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CIVIL PROCEDURE

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

I. SUBJECT MATTER JURISDICTION

In a plurality opinion, the Fourteenth District Court of Appeals, sitting en banc, upheld a trial court's jurisdiction over a post-judgment interpleader in *Madeksho v. Abraham, Watkins, Nichols & Friend*.¹ The case was "part of the debris from a falling-out between attorneys who worked together on asbestos cases for almost twenty years."² The dispute between the law firm and Madeksho, who had left the firm, arose while a case involving four of the firm's clients was on appeal.³ When the clients' judgment was ultimately affirmed, and the asbestos defendant learned of the attorneys' conflicting claims to an interest in the recovery, the defendant filed an interpleader in the underlying case three days after the Texas Supreme Court's mandate issued.⁴ After first disbursing the undisputed amounts to the clients, the trial court split the attorneys' share equally between Madeksho, who was continuing to represent the clients, and the firm.⁵ Madeksho and the clients appealed, claiming that the trial court lacked subject matter jurisdiction to hear the interpleader or take any other action beyond enforcing the mandate by ordering payment of the entire judgment to the clients.⁶

The plurality opinion analyzed at length the pronouncement of various courts, including its own prior decisions, that a trial court has "no jurisdiction" to do anything beyond the appellate mandate and concluded that it

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1. *Madeksho v. Abraham, Watkins, Nichols & Friend*, 112 S.W.3d 679, 690 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

2. *Id.* at 681.

3. *Id.*

4. *Id.* at 682.

5. *Id.*

6. *Id.* at 682-83.

could not be read literally.⁷ The plurality reasoned that, while trial courts clearly must obey the appellate mandates they receive, “[t]rial courts retain their constitutional jurisdiction” to interpret the appellate mandates they receive, and “[t]o perform duties collateral to and consistent with those mandates.”⁸ Those duties include “adjudicat[ing] turnover disputes . . . [and] consider[ing] motions for contempt and to enforce.” Moreover, the plurality emphasized the risk to judgment debtors in situations such as that presented in *Madeksho* if a trial court could not adjudicate the conflicting demands to the money they owe.⁹ Thus, over a vigorous dissent, and with one justice concurring only in the result, the court upheld the trial court’s subject matter jurisdiction.¹⁰

The proper disposition of a case when a plea to the jurisdiction is granted was at issue in *Ab-Tex Beverage Corp. v. Angelo State University*.¹¹ The appellant conceded that its claims were barred by sovereign immunity, but complained that the proper relief was to abate the suit, not to dismiss it.¹² The Austin Court of Appeals disagreed.¹³ According to the court, since a dismissal on jurisdictional grounds is not on the merits, the appellant would be free to re-file the suit if it obtained legislative permission to sue.¹⁴ Thus, it was not error to dismiss the case, rather than abate it, until that time.¹⁵

The Dallas Court of Appeals in *Meridien Hotels, Inc. v. LHO Financing Partnership I, L.P.*¹⁶ held that a statutory county court had jurisdiction to issue a writ of mandamus to a justice court to proceed to trial in a forcible entry and detainer case.¹⁷ The court noted that the Government Code authorizes county courts to issue writs of mandamus,¹⁸ and the Texas Supreme Court long ago recognized their authority to do so in matters within their jurisdiction.¹⁹ Because “Dallas County’s county courts at law have an expanded amount-in-controversy jurisdiction,” to the point that it is co-extensive with the district courts, the *Meridien* court concluded that the county courts at law also have jurisdiction to issue writs of mandamus to the justice courts.²⁰

7. *Id.* at 684-85.

8. *Id.* at 685.

9. *Id.* at 687-90.

10. *Id.* at 690.

11. *Ab-Tex Beverage Corp. v. Angelo State Univ.*, 96 S.W.3d 683, 684 (Tex. App.—Austin 2003, no pet.).

12. *Id.* at 685.

13. *Id.* at 687-88.

14. *Id.* The court did modify the trial court’s order by deleting the “Mother Hubbard” clause denying all relief not expressly granted to make clear that the judgment was not on the merits. *Id.* at 686.

15. *Id.* at 687-88.

16. *Meridien Hotels, Inc. v. LHO Fin. P’ship I, L.P.*, 97 S.W.3d 731 (Tex. App.—Dallas 2003, pet. denied).

17. *Id.* at 737.

18. *Id.* at 736 (referencing TEX. GOV’T CODE ANN. § 25.0004(a) (Vernon Supp. 2004)).

19. *Id.* (noting *Repka v. Am. Nat’l Ins. Co.*, 143 Tex. 542, 548, 186 S.W.2d 977, 980 (1945)).

20. *Id.* at 737.

According to the Texas Supreme Court, the failure to join all persons who have an interest in a suit does not “uniformly” constitute a jurisdictional defect in a declaratory judgment action.²¹ In *Simpson v. Afton Oaks Civic Club, Inc.*,²² however, the Texarkana Court of Appeals dismissed an appeal from a property owner’s declaratory judgment action against the property owners’ association for lack of subject matter jurisdiction based on the failure to join the other property owners as parties.²³ The court held that the failure to join the other property owners was a jurisdictional defect requiring dismissal of the suit because the rendition of a declaratory judgment would clearly prejudice the unjoined property owners’ rights and interests.²⁴

II. SERVICE OF PROCESS

The Fort Worth Court of Appeals addressed the issue of amendment of a return of service after a default judgment in two cases during the Survey period. In *Vespa v. National Health Insurance Co.*,²⁵ the defendant filed a restricted appeal six months after a default judgment was entered, arguing that the return of service failed to show that service had been effectuated in accordance with the trial court’s order allowing substituted service.²⁶ The plaintiff attempted to cure this defect by filing an amended return of service.²⁷ The appellate court held that, under the Texas Supreme Court, a trial court cannot authorize an amendment to the return of service after it has entered judgment.²⁸ However, the Fort Worth Court of Appeals reached a seemingly contrary conclusion in *Dawson v. Briggs*,²⁹ a case decided several months later. The *Dawson* court held, without any reference to *Vespa*, that the trial court had jurisdiction to allow a post-default judgment amendment of the return of service, even though the defendant had already filed a notice of appeal.³⁰ The court distinguished as dicta the same supreme court authority it relied on in *Vespa*.³¹ Instead, the court focused on the fact that the trial court entered the order allowing amendment of the return during the time it still retained plenary power.³²

21. *Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385, 390 (Tex. 1977).

22. *Simpson v. Afton Oaks Civic Club, Inc.*, 117 S.W.3d 480 (Tex. App.—Texarkana 2003, no pet.).

23. *Id.* at 484.

24. *Id.* at 483-84.

25. *Vespa v. Nat’l Health Ins. Co.*, 98 S.W.3d 749 (Tex. App.—Fort Worth 2003, no pet.).

26. *Id.* at 751.

27. *Id.*

28. *Id.* at 752-53 (citing *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 153 (Tex. 1994)).

29. *Dawson v. Briggs*, 107 S.W.3d 739 (Tex. App.—Fort Worth 2003, no pet.).

30. *Id.* at 745.

31. *Id.* at 746-47.

32. *Id.* at 745-46. This result was foreshadowed in the concurring opinion in *Vespa* authored by Justice Livingston, who was also on the panel that decided *Dawson*. See *Vespa*, 98 S.W.3d at 753 (Livingston, J., concurring).

In *Wilkins v. Methodist Health Care System*,³³ the named defendant, Methodist Health Care System (the "System"), owned Methodist Hospital where the plaintiff was treated.³⁴ One year after suit was filed, and after limitations had expired, the System objected that it was not the proper party and that the plaintiff should have sued the hospital.³⁵ The plaintiff then amended her petition to name the hospital as well, but did not request or serve a new citation on the hospital.³⁶ The trial court dismissed the claims against the hospital without prejudice because it was never served.³⁷ The Fourteenth District Houston Court of Appeals concluded that this was a case involving the misidentification of parties, albeit related entities, rather than misnomer, and a new citation was required.³⁸ Thus, although it was clearly troubled by the result, the court affirmed the dismissal of the claims against the hospital.³⁹

Once again, a number of cases during the Survey period grappled with the question of whether a plaintiff exercised reasonable diligence in effecting service of citation so as to avoid a limitations defense.⁴⁰ In *Parsons v. Turley*,⁴¹ for example, the Dallas Court of Appeals held that the plaintiff's reliance on an alleged oral agreement to postpone service did not raise a fact issue on the question of reasonable diligence, since any such "agreement is unenforceable under the rules of civil procedure."⁴² And in *Zacharie v. U.S. Natural Resources, Inc.*,⁴³ the San Antonio Court of Appeals held that, as a matter of law, the plaintiff did not diligently pursue service of process where the requested citations sat unclaimed in the district clerk's office for five and one-half months after the original petition was filed.⁴⁴

To support a default judgment against a corporation based on substituted service, the record must show that the plaintiff used reasonable diligence in seeking to serve the corporation's registered agent at the registered office.⁴⁵ The First District Houston Court of Appeals in *Ingram Industries, Inc. v. U.S. Bolt Manufacturing, Inc.*⁴⁶ interpreted this

33. *Wilkins v. Methodist Health Care Sys.*, 108 S.W.3d 565 (Tex. App.—Houston [14th Dist.] 2003, pet. filed).

34. *Id.* at 567.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 570.

39. *Id.* at 571-72.

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

41. *Parsons v. Turley*, 109 S.W.3d 804 (Tex. App.—Dallas 2003, pet. filed).

42. *Id.* at 809 (citing TEX. R. CIV. P. 11). *Accord* *Meza v. Hooker Contracting Co.*, 104 S.W.3d 111, 114-15 (Tex. App.—San Antonio 2003, no pet.).

43. *Zacharie v. U.S. Natural Res., Inc.*, 94 S.W.3d 748 (Tex. App.—San Antonio 2002, no pet.).

44. *Id.* at 754-55.

45. See generally TEX. BUS. CORP. ACT ANN. art. 2.11(b) (Vernon 2003).

46. *Ingram Indus., Inc. v. U.S. Bolt Mfg., Inc.*, 121 S.W.3d 31 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

requirement quite narrowly where the defendant corporation had moved from the address that was listed with the Secretary of State as its registered office. The court noted that the Texas Business Corporation Act places an affirmative duty on corporations to notify the Secretary of State of any change of its registered address.⁴⁷ Thus, the court held that the plaintiff's one unsuccessful attempt to serve the registered agent at the listed address constituted reasonable diligence, and the plaintiff could thereafter resort to substituted service on the Secretary of State.⁴⁸ The court reached this conclusion, despite the fact that the plaintiff and its counsel apparently knew where the defendant corporation's actual place of business was, but did not attempt to serve the registered agent at that address.⁴⁹

III. SPECIAL APPEARANCE

The interplay between a special appearance and motion for new trial was the issue for out-of-state defendants who defaulted in *Reiff v. Roy*.⁵⁰ The defendants failed to answer even though they were aware of the suit, and a default judgment was entered against them.⁵¹ Within thirty days, however, they filed a special appearance and, subsequently, a motion for new trial subject to their special appearance.⁵² The trial court sustained the special appearance, vacated the default judgment, and dismissed the suit.⁵³ On appeal, the plaintiff complained that the defendants had not met one of the prongs of the familiar *Craddock*⁵⁴ test for setting aside a default judgment, namely that their failure to answer was an accident or mistake. The Dallas Court of Appeals rejected this argument, holding that "*Craddock* does not apply to situations in which a defaulting party seeks to overturn a default judgment by timely filing a special appearance" to contest jurisdiction.⁵⁵

Most practitioners know to take great care to avoid waiving a special appearance through the filing or presentation of any other motion or pleading. In *Allianz Risk Transfer (Bermuda) Limited v. S.J. Camp & Co.*,⁵⁶ the unlucky defendant filed two separate instruments with the district clerk—a special appearance and "a motion to transfer venue and subject thereto, original answer."⁵⁷ The record was silent on which was tendered to the clerk first, but the clerk file-stamped the special appear-

47. *Id.* at 33-34 (citing TEX. BUS. CORP. ACT. ANN. art. 2.11(A) (Vernon 2003)).

48. *Id.* at 34.

49. *Id.* at 35.

50. *Reiff v. Roy*, 115 S.W.3d 700, 703 (Tex. App.—Dallas 2003, no pet.).

51. *Id.* at 703.

52. *Id.*

53. *Id.*

54. *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (1939).

55. *Reiff*, 115 S.W.3d at 704.

56. *Allianz Risk Transfer (Bermuda, Ltd. v. S.J. Camp & Co.*, 117 S.W.3d 92 (Tex. App.—Tyler 2003, no pet.).

57. *Id.* at 94.

ance one minute after the motion to transfer and answer.⁵⁸ The Tyler Court of Appeals held that the defendant made a general appearance, thereby waiving its jurisdictional challenge.⁵⁹ In *Lang v. Capital Resource Investments, I and II, L.L.C.*,⁶⁰ on the other hand, the Dallas Court of Appeals held that the defendant did not waive his special appearance by, among other things, "allowing" the trial court to rule on his motion for new trial first.⁶¹ The court noted that the defendant did not participate in the hearing on the motion for new trial and objected to that motion being ruled on first. The defendant was not required, beyond that, to ignore questions raised by the trial court or refuse to approve the form of order granting a new trial in order to avoid a waiver.⁶²

After the defendants' special appearance was denied, the plaintiff in *Le v. Kilpatrick*⁶³ nonsuited the case.⁶⁴ For reasons that are not apparent from the Tyler Court of Appeal's opinion, the defendants nevertheless appealed the denial of their special appearance.⁶⁵ The defendants argued that the denial of a special appearance, like a venue determination or summary judgment on the merits, should not be vitiated by a nonsuit.⁶⁶ The court disagreed and dismissed the appeal as moot.⁶⁷

IV. VENUE

In *Houston Livestock Show and Rodeo, Inc. v. Hamrick*,⁶⁸ the Austin Court of Appeals had the rare opportunity to address the scope and substance of Texas Rule of Civil Procedure 87(5).⁶⁹ In this case, the plaintiffs originally filed the action in San Saba County against the livestock show and the superintendent of San Saba Independent School District.⁷⁰ Thereafter, Houston Livestock Show and Rodeo moved to transfer venue to either Harris County or Travis County on the grounds that Harris County was the location of its principal place of business; that the alleged

58. *Id.* at 97.

59. *Id.*

60. *Lang v. Capital Res. Invs., I & II, LLC*, 102 S.W.3d 861 (Tex. App.—Dallas 2003, no pet.).

61. *Id.* at 863-64.

62. *Id.* at 865.

63. *Le v. Kilpatrick*, 112 S.W.3d 631 (Tex. App.—Tyler 2003, no pet.).

64. *Id.* at 633.

65. *Id.*

66. *Id.*

67. *Id.* at 635.

68. *Houston Livestock Show & Rodeo, Inc. v. Hamrick*, 125 S.W.3d 555 (Tex. App.—Austin, 2003, pet. denied).

69. If venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then no further motions to transfer shall be considered regardless of whether the movant was a party to the prior proceedings or was added as a party subsequent to the venue proceedings, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was not available to the other movant or movants.

TEX. R. CIV. P. 87(5).

70. *Hamrick*, 125 S.W.3d at 566.

causes of action did not occur in San Saba County; that the allegations regarding the Texas Education Agency ("TEA") should proceed in Travis County; and that no mandatory or permissive exception authorized the maintenance of the action in San Saba County.⁷¹ After filing an amended motion and joining the TEA as a defendant, the parties agreed to transfer venue to Travis County, and the trial court granted the motion to transfer venue.⁷²

Thereafter, plaintiffs amended their petition to join the Texas A&M University System Board of Regents and three additional defendants.⁷³ These defendants "moved to transfer venue from Travis County to Brazos County, arguing that the Texas Torts Claim Act mandates venue in the county where the events . . . occurred."⁷⁴ The trial court overruled the Texas A&M defendants' motion and, thereafter, plaintiffs non-suited the only Travis County defendants.⁷⁵ Based on the foregoing, the original defendants moved for a rehearing on their motion to transfer venue to Harris County and the Texas A&M defendants moved for rehearing on their motion to transfer venue to Brazos County.⁷⁶ The trial court overruled both motions.⁷⁷ The court of appeals affirmed the trial court's decision by strictly interpreting Texas Rule of Civil Procedure 87(5) and holding that "if an action has been transferred to a proper county in response to a motion to transfer, then no further motions to transfer shall be considered."⁷⁸

In *My Café-CCC Ltd. v. LunchStop, Inc.*⁷⁹ the Dallas Court of Appeals analyzed the scope and enforceability of forum selection clauses. My Café filed suit in Texas, alleging breach of four different franchise agreements.⁸⁰ In response, LunchStop filed a motion to dismiss, claiming the court did not have jurisdiction because of a forum selection clause contained in the agreements.⁸¹ The trial court found that the forum selection clause was enforceable and dismissed the case.

On appeal, the court of appeals affirmed the trial court, holding that forum selection clauses are enforceable against the parties if "(1) the parties have contractually consented to submit to the exclusive jurisdiction of another state, and (2) the other state recognizes the validity of such provisions."⁸² However, the court recognized that it was not bound by the parties' selection of a forum if the interests of the public and potential

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 568.

76. *Id.*

77. *Id.*

78. *Id.*

79. *My Café-CCC Ltd. v. LunchStop, Inc.*, 107 S.W.3d 860 (Tex. App.—Dallas 2003, no pet.).

80. *Id.* at 862-63.

81. *Id.* at 863.

82. *Id.* at 864, 867.

witnesses strongly favor jurisdiction in a forum other than the forum chosen by the parties.⁸³ In this case, no public interest argument was asserted.⁸⁴ Rather, My Café argued, among other things, that the forum selection clause did not apply because the agreements were fraudulently induced. However, the court of appeals held that when the claims asserted in a lawsuit “arise out of the parties’ contractual relations and implicate the contract’s terms, the forum selection clause will encompass all the causes of action relating to the agreement,” including a fraudulent inducement claim.⁸⁵

Finally, during the Survey period, the Texas Legislature passed the Texas Omnibus Civil Justice Reform Bill HB4 (“HB4”).⁸⁶ Article 3 of HB4 addresses venue and *forum non conveniens* and should be reviewed by all practitioners. For example, in multiple plaintiff cases, the court can no longer make a distinction between the original plaintiff(s) and ones that were later joined or intervened.⁸⁷ In addition, a defendant previously did not have the right to an interlocutory appeal of a trial court’s decision that each plaintiff in a multiple plaintiff case independently established venue. The defendant could appeal if the trial court determined that venue was improper as to a plaintiff, but there nevertheless was an essential need to have his claims joined in the case.⁸⁸ Now, the trial court’s decision is subject to interlocutory appeal regardless of whether it is based on the venue determination or the joinder determination. Finally, with respect to *forum non conveniens*, a trial court no longer has any discretion regarding whether to stay or dismiss the action if the court otherwise finds the doctrine of *forum non conveniens* applicable:

If a court of this state, on written motion of a party, finds that the interest of justice and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside the state, this court *shall* decline to exercise jurisdiction under the doctrine of *forum non conveniens* and *shall* stay or dismiss the claim or action.⁸⁹

Accordingly, in future Survey periods, *forum non conveniens* may become a more prominent topic.

V. PARTIES

HB4 addressed several class action issues and should be thoroughly reviewed by trial practitioners. Most of the changes were designed to make the class certification procedure more efficient and to keep litiga-

83. *Id.* at 864-65.

84. *Id.* at 865.

85. *Id.* at 866.

86. Tex. H.B. 4, 78th Leg., R.S. (2003).

87. TEX. CIV. PRAC. & REM. CODE § 15.003(a) (Vernon 2003).

88. See, e.g., Bristol-Myers Squibb Co. v. Goldston, 983 S.W.2d 369, 374 (Tex. App.—Fort Worth 1998, pet. dism’d by agr.).

89. TEX. CIV. PRAC. & REM. CODE § 71.051(b) (Vernon Supp. 2004) (emphasis added).

tion expenses to a minimum until all certification issues are decided. For example, prior to a certification decision, the trial court must now consider and rule on pleas to the jurisdiction, wherein it is argued that a state agency has primary or exclusive jurisdiction.⁹⁰ Additionally, the Texas Supreme Court now has jurisdiction to review the grant or denial of class certification when it determines that inconsistent appellate decisions should be “clarified” to remove “unnecessary uncertainty” in the law and unfairness to litigants.⁹¹ Finally, all trial court proceedings are stayed pending a ruling or interlocutory appeal of a class certification decision.⁹²

Prior to HB4, courts of appeal regularly reversed trial court certifications of classes. For example, in *Enron Oil & Gas Co. v. Joffrion*,⁹³ the Tyler Court of Appeals reversed the trial court’s certification for, among other reasons, its failure to issue a certification order that complied with *Bernal*.⁹⁴ In *Tracker Marine, L.P. v. Ogle*,⁹⁵ the Fourteenth District Houston Court of Appeals reversed the trial court’s class certification because (1) compliance with class action requirements must be demonstrated rather than presumed; and (2) consideration of choice of the law questions in class actions may not be postponed until after certification.⁹⁶

In *Barcroft v. County of Fannin*,⁹⁷ the Texarkana Court of Appeals considered whether an individual who filed suit as a “sovereign” had standing and capacity.⁹⁸ The plaintiff sued Fannin County, the City of Paris, and various public officials and peace officers because they allegedly towed away some of his property, rifled his personal belongings, and stole cash from his house. The defendants filed special exceptions asserting that, among other things, the plaintiff was not entitled to recover because he was suing as a sovereign.⁹⁹ The trial court dismissed the action with prejudice, holding the plaintiff had no standing and could not recover in the capacity of a sovereign.¹⁰⁰ On appeal, the court noted the distinction between standing to bring a suit and lack of capacity to recover.¹⁰¹ The court found that the plaintiff sought monetary damages based on allegations of trespass and invasion and, therefore, met the bare minimum necessary to demonstrate standing.¹⁰² However, after providing a detailed analysis of the history of the use of “sovereign” capacity dating back to the Civil War, the court determined that the plaintiff could

90. TEX. CIV. PRAC. & REM. CODE § 26.051(a) (Vernon 2003).

91. TEX. GOV’T CODE § 22.225(c), (e) (Vernon Supp. 2004) (emphasis added).

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

93. *Enron Oil & Gas Co. v. Joffrion*, 116 S.W.3d 215 (Tex. App.—Tyler 2003, no pet.).

94. *Id.* at 224 (citing *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000)).

95. *Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

96. *Id.* at 351-52.

97. *Barcroft v. County of Fannin*, 118 S.W.3d 922 (Tex. App.—Texarkana 2003, no pet.).

98. *Id.* at 924.

99. *Id.* at 923-24.

100. *Id.* at 924.

101. *Id.* at 925.

102. *Id.* at 925-27.

not assert his claims in that capacity.¹⁰³

VI. PLEADINGS

In *Fraud-Tech, Inc. v. Choicepoint, Inc.*,¹⁰⁴ the Fort Worth Court of Appeals considered whether certain claims and parties had been dismissed by an amended pleading. Fraud-Tech, Inc. ("FTI") filed suit against several defendants who, in turn, filed an "Original Cross-Claim" against Dean McGee and Robert Andrews, the founders of FTI.¹⁰⁵ Andrews and McGee filed an answer and "counterclaim" to the defendants' cross-claim, which included the following statement: "Cross-Defendants adopt, individually and collectively, and incorporate by reference each and every allegation and cause of action set forth in Plaintiff's Original Petition and each and every amendment and/or supplement thereof and/or thereto as if set forth herein at length verbatim."¹⁰⁶ Subsequently, FTI filed a sixth amended petition, which contained no reference or allegation concerning McGee and Andrews.¹⁰⁷ Based on the foregoing, the original defendants argued, and the trial court found, that McGee and Andrews' "counterclaims" against the original defendants were dismissed because (1) neither McGee nor Andrews was listed as a party in the sixth amended petition; (2) no allegations were made regarding McGee or Andrews; and (3) the style of the case did not reference McGee or Andrews.¹⁰⁸ The court of appeals reversed, however, holding that although parties to a suit may be effectively dismissed by omitting their names from an amended pleading, no cases "stand for the proposition that amended pleading of a plaintiff [could] effectively dismiss the claims and/or counterclaims between a third-party plaintiff and third-party defendant."¹⁰⁹

In *CHCA East Houston, L.P. v. Henderson*,¹¹⁰ the Fourteenth District Houston Court of Appeals considered whether the "misidentification" of a defendant is a question of standing or capacity. In this lease dispute, the defendant's primary argument was that the plaintiff was not a party to the first lease, had no assignment or other authority to apply lease payments, and therefore, was not a proper party to the lawsuit.¹¹¹ The court's determination as to whether to categorize the defense as one of standing or capacity implicated whether the issue could be raised by objection or must be raised by verified pleading. The court concluded "that misidentification among affiliated corporations or successors-in-interest is

103. *Id.* at 925-26.

104. *Fraud-Tech, Inc. v. Choicepoint, Inc.* 102 S.W.3d 366 (Tex. App.—Fort Worth 2003, no pet.).

105. *Id.* at 371-72.

106. *Id.* at 372.

107. *Id.* at 375.

108. *Id.*

109. *Id.* at 376.

110. *CHCA E. Houston, L.P. v. Henderson*, 99 S.W.3d 630 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

111. *Id.* at 632.

an issue [of capacity] that must be raised by a verified pleading.”¹¹² Otherwise, the court believed that treating the problem as a standing complaint risks substantial waste of time and resources, as standing could be raised long after the trial is over.¹¹³

Finally, HB4 impacted the pleading requirements with respect to “responsible third parties.”¹¹⁴ In particular, in order to seek submission of a third party’s comparative responsibility to the jury, a defendant can now simply identify or designate such third party in its answer.¹¹⁵ It is no longer necessary for the defendant to join the responsible person as an actual party to the suit.

VII. DISCOVERY

Discovery disputes provided fodder for numerous appellate decisions, including several Texas Supreme Court opinions, during the Survey period. The supreme court revisited the trade secret status of a tire manufacturer’s “skim stock” formula in *In re Bridgestone/Firestone, Inc.*¹¹⁶ The supreme court reiterated its holding in *In re Continental General Tire, Inc.*¹¹⁷ that, where the plaintiffs were seeking discovery of what all parties conceded was a trade secret, “they were required to establish that the information was necessary or essential to a fair adjudication of the case, weighing the . . . need for the information against the potential harm” to the party resisting discovery.¹¹⁸ The supreme court concluded that the plaintiffs’ evidence of unfairness was essentially no different than the evidence presented in *Continental General* and, therefore, ordered that the manufacturer would not be required to disclose the formula.¹¹⁹ In an opinion concurring in the result, Justice O’Neill chided the majority for failing to give the trial bench and bar better guidance in determining what evidence would meet the fair adjudication test articulated by the court.¹²⁰ Justice O’Neill then went on to identify several guiding principles gleaned from trade secret cases in Texas and elsewhere that, while not authoritative, should provide practitioners with a starting point.¹²¹

The Texas Supreme Court got another chance to apply the *Continental General* test, in a different manner, in *In re Bass*.¹²² The plaintiff royalty

112. *Id.* at 632-33.

113. *Id.* at 633.

114. See TEX. CIV. PRAC. & REM. CODE § 33.004 (Vernon Supp. 2004).

115. *Id.* § 33.004(a), (j).

116. *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730 (Tex. 2003) (orig. proceeding).

117. *In re Cont’l Gen. Tire, Inc.*, 979 S.W.2d 609 (Tex. 1998) (orig. proceeding).

118. *Bridgestone/Firestone*, 106 S.W.3d at 732 (citing *Cont’l Gen. Tire, Inc.*, 979 S.W.2d at 613).

119. *Id.* at 734.

120. *Id.* at 734-35 (O’Neill, J., concurring).

121. *Id.* at 736 (noting, for example, that trade secrets should be discoverable “when not allowing discovery would significantly impair a party’s ability to establish or rebut a material element of a claim or defense”).

122. *In re Bass*, 113 S.W.3d 735 (Tex. 2003) (orig. proceeding). The court also clarified in *Bass* that the six factors identified in the Restatement (Third) of Unfair Competition for determining whether a trade secret exists are relevant criteria for a court to consider, and a

interest owners in that case sought production of seismic data, claiming it was necessary for a fair adjudication of their claim that the mineral estate owner breached his implied duty to develop the land.¹²³ The supreme court rejected this argument, holding that the seismic data sought was not material, much less essential, to the plaintiffs' case because the law did not impose any such duty on the owner.¹²⁴ It remains to be seen whether trial judges will readily follow the supreme court's lead in scrutinizing the viability of a party's claim or defense in this manner in deciding similar discovery disputes.

The intermediate appellate courts also addressed a variety of privilege issues during the Survey period. The San Antonio Court of Appeals in *In re Toyota Motor Corp.*¹²⁵ relied on federal case law in holding that a binder of materials prepared for Toyota's attorneys for litigation purposes was protected as work product, and therefore, the trial court should not have split the binder apart and ordered the production of those portions that otherwise would be discoverable.¹²⁶ In *In re Jobe Concrete Products, Inc.*,¹²⁷ the El Paso Court of Appeals held that the identity of participants in a survey conducted by plaintiffs' expert witness was not protected by a "human subjects protection privilege."¹²⁸ And in *In re Lincoln Electric Co.*,¹²⁹ the Beaumont Court of Appeals concluded that the spirit, if not the letter, of the rules governing privilege permitted a party responding to a subpoena duces tecum to make objections to such things as vagueness, overbreadth, and relevance, to have these objections ruled upon, and then to make any assertions of privilege at a later time.¹³⁰ In doing so, the court relied on provisions of Rules 192¹³¹ and 193¹³² that evince a bias against finding a privilege waiver to inform the proper interpretation of Rules 196¹³³ and 199,¹³⁴ which arguably required all of the objections and assertions of privilege to be made at the same time.¹³⁵

The discoverability of privileged information reviewed by a testifying expert was at issue in *In re State Farm Mutual Insurance Co.*¹³⁶ In that

party is not required to establish all six factors in every case. *Id.* at 740 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 39 cmt. d (1995)).

123. *Id.* at 737.

124. *Id.* at 743-45.

125. *In re Toyota Motor Corp.*, 94 S.W.3d 819 (Tex. App.—San Antonio 2002, orig. proceeding).

126. *Id.* at 825-26.

127. *In re Jobe Concrete Prods., Inc.*, 101 S.W.3d 122 (Tex. App.—El Paso 2002, orig. proceeding).

128. *Id.* at 128.

129. *In re Lincoln Elec. Co.*, 91 S.W.3d 432 (Tex. App.—Beaumont 2002, orig. proceeding).

130. *Id.* at 437.

131. TEX. R. CIV. P. 192.

132. TEX. R. CIV. P. 193.

133. TEX. R. CIV. P. 196.

134. TEX. R. CIV. P. 199.

135. *Lincoln Elec. Co.*, 91 S.W.3d at 436-37.

136. *In re State Farm Mut. Ins. Co.*, 100 S.W.3d 338 (Tex. App.—San Antonio 2002, orig. proceeding).

case, State Farm designated two of its own employees as “non-retained experts” who would express expert opinions regarding State Farm’s handling of plaintiff’s claim.¹³⁷ When plaintiff sought discovery of privileged documents that had been reviewed by one of the employees, State Farm then “de-designated” them as experts.¹³⁸ The San Antonio Court of Appeals recognized that a party may de-designate an expert witness so long as it is not part of a bargain between adversaries to suppress testimony or for some other improper purpose.¹³⁹ Curiously, however, the court concluded that State Farm’s unilateral decision to de-designate its employee-experts, who were likely fact witnesses in any event, was intended to conceal their testimony and, therefore, was for an improper purpose.¹⁴⁰ Nevertheless, the court held that the privileged documents in dispute had been generated as part of the underlying claim, not in connection with the plaintiff’s lawsuit against State Farm, and were not discoverable as documents prepared or reviewed by an expert witness in anticipation of his testimony.¹⁴¹

The Texas Supreme Court took an opportunity to provide guidance on the subject of electronic discovery in *In re CI Host, Inc.*¹⁴² The plaintiffs in that case sought production of computer backup tapes from CI Host, a web-hosting company.¹⁴³ The trial court overruled CI Host’s objections based on the federal Electronic Communications Privacy Act.¹⁴⁴ The Texas Supreme Court denied CI Host’s request for mandamus relief because CI Host had not met its burden of supporting its objection with evidence as required by the relevant procedural rules.¹⁴⁵ The supreme court stated, however, that it was “loath” to allow CI Host to have waived its customers’ legitimate privacy rights by its failure to adhere to the discovery rules.¹⁴⁶ Accordingly, it denied the mandamus without prejudice to allow the trial court and parties to give due consideration to those privacy interests, whether by protective order or otherwise.¹⁴⁷

In recent years, the Texas Supreme Court has intervened by mandamus to rein in overbroad document requests.¹⁴⁸ In *In re CSX Corp.*,¹⁴⁹ the Texas Supreme Court provided similar guidance for the proper use of interrogatories. The plaintiff in the underlying negligence action pro-

137. *Id.* at 339.

138. *Id.* at 339-40.

139. *Id.* at 340.

140. *Id.* at 341.

141. *Id.* at 343.

142. *In re CI Host, Inc.*, 92 S.W.3d 514 (Tex. 2002) (orig. proceeding).

143. *Id.* at 514-15.

144. 18 U.S.C.A. §§ 2510-2522, 2701-2711, 3121-3127 (West 2000); *In re CI Host*, 92 S.W.3d at 514.

145. *Id.* at 516-17.

146. *Id.* at 517.

147. *Id.*

148. See *In re Sears Roebuck & Co.*, 123 S.W.3d 573 (Tex. App.—Houston [14th Dist.] 2003) (orig. proceeding) (discussing supreme court’s handling of overbroad document requests in asbestos litigation).

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

pounded three interrogatories requesting the identity of the corporate defendants' safety and medical personnel going back over thirty years.¹⁵⁰ The supreme court concluded that these interrogatories were overbroad and rejected the plaintiff's argument that a broader scope of discovery should be allowed in interrogatories than in document requests.¹⁵¹ As the supreme court phrased it, the "central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information."¹⁵² Since plaintiff was asking for information covering periods when he did not even work for defendants, the interrogatories were overbroad and the defendants' objections should have been sustained.¹⁵³

The little-used motion for entry onto land was the subject of a case decided during the Survey period.¹⁵⁴ Under Rule 196.7,¹⁵⁵ an order for entry onto the property of a nonparty may only issue upon a showing of "good cause" and only if the discovery is relevant to the cause of action.¹⁵⁶ The San Antonio Court of Appeals in *Swepti*, after finding that the request for entry onto a nonparty's land was relevant to a defense asserted in the case, defined good cause as being shown "where the movant establishes (1) the discovery sought is relevant and material, that is, the information will in some way aid the movant in the preparation or defense of the case; and (2) the substantial equivalent of the material cannot be obtained through other means."¹⁵⁷

Finally, the propriety of severe discovery sanctions was at issue in *Spohn Hospital v. Mayer*¹⁵⁸ and *Response Time, Inc. v. Sterling Commerce (North America), Inc.*¹⁵⁹ In *Mayer*, the defendant hospital failed to timely produce witness statements it had taken from two nurses.¹⁶⁰ On the plaintiffs' motion, the trial court ordered as a sanction for the late production that the facts contained in those witness statements be taken as established and so instructed the jury.¹⁶¹ The Texas Supreme Court analyzed this sanction under its familiar *TransAmerican*¹⁶² standard and held that it failed to meet either prong of that test—i.e., (1) a sufficient nexus between the offensive conduct, the offender, and the sanction im-

150. *Id.* at 151.

151. *Id.* at 152-53.

152. *Id.* at 153.

153. *Id.*

154. *In re Swepti L.P.*, 103 S.W.3d 578 (Tex. App.—San Antonio 2003) (orig. proceeding).

155. TEX. R. CIV. P. 196.7.

156. TEX. R. CIV. P. 196.7(d).

157. *Swepti*, 103 S.W.3d at 584.

158. *In re Spohn Hosp. v. Mayer*, 104 S.W.3d 878 (Tex. 2003).

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

160. *Mayer*, 104 S.W.3d at 880.

161. *Id.* at 881.

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

posed, and (2) no more severe than necessary to satisfy the legitimate purposes of sanctions.¹⁶³ The Dallas Court of Appeals in *Response Time*, on the other hand, had little difficulty in concluding that a litigant's perjury and fabrication of evidence justified the "death penalty" sanction of striking the party's pleadings.¹⁶⁴

VIII. SUMMARY JUDGMENT

In *In re Estate of Swanson*,¹⁶⁵ the El Paso Court of Appeals abandoned its prior holdings in *Walton v. City of Midland*¹⁶⁶ and *Walton v. Phillips Petroleum Co.*¹⁶⁷ and joined the several other appellate courts in holding that, even where the non-movant does not object or respond to a defective no-evidence summary judgment motion, if the motion is either conclusory or fails to state the elements on which there is no evidence, the non-movant may still challenge the motion on those grounds on appeal.¹⁶⁸ The Corpus Christi Court of Appeals in *Keszler v. Memorial Medical Center of East Texas*¹⁶⁹ held that a no-evidence motion for summary judgment is "fundamentally flawed when used against an adverse party who would not have the burden of proof at trial on the element or issue raised."¹⁷⁰

IX. JURY PRACTICE

The Texas Supreme Court held in *Archer Daniels Midland Co. v. Bohall*,¹⁷¹ that the trial court erred in entering a judgment based on a verdict reached by a jury after it had been released and then recalled for further deliberations following the discovery of a technical defect in the jury charge. The supreme court rejected the trial court's rationale that, because it had not "received the verdict," it was proper to have the panel resume deliberations.¹⁷² In reaching this conclusion, the supreme court noted that Rule 295 did not apply because the verdict itself was not defective. Only the charge was alleged to have contained an error.¹⁷³ Moreover, before recalling the jury for further deliberations, the trial court had accepted the motion of one of the parties to receive the verdict and then advised the panel that it was excused.¹⁷⁴

163. *Mayer*, 104 S.W.3d at 882-83.

164. *Response Time*, 95 S.W.3d at 660-63.

165. *In re Estate of Swanson*, No. 08-02-00154-CV, 2003 WL 22215240, at *1 (Tex. App.—El Paso Sep. 25, 2003, no pet. h.).

166. *Walton v. City of Midland*, 24 S.W.3d 853 (Tex. App.—El Paso 2000, no pet.).

167. *Walton v. Phillips Petroleum Co.*, 65 S.W.3d 262 (Tex. App.—El Paso 2001, pet. denied).

168. *Swanson*, 2003 WL 22215240, at *2.

169. *Keszler v. Mem'l Med. Ctr.*, 105 S.W.3d 122 (Tex. App.—Corpus Christi 2003, no pet.).

170. *Id.* at 125.

171. *Archer Daniels Midland Co. v. Bohall*, 114 S.W.3d 42 (Tex. 2003).

172. *Id.* at 44-45.

173. *Id.* at 46.

174. *Id.*

In *Mercado v. Warner-Lambert Co.*,¹⁷⁵ one of the parties employed a shadow jury to observe the trial. One of the shadow jurors asked an actual juror for a cigarette during a smoking break and for a quarter to purchase a soft drink. The juror obliged. The First District Houston Court of Appeals affirmed the trial court's denial of a motion for new trial based on juror misconduct, holding that, while the contact between the actual juror and the shadow juror was improper, any harm that resulted was not significant enough to warrant a new trial.¹⁷⁶

Two cases during the Survey period held that trial courts erred in failing to grant parties a trial by jury. In *Texas Valley Insurance Agency v. Sweezy Construction, Inc.*,¹⁷⁷ the plaintiff properly requested a jury trial in its initial and amended pleadings, but failed to pay the jury fee. The trial court sent out subsequent announcements acknowledging that the case was on the jury docket. By the time the trial court finally reached the case nearly two years later, the plaintiff's pleadings no longer contained a request for a jury trial, and the jury fee still had not been paid. One of the parties then filed a jury request and paid the required fee; however, the trial court refused to empanel a jury and heard the case itself. The Corpus Christi Court of Appeals held this was error because the trial court carried the case on its jury docket for more than a year and a half. Under these circumstances, the parties "were entitled to rely on the trial court's orders setting the case for jury trial, even in the absence of the timely payment of a jury fee."¹⁷⁸

Similarly, in *In re J.N.F.*,¹⁷⁹ a suit to terminate the parental rights of an incarcerated father, the father originally filed an answer in which he requested a jury trial. He also filed an uncontested declaration of inability to pay costs. He then filed an amended pleading that did not mention the request for a jury trial. The trial court refused to grant a jury trial, which the Fourteenth District Houston Court of Appeals held was error. In reaching this conclusion, the court rejected the argument that the defendant had waived his right to a jury trial by failing to request one in his amended answer.¹⁸⁰

X. JURY CHARGE

The Texas Supreme Court issued several significant decisions during the Survey period on the subject of proper jury charges. In *Harris County v. Smith*,¹⁸¹ the supreme court reversed and remanded an action in which it found that the trial court improperly submitted a broad-form

175. *Mercado v. Warner-Lambert Co.*, 106 S.W.3d 393 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

176. *Id.* at 397.

177. *Tex. Valley Ins. Agency v. Sweezy Constr., Inc.*, 105 S.W.3d 217 (Tex. App.—Corpus Christi 2003, no pet.).

178. *Id.* at 219-21.

179. *In re J.N.F.*, 116 S.W.3d 426 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

180. *Id.*

181. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002).

question on damages that included elements for which there was no evidentiary support. In reaching this conclusion, the supreme court extended the reasoning of *Crown Life Insurance Co. v. Casteel*,¹⁸² which addressed the improper submission of liability issues for which there was no evidence, to jury questions regarding damages. The supreme court expressly noted that it was not retreating from the mandate of broad form submissions by its holding, but rather insuring that only proper elements of damages are presented to the jury for consideration.¹⁸³

The Texas Supreme Court also gave guidance on the issue of spoliation in *Wal-Mart Stores, Inc. v. Johnson*,¹⁸⁴ holding that the trial court erred in submitting such an instruction, which probably caused the rendition of an improper verdict. In this personal injury case, inventory (a reindeer holiday decoration) fell on a customer who was then treated at the store and left without further incident. The manager filled out an accident report, and nothing was heard from the customer for six months until he filed suit. By then, Wal-Mart had either sold or discarded the reindeer decoration. The supreme court held that it was error to give the jury a spoliation instruction regarding the decoration under these circumstances, since there was no indication at the time of the indictment that the customer would file suit, such that Wal-Mart should have actually preserved the item for trial.¹⁸⁵

The Texas Supreme Court in *In re J.F.C.*¹⁸⁶ declined to extend the fundamental error doctrine to allow objections to the jury charge to be raised for the first time on appeal in a suit terminating the parent-child relationship. In reaching this conclusion, the supreme court held that Rule 279, which permits a court to supply omitted findings, did not violate the parents' due process rights, where the charge contained an error regarding the instruction for terminating parental rights to which no objection was made at trial.¹⁸⁷

The Corpus Christi Court of Appeals in *AlliedSignal, Inc. v. Moran*¹⁸⁸ reversed and remanded based on an error in the jury charge in a defective seatbelt case. The jury was asked to apportion fault among two drivers and the alleged defective seatbelt itself, rather than among the various parties who had actually designed and manufactured the seatbelt. Since a dispute existed between two of the parties regarding which was responsible for the alleged defect in the seatbelt, the court held that it was improper to apportion responsibility to the seatbelt rather than the parties.¹⁸⁹

182. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000).

183. *Smith*, 96 S.W.3d at 235-36.

184. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718 (Tex. 2003).

185. *Id.* at 720, 722-24.

186. *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002).

187. *Id.* at 272-75 (discussing TEX. R. CIV. P. 279).

188. *AlliedSignal, Inc. v. Moran*, No. 13-00-00537-CV, 2003 WL 22014805, at *1 (Tex. App.—Corpus Christi Aug. 27, 2003, no pet.).

189. *Id.* at *1-2, 4.

The First District Houston Court of Appeals in *Vecellio Insurance Agency, Inc. v. Vanguard Underwriting Insurance Co.*¹⁹⁰ held that the trial court committed reversible error by using the term "misconduct" in the jury charge without giving proper instruction or clarification as to what that term meant.¹⁹¹

XI. JUDGMENTS

The Texas Supreme Court issued two opinions of note during the Survey period. In *Naaman v. Grider*,¹⁹² the Texas Supreme Court dismissed an appeal as untimely because the appellant filed the notice of appeal based upon the date the trial court granted the motion for judgment, rather than the date of the judgment itself, which had been entered four weeks earlier.¹⁹³ In *In re Crow-Billingsley Air Park, Ltd.*,¹⁹⁴ the Texas Supreme Court conditionally granted mandamus relief in a real estate dispute where the trial court failed to enforce a final judgment that had been timely appealed, but had not been superseded.¹⁹⁵

In *City of Marshall v. Gonzales*,¹⁹⁶ although the trial court had initially sent an order granting the city's plea to the jurisdiction, more than seventy-five days later the court sent a letter indicating that the order granting the plea was signed in error and then signed an order denying the city's plea to the jurisdiction.¹⁹⁷ Because the trial court's plenary jurisdiction had expired, the Texarkana Court of Appeals held that the trial court lacked jurisdiction to retract its original order.¹⁹⁸ In so holding, the court rejected the argument that the trial court's original order was not a final judgment because it failed to address the city's request for costs. The court noted that, although the Texas Supreme Court had not expressly addressed the issue, other intermediate appellate courts had rejected this argument.¹⁹⁹

An en banc panel from the Fourteenth District Houston Court of Appeals held in *In re Gillespie*²⁰⁰ that a request for findings of fact and conclusions of law did not extend the trial court's plenary jurisdiction because the request did not seek a substantive change to any ruling by the trial court. Rather, the request sought an explanation of the trial court's

190. *Vecellio Ins. Agency, Inc. v. Vanguard Underwriting Ins. Co.*, 127 S.W.3d 134 (Tex. App.—Houston [1st Dist.] 2003, no pet. h.).

191. *Id.* at 139.

192. *Naaman v. Grider*, 126 S.W.3d 73 (Tex. 2003).

193. *Id.* at 73-74.

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

195. *Id.* at 178-80.

196. *City of Marshall v. Gonzales*, 107 S.W.3d 799 (Tex. App.—Texarkana 2003, no pet.).

197. *Id.* at 801.

198. *Id.* at 805.

199. *Id.* at 803 (citing *Thompson v. Beyer*, 91 S.W.3d 902 (Tex. App.—Dallas 2002, no pet.) (holding that a trial court is not required to assess costs for its judgment to be final)).

200. *In re Gillespie*, 124 S.W.3d 699 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

decision.²⁰¹ In reaching this conclusion, the court overruled its prior holding in *Electronic Power Design, Inc. v. R.A. Hanson Co.*,²⁰² that a request for findings of fact and conclusions of law would extend the trial court's plenary power.²⁰³

The First District Houston Court of Appeals in *Rapp v. Mandell & Wright, P.C.*²⁰⁴ held that when a judgment creditor accepts full payment of a judgment and acknowledges that it has been satisfied and released, the judgment creditor may not appeal the judgment in its favor.²⁰⁵ In this dispute among attorneys, a former shareholder sued his firm for breach of contract and tort claims. Following a jury trial, the defendants tendered payment in full to the plaintiff and obtained written release. Since the plaintiff had unconditionally accepted the release, the appellate court held that the appeal was moot and dismissed it.²⁰⁶

Courts again wrestled with the issues of res judicata and collateral estoppel during the Survey period. For example, in *Welch v. Hrabar*,²⁰⁷ the Fourteenth District Houston Court of Appeals held that an expert witness was not precluded from suing her client to recover fees in a separate contract action, even though she had intervened in the original underlying action for which she had been retained. In particular, the court found that the expert did not participate at trial, and hence the final judgment entered in that case did not constitute res judicata or collateral estoppel against her, since there had been no adjudication of the expert's claims on the merits.²⁰⁸

In *Heard v. Moore*,²⁰⁹ the plaintiff, a passenger in a car, filed suit against the defendants for personal injuries but did not name Nelson, the driver of the vehicle in which the plaintiff was the passenger. The defendants then joined the driver and obtained a default judgment against him, which included a finding that the driver was the complete cause of the damages alleged by the third-party plaintiffs/defendants, and thus liable for the damages sought by the plaintiff. The defendants then severed their claims against the driver and that judgment became final. Subsequently, the defendants successfully moved for summary judgment against the plaintiff on the basis of res judicata. The Texarkana Court of Appeals reversed and remanded the action, holding that res judicata did not preclude the plaintiff's claims against the defendants. In reaching this conclusion, the court ruled that the plaintiff was not obligated to pursue

201. *Id.* at 704-05.

202. *Elec. Power Design, Inc. v. R.A. Hanson Co.*, 821 S.W.2d 170 (Tex. App.—Houston [14th Dist.] 1991, no writ).

203. *Gillespie*, 124 S.W.3d at 703-04.

204. *Rapp v. Mandell & Wright, P.C.*, 123 S.W.3d 431 (Tex. App.—Houston [1st Dist.] 2003, pet. filed).

205. *Id.* at 435.

206. *Id.* at 436.

207. *Welch v. Hrabar*, 110 S.W.3d 601 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

208. *Id.* at 607-08.

209. *Heard v. Moore*, 101 S.W. 3d 726 (Tex. App.—Texarkana 2003, pet. denied).

her claims of indemnity and contribution against the driver in the original action, since her claims against him were not mandatory under Rule 38(a).²¹⁰

XII. MOTION FOR NEW TRIAL

In *Moritz v. Preiss*,²¹¹ the Texas Supreme Court reversed a decision discussed in previous Surveys and held that the petitioner's amended motion for new trial based on alleged juror misconduct, which was filed more than thirty days after the final judgment was signed, was not timely. Thus, the amended motion for new trial should not have been considered.²¹² The Dallas Court of Appeals held in *Hawkins v. Howard*²¹³ that the trial court erred in refusing to hear evidence on a motion for new trial challenging an agreed judgment entered pursuant to a settlement agreement where one of the parties alleged fraudulent inducement.²¹⁴

The Houston appellate courts issued a trio of opinions of note during the Survey period. In *Coinmach, Inc. v. Aspenwood Apartment Corp.*²¹⁵ the First District Houston Court of Appeals held that, for purposes of calculating the timeliness of a motion for new trial, the date the trial court actually signed the judgment, rather than the date the clerk entered the order, is the operative date.²¹⁶ The First District Houston Court of Appeals in *In re Taylor*²¹⁷ held that a proposed order for new trial signed after the trial court had lost its plenary power had expired was void; however, a subsequent order granting a motion to re-execute an original lost document was permissible where it appeared that the trial court had signed an appropriate order granting a new trial, but that order had then been misplaced.²¹⁸ Finally, in *Chambers Enterprises, Inc. v. 6250 WestPark, L.P.*,²¹⁹ the court held that a motion for new trial was not sufficient to invoke the appellate court's jurisdiction, absent a timely notice of appeal.²²⁰

XIII. DISQUALIFICATION OF JUDGES

It is often broadly stated that a disqualified judge has no authority to take any action in a case and his further rulings are void.²²¹ In *In re*

210. *Id.* at 729.

211. *Moritz v. Preiss*, 121 S.W.3d 715 (Tex. 2003).

212. *Id.* at 720.

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

214. *Id.* at 678-79.

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

216. *Id.* at 380.

217. *In re Taylor*, 113 S.W.3d 385 (Tex. App.—Houston [1st Dist.] 2003) (orig. proceeding).

218. *Id.* at 389-90, 393.

219. *Chambers Enters., Inc. v. 6250 WestPark, L.P.*, 97 S.W.3d 333 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

220. *Id.* at 334.

221. *See, e.g., In re Union Pac. Resources Co.*, 969 S.W.2d 427, 428 (Tex. 1998).

Gonzalez,²²² however, the Fourteenth District Houston Court of Appeals held that a disqualified trial judge's entry of an agreed order appointing a visiting judge was not void.²²³ The San Antonio Court of Appeals reasoned that, given the parties' agreement to have a particular visiting judge hear the case, the entry of an order confirming his appointment was a ministerial act.²²⁴ The court also held, however, that the disqualified judge's subsequent decision transferring the case did involve the exercise of discretion and was therefore void.²²⁵

*Parker v. Parker*²²⁶ involved the issue of whether a trial judge could properly rescind an oral announcement that he was recusing himself. The appellants asserted that the judge had left their counsel a voicemail message recusing himself, which he then rescinded in a later written order granting summary judgment in favor of the appellees.²²⁷ Relying on an earlier court of appeals' opinion, the appellants argued that a clear and unequivocal act constituting a recusal was irrevocable, regardless of whether a formal order was entered.²²⁸ The *Parker* court held, however, that because appellants neither objected at the time of the order rescinding recusal nor filed a written motion to recuse the judge thereafter, and because the only record evidence of the oral recusal was the order rescinding it, appellants waived the issue of recusal on appeal.²²⁹

Most trial practitioners are familiar with the procedure for objecting to "visiting" or assigned judges. During the Survey period, the Seventy-Eighth Legislature amended and clarified the applicable provisions of the Government Code relating to the assignment of trial judges. An order of assignment must now state whether the judge is an active, former, retired, or senior judge.²³⁰ Additionally, the minimum service requirements for a former or retired judge to be able to serve have been doubled.²³¹ The new statute also extends the limitation of one objection per party to former judges, except for those who were defeated in the last primary or general election in which they ran.²³² Moreover, for purposes of objecting to a visiting judge, "party" includes multiple parties who are aligned in a case as determined by the presiding judge.²³³

The timeliness of a party's objection to an assigned judge was at issue

222. *In re Gonzalez*, 115 S.W.3d 36 (Tex. App.—San Antonio 2003, orig. proceeding).

223. *Id.* at 41.

224. *Id.* at 40-41.

225. *Id.* at 41-42.

226. *Parker v. Parker*, Nos. 2-02-312-CV, 02-313-CV, 2004 WL 221173, at *1 (Tex. App.—Fort Worth Feb. 5, 2004, no pet. h.).

227. *Id.* at *4.

228. *Id.* at *5 (citing *Dunn v. County of Dallas*, 794 S.W.2d 560, 562 (Tex. App.—Dallas 1990, no writ)).

229. *Id.* at *4.

230. TEX. GOV'T CODE ANN. § 74.053(a)(1) (Vernon Supp. 2004).

231. *Id.* § 74.055(c)(1) (requiring ninety-six months of service as an active judge).

232. *Id.* § 74.053(b)(d).

233. *Id.* § 74.053(g).

in *In re Naylor*²³⁴ and *In re Approximately \$17,239.00*.²³⁵ In the former case, the real party in interest's objection to the assigned judge was untimely, but the judge nevertheless declined to hear the matter.²³⁶ The Texarkana Court of Appeals denied the relator's petition for a writ of mandamus, holding that there was nothing that compelled the assigned judge to overrule the objection and remain in place as the trial judge.²³⁷ In the latter case, the relator timely filed an objection to the assigned judge, but failed to present the objection when he appeared at the hearing and found the assigned judge presiding.²³⁸ Under these circumstances, the Fourteenth District Houston Court of Appeals concluded that the objection had been waived and denied mandamus relief.²³⁹

In *Davis v. Crist Industries, Inc.*,²⁴⁰ the Fort Worth Court of Appeals overruled one of its own recent decisions in holding that the elected district judge could resume authority over a case in her court despite the fact that a visiting judge had already presided over the first several days of trial.²⁴¹ The prior case had held that the visiting judge's jurisdiction under the assignment order was exclusive until terminated and that the regular judge could not, therefore, take the case back and vacate the visiting judge's orders.²⁴² In *Davis*, however, the court reasoned that the issue was really one of authority, not jurisdiction, and held that more than one judge may exercise authority over a single case.²⁴³ Since the language in the assignment order did not give the assigned judge exclusive authority over the case, nothing precluded the elected judge of the court from re-asserting her own authority over a case pending in her court.²⁴⁴

XIV. DISQUALIFICATION OF COUNSEL

A legal assistant who went on to earn a law degree was at the center of a disqualification battle in *In re TXU U.S. Holdings Co.*²⁴⁵ While working at one law firm, the legal assistant was involved in the representation of TXU in various asbestos cases.²⁴⁶ Upon obtaining her law license, she went to work for another firm, Waters & Kraus, L.L.P. As part of an "Agreement Regarding Conflicts of Interest," the firms agreed that Wa-

234. *In re Naylor*, 120 S.W.3d 498 (Tex. App.—Texarkana 2003, orig. proceeding).

235. *In re Approximately \$17,239.00*, No. 14-03-01177-CV, 2003 WL 22723429, at *1 (Tex. App.—Houston [14th Dist.] 2003, Oct. 24, 2003, orig. proceeding).

236. *Naylor*, 120 S.W.3d at 501.

237. *Id.* at 501-02.

238. *In re \$17,239.00*, 2003 WL 22723429 at *1.

239. *Id.* at *2.

240. *Davis v. Crist Indus., Inc.*, 98 S.W.3d 338 (Tex. App.—Fort Worth 2003, pet. denied).

241. *Id.* at 340 (overruling *In re Cook Children's Med. Center*, 33 S.W.3d 460 (Tex. App.—Fort Worth 2000, orig. proceeding)).

242. *Cook*, 33 S.W.3d at 463.

243. *Davis*, 98 S.W.3d at 342-43.

244. *Id.*

245. *In re TXU U.S. Holdings Co.*, 110 S.W.3d 62 (Tex. App.—Waco 2002, orig. proceeding), mand. denied by *In Re Mitcham*, 47 Tex. S. Ct. J. 374 (Mar. 26, 2004).

246. *Id.* at 64.

ters & Kraus would not handle asbestos cases against TXU.²⁴⁷ When the former legal assistant, now lawyer, subsequently left Waters & Kraus, however, that firm filed an asbestos case against TXU.²⁴⁸ In considering TXU's motion to disqualify, the Waco Court of Appeals held that, since the former employee was a lawyer while she was at Waters & Kraus, an irrebuttable presumption existed that other attorneys at that firm had access to the confidences of TXU she had obtained while working as a legal assistant.²⁴⁹ Thus, even though she had left Waters & Kraus as well, that firm was disqualified from representing its client in the asbestos case against TXU.²⁵⁰

In *Pollard v. Merkel*,²⁵¹ a divorce case, the trial court excluded the testimony of Pollard's former attorney, Robert Holmes, whom Pollard had subsequently sued for malpractice.²⁵² However, the trial court refused to disqualify Merkel's attorney, Sally Bybee, who had previously worked as an associate at Holmes' law firm, although not at the time Holmes was representing Pollard.²⁵³ The Dallas Court of Appeals held that this latter ruling was an abuse of discretion.²⁵⁴ The court quoted at length from Bybee's opening statement at the trial of the divorce case, where she previewed Holmes' expected testimony about Pollard's dishonesty.²⁵⁵ Although Bybee testified that she never discussed either the divorce case or the malpractice case with anyone while she was employed at Holmes' firm and never discussed the matter with Holmes after they both left that firm, the appellate court concluded that Bybee's disqualification was required because she had sought out "the former client's confidential information from her former law partner and use[d] it to the former client's detriment when representing the opposing party in the very same case."²⁵⁶

A party's sharing of confidential information about a lawsuit with its liability insurer lead to a disqualification in *In re Skiles*.²⁵⁷ There, a home seller was sued for misrepresentation and, in turn, filed suit against his insurer for refusing to defend.²⁵⁸ During the course of the coverage suit, the seller's attorneys had discussions with the insurer's counsel for the two-fold purpose of reporting on the status of the fraud case and facilitating settlement of the coverage case.²⁵⁹ The coverage case did in fact settle, and thereafter the attorney for the homebuyer in the fraud case

247. *Id.*

248. *Id.*

249. *Id.* at 66.

250. *Id.* at 66-67.

251. *Pollard v. Merkel*, 114 S.W.3d 695 (Tex. App.—Dallas 2003, pet. denied).

252. *Id.* at 697.

253. *Id.*

254. *Id.* at 703.

255. *Id.* at 697.

256. *Id.* at 702.

257. *In re Skiles*, 102 S.W.3d 323 (Tex. App.—Beaumont 2003, orig. proceeding).

258. *Id.* at 325.

259. *Id.*

joined the firm that had represented the insurer in the coverage case.²⁶⁰ The Beaumont Court of Appeals construed the relationship between the seller and the insurer as being in the nature of a "joint defense," notwithstanding their obvious adversity in the coverage suit, so as to allow the sharing of privileged information about the fraud case.²⁶¹ Thus, the court concluded that the homebuyer's law firm, which had previously represented the insurer, should have been disqualified.²⁶²

XV. MISCELLANEOUS

The enforcement of arbitration provisions continues to be a hot topic. In *MacGregor v. Kellogg, Brown & Root, Inc.*,²⁶³ the court found that a party who was not a signatory to an arbitration agreement was nonetheless bound by the terms of that agreement.²⁶⁴ Ingalls Ship Building contracted with MacGregor to build elevator trunks to be used in a cruise ship. MacGregor subcontracted part of the job to Unidynamics. The contract between MacGregor and Unidynamics contained an arbitration provision. Subsequently, Unidynamics contracted with Kellogg, Brown & Root ("KBR"), which agreed to perform certain services in connection with building the elevator trunks. The contract between Unidynamics and KBR did not contain an agreement to arbitrate. After the party who had ordered the ship from Ingalls declared bankruptcy, "a dispute arose between MacGregor and Unidynamics regarding payment of [certain] storage costs and KBR's refusal to release the trunks."²⁶⁵ The dispute between MacGregor and Unidynamics ultimately was the subject of an arbitration proceeding. While the arbitration proceeding was progressing, both MacGregor and Unidynamics demanded that KBR release the trunks. In response, KBR filed suit against Unidynamics, "seeking a declaratory judgment regarding which party had title to the trunks."²⁶⁶ MacGregor filed a motion to compel KBR's joinder in the arbitration between itself and Unidynamics.²⁶⁷

The First District Houston Court of Appeals found that KBR was compelled to join its claims in the arbitration.²⁶⁸ First, the court recognized that "Texas law does not favor a multiplicity of claims and suits," and that "arbitration provides a speedy and inexpensive alternative to litigation."²⁶⁹ Second, the court held that there were several theories of law and equity that provide a basis for compelling non-signatories to an arbitration agreement to arbitrate their claims, including "(1) incorporation

260. *Id.*

261. *Id.* at 326-27.

262. *Id.* at 327.

263. *MacGregor v. Kellogg, Brown & Root, Inc.*, 126 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2003) (orig. proceeding [mand. pending]).

264. *Id.* at 183.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 183.

269. *Id.*

by reference, (2) assumption, (3) agency, (4) veil piercing alter ego, and (5) estoppel.”²⁷⁰ In this case, the court considered KBR’s relationship to MacGregor and Unidynamics to be “equivalent to the status of a donee, assignee, or third-party beneficiary,” with the result that KBR was subject to an arbitration clause in an agreement it did not sign.²⁷¹

In *In re C&H News Co.*,²⁷² the Corpus Christi Court of Appeals held that an arbitration agreement was unenforceable because it was supported only by an illusory promise.²⁷³ The arbitration agreement was contained in an employee handbook, which specifically identified “the types of claims and disputes that were covered by and excluded from the agreement to arbitrate.”²⁷⁴ The employee handbook further provided that the content “may, and likely will, be changed, modified, deleted, or amended from time to time as the [employer] deems appropriate, with or without prior notification to employees.”²⁷⁵ Based on the foregoing, the court concluded that the employer had reserved the right to unilaterally amend the handbook and, therefore, had reserved the right to also unilaterally amend the arbitration policies and procedures contained in that handbook.²⁷⁶ Thus, the court concluded that the arbitration agreement was not supported by valid consideration or mutuality of obligation.²⁷⁷

In *In re Walkup*,²⁷⁸ the First District Houston Court of Appeals considered the proper way to calculate the fourteen day period under Rule 680.²⁷⁹ The trial court granted a temporary restraining order on January 30, 2003 at 2:30 p.m., and the parties disagreed as to whether the TRO expired on February 13 at 2:30 p.m., which was fourteen twenty-four-hour periods after it was granted, or on February 13 at midnight, which was fourteen calendar days after it was granted.²⁸⁰ The court held that the TRO expired at midnight on February 13 because, among other reasons, the term “day” ordinarily means a calendar day, which is the “[twenty-four]-hour period of time beginning immediately after midnight of the previous day and ending at the next midnight.”²⁸¹ Moreover, the court

270. *Id.*

271. *Id.*

272. *In re C&H News Co.*, No. 13-02-529-CV, 2003 WL 131770 (Tex. App.—Corpus Christi, Jan. 16, 2003, orig. proceeding).

273. *Id.* at *4.

274. *Id.* at *3.

275. *Id.*

276. *Id.* at *3-4.

277. *Id.* at *4.

278. *In re Walkup*, 122 S.W.3d 215 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding).

279. TEX. R. CIV. P. 680 provides, in part, the following:

Each temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; . . . and shall expire by its terms within such time after signing, not to exceed fourteen days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period.

280. *Walkup*, 122 S.W.3d at 215.

281. *Id.* at 217.

concluded that if it interpreted Rule 680 to require fourteen twenty-four-hour periods, trial courts would be required to schedule their daily docket around very specific temporal deadlines, which would be undesirable.²⁸²

282. *Id.* at 218.