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CIVIL EVIDENCE

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I. INTRODUCTION

THE Survey period was a time of refinement and balancing, in which courts weighed the jury's interest in hearing the relevant evidence against the policy goals behind privileges and the rules for expert testimony. The expert witness cases particularly focused on whether testimony matched the requirements of the substantive law. The issue of spoliation produced several thoughtful opinions, and a number of statutory privilege issues also received careful scrutiny.

II. ADMISSIBILITY OF EXPERT TESTIMONY

During the Survey period, several federal and state cases addressed the relevance and reliability of expert testimony. The Fifth Circuit reminded courts and practitioners not to turn a *Daubert* hearing into a trial on the

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merits, while the state courts addressed the preservation of error and what qualifies as an acceptable methodology.

A. THE FEDERAL *DAUBERT* DECISIONS

In *Pipitone v. Biomatrix, Inc.*, Pipitone developed salmonella in his knee after an injection of Synvisc, a synthetic fluid made from rooster combs.[1] Pipitone brought a products liability action against Biomatrix, the manufacturer of Synvisc. The district court excluded the testimony of plaintiff's experts, Dr. Chad Millet and Dr. Jeffrey Coco, and granted defendant's motion for summary judgment.[2]

On appeal, the Fifth Circuit considered the trial court's exclusion of both expert witnesses. Dr. Millet stated that it was as likely as not that Synvisc caused the salmonella and also testified that he had no scientific evidence to support his conclusion. Therefore, because of his "perfectly equivocal opinion," the Fifth Circuit held that his testimony was not relevant to the issue of causation.[3] Dr. Coco testified that Synvisc was responsible for the salmonella infection. In excluding his testimony, the district court had noted that Dr. Coco did not perform an epidemiological study, had found no other instances of a salmonella infection arising after a knee injection, and had failed to eliminate other viable alternative sources for the infection.[4] The Fifth Circuit first found that an epidemiological study was not necessary in a case such as this when only one person was infected.[5] Next, the court decided that the lack of evidence of other salmonella infections following a knee injection actually supported Dr. Coco's conclusion. The court reasoned that because no other knee injection procedures had caused salmonella, then it was more likely that Synvisc, and not the procedure, caused the infection in this instance.[6] The court also noted that Dr. Coco based his opinion on accepted medical knowledge of salmonella and how it infects humans. Because Dr. Coco's testimony was based on his personal observations, his professional experience, his education, and his training, the court found that he had a reasonable basis from which to draw his conclusion.[7] The court reminded the trial court that it must take care not to transform a *Daubert* hearing into a trial on the merits, found an abuse of discretion in excluding Dr. Coco's testimony, and remanded the case for trial.[8]

The Fifth Circuit continued to guard against turning a *Daubert* hearing into a trial on the merits in *Mathis v. Exxon Corp.*[9] In *Mathis*, gasoline station franchisees sued Exxon for breach of contract, claiming that Ex-

1. Pipitone v. Biomatrix, Inc., 288 F.3d 239, 241 (5th Cir. 2002).
2. *Id.* at 243.
3. *Id.* at 245.
4. *Id.*
5. *Id.* at 246.
6. *Id.*
7. *Id.* at 247.
8. *Id.* at 250.
9. Mathis v. Exxon Corp., 302 F.3d 448 (5th Cir. 2002).

xon overcharged them for gas in an attempt to drive them out of business. At trial, the jury found for the plaintiffs and awarded damages.[10] An issue on appeal was the testimony of Barry Pulliam, the plaintiffs' expert economist, who testified that the prices at which Exxon sold gasoline to its franchisees were not commercially reasonable.[11] Exxon filed a motion in limine, opposing his testimony, but did not object to its admission at trial.[12] The Fifth Circuit held that this was sufficient to preserve error for appellate review pursuant to Federal Rule of Evidence 103(a).[13] On appeal, Exxon did not challenge Pulliam's qualifications, as he had a master's degree in economics, but rather challenged the method he used to draw his conclusions. The Fifth Circuit found that Pulliam's methods may not have been exact and were, in fact, "rough-and-ready," but that the errors, if any, in his methodology did not affect his conclusions.[14] The court also cited its recent decision in *Pipitone v. Biomatrix, Inc.*,[15] and stated that a *Daubert* analysis should not supplant trial on the merits. Therefore, the court found no abuse of discretion in the admission of Pulliam's testimony.[16]

In *IQ Products Co. v. Pennzoil Products Co.*, IQ sued Pennzoil under the Lanham Act about a product called Fix-A-Flat.[17] IQ claimed that it lost sales because Pennzoil failed to label the product as "flammable" and falsely alleged that the product was "non-explosive."[18] The district court granted defendant's motion for summary judgment. On appeal, the Fifth Circuit held that the "flammable" language was not actionable, and that regardless of whether the "non-explosive" language was actionable, IQ failed to demonstrate any harm as a result.[19] The Fifth Circuit then upheld the trial court's decision to exclude both of IQ's expert witnesses. First, the court held that since both witnesses based their testimony on the "flammable" and "non-explosive" language, and because the "flammable" language was not actionable, their testimony was flawed.[20] Further, neither expert conducted any surveys or market research to support their conclusion that consumers would have purchased IQ's product had Pennzoil accurately described its Fix-A-Flat product.[21] Therefore, the Fifth Circuit held that the trial court did not abuse its discretion in striking the experts' testimony and declaring summary judgment in favor of the defendants.[22]

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10. *Id.* at 453.
11. *Id.* at 459-60.
12. *Id.* at 459.
13. *Id.*
14. *Id.* at 460-61.
15. *Pipitone*, 288 F.3d at 250.
16. *Mathis*, 302 F.3d at 461.
17. IQ Prods. Co. v. Penzoil Prods. Co., 305 F.3d 368 (5th Cir. 2002).
18. *Id.* at 371.
19. *Id.* at 375-76.
20. *Id.* at 376-77.
21. *Id.* at 376.
22. *Id.* at 377.

In *Stahl v. Novartis Pharmaceuticals Corp.*, plaintiff Stahl sued the manufacturer of Lamisil after developing hepatitis when he was prescribed Lamisil to treat a toenail infection.[23] Stahl claimed that Lamisil was inadequately labeled and failed to warn of possible complications. The district court granted summary judgment for the defendant.[24] On appeal, Stahl challenged the admission of the testimony of Dr. Martin Claiborne, the physician who had originally prescribed Lamisil to Stahl. Dr. Claiborne testified that the warnings on the Lamisil package were clear, unambiguous, and reasonably adequate to inform him of the risk of liver damage.[25] Stahl argued that, because Dr. Claiborne was a dermatologist and not an expert in liver disease, his testimony should not have been considered. The Fifth Circuit disagreed and held that when Dr. Claiborne testified as to the adequacy of the warnings on the Lamisil, he was not speaking as an expert. Rather, he was only testifying as to whether the warnings made him aware of the risks associated with prescribing Lamisil. The court noted that a treating physician does not necessarily testify in an expert capacity when he or she testifies as to the adequacy of a warning on a label.[26] Therefore, the court found that Dr. Claiborne's testimony did not constitute expert testimony, and its admission was appropriate.[27]

In *Tyler v. Union Oil Co.*, the Fifth Circuit considered the expert testimony of a statistician regarding a plaintiff's Age Discrimination in Employment Act ("ADEA") suit.[28] At trial, the plaintiff offered the expert testimony of Dr. Blake Frank, whose statistics were used to support an inference of motive for disparate treatment. Dr. Frank was an industrial/organizational psychologist, and testified that defendant Unocal's employees over age fifty were less likely to be promoted and more likely to be placed in the pool subject to termination.[29] On appeal, the defendant challenged the admission of such testimony. Unocal argued that Dr. Frank's testimony should be excluded, because he only considered employees who were over 50, while the ADEA protects employees over the age of 40. The court noted that the relevant age groupings for a particular ADEA case will vary by the circumstances of the case.[30] Unocal also challenged the data used by Dr. Frank; however, the court noted that Unocal had provided the data in the first place and could challenge its reliability on cross-examination.[31] Finally, Unocal asserted that is own expert, Dr. Baxter, had performed a statistical analysis that discredited Dr. Frank's methodologies, but the Fifth Circuit found that this opinion

23. Stahl v. Novartis Pharms. Corp., 283 F.3d 254, 260 (5th Cir. 2002).
24. *Id.*
25. *Id.* at 264.
26. *Id.* at 265 n.5.
27. *Id.* at 265.
28. Tyler v. Union Oil Co., 304 F.3d 379 (5th Cir. 2002).
29. *Id.* at 392.
30. *Id.*
31. *Id.* at 392-93. The court similarly rejected Unocal's other arguments that Dr. Frank's methods and data were flawed. *Id.*

went to the weight of Dr. Frank's testimony and not to its admissibility.[32] Therefore, the court held that the district court did not abuse its discretion by admitting the statistical testimony offered by Dr. Frank.[33]

B. THE STATE *ROBINSON* DECISIONS

The Texas Supreme Court addressed the reliability of expert opinions about property valuation twice during the Survey period. In *Guadalupe-Blanco River Authority v. Kraft*, the court addressed the reliability of a property owner's expert opinion based on the "comparable sales" approach.[34] After the River Authority instituted a condemnation action against Kraft seeking a permanent easement across his property, Kraft hired an expert to appraise the property. The expert admitted on *voir dire* that, although he had used the comparable sales approach, there were no comparable sales in the local market of the type of easement at issue in the case.[35] Citing *Merrell Dow Pharmaceuticals, Inc. v. Havner*,[36] the court looked beyond the expert's "bald assurance" that he was using a widely accepted approach. Instead, the court held that because the local property sales the expert had relied upon were not comparable to the condemned easement, the expert's opinion was unreliable under the principles of *Gammill v. Jack Williams Chevrolet, Inc.*.[37]

The supreme court again addressed the reliability of an expert's opinion on valuation in *Exxon Pipeline Company v. Zwahr*.[38] This time, the expert assessed the value of land taken by eminent domain by determining its fair market value. The court noted that the general rule for determining fair market value is the before-and-after rule, which measures the difference in the value of the land immediately before and immediately after the taking.[39] In doing so, the project enhancement rule says that the fact finder may not consider any enhancement to the value of the landowner's property that results from the taking. The fact finder may, however, consider the highest and best use to which the land taken may be adapted.[40] In this situation, cotton farming was presumed to be the highest and best use of the land, although the landowner could have rebutted that presumption. The expert impermissibly included project enhancement in his evaluation and concluded that the property's highest and best use was for a pipeline easement.[41] Because of the expert's improper premise, and because the expert admitted that the value he had placed on

32. *Id.* at 393.
33. *Id.*
34. Guadalupe-Blanco River Auth. v. Kraft, 77 S.W.3d 805, 808 (Tex. 2002).
35. *Id.* at 806.
36. Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 713 (Tex. 1997).
37. *Guadalupe-Blanco*, 77 S.W.3d at 808 (citing Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713 (Tex. 1988)).
38. Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623 (Tex. 2002).
39. *Id.* at 627 (citing Callejo v. Brazos Elec. Power Coop, Inc., 755 S.W.2d 73, 76 (Tex. 1988)).
40. *Id.*
41. *Id.* at 628.

the property did not exist before the condemnation, the expert's testimony was found unreliable and thus inadmissible.[42]

Zwahr has particular significance beyond the already-important area of condemnation law. That case, along with the Fifth Circuit's *IQ Products* case,[43] re-emphasizes that that an expert's testimony needs to match the requirements of the controlling substantive law. The failure to address a legally relevant issue—or the inclusion of a legally irrelevant one—can make testimony inadmissible that is otherwise credible as a pure matter of the factual evidence.

On that same general topic, the question of whether an expert witness is insulated from a *Robinson* challenge, when a statute mandates the methodology to use, was addressed in *Weingarten Realty Investors v. Harris County Appraisal District.*[44] Citing *Rushing v. Kansas City South Railway*,[45] the plaintiff asserted that its expert's testimony was reliable as a matter of law because the expert used a methodology required by section 42.26(d) of the Texas Tax Code.[46] The court of appeals distinguished *Rushing*, noting that if a statute requires a certain methodology, use of that methodology alone would not be unreliable. Use of a statutorily mandated methodology, however, does not insulate an expert from a *Robinson* challenge to the reliability of the underlying data.[47]

In *Vasquez v. Hyundai Motor Co.*, the San Antonio Court of Appeals affirmed the lower court's ruling that an expert report comparing air bag-related child fatality rates in Hyundais was unreliable because it was based on selected sampling and it failed to rule out other plausible causes.[48] The parents of a child killed by an air bag in an automobile collision brought a crash-worthiness action against the manufacturer, Hyundai. The plaintiffs hired experts who collected child air bag-related fatality data. In collecting the data, however, the experts left out two years' worth of data, despite the fact that the air bag systems were identical for models during all of the relevant years. The experts also only included data concerning two-door Hyundais, and excluded four-door Hyundais. The data from the excluded years and for the excluded four-door vehicles revealed that there were significantly less fatalities than the experts concluded.[49] The experts also failed to rule out any other plausible causes for the fatalities, including crash frequency, child occupancy, and seat belt usage. The court rejected the plaintiffs' attempt to use the report as an inferential chain between the alleged defective air bag and the child's death, finding that the "result-oriented methodology" employed by the

42. *Id.*
43. *IQ Prods.*, 305 F.3d 368.
44. Weingarten Realty Investors v. Harris County Appraisal Dist., 93 S.W.3d 280, 284 (Tex. App.—Houston [14th Dist.] 2002, no pet.).
45. Rushing v. Kansas City S. Ry., 185 F.3d 496, 506-07 (5th Cir. 1999).
46. *Weingarten*, 93 S.W.3d at 284.
47. *Id.*
48. Vasquez v. Hyundai Motor Co., No. 04-01-0054-CV (Tex. App.—San Antonio Aug. 21, 2002, no pet.) (not designated for publication), 2002 WL 1905203, at *7.
49. *Id.* at *6-7.

experts is what *Daubert* precludes.[50]

The qualification of a medical expert was addressed in *Keo v. Vu*.[51] In that case, the trial court struck the expert's testimony, finding that the expert was not qualified. At issue was whether a medical expert witness must be a specialist in the specific branch of the medical profession for which the testimony is offered. The court noted that trial courts may qualify a medical witness of a different specialty to testify if that witness has practical knowledge of what is usually and customarily done by other practitioners under similar circumstances.[52] The trial court struck this expert's testimony because he was board certified in otolaryngology, and the issues in the case concerned cosmetic surgery on a nose. The appellate court, however, found that the issues concerned operative procedures generally, and the infection process related to surgery in general. The medical issues were thus within the witness's expertise.[53]

Preservation of error was addressed in the legal malpractice case of *Piro v. Sarofim*.[54] The plaintiff successfully sued her divorce lawyers for breach of fiduciary duty. The lawyers appealed, contending that the trial court erred by not excluding the plaintiff's expert witnesses on legal ethics at the *Robinson* hearing. The appellate court noted a fundamental procedural difficulty, since the record references cited by the lawyers all came from trial testimony after the hearing on their motion to strike. The lawyers did not show that they specifically objected to the testimony as it was offered to the jury or re-urged their *Robinson* objections before the case was submitted to the jury. Additionally, nothing in the record indicated that the lawyers objected that the witnesses were testifying outside of the limits imposed by the trial court.[55] Consequently, the court held that the lawyers failed to preserve error, and rejected the lawyers' assertion that *Merrell Dow Pharmaceuticals Inc. v. Havner*[56] relieved opponents of expert testimony from the duty to preserve error.[57]

III. PRIVILEGES

A. STATUTORY CRIME STOPPERS PRIVILEGE

The Fort Worth Court of Appeals considered Texas's statutory crime stoppers privilege[58] in *In re Hinterlong*.[59] In this case, Hinterlong, a high school student, was expelled when an anonymous tip to a teacher resulted in the discovery of a tiny amount of liquid presumed to be alcohol in the

50. *Id.* at *7 (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993)).
51. Keo v. Vu, 76 S.W.3d 725 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).
52. *Id.* at 732.
53. *Id.* at 733.
54. Piro v. Sarofim, 80 S.W.3d 717, 719 (Tex. App.—Houston [1st Dist.] 2002, no pet.).
55. *Id.* at 719-20.
56. *Havner*, 953 S.W.2d 706.
57. *Piro*, 80 S.W.3d at 720-21.
58. TEX. GOV'T CODE ANN. § 414.008 (Vernon 1998 & Supp. 2003).
59. *In re* Hinterlong, No. 02-016-CV (Tex. App.—Fort Worth Aug. 23, 2002, no pet.) (not designated for publication), 2002 WL 1941564.

back of his car.[60] Hinterlong was subsequently cleared of all criminal charges and filed suit against the school district, the student informant, and one of the teachers for malicious prosecution, defamation, and negligence.[61] Hinterlong sought to discover the identity of the student informant who had originally made the report of illegal activity. However, the defendants asserted the statutory crime stoppers privilege and refused to answer any questions about information given by the student informant or the informant's identity. The trial court denied Hinterlong's motion to compel discovery, and Hinterlong sought mandamus relief in the court of appeals.[62]

Hinterlong first argued that the school's crime stoppers program was not a "crime stoppers organization" as defined by the statute. However, the court of appeals determined that the school's program did meet the statutory requirements.[63] Hinterlong's next argument was that the communication was not privileged because the school did not follow proper procedure in investigating the tip. The court of appeals also rejected this argument, noting that the statute did not mandate any particular procedure for investigating tips.[64] Finally, Hinterlong argued that the crime stoppers privilege was unconstitutional as applied to him because it violated the Texas Constitution's open courts provision.[65] The court found that because Hinterlong had been exonerated of the crime, because he had offered *prima facie* proof of a right of redress for the wrongful conduct of another, and because the privilege restricted a common law cause of action, its application to Hinterlong was unreasonable when balanced against the legitimate purpose of the crime stoppers statute.[66] The court thus held that the trial court must conduct an *in camera* review of an affidavit from the student tipster. If the affidavit reflected that the student had personal knowledge of the actions, then his identity would be revealed; however, if the affidavit reflected hearsay, then the tipster's name would be privileged, but the person from whom he got the hearsay would have to be disclosed.[67]

B. PHYSICIAN-PATIENT PRIVILEGE

In re Whiteley was a medical malpractice action brought against a surgeon after a failed knee replacement procedure.[68] Whiteley, the plaintiff, moved to compel production of the medical records of non-party patients on whom the defendant had performed the procedure. The defendant, Dr. Wright, argued that the records fell within the physician-patient privi-

60. *Id.* at *1-2.
61. *Id.* at *4.
62. *Id.* at *5.
63. *Id.* at *7.
64. *Id.* at *7-8.
65. *Id.* at *9 (citing TEX. CONST. art. I § 13).
66. *Id.* at *15.
67. *Id.* at *18.
68. *In re* Whiteley, 79 S.W.3d 729 (Tex. App.—Corpus Christi 2002, orig. proceeding).

lege in Texas Rule of Evidence 509. The trial court denied Whiteley's request, and she sought mandamus relief.[69]

Whitely argued that an exception to the privilege applied to the records, because Dr. Wright relied on them as part of his defense.[70] The court of appeals noted that while Dr. Wright's pleadings did not indicate that he was relying on the records, other discovery materials showed that they were in fact part of his defense. Specifically, in his disclosure of legal theories, Dr. Wright alleged that he had performed the procedure in question numerous times without complications. Further, at his deposition, Dr. Wright testified that of all the knee replacements he had done, only three had ever failed. Based on that information, the court concluded that Dr. Wright was relying on the medical condition of his other patients as a basis for his defense and ordered that Dr. Wright produce the requested medical records with patient names redacted.[71]

In *James v. Kloos*, the Fort Worth Court of Appeals considered the physician-patient privilege in the context of defense counsel's *ex parte* conversations with plaintiff's treating physician.[72] In this case, Billy James brought suit against Susan Kloos, a registered nurse, for her alleged negligent care.[73] At trial, Kloos called Dr. Robert McBroom to testify, who had treated the initial infections allegedly caused by the defendant.[74] During his testimony, the plaintiff learned for the first time that the doctor had an *ex parte* meeting with defense counsel before trial. Upon learning of this meeting, the plaintiff objected to the witness's testimony and asked that it be stricken; however, the trial court overruled the objection and also refused to let the plaintiff question Dr. McBroom in front of the jury about the meeting.[75]

On appeal, the court first noted that the Texas Supreme Court has not yet addressed the propriety of a physician's *ex parte* conversation with opposing counsel.[76] The court did recognize the supreme court's opinion in *Mutter v. Wood*, which held that a plaintiff in a medical malpractice action was not required to sign an authorization for defense counsel to discuss her son's treatment with his physicians, noting that such an authorization would effectively let defense counsel question physicians outside the presence of plaintiff's counsel.[77] The court of appeals also noted that two federal courts had held that such *ex parte* meetings were barred, while two Texas courts of appeals have held that *ex parte* conversations were not necessarily improper.[78] After this analysis, the court focused on harm. The court assumed that such *ex parte* conversations were

69. *Id.* at 732.
70. *Id.*
71. *Id.* at 736.
72. James v. Kloos, 75 S.W.3d 153 (Tex. App.—Fort Worth 2002, no pet.).
73. *Id.* at 156.
74. *Id.* at 157.
75. *Id.*
76. *Id.* at 158.
77. *Id.* (citing Mutter v. Wood, 744 S.W.2d 600 (Tex. 1988) (orig. proceeding)).
78. *Id.*

improper, but held that the plaintiff had not shown sufficient evidence of harm to prove an abuse of discretion.[79]

The San Antonio Court of Appeals considered a similar situation in *Durst v. Hill Country Memorial Hospital*, in which the trial court admitted the testimony of four of plaintiff's treating physicians, after it was discovered there had been *ex parte* contact between defense counsel and those physicians.[80] The plaintiff acknowledged that the physicians were free to give the information they did, but challenged the means by which the information had been obtained.[81] On appeal, the court recognized that there were public policy reasons to support a prohibition against such *ex parte* contact, given the potential for disclosure of irrelevant and privileged information.[82] However, the court had recently held that no specific rule prohibited *ex parte* communications between a plaintiff's treating physician and defense counsel.[83] The court then noted that the doctor himself has the burden to refrain from revealing irrelevant and privileged matters in other circumstances.[84] While recognizing the concerns of the plaintiff, the court indicated that the *ex parte* contact was not necessarily improper and held that the plaintiff had not demonstrated sufficient harm to require reversal.[85]

C. Alternative Dispute Resolution Confidentiality

In *Avary v. Bank of America*, the Dallas Court of Appeals considered the extent to which communications during a mediation were privileged from discovery in a later lawsuit.[86] In the original lawsuit, Bank of America acted as the independent executor of Joseph Bourgeois's estate after he was killed in a tractor accident.[87] During the mediation of the subsequent wrongful death action, it was alleged that the bank's representative did not communicate a settlement offer to Bourgeois's estate.[88] After the case settled, the estate sued the bank for breach of fiduciary duty.[89] The trial court granted summary judgment for the defendant based on the confidentiality provisions of the alternative dispute resolution statute, holding that the statute prevented any discovery of communications in the original mediation.[90] The court allowed the bank's representative to be deposed but did not allow other discovery of the

79. *Id.* at 159-61.
80. Durst v. Hill Country Mem'l Hosp., 70 S.W.3d 233, 236 (Tex. App.—San Antonio 2001, no pet.).
81. *Id.* at 237.
82. *Id.*
83. *Id.* (citing Rios v. Tex. Dept. of Mental Health & Mental Retardation, 58 S.W.3d 167 (Tex. App.—San Antonio 2001, no pet.)).
84. *Id.* at 238.
85. *Id.*
86. Avery v. Bank of Am., 72 S.W.3d 779 (Tex. App.—Dallas 2002, pet. denied).
87. *Id.* at 784.
88. *Id.* at 785.
89. *Id.* at 786.
90. *Id.* at 794 (citing Tex. Civ. Prac. & Rem. Code § 154.073 (Vernon 1997 & Supp. 2003)).

claim about the mediation.[91]

On appeal, the plaintiff argued that the judge abused his discretion when he prevented her from deposing witnesses and obtaining written discovery about the mediation. The court of appeals first noted that the bank had a fiduciary obligation to disclose such information.[92] Second, the court also found that the trial court correctly conducted an *in camera* review of the communications at issue.[93] The court then compared the ADR confidentiality statute to Texas Rule of Evidence 408, which excludes evidence of offers to compromise a disputed claim. The court noted that Rule 408 does not prevent a party from proving a separate cause of action simply because some of the acts complained of took place during compromise negotiations. Similarly, in this case, the court held that the ADR confidentiality statute should not preclude the gathering of evidence for a separate cause of action despite the fact that such evidence came from a mediation session.[94] Thus, the court held that the trial court abused its discretion in limiting discovery of communications during the mediation to the extent that it did.[95]

In *In re Learjet, Inc.*, the Texarkana Court of Appeals also considered discovery of information that was presented during a mediation.[96] At the mediation of a contract dispute, Learjet showed videotaped witness statements of three of its employees. The mediation failed, and in the subsequent litigation the plaintiff asked the trial court to order production of the videotapes shown at the mediation. The trial court ordered production, and Learjet sought mandamus relief.[97] The court of appeals first noted that under the ADR confidentiality statute, information presented during a mediation is discoverable, if it is discoverable independent of the ADR procedure itself. Thus, the court decided that the relevant question was not whether the tapes were covered by the confidentiality statute, but whether the tapes were attorney-client privileged.[98] The court noted that the videotapes were not made to facilitate the rendition of legal services, as required by that privilege, but rather were made to present factual information to opposing parties at the mediation.[99] Further, the witnesses on the videotapes were designated as testifying expert witnesses; thus, information such as their taped testimony was discoverable.[100] Therefore, the court held that the videotapes were discoverable even though they had been shown in a mediation.[101]

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91. *Id.* at 795.
92. *Id.* at 796.
93. *Id.* at 797.
94. *Id.* at 801.
95. *Id.* at 802.
96. *In re* Learjet, Inc., 59 S.W.3d 842 (Tex. App.—Texarkana 2001, orig. proceeding).
97. *Id.* at 844.
98. *Id.* at 845.
99. *Id.* at 846.
100. *Id.*
101. *Id.* at 847.

IV. SANCTIONS

In *Matagorda County Hospital District v. Burwell*, Burwell sued MCHD for breaching an employment contract.[102] At trial, the court excluded one of MCHD's witnesses pursuant to Rule 193.6 of the Texas Rules of Civil Procedure as untimely designated.[103] On appeal, MCHD advanced three arguments. First, MCHD argued that it timely supplemented its response to identify its trial witnesses. However, the appellate court noted that MCHD waited nine months before supplementing its response and held that the trial court thus acted within its discretion in determining that MCHD did not supplement "reasonably promptly."[104] Second, MCHD contended that because its supplemental response was made more than thirty days before trial, there should be a presumption that it was made reasonably promptly. The court also rejected this argument and held that if such a presumption was intended, it should have been written into the rule.[105] Finally, MCHD contended that because Burwell knew that this witness had seen some of the events at issue, Burwell could not be unfairly surprised.[106] However, the court held that Burwell was entitled to rely on MCHD's failure to disclose this witness. The court stated that a party should not have to anticipate the disclosure of a material witness simply because his testimony would be vital to the case, as the discovery rules were created to make that sort of anticipation unnecessary. Thus, the trial court did not abuse its discretion in excluding MCHD's witness.[107]

The El Paso Court of Appeals took a different approach in *Gutierrez v. Gutierrez*, a custody case between Kendall Gutierrez and Helen Brooks.[108] In that case, Brooks filed a witness list naming her attorney as a witness about her attorneys' fees and whether they were reasonable and necessary.[109] Brooks also supplemented her interrogatory responses to list her attorney as a person with knowledge of her attorneys' fees and that they were reasonable and necessary, but she did not identify her attorney in response to an interrogatory asking for the identity of all expert witnesses.[110] At trial, while Gutierrez objected to the admission of the attorney's expert testimony as not having been designated, the trial court allowed the testimony.[111] The court of appeals found no abuse of discretion, because the testimony presented no unfair surprise.[112] The court held that Brooks' discovery responses gave Gutierrez notice that the at-

102. Matagorda County Hosp. Dist. v. Burwell, 94 S.W.3d 75 (Tex. App.—Corpus Christi 2002, no pet.).
103. *Id.* at 80.
104. *Id.* at 81.
105. *Id.*; *see also* TEX. R. CIV. P. 193.5.
106. *Burwell*, 94 S.W.3d at 82.
107. *Id.* at 83.
108. Gutierrez v. Gutierrez, 86 S.W.3d 729, 731 (Tex. App.—El Paso 2002, no pet.).
109. *Id.* at 732.
110. *Id.* at 732-33.
111. *Id.* at 733.
112. *Id.* at 736-37.

torney would be testifying to both fact and opinion.[113] Gutierrez also argued that the admission of the attorney's testimony was improper because no evidence established good cause or inadvertence for failing to timely designate. However, the court pointed out that such testimony was not necessary to establish a lack of unfair surprise, which was the exception under which Brooks argued the attorney's testimony should be admitted.[114]

In *Ersek v. Davis & Davis*, Ersek brought a legal malpractice action against his former law firm of Davis & Davis.[115] Ersek did not disclose or identify any expert witnesses until a year after he filed suit, at which time he filed a supplemental response to his disclosures and identified David Shapiro as an expert witness. Ersek also included an affidavit from Shapiro as evidence in his response to Davis & Davis's motion for summary judgment. The trial court struck Shapiro's affidavit and granted the motion for summary judgment in favor of the defendant.[116]

On appeal, Ersek first contended that, while he did not meet the Rule 195.2 deadline for designating expert witnesses, his response was timely supplemented under Rule 193.5. The appellate court disagreed and held that Ersek was required to designate his experts by the Rule 195.2 deadline. The court indicated that Rule 193.5 supplementation could only be used if an expert was first timely designated and then another expert was substituted in his place.[117] Next, Ersek argued that he met the exceptions for late designation of expert witnesses under Rule 193.6. The appellate court found that Ersek did not meet the good cause exception because he waited more than a year to designate his expert witness. The court then held that Ersek was unable to establish lack of unfair surprise or prejudice, noting that simply because an expert was required to establish Ersek's cause of action, Davis & Davis could still be unfairly surprised by a late designation.[118] Finally, Ersek argued that striking the expert's affidavit in the summary judgment context was error because the discovery rules do not apply to summary judgments. The court of appeals held that Ersek could not introduce the affidavit at summary judgment because he could not testify at trial.[119] Thus, the trial court did not abuse its discretion in striking Ersek's expert witness affidavit.

The Texarkana Court of Appeals disagreed with *Ersek* in *Johnson v. Fuselier*.[120] In this case, the Johnsons sued Dr. Fuselier for medical malpractice and produced an expert affidavit five days before the hearing on a motion for summary judgment. The court granted Dr. Fuselier's mo-

113. *Id.* at 736.
114. *Id.* at 736-37.
115. Ersek v. Davis & Davis P.C., 69 S.W.3d 268 (Tex. App.—Austin 2002, pet. denied).
116. *Id.* at 270.
117. *Id.* at 271.
118. *Id.* at 272 (citing Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 915 (Tex. 1992) ("[I]t would hardly be right to reward competent counsel's diligent preparation by excusing his opponent from complying with the requirements of the rules.").
119. *Id.* at 273.
120. Johnson v. Fuselier, 83 S.W.3d 892, 897 (Tex. App.—Texarkana 2002, no pet.).

tion to strike the affidavit, and the court then granted summary judgment in favor of Dr. Fuselier.[121] On appeal, the Texarkana Court of Appeals held that Rule 193.6 does not apply in the summary judgment setting. It stated that because the promptness of a discovery response is determined in relation to the trial date, it was not possible at the time of summary judgment to determine whether or not supplementation had been timely.[122] Thus, the court held that the trial court had abused its discretion in striking the expert's affidavit at the summary judgment stage.[123]

In *In re K.S.*, the Amarillo Court of Appeals considered disclosure of expert witnesses in a suit to terminate both a mother's and father's parental rights.[124] In this case, the parents, W.S. and I.S., appealed the trial court's decision to allow testimony from witnesses who had not been disclosed by the Texas Department of Protective and Regulatory Services ("TDPRS").[125] I.S. served a Rule 194 request for disclosure on the TDPRS, in response to which the TDPRS did not identify certain witnesses.[126] At trial, W.S. objected to the testimony of those witnesses. The appellate court held that, because the request for disclosure was sent by I.S., W.S. did not have the right to object to TDPRS's response.[127] I.S. also objected to the testimony of those witnesses. However, the court held that I.S. should have requested an instruction limiting the admission of the expert testimony to the case against W.S. Because the testimony was admissible against W.S., the court said that I.S. was required to request a limiting instruction to preserve error. Therefore, the court held that I.S. waived her right to complain that the evidence was admitted for all purposes.[128]

V. SPOLIATION

In *State v. Gonzalez*, the Texas Supreme Court addressed the issue of spoliation in a wrongful death case.[129] A driver and three passengers were killed in an automobile accident when the driver went through an intersection that was missing a stop sign. At issue was whether the Texas Department of Transportation had actual notice that someone had removed the sign before the accident, since actual notice would waive the state's immunity under the Texas Torts Claims Act.[130] The plaintiff argued at trial that a missing sign-repair log book created an inference of actual notice of the removed stop sign.[131] The Texas Department of

121. *Id.* at 894.
122. *Id.* at 897.
123. *Id.* at 898.
124. *In re* K.S., 76 S.W.3d 36 (Tex. App.—Amarillo 2002, no pet.).
125. *Id.* at 39.
126. *Id.* at 40.
127. *Id.*
128. *Id.*
129. State v. Gonzalez, 82 S.W.3d 322 (Tex. 2002).
130. *Id.* at 327 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.060 (Vernon 1997 & Supp. 2003)).
131. *Id.* at 330.

Transportation sign worker whose log book was missing testified that he only recorded information about completed repairs, and that information concerning when he received notice that a sign was down would not have been included in the book.[132] Because the plaintiff failed to show any evidence that the missing log book would have contained any information relevant to the actual notice issue, the court held that an inference of actual notice was not appropriate. Consequently, it was improper for the jury to presume that the missing log book contained relevant information.[133]

In *Felix v. Gonzales*, the issue of an erroneous spoliation instruction was addressed by the San Antonio Court of Appeals.[134] In this case, the plaintiff Gonzales claimed that the defendant Felix rear-ended her, while Felix claimed that Gonzales side-swiped him. The jury found Felix seventy-five percent negligent and Gonzales twenty-five percent negligent, and the trial court awarded Gonzales $60,000 in damages.[135] After Gonzales argued that Felix had failed to produce a recorded statement given to his insurance adjuster, the court submitted an instruction to the jury permitting them to infer that the recorded statement, if produced, would have contained information unfavorable to Felix. After the trial court's judgment, Felix appealed, challenging several of the court's evidentiary rulings and the spoliation instruction.

The court noted that while intentional spoliation raises a presumption that the evidence would have been unfavorable to the spoliator, unintentional spoliation or failure to produce evidence within a party's control merely raises a rebuttable presumption that the missing evidence would be unfavorable.[136] If the non-producing party testifies as to the substance of the missing evidence, the opposing party is thus not entitled to the presumption.[137] Because there was no evidence that Felix had actually given a recorded statement, because written notes taken by the adjusters during the telephone conversations with Felix were turned over to the plaintiff, and because there was no evidence of intentional spoliation, the court of appeals found that the trial court abused its discretion in giving a spoliation instruction.[138]

The issue of death penalty sanctions in the context of spoliation was addressed by the Amarillo Court of Appeals in *Cummings v. Cire*.[139] A former client brought a legal malpractice action against her former attorneys. The trial court dismissed the plaintiff's lawsuit after it struck her pleadings due to her sustained discovery abuse, finding that she violated

132. *Id.*
133. *Id.*
134. Felix v. Gonzales, 87 S.W.3d 574 (Tex. App.—San Antonio 2002, pet. denied).
135. *Id.* at 577.
136. *Id.* at 80 (citing Ordonez v. M.W. McCurdy & Co., 984 S.W.2d 264, 273 & n.11 (Tex. App.—Houston [1st Dist.] 1998, no pet.)).
137. *Id.*
138. *Id.*
139. Cummings v. Cire, 74 S.W.3d 920 (Tex. App.—Amarillo 2002, no pet.).

four court orders, hid her relationship with other attorneys by refusing to answer deposition questions, forged documents, and deliberately destroyed or concealed certain material audio tapes.[140] Applying a six-factor test, the appellate court held that a lesser sanction must have been assessed before imposition of a sanction that would effectively terminate the plaintiff's litigation.[141] Among other reasons, the court noted that, although dismissing the claims of a litigant who has destroyed evidence may be appropriate at times, alternative remedies such as a spoliation instruction were available here. Because the trial court did not indicate that it considered any less severe alternative to striking the pleading, it was reversed.[142]

VI. MISCELLANEOUS DECISIONS OF NOTE

A. JUDICIAL NOTICE

In *O'Quinn v. Hall*, the Corpus Christi Court of Appeals considered the scope of judicial notice.[143] In that case, the trial court denied O'Quinn's motion to transfer venue on October 12, 2001. However, O'Quinn allegedly did not receive notice of the order until December 19, 2001. O'Quinn filed its notice of appeal on January 7, 2002. The trial court held that the notice was not timely filed.[144] At the hearing, O'Quinn produced ten affidavits from his attorneys stating that they did not receive notice of the trial court's October 12 order until December 19.[145] However, the trial court took judicial notice that a member of his staff had given all local counsel notice of the order by telephone on October 12.[146]

The court of appeals first determined that the trial court's actions fell within the category of taking judicial notice of adjudicative facts, which is governed by Texas Rule of Evidence 201.[147] The court then noted that assertions made by an individual are not the type of facts that are "capable of accurate and ready determination" as that rule requires, and that a member of the court's staff cannot be considered to be the court itself. Therefore, the trial court could not have taken judicial notice of the infor-

140. *Id.* at 924.
141. *Id.* at 927. The factors are: (i) evidence that some discovery abuse occurred; (ii) conduct during the entire litigation; (iii) the three purposes of sanctions, which are to punish those violating the rules, to deter other litigants from similar conduct, and to secure compliance with discovery rules; (iv) a direct relationship between the offensive conduct and the sanction imposed; (v) whether the sanction imposed is excessive or more severe than necessary to achieve the purposes itemized above; and (vi) to only impose sanctions that prevent disposition of a case on the merits is when a party has acted in flagrant bad faith or his counsel has callously disregarded the responsibilities implicit in the discovery rules. *Id.* (citing, among other authorities, Tjernagel v. Roberts, 928 S.W.2d 297, 303-04 (Tex. App.—Amarillo 1996, orig. proceeding).
142. *Id.* at 929.
143. O'Quinn v. Hall,77 S.W.3d 438 (Tex. App.—Corpus Christi 2002, no pet.).
144. *Id.* at 445.
145. *Id.* at 446.
146. *Id.*
147. *Id.* at 447.

mation provided by its staff.[148] Finally, the court of appeals held that the judge's conduct arguably violated Texas Rule of Evidence 605, which provides that a presiding judge may not testify as a witness in a trial, and stated that the trial judge's actions in this case created the appearance of bias, which Rule 605 seeks to prevent.[149] Therefore, the court held that the trial court abused its discretion in finding that O'Quinn had actual notice of the order on October 12, 2001.[150]

B. Parol Evidence

In *Liu v. City of San Antonio*,[151] Liu filed suit against the city claiming breach of contract and various other torts arising from her employment with the city. Prior to the suit, Liu had filed a grievance with the city alleging retaliatory treatment by her supervisors.[152] In an effort to resolve her grievance, Liu met with a city official, and the city official provided the city's written response to Liu's grievance. The response indicated that the city would remove certain documents from Liu's personnel file.[153] However, the documents were not removed, and Liu subsequently filed suit.[154] The city moved for summary judgment, arguing that there was no contract between the city and Liu.[155] Liu alleged that the written response provided by the city official constituted a contract between herself and the city and provided an affidavit to that effect.[156] The court first analyzed the response and held that it was not a contract.[157] The court went on to cite the parol evidence rule and say that Liu's affidavit could not refute the unambiguous meaning of the response. The court therefore held that the city and Liu did not have a written contract.[158]

C. Hearsay

Volkswagen of America, Inc. v. Ramirez was a products liability action involving a defective wheel assembly.[159] At trial, the court admitted testimony from a "mystery" witness who had seen the accident at issue. The testimony consisted of a videotaped statement of an eye witness interviewed by a local news crew at the scene. The witness refused to identify himself and his face was not shown on camera. He stated that "the tire

148. *Id.*
149. *Id.* at 448.
150. *Id.*
151. Lui v. City of San Antonio, 88 S.W.3d 737, 740-41 (Tex. App.—San Antonio 2002, pet. denied).
152. *Id.* at 739.
153. *Id.* at 740.
154. *Id.* at 740-41.
155. *Id.* at 741.
156. *Id.* at 742-43.
157. *Id.* at 742.
158. *Id.* at 742-43.
159. Volkswagen of Am., Inc. v. Ramirez, 79 S.W.3d 113 (Tex. App.—Corpus Christi 2002, pet. granted).

blew up and it headed across the median and it hit the car . . . ." The witness was never located or deposed.[160]

On appeal, Volkswagen argued that the admission of this statement was inadmissible hearsay and reversible error.[161] The court of appeals first concluded that the statement was not hearsay, because it was not offered to prove the truth of the matter asserted.[162] The court went on to note that the trial court could have admitted the witness's statement as an "excited utterance" pursuant to Texas Rule of Evidence 803(2), noting that the witness's statement was made shortly following the collision while emergency personnel were still on the scene attending to the lone survivor. The court downplayed the fact that the witness's comments were made in response to questions and that there was a period of time from the accident until the witness's statement. The court held that because of the videotape the trial court had the "singular opportunity" to judge whether the witness was still under the stress of the excitement caused by the accident. Therefore, the court of appeals concluded that the trial court had not abused its discretion in admitting the videotaped statement.[163]

160. *Id.* at 121-22.
161. *Id.* at 121.
162. *Id.* at 122.
163. *Id.*