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APPELLATE PRACTICE AND PROCEDURE

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I. APPELLATE REVIEW BEFORE FINAL JUDGMENT

A. MANDAMUS AND OTHER ORIGINAL PROCEEDINGS

DURING this Survey period, the Texas Supreme Court and intermediate appellate courts continued the trend toward granting mandamus to enforce arbitration clauses¹ and reverse overly broad discovery orders.² In addition, the supreme court (by a narrow margin of five justices) extended mandamus relief to enforce contractual venue and forum selection provisions, areas previously identified as incidental trial court rulings not supporting mandamus relief.³ The courts also grappled with the propriety of mandamus in cases involving the denial of a motion to dismiss for an inadequate or untimely expert affidavit in medical malpractice cases.⁴

1. Medical Malpractice Claims

In medical malpractice lawsuits, the plaintiff must present a timely and adequate expert affidavit supporting his claims within the first 120 days after filing the lawsuit or the lawsuit *must* be dismissed.⁵ The plaintiff

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1. See, e.g., *In re First Tex. Homes, Inc.*, 120 S.W.3d 868, 868 (Tex. 2003) (orig. proceeding).

2. See, e.g., *In re Dana Corp.*, 138 S.W.3d 298, 302 (Tex. 2004) (orig. proceeding) (per curiam).

3. See *In re AIU Ins. Co.*, 148 S.W.3d 109, 120 (Tex. 2004) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-41 (Tex. 2004) (orig. proceeding).

4. See, e.g., *In re Woman's Hosp. of Tex., Inc.*, 141 S.W.3d 144, 153 (Tex. 2004) (orig. proceeding) (Owen, J., dissenting from denial of ten mandamus petitions seeking relief from denial of motion to dismiss in medical malpractice cases).

5. TEX. REV. CIV. STAT. ANN. art. 4590i, Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, 1995 Tex. Gen. Laws 985, repealed by Act of June 2, 2003, 78th Leg., R.S., ch. 204,

may obtain a thirty-day extension to file the affidavit when noncompliance is unintentional.⁶ Effective September 1, 2003, the Texas Legislature amended section 51.014 of the Texas Civil Practice and Remedies Code to provide for an interlocutory appeal if a trial court refuses to dismiss a health care liability claim when no timely, adequate expert affidavit is filed.⁷ However, for the thousands of medical malpractice claims pending prior to September 1, 2003, there is no statutory right to interlocutory appeal. As a result, the appellate courts have issued conflicting rulings on whether mandamus is available to review the denial of a motion to dismiss in a medical malpractice case.⁸

The supreme court had the opportunity to resolve the confusion in ten mandamus petitions, all asking whether the denial of a motion to dismiss a medical malpractice claim is subject to review by mandamus. However, rather than resolve the question, the supreme court declined review of all ten petitions without opinion.⁹ As one justice noted, "With more than a thousand 4590i cases reportedly still in the pipeline, the intermediate courts are sure to see this issue again."¹⁰

2. *Discovery Rulings*

The Texas Supreme Court continued a longstanding trend of granting mandamus to address overly broad discovery orders, especially when such orders required production of privileged or potentially privileged materials. For instance, in *In re Dana Corp.*, the supreme court granted mandamus to correct a trial court's order requiring a defendant in an asbestos-related case to produce seventy-five years worth of insurance policies.¹¹ The court noted that the discovery order was overly broad

§10.09, 2003 Tex. Gen. Laws 847, 884, and *recodified* at TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (Vernon Supp. 2004-2005) [hereinafter § 74.351].

6. § 74.351(c).

7. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (Vernon Supp. 2004-2005).

8. See *In re Watumull*, 127 S.W.3d 351, 355 (Tex. App.—Dallas 2004, orig. proceeding, pet. denied); see also *In re Zimmerman*, 148 S.W.3d 214, 216-17 (Tex. App.—Texarkana 2004, orig. proceeding, no pet.) (acknowledging that mandamus may lie to review a trial court's failure to dismiss a medical malpractice case, but finding no abuse of discretion by the trial court in granting 30-day extension to file expert affidavit). Cf. *In re Schneider*, 134 S.W.3d 866, 869-70 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding, no pet.) (concluding that because the legislature provided for interlocutory appeals in medical malpractice cases only prospectively, mandamus will not issue in pre-September 2003 cases).

9. See *Woman's Hosp. of Tex., Inc.*, 141 S.W.3d at 146; *In re Horswell*, 47 Tex. Sup. Ct. J. 346 (Mar. 5, 2004); *In re Shapiro*, 47 Tex. Sup. Ct. J. 346 (Mar. 5, 2004); *In re Rodriguez*, 47 Tex. Sup. Ct. J. 346 (Mar. 5, 2004); *In re Fort Worth Osteopathic Hosp., Inc.*, 47 Tex. Sup. Ct. J. 346 (Mar. 5, 2004); *In re Barker*, 47 Tex. Sup. Ct. J. 346 (Mar. 5, 2004); *In re Southside Fam. Care Assocs.*, 47 Tex. Sup. Ct. J. 346 (Mar. 5, 2004); *In re Riverside Hosp., Inc.*, 47 Tex. Sup. Ct. J. 346 (Mar. 5, 2004); *In re Farley*, 47 Tex. Sup. Ct. J. 346 (Mar. 5, 2004); *In re Redels*, 47 Tex. Sup. Ct. J. 346 (Mar. 5, 2004).

10. *Schneider*, 134 S.W.3d at 872 (Frost, J., concurring).

11. 138 S.W.3d 289, 300-02 (Tex. 2004) (orig. proceeding) (per curiam); see also *In re Sears, Roebuck & Co.*, 146 S.W.3d 328, 334 (Tex. App.—Beaumont 2004, orig. proceeding, no pet.) (per curiam) (granting mandamus after finding trial court abused its discretion in ordering automobile manufacturer to produce all claim files for extensive list of repair shop chain's asbestos-related workers' compensation claims); *In re Merck & Co., Inc.*, 150 S.W.3d 747, 750 (Tex. App.—San Antonio 2004, orig. proceeding, no pet.) (granting man-

because the plaintiff failed to show that all of the insurance policies covering the full seventy-five years were potentially relevant.¹²

Similarly, in *In re E.I. DuPont de Nemours & Co.*, the supreme court granted mandamus to correct a trial court's order requiring production of all documents on defendant's privilege log.¹³ In *DuPont*, the trial court found that the defendant's privilege log failed to establish a prima facie case of privilege over the referenced communications and thus ordered production of all documents.¹⁴ The supreme court granted mandamus review, reviewed each portion of the privilege log, and concluded that, with the exception of one category of documents that had no explanation of privilege attached to them, defendants met their burden to establish a prima facie case of privilege over the logged documents.¹⁵

In *In re Kuntz*, the supreme court granted mandamus to reverse a discovery order requiring an individual to produce a third party's privileged trade secrets.¹⁶ Hal Kuntz worked for a geology company that prepared letters of recommendation for an oil company analyzing potential oil prospects. Kuntz's ex-wife sought to discover these letters of recommendation to show Kuntz's future income. The trial court ordered Kuntz to produce the letters of recommendation to his ex-wife. On mandamus, Kuntz challenged the trial court's order, claiming that although he had access to the letters of recommendation, the letters were not in his "possession, custody, or control" as required under Rule 192.7(b) because the letters belonged to the oil company, and he was expressly prohibited from sharing the letters with third parties. In reviewing the trial court's order, the supreme court addressed for the first time how to interpret the phrase "possession, custody, or control" as used in the Texas Rules of Civil Procedure 192.3(b) and 192.7(b).¹⁷ Although the court did not provide a complete definition of "possession, custody, or control," the court held that "mere access to the relevant letters of recommendation does not constitute 'physical possession' of the documents under the definition of 'possession, custody, or control' set forth in the Texas Rule of Civil Procedure 192.7(b)."¹⁸ The court further concluded that Kuntz had no adequate remedy by appeal because he was contractually obligated not to disclose the information. If required to disclose the materials and then challenge it on appeal, the harm in breaching his confidentiality agree-

damus after finding that trial court abused its discretion in ordering production of information related to different pharmaceutical product than the product at issue in the lawsuit).

12. *Dana*, 138 S.W.3d at 301-02; see also *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003) (orig. proceeding) (per curiam) (granting mandamus to correct trial court's order compelling discovery of 30 years of information regarding safety employees and company physicians).

13. 136 S.W.3d 218, 225-26 (Tex. 2004) (orig. proceeding) (per curiam).

14. *Id.*

15. *Id.* Cf. *In re Maher*, 143 S.W.3d 907, 914-15 (Tex. App.—Fort Worth 2004, orig. proceeding, no pet.) (granting mandamus to compel production of items not properly identified on privilege log).

16. 124 S.W.3d 179, 184 (Tex. 2003) (orig. proceeding).

17. *Id.* at 180.

18. *Id.* at 184.

ment would already have been done.¹⁹

3. *Disqualification Rulings*

The supreme court has long held that mandamus is appropriate to correct a trial court's failure to disqualify counsel with a conflict of interest.²⁰ In this Survey period, the supreme court held that the same principles apply when a law firm contractually agrees to maintain indefinitely the confidences of an ex-employee's former client.²¹ In *In re Mitcham*, the supreme court reviewed a law firm's agreement not to sue the former client of one of the firm's associates. The court concluded that because the agreement placed no time limitations on the law firm's promise not to pursue claims against the client, the trial court did not abuse its discretion in disqualifying counsel.²²

Mandamus is also traditionally available to correct a visiting judge's failure to honor a timely objection to his assignment.²³ However, in a unique opinion, the Texarkana Court of Appeals concluded that mandamus would not issue to correct a visiting judge's decision to remove himself based on an *untimely* objection to his assignment.²⁴ The court reasoned that "[t]his is the opposite of the usual situation. If the objection had been timely, . . . [the judge] would be in violation of a mandatory statute and mandamus would lie."²⁵ Because there is no statute requiring an assigned judge to refuse to remove himself from a case, the fact that a judge mistakenly does so when the objection was untimely does not require mandamus relief.²⁶

4. *Arbitration Rulings*

The Texas Supreme Court has consistently held that mandamus will lie to enforce a clause providing for arbitration under the Federal Arbitration Act.²⁷ In this Survey period, the court was faced with the question of whether a court or arbitrator should rule on class certification issues "when the contracts at issue committed all disputes arising out of the

19. *Id.*

20. *See Nat'l Med. Enters. v. Godbey*, 924 S.W.2d 123, 123-24 (Tex. 1996).

21. *In re Mitcham*, 133 S.W.3d 274, 276-77 (Tex. 2004) (orig. proceeding) (per curiam).

22. *Id.*

23. *Dunn v. Street*, 938 S.W.2d 33, 34-35 (Tex. 1997) (per curiam).

24. *See In re Naylor*, 120 S.W.3d 498, 501-02 (Tex. App.—Texarkana 2003, orig. proceeding, pet. denied).

25. *Id.* at 501.

26. *Id.* at 502.

27. *See, e.g., In re First Tex. Homes, Inc.*, 120 S.W.3d 868, 869 (Tex. 2003) (orig. proceeding) (per curiam) (granting mandamus petition to enforce arbitration clause in home construction agreement); *see also Feldman/Matz Interests, L.L.P. v. Settlement Capital Corp.*, 140 S.W.3d 879, 887-88 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (granting mandamus relief to enforce Federal Arbitration Agreement and holding that trial court could not enter any ruling, including injunction to maintain the status quo during arbitration proceedings); *In re R&R Pers. Specialists of Tyler, Inc.*, 146 S.W.3d 699, 705 (Tex. App.—Tyler 2004, orig. proceeding, no pet.) (granting mandamus to compel arbitration, finding that claims that arbitration is waived are to be resolved by the arbitrator).

agreement to the arbitrator.”²⁸ Following the recent holding of the United States Supreme Court in *Green Tree Financial Co. v. Bazzle*,²⁹ the Texas Supreme Court held that in light of the express contractual agreement to submit all issues to arbitration, the appellate court abused its discretion in directing the trial court to decide the class certification issue.³⁰ The Texas Supreme Court further held that a party denied the right to arbitrate has no adequate remedy by appeal.³¹

5. Incidental Rulings

a. Mandamus Granted

As a general rule, mandamus does not issue to correct incidental trial court rulings. However, in four instances during this Survey period, the Texas Supreme Court granted mandamus to correct such incidental rulings as consolidation orders and venue. For instance, in *In re Van Waters & Rogers, Inc.*, the supreme court held per curiam that mandamus would issue to correct the improper consolidation of twenty plaintiffs into a single lawsuit.³² The court acknowledged that such consolidation orders do not ordinarily support mandamus relief.³³ However, the court reasoned that extraordinary circumstances—specifically, the confusion and prejudice to the defendants from the consolidated trials requiring different facts as to different parties—justified mandamus under the facts of this case.³⁴

In two opinions during this Survey period, a divided court narrowly granted mandamus relief to enforce the parties’ contractual agreements. In *In re AIU Insurance Co.*, the supreme court held that mandamus will lie to enforce a forum selection clause.³⁵ The majority likened the forum selection clause to an arbitration clause and reasoned that “[s]ubjecting a party to trial in a forum other than that agreed upon and requiring an appeal to vindicate the rights granted in a forum-selection clause is clear harassment.”³⁶

The supreme court also granted mandamus to correct a trial court’s order denying a motion to transfer venue from a state district court to the Public Utility Commission (“PUC”). The court noted that a venue ruling is an incidental ruling that does not normally justify mandamus.³⁷ How-

28. See *In re Wood*, 140 S.W.3d 367, 368 (Tex. 2004) (orig. proceeding) (per curiam).

29. 539 U.S. 444 (2003).

30. *Wood*, 140 S.W.3d at 370.

31. *Id.*

32. 145 S.W.3d 203, 206 (Tex. 2004) (orig. proceeding) (per curiam).

33. *Id.* at 211.

34. *Id.* at 210.

35. 148 S.W.3d 109, 110 (Tex. 2004) (orig. proceeding).

36. *Id.* at 117.

37. See *In re Entergy Corp.*, 142 S.W.3d 316, 321 (Tex. 2004) (orig. proceeding). *But see In re Daly*, 148 S.W.3d 578, 581 (Tex. App.—El Paso 2004, orig. proceeding, no pet. h.) (granting mandamus relief to enforce mandatory venue provisions in suit affecting the parent-child relationship); *Fincher v. Wright*, 141 S.W.3d 255, 264 (Tex. App.—Fort Worth 2004, no pet.) (finding mandamus appropriate remedy for trial court’s failure to follow

ever, citing “unique circumstances,” the court held that mandamus was appropriate where the PUC had exclusive jurisdiction over the subject challenges to utility rates and thus, “permitting a trial to go forward would interfere with the important legislatively mandated function and purpose of the PUC.”³⁸ The court reasoned that,

if the PUC has exclusive jurisdiction in this dispute, the judicial appropriation of state agency authority would be a clear disruption of the “orderly process of government.” This disruption, coupled with the hardship imposed on Entergy by a postponed appellate review, warrants an exception to our general proscription against using mandamus to correct incidental trial court rulings.³⁹

The four justice dissent in *In re AIU Insurance Co.*, comprising Justices Phillips, O’Neill, Jefferson, and Schneider, reasoned that unlike arbitration agreements, Texas public policy does not favor forum selection clauses.⁴⁰ Moreover, the dissent concluded that “we do not specifically enforce contractual rights by mandamus.”⁴¹

In a second opinion decided on the same day as *AIU*, the same divided court decided *In re Prudential Insurance Co. of America*.⁴² In *Prudential*, the same five justice majority granted mandamus to enforce a contractual jury waiver provision. The court quickly concluded that the refusal to enforce the contractual jury waiver “was a clear abuse of discretion.”⁴³ As a result, the only question was whether the parties had an adequate remedy by appeal for the trial court’s error.⁴⁴ The majority acknowledged that the term “adequate” has “no comprehensive definition,” but proceeded to articulate a new standard for determining whether there is an adequate remedy by appeal.⁴⁵ Specifically, the court stated that mandamus is permitted,

to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is “adequate” when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is

proper procedures in determining venue); *In re Shell Oil Co.*, 128 S.W.3d 694, 696 (Tex. App.—Beaumont 2004, orig. proceeding, no pet. h.) (“Although mandamus is not available to review the propriety of venue . . . it is properly employed to correct improper venue procedure.”) (internal citations omitted).

38. *Entergy Corp.*, 142 S.W.3d at 321.

39. *Id.*

40. *AIU*, 148 S.W.3d at 122-23 (Phillips, C.J., dissenting).

41. *Id.* at 123.

42. 148 S.W.3d 124 (Tex. 2004) (orig. proceeding).

43. *Id.* at 135.

44. *Id.* at 135-36.

45. *Id.* at 136.

adequate.⁴⁶

The majority went on to conclude that enforcement of a contractual right to waive trial by jury cannot be rectified on appeal. As in *AIU*, the court analogized the contractual jury waiver to a contractual agreement to arbitrate and held that there was no adequate remedy by appeal.⁴⁷

The dissenting justices, the same four dissenting in the *AIU* opinion, argued that mandamus should not apply to enforce the parties' contractual rights.⁴⁸

In another case involving the trial court's exclusive jurisdiction over a child-custody battle, the court took the opposite approach. The court held in *In re Forlenza* that the trial court acted within its discretion in retaining jurisdiction over the children, and reversed the court of appeals order finding that the trial court lacked jurisdiction.⁴⁹

b. Mandamus Denied

Notwithstanding the court's rulings in *AIU* and *Prudential*, the general rule remains that mandamus will not lie to review incidental trial court rulings. Indeed, in a case involving hundreds of plaintiffs, the supreme court granted oral argument to hear a petition for writ of mandamus asking that the trial court be required to release settlement funds tendered to the court but not recovered by absentee plaintiffs.⁵⁰ The court denied mandamus relief, holding that mandamus will not lie simply to expedite payment of money to a party.⁵¹

6. Elections, Municipalities, and Politics

Election years frequently bring with them mandamus petitions requiring the appellate court's immediate attention. This year was no exception. In *In re Newton*, Democratic candidates to the Texas House of Representatives sued a Republican Political Action Committee ("PAC") for unlawful payments in violation of the Election Code.⁵² The Democratic candidates obtained a temporary restraining order, restraining the PAC from making further contributions. A hearing on the permanent injunction was set fourteen days later, one day after the general election. Wasting no time, the PAC sought mandamus relief directly from the Texas Supreme Court. The supreme court held that mandamus directly to the supreme court was proper because the issue of the PAC's ability to contribute to state elections was an issue of statewide importance.⁵³

46. *Id.*

47. *Id.* at 134-35.

48. *Id.* at 141-43 (Phillips, C.J., dissenting).

49. 140 S.W.3d 373 (Tex. 2004) (orig. proceeding).

50. *In re Kansas City S. Indus., Inc.*, 139 S.W.3d 669, 670 (Tex. 2004) (orig. proceeding).

51. *Id.*

52. 146 S.W.3d 648, 649 (Tex. 2004) (orig. proceeding).

53. *Id.* at 650.

The court strongly criticized the trial court's temporary restraining order ("TRO") as failing to maintain the status quo and effectively taking away the PAC's rights by setting the preliminary injunction on a date after the elections.⁵⁴ The court directed the trial court to vacate its temporary restraining order and, in a somewhat unusual step, further ordered the trial court "to furnish the Clerk of this Court proof of compliance by 4:00 p.m." on the same day the court's opinion was issued.⁵⁵

In *In re Dupont*, the Fort Worth Court of Appeals granted mandamus relief to compel the chairperson of the Parker County Republican Party to certify a candidate duly elected by a majority of the county's precinct chairs.⁵⁶ The party chairperson complained that she was not obligated to certify the candidate's name on the election ballot because proper parliamentary procedures had not been followed during the election process. The court of appeals ignored this argument, noting that "we do not concern ourselves with parliamentary procedure."⁵⁷

Mandamus is also the appropriate remedy where a judge refuses to take actions in direct contravention to a municipal statute. In *In re Fitzgerald*, the supreme court granted mandamus to direct a county judge to order an incorporation election as required under Section 8.003 of the Texas Local Government Code, when there was no basis to deny the petition for such an election.⁵⁸

In *In re Suson*, the Corpus Christi Court of Appeals granted mandamus to order the city secretary for the home rule city of Kingsville to submit a petition to recall the mayor and other city officials to the city commissioner.⁵⁹ The court agreed with the city secretary that the petition did not contain the minimum signatures necessary to support a recall election. However, upon review of the city's charter, the court concluded that the secretary and city commission had no authority to review the sufficiency of the recall petition.⁶⁰ Thus, despite the inadequacy of the petition, the city officials were obligated to forward the petition and order the recall election, and the only remedy available to those subject to the recall was to file a lawsuit and have a court determine the petition to be inadequate.⁶¹

7. Void Orders

Mandamus is typically available to correct void orders. However, although finding a trial court's order granting a new trial void when entered after plenary jurisdiction had expired, the Fourteenth Court of Appeals in

54. *Id.* at 652.

55. *Id.* at 653.

56. 142 S.W.3d 528, 532 (Tex. App.—Fort Worth 2004, orig. proceeding, no pet.).

57. *Id.*

58. 140 S.W.3d 380, 381 (Tex. 2004) (orig. proceeding) (per curiam).

59. 120 S.W.3d 477, 480 (Tex. App.—Corpus Christi 2003, orig. proceeding, no pet.).

60. *Id.*

61. *Id.*

In re Gillespie nonetheless refused to issue a writ of mandamus.⁶² In *Gillespie*, the trial court determined that it had plenary jurisdiction to grant a new trial based on the Fourteenth District Court's 1991 opinion, *Electronic Power Design, Inc. v. R.A. Hanson Co.*, in which the court held that a request for findings of fact and conclusions of law extends the court's plenary power.⁶³ On mandamus, the Fourteenth District Court of Appeals reversed its holding in *Electronic Power Design* and held for the first time that the request for findings of fact and conclusions of law did not extend the trial court's plenary power.⁶⁴

Under *Electronic Power Design*, the trial court's new order would have been entered within its plenary power.⁶⁵ However, by reversing *Electronic Power Design*, the Fourteenth District Court of Appeals determined that the trial court's plenary power had expired by the time the new trial order was signed, making the order void.⁶⁶ Despite the void order, however, the Fourteenth District Court of Appeals determined that the trial court did not abuse its discretion in granting the motion for new trial based on the then controlling precedent.⁶⁷ Thus, the court denied the mandamus petition without prejudice, reurging the trial court not to correct its error based on the now controlling precedent.⁶⁸

8. Waiver on Mandamus

Although arguments on direct appeal must be raised in the court of appeals before they can be asserted in the Texas Supreme Court, the same is not true for mandamus proceedings. In *In re AIU Insurance Co.*, the court rejected the argument that the petitioner waived certain arguments by failing to raise them in the court of appeals before asserting them to the supreme court.⁶⁹ The court reasoned "[w]hile it is certainly the better practice to present all arguments to a court of appeals before seeking mandamus in this Court, the failure to do so is not a failure to preserve error as it ordinarily would be in an appeal."⁷⁰

9. Other Original Proceedings

Appellate courts have limited injunctive powers that are granted only sparingly. In *In re Health Discovery Corp.*, the Waco Court of Appeals recognized that it does not have the authority to grant a writ of injunction solely to preserve the status quo pending appeal.⁷¹ However, it concluded that a writ of injunction will issue to preserve the status quo on

62. 124 S.W.3d 699, 704 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding, no pet.).

63. 821 S.W.2d 170, 171 (Tex. App.—Houston [14th Dist.] 1991, no writ).

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

65. *Id.* at 704.

66. *Id.*

67. *Id.*

68. *Id.*

69. 148 S.W.3d 109, 121 (Tex. 2004) (orig. proceeding).

70. *Id.*

71. 148 S.W.3d 163 (Tex. App.—Waco 2004, orig. proceeding, no pet.).

interlocutory appeal from the denial of an injunction.⁷²

II. INTERLOCUTORY APPEALS

A. PERMISSIVE INTERLOCUTORY APPEALS

Section 51.014(d) of the Texas Civil Practice and Remedies Code provides for a permissive interlocutory appeal.⁷³ Under that provision, a court of appeals may permit an appeal to be taken from an otherwise nonappealable order but only if, among other requirements, the appeal is ordered by the trial court pursuant to the terms of subsection (d).⁷⁴ An appellate court's ability to permit an appeal under section 51.014(f) is not "purely discretionary" or independent of section 51.014(d)'s requirements.⁷⁵

Several courts of appeals have split on the issue of time extensions for filing an application for permission to appeal under section 51.014(f). The deadline for filing an application in the court of appeals is ten days after the date the trial court grants permission to appeal.⁷⁶ What happens if the appellant fails entirely to file an application for permission to appeal and instead files a regular notice of appeal more than ten days after the trial court's grant of permission to appeal?

The San Antonio Court of Appeals considered this issue in *Stolte v. County of Guadalupe*⁷⁷ and concluded that: (1) the appellant's notice of appeal was an instrument filed in a bona fide attempt to invoke the court's appellate jurisdiction and was thus sufficient to invoke the court's jurisdiction, (2) Appellate Rule 26.3 allowing time extensions for perfecting appeal applies in the agreed appeal context, and (3) *Verburgt v. Dornier's*⁷⁸ implied motion for time extensions applies in the agreed appeal context.⁷⁹ The appellant in *Stolte* was, accordingly, given an opportunity to cure his failure to file the proper instrument and to explain his untimeliness.⁸⁰

72. *Id.*

73. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (Vernon Supp. 2004-2005).

74. See *Watson v. Moray*, 133 S.W.3d 877, 877 (Tex. App.—Dallas 2004, orig. proceeding [mand. denied]); *Serrano v. Union Planter's Bank, N.A.*, 155 S.W.3d 381 (Tex. App.—El Paso 2004, no pet.). In addition to the trial court ordering the appeal, (1) the parties must agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion, (2) there must be a determination that an immediate appeal from the order may materially advance the ultimate termination of the litigation, and (3) the parties must agree to the interlocutory appeal. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d). Only then may the court of appeals consider permitting the appeal. *Id.* § 51.014(f).

75. *Watson*, 133 S.W.3d at 877.

76. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d), (f).

77. 139 S.W.3d 406, 407-10 (Tex. App.—San Antonio 2004, no pet.), *rev'd on other grounds*, No. 04-04-00083-CV, 2004 WL 2597443 (Tex. App.—San Antonio Nov. 17, 2004, no pet.) (not designated for publication).

78. 959 S.W.2d 615, 617 (Tex. 1997).

79. *Stolte*, 139 S.W.3d at 408-10.

80. *Id.* at 410.

The Fourteenth District Court of Appeals agreed in *Diamond Products International, Inc. v. Handsel* that the failure to file an application for permission to appeal should not result in automatic dismissal without an opportunity to cure when the appellant fails to file an application but files a notice of appeal.⁸¹

It is not so in the Dallas Court of Appeals. In *In re D.B.*, the Dallas Court of Appeals concluded that the extension of time provided in Rule 26.3(b) of the Texas Rules of Appellate Procedure does not apply in section 51.014(d) appeals.⁸² The court reasoned that “[b]ecause the deadline for perfecting an appeal from an interlocutory order pursuant to section 51.014(d) is specifically stated in section 51.014(f), the deadline and extension for perfecting an appeal in the rules of appellate procedure do not apply.”⁸³ The *Stolte* court disagreed with this reasoning because (1) the supreme court in *Verburgt* made no distinction between types of appeals and (2) “the Notes and Comments to [Texas] Rule [of Appellate Procedure] 26 expressly provide that ‘an extension of time is available for all appeals.’”⁸⁴

What about the contents of an application to appeal under section 51.014(f)? The *Stolte* court explained that an application should include “facts and argument addressing the requirements of section 51.014(d)—that the order ‘involves a controlling question of law as to which there is a substantial ground for difference of opinion’ and that ‘an immediate appeal . . . may materially advance the ultimate termination of the litigation.’”⁸⁵

The types of disputes reserved for agreed interlocutory appeals are those that can be resolved by a controlling *legal issue*—“[t]he statute does not contemplate permissive appeals of summary judgments where the facts are in dispute.”⁸⁶

81. 142 S.W.3d 491, 493-94 (Tex. App.—Houston [14th Dist.] 2004, no pet.). Notably, however, the appellant in *Diamond* filed his notice of appeal within ten days after the trial court granted permission to appeal.

82. 80 S.W.3d 698, 701-02 (Tex. App.—Dallas 2002, no pet.).

83. *Id.* at 702.

84. *Stolte*, 139 S.W.3d at 409 (emphasis in original).

85. *Id.* at 410 (citing *Richardson v. Kays*, No. 02-03-00241-CV, 2003 WL 22457054, at *2 (Tex. App.—Fort Worth Oct. 30, 2003, no pet.) (mem. op.) (not designated for publication) (denying application to appeal that did “not mention, discuss, or analyze why the issue . . . involves a controlling question of law as to which there is a substantial ground for difference of opinion”); see also TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d). *Accord Diamond*, 142 S.W.3d at 494. Ultimately, the *Stolte* court refused permission to appeal based on the appellant’s initial application, which contained no facts or argument explaining why the court should have granted permission. The court, however, granted the appellant leave to amend his application to meet the requirements stated in the opinion. *Stolte*, 139 S.W.3d at 410.

86. *Diamond*, 142 S.W.3d at 494.

B. INTERLOCUTORY APPEALS AS OF RIGHT

1. *Pleas to the Jurisdiction*

Under Civil Practice and Remedies Code section 51.014(a)(8), the Texas courts of appeals have the authority to review an appeal from an interlocutory order that “grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001.”⁸⁷ The policy reason behind this authority “is that the State should not have to expend resources in trying a case on the merits if it is immune from suit.”⁸⁸ However, despite the deceptively simple language of section 51.014(a)(8), the fact that an argument is raised in a plea to the jurisdiction does not mean the order denying it is subject to interlocutory appeal. The reference to “plea to the jurisdiction” in the statute “is not to a particular procedural vehicle but to the substance of the issue raised.”⁸⁹

For example, the Attorney General’s challenge in *State v. Fernandez*—by way of a plea to the jurisdiction—to a probate court’s decision to transfer certain actions from district court to probate court was not reviewable by interlocutory appeal because the challenge was not a proper subject for a plea to the jurisdiction.⁹⁰ Similarly, a plaintiff’s failure to give notice required under the Tort Claims Act is not a proper basis for dismissal and cannot be raised in a plea to the jurisdiction.⁹¹ As clarified by the supreme court:

an interlocutory appeal may be taken from a refusal to dismiss for want of jurisdiction whether the jurisdictional argument is presented by plea to the jurisdiction or some other vehicle, such as a motion for summary judgment. By the same token, an interlocutory appeal cannot be taken from the denial of a plea to the jurisdiction that does not raise an issue that can be jurisdictional.⁹²

2. *Denial of arbitration*

Under the Texas Arbitration Act, a trial court’s order denying a motion to compel arbitration brought under the Act may be reviewed by interlocutory appeal.⁹³ However, if the motion denied is brought under the Federal Arbitration Act, mandamus is the appropriate remedy.⁹⁴ The Federal Arbitration Act governs an arbitration agreement if it is con-

87. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (Vernon Supp. 2004-2005).

88. *State v. Fernandez*, No. 13-03-00546-CV, 2004 Tex. App. LEXIS 5257, at *26 (Tex. App.—Corpus Christi June 16, 2004, no pet.) (Castillo, J., concurring and dissenting).

89. *Tex. Dep’t of Criminal Justice v. Simons*, 140 S.W.3d 338, 349 (Tex. 2004).

90. *Fernandez*, 2004 Tex. App. LEXIS 5257, at *26-28.

91. *Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 366 (Tex. 2004); *Simons*, 140 S.W.3d at 348-49.

92. *Simons*, 140 S.W.3d at 349.

93. TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1) (Vernon Supp. 2004-2005); *Merrill Lynch Trust Co. FSB v. Alaniz*, No. 13-04-073-CV, 2004 Tex. App. LEXIS 7029, at *7 (Tex. App.—Corpus Christi August 5, 2004, no pet.).

94. *Merill Lynch*, 2004 Tex. App. LEXIS 7029, at *7.

tained in a contract that “involves or affects interstate commerce.”⁹⁵

3. Denial of special appearance

Section 51.014(a)(7) of the Civil Practice and Remedies Code authorizes an interlocutory appeal from an order denying a special appearance.⁹⁶ While the Texas Rules of Appellate Procedure appear to make findings of fact and conclusions of law “optional” in the interlocutory appeal context,⁹⁷ the Dallas Court of Appeals recently remanded a special appearance appeal back to the trial court because the findings and conclusions entered by the trial court did not address the issues of personal jurisdiction over the defendant, forcing the court of appeals to guess the reason or reasons for the trial court’s finding of jurisdiction.⁹⁸ These circumstances prevented adequate presentation of the appellant’s appeal, requiring remand.⁹⁹

C. BRIEFING ON INTERLOCUTORY APPEAL

Under Rule 28.3 of the Texas Rules of Appellate Procedure, the court of appeals may allow an interlocutory appeal to be submitted without briefs.¹⁰⁰ The purpose of the rule is “to grant appellate courts the flexibility to expedite appeals by dispensing with the necessity of a formal record or briefing.”¹⁰¹ The rule does not, however, give a party who believes that briefs are unnecessary an option to simply announce its decision not to file a brief.¹⁰² Instead, such a party must file a proper motion, accompanied by the appropriate filing fee, demonstrating why briefs should not be required.¹⁰³

D. TRIAL COURT’S POWER PENDING INTERLOCUTORY APPEAL

Statutory stay provisions applicable in certain interlocutory appeals limit the trial court’s power to act while an interlocutory appeal is pending. For example, a trial court may not grant summary judgment while an interlocutory appeal is pending in a case subject to the stay provisions of section 51.014(b) of the Texas Civil Practice and Remedies Code.¹⁰⁴ Section 51.014(b)’s stay of the “commencement of a trial” prohibits such an act because a summary judgment proceeding is a trial within the meaning

95. *Id.* (concluding that transaction involved interstate commerce and dismissing interlocutory appeal for lack of jurisdiction); see 9 U.S.C. § 2 (2004).

96. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 2004-2005).

97. TEX. R. APP. P. 28.1.

98. *Hoffman v. Dandurand*, 143 S.W.3d 555, 560 (Tex. App.—Dallas 2004, no pet.).

99. *Id.*

100. TEX. R. APP. P. 28.3.

101. *In re J.S.*, 136 S.W.3d 716, 717 (Tex. App.—El Paso 2004, no pet.).

102. *Id.*

103. *Id.*

104. *Lee-Hickman’s Invs. v. Alpha Invesco Corp.*, 139 S.W.3d 698, 701 (Tex. App.—Corpus Christi 2004, no pet.); TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (Vernon Supp. 2004-2005).

of that statute.¹⁰⁵ While Rule 29.5 of the Texas Rules of Appellate Procedure gives the trial court authority to proceed with a trial on the merits while an interlocutory appeal is pending, it does so only “if permitted by law,” acknowledging that a trial court may be prohibited by law from doing so, as, for example, by section 51.014(b).¹⁰⁶ Further, Rule 29.5 prohibits the trial court from making an order that “interferes with or impairs the jurisdiction of the appellate court or the effectiveness of any relief sought or that may be granted on appeal.”¹⁰⁷ A final summary judgment may very well interfere with the jurisdiction of the court of appeals, which may be compelled to dismiss the interlocutory appeal as moot in light of the final summary judgment.¹⁰⁸

E. TEXAS SUPREME COURT JURISDICTION OVER INTERLOCUTORY APPEALS.

The Texas Supreme Court freely exercised jurisdiction over a number of interlocutory appeals during the Survey period. For example, in *J.M. Davidson, Inc. v. Webster*, the supreme court accepted an interlocutory appeal *without comment* as to the source of its jurisdiction, where the enforcement of an arbitration agreement was at issue.¹⁰⁹ The court similarly decided *San Antonio State Hospital v. Cowan*, an interlocutory appeal from the trial court’s denial of the defendant’s plea to the jurisdiction, without any discussion as to the basis of its jurisdiction.¹¹⁰

In a number of cases decided under the former, more stringent rules governing the supreme court’s “conflicts” jurisdiction, the court nevertheless determined that it had jurisdiction in the interlocutory appeal context.¹¹¹ In *Texas Department of Parks and Wildlife v.*

105. *Lee-Hickman’s Invs.*, 139 S.W.3d at 701.

106. *Id.* at 702 n.4; TEX. R. APP. P. 29.5.

107. TEX. R. APP. P. 29.5(b).

108. *Lee-Hickman’s Invs.*, 139 S.W.3d at 702.

109. 128 S.W.3d 223, 225 (Tex. 2003). The court’s jurisdiction over the appeal appeared to be based on a dissenting opinion in the court of appeals, demonstrating a conflict between the justices of that court. See TEX. GOV’T CODE ANN. §§ 22.225(c), 22.001(a)(1) (Vernon 2004).

110. 128 S.W.3d 244, 245 (Tex. 2004). The court did, however, specifically reference sections 22.001(a)(1) and 22.225(c) of the Texas Government Code, which permit the supreme court to accept cases in which the justices of the court of appeals disagree on a question of law material to the decision. See TEX. GOV’T CODE ANN. §§ 22.225(c), 22.001(a)(1) (Vernon 2004).

111. Previously, the supreme court’s “conflicts” jurisdiction extended only to interlocutory appeals where the court of appeals’s decision conflicted with “a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case.” TEX. GOV’T CODE ANN. § 22.001(a)(2) (Vernon 2004). Under that standard, two decisions conflicted only when the two cases were so similar that the decision in one case was necessarily conclusive of the decision in the other. *Schein v. Stromboe*, 102 S.W.3d 675, 687-88 (Tex. 2002). The Legislature amended section 22.001 of the Government Code, effective September 1, 2003, effectively expanding the supreme court’s jurisdiction over interlocutory appeals. See Act of June 11, 2003, 78th Leg., R.S., Ch. 204, 2003 Tex. Gen. Laws 2004 (now codified as section 22.001(e) of the Texas Government Code). Under the amended standard, which applies to actions filed on or after September 1, 2003, “one court holds differently from another when there is inconsistency in their respective

Miranda,¹¹² a plea to the jurisdiction appeal, the supreme court concluded that the court of appeals' decision that the trial court could not consider evidence in support of the defendant's plea conflicted with the supreme court's holding in *Bland Independent School District v. Blue*¹¹³ requiring trial courts to consider evidence when necessary to resolve jurisdictional issues. The court similarly exercised jurisdiction over a class action appeal in *Compaq Computer Corp. v. LaPray*,¹¹⁴ when the court of appeals affirmed the trial court's certification of the class without a rigorous analysis of predominance and superiority, as required under *Southwestern Refining Co. v. Bernal*.¹¹⁵

III. PRESERVATION OF ERROR IN THE TRIAL COURT

To preserve an issue for appeal, a litigant must make a timely, specific objection at the earliest possible opportunity and obtain a ruling on the record.¹¹⁶ Failure to comply with these requirements will result in waiver on appeal.¹¹⁷ During the Survey period, numerous courts explored the scope of this rule in deciding how and when objections are properly preserved for review.

For example, in *Schwartz v. Forest Pharmaceuticals, Inc.*, the court held that the appellant waived any error in the admission of testimony regarding the plaintiff's litigious character.¹¹⁸ Even though the motion in limine regarded evidence of prior lawsuits, the plaintiff did not object until after the defendant was asked about several different lawsuits and the plaintiff already gave substantial testimony about them. The court held this objection to be untimely and the issue waived, noting that a motion in limine will not preserve error.¹¹⁹ The court further held that even if an objection was timely, it must be the same objection raised on appeal to preserve error.¹²⁰

The appellant similarly waived error in *Cruikshank v. Consumer Direct Mortgage, Inc.*, in which he argued that the trial court had erroneously

decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." TEX. GOV'T CODE ANN. §§ 22.001(e), 22.225(e) (Vernon 2004).

112. 133 S.W.3d 217 (Tex. 2004).

113. 34 S.W.3d 547, 555 (Tex. 2000).

114. 135 S.W.3d 657, 662-63 (Tex. 2004).

115. 22 S.W.3d 425, 435 (Tex. 2000). See *Snyder Communications, L.P. v. Magana*, 142 S.W.3d 295, 298 (Tex. 2004) (per curiam) (exercising jurisdiction based on conflict between court of appeals' analysis of class certification ruling and requirements of *Bernal*); see also *Exito Elecs. Co., Ltd. v. Trejo*, 142 S.W.3d 302, 305 (Tex. 2004) (per curiam) (exercising conflicts jurisdiction in special appearance appeal); *Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 355 (Tex. 2004) (exercising conflicts jurisdiction in plea to the jurisdiction appeal); *Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 339 (Tex. 2004) (same).

116. TEX. R. APP. P. 33.1(a)(2); *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 251 (Tex. 2004).

117. *Kerr-McGee Corp.*, 133 S.W.3d at 251.

118. 127 S.W.3d 118, 120 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

119. *Id.* at 123-24.

120. *Id.* at 125-26 (holding Rule 403 objection that evidence was unduly prejudicial did not preserve relevance objection for appeal).

sustained objections to the appellant's summary judgment affidavit.¹²¹ The court of appeals held that the appellant had not preserved error because he had not filed a response to the objecting party's motion to strike, he did not object to the trial court's ruling, and he did not request the court to reconsider its ruling.¹²² In another case, the court of appeals held that the appellant failed to preserve error on its complaint regarding an expert's qualifications because, although the appellant filed a motion to exclude, it did not secure a ruling on the record.¹²³

Further, in *Kendall Builders, Inc. v. Chesson*,¹²⁴ a proceeding to reinstate an arbitration award vacated by the district court in which the impartiality of the arbitrator was challenged after the arbitrator's award issued, the court held that "a party can waive an otherwise valid objection to the partiality of the arbitrator by proceeding with arbitration despite knowledge of facts giving rise to such an objection."¹²⁵ This waiver principle applies, the court held, "even where an evident partiality objection could be asserted based on failure to disclose."¹²⁶

Applying these principles, the court held that the appellees waived their partiality objection based on the fact (disclosed during the arbitration hearing) that the arbitrator had suffered investment losses in the stock of one of their former employers by failing to raise the objection until after the arbitration award issued.¹²⁷ The court rejected the appellees' argument that the arbitrator failed to "divulge sufficient information" for them to have waived the objection.¹²⁸ The court also rejected the argument that a waiver finding was inappropriate as to both appellees because the arbitrator mentioned his stock losses to only one of the two appellees, who was allegedly unfamiliar with the rules of the American Arbitration Association. Noting that the appellee to whom disclosure was not made had at least constructive notice of her rights, the court concluded "[w]e cannot reward parties for not reading legal documents that affect them and then using their ignorance as a tool to undermine the proceedings."¹²⁹ Finally, the court rejected appellees' argument that their lawyer did not know about the basis for the objection until after the award was announced, holding that "Texas cases addressing evident parti-

121. 138 S.W.3d 497 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

122. *Id.* at 499.

123. *Pilgrim's Pride Corp. v. Smoak*, 134 S.W.3d 880, 890 (Tex. App.—Texarkana 2004, pet. denied).

124. 149 S.W.3d 796, 804 (Tex. App.—Austin 2004, pet. filed).

125. *Id.*

126. *Id.* (citing *Mariner Fin. Group, Inc. v. H.G. Bossley*, 79 S.W.3d 30, 36 (Tex. 2002) (Owen, J., concurring) ("There could be waiver of evident partiality based on nondisclosure if the complaining party knew all the facts before the arbitration concluded and did not complain.")).

127. *Id.* at 804-05.

128. *Id.* at 805 (citing *Cook Indus. v. C. Itoh & Co.*, 449 F.2d 106, 108 (2d Cir. 1971) ("When a party has knowledge of facts *possibly indicating bias or partiality* on the part of the arbitrator he cannot remain silent and later object to the award of the arbitrator on that ground.") (emphasis added)).

129. *Id.* (citing *Estes v. Republic Nat'l Bank*, 462 S.W.2d 273, 276 (Tex. 1970) (absent fraud, failure to read contract generally is not ground to avoid it)).

ality and waiver issues contemplate disclosure of relevant facts to a party, with no mention of lawyers.”¹³⁰ The court distinguished the decision in *Morin v. Boecker*¹³¹ on the basis that *Morin* dealt with a party’s receipt of a communication from a court, which a party could reasonably assume would also be sent to his attorney, while a communication from an arbitrator directly to a party would impose on the party the burden to disclose to counsel or risk waiver.¹³²

In *Tesfa v. Stewart*,¹³³ the court held that the appellants’ objection to each element of damages in a four-element damages question on the basis of no evidence to support submission of the issue was insufficiently specific to preserve a broad form submission charge error for appeal.¹³⁴ Relying on the Texas Supreme Court’s decisions in *In re B.L.D.*,¹³⁵ *Harris County v. Smith*,¹³⁶ and *In re A.V.*,¹³⁷ the court held the charge error waived because

Appellants did not object in any respect to the form of the damages question, did not contend that some proper element of damages was improperly comingled in a list with a damage element supported by no evidence, and did not plainly inform the trial court that any specific element of damages—as opposed to every element of damages—should not be included in the broad-form submission.¹³⁸

Again, in *Nissan Motor Co. Ltd. v. Armstrong*,¹³⁹ the Texas Supreme Court held that the defendant/appellant’s pretrial motion to exclude the testimony of the plaintiff/appellee’s expert witness on the basis that his opinions were unreliable did not preserve the complaint on appeal that the testimony should have been excluded because the expert was unqualified to testify.¹⁴⁰

In other instances, however, courts have found error preserved. For example, in *Kerr-McGee Corp. v. Helton*,¹⁴¹ the Texas Supreme Court refused to find waiver in a dispute over an oil and gas lease. At trial, the lessor’s only evidence of the amount of damages was the expert testimony

130. *Id.* at 805-06 (emphasis added) (citing *Bossley*, 79 S.W.3d at 32; Burlington N.R.R. Co. v. TUCO Inc., 960 S.W.2d 629, 635-39 (Tex. 1997)).

131. 122 S.W.3d 911, 917 (Tex. App.—Corpus Christi 2003, no pet.).

132. *Kendall Builders*, 149 S.W.3d at 806 n.10.

133. 135 S.W.3d 272 (Tex. App.—Fort Worth 2004, pet. denied).

134. *Id.* at 275-76.

135. 113 S.W.3d 340, 349-50 (Tex. 2003) (“A timely objection, plainly informing the court that a specific element of damages should not be included in a broad-form question because there is no evidence to support its submission, therefore preserves the error for appellate review.”) (emphasis added) (quoting *Harris County v. Smith*, 96 S.W.3d 230, 236 (Tex. 2002)).

136. 96 S.W.3d 230, 236 (Tex. 2002).

137. 113 S.W.3d 355, 362 (Tex. 2003) (alleging broad-form charge error not preserved when appellant “did not argue to the trial court that because the charge was based on a theory without evidentiary support, the charge should not be submitted in broad form.”) (emphasis added).

138. *Tesfa*, 135 S.W.3d at 275-76.

139. 145 S.W.3d 131 (Tex. 2004).

140. *Id.* at 143-44 (citing TEX. R. APP. P. 33.1).

141. 133 S.W.3d 245 (Tex. 2004).

of a single witness. After cross-examination, the lessee objected and moved to strike the expert's testimony as unreliable. The trial court denied the motion. On appeal, the lessor argued that the point was waived because the lessee did not object to the expert's testimony until after cross-examination. The court rejected this argument and held that a motion to strike after cross-examination was sufficient to preserve error when the basis for the objection became apparent on cross.¹⁴²

Similarly, in *James v. Gruma Corp.*,¹⁴³ the court held that the appellant preserved for review her argument that the defendant/appellee's plea in abatement waived any defect in service when she argued in response to a summary judgment motion that the defendant's plea in abatement constituted a general appearance. Although she did not specifically allege waiver, the contention was "apparent from the context of her response."¹⁴⁴

In *Cimarron Hydrocarbons Corp. v. Carpenter*,¹⁴⁵ the court addressed the question of whether a response to a no-evidence summary judgment motion must be filed to preserve a legal sufficiency objection for appeal, noting a split of authority among the Texas courts of appeal on the issue.¹⁴⁶ Analogizing to the Texas Supreme Court's holding in *McConnell v. Southside Independent School District*,¹⁴⁷ applied by several courts of appeal,¹⁴⁸ that a nonmovant need not object to the legal sufficiency of a traditional motion for summary judgment to assert the complaint on appeal, the court held that "no response need be filed to raise, on appeal, the legal insufficiency of a no-evidence motion for summary judgment."¹⁴⁹

Further, in *In re M.N.G.*,¹⁵⁰ a termination of parental rights case, the court held that the appellant did not waive her objection regarding equalization of preemptory strikes by failing to timely object. The court noted that objection must ordinarily be made "at the same time that the determination of antagonism by the trial court should be made—after *voir dire* and prior to the exercise of the preemptory challenges allocated by the

142. *Id.* at 252.

143. 129 S.W.3d 755 (Tex. App.—Fort Worth 2004, pet. denied.).

144. *Id.* at 760.

145. 143 S.W.3d 560 (Tex. App.—Dallas 2004, pet. filed).

146. *Id.* at 562-63 (citing *In re Estate of Swanson*, 130 S.W.3d 144, 147 (Tex. App.—El Paso 2003, no pet.) (response not required); see *Cuyler v. Minns*, 60 S.W.3d 209, 213 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (response not required); *Callaghan Ranch, Ltd. v. Killam*, 53 S.W.3d 1, 3 (Tex. App.—San Antonio 2000, pet. denied) (response not required); *Roth v. FFP Operating Partners, L.P.*, 994 S.W.2d 190, 194-95 (Tex. App.—Amarillo 1999, pet. denied) (response required); *Williams v. Bank One, Tex., N.A.*, 15 S.W.3d 110, 117 (Tex. App.—Waco 1999, no pet.) (response required)).

147. 858 S.W.2d 337, 341 (Tex. 1993).

148. *Cimarron*, 143 S.W.3d at 563 (citing *Swanson*, 130 S.W.3d at 147 (applying *Cuyler* and *Callaghan Ranch*)); *Cuyler*, 60 S.W.3d at 213-14; *Callaghan Ranch*, 53 S.W.3d at 3.

149. *Cimarron*, 143 S.W.3d at 563 (citing *Crocker v. Paulyne's Nursing Home, Inc.*, 95 S.W.3d 416, 419 (Tex. App.—Dallas 2002, no pet.)).

150. 147 S.W.3d 521 (Tex. App.—Fort Worth 2004, pet. filed).

court.”¹⁵¹ Nonetheless, the court found no waiver because appellant, who had been relying on a representation by the attorney *ad litem* that he would not exercise any preemptory challenges and would leave jury selection to appellant and appellee Texas Department of Family and Protective Services, objected as soon as it became apparent “that the *ad litem* had coordinated his strikes with DFPS and that the *ad litem* planned to use his six strikes after all.”¹⁵² Appellant also moved for a mistrial after the jury was empaneled and sworn.¹⁵³

The court noted a similarity between the circumstances of the case and those in *Van Allen v. Blackledge*,¹⁵⁴ a case in which the plaintiffs’ objection to the defendants’ improper coordination of preemptory challenges was held to be timely, even though the plaintiff’s motion for mistrial was not urged until after the jury had been selected, seated and sworn.¹⁵⁵ Also of significance to the court in *M.N.G.* was that the attorney *ad litem* admitted in a trial court hearing that he had informed counsel for appellant that he “was aligned with the position of DFPS” and that he would not exercise any peremptory challenges.¹⁵⁶

The Texas Supreme Court also recently addressed the issue of preservation in the specific context of objections to *ad litem* fees. In *Jocson v. Crabb*,¹⁵⁷ the Texas Supreme Court considered the question of whether the defendants had waived their objections to *ad litem* fees awarded by the trial court. Although the defendants had objected to the *ad litem*’s attendance at depositions, the court of appeals held that they had waived their objections by failing to secure a ruling during the course of discovery.¹⁵⁸ Reversing, the Texas Supreme Court noted that while it “would be wise” to immediately seek guidance from the court as to the *ad litem*’s role, it could be expensive and disruptive to pursue every disagreement to a hearing during pretrial matters. Thus, the court held that the final fee hearing was an appropriate forum in which to assert—and preserve—any objections to the *ad litem*’s fee.¹⁵⁹ The court also held that the defendants did not waive their objection to certain line item charges by not submitting the *ad litem*’s entire file into the record.¹⁶⁰

Texas rules provide that litigants may object to judges sitting by assignment. Normally, an objection is effective automatically when it is filed, as long as it is filed in a timely manner under Section 74.053 of the Govern-

151. *Id.* at 532 (emphasis added) (citing *Tex. Commerce Bank Nat’l Ass’n v. Lebcos Constructors, Inc.*, 865 S.W.2d 68, 77 (Tex. App.—Corpus Christi 1993, writ denied), *overruled on other grounds* by *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 530 (Tex. 1998)); TEX. R. CIV. P. 233.

152. *M.N.G.*, 147 S.W.3d at 532 (emphasis added).

153. *Id.*

154. 35 S.W.3d 61 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

155. *Id.* at 64.

156. *M.N.G.*, 147 S.W.3d at 533.

157. 133 S.W.3d 268 (Tex. 2004) (per curiam).

158. *Id.* at 270.

159. *Id.*

160. *Id.* at 271.

ment Code.¹⁶¹ But one recent case suggests that even if the objection is timely filed, it may not preserve error if the objecting party does not ensure that the judge is actually aware of the objection. In *In re Approximately \$17,239.00*,¹⁶² the court held that the relator had waived its objection under section 74.053 to a judge sitting by assignment. The relator filed its objection on September 22, 2003. A week later, the parties appeared for a discovery hearing, over which the assigned judge presided. After the parties argued the motion, but before the judge ruled, the relator mentioned the previously-filed objection, of which the judge was not aware. After some discussion, the judge denied the objection, finding that it was not timely filed. The court of appeals held that although the objection was filed in a timely manner under the newly-amended version of section 74.053, the relator waived its objection.¹⁶³ The court conceded that a timely-filed objection is normally effective upon filing, but in this case the judge was not aware of the objection before the discovery hearing commenced. In order to preserve the issue, the relator should have made certain that the court was aware of the objection *before* the commencement of the hearing—even though the objection was already on file.¹⁶⁴

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In any non-jury case, a party may request findings of fact or conclusions of law within twenty days after the judgment is signed.¹⁶⁵ Upon any party's timely request for additional findings and conclusions, the trial court "shall file any additional or amended findings and conclusions that are appropriate."¹⁶⁶ The court is only required to make additional findings on ultimate or controlling issues, that is, an issue "that is essential to the cause of action" and "that would have a direct effect on the judgment."¹⁶⁷ The trial court's refusal to make additional findings and conclusions under this rule results in reversal unless the record shows no injury to the complaining party.¹⁶⁸ There is also no reversible error if the party is not prevented from adequately presenting an argument on appeal, or if the requested findings would not result in a different

161. TEX. GOV'T CODE § 74.053 (Vernon 2005); *see, e.g.*, *Lewis v. Leftwich*, 775 S.W.2d 848, 850-51 (Tex. App.—Dallas 1989, orig. proceeding, no writ).

162. 129 S.W.3d 167 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding [mand. denied]).

163. *Id.* at 169. The 2003 amendments to the rule made significant changes to the section defining *when* an objection is timely. The new rule provides that an objection is timely if it is filed "not later than the seventh day after the date the party receives actual notice of the assignment or before the date the first hearing or trial, including pretrial hearings, commences, whichever date occurs earlier." TEX. GOV'T CODE § 74.053(c) (Vernon 2005).

164. *In re Approximately \$17,239.00*, 129 S.W.3d at 169.

165. TEX. R. CIV. P. 296.

166. TEX. R. CIV. P. 298.

167. *In re Marriage of Edwards*, 79 S.W.3d 88, 94-95 (Tex. App.—Texarkana 2002, no pet.).

168. *See Tillery & Tillery v. Zurich Ins. Co.*, 54 S.W.3d 356, 360 (Tex. App.—Dallas 2001, pet. denied).

judgment.¹⁶⁹

In *Flanary v. Mills*,¹⁷⁰ the defendant/appellant argued that the trial court erred when it stated that the defendant had committed fraud against the plaintiff, but had not specified the party defrauded. The plaintiff in *Flanary* was “Roy Mills d/b/a Row Mills Construction and Roofing.” The defendant requested that the court issue amended findings and conclusions to specifically identify the defrauded party, and the trial court refused. The court of appeals held that because there was only one plaintiff, it was not error to specifically identify the party defrauded. In any event, the court concluded that there is no harm to the defendant due to the court’s failure to specifically identify the party defrauded.¹⁷¹

In *Hoffmann v. Dandurand*,¹⁷² however, the court held that the trial court erred in refusing to make additional findings of fact and conclusions of law on the issue of personal jurisdiction. In *Hoffman*, the defendant appealed an interlocutory order denying his special appearance.¹⁷³ The court’s findings of fact did not address the issues raised in the defendant’s special appearance, nor did they address the defendant’s minimum contacts, “but rather appear[ed] to reach the merits of the case.”¹⁷⁴ Both parties requested amended or additional findings, which the trial court refused. Because the trial court’s failure to make sufficient findings and conclusions on the jurisdictional issue prevented adequate presentation of the defendant’s appeal, the court of appeals reversed and remanded for further proceedings.¹⁷⁵

V. THE TRIAL COURT’S PLENARY POWER

A trial court retains jurisdiction over a case for thirty days after it signs a final judgment or order.¹⁷⁶ This time period can be extended to seventy-five days after the judgment date if a party timely files an appropriate post-judgment motion, such as a motion for new trial, within thirty days of the judgment.¹⁷⁷ The trial court lacks jurisdiction to act in the matter after its plenary power has expired.¹⁷⁸

In *Martin v. Texas Department of Family & Protective Services*,¹⁷⁹ the court applied this rule to a motion for sanctions pending after an order of dismissal on a motion to nonsuit. The DFPS sued Martin seeking the

169. See *Johnston v. McKinney Am., Inc.*, 9 S.W.3d 271, 277 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *ASAI v. Vanco Insulation Abatement, Inc.*, 932 S.W.2d 118, 122 (Tex. App.—El Paso 1996, no writ).

170. 150 S.W.3d 785 (Tex. App.—Austin 2004, pet. denied).

171. *Id.* at 793.

172. 143 S.W.3d 555 (Tex. App.—Dallas 2004, no pet.).

173. See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 2004-2005).

174. *Hoffman*, 143 S.W.3d at 560.

175. *Id.*

176. TEX. R. CIV. P. 329b(d).

177. TEX. R. CIV. P. 329b.

178. *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988).

179. *Martin v. Tex. Dep’t of Family & Protective Servs.*, No. 01-03-01111-CV, 2004 WL 1945255 (Tex. App.—Houston [1st Dist.] Aug. 31, 2004, no pet.).

termination of her parental rights. On November 20, 2002 Martin filed a motion for sanctions; on the same day, DFPS moved to nonsuit its claims. The trial court granted the motion for nonsuit. In February 2003, Martin served discovery upon DFPS, to which DFPS responded. Martin later served additional discovery requests, and when DFPS refused to respond, Martin filed a motion to compel. DFPS responded with a plea to the jurisdiction, which the trial court granted. Noting that the trial court retains jurisdiction for thirty days after signing a final order of nonsuit, the court held that plenary power expired. Although Martin moved for sanctions before the nonsuit was signed and thus it remained pending when the final order was issued, the court held that a judgment need not resolve an outstanding motion for sanctions in order to be final.¹⁸⁰ In so holding, the court expressly disapproved of prior cases holding that a motion for sanctions survives a nonsuit.

Not all postjudgment motions will extend the court's plenary power. The Fourteenth District Court of Appeals clarified recently that unlike a motion for new trial, a request for findings of fact and conclusions of law does not extend the court's plenary power even though it might extend the deadline for filing a notice of appeal.¹⁸¹ In so holding, the court overruled a prior panel's holding that suggested that a request for findings and conclusions did extend plenary power.¹⁸²

VI. THE RECORD ON APPEAL

"The appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record."¹⁸³ The appellant is responsible for arranging for the record to be provided to the court of appeals. Failure to comply with the procedures in Rule 34 may result in refusal of the court to consider the appellant's appeal. A number of cases recently addressed the record on appeal and the steps necessary to ensure the court is provided with an accurate record.

As an initial matter, the appellant is not necessarily required to have the entire reporter's record provided on appeal.¹⁸⁴ However, when designating less than the entire record, the appellant must ensure that all items relevant to the appeal are included. In *Coleman v. Carpenter*,¹⁸⁵ the court noted that the court presumes a partial reporter's record designated by the parties constitutes the entire record for the purposes of its review. Rule 34.6(c)(1) requires the appellant to specify issues presented

180. *Id.* at *2.

181. *In re Gillespie*, 124 S.W.3d 699, 703 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding, no pet.) (en banc).

182. *Id.* at 704 (overruling *Elec. Power Design, Inc. v. R.A. Hanson Co.*, 821 S.W.2d 170 (Tex. App.—Houston [14th Dist.] 1991, no writ) to the extent that it held that a request for findings and conclusions extended plenary power); see also TEX. R. APP. P. 26.1; TEX. R. CIV. P. 329b.

183. TEX. R. APP. P. 34.1.

184. See TEX. R. APP. P. 34.5(a), 34.6(b)(1).

185. 132 S.W.3d 108 (Tex. App.—Beaumont 2004, no pet.).

on appeal when filing a partial record, and the court will limit the appellant to those issues. If the appellant fails to comply with this rule, there is a “presumption that the omitted parts of the record are relevant to the disposition of the appeal, and that they support the trial court’s ruling.”¹⁸⁶ Although noting that the Texas Supreme Court has not required literal compliance with the rule,¹⁸⁷ the court held “that ‘complete failure’ to file the required statement of points would require the appellate court to affirm the trial court’s judgment.”¹⁸⁸ The Dallas Court of Appeals in *\$4,310 in U.S. Currency v. State*,¹⁸⁹ stressed that this rule applies equally to pro se litigants.

If the appellant fails to designate the entire record, Texas Rule of Appellate Procedure 34.6(d)¹⁹⁰ allows the reporter’s record to be supplemented, and Rule 34.6(b)(3)¹⁹¹ prohibits an appellate court from refusing to file a supplemental reporter’s record for failure to timely request it. However, in *Daniels v. University of Texas Health Science Center of Tyler*,¹⁹² the court held that “these rules apply only where a reporter’s record has been filed with the appellate court.”¹⁹³ As a result, because the appellant had not previously filed or requested a reporter’s record and had filed a motion for leave to supplement the reporter’s record at the same time she filed her appellant’s brief, the court held that appellant was not entitled to file a supplemental reporter’s record “because there is no reporter’s record to supplement.”¹⁹⁴ The court rejected appellant’s argument that she was merely seeking to provide a court reporter’s certification that certain of her medical records and deposition excerpts contained in the clerk’s record filed in the appeal and “certainly” introduced at trial were “in fact admitted exhibits,” holding that “[a]n appellant cannot circumvent the rules relating to the filing of a reporter’s record by furnishing a court reporter’s certification relating to matters included in the clerk’s record.”¹⁹⁵ The court similarly found appellant’s argument that she did not file a complete reporter’s record because of the expense

186. *Id.* at 110.

187. *Id.* (citing *Schafer v. Conner*, 813 S.W.2d 154, 155 (Tex. 1991); *Gallagher v. Fire Ins. Exch.*, 950 S.W.2d 370 (Tex. 1997); *Furr’s Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 377 (Tex. 2001)).

188. *Id.*

189. 133 S.W.3d 828 (Tex. App.—Dallas 2004, no pet.).

190. TEX. R. APP. P. 34.6(d): (“If anything relevant is omitted from the reporter’s record, the trial court, the appellate court, or any party may by letter direct the official court reporter to prepare, certify, and file in the appellate court a supplemental reporter’s record containing the omitted items. Any supplemental reporter’s record is part of the appellate record.”).

191. TEX. R. APP. P. 34.6(b)(3) (stating in relevant part: “Additions requested by another party must be included in the reporter’s record at the appellant’s cost.”).

192. *Daniels v. Univ. of Tex. Health Sci. Ctr. of Tyler*, No. 12-03-00399-CV, 2004 WL 1795348 (Tex. App.—Tyler Aug. 11, 2004, no pet.).

193. *Id.* at *1.

194. *Id.* at *2 (citing *Aluminum Chems. (Bolivia), Inc. v. Bechtel Corp.*, 28 S.W.3d 49, 50 (Tex. App.—Texarkana 2000, no pet.); *R.R. Comm’n of Tex. v. Belknap Van & Storage*, 893 S.W.2d 1, 2 (Tex. App.—Austin 1994, no writ)).

195. *Id.* at *2-3.

to be unpersuasive, noting that appellant made no effort to file a partial reporter's record or an agreed reporter's record.¹⁹⁶

VII. THE BRIEF ON APPEAL

The rules of appellate procedure provide that in an accelerated appeal, "[t]he appellate court may allow the case to be submitted without briefs."¹⁹⁷ The case of *In re J.S.*¹⁹⁸ recently clarified the meaning of this rule, stressing that whether a brief is required is within the court's discretion, not the appellant's; "An appellant who believes that briefs are unnecessary may not simply announce its decision not to file a brief. Instead, an appellant must file a proper motion, accompanied by the appropriate filing fee, and must demonstrate why briefs should not be required."¹⁹⁹ The *J.S.* court noted that, without briefing, the court must step into the unnatural role of advocate, and thus it will exercise its discretion to dispense with briefing only in extraordinary circumstances."²⁰⁰

Parties frequently frame their issues on appeal to cover numerous specific points. In doing so, however, the parties must take care to specifically address those issues in briefing. For example, in *Cruikshank v. Consumer Direct Mortgage, Inc.*,²⁰¹ the court noted the general rule that a point of error stating that the trial court erred in granting summary judgment is sufficient to preserve error and allow argument on all possible grounds on which summary judgment should have been denied.²⁰² The court held, however, that a general *Malooly* point of error only preserves a complaint on appeal if it is actually supported by argument in the briefs.²⁰³ Because the appellant did not address his specific issues in his brief, any error was waived.²⁰⁴

VIII. WAIVER ON APPEAL

The rules of appellate procedure require that the appellant's brief contain "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."²⁰⁵ Courts have frequently held that an issue is waived on appeal if it is unsupported by argument or citation to legal authority. In the case of *Strange v. Continental Casualty Co.*,²⁰⁶ the court restated this, and stressed that it applies equally to *pro se* litigants. Although the trial court "went to great lengths to afford [the] appellant the opportunity to try her case," the court has

196. *Id.* at *3 (citing TEX. R. APP. P. 34.6(c) (partial reporter's record); TEX. R. APP. P. 34.2 (agreed reporter's record)).

197. TEX. R. APP. P. 28.3.

198. 136 S.W.3d 716 (Tex. App.—El Paso 2004, no pet.).

199. *Id.* at 717.

200. *Id.*

201. 138 S.W.3d 497 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

202. *Id.* at 502 (citing *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119 (Tex. 1970)).

203. *Id.*

204. *Id.* at 503.

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

206. 126 S.W.3d 676 (Tex. App.—Dallas 2004, pet. denied).

“little latitude on appeal.”²⁰⁷ Because the appellant’s brief cited neither legal authorities nor the record, she waived all points on appeal.²⁰⁸

This rule has been applied by one court to hold that not only must the appellant cite legal authority, he must also cite authority arising under the controlling statute. In the case of *Bankhead v. Maddox*,²⁰⁹ the appellant argued on appeal that the trial court erred in not awarding her attorneys’ fees as a matter of law when the jury awarded breach of contract damages but awarded nothing as reasonable and necessary attorneys’ fees. The appellant raised a claim for damages arising from a construction defect under a breach of contract theory. However, claims arising out of an alleged construction defect are controlled by a specific provision of the Texas Residential Construction Liability Act (“RCLA”).²¹⁰ The appellant’s brief argued that she was entitled to attorneys’ fees under case law stemming from the Civil Practice and Remedies Code’s provision for breach of contract cases.²¹¹ The court held that because she did not cite cases addressing the RCLA, she waived her claim for attorneys’ fees.²¹²

A corollary to this rule is that an appellant cannot raise an argument for the first time in her reply brief. For example, in *Lopez v. Montemayor*,²¹³ the San Antonio Court of Appeals held that an argument that the appellants raised only in their reply brief was not properly before the court. In *Lopez*, the plaintiffs’ medical malpractice case was dismissed for failure to file an adequate expert report as required by article 4590i, section 13.01 of the revised civil statutes.²¹⁴ The trial court determined that the plaintiffs’ expert report did not adequately present causation. The plaintiffs’ reply brief pointed to a second expert report they claimed supported causation. Because neither the appellants’ nor the appellees’ briefs addressed this additional expert report, the court of appeals would not consider the new argument. In another case, this rule was applied to find waiver on appeal—even though the appellant’s reply brief addressed issues specifically raised in the appellee’s brief.²¹⁵

IX. RESTRICTED APPEALS

A restricted appeal must “(1) be brought within six months after the trial court signs the judgment, (2) by a party to the suit, (3) who, either in person or through counsel, did not participate at trial, and (4) the error complained of must be apparent from the face of the record.”²¹⁶ The

207. *Id.* at 678.

208. *Id.*

209. 135 S.W.3d 162 (Tex. App.—Tyler 2004, no pet.).

210. TEX. PROP. CODE § 27.002 (Vernon Supp. 2004-2005).

211. See TEX. CIV. PRAC. & REM. CODE § 38.001 (Vernon 1997).

212. *Bankhead*, 135 S.W.3d at 164.

213. 131 S.W.3d 54 (Tex. App.—San Antonio 2004, pet. denied).

214. TEX. REV. CIV. STAT. art. 4590i, § 13.01 (Vernon Supp. 2004-2005).

215. *Bankhead*, 135 S.W.3d at 164-65 (holding that proper authority should have been raised in appellant’s initial brief).

216. *Rivero v. Blue Keel Funding, L.L.C.*, 127 S.W.3d 421, 423 (Tex. App.—Dallas 2004, no pet.); TEX. R. APP. P. 26.1(c), 30; see also *Armendariz v. Barragan*, 143 S.W.3d

issue when analyzing the participation requirement of a restricted appeal “is whether appellant took part in the decision-making event that results in the adjudication of his rights.”²¹⁷ In the summary judgment context, a party who takes part in all necessary steps of the summary judgment proceedings, but merely fails to attend the hearing, “participated at trial” for purposes of a restricted appeal. However, a party who does not respond to or appear at the hearing on a motion for summary judgment does “not participate in the actual decision-making event from which the judgment against him resulted” and may challenge the judgment by restricted appeal.²¹⁸

Review by restricted appeal “entitles the appellant to the same scope of appeal as an ordinary appeal, except the error must appear on the face of the record.”²¹⁹ For purposes of a restricted appeal, “the record consists of all documents on file with the trial court at the time of judgment.”²²⁰

X. REVIEW AND DISPOSITION ON APPEAL

A. VENUE RULINGS

Generally, as a part of appellate review, the Texas appellate courts are required to presume that a trial court’s order that does not specify grounds is correct if any meritorious ground was before the trial court.²²¹ During the Survey period, the Texas Supreme Court in *Garza v. Garcia* analyzed this rule in the context of venue determinations, in which appellate review of convenience transfers is precluded by statute.²²² Specifically, under section 15.002(b) of the Texas Civil Practice and Remedies Code, a trial court’s decision to transfer venue for the convenience reasons is “not grounds for appeal or mandamus and is not reversible error.”²²³ What if the motion to transfer venue asserts both improper venue and inconvenience, and the trial court grants the motion without specifying the grounds? Is the ruling reviewable on appeal?

Applying the presumption in favor of unspecific orders outlined above, the majority in *Garza* said *no*, the ruling is not reviewable on appeal, even though the court could not be certain that the motion was granted on convenience grounds.²²⁴ In reaching this conclusion, the majority acknowledged that “it is irrelevant whether a transfer for convenience is

853, 854 (Tex. App.—El Paso 2004, no pet.) (“A restricted appeal (1) must be brought within six months of the date of judgment; (2) by a party to the suit; (3) who did not participate in the hearing that resulted in the judgment complained of and who did not file a timely post-judgment motion; and (4) the error must be apparent from the face of the record.”).

217. *Rivero*, 127 S.W.3d at 423-24.

218. *Id.* at 424.

219. *Armendariz*, 143 S.W.3d at 854.

220. *Id.*

221. *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993).

222. 137 S.W.3d 36 (Tex. 2004).

223. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(c) (Vernon 2002).

224. *Garza*, 137 S.W.3d at 39.

supported by *any* record evidence.”²²⁵ In fact, the court admitted that, because transfer orders based on convenience may not be reviewed on appeal, a trial court could overtly state that there was no evidence for a convenience transfer, and there is little an appellate court could do about it.²²⁶

The dissenting justices disagreed with the majority’s analysis, arguing that trial courts should be required to state the basis for a transfer in the transfer order or otherwise in findings in the record when the grant of a motion to transfer venue is based on convenience of the parties.²²⁷ This is important because, if the trial court transferred the case based on an improper venue analysis (as opposed to convenience), that ruling is automatically reversible under legislative mandate.²²⁸ To preserve this mandate, the dissenters maintained, the trial court needs to clarify its basis for transferring the case.²²⁹

B. CLASS CERTIFICATION RULINGS

Subparts (b) and (c) of Rule 42 of the Texas Rules of Civil Procedure provide two separate bases for certifying a lawsuit as a class action. Subpart (b) allows certification when the principal claim in the case is one for declaratory or injunctive relief.²³⁰ Subpart (b)(3) contemplates certification in cases where issues of “law or fact common to the members of the class predominate over any questions affecting only individual members and a class action is superior to other available methods for [the fair and efficient] adjudication of the controversy.”²³¹

In *Southwestern Refining Co. v. Bernal*, the supreme court held that “[c]ourts must perform a ‘rigorous analysis’ before ruling on class certification to determine whether all prerequisites to certification have been met.”²³² While *Bernal* involved certification under Rule 42(b)(3), the supreme court clarified in *Compaq Computer Corp. v. LaPray* that the same “rigorous analysis” applies in Rule 42(b)(2) cases.²³³ The focus in a Rule 42(b)(2) case, however, is on the requirement of “cohesiveness”—the trial court must rigorously analyze the cohesiveness and homogeneity of the class. According to the supreme court, in many cases, “this analysis will be identical to the ‘predominance and superiority’ directive undertaken by trial courts certifying (b)(3) classes.”²³⁴

In the wake of *Bernal* and *LaPray*, is the standard of review for class certification decisions still abuse of discretion? According to the Texar-

225. *Id.* (emphasis added).

226. *Id.*

227. *Id.* at 44-45 (Phillips, C.J., dissenting, joined by Wainwright, J.).

228. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 2002).

229. *Garza*, 137 S.W.3d at 45.

230. TEX. R. CIV. P. 42(b)(2).

231. TEX. R. CIV. P. 42(b)(3).

232. 22 S.W.3d 425, 435 (Tex. 2000).

233. 135 S.W.3d 657, 671 (Tex. 2004).

234. *Id.*

kana Court of Appeals, the standard is the same, although *Bernal's* use of the term "rigorous analysis" instructs the courts of appeals "to review the certification under an abuse of discretion standard, *provided that the trial court exercised its discretion within the framework of the rule.*"²³⁵

XI. MOOT APPEALS

Under the "acceptance-of-benefits doctrine," a litigant "cannot treat a judgment as both right and wrong."²³⁶ As a result, if a party "*voluntarily* accepts the benefits of a judgment, she is barred by the acceptance-of-benefits doctrine from appealing it."²³⁷ Notably, this rule applies only if the acceptance is *voluntary*. It does not apply to a party "who is compelled to accept the benefits of a judgment by 'economic circumstances.'"²³⁸ Accordingly, the doctrine does not apply to a party who accepts benefits awarded in a divorce decree to provide for necessities, including basic living expenses.²³⁹

Rule 7.1(a)(1) of the Texas Rules of Appellate Procedure provides that, if a party to a civil appeal dies during the pendency of an appeal, the court of appeals will adjudicate the appeal "as if all parties were alive."²⁴⁰ However, "[i]f the death of the party results in the end of any controversy between the parties, then the appeal is rendered moot and is dismissed."²⁴¹ But if a remaining claim involves the property rights of the parties, "then the claim survives the death of a party."²⁴²

235. *Vanderbilt Mortgage & Fin., Inc. v. Posey*, 146 S.W.3d 302, 311 (Tex. App.—Texarkana 2004, no pet.) (emphasis added).

236. *Garza v. Garza*, 155 S.W.3d 471, 474-75 (Tex. App.—San Antonio 2004, no pet.)

237. *Id.* (emphasis added).

238. *Id.*

239. *Id.*

240. TEX. R. APP. P. 7.1(a)(1).

241. *Kenseth v. Dallas County*, 126 S.W.3d 584, 593 (Tex. App.—Dallas 2004, pet. denied).

242. *Id.* at 593-94 (concluding that appeal of judgment assessing sanctions against appellant of \$65,500 was not mooted by his death).