SMU | Dedman School of Law

SMU Law Review

Volume 57
Issue 3 *Annual Survey of Texas Law*

Article 3

January 2004

Appellate Practice and Procedure

Alan Wright

Debra J. McComas

LaDawn H. Conway

Heather D. Bailey

APPELLATE PRACTICE AND PROCEDURE

*Alan Wright**
*Debra J. McComas***
*LaDawn H. Conway****
*Heather D. Bailey*****

TABLE OF CONTENTS

* B.A., with high honors, University of Texas at Austin; M.P.A., University of Texas at Austin; J.D., with honors, University of Texas at Austin; Partner, Haynes and Boone, LLP, Dallas, Texas.
** B.A., with honors, Austin College; J.D. *cum laude*, Tulane University; Partner, Haynes and Boone, LLP, Dallas, Texas.
*** B.G.S., University of Texas at Arlington; J.D. *cum laude*, Southern Methodist University; Shareholder, Munsch Hardt Kopf & Harr, P.C., Dallas, Texas.
**** B.A., *summa cum laude*, Stephen F. Austin University; J.D., *magna cum laude*, Baylor University; Associate, Haynes and Boone, LLP, Dallas, Texas.

I. APPELLATE REVIEW BEFORE FINAL JUDGMENT

A. MANDAMUS AND OTHER ORIGINAL PROCEEDINGS

1. Mandamus Relief Granted

a. Discovery Orders

DURING the Survey period, the Texas Supreme Court twice granted mandamus relief to protect trade secrets from disclosure. In the 1998 case of *In re Continental General Tire, Inc.*, the supreme court established the standard for determining whether trade secrets are discoverable.[1] A party asserting trade secret privilege has the burden of proving that the information sought qualifies as a trade secret. If met, the burden shifts to the party seeking trade secret information to establish that the information is necessary for a fair adjudication of its claim. If a trial court orders production once trade secret status is proven, but the party seeking production has not shown a necessity for the requested materials, then the trial court's action is an abuse of discretion.[2]

In *In re Bridgestone/Firestone, Inc.*[3] and *In re Bass*,[4] the Texas Supreme Court determined that the plaintiffs did not show that disclosure of the trade secret was necessary for a fair adjudication. *In re Bridgestone/Firestone* involved the allegation that Firestone tire tread separations caused the failure of the tires and roll-overs in Ford Explorers. Like the plaintiffs in *Continental General Tire*,[5] the plaintiffs in *Bridgestone* sought the discovery of Firestone's skim stock formulas, which they conceded were trade secrets before the Texas Supreme Court. The supreme court held

1. *In re* Cont'l Gen. Tire, Inc., 979 S.W.2d 609, 611 (Tex. 1998).
2. *Id.*
3. *In re* Bridgestone/Firestone, Inc., 106 S.W.3d 730, 735 (Tex. 2003).
4. *In re* Bass, 113 S.W.3d 735, 738 (Tex. 2003).
5. *In re* Cont'l Gen. Tire, Inc., 979 S.W.2d 609, 610 (Tex. 1998).

that the test for determining whether disclosure of the skim stock formulas was necessary for a fair adjudication could not be satisfied by general assertions of unfairness or the possibility of unfairness, and that the plaintiffs' evidence of unfairness did not meet that test.[6] Accordingly, the trial court was ordered to vacate its order requiring disclosure of the formulas.

In the case of *In re Bass*, a group of non-participating royalty interest owners sought discovery of seismic data, which they claimed was necessary to show that the mineral estate owner breached its fiduciary duty to develop his land.[7] The Texas Supreme Court held that the geological seismic data was a trade secret, but disclosure was not necessary for a fair adjudication because the mineral estate owner did not have a duty to develop or a fiduciary duty.[8] Thus, the supreme court held that the trial court abused its discretion by compelling the mineral estate owner to produce trade secrets, and no appellate remedy existed.[9]

In the case of *In re CSX Corp.*,[10] the Texas Supreme Court granted mandamus relief from a trial court order directing the relators to identify all safety employees who worked for them for a thirty-year period, even though the plaintiff never worked for the relators or for their parent company for that length of time.[11] Comparing the discovery request to a "fishing expedition," the supreme court held that the information sought was irrelevant, overly broad, and lacked reasonable limitations as to time and subject matter under Texas Rule of Civil Procedure 192.3.[12] Moreover, the court held that no adequate remedy existed by appeal, explaining that the discovery order imposed a burden on the producing party "far out of proportion to any benefit that may obtain to the requesting party."[13]

In re Burlington Northern and Santa Fe Railway Co.[14] involved the apex deposition of the president and CEO of Burlington Northern and Santa Fe Railway Company. The Fort Worth Court of Appeals granted mandamus relief, concluding that the real parties in interest failed to show that the apex executive had unique or superior knowledge of discoverable information, or that he had information that could not be obtained through less intrusive means.[15]

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6. *Bridgestone*, 106 S.W.3d at 732-34. Justice O'Neill wrote a separate concurring opinion to offer more guidance to the bench and bar on the proper analysis of the necessity of trade secret information to fair adjudication. *Id.* at 734-38 (O'Neill, J., concurring).

7. *Bass*, 113 S.W.3d at 738.

8. *Id.* at 742-45.

9. *Id.* at 746.

10. *In re* CSX Corp., 124 S.W.3d 149 (Tex. 2003).

11. *Id.* at 152.

12. *Id.*

13. *Id.*

14. *In re* Burlington N. & Santa Fe Ry. Co., 99 S.W.3d 323, 325 (Tex. App.—Fort Worth 2003, orig. proceeding).

15. *Id.* at 327. That standard was articulated in Crown Cent. Petroleum Corp. v. Garcia, 904 S.W.2d 125, 128 (Tex. 1995).

In the case of *In re Hochheim Prairie Farm Mutual Insurance Ass'n*,[16] the supreme court held that the trial court abused its discretion by granting a petition for pre-suit depositions and production of documents under Texas Rule of Civil Procedure 202. The court reasoned that the real parties in interest adduced no evidence of imminent loss of the witnesses' testimony, and the prejudice to the defendant in having to submit its employees for deposition far outweighed any benefit to the real parties in interest.[17]

During the Survey period, mandamus relief was also available where the trial court abused its discretion by denying a motion to exclude an inadvertently-produced legal memorandum prepared by an attorney outlining potential claims in the suit,[18] where the trial court ordered an out-of-state non-party witness to appear for a deposition in Texas,[19] and where the trial court made a deemed finding of joint and several liability as a discovery sanction.[20]

b. Order Interfering with a Board of Disciplinary Appeals Judgment

In the case of *In re State Bar of Texas*, the Texas Supreme Court held that the district court abused its discretion by interfering with a finally adjudicated Board of Disciplinary Appeals (BODA) judgment.[21] The State Bar Act gives the Texas Supreme Court administrative power to regulate the practice of law, which it has delegated to BODA.[22] In *State Bar*, BODA suspended an attorney from practicing law after the supreme court affirmed the attorney's suspension order. However, the suspended attorney appealed the suspension to the trial court, asserting that the court had jurisdiction because of its enforcement power over BODA judgments. The trial court declared the BODA judgment void based on the suspended attorney's argument that a BODA panel member who heard the case should have been disqualified.[23] BODA sought mandamus relief.

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16. *In re* Hochheim Prairie Farm Mut. Ins. Ass'n, 115 S.W.3d 793, 796 (Tex. App.—Beaumont 2003, orig. proceeding).

17. *Id.*

18. *In re* AEP Tex. Centr. Co., No. 04-03-00253-CV, 2003 WL 21658540, at *6 (Tex. App.—San Antonio July 16, 2003, orig. proceeding).

19. *In re* W. Star Trucks US, Inc., 112 S.W.3d 756, 764-65 (Tex. App.—Eastland 2003, orig. proceeding).

20. *Id.* at 765-66.

21. *In re* State Bar of Tex., 113 S.W.3d 730, 733-34 (Tex. 2003). Ordinarily, a relator must first seek mandamus relief in the court of appeals. TEX. GOV'T CODE ANN. §§ 22.220(a)-22.221. Here, BODA was excused from bypassing the court of appeals because it presented an issue of statewide importance. *State Bar*, 113 S.W.3d at 732-33. Thus, the supreme court opted to exercise jurisdiction over BODA's mandamus petition. *Id.* at 733.

22. TEX. GOV'T CODE ANN. § 81.011(c) (Vernon 1998); State Bar of Tex. v. Gomez, 891 S.W.2d 243, 245 (Tex. 1994).

23. *State Bar*, 113 S.W.3d at 732.

The supreme court stated that it had "consistently granted mandamus relief when a lower court interferes with the disciplinary process," but that it had "never considered whether a district court's interference with a finally adjudicated BODA disciplinary judgment constitutes an abuse of discretion."[24] The court concluded that Texas Rule of Disciplinary Procedure 2.20, which provides that such a BODA order cannot be superseded or stayed, was dispositive.[25] Therefore, the district court abused its discretion in voiding the BODA judgment.[26]

c. Order Refusing to Dismiss Out-of-State Asbestos Claims

Section 71.052 of the Texas Civil Practice and Remedies Code generally provides for the dismissal of asbestos claims in which (1) the plaintiff was not a Texas resident when the claim arose; and (2) the claim arose outside of Texas; and (3) the claim was commenced in a Texas court after August 1, 1995 but before January 1, 1997.[27] In the case of *In re E.I. du Pont de Nemours and Co.*,[28] 8,000 plaintiffs sued eighty defendants for damages to exposure to asbestos based on claims that commenced before August 1, 1995. Relator was added by amended pleadings on September 10, 1996. Relator moved to dismiss the plaintiffs' claims against it under Section 71.052, arguing that (1) most plaintiffs had no contact with Texas; and (2) the claims against it were commenced within the August 1, 1995 - January 1, 1997 timeframe because it was not named in the litigation until September 10, 1996. The plaintiffs, on the other hand, argued that the statute did not apply because the claims against relator related back to their lawsuits against the other defendants filed before August 1, 1995.[29]

The trial court denied relator's motion to dismiss, and the court of appeals denied mandamus relief. The Texas Supreme Court granted mandamus relief, concluding, based in part on the court's construction of the statute, that plaintiffs' claims against relator did not relate back.

Plaintiffs also argued that Section 71.052 rulings are not reviewable by mandamus because the legislature provided for an interlocutory appeal from the denial of a special appearance in the same session in which it enacted Section 71.052.[30] The supreme court rejected that argument, stating that "the inference is not one we can logically draw."[31] "It is just as reasonable to infer that the legislature intended that orders under Section 71.052 be subject to the same rules regarding mandamus review as any other interlocutory orders."[32]

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24. *Id.* at 733.
25. *Id.* (citing TEX. R. DISCIPLINARY P. 2.20).
26. *Id.* at 734.
27. TEX. CIV. PRAC. & REM. CODE § 71.052 (Vernon Supp. 2004) (repealed 2003).
28. *In re* E.I. du Pont de Nemours & Co., 92 S.W.3d 517, 519 (Tex. 2002).
29. *Id.* at 521-22.
30. *Id.* Before seeking mandamus relief, relator had filed a special appearance, which the trial court denied, and which was affirmed on interlocutory appeal. *Id.* at 521.
31. *Id.* at 524.
32. *Id.*

d. Order Refusing to Enforce an Unsuperseded Judgment

A party is entitled to mandamus relief to vacate an order that improperly denies a prevailing party's attempt to enforce an unsuperseded judgment.[33] In *In re Crow-Billingsley Air Park, Ltd.*, the Texas Supreme Court held that the trial court abused its discretion when it refused to hear a motion to enforce an unsuperseded final judgment. Instead, it dismissed relator's enforcement motion for want of jurisdiction.[34]

e. Arbitration Orders

Mandamus is the appropriate method by which to challenge a trial court's ruling on a motion to compel arbitration under the Federal Arbitration Act (FAA).[35] When a trial court abuses its discretion by denying a motion to compel arbitration under the FAA, the movant has no adequate remedy at law and is entitled to mandamus relief.[36] Moreover, mandamus relief is available when a trial court improperly enforces an arbitration agreement against non-signatories to the agreement,[37] and when a trial court improperly includes findings of fact on the merits in an order compelling arbitration.[38]

f. Void Orders

"Mandamus will issue to correct a void order of a trial court."[39] If an order challenged by writ of mandamus is void, the relator need not show it does not have an adequate remedy by appeal.[40]

For example, mandamus will issue to set aside an order for new trial that is granted after the court's plenary power expires and is, therefore, void.[41] Mandamus will also issue to set aside an amended scheduling order purporting to rule that a previous scheduling order was actually an

33. *In re* Crow-Billingsley Air Park, Ltd., 98 S.W.3d 178, 179 (Tex. 2003) (orig. proceeding).

34. *Id.* at 179-80.

35. 9 U.S.C. § 2 (2000); AutoNation USA Corp. v. Leroy, 105 S.W.3d 190, 195 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). If the Texas General Arbitration Act (TAA) applies, the order is reviewable by interlocutory appeal. TEX. CIV. PRAC. & REM. CODE § 171.098(a) (Vernon 1997). In *MacGregor*, 126 S.W.3d 176, 181 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding), the court refused to decide whether parties must file dual proceedings when it is not clear whether the FAA or the TAA applies, stating that it was not the proper forum to determine the issue.

36. *In re* Media Arts Group, Inc., 116 S.W.3d 900, 904 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding); *In re* Neutral Posture, Inc., No. 01-02-00447-CV, 2003 WL 21756427, at *2 (Tex. App.—Houston [1st Dist.] July 31, 2003, orig. proceeding); *In re* Whitfield, 115 S.W.3d 753, 755 (Tex. App.—Beaumont 2003, orig. proceeding); *In re* Scott, 100 S.W.3d 575, 582 (Tex. App.—Fort Worth 2003, orig. proceeding).

37. *In re* Hartigan, 107 S.W.3d 684, 691-92 (Tex. App.—San Antonio 2003, orig. proceeding).

38. *In re* H2O Plumbing, Inc., 115 S.W.3d 79, 81 (Tex. App.—San Antonio 2003, orig. proceeding).

39. *In re* Gonzalez, 115 S.W.3d 36, 39 (Tex. App.—San Antonio 2003, orig. proceeding) (citing Urbish v. 127th Judicial Dist. Ct., 708 S.W.2d 429, 431 (Tex. 1986)).

40. *Id.*

41. *In re* Parker, 117 S.W.3d 484, 486 (Tex. App.—Texarkana 2003, orig. proceeding).

order granting a motion for new trial, as the trial court's order was void.[42]

Moreover, when a judge "continues to sit in violation of a constitutional proscription," mandamus is available to compel the judge's mandatory disqualification without showing that the relator lacks an adequate appellate remedy.[43] *In re Gonzalez* involved the issue of whether a constitutional county judge disqualified from serving on the case under Article V, Section 11 of the Texas Constitution continued "to sit in violation of a constitutional proscription" when he signed (1) an order appointing a visiting judge to try the case; and (2) an order transferring the case from county court to district court after the case had already been tried by the appointed visiting judge.[44] The San Antonio Court of Appeals held that the order appointing the visiting judge was not void for lack of jurisdiction because the order was a ministerial act confirming a selection made by the parties as authorized by the Texas Constitution.[45] Accordingly, mandamus relief was denied on that point. However, because the order of transfer involved the exercise of judicial discretion, the disqualified trial judge had no authority to sign the order.[46] Accordingly, mandamus relief was available to compel the disqualified trial judge to vacate his transfer order.[47]

g. Order Disposing of a Foreign Judgment

In a suit to enforce a foreign judgment, a court can grant only two types of relief: (1) enforce the judgment; or (2) declare the judgment void for want of jurisdiction.[48] In the case of *In re Jackson Person & Associates, Inc.*, the trial court purported to grant a new trial setting aside a Tennessee default judgment.[49] Because the trial court did not have the discretion to grant a new trial and place the parties back where they were before the trial in the foreign jurisdiction, mandamus relief was available.[50]

2. Mandamus Relief Denied

a. Discovery Orders

Where a trial court's order requiring the production of databases for examination contemplated a possible future order detailing the search methodology, but no search methodology had been ordered, the Texas Supreme Court denied the petition for writ of mandamus as premature.

42. *In re* Nguyen, No. 12-03-00162-CV, 2003 WL 21402503, at *2 (Tex. App.—Tyler June 18, 2003, orig. proceeding).
43. *Gonzalez*, 115 S.W.3d at 39 (quoting *In re* Union Pac. Res. Co., 969 S.W.2d 427, 428 (Tex. 1998)).
44. *Id.* at 38; TEX. CONST. art. V, § 11.
45. *Gonzalez*, 115 S.W.3d at 40-41 (quoting TEX. CONST. art. V, § 16).
46. *Id.* at 41-42.
47. *Id.* at 42.
48. *In re* Jackson Person & Assocs., Inc., 94 S.W.3d 815, 816 (Tex. App.—San Antonio 2003, orig. proceeding).
49. *Id.* at 817.
50. *Id.*

The Eastland Court of Appeals denied relators' request for mandamus protection from producing net worth information in *In re Western Star Trucks, Inc.*[51] In that case, relators relied on the dissenting opinion in *In re Jerry's Chevrolet-Buick, Inc.*,[52] in which Justice Raul Gonzalez argued that a plaintiff should be required to make a prima facie showing that exemplary damages are appropriate before obtaining discovery of net worth information.[53] Relying on the Texas Supreme Court's decision in *Lunsford v. Morris*, the Eastland Court of Appeals rejected relators' argument and held that "there is no evidentiary threshold a litigant must cross before seeking discovery."[54] Accordingly, plaintiff's allegations that defendants/relators had engaged in fraudulent and malicious conduct were sufficient to permit the plaintiff to obtain discovery of the defendants' net worth, and mandamus relief was not available.[55]

b. Orders Involving Emergency Relief

Mandamus is generally available to stay a trial court's extension of a fourteen-day temporary restraining order (TRO).[56] In the case of *In re Walkup*, however, the court decided that the fourteen-day maximum length for a TRO was fourteen calendar days, not fourteen twenty-four-hour periods.[57] Counting fourteen calendar days, the TRO in *Walkup* was in effect when the trial court granted the extension, and therefore, there was no abuse of discretion.[58]

c. Orders Compelling Arbitration

As discussed above, mandamus is often available to obtain relief from a trial court's ruling on a motion to compel arbitration.[59] However, in two cases decided this Survey period, the courts found no abuse of discretion.

In re Hartigan[60] involved an arbitration agreement between an attorney and his client. The client argued, among other things, that the arbitration provision was unenforceable because it prospectively limited the lawyer's liability for malpractice in violation of Rule 1.08(g) of the Texas Disciplinary Rules of Professional Conduct and that the arbitration provision failed to meet the requirements of Section 171.002 of the Texas Civil

51. *In re* W. Star Trucks US, Inc., 112 S.W.3d 756, 764 (Tex. App.—Eastland 2003, orig. proceeding).
52. *In re* Jerry's Chevrolet-Buick, Inc., 977 S.W.2d 565 (Tex. 1998).
53. *Star Trucks*, 112 S.W.3d at 764 (relying on *Jerry's Chevrolet-Buick, Inc.*, 977 S.W.2d at 565).
54. *Id.* (quoting Lunsford v. Morris, 746 S.W.2d 471, 473 (Tex. 1988)).
55. *Id.*
56. *In re* Walkup, 122 S.W.3d 215, 215-16 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding).
57. *Id.* at 218.
58. *Id.*
59. *See supra* Part I.A.1.e and note 34.
60. *In re* Hartigan, 107 S.W.3d 684, 687 (Tex. App.—San Antonio 2003, orig. proceeding).

Practice and Remedies Code, which applies to claims for personal injury.[61] The court of appeals rejected each argument, holding that there was no violation of the disciplinary rule and that a malpractice claim is not a claim for personal injury excluded from the scope of the Texas Arbitration Act by Section 171.002(a).[62] Finding that the trial court did not abuse its discretion by compelling arbitration between the client and her attorney, the court of appeals denied mandamus relief.[63]

In re Bustamante[64] involved the challenge of an order directing an employee to arbitrate her negligence claims against her employer. The employee sought mandamus relief, arguing that the arbitration agreement was illusory because her employer retained the right to unilaterally amend the agreement at any time.[65] However, based on the record presented to the court of appeals, the court found that the arbitration agreement properly required mutual consent to modify.[66] Thus, the trial court did not clearly abuse its discretion by ordering relator to arbitration.

d. Orders of Severance

The Amarillo Court of Appeals denied mandamus relief in *In re Occidental Permian Ltd.*,[67] an oil and gas case involving the severance of Occidental's counterclaim from the remaining claims in the suit. Under Texas Rule of Civil Procedure 41, any claim against a party may be severed and pursued separately.[68] It makes no difference that the severed claim is a compulsory counterclaim. "[A]s long as the trial court abides by Rule 41, it is not error to sever and proceed separately with any claim, including a compulsory counterclaim."[69] Moreover, a claim is severable if (1) the suit involves more than one cause of action; (2) the severed claim is one that could be prosecuted through a separate lawsuit; and (3) it is not so interwoven with the remaining action that they involve the same facts and issues.[70] Because the record demonstrated that those three elements

61. *Id.* at 689-90.

62. *Id.* In so holding, the court expressly disagreed with contrary decisions by the Beaumont and Corpus Christi Courts of Appeals holding that Texas classifies legal malpractice claims as personal injury claims for all purposes. *Id.* at 690; *cf. In re* Godt, 28 S.W.3d 732, 738 (Tex. App.—Corpus Christi 2000, orig. proceeding); Sample v. Freeman, 873 S.W.2d 470, 476 (Tex. App.—Beaumont 1994, writ denied); Estate of Degley v. Vega, 797 S.W.2d 299, 302-03 (Tex. App.—Corpus Christi 1990, no writ).

63. *Hartigan*, 107 S.W.3d at 692. However, the court granted mandamus relief in part, concluding that the trial court could not compel two of the client's former attorneys to arbitration because they were not parties to the arbitration agreement.

64. *In re* Bustamante, 104 S.W.3d 704, 705 (Tex. App.—El Paso 2003, orig. proceeding).

65. *Id.* at 706.

66. *Id.*

67. *In re* Occidental Permian Ltd., No. 07-03-0016-CV, 2003 WL 1799012, at *3 (Tex. App.—Amarillo Apr. 7, 2003, orig. proceeding).

68. TEX. R. CIV. P. 41.

69. *Occidental Permian*, 2003 WL 1799012, at *2.

70. *Id.* (citing Guar. Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 658 (Tex. 1990)).

were met, the trial court did not abuse its discretion in ordering a severance and mandamus was denied.[71]

e. Refusal to Rule on Summary Judgment Motion

As a general rule, appellate courts have the power to compel a trial judge to rule on pending motions when it is shown that the trial judge has a clear legal duty to act and has refused to do so.[72] *In re American Media Consolidated*[73] involved the trial court's failure to rule on a motion for summary judgment filed more than two years after the underlying lawsuit was filed and less than one month before the scheduled trial date. The court held that to be entitled to mandamus relief, relator was required to show that the trial court's express purpose in refusing to rule was to preclude relator from perfecting a statutory interlocutory appeal.[74] Because relator did not meet that burden, the petition for writ of mandamus was denied.[75]

f. Order Refusing to Stay Probate Proceedings

In the case of *In re Shore*,[76] the relator sought to stop the trial court's efforts to finalize probate proceedings based on the pendency of his appeal from the trial court's earlier declaratory judgment on the invalidity of part of the deceased's will. The controlling statute, Texas Probate Code Section 29, provided that "[w]hen an appeal is taken by an executor . . . no bond shall be required, unless such appeal personally concerns him, in which case he must give the bond." Relator, who served as both the executor and devisee under the will, did not file a bond, arguing that Section 29 excused him from such a requirement because he served as the executor of the estate.[77] The San Antonio Court of Appeals rejected relator's argument, holding instead that relator had a personal interest in what will provisions applied and was required to file a supersedeas bond to prevent execution of the judgment.[78] Finding that the trial court did not abuse its discretion by refusing to stay proceedings, mandamus was denied.

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71. *Id.* at *3.

72. *In re* Mission Consol. Indep. Sch. Dist., 990 S.W.2d 459, 461 (Tex. App.—Corpus Christi 1999, orig. proceeding); Zalta v. Tennant, 789 S.W.2d 432, 433 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

73. *In re* Am. Media Consol., 121 S.W.3d 70, 72 (Tex. App.—San Antonio 2003, orig. proceeding).

74. *Id.* at 73 (citing Grant v. Wood, 916 S.W.2d 42, 45 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding)).

75. *Id.* The summary judgment motion in this defamation case was filed by a media defendant, so interlocutory appeal would have been available from the denial of the defendant's summary judgment. *See* TEX. CIV. PRAC. & REM. CODE § 51.014 (Vernon Supp. 2004).

76. *In re* Shore, 106 S.W.3d 817, 818 (Tex. App.—Texarkana 2003, orig. proceeding).

77. *Id.*

78. *Id.* at 820-21.

3. *Adequate Remedy by Appeal*

"That a party must have 'no other adequate remedy by law' is a 'fundamental tenet' of mandamus practice."[79] Ordinarily, incidental district court rulings will not be reviewed by mandamus because an adequate appellate remedy exists.[80] An appellate remedy is not inadequate merely because it involves more expense or delay than a writ of mandamus.[81] Rather, the relator must establish the effective denial of a reasonable opportunity to develop the merits of his or her case, so that the trial would be a waste of judicial resources.[82]

An exception to these general rules arises when one court renders an order that directly interferes with another court's jurisdiction or fails to observe a mandatory statutory provision conferring a right.[83] In such instances, there is no adequate appellate remedy.

Moreover, in most instances an appeal is an adequate remedy for the improper denial of a special appearance.[84] However, that is not so in "mass tort litigation [which] places significant strain on a defendant's resources and creates considerable pressure to settle the case, regardless of the underlying merits."[85]

A party generally lacks an adequate remedy by appeal in a number of instances, including the denial or grant of a motion to compel arbitration,[86] a motion seeking the disqualification of an attorney or a law

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79. *In re* State Bar of Tex., 113 S.W.3d 730, 734 (Tex. 2003) (quoting Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992)).

80. *Id.*; Galtex Prop. Investors, Inc. v. City of Galveston, 113 S.W.3d 922, 926 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (challenge to contempt judgment adequately remedied by appeal); *In re* Aaron, No. 07-03-0324-CV, 2003 WL 21919346, *2 (Tex. App.—Amarillo Aug. 12, 2003, orig. proceeding) ("Mandamus is not an available remedy for monetary sanctions imposed during post-judgment proceedings such as these because review is available by appeal when the sanctions become part of a final judgment on which execution is authorized."); *In re* Pena, 104 S.W.3d 719 (Tex. App.—Tyler 2003, orig. proceeding) (appeal is an adequate remedy for trial court's refusal to rule on a motion for new trial or the overruling of such a motion by operation of law); *In re* W. Star Trucks US, Inc., 112 S.W.3d 756, 763 (Tex. App.—Eastland 2003, orig. proceeding) ("[A] trial court's decision to permit an amended pleading is not particularly amenable to review by mandamus.").

81. *In re* Smart, 103 S.W.3d 515, 521 (Tex. App.—San Antonio 2003, orig. proceeding) (Although trial court abused its discretion by granting legislative continuance, the matter was comparable to an ordinary continuance; such delay can be remedied on appeal.).

82. *In re* Certain Underwriters at Lloyd's, 106 S.W.3d 332, 333-34 (Tex. App.—Dallas 2003, orig. proceeding) (finding that relators did not meet their burden of proving that the trial court's order requiring them to pay an $8 million bond would preclude them from developing the merits of their case or that they were in danger of permanently losing substantial rights).

83. *Id.* (stating that the district court order interfered with BODA's continuing jurisdiction over attorney's suspension); *In re* Tyler Asphalt & Gravel Co., 107 S.W.3d 832, 844 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (stating that the district court interfered with the exclusive jurisdiction of the county court).

84. *In re* E.I. du Pont de Nemours and Co., 92 S.W.3d 517, 524 (Tex. 2002).

85. *Id.* (quoting CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996)).

86. *In re* Media Arts Group, Inc., 116 S.W.3d 900, 904 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding); *In re* Neutral Posture, Inc., No. 01-02-00447-CV, 2003 WL 21756427, at *2 (Tex. App.—Houston [1st Dist.] July 31, 2003).

firm,[87] certain discovery orders,[88] and an order compelling a case to arbitration that also includes findings of facts on the merits.[89]

4. *Diligence in Seeking Mandamus Relief*

Mandamus is an extraordinary remedy that is largely governed by equitable principles.[90] Thus, Texas courts often deny mandamus relief due to a party's lack of diligence in asserting its rights.[91] In determining whether a relator's delay in seeking a writ of mandamus is a barrier to the issuance of the writ, a court may analogize to the doctrine of laches, which requires a showing of (1) an unreasonable delay; and (2) harm resulting because of the delay.[92]

A party may file an affidavit providing a reasonable explanation for the delay.[93] A delay will be excused upon a showing that the relator was waiting for the preparation of the reporter's record and a ruling on a related motion, and where the real party in interest had requested a brief moratorium of activity in the case after her father passed away.[94]

5. *Mandamus Jurisdiction*

In the case of *In re Hettler*,[95] the Amarillo Court of Appeals held that it did not have jurisdiction to consider a petition for mandamus against a district court judge acting in his capacity as regional presiding judge. Section 22.221 of the Texas Government Code authorizes a court of appeals to issue a writ of mandamus where relief is sought against a judge of a district or county court in the court of appeals's district or a judge of a district court who is acting as a magistrate at a court of inquiry under Chapter 52, Code of Criminal Procedure, in the court of appeals's dis-

87. *In re* Skiles, 102 S.W.3d 323, 326 (Tex. App.—Beaumont 2003, orig. proceeding) (quoting Nat'l Med. Enter., Inc. v. Godbey, 924 S.W.2d 123, 133 (Tex. 1996) (A party "is not required to simply hope that the pending case is concluded without disclosure of its confidences," nor is a party "required to wait until any damage will have been done and will be irremediable.")).

88. *In re* Hinterlong, 109 S.W.3d 611, 621 (Tex. App.—Fort Worth 2003, orig. proceeding) ("Remedy by appeal in a discovery mandamus is not adequate where a party is required 'to try his lawsuit, debilitated by the denial of proper discovery, only to have that lawsuit rendered a nullity on appeal.' Remedy by appeal is likewise not adequate where the trial court's discovery order disallows discovery that cannot be made a part of the appellate record, thereby denying the reviewing court the ability to evaluate the effect of the trial court's error.").

89. *In re* H2O Plumbing, Inc., 115 S.W.3d 36, 81 (Tex. App.—San Antonio 2003, orig. proceeding).

90. Galtex Prop. Investors, Inc. v. City of Galveston, 113 S.W.3d 922, 926 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

91. *Id.* (fourteen-month delay).

92. *Hinterlong*, 109 S.W.3d at 620; AutoNation USA Corp. v. Leroy, 105 S.W.3d 190, 202 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (eight-month delay did not prevent mandamus relief where the real party in interest does not assert prejudice caused by the delay).

93. *Hinterlong*, 109 S.W.3d at 620.

94. *Id.*

95. *In re* Hettler, 110 S.W.3d 152, 155 (Tex. App.—Amarillo 2003, orig. proceeding).

trict.[96] In *Hettler*, a district judge was assigned to hear relators' motion for disqualification.[97] Although the assigned judge was a district judge sitting in the court of appeals's district (over whom the court of appeals would ordinarily have mandamus jurisdiction), relators sought relief against that judge in his capacity as the presiding judge of an administrative judicial region.[98] Because the legislature did not give courts of appeals the specific power to issue writs of mandamus against district judges acting in the capacity of a regional presiding judge, the court held that it had no mandamus jurisdiction and dismissed the case.[99]

In re Meridien Hotels, Inc.[100] involved the mandamus jurisdiction of county courts at law. The Texas Constitution provides that "[t]he [c]ounty [c]ourt has jurisdiction as provided by law. . . [c]ounty court judges shall have the power to issue writs necessary to enforce their jurisdiction."[101] Section 25.0004(a) of the Texas Government Code provides that "[a] statutory county court or its judge may issue writs of injunction, mandamus, sequestration, attachment, garnishment, certiorari, supersedeas, and all writs necessary for the enforcement of the jurisdiction of the court."[102] The relator in *Meridien* took the position that a county court's jurisdiction to issue writs of mandamus was limited to writs necessary to enforce the county court's jurisdiction.[103] The Dallas Court of Appeals disagreed, reasoning that the constitution and statute provided two grants of authority to issue writs:

> (1) the specifically named writs when the petition for the writ pleads an amount in controversy within the county court's limited jurisdiction; and
> (2) all writs necessary to the enforcement of the county court's jurisdiction, regardless of the amount in controversy.[104]

Therefore, Dallas County Court at Law No. 2 had jurisdiction to issue a writ of mandamus compelling a justice court to vacate its order of abatement of a forcible entry and detainer action, to begin trial by a certain date, and to render a decision within a reasonable time.[105]

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96. TEX. GOV'T CODE ANN. § 22.221(b)(1)-(2) (Vernon Supp. 2004).
97. *Hettler*, 110 S.W.3d at 153.
98. *Id.* at 154.
99. *Id.* at 154-55.
100. Meridien Hotels, Inc. v. LHO Fin. P'ship, 97 S.W.3d 731, 736-37 (Tex. App.—Dallas 2003, orig. proceeding).
101. TEX. CONST. art. V, § 16.
102. TEX. GOV'T CODE ANN. § 25.0004(a) (Vernon Supp. 2004).
103. *Meridien Hotels*, 97 S.W.3d at 736.
104. *Id.* Unlike other Texas county courts, Dallas County's county courts at law have expanded amount-in-controversy jurisdiction concurrent with the district court in civil cases. *See* TEX. GOV'T CODE ANN. § 25.0592(a) (Vernon Supp. 2004).
105. *Meridien Hotels*, 97 S.W.3d at 737.

B. Interlocutory Appeals

1. *Interlocutory Appeals in the Courts of Appeals*

a. Orders Subject to Interlocutory Appeal

i. Orders Relating to Arbitration

"Appellate courts have jurisdiction to consider immediate appeals of interlocutory orders only if a statute *explicitly provides* appellate jurisdiction."[106] Because "a statute authorizing an appeal from an interlocutory order is 'in derogation' of the general rule that only final judgments are appealable . . . Texas courts strictly construe those statutes authorizing interlocutory appeals."[107]

Applying these principles, the First District Court of Appeals in *Walker Sand, Inc. v. Baytown Asphalt Materials, Ltd.* dismissed an appeal for lack of jurisdiction because the interlocutory order appealed did not fall into any statutory provision permitting an interlocutory appeal. Section 171.098(a)(1) of the Texas Civil Practice & Remedies Code permits an interlocutory appeal from the denial of an application to compel arbitration made pursuant to Section 171.021.[108] In *Walker Sand*, the defendant appealed the trial court's order denying his motion requesting a stay and abatement of proceedings "to permit arbitration." Dismissing the appeal for lack of jurisdiction, the court of appeals noted that neither Section 171.098 nor any other statute provides for an interlocutory appeal of an order denying a motion to stay or to abate the trial court's proceedings. The court specifically concluded that the order did not deny "an application to compel arbitration" as contemplated by Section 171.098(a)(1) because it neither actually nor effectively stayed or prevented arbitration.[109]

ii. Orders Relating to Injunctive Relief

Under Section 51.014(a)(4) of the Texas Civil Practice & Remedies Code, an interlocutory appeal may be taken from an interlocutory order that "grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65 [of the Texas Civil Practice & Remedies Code]."[110] During the Survey period, the First District Court of Appeals in *Ahmed v. Shimi Ventures, L.P.* analyzed whether an interlocutory order *modifying* a temporary injunction is subject to interlocutory appeal.[111] Acknowledging the strict construction required for statutes granting interlocutory jurisdiction, and further recognizing that an order modifying a temporary injunction is "not exactly" one of the orders listed in Section 51.014(a)(4), the court of

106. Walker Sand, Inc. v. Baytown Asphalt Materials, Ltd., 95 S.W.3d 511, 514 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (emphasis in original).
107. *Id.* at 514.
108. Tex. Civ. Prac. & Rem. Code Ann. § 171.098(a)(1) (Vernon Supp. 2004).
109. *Walker Sand*, 95 S.W.3d at 515-16.
110. Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(a)(4), 65.001-.045 (Vernon 1997 & Supp. 2004).
111. Ahmed v. Shimi Ventures, L.P., 99 S.W.3d 682, 688-89 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

appeals nonetheless found that it had jurisdiction over the order modifying the temporary injunction "given the similarity" of the order to the orders expressly listed in the statute.[112]

In contrast, the Dallas Court of Appeals in *Art Institute v. Integral Hedging, L.P.* strictly construed the statute allowing an interlocutory appeal from an order granting or refusing a temporary injunction, and concluded that it "cannot be used as a vehicle for carrying other non-appealable interlocutory orders to the appellate court."[113] The court, accordingly, refused to exercise jurisdiction over an appeal from an order directing a receiver to sell assets and pay from a fund a certain sum in attorney's fees to the appellees' attorneys because the order neither appointed a receiver or overruled a motion to vacate a receiver, nor denied a request for a temporary injunction against payment of attorney's fees from the assets of the fund.[114]

iii. Orders Relating to Class Certification

During the Survey period, the Texas Supreme Court and the Austin Court of Appeals[115] confirmed that, although the standard of review for class certification decisions is abuse of discretion, the court of appeals's discretion is narrowed by the "rigorous analysis" rule of *Southwestern Refining Co. v. Bernal.* In *Bernal*, the supreme court held that "[c]ourts must perform a 'rigorous analysis' before ruling on class certification to determine whether all prerequisites to certification have been met . . . [because] actual, not presumed, conformance with [the requirements of Rule 42] remains . . . indispensable."[116]

iv. Orders Relating to Immunity of a Government Official

An order that denies a motion for summary judgment based on an assertion of immunity by a person who is an officer or employee of the state or a political subdivision of the state is an appealable interlocutory order.[117] Because the waiver of sovereign immunity found in the Texas Tort Claims Act (the "Act") is based on respondeat superior, the Texas Supreme Court has held that a governmental entity cannot be held liable under the Act if its individual officer would be entitled to immunity.[118] Under this rule, a governmental entity may use an employee's official immunity defense as a basis for interlocutory appeal in a case arising under the Act.[119]

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112. *Id.* at 689.

113. Art Inst. v. Integral Hedging, L.P., No. 05-02-01314-CV, 2003 WL 21715885, at *5 (Tex. App.—Dallas July 25, 2003, no pet.).

114. *Id.* at *4.

115. Union Pac. Res. Group, Inc. v. Hankins, 111 S.W.3d 69, 71 (Tex. 2003); Ford Motor Co. v. Sheldon, 113 S.W.3d 839, 846 (Tex. App.—Austin 2003, no pet.).

116. S.W. Refining Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000).

117. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5) (Vernon Supp. 2004).

118. DeWitt v. Harris County, 904 S.W.2d 650, 652 (Tex. 1995).

119. City of Beverly Hills v. Guevara, 904 S.W.2d 655, 656 (Tex. 1995). *See* City of Houston v. Flaniken, 108 S.W.3d 555, 556 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (permitting City of Houston to pursue interlocutory appeal based on official immunity claim of employee).

v. Orders Relating to Joinder

An order granting or denying the joinder or intervention of a plaintiff who could not otherwise maintain proper venue is an appealable interlocutory order.[120] However, in actions filed before September 1, 2003, only a person seeking or opposing intervention or joinder is permitted to pursue an interlocutory appeal of the order. A party whose rights are not affected by the intervention or joinder order has no standing to seek an interlocutory appeal from the order.[121]

vi. Orders on Plea to the Jurisdiction

An order that grants or denies a plea to the jurisdiction by a governmental unit is appealable.[122] There is a split of authority as to whether individual officers may file pleas to the jurisdiction and file an interlocutory appeal. Because an official capacity suit is essentially a suit against the government, some Texas appellate courts hold that governmental officials acting in their official capacity are "governmental units."[123] Other courts hold that individual officials are not "governmental units" under the statute granting the right to appeal.[124]

b. Scope of Review on Interlocutory Appeal

While an interlocutory appeal is pending before it, a court of appeals has jurisdiction, under Rule of Appellate Procedure 29.6, to review "a further appealable order concerning the same subject matter."[125] During the Survey period, the First District Court of Appeals utilized this rule to review a modified temporary injunction order that was independently appealable and concerned the same subject matter as an earlier temporary injunction order already pending on interlocutory appeal.[126] In another case, the court further reviewed a modified trial court's order deciding the propriety of a party's joinder, which the trial court had entered to correct an earlier order that had already been appealed.[127] In considering the modified order, the court of appeals cited to Rule of Appellate Procedure 27.3, which requires the court of appeals in such circumstances

120. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c) (Vernon Supp. 2004).

121. Ramirez v. Collier, Shannon, Scott, PLLC, 123 S.W.3d 43, 46 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

122. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (Vernon Supp. 2004).

123. Potter County Attorney's Office v. Stars & Stripes Sweepstakes, L.L.C., 121 S.W.3d 460, 465 (Tex. App.—Amarillo 2003, no pet. h.); Ware v. Miller, 82 S.W.3d 795, 800 (Tex. App.—Amarillo 2002, pet. denied); Friona Indep. Sch. Dist. v. King, 15 S.W.3d 653, 657 n.3 (Tex. App.—Amarillo 2000, no pet.); Perry v. Del Rio, 53 S.W.3d 818, 821-22 (Tex. App.—Austin 2001), *pet. dism'd*, 66 S.W.3d 239, 264 (Tex. 2001).

124. Castleberry Indep. Sch. Dist. v. Doe, 35 S.W.3d 777, 780 (Tex. App.—Fort Worth 2001, pet. dism'd w.o.j.); Univ. of Houston v. Elthon, 9 S.W.3d 351, 354 (Tex. App.—Houston [14th Dist.] 1999, pet. dism'd w.o.j.); Johnson v. Resendez, 993 S.W.2d 723, 728 (Tex. App.—Dallas 1999), *appeal dism'd*, 52 S.W.3d 689, 693 (Tex. 2001).

125. TEX. R. APP. P. 29.6(a)(1).

126. Ahmed v. Shimi Ventures, L.P., 99 S.W.3d 682, 688-89 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

127. Ramirez v. Collier, Shannon, Scott, PLLC, 123 S.W.3d 43, 46 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

to treat the pending appeal "as from the subsequent order."[128]

In an interlocutory appeal based on a trial court's denial of a motion for summary judgment by a state official or employee asserting immunity, the court of appeals may review only the trial court's ruling on the immunity defense—the court may not consider other defenses raised by the motion for summary judgment.[129]

c. Trial Court Proceedings Pending Interlocutory Appeal

In cases filed prior to September 1, 2003, the filing of an interlocutory appeal from an order certifying a class action operates to stay the commencement of a trial in the trial court pending resolution of the appeal.[130] As the parties learned in *Lincoln Property Co. v. Kondos*, however, this stay can be waived, which, if the case proceeds far enough, can moot the interlocutory appeal.[131]

In *Lincoln Property*, the trial court certified the class and the defendant filed an interlocutory appeal from the class certification order. Before the appeal was argued, however, both parties moved for summary judgment, which the trial court granted in favor of the defendant. Ultimately, the trial court signed a final judgment, which the plaintiff separately appealed.[132]

Questioning its jurisdiction over the interlocutory appeal, the court of appeals noted that, because the interlocutory class certification order merged into the final judgment and the trial court's plenary jurisdiction thereafter expired, the trial court had rendered itself powerless to reconsider its class certification ruling, even if the court of appeals remanded the order in the interlocutory appeal. This meant that the court of appeals's decision in the interlocutory appeal would not affect the rights of the parties. The court of appeals accordingly concluded that, by signing a final judgment, the trial court rendered the interlocutory appeal of the class certification order moot, requiring a dismissal of the appeal for want of jurisdiction.[133]

2. Supreme Court Jurisdiction Over Interlocutory Appeals

During the Survey period, the Texas Supreme Court readily accepted jurisdiction over several interlocutory appeals involving the issue of waiver of sovereign immunity in suits involving public mental health facilities.[134] The waiver issue had previously been resolved in a series of opin-

128. TEX. R. APP. P. 27.3.

129. City of Houston v. Flaniken, 108 S.W.3d 555, 556 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

130. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (Vernon Supp. 2004).

131. Lincoln Prop. Co. v. Kondos, 110 S.W.3d 712, 713-14 (Tex. App.—Dallas 2003, no pet.).

132. *Id.* at 714-15.

133. *Id.* at 715-16.

134. Beaumont State Ctr. v. Kozlowski, 108 S.W.3d 899, 899-900 (Tex. 2003); Dallas Metrocare Servs. v. Pratt, 124 S.W.3d 147, 148-49 (Tex. 2003).

ions,[135] and the supreme court had no difficulty accepting jurisdiction where the holdings in the prior cases were dispositive.[136]

The Texas Supreme Court further continued its trend of approaching the "conflicts" jurisdictional analysis from a functional rather than technical perspective. For example, the supreme court found jurisdiction over an interlocutory order certifying a class in *Union Pacific Resources Group, Inc. v. Hankins*[137] based on the court of appeals's failure to enforce the supreme court's requirement pronounced in *Southwestern Refining Co. v. Bernal* that the trial court consider the substantive law involved in the case in determining whether the purported class can meet the certification prerequisites under Rule 42.[138]

3. *Impact of House Bill 4 on Interlocutory Appeals*

House Bill 4 has impacted interlocutory appeals in a number of important respects. In House Bill 4, the legislature enacted Section 74.351(b) of the Texas Civil Practice and Remedies Code, which requires a plaintiff in a healthcare liability case to serve an expert report on the defendant no later than 120 days after the date the suit is filed, or suffer dismissal of the case with a possible award of attorney's fees to the defendant.[139] Chapter 51 of the Civil Practice and Remedies Code now affords the defendant an immediate appeal of any order denying him all or part of the relief sought pursuant to the provisions of Section 74.351(b).[140]

The legislature also enacted Section 74.351(l) of the Civil Practice and Remedies Code, which addresses the standard for granting a defendant's motion challenging the adequacy of an expert report in a healthcare liability suit.[141] An interlocutory order granting such a motion is also immediately appealable under Chapter 51 of the Civil Practice and Remedies Code.[142]

House Bill 4 further added venue orders to the types of interlocutory orders subject to immediate appeal. Specifically, before House Bill 4, Section 15.003 of the Civil Practice and Remedies Code was only a joinder statute and *not* a venue statute. Now, under new Section 15.003, a ruling that a plaintiff did or did not independently establish proper venue *is* immediately appealable, in addition to any joinder decision made by the trial court.[143] Additionally, any party affected by the trial court's de-

135. Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 695-96 (Tex. 2003); Tex. Dep't of Mental Health and Mental Retardation v. Lee, 38 S.W.3d 862, 869-70 (Tex. App.—Fort Worth 2001, pet. denied); Tex. Dep't of Mental Health and Mental Retardation v. Kelley, No. 11-01-00258-CV, 2003 WL 1391310 (Tex. App.—Eastland March 20, 2003, no pet.).

136. *Beaumont*, 108 S.W.3d at 899-900; *Dallas Metrocare*, 124 S.W.3d at 148-49.

137. Union Pac. Res. Group, Inc. v. Harkins, 111 S.W.3d 69, 72 (Tex. 2003).

138. S.W. Refining Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000).

139. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b)(1) (Vernon Supp. 2004).

140. *Id.* § 51.014(a)(9).

141. *Id.* § 74.351(l).

142. *Id.* § 51.014(a)(10).

143. *Id.* § 15.003(b).

termination may pursue an interlocutory appeal.[144]

House Bill 4 also impacted the Texas Supreme Court's jurisdiction over interlocutory appeals. After House Bill 4, the supreme court has jurisdiction—without the need for a dissent or a conflict—over interlocutory orders denying a motion for summary judgment by a media defendant based on the free speech/free press provisions of the United States and Texas Constitutions, as well as over interlocutory orders certifying or refusing to certify a class.[145]

House Bill 4 also sets a new standard for determining whether the supreme court has "conflicts" jurisdiction over an interlocutory appeal. Before House Bill 4, the Texas Supreme Court had "conflicts" jurisdiction (the court of appeals' opinion conflicts with a prior decision of the supreme court or another court of appeals) only when the "rulings in the two cases are so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other."[146] Under the new standard, one court holds differently from another "when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants."[147]

4. *Stay of Proceedings Pending Interlocutory Appeal*

After House Bill 4, stays of proceedings in the trial court pending interlocutory appeal are as follows:

No stay:

- Order granting or refusing a temporary injunction or granting or overruling a motion to dissolve a temporary injunction.[148]
- Agreed interlocutory appeals (unless the parties agree *and* the trial court, court of appeals, or judge of the court of appeals orders a stay).[149]

Stay of commencement of trial pending resolution of appeal, if the motion upon which the interlocutory order is based is filed within the time limits specified in Section 51.014(c) of the Civil Practice and Remedies Code:

- Order granting or denying special appearance.[150]

Stay of ALL proceedings in the trial court pending resolution of appeal, if the motion upon which the interlocutory order is based is filed within the time limits specified in Section 51.014(c) of the Civil Practice and Remedies Code:

- Order denying a motion for summary judgment based on an assertion of immunity by an officer or employee of the state or political

144. *Id.* § 15.003(c).
145. TEX. GOV'T CODE ANN. § 22.225(d) (Vernon Supp. 2004).
146. Gross v. Innes, 988 S.W.2d 727, 729 (Tex. 1998).
147. TEX. GOV'T CODE ANN. § 22.225(e) (Vernon Supp. 2004).
148. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4) (Vernon Supp. 2004).
149. *Id.*
150. *Id.* § 51.014(a)(7).

subdivision.[151]

- Order granting or denying a plea to the jurisdiction by a governmental unit.[152]

Stay of commencement of trial pending resolution of appeal, regardless of when the motion upon which the interlocutory order is based is filed:

- Order appointing a receiver or trustee.[153]
- Order overruling a motion to vacate an order appointing a receiver or trustee.[154]
- Order denying a motion for summary judgment brought by a media defendant based on the free speech/free press clauses of Texas and United States Constitutions.[155]
- Order denying a motion to dismiss and/or for fees in a healthcare liability case.[156]
- Order granting a challenge to an expert's report in a healthcare liability case.[157]
- Venue and joinder rulings pursuant to Section 15.003(b) of the Civil Practice and Remedies Code.[158]

Stay of ALL proceedings in the trial court pending resolution of appeal, regardless of when the motion upon which the interlocutory order is based is filed:

- Order certifying or refusing to certify a class.[159]

II. PRESERVATION OF ERROR

There are three basic steps to preserving error in the trial court. First, state a clear objection. Second, get a ruling on the objection. Third, make certain that your objection and ruling are both in the appellate record.[160] The Texas Supreme Court issued a series of opinions during the Survey period making it clear that arguments will not be reviewed on appeal absent strict compliance with each of these three steps.

A. Objections Raised for the First Time on Appeal

As a general rule, an objection in the trial court is a necessary prerequisite to preserving an argument for appeal.[161] In a series of cases, the Texas Supreme Court emphasized that this general rule will not be over-

151. *Id.* § 51.014(a)(5).
152. *Id.* § 51.014(a)(8).
153. *Id.* § 51.014(a)(1).
154. *Id.* § 51.014(a)(2).
155. *Id.* § 51.014(a)(6).
156. *Id.* § 51.014(a)(9).
157. *Id.* § 51.014(a)(10).
158. *Id.* § 15.003(b).
159. *Id.* § 51.014(a)(3).
160. *See* Tex. R. App. P. 33.1.
161. *See* Tex. R. App. P. 33.1; *In re* B.L.D., 113 S.W.3d 340, 349 (Tex. 2003) ("Our procedural rules state that any complaint to a jury charge is waived unless specifically included in an objection.").

looked, even where the complaint on appeal involves constitutional questions and parental rights.[162]

In *In re J.F.C.*,[163] the supreme court found it was error to fail to instruct the jury that a parent's right could not be terminated unless it is in the best interests of the child.[164] The court recognized that the omission of this important element may have just been a typographical error.[165] However, because there was no objection to the omission, the court concluded that the element was deemed found by the trial court pursuant to Rule 279 of the Texas Rules of Civil Procedure.[166] The court rejected the parent's argument that a deemed finding violated the due process clause of the United States and Texas Constitutions.[167] The majority also rejected the dissent's position that the error in omitting an element was fundamental error that should be reviewed notwithstanding the failure to object.[168] The majority reasoned that "deeming an omitted finding in support of a judgment in a parental termination case when that finding is supported by clear and convincing evidence does not adversely affect any 'fundamental public policy' found in the Texas Constitution or statutes" because the deemed finding provision of Rule 279 "simply means that a court, rather than a jury, has supplied a finding that is supported by clear and convincing evidence on one of the elements of parental termination."[169]

The supreme court also declined in *J.F.C.* to reach the question of whether a constitutional due process challenge to the broad-form submission of the parental termination question could be raised for the first time on appeal because the "evidence conclusively establishes that each parent engaged in a course of conduct described by sub-Section 161.001(1) of the Family Code."[170] Following *J.F.C.*, the supreme court was asked repeatedly during the Survey period to address the constitutionality of a broad-form submission of the parental termination question. The Court repeatedly declined to reach the issue because there was no objection at trial to the broad-form submission.[171]

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162. See *In re* J.F.C., 96 S.W.3d 256, 273-74 (Tex. 2002).

163. *Id.*

164. *Id.* at 259.

165. *Id.* at 261.

166. *Id.* at 262.

167. *Id.* at 263, 272-73.

168. *Id.* at 274-75. The dissent criticized the court by "failing to resolve the conflict among [the appellate courts] as to whether they may review unpreserved error in termination cases." *Id.* at 285 (Hankinson, J., dissenting, joined by Enoch, J., dissenting). The dissent would have applied the fundamental error standard to review the charge error. *Id.* at 293.

169. *Id.* at 275. Notably, the parents made no factual sufficiency challenge to the evidence. *Id.*

170. *Id.* at 277.

171. *See, e.g., id.* at 274; *In re* B.L.D., 113 S.W.3d 340, 349-50 (Tex. 2003); *see also In re* K.N.R., 113 S.W.3d 365, 366 (Tex. 2003) (per curiam); *In re* A.F., 113 S.W.3d 363, 364 (Tex. 2003) (per curiam); *In re* A.V., 113 S.W.3d 355, 358 (Tex. 2003).

The supreme court reiterated in numerous opinions the "strong policy considerations favoring preservation" in the trial court and concluded that these policies outweighed the interests of the parents in parental rights termination cases.[172] In *In re B.L.D.*,[173] the court considered two narrow exceptions to the preservation requirement, including fundamental error and constitutional principles of due process. The court reasoned that fundamental error—"describ[ing] situations in which an appellate court may review error that was neither raised in the trial court nor assigned on appeal—is a 'discredited doctrine'" that should apply only in criminal and quasi-criminal cases.[174] Thus, the supreme court declined to apply the fundamental error doctrine to parental rights termination cases.[175]

Additionally, the Court explained that just because the issue involves the parents' constitutional rights does not justify overlooking procedural rules.[176] Indeed, the supreme court explained that it presumes that the rules governing preservation of error comport with due process.[177] Thus, the supreme court held that as "a general rule, [and absent any claims of ineffective assistance of counsel] due process does not mandate that appellate courts review unpreserved complaints of charge error in parental rights termination cases."[178]

B. Delays in Making Objections

A party can waive an objection by waiting too long to raise it. In *Laboratory Corp. of America v. Compton*,[179] the San Antonio Court of Appeals held that a defendant waived her right to seek sanctions for the plaintiffs' conduct in the first trial by waiting until completion of a second trial to raise the complaint.[180] The defendant relied on the grounds in the sanctions motion to obtain a new trial, but sat on her rights until after she was successful in a subsequent trial.[181] Thus, the court of appeals held that the defendant waived her sanctions complaint.[182]

172. B.L.D., 113 S.W.3d at 350; *see also K.N.R.*, 113 S.W.3d at 366; *In re* A.F., 113 S.W.3d at 364; *A.V.*, 113 S.W.3d at 358.

173. B.L.D., 113 S.W.3d at 349.

174. *Id.*

175. *Id.* at 351.

176. *Id.* at 352 ("we presume that our rules governing preservation of error in civil cases comport with due process.").

177. *Id.*

178. *Id.* at 354.

179. Laboratory Corp. of Am. v. Compton, 126 S.W.3d 196 (Tex. App.—San Antonio 2003, Rule 53.7(f) motion filed 12-31-03).

180. *Id.* at 200.

181. *Id.*

182. *Id.*

C. Scope of the Objection

1. *Objections Found Insufficient to Preserve Error Raised on Appeal*

It is a longstanding principle that the objection in the trial court must match the argument made on appeal. During the Survey period, the supreme court left significant confusion on the question of how clear the objection must be to justify appellate review. In *In re L.M.I.*,[183] the Texas Supreme Court found that a father could not challenge the constitutionality of his affidavit relinquishing his parental rights on appeal, because the father did not cite to the Constitution or make a constitutional argument in the trial court and did not raise the issue in any post-judgment motion.[184]

In a plurality opinion, the supreme court also expressed frustration with the inarticulate wording of the wife's appellate briefing, which the plurality admitted made it difficult for the court to decipher exactly what the wife's complaint was on appeal. As a result, the plurality held that although the mother presented evidence at trial as to the false promises made to her to coerce her to sign the affidavit, her failure to expressly articulate in the trial court that she was challenging the enforceability of her affidavit waived her right to challenge the affidavit on appeal.[185]

Other members of the court disagreed with this conclusion, believing that the mother was not challenging the enforceability of the affidavit, but rather was raising a legal sufficiency challenge to the trial court's termination of her parental rights based on the affidavit.[186] The dissent, authored by Justice Hecht, pointedly attacked the plurality opinion, stating that there is no confusion as to the mother's position:

> [s]he contends that in signing her affidavit of relinquishment she was unduly influenced by the kindness of some of the participants in the process and defrauded by promises that her sons' adoptive parents would send her pictures and update her on their progress. This was her position in the trial court; it was her argument in the court of appeals, was briefed by the parties, and was decided by the court; it is still her argument here.[187]

Justice Hecht criticized that "[t]o miss the simple arguments these parents make, one would seemingly have to understand as little English as Ricardo [the father] does."[188] Justice Hecht pleaded that to "order that children be taken from their parents" for solely "technical reasons of appellate procedure, without regard for the parents' arguments is hard to justify" and to do so "based solely on a rigid reading of a brief, is in my view indefensible."[189]

183. *In re* L.M.I. 119 S.W.3d 707 (Tex. 2003).
184. *Id.* at 710.
185. *Id.* at 711-12 (O'Neill, J. , joined by Justices Enoch, Schneider and Smith).
186. *Id.* at 730 (Owen, J., joined by Phillips, C.J.).
187. *Id.* at 732.
188. *Id.* at 732-33.
189. *Id.* at 733.

2. *Objections Found Sufficient to Preserve Error for Appeal*

An objection to the trial court's use of the wrong date in submitting a defendant's limitations defense is sufficient to preserve a complaint on appeal as to a defective jury charge submission.[190] In *Holubec v. Brandenberger*,[191] the plaintiffs brought nuisance claims against their neighboring sheepfarmers. At trial, the defendants objected to the trial court's incorrect instruction to the jury on their limitations defense under the Right to Farm Act, complaining that the instruction did not tell the jury the proper date to consider in assessing the limitations defense.[192] Defendants conceded on appeal that their own tendered submission did not track the statutory provisions precisely.[193] However, the supreme court found that the defendants did not have to submit their own substantially correct question (despite the fact that they had the burden on the affirmative defense) because the question actually submitted was defective.[194]

C. Arguments Not Raised in Response to Summary Judgment

While the grounds for objecting to issues at trial must be stated with particularity or risk being waived, the standards may not be as stringent when objecting to an opponent's summary judgment motion. A no-evidence summary judgment motion must state the elements as to which there is no evidence.[195] In *In re Estate of Swanson*,[196] the El Paso Court of Appeals reversed its prior precedent[197] and joined the San Antonio and Houston Fourteenth District Courts of Appeals in holding that "even if the nonmovant does not object or respond to a defective no-evidence motion, if it is conclusory, general, or does not state the elements for which there is no evidence, it cannot support the judgment and may be challenged for the first time on appeal."[198]

D. Preserving Issues Through a Motion for New Trial

A party should file a motion for new trial to preserve factual sufficiency points and to raise new evidence that was not available at the time of

190. *See* Holubec v. Brandenberger, 111 S.W.3d 32, 39 (Tex. 2003).
191. *Id.*
192. *Id.* at 38-39.
193. *Id.*
194. *Id.* at 39.
195. Tex. R. Civ. P. 166a(i).
196. *In re* Estate of Swanson, No. 08-02-00154-CV, 2003 WL 22215240 (Tex. App.—El Paso Sept. 25, 2003, no pet. h.).
197. *See* Walton v. Phillips Petroleum Co., 65 S.W.3d 262, 268 (Tex. App.—El Paso 2001, pet. denied); Walton v. City of Midland, 24 S.W.3d 853, 857 (Tex. App.—El Paso 2000, no pet.).
198. *Swanson*, 2003 WL 22215240 at *2 (citing Crocker v. Paulyne's Nursing Home, Inc., 95 S.W.3d 416, 419 (Tex. App.—Dallas 2002, no pet.); Callaghan Ranch, Ltd. v. Killam, 53 S.W.3d 1, 3-4 (Tex. App.—San Antonio 2000, pet. denied)); *see also* Cuyler v. Minns, 60 S.W.3d 209, 212-14 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

trial.[199] A party may file an amended motion for new trial without leave of court "before any earlier motion for new trial is overruled and within thirty days after the judgment."[200] An amended motion for new trial filed more than thirty days after judgment is signed is untimely.[201] Thus, the supreme court reasoned in *Moritz v. Presiss*, that even though the trial court has inherent power to modify, vacate, correct, or reform the judgment during its plenary power, if the trial court does not so change the judgment, the matters raised in an amended motion for new trial filed more than thirty days after the judgment is signed are not preserved for appeal.[202] In reaching this conclusion, the supreme court overruled its 1983 opinion in *Jackson v. Van Winkle*,[203] "to the extent that it allows appellate review of a trial court's decision to deny an untimely new trial motion."[204]

III. JUDGMENTS

A. FINALITY IN THE SUMMARY JUDGMENT CONTEXT

Whether a trial court's summary judgment order is intended to be a final order disposing of all claims depends on the trial court's intent.[205] *In re Campbell*, the First District Court of Appeals held that the trial court's notification to the parties that it believed it lacked jurisdiction to rule reflected the trial court's intent to enter a final judgment.[206]

B. FINALITY AFTER A CONVENTIONAL TRIAL ON THE MERITS

As in prior Survey periods, the supreme court once again addressed the question of whether a judgment that did not expressly dispose of the plaintiffs' claims against one of multiple defendants was final. In *Moritz v. Presiss*, survivors of a woman who died after a kidney biopsy sued four healthcare providers.[207] No jury questions were submitted at trial as to one of the four defendants. On appeal, the plaintiff sought to raise certain arguments that had been raised only in an amended motion for new trial filed more than thirty days after judgment. Plaintiff admitted that if the judgment entered by the trial court were final, these arguments were not preserved for appeal. To avoid this result, plaintiff argued that the

199. *See* TEX. R. CIV. P. 324(b)(2), (3); *see also In re* B.K.D., No. 2-02-289-CV, 2003 WL 22110416, at *3 (Tex. App.—Fort Worth Sept. 11, 2003, pet. denied) (finding that appellant waived factual sufficiency challenge to order terminating her parental rights by failing to file a motion for new trial).

200. TEX. R. CIV. P. 329b(b).

201. *See* Moritz v. Presiss, 121 S.W.3d 715, 720 (Tex. 2003).

202. *Id.*

203. Jackson v. Van Winkle, 660 S.W.2d 807, 808 (Tex. 1983).

204. *Moritz*, 121 S.W.3d at 721.

205. *In re* Campbell, 101 S.W.3d 664, 667 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding).

206. *Id.*; *see also* Hinson v. Thompson, 112 S.W.3d 766 (Tex. App.—Beaumont 2003, no pet. h.) (finding summary judgment not final because judgment did not dispose of all claims and did not contain finality language) (per curiam).

207. *Moritz*, 121 S.W.3d at 717.

judgment entered by the trial court was not final because it did not mention the defendant not pursued at trial. The court of appeals agreed with the plaintiff. However, citing to its opinion in *Lehmann v. Har-Con Corp.*,[208] the supreme court reiterated that if a "judgment actually disposes of every issue in a case, then it is not interlocutory simply because it does not include one of the parties."[209] The supreme court concluded that because there was "nothing to indicate that the trial court did not intend to finally dispose of the entire case," and the trial court did not submit the defendant's liability to the jury, the judgment was presumed final even though it did not expressly mention the defendant.[210]

C. Finality in the Severance Context

Severance of an interlocutory judgment from unresolved claims renders the judgment in the severed action final unless the trial court indicates that further proceedings are to be had in the severed action.[211] Consistent with this rule, the Dallas Court of Appeals held that a notice of appeal, filed almost five months after a severance order was signed, was untimely.[212] The court further held that a trial court is not required to assess costs for its judgment to be final.[213]

D. Finality of Protective Orders and Permanent Injunctions

In *B.C. v. Rhodes*, the Austin Court of Appeals drew a distinction between family protective orders rendered during the pendency of the parties' divorce (which are not final appealable judgments) and those rendered post-divorce or in the absence of a pending divorce proceeding (which are final and appealable).[214]

E. Enforcing and Superseding the Judgment

A trial court has an affirmative duty to enforce its judgment.[215] The rules of appellate procedure allow a judgment debtor to supersede a judgment by posting a security set by the trial court.[216] The filing of an appeal does not alone suspend enforcement of a judgment.[217] Thus, in the case of *In re Crow-Billingsley Air Park, Ltd.*, the supreme court held that the trial court had jurisdiction to hear a motion to enforce the final judgment

208. Lehmann v. Har-Con Corp., 39 S.W.3d 191, 198 (Tex. 2001).
209. *Moritz*, 121 S.W.3d at 719.
210. *Id.* at 718.
211. *See* Thompson v. Beyer, 91 S.W.3d 902, 904 (Tex. App.—Dallas 2002, no pet.). *Cf.* U.S. Builders, Inc. v. Atl. Louetta, L.P., 95 S.W.3d 585, 589 (Tex. App.—Eastland 2002, no pet.) (severed judgment not final because did not dispose of all claims and all parties).
212. *Thompson*, 91 S.W.3d at 904.
213. *Id.*
214. B.C. v. Rhodes, 116 S.W.3d 878, 881 (Tex. App.—Austin 2003, no pet. h.).
215. *In re* Crow-Billingsley Air Park, Ltd, 98 S.W.3d 178, 179 (Tex. 2003) (orig. proceeding).
216. *Id.* (citing Tex. R. App. P. 24.1, 24.2(a)(3)).
217. *Id.*

despite the fact that the judgment had been appealed.[218]

Moreover, the trial court has continuing jurisdiction to review the sufficiency of a bond on any party's motion.[219] Thus, an appellate court does not have jurisdiction to entertain a motion to provide additional security unless a motion to increase the amount of a supersedeas bond has first been presented to the trial court and the trial court has made a ruling on the motion.[220]

IV. THE TRIAL COURT'S PLENARY POWER

A. Power to Grant a New Trial

Is an order granting a new trial effective when signed during plenary jurisdiction, even if the order is not filed in the court's record until after plenary jurisdiction expires? The First District Court of Appeals was faced with this question in *Coinmach, Inc. v. Aspenwood Apt. Corp.* and concluded that the date of signing, rather than the date of filing, controls.[221] In *Coinmach*, after the appellant filed a timely notice of appeal, and only two days before its plenary power expired, the trial court signed an order granting a new trial.[222] However, the order was not filed by the clerk until six days later, after plenary power had expired. In the wake of the appellees' arguments that the new trial was granted untimely and to avoid waiving its appeal should appellees be proven correct, the appellant filed a motion with the court of appeals seeking to abate the appeal pending resolution of the new trial. Relying on the Rules of Civil Procedure and the Texas Supreme Court's opinions in *Board of Trustees of Bastrop v. Toungate*[223] and *In re Barber*,[224] the court of appeals held that the trial court granted the new trial during its plenary jurisdiction regardless of when the order was filed by the clerk.[225]

Additionally, if the trial court still has plenary power it *must* hear evidence in support of a motion for new trial, even if the hearing is conducted after the motion for new trial is overruled by operation of law.[226]

B. Power to Enforce a Judgment

A trial court has the power to enforce its judgments even after its ple-

218. *Id.*

219. Law Eng'g & Envt'l Servs., Inc. v. Slosburg Co., 100 S.W.3d 389, 390 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

220. *Id.*

221. Coinmach, Inc. v. Aspenwood Apt. Corp., 98 S.W.3d 377 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

222. *Id.* at 378.

223. Bd. of Trustees of Bastrop v. Toungate, 958 S.W.2d 365, 367 (Tex. 1997).

224. *In re* Barber, 982 S.W.2d 364, 367 (Tex. 1998) (holding that the date of signing rather than the date of entry by the clerk controls whether the granting of a new trial was timely).

225. *Coinmach*, 98 S.W.3d at 382.

226. Hawkins v. Howard, 97 S.W.3d 676, 678 (Tex. App.—Dallas 2003, no pet.).

nary power expires, and such orders are not appealable.[227] However, the trial court may not, in enforcing its judgment, modify the judgment.[228]

V. PERFECTING APPEAL

A. Extending the Appellate Timetable

If any party makes a timely motion for new trial, to modify the judgment, or to reinstate a request for findings of fact and conclusions of law in a case where such findings are required or could be considered by the court of appeals, "the notice of appeal must be filed within [ninety] days after the judgment is signed."[229] The trial court cannot extend the time for filing a notice of appeal by delaying the filing of findings of fact.[230] Moreover, because there are no fact findings to be made in a trial on stipulated facts, a request for findings in such a case will not extend the time for filing a notice of appeal.[231]

During the Survey period, the Texas Supreme Court declined to resolve the question of whether a request for findings of fact and conclusions of law will extend the deadline for perfecting appeal in accelerated appeals.[232] In an accelerated appeal, the appellant ordinarily must file a notice of appeal within twenty days after the trial court signs the relevant order.[233] Texas Rule of Appellate Procedure 26.1(a)(4) provides that a notice of appeal may be filed within ninety days after the judgment is signed if any party timely files a request for findings of fact and conclusions of law.[234] As the supreme court noted, based on use of the term "judgment" in Rule 26.1(a)(4), "[c]ourts and scholars disagree about whether filing a request for findings of fact and conclusions of law extends the deadline for perfecting an appeal when the appeal is accelerated."[235] Despite recognizing this ambiguity in the law, the supreme

227. Wall Street Deli, Inc. v. Boston Old Colony Ins. Co., 110 S.W.3d 67, 69-70 (Tex. App.—Eastland 2003, no pet.).

228. *Id.* at 70.

229. Tex. R. Civ. P. 26.1(a)(4).

230. *See* Tex. R. App. P. 2; *see also* Wortham v. Calame, 91 S.W.3d 426 (Tex. App.—Waco 2002, no pet.) (City could not blame notice of appeal filed more than one hundred days late on trial court's delay in filing findings of fact and conclusions of law because "Rule of Appellate Procedure 2 expressly prohibits this court from suspending the requirements of the appellate rules in a manner which will 'alter the time for perfecting an appeal in a civil case.'") (quoting Tex. R. App. P. 2) (Memorandum Opinion) (per curiam).

231. Int'l Union, United Auto., Aerospace Agric. Implement Workers of Am. v. Gen. Motors Corp., 104 S.W.3d 126, 129 (Tex. App.—Fort Worth 2003, no pet.) (In reviewing a Texas Workforce Commission decision, which is reviewed under a de novo standard of review, submitted on agreed stipulations, a request for findings of fact and conclusions of law did not extend the deadline for perfecting their appeal.).

232. *See* Hone v. Hanafin, 104 S.W.3d 884, 887 n.2 (Tex. 2003) (per curiam).

233. *Id.* at 886; Tex. R. App. P. 26.1(b); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 51.014 (Vernon Supp. 2004).

234. Tex. R. Civ. P. 26.1(a)(4).

235. *Hone*, 104 S.W.3d at 887-88 (comparing Hone v. Hanafin, 105 S.W.3d 15 (Tex. App.—Dallas 2003, pet. denied) (holding request for findings and conclusions does not extend the time period for filing a notice of appeal) *with* John Hill Cayce, Jr., et al., *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 Baylor L.

court disposed of the case on other grounds and expressly did not reach this question.[236]

B. Extensions of Time to File a Notice of Appeal

As noted in prior Surveys, a motion for extension of time is necessarily implied when a party, acting in good faith, files a notice of appeal beyond the time allowed by Rule 26.1, but within the fifteen-day grace period provided by Rule 26.3 for filing a motion for extension of time.[237] However, the extension is not guaranteed. A party filing the late notice of appeal must reasonably explain the need for the extension.[238] Any explanation short of deliberate or intentional non-compliance with the Rules of Appellate Procedure will constitute a "reasonable explanation."[239]

In this Survey period, the Texas Supreme Court explained that the appellant need not admit that the appeal was untimely to have a reasonable explanation for filing a late notice of appeal.[240] On the contrary, an appellant's (or his counsel's) belief that the appeal is timely shows that the failure to file timely was not intentional or deliberate.[241] In *Hone v. Hanafin*, the trial court signed an order sustaining a special appearance.[242] To appeal an interlocutory order denying a special appearance, the notice of appeal must be filed within twenty days from the date the order is signed.[243] Appellants filed their notice of appeal twenty-two days after the order was signed.[244] In response to questions on appeal about the timeliness of the notice of appeal, appellants explained that they believed their notice of appeal was timely because their request for findings of fact and conclusions of law had extended the time for filing the notice of appeal. The Dallas Court of Appeals concluded that "because [Appellants] only provided explanations 'for why their notice of appeal was timely filed,' they failed to 'offer any explanation for their *failure* to timely file their notice of appeal.'"[245] The supreme court disagreed, holding that a "court of appeals cannot require appellants to admit that their filings were untimely if they offer a plausible good faith

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Rev. 867, 880 (1997) (concluding that a request for findings of fact and conclusions of law should extend the time to file an accelerated appeal)).

236. *Id.* at 887 n.2 ("Because we do not reach Petitioners' second issue, we do not consider whether a request for findings of fact and conclusions of law extends the appellate timetable in an interlocutory appeal under Rule 26.1(b).")

237. Tex. R. App. P. 26.3, 10.5(b)(1)(C); *see* Verburgt v. Dorner, 959 S.W.2d 615, 617-18 (Tex. 1997).

238. *See* Jones v. City of Houston, 976 S.W.2d 676, 677 (Tex. 1998).

239. *See Hone*, 104 S.W.3d at 887; *see also* Hykonnen v. Baker Hughes Bus. Support Servs., 93 S.W.3d 562, 563 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (citing Garcia v. Kastner Farms, Inc., 774 S.W.2d 668, 669 (Tex. 1989)).

240. *Hone*, 104 S.W.3d at 885.

241. *Id.*

242. *Id.* at 886.

243. Tex. R. App. P. 26.1(a)(4).

244. *Hone*, 104 S.W.3d at 885.

245. *Id.* (quoting Hone v. Hanaffin, 105 S.W.3d 15, 20 (Tex. App.—Dallas 2003, pet. denied).

justification for filing their notice of appeal when they did."[246] The court also held that in light of the disputed state of the law on whether a request for findings and conclusions extends the time for filing a notice of appeal in accelerated appeals, the Appellants supplied a reasonable explanation for filing their notice of appeal more than twenty days after the order was signed.[247]

The Fourteenth District Court of Appeals held in *Hykonnen v. Baker Hughes Business Support Services* that the inability of a would-be appellant to convince his lawyers to continue to represent him at low or no cost was not a "reasonable explanation."[248] On the contrary, the evidence showed that the appellant deliberately and intentionally bypassed the time for filing the notice of appeal, hoping to find an affordable lawyer within the fifteen-day grace period.[249]

C. Standing to Appeal

The United States Supreme Court in *Devlin v. Scardelletti* held that unnamed class members are not required to intervene in order to appeal a trial court's judgment approving a class settlement.[250] In *City of San Benito v. Rio Grande Valley Gas Co.*, the Texas Supreme Court followed *Devlin* and reversed the court of appeals's decision, which had held that unnamed class members lacked standing to appeal the trial court's judgment because they did not formally intervene.[251] Under Texas jurisprudence, an appeal can generally only be brought by a named party to the suit unless the appellant can be deemed a party under the doctrine of virtual representation.[252] Virtual representation exists when: (1) the person is bound by the judgment; (2) privity of estate, title, or interest appears from the record; and (3) there is an identity of interest between the appellant and a party to the judgment.[253] The Texas Supreme Court likened the virtual representation doctrine to the rule announced in *Devlin* and agreed with the United States Supreme Court that the most important consideration is whether the appellant is bound by the judgment.[254] The Texas Supreme Court concluded that the unnamed class members should be considered "parties" with standing to appeal because they would be bound to the judgment approving the class settlement.[255]

Section 15.003(c) of the Texas Civil Practice and Remedies Code gives standing to "a person seeking intervention or joinder who is unable to

246. *Id.* at 886.
247. *Id.* at 887.
248. Hykonnen v. Baker Hughes Bus. Support Servs., 93 S.W.3d 562, 564 (Tex. App.—Houston [14th Dist.] 2002, no pet.).
249. *Id.* at 563.
250. Devlin v. Scardelletti, 536 U.S. 1, 6-7 (2002).
251. City of San Benito v. Rio Grande Valley Gas Co., 109 S.W.3d 750, 754 (Tex. 2003).
252. *Id.* at 754-55.
253. *Id.* at 755 (citing Motor Vehicle Bd. of the Tex. Dept. of Transp. v. El Paso Indep. Auto Dealers Ass'n, 1 S.W.3d 108, 110 (Tex. 1999)).
254. *Id.*
255. *Id.*

independently establish proper venue, or a person opposing intervention or joinder of such a person" to file an interlocutory appeal from a ruling on intervention.[256] In *Ramirez v. Collier*,[257] Wiegel, a Wisconsin resident, intervened after Ramirez sued Collier. The trial court struck Wiegel's intervention and both Ramirez and Wiegel brought an interlocutory appeal.[258] The court of appeals dismissed the appeal as to Ramirez because the orders appealed from did not affect his rights and because Section 15.003(c) did not give him standing to bring an interlocutory appeal.[259]

D. THE NOTICE OF APPEAL

Any *bona fide* attempt to file a notice of appeal within the time for filing a notice of appeal will invoke the appellate court's jurisdiction.[260] This point is especially true where the confusion as to the notice of appeal results from the court of appeals's own error. In *Briscoe v. Goodmark Corp.*,[261] an employee defendant sought to appeal from a judgment in favor of his employer. However, on appeal, the court of appeals determined that the judgment was not final and remanded the matter to the trial court for further proceedings.[262] The trial court entered a new judgment, which the defendant also appealed. In considering the second appeal, the appellate court reversed its original determination that the judgment was not final and then held that the second notice of appeal (filed nine months after the original judgment was signed) was untimely and dismissed the appeal for want of jurisdiction.[263] On review, the supreme court held that the court of appeals properly reconsidered its original ruling as to the finality of the judgment, but improperly dismissed the defendants' appeal.[264] The court reasoned that "[a]s incorrect as that decision [in the first appeal] was, as a matter of law, the judgment was then interlocutory. Consequently, the court should have asserted jurisdiction over [the defendant's] second appeal and considered his issues on the merits."[265] The court recognized that the defendant had done everything possible to preserve his appellate rights, and he would not lose those rights simply because the court of appeals later found its own decision to

256. TEX. CIV. PRAC. & REM. CODE § 15.003(c) (Vernon Supp. 2004).

257. Ramirez v. Collier, 123 S.W.3d 43 (Tex. App.—Houston [1st Dist.] 2003, rule 53.7(f) motion filed).

258. *Id.* at 45.

259. *Id.*

260. Linwood v. NCNB Tex., 885 S.W.2d 102, 103 (Tex. 1994); *see also* Gregorian v. Ewell, 106 S.W.3d 257, 260 (Tex. App.—Fort Worth 2003, no pet.) (holding that the filing of a cash deposit in lieu of supersedeas bond within the time period for filing a notice of appeal, where the appellant's intent to appeal was made known and where the appellee claimed no surprise that appellant intended to appeal, constitutes a bona fide attempt to invoke the jurisdiction of the appellate court).

261. Briscoe v. Goodmark Corp., 102 S.W.3d 714 (Tex. 2003).

262. *Id.* at 715.

263. *Id.* at 716.

264. *Id.* at 717.

265. *Id.*

be erroneous.[266]

In *LaGoye v. Victoria Wood Condominium Ass'n*,[267] the Fourteenth District Court of Appeals found that the appellant had made a *bona fide* attempt to appeal a summary judgment ruling despite failing to properly indicate the cause number appealed from in the notice of appeal. Noting the general rule that an appellate court has jurisdiction over any "bona fide attempt to invoke appellate jurisdiction," the court of appeals found that where there is no confusion as to which judgment appellant intends to appeal, the placement of the wrong case number on the notice of appeal will not "defeat the appellate court's jurisdiction."[268] In *LaGoye*, the trial court granted summary judgment for certain defendants, which judgment was subsequently severed into a different cause number. Because appellees had participated in the appeal without complaint as to the nature of the subject matter of the appeal and because the summary judgment motion referenced in the notice was the only summary judgment granted at the time the notice of appeal was filed, the court found that the misnumbering on the notice "caused no confusion regarding the judgment from which LaGoye seeks to appeal," and thus, found it had jurisdiction over the appeal.[269]

VI. THE RECORD ON APPEAL

Texas Rule of Appellate Procedure 34.5(c) allows a clerk's record to be supplemented with relevant items originally omitted from the clerk's record.[270] Under this rule, the trial court, appellate court, or any party may direct the trial court clerk to supplement the clerk's record. The rule does *not* require a party to obtain a ruling from any court before a supplemental clerk's record is included in the record on appeal.[271] Neither does the rule contemplate an opposing motion to strike a supplemental clerk's record.[272] According to the plain language of the rule, items included in a supplemental clerk's record become part of the appellate record when a party or a court directs the trial court clerk to prepare and file a supplemental clerk's record.[273]

Notably, however, while the parties may supplement the appellate record with items they deem relevant, nothing in the rule compels the court on appeal to consider those items in reaching its decision.[274] For example, to the extent the supplemental clerk's record contains evidence that was not before the trial court at the time it rendered its decision, the

266. *Id.*
267. LaGoye v. Victoria Wood Condo. Ass'n, 112 S.W.3d 777 (Tex. App.—Houston [14th Dist.] 2003, no pet.).
268. *Id.* at 782.
269. *Id.*
270. TEX. R. APP. P. 34.5(c); Roventini v. Ocular Scis., Inc., 111 S.W.3d 719, 725 (Tex. App.—Houston [1st Dist.] 2003, no pet.).
271. *Roventini*, 111 S.W.3d at 725.
272. *Id.*
273. *Id.*
274. *Id.* at 726.

court of appeals cannot consider the evidence, notwithstanding its inclusion in the record on appeal.[275]

Similarly, Rule 34.6(d) of the Texas Rules of Appellate Procedure grants the court on appeal broad authority to supplement the reporter's record on its own motion, if anything relevant is omitted from the record, so long as supplementation does not unreasonably delay disposition of the appeal.[276] The trial court and the parties may also direct a supplemental reporter's record under this rule.[277]

VII. THE BRIEF ON APPEAL

Inadequately briefed issues can be waived on appeal.[278] Texas Rule of Appellate Procedure 38.1(h) provides that, for an issue to be properly before the court, the issue must be supported by argument and authorities and must contain appropriate citation to the record.[279] In *Trebesch v. Morris*, the court found waiver where appellants' brief provided no discussion, analysis, or evidence in the record pertaining to their argument that there was an issue of fact regarding which party breached the contract at issue in the case.[280]

And in *Plummer v. Reeves*,[281] the appeal was dismissed for want of prosecution after the pro se party, a doctor, had been given three opportunities to file a brief that complied with the rules. The court explained that appellant's brief contained "only sporadic citation to the record (despite her lengthy allusions to purported facts appearing of record) and no citation to any legal authority to support her ten issues," despite the fact that appellant "knew of her duty to cite to legal authority [as] exemplified by her statement in her brief that she cited to none because 'she is not an attorney and is not trained as an attorney.'"[282] The court reasoned: "[s]imply stating that one opts to forgo researching the law because he is not an attorney is unacceptable, especially when (1) that person has an education, (2) that person illustrates no effort to discover or obtain pertinent authority, and (3) the law is one of the most indexed bodies of writing in existence."[283] Citing Texas Rules of Appellate Procedure 38.9(a) and 38.8(a)(1), and finding a "flagrant violation of the briefing rules," the

275. *Id.* In a concurring opinion, Justice Hedges argued that the court on appeal should decline to file any material that was not before the trial court, even though designated by a party as a "supplemental clerk's record." *Id.* at 727 (Hedges, J., concurring). He reasoned that, under the language of Rule 34.5(c), only *relevant* items may be included in a supplemental clerk's record and material that was not before the trial court is not relevant to the appeal. *Id.*

276. GMR Gymnastics Sales, Inc. v. Walz, 117 S.W.3d 57, 60 n.2 (Tex. App.—Fort Worth 2003, pet. denied).

277. TEX. R. APP. P. 34.6(d).

278. Trebesch v. Morris, 118 S.W.3d 822, 824 (Tex. App.—Fort Worth 2003, no pet.).

279. TEX. R. APP. P. 38.1(h).

280. *Trebesh*, 118 S.W.3d at 824-25.

281. Plummer v. Reeves, 93 S.W.3d 930 (Tex. App.—Amarillo 2003, pet. denied).

282. *Id.* at 931.

283. *Id.*

court dismissed the appeal for want of prosecution.[284]

VIII. WAIVER ON APPEAL

An appellant "must attack all independent bases or grounds that fully support a complained-of ruling or judgment."[285] If the appellant fails to do so, the court of appeals "must affirm the ruling or judgment."[286] As a general rule, an appellate court cannot alter an erroneous judgment in favor of an appellant who fails to challenge error on appeal. The reasoning behind this rule is that,

> if an independent ground fully supports the complained-of ruling or judgment, but the appellant assigns no error to that independent ground, then (1) [the appellate court] must accept the validity of that unchallenged independent ground, . . . and thus (2) any error in the grounds challenged on appeal is harmless because the unchallenged independent ground fully supports the complained-of ruling or judgment.[287]

This principle is most commonly applied in the summary judgment context, when an order granting summary judgment does not specify which of the multiple grounds the judgment is rendered and the appellant fails to negate all grounds raised in the motion for summary judgment.[288] In this circumstance, the summary judgment must be affirmed if it may have been rendered, *properly or improperly*, on a ground not challenged by the appellant.[289] Appellate courts will similarly overrule a challenge to fact findings that underpin a legal conclusion or disposition when the appellant fails to challenge other fact findings that also support that legal conclusion or disposition.[290] A court of appeals will likewise affirm a judgment when more than one legal conclusion or jury finding independently supports a judgment but the appellant attacks only one of the findings or legal conclusions on appeal.[291]

During the Survey period, the First District Court of Appeals in *Britton* concluded that this principle also applies in the plea to the jurisdiction context. Under *Britton*, when a plea to the jurisdiction is based on multiple grounds and the trial court sustains the plea without specifying

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284. *Id.*

285. Britton v. Texas Dep't of Criminal Justice, 95 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

286. *Id.*

287. *Id.*

288. *Id. See* Strather v. Dolgencorp of Texas, Inc. d/b/a Dollar Gen. Stores, 96 S.W.3d 420, 422-23 (Tex. App.—Texarkana 2003, no pet.). In its opinion on rehearing, the Texarkana court in *Strather* struggled with the unfairness that can occur, in some circumstances, as a result of the rule requiring an appellant to attack all grounds raised in the motion for summary judgment. The court concluded that a trial court can, and should, disclose in its order the reasons it grants summary judgment, and urged the Texas Supreme Court to adopt rules requiring the trial court to do so. *Id.* at 426 n.3.

289. *Britton*, 95 S.W.3d at 682.

290. *Id. See* Kent v. Citizens State Bank, 99 S.W.3d 870, 874 (Tex. App.—Beaumont 2003, pet. denied).

291. *Britton*, 95 S.W.3d at 682.

grounds, the court on appeal must affirm the trial court's order if the appellant fails to challenge *all* of the grounds—valid or invalid—specified in the plea.[292]

IX. SPECIAL APPEALS

A. RESTRICTED APPEALS

A restricted appeal is a direct attack on a judgment.[293] To succeed on restricted appeal, the appellant must (1) file his notice of appeal within six months after judgment is signed, (2) be a party to the lawsuit, (3) have not participated at trial or filed a timely post-judgment motion or request for findings of fact and conclusions of law, and (4) demonstrate error on the face of the record.[294] The scope of review in a restricted appeal is the same as in an ordinary appeal—a review of the entire case.[295] The only restriction is that the error must appear on the face of the record.[296] The "face of the record," for purposes of restricted appeal review, consists of the reporter's record, as well as all the papers on file with the court when it rendered judgment.[297] As with ordinary appeals, the court on appeal may not consider, as part of the record, evidence or documents that were not before the trial court when it rendered judgment.[298]

A party claiming error in a restricted appeal based on the trial court's failure to give him notice of trial carries a heavy burden. Typically, the record will contain no affirmative proof of the error claimed because the rules of procedure do not impose a duty on the trial court, or its personnel, to place in the case file evidence that notice of a trial setting was given.[299] As a result, an absence in the record of affirmative proof of notice does not establish error on the face of the record.[300]

In contrast, when a court of appeals reviews a restricted appeal, there are no presumptions of valid issuance, service, and return of citation.[301] Accordingly, an absence in the record of affirmative proof of strict compliance with the rules governing service of process establishes error on the face of the record for purposes of a restricted appeal.[302] This is so,

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292. *Id.* at 678.
293. Roventini v. Ocular Scis., Inc., 111 S.W.3d 719, 721 (Tex. App.—Houston [1st Dist.] 2003, no pet.).
294. *Id.*; Autozone, Inc. v. Duenes, 108 S.W.3d 917, 919 (Tex. App.—Corpus Christi 2003, no pet.).
295. *Roventini*, 111 S.W.3d at 721; *Autozone*, 108 S.W.3d at 919-20.
296. *Roventini*, 111 S.W.3d at 721; *Autozone*, 108 S.W.3d at 920.
297. *Roventini*, 111 S.W.3d at 721-22; *Autozone*, 108 S.W.3d at 920. Redding v. Dick Thompson Enters., Inc. d/b/a Honda West, No. 2-02-142-CV, 2003 Tex. App. LEXIS 184, *3 (Tex. App.—Fort Worth Jan. 9, 2003, no pet.); AAA Navi Corp. v. Parrot-Ice Drink Prods. of Am., 119 S.W.3d 401, 403 (Tex. App.—Tyler 2003, no pet.).
298. *Roventini*, 111 S.W.3d at 722, 726.
299. *Redding*, 2003 Tex. App. LEXIS 184 at *3.
300. *Id.* at *3-4.
301. *Autozone*, 108 S.W.3d at 920.
302. *Id.* at 921.

even if the appellant fails to file a complete reporter's record—Texas Rule of Appellate Procedure 34.6(c)(1)'s presumption that omitted portions of the record support the judgment does not apply to a restricted appeal attacking a default judgment on the ground that service of process was defective.[303]

A notice of restricted appeal is due six months after the date on which the trial court's judgment is signed.[304] This deadline cannot be extended, even if the appellant receives late notice of judgment.[305] In fact, Rule 4.2(a)(2) of the Texas Rules of Appellate Procedure—providing additional time to file documents when a party receives late notice of judgment—expressly exempts restricted appeals from its provisions.[306]

B. Bill of Review

A bill of review "is an independent action brought to set aside a judgment that is no longer appealable or subject to challenge by a motion for new trial."[307] It is a direct attack on a judgment and, as such, "only the court rendering the original judgment has jurisdiction over the proceeding." Accordingly, a bill of review must be filed in the same court that rendered the judgment under attack.[308] However, once jurisdiction has attached in the proper court, the case may be transferred to another court and the transferee court has the authority to determine the merits of the bill.[309]

Because finality in judgments is important in Texas jurisprudence, the grounds for setting aside a final judgment are limited, and bills of review are permitted only in exceptional circumstances.[310] A bill of review petitioner must have exercised due diligence to prosecute all adequate legal remedies against a former judgment, and at the time the bill of review is filed, "there remains no such adequate remedy still available because, through no fault of [his], fraud, accident, or mistake precludes presentation of a meritorious claim or defense."[311] Accordingly, a bill of review petitioner must plead and prove "(1) a meritorious defense to the cause of action alleged to support the judgment (2) which [he] was prevented

303. GMR Gymnastics Sales, Inc. v. Walz, 117 S.W.3d 57, 59 (Tex. App.—Fort Worth 2003, pet denied).

304. Tex. R. App. P. 26.1(c), 30.

305. Maldonado v. Macaluso, 100 S.W.3d 345, 346 (Tex. App.—San Antonio 2002, no pet.).

306. *Id.*; Tex. R. App. P. 4.2(a)(2) ("Exception for restricted appeal. Subparagraph (1) does not extend the time for perfecting a restricted appeal."). *But see GMR Gymnastics*, 117 S.W.3d at 58 (appearing to allow extended deadlines in restricted appeal based on late notice of judgment).

307. Rodriguez v. EMC Mortgage Corp., 94 S.W.3d 795, 797 (Tex. App.—San Antonio 2002, no pet.).

308. *Id.*

309. *Id.*

310. King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 751 (Tex. 2003); Martindale v. Reno, No. 11-02-00256-CV, 2003 WL 21196506, at *1 (Tex. App.—Eastland May 22, 2003, no pet.).

311. *King Ranch*, 118 S.W.3d at 751.

from making by fraud, accident, or wrongful act of the opposite party (3) unmixed with any fault or negligence of [his]."[312]

Only "extrinsic" fraud, as opposed to "intrinsic" fraud, will support the granting of relief pursuant to a bill of review.[313] Extrinsic fraud "is conduct that prevents a real trial upon the issues involved." Intrinsic fraud includes any matter which was actually presented to and considered by the trial court in rendering the judgment. This includes the alleged perjury of a witness on a contested issue, which the opposing party had the opportunity to refute, as well as allegations of fraud or negligence on the part of a party's attorney.[314]

Procedurally, when a trial court grants a bill of review and sets aside a judgment in a prior case, a subsequent trial on the merits of the prior case occurs in the same proceeding as the trial on the bill of review.[315] Specifically,

> To invoke the equitable powers of the court, the bill of review petitioner must file a petition alleging factually and with particularity that the prior judgment was rendered as a result of fraud, accident or wrongful act of the opposite party or official mistake unmixed with his own negligence. The petition must further allege, with particularity, sworn facts sufficient to constitute a defense and, as a pretrial matter, present prima facie proof to support the contention.
> Second, if a prima facie defense has been shown, the court will conduct a trial. At this trial, the petitioner must open and assume the burden of proving by a preponderance of the evidence that the judgment was rendered as the result of fraud, accident or wrongful act of the opposite party, or official mistake unmixed with any negligence of his own. If the petitioner meets this burden, the factfinder will then determine whether the bill of review defendant, the original plaintiff, has proved the elements of his original cause of action. Once it is found that the petitioner is suffering under a wrongfully obtained judgment that is unsupported by the weight of the evidence, equity is satisfied and the court should grant the requested relief.[316]

In determining whether the petitioner has presented adequate *prima facie* proof, as a pretrial matter, to support a meritorious defense, the relevant inquiry "is not whether the result would be different on retrial, but instead whether the defense is barred as a matter of law and whether the complainant will be entitled to judgment if no evidence to the contrary is offered."[317] This is a question of law, and the court will proceed

312. *Martindale*, 2003 WL 21196506 at *1; *King Ranch*, 118 S.W.3d at 752.
313. *Martindale*, 2003 WL 21196506 at *2; *King Ranch*, 118 S.W.3d at 752.
314. *Martindale*, 2003 WL 21196506 at *2; *King Ranch*, 118 S.W.3d at 752.
315. Hartford Underwriters Ins. v. Mills, 110 S.W.3d 588, 590 (Tex. App.—Fort Worth 2003, no pet.).
316. *Id.* (quoting State v. 1985 Chevrolet Pickup Truck, 778 S.W.2d 463, 464-65 (Tex. 1989)).
317. Martinez v. Texas Dep't of Protective & Regulatory Servs., 116 S.W.3d 266, 270 (Tex. App.—El Paso 2003, no pet.).

to trial only if such a defense has been demonstrated.[318]

For purposes of appeal, a bill of review that sets aside a prior judgment but does not dispose of the case on the merits is interlocutory and not appealable.[319]

X. STANDARDS OF REVIEW

In *In re J.F.C.*,[320] a termination of parental rights case, the Texas Supreme Court reiterated that due process requires application of the clear and convincing evidence standard of proof in termination cases.[321] The supreme court further stated that "clear and convincing evidence" is defined in the Family Code as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established."[322]

Noting that it had never considered "how to apply the overlay of the clear and convincing evidence burden of proof onto our legal sufficiency, also known as our 'no evidence,' standard of review in cases other than defamation cases,"[323] the court held that the "traditional legal sufficiency standard, which upholds a finding supported by '[a]nything more than a scintilla of evidence,' is inadequate when the United States Constitution requires proof by clear and convincing evidence."[324] The supreme court then stated the appropriate standard of review as follows:

> In a legal sufficiency review, a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. This does not mean that a court must disregard all evidence that does not support the finding. Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence.
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> If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a

318. *Id.*
319. *Hartford*, 110 S.W.3d at 591.
320. *In re* J.F.C., 96 S.W.3d 256 (Tex. 2002).
321. *Id.* at 263.
322. *Id.* at 264 (citing TEX. FAM. CODE ANN. § 101.007 (Vernon 2002)); *In re* C.H., 89 S.W.3d 17, 25 (Tex. 2002); Bentley v. Bunton, 94 S.W.3d 561, 597 (Tex. 2002).
323. *J.F.C.*, 96 S.W.3d at 264.
324. *Id.* at 264-65 (citing Formosa Plastics Corp. U.S.A. v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 48 (Tex. 1998) (citing Cont'l Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 450 (Tex. 1996) and Browning-Ferris, Inc. v. Reyna, 865 S.W.2d 925, 928 (Tex. 1993))).

> firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient. [footnote omitted] Rendition of judgment in favor of the parent would generally be required if there is legally insufficient evidence.[325]

The supreme court disapproved of numerous decisions from the courts of appeals holding that a legal sufficiency review in a case in which the burden of proof is clear and convincing evidence is the same as in a case in which the burden of proof is a preponderance of the evidence.[326]

The supreme court also reiterated the factual standard of review it had announced in its 2002 decision in *In re C.H.*, stating:

> In a factual sufficiency review, as we explained in *In re C.H.*, a court of appeals must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing. [footnote omitted] We also explained in that opinion that the inquiry must be "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations." [citation omitted] A court of appeals should consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding. If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. [citation omitted] A court of appeals should detail in its opinion why it has concluded that a reasonable factfinder could not have credited disputed evidence in favor of the finding.[327]

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325. *J.F.C.*, 96 S.W.3d at 266.

326. *Id.* at 267 (citing W.B. v. Tex. Dep't of Protective & Regulatory Servs., 82 S.W.3d 739, 741 (Tex. App.—Corpus Christi 2002, no pet.)); *In re* J.M.M., 80 S.W.3d 232, 240 (Tex. App.—Fort Worth 2002, pet. denied); *In re* A.L.S., 74 S.W.3d 173, 178 (Tex. App.—El Paso 2002, no pet.); *In re* R.G., 61 S.W.3d 661, 667 (Tex. App.—Waco 2001, no pet.); *In re* I.V., 61 S.W.3d 789, 794 (Tex. App.—Corpus Christi 2001, no pet.); *In re* L.S.R., 60 S.W.3d 376, 378 (Tex. App.—Fort Worth 2001, pet. denied); *In re* A.V., 57 S.W.3d 51, 61-62 (Tex. App.—Waco 2001, pet. granted); *In re* J.O.C., 47 S.W.3d 108, 113 (Tex. App.—Waco 2001, no pet.); *In re* A.P., 42 S.W.3d 248, 256 (Tex. App.—Waco 2001, no pet.); *In re* V.R.W., 41 S.W.3d 183, 190 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *In re* J.M.T., 39 S.W.3d 234, 238 (Tex. App.—Waco 1999, no pet.); Leal v. Tex. Dep't of Protective & Regulatory Servs., 25 S.W.3d 315, 321 (Tex. App.—Austin 2000, no pet.); *In re* P.R., 994 S.W.2d 411, 415 (Tex. App.—Fort Worth 1999, pet. dism'd w.o.j.); *In re* J.N.R., 982 S.W.2d 137, 142 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *In re* W.A.B., 979 S.W.2d 804, 806 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); Hann v. Tex. Dep't of Protective & Regulatory Servs., 969 S.W.2d 77, 82 (Tex. App.—El Paso 1998, pet. denied); *In re* D.L.N., 958 S.W.2d 934, 936 (Tex. App.—Waco 1997, pet. denied); *In re* B.R., 950 S.W.2d 113, 119 (Tex. App.—El Paso 1997, no writ); Lucas v. Tex. Dep't of Protective & Regulatory Servs., 949 S.W.2d 500, 502 (Tex. App.—Waco 1997, writ denied); Edwards v. Tex. Dep't of Protective & Regulatory Servs., 946 S.W.2d 130, 137 (Tex. App.—El Paso 1997, no writ); Spurlock v. Tex. Dep't of Protective & Regulatory Servs., 904 S.W.2d 152, 155-56 (Tex. App.—Austin 1995, writ denied); *In re* J.F., 888 S.W.2d 140, 141 (Tex. App.— Tyler 1994, no writ); *In re* A.D.E., 880 S.W.2d 241, 245 (Tex. App.—Corpus Christi 1994, no writ); D.O. v. Tex. Dep't of Human Servs., 851 S.W.2d 351, 353 (Tex. App.—Austin 1993, no writ); *In re* L.R.M., 763 S.W.2d 64, 67 (Tex. App.—Fort Worth 1989, no writ).

327. *J.F.C.*, 96 S.W.3d at 266-67.

In re M.S.[328] involved the standard that applies to review claims of ineffective assistance of counsel in parental-rights termination proceedings. As an issue of first impression, the supreme court concluded that the standard set forth by the United States Supreme Court in *Strickland v. Washington*, which has been applied by the Texas Court of Criminal Appeals in the criminal context, should also be applied in parental-rights termination proceedings.[329] Under *Strickland*, the defendant must show that (1) counsel's performance was deficient (*i.e.*, that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment); and (2) the deficient performance prejudiced the defense (*i.e.*, that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable).[330] The Texas Supreme Court further explained:

> With respect to whether counsel's performance in a particular case is deficient, we must take into account all of the circumstances surrounding the case, and must primarily focus on whether counsel performed in a "reasonably effective manner." The Court of Criminal Appeals explained that counsel's performance falls below acceptable levels of performance when the representation is so grossly deficient as to render proceedings fundamentally unfair. . . .
>
> In this process, we must give great deference to counsel's performance, indulging "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," including the possibility that counsel's actions are strategic. It is only when "the conduct was so outrageous that no competent attorney would have engaged in it," that the challenged conduct will constitute ineffective assistance.[331]

In re B.L.D.,[332] also a parental-rights termination case, involved the standard for reviewing a trial court's determination of whether there was a conflict of interest between parents opposing termination of parental rights in a single suit. The supreme court held that an abuse-of-discretion standard applied in such cases.[333]

In *Railroad Commission of Texas v. WBD Oil & Gas Co.*,[334] the supreme court addressed the question of the proper standard of review of "contested case" determinations made by the Railroad Commission under the Texas Administrative Procedure Act, Texas Government Code Sections 2001.001-.902. The court noted that the APA provides "significantly different" modes of judicial review for contested case decisions

328. *In re* M.S., 115 S.W.3d 534 (Tex. 2003).

329. *Id.* at 544-45 (citing Strickland v. Washington, 466 U.S. 668 (1984); Garcia v. State, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001); Thompson v. State, 9 S.W.3d 808, 812-13 (Tex. Crim. App. 1999)).

330. *Id.* at 545.

331. *Id.*

332. *In re* B.L.D., 113 S.W.3d 340 (Tex. 2003).

333. *Id.* at 347.

334. R.R. Comm'n of Tex. v. WBD Oil & Gas Co., 104 S.W.3d 69 (Tex. 2003).

than for rules.[335] In order to obtain judicial review of a contested case decision, an aggrieved party must "move for rehearing (except in certain cases), [footnote omitted] must have exhausted all other administrative remedies available, [footnote omitted] and must file a petition with the court within thirty days of the decision."[336] By contrast, judicial review of a rule requires the initiation of "a proceeding to contest compliance with certain procedural requirements . . . within two years of the rule's effective date."[337] Otherwise, "judicial review of a rule may be sought at any time."[338]

As the supreme court observed, the scope of review of a contested case decision "varies from statute to statute."[339] In some matters, a court must try the issue *de novo*.[340] More commonly, review is limited to "determining whether the agency decision was supported by substantial evidence."[341]

In the instant case, the supreme court held that "judicial review of orders adopting field rules should be the same as in other contested case decisions."[342] As a result, the court of appeals erred in holding that Railroad Commission field rules "adopted in a contested case like those involved here cannot be challenged in a declaratory judgment action under Section 2001.038 of the APA."[343]

In *St. Joseph Hospital v. Wolff*,[344] a medical malpractice case, the defendant hospital complained on appeal that the trial court's "joint enterprise" definition submitted to the jury misstated Texas law. Drawing a distinction between an objection to the form of the definition submitted (reviewable for abuse of discretion) and an objection that the definition misstated Texas law, and noting that the court of appeals had reviewed the issue under a de novo standard of review,[345] the supreme court held that whether a definition used in the charge misstates the law is a legal question, reviewable de novo.[346]

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335. *Id.* at 74.
336. *Id.* at 74-75.
337. *Id.* at 75.
338. *Id.*
339. *Id.* (citing TEX. GOV'T CODE ANN. § 2001.172 (Vernon 2000) ("The scope of judicial review of a state agency decision in a contested case is as provided by the law under which review is sought.")).
340. *Id.* at 75 n.43 (citing TEX. GOV'T CODE ANN. § 2001.173(a) (Vernon 2000) ("If the manner of review authorized by law for the decision in a contested case that is the subject of complaint is by trial de novo, the reviewing court shall try each issue of fact and law in the manner that applies to other civil suits in this state as though there had not been an intervening agency action or decision but may not admit in evidence the fact of prior state agency action or the nature of that action except to the limited extent necessary to show compliance with statutory provisions that vest jurisdiction in the court.")).
341. *Id.* at 75, n.44 (citing TEX. GOV'T CODE ANN. § 2001.174 (Vernon 2000)).
342. *Id.* at 79.
343. *Id.*
344. St. Joseph Hosp. v. Wolff, 94 S.W.3d 513 (Tex. 2002).
345. St. Joseph Hosp. v. Wolff, 999 S.W.2d 579, 586 (Tex. App.—Austin 1999, no pet).
346. *St. Joseph Hosp.*, 94 S.W.3d at 525 (citing TEX. R. CIV. P. 277; M.N. Dannenbaum, Inc. v. Brummerhop, 840 S.W.2d 624, 631 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (stating that an instruction is improper if it misstates the law)).

In *Bennett v. Cochran*,[347] the supreme court reversed the court of appeals' ruling that, by requesting only a partial reporter's record, the appellant waived his right to challenge the legal and factual sufficiency of the evidence on appeal. Relying on the language of Texas Rule of Appellate Procedure 34.6(c)(4),[348] the supreme court held that "an appellant need not file a complete reporter's record to preserve legal or factual sufficiency points."[349]

Disagreeing with the decisions of several courts of appeals requiring strict compliance, the supreme court also held that the appellant's untimely filing of its statement of issues on appeal as required by Texas Rule of Appellate Procedure 34.6(c)(1) did not require affirmance, as the "objective behind Rule 34.6(c)(1) was fully served" and the appellee was not prejudiced by the late filing:

> Our appellate rules are designed to further the resolution of appeals on the merits. [citation omitted] We will interpret these rules, when possible, to achieve that aim. However, litigants should not view our relaxation of rules in a particular case as endorsing noncompliance. While we seek to resolve appeals on their merits, litigants who ignore our rules do so at the risk of forfeiting appellate relief.
>
> Here, the objective behind Rule 34.6(c)(1) was fully served. Cochran [the appellee] does not allege that he was deprived of an opportunity to designate additional portions of the reporter's record, nor does he assert that Bennett's delay otherwise prejudiced the preparation or presentation of his case. Under these circumstances, we hold that Rule 34.6 does not preclude appellate review of Bennett's legal and factual sufficiency issues.[350]

In *Heritage Resources, Inc. v. Hill*,[351] an appeal from a judgment entered after a trial to the court in a suit for attorney's fees under the Texas Uniform Declaratory Judgment Act,[352] the El Paso Court of Appeals noted that there is a split among the intermediate courts of appeals regarding factual sufficiency review in cases in which the standard of review is abuse of discretion. The El Paso Court of Appeals, following its 1998 decision in *Lindsey v. Lindsey*,[353] employs a two pronged inquiry:

(1) Did the trial court have sufficient information upon which to exercise its discretion; and

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347. Bennett v. Cochran, 96 S.W.3d 227 (Tex. 2002) (per curiam).

348. TEX. R. APP. P. 346(c)(4) ("The appellate court must presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues. This presumption applies even if the statement includes a point or issue complaining of the legal or factual insufficiency of the evidence to support a specific factual finding identified in that point or issue.")

349. *Bennett*, 96 S.W.3d at 228.

350. *Id.* at 229.

351. Heritage Res., Inc. v. Hill, 104 S.W.3d 612 (Tex. App.—El Paso 2003, no pet.).

352. TEX. CIV. PRAC. & REM. CODE ANN. § 37.001 *et seq.* (Vernon 1997 & Supp. 2004).

353. Lindsey v. Lindsey, 965 S.W.2d 589 (Tex. App.—El Paso 1998, no pet.).

(2) Did the trial court err in its application of discretion?[354]

This procedure has also been followed by the San Antonio Court of Appeals.[355] For other courts of appeals, "the normal sufficiency of the evidence review is part of the abuse of discretion review and not an independent ground for reversal."[356]

In *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*,[357] an appeal from the trial court's confirmation of an arbitration award under the Federal Arbitration Act,[358] the court noted that, while appellate review of an FAA arbitration award is ordinarily de novo, the appellate court's review is "usually 'extraordinarily narrow.'"[359] Under the applicable standard of review, it is presumed that arbitration awards will be confirmed and "[t]he court may not review the arbitrators' decision on the merits even if it is alleged that the decision is based on factual error or it misinterprets the parties' agreement."[360] As a result, as the court noted, "[s]uccessful court challenges are few and far between."[361]

The court rejected the appellant's argument that a contractual choice-of-law provision providing that the "agreement shall be construed in accordance with the laws of the State of Texas" and language in the contract stating that the parties agreed to submit their disputes to arbitration "under the rules of the American Arbitration Association then in place and applicable legal and equitable principles" required the arbitration award to be judicially reviewed under "the normal appellate standard of review."[362] Noting that the FAA provides four statutory grounds for vacating an arbitration award,[363] and recognizing several common law

354. *Heritage Res., Inc.*, 104 S.W.3d at 618.

355. Matthiessen v. Schaefer, 897 S.W.2d 825, 828 (Tex. App.—San Antonio 1994), *rev'd on other grounds*, 915 S.W.2d 479 (Tex. 1995).

356. *Heritage Res.*, 104 S.W.3d at 618, citing Crawford v. Hope, 898 S.W.2d 937, 940-41 (Tex. App.—Amarillo 1995, writ denied); Thomas v. Thomas, 895 S.W.2d 895, 898 (Tex. App.—Waco 1995, writ denied); *In re* Marriage of Driver, 895 S.W.2d 875, 877 (Tex. App.—Texarkana 1995, no writ); Wood v. O'Donnell, 894 S.W.2d 555, 556 (Tex. App.—Fort Worth 1995, no writ); *In re* Pecht, 874 S.W.2d 797, 800 (Tex. App.—Texarkana 1994, no writ).

357. Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

358. 9 U.S.C. § 1 *et seq.* (1999 & Supp. 2001).

359. *Tanox*, 105 S.W.3d at 250 (citing Hughes Training, Inc. v. Cook, 254 F.3d 588, 593 (5th Cir. 2001)).

360. *Tanox*, 105 S.W.3d at 250.

361. *Id.* at 250 (citing Gupta v. Cisco Sys., Inc., 274 F.3d 1, 3 (1st Cir. 2001) (internal citations omitted)).

362. *Id.* at 251.

363. Under 9 U.S.C. § 10, an arbitration award may be set aside "(1) [w]here the award was procured by corruption, fraud, or undue means; (2) [w]here there was evident partiality or corruption in the arbitrators, or either of them; (3) [w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced; or (4) [w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10 (1999).

grounds for vacatur,[364] the court focused on the appellant's claim that the arbitrators manifestly disregarded the law, stating: "Manifest disregard of the law is more than mere error or misunderstanding with respect to the law. [citations omitted] Under this standard, the arbitrator clearly recognizes the applicable law, but chooses to ignore it."[365] Applying this deferential standard, the judgment confirming the arbitration award was affirmed.[366]

In *Spohn Hospital v. Mayer*,[367] an appeal from a judgment for the plaintiff in a medical negligence case, the supreme court reversed the trial court's judgment, holding that the trial court's ruling ordering specified portions of witness statements be taken as established facts at trial as a discovery sanction for the defendant hospital's late production of witness statements was excessive under the two-part test set forth in *TransAmerican Natural Gas Corp. v. Powell*.[368] Noting that sanctions are reviewed on appeal for abuse of discretion,[369] the court agreed with the defendant hospital that the trial court failed to follow either prong of *TransAmerican*.[370] Specifically, the record contained no evidence that the sanctions were "visited on the offender" because "neither the trial court nor the court of appeals discusses whether counsel or their clients were responsible for the discovery abuse."[371] In addition, under the second prong of *TransAmerican*, the trial court must consider "less stringent measures before settling on severe sanctions" and "the record should contain some explanation of the appropriateness of the sanctions imposed."[372] Reversal on this point was appropriate because "the record is silent regarding the consideration and effectiveness of less stringent sanctions."[373]

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364. *Tanox*, 105 S.W.3d at 252. "[T]here are several common law grounds for vacating an arbitration award: (1) the arbitrator manifestly disregards the law, (2) the award is against public policy, and (3) the award is arbitrary or capricious."

365. *Id.*

366. *Id.* at 268.

367. Spohn Hosp. v. Mayer, 104 S.W.3d 878 (Tex. 2003).

368. TransAm. Nat. Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991). As the court noted, "*TransAmerican* set out a two-part test for determining whether a particular sanction is just. First, there must be a direct nexus among the offensive conduct, the offender, and the sanction imposed. [citation omitted] A just sanction must be directed against the abuse and toward remedying the prejudice caused to the innocent party, and the sanction should be visited upon the offender. [citation omitted] The trial court must attempt to determine whether the offensive conduct is attributable to counsel only, to the party only, or to both. [citation omitted] Second, just sanctions must not be excessive. [citation omitted] In other words, a sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes, which include securing compliance with discovery rules, deterring other litigants from similar misconduct, and punishing violators." *Spohn Hosp.*, 104 S.W.3d at 882.

369. *Spohn Hosp.*, 104 S.W.3d at 881.

370. *Id.* at 882.

371. *Id.* at 883.

372. *Id.* (citing Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 852-53 (Tex. 1992)); GTE Communications Sys. Corp. v. Tanner, 856 S.W.2d 725, 729 (Tex. 1993); Otis Elevator Co. v. Parmelee, 850 S.W.2d 179, 181 (Tex. 1993)).

373. *Id.* at 883.

In *Williams Industries, Inc. v. Earth Development Systems Corp.*,[374] the court held that whether a party has waived its right to arbitrate is a question of law reviewed *de novo*.[375] The court observed that some courts of appeals "have held that the findings on which the legal determination of waiver is based (namely, substantial invocation of the judicial process and prejudice) are subject to a different standard of review because they are largely fact questions—although these courts differ somewhat as to which standard of review applies."[376]

In *Wal-Mart v. Canchola*,[377] an employment discrimination case filed under the Texas Commission on Human Rights Act, the supreme court stated that reviewing courts engage in different analyses in discrimination cases, depending on whether the case has been fully tried on the merits. For discrimination cases that have not been fully tried on the merits, appellate courts apply the burden-shifting analysis established by the United States Supreme Court.[378] For discrimination cases that have been fully tried on the merits, appellate courts do not engage in a burden-shifting analysis, and instead, determine whether the evidence is legally sufficient to support the jury's ultimate finding.[379]

In *Kondos v. Lincoln Property Co.*,[380] the Dallas Court of Appeals clarified the approach for conducting the abuse-of-discretion standard for reviewing a trial court's order granting or denying class certification. Because the supreme court has rejected what it described as the "certify

374. Williams Indus., Inc. v. Earth Dev. Sys. Corp., 110 S.W.3d 131 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

375. *Id.* at 136 (citing *In re* Oakwood Mobile Homes, Inc., 987 S.W.2d 571, 574 (Tex. 1999); *In re* Serv. Corp. Int'l, 85 S.W.3d 171, 174 (Tex. 2002)).

376. *Id. See* Pennzoil Co. v. Arnold Oil Co., Inc., 30 S.W.3d 494, 501 (Tex. App.—San Antonio 2000, orig. proceeding) (Hardberger, C.J., concurring) (advocating clearly-erroneous standard); Cent. Nat'l Ins. Co. v. Lerner, 856 S.W.2d 492, 494 n.1 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (applying clear-abuse-of-discretion standard because of nature of proceeding (mandamus), but noting that prejudice finding is normally subject to clearly-erroneous standard), Marble Slab Creamery, Inc. v. Wesic, Inc., 823 S.W.2d 436, 438-39 (Tex. App.—Houston [14th Dist.] 1992, no writ) (applying clearly-erroneous standard); Transwestern Pipeline Co. v. Horizon Oil & Gas Co., 809 S.W.2d 589, 592 (Tex. App.—Dallas 1991, writ dism'd w.o.j.) (applying clearly-erroneous standard); Pepe Int'l Dev. Co. v. Pub. Brewing Co., 915 S.W.2d 925, 929, 931-32 (Tex. App. Houston [1st Dist.] 1996, pet denied) (applying no-evidence standard); *cf.* Ikon Office Solutions, Inc. v. Eifert, 2 S.W.3d 688, 693-94 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (combined appeal and orig. proceeding) (holding factual questions concerning order denying arbitration; there, whether agreement existed-subject to no-evidence review); Certain Underwriters at Lloyd's of London v. Celebrity, Inc., 950 S.W.2d 375, 377 (Tex. App.—Tyler 1996) (noting same), writ dism'd w.o.j., 988 S.W.2d 731 (Tex.1998); Belmont Constructors, Inc. v. Lyondell Petrochem. Co., 896 S.W.2d 352, 356 (Tex. App.—Houston [1st Dist.] 1995, no writ) (combined appeal and orig. proceeding) (same); *cf.* also Pony Express Courier Corp. v. Morris, 921 S.W.2d 817, 820 (Tex. App.—San Antonio 1996, no writ) (employing abuse-of-discretion standard to review ruling on defense to arbitration).

377. Wal-Mart v. Canchola, 121 S.W.3d 735 (Tex. 2003).

378. *Id.* at 739 (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973)).

379. *Wal-Mart*, 121 S.W.3d at 739.

380. Kondos v. Lincoln Prop. Co., 110 S.W.3d 716 (Tex. App.—Dallas 2003, no pet.).

now and worry later" philosophy towards class certification, actual, and not presumed, compliance with certification prerequisites is required.[381] Thus, reviewing courts "do not view the evidence in the light most favorable to the trial court's decision in either granting or denying certification, nor do [they] entertain every presumption in favor of the trial court's decision."[382] Rather, an abuse of discretion exists if the trial court failed to conduct a "rigorous analysis" on whether the prerequisites to certification have been met.[383]

Several cases decided this survey period examined the application of the de novo standard for reviewing a trial court's ruling on a plea to the jurisdiction.[384] In conducting the de novo review, appellate courts do not look at the merits of the plaintiff's case but consider only the plaintiff's pleadings and the evidence pertinent to the jurisdictional inquiry.[385] The plaintiff's pleadings are to be construed liberally.[386]

However, while personal jurisdiction is a question of law, a trial court must frequently decide questions of fact. On appeal, reviewing courts may be called on to review such fact findings.[387] When the trial court does not issue findings of fact, reviewing courts should presume that the trial court resolved all factual disputes in favor of the judgment.[388] But when the reporter's record and clerk's record are included in the appellate record, such implied findings are not conclusive and may be challenged for legal and factual sufficiency.[389]

In *Coalition for Long Point Preservation v. Texas Commission on Environmental Quality*,[390] the court addressed the standard of review applicable to an administrative order entered following a contested-case proceeding, noting that review is under the substantial evidence rule.[391] An appellate court conducting a substantial evidence review must "determine whether the evidence as a whole is such that reasonable minds could have reached the same conclusion as the agency in the disputed action."[392] In addition, the reviewing court cannot "substitute [its] judgment for that of the agency and may only consider the record on which

381. *Id.* at 720 (citing S.W. Ref. Co., Inc. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000)).
382. *Id.*
383. *Id.*
384. City of Dallas v. First Trade Union Sav. Bank, 2003 WL 21715883, *2 (Tex. App.—Dallas July 25, 2003, pet. filed); Stern v. KEI Consultants, Ltd., 123 S.W.3d 482, 486 (Tex. App.—San Antonio 2003, no pet.); Harlandale Indep. Sch. Dist. v. Rodriguez, 121 S.W.3d 88, 91-92 (Tex. App.—San Antonio 2003, no pet.).
385. *City of Dallas*, 2003 WL 21715883, at *2; *Harlandale*, 121 S.W.3d at 91 (both citing County of Cameron v. Brown, 80 S.W.3d 549, 555 (Tex. 2002)).
386. *Harlandale*, 121 S.W.3d at 91.
387. *Stern*, 123 S.W.3d at 483.
388. *Id.*
389. *Id.*
390. Coalition for Long Point Pres. v. Tex. Comm'n on Envtl. Quality, 106 S.W.3d 363 (Tex. App.—Austin 2003, pet. denied).
391. *Id.* at 366 (citing Tex. Gov't Code Ann. § 2001.174 (Vernon 2000)).
392. *Id.* at 366 (citing Stratton v. Austin Indep. Sch. Dist., 8 S.W.3d 26, 30 (Tex. App.—Austin 1999, no pet.)).

the agency based its decision."[393] As stated by the court, "[t]he issue for the reviewing court is not whether the agency reached the correct conclusion, but rather whether there is some reasonable basis in the record for its action."[394] The court also noted that "findings, inferences, conclusions, and decisions of an administrative agency are presumed to be supported by substantial evidence, and the burden to prove otherwise is on the contestant."[395]

In *Sedillo v. Valtierra*,[396] an appeal from the grant of a summary judgment for the defendant based on deemed admissions, the court held that summary judgment is proper if "a party's deemed admission defeats the causation element of the party's cause of action."[397] The court reversed the trial court's summary judgment because use of the term "and/or" in a request for admission asking the plaintiff to admit that the defendant's "negligence and/or negligence *per se* was not a proximate cause of the accident in question," "raises a genuine issue of material fact issue regarding whether the deemed admission addresses both negligence claims or only one of the negligence claims."[398]

In *Taherzadeh v. Ghaleh-Assadi*,[399] an action in which the mandatory continuance language of Section 84.004(a) of the Texas Family Code[400] was at issue, the court followed well established case law holding that a trial court's ruling on a motion for continuance is reviewed under an abuse of discretion standard.[401] Under this standard, "[a] trial court commits an abuse of discretion if its decision is 'so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.'"[402]

In *Walker v. Gutierrez*,[403] the Texas Supreme Court addressed for the first time the issue of the standard of review applicable to a trial court's ruling on a grace period for the untimely filing of an expert report under Section 13.01(g) of the Medical Liability and Insurance Improvement

393. *Id.*

394. *Id.* at 367 (citing City of El Paso v. Public Util. Comm'n, 883 S.W.2d 179, 185 (Tex. 1994)).

395. *Id.* (citing *Stratton*, 8 S.W.3d at 30).

396. Sedillo v. Valtierra, 115 S.W.3d 52 (Tex. App.—San Antonio 2003, no pet.).

397. *Id.* at 53 (citing TEX. R. CIV. P. 198.3 (matter admitted under Rule 198 is conclusively established as to the party making the admission)); Flores v. H.E. Butt Stores, Inc., 791 S.W.2d 160, 162 (Tex. App.—Corpus Christi 1990, writ denied).

398. *Id.*

399. Taherzadeh v. Ghaleh-Assadi, 108 S.W.3d 927 (Tex. App.—Dallas 2003, pet. denied).

400. Section 84.004(a) states "[i]f a respondent receives service of notice of an application for a protective order within 48 hours before the time set for the hearing, on request by the respondent, the court shall reschedule the hearing for a date not later than 14 days after the date set for the hearing." TEX. FAM. CODE ANN. § 84.004(a) (Vernon 2002).

401. *Taherzadeh*, 108 S.W.3d at 928 (citing BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 794 (Tex. 2002)).

402. *Id.*

403. Walker v. Guiterrez, 111 S.W.3d 56 (Tex. 2003).

Act,[404] holding that review is under an abuse of discretion standard.[405]

In *King Ranch, Inc. v. Chapman*,[406] the Texas Supreme Court reiterated the standards of review for no-evidence summary judgment motions. The supreme court noted that, because a no-evidence summary judgment is "essentially a pretrial directed verdict,"[407] the reviewing court applies the same legal sufficiency standard as would be applied in reviewing a directed verdict at trial.[408] Under this standard, the court must "review the evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences."[409] The supreme court further noted that a no-evidence point will be sustained on appeal when

> (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact.[410]

As a result, a no-evidence summary judgment is improperly granted "if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact."[411] As for the definition of "scintilla," the court stated that less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact. More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions."[412]

In *Golden Eagle Archery, Inc. v. Jackson*,[413] a products liability action, the Texas Supreme Court announced a byzantine new factual sufficiency standard of review applicable to review of jury awards of multiple damage amounts in multiple damage categories. The supreme court stated that "[t]he standard of review to determine factual sufficiency of the evidence that we set forth today differs from the standard of review that is applied when the jury is asked to award a single amount of damages, but is told that it may consider various elements in arriving at that amount."[414]

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404. TEX. REV. CIV. STAT. art. 4590i, § 13.01(g), repealed effective September 1, 2003 and now codified as Tex. Civ. Prac. & Rem. Code § 74.351(c) (Vernon Supp. 2004), provided that a claimant is entitled to a grace period for the filing of an expert report only if "after hearing, the court finds that the failure of the claimant or the claimant's attorney was not intentional or the result of conscious indifference but was the result of an accident or mistake." TEX. REV. CIV. STAT. art. 4590i, § 13.01(g).

405. *Walker*, 111 S.W.3d at 62.

406. King Ranch, Inc. v. Chapman, 118 S.W.3d 742 (Tex. 2003).

407. *Id.* at 750.

408. *Id.* at 750-51.

409. *Id.* at 751 (citing Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997)).

410. *Id.* (quoting *Merrell Dow Pharms.*, 953 S.W.2d at 711 (internal citations omitted)).

411. *Id.* (citing TEX. R. CIV. P. 166a(i); Wal-Mart Stores, Inc. v. Rodriguez, 92 S.W.3d 502, 506 (Tex. 2002)).

412. *Id.*

413. Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757 (Tex. 2003).

414. *Id.* at 771.

In the situation in which the jury is asked to make a single award of damages based on various elements, a factual sufficiency challenge "must address all the elements that could have been considered by the jury in making its total, single-amount award."[415] In this situation, the supreme court stated, "[i]f there is just one element that is supported by the evidence, the damages award will be affirmed if it is supported by the evidence."[416]

By contrast, in *Golden Eagle*, the jury had six different categories of damages to consider[417] and was instructed not to award damages for the same element of damages more than once.[418] In such a situation, the Texas Supreme Court stated the factual sufficiency standard of review as follows:

> In conducting its factual sufficiency review, the court of appeals should presume that the jury did not award damages to Jackson for any element more than once, unless the record demonstrates otherwise. Accordingly, in reviewing the evidence, the court of appeals should consider whether the jury could reasonably have compensated Jackson for a particular loss that might be "physical impairment other than loss of vision" under another category of damages. If the jury could have done so, then the failure to award damages for that particular loss would not be against the great weight and preponderance of the evidence.[419]

The supreme court, noting that the plaintiff had challenged the factual sufficiency of "the jury's failure to award larger damages in the categories of physical pain and mental anguish, physical impairment of loss of vision, and disfigurement, as well as the award of no damages for 'physical impairment other than loss of vision,'"[420] stated:

> The court of appeals should conduct a review of each of these categories, considering the evidence unique to each category. If, after considering evidence unique to a category, the court concludes that the jury's failure to award larger damages for that category is against the great weight and preponderance of the evidence, it should then consider all the overlapping evidence, together with the evidence unique to each other category to determine if the total amount awarded in the overlapping categories is factually sufficient. This takes into account all the evidence regarding damages in categories that overlap, but does not credit that evidence more than once in evaluating the amount awarded by the jury.

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415. *Id.* (citing Price v. Short, 931 S.W.2d 677, 688 (Tex. App.—Dallas 1996, no writ)).

416. *Id.* (citing Greater Houston Transp., Inc. v. Zrubeck, 850 S.W.2d 579, 589 (Tex. App.—Corpus Christi 1993, writ denied)).

417. The jury found liability and awarded damages to Mr. Jackson, the plaintiff, in five separate categories: (1) medical care, (2) physical pain and mental anguish, (3) physical impairment of loss of vision, (4) disfigurement, and (5) loss of earnings in the past. *Id.* at 760. In answer to a sixth category—physical impairment other than the loss of vision—the jury awarded no damages. *Id.*

418. *Id.* at 771.

419. *Id.*

420. *Id.* at 773.

The necessary corollary to these principles is that in reviewing a challenge that an award for a category is excessive because there is factually insufficient evidence to support it, a court of appeals should consider all the evidence that bears on that category of damages, even if the evidence also relates to another category of damages. To do otherwise would mean that evidence that reasonably could have supported the jury's award would not be considered, which would be improper. If more than one award in overlapping categories is challenged as excessive, the court of appeals should consider all the evidence that relates to the total amount awarded in all overlapping categories to determine if the total amount awarded was excessive. This likewise gives full effect to all the evidence without crediting any of the evidence more than once.[421]

XI. APPELLATE REMEDIES

A. Remand for Harmful Charge Error

An appellant is entitled to a remand for new trial based on error in the jury charge where the error complained of probably prevented him from properly presenting his case to the appellate courts.[422] Expanding on its application of this principle in *Crown Life Insurance Co. v. Casteel*,[423] the Texas Supreme Court ruled in *Harris County, Texas v. Smith*[424] that a trial court's erroneous inclusion in the jury charge of an invalid element of damage is harmful error, requiring a remand of the case. The court reasoned that, as with an invalid liability theory (*Casteel*), an unsupported element of damage prevents the appellant from demonstrating the consequences of the error on appeal.[425] A litigant has a right to a fair trial before a jury properly instructed on the issues authorized and supported by the law governing the case. Where it is not possible for the appellate court to say the jury did not consider the erroneous charge in arriving at the amount of damage, harm is presumed.[426] Accordingly, when the trial court includes, over timely and specific objection, both valid and invalid elements of damages in a single broad-form submission, harm is inherent in the error and the litigant's remedy on appeal is a remand for a new trial.[427]

A litigant is also entitled to a remand for a new trial based on error in the jury charge where the error probably caused the rendition of an im-

421. *Id.* at 773-74.
422. Tex. R. App. P. 44.1(a)(2), 61.1(b).
423. Crown Life Ins. Co. v. Casteel, 2 S.W.3d 378 (Tex. 2000).
424. Harris County, Tex. v. Smith, 96 S.W.3d 230 (Tex. 2002).
425. *Id.* at 233.
426. *Id.* at 233-34.
427. *Id.* at 231. Responding to the dissents' assertions that the majority's conclusion would result in the end of broad-form submission, the court pointed out that the comments to the Texas Pattern Jury Charges have long recommended that damage elements should be submitted separately "if there is substantial doubt as to whether there is evidence to support" an element. *Id.* at 235 (quoting PJC 8.2 cmt. ("The use of a separate answer line for each element of damages might avoid the need for a new trial if the appellate court finds that one or more, but not all, of the elements lack legal or evidentiary support.")).

proper judgment.[428] In *Wal-Mart Stores, Inc. v. Johnson*,[429] for example, the Texas Supreme Court examined a trial court's submission of a spoliation instruction to the jury. Finding the submission erroneous, the supreme court reversed and remanded the case, emphasizing that the court does not lightly reverse a judgment because of an erroneous instruction. The supreme court reasoned, however, that an "unnecessary spoliation instruction is particularly likely to cause harm," because the instruction's very purpose "is to 'nudge' or 'tilt' the jury." If a spoliation instruction should not have been given, the supreme court concluded, "the likelihood of harm from the erroneous instruction is substantial, particularly when the case is closely contested."[430]

B. Remand "In the Interest of Justice"

In what appears to be an expansion of the situations in which a remand "in the interest of justice" is appropriate under Texas Rule of Appellate Procedure 43.3(b), the Eastland Court of Appeals in *Archer Daniels Midland Co. v. Bohall*, a wrongful death case, ordered a remand of the case for new trial based on error in the conditioning of questions in the jury charge, despite the absence of any timely objection to the error.[431] The charge error in that case occurred when the trial court failed to properly condition questions relating to the defendant's alleged negligence on a "yes"—instead of a "no"—answer to a question about the defendant's control over the manner in which the decedent performed work. It was not until after the jury was discharged that the plaintiffs noticed and objected to the improper conditioning of the questions in the charge. As a result of the charge error, the jury found that the proof was insufficient to establish that the defendant had exercised control over the decedent, but that the defendant had nonetheless committed negligence.[432]

Although acknowledging that, despite the improper conditioning, a judgment could be rendered in favor of the defendant based on the jury's verdict by viewing the negligence findings as immaterial (due to the absence of liability under Texas Civil Practice & Remedies Code Section 95.003(1)), the court of appeals nonetheless remanded the case for a new trial "in the interest of justice."[433] The court recognized the absence of

428. Tex. R. App. P. 44.1(a)(1), 61.1(a).
429. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718 (Tex. 2003).
430. *Id.* at 724.
431. Archer Daniels Midland Co. v. Bohall, 114 S.W.3d 42, 47-48 (Tex. App.—Eastland 2003, no pet.).
432. The error in the charge was noticed by the parties immediately after the trial court verbally discharged the jury, but before the jury left the courtroom. Since the jury was still present, the trial court reassembled them to deliberate upon a corrected jury charge. The only change in the corrected charge was the conditioning of the negligence questions on a "yes" answer to the control question. Interestingly, in their second deliberation, the jurors changed their answer to the control question (they had answered "no" the first time and answered "yes" the second time). *Id.* at 44-45. The trial court based its judgment upon the second, corrected jury charge. The court of appeals, however, concluded that the trial court erred by reassembling the jury to deliberate upon the second charge. *Id.* at 47.
433. *Id.* at 48.

any timely objection to the charge, but decided to remand because of the unusual circumstances of the case and the "overall principle of justice" conveyed by the Texas Supreme Court in *Harris County v. Smith*—"a litigant in a jury trial has every right to a trial in which the jury has been instructed correctly upon the law and the issues."[434]

C. Abatement for Failure to File Findings and Conclusions

A trial court has a mandatory duty to file findings of fact and conclusions of law when properly requested under Texas Rule of Civil Procedure 297. The court's failure to do so is presumed to be harmful and, on appeal, the usual remedy is to abate the appeal for entry of findings and conclusions.[435] The test for harm, however, depends on the circumstances of the case and turns on whether the appellant would have to guess the reasons for the trial court's ruling. Where the reasons for the court's ruling are clear from the record and there is no disputed fact issue for the court's resolution, there is no harm and the court of appeals may render the judgment that should have been rendered by the trial court.[436]

D. Recusal of Appellate Court Justices

Recusal of appellate court justices and judges is governed by Rule 16 of the Texas Rules of Appellate Procedure, which incorporates by reference the grounds for recusal of trial court judges (Texas Rule of Civil Procedure 18b).[437] Rule 18b requires that a motion for recusal be verified, made on personal knowledge and set forth such facts as would be admissible in evidence or on information and belief if the grounds for such belief are specifically stated.[438] In *Cadle Co. v. Lobingier*, an appeal from a turnover order, the Fort Worth Court of Appeals noted that neither the appellate rules nor case law definitively state whether the requirement of verification applies to motions in the appellate courts.[439] The court nonetheless considered the unverified motion of the appellants seeking recusal of the justices of the court and a transfer of the case.

In ruling on the motion to recuse and transfer, each challenged justice considered the motion in chambers, and two recused themselves because of prior participation in related proceedings in the trial court.[440] The remaining justices found no reason to recuse themselves, rejecting the ap-

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434. *Id.* at 47 (citing *Smith*, 96 S.W.3d at 230).

435. Lubbock County Cent. Appraisal Dist. v. Contrarez, 102 S.W.3d 424, 426 (Tex. App.—Amarillo 2003, no pet.).

436. *Id. See* Tex. R. App. P. 43.2(c).

437. Texas Rule of Appellate Procedure 16.2 provides:
The grounds for recusal for an appellate court justice or judge are the same as those provided in the Rules of Civil Procedure. In addition, a justice or judge must recuse in a proceeding if it presents a material issue which the justice or judge participated in deciding while serving on another court in which the proceeding was pending. Tex. R. Civ. P. 16.2.

438. Tex. R. Civ. P. 18b(2)(b).

439. Cadle Co. v. Lobingier, No. 2-03-054-CV, 2003 WL 21525417, *1 n.1 (Tex. App.—Fort Worth July 3, 2003, no pet.).

440. *Id.* at *2.

pellants' contention that an appearance of impropriety would arise because two of the justices had been named as defendants in federal lawsuits filed by appellants or that recusal was proper because the justices had a "financial interest" in the portion of the turnover order that would benefit the State of Texas.[441] The justices also found no merit in appellants' argument that the court had a bias against appellant "as shown by prior rulings by [the] court adverse to [a]ppellants."[442] Acknowledging that the question of recusal is a case-by-case, fact-intensive analysis, the court decided the motion with respect to each of the challenged justices by a vote of the other remaining justices sitting en banc, in accordance with Rule 16.3(b) of the Texas Rules of Civil Procedure, and found no reason to recuse the justice under consideration.[443]

E. Suspension of Rules Governing Pleading Practice in Trial Court

Rule 2 of the Texas Rules of Appellate Procedure gives the courts of appeals the power to suspend "a rule's operation in a particular case and order a different procedure."[444] During the Survey period, the Texas Supreme Court clarified that this rule does *not* allow the courts of appeals to suspend rules governing pleading practice before the trial courts.[445]

XII. MOOT APPEALS

Subject to some exceptions, "a case becomes moot when a court's actions cannot affect the rights of the parties."[446] Applying this principle in *Pinnacle Gas Treating, Inc. v. Read*, the Texas Supreme Court reversed the court of appeals' refusal to reach the merits of a trial court's dismissal of an easement condemnation proceeding in light of a pending second condemnation proceeding filed by the same condemnor. The court of appeals had concluded that the filing of the second condemnation proceeding before the first one was resolved mooted the question of whether the condemnor was entitled to possession of the easements in the first condemnation proceeding, despite the fact that the property owners had obtained a judgment for wrongful condemnation in the first proceeding.[447] The supreme court disagreed that the appeal was moot, reasoning that, if the trial court erred in dismissing the first proceeding, then the condemnor's possession of the easements was legal and he would not owe the property owners damages for wrongful condemnation. Accordingly,

441. *Id.* at *1.
442. *Id.*
443. *Id.* at *2.
444. Tex. R. App. P. 2.
445. Ray Ins. Agency v. Jones, 92 S.W.3d 530, 531 (Tex. 2002) (per curiam). The court of appeals in *Ray* had purported to suspend, pursuant to Tex. R. App. P. 2, the operation of Rule 94 of the Texas Rules of Civil Procedure, in connection with an argument that the plaintiff had failed to plead estoppel.
446. Pinnacle Gas Treating, Inc. v. Read, 104 S.W.3d 544, 545 (Tex. 2003) (per curiam).
447. *Id.*

because the appellate court's action in either affirming or reversing the trial court's dismissal of the first condemnation proceeding would affect substantial rights of the parties, there was a live issue in controversy and the appeal was not moot.[448]

Under certain circumstances, a nonsuit by a plaintiff can moot a pending appeal. For example, in *Le v. Kilpatrick*, the Tyler Court of Appeals dismissed as moot an interlocutory appeal from the trial court's denial of defendants' special appearances after the plaintiffs nonsuited their claims against the defendants.[449] In concluding that the nonsuit mooted the appeal, the court of appeals applied the general rule that a nonsuit vitiates prior interlocutory orders. In doing so, the court recognized that exceptions exist as to this general rule as it relates to venue determinations and rulings on the merits, but determined that a ruling on a special appearance falls into the general rule and not the exception.[450]

XIII. APPELLATE COURT GUIDANCE ON IMPORTANT ISSUES OF LAW

Several dissenting opinions issued during the Survey period reflect a growing concern—at both the intermediate and supreme court levels—about the lack of guidance by the courts on important issues of law. For example, in *Global Drywall Systems, Inc. v. Coronado Paint Co.*, three supreme court justices dissented to the court's denial of the petition as improvidently granted because, according to the dissenters, the court of appeals's decision incorrectly changed the law regarding the assignability of claims and the supreme court's denial of the petition "effectively [leaves] this type of assignment void without an explanation."[451] Similarly, in *Certain Underwriters at Lloyd's, London v. Smith*, one justice from the Fourteenth District Houston Court of Appeals dissented to the court's decision to withdraw its opinion pursuant to a request from the parties after settlement because, according to the dissent, the dissenting and concurring opinions in the case would have challenged the litigants' improper use of a prior Fourteenth District Court of Appeals decision to create a mass tort.[452] The dissent charged the court with doing a "disservice to the public and the law by exercising its discretion to withdraw the decisions in [the] case."[453]

448. *Id.* at 545-46.
449. Le v. Kilpatrick, 112 S.W.3d 631, 633 (Tex. App.—Tyler 2003, no pet.).
450. *Id.* at 633-34.
451. Global Drywall Sys., Inc. v. Coronado Paint Co., 104 S.W.3d 538, 540 (Tex. 2003).
452. Certain Underwriters at Lloyd's, London v. Smith, 93 S.W.3d 657, 659 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (citing Tamez v. Certain Underwriters at Lloyd's, London, 999 S.W.2d 12 (Tex. App.—Houston [14th Dist.] 1998, pet. denied)).
453. *Id.* at 659.