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## Appellate Practice and Procedure

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# APPELLATE PRACTICE AND PROCEDURE

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I. APPELLATE REVIEW BEFORE FINAL JUDGMENT<sup>1</sup>

A. MANDAMUS AND OTHER ORIGINAL PROCEEDINGS

1. *Orders and Rulings Subject to Review by Mandamus*

a. Discovery Rulings

AS in previous Survey periods, the appellate courts continue to grant mandamus relief from orders compelling production of privileged documents. In *In re University of Texas Health Center at Tyler*,<sup>2</sup> the Texas Supreme Court found that the trial court abused its discretion by ordering a hospital to produce documents protected from discovery by statutory medical peer review committee privileges. Notably, the court refused to find that the trial court’s disclosure of the privileged documents to the hospital’s opponent waived the hospital’s privilege.<sup>3</sup>

In *In re City of Georgetown*,<sup>4</sup> the supreme court also granted mandamus relief to prohibit disclosure of, what the majority found, were confidential reports of a consulting expert protected under the Texas Rules of Civil Procedure. In *Georgetown*, the City of Georgetown had been involved in litigation regarding its wastewater treatment plants and had hired an engineer as a consulting expert to assess certain parts of the plants.<sup>5</sup> Under Texas law, a consulting expert report is ordinarily privileged.<sup>6</sup> However, an Austin newspaper, the *Austin American Statesman*, filed a petition for writ of mandamus in the trial court and sought disclo-

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1. The Survey period includes cases decided from October 1, 2000 to October 1, 2001.  
 2. 33 S.W.3d 822 (Tex. 2000) (orig. proceeding) (per curiam).  
 3. *Id.* at 827.  
 4. 53 S.W.3d 328 (Tex. 2001) (orig. proceeding).  
 5. *Id.* at 329.  
 6. See TEX. R. EVID. 503(a)(5), (b)(1); TEX. R. CIV. P. 192.3(e).

sure of the expert's report under section 552.301(d) of the Public Information Act, which the trial court granted.<sup>7</sup> The supreme court held that if, as in this case, the "documents are privileged or confidential under the Texas Rules of Civil Procedure or Texas Rules of Evidence, they are within a 'category of information [that] is expressly made confidential under other law' within the meaning of section 552.022 of the Public Information Act."<sup>8</sup> Accordingly, the court issued mandamus directing the trial court to vacate its order requiring the City to produce its consulting-expert report to the *Austin American Stateman*.<sup>9</sup>

Numerous appellate court decisions similarly granted mandamus relief to avoid the production of privileged information. The Fort Worth Court of Appeals granted mandamus to prohibit a trial court from soliciting testimony on whether a party acted in "good faith" at a mediation, because a party's conduct at mediation is confidential under section 154.073(a) of the Texas Civil Practice and Remedies Code.<sup>10</sup> The Corpus Christi Court of Appeals granted mandamus relief from an order requiring an individual to submit to an invasive gynecological exam without any evidence by the requesting party that there was good cause to require the exam.<sup>11</sup> The Dallas Court of Appeals found that mandamus relief is appropriate to correct an order staying all discovery pending resolution of a related criminal matter where the discovery delay indefinitely deprives a father of his right to visitation with his child.<sup>12</sup>

However, mandamus is *not available* to order production of privileged documents under the offensive use doctrine where the trial court did not review the privileged documents *in camera* prior to denying the motion to compel.<sup>13</sup> Nor is mandamus available to review monetary sanctions imposed against a party for refusing to respond to discovery requests despite court order, because there is an adequate remedy by appeal.<sup>14</sup> Moreover, although death penalty sanctions can be reviewed by mandamus, mandamus will not issue where there was no abuse of discretion in imposing the sanctions.<sup>15</sup>

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7. *Georgetown*, 53 S.W.3d at 329-30.

8. *Id.* at 337.

9. *Id.* In dissent, Justice Abbott, joined by Chief Justice Phillips and Justice Baker, disagreed with the majority's interpretation of Section 552.022 of the Texas Government Code, concluding that the Legislature does not consider the rules of civil procedure and the rules of evidence as "other laws." *Id.* at 339 (Abbott, J., dissenting).

10. *In re Acceptance Ins. Co.*, 33 S.W.3d 443, 452-53 (Tex. App.—Fort Worth 2000, orig. proceeding).

11. *In re Caballero*, 36 S.W.3d 143, 145 (Tex. App.—Corpus Christi 2000, orig. proceeding).

12. *In re R.R.*, 26 S.W.3d 569, 573 (Tex. App.—Dallas 2000, orig. proceeding).

13. *In re United Supermarkets, Inc.*, 36 S.W.3d 619, 622 (Tex. App.—Amarillo 2000, orig. proceeding).

14. *In re Dynamic Health, Inc.*, 32 S.W.3d 876, 886 (Tex. App.—Texarkana 2000, orig. proceeding, leave denied).

15. *Id.*

b. Order Overruling Objections to Visiting Judge

The appellate courts consistently grant mandamus relief where an assigned judge refuses to recuse himself or herself after a party has filed a timely objection under Chapter 74 of the Texas Government Code. In this Survey period, the supreme court granted mandamus relief to correct a judgment by the court of appeals ordering an assigned judge to recuse himself where the objection to the judge was not timely made.<sup>16</sup> In *In re Canales*, an assigned judge presided over several discovery hearings without objection.<sup>17</sup> Several months later a party objected to the assignment of the same judge to preside over the underlying case.<sup>18</sup> The supreme court concluded that, to be timely, a party must object to the assigned judge's appointment before the judge "preside[s] over any pretrial hearings in the case."<sup>19</sup>

However, mandamus will not issue where a party attempts to assert a Chapter 74 objection to a presiding judge of the administrative region hearing a recusal motion, because Chapter 74 does not permit such an objection.<sup>20</sup>

c. Void Orders

In this Survey period, the Fort Worth Court of Appeals granted mandamus relief from void orders on several occasions. In *In re Boyd*,<sup>21</sup> the court granted petitions for writs of mandamus and of prohibition holding that a trial court's orders for temporary relief signed more than thirty days after an appeal was perfected from a divorce decree were void.<sup>22</sup>

In *In re Acceptance Ins. Co.*,<sup>23</sup> the court found that the trial court abused its discretion and violated the relator's due process rights by scheduling a sanctions hearing without giving written notice of the hearing or its subject matter.<sup>24</sup> Accordingly, the court granted the writ of mandamus and ordered that the hearing was void.<sup>25</sup>

The court also granted mandamus relief from an order by the original trial court transferring a case back to that court after it had been reassigned to a new judge.<sup>26</sup> Under Chapter 74 of the Texas Government Code, once a case is assigned to a new judge, the original trial court has no authority to transfer the case back to his court, and any such order is

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16. *In re Canales*, 52 S.W.3d 698, 704 (Tex. 2001) (orig. proceeding).

17. *Id.* at 700.

18. *Id.*

19. *Id.* at 704.

20. See *In re Flores*, 53 S.W.3d 428, 431-32 (Tex. App.—San Antonio 2001, orig. proceeding).

21. 34 S.W.3d 708 (Tex. App.—Fort Worth 2000, orig. proceeding).

22. *Id.* at 711.

23. 33 S.W.3d 443 (Tex. App.—Fort Worth 2000, orig. proceeding).

24. *Id.* at 451.

25. *Id.* at 454.

26. *In re Cook Children's Med. Ctr.*, 33 S.W.3d 460, 463 (Tex. App.—Fort Worth 2000, orig. proceeding).

void, justifying mandamus relief.<sup>27</sup>

d. Incidental Rulings

Mandamus is generally not available to correct incidental rulings by the trial court, including rulings on pleas to the jurisdiction,<sup>28</sup> venue,<sup>29</sup> or motions for continuances.<sup>30</sup> However, the Beaumont Court of Appeals held in *In re North American Refractories Co.*<sup>31</sup> that mandamus relief is available to correct a trial court's order denying a motion for continuance of a trial setting where a mandatory local rule required the court to honor vacation letters and defendants were given only two weeks notice of the first trial setting in violation of both due process and local rules requiring forty-five (45) days notice of the first trial setting.<sup>32</sup>

e. Acts of Special Commissioner

Mandamus will not issue to order a Special Commissioner, appointed in a condemnation proceeding, to take certain actions, because the "Government Code does not confer mandamus jurisdiction over [such] commissioners."<sup>33</sup>

f. Order Disqualifying Counsel

Mandamus will issue to correct an order improperly disqualifying counsel. In *In re Chonody*,<sup>34</sup> the Fort Worth Court of Appeals found that the trial court abused its discretion by granting a motion to disqualify counsel without evidence to support the disqualification.<sup>35</sup> Notably, the court did not foreclose the possibility of disqualification of a lawyer who had previously represented the husband in a criminal case involving domestic violence and now represented the wife in a divorce proceeding, but granted mandamus relief because the issue was decided without any evidence to support the disqualification.<sup>36</sup>

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27. *Id.* at 462-63.

28. *See Denton County v. Huther*, 43 S.W.3d 665, 667 n.2 (Tex. App.—Fort Worth 2001, no pet.); *In re Aramark Corp.*, 38 S.W.3d 291, 293 (Tex. App.—Tyler 2001, orig. proceeding).

29. *See In re City of Irving*, 45 S.W.3d 777, 779 (Tex. App.—Texarkana 2001, orig. proceeding); *In re Colonial Cas. Ins. Co.*, 33 S.W.3d 399, 400 (Tex. App.—Texarkana 2000, orig. proceeding).

30. *See General Motors Corp. v. Gayle*, 951 S.W.2d 469, 477 (Tex. 1997) (orig. proceeding).

31. No. 09-01-270-CV, 2001 WL 1517920 (Tex. App.—Beaumont Nov. 29, 2001, orig. proceeding).

32. *Id.* at \*3.

33. *In re McAfee*, 54 S.W.3d 460, 461 (Tex. App.—Waco 2001, orig. proceeding) (per curiam).

34. 49 S.W.3d 376 (Tex. App.—Fort Worth 2000, orig. proceeding).

35. *Id.* at 380.

36. *Id.*

g. Orders Denying Motions to Compel Arbitration

As in previous Survey periods, courts consistently grant mandamus relief to a party that is “improperly denied the right to arbitration under an agreement subject to the Federal Arbitration Act.”<sup>37</sup>

2. *Mandamus Procedures*

To be entitled to mandamus relief, a party must comply with the technical requirements of the Texas Rules of Appellate Procedure. A stubborn refusal to abide by these Rules can result not just in dismissal of the petition, but in denial of the requested relief. In *In re Henster*,<sup>38</sup> the Waco Court of Appeals denied a petition for writ of mandamus after the Relator failed to file proof of service during a seven month period, despite two separate requests from the court for proof of service.<sup>39</sup>

B. INTERLOCUTORY APPEALS

1. *Review of Interlocutory Appeals By the Texas Supreme Court*

The Texas Supreme Court recently construed Texas Government Code Section 22.225 as stating that a judgment by the court of appeals in an interlocutory appeal that is allowed by law is conclusive on the facts and review by the supreme court is not allowed, except in cases where (1) “there was a dissent in the court of appeals,” or (2) “the court of appeals’ holding conflicts with that of another court of appeals or this Court.”<sup>40</sup> Traditionally, the supreme court has narrowly construed Section 22.225, exercising conflicts jurisdiction over an interlocutory appeal only three times within the last decade.<sup>41</sup> In a dissenting opinion in a case where the court had dismissed the petition from an interlocutory appeal for want of jurisdiction, Justice Hecht complained that

[o]ur unshaken view of what we have come to call “conflicts jurisdiction” . . . has been hypertechnically narrow, motivated by a jurisdiction-avoidance determination that has no regard for the obvious, prudential, and entirely salutary purpose of the power granted by the Legislature, which is to resolve important legal disputes among the courts of appeals so that Texas law is not one thing for litigants in one of fourteen court of appeals districts and a different thing for

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37. *In re Winter Park Constr., Inc.*, 30 S.W.3d 576, 579 (Tex. App.—Texarkana 2000, orig. proceeding). *But see* *GAF Corp. v. Bamber*, 29 S.W.3d 650 (Tex. App.—Beaumont 2000, orig. proceeding) (denying mandamus relief because claims alleged were not subject to arbitration clause).

38. 27 S.W.3d 719 (Tex. App.—Waco 2000, orig. proceeding) (per curiam).

39. *Id.* at 720.

40. *Bland I.S.D. v. Blue*, 34 S.W.3d 547, 551 (Tex. 2000); TEX. GOV'T CODE ANN. § 22.225(b)(3), (c) (Vernon Supp. 2001).

41. Justice Hecht, adopting the petitioner's briefing, noted that the court's “exercise of conflicts jurisdiction is thus more rare than a blue moon (5 in the last 10 years), a total eclipse of the sun (6 in the past decade), or the birth of a Giant Panda in captivity (18 in 1999 alone, 15 of which survived).” *Wagner & Brown, Ltd. v. Horwood*, 53 S.W.3d 347, 350 (Tex. 2001) (Hecht, J., dissenting).



litigants in other districts.<sup>42</sup>

In the wake of this criticism, the court found jurisdiction over interlocutory appeals in several cases during this Survey period—finding jurisdiction over an interlocutory appeal where there was a dissent as to part, but not all, of the appellate court's decision and finding conflicts jurisdiction twice.<sup>43</sup> The court also noted that it has jurisdiction to review an appellate court's decision that it lacks jurisdiction over an interlocutory appeal.<sup>44</sup>

a. Jurisdiction Based on a Dissent in the Court of Appeals

By statute, the supreme court has jurisdiction over an interlocutory appeal where the “justices of the courts of appeals disagree on a question of law material to the decision.”<sup>45</sup> In *Brown v. Todd*,<sup>46</sup> the supreme court faced the question of whether the dissenting opinion must be on the same issue raised in the supreme court. In *Brown*, the trial court found that one of two plaintiffs lacked standing to sue the City of Houston and its Mayor over an executive order of the Mayor.<sup>47</sup> However, the court did enjoin the City from enforcing the executive order.<sup>48</sup> The plaintiff appealed the trial court's order dismissing his claim, and the City appealed from the temporary injunction.<sup>49</sup> The court of appeals affirmed the injunction and the finding of no standing against one of the plaintiffs (Hotze), but there was a dissenting opinion on the standing issue.<sup>50</sup>

Both Hotze and the City filed petitions for review with the supreme court – Hotze challenging the finding that he lacked standing and the City challenging the injunction.<sup>51</sup> The City asserted jurisdiction on the grounds that the issues were important to the jurisprudence of the State, which the court noted did not satisfy the limited jurisdictional provisions of the Government Code regarding interlocutory appeals.<sup>52</sup> Hotze, however, asserted that the court had jurisdiction over his appeal as a result of the dissenting opinion.<sup>53</sup> While the court acknowledged that it would not have jurisdiction over the City's petition by itself, the court reasoned that because it had jurisdiction to hear Hotze's appeal, it “acquire[d] jurisdiction of the entire case.”<sup>54</sup>

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42. *Id.* at 349.

43. See *Brown v. Todd*, 53 S.W.3d 297 (Tex. 2001); *Texas Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864 (Tex. 2001); *Bland ISD v. Blue*, 37 S.W.3d 547 (Tex. 2000).

44. *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227 (Tex. 2001).

45. TEX. GOV'T CODE ANN. § 22.225(c) (Vernon Supp. 2001).

46. 53 S.W.3d 297 (Tex. 2001).

47. *Id.* at 300.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Brown*, 53 S.W.3d at 300.

52. *Id.*

53. *Id.*

54. *Id.* at 301 (quoting *Harry Eldridge Co. v. T.S. Lankford & Sons, Inc.*, 371 S.W.2d 878, 879 (Tex. 1963)).

b. Conflicts Jurisdiction

In several cases during this Survey period, the supreme court found conflicts jurisdiction. In *Bland Independent School District v. Blue*,<sup>55</sup> the court defined when a holding conflicts with another court of appeals for purposes of determining jurisdiction over interlocutory appeals. In that case, the Bland Independent School District filed a plea to the jurisdiction, claiming that two individuals challenging how the school district had financed a construction project lacked standing to sue.<sup>56</sup> The trial court overruled BISD's jurisdictional challenge based solely on the plaintiffs' pleadings without reference to the actual evidence presented by BISD.<sup>57</sup>

BISD filed an interlocutory appeal asserting error in the trial court's failure to consider BISD's evidence. The court of appeals affirmed the trial court's ruling, concluding that the trial court could not look beyond the plaintiffs' pleadings to determine jurisdiction.<sup>58</sup>

BISD filed a petition for review with the supreme court. Prior to addressing the merits of BISD's appeal, the court considered its own jurisdiction to review an interlocutory appeal.<sup>59</sup> The court noted that to have conflicts jurisdiction over an interlocutory appeal, "[t]he conflict must be on the very questions of law actually involved and determined, in respect of an issue in both cases, the test being whether one would operate to overrule the other in case they were both rendered by the same court."<sup>60</sup> The conflict between the cases must "appear on the face of the opinions themselves."<sup>61</sup>

The court rejected cases that simply implied that evidence could be considered or even cases that may have actually considered evidence in deciding a plea to the jurisdiction, because none of the authorities held on their face that evidence must be considered.<sup>62</sup> However, the court noted one case where it had remanded a plea to the jurisdiction to "determine whether the evidence was factually sufficient to support the trial court's ruling."<sup>63</sup> Although the case did not expressly discuss "whether evidence could be considered in deciding a plea to the jurisdiction, the propriety of such evidence was essential to our ruling on the face of the opinion. Our judgment would have been different if consideration of such evidence had been improper."<sup>64</sup> The court reasoned that "[i]f a rule of decision in one case would require a different result were it applied in another case, the conflict between the two cases is sufficient to invoke our jurisdiction

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55. 34 S.W.3d 547 (Tex. 2000).

56. *Id.* at 550.

57. *Id.*

58. *Id.* at 551.

59. *Id.*

60. *Blue*, 34 S.W.3d at 551 (quoting *Christy v. Williams*, 156 Tex. 555, 560, 298 S.W.2d 565, 568-69 (1957)).

61. *Id.* (quoting *State v. Wynn*, 157 Tex. 200, 203, 301 S.W.2d 76, 79 (1957)).

62. *Id.* at 551-52.

63. *Id.* at 553.

64. *Id.*

over an interlocutory appeal.”<sup>65</sup>

The dissent, filed by Chief Justice Phillips and joined by Justices Enoch and Hankinson, agreed with the standards applied by the majority but disagreed with the majority’s conclusion that the rule espoused in the earlier decision would require a different result in this case.<sup>66</sup> Chief Justice Phillips warned against result-oriented opinions and noted “I realize that it is difficult to resist ‘the desire to remedy significant errors’ arising in interlocutory appeals [citation omitted] . . . But as a Court of limited appellate jurisdiction, we must wait until issues are properly before us before we address them by judicial decision.”<sup>67</sup>

The court also found conflicts jurisdiction over an interlocutory appeal in *Texas Natural Resource Conservation Comm’n v. White*.<sup>68</sup> In *White*, the plaintiff sued the TNRCC after a fire destroyed her business.<sup>69</sup> The TNRCC filed a plea to the jurisdiction claiming sovereign immunity under the Texas Tort Claims Act.<sup>70</sup> Under Section 101.021 of the Texas Tort Claims Act, the TNRCC was not immune from suit if the stationary electric motor-driven pump at issue in the lawsuit was “motor-driven equipment” as defined in the Act.<sup>71</sup> The trial court and the court of appeals on interlocutory appeal both found that the plaintiff sufficiently alleged that the TNRCC’s pump was “motor-driven equipment” within the Act and that the TNRCC was not immune from liability.<sup>72</sup>

The TNRCC sought review in the supreme court asserting that the court of appeals’ opinion conflicted with an opinion from the San Antonio Court of Appeals that found two grounds to support the plea to the jurisdiction, one of which was the conclusion that the pump in question was not “motor-driven equipment.”<sup>73</sup> The court concluded that because of “the factual similarities between [the San Antonio court of appeals opinion] and this case, and the divergence between the two cases’ holdings, we conclude that one decision ‘would operate to overrule the other.’”<sup>74</sup> Accordingly, the court found jurisdiction to review the merits of the case.

In contrast, the court found no conflicts jurisdiction in *Resendez v. Johnson*.<sup>75</sup> In *Resendez*, the parents of four students sued the Dallas Independent School District, the school superintendent, the school principal and two teachers for excessive punishment.<sup>76</sup> The school district was

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65. *Blue*, 34 S.W.3d at 553.

66. *Id.* at 559 (Phillips, C.J., dissenting).

67. *Id.*

68. 46 S.W.3d 864 (Tex. 2001).

69. *Id.* at 866.

70. *Id.*

71. *Id.*

72. *Id.* at 866-67.

73. *White*, 46 S.W.3d at 867-68.

74. *Id.* at 868.

75. 52 S.W.3d 689 (Tex. 2001).

76. *Id.* at 690.

granted summary judgment.<sup>77</sup> The other defendants then filed a plea to the jurisdiction claiming that they were immune from suit under section 101.106 of the Texas Tort Claims Act, because the district had already been dismissed on summary judgment.<sup>78</sup> The trial court denied the plea, and the court of appeals affirmed holding that section 101.106 of the Texas Tort Claims Act does not confer immunity without a final judgment for the school district.<sup>79</sup> In a prior opinion, the supreme court had concluded “section 101.106 applies if a judgment is rendered against the governmental unit at any time during the pendency of the action against the employee.”<sup>80</sup> The court noted that it did not decide in its prior decision the exact question at issue in this case—whether an interlocutory judgment would bar an action pursuant to section 101.106.<sup>81</sup> Accordingly, the court found that it lacked conflicts jurisdiction over the appeal.

## 2. *Appealing an Order Allowing or Denying Intervention or Joinder*

During the Survey period, the Texas Supreme Court took the opportunity to clarify the scope of Section 15.003 of the Texas Civil Practice and Remedies Code, which is a joinder statute.<sup>82</sup>

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Resendez*, 52 S.W.3d at 691 (analyzing *Thomas v. Oldham*, 895 S.W.2d 352 (Tex. 1995)).

81. *Id.*

82. *American Home Prods. Corp. v. Clark*, 38 S.W.3d 92 (Tex. 2000). Section 15.003 of the Texas Civil Practice & Remedies Code provides:

(a) In a suit where more than one plaintiff is joined each plaintiff must, independently of any other plaintiff, establish proper venue. Any person who is unable to establish proper venue may not join or maintain venue for the suit as a plaintiff unless the person, independently of any other plaintiff, establishes that:

- (1) joinder or intervention in the suit is proper under the Texas Rules of Civil Procedure;
- (2) maintaining venue in the county of suit does not unfairly prejudice another party to the suit;
- (3) there is an essential need to have the person's claim tried in the county in which the suit is pending; and
- (4) the county in which the suit is pending is a fair and convenient venue for the person seeking to join in or maintain venue for the suit and the persons against whom the suit is brought.

(b) A person may not intervene or join in a pending suit as a plaintiff unless the person, independently of any other plaintiff:

- (1) establishes proper venue for the county in which the suit is pending; or
- (2) satisfies the requirements of Subdivisions (1) through (4) of Subsection (a).

(c) Any person seeking intervention or joinder, who is unable to independently establish proper venue, or a party opposing intervention or joinder of such a person may contest the decision of the trial court allowing or denying intervention or joinder by taking an interlocutory appeal to the court of appeals district in which the trial court is located under the procedures established for interlocutory appeals. The appeal must be perfected not later than the 20th day after the date the trial court signs the order denying or allowing the intervention or joinder. The court of appeals shall:

Section 15.003(a) provides that, in a suit in which more than one plaintiff is joined, each plaintiff must independently establish proper venue.<sup>83</sup> While there is no right to an interlocutory appeal from a trial court's determination of a venue question,<sup>84</sup> the Legislature has provided the right of limited interlocutory appeal in an intervention or joinder situation:

Any person seeking intervention or joinder, who is unable to independently establish proper venue, or a party opposing intervention or joinder of such a person may contest the decision of the trial court allowing or denying intervention or joinder by taking an interlocutory appeal to the court of appeals district in which the trial court is located under the procedures established for interlocutory appeals.<sup>85</sup>

According to the supreme court in *American Home*, this statute "allows an interlocutory appeal for one specific purpose: to contest the trial court's decision allowing or denying intervention or joinder."<sup>86</sup> The statute does *not* provide for an interlocutory appeal from the trial court's conclusion that a person seeking intervention or joinder has independently established proper venue.<sup>87</sup> Only when the trial court's order necessarily determines an intervention or joinder issue under section 15.003(a), which takes as its starting point a "person who is unable to establish proper venue," does section 15.003(c) allow for either party to contest that decision by taking an interlocutory appeal.<sup>88</sup> If the trial court determines that venue is proper under section 15.002, the inquiry is over, and no interlocutory appeal is available even if the trial court's venue decision is erroneous.<sup>89</sup> The Court in *American Home* accordingly rejected the petitioner's argument that a court of appeals has interlocutory-appeal jurisdiction over all venue decisions that relate to intervention or joinder under section 15.003, reasoning that such an interpretation would make "any trial court venue decision under § 15.002 in a multi-plaintiff case reviewable by interlocutory appeal, which is contrary to the plain language of [section 15.064]."<sup>90</sup>

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- (1) determine whether the joinder or intervention is proper based on an independent determination from the record and not under either an abuse of discretion or substantial evidence standard; and
  - (2) render its decision not later than the 120th day after the date the appeal is perfected by the complaining party.

TEX. CIV. PRAC. & REM. CODE ANN. § 15.003 (Vernon Supp. 2001).

83. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a) (Vernon Supp. 2001).

84. *Id.* § 15.064(a).

85. *Id.* § 15.003(c).

86. 38 S.W.3d at 96.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* See TEX. CIV. PRAC. & REM. CODE ANN. § 15.064 (Vernon Supp. 2001) ("No interlocutory appeal shall lie from the [venue] determination.").

### 3. *Appealing an Order Certifying or Refusing to Certify a Class Action*

#### a. *Order Altering the Fundamental Nature of the Class*

Section 51.014(a)(3) of the Texas Civil Practice and Remedies Code gives a party the statutory right to appeal an interlocutory order that certifies or refuses to certify a class action.<sup>91</sup> As the construction of this statute has developed, an order may be subject to interlocutory appeal even if it does not expressly certify or refuse to certify a class. For example, in 1996, the Texas Supreme Court held in *De Los Santos v. Occidental Chemical Corp.*<sup>92</sup> that an interlocutory order changing a certified class from opt-out to mandatory was appealable under section 51.014(a)(3), because such an order “alters the fundamental nature of the class.”<sup>93</sup> In contrast, an order changing the size of a class merely modifies a certification order and does not qualify as an “order certifying or refusing to certify a class.”<sup>94</sup>

What about an interlocutory partial summary judgment on liability entered in favor of the plaintiffs after an opt-out class is certified but *before* notice is sent to the class? Arguably, the summary judgment makes it less likely that class members will opt out. The supreme court faced this issue in *Bally Total Fitness Corp. v. Jackson*,<sup>95</sup> when the defendant attempted an interlocutory appeal of the trial court’s order refusing to decertify the class after it had entered a partial summary judgment on liability against the defendant *preceding* notice of the lawsuit to the class members.<sup>96</sup> The defendant argued that the fundamental nature of the class was altered by the trial court’s rulings, because the pre-notice partial summary judgment virtually eliminated the potential class members’ incentives to opt out, effectively transforming the opt-out nature of the class into a *de facto* mandatory class.<sup>97</sup>

Rejecting this argument, the supreme court held that, even if the trial court’s partial summary judgment created an incentive to stay in the class, this would affect only the size of the class, not its fundamental nature.<sup>98</sup> *De Los Santos*, the Court explained, was not about strategic opting in, which was the defendant’s complaint in *Bally*, but “about forcing plaintiffs who had already opted out into a mandatory settlement class.”<sup>99</sup> In contrast to the class members in *De Los Santos*, the *Bally* class members faced no legal bar to opting out as a result of the pre-notice partial summary judgment, nor were they forced into the class against their will.<sup>100</sup>

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91. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(3) (Vernon 2001).

92. 933 S.W.2d 493 (Tex. 1996).

93. *Id.* at 495.

94. *Id.* (citing *Pierce Mortuary Colleges, Inc. v. Bjerke*, 841 S.W.2d 878, 880-81 (Tex. App.—Dallas 1992, writ denied)).

95. 53 S.W.3d 352 (Tex. 2001).

96. *Id.* at 353.

97. *Id.* at 355.

98. *Id.* at 356.

99. *Id.*

100. *Bally*, 53 S.W.3d at 356.

Because the trial court's order "changed nothing about the class itself," it was not subject to interlocutory appeal, even if the order was wrong.<sup>101</sup>

b. "Preliminary" Order Certifying a Class

In *McAllen Medical Center, Inc. v. Cortez*, the supreme court analyzed whether a "preliminary" certification order permitting the plaintiffs and their counsel to proceed as a class, without first determining that the requirements of Texas Rule of Civil Procedure 42 have been met is ripe for appellate review.<sup>102</sup> The case before the court after the court of appeals dismissed the interlocutory appeal for lack of jurisdiction.<sup>103</sup> Shortly after suit was filed, the trial court in *McAllen* certified a class action "for purposes of settlement with [one of the defendants] only" and deferred its inquiry under Rule 42's numerosity, commonality, typicality, and adequacy criteria to the fairness hearing on the settlement.<sup>104</sup> On interlocutory appeal from the class certification order, the appellee argued that, because the trial court had made no final determination as to Rule 42's criteria, appellate review of the trial court's certification order was premature.<sup>105</sup> The court of appeals dismissed the appeal as "premature."<sup>106</sup>

Noting that trial courts are required to perform a "rigorous analysis" before ruling on class certification to determine whether all prerequisites to certification have been met, the supreme court concluded that the certification order was ripe for appellate review and could "not be shielded from appellate review merely because it [was] termed 'preliminary' or because the trial court [might] later reconsider its ruling at a fairness hearing."<sup>107</sup>

#### 4. *Appealing an Order Granting or Denying a Temporary Injunction*

An interlocutory order granting or refusing to grant a temporary in-

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101. *Id.* ("That the order might be wrong (which we do not decide) does not make it appealable, else all alleged irregularities in a class-action suit would be immediately subject to review."). Justice Owen, joined by Justices Hecht and Abbott, dissented, finding that the trial court's refusal to decertify the class after entry of a pre-notice partial summary judgment against the defendant altered the fundamental nature of the class "because under our class action rule, when liability is resolved before notice is given to class members, the class certification can no longer be sustained, and the class must be decertified." *Id.* at 359 (Owen, J., dissenting). The crux of the disagreement between the majority and the dissent was the issue of whether any pre-notice merits determination favoring the plaintiff requires decertification. The dissent argued that it does, resulting in a fundamental change in the nature of the class (mandatory decertification), while the majority questioned the authority relied upon by the dissent for this proposition and concluded that, in any event, the order, even if wrong, changed nothing about the class itself. *Id.* at 356-57, 359.

102. 66 S.W.3d 227 (Tex. 2001).

103. *Id.* at 231. The supreme court granted review of the case to consider whether the court of appeals correctly decided that it lacked jurisdiction. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *McAllen*, 66 S.W.3d at 232-33 ("Once the trial court certified the settlement class against [the defendant], its order was ripe for appellate review, and the court of appeals erred in dismissing [appellant's] appeal as 'premature.'").

junction is appealable.<sup>108</sup> Of course, to be appealable, the order must constitute a “temporary injunction.” An order requiring the deposit of funds into the registry of a court cannot be characterized as an appealable temporary injunction, even if entered in response to a motion for injunctive relief.<sup>109</sup>

### 5. *Appealing an Order Assessing Sanctions*

A trial court’s order assessing monetary sanctions against an attorney in a case is not an appealable interlocutory order, because there is no statutory authority for such an appeal.<sup>110</sup> Any appeal of such sanctions is necessarily taken from the date of the final judgment.<sup>111</sup> Notably, while an attorney against whom sanctions have been assessed is not a party to the lawsuit and thus would not ordinarily have the authority to file an appeal from that judgment, the order awarding the sanction is nonetheless reviewable on appeal from the final judgment.<sup>112</sup> Not only may the non-party attorney appeal from the final judgment to challenge the sanctions order, he may do so in a *separate* appeal.<sup>113</sup>

### 6. *Appealing an Order That Grants a Bill of Review but Does Not Dispose of the Underlying Lawsuit*

During the Survey period, the Houston Court of Appeals, in *Mills v. Corvettes of Houston, Inc.*,<sup>114</sup> confirmed that the rule in Texas concerning bills of review is well-established: “An order which grants a bill of review and voids a judgment in an underlying lawsuit, but which does not dispose of the underlying lawsuit, is not a final appealable order.”<sup>115</sup> An order granting a bill of review is not among the enumerated items of section 51.014 of the Texas Civil Practice and Remedies Code, which is a narrow exception to the general rule that only final judgments and orders are appealable.<sup>116</sup>

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108. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4) (Vernon Supp. 2001).

109. Faddoul, Glasheen & Valles, P.C. v. Oaxaca, 52 S.W.3d 209, 212 (Tex. App.—El Paso 2001, no pet.).

110. See Onstad v. Wright, 54 S.W.3d 799, 803 (Tex. App.—Texarkana 2001, pet. filed).

111. *Id.*

112. *Id.*

113. *Id.* at 804 (“Indeed, if no appeal had been taken by a party, it is clear that [the attorney] would have been required to file a separate appeal in order to contest the order awarding the sanction. We are not convinced that this situation is materially changed by the plaintiffs’ decision to pursue an appeal. In this situation, we find it permissible for [the attorney] to appeal from the sanction in a separate appeal.”).

114. 44 S.W.3d 197, 199 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (citing *Jordan v. Jordan*, 907 S.W.2d 471, 472 (Tex. 1995)).

115. *Id.*

116. *Id.* (citing *Lehman v. Har-Con Corp.*, 39 S.W.3d 191, 194 (Tex. 2001). See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (Vernon Supp. 2001).



### 7. *Consideration of Non-appealable Orders That Affect the Validity of an Appealable Interlocutory Order*

At least one court of appeals has held that, to the extent the subject matter of a non-appealable interlocutory order may affect the validity of an appealable interlocutory order, the non-appealable order may be considered on interlocutory appeal.<sup>117</sup> While not rejecting this concept outright, the El Paso Court of Appeals in *Faddoul, Glasheen & Valles, P.C. v. Oaxaca*<sup>118</sup> nonetheless denied the appellants' request that the court review the trial court's non-appealable order denying their motion to abate on the grounds that it affected the validity of an appealable order granting temporary injunctive relief.<sup>119</sup>

### 8. *Orders Subject to Interlocutory Appeal*

A trial court's order denying a motion that is substantively a motion for new trial or for reconsideration of an appealable interlocutory order is not of itself subject to interlocutory appeal.<sup>120</sup> As recently held by the Fort Worth Court of Appeals in *Denton County v. Huther*, this would include an order denying a motion that renews the original motion and requests the trial court to reconsider the prior order, even if the renewed motion or motion for reconsideration is based upon new authority.<sup>121</sup> The fact that the renewed motion cites additional authority in support of the original motion, which was not originally included when the motion was first presented to the trial court, does not "transform the motion into a second, separate and distinct [request]."<sup>122</sup> Accordingly, under such circumstances, an order denying a renewed motion or motion for reconsideration is not an appealable interlocutory order.<sup>123</sup> The *Huther* court suggested that there had to be a substantive difference between the renewed motion and a typical motion for new trial or motion for reconsideration before an order denying the renewed motion would constitute a distinct order subject to interlocutory appeal.<sup>124</sup>

### 9. *Stay Pending Interlocutory Appeal*

Under section 51.014(b) of the Texas Civil Practice and Remedies Code, an interlocutory appeal under section 51.014(a) has "the effect of staying the commencement of a trial in the trial court pending the resolution of the appeal."<sup>125</sup> At least one court of appeals has limited the scope

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117. See *Letson v. Barnes*, 979 S.W.2d 414, 417 (Tex. App.—Amarillo 1998, pet. denied).

118. 52 S.W.3d 209 (Tex. App.—El Paso 2001, no pet.).

119. *Id.* at 211-12.

120. TEX. R. APP. P. 28.1; *Denton County v. Huther*, 43 S.W.3d 665, 666 (Tex. App.—Fort Worth 2001, no pet.).

121. *Id.* at 667.

122. *Id.*

123. *Id.*

124. *Id.*

125. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (Vernon Supp. 2001).

of this statutory-mandated stay to a stay of only those parts of the trial proceeding that may be affected by the court of appeals' decision in the interlocutory appeal.<sup>126</sup>

Applying this precedent during the Survey period, the San Antonio Court of Appeals reversed a trial court's refusal to stay commencement of trial in *Sheinfeld, Maley & Kay, P.C. v. Bellush*,<sup>127</sup> concluding that the court of appeals' decision in the interlocutory appeal would necessarily affect each of the claims pending in the case.<sup>128</sup> Notably, the court of appeals was not swayed by the fact that the trial court had severed the pending claims into a different cause, rejecting the argument that none of the pending claims would be affected by the interlocutory appeal because they had been severed into the separate cause.<sup>129</sup> The court held that the severance argument "ignores the realities of the [interlocutory] order. If the interlocutory appeal affected the pending claims at the time the trial court denied the motion to stay, the trial court erred in denying the motion regardless of its subsequent severance of those claims."<sup>130</sup> "The severance," the court concluded, "cannot isolate the claims that would be affected by the [interlocutory order] or the intent of the legislature could be circumvented in every case in which an interlocutory appeal is pending by simply severing the order on appeal from the remainder of the cause."<sup>131</sup>

## II. PRESERVATION OF ERROR

During the Survey period, the supreme court confirmed several well-established principles involving the preservation of error at the trial stage. For example, the court held in *Harris County Bail Bond Board v. Blackwood* that a post-judgment motion arguing that the evidence is legally insufficient to support the judgment adequately preserves the error, because a no-evidence challenge may be raised for the first time in a post-judgment motion.<sup>132</sup> The court similarly reiterated in both *Texas Natural Resource Conservation Commission v. White*<sup>133</sup> and *Coastal Liquids Transportation, L.P. v. Harris County Appraisal District*<sup>134</sup> the basic rule that arguments not made to the trial court generally cannot be raised for the first time on appeal.<sup>135</sup>

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126. See *Tarrant Regional Water Dist. v. Gragg*, 962 S.W.2d 717, 719 (Tex. App.—Waco 1998, no pet.).

127. 61 S.W.3d 437 (Tex. App.—San Antonio 2001, no pet.).

128. *Id.* at 438.

129. *Id.*

130. *Id.*

131. *Id.*

132. 41 S.W.3d 123, 127 (Tex. 2001).

133. 46 S.W.3d 864 (Tex. 2001).

134. 46 S.W.3d 880 (Tex. 2001).

135. *White*, 46 S.W.3d at 870 (citing *Perry v. S.N.*, 973 S.W.2d 301, 303 (Tex. 1998)); *Coastal Liquids*, 46 S.W.3d at 885 (citing *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993)).

As for preservation cases from the courts of appeals during the Survey period, of note is the Waco Court of Appeals' opinion in *Wal-Mart Stores, Inc. v. Reece*<sup>136</sup> analyzing the concept of implied rulings under Texas Rule of Appellate Procedure 33.1(a)(2)(A). In *Reece*, the appellant complained on appeal of improper side-bar remarks made by opposing counsel in front of the jury, which violated the parties' pretrial motions in limine.<sup>137</sup> At trial, the appellant objected to the side-bar remarks on the basis of the motions in limine, and the court responded by asking the parties to abide by those motions.<sup>138</sup> While the Waco court in *Reece* noted that inappropriate side-bar remarks are to be "rigidly repressed" under the Texas Rules of Civil Procedure,<sup>139</sup> the court said, "this does not excuse counsel from complying with the basic rules for preservation of error."<sup>140</sup> The Waco court concluded that, even applying the implied ruling provisions of the Texas Rules of Appellate Procedure, the trial court's response was too indefinite to constitute even an implicit ruling on the objection, and any error was waived.<sup>141</sup>

The Houston Court of Appeals similarly found waiver in *Jones v. Lurie*<sup>142</sup> when the appellant failed to make a bill of exceptions or other offer of proof showing the substance of excluded evidence.<sup>143</sup> The court of appeals confirmed that "[e]rror may not be based on a ruling that excludes evidence unless the substance of the evidence was made known to the [trial] court by offer of proof."<sup>144</sup> In contrast, no waiver occurred in *Texas A & M University v. Chambers*<sup>145</sup> when the appellant objected to the trial court's improper inclusion of a presumption in the jury charge by stating that the charge improperly shifted the burden of proof to the defendant because the presumption should have dropped out of the case.<sup>146</sup> The Austin Court of Appeals held that this objection was specific enough to preserve the complaint for appellate review.<sup>147</sup> While "[i]ncluding a presumption in the jury charge which has been rebutted by controverting facts is an improper comment on the weight of the evidence," the court of appeals cautioned that "[i]t is insufficient to object to a jury charge by stating only that the instruction constitutes a comment on the weight of the evidence."<sup>148</sup>

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136. 32 S.W.3d 339 (Tex. App.—Waco 2000, pet. granted).

137. *Id.* at 346-77.

138. *Id.* at 348.

139. TEX. R. CIV. P. 269(f).

140. *Reece*, 32 S.W.3d at 347.

141. *Id.* at 348. See TEX. R. APP. P. 33.1(a)(2)(A).

142. 32 S.W.3d 737 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

143. *Id.* at 745.

144. *Id.* See TEX. R. EVID. 103(a)(2).

145. 31 S.W.3d 780 (Tex. App.—Austin 2000, pet. denied).

146. *Id.* at 783 n.1.

147. *Id.*

148. *Id.* at 783 n.1, 785.

## III. JUDGMENTS

## A. FINALITY IN THE SUMMARY JUDGMENT CONTEXT

At the beginning of the Survey period, the courts of appeals continued to struggle<sup>149</sup> 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 decision in *Mafrige v. Ross*<sup>150</sup> "that a summary judgment that on its face purported to dispose of all issues and all parties was final for purposes of appeal."<sup>151</sup> Under *Mafrige*, a "judgment containing language purporting to grant or deny relief that disposes of all claims or parties [like a Mother Hubbard clause], regardless of the intent of the parties or the trial court," resulted in a judgment that was final as to all issues and all parties.<sup>152</sup> During the Survey period, the supreme court issued *Lehmann v. Har-Con Corp.*,<sup>153</sup> which effectively overturned the *Mafrige* rule, holding:

We no longer believe that a Mother Hubbard clause in an order or in a judgment issued without full trial can be taken to indicate finality. We therefore hold 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.<sup>154</sup>

Applying its ruling in *Lehmann*, the supreme court in *Guajardo v. Conwell*<sup>155</sup> held that the trial court's summary judgment order was not final and appealable where it included a Mother Hubbard clause but did not specifically mention claims not addressed by the motions for summary judgment. The court emphasized that "a judgment is final for purposes of appeal in circumstances like those of this case 'if and only if either it actually disposes of all claims and parties then before the court, or it states with unmistakable clarity that it is a final judgment.'"<sup>156</sup> Mother Hubbard language, the Court reiterated, "does not indicate finality."<sup>157</sup> Where, as in *Guajardo*, there is no language other than the Mother Hubbard clause to indicate finality and the order does not actually dispose of all claims and parties by specifically mentioning those claims not addressed by the motions for summary judgment, the order is not final and

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149. See *Stettner Clinic, Inc. v. Burns*, 61 S.W.3d 16, 20 (Tex. App.—Amarillo 2000, no pet.) (holding that trial court order granting partial summary judgment was not final and appealable despite inclusion of Mother Hubbard language since the order also included a statement expressly reserving the issue of damages for later resolution).

150. 866 S.W.2d 590 (Tex. 1993).

151. *Henderson v. Duran*, 39 S.W.3d 392, 394 (Tex. App.—Waco 2001, no pet.).

152. *Harris County v. Nash*, 22 S.W.3d 46, 49 (Tex. App.—Houston [14th Dist.] 2000), *rev'd*, 63 S.W.3d 415 (Tex. 2001).

153. 39 S.W.3d 191 (Tex. 2001).

154. *Id.* at 192.

155. 46 S.W.3d 862 (Tex. 2001).

156. *Id.* at 863-64 (citing *Lehmann*, 39 S.W.3d at 192).

157. *Id.* at 864.

appealable.<sup>158</sup>

The supreme court similarly concluded that neither of the summary judgment orders entered in *Clark v. Pimienta*<sup>159</sup> or *Bobbitt v. Stran*<sup>160</sup> were final and appealable despite the inclusion of Mother Hubbard language, where both orders were interlocutory on their faces (they were both entitled “partial summary judgment”) and neither disposed of all claims and parties in the case.<sup>161</sup>

The supreme court also applied *Lehmann* during the Survey period in the context of a motion for summary judgment that encompassed all claims in the case followed by an order containing Mother Hubbard language. In *Parking Company of America v. Wilson*,<sup>162</sup> the plaintiff moved for summary judgment on all of its claims against the defendant (breach of contract, accounting, damages, attorney’s fees).<sup>163</sup> The trial court granted summary judgment in an order that: (i) was titled “Partial Summary Judgment,” (ii) contained language that the motion was “granted in part and denied in part,” and (iii) expressly found liability and awarded damages based on the plaintiff’s claim for breach of contract.<sup>164</sup> The order did not expressly mention the plaintiff’s accounting action or his claim for attorney’s fees but contained a Mother Hubbard clause stating that “all other relief requested is hereby denied.”<sup>165</sup> Thereafter, the plaintiff nonsuited his accounting action and the issue of attorney’s fees was tried to the bench. Ultimately the trial court entered a “Final Judgment” that incorporated the partial summary judgment and awarded attorney’s fees.<sup>166</sup> When the defendants appealed from this judgment, the court of appeals dismissed the appeal for want of jurisdiction, holding that the summary judgment order was made final by the inclusion of the Mother Hubbard language and that no appeal from that order was timely perfected.<sup>167</sup> The supreme court reversed the court of appeals, holding that, under *Lehmann*, the summary judgment was “clearly interlocutory”

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158. *Id.*

159. 47 S.W.3d 485 (Tex. 2001) (per curiam).

160. 52 S.W.3d 734 (Tex. 2001) (per curiam).

161. In *Bobbitt*, claims by the plaintiffs against some or all of the defendants, counter-claims by three defendants against one of the plaintiffs, and a cross-claim all appeared to have remained pending at the time the summary judgment order containing the Mother Hubbard language was entered. 52 S.W.3d at 735. In *Clark*, the plaintiff sued three groups of defendants on various claims and the trial court entered summary judgment in favor of one of the groups of defendants. 47 S.W.3d at 486. Later, in the order at issue on appeal, the trial court granted summary judgment in favor of a second group of defendants and included a Mother Hubbard clause in the order despite the fact that the third group of defendants had not moved for summary judgment. *Id.* The supreme court concluded that the trial court’s second order granting summary judgment was not final and appealable, regardless of the inclusion of Mother Hubbard language, because it “did not expressly dispose of all the claims and parties in the case, nor was its intent to do so unmistakable.” *Id.*

162. 58 S.W.3d 742 (Tex. 2001) (per curiam).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Wilson*, 58 S.W.3d at 742.

despite the presence of the Mother Hubbard clause and the appeal from the final judgment was, therefore, timely perfected.<sup>168</sup>

So far, the courts of appeals have for the most part applied *Lehmann* without difficulty or significant explanation.<sup>169</sup> Of interest, however, are two cases decided by the Fourteenth Court of Appeals. First, the court made some noteworthy observations in *Taub v. Dedman*<sup>170</sup> regarding the process of determining finality under *Lehmann*. In *Taub*, the Fourteenth Court of Appeals held that, in light of the state of the record reflecting unresolved claims and parties, and the absence of any language indicating an intention of finality other than the Mother Hubbard clause, the trial court's summary judgment order was interlocutory and not appealable.<sup>171</sup> In reaching its holding, the court noted that in determining finality under *Lehmann*, it may be necessary to examine the language of the summary judgment order in light of the record as a whole.<sup>172</sup>

However, the balance still appears to be in favor of finality. A judgment that finally disposes of all remaining parties and claims is final regardless of its language, yet *unequivocal language expressing finality controls to make an order final even if the record indicates that such judgment is erroneous*.<sup>173</sup>

The *Taub* court concluded that, under *Lehmann*, a Mother Hubbard clause in an order on an interlocutory motion may only mean that any relief requested in the motion but not specifically granted in the order is denied, or it may have no intended meaning at all, being inserted simply

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168. *Id.*

169. See *Lucas v. Burleson Publ'g Co.*, 39 S.W.3d 693, 695-96 (Tex. App.—Waco 2001, no pet.) (determining from review of the record reflecting unresolved parties and claims and from review of trial court's order entitled "partial" summary judgment that the trial court had not intended to dispose of all parties and claims, despite presence of Mother Hubbard language in summary judgment order and stating that where the judgment is interlocutory, "inclusion of the Mother Hubbard clause cannot make it final."); *Henderson v. Duran*, 39 S.W.3d 392, 394 (Tex. App.—Waco 2001, no pet.) (concluding that, on the record before the court of appeals, the trial court had not intended the judgment to dispose of all four of the plaintiff's claims where only two were addressed in his motion for summary judgment, despite the presence of Mother Hubbard language in the summary judgment order); *Anderson v. Long*, 52 S.W.3d 385, 385-86 (Tex. App.—Fort Worth 2001, no pet.) (determining that an order granting summary judgment was interlocutory, despite inclusion of Mother Hubbard language, where the motion for summary judgment did not address the plaintiff's claims for breach of contract and negligence against the defendants and where nothing in the order suggested that the trial court intended to dispose of those claims. "The Mother Hubbard clause, by itself, does not make the judgment final."). The Waco Court of Appeals in *Henderson* observed that, if it were to render the judgment that the trial court should have rendered, it would be rendering an interlocutory partial summary judgment which would become law of the case on remand and not subject to being set aside or contravened by the trial court. 39 S.W.3d at 395. The court concluded that, in addition to not having jurisdiction to review a partial summary judgment, taking it upon itself to review less than the entire case at that time would be imprudent because it would "affect the trial court's ability to deal with issues as they [might] develop prior to final judgment." *Id.*

170. 56 S.W.3d 83 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

171. *Id.* at 87.

172. *Id.* at 86.

173. *Id.* (emphasis added).

from a recitation on a form.<sup>174</sup>

The second case from the Fourteenth Court of Appeals is noteworthy in its strict application of *Lehmann*. In *Youngblood & Associates, P.L.L.C. v. Duhon*,<sup>175</sup> the court concluded that Mother Hubbard language in a summary judgment order did not reflect the disposition (denial) of a claim for attorney's fees *that was asserted in the motion for summary judgment*.<sup>176</sup> In that case, the plaintiff law firm sued for breach of contract and on sworn account for payment of legal services rendered, as well as for attorney's fees incurred in bringing suit. The plaintiff moved for summary judgment on all of its claims (breach of contract, sworn account *and* attorney's fees).<sup>177</sup> The trial court granted the plaintiff summary judgment for the debt but the order contained no ruling on attorney's fees. Instead, the order contained a Mother Hubbard clause.<sup>178</sup> Relying on *Lehmann*, the court of appeals concluded that the Mother Hubbard clause did not constitute a denial of plaintiff's claim for attorney's fees but, rather, was no longer determinative of finality.<sup>179</sup> Because the summary judgment order expressly disposed of the plaintiff's claims for breach of contract and sworn account, the court of appeals read the order as containing "no ruling" on plaintiff's claim for recovery of attorney's fees.<sup>180</sup> The court further supported this conclusion by noting that the plaintiff had filed a motion to modify the judgment to include a ruling on its claim for fees and that the trial court had denied this motion. According to the court of appeals, the motion to modify "alerted the trial court to the outstanding claim" and the denial indicated that the trial court did not intend to rule on all claims and, thus, "did not intend the summary judgment order to be final, despite the language in the order to the contrary."<sup>181</sup>

## B. FINALITY IN THE CONVENTIONAL TRIAL CONTEXT

During the Survey period, the Texas Supreme Court reaffirmed in *John v. Marshall Health Services, Inc.*<sup>182</sup> that, after a conventional trial on the merits, a judgment containing a Mother Hubbard clause is *presumed* final.<sup>183</sup> While the court noted that this presumption "should not be rigidly applied to make judgments final contrary to litigants' reasonable expectations," the court concluded that the presumption was appropriate where

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174. *Id.* at 87 n.2.

175. 57 S.W.3d 63 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

176. *Id.* at 65.

177. *Id.* at 64.

178. *Id.*

179. *Id.*

180. *Dehon*, 57 S.W.3d at 65.

181. *Id.*

182. 58 S.W.3d 738 (Tex. 2001) (per curiam).

183. *Id.* at 740. See *Lehmann*, 39 S.W.3d at 204 ("If there has been a full trial on the merits either to the bench or before a jury, the [Mother Hubbard] language indicates the court's intention to finally dispose of the entire matter, assuming that a separate or bifurcated trial is not ordered.").

the plaintiff went forward with trial against the only defendants against whom he still wished to prosecute his claims and failed to seek an agreed judgment reflecting a settlement he had pending against another set of defendants at the time of judgment.<sup>184</sup> The court noted that the finality of the judgment, “should not depend on one party’s testimony that he did or did not finalize a settlement with parties from whom he sought no relief at trial.”<sup>185</sup> The court also pointed out that the trial court was aware of the pending settlement when it entered the judgment containing the Mother Hubbard clause, and that there was nothing to indicate that the trial court did not intend the judgment to finally dispose of the entire case.<sup>186</sup>

### C. MERGER

Interlocutory orders entered during the pendency of a case merge into the last judgment, creating a final, appealable judgment, even if the final judgment does not specifically reference the prior interlocutory order.<sup>187</sup> For example, an interlocutory order vacating a default judgment entered after a bench trial on a bill of review remains in effect and merges into a final judgment entered after a jury trial on the merits, even if the judgment on the merits does not expressly incorporate the prior interlocutory order setting aside the default judgment.<sup>188</sup>

### D. SEVERANCE

As a rule, “the severance of an interlocutory judgment into a separate cause makes it final.”<sup>189</sup> The Texas Supreme Court analyzed this rule in the context of a trial court’s order that severed an interlocutory summary judgment into a separate cause but then expressly stated that the separate action should “proceed as such to final judgment or other disposition in this Court [under a new style and cause number].”<sup>190</sup> The supreme court concluded that, where the severance order “expressly contemplated that the severed claims would ‘proceed as such to final judgment or other disposition in this Court,’ [the order] clearly precluded a final judgment in the severed action until the later judgment was signed.”<sup>191</sup>

Notably, a Mother Hubbard clause included in an order severing an interlocutory summary judgment from the original cause does not make the judgment in the severed cause final. Absent language (like that seen in *Diversified*<sup>192</sup>) indicating that the judgment in the severed cause is not

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184. *Marshall Health*, 58 S.W.3d at 740.

185. *Id.*

186. *Id.*

187. *Jordan v. Jordan*, 36 S.W.3d 259, 265-66 (Tex. App.—Beaumont 2001, pet denied).

188. *Id.*

189. *Diversified Fin. Sys., Inc. v. Hill, Heard, O’Neal, Gilstrap & Goetz, P.C.*, 63 S.W.3d 795 (Tex. 2001) (per curiam).

190. *Id.* (alteration in original).

191. *Id.*

192. See *supra* notes 189-91 and accompanying text.



final, the judgment in the severed cause is final because it disposes of all parties and issues in that cause—not because it contains a Mother Hubbard clause.<sup>193</sup> Moreover, the inclusion of a Mother Hubbard clause in a severance order does not make it a final judgment in the original cause.<sup>194</sup>

#### E. NONSUIT

The San Antonio Court of Appeals in *In re Bro Bro Properties, Inc.*<sup>195</sup> reaffirmed the supreme court's holding in *In re Bennett*<sup>196</sup> that:

The signing of an order dismissing a case, *not the filing of a notice of nonsuit*, is the starting point for determining when a trial court's plenary power expires. Appellate timetables do not run from the date a nonsuit is filed, but rather from the date the trial court signs an order of dismissal.<sup>197</sup>

Accordingly, in *In re Bro Bro*, a default judgment entered against one of several defendants was not final for purposes of appeal, despite the plaintiff having filed notices of nonsuit against the remaining defendants, where the trial court had not yet signed an order dismissing the case against the nonsuited defendants.<sup>198</sup>

#### F. JUDGMENTS NUNC PRO TUNC

A nunc pro tunc order “allows the trial court to correct clerical errors in the judgment after the court's plenary power has expired.”<sup>199</sup> Judicial mistakes may not be corrected by a judgment nunc pro tunc signed after the expiration of the trial court's plenary power, and a judgment attempting to do so is void.<sup>200</sup> “The salient distinction between ‘clerical’ and ‘judicial’ errors lies in the exercise of the judgmental offices of the court. A clerical error is one which does not result from judicial reasoning or determination. A judicial error occurs in the rendering as opposed to the entering of a judgment.”<sup>201</sup> Typical clerical changes include: corrections of the date of judgment, correction of a party's name, and correction of a numerical error.<sup>202</sup>

193. *Harris County Flood Control Dist. v. Adam*, 66 S.W.3d 265 (Tex. 2001) (per curiam).

194. *Id.* See *Lehmann*, 39 S.W.3d at 192.

195. 50 S.W.3d 528 (Tex. App.—San Antonio 2000, orig. proceeding).

196. 960 S.W.2d 35 (Tex. 1997).

197. *In re Bro Bro*, 50 S.W.3d at 530 (emphasis added) (quoting *In re Bennett*, 960 S.W.2d at 38).

198. 50 S.W.2d at 531.

199. *In re Ellebracht*, 30 S.W.3d 605, 608 (Tex. App.—Texarkana 2000, no pet.).

200. *Id.*

201. *Id.*

202. *Id.* (citing *Nolan v. Bettis*, 562 S.W.2d 520, 522 (Tex. Civ. App.—Austin 1978, no writ) (correction of date of judgment); *Carlyle Real Estate Ltd. Partnership-X v. Leibman*, 782 S.W.2d 230 (Tex. App.—Houston [1st Dist.] 1989, no writ) (correction of party's name); *Escobar v. Escobar*, 711 S.W.2d 230, 230 (Tex. 1986) (correction of numerical error)).

Analyzing the nature of the trial court's nunc pro tunc judgment signed after the expiration of its plenary jurisdiction in *In re Ellebracht*, the Texarkana Court of Appeals concluded that the act of vacating an order granting a new trial and reinstating a judgment against a party constitutes the correction of a judicial, not a clerical, error, which cannot be made outside of the court's plenary power.<sup>203</sup> In reaching this conclusion, the Texarkana court noted that there was no evidence in the record to show the court's intention at the time it granted the new trial and, on its face, the nunc pro tunc judgment removed the plaintiff's right to re-litigate its claims, which constituted a substantive, not merely clerical, change.<sup>204</sup>

#### IV. EXTENDING THE APPELLATE TIMETABLE

During the Survey period, the supreme court in *John v. Marshall Health Services, Inc.*<sup>205</sup> resolved a conflict among the courts of appeals as to the deadline for filing a motion under Texas Rule of Civil Procedure 306a(5). Under Rule 306a(1), all periods for filing post-judgment motions run from the date the judgment is signed.<sup>206</sup> There is an exception to this rule, set forth in Rule 306a(4): if a party adversely affected by a judgment does not receive notice<sup>207</sup> of the judgment within 20 days of the date the judgment is signed, the date for filing post-judgment motions does not begin to run for that party until the date the party receives notice (but in no event do such periods begin more than 90 days from the date the judgment was signed).<sup>208</sup> The procedure for claiming this exception requires the party adversely affected to file in the trial court a sworn motion and notice proving the date on which the party or his attorney received notice.<sup>209</sup> The issue in *Marshall Health* was the deadline for filing a Rule 306a(5) motion: three courts of appeal (Dallas, El Paso and Corpus Christi) had held that such a motion must be filed within 30 days of the date a party or his attorney received notice,<sup>210</sup> while two other appellate courts (Waco and Austin) had concluded that Rule 306a(5) does not prohibit a motion from being filed at any time within the trial court's plenary jurisdiction, measured from the date determined under Rule 306a(4).<sup>211</sup> Resolving the conflict, the supreme court held that Rule

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203. *In re Ellebracht*, 30 S.W.3d at 609.

204. *Id.* at 608-09.

205. 58 S.W.3d 738 (Tex. 2001).

206. TEX. R. CIV. P. 306a(1).

207. "Notice" includes receipt of the notice court clerks are required under Rule 306a(3) to give to the parties or their attorneys immediately when a judgment is signed, or actual notice of the judgment. *Marshall Health*, 58 S.W.3d at 740; TEX. R. CIV. P. 306a(3).

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

209. TEX. R. CIV. P. 306a(5).

210. See *Thompson v. Harco Nat'l Ins. Co.*, 997 S.W.2d 607, 618 (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); *Womack-Humphreys Architects, Inc. v. Barrasso*, 886 S.W.2d 809, 816 (Tex. App.—Dallas 1994, writ denied).

211. See *Green v. Guidry*, 34 S.W.3d 669, 670 (Tex. App.—Waco 2000, no pet.); *Grondona v. Sutton*, 991 S.W.2d 90, 92 (Tex. App.—Austin 1998, pet. denied); *Vineyard*

306a “simply imposes no deadline, and none can be added by decision, other than the deadline of the expiration of the trial court’s jurisdiction.”<sup>212</sup>

## V. THE TRIAL COURT’S PLENARY POWER

Texas Rule of Civil Procedure 329b provides that the trial court will maintain plenary jurisdiction for 30 days after a motion for new trial is denied by the trial court in writing or by operation of law.<sup>213</sup> In *In re J.H.*,<sup>214</sup> the court’s strict application of Rule 329b’s writing requirement brought about a harsh result. In that case, the trial court timely granted a motion for new trial by oral pronouncement and docket entry, but never reduced the order to writing.<sup>215</sup> Believing that a new trial had been granted, the parties retried the case, and the appellant appealed the second judgment.<sup>216</sup> The court of appeals dismissed the appeal for lack of jurisdiction, concluding that the second trial and all proceedings that took place after the trial court lost plenary jurisdiction were a nullity.<sup>217</sup> Therefore, the first judgment was the final judgment, and, because it was not appealed, there was nothing to review.<sup>218</sup>

The court commented on the harshness of its ruling, stating: “We note the obvious inequity caused by the Rules in this termination of parental rights case . . . . Even though the record is crystal clear that the judge granted a new trial, the absence of a written order has deprived [appellant] of a proper jury trial and appellate review.”<sup>219</sup> The court concluded its opinion by requesting supreme court review, stating that “the current case cries out for a rule change to prevent the recurrence of the inequitable result we are compelled to reach here.”<sup>220</sup>

*In re Bro Bro Properties, Inc.*, also decided this Survey period, is a default judgment case in which the defaulting defendant argued on appeal that a turnover order was premature because the trial court’s plenary power to grant a new trial had not yet expired.<sup>221</sup> The court of appeals agreed, holding that the trial court maintained plenary jurisdiction because the judgment did not finally dispose of all parties in the lawsuit.<sup>222</sup> Although the plaintiff filed notices non-suiting all defendants except ap-

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Bay Dev. Co. v. Vineyard on Lake Travis, 864 S.W.2d 170, 172 (Tex. App.—Austin 1993, writ denied).

212. *Marshall Health*, 58 S.W.3d at 741. The Court, accordingly, disapproved the cases that had reached a contrary result. *Id.*

213. TEX. R. CIV. P. 296.

214. 39 S.W.3d 688, 690-91 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

215. *Id.* at 689-90.

216. *Id.* at 690.

217. Because the trial court’s order granting new trial was ineffective, the court’s plenary power expired 30 days after the motion for new trial was overruled by operation of law, or 105 days after the first judgment was signed. *Id.* at 689-90.

218. *Id.* at 690.

219. *Id.*

220. *Id.* at 691.

221. 50 S.W.3d 528 (Tex. App.—San Antonio 2000, orig. proceeding).

222. *Id.* at 531.

pellant just prior to obtaining its no-answer default, the trial court did not sign a dismissal order.<sup>223</sup> As the supreme court has held, “the signing of an order dismissing a case, not the filing of a notice of nonsuit, is the starting point for determining when a trial court’s plenary power expires.”<sup>224</sup>

## VI. STANDING TO APPEAL

In *Torrington v. Stutzman*,<sup>225</sup> the Texas Supreme Court held that an indemnor had standing to appeal a trial court judgment it was obligated to pay, even though its indemnee chose not to appeal. In this products liability case, the plaintiff sued the manufacturer (Textron) of a defective bearing in a helicopter’s tail rotor and its successor (Torrington). The purchase agreement between Textron and Torrington required Torrington to indemnify Textron for products liability claims based upon the bearing.

The trial court entered judgment against both defendants, but only Torrington appealed.<sup>226</sup> Plaintiffs argued that Torrington had no standing to appeal the judgment against Textron.<sup>227</sup> The supreme court rejected that argument, holding that Torrington had “a clear justiciable interest in appealing the judgment against Textron” because it was obligated to pay the judgment and that Torrington “would be injured by any error in the judgment against Textron.”<sup>228</sup>

In the class action context, a named plaintiff’s lack of individual standing at the time suit is filed deprives the court of subject matter jurisdiction over the plaintiff’s individual claims and claims on behalf of the class.<sup>229</sup>

## VII. PERFECTION OF APPEAL

### A. PERFECTING APPEALS UNDER PARTICULAR STATUTES

Five years have passed since the appellate rules changed the procedure for perfecting appeals in Texas to the filing of a notice of appeal. For the most part, Texas courts have fleshed out the procedures for perfecting appeals under the Texas Rules of Appellate Procedure. As a result, this Survey period produced a number of decisions involving the procedures for perfecting appeals under particular statutes, including statutes governing the appeal of temporary commitment orders, protective orders,

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223. *Id.*

224. *Id.* at 530 (citing *In re Bennet*, 960 S.W.2d 35, 38 (Tex. 1997)). The appellee attempted to distinguish *Bennet*, because there the notice of nonsuit was filed after the default judgment was signed; in this case, the notices of nonsuit were filed before default judgment was obtained. But the court of appeals found this to be a distinction without a difference.

225. 46 S.W.3d 829, 843-44 (Tex. 2000).

226. *Id.* at 833.

227. *Id.* at 843.

228. *Id.* at 844.

229. *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 711 (Tex. 2001).

administrative orders, and the admittance of a will to probate as a muniment of title.

### 1. *Appealing a Temporary Commitment Order*

Texas Health & Safety Code section 574.070(b) governs the appeals of temporary commitment orders and provides that a “[n]otice of appeal must be filed not later than the 10th day after the date on which the order is signed.”<sup>230</sup> In *In re J.A.*,<sup>231</sup> the Dallas Court of Appeals dismissed the appeal when the appellant filed a notice of appeal twenty days after judgment was signed. Citing the court of appeals’ and supreme court’s decisions in *Johnstone v. State*,<sup>232</sup> the court held that, while Rule 26.3 (governing requests to file notices of appeal up to 15 days late) applies to appeals of temporary commitment orders, Rule 26.1 and Texas Rule of Civil Procedure 324 (governing the extension of the appellate timetable by filing a motion for new trial) do not.<sup>233</sup> Therefore, appellant’s motion for new trial did not extend the time for filing a notice of appeal.<sup>234</sup>

Moreover, although appellant sought a Rule 26.3 extension, it did not properly comply with the rule.<sup>235</sup> Rule 26.3 provides that the appellate court may extend the time to file a notice of appeal if the appellant files its notice of appeal in the trial court and a motion for extension of time in the court of appeals.<sup>236</sup> Here, the appellant filed a motion for extension in the wrong court (the trial court).<sup>237</sup> The court of appeals held that it did not have authority to rule on the motion and that the trial court’s order purporting to grant the extension was “void and of no effect.”<sup>238</sup>

Finally, the court held that no motion for extension could be implied under these circumstances.<sup>239</sup> In *Verburgt v. Dorner*,<sup>240</sup> the supreme court had held that a motion for extension of time is necessarily implied when an appellant acting in good faith perfects the appeal within the fifteen-day period in which appellant would be entitled to move for an extension of time. However, the court in *J.A.* concluded that *Verburgt* did not apply where, as here, the appellant knew the appeal-invoking instrument was late.<sup>241</sup> The court reasoned, “[a]pplication of the *Verburgt*

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230. TEX. HEALTH & SAFETY CODE ANN. § 574.070(b) (Vernon 2001).

231. 53 S.W.3d 869, 873 (Tex. App.—Dallas 2001, no pet. h.).

232. 988 S.W.2d 950 (Tex. App.—Houston [1st Dist.] 1999), *rev’d* 22 S.W.3d 408 (Tex. 2000)).

233. *J.A.*, 53 S.W.3d at 871.

234. *Id.*

235. *Id.* at 871-72.

236. TEX. R. APP. P. 26.3.

237. To say that the motion was “filed” at all is a stretch. Indeed, the motion contained in the appellate record was not file-stamped and the record did not contain any other indication of filing. The court of appeals only assumed that the motion was filed in the trial court, because the trial court purported to grant an extension. *See J.A.*, 53 S.W.3d at 871.

238. *Id.* at 872.

239. *Id.* at 872-73.

240. 959 S.W.2d 615, 617 (Tex. 1997). While *Verburgt* was decided under the old appellate rules, the *J.A.* court acknowledged that several courts of appeals had applied its reasoning under the new rules. *See J.A.*, 53 S.W.3d at 872 (listing cases).

241. *J.A.*, 53 S.W.3d at 873.

holding to this case would not only nonsensically 'imply' the existence of a document already in existence, but would operate to correct a conscious, overt act by appellant's counsel rather than a mere omission."<sup>242</sup> The court concluded that "[w]e will not extend *Verburgt* so far."<sup>243</sup>

## 2. *Appealing a Protective Order*

Recent changes to the Family Code do not render all protective orders interlocutory, and an immediate appeal is available so long as the duration of the injunctive relief does not depend on any further order of the court.<sup>244</sup> Before the Family Code was amended in 2000, the duration of a protective order was specified in the order. Now, the duration of a protective order is either specified in the order or fixed by the statute at two years, with review available after one year.<sup>245</sup> In *Pena v. Garza*, the State argued that, because the duration of protective orders vary under the amended statute, they are interlocutory and reviewable only by mandamus.<sup>246</sup> The court of appeals rejected the State's argument, concluding that the relief granted did not depend on any further order of the court and, therefore, constituted a permanent injunction that could be appealed.<sup>247</sup>

## 3. *Appealing an Administrative Order*

Failure to exhaust administrative remedies is not jurisdictional. In *Fincher v. Board of Adjustment of the City of Hunters Creek Village*,<sup>248</sup> appellants failed to appeal a building inspector's decision to a local board before seeking judicial review in the trial court. The trial court dismissed the case, concluding that it lacked subject-matter jurisdiction because appellants failed to exhaust their administrative remedies.<sup>249</sup> The court of appeals reversed, holding that failure to comply with statutory requirements to bring suit should not be treated as jurisdictional, but as an issue the parties may raise on the merits.<sup>250</sup> However, because appellants failed to establish their right to go forward with the suit under applicable statutes and ordinances, the court rendered judgment against them.<sup>251</sup>

## 4. *Appealing a Probate Order*

Under Texas Probate Code section 5(g), "[a]ll final orders of any court exercising original probate jurisdiction shall be appealable to the court of

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242. *Id.*

243. *Id.*

244. *Pena v. Garza*, 61 S.W.3d 529, 531 (Tex. App.—San Antonio 2001, no pet.).

245. See TEX. FAM. CODE ANN. § 85.025 (Vernon 2001).

246. *Pena*, 61 S.W.3d at 531.

247. *Id.*

248. 56 S.W.3d 815, 816-17 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

249. *Id.* at 815.

250. *Id.* at 817 (citing *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76-77 (Tex. 2000)).

251. *Id.*

appeals."<sup>252</sup> An order admitting a will to probate as a muniment of title is a final order.<sup>253</sup> Therefore, a party's failure to perfect an appeal from such an order will result in waiver of the appeal.<sup>254</sup>

## B. PERFECTING APPEALS UNDER COURT RULES

Appellate practitioners received an interesting new instruction from the Waco Court of Appeals on the issue of whether multiple notices of appeal are required when the appellant seeks review of more than one interlocutory trial court order.<sup>255</sup> In *Chase Manhattan Bank v. Bowles*, the appellant sought review of "two entirely separate orders": an order granting a motion to enforce a Rule 11 agreement and an order denying a motion to terminate an injunction.<sup>256</sup> The appellant filed a single notice of appeal stating its desire to "appeal from the court orders" and briefed the issues together.<sup>257</sup> The court of appeals, however, docketed the appeals separately with different cause numbers and stated that it would have preferred the appellant to have filed two separate notices of appeal. The court wrote:

Although we believe that, as long as the requirements of Rules 25 and 26 of the Rules of Appellate Procedure are met, a single notice of appeal can be effective to perfect an appeal from more than one trial court order, the better practice would be to file a separate notice of appeal for each separate order from which a party desires to appeal.<sup>258</sup>

The remainder of appeal-perfection cases decided this survey period produced a simple and straightforward application of the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure.<sup>259</sup> For example, it is well established that the time periods that normally run from the date judgment is signed can be extended to the date the party receives notice of a judgment if the party can demonstrate that it received notice more than twenty days, but less than ninety days, after the judgment was signed.<sup>260</sup> Under those rules, however, there are no circumstances under which the appellate timetable can begin more than ninety days after the judgment was signed.<sup>261</sup> Accordingly, it is not surprising that the court in *Lott v. Hidden Valley Airpark Association, Inc.* rejected the appellant's

252. TEX. PROB. CODE ANN. § 5(g) (Vernon 2001).

253. See *In re Estate of Kurtz*, 54 S.W.3d 353, 355 (Tex. App.—Waco 2001, no pet.).

254. *Id.*

255. See *Chase Manhattan Bank v. Bowles*, 52 S.W.3d 871 (Tex. App.—Waco June 27, 2001, no pet.) [hereinafter *Chase I*].

256. *Id.*; see also *Chase Manhattan Bank v. Bowles*, 52 S.W.3d 871, 877 (Tex. App.—Waco July 18, 2001, no pet.) [hereinafter *Chase II*].

257. *Chase I* at 871.

258. *Id.*

259. See, e.g., *Ashiru v. Comm'n for Lawyer Discipline*, 58 S.W.3d 163, 163-64 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (dismissing appeal for nonpayment of the appellate filing fee and record and rejecting appellant's motion for a free record as untimely under Texas Rule of Appellate Procedure 20.1).

260. TEX. R. CIV. P. 306a(4); TEX. R. APP. P. 4.2(a)(1).

261. TEX. R. CIV. P. 306a(4); TEX. R. APP. P. 4.2(a)(1).

argument that the appellate timetable began on the date the trial court entered the order under Rule 306a(5) establishing that appellant did not receive notice of the judgment until approximately nine months after the judgment was signed.<sup>262</sup>

Additionally, it is well established that accelerated appeals must be filed within twenty days of the signing of the judgment and that a motion for new trial will not extend the time for perfection.<sup>263</sup> Therefore, it was not surprising that the court in *Denton County v. Huther*<sup>264</sup> rejected appellant's argument that its "Motion to Reconsider and Renewed Plea to the Jurisdiction" was a second plea based upon new authority, the denial of which was independently appealable under the interlocutory appeal statute. The court concluded that the motion was nothing more than a typical motion for new trial or motion to reconsider, which did not extend the appellate timetable for accelerated appeals.<sup>265</sup> Accordingly, the court dismissed the appeal for want of jurisdiction.<sup>266</sup>

### C. AFFIDAVITS OF INABILITY TO PAY COST

Although the filing of an affidavit of indigence is no longer necessary to invoke appellate jurisdiction,<sup>267</sup> it is nevertheless essential to an appeal because, if a contest to the affidavit is sustained, the appellant must either pay for the appellate record or suffer dismissal of the appeal.<sup>268</sup> Accordingly, where the appellant's affidavit does not contain the information required by Texas Rule of Appellate Procedure 20.1, the trial court should give the appellant an opportunity to amend its affidavit of inability to pay costs before dismissing the appeal.<sup>269</sup>

Additionally, an indigent party can challenge the trial court's order sustaining a contest to the party's affidavit of indigence and is entitled to those portions of the record necessary for the court of appeals to review the order on the contest without paying for those portions of the record.<sup>270</sup> However, the rules do not allow a party to seek to be declared an indigent in the court of appeals based on a change in circumstances after the notice of appeal and initial affidavit of indigence were filed.<sup>271</sup>

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262. 49 S.W.3d 604, 605 (Tex. App.—Fort Worth 2001, no pet.).

263. See TEX. R. APP. P. 26.1(b), 28.1.

264. 43 S.W.3d 665, 667 (Tex. App.—Fort Worth 2001, no pet.).

265. *Id.*

266. *Id.*

267. See *Wells v. Breton Mill Apartments*, No. 07-01-0320-CV, 2001 WL 111504 (Tex. App.—Amarillo Sept. 21, 2001, no pet. h.) (not released for publication) (holding that, because an affidavit of indigence is not a prerequisite to perfection, courts can invoke Texas Rule of Appellate Procedure 2 and, for good cause, accept a late-filed affidavit of indigence).

268. See *In re J.W.*, 52 S.W.3d 730, 733 (Tex. 2001); *Brown v. Paris Indus. Foundation*, 46 S.W.3d 321, 322-23 (Tex. App.—Texarkana 2001, pet. dism'd).

269. See *J.W.*, 52 S.W.3d at 733.

270. See *Brown*, 46 S.W.3d at 322-23 (citing *In re Arroyo*, 988 S.W.2d 737, 739 (Tex. 1998)).

271. *Id.* at 323.



The standard for proving indigence in the trial court is whether a preponderance of the evidence shows that the party would be unable to pay costs "if she really wanted to and made a good faith effort to do so."<sup>272</sup> When a trial court sustains a contest the standard of review on appeal is abuse of discretion.<sup>273</sup> Using these standards, the court in *White v. Bayless* found that the trial court did not abuse its discretion in sustaining a contest where the evidence showed that the appellant failed to pursue and use assets that could be used to provide funds for paying for the appellate record.<sup>274</sup>

Rule 20.1 does not apply to appeals under the Juvenile Justice Code.<sup>275</sup> Instead, an indigence finding can be based on either a hearing or an affidavit filed by the child's parent.<sup>276</sup> The appropriate forum to establish that a juvenile is entitled to appeal without payment of costs is the trial court, but the trial court's determination on the indigence issue must be contained in the clerk's record or reporter's record.<sup>277</sup>

### VIII. THE RECORD ON APPEAL

Texas Rules of Appellate Procedure 13.2 and 34.6, which govern the duties of court recorders, require electronic recordings to be certified and filed in the appellate court along with exhibits and a certified copy of the court recorder's logs.<sup>278</sup> One case decided this Survey period addressed whether a tape recording of a child support/paternity hearing before a Title IV-D Master could be considered as part of the appellate record.<sup>279</sup> In *In re B.R.G.*, the Master's office forwarded to the court of appeals an uncertified tape recording without designated exhibits and certified logs required by the rules.<sup>280</sup> The court of appeals abated the appeal for a clarification of the recorder's record.<sup>281</sup> During the abatement, the trial court conducted a hearing and concluded that (1) it was not possible to obtain a certified recording of the relevant hearing, but a fully audible and intelligible recording was available; (2) because the Master who presided over the hearing does not utilize the services of a court reporter or a court recorder, no certified log of the proceeding was made; and (3) the exhibits were designated to be included with the record.<sup>282</sup> Additionally, the trial court admitted into evidence the affidavit of the Master, which

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272. *White v. Bayless*, 40 S.W.3d 574, 576 (Tex. App.—San Antonio 2001, pet. denied) (citing *In re Sosa*, 980 S.W.2d 814, 815 (Tex. App.—San Antonio 1998, no pet.).

273. *Id.*

274. *Id.*

275. *In re L.P.*, 51 S.W.3d 855, 856 (Tex. App.—Houston [1st Dist] 2001, no pet.) (citing *In re K.C.A.*, 36 S.W.3d 501, 502 (Tex. 2000)).

276. *Id.* (citing *K.C.A.*, 36 S.W.3d at 503).

277. *Id.*

278. See TEX. R. APP. P. 13.2, 34.6.

279. See *In re B.R.G.*, 37 S.W.3d 542, 542-46 (Tex. App.—El Paso 2001, no pet.) [hereinafter *B.R.G. I*]; *In re B.R.G.*, 48 S.W.3d 812, 815-16 (Tex. App.—El Paso 2001, no pet.) [hereinafter *B.R.G. II*].

280. See *B.R.G. I*, 37 S.W.3d at 543-45.

281. *Id.* at 545-46.

282. See *B.R.G. II*, 48 S.W.3d at 816.

stated that he presided over the hearing and operated the tape recording, and that he was tendering a true and correct copy of the tape.<sup>283</sup>

The court of appeals held that the Master was authorized to make an audiotape recording of the proceedings because the Family Code requires a court reporter only when associate judges preside over jury trials or final termination hearings.<sup>284</sup> Citing its previous decision in *In re L.B.*,<sup>285</sup> the court concluded that the cassette copy of the original taped proceedings would comprise the reporter's record in the case.<sup>286</sup>

In *Halsey v. Dallas County, Texas*,<sup>287</sup> the court concluded that official court reporters are an integral part of the court and are therefore immune from suit based on the doctrine of derived judicial immunity.<sup>288</sup>

### IX. THE BRIEF ON APPEAL

The supreme court in *Daimler-Benz Aktiengesellschaft v. Olson*<sup>289</sup> struck a petition for review for failure to comply with Texas Rule of Appellate Procedure 53.2(e), which provides that petitions for review must state the basis of the court's jurisdiction "without argument."<sup>290</sup> The majority issued no opinion, but in a dissenting opinion, Justice Hecht explained that the petition's jurisdictional statement contained a five-page analysis of the nature of the conflicts that petitioner alleged existed between the court of appeals' decision and six other appellate court decisions.<sup>291</sup> Justice Hecht criticized the court's action because, in his opinion, there was no violation of Rule 53.2(e), striking the petition served no purpose, and the court's enforcement of Rule 53.2(e) was arbitrary and inconsistent.<sup>292</sup>

In *Clemens v. Allen*,<sup>293</sup> the court dismissed an appeal for want of prosecution because the *pro se* appellant's brief (1) failed to identify how the trial court's summary judgment ruling was erroneous, (2) did not reference a specific page in the 347-page record, (3) did not contest any particular summary judgment evidence presented by appellee, and (4) failed to cite any authorities other than general references to Texas Rule of Civil Procedure 166a. Moreover, appellant's response to the appellate clerk's notice of deficiency (in which the appellant complained that the clerk's letter did not point to specific deficiencies of the brief) was ineffective,

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283. *Id.*

284. *Id.* at 816-17 (citing TEX. FAM. CODE §§ 201.009, .104(b) (Vernon 2001)).

285. 936 S.W.2d 335, 336 (Tex. App.—El Paso 1996, no writ).

286. *See B.R.G. II*, 48 S.W.3d at 817.

287. No. 05-00-01518-CV, 2001 WL 576606, at \*4 (Tex. App.—Dallas 2001, pet. filed) (not released for publication).

288. "Derived judicial immunity" attaches when judges delegate their authority or appoint others to perform services for the court. *Id.* at \*2 (citing *Byrd v. Woodruff*, 891 S.W.2d 689, 707 (Tex. App.—Dallas 1994, writ dismissed by agr.)).

289. 53 S.W.3d 308, 308-09 (Tex. 2000).

290. TEX. R. APP. P. 53.2(e).

291. *Daimler-Benz*, 53 S.W.3d at 308-09.

292. *Id.* at 308.

293. *See* 47 S.W.3d 26, 28 (Tex. App.—Amarillo 2000, no pet.).

because it did not meet or correct the lack of compliance with Rule 38.1.<sup>294</sup>

## X. STAY OF APPEAL

In *Davis v. Baker*,<sup>295</sup> the court of appeals held that a bankruptcy court's order modifying an automatic stay to allow a lawsuit to "proceed to final judgment" did not allow an appeal to the court of appeals. The court of appeals reasoned that, "[b]ecause an order modifying an automatic stay must be strictly construed, this Court will not presume that the bankruptcy court intends to hold in abeyance final resolution of Davis's pending bankruptcy until all state-court appeals have become final."<sup>296</sup> Therefore, the court suspended and removed the case from the active docket until further order from the bankruptcy court.<sup>297</sup>

## XI. WAIVER ON APPEAL

Similar to the previous Survey period, this Survey period produced two cases in which the appellants waived their arguments on appeal by failing to complain about each possible ground upon which the appellee could have prevailed.

The waiver issue first arose in a non-jury case in which no findings of fact or conclusions of law were requested or filed.<sup>298</sup> In the absence of findings and conclusions, the court of appeals was required to imply findings of fact in favor of the appellee "on every issue [appellee] was obligated to establish by a preponderance of evidence as a predicate for the desired recovery."<sup>299</sup> On appeal, the appellant only complained of two out of four possible bases of recovery.<sup>300</sup> Therefore, the appellant waived any possible error the trial court may have made in ruling for appellee on the two unchallenged grounds, and the trial court's liability determination was affirmed.<sup>301</sup>

The waiver issue arose again in *Rogers v. Continental Airlines, Inc.*, a summary judgment case.<sup>302</sup> There, the motion for summary judgment addressed four separate grounds, the trial court's summary judgment did not specify the grounds upon which summary judgment was granted, and the appellant challenged only two grounds on appeal.<sup>303</sup> The court of appeals found waiver and affirmed the trial court's judgment.<sup>304</sup>

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294. *Id.*

295. 29 S.W.3d 921, 923-24 (Tex. App.—Austin 2000, no pet.).

296. *Id.* at 924.

297. *Id.*

298. *See* *Secure Comm., Inc. v. Anderson*, 31 S.W.3d 428, 430 (Tex. App.—Austin 2000, no pet. h.).

299. *Id.* (citing *Roever v. Delaney*, 584 S.W.2d 180, 182 (Tex. Civ. App.—Fort Worth 1974, no writ).

300. *Id.*

301. *Id.* at 431.

302. 41 S.W.3d 196, 198-99 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

303. *Id.*

304. *Id.* at 199.

In *Waltrip v. Bilbon Corp.*,<sup>305</sup> the court held that the appellants came close to waiving their insufficiency challenge by taking inconsistent positions in the trial court. In that case, the jury initially awarded plaintiffs \$0 damages.<sup>306</sup> Appellee sought further jury instructions based on conflicting jury answers, and appellants moved the trial court to accept the verdict.<sup>307</sup> Appellants' request was denied, and the jury reached a second verdict after receiving additional instructions.<sup>308</sup> The second verdict revised the damages award to give \$100 for each of the appellants.<sup>309</sup> On appeal, the appellants challenged the sufficiency of the evidence to support the verdict.<sup>310</sup> The court noted that it was "perplexed" by the position taken by appellants: "[A]ppellants' counsel moved the trial court to accept the verdict, *but* did not want the trial court to enter judgment on the verdict. . . . In urging the trial court to accept the verdict based upon Rule 295, appellants came close to waiving appellate analysis of their insufficient evidence claim."<sup>311</sup>

## XII. SPECIAL APPEALS

### A. RESTRICTED APPEALS

A restricted appeal is available to a party that did not participate in the trial. Consistent with the limited purpose of the restricted appeal, the Fort Worth Court of Appeals dismissed a restricted appeal for want of jurisdiction where the appellant's counsel participated at the hearing that led to the family violence protective order at issue on appeal by making an opening statement, cross-examining a witness, calling a witness, and presenting closing argument.<sup>312</sup>

### B. LIMITED APPEALS

Rule 34.6(c) permits a party to limit the issues on appeal and reduce the size of the reporter's record by requesting the court reporter to prepare a partial reporter's record, listing the issues the appellant intends to appeal, and sending the request to the court reporter, trial court clerk, and other parties.<sup>313</sup> By strictly complying with the requirements of Rule 34.6(c), a presumption arises that the omitted portions of the record are not relevant to the disposition of the appeal.<sup>314</sup> However, where a party does not strictly comply with the rule's requirement, a presumption arises that the omitted portions of the record support the judgment the trial

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305. 38 S.W.3d 873, 882 n.4 (Tex. App.—Beaumont 2001, pet. denied).

306. *Id.* at 876.

307. *Id.*

308. *Id.*

309. *Id.* at 876-77.

310. *Waltrip*, 38 S.W.3d at 881-82.

311. *Id.* at 882 n.4.

312. *See Franklin v. Wilcox*, 53 S.W.3d 739, 741 (Tex. App.—Fort Worth 2001, no pet.).

313. *See* TEX. R. APP. P. 34.6(b)(c); *Brown v. McGuyer Homebuilders, Inc.*, 58 S.W.3d 172, 174-75 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

314. *See Brown*, 58 S.W.3d at 175.

court rendered.<sup>315</sup>

In *Brown v. McGuyer Homebuilders, Inc.*,<sup>316</sup> the Houston Fourteenth District Court of Appeals found that the appellant had failed to comply with the strict requirements of Rule 34.6(c) by failing to identify the limited issues on appeal and by failing to copy the trial court clerk or the other parties with the request for the reporter's record.<sup>317</sup> Notably, the court found appellant's request to the court reporter to file a copy of the request with the clerk insufficient, noting that "the rules specifically require the appellant to file the request with the trial court clerk."<sup>318</sup> The court concluded that "[a]ppellants' failure to comply with the strict requirements of rule 34.6(c) requires this Court to presume the omitted portions of the record support the trial court's decisions and judgment."<sup>319</sup> Applying that presumption, the court rejected all of appellants' challenges to the trial court's rulings and affirmed the judgment.<sup>320</sup>

### C. BILL OF REVIEW

When the time to appeal has passed, a party might consider seeking review of a judgment through a bill of review. Generally, to be entitled to a bill of review, a party must show (1) a meritorious defense to the cause of action alleged to support the judgment, (2) that the party was prevented from making the defense by the fraud, accident, or wrongful act of his opponent, and (3) that there was no fault or negligence on the part of the party seeking review.<sup>321</sup>

A critical question in every case involving a bill of review is whether the party had other remedies available to it that it did not exercise. A bill of review is not available where other legal remedies were available to a party and the party did not pursue them.<sup>322</sup> In *Thompson v. Henderson*,<sup>323</sup> the Dallas Court of Appeals reversed a trial court's judgment granting a bill of review after finding no evidence to support the jury's finding that the petitioner acted diligently in availing himself of adequate legal remedies to set aside the default judgment.<sup>324</sup> In reaching its conclusion, the court noted that the petitioner delayed in delivering the default judgment to his counsel and that his counsel failed to file a motion for new trial within the trial court's plenary power (despite receiving the default judgment on the last day of the court's plenary jurisdiction) and failed to pursue other remedies, such as seeking to extend the court's

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315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 175 n.3.

319. *Brown*, 58 S.W.3d at 176.

320. *Id.*

321. See *Baker v. Goldsmith*, 582 S.W.2d 404, 406-07 (Tex. 1979).

322. See, e.g., *Thompson v. Henderson*, 45 S.W.3d 283, 291 (Tex. App.—Dallas 2001, pet. denied).

323. *Id.*

324. *Id.*

plenary under Rule 306a of the Texas Rules of Civil Procedure.<sup>325</sup>

In a decision by a divided court, the Beaumont Court of Appeals reversed its prior ruling in an earlier case and concluded that a party that learned of a judgment within six months of the judgment, but who did not file a writ of error, was still entitled to a bill of review.<sup>326</sup> In *Jordan v. Jordan*,<sup>327</sup> the Jordans challenged a default judgment that was entered against them, because the clerk failed to either mail the notice of the default judgment or note the mailing of the notice on the docket, as required by Rule 239a of the Texas Rules of Civil Procedure.<sup>328</sup> The court concluded that, although the Jordans received actual notice of the judgment within six months of the date judgment was signed, they could not avail themselves of a writ of error, because the error in the judgment was not apparent on the face of the record.<sup>329</sup> Specifically, the court reasoned that “because the ‘error’ here occurred after judgment was rendered, the clerk’s failure to mail the notice (or to note on the docket the mailing of the notice) of the signing of the default judgment does not constitute error reversible by writ of error.”<sup>330</sup> Accordingly, the court found no fault in the Jordan’s failure to pursue a writ of error proceeding and held that their only remedy was by bill of review.<sup>331</sup> Justice Burgess filed a dissenting opinion, because he believed that the Jordans had an adequate remedy by writ of error.<sup>332</sup>

### XIII. FRIVOLOUS APPEALS

In the criminal context, an attorney appointed to represent an indigent defendant can file a so-called “*Anders* brief” in the court of appeals if counsel has concluded that his client’s criminal appeal is frivolous. This procedure, set forth by the United States Supreme Court in *Anders v. The State of California*,<sup>333</sup> recognizes “the need to safeguard both the criminal defendant’s constitutional right to counsel and the appointed counsel’s obligation not to bring frivolous claims before a court.”<sup>334</sup> An *Anders* brief essentially advises the court of appeals that appointed counsel has, after conscientiously reviewing the record, concluded an appeal is wholly frivolous. The brief, however, must refer to anything in the record that might arguably support the appeal.<sup>335</sup>

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325. *Id.* at 288-91; TEX. R. CIV. P. 306a (Vernon 1977 & Supp. 2002).

326. *See* *Jordan v. Jordan*, 36 S.W.3d 259, 264-65 (Tex. App.—Beaumont 2001, pet. denied).

327. *Id.*

328. *Id.* at 264; *see* TEX. R. CIV. P. 239a (Vernon 1976 & Supp. 2002).

329. *Jordan*, 36 S.W.3d at 264.

330. *Id.*

331. *Id.* at 265.

332. *Id.* at 266 (Burgess, J., dissenting).

333. 386 U.S. 738 (1967).

334. *Id.* at 744.

335. *Id.* *See* *Gainous v. State*, 436 S.W.2d 137, 137-38 (Tex. Crim. App. 1969) (applying *Anders* in criminal context); *In re D.A.S.*, 973 S.W.2d 296, 299 (Tex. 1998) (extending *Anders* to the civil realm, allowing attorneys to file *Anders* briefs in juvenile delinquency proceedings).

In a case of first impression, the Tyler Court of Appeals in *In re K.S.M.*<sup>336</sup> extended the *Anders* brief concept to the parental-termination context, where, like a criminal defendant, an indigent appellant challenging an order terminating his or her parental rights enjoys a right to counsel on appeal.<sup>337</sup> To alleviate the dilemma facing appointed counsel representing the indigent client who wants to appeal a meritless ruling while still complying with counsel's other ethical duties as a member of the Bar to avoid pursuing frivolous appeals, the Tyler court held that "when appointed counsel represents an indigent client in a parental termination appeal and concludes that there are no non-frivolous issues for appeal, counsel may file an *Anders*-type brief."<sup>338</sup> The Amarillo Court of Appeals similarly addressed this issue for the first time in *In re A.W.T.*,<sup>339</sup> a case involving an indigent parent appealing an order terminating the parent-child relationship. Like the Tyler court in *K.S.M.*, the Amarillo court reached the same conclusion: "we see no reason why the procedure utilized in *Anders v. California* and its progeny should not be available to appointed counsel faced with the prospect of conducting a meritless appeal, irrespective of whether the appeal involves a criminal or civil matter."<sup>340</sup>

During the Survey period, the El Paso Court of Appeals in *Faddoul, Glasheen & Valles, P.C. v. Oaxaca*<sup>341</sup> discussed the standards for imposing sanctions under Texas Rules of Appellate Procedure 45 and 52.11 for the filing of a frivolous appeal. "Appellate sanctions," the court held, "will be imposed only if the record clearly shows the appellant has no reasonable expectation of reversal, and the appellant has not pursued the appeal in good faith."<sup>342</sup> In deciding whether to impose sanctions, the court of appeals "look[s] at the record from the view point of the advocate and determine[s] whether it had reasonable grounds to believe the judgment should be reversed."<sup>343</sup> The court identified the four factors that tend to indicate that an appeal is frivolous:

1. the unexplained absence of a statement of facts;
2. the unexplained failure to file a motion for new trial when it is required to successfully assert factual sufficiency on appeal;
3. a poorly written brief raising no arguable points of error; and
4. the appellant's unexplained failure to appear at oral argument.<sup>344</sup>

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336. 61 S.W.3d 632 (Tex. App.—Tyler 2001, no pet.).

337. *Id.* at 633-34. See TEX. FAM. CODE ANN. § 107.013(a) (Vernon 1996 & Supp. 2002) (providing that "[i]n a suit in which termination of the parent-child relationship is requested, the court shall appoint an attorney ad litem to represent the interests of: (1) an indigent parent of the child who responds in opposition to the termination.").

338. *K.S.M.*, 61 S.W.3d at 364.

339. 61 S.W.3d 87 (Tex. App.—Amarillo 2001, no pet.).

340. *Id.* at 88.

341. 52 S.W.3d 209 (Tex. App.—El Paso 2001, no pet.).

342. *Id.* at 213.

343. *Id.*

344. *Id.*

Noting that the appellants had written a very thorough brief, which included a statement of facts, and that counsel for appellants appeared at oral argument, the court in *Faddoul* concluded that the appeal was not frivolous and refused to assess sanctions.<sup>345</sup>

#### XIV. MOOT APPEALS

An appeal becomes moot when there ceases to be a live controversy between the parties to the appeal.<sup>346</sup> This is so because, “[U]nder article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions.”<sup>347</sup> Accordingly, when a party appeals a trial court’s ruling ordering presuit discovery in the form of a deposition, the appeal becomes moot when the appealing party produces a representative for deposition in compliance with the trial court’s discovery order.<sup>348</sup> Any opinion issued by the court of appeals after the deposition takes place is advisory, because the discovery order became moot after the deposition occurred.<sup>349</sup>

Two exceptions to the mootness doctrine currently exist: (1) the “capable of repetition” exception, and (2) the “collateral consequences” exception.<sup>350</sup> The “capable of repetition” exception is applied “where the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot.”<sup>351</sup> The “collateral consequences” exception is applied when “prejudicial events have occurred ‘whose effects continued to stigmatize helpless or hated individuals long after the unconstitutional judgment had ceased to operate.’”<sup>352</sup> Under the “collateral consequences” exception, the effects are not absolved by mere dismissal of the cause as moot.<sup>353</sup>

Relying on the “collateral consequences” exception, the El Paso Court of Appeals in *In re Salgado* held that the issue of whether a protective order entered in a child possession case was void was not moot despite the expiration of the order, because, if the court of appeals were to determine that the protective order was void, a question would arise as to

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345. *Id.*

346. *Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 833 (Tex. 2000) (per curiam).

347. *Id.*

348. *Id.*

349. *Id.* (vacating the court of appeals’ judgment and opinion and dismissing the cause as moot). *See also* *Kemper v. Stonegate Manor Apartments, Ltd.*, 29 S.W.3d 362, 363 (Tex. App.—Beaumont 2000, pet. dismissed w.o.j.) (where former tenant failed to file superseded bond in appeal from forcible detainer proceeding and writ of possession issued, court of appeals could no longer grant effectual relief and appeal became moot); *Faddoul, Glasheen & Valles, P.C. v. Oaxaca*, 52 S.W.3d 209, 212-13 (Tex. App.—El Paso 2001, no pet.) (where appellants deposited funds in controversy into the registry of the trial court, there was no longer any danger of appellants violating injunctive portion of trial court’s order, rendering the appealable interlocutory injunctive order moot).

350. *In re Salgado*, 53 S.W.3d 752, 757 (Tex. App.—El Paso 2001, orig. proceeding).

351. *Id.*

352. *Id.* (quoting *Gen. Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990)).

353. *Id.*



whether the child's aunt had standing to maintain her action to obtain exclusive possession of the child.<sup>354</sup> "Given this serious collateral consequence," the court held, "we find that the issue before us is not moot."<sup>355</sup>

## XV. PRACTICE IN THE COURT OF APPEALS

In *McCullough v. Kitzman*,<sup>356</sup> the court examined its internal procedure for deciding a motion to disqualify or recuse a court of appeals judge. In that case, the appellants filed motions for disqualification and recusal *after* the court of appeals issued an opinion affirming the trial court's decision.<sup>357</sup> Because the appellate rules do not provide a procedure for disqualification motions, the court determined that it would follow the same procedures as those used for deciding recusal motions.<sup>358</sup> Accordingly, pursuant to Rule 16.3(b), each member of the panel considered the motions and found no reason to disqualify himself.<sup>359</sup> Then, the justices certified the issue to the entire court, which (with the exception of the challenged judge) decided each motion with respect to each of the panel members.<sup>360</sup> The majority of the remaining justices found no reason to recuse or disqualify any member of the panel and denied the motions.<sup>361</sup>

## XVI. STANDARDS OF REVIEW

### A. SUFFICIENCY OF THE EVIDENCE

In *Dow Chemical Co. v. Francis*, the court of appeals failed to conduct a proper legal sufficiency and factual sufficiency analysis, giving the supreme court an opportunity to restate those well-established standards.<sup>362</sup>

When a party attacks the legal sufficiency of an adverse finding on an issue on which she has the burden of proof, she must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. In reviewing a "matter of law" challenge, the reviewing court must first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary. If there is no evidence to support the finding, the reviewing court will then examine the entire record to determine if the contrary proposition is established as a matter of law. The point of error should be sus-

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354. *Id.* at 757-58.

355. *In re Salgado*, 53 S.W.3d at 758.

356. 50 S.W.3d 87, 88-89 (Tex. App.—Waco 2001, pet. denied).

357. *Id.* at 87-88. As an initial matter, the court noted that the motions were subject to being denied as untimely. See TEX. R. APP. P. 16.3(a) (stating that a motion to recuse must be filed "promptly after a party has reason to believe that the justice . . . should not participate in deciding the case"). However, because the court had never addressed in a published opinion the timeliness of a motion to recuse under Texas Rule of Appellate Procedure 16.3, it proceeded with a determination of the merits of the motions. *McCullough*, 50 S.W.3d at 88.

358. *McCullough*, 50 S.W.3d at 88.

359. *Id.*

360. *Id.*

361. *Id.* at 89.

362. 46 S.W.3d 237, 241-42 (Tex. 2001).

tained only if the contrary proposition is conclusively established.<sup>363</sup> In this case, the appellee had the burden of proof on the claim at issue.<sup>364</sup> Thus, in considering only the evidence favorable to appellee, the court of appeals did not conduct a proper “matter of law” review.<sup>365</sup>

When a party attacks the factual sufficiency of an adverse finding on an issue on which she has the burden of proof, she must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence. The court of appeals must consider and weigh all of the evidence, and can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust.<sup>366</sup>

In doing so, the court of appeals must “detail the evidence relevant to the issue” and “state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.”<sup>367</sup> In *Dow*, the court of appeals improperly considered only the evidence favorable to appellee’s claim and did not review the evidence supporting the jury verdict.<sup>368</sup> Thus, the supreme court concluded that the court of appeals did not conduct a proper factual-sufficiency review.<sup>369</sup>

#### B. NO-EVIDENCE REVIEW AND THE EQUAL INFERENCE RULE

In *Lozano v. Lozano*,<sup>370</sup> a divided supreme court was presented with an opportunity to reevaluate the equal inference rule. The equal inference rule provides that “a jury may not reasonably infer an ultimate fact from meager circumstantial evidence ‘which could give rise to any number of inferences, none more probable than another.’”<sup>371</sup> The *Lozano* case turned on circumstantial evidence relating to whether Mr. Lozano’s family members aided or assisted in taking, retaining, or concealing his daughter, over whom Mr. Lozano did not have custody.<sup>372</sup> After discounting circumstantial evidence supporting the jury’s verdict under the equal inference rule, the court of appeals held that the evidence was not legally sufficient to support the jury’s verdict.<sup>373</sup>

The supreme court reversed as to some family members and affirmed as to others, and Justices Phillips, Hecht, and Baker filed separate concurring and dissenting opinions addressing the equal inference rule and its effect on the evidence in this case. Under Justice Phillips’ view, “the

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363. *Id.*

364. *Id.* at 242.

365. *Id.*

366. *Id.*

367. *Francis*, 46 S.W.3d at 242.

368. *Id.*

369. *Id.*

370. 52 S.W.3d 141 (Tex. 2001).

371. *Id.* at 148 (citing *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997)).

372. *Id.* at 145-47.

373. *Id.* at 144.

equal inference rule is but a species of the no evidence rule.<sup>374</sup> As Justice Phillips explained: “[i]f circumstantial evidence will support more than one reasonable inference, it is for the jury to decide which is more reasonable, subject only to review by the trial court and the court of appeals to assure that such evidence is factually sufficient.”<sup>375</sup>

Justice Hecht, in contrast, would have applied the equal inference rule more aggressively, stating that the jury’s inference must not only be reasonable, it must be probable.<sup>376</sup> If the jury did not draw an inference that is more probable than other reasonable inferences, then the jury’s verdict or finding must be set aside on no-evidence grounds.<sup>377</sup>

Justice Baker, although agreeing with Justice Phillips’ statement of the standard of review, would have viewed the evidence as a whole and would have concluded that there was some evidence to support the jury’s verdict as to certain family members.<sup>378</sup>

In *Wal-Mart v. Sturges*, the supreme court cited the well-established principle that courts must review the legal sufficiency of the evidence in light of the jury charge that the district court gave without objection, even if the charge’s statement of the law is incorrect.<sup>379</sup> However, the court then created a new standard for establishing the tort of interference with prospective contractual or business relations and concluded that there was no evidence to support the jury’s verdict.<sup>380</sup> In a concurring opinion, Justice O’Neill criticized the majority for “straying beyond measuring the evidence against the charge that was given,” and for “expound[ing] on what the law should be.”<sup>381</sup>

### C. REVIEW OF TRIAL COURT’S RULING ON PRIMARY JURISDICTION ISSUES

In *Subaru of America, Inc. v. David McDavid Nissan, Inc.*,<sup>382</sup> the supreme court resolved an open question regarding the proper standard of review of a trial court’s grant or denial of a motion for dismissal or abatement based on the primary jurisdiction doctrine. The court concluded that primary jurisdiction questions are questions of law.<sup>383</sup> The court reasoned that primary jurisdiction inquiries are quasi-jurisdictional in nature,

374. *Id.* at 148 (Phillips, C.J., concurring and dissenting).

375. *Lozano*, 52 S.W.3d at 148.

376. *Id.* at 158-62 (Hecht, J., concurring and dissenting).

377. *Id.*

378. *Id.* at 162 (Baker, J., concurring and dissenting).

379. 52 S.W.3d 711, 715 n.4 (citing *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 71 (Tex. 2000) (stating that when no objection was made to a jury instruction, evidence to support a finding based on the instruction should be assessed “in light of” the instruction given) and *Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567, 568 (Tex. 1985) (same)); *see also Lozano*, 52 S.W.3d at 145.

380. *Sturges*, 52 S.W.3d at 726-28.

381. *Id.* at 729 (O’Neill, J., concurring).

382. 44 Tex. Sup. Ct. J. 779, No. 00-0292, 2001 WL 578337 (Tex. May 31, 2001).

383. *Id.* at \*5 (abrogating *State Bar v. McGee*, 972 S.W.2d 770, 773 (Tex. App.—Corpus Christi 1998, no writ); *Shell Pipeline Corp. v. Coastal States Trading, Inc.*, 788 S.W.2d 837, 842 (Tex. App.—Houston [1st Dist.] 1990, writ denied); *Simmons v. Danco, Inc.*, 563

and often require an analysis of statutory construction.<sup>384</sup> Because both jurisdictional and statutory construction matters are generally questions of law, primary jurisdiction issues are also questions of law which are reviewed de novo, with no deference to the trial court's decision.<sup>385</sup>

#### D. REVIEW OF TRIAL COURT'S DISMISSAL BASED ON AN INADEQUATE EXPERT MEDICAL REPORT

Section 13.01 of the Medical Liability and Insurance Improvement Act requires medical malpractice plaintiffs, within 180 days of filing suit, to either provide each defendant physician and health-care provider with an expert report and the expert's curriculum vitae or to nonsuit the claims.<sup>386</sup> The adequacy of expert reports can be challenged, and the trial court must dismiss the claims against the defendant if "it appears to the court . . . that the report does not represent a good faith effort to comply with the definition of an expert report."<sup>387</sup> In *American Transitional Care Centers of Texas, Inc. v. Palacios*, the supreme court held that the trial court's determination about the adequacy of an expert report is reviewed under an abuse of discretion standard.<sup>388</sup> The court reasoned that the plain language of section 13.01 compelled such a conclusion.<sup>389</sup> First, the statute itself contains deferential language, directing the trial court to sustain a challenge to an expert report if it "appears to the court" that the plaintiffs did not make a good-faith effort to meet statutory requirements.<sup>390</sup> Second, the statute states that dismissal under section 13.01(e) is a sanction, and sanctions are generally reviewed under an abuse-of-discretion standard.<sup>391</sup>

The supreme court disagreed with the court of appeals' conclusion that the usual standard of review for sanctions did not apply in this case because section 13.01 was intended to eliminate frivolous claims, not to sanction litigation misconduct.<sup>392</sup> The supreme court held that filing a frivolous lawsuit can be litigation misconduct subject to a Rule 13 sanction and stated that "this is exactly the type of conduct for which sanctions are appropriate."<sup>393</sup>

#### E. BURDEN AND REVIEW IN DEFAMATION CASES

The supreme court in *Turner v. KTRK Television, Inc.*<sup>394</sup> clarified that,

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S.W.2d 376, 379 (Tex. App.—Dallas 1978, writ ref'd n.r.e.) (all applying an abuse of discretion standard of review to a trial court's primary jurisdiction analysis)).

384. *Id.*

385. *Id.*

386. See TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(d) (Vernon Supp. 2001).

387. *Id.* § 13.01(l).

388. 46 S.W.3d 873 (Tex. 2001).

389. *Id.* at 877.

390. *Id.*

391. *Id.*

392. *Id.* at 878.

393. *Palacios*, 46 S.W.3d at 878.

394. 38 S.W.3d 103, 119 (Tex. 2000).

to prove defamation, a public-figure plaintiff must establish clear and convincing evidence of actual malice. Additionally, the majority noted that “courts are divided on the burden that a public-figure plaintiff bears in proving falsity.”<sup>395</sup> However, because neither side briefed the issue, the court stated that, “on this record,” it was unwilling to require clear and convincing evidence of falsity.<sup>396</sup> Accordingly, the court assumed without deciding that the trial court properly instructed the jury to determine falsity by a preponderance of the evidence, and reviewed the jury’s finding on falsity under the traditional “no evidence” standard of review.<sup>397</sup>

In a concurring and dissenting opinion, Justice Hecht argued that falsity should be proven by clear and convincing evidence, stating that the majority’s “lenient standard for measuring evidence of falsity . . . is inconsistent with the rule that a statement is not defamatory if it is substantially true.”<sup>398</sup>

#### F. BURDEN AND REVIEW IN UNLAWFUL EMPLOYMENT PRACTICE CASES

In an age discrimination case decided this Survey period, the supreme court established that “motivating factor” is the correct standard of causation for the plaintiff in all unlawful employment practice claims under the Texas Commission on Human Rights Act.<sup>399</sup> The court reached this conclusion by reference to the plain meaning of Texas Labor Code section 21.125, which requires plaintiffs to prove an unlawful employment practice by showing that discrimination was a “motivating factor” for the practice.<sup>400</sup> The court then overruled the employer’s legal sufficiency challenge, concluding that, under the motivating factor standard, there was more than a scintilla of evidence that the employer was motivated by age discrimination when it fired the plaintiff.<sup>401</sup>

#### G. REVIEW IN TERMINATION OF PARENTAL RIGHTS CASES

Under section 161.001 of the Texas Family Code, clear and convincing evidence is required to support an order terminating parental rights.<sup>402</sup> The clear and convincing standard is an intermediate standard, falling between preponderance of the evidence and beyond a reasonable doubt. In

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395. *Id.* at 117 (comparing *Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976) and *Firestone v. Time, Inc.*, 460 F.2d 712, 723 (5th Cir. 1972) (Bell, J., concurring) (both requiring clear and convincing evidence of falsity) to *Ratray v. City of National City*, 51 F.3d 793, 801 (9th Cir. 1994) and *Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2d Cir. 1969) (both requiring proof of falsity based on a preponderance of the evidence)).

396. *Id.*

397. *Id.*

398. *Id.* at 131 (Hecht, J., concurring and dissenting).

399. *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 480 (Tex. 2001).

400. *Id.* at 474, 480.

401. *Id.* at 481-82.

402. TEX. FAM. CODE ANN. § 161.001 (Vernon Supp. 2001).

*In re N.K.*,<sup>403</sup> the appellant argued that the heightened quantum of proof at trial requires that the appellate court reviewing a termination order use a corresponding intermediate appellate standard of review. Citing the supreme court's decision in *Meadows v. Green*,<sup>404</sup> the Texarkana Court of Appeals refused to apply an intermediate standard of review, stating that it would continue to use the traditional appellate review standard in parental termination cases unless the Texas Supreme Court changed the law.<sup>405</sup>

## XVII. APPELLATE REMEDIES

### A. ABATING AN INTERLOCUTORY APPEAL FOR TRIAL COURT CLARIFICATION

Texas Rule of Appellate Procedure 29.5 governs the trial court's powers during an interlocutory appeal and provides that, while a trial court retains jurisdiction of the case, it may not enter an order that (1) is inconsistent with any appellate court temporary order; or (2) interferes with or impairs the appellate court's jurisdiction or the effectiveness of any relief sought.<sup>406</sup> In *American Home Products v. Clark*,<sup>407</sup> the court of appeals abated an interlocutory appeal to allow the trial court to clarify its order on venue. On appeal to the supreme court, the petitioner argued that the abatement of the appeal for clarification impermissibly invited interference with the court of appeals' jurisdiction under Rule 29.5 and had the effect of instructing the trial court how to make its decision nonreviewable.<sup>408</sup> The supreme court rejected that argument, holding that, because the appellant complained of the appellate court's ruling and not the trial court's ruling, Rule 44.4(a) (and not Rule 29.5) applied.<sup>409</sup> Under Rule 44.4(a), an appellate court cannot affirm or reverse a judgment if the trial court has committed an error that prevents the proper presentation of the case on appeal.<sup>410</sup> If the trial court's erroneous action or inaction can be corrected, the appellate court must direct the trial court to do so before disposing of the case on appeal.<sup>411</sup>

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403. 54 S.W.3d 499, 503 (Tex. App.—Texarkana 2001, pet. filed).

404. 524 S.W.2d 509, 510 (Tex. 1975).

405. *N.K.*, 54 S.W.3d at 503. Justice Grant, concurring, expressly urged the Texas Supreme Court to reconsider its ruling in *Meadows*, arguing that "it is inconsistent to require a jury to decide a case on one standard and then review it on a different standard." *Id.* at 506 (Grant, J., concurring). Compare *Price v. Lewis*, 45 S.W.3d 215, 218, 220-21 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (reviewing trial court's ruling under clear and convincing evidence standard of review where party contesting results of an election must carry burden of proving, by clear and convincing evidence, that violations of the Election Code materially affected the outcome of the election).

406. TEX. R. APP. P. 29.5.

407. 38 S.W.3d 92 (Tex. 2000).

408. *Id.* at 96.

409. *Id.* at 97.

410. *Id.* (citing TEX. R. APP. P. 44.4(a)(1)).

411. *Id.*

### B. WHEN RENDITION IS PROPER

Texas Rule of Appellate Procedure 60.2(f) gives the supreme court the authority to vacate the lower court's judgment and remand the case for further proceedings in light of changes in the law.<sup>412</sup> In *Wal-Mart v. Sturges*, the supreme court held for the first time that, "to establish liability for interference with prospective contractual or business relation, the plaintiff must prove that it was harmed by the defendant's conduct that was either independently tortious or unlawful."<sup>413</sup> However, instead of remanding the case in light of changes in the law, the court determined that there was no evidence in the case that the defendant's conduct was independently tortious or unlawful and rendered judgment for the defendant.<sup>414</sup>

### C. WHEN REMAND IS PROPER

During this Survey period, Texas courts of appeals have ordered a remand where a party proceeded under a wrong legal theory,<sup>415</sup> where a party failed to segregate attorney's fees,<sup>416</sup> and where there was an irreconcilable conflict in the jury's answers.<sup>417</sup>

### D. DISPOSITION OF DAMAGES AWARDS

It is improper for an appellate court to remand a case for a new trial solely on a damages issue when liability is contested in the trial court.<sup>418</sup> Nor is it proper for an appellate court to grant a judgment notwithstanding the verdict and to enter a new damages award by sifting through the evidence and independently calculating a new award when it is unclear what amounts the jury awarded for the various line items in a damages award.<sup>419</sup>

When a jury's damages award is excessive, remittitur is the appropriate remedy.<sup>420</sup> A trial court's order of remittitur can be challenged on appeal by arguing that there was factually sufficient evidence to support the jury's damages award.<sup>421</sup> When such a sufficiency challenge is sustained,

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412. TEX. R. APP. P. 60.2(f).

413. 52 S.W.3d 711, 713 (Tex. 2001).

414. *Id.* at 727-29.

415. *Texas Dep't of Transp. v. Bederka*, 36 S.W.3d 266, 272 (Tex. App.—Beaumont 2001, no pet.) (remanding in the interest of justice under Rule 43.3(b) where plaintiffs' petition failed to allege a claim for which sovereign immunity is waived under the Texas Tort Claims Act).

416. *Pratt v. Trinity Projects, Inc.*, 26 S.W.3d 767, 769 (Tex. App.—Beaumont 2000, pet. denied) (citing *Texarkana Mem. Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 841 (Tex. 1997)).

417. *Calabrian Chems. Corp. v. Bailey-Buchanan Masonry, Inc.*, 44 S.W.3d 276, 282-83 (Tex. App.—Beaumont 2001, pet. denied).

418. *See Estrada v. Dillon*, 44 S.W.3d 558, 562 (Tex. 2001). A general denial is sufficient to contest liability and to prevent remand of a damages issue without a retrial on liability. *Id.*

419. *II Deerfield Ltd. Partnership v. Henry Bldg., Inc.*, 41 S.W.3d 259, 268-69 (Tex. App.—San Antonio 2001, pet. denied).

420. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 851 (Tex. 2000).

421. *Id.*; *Gray v. Allen*, 41 S.W.3d 330, 331-34 (Tex. App.—Fort Worth 2001, no pet.).

the court of appeals can modify the trial court's judgment to reinstate the jury's damages award and affirm the trial court's judgment as modified.<sup>422</sup>

Where the trial court's judgment does not remit an excessive verdict, the court of appeals can order a remittitur when the evidence supporting damages is factually insufficient.<sup>423</sup> However, because the supreme court is not empowered to determine factual sufficiency questions, it cannot overturn an excessive verdict based on factual insufficiency.<sup>424</sup>

However, in *Torrington Co. v. Stutzman*, the petitioner attempted to side-step the supreme court's prohibition of deciding factual insufficiency questions by citing *World Oil v. Hicks*<sup>425</sup> and arguing that it was entitled to a new trial because "a jury that gets damages egregiously wrong probably got liability wrong, too."<sup>426</sup> In *World Oil*, the court had held that remittitur is the appropriate remedy except in cases where the verdict "is so flagrantly excessive that it cannot be accounted for on any other ground."<sup>427</sup>

The supreme court in *Torrington* refused to grant a new trial, reasoning that it had never before relied on *World Oil* to disturb a verdict and concluding that *World Oil's* continued vitality was questionable.<sup>428</sup>

#### E. DISPOSITION AFTER SETTLEMENT

In an unpublished decision from the San Antonio Court of Appeals, the court not only dismissed an appeal pursuant to settlement, it also issued an order withdrawing a previous opinions issued from the court.<sup>429</sup>

### XVIII. APPELLATE ATTORNEYS' FEES AND COSTS

Courts of appeals generally have discretion to assess costs in subsequent court of appeals proceedings,<sup>430</sup> but, because of the peculiar procedural posture of the case in *Texas Workers' Compensation Insurance Fund v. Mandlbauer*, the supreme court concluded that the court of appeals' mandate ordering that "all costs of appeal" be assessed against the Fund was ambiguous.<sup>431</sup> There the case was initially tried and appealed

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422. *Gray*, 41 S.W.3d at 334.

423. *Torrington*, 46 S.W.3d at 851.

424. *Id.*

425. 103 S.W.2d 962, 964 (1937). The court further held that "[t]here are cases where a shockingly excessive verdict, and the record as a whole, leave no room for doubt that the minds of the jurors were so controlled and dominated by passion and prejudice as made them incapable of, or entirely unwilling, to consider a case on the merits." *Id.*

426. *Torrington*, 46 S.W.3d at 851.

427. *World Oil*, 103 S.W.2d at 964.

428. *Torrington*, 46 S.W.3d at 851-52.

429. *Perry Homes v. Carnes*, No. 04-00-00185-CV, 2001 WL 322187 (Tex. App.—San Antonio, Apr. 4, 2002, no pet.) (not designated for publication). The parties had filed a joint motion informing the court that they had settled and asking the court to dismiss the proceeding and to vacate all previous opinions, orders, and judgments in the case. *Id.* at \*1.

430. *Texas Workers' Comp. Ins. Fund v. Mandlbauer*, 34 S.W.3d 909, 912 (Tex 2000).

431. *Id.*



to the court of appeals and to the supreme court.<sup>432</sup> The supreme court reversed and remanded to the court of appeals, ordering Mandlbauer to pay costs.<sup>433</sup> The court of appeals, on remand, reversed the case and ordered that "all costs of the appeal shall be assessed against [the Fund]."<sup>434</sup> The supreme court then heard the case for a second time and concluded that the court of appeals' mandate was ambiguous, because it could be interpreted to include costs of the first appeal in the court of appeals (which the supreme court had ordered Mandlbauer to pay).<sup>435</sup> The court of appeals should have limited costs to the appeal on remand.<sup>436</sup> In the end, however, the supreme court reversed the court of appeals judgment and awarded all costs against Mandlbauer for all appeals.<sup>437</sup>

In *Moore v. Bank Midwest*,<sup>438</sup> the court held that interest on appellate attorney's fees should run from the date of the notice appeal, not the date of judgment. The court reasoned that interest on appellate attorney's fees is directly connected to the pursuit of an unsuccessful appeal and that the appellee cannot collect interest on money before it is owed.<sup>439</sup>

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432. *Id.* at 911.

433. *Id.*

434. *Id.*

435. *Mandlbauer*, 34 S.W.3d at 912.

436. *Id.*

437. *Id.*

438. 39 S.W.3d 395, 404 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

439. *Id.* The trial court's judgment in *Moore* also impermissibly awarded appellate attorney's fees without conditioning the award on an unsuccessful appeal. However, the court of appeals held that the point was moot because it had already concluded that the trial court's judgment should be affirmed. *Id.*