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Donald Colleluori

Gary D. Eisenstat

Bill E. Davidoff

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CIVIL PROCEDURE

*Donald Colleluori**

*Gary D. Eisenstat***

*Bill E. Davidoff****

THE major developments in the field of civil procedure during the Survey period occurred through judicial decisions.

I. SUBJECT MATTER JURISDICTION

In *Subaru of America, Inc. v. David McDavid Nissan, Inc.*,¹ the Texas Supreme Court attempted to clarify the oft-confused doctrines of primary jurisdiction and exclusive jurisdiction with respect to proceedings before an administrative agency.² The supreme court explained that, “[d]espite similar terminology, primary jurisdiction is prudential whereas exclusive jurisdiction is jurisdictional.”³ Under the primary jurisdiction doctrine, both the courts and the administrative agency have the authority to make the initial determination of a matter in dispute.⁴ A trial court should nevertheless defer to the administrative agency, and abate any lawsuit until the agency has made a determination, if the agency has special expertise in the matter and a significant benefit would be derived from the agency’s uniform interpretation of its laws, rules, and regulations.⁵ Under the exclusive jurisdiction doctrine on the other hand, the administrative agency is legislatively granted “the sole authority to make the initial determination in a dispute.”⁶ In the latter situation, a party must exhaust all administrative remedies before seeking judicial review of the agency’s action,” and, “until then, the trial court lacks subject matter jurisdiction.”⁷

* B.A., Dickinson College; J.D., New York University. Partner, Figari Davenport & Graves, L.L.P., Dallas, Texas.

** B.S. University of Colorado; J.D., Boston University. Partner, Figari Davenport & Graves, L.L.P., Dallas, Texas.

*** B.B.A., University of Texas; J.D., Southern Methodist University. Partner, Figari Davenport & Graves, L.L.P., Dallas, Texas.

1. *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212 (Tex. 2002).

2. *Id.* at 220.

3. *Id.*

4. *Id.* at 221.

5. *Id.*

6. *Id.*

7. *Id.* Lacking subject matter jurisdiction, the trial court should ordinarily dismiss claims that are within the agency’s exclusive jurisdiction. *Id.* If the statutory scheme requires the agency to make certain findings as a predicate to a court’s adjudication of the claim, however, and a party files suit prematurely, the trial court may simply abate the case until such time as the jurisdictional impediment is removed. *Id.* at 221-22.

A putative class representative had his case dismissed because he lacked standing to seek injunctive or declaratory relief in *Met-Rx USA, Inc. v. Shipman*.⁸ After bringing his own separate personal injury suit arising out of his use of defendants' nutritional supplements, plaintiff sought to represent a class action to enjoin the marketing and distribution of those products without proper warnings.⁹ The trial court certified the class, but the Waco Court of Appeals reversed on the ground that the trial court lacked subject matter jurisdiction.¹⁰ In doing so, the appellate court relied on the plaintiff's own pleading, in which he alleged that he had stopped using defendants' products.¹¹ Based on this allegation, and the plaintiff's testimony at the class certification hearing that he did not plan to use such products in the future, the court concluded that he had no individual interest in the prospective relief being requested and, therefore, lack standing to pursue such claims.¹²

In *Reynolds v. Reynolds*,¹³ the Austin Court of Appeals, *sua sponte*, raised the issue of the trial court's jurisdiction over a suit for a declaration that there was no common law marriage between the parties under Texas law.¹⁴ The court noted that neither party had filed a divorce action in Texas, nor would they have been able to in the immediate future given that they did not reside in Texas.¹⁵ Indeed, it had been many years since either party had any contact with the state of Texas.¹⁶ Under these circumstances, the court of appeals held that a Texas district court was not an appropriate forum for the declaratory judgment action, and that the Texas courts lacked subject matter jurisdiction because there was a lack of a justiciable controversy in Texas.¹⁷

As most practitioners know, a bill of review is an independent action to set aside a judgment, and only the court that rendered the judgment has jurisdiction over such a proceeding.¹⁸ The parties in *Richards v. Commission for Lawyer Discipline*¹⁹ agreed on this proposition, but disagreed on whether the case was actually brought in the proper court.²⁰ In this regard, the bill of review plaintiff styled his petition to reflect the original cause number and court that entered the judgment, but the district clerk filed the case with a new cause number in a different court.²¹ An as-

8. *Met-Rx USA, Inc. v. Shipman*, 62 S.W.3d 807 (Tex. App.—Waco 2001, pet. denied).

9. *Id.* at 808-09 n.1.

10. *Id.* at 812.

11. *Id.* at 811.

12. *Id.* at 811-12.

13. *Reynolds v. Reynolds*, 86 S.W.3d 272 (Tex. App.—Austin 2002, no pet. h.).

14. *Id.* at 275.

15. *Id.* at 276-77.

16. *Id.* at 277.

17. *Id.* at 277-78.

18. See, e.g., *Solomon, Lambert, Roten & Assoc., Inc. v. Kidd*, 904 S.W.2d 896, 899 (Tex. App.—Houston [1st Dist.] 1995, no writ).

19. *Richards v. Comm'n for Lawyer Discipline*, 81 S.W.3d 506, 508 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

20. *Id.* at 508.

21. *Id.* at 508-09.

signed judge heard the matter, and the judgment he entered reflected that he was sitting for the latter court.²² Because there was no motion or order reflecting a transfer of the case from the court assigned by the district clerk back to the court that rendered the original judgment, and no indication that the designation of the court that entered the judgment was a typographical error, the Houston Court of Appeals, First District, reversed for lack of subject matter jurisdiction.²³

Finally, the Houston Court of Appeals, First District, in *Tovias v. Wildwood Properties Partnership, L.P.*²⁴ discussed the proper procedure for asserting that another court has already acquired dominant jurisdiction over the subject matter of a suit. The court of appeals stated that district courts in Texas are courts of general jurisdiction.²⁵ Accordingly, the proper procedure for asserting dominant jurisdiction when there is already another lawsuit between the parties covering the same subject matter is by plea in abatement.²⁶ The district court erred, therefore, in "granting the plea to the jurisdiction and dismissing the case."²⁷

II. SERVICE OF PROCESS

Two cases during the Survey period addressed whether a plaintiff exercised reasonable diligence in effecting service of a citation so as to avoid a statute of limitations defense.²⁸ In *Carter v. MacFadyen*,²⁹ the Houston Court of Appeals, Fourteenth District, confirmed that pro se plaintiffs are held to the same standard of diligence applicable to licensed attorneys.³⁰ The plaintiff had attempted to personally serve a physician defendant on six separate occasions, and then ultimately moved for substituted service, which was successfully achieved 8 ½ months after filing suit.³¹ Despite the foregoing, the court found that there was no explanation why the plaintiff "kept trying to personally serve [the physician] personally for four months, when it was clear the doctor could not or would not cooperate with those efforts."³² Because defendant's usual place of business was readily apparent, the court held the pro se plaintiff did not exercise rea-

22. *Id.* at 509.

23. *Id.* at 509-10.

24. *Tovias v. Wildwood Prop. P'ship, L.P.*, 67 S.W.3d 527 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

25. *Id.* at 529.

26. *Id.*

27. *Id.*; but see *McAlister v. McAlister*, 75 S.W.3d 481, 486 (Tex. App.—San Antonio 2002, pet. denied) (holding complaint regarding dominant jurisdiction was not mooted by subsequent voluntary dismissal of first lawsuit, and trial court's order granting plea in abatement and dismissing second lawsuit was proper).

28. A plaintiff who files suit within the limitations period, but does not serve citation until after limitations has run, must have exercised "diligence" in effecting service or his claim will be time-barred. See *Grant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990).

29. *Carter v. MacFadyen*, 93 S.W.3d 307 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

30. *Id.* at 313; *Weaver v. E-Z Mart Stores, Inc.*, 942 S.W.2d 167, 169 (Tex. App.—Texarkana 1997, no pet.).

31. *Carter*, 93 S.W.3d at 314.

32. *Id.*

sonable diligence because he should have sought substituted service at an earlier date.³³

In *Baker v. Monsanto Co.*,³⁴ the Houston Court of Appeals, First District, held that an intervenor's claims were barred by limitations because it had failed to use reasonable diligence in serving the defendant.³⁵ In a somewhat unusual set of facts, the plaintiff originally filed suit against Monsanto, but Monsanto had not yet been served when an intervenor filed its petition and attempted to serve Monsanto by certified mail, return receipt requested.³⁶ Monsanto's counsel advised the intervenor that it would not accept service by certified mail, as Monsanto had not yet been served by plaintiff or appeared as a party in the action. Almost a year later, the plaintiff did serve Monsanto, which then filed its original answer solely to plaintiff's original petition. Notably, the intervenor did not effectuate service on Monsanto.

Thereafter, the trial court granted Monsanto's motion for summary judgment holding that the intervenor's claims were barred by limitations.³⁷ On appeal, the intervenor claimed (1) it had successfully served Monsanto during the limitations period by certified mail and, alternatively, (2) Monsanto had appeared in the matter by filing its original answer to plaintiff's petition prior to the expiration of the limitations period. The court rejected both of the intervenor's arguments. First, the court reaffirmed that an intervenor may, under Rule 21a, serve a petition in intervention on the parties to the suit by notifying opposing counsel of the filing of such pleadings.³⁸ However, citation is necessary when the intervenor requests relief against a defendant who has not yet appeared, which was the case in this instance.³⁹ Second, the court found that Monsanto had not received or waived required service of the intervenor's petition.⁴⁰ Rather, Monsanto's answer was directed specifically to the allegations in plaintiff's claims, not those asserted by the intervenor.⁴¹

As most practitioners are aware, to support a default judgment based upon substituted service, the record must show that reasonable diligence was used in seeking service on the corporation's registered agent at the registered office.⁴² In *Wright Bros. Energy, Inc. v. Krough*,⁴³ the plaintiff

33. *Id.*; see *Doue v. City of Texarkana*, 786 S.W.2d 474, 477 (Tex. App.—Texarkana 1990, writ denied) (a "flurry of ineffective activity does not constitute due diligence if easily available and more effective alternatives are ignored." *Carter*, 93 S.W.3d at 314-15).

34. *Baker v. Monsanto Co.*, 77 S.W.3d 477 (Tex. App.—Houston [1st Dist.] 2002, pet. filed).

35. *Id.* at 481.

36. *Id.* at 479; see TEX. R. CIV. P. 21a (allowing service by certified mail, return receipt requested, on parties to a suit).

37. *Baker*, 77 S.W.3d at 479.

38. *Id.* at 480; TEX. R. CIV. P. 21a; *McWilliams v. Snap-Pac Corp.*, 476 S.W.2d 941, 949-50 (Tex. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.).

39. *Baker*, 77 S.W.3d at 480.

40. *Id.* at 481.

41. *Id.*

42. TEX. BUS. CORP. ACT. ANN. art. 2.11(b) (Vernon 2003).

43. *Wright Bros. Energy, Inc. v. Krough*, 67 S.W.3d 271 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

attempted to serve the corporation's registered agent by certified mail, return receipt requested, on two separate occasions.⁴⁴ Each time, the envelope was returned with an indication that service was attempted but there was no such known address.⁴⁵ The plaintiff next served the Secretary of State as the corporation's agent⁴⁶ and later obtained a default judgment.⁴⁷ The Houston Court of Appeals, First District, reversed the default judgment, however, holding that the facts in the record "were sufficient to put a party attempting service by mail on notice that there was a problem with the address."⁴⁸ Thus, because the returned citation did not reflect why it was returned or rejected, the court held the plaintiff did not exercise reasonable diligence as a matter of law.⁴⁹

III. SPECIAL APPEARANCE

As most practitioners are aware, special appearances are subject to the due order of pleading requirement. Two cases during the Survey period addressed whether a defendant waived its special appearance, thereby subjecting itself to the jurisdiction of the court.

In *Gutierrez v. Deloitte & Touche*,⁵⁰ the San Antonio Court of Appeals held that the defendant, who had received an adverse ruling on a motion to compel, did not waive its special appearance by filing in the appellate court a petition for writ of mandamus and motion for emergency stay and temporary injunction, without stating that the pleadings were subject to the defendant's special appearance.⁵¹ First, the court held the petition and motion were not "pleadings," because they did not allege a cause of action or a ground of defense.⁵² Second, "jurisdiction of the various trial courts and appellate courts is independently conferred by law."⁵³ Therefore, the court held that a party's appearance before an appellate court did not constitute a general appearance before the trial court.⁵⁴ Finally, the court held that "the use of mandamus proceedings to challenge discovery orders [constituted] a 'use of discovery processes' envisioned by Rule 120a" and, therefore, did not run afoul of the limitations regarding special appearances.⁵⁵

44. *Id.* at 272-73.

45. *Id.*

46. TEX. BUS. CORP. ACT. ANN. art. 2.11(b).

47. *Krough*, 67 S.W.3d at 273.

48. *Id.* at 274.

49. *Id.* at 275.

50. *Gutierrez v. Deloitte & Touche*, No. 04-01-00637-CV, 2002 Tex. App. LEXIS 2195 (Tex. App.—San Antonio Mar. 27, 2002), *as supplemented* 2003 Tex. App. LEXIS 823 (Tex. App.—San Antonio Jan. 29, 2003, pet filed).

51. *Id.* at *4.

52. *Id.* at *6-7.

53. *Id.* at *7.

54. *Id.*

55. *Id.*; TEX. R. CIV. P. 120a(1) provides: "The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance."

In *Von Briesen, Purtell & Roper, S.C. v. French*,⁵⁶ the Amarillo Court of Appeals reminded practitioners “that once a party has filed an answer or otherwise appeared” in a lawsuit, “he is before the court for all purposes,” including cross-actions.⁵⁷ In this case, although the defendant had filed an answer in response to plaintiff’s petition, when its co-defendant asserted cross-claims, it filed a special appearance and moved to dismiss those cross-claims. The court of appeals, of course, held that the defendant had already appeared in the matter.⁵⁸

IV. VENUE

The Houston Court of Appeals, Fourteenth District, in *Reliant Energy, Inc. v. Gonzales*,⁵⁹ reconciled arguably conflicting venue provisions in the Texas Probate Code and Texas Civil Practices and Remedies Code. In this wrongful death action, the plaintiff first filed suit in the Hidalgo County probate court where her husband’s estate was being probated. While venue was arguably proper in Hidalgo County under sections 5A and 5B of the Texas Probate Code, venue was not proper against Reliant under the Texas Civil Practices and Remedies Code.⁶⁰ Reliant moved to transfer venue of the wrongful death action to Harris County, which the probate court denied.⁶¹ The plaintiff then filed a second suit in the Harris County district court asserting the same claims and seeking the same relief as in her probate court suit. The plaintiff then moved to consolidate both wrongful death actions in Hidalgo County before the probate court. However, Reliant answered the Harris County suit and filed a counterclaim seeking an anti-suit injunction. The Hidalgo probate court subsequently granted the consolidation motion and the Harris County court denied Reliant’s request for injunctive relief.⁶² In resolving the conflict between the Texas Civil Practices and Remedies Code and the Texas Probate Code, the court of appeals noted that both courts had subject-matter jurisdiction over the wrongful death action. Under section 15.007 of the Texas Civil Practices and Remedies Code, however, the general venue statute prevails in the event of a conflict with venue provisions of the Texas Probate Code in an administrator’s suit for personal injury, death, or property damage.⁶³

In *In re Pepsico, Inc.*,⁶⁴ the Texarkana Court of Appeals held that an amended motion to transfer venue, which contained a mandatory venue

56. *Von Briesen, Purtell & Roper, S.C. v. French*, 78 S.W.3d 570 (Tex. App.—Amarillo 2002, pet. dism’d w.o.j.).

57. *Id.* at 575.

58. *Id.*

59. *Reliant Energy, Inc. v. Gonzales*, No. 01-02-00679-CV, 2002 Tex. App. LEXIS 6655, (Tex. App.—Houston [14th Dist.] Sept. 6, 2002, pet. denied), *vacated*, 2003 Tex. App. LEXIS 3665 (Tex. App.—Houston [1st Dist.] Apr. 29, 2003).

60. *Id.* at *8.

61. *Id.* at *4-5.

62. *Id.*

63. *Id.* at *14-15.

64. *In re Pepsico, Inc.*, 87 S.W.3d 787 (Tex. App.—Texarkana 2002, no pet. h.).

argument not advanced in the original motion, was timely asserted prior to the venue hearing.⁶⁵ In reaching this conclusion, the appellate court analogized to the former plea of privilege, and noted that a timely amendment to a plea of privilege was permitted and did relate back to the filing of the initial pleading.⁶⁶ The court held that the same pleading amendment rules should apply to the current motion to transfer practice.⁶⁷

V. PARTIES

Once again, class actions were a hot topic during the Survey period. In two cases, the Texas Supreme Court had the opportunity to refine and further explain its holding in *Southwestern Refining Co. v. Bernal*.⁶⁸ In *Henry Schein, Inc. v. Stromboe*,⁶⁹ the Texas Supreme Court held that it had jurisdiction over an interlocutory appeal from an order certifying a class action because the certification order failed to follow *Bernal* in two respects.⁷⁰ First, the court held that the trial court's certification order failed to demonstrate how the class "claims will likely be tried so that conformance with Rule 42 may be meaningfully evaluated."⁷¹ The Austin Court of Appeals had held that the trial court's certification order satisfied *Bernal*'s requirements because

the certification hearing was lengthy, the trial court identified a number of factual and legal issues common to class members, disgorgement of amounts paid was the plaintiffs' "primary measure of damages" and could be proved from [the defendant's] records, "reliance was not a critical issue," and, finally, proof of consequential and other damages was manageable.⁷²

The Texas Supreme Court disagreed, however, holding that the plaintiffs had not abandoned certain other causes of action and damage claims not addressed in the certification order, and that these issues would present problems on a class basis.⁷³

Second, the supreme court held that the trial court had failed to follow *Bernal*'s requirement that "[c]ourts must perform a 'rigorous analysis' before ruling on class certification to determine whether all prerequisites to certification have been met."⁷⁴ In particular, the certification order did not set forth any plan for trying plaintiffs' claims. Accordingly, the court held that the trial court had failed to satisfy *Bernal*'s requirements

65. *Id.* at 794.

66. *Id.* at 792-93.

67. *Id.* at 793.

68. *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000).

69. *Henry Schein, Inc. v. Stromboe*, 103, No. 00-1162, 2002 Tex. LEXIS 178 (Oct. 31, 2002).

70. *Id.* at *41.

71. *Id.* at *31.

72. *Id.* at *33.

73. *Id.* at *32.

74. *Id.* at *37-38.

and the court of appeals' review was inadequate.⁷⁵ In fact, the court of appeals had merely stated that we are confident that any individual damages issues may be resolved in a "manageable, time efficient, yet fair manner."⁷⁶ The supreme court found that the court of appeals had "brushed aside arguments that the trial court had not explained how other individual issues like reliance and other claims, like fraud, would be tried."⁷⁷ Accordingly, the court reaffirmed its position that "*Bernal* requires actual, demonstrated compliance with Rule 42."⁷⁸

In *State Farm Mutual Automobile Insurance Co. v. Lopez*,⁷⁹ the Texas Supreme Court held that it did not have jurisdiction to review a class certification order because the Corpus Christi Court of Appeals' opinion did not conflict with *Bernal*.⁸⁰ In *Lopez*, the appellant argued that *Bernal* "required the trial court to examine the merits of the plaintiffs' claims before certifying a class."⁸¹ The court of appeals disagreed and was affirmed by the supreme court, which held that "*Bernal* does not require trial courts to evaluate the merits of the plaintiffs' claims" when determining whether to certify the class.⁸²

In *Wood v. Victoria Bank & Trust Co.*,⁸³ the Corpus Christi Court of Appeals addressed the circumstances under which a trial judge may change his mind and de-certify a class, which he had previously certified and which certification had been affirmed by the court of appeals.⁸⁴ The court held that the trial court had not abused its discretion in de-certifying the class for two reasons. "First, the trial court [had] acknowledged that it initially certified the class" prior to the Texas Supreme Court's opinion in *Bernal*.⁸⁵ "Second, . . . as the case developed, the trial [court] became increasingly aware of the difficulty of managing [the] litigation as a class action."⁸⁶ In particular, the trial "judge remarked . . . during the hearing on the motion to decertify that, in his opinion, [the] class action was not manageable, and that the plaintiffs, defendants, and especially the jury would be 'at a disadvantage' were [the] matter to proceed to trial as a class action."⁸⁷

75. *Id.* at *36-37.

76. *Id.* at *39-40.

77. *Id.*

78. *Id.*

79. *State Farm Mut. Auto Ins. Co. v. Lopez*, 129, No. 01-0540, 2002 Tex. LEXIS 176 (Oct. 31, 2002) (per curiam).

80. *Id.* at *3-4.

81. *Id.* at *2.

82. *Id.* at *3-4.

83. *Wood v. Victoria Bank & Trust Co.*, 69 S.W.3d 235 (Tex. App.—Corpus Christi 2001, no pet.).

84. *Id.* at 237.

85. *Id.* at 239.

86. *Id.*

87. *Id.*

VI. PLEADINGS

The omission of parties in amended pleadings was once again a popular topic during the Survey period. In *Cudd Pressure Control, Inc. v. Sonat Exploration Co.*,⁸⁸ several plaintiffs sued Sonat Exploration Co. and Cudd Pressure Control, Inc. for damages arising out of a gas well blow-out. Sonat cross-claimed for contractual indemnity against Cudd, and filed a separate lawsuit against Brooks Well Servicing Company, also for contractual indemnity.⁸⁹ The trial court consolidated the two lawsuits and then severed the contractual indemnity claims.⁹⁰ Immediately before the severed indemnity claims were to proceed to trial, Brooks filed a motion to continue, which the trial court granted.⁹¹ However, the trial court also held that Sonat's claims against Cudd should go forward as scheduled.⁹² Notably, although the trial court ordered separate trials, it did not sever Sonat's claims against Brooks and Cudd into separate suits.⁹³

"Less than two weeks after the trial court ordered separate trials, and less than ten days before the trial [on Sonat's claims against Cudd], Sonat filed its second and third amended petitions."⁹⁴ In those amended petitions, Sonat omitted any reference to Brooks in either the caption or the body of those petitions.⁹⁵ Accordingly, Brooks argued that Sonat had non-suited its claims against it.⁹⁶ Although the Texarkana Court of Appeals recognized the general rule that the omission of a defendant from a plaintiff's amended petition has the affect of dismissing that defendant from the lawsuit, it found that the general rule was inapplicable under these facts.⁹⁷ Rather, the court held that in cases involving multiple parties, "after there has been an order for separate trials . . . a plaintiff does not automatically dismiss a previously-named party . . . by filing [amended] pleadings pertaining to one separate trial that omit that party whose rights or liabilities are the subject of another separate trial in the same case."⁹⁸

In *Green v. Vidlak*,⁹⁹ the plaintiff amended its petition after the trial court sustained one of the defendant's special exceptions.¹⁰⁰ Although both defendants remained in the style of the amended petition, one of the defendants was completely omitted from the body of the pleading.¹⁰¹ Under these facts, the Amarillo Court of Appeals held that the omitted

88. *Cudd Pressure Control, Inc. v. Sonat Exploration Co.*, 74 S.W.3d 185 (Tex. App.—Texarkana 2002, pet. denied).

89. *Id.* at 187.

90. *Id.*

91. *Id.*

92. *Id.* at 187-88.

93. *Id.* at 188.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Green v. Vidlak*, 76 S.W.3d 117 (Tex. App.—Amarillo 2002, no pet.).

100. *Id.* at 118.

101. *Id.*

defendant had been non-suited by the plaintiff.¹⁰²

In *Doyer v. Pitney Bowes, Inc.*,¹⁰³ the Austin Court of Appeals analyzed whether claims asserted in plaintiff's original petition, which were otherwise barred by limitations, constituted a counter-claim such that they would not be barred by limitations under section 16.069 of the Texas Civil Practice & Remedies Code.¹⁰⁴ In this matter, Randolph Doyer and Pitney Bowes, Inc. executed a rental contract for a postage meter machine. Additionally, Doyer and Pitney Bowes' subsidiary, Pitney Bowes Credit Corporation, executed a rental contract for mailroom equipment. Pitney Bowes initially sued Doyer in a justice of the peace court alleging that he had breached the postage meter contract.¹⁰⁵ However, that case did not proceed to trial. Thereafter, Doyer filed suit in district court against Pitney Bowes and Pitney Bowes Credit alleging damages pertaining exclusively to the mailroom equipment contract.¹⁰⁶ Although Pitney Bowes was not a party to the mailroom equipment contract, Doyer alleged that the two entities were co-conspirators acting as a single business enterprise.¹⁰⁷

Pitney Bowes moved for summary judgment alleging that Doyer's claims were barred by limitations. In response, Doyer argued that his lawsuit was "filed in the nature of a compulsory counterclaim to the lawsuit filed by [Pitney Bowes] in . . . the small claims court."¹⁰⁸ In particular, Doyer argued that only the district court had jurisdiction to decide his "counterclaim" because his damages exceeded the jurisdictional limit of the small claims court.¹⁰⁹ Based on the foregoing, Doyer claimed that section 16.069 precluded the court from determining his claims were barred by limitations.¹¹⁰

The court of appeals disagreed, holding that section 16.069 did not extend the limitation period for Doyer's claims against Pitney Bowes.¹¹¹ First, the court found that Doyer's claims pertaining to the mailroom equipment contract were independent causes of action contained in a plaintiff's petition and, therefore, did not constitute counterclaims.¹¹²

102. *Id.* at 120.

103. *Doyer v. Pitney Bowes, Inc.*, 80 S.W.3d 215 (Tex. App.—Austin 2002, pet. denied).

104. *Id.* at 217-18. Section 16.069 of the Texas Civil Practice & Remedies Code provides:

(a) If a counterclaim or cross-claim arises out of the same transaction or occurrence that is the basis of an action, a party to that action may file the counterclaim or cross-claim even though as a separate action it would be barred by limitation on the date the party's answer is required.

(b) The counterclaim or cross-claim must be filed no later than the 30th day after the date on which the party's answer is required.

TEX. CIV. PRAC. & REM. CODE § 16.069 (Vernon 1997).

105. *Doyer*, 80 S.W.3d at 216-17.

106. *Id.* at 217.

107. *Id.*

108. *Id.* at 218.

109. *Id.*

110. *Id.*

111. *Id.* at 219.

112. *Id.* at 219-20.

Second, the court found that it was immaterial that Doyer could not bring the alleged counterclaim in small claims court because of the jurisdictional limits.¹¹³ The court found that “[w]hen a counterclaim is compulsory, as Doyer [was claiming], the defendant is not at liberty to decline battle in the forum chosen by the plaintiff.”¹¹⁴ Rather, the court held that Doyer had produced no evidence that he could not have filed his alleged counterclaim, within the limitations period, in a court having jurisdiction.¹¹⁵

VII. DISCOVERY

The Texas appellate courts had more opportunities to interpret the 1999 amendments to the Texas Rules of Civil Procedure during the Survey period.

A. DISCOVERY PROCEDURES AND SCOPE

*In re Shipmon*¹¹⁶ addressed authorizations for the disclosure of medical records and bills in personal injury suits. The Amarillo Court of Appeals noted that new Rule 194.2,¹¹⁷ governing requests for disclosures, specifically provides for the production of “medical records and bills . . . or, in lieu thereof, an authorization permitting [their] disclosure.”¹¹⁸ The court rejected the plaintiff’s argument that the trial court’s order requiring her to provide such an authorization was unauthorized because it required her to produce documents that were not already in existence.¹¹⁹ Instead, the court construed that the trial court’s order, and presumably Rule 194.2 itself, as impliedly requiring the party seeking discovery to prepare the form of authorization and the responding party merely to sign it.¹²⁰

Rule 192.3(f)¹²¹ specifically provides that an insurance policy that may provide coverage for a claim is discoverable.¹²² The plaintiff in *In re Senior Living Properties, L.L.C.*¹²³ sought additional discovery regarding the defendants’ insurance coverage, however, namely the deposition of a witness with knowledge of the extent to which such insurance had already been eroded, the effect of any pending litigation on the available coverage, and the self-insured retention applicable to the case.¹²⁴ The defendants argued that this information was not discoverable, but the Tyler

113. *Id.* at 220.

114. *Id.*

115. *Id.*

116. *In re Shipmon*, 68 S.W.3d 815 (Tex. App.—Amarillo 2001, orig. proceeding [mand. denied]).

117. TEX. R. CIV. P. 194.2.

118. TEX. R. CIV. P. 194.2(j), (k); see *Shipmon*, 68 S.W.3d at 819-20.

119. *Shipmon*, 68 S.W.3d at 818-19.

120. *Id.* at 819.

121. TEX. R. CIV. P. 192.3(f).

122. *Id.*

123. *In re Senior Living Props., L.L.C.*, 63 S.W.3d 594 (Tex. App.—Tyler 2002, orig. proceeding).

124. *Id.* at 596-97.

Court of Appeals disagreed.¹²⁵ The court reasoned that the specific authorization of Rule 192.3(f) should not be read as a limitation on any additional discovery related to the insurance policy.¹²⁶ Moreover, the court rebuffed the defendants' arguments that they might be required to disclose confidential settlements in other cases, or privileged analysis of pending litigation, noting that objections on those bases could be raised in response to specific questions that might be posed to the deponent.¹²⁷

*Compaq Computer Corp. v. Lapray*¹²⁸ involved the interplay between the discoverability of documents and the sealing of court records. Compaq appealed a trial court's order unsealing certain documents that had been filed as part of the plaintiffs' class certification motion.¹²⁹ Compaq complained, under several different issues it presented on appeal, that the trial court should not have conducted a hearing under Rule 76a¹³⁰ because the documents in question either were not discoverable, were not "legitimately" court records, or did not relate to the class certification issues.¹³¹ The Beaumont Court of Appeals rejected each of these arguments, noting that once documents are actually filed with the court, as they were in this case, they are indisputably "court records" within the meaning of Rule 76a(2)(a)¹³² and, therefore, the procedures required by Rule 76a must then be followed.¹³³

B. PRIVILEGES AND EXEMPTIONS

The Texas Supreme Court addressed the issue of legislative immunity from discovery in *In re Perry*.¹³⁴ The court held that when a person acts in a legislative capacity, then both he and his legislative aides may claim immunity from having to give testimony regarding those actions.¹³⁵ The court further held, however, that such immunity can be waived like any other privilege.¹³⁶ Moreover, the court considered, but did not have to decide, whether a legislator's testimonial privilege might also be "subject to limited, very closely guarded exceptions when invidious legislative intent is an element of a cause of action."¹³⁷ The court noted that, even if it were to recognize such an exception, the party seeking the testimony would have to have first exhausted all other available evidentiary sources,

125. *Id.* at 597.

126. *Id.* at 597.

127. *Id.* at 598.

128. *Compaq Computer Corp. v. Lapray*, 75 S.W.3d 669 (Tex. App.—Beaumont 2002), *aff'd*, 79 S.W.3d 779 (Tex. App.—Beaumont 2002, pet filed).

129. *Id.* at 670-71.

130. TEX. R. CIV. P. § 76a.

131. *Compaq*, 75 S.W.3d at 672-74.

132. TEX. R. CIV. P. § 76a(2)(a) (defining court records to include "all documents of any nature filed in connection with any matter before any civil court").

133. *Compaq*, 75 S.W.3d at 672-74.

134. *In re Perry*, 60 S.W.3d 857 (Tex. 2001).

135. *Id.* at 858.

136. *Id.* at 862.

137. *Id.* at 861.

which had not happened in the case before it.¹³⁸

A party's use of videotaped statements from its employees in a mediation led to a discovery dispute in *In re Learjet Inc.*¹³⁹ After the mediation failed, the opposing party requested production of both the edited videotapes it had seen and the unedited original tapes.¹⁴⁰ The Texarkana Court of Appeals rejected the relator's argument that the videotapes were privileged or otherwise not discoverable simply because they were prepared for the mediation.¹⁴¹ According to the court, the relevant question was whether the substance of the videotapes was itself protected by the attorney-client privilege.¹⁴² Although the videotapes consisted of the employer's attorney questioning the employees, the court concluded that this content did not fall within the attorney-client privilege, apparently because the communications were expressly intended to be shared with the opposing party at mediation.¹⁴³ Moreover, the court pointed out that the employees interviewed had also been designated as testifying expert witnesses, and the tapes would be discoverable on that basis as well.¹⁴⁴

*In re Lincoln Electric Co.*¹⁴⁵ demonstrates the far less rigid approach to the preservation of privilege claims reflected in the 1999 amendments to the Texas Rules of Civil Procedure. In this case, the relator filed motions for protective order with respect to the timing of a subpoena duces tecum served with a deposition notice, and then served objections to the specific document requests themselves as being "overly broad, vague, ambiguous, and not document-specific."¹⁴⁶ Only after these objections were overruled did relator serve a supplemental response raising claims of attorney-client and work product privilege, and indicating that it was withholding documents on that basis.¹⁴⁷ The parties seeking discovery responded with a motion to compel arguing that these privilege claims were untimely and were therefore waived.¹⁴⁸ After initially indicating that it would review the disputed documents *in camera* to determine if they were in fact privileged, the trial judge ultimately entered an order ruling that any privilege had been waived.¹⁴⁹

The Beaumont Court of Appeals conditionally granted relator's writ of

138. *Id.* at 861-62.

139. *In re Learjet Inc.*, 59 S.W.3d 842 (Tex. App.—Texarkana 2001, orig. proceeding [mand. diss'm'd]).

140. *Id.* at 844.

141. *Id.* at 845 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(c) (Vernon Supp. 2001) (written material used in mediation is discoverable if it is discoverable independent of the mediation)).

142. *Learjet*, 59 S.W.3d at 845.

143. *Id.* at 846.

144. *Id.* at 846-47. The court was probably on less solid ground when, as part of its basis for rejecting the privilege claim, it explained that the tapes did not include explicit discussions of legal strategies or advice. *Id.* at 846.

145. *In re Lincoln Electric Co.*, 91 S.W.3d 432 (Tex. App.—Beaumont 2002, orig. proceeding [mand. denied]).

146. *Id.* at 433-34.

147. *Id.* at 434.

148. *Id.*

149. *Id.* at 434-35.

mandamus from this ruling.¹⁵⁰ In surveying the rules governing objecting and asserting privilege, the court observed that “significant effort was made by the promulgators of the Rules to avoid waiver by a party when privileged materials or information *may* be at issue.”¹⁵¹ The court opined that “the spirit, if not the letter, of this prophylactic effort” is defeated where a trial court does not expressly rule on a privilege assertion based on evidence presented and/or *in camera* inspection of the materials.¹⁵² Thus, the court held, “[i]n keeping with the overall spirit of non-waiver apparent in the applicable discovery rules,” a party responding to discovery may first make objections based on overbreadth, relevance and the like, have those objections ruled upon, and only then be required to assert privilege under Rule 193.3.¹⁵³

C. SUPPLEMENTATION OF DISCOVERY RESPONSES

The 1999 rule amendments also significantly increased the flexibility of trial courts in dealing with a party's failure to properly disclose fact or expert witnesses. As a result, cases decided during the Survey period were far more likely to allow the disputed witness's testimony than were cases in years past. The Texarkana Court of Appeals in *City of Paris v. McDowell*,¹⁵⁴ for example, held that the trial court did not abuse its discretion in allowing the testimony of plaintiff's expert, despite defendant's complaints about deficiencies in the plaintiff's disclosure regarding the expert's qualifications and the substance of his opinions.¹⁵⁵ Similarly, in *Norfolk Southern Railway Co. v. Bailey*,¹⁵⁶ the Austin Court of Appeals allowed the plaintiff's medical expert to testify to a revised opinion—from “asbestosis with no impairment” to “asbestosis with mild impairment”—even though the plaintiff never supplemented his previous discovery response.¹⁵⁷

Rule 193.6(a)¹⁵⁸ provides that, even if a party fails to timely disclose the identity of a fact or expert witness, the trial court may still allow the witness to testify if there is no unfair surprise or prejudice to the other parties.¹⁵⁹ The El Paso Court of Appeals in *Gutierrez v. Gutierrez*¹⁶⁰ availed itself of this “alternative to the draconian sanction of automatic exclusion,” where the appellee failed to identify her attorney as an expert witness on attorneys' fees.¹⁶¹ The court noted that the appellee had iden-

150. *Id.* at 438.

151. *Id.* at 436 (citing TEX. R. CIV. P. 192.6, 193.2, and 193.3).

152. *Id.*

153. TEX. R. CIV. P. 193.3; *Lincoln Electric*, 91 S.W.3d at 437.

154. *City of Paris v. McDowell*, 79 S.W.3d 601 (Tex. App.—Texarkana 2002, pet. ref'd).

155. *Id.* at 605-08.

156. *Norfolk S. Ry. Co. v. Bailey*, 92 S.W.3d 577 (Tex. App.—Austin 2002, no pet. h.).

157. *Id.* at 580-81. Plaintiff's counsel acknowledged, and the court agreed, that it would have been the better practice to have supplemented the discovery response. *Id.* at 581.

158. TEX. R. CIV. P. 193.6(a).

159. *Id.*

160. *Gutierrez v. Gutierrez*, 86 S.W.3d 729 (Tex. App.—El Paso 2002, no pet.).

161. *Id.* at 734, 736 n.9.

tified her attorney as a fact witness with knowledge regarding reasonable attorneys' fees in her pretrial witness list and, subsequently, in supplemental interrogatory answers.¹⁶² Thus, the court concluded there was no unfair surprise to the appellant.¹⁶³ In *Dolenz v. State Bar of Texas*,¹⁶⁴ the Dallas Court of Appeals allowed a previously undisclosed witness to testify at the punishment phase of a disciplinary action against an attorney.¹⁶⁵ The court based its decision both on the wording of the specific interrogatory propounded by the attorney, which arguably did not call for the witness's identity since he did not have knowledge of the facts alleged in the State Bar's petition, and perhaps more importantly on the fact that the trial court ordered a continuance to allow the attorney to depose the witness.¹⁶⁶

Other courts during the Survey period took the approach of reviewing the exclusion of an expert witness as a "death penalty" sanction that is subject to the strictures of *TransAmerican Natural Gas Corp. v. Powell*.¹⁶⁷ In *Vaughn v. Ford Motor Co.*,¹⁶⁸ for example, the trial court had excluded three expert witnesses whose identities were disclosed by plaintiff, but who neither provided written reports nor were made available promptly for their depositions in contravention of the trial court's scheduling order and the applicable procedural rule.¹⁶⁹ The Eastland Court of Appeals first found that exclusion was not mandatory under Rule 193.6,¹⁷⁰ because the plaintiff had identified the experts and provided a synopsis of their opinions.¹⁷¹ Thus, the court reasoned that the sanction of exclusion had to be evaluated under *TransAmerican*, and under those standards the trial court abused its discretion.¹⁷² Similarly, in *In re Harvest Communities of Houston, Inc.*,¹⁷³ the San Antonio Court of Appeals held that, while an attorney's conduct in presenting his expert for deposition was sanctionable, an order excluding the expert's testimony did not meet the *TransAmerican* standards where the penalty fell on the party, not the attorney, and the trial court failed to consider less severe sanctions.¹⁷⁴

D. SANCTIONS

The San Antonio Court of Appeals in *In re U-Haul International*,

162. *Id.* at 732-33.

163. *Id.* at 736.

164. *Dolenz v. State Bar of Tex.*, 72 S.W.3d 385 (Tex. App.—Dallas 2001, no pet.).

165. *Id.* at 387.

166. *Id.*

167. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991).

168. *Vaughn v. Ford Motor Co.*, 91 S.W.3d 387 (Tex. App.—Eastland 2002, pet. filed).

169. *Id.* at 389 (citing TEX. R. CIV. P. 195.3).

170. TEX. R. CIV. P. 193.6(a).

171. *Vaughn*, 91 S.W.3d at 391.

172. *Id.* at 391-92. The court ultimately found the error was harmless, however, as the defendants were entitled to a directed verdict in any event. *Id.* at 394.

173. *In re Harvest Cmty. of Houston, Inc.*, 88 S.W.3d 343 (Tex. App.—San Antonio 2002, no pet.).

174. *Id.* at 348-49.

*Inc.*¹⁷⁵ held that the relator, U-Haul International, could not be sanctioned for failing to produce records belonging to its insurer and sister corporation, Republic Western Insurance.¹⁷⁶ U-Haul argued that it had asked Republic for the documents, but the latter refused to honor the request.¹⁷⁷ Recognizing the separate identity of the corporations, and finding that there was no evidence of alter ego, the court held that U-Haul did not have "possession, custody, or control" of the documents.¹⁷⁸ Although the court's reasoning would appear to be equally applicable where the entity in possession of the documents is a subsidiary of the responding party, it might be difficult to justify the same result on a theory that a parent corporation does not have the right to obtain possession of its subsidiary's documents.

In *Finlay v. Olive*,¹⁷⁹ the Houston Court of Appeals, First District, reversed the trial court's imposition of sanctions for pretrial discovery abuse.¹⁸⁰ The court first noted that the trial judge had not conducted any sanctions hearing, designated as such, after notice to the parties.¹⁸¹ Moreover, because the appellee was relying on proceedings during and after trial as constituting the sanctions hearing, any request for sanctions based on discovery abuse that the appellee was aware of before trial was waived once she proceeded to trial without obtaining a hearing and ruling on that request.¹⁸²

Finally, the Texas courts continued to closely scrutinize so-called death penalty sanctions during the Survey period. For example, the Fort Worth Court of Appeals in *In re Adkins*¹⁸³ overturned the trial court's proposed instruction to the jury that the relators had knowledge of a dog's vicious propensities, which it concluded was tantamount to a death penalty sanction.¹⁸⁴ The court held that, while the trial court recited that it had considered the possibility of less severe sanctions and concluded they would be ineffective, it did not explain why.¹⁸⁵ Similarly, in *Cummings v. Cire*,¹⁸⁶ in which the alleged discovery abuse included the forging of documents and intentional destruction of evidence, the Amarillo Court of Appeals reversed an order striking the plaintiff's pleadings because the court had not previously sanctioned plaintiff herself (as opposed to her attorneys) and had not properly explained why lesser sanctions would not

175. *In re U-Haul Int'l, Inc.*, 87 S.W.3d 653 (Tex. App.—San Antonio 2002, orig. proceeding [mand. denied]).

176. *Id.* at 656-57.

177. *Id.* at 655.

178. *Id.* at 656-57.

179. *Finlay v. Olive*, 76 S.W.3d 520 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

180. *Id.* at 526.

181. *Id.* at 525.

182. *Id.* at 525-26 (citing *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167 (Tex. 1993)).

183. *In re Adkins*, 70 S.W.3d 384 (Tex. App.—Fort Worth 2002, orig. proceeding).

184. *Id.* at 389-90.

185. *Id.* at 391.

186. *Cummings v. Cire*, 74 S.W.3d 920 (Tex. App.—Amarillo 2002, pet. granted).

have been effective.¹⁸⁷ *Magnuson v. Mullen*¹⁸⁸ teaches, however, that where a plaintiff “persistently” fails to comply with discovery and makes no attempt to secure discovery from the other side, and lesser sanctions have already been imposed, a trial court may justifiably assume that the plaintiff’s discovery abuse demonstrates a lack of merit to his claim and enter the ultimate sanction of dismissal.¹⁸⁹

VII. DISMISSAL

The Houston appellate courts expressed conflicting views regarding the extent of a trial court’s plenary powers to levy sanctions following the filing of a nonsuit. In *In re T.G.*,¹⁹⁰ the Houston Court of Appeals, First District, held that, even where a party’s motion for sanctions had been filed prior to the entry of an order granting a non-suit, a trial court has no power to enter sanctions once its plenary power expires.¹⁹¹ In so holding, the court expressly declined to follow the holding of its sister court in *Mattly v. Spiegel, Inc.*,¹⁹² which affirmed the entry of a sanction award entered after the expiration of the trial court’s plenary power.¹⁹³

In *In re Martinez*,¹⁹⁴ the Corpus Christi Court of Appeals held that the granting of a motion for new trial after a notice of nonsuit was beyond the trial court’s jurisdiction and amounted to a void order.¹⁹⁵ In this case, the Donna Independent School District (“DISD”) filed a suit in which the relator intervened and counterclaimed against DISD. DISD subsequently non-suited its claims against the original defendant, and the relator then non-suited his claims against DISD.¹⁹⁶ Prior to the expiration of the trial court’s plenary power, however, the DISD filed a motion for new trial in order to assert a counterclaim against the relator, which the trial court granted.¹⁹⁷ The relator then filed his petition for a writ of mandamus, and the court of appeals entered a stay order. The DISD then non-suited its claims against the relator.¹⁹⁸ In addition to disapproving of the DISD’s violation of its stay order, the appellate court held that following the relator’s nonsuit there remained no justiciable claim in the lawsuit, and the trial court therefore lacked jurisdiction to grant DISD’s motion

187. *Id.* at 928-29. The court rejected the trial court’s conclusion that a monetary sanction would have been ineffective because the plaintiff lacked the resources to pay, noting that the justice system will not allow the most severe penalty to be imposed simply because a litigant lacks the money to pay a fine. *Id.* at 928.

188. *Magnusson v. Mullen*, 65 S.W.3d 815 (Tex. App.—Fort Worth 2002, pet. denied).

189. *Id.* at 828.

190. *In re T.G.*, 68 S.W.3d 171 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

191. *Id.* at 177.

192. *Mattly v. Spiegel, Inc.*, 19 S.W.3d 890 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

193. *T.G.*, 68 S.W.3d at 179.

194. *In re Martinez*, 77 S.W.3d 462 (Tex. App.—Corpus Christi 2002, orig. proceeding).

195. *Id.* at 465.

196. *Id.* at 463.

197. *Id.*

198. *Id.*

for new trial.¹⁹⁹

The San Antonio Court of Appeals in *Pace Concerts, Ltd. v. Resendez*²⁰⁰ held that, even in the context of a no-evidence summary judgment motion, the plaintiff retains an absolute right of non-suit after a summary judgment hearing, but before the trial court enters its ruling.²⁰¹ The court rejected the appellants' argument that the plaintiff's nonsuit came too late since he had already been required to present his evidence in responding to the no-evidence motion.²⁰² In addition, the court held that the defendant's counterclaim for declaratory judgment and attorneys' fees did not preclude the dismissal of the entire action either, because the declaratory judgment action essentially mirrored the plaintiff's claim and was framed in terms of the defendant's non-liability.²⁰³

*Slaughter v. Clement*²⁰⁴ held that the plaintiff in an action may not be defaulted for failing to appear at trial; rather, the trial court may only dismiss the suit for failure to appear, following proper notice and a hearing, and such a dismissal does not constitute an adjudication on the merits of the plaintiff's claims.²⁰⁵ Similarly, in *In re Marriage of Seals*,²⁰⁶ an incarcerated prisoner filed a divorce proceeding, which the trial court subsequently dismissed for want of prosecution when the plaintiff failed to appear at a dismissal hearing. The Texarkana Court of Appeals reversed and remanded, holding that the trial court abused its discretion in dismissing the suit since the plaintiff had made it known to the trial court that a bench warrant would be required to secure his attendance at the hearing.²⁰⁷

IX. SUMMARY JUDGMENT

The Texas Supreme Court in *Carpenter v. Cimarron Hydrocarbons Corp.*²⁰⁸ held that

a motion for leave to file a late summary judgment response should be granted when the nonmovant establishes good cause by showing that the failure to timely respond (1) was not intentional or the result of conscious indifference, but the result of an accident or mistake, and (2) that allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment.²⁰⁹

199. *Id.* at 464-65.

200. *Pace Concerts, Ltd. v. Resendez*, 72 S.W.3d 700 (Tex. App.—San Antonio 2002, pet. denied).

201. *Id.* at 702.

202. *Id.*; see TEX. R. CIV. P. 162 (plaintiff may nonsuit anytime before he has introduced all of his evidence).

203. *Resendez*, 72 S.W.3d at 703.

204. *Slaughter v. Clement*, 64 S.W.3d 448 (Tex. App.—El Paso 2001, no pet.).

205. *Id.* at 450.

206. *In re Marriage of Seals*, 83 S.W.3d 870 (Tex. App.—Texarkana 2002, no pet.).

207. *Id.* at 874.

208. *Carpenter v. Cimarron Hydrocarbons Corp.*, 45 Tex. Sup. Ct. J. 1031, 2002 Tex. LEXIS 120 (July 3, 2002, pet. granted), *substituted opinion*, 98 S.W.3d 682 (Tex. 2002).

209. *Id.* at *3.

In so holding, the supreme court expressly rejected the application of the test announced in *Craddock v. Sunshine Bus Lines*²¹⁰ for setting aside default judgments to these summary judgment procedures.²¹¹ Based on this standard, the supreme court affirmed the summary judgment, holding that the trial court did not abuse its discretion in concluding that a calendaring error by the respondent's counsel did not constitute good cause for failing to timely file a summary judgment response.²¹²

The Texas Supreme Court in *Jacobs v. Satterwhite*²¹³ held that the trial court erred in granting summary judgment on a claim not addressed in the summary judgment motion.²¹⁴ However, in *Beathard Joint Venture v. West Houston Airport Corp.*,²¹⁵ the Texarkana Court of Appeals held that while it is normally improper to grant summary judgment on a ground not asserted by the movant, "this requirement can be waived if the appellant fails to raise an issue on appeal [by] complaining of the trial court's error or arguing that the excess relief was [improper]." ²¹⁶

Both the Dallas and Houston Courts of Appeal opined on the subject of when sufficient time had passed for the filing of no-evidence summary judgment motions. In *Restaurant Teams International, Inc. v. MG Securities Corp.*,²¹⁷ the Dallas Court of Appeals held that the trial court did not abuse its discretion in considering a no-evidence motion where only seven months had elapsed between the date the plaintiff filed suit and the date the defendants moved for summary judgment.²¹⁸ The court rejected the appellant's "bright line" argument that Rule 166a(i)²¹⁹ prohibits the filing of a no-evidence summary judgment prior to the expiration of the discovery period provided in Rule 190.3²²⁰ in the absence of the entry of a scheduling order.²²¹ In *Gourrier v. Joe Meyer Motors, Inc.*,²²² the Houston Court of Appeals, Fourteenth District, held that the comment to Rule 166a does not prohibit the imposition of a summary judgment deadline or thirty days before the close of discovery, and the plaintiff's motion to continue the summary judgment hearing failed to show that there was an

210. *Craddock v. Sunshine Bus Lines*, 134 Tex. 388, 133 S.W.2d 124, 126 (1939) (holding that the standard for motions for new trial on default judgments is whether (1) the failure to answer was not intentional or the result of conscious indifference, but the result of an accident or mistake, (2) the motion for new trial sets up a meritorious defense, and (3) granting the motion will occasion no undue delay or otherwise injure the plaintiff).

211. *Carpenter*, 2002 Tex. LEXIS 120, at *3.

212. *Id.* at *3-4; *accord* *Neely v. Coleman Enters., Ltd.*, 62 S.W.3d 802 (Tex. App.—Waco 2001, pet. denied).

213. *Jacobs v. Satterwhite*, 65 S.W.3d 653 (Tex. 2001).

214. *Id.* at 655.

215. *Beathard Joint Venture v. W. Houston Airport Corp.*, 72 S.W.3d 426 (Tex. App.—Texarkana 2002, pet. denied).

216. *Id.* at 436.

217. *Rest. Teams Int'l, Inc. v. MG Secs. Corp.*, 95 S.W.3d 336 (Tex. App.—Dallas 2002, no pet.).

218. *Id.* at 340.

219. TEX. R. CIV. P. 166a(i).

220. TEX. R. CIV. P. 190.3.

221. *Rest. Teams Int'l*, 95 S.W.3d at 340.

222. *Gourrier v. Joe Meyer Motors*, No. 14-00-01165-CV, 2002 Tex. App. LEXIS 5839 (Tex. App.—Houston [14th Dist.] Aug. 8, 2002, no pet.).

inadequate time for discovery or how additional time would have added anything other than needless expense.²²³

In *Merchandise Center, Inc. v. WNS, Inc.*,²²⁴ the summary judgment respondent filed both a written response and an appendix containing supporting summary judgment materials. While the attorney submitted an affidavit stating that both the response and the appendix had been filed simultaneously, for inexplicable reasons the appendix was not marked by the clerk's office as timely received along with the response. In the absence of an order from the trial court granting leave to consider the late-filed summary judgment materials, the Texarkana Court of Appeals concluded that it could not consider the appendix on appeal.²²⁵

In *Aguilar v. LVDVD, L.C.*,²²⁶ the El Paso Court of Appeals held that, while normally it is not proper to consider a reporter's record of a summary judgment hearing on appeal, such a record may be properly considered where it contains the trial court's rulings on evidentiary objections to the summary judgment submissions.²²⁷ Regarding the preservation of such objections, the Texarkana Court of Appeals in *Trusty v. Strayhorn*²²⁸ held that a statement by the trial court that it "considered" evidentiary objections is not tantamount to a ruling thereon.²²⁹ Moreover, the court concluded that a party seeking to challenge the admissibility of summary judgment evidence is obligated to obtain a ruling on those objections to preserve the point for appeal, regardless of whether he is arguing for affirmance or reversal.²³⁰ The court also held that a party's failure to designate a witness as an expert, and then submitting a summary judgment affidavit from the expert, was not by itself sufficient to render the expert's opinion inadmissible.²³¹ Rather, the opposing party was required to present the issue to the trial court and obtain a ruling.²³²

In *Blanche v. First Nationwide Mortgage Co.*,²³³ the Dallas Court of Appeals rejected the appellant's argument that under Texas Rules of Civil Procedure 193.7 a party's own documents are deemed to be self-authenticated by virtue of their production in the litigation.²³⁴ Rather, the court held that a party must properly authenticate its own documents and may not rely on Rule 193.7, which only applies to authentication of docu-

223. *Id.* at *4-5.

224. *Merch. Ctr., Inc. v. WNS, Inc.*, 85 S.W.3d 389 (Tex. App.—Texarkana 2002, no pet.).

225. *Id.* at 394-95. The court also held that the trial court erred in granting a motion to dismiss certain claims because Texas procedure does not recognize a motion to dismiss, and that the proper procedural tool was to complete at least one round of special exceptions before dismissing any claims. *Id.* at 392-94.

226. *Aguilar v. LVDVD, L.C.*, 70 S.W.3d 915 (Tex. App.—El Paso 2002, pet. denied).

227. *Id.* at 917.

228. *Trusty v. Strayhorn*, 87 S.W.3d 756 (Tex. App.—Texarkana 2002, no pet.).

229. *Id.* at 761.

230. *Id.* at 763-64.

231. *Id.* at 764.

232. *Id.*

233. *Blanche v. First Nationwide Mortgage Co.*, 74 S.W.3d 444 (Tex. App.—Dallas 2002, no pet.).

234. *Id.* at 451.

ments produced by another party.²³⁵

The Beaumont Court of Appeals affirmed the entry of a summary judgment in *Yarbrough's Dirt Pit, Inc. v. Turner*,²³⁶ holding that, although the expert testimony relied upon by the defendant was conclusory, it came from the plaintiff's own expert, whose statements were deemed to be admissions of the party opponent and were therefore admissible.²³⁷

Finally, the Texas Supreme Court again addressed the issue of the finality of summary judgment orders in *Ritzell v. Espeche*,²³⁸ in light of the court's prior holding in *Lehman v. Har-Con Corp.*²³⁹ In *Ritzell*, after the movant filed his summary judgment motion, the respondent filed an amended pleading asserting new claims six days before the summary judgment hearing. The movant then sought leave to file an amended summary judgment motion three days prior to the hearing to address the newly-asserted claims. The trial court did not enter an order granting the movant leave to amend his summary judgment motion, but did enter a docket notation to that effect.²⁴⁰ The trial court then entered a "Final Summary Judgment" purporting to dispose of all claims and all parties.²⁴¹ Without addressing the propriety of such an order, the supreme court held that the intermediate appellate court erred in dismissing the appeal as interlocutory.²⁴²

X. JURY PRACTICE

The Austin Court of Appeals in *In re Bradle*²⁴³ confirmed that where a party has requested the bifurcation of the punitive damage phase of a trial from the underlying liability and damages issues, the same jury that decides the underlying issues must also hear and determine the issue of punitive damages.²⁴⁴ The failure to allow the initial jury to determine the punitive damage claims constitutes an abuse of discretion by the trial court and a denial of the parties' constitutional due process rights and right to trial by the jury impaneled to decide to the dispute.²⁴⁵

The San Antonio Court of Appeals in *Chavarria v. Valley Transit Co., Inc.*,²⁴⁶ rejected the plaintiffs' juror misconduct argument, holding that the communications between jurors that plaintiffs contended evidenced misconduct were not admissible under the Texas Rules of Civil Procedure

235. *Id.* at 451-52.

236. *Yarbrough's Dirt Pit, Inc. v. Turner*, 65 S.W.3d 210 (Tex. App.—Beaumont 2002, pet. denied).

237. *Id.* at 214-15.

238. *Ritzell v. Espeche*, 87 S.W.3d 536 (Tex. 2002) (per curiam).

239. *Lehman v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001).

240. *Ritzell*, 87 S.W.3d at 536.

241. *Id.*

242. *Id.* at 537.

243. *In re Bradle*, 83 S.W.3d 923 (Tex. App.—Austin 2002, orig. proceeding [mand. denied]).

244. *Id.* at 926.

245. *Id.* at 927-28.

246. *Chavarria v. Valley Transit Co., Inc.*, 75 S.W.3d 107 (Tex. App.—San Antonio 2002, no pet.)

or the Texas Rules of Evidence,²⁴⁷ even though such communications occurred during a break in the jury's deliberations.²⁴⁸ Specifically the court held "jurors discussing the case on breaks during deliberations is the same as deliberations themselves" and are therefore inadmissible to prove juror misconduct.²⁴⁹

In *Suggs v. Fitch*,²⁵⁰ the plaintiff complained that the trial court erred in its method of polling the jury following the entry of a 10-2 verdict. Specifically, the Texarkana Court of Appeals *sua sponte* polled the jury after deliberations had concluded, but only asked nine of the ten jurors about their verdict.²⁵¹ The appellate court held that because the plaintiff had not requested the court to poll the jury and had not objected to its methodology, he waived any right to complain about the trial court's conduct in that regard.²⁵² Moreover, because the tenth juror, who was not polled, had actually read the verdict aloud in open court and affirmatively represented to the court that ten jurors had signed the verdict, the court of appeals determined that any error was harmless.²⁵³

XI. JURY CHARGE

The Texas Supreme Court addressed the issue of deemed findings in *Gulf States Utilities Co. v. Low*.²⁵⁴ The trial court in this case had rendered judgment on a jury verdict for \$12,100, but the court of appeals deemed a finding to support recovery under the Deceptive Trade Practices Act of \$22,100 in damages and \$150,000 in attorneys fees and rendered judgment in that higher amount.²⁵⁵ The supreme court reversed, holding that Texas Rule of Civil Procedure 279,²⁵⁶ by its terms, only allows a deemed finding in support of a trial court's judgment.²⁵⁷ Thus, the Beaumont Court of Appeals erred in relying on the rule not to support the trial court's judgment, but to render its own judgment for a significantly greater recovery.²⁵⁸ The majority opinion in *Low* also rejected the dissent's contention that the case should be remanded to allow the trial court to clarify its theory of judgment.²⁵⁹ According to the majority, Rule 279 simply allows a trial court to make a written finding on an element of a cause of action that was incompletely submitted to the jury without objection; if the trial judge does not do so, however, nothing in the rule

247. TEX. R. CIV. P. 327(b); TEX. R. EVID. 606(b).

248. *Chavarria*, 75 S.W.3d at 110.

249. *Id.* at 111.

250. *Suggs v. Fitch*, 64 S.W.3d 658 (Tex. App.—Texarkana 2002, no pet.)

251. *Id.* at 659-60.

252. *Id.* at 661.

253. *Id.* at 662.

254. *Gulf States Utils. Co. v. Low*, 79 S.W.3d 561 (Tex. 2002).

255. *Id.* at 562.

256. TEX. R. CIV. P. 279.

257. *Low*, 79 S.W.3d at 564.

258. *Id.*

259. *Id.* at 565.

provides a basis for reversal or remand.²⁶⁰

The proper way to submit a multi-defendant negligence case was at issue in *Rosell v. Central West Motor Stages, Inc.*²⁶¹ In this wrongful death case, the plaintiffs sued two individual drivers and Central West, which employed one of the drivers.²⁶² On appeal, the plaintiffs complained that the trial court had violated the broad form submission mandate of Rule 277²⁶³ by submitting one negligence question that included only the two individual defendants and a separate negligent entrustment question for Central West.²⁶⁴ The Dallas Court of Appeals disagreed, noting that Central West's liability for its driver's negligence was undisputed, and that the two theories of recovery were independent and mutually exclusive.²⁶⁵ The court also rejected the plaintiffs' argument that Central West should have been included in the jury question apportioning responsibility among the decedent and the two individual drivers pursuant to the comparative responsibility statute.²⁶⁶ Once again, the court held that Central West would only be vicariously liable, whether based on respondeat superior or negligent entrustment, and the degree of its own negligence was therefore of no consequence.²⁶⁷

XII. JUDGMENTS

The Texas Supreme Court in *Utts v. Short*²⁶⁸ clarified the circumstances under which a non-settling defendant can claim a dollar-for-dollar settlement credit against a plaintiff that the defendant alleges received the benefit of settlement proceeds that were ostensibly paid to another plaintiff. In such a case, the court held that "the nonsettling defendant must file a written election before the trial court submits the case to the jury and ensure that the settlement amount is in the record."²⁶⁹ "[T]he nonsettling defendant must present evidence to the trial court [(not the jury)] that demonstrates nonsettling plaintiff benefited from the settlement [that] the nonsettling defendant relies on. If the evidence shows such a benefit, the trial court should apply the settlement credit [claimed by the defen-

260. *Id.* at 565-66. The four dissenting justices acknowledged that the rule cannot be used to deem a finding contrary to the trial court's judgment. *Id.* at 568 (Hankinson, J., dissenting). The dissent argued, however, that the trial court's judgment in this case was ambiguous, containing elements of both a DTPA and negligence recovery, and that a remand was therefore appropriate. *Id.*

261. *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643 (Tex. App.—Dallas 2002, no pet.).

262. *Id.* at 649.

263. TEX. R. CIV. P. 277 ("In all jury cases the court shall, whenever feasible, submit the cause upon broad form questions.").

264. *Rosell*, 89 S.W.3d at 653-54.

265. *Id.* at 654.

266. *Id.* at 657.

267. *Id.* at 656-57. Although the court noted that TEX. CIV. PRAC. & REM. CODE ANN. § 33.003 (Vernon 1997) on its face requires *all* defendants to be listed in the apportionment question, it held, citing just two cases, that the comparative responsibility statute had not been applied literally in vicarious liability situations. *Rosell*, 89 S.W.3d at 656-57, n.9.

268. *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002).

269. *Id.* at 829.

dant] . . . unless the nonsettling plaintiff presents evidence” to overcome the presumption that the credit should be applied.²⁷⁰ The court held that the burden is on the nonsettling plaintiff to prove that he did not benefit from the settlement because the plaintiffs are in the best position to demonstrate how they agreed to allocate settlement amounts and how they did or did not benefit from the settlement.²⁷¹

In *Miga v. Jensen*²⁷² the Texas Supreme Court addressed the mechanism under which a defendant faced with an adverse monetary judgment may stop the accrual of post-judgment interest without waiving his appellate rights. In this employment dispute, the plaintiff sued the defendant for failing to make good on a promise for stock options. Between the date of the alleged breach of the option agreement and the time of trial, the company for which the stock options applied went public and the stock price increased dramatically from the value of the options at the date of the breach. Pending appeal, the defendant originally posted an appeal bond, but after the appellate court released its decision, the parties entered into an agreed order under which the defendant made an “unconditional tender” to the plaintiff of the specified amount to terminate the accrual of post-judgment interest on that amount. The result of this tender was to save the defendant roughly \$1 million annually pending the completion of the appeal. Subsequently, however, the plaintiff argued that the tender constituted a satisfaction of the judgment, rendering the appeal moot and waiving any appellate rights. The supreme court disagreed, holding that a party may make an unconditional payment while still preserving its appellate rights where “the judgment debtor clearly expresses . . . that he intends to exercise [its] right of appeal and the appellate relief is not futile.”²⁷³

Two courts during the Survey period addressed the subject of attacking foreign judgments that the judgment creditor sought to enforce in Texas state courts. In *Urso v. Lyon Financial Services, Inc.*,²⁷⁴ the judgment creditor perfected a foreign judgment in Texas and then sought to have a receiver appointed. In his attack on the appointment of the receiver, the judgment debtor argued that he had not received prior notice of the original suit or its perfection in the state of Texas. Since the time for the judgment debtor to file a motion for new trial had expired, the Houston Court of Appeals, Fourteenth District, held that the judgment debtor’s attack on the appointment of a receiver was, in essence, a collateral attack on the underlying judgment that could only be pursued by a bill of review.²⁷⁵ In *Cash Register Sales and Services of Houston, Inc. v. Copelco*

270. *Id.*

271. *Id.*

272. *Miga v. Jensen*, 96 S.W.3d 207 (Tex. 2002).

273. *Id.* at 211-12.

274. *Urso v. Lyon Fin. Serv., Inc.*, 93 S.W.3d 276 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

275. *Id.* at 280.

Capital, Inc.,²⁷⁶ the judgment debtor attempted to attack the validity of a judgment entered against it in a sister state by claiming that the signatory to the underlying contract lacked authority to execute that agreement. The Houston Court of Appeals, First District, rejected this argument as a collateral attack on the merits of the underlying claim, rather than as an attack on service of process or the exercise of jurisdiction over the person or the subject matter.²⁷⁷

Finally, in *Ford v. City of Lubbock*²⁷⁸ the plaintiff appealed a take-nothing judgment entered as a result of a plea to the jurisdiction. The Amarillo Court of Appeals dismissed the appeal for want of jurisdiction, holding that the appellant's notice of appeal was not timely because it was keyed off her unfulfilled request to the trial court to enter findings of fact and conclusions of law.²⁷⁹ The appellate court held that such a request was not proper because the requested findings and conclusions would serve no purpose in the appellate court's determination of the underlying jurisdictional issue.²⁸⁰

XIII. MOTION FOR NEW TRIAL

The Houston Court of Appeals, First District, in *Mahand v. Delaney*,²⁸¹ held that where the defendant did not receive reasonable notice of a trial setting, it was error for the trial court to enter a post-answer default judgment against him and subsequently overrule his motion for new trial.²⁸² In this contingency fee dispute between two attorneys, the clerk advised plaintiff's counsel in June of a new trial setting in August, and requested that plaintiff's counsel inform all parties of the new trial setting. However, Plaintiff's counsel did not notify the defendant of the new setting until the evening before the trial date, when plaintiff's counsel faxed a letter to defendant's counsel at his office and had a letter couriered to his home. Counsel for the defendant did not receive either notice until the day of trial. The trial court then entered a default judgment against the defendant for failing to appear at trial and subsequently denied the defendant's motion for new trial.²⁸³ The appellate court reversed, holding that under the three-part test in *Craddock v. Sunshine Bus Lines, Inc.*,²⁸⁴ the defaulted party need only show lack of reasonable notice in order to prove that his "failure to appear was not intentional or the result of conscious indifference."²⁸⁵ In so holding, the court extended the holding in

276. *Cash Register Sales & Servs. of Houston, Inc. v. Copelco Capital, Inc.*, 62 S.W.3d 278 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

277. *Id.* at 282-83.

278. *Ford v. City of Lubbock*, 76 S.W.3d 795 (Tex. App.—Amarillo 2002, no pet.).

279. *Id.* at 798.

280. *Id.*

281. *Mahand v. Delaney*, 60 S.W.3d 371 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

282. *Id.* at 375.

283. *Id.* at 373.

284. *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (1939).

285. *Mahand*, 60 S.W.3d at 373.

Lopez v. Lopez,²⁸⁶ which dispensed of the meritorious defense requirement in the absence of reasonable notice, and concluded that the defaulted party also need not prove that the delay would not cause injury to the plaintiff.²⁸⁷

In *Texas Sting, Ltd. v. R.B. Foods, Inc.*,²⁸⁸ after the plaintiff filed suit, the defendant counterclaimed. The clerk then sent several notices to plaintiff's counsel at the address listed on the court's registry of attorneys, rather than on the address listed on the plaintiff's petition or cover letter. Following a missed docket call and dismissal hearing, the trial court dismissed the plaintiff's claims for want of prosecution and set the defendant's counterclaim for trial.²⁸⁹ The San Antonio Court of Appeals held that while the clerk clearly used the wrong address in notifying plaintiff's counsel of the dismissal hearing, the plaintiff had an opportunity at the hearing on the motion for new trial to present evidence why the dismissal order should not be entered.²⁹⁰ At that hearing, however, the plaintiff only argued it did not receive notice of the dismissal hearing and failed to present any evidence of good cause to reinstate at the hearing. Thus, the appellate court affirmed the dismissal of the plaintiff's claims.²⁹¹ However, the court reversed the post-answer default judgment entered against the plaintiff because the plaintiff never had notice of the trial setting.²⁹² Absent such notice, the court held that the plaintiff had met its burden under *Craddock*, as without notice, a party's failure to appear cannot be intentional or the result of conscious indifference.²⁹³ Like the *Mahand* court, the court in *Texas Sting* also concluded that it was not necessary to prove either the second or third prong of the *Craddock* test to set aside the default judgment.²⁹⁴

In *Custom-Crete, Inc. v. K-Bar Services, Inc.*,²⁹⁵ a non-attorney representative of a corporation filed a letter denying the allegations in the plaintiff's petition. Thereafter, the plaintiff's counsel mailed a notice to the corporate representative that a trial on the merits would occur approximately twenty-five days later. The defendant's representative appeared at trial, but was not allowed to participate in the proceedings since he was not a licensed attorney. The trial court then entered a default judgment against the corporation.²⁹⁶ The San Antonio Court of Appeals reversed, holding that the letter filed by the defendant's representative,

286. *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988).

287. *Mahand*, 60 S.W.3d at 375.

288. *Tex. Sting, Ltd. v. R.B. Foods, Inc.*, 82 S.W.3d 644 (Tex. App.—San Antonio 2002, pet. denied).

289. *Id.* at 646-47.

290. *Id.* at 649.

291. *Id.* at 649-50.

292. *Id.* at 652.

293. *Id.* at 651-52.

294. *Id.* at 652.

295. *Custom-Crete, Inc. v. K-Bar Servs., Inc.*, 82 S.W.3d 655 (Tex. App.—San Antonio 2002, no pet.).

296. *Id.* at 657-58.

although technically deficient, constituted an appearance.²⁹⁷ As a result, because the corporation was provided with less than 45 days notice of the initial trial setting, its due process rights were violated and the requirement of Texas Rule of Civil Procedure 245 was not met.²⁹⁸ The appellate court also held that, by appearing at the trial, the corporation did not waive any right to complain about the defective notice since its representative was not allowed to participate in the proceedings.²⁹⁹ Finally, the court held that, under *Craddock*, the corporation's attempt to file an answer and appear at the trial, while perhaps negligent, was not intentional conduct or conscious indifference.³⁰⁰ Thus, the trial court erred in failing to grant the defendant's motion for new trial.³⁰¹

Finally, in *In re K.C.*,³⁰² an en banc panel of the San Antonio Court of Appeals overruled its own recent holding in *In re R.H.*,³⁰³ and held that where a party's attorney appears at trial, but the party does not attend, there is no default.³⁰⁴ Therefore, that party is not entitled to avail itself of the *Craddock* test, and the trial court does not abuse its discretion in denying a motion for new trial.³⁰⁵

XIV. DISQUALIFICATION OF JUDGES

Texas Rule of Civil Procedure 18b(1)(a)³⁰⁶ requires trial judges to disqualify themselves in cases in which they, or another lawyer with whom they previously practiced law, served as a lawyer with respect to the matter in controversy.³⁰⁷ In *In re O'Connor*,³⁰⁸ the Texas Supreme Court held that this rule does not limit disqualification to just those situations in which the "same lawsuit" is involved.³⁰⁹ In *O'Connor*, the trial judge's former law partner had represented the relator in her original divorce action.³¹⁰ Upon learning of this, the relator's new counsel in a subsequent action to modify the parent-child relationship moved to disqualify the trial judge.³¹¹ The supreme court held that the original divorce action and the modification proceeding involved the same "matter in controversy" within the meaning of Rule 18b(1)(a),³¹² and that the trial judge was, therefore, disqualified from presiding over the modification

297. *Id.* at 658.

298. *Id.* at 658-59.

299. *Id.* at 659.

300. *Id.* at 660.

301. *Id.*

302. *In re K.C.*, 88 S.W.3d 277 (Tex. App.—San Antonio 2002, pet. denied).

303. *In re R.H.*, 75 S.W.3d 126 (Tex. App.—San Antonio 2002, no pet.), *overruled by In re K.C.*, 88 S.W.3d 277 (Tex. App.—San Antonio 2002, pet. denied).

304. *K.C.*, 88 S.W.3d at 279.

305. *Id.*

306. TEX. R. CIV. P. 18b(1)(a).

307. *Id.*

308. *In re O'Connor*, 92 S.W.3d 446 (Tex. 2002).

309. *Id.* at 449.

310. *Id.* at 448.

311. *Id.*

312. TEX. R. CIV. P. 18b(1)(a).

proceeding.³¹³

XV. DISQUALIFICATION OF COUNSEL

*In re Nitla S.A. de C.V.*³¹⁴ presented the issue of whether counsel who reviewed an opposing party's privileged documents, which the trial court had ordered produced, should be disqualified when an appellate court later ordered the documents returned. The Houston Court of Appeals, First District, had ordered disqualification, relying on the supreme court's previous opinion in *In re Meador*,³¹⁵ which set forth six factors for determining whether to disqualify an attorney who obtained an opponent's privileged information outside the normal course of discovery.³¹⁶ The supreme court held, however, that the *Meador* factors did not apply because the attorney in this case received the privileged documents directly from the trial court in a discovery hearing.³¹⁷ Under these circumstances, the high court ruled that "the party moving to disqualify opposing counsel must show that: (1) opposing counsel's reviewing the privileged documents caused actual harm to the moving party; and (2) disqualification is necessary, because the trial court lacks any lesser means to remedy the moving party's harm."³¹⁸ Finding that the trial court correctly applied these principles, the supreme court held that the trial court had not abused its discretion when it refused to disqualify Nitla's counsel.³¹⁹

Hiring a consulting expert who had formerly been employed by the defendants resulted in the disqualification of plaintiffs' counsel in *In re Bell Helicopter Textron, Inc.*³²⁰ The consultant in question, Caren Vale, had been employed as an engineer in Bell's System Safety Group and, in that capacity, worked with Bell's lawyers in defending helicopter crash cases.³²¹ Based on Vale's work at Bell, the Fort Worth Court of Appeals conclusively presumed that she was privy to confidential information about Bell's defense of cases involving helicopters of the type at issue.³²² Because Vale was not an attorney, however, the court could not conclusively presume that she had shared, or would share, such information with the plaintiffs' lawyers.³²³ Nevertheless, the court held that Vale could not effectively be screened and, therefore, disqualification was re-

313. *O'Connor*, 92 S.W.3d at 449.

314. *In re Nitla S.A. de C.V.*, 92 S.W.3d 419 (Tex. 2002).

315. *In re Meador*, 968 S.W.2d 346 (Tex. 1998).

316. *Nitla*, 92 S.W.3d at 421 (citing *Meador*, 968 S.W.2d at 351-52).

317. *Id.* at 423.

318. *Id.*

319. *Id.*; cf. *In re Marketing Investors Corp.*, 80 S.W.3d 44 (Tex. App.—Dallas 1998, orig. proceeding) (applying *Meador* factors in upholding disqualification of counsel for former corporate officer who had taken corporation's privileged documents, where such counsel reviewed and used the privileged documents in the litigation).

320. *In re Bell Helicopter Textron, Inc.*, 87 S.W.3d 139 (Tex. App.—Fort Worth 2002, orig. proceeding).

321. *Id.* at 144.

322. *Id.* at 147.

323. *Id.* at 148.

quired.³²⁴ In this regard, the court discounted Vale's testimony that she had not disclosed any confidential information and had not worked on any case involving the crash in question.³²⁵ Instead, the court focused on the fact that the litigation Vale was hired by plaintiffs' counsel to work on was substantially related to other litigation she worked on for Bell involving the same model aircraft.³²⁶

Trying to avoid disqualification, plaintiffs' counsel argued that Bell had previously designated Vale as a testifying expert in other cases, thereby waiving any privileges with respect to confidential information she may have possessed.³²⁷ The court rejected this waiver argument, however, finding that Vale had never been designated to testify regarding the particular model at issue.³²⁸ The court also held that plaintiffs' counsel would not be saved from disqualification even if Vale would be called to testify in the case as a fact witness.³²⁹ The court noted that if called only as a fact witness, Vale's knowledge of privileged or confidential information would not be discoverable.³³⁰

An opposing party's standing to move for disqualification based on a potential conflict of interest was at issue in *In re Robinson*.³³¹ After surveying the relevant Texas case law, none of which it found dispositive, the San Antonio Court of Appeals pronounced that where no "actual" conflict of interest exists between two co-parties represented by the same attorney, an opposing party lacks standing to bring a motion to disqualify based only on a potential conflict of interest.³³²

XVI. MISCELLANEOUS

The enforcement of arbitration agreements continued to be a subject of dispute during the Survey period. In *In re J. D. Edwards World Solutions Co.*,³³³ the Texas Supreme Court held that the parties' agreement to arbitrate all disputes "involving" the underlying contract encompassed a party's allegation that it was fraudulently induced to enter into the contract.³³⁴ The supreme court noted that the United States Supreme Court had already distinguished "between claims of fraud in the inducement of the arbitration agreement itself and fraud in the inducement of the contract as a whole, [holding] that a claim for fraud in the inducement of a

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*; see TEX. R. CIV. P. 192.3(e), 194.2(f) (allowing discovery of facts known to testifying expert that relate to opinions and mental impressions, regardless of when or how factual information was acquired).

328. *Bell Helicopter*, 87 S.W.3d at 149-50.

329. *Id.* at 151.

330. *Id.*

331. *In re Robinson*, 90 S.W.3d 921 (Tex. App.—San Antonio 2002, orig. proceeding).

332. *Id.* at 926.

333. *In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546 (Tex. 2002) (per curiam).

334. *Id.* at 548 (applying federal law under the Federal Arbitration Act).

contract falls within the scope of a broad arbitration agreement.”³³⁵ Although the party in this matter argued that the term “involving” was much narrower than the standard “arising under or related to” language, the supreme court was unpersuaded.³³⁶

In *In re Halliburton Co.*,³³⁷ the Texas Supreme Court held that an employee was required to arbitrate his wrongful termination claims because he had received and implicitly accepted the employer’s dispute resolution program provided to him approximately eighteen months before his termination.³³⁸ The employer had sent notice of a new dispute resolution program to all employees informing them that continuing employment would constitute acceptance of the new plan.³³⁹ Among other things, the program provided binding arbitration as the exclusive method for resolving all disputes between the company and its employees.³⁴⁰ As it was undisputed that the employee continued working after receiving notice of the program, the only remaining issue was whether the employer had properly changed the terms of the at-will employment contract.³⁴¹ In this regard, the supreme court held that “[a] party asserting a change to an at-will employment contract must prove two things: (1) notice of the change, and (2) acceptance of the change.”³⁴² Here, the supreme court found that both requirements had been satisfied and, therefore, the discharged employee’s claims were subject to the arbitration agreement.³⁴³

One case during the Survey period addressed the scope of jurisdictional authority granted to visiting judges. In *In re Republic Parking System of Texas, Inc.*,³⁴⁴ “a visiting judge acting under a general assignment made several pretrial rulings and set a date for trial.”³⁴⁵ The matter was not reached for trial, and “the sitting judge stepped in and resumed control of the case.”³⁴⁶ The relators argued that in the absence of an order from the regional presiding judge terminating the former assignment of the visiting judge, the case had to remain with the visiting judge.³⁴⁷

The Houston Court of Appeals, Fourteenth District, disagreed, noting that visiting judges are generally assigned “either for a period of time or for a particular case.”³⁴⁸ In this case, the order of assignment was for a period of only one day.³⁴⁹ If the presiding judge’s assignment in this mat-

335. *Id.* at 550 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)).

336. *Id.* at 551.

337. *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002).

338. *Id.* at 569.

339. *Id.* at 568.

340. *Id.*

341. *Id.*

342. *Id.* (citing *Hathoway v. Gen. Mills, Inc.* 711 S.W.2d 227 (Tex. 1986)).

343. *Id.* at 569.

344. *In re Republic Parking Sys. of Tex., Inc.*, 60 S.W.3d 877 (Tex. App.—Houston [14th Dist.] 2001, orig. proceeding).

345. *Id.* at 878.

346. *Id.*

347. *Id.*

348. *Id.* at 879 (citing *In re Canales*, 52 S.W.3d 698, 701 (Tex. 2001)).

349. *Id.* The order of assignment stated:

ter had been for the particular case, the court would have agreed with the relators' position that the visiting judge must remain with the case.³⁵⁰ However, because the assignment in this matter was for a period of time, which had expired, no order from the presiding judge was necessary for the matter to revert back to the sitting judge.³⁵¹

During the Survey period, the Texas Supreme Court also addressed whether temporary restraining orders are subject to the temporal limitations set forth in Tex. R. Civ. P. 680. In *In re Texas Natural Resource Conservation Commission*,³⁵² the trial court entered a temporary restraining order on April 17, 2002, which stated that it would expire pursuant to an agreement of the parties on May 13, 2002.³⁵³ On May 10, 2002, the plaintiffs moved to extend the temporary restraining order to June 25, 2002.³⁵⁴ Defendants argued that the trial court should not extend the temporary restraining order at all, and in no event for more than fourteen days as set forth in Tex. R. Civ. P. 680.³⁵⁵ The trial court, however, granted the extension.³⁵⁶

On appeal, the plaintiffs claimed that the "fourteen day limitation" set forth in Tex. R. Civ. P. 680 applied only to temporary restraining orders that are "granted without notice."³⁵⁷ The appellate court disagreed holding that Rule 680 governs an extension of temporary restraining order, whether issued with or without notice, and permits only one extension for no longer than fourteen days unless the restrained party agrees to a longer extension.³⁵⁸ The court based its ruling, in part, on its belief that a party otherwise could "obtain unlimited extensions of a temporary restraining order," and never need to "seek a temporary injunction, which has more stringent proof requirements."³⁵⁹

This assignment is for the period of one day, beginning the 30th day of April, 2001, provided that this assignment shall continue after the specified period of time as may be necessary for the assigned Judge to complete trial of any case or cases begun during this period, and to pass on motions for new trial and all other matters growing out of cases tried by the Judge herein assigned during this period.

Id.

350. *Id.*

351. *Id.* at 879-80.

352. *In re Tex. Natural Res. Conservation Comm'n*, 85 S.W.3d 201 (Tex. 2002).

353. *Id.* at 202.

354. *Id.* at 202-03.

355. *Id.* TEX. R. CIV. P. 680 provides in part, that:

Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after signing, not to exceed fourteen days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

TEX. R. CIV. P. 680 (emphasis added).

356. *In re Tex. Natural Resource Conservation Comm'n*, 85 S.W.3d at 202-03.

357. *Id.* at 203-04.

358. *Id.* at 204-05.

359. *Id.* at 204.

