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Civil Evidence

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CIVIL EVIDENCE

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I. INTRODUCTION

THIS Survey period brought greater focus on the relevance and reliability of expert testimony, the importance of the scope of parties' objections, and the important issue of the waiver of privileges. The Survey period also found the Texas Supreme Court addressing the appropriateness of spoliation instructions, sanction awards, application of the thirty-day grace period in the Medical Liability and Insurance Improvement Act, and the scope of the confidentiality provisions under the ADR statute.

II. ADMISSIBILITY OF EXPERT TESTIMONY

The reliability of expert testimony was addressed by both state and federal courts during this Survey period. The Fifth Circuit and the Texas Supreme Court addressed the reliability of medical experts, while the

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state appellate courts focused on reliability, expert methodology, and the scope of objections.

A. THE FEDERAL *DAUBERT* CASES

In *Vargas v. Lee*, the Fifth Circuit reiterated its previous ruling that purported expert testimony regarding whether trauma causes fibromyalgia is not sufficiently reliable to be admitted into evidence. The Fifth Circuit had previously held that expert testimony concerning whether trauma causes fibromyalgia is not sufficiently reliable under *Daubert*.[1] In *Vargas*, the court examined whether scientific understanding of fibromyalgia syndrome had progressed sufficiently since the decision in *Black* to permit the admission of expert testimony. The plaintiff in *Vargas* brought suit after a tractor trailer accident, alleging trauma from the accident had caused his fibromyalgia. The district court admitted expert testimony of a doctor who testified that the accident had caused the plaintiff to develop symptoms of fibromyalgia syndrome. However, the court found that the two studies produced by the plaintiff in support of the expert's testimony either expressly disavowed the conclusion that trauma causes fibromyalgia or acknowledged that then present data and literature were insufficient to conclude causal relationships exist between trauma and fibromyalgia. The court held these studies only bolstered the conclusion in *Black* that expert testimony concerning a link between trauma and fibromyalgia is not sufficiently reliable; thus, the admission of the expert testimony was an abuse of discretion. The court did not hold that expert testimony concerning the link is permanently foreclosed because medical science might someday determine with sufficient reliability that a causal relationship between trauma and fibromyalgia syndrome exists.[2]

In *Bocanegra v. Vicmar Services, Inc.*, the Fifth Circuit held that expert testimony regarding the effects of marijuana on a driver's reaction time is permissible. After the trial court excluded testimony on the causal connection between marijuana use and accidents, the Fifth Circuit found that the expert had testified extensively that studies have demonstrated that marijuana use impairs cognitive functions, including those related to the operation of a motor vehicle for at least twelve hours after the acute high wears off. The Fifth Circuit found that the toxicologist's knowledge and training in the field of toxicology would be helpful to the fact finder, not because it would have explained the connection between marijuana and the accident at issue, but because it explained the effect of recent ingestion of marijuana on an individual's cognitive functions, including perception and reaction time, which are both critical factors in any accident. The Fifth Circuit thus found that the trial court had erred in finding that the toxicologist's failure to point to a causal connection between the driver's marijuana use and the accident at issue rendered his testimony

1. Black v. Food Lion, Inc., 171 F.3d 308 (5th Cir. 1999).
2. Vargas v. Lee, 317 F.3d 498 (5th Cir. 2003).

unhelpful to the jury.[3]

B. The State *Robinson* Cases

The Texas Supreme Court addressed expert witness qualifications during this Survey period in *Roberts v. Williamson*, a medical malpractice case. At issue was the court of appeals's approval of the trial court's decision to allow a board certified pediatrician to testify regarding the nature and effect of the plaintiff's neurological injuries. The defendant appealed, relying upon *Broders v. Heise*,[4] which upheld the exclusion of emergency room physician testimony about neurological injuries. Unlike the physician in *Broders*, however, the pediatrician in *Roberts* had studied the effect of pediatric neurological injuries and had extensive experience advising parents about the effect of those injuries. The pediatrician based his opinions on his experience, his medical training and education, the plaintiff's diagnostic test results, and the diagnostic results from an early childhood development specialist. He also relied upon MRIs and CT scans and the interpretation of those tests by a pediatric neurologist whose qualifications the defendant did not challenge. The pediatrician also consulted several peer-reviewed medical journal articles and textbooks on pediatric neurology. The Texas Supreme Court held that although the pediatrician was not a neurologist, the record reflected that he had experience and expertise regarding the specific causes and effects of the plaintiff's injuries. Thus, the trial court did not abuse its discretion in admitting his testimony on matters pertaining to those neurological injuries.[5]

The Waco Court of Appeals addressed the reliability of expert testimony in *In re J.B.* after the trial court allowed expert testimony notwithstanding the lack of any independent support of the expert's methodology. A mother challenged the expert testimony of a doctor offered by Child Protective Services on the issue of her parenting abilities and whether termination of her parental rights would be in the child's best interests. The mother contended, and the court of appeals agreed, that Child Protective Services failed to demonstrate that a parenting assessment conducted by the doctor was based on a reliable methodology. Applying the *Robinson* reliability factors, the court examined the doctor's testimony, finding that the doctor's reluctance to allow independent review made his assessment subjective in practice. Further, the doctor's inability to name any groups, studies, or reports supporting or using his methodology weighed against the reliability of his methodology. Additionally, the doctor proffered no testimony, other than his own, concerning the technique's potential rate of error or the general acceptance of his technique by the relevant scientific community. The doctor also admitted that he employed his parenting assessment almost exclusively in court-

3. Bocanegra v. Vicmar Servs., Inc., 320 F.3d 581 (5th Cir. 2003).
4. Broders v. Heise, 924 S.W.2d 148 (Tex. 1996).
5. Roberts v. Williamson, 111 S.W.3d 113 (Tex. 2003).

room settings, which weighed against the reliability of his methodology. Thus, the court found that because Child Protective Services had offered only the testimony of the doctor to establish the reliability of this methodology and had no specific independent sources to support the reliability of this methodology, the trial court had abused its discretion in admitting the doctor's testimony.[6]

The reliability of expert testimony was also addressed in *Praytor v. Ford Motor Co.*, in which the plaintiff alleged that her sinusitis and asthma were caused by exposure to chemicals released when her air bag deployed. The defendant challenged the plaintiff's experts' reliability and filed a no-evidence motion for summary judgment. The trial court granted the motion, finding no evidence of causation because both of the plaintiff's experts were unreliable. The plaintiff first offered the affidavit of a doctor certified in pulmonary medicine who opined that the plaintiff's asthma and sinusitis were caused by the chemicals from the air bag. However, the doctor was not an expert on asthma, the causes of asthma, whether the deployment of air bags can cause asthma, or on the toxicity of chemicals released when air bags deploy. He did not testify that his theory had been tested, subjected to peer review, or generally accepted outside of the courtroom by the relevant scientific community. The physician also failed to explain what literature he read or whether there were any peer-reviewed studies supporting his theory of causation. The court further found that the physician's treatment of two patients with similar symptoms following accidents in which an air bag deployed did not constitute an epidemiological study that could be tested or peer-reviewed.

Although the plaintiff's second expert was an independent consultant on automotive safety design and vehicle crashworthiness who was familiar with the air bag system that was in the automobile owned by the plaintiff, he professed no knowledge of the possible causes of respiratory illness. His theory that the air bag system released toxic materials that caused respiratory injury had also not been tested or subjected to peer review, and there was no indication that his technique had been generally accepted as valid by the relevant scientific community. The plaintiff argued that the independent consultant's opinion was reliable because there was no analytical gap in his logic and because it was based upon a physician's opinion that chemicals from the air bag caused the symptoms. However, the court found that the independent consultant's conclusion was not supported by verifiable data and that the physician's opinion on which the consultant relied was unreliable.[7]

In *Tamez v. Mack Trucks, Inc.*, the Tamez family sued Mack Trucks after Abram Tamez was killed when his vehicle overturned and burst into flames. The Tamez family alleged that a defect in the fuel system of the Mack truck was the producing cause of the fire that injured Tamez. Mack

6. *In re* J.B., 93 S.W.3d 609 (Tex. App.—Waco 2002, pet. denied).

7. Praytor v. Ford Motor Co., 97 S.W.3d 237 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

Trucks moved to exclude the plaintiffs' expert testimony on the grounds that the opinions were not sufficiently reliable. The court of appeals first addressed the reliability of the testimony of plaintiffs' expert on post-collision fuel-fed fires. The court found that the expert's opinion that a defect in the truck's fuel system was the cause of the fire that injured Tamez was based on the application of his knowledge, training, and experience to the underlying data in the case. Because the expert's opinion did not involve science, the court applied the analytical gap test rather than the *Robinson* factors. The court held that the expert had properly identified the underlying facts he relied upon in arriving at his conclusion, explained the methodology he used, showed how he applied this methodology to the underlying facts of the case to support his conclusion, and discounted other possible sources of the fire. The court also found that the expert provided a link between his observation and his conclusions and had used objective and relevant data in arriving at his conclusion in his examination of the underlying data. Ultimately, the court of appeals concluded that his testimony detailing his vast experience with post-collision fuel-fed fires, coupled with his testimony concerning the application of his knowledge and experience to the underlying data in the case, sufficiently demonstrated that the opinions he drew were reliable, and the trial court had abused its discretion in excluding his testimony.

The plaintiff's second expert did not fare as well. The expert concluded that the cause of the fire was diesel fuel that escaped from the fuel tank of the Mack truck Tamez was driving. The court of appeals agreed with the trial court that there was an analytical gap in the expert's testimony because he failed to set forth the basis for his opinion that a battery cable was the ignition source of the fire. Because the expert stated his conclusion without describing the methodology used to arrive at his conclusion, the trial court was not required to admit opinion testimony connected to the underlying data only by the *ipse dixit* of the expert.[8]

In *Reed v. Granbury Hospital Corp.*, the Fort Worth Court of Appeals affirmed the trial court's exclusion of expert testimony in a medical negligence case. The patient and his family contended that because the patient was not administered the drug t-PA, he was significantly and permanently disabled from a stroke. The plaintiffs' experts on the standard of care of hospitals concerning the administration of t-PA were stricken because neither were familiar with hospital protocols for administering t-PA. Although the first expert was board certified in emergency medicine, a doctor on the emergency medical staff at two Los Angeles area hospitals, a contributing author to a textbook on managed care in emergency medicine, and regularly administered t-PA to stroke patients whose conditions qualified them for it, the record did not show that the doctor possessed any special knowledge about what protocols, policies, or procedures a hospital of ordinary prudence would have had in

8. Tamez v. Mack Trucks, Inc., 100 S.W.3d 549 (Tex. App.—Corpus Christi 2003, no pet.).

place. The plaintiffs' second expert, a neurologist who had thirty years of experience treating stroke patients, testified he was familiar with the t-PA literature, was competent to administer t-PA, was familiar with and qualified to offer an opinion regarding the standard of care for treating acute stroke patients, and had some experience in developing hospital protocols, but he had not developed a t-PA protocol. The court of appeals held that because the doctors were not familiar with hospital protocols for the administration of t-PA to stroke patients, with the possible exception of the hospitals in which they practiced, the trial court had not abused its discretion by concluding that the experts were not qualified to testify about the standard of care applicable to the hospital.[9]

The Houston Court of Appeals addressed for the first time the admissibility of a medical examiner's opinion that a death was a suicide in *Texas Workers' Compensation Commission v. Wausau Underwriters Insurance.* The decedent's body was found on a fifth floor awning with no witnesses who had seen him fall and little physical evidence due to extreme weather conditions. The assistant medical examiner's investigation was limited to an autopsy, which revealed that the cause of death was a crushed chest, abdomen, and pelvis. Based solely on police investigative reports, the medical examiner determined that the decedent had committed suicide. After the decedent's widow's application for workers' compensation death benefits was denied, the Texas Workers' Compensation Commission held an administrative case hearing and found that the death was not the result of suicide. The insurance company subsequently filed an administrative appeal challenging that decision. The trial court initially determined that the medical examiner was not qualified as an expert on suicide and excluded all opinions stating the ultimate conclusion that the decedent had committed suicide.

During the course of the trial, however, the trial court determined *sua sponte* that the decedent's widow had opened the door to this previously excluded testimony, and, as a sanction, allowed in the medical examiner's testimony, the death certificate that indicated suicide, and the autopsy that concluded the death was a suicide. The jury found that the decedent had committed suicide, and the administrative decision was set aside. The court of appeals found that the decedent's widow had not opened the door to excluded testimony, and the trial court had thus erred in sanctioning her, but that the error did not constitute reversible error because the evidence admitted was admissible for other reasons. The court of appeals held that the trial court erred in concluding that the medical examiner was not qualified to render an expert opinion regarding the manner of death in addition to the cause of death because the medical examiner had over nineteen years of experience, including significant experience with death resulting from falls from heights. In addition, the medical examiner's job involved performing autopsies and reviewing investigation re-

9. Reed v. Granbury Hosp. Corp., 117 S.W.3d 404 (Tex. App.—Fort Worth 2003, no pet.).

ports to determine the cause and manner of death. The court therefore found that the trial court would not have abused its discretion if it had later decided to admit the medical examiner's expert testimony, and, therefore, the error was harmless.[10]

In an involuntary commitment case, the El Paso Court of Appeals addressed the expert qualifications of a foreign medical resident. The appellant appealed a judgment ordering his commitment for temporary inpatient mental health services. At the hearing on the mental health application, the state presented as an expert witness a resident in his second month of a four-year program in clinical psychiatry. The appellant challenged the reliability of the doctor's testimony because he lacked board certification. After the state established that the doctor had passed the licensing exams to practice medicine in the United States and that he had been certified as an expert in the courts of Pakistan over one hundred times to testify on psychiatric issues, the court allowed the doctor to testify as an expert. On appeal, the appellant argued that the trial court erred in accepting the doctor as an expert in the field of psychiatry because the physician was a student and therefore could not be qualified as an expert absent a significant demonstration of skill, experience, and training. The court of appeals disagreed, stating that although not all residents have the proper knowledge and credentials to testify as experts on all medical topics, the trial court did not abuse its discretion in accepting this doctor as an expert because he had received a medical degree in Pakistan, had passed the requisite exams to become licensed in Texas, had undergone a one-year rotation in psychiatry in Pakistan, had examined many patients diagnosed with schizophrenia, and had done research on psychotropic drugs.[11]

In *Wolfson v. Bic Corp.*, the Houston Court of Appeals reviewed the exclusion of expert testimony in a wrongful death and survival action. In this case, a woman was found dead in her home from first and second degree burns. Her family brought suit alleging that she was engulfed in flames as she lit a cigarette with a defective butane lighter. On appeal, the plaintiffs challenged the trial court's order granting Bic's motion to exclude the plaintiffs' expert testimony. The court of appeals held that the expert's conclusion that a design defect in the lighter was the cause of death was developed through a series of assumptions, and the expert had not observed, performed, or attempted to perform any tests which would duplicate or verify a failure to extinguish in a similar lighter. The expert also relied heavily on his own subjective assumptions that debris entering the lighter caused it to explode, had not published any work on his theory, was not aware of any such publication, did not provide any evidence relating to the potential rate of error, offered no evidence as to whether the failure to extinguish was generally accepted as valid by the relevant

10. Texas Workers' Comp. Comm'n v. Wausau Underwriters Ins., No. 01-01-00955-CV, 2003 Tex. App. LEXIS 8325 (Tex. App.—Houston [1st Dist.] Sept. 25, 2003, pet. filed).

11. *In re* L.C.F., 96 S.W.3d 651 (Tex. App.—El Paso 2003, no pet.).

scientific community, did not demonstrate any non-judicial uses that had been made of his theory, and had admitted that critical items for his study were never recovered for examination. The court of appeals thus affirmed, holding that the expert had formed a conclusion and then improperly based an opinion on that conclusion.[12]

Norstrud v. Trinity Universal Insurance Co. underscores the importance of adequately objecting to expert testimony at the trial court level. In *Norstrud*, homeowners sued their insurance company for refusing to pay to repair damage to their home's foundation. The jury found that the damage to the foundation was not caused by an accidental discharge, leakage, or overflow of water from the homeowner's sprinkler system and, therefore, the home's damage was not covered by the insurance policy. The plaintiffs appealed, arguing that the trial court abused its discretion by admitting the testimony of the insurance company's expert because the expert's resistivity imaging tests, which involved placing electrodes along the top of the ground, running electricity through the electrodes, and determining the water concentration of an area of ground by the electrical conductivity of the ground, were unreliable. The Fort Worth Court of Appeals examined the record as a whole and concluded that the expert's resistivity imaging testing and the results of that testing were simply one tool he used in reaching his opinions and conclusions that the sprinkler leak did not cause the foundation damage. Because the plaintiffs did not challenge the balance of the expert's testimony or methodology, the court of appeals held that the trial court could have reasonably concluded that the expert's ultimate opinions were grounded in unchallenged scientific method and procedure that amounted to more than subjective belief or unsupported speculation, regardless of the resistivity imaging testing results.[13]

III. PRIVILEGES

A. PHYSICIAN-PATIENT PRIVILEGE

The Fort Worth Court of Appeals addressed what constitutes privileged information under the rules of evidence and the Health and Safety Code in *In re Fort Worth Children's Hospital.* After suit was filed concerning the care and treatment of four premature infant patients who received E-Ferol, a vitamin E solution that was later recalled by the FDA, the trial court ordered the hospital to produce the admitting paperwork of all infants who had received the same drug. Arguing the information was privileged under Rule 509 of the Texas Rules of Evidence[14] and Section 241.152 of the Health and Safety Code,[15] the hospital sought manda-

12. Wolfson v. Bic Corp., 95 S.W.3d 527 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

13. Norstrud v. Trinity Universal Ins. Co., 97 S.W.3d 749 (Tex. App.—Fort Worth 2003, no pet.).

14. TEX. R. EVID. 509.

15. TEX. HEALTH & SAFETY CODE ANN. § 241.152 (Vernon 2001).

mus relief from the trial court's order. Section 241.152 provides that a hospital or its agents or employees may not disclose health care information about a patient to any person other than the patient or the patient's legally authorized representative without written consent.[16] The court rejected the hospital's argument, holding that Section 241.152 "does not make 'health care information' privileged," but "merely imposes liability on a hospital for disclosing health care information in violation of the statute."[17] The court also held that because the hospital had not carried its burden of proving that the documents sought were subject to the physician-patient privilege of Rule of Evidence 509, the information was not subject to the physician-patient privilege.[18]

The Fort Worth Court of Appeals also considered the physician-patient privilege in *In re W.E.C.* In this termination of parental rights case, the appellant argued that the trial court erred in admitting into evidence privileged communications with her drug treatment counselor. The court held that because the patient had disclosed the same information to numerous other parties, including case workers, therapists, and her friends, she waived the physician-patient privilege.[19]

B. Trade Secret Privilege

The Supreme Court of Texas clarified the trade secret privilege in *In re Bass,* a case in which non-participating royalty interest owners sought discovery of the mineral estate owner's geological seismic data to prove that the mineral estate owner had breached an implied duty to develop its land. The court applied the Restatement of Torts six-factor trade secret test, acknowledging a court of appeals split on whether the six factors should be weighed as relevant criteria, or whether a person claiming trade secret privilege must satisfy all six factors before trade secret status would apply.[20] The court adopted the majority position that a party claiming a trade secret "should not be required to satisfy all six factors because trade secrets do not fit neatly into each factor every time."[21] The court also held that other circumstances could be relevant to the trade secret analysis. Ultimately, the court found that since the mineral estate owner had at all times maintained the confidentiality of the data, the data was kept in a secured vault, the data's monetary value was between $800,000 and $2,200,000, and the cost of duplicating the data would run between $800,000 and $2,200,000, the seismic data and its interpretations were trade secrets protected by the Texas Rules of Evidence.[22]

16. *Id.*
17. *In re* Fort Worth Children's Hosp., 100 S.W.3d 582, 588 (Tex. App.—Fort Worth 2003, no pet.).
18. *Id.* at 585-88.
19. *In re* W.E.C., 110 S.W.3d 231 (Tex. App.—Fort Worth 2003, no pet.).
20. The Trade Secret Privilege is addressed by Texas Rule of Evidence 507.
21. *In re* Bass, 113 S.W.3d 735, 739 (Tex. 2003).
22. *Id.* at 741.

C. Peer Review Privilege

The peer review privilege was applied in *In re Tollison*, a medical malpractice action. The plaintiff sought a writ of mandamus directing the trial court to compel deposition testimony regarding peer review committee records obtained by the plaintiffs from a previous lawsuit by the doctor against a hospital, arising out of the doctor's suspension of privileges. The court stated that since a doctor may use such confidential information for legitimate internal business and professional purposes, including use in the doctor's own defense, without waiving the privilege, the court could not find that the trial court had committed a clear abuse of discretion in upholding the privilege. However, the court also emphasized that it did not hold that the peer review privilege cannot be waived by public disclosure or that plaintiffs may not inquire about particular subjects relevant to proving their cause of action simply because they may be touched upon in peer review documents. Rather, the court observed that although the trial judge had applied the law, "it seems unfair and illogical that this statute could prevent plaintiffs from using information available to, and publishable by, any newspaper reporter. Common sense dictates there must be some point at which privilege ceases to serve its intended purpose."[23]

Discovery issues involving the peer review privilege also were addressed in *Wheeler v. Methodist Hospital*, a defamation and business disparagement suit brought by a doctor against a hospital. After the trial court granted summary judgment in favor of the hospital, the doctor appealed arguing that the trial court erred in denying his motion to compel the production of discovery. The court of appeals held that non-privileged documents, such as documents possessed by the hospital as a custodian of a patient's medical records, do not fall under the medical peer review privilege, even if the medical peer review committee has reviewed them.[24] "A doctor affected by a peer review decision is also entitled to written copies of any recommendations or final decisions of a medical peer review committee that could result in an [action against the doctor]."[25] Finally, a physician alleging malice is entitled to documents he either furnished to or received from a medical peer review committee. The court held that the peer review privilege does not bar a doctor from obtaining documents within the public domain that a peer review committee reviews or considers, recommendations or final decisions of the medical peer review committee that could result in censure, communications between the doctor and the medical peer review committee, and documents for which the hospital or the peer review committee had

23. *In re* Tollison, 92 S.W.3d 632, 635 (Tex. App.—El Paso 2002, no pet.).

24. The Texas Occupation Code Sections 160.007-008 provide that records or determinations of or communications to a medical peer review committee are not subject to subpoena or discovery and are not admissible as evidence without a waiver of privilege. Tex. Occ. Code Ann. §§ 160.007-.008 (Vernon 2001).

25. Wheeler v. Methodist Hosp., 95 S.W.3d 628, 645 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

waived privilege. The trial court had thus erred in issuing a blanket ruling denying all of the doctor's discovery requests.[26]

D. Other Privileges

The El Paso Court of Appeals rejected application of the little known "human subjects protection privilege" in *In re Jobe Concrete Products, Inc.* The plaintiffs residing near a quarry claimed negligence and nuisance against the quarry operator due to blasting noise and emissions of fine particulate matter. The plaintiffs' expert witness evaluated potential property value losses in the neighborhood adjacent to the quarry partially through a telephone survey of area residents that revealed how the history of complaints and environmental violations by the quarry affected real estate purchasing decisions. Defendants, through disclosures, requested all documents that had been provided to, reviewed by, or prepared by or for the expert. The plaintiffs objected to the defendants' request for disclosure, arguing the documents were protected by the human subjects protection privilege and that federal law protected any information regarding the identities of the survey participants from disclosure.[27] After the trial court ruled that the plaintiffs were not required to produce participant identification, the defendants sought mandamus to compel production. The court of appeals held that while it agreed with the public policy underlying federal regulations protecting survey participants' confidentiality and anonymity, it did not believe that federal regulations created a privilege in this case. The court of appeals also held that the Texas Rules of Evidence do not recognize a human subjects protection privilege, and no Texas case law has asserted or accepted such a privilege.[28]

The San Antonio Court of Appeals addressed how the discoverability of privileged documents may be affected by the designation of experts in *In re State Farm Mutual Automobile Insurance Co.* In this case, the plaintiff made a claim against an insured's policy after an accident. After State Farm denied coverage, plaintiff obtained a default judgment against the insured and then sued State Farm, alleging that it had wrongfully refused to defend the insured. During discovery in the case, State Farm withheld certain documents on the grounds that they were privileged. State Farm subsequently designated the two employees who had investigated plaintiff's original claim as non-retained experts who might express opinions concerning the handling of the claim made by plaintiff. In response, the plaintiff filed a motion to determine whether the documents were privileged. After a hearing, the trial judge ruled that except for attorney-cli-

26. *Id.* at 645-46.

27. The plaintiffs alleged that 45 C.F.R. Section 46.101 applied. That regulation merely states that each subject shall be provided with "[a] statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained." 45 C.F.R. § 46.116(a)(5) (2004).

28. *In re* Jobe Concrete Prod., Inc., 101 S.W.3d 122 (Tex. App.—El Paso 2002, no pet.).

ent privileged documents, the documents were discoverable. The judge reasoned that State Farm had waived any other privilege by designating the employees as expert witnesses. Immediately after the hearing, State Farm de-designated the employees as expert witnesses and filed a motion to reconsider the trial court's ruling. The trial judge denied the motion and found that the withheld documents contained facts that related to the case and were known to and created by the experts and were accordingly discoverable, that once the experts were de-designated, the documents were no longer discoverable, and that State Farm's decision to de-designate was a tactical move and was, therefore, not permitted.

State Farm filed a petition for writ of mandamus requesting the court of appeals to vacate the order denying State Farm's motion for consideration and to permit State Farm to de-designate the two expert witnesses or rule that the documents in question were still privileged. The court of appeals found that there were no allegations that the parties had bargained to suppress testimony and that, according to State Farm, there was nothing before the trial court to show that its de-designation was for an improper purpose. However, the court of appeals held that the circumstances surrounding the de-designation supported the trial court's ruling, since the timing of the de-designation reasonably led to the inference that State Farm de-designated the experts to protect or conceal their testimony. Because concealing testimony is an improper purpose, the court of appeals held that the trial court had not abused its discretion in refusing to permit the de-designation.

State Farm then argued that the documents in question were privileged and that the privilege had not been waived by designating the expert witnesses. State Farm argued that the trial court had erroneously relied upon the Texas Rule of Civil Procedure 192.3(e),[29] which provides that the facts known by an expert that relate to or form the basis of the experts' mental impressions are discoverable by the opposing party. State Farm argued that the documents were covered instead by Rule 192.3(e)(6),[30] which states that documents provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony are discoverable. Because the items sought to be discovered in this case were documents, the court of appeals ruled that subsection six rather than subsection three applied. Because the documents in question were created for the plaintiff's lawsuit against the insured and not generated for his lawsuit against State Farm, the documents were not provided to, reviewed by, or prepared by or for the experts in anticipation of the experts' testimony in this lawsuit. Accordingly, State Farm did not waive the privilege in relation to the documents by designating expert witnesses, and the court of appeals held that the trial court had abused its discretion

29. TEX. R. CIV. P. 192.3(e)(3).
30. TEX. R. CIV. P. 192.3(e)(6).

by ordering State Farm to produce the documents.[31]

IV. SPOLIATION

The Supreme Court of Texas clarified the use of spoliation instructions in *Wal-Mart Stores, Inc. v. Johnson*, a negligence action brought by a Wal-Mart customer after a Wal-Mart employee accidentally "knocked one or more decorative reindeer from a high shelf onto the plaintiff's head and arm."[32] During discovery, the plaintiffs sought the offending reindeer but, Wal-Mart claimed they had all been sold or thrown away. The missing reindeer became important when the parties offered contradicting evidence at trial about the composition and weight of the reindeer in question. While plaintiff "testified that the reindeer were made of wood, each weighing as much as ten pounds," Wal-Mart "maintained that the reindeer were made out of papier mâché and weighed only five to eight ounces each."[33]

Based on Wal-Mart's failure to keep the reindeer, the jury was given a spoliation instruction and ultimately found Wal-Mart negligent. The court of appeals affirmed the verdict. On the issue of the spoliation instruction, the supreme court held:

> [B]efore any failure to produce material evidence may be viewed as a discovery abuse, the opposing party must establish that the non-producing party had a duty to preserve the evidence in question. . . . Such a duty arises only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim.[34]

In this case, "Wal-Mart argue[d] that it had no duty to preserve the reindeer as evidence because it had no notice that they would be relevant to a future claim" and "it did not learn of the claim until all of the reindeer had been disposed of in the normal course of business."[35] The supreme court agreed, finding that even after the plaintiff learned he had injured his neck, nothing in the record suggested that he had informed Wal-Mart of his claim prior to filing suit six months later. Nor was there any evidence Wal-Mart had learned of his claim in any other way. The supreme court thus held that the plaintiff had failed to show that Wal-Mart disposed of the reindeer after it knew or should have known there was a substantial chance that there would be litigation and that the reindeer would be material to it, and the trial court had abused its discretion in submitting the spoliation instruction to the jury.[36]

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31. *In re* State Farm Mut. Auto. Ins. Co., 100 S.W.3d 338 (Tex. App.—San Antonio 2002) (org. proceeding).
32. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 720 (Tex. 2003).
33. *Id.*
34. *Id.* at 722.
35. *Id.* at 722.
36. *Id.* at 718.

A spoliation instruction was found proper in *Cresthaven Nursing Residence v. Freeman*, in which the plaintiffs sued a nursing residence for damages resulting from the care and treatment received by their mother, which allegedly resulted in her death. After receiving a spoliation instruction concerning missing records, a jury found that the nursing residence had negligently caused the injury and death and awarded plaintiffs survival damages and wrongful death damages. On appeal, the nursing residence claimed the "trial court erred in submitting a spoliation instruction in the jury charge because the three elements of the spoliation complaint were not established and the defendant rebutted the spoliation presumption with a reasonable explanation."[37] Because one of the plaintiffs "had visited the nursing home seeking information concerning her mother's condition days prior to her hospitalization and death and had requested a copy of her mother's records," the court of appeals held that the "trial court could have concluded that there was a duty on the part of the nursing residence to preserve the records."[38] The appellate court also found sufficient evidence to raise the issue of spoliation. Specifically, there was inconsistent testimony of a nurse as to whether or not she was asked to make late entries for days that she did not actually work, inconsistencies between a nurse's records showing that the patient was eating and talking on the days before death and the testimony of a nurse's aide and plaintiffs which stated that she was not, and a nurse's notes for a day which may have been missing but were not shown conclusively to have actually existed. The court stated that although this evidence was not particularly strong, it did give rise to a scintilla of evidence which supported the spoliation instruction.[39]

In *Stephens v. Dolcefino*, the Houston Court of Appeals addressed spoliation in the context of the discovery rule. After a television station, KTRK, videotaped a conversation between the plaintiffs with a pager-camera, it broadcast the footage of the conversation but without sound. The plaintiffs sued KTRK for violations of privacy based on the alleged non-consensual recording of the conversation. The sound from the pager-camera tape was erased before trial and before being produced to appellants. KTRK "claim[ed] that the tape was recycled in the normal course of business, but [plaintiffs] claimed that the tape was intentionally erased."[40] The existence of the audible portion of the tape was significant to the plaintiffs' discovery rule defense to the statute of limitations. On appeal, the defendant "argue[d] that it had negated the discovery rule as a matter of law because whether the pager-camera recorded the courtyard conversation audibly was disputed and could not be objectively veri-

37. Cresthaven Nursing Residence v. Freeman, No. 07-02-0011-CV, 2003 Tex. App. LEXIS 1187, *1 (Tex. App.—Amarillo Feb. 5, 2003, no pet.).

38. *Id.* at *2.

39. *Id.*

40. Stephens v. Dolcefino, 126 S.W.3d 120 (Tex. App.—Houston [1st Dist.] 2003, pet. filed).

fied since the audiotaped portion no longer existed."[41] The court of appeals disagreed, stating that the reason the sound from the videotape "could not be reviewed was because KTRK erased it."[42] Whether done in the usual course of business or as an act of spoliation, "a defendant cannot unilaterally destroy the principal object needed to verify a wrong and then argue that a plaintiff cannot verify the wrong because that object is missing."[43]

V. SANCTIONS

In *Spohn Hospital v. Mayer*, the Texas Supreme Court reversed an award of sanctions ordering that specified portions of witness statements be taken as established facts at trial as a discovery sanction for the hospital's late production of those witness statements. In this medical negligence case, the plaintiffs sued Spohn Hospital, alleging that the negligence of the hospital's staff resulted in the death of their father. Although the plaintiffs propounded requests for disclosure, the defendant failed to produce written statements from a telemetry technician and various nurses that indicated that immediately prior to the patient's death, he had called for a nurse four times and that the patient had been restrained. Thirty-one days before trial the hospital voluntarily produced the statements, stating that it had withheld them based on attorney-work product, but that recent case law had convinced them the statements were discoverable. The plaintiffs moved for sanctions, arguing that the statements had a direct bearing on the issue of breach of the standard of care and that the late production prejudiced the plaintiffs' case. The court of appeals agreed with the hospital that the trial court had abused its discretion in ordering the sanctions because there was no direct nexus among the offensive conduct, the offender, and the sanction imposed, and because the sanctions were excessive. The supreme court agreed, holding that although sanctions are generally directed against the alleged abuse, the record contained no evidence of whether the counsel or their clients were responsible for the discovery abuse. Additionally, the record was silent regarding the consideration and effectiveness of less stringent sanctions. Because the sanctions imposed were the type that would inhibit the presentation of a party's claim, and they were imposed as a result of a late production, the harmful conduct was insufficient to justify the severity of the sanctions imposed. The supreme court thus held that the trial court had abused its discretion in ordering that the specified portions of the witness statements be taken as established facts at trial.[44]

In *Villegas v. Texas Department of Transportation*, the San Antonio Court of Appeals upheld the trial court's order striking an expert witness due to untimely disclosure of the expert's affidavit and report. Although

41. *Id.* at 4.
42. *Id.*
43. *Id.*
44. Spohn Hosp. v. Mayer, 104 S.W.3d 878 (Tex. 2003).

the plaintiffs' expert had been timely disclosed, an affidavit incorporating a preliminary professional engineering report, a resume, and 162 pages of supporting data and material (filed in response to a no-evidence motion) had not been disclosed at all. The trial court struck the expert affidavit and granted the defendants' motion for summary judgment. The plaintiffs appealed, arguing that they had timely designated the expert and had supplied the defendants with two boxes of materials, which included the expert's conclusions and some supporting data. The court of appeals held that because the plaintiffs failed to establish good cause for failing to timely disclose the expert's affidavit and incorporated data, the trial court did not abuse its discretion in striking the plaintiffs' expert.[45]

Death penalty sanctions were upheld by the Dallas Court of Appeals in *Response Time, Inc. v. Sterling Commerce, Inc.* In this case, Response Time, a company that employs and places programmers in the financial industry, recruited an employee of Sterling and placed him at a different company to oversee the installation of a program that he had worked on while at Sterling. Sterling sued Response Time for tortious interference with contractual relations, breach of contract, theft of trade secrets, misappropriation, and unfair competition. The parties subsequently entered into an agreed temporary injunction, which prevented any changes in the employee's job status at his new company pending trial on the merits. The injunction, however, was quickly violated, and the employee began working on the contested program. In response, the defendant filed defamation counterclaims.

In support of its defamation counterclaim, Response Time produced notes and interrogatory responses that purported to detail conversations in which prospective clients declined to work with Response Time because of statements made by Sterling employees. Although the president of Response Time testified in support of the notes, he later confessed they had been fabricated. After Response Time withdrew its counterclaims, Sterling moved for sanctions on the basis of the fabricated notes, concealment of the violation of the injunction, and other discovery abuses. The trial judge granted the motion and entered an order striking all of Response Time's pleadings. The court of appeals affirmed, concluding that the sanctions bore a direct relationship to the offensive conduct. The court disagreed with Response Time's argument that the perjury and fabricated evidence had no bearing on the defendant's defenses to the misappropriation claims, because Response Time hid its injunction violation for two years and failed to cooperate in discovery. The court found that the trial judge had thoroughly analyzed and considered the imposition of lesser sanctions and found them inappropriate. The court of appeals agreed with the lower court's findings and concluded that in light of Response Time's deliberate and callous conduct, the sanctions imposed

45. Villegas v. Tex. Dep't of Transp., 120 S.W.3d 26 (Tex. App.—San Antonio 2003, pet. denied).

were not excessive.[46]

VI. MISCELLANEOUS DECISIONS OF NOTE

A. HEARSAY

The business record exception to hearsay was addressed in *Whacep, Inc. v. Congress Financial Corp.*, after a finance company seized the accounting records of a bankrupt business and then sued to recover outstanding account amounts. The court rejected the plaintiff's contention that the bankrupt company's records were not admissible as business records because the finance company did not generate the documents. The court noted that the sponsoring witness of a business record need not be the creator of the record or even an employee of the company keeping the record. Here, the sponsoring witness testified that his company was very involved on a daily basis with monitoring the records. The court affirmed the trial court's ruling, finding that all parties had a strong interest in the accuracy of the records.[47]

B. EXPERT REPORTS AND AFFIDAVITS

In two companion cases, the Texas Supreme Court addressed the thirty-day grace period in connection with the deadline for filing expert reports in medical malpractice actions. In *Walker v. Gutierrez*, the supreme court reviewed the applicability of the Medical Liability and Insurance Improvement Act, the standard for review for a trial court's ruling on a grace period under the Act, and the circumstances under which a mistake of law will negate a finding of intentional conduct or conscious indifference under the Act. In this medical malpractice case, the plaintiffs filed expert reports that summarized medical records and stated that the defendants had deviated from standard medical care and that their negligence was a proximate cause of the injury. The defendants moved to dismiss the plaintiffs' claims for failure to provide expert reports that represented good faith efforts to comply with Section 13.01 of the Medical Liability and Insurance Improvement Act.[48] Plaintiffs responded that the reports complied with the statute and that if they did not, they were entitled to a thirty-day grace period under Section 13.01(g) of the statute. At the hearing on the motion to dismiss, the plaintiffs' attorney testified that although he knew that the plaintiffs' claims were governed by the statute and he was familiar with the statute's requirements, he did not compare the expert reports with the statute to confirm compliance. He admitted that the reports did not comply with the statute because the standard and violation of the standard of care was missing.

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46. Response Time, Inc. v. Sterling Commerce, Inc., 95 S.W.3d 656 (Tex. App.—Dallas 2002, no pet.).

47. Whacep, Inc. v. Cong. Fin. Corp., No. 03-02-00111-CV, 2003 Tex. App. LEXIS 4130 (Tex. App.—Austin May 15, 2003, no pet.).

48. TEX. REV. CIV. STAT. art. 4590i.

The trial court granted the motion to dismiss and denied the plaintiffs' motion for reconsideration. The court of appeals reversed and remanded, holding that the trial court had abused its discretion in denying the plaintiffs' request for a thirty-day grace period because there was uncontroverted evidence that the failure to timely file a sufficient report was due to a mistake as to the necessary contents of an expert result and not the result of conscious indifference. Granting the petition for review, the supreme court first ruled that a party who files a timely but inadequate expert report may seek relief under the grace period provisions of the statute. The court held that the appropriate standard of review for the denial or grant of a grace period under the statute is an abuse of discretion standard. Applying that standard, the court addressed when a grace period is warranted, concluding that although some mistakes of law may negate the finding of intentional conduct or conscious indifference entitling the claimant to a grace period under Section 13.01(g), not every act of a defendant that could be characterized as a mistake of law is a sufficient excuse. The court held that when a plaintiff files a report that omits one or more of the statute's required elements, a reportedly mistaken belief that the report complied with the statute does not negate a finding of intentional or conscious indifference. Accordingly, such a mistake is not a mistake of law that entitles claimant a grace period under Section 1301(g).[49]

In *Horizon/CMS Healthcare Corp. v. Fischer*, a case decided on the same day, the Texas Supreme Court reiterated its holding in *Walker* that a purportedly mistaken belief that a report complies with Section 13.01 does not negate a finding of intentional or conscious indifference. In this case, the plaintiff timely filed an expert report that stated that the nursing care at the defendant hospital was below the standard of good nursing care, but that omitted the necessary standard of care and any causal connection between the conduct and injury. The defendant moved to dismiss the case, claiming that the report did not comply with Section 13.01. The plaintiff argued that the report complied, and alternatively requested a thirty-day grace period if the report was insufficient because it was the result of a mistake and not an intentional act of conscious indifference. Although the plaintiff's counsel believed the report was adequate when filed and argued that the fact that she filed the report along with bonds demonstrated that she did not act with conscious indifference, the trial court dismissed the plaintiff's claims with prejudice. The court of appeals reversed and remanded, holding that the trial court abused its discretion when it denied the plaintiff a thirty-day grace period. The supreme court, referring to its decision in *Walker*, held that the trial court had not abused its discretion in denying the grace period and determined that plaintiff's failure to file an adequate expert report was not the result of accident or mistake.[50]

49. Walker v. Gutierrez, 111 S.W.3d 56 (Tex. 2003).
50. Horizon/CMS Healthcare Corp. v. Fischer, 111 S.W.3d 67 (Tex. 2003).

In *Lerer v. Lerer*, the appellants challenged a trial court's judgment enforcing a mediated settlement agreement, arguing that the appellant suffered from a medical condition which caused him not to understand what he was signing. The appellants contended that the trial court erred in excluding the affidavit of a psychiatrist who treated appellant, any references to the psychiatrist, and any references to testifying experts reviewing the psychiatrist's affidavit. The appellants argued that the affidavit should be admissible under Texas Rules of Evidence 703[51] and 705[52] because it was reviewed by the appellant's treating physician and by the psychiatrist testifying for the appellees. Because the appellees' psychiatrist testified that he had reviewed, but not relied on the affidavit, there was no testimony that the treating physician had relied upon the affidavit. Because the appellants admitted that they wished to introduce the affidavit because a psychiatrist's conclusions were necessary to rebut those of the appellees' expert psychiatrist, the court held that the trial court did not abuse its discretion in excluding the affidavit. The court noted that it would have been unfairly prejudicial to the appellees to have the jury hear the affidavit when appellees had no opportunity to cross-examine the expert or review the records of his treatment of appellant.[53]

C. Relevance

The El Paso Court of Appeals addressed Texas Rule of Evidence 613[54] concerning prior inconsistent statements in *Denney v. Dillard Texas Operating Ltd. Partnership*. In this case, the plaintiff alleged that she was fired because she sought workers' compensation for an injury, while the defendant argued that the plaintiff was terminated because of a nondiscriminatory absence-control policy. After defense witnesses expressly testified that managers had no authority to extend leave to injured workers beyond six months, the plaintiff attempted to impeach the witnesses using the defendant's interrogatory responses indicating that other employees were allowed longer leaves of absence before they were terminated. The defense argued that these other employees worked at different locations and were on leave for different reasons and should thus not be considered in this case. The trial court agreed and excluded the evidence, and plaintiff appealed. The court of appeals found error, holding that the evidence was relevant for impeachment purposes and admissible under Rule 613[55] as an inquiry regarding prior inconsistent statements. The court stated that by not allowing in the evidence, the jury was left with the misleading impression that employees were always

51. Tex. R. Evid. 703.

52. Tex. R. Evid. 705.

53. Lerer v. Lerer, No. 05-02-00124-CV, 2002 Tex. App. LEXIS 8371 (Tex. App.—Dallas Nov. 26, 2002, pet. denied) (not designated for publication).

54. Tex. R. Evid. 613.

55. *Id.*

terminated once their leave of absence exceeded six months.[56]

The Tyler Court of Appeals addressed the relevance of subsequent remedial measures in *Tyson Foods, Inc. v. Guzman.* Guzman, an employee of an independent contractor hired by Tyson, sued Tyson after he was injured while performing his job as a chicken catcher. After Guzman was awarded damages for physical pain and mental anguish, as well as for future lost earning capacity, Tyson appealed, arguing that the trial court committed reversible error by allowing Guzman to present to the jury various subsequent remedial measures implemented to prevent future accidents because the evidence was prejudicial and not admissible under the rules of evidence. Tyson further argued the evidence was inadmissible for purposes of showing control because it had already stipulated that it had sufficient control over the independent contractor to require workers to wear safety gear. Guzman countered that the exception to the general rule still applied because Tyson had not stipulated to all areas of control, and had not specifically acknowledged that it had the ability to control the manner and means by which the contractor accomplished the objective of the contract. The court of appeals held that because Guzman was required to prove that Tyson exercised some control over the subcontractor's work in order to show that Tyson owed him a duty and because Tyson had not stipulated to all areas of control, the issue of control was controverted and the evidence of subsequent remedial measures was properly admitted.[57]

D. ADR Confidentiality

The Supreme Court of Texas addressed the confidentiality provisions of the ADR statute in *In re M.S.*, in which the mother in a parental rights termination case argued that the admission of a memorandum of agreement between her and Child Protective Services violated the confidentiality provisions of the ADR statute.[58] Since the ADR statute states that *communications* relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure are confidential, and the agreement in this case was not a communication but an agreement between the parties, the supreme court disagreed. In addition, the agreement clearly stated in two places that it was subject to Texas Rule of Civil Procedure 11, which provides that "agreements between attorneys or parties concerning the pending suit must be in writing, signed and filed in the record of the cause to be enforceable,"[59] and the agreement specifically noted that it could be attached to an order of the court as an exhibit. Therefore, the court held that the agreement was not a confidential communication protected by the ADR statute.[60]

56. Denney v. Dillard Tex. Operating Ltd. P'ship, No. 08-01-00442-CV, 2003 Tex. App. LEXIS 4066 (Tex. App.—El Paso May 8, 2003, no pet.).
57. Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233 (Tex. App.—Tyler 2003, no pet.).
58. Tex. Civ. Prac. & Rem. Code Ann. § 154.073 (Vernon 2002).
59. Tex. R. Civ. P. 11.
60. *In re* M.S., 115 S.W. 543 (Tex. 2003).