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Civil Evidence

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CIVIL EVIDENCE

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I. INTRODUCTION

DURING this Survey period, the Texas Supreme Court addressed the timely waiver of objections to expert testimony and the reliability of expert testimony on damages, considered the significance of an *in camera* review in connection with assertions of attorney-client privilege, and reviewed the appropriateness of death-penalty sanctions. The appeals courts grappled with the affidavit requirements under the Medical Liability Insurance Improvement Act and created a conflict ripe for consideration by the Texas Supreme Court concerning whether expert witness statements are party opponent admissions.

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II. ADMISSIBILITY OF EXPERT TESTIMONY

Once again, the connection between expert testimony and the specific issues in a case was addressed by the Fifth Circuit during this Survey period.[1] Also considered was the waiver of an objection to expert testimony, the distinction between actual and merely hypothetical alternative explanations an expert is required to consider, the admissibility of play therapy expert testimony, and the adequacy of expert reports under the Medical Liability Insurance Improvement Act. Although other cases were reported concerning expert testimony,[2] the following had the most impact.

A. THE FEDERAL *DAUBERT* CASES

In *Vogler v. Blackmore*,[3] the Fifth Circuit addressed the admissibility of a thanatologist, or "grief" expert. After the plaintiff's wife and daughter were killed when a tractor-trailer ran over the roof of their car from front to back, he brought a wrongful death action against the driver of the tractor-trailer and the driver's employer. At trial, the plaintiff presented an expert in thanatology, which is the study of the effects of approaching death and the needs of the terminally ill and their families. Although highly qualified academically, the expert did not interview or evaluate the plaintiff, confining her testimony to general theories about grief and recovery. The defendants appealed the jury's damage award, contending that the expert's testimony was not relevant because it was unconnected to the facts of the case. The court disagreed, noting its 2003 holding in *Bocanegra* allowing general expert testimony.[4] The defendants also argued that the expert's testimony would not have assisted the jury because grief is a universally experienced emotion that is within the common sense understanding of jurors and that the admission of such testimony might unduly influence the jurors with its scientific appearance. The court acknowledged these dangers were present in the relatively untested area of grief expert testimony. However, the defendants had not timely objected to the admission of such testimony, and they had not challenged the expert's credentials. The trial court thus had discretion to consider whether the jury was competent to assess the evidence intelligently without expert testimony, whether the evidence had probative weight, and the

1. During the last Survey period, the Fifth Circuit held that an expert could testify generally about the effects of marijuana on a person's cognitive functions despite a defendant's objection that the expert could not tie the marijuana use to the cause of an accident. *See* Bocanegra v. Vicmar Servs., Inc., 320 F.3d 581, 587 (5th Cir. 2003).

2. *See, e.g.*, Primrose Operating Co. v. Nat'l Am. Ins. Co., 382 F.3d 546, 562-63 (5th Cir. 2004) (addressing expert testimony on attorneys' fees); Loram Maint. of Way, Inc. v. Ianni, 141 S.W.3d 722, 730 (Tex. App.—El Paso 2004, pet. filed) (concerning admissibility of expert testimony on effect of amphetamines); Brookshire Bros., Inc. v. Smith, No. 01-02-00677-CV, 2004 WL 1064776, at *5 (Tex. App.—Houston [1st Dist.] May 13, 2004, no pet. h.) (finding unreliable causation testimony that relied on manufacturer provided data rather than the expert's actual knowledge).

3. Vogler v. Blackmore, 352 F.3d 150 (5th Cir. 2003).

4. *Id.* at 155 (citing *Bocanegra*, 320 F.3d at 587).

risk of prejudice.[5] Because the expert's testimony was relevant, the district court did not abuse its discretion in admitting the evidence, even if it was not necessary, and even if it had, the testimony was harmless because the jury already knew the tragic facts of the case, had seen photos of the happy family and the mangled remains of their car, and it was therefore highly unlikely that the expert's testimony aided in the jury's resolution of the case or its awards.[6]

B. The State *Robinson* Cases

The Texas Supreme Court addressed the timeliness of a challenge to expert testimony in *Coastal Transport Co., Inc. v. Crown Central Petroleum Corp.*[7] Crown Central sued for negligence and gross negligence after a Coastal gasoline truck caused a fire that destroyed a Crown Central gasoline loading facility. The trial court granted Coastal's motion for directed verdict on the issue of gross negligence due to insufficient evidence. Crown Central appealed, arguing that its trucking safety expert presented evidence of conscious indifference by Coastal when he opined that Coastal had an actual awareness of risk and nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others. Coastal responded that the expert testimony was conclusory and factually unsubstantiated and therefore constituted no evidence in support of Crown Central's gross negligence claim. The appeals court held Coastal had waived its right to assert that the expert testimony constituted no evidence because it had not objected to the testimony at trial.[8] The Texas Supreme Court reversed and rendered, holding that an objection to expert testimony must be timely made only when the objection "requires the court to evaluate the underlying methodology, technique, or foundational data used by the expert."[9] Because Crown Central's expert testimony was conclusory and therefore non-probative on its face, Coastal had not waived its no evidence challenge despite its failure to object to the admissibility of the expert's testimony.[10]

In *Kerr-McGee Corp. v. Helton*, the Texas Supreme Court rejected damages testimony from a petroleum engineer based on the *Gammill* analytical gap test.[11] The plaintiff brought suit against Kerr-McGee for failure to drill an additional well to prevent drainage and offered the testimony of an engineer as to the amount of gas a hypothetical well would have produced. Relying on the engineer's testimony that he based his projection of the hypothetical well's production on the assumption

5. *Id.* at 156.
6. *Id.*
7. 136 S.W.3d 227 (Tex. 2004).
8. *Id.* at 230-31.
9. *Id.* at 233.
10. *Id.*
11. Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 254 (Tex. 2004) (citing Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726 (Tex. 1998) (holding that expert testimony is unreliable if there exists "'too great an analytical gap between the data and the opinion proffered'") (quoting Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997)).

that the hypothetical well would have produced at the same rate as two existing wells, the trial court awarded damages.[12] Because the expert (1) admitted that the hypothetical well would have a different wall thickness from the existing wells, which would cause it to produce less; (2) failed to testify with any specificity how other factors would increase production; and (3) did not explain how he used the data to reach his opinion, the court found there was too great an analytical gap between the data and the conclusions, and the testimony was therefore unreliable and incompetent.[13]

The Fort Worth and San Antonio Courts of Appeals were also fairly active in 2004 in the area of expert testimony. The Fort Worth Court of Appeals, in *Allstate Texas Lloyds v. Mason*, examined whether an expert must exclude merely hypothetical alternative explanations. After Allstate determined that damage to the Masons' home was not caused by a plumbing leak and was thus not covered by their insurance, the Masons sued Allstate and presented testimony from an engineering expert who opined that the damage to the house was the result of a plumbing leak. During a *Daubert* hearing, the plaintiff's expert conceded that plumbing pipes could hypothetically break due to soil movement and that he had not investigated why the pipes had broken in this case. On appeal, Allstate argued that because the expert had not ruled out other possible causes of damage to the house, his testimony was unreliable and should not have been admitted. The court rejected this argument because the expert had testified that he had excluded the possibility that the problems that had caused previous foundation damage, including soil movement, were the cause of the damage at issue at trial. He had also testified that he did not believe that seasonal moisture, which can cause soil movement, caused the damage at issue. Furthermore, Allstate's questions to the expert were based on hypothetical situations that had not been shown to be plausible causes of the foundation damage.[14] The court found that "there was no evidence presented during the hearing to show that soil movement was a plausible cause of the foundation problems" or that such movement could break plumbing pipes.[15] The trial court, therefore, did not abuse its discretion in admitting expert testimony where Allstate had devised a hypothetical theory at the hearing that it had not shown was "possible or provable."[16]

The Fort Worth Court of Appeals accepted the expert testimony of a play therapist in *In re A.J.L.*[17] In this termination of parental rights case, the court allowed a play therapist to testify about the play therapy she had conducted with the child. By "using puppets in a play-acting scena-

12. *Id.* at 249-50.
13. *Id.* at 257-58.
14. Allstate Tex. Lloyds v. Mason, 123 S.W.3d 690, 699 (Tex. App.—Fort Worth 2003, no pet.).
15. *Id.*
16. *Id.*
17. 136 S.W.3d 293, 296 (Tex. App.—Fort Worth 2004, no pet. h.).

rio," she concluded that the child felt "he needed to protect his baby sister and that he had been traumatized at home."[18] The court, considering testimony that (1) play therapy was "highly regarded" and "a generally accepted method for counseling children;" (2) "research in the area of play therapy" showed it was a "successful and effective way to work with children;" (3) there were no studies challenging the reliability of play therapy; and (4) it had "been used for decades and [was] widely accepted in the counseling community," held that play therapy is a legitimate field of expertise.[19] The court also noted that other courts had accepted play therapy as a basis for expert testimony.[20]

The Fort Worth Court of Appeals excluded testimony from a pediatric ophthalmologist in *Gross v. Burt*,[21] finding that it lacked a reliable foundation. In that case, twin boys were born prematurely and were at risk of retinopathy of prematurity ("ROP"), which can cause vision loss. Babies at risk of ROP require serial screening and special eye exams to determine when the disease has reached "threshold." Treatment before threshold is not effective, but treatment must usually occur within seventy-two hours of threshold to improve the ultimate outcome. Dr. Perdue, one of the twins' doctors first saw the boys when they were forty-one and one-half weeks old. She did not initiate a referral to a pediatric ophthalmologist until a month later and did not determine that the twins' external eye exams were abnormal until two months later. By then, the twins were legally blind. The plaintiffs alleged that Dr. Perdue's negligence proximately caused the twins' blindness. Because the median age of threshold for ROP is thirty-seven and one-third weeks, Dr. Perdue claimed that the twins had already reached threshold by the time of their first visit with her and that her actions did not deprive the twins of more than a fifty percent chance of a different outcome.[22]

The plaintiffs's expert, a pediatric ophthalmologist testifying on causation, conceded that based on ROP studies, the odds were ninety-five percent or more that the twins had passed threshold before seeing the doctor. He also agreed that seventy-two hours was the accepted standard of care for treating ROP after observed threshold, but testified that it was not proven whether treatment more than seventy-two hours after threshold is effective. He stated that he had treated some patients ninety-six hours after observing threshold and that they had done as well as the patients treated within seventy-two hours. However, he admitted that approximately forty-seven percent of the children who were treated within the seventy-two-hour window after threshold still became blind. On appeal, the defendant doctor argued that the expert's opinion that the twins would still have had a better than fifty percent chance of improvement if the doctor had immediately referred them for treatment was un-

18. *Id.* at 296.
19. *Id.* at 299.
20. *Id.*
21. 149 S.W.3d 213 (Tex. App.—Fort Worth 2004, pet. filed).
22. *Id.* at 230-31.

reliable.[23] The appeals court agreed, pointing out that the expert acknowledged there were no studies supporting his theory that ROP "could be treated effectively outside the seventy-two hour window . . . because no physician would knowingly withhold treatment upon an observation of threshold ROP."[24] Furthermore, in the only study cited in which treatment did not occur within seventy-two hours of threshold, none of the patients achieved a positive outcome. The expert's testimony regarding his own personal experience only supported the conclusion that treatment within ninety-six hours after observing threshold was effective. The testimony that the defendant's negligence proximately caused the twins' injuries was thus unreliable and constituted no evidence of causation.[25]

In *Wiggs v. All Saints Health System*,[26] the Fort Worth Court of Appeals rejected expert testimony regarding the causation of ischemic optic neuropathy "(ION") as unreliable. The plaintiff suffered vision loss from ION following his back surgery and claimed that the negligence of All Saints Health System and its doctors caused his ION. The trial court excluded the testimony of two of the plaintiff's experts as scientifically unreliable and entered a take-nothing judgment in favor of All Saints and the doctors. The plaintiff appealed on the grounds that the trial court had incorrectly applied the *Daubert/Robinson* factors instead of the *Gammill* analytical gap test.[27] The appeals court disagreed, stating that although the trial court had not specified which analysis it had applied, the expert testimony failed regardless of what standard applied.[28] For example, one of the experts had never administered anesthesia in a similar case, and only one of his patients might have had ION. The court concluded that the expert's lack of personal experience with patients having ION amounted to "no experience at all:" he had "no special training regarding ION or its causes," had never treated anyone for ION, had never made a diagnosis of ION, and had never authored any journal articles on ION.[29] In fact, he had only read two articles on ION, and he did not explain how they supported his opinion. Moreover, the articles stated that the causes of ION are unknown in the scientific community and confirmed that post-surgical vision loss is rare and that many other factors might have important contributory roles in the development of post-operative visual problems. The second expert had only diagnosed forty *post-surgery* ION patients since 1970, and had no special training regarding the actual cause of ION.[30] The court stated that while this experience might provide a basis for him to express an opinion on treating ION, it did not provide a

23. *Id.*
24. *Id.* at 240.
25. *Id.* at 241.
26. 124 S.W.3d 407, 410-11 (Tex. App.—Fort Worth 2003, pet. denied).
27. *Id.* at 416.
28. *Id.*
29. *Id.* at 413.
30. *Id.*

reliable basis for him to give an expert opinion on what caused a particular patient's ION. The court found that neither expert's testimony was sufficiently reliable to be admissible.[31]

The San Antonio Court of Appeals reversed a trial court's decision to allow expert testimony regarding the cause of tetanus in *Texas Mutual Insurance Co. v. Lerma*.[32] Sixty days after Cresencio Lerma punctured his arm with barbed wire at work, he was admitted to a hospital where he was diagnosed with tetanus and died shortly thereafter. Lerma's wife filed a worker's compensation claim, alleging that the barbed wire injury was the producing cause of his death. Lerma presented expert testimony that the tetanus infection was a result of the barbed wire incident based on a study finding that ten percent of tetanus cases developed more than two weeks from the initial puncture wound. After a jury trial, the trial court entered judgment for Lerma. The insurer appealed, arguing that the expert's testimony was unreliable and speculative as to the cause of Lerma's death. The expert had admitted that he knew of no scientific evidence indicating that a person could contract tetanus after more than twenty-one days and that he could not eliminate other ways Lerma might have contracted tetanus.[33] The appeals court found that in light of the incubation period and the numerous other existing probable causes for the infection, the expert was unable to prove with reasonable probability that Lerma contracted tetanus from his barbed wire wound and his conclusion was thus an inference of causation "amounting to no more than conjecture or speculation."[34] Therefore, "the trial court [had] abused its discretion in admitting his testimony."[35]

The San Antonio Court of Appeals also reversed a trial court's decision allowing expert testimony regarding the cause of tire failure in *Goodyear Tire & Rubber Co. v. Rios*.[36] The Rios family pickup truck had a used tire manufactured by Goodyear. The truck rolled over when the tire's tread and belt separated from the inner belt, causing the death of Mr. Rios. Mrs. Rios sued Goodyear and the retailer of the tire, claiming that the manufacturing defect had prevented the outer belt and inner belt of the tire from properly bonding. After a jury trial, the trial court rendered judgment against Goodyear. On appeal, Goodyear attacked the testimony of the plaintiff's two experts. The first expert based his opinion on observations he made either by touch or sight. He examined the failed tire and concluded that the tread separation had resulted from a manufacturing defect.[37] Holding that the testimony was unreliable, the court noted that there was no "evidence in the record indicating that other experts in the industry" used the same methodology to determine if

31. *Id.* at 414.
32. 143 S.W.3d 172 (Tex. App.—San Antonio 2004, pet. filed).
33. *Id.* at 176-77.
34. *Id.* at 177.
35. *Id.* at 178.
36. 143 S.W.3d 107 (Tex. App.—San Antonio 2004, pet. filed).
37. *Id.* at 113-14.

a manufacturing defect exists, "as opposed to a defect caused by the use and abuse of a tire over time," and the expert "did not refer to any article or publication that specifically supported his approach."[38] The second expert was a research scientist with educational degrees in chemistry, polymer science, and engineering. Although his background included research generally into the adhesion properties of various materials, he had no specific experience with tires. The court stated that while he could "discuss adhesion failures generally, he was not qualified to opine on the specifics [of] whether the Rios's tire failed because of an adhesion defect present at the time of manufacture."[39] He was therefore "not qualified as an expert in the field of tire failure analysis," and his testimony was "legally insufficient evidence of a manufacturing defect."[40]

C. Expert Reports and Affidavits

Two courts addressed the adequacy of expert reports under the Medical Liability Insurance Improvement Act ("Act") during this Survey period. The Act, repealed by the Act of June 2, 2003, and recodified as Texas Practice & Remedies Code Annotated Section 74.351, allows a party to challenge an expert report by a motion to dismiss if the report fails to comply with the statutory definition of "expert report."[41] Specifically, the statute requires that an expert report provide a fair summary of the expert's opinion "regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between the failure and the injury, harm, or damages claimed."[42] Texas courts have struggled over the last few years in determining whether or not particular expert reports meet this test. The trend continued this Survey period, with one court accepting the plaintiff's expert report and the other court rejecting the plaintiff's report.

In *Chandler v. Singh*,[43] the Texarkana Court of Appeals reversed the trial court's dismissal of a case in which the plaintiff claimed she was injured in an automobile accident caused by a seizure brought on by Ultram—medication prescribed for her by the defendant. The court acknowledged that a report must do more than "merely stat[e] the expert's conclusions about the standard of care, breach, and causation."[44] Rather, the expert report must specifically set out the standard of care, describe how that care was breached, and must include more than conclusory insights concerning causation. Further, the court held that a good faith effort requires that the report discuss the standard of care, breach, and causation with enough specificity to inform the defendant of the con-

38. *Id.* at 115.
39. *Id.* at 116.
40. *Id.*
41. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351 (Vernon 2005).
42. *Id.*
43. 129 S.W.3d 184 (Tex. App.—Texarkana 2004, no pet. h.).
44. *Id.* at 188.

duct the plaintiff has brought into question.[45] However, the plaintiff is not required to present evidence in the report as if it were actually litigating the merits, and the report can be informal.[46] In *Chandler*, the first expert, Dr. Ginsburg, briefly addressed causation, stating "[t]he literature clearly states that a person with a prior history of seizure activity . . . is at an increased risk of having a seizure when taking Ultram."[47] The second expert, Dr. Fischer, expanded on causation, stating:

> Taking Tegretol and Ultram lowered [the plaintiff's] threshold for seizures and she suffered a seizure while driving 5/24/99 resulting in her motor vehicle accident and subsequent injuries. [Plaintiff] had been seizure-free for at least six years and stable on her current medication. If a different medication had been prescribed instead of Ultram more likely than not she would not have suffered the seizure and the resulting accident . . . .
> Five days [after receiving the prescription for Ultram, Plaintiff] . . . had a seizure while driving and suffered multiple injuries in a motor vehicle accident. More likely than not[,] taking Ultram was a direct and proximate cause of the seizure and a motor vehicle accident.
> . . . It is my medical opinion that the deviation from pharmacy standards of care as stated by Diane Ginsburg [in her report] was another cause of the damages suffered by Debra Chandler.[48]

After reviewing the two expert reports in question, the court of appeals found that although reference to causation was brief in the first report, together, the reports were sufficient to put the defendant on notice as to what actions were being challenged.[49]

By contrast, the San Antonio Court of Appeals found in *Hutchinson v. Montemayor*,[50] that the plaintiff's expert report did not show a good faith effort in establishing the causation element. The plaintiff, who had a long history of diabetes and vascular disease, sued after an ulcer on his heel caused a below-the-knee amputation. The defendants filed a motion to dismiss, contending that the expert report did not meet the statutory requirements because it was conclusory and based on mere conjecture. Specifically, the report stated that had a certain medical procedure been done "there would have been a possibility that [the plaintiff] may have had bypassable lesions and that the amputation may have been avoided. Within reasonable medical probability these doctors's [sic] breaches caused injury to [the plaintiff]."[51] Because the court could not infer from the expert report that the discovery of bypassable lesions would have prevented the amputation or that the plaintiff's amputation could have been avoided, the report did not show a good faith effort to comply with the

45. *Id.*
46. *Id.*
47. *Id.* at 190.
48. *Id.* at 191.
49. *Id.*
50. 144 S.W.3d 614, 617 (Tex. App.—Texarkana 2004, no pet. h.).
51. *Id.* at 617.

statutory requirements.[52] The court rejected the plaintiff's contention that the phrase "reasonable medical probability" satisfied the statutory requirement that the report provide more than speculation or conjecture.[53]

III. PRIVILEGES

The Survey period brought review of numerous privileges, including the physician-patient, peer-review, and of course, the attorney-client privilege.

A. PHYSICIAN-PATIENT PRIVILEGE

In *In re Arriola*,[54] the Corpus Christi Court of Appeals addressed the discovery of medical records and testimony regarding a nursing home patient. The family and estate of the patient sued Sunnybrook Health Care Center, alleging sexual assault by another resident. The plaintiffs claimed that Sunnybrook had knowledge of previous assaults of other Sunnybrook staff members and residents by the same resident. Sunnybrook asserted claims of physician-patient privilege to almost all deposition questions pertaining to the resident and refused to produce similar documents.[55] Acknowledging an exception to the privilege for abuse and neglect cases, the appeals court conditionally granted a writ of mandamus requiring the trial court to vacate its protective orders and grant the plaintiff's motion to compel.[56]

The court noted that by contrast to section 242.129 of the Health & Safety Code, which contains exceptions that only apply to proceedings brought by law enforcement agencies, the abuse and neglect exceptions to Texas Rules of Evidence 509 and 510 contain no such limitations and explicitly state that "they apply to 'any proceeding regarding the abuse or neglect'" of a resident of a statutorily-defined "institution."[57] Although several provisions of the Health & Safety Code and Human Resources Code could also prevent a nursing facility from releasing certain medical information, "each of the confidentiality and privilege provisions cited" by Sunnybrook contained "an exception to nondisclosure where release of the information [was] required by law" or court order.[58] Because the rules of evidence required release of the information, the statutes and rules cited by Sunnybrook did not prevent disclosure.[59] The court acknowledged that it had previously ruled in a factually similar case, *In re Diversicare General Partner, Inc.*, that various provisions of the Health &

52. *Id.*
53. *Id.*
54. No. 13-03-376-CV, 2004 WL 1244289, at *1 (Tex. App.—Corpus Christi June 3, 2004, orig. proceeding).
55. *Id.*
56. *Id.* at *6.
57. *Id.* at *3.
58. *Id.* at *4.
59. *Id.* at *5.

Safety Code, the Human Resources Code, and the Administrative Code prohibited disclosure of medical information about an assaulting patient.[60] However, the parties in that case had not referenced the rules of evidence, and the court stated that had they done so, the result most likely would have been different. The appeals court thus overruled *Diversicare* to the extent that it was inconsistent with its analysis in *Arriola*.[61]

B. Peer Review Privilege

The Austin Court of Appeals addressed the tension between the Public Information Act and medical peer review privileges in *Capital Senior Management 1, Inc. v. Texas Department of Human Services*.[62] The Texas Department of Human Services ("Department") received a request to disclose public information about Capital Senior Management 1, Inc. ("Capital"), a nursing home operator. Capital asserted various peer review privileges and a quality of care privilege and sued to enjoin the release of the documents. The trial court denied Capital's request and ordered the documents released. The requested documents were compiled by the Department for its annual surveys and licensing examinations and its investigations of complaints of abuse or neglect. Some documents were generated by Capital, and some were generated by the Department. The documents generated by Capital were titled "Facility Investigation Reports" and "Facility Abuse/Neglect Investigation Reports" and were used by the Department in their investigations.[63] The appeals court held that these documents were privileged and that the trial court had erred in ordering their production.[64] Pursuant to Texas Health & Safety Code section 242.127, "reports, records, and working papers used" or developed by the Department in an investigation of "a complaint of abuse or neglect" are privileged, partially to protect the identity of the patient and partially to protect the integrity of the investigation process.[65]

By contrast, the documents created by the Department were public and therefore subject to disclosure.[66] Capital argued that these documents fell within various peer review privileges because the documents were reviewed by hospital committees and because the Department was an extension of Capital's peer review committees in that (1) its work fell within the Committee's quality of care oversight function and (2) Department investigators were members of Capital's peer review committees. The court noted that Department representatives were "not agents of the

60. *Id.* (citing *In re* Diversicare Gen. Partner, Inc., 41 S.W.3d 788 (Tex. App.—Corpus Christi 2001, orig. proceeding)).
61. *Id.*
62. 132 S.W.3d 71 (Tex. App.—Austin 2004, pet. filed).
63. *Id.* at 73.
64. *Id.*
65. *Id.* at 76.
66. *Id.* at 79.

nursing home and [were] not for hire."[67] Moreover, public information cannot be cloaked "in confidentiality by first filtering it through the peer-review process."[68] Merely because the Department's reports might have dealt "with the nursing home's quality of care" and might have "been reviewed by a peer review committee" did not give them a "committee privilege."[69] Furthermore, chapter 242 of the Health & Safety Code, Title 40 of the Administrative Code, and federal law "make all inspection, survey, or investigation reports public either through the nursing home or through the Department."[70] The documents here were generated by the Department and "were not the product of a committee's deliberative process," and therefore were not privileged.[71]

Martinez v. Abbott Laboratories[72] reviewed the peer review committee privilege and the medical committee privilege. In this case, the plaintiff alleged she was administered morphine through a defective patient-controlled anesthesia pump at the Harris Methodist Fort Worth Hospital. During discovery, the plaintiff requested documents relating to hospital investigations of the incident and asked the hospital to describe its investigations of the incident. The hospital withheld documents and information on the basis of peer review privilege and refused to provide deposition testimony regarding its investigations of the incident. The hospital supported its claims of privilege with affidavits from its Directors of Risk Management and Continuous Improvement, and it submitted the documents it claimed were privileged to the trial court for an *in camera* review. The trial court held that all but two of the documents were privileged and that the plaintiff could only inquire into whether the hospital had investigated the incident, "who was involved in the investigation, and when and where the investigation was conducted."[73]

After the plaintiff appealed, the court of appeals first examined the peer review privilege and noted that a "medical peer review committee" must be a hospital committee that both "operates under the hospital's written bylaws and is authorized to evaluate the quality of medical and health care services or the competence of physicians."[74] The Risk Management Director's affidavit stated that Harris's Risk Management Committee was established pursuant to Harris's bylaws, but was silent on whether the Committee was authorized to carry out quality reviews. While the affidavit indicated that the Risk Management Committee directed investigations of identified risk exposure and reports of dissatisfaction, it did not state whether these investigations were performed for the purpose of quality assessment or for the purpose of financial claims ad-

67. *Id.* at 78.
68. *Id.*
69. *Id.*
70. *Id.* at 79.
71. *Id.*
72. 146 S.W.3d 260 (Tex. App.—Fort Worth 2004, pet. filed).
73. *Id.* at 264-65.
74. *Id.* at 265-66.

justment. Thus, the hospital did not prove that that committee was entitled to assert the peer review privilege for any investigation documents it generated.[75] By contrast, the affidavit of Harris's Director of Continuous Improvement stated that the Quality Review Committee was one of the committees formed under Harris's bylaws "to review and evaluate the provision of medical care, including the performance of physicians."[76] It further explained that the Quality Review Committee could perform a peer review evaluation of an incident underlying a health care liability claim and generate a peer review file containing confidential documentation not kept in the regular course of business. This affidavit was sufficient to establish the peer review privilege, and the records and determinations of and communications to Harris's Quality Review Committee were protected by the medical peer review committee privilege.[77]

The court then addressed the medical committee privilege, which protects records and proceedings of a "medical committee" unless the records are made or maintained in the regular course of business by a hospital. A medical committee is broadly defined and includes any committee of a hospital. The affidavit of Harris's Risk Management Director was sufficient to show the Risk Management Committee was a medical committee of Harris.[78] Its records and proceedings that were not made in the regular course of business were thus confidential and not subject to discovery. Here, the incident reports for the plaintiff were marked "Confidential Committee Report" and "Not part of the Medical Record."[79] Because any investigation commissioned by the Risk Management Committee would have been conducted for the committee's purposes, the documents and proceedings generated by the investigation would be protected by the medical committee privilege.[80]

The Beaumont Court of Appeals conditionally granted a petition for writ of mandamus in part in *In re Liberty-Dayton Hospital, Inc.*[81] The plaintiffs served requests for admissions asking the Liberty-Dayton Hospital to admit that a hospital administrator and members of the credentialing committee and the peer review committee had received, read, and reviewed various documents. The plaintiffs also requested various documents relating to a particular doctor and documents listing or identifying the members of the hospital's medical staff, peer review committee, and board of directors.[82] As to the request for admissions, the appeals court stated that any communication made to a medical peer review committee is privileged and deposition questions inquiring about communications to peer review committees are included in the medical peer review privi-

75. *Id.* at 266.
76. *Id.*
77. *Id.*
78. *Id.* at 267.
79. *Id.*
80. *Id.* at 267-68.
81. 144 S.W.3d 642 (Tex. App.—Beaumont 2004, pet. filed).
82. *Id.* at 644.

lege.[83] The court found "no reason to distinguish requests for admission from deposition questions" and held that the trial court had erred in compelling the hospital to respond to plaintiffs' request for admissions.[84] However, the documents sought by the plaintiffs were not created by, or at the direction of, the peer review committees of the hospital. "Documents do not become privileged simply by being reviewed or acquired by a review committee," and there is no prohibition against discovery from alternative sources.[85] Here, the documents requested did not appear on their face to be privileged, and they had not been submitted for *in camera* inspection. The court therefore could not determine whether mandamus relief was appropriate, and it directed the trial court to "conduct an examination of the documents in question to determine" whether any were discoverable.[86]

C. Attorney-Client Privilege

The Texas Supreme Court addressed the importance of an *in camera* review once a party makes a prima facie showing of privilege and tenders documents to the trial court in *In re E. I. Dupont DeNemours & Co.*[87] The defendants produced over 55,000 pages of documents spanning over sixty years and withheld 607 documents, citing the attorney-client privilege and the work-product privilege. The defendants filed an affidavit from its paralegal describing the basis of the privilege and tendered the documents to the trial court for *in camera* review. The withheld documents included (1) documents authored or received exclusively by Dupont legal representatives; (2) documents authored or received by a combination of legal and non-legal representatives; and (3) documents authored or received exclusively by non-legal representatives.

The affidavit specifically described why the first two categories of documents were privileged but was silent as to the third category. Without holding an *in camera* inspection, the trial court held that the first category of documents was privileged but that the remaining two categories of documents were not privileged.[88] On mandamus, the Texas Supreme Court held that once the defendant "makes its prima facie showing of privilege and tenders documents to the trial court, the trial court must conduct an *in camera* inspection" before compelling production.[89] Because the affidavit was silent as to the third category, the court held that the defendant failed to meet its prima facie showing and that the trial court did not error in compelling production of those documents.[90]

The Fort Worth Court of Appeals addressed waiver of the attorney-

83. *Id.*
84. *Id.* at 644.
85. *Id.* at 646 (quoting Irving Healthcare Sys. v. Brooks, 972 S.W.2d 12 (Tex. 1996)).
86. *Id.* at 647.
87. 136 S.W.3d 218 (Tex. 2004).
88. *Id.* at 221-22.
89. *Id.* at 223.
90. *Id.* at 226.

client privilege in *Warrentech Corp. v. Computer Adapter Services, Inc.*[91] In this breach of contract and fraud case, the primary issue was whether the trial court abused its discretion by excluding, based on the attorney-client privilege, a letter that would have shown trial testimony to have been false. The third-party defendant's president testified that she had not told anyone who worked at her company to use a false name when talking to the defendant and that she did not know a specific individual who worked at Warrantech. To rebut this testimony, the defendant offered a letter that the president had written to her attorney stating that she did know the individual in question and that an employee had spoken to the individual using a false name. The third-party defendants objected to the admission of this letter based on attorney-client privilege, and the trial court excluded the letter.

The defendant alleged that the third-party defendants had waived their claim of privilege by failing to assert the privilege over three years after its production and by failing to assert the privilege within ten days after the exhibit was identified on the defendant's exhibit list.[92] The document in question was originally identified by the defendant as "an invoice with attachments"—the identical description given to hundreds of other exhibits.[93] The day before trial, the defendant amended their exhibit list to identify the document as "a letter from the third-party defendant to his lawyer."[94] The third-party defendant did not assert the privilege until the exhibit was offered at trial. The trial court held and the court of appeals affirmed that the defendant did not properly identify the document, and therefore, privilege was not waived.

The trial court also rejected admission of the document under the crime-fraud exception. The defendant argued that the exception applied because the attorney had a duty to disclose the existence of the document in order to prevent her client from working a fraud upon the court by providing false testimony. Important to the crime-fraud exception, however, is that the fraud must have been ongoing or about to be committed when the document in question was prepared. Here, the document was prepared long before anyone arguably contemplated providing false testimony during trial.[95] Consequently, there was no showing that a fraud was contemplated upon the court when the letter was written, and therefore, the crime-fraud exception was not applicable.[96]

Requirements for establishing a prima facie case of work-product privi-

91. 134 S.W.3d 516 (Tex. App.—Fort Worth 2004, no pet. h.).

92. "A party who produces material or information without intending to waive a claim of privilege does not waive that claim . . . if within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted." TEX. R. CIV. P. 193.3 (Vernon 2005).

93. *Warrantech*, 134 S.W.3d at 525.

94. *Id.* at 527.

95. *Id.* at 522.

96. *Id.* at 528.

lege were addressed in *In re Maher*.[97] In that case, the insured applied for his personal injury protection policy limits following a car accident, but the insurance company denied coverage. The insured sued and filed a motion to compel after the insurer did not respond to his requests for production. At the hearing, the insurer claimed that some of the documents were covered by the work-product privilege. The trial court ordered the insurer to provide a privilege log, which it did. The insured objected to the sufficiency of the log and requested a rehearing on the motion to compel. At the rehearing, the insurer provided more than 200 pages of withheld documents for an *in camera* inspection. The insured again directed the trial court to the inadequacy of the privilege log, but the trial court denied the motion to compel, and the insured filed a petition for a writ of mandamus.[98] The appeals court found that the insurer's privilege log was not adequate because the log provided only general descriptions of documents, stating that various logs, records, and notes were created "in anticipation of litigation" expected to commence on a certain date.[99] However, the date specified was a year after the accident occurred and a year before suit was filed. With no supporting evidence, the date did not appear to have any significance to the suit, and a "reasonable person would not have expected litigation to result" on that date.[100] By "producing over 200 pages of documents without making a prima facie case" of privilege, the insurer had "required the trial judge to inspect hundreds of documents."[101] Because the insurer failed to make a prima facie case of privilege, the burden never shifted to the insured to challenge the privilege. The trial court therefore abused its discretion by holding that the documents were privileged.[102]

D. Other Privileges

In a case of first impression, the El Paso Court of Appeals held in *Wil-Roye Investment Co. II v. Washington Mutual Bank*,[103] that an adverse inference from a non-party agent's assertion of privilege against self-incrimination was permissible in a civil action. In this factually complicated case, the plaintiff companies re-factored invoices purchased by Key Commercial Investments, Inc.[104] Key Commercial was owned and operated by Steve and Tim Holder. The predecessor of Washington Mutual Bank recommended the Riley Drilling Company as a client to Key Commercial. Steve Holder later went to work for the parent company of Riley. Subsequently, Riley and its parent company created false invoices which

97. 143 S.W.3d 907 (Tex. App.—Fort Worth 2004, orig. proceeding).
98. *Id.* at 910-11.
99. *Id.* at 914.
100. *Id.*
101. *Id.*
102. *Id.*
103. 142 S.W.3d 393, 407 (Tex. App.—El Paso 2004, no pet.).
104. Factoring invoices is a practice in which a company sells its invoices for less than their face value rather than waiting for full payment later.

they then factored, causing significant financial losses to the plaintiffs. The plaintiffs brought claims against Washington Mutual for fraud, conspiracy, and negligence. At trial, the plaintiffs introduced portions of the deposition testimony of Steve Holder, who had testified as to some subjects, but asserted his Fifth Amendment right against self-incrimination when asked about the fraudulent invoices. The bank then introduced the portions of Steve Holder's testimony in which he asserted his privilege. The bank also introduced Tim Holder's deposition testimony into evidence. The trial court ruled that it would draw an inference from both Holders' assertions of privilege—that they knew plaintiffs were being sold fraudulent invoices. The court stated that while Texas Rule of Evidence 513 prohibited the court from drawing an adverse inference against the plaintiffs as a result of the Holders' invocation of privilege, it did not prevent the court from drawing inferences against the credibility of the Holders or their involvement on the issue of causation. The court found that though the bank had been negligent, plaintiffs' losses were caused by a criminal and fraudulent scheme and therefore ruled against the plaintiffs on all of their claims.[105]

On appeal, the plaintiffs argued that Rule 513(c), which states that an adverse inference may be drawn in a civil proceeding with respect to a party's claim of the privilege against self-incrimination, did not apply in this case because the Holders were not parties to the proceeding. The bank responded that the Holders were parties for purposes of Rule 513 because they were agents of the plaintiffs. The appellate court looked to hearsay rules, which allow statements made by certain designated persons to be admissible against a named party due to the person's relationship to the party. The court also noted that federal courts had, on a case-by-case basis, allowed adverse inferences to be drawn where a non-party witness invokes the privilege. The court concluded that the rationale for allowing introduction of an agent's admissions against the principal under hearsay rules also justified the admission of evidence showing that an agent/witness "has exercised his Fifth Amendment privilege . . . where the questions substantially relate to a party's claim of defense."[106] Here, the Holders acted as plaintiffs' agents, the questions the bank sought to ask directly related to its defense, and the plaintiffs would have obtained an unfair advantage had they been able to present favorable portions of testimony while precluding cross-examination. "Allowing the fact-finder to draw an adverse inference against [the plaintiffs did not] in any way infringe upon the privilege claimed by the Holders."[107] Furthermore, other evidence at trial established that the Holders had knowledge of or were involved with the fraudulent invoices. Therefore, if there was any error, it "did not cause the rendition of an improper judgment."[108]

105. *Id.* at 399.
106. *Id.* at 406-07.
107. *Id.* at 407.
108. *Id.*

The Texarkana Court of Appeals addressed a federal law on confidentiality of drug treatment programs in *In re K.C.P.*[109] In this case, a mother's parental rights were terminated after the trial court admitted into evidence the complete record of the results of the mother's therapy and drug treatment program. The mother argued that the file was protected and made confidential by 42 U.S.C. § 290dd-2, which provides that the records of the treatment of any patient maintained in connection with the performance of any program or activity relating to a substance abuse treatment program are confidential and shall not be disclosed except if authorized by appropriate court order after application showing good cause. Here, there was no specific written or oral order finding good cause to release the documents. The state argued that there was no need for such an order because (1) the state's need "to ensure the safety and best interests of the children" must control over any parent's "right to confidentiality;" (2) the documents were created "as part of a court-instigated plan to assist" the mother; and (3) she "had waived her right to confidentiality by signing formal waivers."[110]

The appeals court disagreed, rejecting Indiana and Alaska parental termination cases that held that the interest of the child clearly outweighs any confidentiality to which a parent is entitled.[111] The court was unwilling to ignore the plain language of the civil statute, which required an "application to an appropriate court, showing good cause."[112] However, it found that the trial court was not "statutorily required to enter a written or specific oral order."[113] Instead, the court was to engage in a balancing test, and there was no error when a trial court considered objections and overruled them. The court therefore concluded that the trial court had "adequately engaged in the requisite balancing test" as required by statute, and it "did not abuse its discretion by admitting the documents into evidence."[114]

IV. SANCTIONS

In *Cire v. Cummings*,[115] the Texas Supreme Court addressed when a trial court may strike pleadings without first testing the effectiveness of lesser sanctions. During pre-trial discovery in this legal malpractice case, the plaintiff testified she had tape recorded several conversations with her attorneys, including discussions of settlement negotiations, which was the subject matter of the malpractice claim. After the plaintiff refused to produce the tapes, the trial court ordered production and also ordered counsel to pay $250 in attorney's fees. After an unsuccessful writ of mandamus, the plaintiff refused to produce the tapes, and the defendants filed

109. 142 S.W.3d 574 (Tex. App.—Texarkana 2004, no pet.).
110. *Id.* at 581-84.
111. *Id.* at 583-84.
112. *Id.* at 584.
113. *Id.*
114. *Id.* at 585.
115. 134 S.W.3d 835 (Tex. 2004).

a motion to strike her pleadings. At the sanctions hearing, the plaintiff admitted that she had possession of the audio tapes, which were the only evidence that would support or disprove her claims of misrepresentation, but her neighbor testified that she had watched the plaintiff burn the audio tapes. The trial court determined that the plaintiff had deliberately destroyed the tapes to avoid production, and it presumed that these actions prevented the attorneys from obtaining objective proof that they were not liable. The trial court granted the attorneys' motion to strike the pleadings as a sanction, finding that the plaintiff violated four discovery orders, deliberately destroyed and/or concealed material evidence, and that less stringent sanctions would be ineffective because the plaintiff's counsel (1) had never paid the $250 sanction and (2) could not cure the wrongdoing because the plaintiff had deprived the attorneys of evidence that went to the heart of the proof required to show that her claims had no merit. The appeals court reversed on the grounds that the trial court had only issued sanctions once before striking the pleadings, had failed to consider an alternative lesser sanction such as a spoliation instruction, and had not explained why lesser sanctions would not suffice.[116]

On appeal, the Texas Supreme Court noted that "death penalty sanctions may only be imposed in the first instance when the facts of the case are exceptional and such a sanction is 'clearly justified.'"[117] While a trial court is required to consider the availability of lesser sanctions, it need not test the effectiveness of each lesser sanction by actually first imposing the lesser sanction.[118] Here, the trial court had found that Cummings deliberately destroyed the audio tapes after being ordered to produce them, and the destruction of the tapes justified a presumption that they would have disproved her claim. The trial court's order contained an extensive explanation of the appropriateness of the sanction imposed, demonstrating that the trial court had considered the availability of less stringent sanctions. Cummings's "egregious conduct" made this an "exceptional case where it was fully apparent and documented that no lesser sanctions would promote compliance," and "death penalty sanctions are clearly justified."[119] Because this was an exceptional case where the only objective evidence that would have supported or disproved Cummings's claims was deliberately destroyed after multiple court orders compelling its production, the Texas Supreme Court held a harsher sanction than a mere spoliation instruction was proper.[120]

The Tyler Court of Appeals addressed the imposition of sanctions in *Hill & Griffith Co. v. Bryant*.[121] The plaintiffs in that case sued Hill & Griffith, a seller of silica products, for failing to warn of the dangers of

116. *Id.* at 838.
117. *Id.* at 841 (citing Spohn Hosp. v. Mayor, 104 S.W.3d 878, 882 (Tex. 2003)).
118. *Id.* at 842.
119. *Id.*
120. *Id.* at 843.
121. 139 S.W.3d 688 (Tex. App.—Tyler 2004, pet. denied).

silica. They requested production of all internal memoranda relating to the marketing of silica-containing products and served interrogatories requesting both details about any documents relating to the potential health hazards of silica-based products and who within the company would have possession of such documents. The defendants objected to the interrogatories and requests, and at a hearing on the plaintiffs' motion to compel, their lawyers represented to the court that every document provided to them in response to the discovery requests had been produced. However, after the court granted the plaintiffs' motion, the defendants produced three warning labels. Subsequent deposition testimony revealed that there were inter-office documents about other warning labels. On the morning of pretrial, the plaintiffs filed a motion for sanctions against the defendants for failure to produce the documents referred to in the deposition. Later that day, the defendants' counsel delivered to the plaintiffs an interoffice memorandum that detailed the history of the warning labels previously produced and the development of warning labels in response to federal regulations. During the subsequent sanctions hearing, the defendants' lawyer testified that she had made the decision to withhold the document from plaintiffs after it was sent to her. She also testified that another lawyer had been responsible for everything that had taken place at the deposition and the determination of which documents would be produced at that time. The trial court ordered that the plaintiffs be allowed to retake and take additional depositions and that the defendants pay the plaintiffs' fees associated with the depositions, the motion to compel, and the motion for sanctions. In addition, the trial court ordered the defendants' lawyer to perform fifty hours of community service with a legal aid program. The trial court also ordered counsel to turn over for *in camera* inspection other documents that had been withheld during discovery, some of which the trial court subsequently ordered to be produced. The plaintiffs then filed a second motion for sanctions, and the trial court ordered additional depositions at the defendants' expense. The plaintiffs' counsel submitted documentation showing that the total expenses pursuant to the sanctions orders totaled $17,500.30, which the trial court determined was reasonable. It entered orders granting the plaintiffs' first and second motions for sanctions, and the defendant appealed, arguing that the trial court had abused its discretion in granting plaintiffs' motions for sanctions.[122]

The defendants argued on appeal that the memo on warning labels had nothing to do with marketing, and therefore, their attorneys had a good faith basis for withholding the documents from production. The court of appeals disagreed, stating that the trial court had been explicit that all information and documentation relating to the potential health hazards of silica were to be produced. The trial judge had taken an expansive and liberal view of the plaintiffs' discovery requests, which corresponded with the views taken by the Texas Supreme Court and the United States Su-

122. *Id.* at 694, 696.

preme Court. The defendants also argued that it was their attorneys alone who had decided that the memo was not responsive and that they should not have been punished for their counsel's conduct. The court of appeals found that while the lawyer had stated that she had made the decision not to turn over the memo, other factors and circumstances showed that the defendants had played a role in the discovery abuse. For example, they had withheld the memo from their attorneys for a period of over eight months, until the court's hearing on the motion to compel, and they had also hired another lawyer who knew or should have reasonably known after the deposition that the memo had been withheld. As an agent of the defendants, his actions should be attributed to them "when determining sanctionable costs."[123] The defendants had also asserted their attorney-client privilege with regard to communications with their attorneys regarding the memo. Although Hill & Griffith had a right to claim the privilege, it showed a "lack of cooperation with the court in making its determination of whether the" company or its attorneys "should pay the discovery sanctions."[124] The lawyer also argued that the court's order for her to perform community service was not a just sanction. The court disagreed, noting that she herself had stated that she had made the decision not to produce the memo despite the court's orders. The court stated that it did not view community service for discovery abuse with much favor, but other courts had approved such sanctions. The court further stated that it believed "that the community service would persuade" her, her law firm, "and other attorneys to be careful not to take actions contrary to the liberal spirit in which they should view all discovery requests."[125]

V. MISCELLANEOUS DECISIONS OF NOTE

A. Hearsay

In *Powell v. Vavro, McDonald and Associates, L.L.C.*,[126] the Dallas Court of Appeals addressed the business records exception to the hearsay rule. The defendant travel company filed a motion for summary judgment, arguing no evidence of damages in a fraud case where the plaintiffs received a full refund of the charge for a travel club membership to their credit card. The trial court granted summary judgment, and on appeal, the plaintiffs asserted that the trial court erred in overruling their objections to summary judgment evidence. The defendant had presented two affidavits by its customer service manager, who stated that the plaintiffs' credit card had been credited and that he had personal knowledge of this information because he had received notice of a chargeback from the credit card company. The manager also stated that he was the custodian of records for the travel company and that his affidavit attached to busi-

123. *Id.* at 696.
124. *Id.*
125. *Id.* at 697-98.
126. 136 S.W.3d 762 (Tex. App.—Dallas 2004, no pet. h.).

ness records received from the credit card company.[127] The court of appeals held that the trial court had erred in admitting the documents because the affidavit failed to lay the proper foundation for the credit card documents.[128] The manager "was not a qualified witness to testify about the recordkeeping of" the credit card company for which he was not an employee, and the documents were therefore inadmissible.[129]

The Texas Supreme Court reversed a trial court's decision to admit hundreds of consumer complaints in a products liability case in *Nissan Motor Co. v. Armstrong*.[130] In that case, the plaintiff sued Nissan after she was in an accident caused by unintended acceleration, which resulted both in broken bones in her foot and nerve damage. The National Highway Traffic Safety Administration ("NHTSA") had previously received a number of complaints of unintended acceleration in the 280ZX and 300ZX cars. After an investigation, it concluded that there was no problem with the car and that the acceleration was likely caused by driver error. In response to this finding, Nissan recalled some models to install a system that required drivers to step on the brake before shifting out of park. The trial court admitted evidence from Nissan's database of the 757 consumer complaints, notwithstanding objections based on hearsay and relevance. The jury returned a verdict for the plaintiff, and the appeals court affirmed.[131]

The appeals court upheld the admission of the database, holding that (1) the accidents complained of had occurred under reasonably similar circumstances; (2) the sheer number and nature of the accidents raised an inference that the unintended acceleration was caused by something other than driver error; (3) Nissan had waived any objection to the admission of the other accidents; and (4) the database was relevant to show Nissan's knowledge of the dangerous condition of its vehicles. The Texas Supreme Court reversed and remanded, noting that evidence of similar accidents is admissible only if the other incidents have occurred under reasonably similar conditions and do not cause undue prejudice, confusion, or delay.[132] "Prolonged proof of what happened in other accidents may not be used to distract a jury's attention from what happened in the case at hand."[133] The court noted that unintended acceleration can have many causes, and competent evidence of a specific defect is required.[134] Although the plaintiff alleged that the unintended acceleration was caused by a defective throttle cable, none of the complaints Nissan received concerned the throttle cable. In fact, over 200 of the complaints involved cars that did not even have the allegedly defective throttle

127. *Id.* at 765.
128. *Id.* at 765.
129. *Id.*
130. 145 S.W.3d 131 (Tex. 2004).
131. *Id.* at 134-36.
132. *Id.* at 138.
133. *Id.*
134. *Id.* at 141.

mechanism. Therefore, there was nothing in Nissan's database of consumer complaints to suggest that the defect, if any, causing the complaints was similar to any of the defects alleged by Armstrong. Additionally, the sheer number of the reported incidents raised no inference that the unintended acceleration was caused by something other than driver error, just as the number of automobile accidents in America raises no inference that most have nothing to do with drivers' mistakes. Finally, the Texas Supreme Court rejected the court of appeals's ruling that the "database was relevant to show Nissan's knowledge of the dangerous condition of its vehicles."[135] The Court dismissed the appeals court's reasoning as being circular because the hearsay was not admissible for the truth of the matter asserted but was admissible to show Nissan's knowledge of the truth of the matter asserted.[136]

The Houston Court of Appeals raised a conflict with the Beaumont Court of Appeals with its decision in *McCluskey v. Randall's Food Markets, Inc.*,[137] regarding whether testimony of an opposing party's expert is an admission by a party opponent. The plaintiff, Robert McCluskey, was prescribed a drug by a doctor who was unaware that McCluskey had chronic obstructive pulmonary disease. McCluskey filled the prescription at Randall's Food Market Pharmacy and died a few hours later of cardiac arrest. Randall's designated an expert witness to bolster its claims against the doctor who had prescribed McCluskey's medication. After McCluskey non-suited the doctor, Randall's decided that it no longer needed Dr. Thornton's expertise or testimony. McCluskey then attempted to introduce the expert's deposition under the theory that it constituted the admission of a party opponent.[138] The trial court excluded the testimony, and the Houston Court of Appeals affirmed, disagreeing with a Beaumont Court of Appeals' decision, holding that a conclusion of an expert witness hired by an opposing party is admissible against the party opponent.[139] The Houston court stated that to treat all statements made by an expert witness as admissions of the designating party would misconstrue the rules of evidence, the law of agency, and the purpose of calling expert witnesses.[140] While an expert witness is hired by one party to testify on that party's behalf, rarely will an expert agree to be under the party's control with respect to his or her testimony. The rules of evidence require that the expert testify to his own opinion in his particular field of expertise. The opinion is to be impartial and cannot be imputed to the party who called the expert to testify. Indeed, there may be instances where a party disagrees with the testimony of its own expert. Therefore,

135. *Id.* at 141-42.

136. *Id.*

137. No. 14-03-01087-CV, 2004 WL 2340278, at *1 (Tex. App.—Houston [14th Dist.] Oct. 19, 2004, no pet. h.).

138. *Id.* at *3.

139. *Id.* at *9 (citing Yarbrough's Dirt Pit, Inc. v. Turner, 65 S.W.3d 210, 214 (Tex. App.—Beaumont 2001, no pet.)).

140. *Id.*

the testimony of an expert witness "should not, *ipso facto*, be deemed an admission of the party who originally sought the expert's opinion."[141] The court noted that, of course, an opinion may sometimes be admissible if the expert actually is an agent or employee of the party opponent.[142]

The Texarkana Court of Appeals addressed the exception to the hearsay rule for statements by a party's agent concerning a matter within the scope of the agency or employment made during the existence of the relationship in *Tucker's Beverages, Inc. v. Fopay*.[143] Twenty minutes before his scheduled work shift was to begin, a Tucker's employee, Moore, drove across a highway, striking another vehicle. The employee acknowledged his fault, but his employer disputed its vicarious liability under *respondeat superior*. The jury concluded that the attempted highway crossing was within the course and scope of employment and found for the plaintiffs. On appeal, Tucker's contended that the trial court erred in admitting post-accident statements attributed to the employee by other witnesses. Specifically, the witnesses testified that immediately after the accident, the employee said that he had been transporting merchandise between Tucker's stores and picking up night deposits for Tucker's. These statements were the only non-circumstantial evidence of course and scope.[144] The appeals court stated that because it was "undisputed that [the driver] was Tucker's employee on the day of the accident, the trial court needed to determine only whether [his] statements concerned a matter within the scope of his employment."[145] "It [was] irrelevant to the admissibility question whether [he] was on duty at the time of the accident."[146] Therefore, there was "no error in the trial court's determination that Moore's statements were admissions by a party-opponent" and fell within an exception to the hearsay rule.[147]

B. ADR Confidentiality

In *Alford v. Bryant*,[148] the Dallas Court of Appeals addressed the limits of confidentiality under the alternative dispute resolution statutes in the context of the "offensive use" exception. Le Earl Bryant hired attorney Alford to represent her in litigation against a roofing contractor. The suit settled at mediation, and the parties entered into an agreement settling all claims between Bryant and the roofing contractor except for attorney's fees and recoverable costs of litigation, which were left to the trial court. The trial court decided that each party was to bear its own costs and attorney's fees. Subsequently, Bryant sued Alford for legal malpractice, alleging that Alford had failed "to disclose the risks and benefits of

141. *Id.* at *4.
142. *Id.*
143. 145 S.W.3d 765 (Tex. App.—Texarkana 2004, no pet. h.).
144. *Id.* at 767.
145. *Id.* at 768.
146. *Id.*
147. *Id.*
148. 137 S.W.3d 916, 918-19 (Tex. App.—Dallas 2004, pet. filed).

settlement, including the fact that the trial court had the power to deny" Bryant's claim for attorney's fees.[149]

Alford maintained that she had disclosed the risk that the trial court might not award attorney's fees, but that the only people who heard this disclosure were herself, Bryant, and the mediator. At trial, Alford attempted to call the mediator to testify about the disclosure, but the trial court did not allow the mediator to testify on the basis of Texas's alternative dispute resolution statutes. On appeal, the court stated that "[a]lthough the mediation confidentiality statutes have not been accorded the status" of a privilege by case law, it would look to other situations in which privileges were held not to be absolute.[150] "[A] statutory privilege may be waived by the holder of the privilege" where the holder seeks to "invoke the jurisdiction of the courts in search of affirmative relief" but on the basis of privilege denies the opposing party "the benefit of evidence that would materially weaken or defeat the claims."[151]

The court found that policy supported the "disclosure of the confidential communications at issue."[152] Significant substantive and procedural rights of the attorney were implicated, including her opportunity to develop evidence of her defense to the claim of malpractice and to submit contested fact issues to the fact finder. Furthermore, since Bryant was seeking to assert a new and independent cause of action, Alford's defense would not disturb the settlement in the underlying action. The court concluded that since "the mediation confidentiality statutes and the attorney-client privilege are grounded upon similar policy rationales, including effective legal services and administration of justice, the offensive use doctrine" that applies to the attorney-client privilege should also apply to the mediation confidentiality statutes.[153] The court therefore applied the test for offensive use. It found that "Bryant sought affirmative relief in the form of a money judgment;" the information sought was likely to be "outcome-determinative" since "only Alford, Bryant, and the mediator were present;" and the testimony of the mediator would not be cumulative as it was the only evidence available to the fact finder other than the word of Bryant and Alford.[154] The court found that Bryant had waived the privilege and therefore reversed the trial court's judgment and remanded the case for further proceedings.[155]

C. Optional Completeness

In *Crosby v. Minyard Food Stores, Inc.*,[156] the court addressed the applicability of the rule of optional completeness in the context of a slip and

149. *Id.* at 918-19.
150. *Id.* at 921.
151. *Id.*
152. *Id.* at 922.
153. *Id.*
154. *Id.*
155. *Id.* at 923.
156. 122 S.W.3d 899 (Tex. App.—Dallas 2003, no pet. h.).

fall case in which the defendant's expert physician's affidavit was admitted after the plaintiff's expert addressed many of the opinions set forth in the affidavit. Although the plaintiff's expert challenged the credibility of the defendant's expert and refuted the opinions therein, the Dallas Court of Appeals held that the affidavit was hearsay and should not have been admitted under the rule of optional completeness.[157] Specifically, the court noted that application of the rule first requires a showing that "some portion of the matter sought to be 'completed' [was] actually . . . introduced into evidence."[158] "Second, the party seeking to complete the matter must show that the remainder being offered" is on the same subject "and is necessary to fully understand or explain the matter."[159] Focusing on the second requirement, the court held that the defendant failed to show "why it was necessary to admit the affidavit to explain or understand the portions referred to" by the plaintiff's expert.[160] However, because the affidavit was directly challenged by the plaintiff's expert and because the defendant's expert did not testify and therefore had no opportunity to dispute the plaintiff's expert's statements, the court ultimately found that although admission of the affidavit was error, the error was not harmful.[161]

D. Judicial Notice and Admission

The Dallas Court of Appeals addressed the importance of specifically identifying the discrete facts for which a party seeks judicial notice in *Longtin v. Country One Stop, Inc.*[162] In this case, the plaintiff merely requested that the trial court take judicial notice of a prior temporary injunction hearing that had not been transcribed. Because no particular testimony or reporter's record was identified by the plaintiff, the court of appeals held that the trial court did not err in failing to take judicial notice.[163]

The Texas Supreme Court addressed judicial admissions in *PPG Industries, Inc. v. JMB/Houston Centers Partners Limited Partnership*—a case that is more significant for its holding that DTPA claims cannot be assigned by a building owner to a building purchaser.[164] In that case, the plaintiff building purchaser brought a DTPA action after the original owner assigned its warranty claims to the purchaser as part of the sale, and the window manufacturer and installer refused to replace or repair defective windows in the building. The plaintiff argued that the defendants judicially admitted that the discovery rule tolled limitations on all of the warranty claims until the date the defendant refused to repair or re-

157. *Id.* at 903.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 904.
162. 129 S.W.3d 632 (Tex. App.—Dallas 2003, no pet. h.).
163. *Id.* at 634-36.
164. 146 S.W.3d 79, 82 (Tex. 2004).

place defective windows by failing to object to a jury charge instruction that so-stated the same. The court disagreed, noting that a judicial admission "must be a clear, deliberate, and unequivocal statement," and although "a party's failure to object at trial may constitute waiver," it does not constitute a judicial admission.[165]

E. Parol Evidence

Two cases addressed parol evidence during this Survey period—one admitting parol evidence and the other not. In the first case, *Wilson & Wilson Tax Services, Inc. v. Mohammed*,[166] investors brought a breach of contract and fraud action against an investment banker and accountant, and the trial court granted the investors' motion for judgment notwithstanding the verdict after the jury returned a verdict for the defendants. The trial court permitted parol evidence to complete an ambiguous contract that was silent as to the date of performance. The parol evidence in question indicated that payments on the contract were due once the investment account was funded, and because the investment account was never funded, payment was never due. The Houston Court of Appeals agreed, noting that where "parties to a written agreement agree orally" to a condition precedent, "the agreement is not integrated with respect to the oral condition."[167]

The *Wilson* case is consistent with another Houston Court of Appeals case, *Atlantic Lloyds Insurance Co. v. Butler*, which clarified that parol evidence may not be used to alter or contradict any part of a written contract. Rather, parol evidence may only be used to remove ambiguity and to make a contract complete in its terms which show to be incomplete.[168] In *Atlantic Lloyds*, the plaintiffs appealed a summary judgment order finding that the settlement agreement in question required payment of a specific amount rather than exhaustion of the insurance policy. Despite correspondence leading up to the written settlement agreement and an alleged oral agreement indicating that the parties intended to settle for the remainder of the insurance policy, the court of appeals affirmed, holding that the settlement agreement was not ambiguous and parol evidence could not be used to materially alter or contradict the express and unambiguous terms of the settlement agreement.[169]

165. *Id.* at 95.
166. 131 S.W.3d 231 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).
167. *Id.* at 238.
168. Atl. Lloyds Ins. Co. v. Butler, 137 S.W.3d 199, 211 (Tex. App.—Houston [1st Dist.] 2004, no pet. h.).
169. *Id.* at 212.