of Appellate Procedure 306a.[269] During this Survey period, the Texarkana Court of Appeals joined the decided majority courts and held that "a party seeking relief under Rule 306a(4) and (5) has thirty days from the first date he or his attorney receives the clerk's notice or acquires actual knowledge of the judgment to establish a *prima facie* showing of the Rule 306a (5) requirements."[270]

D. Finality of Judgments

In *Olympia Marble & Granite v. Mayes*,[271] an issue arose regarding whether a judgment awarding prejudgment interest was interlocutory because it did not state a specific amount of prejudgment interest. Generally, where the rate and means of calculating prejudgment interest is a matter of law, the act of setting that amount is ministerial and the failure to include the amount in the judgment will not prevent it from being final.[272] However, "if the record reveals facts that call into question the date on which prejudgment interest should accrue, then the calculation of prejudgment interest is not a simple ministerial act," and the judgment is interlocutory.[273] In *Olympia*, the court held such a judgment to be interlocutory because the record revealed a question about whether "any period of delay" by the plaintiff "tolled the accrual of prejudgment interest."[274]

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268. *Id.* at 313-14; *see also* Leal v. City of Rosenburg, 17 S.W.3d 385, 386 (Tex. App.—Amarillo 2000, no pet.) (refusing to dismiss an appeal because appellant filed a motion for new trial under the wrong cause number, explaining that because "appellant's efforts constituted a bona fide attempt to invoke appellate court jurisdiction, the court should construe them as successful").

269. *Cf.* Thompson v. Harco Nat'l Ins. Co., 997 S.W.2d 607, 625 (Tex. App.—Dallas 1998, pet. denied); 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) (all holding that a 306a(5) motion must be filed within thirty days of receiving notice) *with* Grondona v. Sutton, 991 S.W.2d 90, 91-92 (Tex. App.—Austin 1998, pet. denied); Vineyard Bay Dev. Co. v. Vineyard on Lake Travis, 864 S.W.2d 170, 172 (Tex. App.—Austin 1993, writ denied) (both holding that a 306a(5) motion need not be filed within thirty days of receiving notice).

270. John v. Marshall Health Servs., Inc., 12 S.W.3d 888, 891 (Tex. App.—Texarkana 2000, Rule 53(f) motion filed Apr. 3, 2000).

271. 17 S.W.3d 437, 440-43 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

272. *Id.* at 441 (citing Ortiz v. Avante Villa, 926 S.W.2d 608, 611 (Tex. App.—Corpus Christi 1996, writ denied)).

273. *Id.* at 442; *see also* Fuller-Austin Insulation Co. v. Bilder, 960 S.W.2d 914, 923 (Tex. App.—Beaumont 1998, pet. dism'd); Zamarripa v. Sifuentes, 929 S.W.2d 655, 657 (Tex. App.—San Antonio 1996, no writ); H.E. Butt Grocery Co. v. Bay, 808 S.W.2d 678, 680 (Tex. App.—Corpus Christi 1991, writ denied).

274. *Id.* at 443.

Under Texas Rule of Civil Procedure 329b(h), any change to the judgment made by the trial court while it retains plenary jurisdiction will restart the appellate timetable.[275] In *Quanaim v. Frasco Restaurant & Catering*,[276] the court faced the task of determining which of three separate orders granting summary judgment constituted the final judgment.[277] The court determined that the second order disposed of all claims and parties, but a question remained as to whether the third order vacated, set aside, modified, or amended the final judgment so that the appellate timetable ran from the later date.[278]

The court held that it did, explaining that "the trial court's entry of a subsequent order identifying different grounds for summary judgment should be construed as a change sufficient to restart the appellate timetable under Rule 329b(h)."[279] Thus, even though there was nothing in the record to intimate that the trial court intended to vacate its earlier order, the court of appeals treated the later order granting summary judgment as a modification, correction, or reformation of the earlier order granting summary judgment, and concluded that "the trial court presumptively vacated" its earlier order.[280]

E. Affidavit of Inability to Pay Costs

Must a minor file an affidavit of indigence under Rule 20.1[281] as a predicate to being declared indigent for purposes of appealing an adjudication of delinquency? In *In re K.C.A.*,[282] the supreme court said no.[283]

The Family Code, and not the Texas Rules of Appellate Procedure, governs juvenile indigent appeals.[284] Sections 56.01(c)(1)(A) and 54.03(a) of the Family Code provide for a right to appeal delinquency findings, and section 56.01 provides that the court can consider the assets and income of the child and the child's parents in determining whether a

275. Tex. R. Civ. P. 329b(g) ("If a judgment is modified, corrected, or reformed *in any respect*, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed.") (emphasis added).

276. 17 S.W.3d 30 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

277. *Id.* at 34-41. On May 5, 1998, the trial court granted summary judgment for Fransco on a ground that disposed of all of its claims against Quanaim. On May 11, 1998, the trial court granted Quanaim's motion for summary judgment against Fransco. And on May 18, 1998, the trial court granted another motion for summary judgment in favor of Fransco, but on different grounds than the May 5 judgment. *See id.* at 34.

278. *Id.* at 37.

279. *Id.* at 40.

280. *Id.* at 39-40.

281. Rule 20.1(a) provides:

> A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if: (1) the party files an affidavit of indigence in compliance with this rule; (2) the claim of indigence is not contested or, if contested, the contest is not sustained by written order; and (3) the party timely files a notice of appeal.

Tex. R. App. P. 20.1(a).

282. 36 S.W.3d 501 (Tex. 2000).

283. No. 99-0986 d2000 WL 798107 (Tex. Jun. 22, 2000).

284. *Id.* at 502

juvenile is indigent.[285] Further, section 56.02 provides that the court reporter must provide a free transcript "if the court finds, after hearing or on an affidavit filed by the child's parent or other person responsible for support of the child that the parent or other responsible person is unable to pay" or provide security.[286] Because Family Code section 56.02 allows the court to determine the minor's indigence based on either (1) a hearing, or (2) an affidavit filed by the minor's parents, "a Rule 20.1 affidavit is not required, and a hearing will suffice."[287]

The deadlines for challenging an affidavit of indigence and for trial court action on the challenge are strictly construed.[288] Under Rule 20.1(e), the trial court clerk, the court reporter, or any other party may challenge an appellant's claim of indigence by filing a contest within ten days after the affidavit is filed.[289] Under Rule 20.1(i), the trial court must sign an order either sustaining the indigence contest or extending the time for hearing the challenge within ten days after the contest was filed or referred to the trial court.[290] If either of these ten-day deadlines are not met, the allegations in the affidavit of indigence will be deemed true, and the trial court clerk and court reporter must prepare the appellate record without advance payment of cost.[291] Further, the obligation to accept the allegations in the affidavit as true will be imposed even if the appellant's affidavit fails to comply with the strict requirements of Rule 20.1(b).[292]

F. Prisoner Notices of Appeal

Cases decided this Survey period demonstrate that Texas courts will not will not give *pro se* prisoners a break when they attempt to perfect appeals in civil cases. For example, in *Kinnard v. Carnahan*,[293] the San Antonio Court of Appeals held that a *pro se* prisoner's notice of appeal will not be deemed timely filed if it was timely deposited in a prison mail receptacle.[294] Although federal courts deem prisoner notices of appeal filed on the date they are delivered to prison authorities for forwarding to the trial court clerk, the court held that Texas appellate rules are not subject to such a reading.[295] Under Rule 2, the court reasoned, appellate courts are forbidden to "alter the time for perfecting an appeal in a civil case."[296] And under Rule 9.2(b), "a prison mail receptacle is not a

285. Tex. Fam. Code Ann. §§ 56.01(c)(1)(A), 54.03(a), 56.01(l), (m) (Vernon 2000).
286. *Id.* § 56.02(b).
287. *K.C.A.*, 36 S.W.3d at 502.
288. *In re* G.C., 22 S.W.3d 932, 933 (Tex. 2000); *In re* B.A.C., 4 S.W.3d 322, 323 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd).
289. Tex. R. App. P. 20.1(e).
290. Tex. R. App. P. 20.1(i)(2).
291. *Id.* 20.1(f), (i)(4), (j); *see G.C.*, 22 S.W.3d at 933; *B.A.C.*, 4 S.W.3d at 323.
292. *See B.A.C.*, 4 S.W.3d at 324-25 (holding that the court reporter lost the right to challenge the appellant's affidavit by failing to raise the challenge in a timely manner).
293. 25 S.W.3d 266, 269 (Tex. App.—San Antonio 2000, no pet.).
294. *Id.* at 269.
295. *Id.*
296. *Id.*

mailbox for purposes of the mailbox rule."[297]

In *Thomas v. Texas Dep't of Criminal Justice—Institutional Division*,[298] the court held that a prisoner's filing of a post-judgment motion to reinstate prevented him from being entitled to 6 months in which to file his notice of appeal under the Rule 30, governing restricted appeals.[299] Accordingly, the prisoner's notice of appeal was due 90 days after the signing of the order dismissing the case, rendering the prisoner's notice of appeal over 3 weeks late.

IX. THE RECORD ON APPEAL

Before the Rules of Appellate Procedure were amended effective September 1, 1997, the appellant had the burden to provide to the appellate court a record sufficient to prove error.[300] If appellant failed to meet that burden, the appellate court presumed that the missing portions of the record supported the trial court's decision.[301]

Under the current rules, the court reporter has the responsibility to prepare, certify, and timely file the reporter's record.[302] However, the court reporter's burden does not attach until the appellant files a notice of appeal, requests the preparation of the reporter's record, and pays for or makes arrangements to pay for the court reporter's record.[303]

The court in *In re Spiegel*[304] held that, although appellant's burden with regard to the reporter's record is relaxed under the current appellate

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297. *Id.* (intended quotations omitted). Texas Rule of Appellate Procedure 9.2(b) states: A document received within ten days after the filing deadline is considered timely filed if:

> (A) it was sent to the proper clerk by United States Postal Service first-class, express, registered, or certified mail;
> (B) it was placed in an envelope or wrapper properly addressed and stamped; and
> (C) it was deposited in the *mail* on or before the last day for filing.

TEX. R. APP. P. 9.2(b) (emphasis added).

298. 3 S.W.3d 665, 667 (Tex. App.—Fort Worth 1999, no pet.).

299. *Id.* at 667. Rule 30 provides:

> A party who did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of and who did not timely file a postjudgment motion . . . may file a notice of appeal within [six months after the judgment or order is signed] permitted by Rule 26.1(c). TEX. R. APP. P. 30.

300. *See* Bryant v. United Shortline, Inc., 972 S.W.2d 26, 31 (Tex. 1998).

301. *Id.*; Schafer v. Conner, 813 S.W.2d 154, 155 (Tex. 1991).

302. Rule 35.3(b) provides:

> The official or deputy reporter is responsible for preparing certifying, and timely filing the reporter's record if:
> (1) a notice of appeal has been filed;
> (2) the appellant has requested that the reporter's record be prepared; and
> (3) the party responsible for paying for the preparation of the reporter's record has paid the reporter's fee, or has made satisfactory arrangements with the reporter to pay the fee, or is entitled to appeal without paying the fee.

TEX. R. APP. P. 35.3(b).

303. *Id.*; *see also* Mills v. Haggard, 17 S.W.3d 462, 462-63 (Tex. App.—Waco 2000, no pet.).

304. 6 S.W.3d 643 (Tex. App.—Amarillo 1999, no pet.).

rules, a complete failure to request the reporter's record can defeat an appeal. *Spiegel* involved the appeal of the trial court's denial of appellant's request for a temporary injunction.[305] The trial court's orders stated that the reasons for denying the request was "on record."[306] However, the clerk's record (which was properly filed with the appellate court) did not reflect the trial court's reasons for denying the temporary injunction, and the appellant specifically opted not to request the reporter's record.[307] The court of appeals held that, even under the new rules, "the onus upon an appellant to secure an adequate appellate record . . . still exists in a limited way."[308] Because the appellant did not satisfy his burden of requesting and paying for a reporter's record, the court applied the presumption established in *Bryant* and *Schafer* "that the missing record supports the trial court's determination."[309] Further, the court held that appellate rule 37.3, which requires appellate courts to address issues that do not need the reporter's record for decision, implicitly gives appellate courts the authority to decide not to consider those issues that are dependent on the reporter's record.[310] Accordingly, the court decided to "forgo reviewing the dispute" and "affirm[ed] the orders denying the application for temporary injunction because [appellant] opted not to provide [the court] with a complete record."[311]

Section 105.003 of the Texas Family Code mandates that a record of the proceedings in suits affecting the parent-child relationship shall be made as in civil cases generally unless waived by the parties with the consent of the court.[312] In *In re Vega*,[313] no record was made of a final hearing establishing the paternity, conservatorship, possession, and child support of four children. The order contained a notation that the "record of the proceedings was waived," but Vega (who represented himself pro se) was not present at the hearing.[314] The court of appeals held that the making of the record was mandatory and that the trial court erred by consenting to a waiver of the making of the record in Vega's absence.[315]

X. ABATEMENT OF APPEAL

Texas Rule of Appellate Procedure 2 allows appellate courts to suspend the operation of a rule and to order a different procedure to expe-

305. *Id.* at 645.
306. *Id.*
307. *Id.* In fact, the appellant affirmatively stated on his docketing statement that he would "not request a Reporter's Record." *See id.*
308. *Id.* at 646.
309. *Id.*
310. *Spiegel*, 6 S.W.3d at 646 n.1.
311. *Id.* at 646.
312. TEX. FAM. CODE ANN. § 105.003 (Vernon 2000). In construing section 105.003's predecessor, the Texas Supreme Court has held that the trial court has an affirmative duty to insure that such a record is prepared and that a failure to do so constitutes reversible error; *see* Stubbs v. Stubbs, 685 S.W.2d 643, 645-46 (Tex. 1985).
313. 10 S.W.3d 720, 722 (Tex. App.—Amarillo 1999, no pet.).
314. *Id.*
315. *Id.*

dite a decision or for other good cause.[316] In *Mills v. Haggard*,[317] the court applied Rule 2 in abating the appeal so that the trial court could resolve a dispute between the appellant and the court reporters regarding whether the appellant had made arrangements to pay for the court reporter's record. Mills asked the court of appeals to order the court reporters to appear before it and to "show cause why they should not be ordered to file the record."[318] Stating that an appellate court was not the appropriate forum for an evidentiary show cause hearing, the court of appeals suspended the rule mandating the filing of the reporter's record, abated the appeal, and remanded the case to the trial court for an evidentiary hearing on the issue of payment for the reporter's record.[319]

In *Peavy v. Texas Home Management, Inc.*,[320] the court of appeals generously abated an appeal to give appellee another shot at demonstrating that it was entitled to an extension of time to file its motion for rehearing. The court stated that it could have denied the motion for additional time because appellee's allegation that its counsel did not receive notice of the court of appeals' decision in time was too conclusory.[321] Instead, the court decided to abate the appeal "[i]n the spirit of fairness and equity" and to allow the trial court to hold an evidentiary hearing on the matter.[322]

In *Costilla Energy, Inc. v. GNK, Inc.*,[323] the court reinstated an appeal following an automatic stay entered by the bankruptcy court and applied appellate rule 8.2[324] to calculate the new appellate deadlines.[325] The appeal in that case had been suspended from September 3, 1999 (the date appellant filed its bankruptcy petition) to March 1, 2000 (the date of the reinstatement order).[326] Accordingly, the clerk's record, which had been filed during the abatement, was deemed filed on March 1, 2000.[327] Absent the bankruptcy, the reporter's record would have been due 120 days

316. TEX. R. APP. P. 2.
317. 17 S.W.3d 462, 463 (Tex. App.—Waco 2000, no pet.).
318. *Id.* at 462.
319. *Id.* at 463.
320. 16 S.W.3d 104, 105 (Tex. App.—Houston [1st Dist.] 2000, no pet.).
321. *Id.*
322. *Id.*
323. 15 S.W.3d 579, 580 (Tex. App.—Waco 2000, no pet.).
324. Rule 8.2 provides:

> A bankruptcy suspends the appeal and all periods in these rules from the date when the bankruptcy petition is filed until the appellate court reinstates or severs the appeal in accordance with federal law. A period that began to run and had not expired at the time the proceeding was suspended begins anew when the proceeding is reinstated or severed under 8.3. A document filed by a party while the proceeding is suspended will be deemed filed on the same day, but after, the court reinstates or severs the appeal and will not be considered ineffective because it was filed while the proceeding was suspended.

TEX. R. APP. P. 8.2
325. *Costilla Energy*, 15 S.W.3d at 580.
326. *Id.*
327. *Id.*

after judgment was signed (because motions for new trial were filed).[328] According to Rule 8.2, the 120-day period began "anew" on the date of reinstatement, so the reporter's record became due on June 29, 2000, 120 days after the order of reinstatement.[329]

XI. WAIVER ON APPEAL

When a summary judgment does not state the specific grounds on which it was granted, a failure to attack on appeal each of the independent arguments alleged in the motion will result in an affirmance of the judgment.[330] In *Smith v. Houston Lighting & Power Co.*,[331] for example, the trial court did not specifically identify the particular ground upon which summary judgment was granted.[332] Although the appellee had argued failure to exhaust alternative remedies in its summary judgment motion, appellant failed to address that argument in its motion for new trial or appellate brief.[333] The court of appeals had no choice but to affirm the judgment "because it may have been based on a ground not specifically challenged by appellant."[334]

Waiver also results when an appellant attempts to raise an argument for the first time on appeal in a motion for rehearing.[335] It is well established that, by failing to raise an issue prior to submission, an appellant will waive presentation and consideration of the complaint to the appellate court.[336]

XII. DISPOSITION ON APPEAL

A. REMAND IN LIGHT OF CHANGES IN THE LAW

Under Texas Rule of Appellate Procedure 60.2(f), the supreme court may "vacate the lower court's judgment and remand the case for further proceedings in light of changes in the law."[337] The supreme court found a new application for this rule in a series of four "Jane Doe" cases construing Texas's parental notification statute, which generally allows a minor to have an abortion without notifying her parents if she demonstrates that she is mature and well-informed, that notification would not be in her

328. *Id.*
329. *Id.*
330. Smith v. Houston Lighting & Power Co., 7 S.W.3d 287, 290 (Tex. App.—Houston [1st Dist.] 1999, no pet.).
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.* at 291. The court noted, however, that a general point of error stating that "the trial court erred by granting the motion for summary judgment" would have been sufficient to preserve error for all possible grounds on which summary judgment should have been denied. *Id.*
335. McElwee v. Estate of Joham, 15 S.W.3d 557, 560 (Tex. App.—Waco 2000, no pet.).
336. *See id.*
337. TEX. R. APP. P. 60.2(f).

best interests, or that notification may lead to abuse.[338] In the first two "Jane Doe" decisions, the court established, for the first time, the requirements for a judicial bypass of the parental notification requirement.[339] In light of the fact that they did not have the benefit of the supreme court's interpretation of this "unique or novel statutory scheme" in the trial court, the minors in each case failed to satisfy the new requirements as a matter of law.[340] Relying on Rule 60.2(f), the supreme court vacated the trial courts' decisions (even though the trial courts did not specifically err) and remanded the cases for subsequent hearings in light of the new standards.[341]

In disposing of the cases, the court recognized that it had never before applied Rule 60.2(f) to remand for a new hearing in the trial court, but reasoned that it was proper to do so because "the rule's plain language does not preclude us from doing so."[342] Justice Hecht dissented in each case, arguing that "an errorless judgment of a trial court cannot be reversed in the interest of justice" and that "[t]he Court should not be ordering new trials just because it would like to see a different result."[343]

In *Crown Life Ins. Co. v. Casteel*,[344] the court would have remanded the case to the trial court to allow appellant to allocate settlement credits consistent with supreme court authority decided after the trial of the case. However, because appellant had fully released its judgment against appellee, the settlement credit issue became moot and remand was no longer necessary.[345] The court vacated the part of the court of appeals judgment ordering the remand but refused to vacate the part of the opinion discussing the settlement credit issue, reasoning that "settlement or release does not automatically require vacating an opinion."[346]

B. Rendition Versus Remand Following Charge Error Reversal

After an appellate court determines that error in a jury charge is reversible, the proper disposition on appeal depends on whether the error is an omission or a defect.[347] If the question submitted is merely defec-

338. *In re* Doe 1, 19 S.W.3d 249, 257 (Tex. 2000); *In re* Doe 2, 19 S.W.3d 278, 283-84 (Tex. 2000); *In re* Doe 3, 19 S.W.3d 300, 300-01 (Tex. 2000); *In re* Doe 4, 19 S.W.3d 322, 326-27 (Tex. 2000).

339. *Doe* 1, 19 S.W.3d at 256-57; *Doe* 2, 19 S.W.3d at 282-83.

340. *Doe* 1, 19 S.W.3d at 257; *Doe* 2, 19 S.W.3d at 283; *Doe* 3, 19 S.W.3d at 300; *Doe* 4, 19 S.W.3d at 326.

341. *Doe* 1, 19 S.W.3d at 257; *Doe* 2, 19 S.W.3d at 283-84; *Doe* 3, 19 S.W.3d at 300; *Doe* 4, 19 S.W.3d at 326. Notably, in *Doe* 3, four justices would have rendered judgment for Doe and only two voted to remand. *Doe* 3, 19 S.W.3d at 301. The court was constrained to grant the lesser relief because a majority of the court did not agree on remand or rendition. *See id.* (citing Twyman v. Twyman, 855 S.W.2d 619, 622 n.4, 626 (Tex. 1993)).

342. *Doe* 3, 19 S.W.3d at 314; *Doe* 2, 19 S.W.3d at 283.

343. *Id.* at 295-96.

344. 22 S.W.3d 368, 392 (Tex. 2000).

345. *Id.*

346. *Id.*

347. *See* Borneman v. Steak & Ale of Tex., Inc., 22 S.W.3d 411, 413 (Tex. 2000).

tive (i.e., the party plainly attempted to request a finding on a recognized cause of action but did so improperly), the proper disposition is remand.[348] If the question is omitted (i.e., the party refused to submit a theory of recovery by, for example, choosing one theory of recovery over another), the proper disposition is rendition.[349] In *Borneman*, the supreme court held that a jury question that failed to track applicable statutory language was a charge defect, not an omission, and therefore remanded the case to the court below.[350] The court similarly found a jury question to be defective in *Stevens v. Nat'l Educ. Ctrs.*,[351] but because appellant prayed only for rendition and specifically asked the court not to remand the case for new trial, the court denied the petition for review.

C. Remand to Redefine Class Definition

In *Intratex Gas Co. v. Beeson*,[352] the supreme court refused to modify a flawed class definition because it would interfere with the trial court's broad discretion and responsibility to manage a class action. However, it may be appropriate for an appellate court to redefine a class "in those limited instances when correcting the definitional infirmity d[oes] not interfere with the trial court's discretion and oversight of the class action."[353]

D. Disposition as to Party Not Named on Appeal

In *Kagan-Edelman Enters. v. Bond*,[354] Bond (plaintiff below) appealed an unfavorable judgment against certain defendants but failed to list "Kagan-Edelman as a party or raise any issue on appeal with regard to that entity."[355] The court of appeals reversed the judgment as to all defendants, including Kagan-Edelman.[356] Holding that the court of appeals erred in reversing as to Kagan-Edelman, the supreme court severed Kagan-Edelman's petition for review, reversed the court of appeals' judgment in part, and rendered a take-nothing judgment in favor of Kagan-Edelman.[357]

E. Court of Appeals' Authority to Vacate Trial Court Judgment

Before the 1997 amendments to the appellate rules, courts of appeals

348. *Id.*; Southeastern Pipe Line Co. v. Tichacek, 997 S.W.2d 166, 172 (Tex. 1999); Spencer v. Eagle Star Ins. Co., 876 S.W.2d 154 (Tex. 1994).
349. *Borneman*, 22 S.W.3d at 413; State Dept. of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 241 (Tex. 1992).
350. 22 S.W.3d at 413-14.
351. 11 S.W.3d 185, 186 (Tex. 2000).
352. 22 S.W.3d 398, 406-08 (Tex. 2000).
353. *Id.* at 407.
354. 20 S.W.3d 706 (Tex. 2000).
355. *Id.*
356. *Id.*
357. *Id.*

were without authority to "vacate" a trial court's judgment.[358] Now, Rule 43.2 specifically allows courts of appeals to "vacate the trial court's judgment and dismiss the case."[359] Accordingly, in *Young Materials Corp. v. Smith*,[360] the Waco Court of Appeals granted the parties' agreed motion pursuant to settlement, vacating the trial court judgment and dismissing the case.

XIII. SPECIAL APPEALS

Under the Texas Rules of Appellate Procedure, an appellant may limit his appeal to a specific error by the trial court. However, to do so, the appellant must strictly comply with Rule 34.6(c)'s requirement for including in his request for a partial reporter's record a statement of the points or issues to be presented on appeal.[361] Under this requirement, both the request for a partial reporter's record and the statement of points or issues to be presented on appeal must be timely filed and appear in the appellate record.[362] Strict compliance is necessary to activate the presumption that the omitted portions of the record are irrelevant.[363] If no request or document that provides the same information is filed of record, the other party is prevented from requesting additional portions of the record that might be relevant to the appeal.[364] When the requisite information is not provided as the rule requires, the court of appeals "must presume that the omitted portions of the record are relevant to this appeal and that the missing evidence supports the trial court's judgment."[365] Notably, when an appellant does properly restrict his appeal to certain issues pursuant to Rule 34.6(c), his appeal is limited to those issues properly designated, and other issues are not before the appellate court.[366]

XIV. STANDARDS OF REVIEW

A. REVIEW OF TRIAL COURT'S REFUSAL TO SUBMIT A REQUESTED INSTRUCTION

In *Texas Workers' Compensation Ins. Fund v. Mandlbauer II*,[367] the supreme court held that the trial court does not abuse its discretion by re-

358. Rothlander v. Ayala, 943 S.W.2d 546 (Tex. App.—Waco 1997, no writ).
359. TEX. R. APP. P. 43.2(e).
360. 4 S.W.3d 84, 85 (Tex. App.—Waco 1999, no pet.).
361. Hilton v. Hillman Distrib. Co., 12 S.W.3d 846, 847 (Tex. App.—Texarkana 2000, no pet.).
362. *Id.* at 847-48.
363. *Id.*
364. *Id.* at 848. A notice of appeal that reflects the appellant's desire to limit his appeal and contains a statement of the points or issues to be presented on appeal can meet the requirements of Rule 34.6(c). *Id.* (citing CMM Grain Co. v. Ozgunduz, 991 S.W.2d 437, 440 (Tex. App.—Fort Worth 1999, no pet.).
365. *Id.*
366. *In re* R.C., a Child, No. 02-99-00397-CV, 2000 WL 1459806, at *2 (Tex. App.—Fort Worth 2000, no pet.).
367. 34 S.W.3d 909, 911 (Tex. 2000).

fusing to define a term or otherwise instruct the jury on a term that is not used in the charge. At trial after reversal and remand for a new trial, the plaintiff requested three instructions on producing cause, which the trial court refused to submit.[368] The supreme court articulated the standard for determining whether the trial court abused its discretion in refusing to submit a requested instruction: "the question on appeal is whether the request was reasonably necessary to enable the jury to render a proper verdict. Further, for an instruction to be proper, it must (1) assist the jury; (2) accurately state the law; and (3) find support in the pleadings and the evidence."[369] Here, the court held there was no abuse of discretion because the plaintiff did not plead or try his case under a producing cause theory and because the charge submitted the relevant jury question in terms of "resulting from," not producing cause.[370]

B. Review in Quasi-Criminal Cases

Section 524.031 of the Transportation Code provides for an administrative hearing to challenge the suspension of a driver's license following an arrest for drunk driving.[371] In *Mireles v. Texas Dep't of Safety*,[372] the driver challenged the ALJ's decision to suspend and the court of appeals' affirmance of his license suspension, claiming that the breath-test results taken one hour after he was stopped were no evidence that his blood alcohol level was above the legal limit. The supreme court held that, although sufficiency of the evidence reviews in criminal cases have a high standard, appellate courts review an administrative license suspension decision using the deferential substantial evidence standard.[373] Under that standard, the appellate court may not substitute its judgment for that of the agency, but must determine whether there is "some reasonable basis for the agency's action" in the record.[374] Indeed, even if the evidence preponderates against the agency's decision, the court must affirm the administrative decision, so long as there is more than a scintilla of evidence to support it.[375] The court concluded that, because the breath-test results "are more than a scintilla of evidence to support the ALJ's finding," the license suspension was proper.[376]

In *State v. $217,590*,[377] a civil forfeiture case, the supreme court articulated the standard for reviewing a trial court's decision regarding whether a person's consent to a search was voluntary. The court held that the

368. *Id.*
369. *Id.* at 912 (citations omitted).
370. *Id.*
371. Tex. Transp. Code Ann. § 524.031 (Vernon 2000).
372. 9 S.W.3d 128 (Tex. 1999).
373. *Id.* at 131.
374. *Id.*
375. *Id.*
376. *Id.* at 132.
377. 18 S.W.3d 631 (Tex. 2000).

issue involves questions of both fact and law.[378] Because trial court decisions on mixed questions of law and fact are reviewed for abuse of discretion, that standard applies to a trial court's ruling on a motion to suppress evidence based on the argument that a claimant's consent was not voluntary.[379]

C. Review for Sufficiency of the Evidence of Punitive Damages

In *Louisiana Pac. Corp. v. Andrade*,[380] the supreme court rejected the Beaumont Court of Appeals' holding that appellate courts are only required to conduct a factual sufficiency or great weight and preponderance reviews in gross negligence cases in which the amount of the punitive damages awarded has been preserved. The court stated: "The notion that a party is not entitled to factual-sufficiency review of a gross-negligence finding and that such review is limited to challenges to the amount of punitive damages is simply incorrect."[381] Indeed, appellate courts "have a duty to resolve such issues if necessary to final disposition of the appeal."[382]

D. Review of Trial Court's Decision on Parental Notification Waiver

Under the procedures established in the Texas Parental Notification Statute, a pregnant minor can petition to the court for a judicial bypass to have an abortion without telling her parents.[383] Section 33.003(i) of the Family Code states that the court "shall enter an order" that the minor is authorized to have an abortion if she demonstrates "by a preponderance of the evidence [that she] is mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents" or that "notification would not be in [her] best interest" or that "notification may lead to physical, sexual, or emotional abuse."[384] In a series of "Jane Doe" opinions, the supreme court articu-

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378. The determination of the historical facts leading up to the consent is a question of fact, while the assessment of whether the totality of the circumstances demonstrates voluntary consent is a question of law. *See id.* at 633.

379. *See id.*

380. 19 S.W.3d 245 (Tex. 1999).

381. *Id.* at 248. The Beaumont court's misconception may have arisen from the fact that the supreme court did not conduct a factual sufficiency review in *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994). *Id.* However, the court reviewed only the legal sufficiency of punitive damages evidence in *Moriel* because the supreme court, unlike courts of appeals, has no jurisdiction to conduct a factual sufficiency review. *Id.*; TEX. CONST. art. V, § 6.

382. *Louisiana Pacific*, 19 S.W.3d at 248.

383. TEX. FAM. CODE ANN. § 33.003(i) (Vernon 2000).

384. *Id.* The supreme court has rejected proposals by amicus curiae to require trial courts to apply a higher burden of proof than preponderance of the evidence. The court explained:

> [A]lthough the Legislature could have chosen to impose a higher standard of proof, such as by requiring the minor to establish the statutory requisites by "clear and convincing" proof or proof "beyond a reasonable doubt," it did

lated the standard for reviewing the trial court's findings on maturity, the minor's best interests, and the potential for abuse.[385]

First, appellate courts review a trial court's maturity finding under a factual and legal sufficiency standard of review.[386] The supreme court held that the determination of maturity is a question of fact, reasoning that section 33.003's "preponderance of the evidence" burden of proof implies that the trial court's duty in this regard is to find facts by weighing the evidence and determining the credibility of the minor.[387] Further, the court determined that the factual and legal sufficiency standard was more appropriate than an abuse of discretion standard because the trial court has no discretion over the order.[388] Under the statute, if the court finds that the minor is "mature and sufficiently well informed," it "shall enter an order authorizing the minor to consent to the performance of the abortion" without her parents' consent.[389]

Second, appellate courts review a trial court's "best interest" determination using the abuse of discretion standard of review.[390] Unlike the determination on maturity, in which the trial court is solely making factual findings, the best interest determination "requires the trial court to balance the possible benefits and detriments to the minor in notifying her parents," which necessarily involves the exercise of judicial discretion.[391]

Third, appellate courts review the trial court's "potential for abuse" determination using the legal and factual sufficiency standard of review for the same reasons that standard is employed to review findings on maturity.[392]

E. Review of a Trial Court's Choice of Law

Ultimate choice of law decisions are questions of law for the court to decide.[393] But determining the state contacts to be considered by the court in rendering its choice of law decision involves a factual inquiry.[394] Thus, a summary judgment movant seeking to have the law of another state applied has the burden of proof with respect to fact questions necessary to the choice of law decision.[395]

> not do so. Instead, it set the level of proof at the lower "preponderance of the evidence" standard . . . . For this Court to impose a standard different than that our Legislature chose would usurp the legislative function and amount to judicial activism.

In re Doe 1 (II), 19 S.W.3d 346, 350-51 (Tex. 2000).

385. *In re* Doe 1 (I), 19 S.W.3d 249, 257 (Tex. 2000); *In re* Doe 1 (II), 19 S.W.3d 346 (Tex. 2000); *In re* Doe 2, 19 S.W.3d 278, 283-84 (Tex. 2000).

386. *Doe 1 (I)*, 19 S.W.3d at 253.

387. *Id.*

388. *Id.*

389. *Id.* (citing Tex. Fam. Code Ann. § 33.003(i) (Vernon 2000)).

390. *Doe 2*, 19 S.W.3d at 281.

391. *Id.*

392. *Doe 2*, 19 S.W.3d at 283 n.27.

393. *See* Hughes Wood Prods., Inc. v. Wagner, 18 S.W.3d 202, 204 (Tex. 2000).

394. *Id.*

395. *Id.* at 205.

XV. FRIVOLOUS APPEALS

In *Bridges v. Robinson*,[396] the Houston Fourteenth District Court of Appeals awarded sanctions under appellate rule 45[397] based on its finding that appellants brought their appeal in bad faith and for purposes of delay.[398] *Bridges* was a wrongful death action with "bizarre and horrendous proof" that Dillard's Department Store, its off-duty police officers serving as security guards and Houston on-duty police officers "hogtied" and beat the plaintiff's husband to death.[399] After the trial court denied the defendants' summary judgment motions on the defenses of derivative and official immunity, they all sought interlocutory appeal.[400]

Appellee moved for sanctions, arguing that, "because the existence of material facts in dispute is so obvious, appellants brought this appeal in bad faith and for the explicit purpose of delaying an upcoming trial setting."[401] The Houston court agreed that the appeals were "objectively frivolous," explaining that the record was "replete" with contradictory proof that appellants ignored in their appellate briefing, although counsel admitted at oral argument that the unmentioned evidence "reflected sadly upon her clients."[402] The court was also offended by the fact that appellate counsel justified its failure to acknowledge "bad facts" by citing to the dissenting opinion in a case as controlling authority.[403]

The court also agreed that the City of Houston brought the appeal for purposes of delay, finding that the City had a history of filing interlocutory appeals in the case or threatening to do so just before trial dates for the stated purpose of "keep[ing] this case on appeal into the millennium."[404]

XVI. PLENARY JURISDICTION OF THE COURTS OF APPEALS

An appellate court's plenary power over its judgment expires "(a) 60 days after judgment if no timely filed motion to extend time or motion for rehearing is then pending; or (b) 30 days after the court overrules all timely filed motions for rehearing and motions to extend time to file a motion for rehearing."[405]

A party may file a motion for rehearing within 15 days after the court

396. 20 S.W.3d 104 (Tex. App.—Houston [14th Dist.] 2000, no pet.).
397. *See* TEX. R. APP. P. 45 ("If the court of appeals determines that an appeal is frivolous, it may—on motion of any party or on its own initiative, after notice and a reasonable opportunity for response—award each prevailing party just damages.").
398. *Bridges*, 20 S.W.3d at 116-19.
399. *Id.* at 110.
400. *Id.* at 107.
401. *Id.* at 114-15.
402. *Id.* at 116-17.
403. *Id.* at 116.
404. *Id.* at 118.
405. TEX. R. APP. P. 19.1.

of appeals issues its judgment or order.[406] A party may bring another motion for rehearing within 15 days after the court of appeals disposes of a motion for rehearing *if the court* "(a) modifies its judgment; (b) vacates its judgment and renders a new judgment; or (c) issues an opinion in overruling a motion for rehearing."[407] When the court of appeals simply denies a motion for rehearing, none of these situations applies and a further motion for rehearing has no effect.[408]

Accordingly, a court of appeals has no authority to grant a second motion for rehearing after 30 days has expired from the date it denied a first motion for rehearing, where the second motion was not permitted because the first motion was simply denied without opinion or modification of the judgment.[409]

XVII. THE MANDATE

After a case is appealed and remanded, the court of appeals generally has discretion to assess costs in subsequent appellate proceedings.[410] However, in *Mandlbauer II*, the supreme court found the court of appeals' mandate that "all costs of the appeal shall be assessed against [the Fund]" to be ambiguous because it did "not limit costs to the appeal *on remand*."[411] The court explained that the mandate could be read to include the costs in the court of appeals that the supreme court ordered Mandlbauer to pay, but because the supreme court reversed the court of appeals, all costs of the appeal were awarded against Mandlbauer for all appeals.[412]

XVIII. PETITIONS FOR REVIEW

The Texas Rules of Appellate Procedure require that petitions for review include a "Statement of Jurisdiction" that states, "without argument, the basis of the Court's jurisdiction."[413] The rule does not provide for a page limit for the jurisdictional statement. Nonetheless, the Texas Supreme Court in *Aktiengesellschaft v. Olson*[414] struck the petitioner's petition for review and ordered it redrawn because the jurisdictional statement was over five pages long.[415] The jurisdictional basis for the petition was that the court of appeals' decision conflicted with six prior

406. TEX. R. APP. P. 49.1; Davis v. Methodist Hosp., 4 S.W.3d 389, 389 (Tex. App.—Houston [1st Dist.] 1999, no pet.).
407. TEX. R. APP. P. 49.5; *Davis*, 4 S.W.3d at 389.
408. *Davis*, 4 S.W.3d at 389.
409. Kacal v. Cohen, 13 S.W.3d 900, 902 (Tex. App.—Waco 2000, no pet.) (withdrawing order granting second motion for rehearing and reinstating judgment).
410. *See* Texas Workers' Comp. Ins. Fund v. Mandlbauer II, 34 S.W.3d 909, 912 (Tex. 2000).
411. *Id.* (internal quotes omitted) (emphasis added).
412. *See id.*
413. TEX. R. APP. P. 53.2(e).
414. No. 00-0792, 2000 WL 1508842 (Tex. Oct. 12, 2000).
415. *Id.* at *1.

decisions of other appellate courts on material questions of law.[416] Dissenting from the order striking the petition, Justice Hecht, joined by Justice Owen, argued that the jurisdictional statement did not violate Rule 53.2.[417] That rule, Justice Hecht explained, prohibits diverting argument on the merits into the jurisdictional statement in an attempt to circumvent the 15-page limit on argument.[418] The rule does not prohibit a concise explanation of the basis for jurisdiction. According to Justice Hecht, a petition invoking the Court's conflict jurisdiction is required to cite each case asserted to be in conflict *and* "plainly and specifically state the point of conflict" as well.[419] He rejected the respondents' argument that, according to Rule 53.2(i) of the Texas Rules of Appellate Procedure, the explanation of the basis for jurisdiction belongs in the argument.[420] "[T]he express concern of Rule 56.1," he maintained, "is whether judicial discretion to grant review should be exercised, not whether jurisdiction over the case exists." Argument relating to the Rule 56.1 factors and an explanation of the statutory basis for the existence of jurisdiction are not the same—"the former belongs in the argument section of the petition, . . . the latter belongs in the jurisdictional statement."[421]

416. *Id.* (Hecht J., dissenting).
417. *Id.* (Hecht J., dissenting).
418. *Id.*
419. *Id.*
420. *Id.* Rule 53.2(i) states: "The argument should state the reasons why the Supreme Court should exercise jurisdiction to hear the case with specific reference to the factors listed in Rule 56.1(a)." TEX. R. APP. P. 53.2(i).
421. *Aktiengesellschaft*, 2000 WL 1508842 at *1. The dissent also argued that the Court's action in striking the petition was "arbitrary." *Id.* at *2.