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CIVIL PROCEDURE

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

I. SUBJECT MATTER JURISDICTION

The Texas Supreme Court issued several opinions addressing jurisdictional issues during the Survey period. In *Texas Department of Parks and Wildlife v. Miranda*,[1] the supreme court noted that the court of appeals misstated and misapplied the holding in *Bland Independent School District v. Blue*[2] that "a trial court 'may consider evidence *and must do so when necessary to resolve the jurisdictional issues raised.*'"[3] The *Miranda* plaintiffs sued for personal injury suffered at a state park. "Due to the unusual confluence of standards . . . for waiver of sovereign immunity" set out in the Texas Tort Claims Act and recreational use statute, the supreme court held the plaintiffs were required to plead and, if their pleading was challenged, offer proof that the Department of Parks and Wildlife was grossly negligent in order to establish that the district court had subject matter jurisdiction.[4] Recognizing that this same proof would also go to the merits of plaintiffs' claim, the supreme court adopted a standard that mirrors summary judgment practice and requires only that the plaintiff introduce evidence sufficient to raise a fact issue on the jurisdictional question in order to defeat a plea to the jurisdiction.[5] In response to dissenting Justice Jefferson's concern that this rule could deprive plaintiffs of the procedural protections attendant to summary judgment motions, such as twenty-one days notice of any hearing and

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1. 133 S.W.3d 217 (Tex. 2004).
2. 34 S.W.3d 547 (Tex. 2000).
3. *Miranda*, 133 S.W.3d at 223 (quoting *Bland*, 34 S.W.3d at 555); *see also* Gene Duke Builders, Inc. v. Abilene Hous. Auth., 138 S.W.3d 907 (Tex. 2004) (holding that trial court must, upon request, enter findings of fact and conclusions of law when evidence is received on plea to jurisdiction).
4. *Miranda*, 133 S.W.3d at 221.
5. *Id.* at 227-28.

time for discovery, the majority stated that matters such as the timing of the hearing and amount of discovery permitted should be left to the sound discretion of the trial court.[6] Similarly, the supreme court rejected the suggestion in a second dissent by Justice Brister that any plea of immunity should be required to take the form of "two 'standard' or 'established' motions—either special exceptions or motions for summary judgment."[7] The majority explained that the plea to the jurisdiction has been used in Texas for over 150 years, and a refinement of the rules for considering such a plea is a better solution than abolishing the plea in its entirety.[8]

In *Harris County v. Sykes*,[9] the Texas Supreme Court held that when a governmental entity successfully files a plea to the jurisdiction, the resulting dismissal should be with prejudice because it fully and finally adjudicates whether the claims asserted come within the Texas Tort Claims Act's limited waiver of sovereign immunity. The supreme court noted that where a plaintiff is capable of remedying a jurisdictional defect, "a dismissal with prejudice would be improper."[10] The supreme court held, however, that if the plaintiff does not establish a waiver of immunity, after having been given a reasonable opportunity to amend his pleadings to meet a plea to the jurisdiction, he should not be permitted to relitigate the issue in a second action.[11] Echoing his dissent in *Miranda*, Justice Brister viewed *Sykes* as another reason why the defense of governmental immunity ought not to be raised by "a motion called a 'plea to the jurisdiction.'"[12] In this regard, his concurring opinion noted that the supreme court in recent years held that "the dismissal must be without prejudice when the plea to the jurisdiction is based on mootness, forum non conveniens, or exclusive jurisdiction."[13]

The Texas Tort Claims Act requires a claimant to give the governmental entity notice of his claim within six months of the date of the incident.[14] *University of Texas Southwestern Medical Center at Dallas v. Loutzenhiser*[15] examined the question whether this notice requirement is jurisdictional.[16] Resolving a split among the courts of appeals, the Texas Supreme Court held that the failure to give the required notice does not deprive the trial court of subject matter jurisdiction over an action on the claim.[17] The supreme court noted that where courts in other states have construed such notice provisions as jurisdictional, the statutory language

6. *Id.* at 228-29.
7. *Id.* at 232.
8. *Id.*
9. 136 S.W.3d 635, 637 (Tex. 2004).
10. *Id.* at 639.
11. *Id.*
12. *Id.* at 641 (Brister, J., concurring).
13. *Id.* (internal citations omitted).
14. TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a) (Vernon 1997).
15. 140 S.W.3d 351, 362 (Tex. 2004).
16. *Id.* at 366.
17. *Id.* at 362.

was much clearer than that in the Texas Tort Claims Act.[18] The supreme court emphasized, however, that the requirement of notice is no less mandatory in Texas, and the failure to provide such notice, while not jurisdictional, will bar the action.[19]

While sovereign immunity may protect a governmental entity from suit, the governmental entity may waive that protection by its litigation conduct. Thus, in *Reata Construction Corp. v. City of Dallas*, the Texas Supreme Court held that by intervening in a pending lawsuit to assert its own claims for affirmative relief, the City of Dallas waived its immunity, and the trial court therefore had subject matter jurisdiction over the adverse party's claims against the city.[20] Similarly, in *Ray Ferguson Interests, Inc. v. Harris County Sports & Convention Corp.*, the local government corporation waived its immunity from suit on the adverse party's claims by filing its own counterclaim for affirmative relief.[21]

The jurisdiction of Texas courts to enter orders having extraterritorial effect was the subject of two cases decided during the Survey period. In *Greenpeace, Inc. v. Exxon Mobil Corp.*,[22] the oil company obtained injunctive relief against the activist group that was aimed specifically at a protest planned for the company's headquarters in Irving, Texas. The form of the temporary injunction, however, also prohibited Greenpeace from breaking into or trespassing on any Exxon Mobil property anywhere within the United States. The Dallas Court of Appeals held that the trial court had jurisdiction to enter such an injunction since it operated in personam against Greenpeace and did not involve issues of title or local real estate law applicable to property located in other states.[23] Similarly, in *McDowell v. McDowell*, the trial court had in personam jurisdiction over the parties, and the central issue in the case was not who had title to real property located in Florida, but whether a partnership existed between the parties and, if so, on what terms.[24] Thus, the San Antonio Court of Appeals had subject matter jurisdiction over the case, including jurisdiction to order one partner to pay the other half of the profits from the sale of the Florida realty.[25]

In *Lacy v. Bassett*,[26] the plaintiff sought inspection of the financial records of his church under the non-profit corporation act. The defendant argued that the "ecclesiastical doctrine," which forbids civil courts

18. *Id.* at 362-65 n.53 (surveying case law from various states).

19. *Id.* at 365.

20. Reata Constr. Corp. v. City of Dallas, 47 Tex. Sup. Ct. J. 408, 410 (Tex. April 2, 2004).

21. Ray Ferguson Interests, Inc. v. Harris County Sports & Convention Corp., No. 01-04-00568-CV, 2004 WL 2250930, at *5-6 (Tex. App.—Houston [1st Dist.] Oct. 7, 2004, no pet. h.).

22. 133 S.W.3d 804 (Tex. App.—Dallas 2004, pet. denied).

23. *Id.* at 809-10.

24. McDowell v. McDowell, 143 S.W.3d 124, 127 (Tex. App.—San Antonio 2004, pet. denied).

25. *Id.*

26. 132 S.W.3d 119 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).

from inquiring into religious doctrine or beliefs in order to resolve disputes over church property, polity, or administration, deprived the trial court of jurisdiction.[27] Notwithstanding this doctrine, the Houston Court of Appeals stated that churches and their congregations are amenable to the rules governing civil, contract, and property rights, and a court may interpret church documents in purely secular terms without relying on religious precepts to resolve conflicts that have been brought before the court.[28] Thus, the trial court erred in dismissing the case for lack of subject matter jurisdiction, because that plaintiff's claim would require the court only to interpret a neutral principle of law and not to involve itself in any religious doctrine or principles.[29]

II. SERVICE OF PROCESS

The sufficiency of a certificate of service from the Secretary of State to support a default judgment was at issue in *Campus Investments, Inc. v. Cullever*.[30] After several unsuccessful attempts to serve the corporate defendant at its registered address, the plaintiffs requested service on the Secretary of State pursuant to the Business Corporation Act.[31] The Secretary of State issued a certificate that he had received and forwarded the citation and petition by certified mail, which was returned marked "Attempted—Not Known." After this certificate but no citation or return had been on file more than ten days, the plaintiffs obtained a default judgment, which the court of appeals upheld. Resolving a conflict among the appellate courts, the Texas Supreme Court held that the Secretary of State's certificate conclusively established that process was served and dispensed with the requirement in Rule 107[32] that the citation and proof of service be on file for ten days before a default judgment can be entered.[33] The supreme court recognized that "service of a defective citation through substituted service on the Secretary of State could mislead a defendant and lead to the entry of an improper default judgment."[34] The remedy in that case, however, is that the defendant may bring a bill of review and establish those facts.[35]

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27. *Id.* at 122.
28. *Id.* at 123.
29. *Id.* at 126.
30. 144 S.W.3d 464 (Tex. 2004).
31. *Id.*
32. TEX. R. CIV. P. 107.
33. *Id.*; *Campus*, 144 S.W.3d at 465-66.
34. *Campus*, 144 S.W.3d at 466.
35. *Id.* The court found the defendant was not misled in *Campus*, and that it was negligent in failing to update the addresses for its registered agent and registered office. *Id.* Presumably, the Texas courts will be more sympathetic to a bill of review brought by a defendant who was served through the Secretary of State, but who was not statutorily required to have its current address on file with the Secretary of State. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 17.044(b) (Vernon 1997) (authorizing substituted service on Secretary of State for a non-resident who does business in Texas but does not maintain a regular place of business or registered agent in the State).

As most practitioners are aware, a plaintiff who files suit within the limitations period but does not serve the defendant with process until after limitations has run must have exercised diligence in effecting service, or his claim will be time-barred.[36] *Ramirez v. Consolidated HGM Corp.* applied this rule in a rather unusual factual setting.[37] In *Ramirez*, suit was filed and service of citation attempted by certified mail within the statute of limitations, but the return receipt was signed by someone other than the party to whom it was addressed. Several years passed, however, before a motion to quash was filed, and then several more years passed before the motion was heard. The trial court stated at the hearing that it intended to grant the motion, but no order to that effect was entered for over another year. In the meantime, the defendant filed its answer.[38] The defendant then successfully moved for summary judgment on limitations grounds.[39]

The Amarillo Court of Appeals affirmed the summary judgment.[40] The court first held that the order quashing service was proper, because the wrong person signed the return receipt.[41] The court rejected the argument that this defect was waived by the defendant's filing of an answer before the trial court ruled on its motion to quash.[42] The court reasoned that while the filing of an answer dispenses with the need for issuance and service of citation and normally waives any complaints regarding service, it does not waive defects in service that are raised for the purpose of showing that the limitations period has expired.[43] The court went on to hold that, given the passage of time with little or no activity on their part, the plaintiffs had not, as a matter of law, used diligence in attempting to perfect service on defendant.[44]

III. SPECIAL APPEARANCE

The Texas Supreme Court addressed the issue of waiver of a special appearance in *Exito Electronics Co., Ltd. v. Trejo*.[45] The Taiwanese manufacturer in this product case entered into and filed a Rule 11[46] agreement extending its time to file a responsive pleading before filing its special appearance. The court of appeals held that this violated the due-order-of-pleading rule and waived the manufacturer's special appear-

36. *See, e.g.*, Tranter v. Duemling, 129 S.W.3d 257, 259-61 (Tex. App.—El Paso 2004, no pet.) (holding that plaintiff raised a fact issue regarding his diligence in serving defendant despite total elapsed time of three months between filing and service).
37. Ramirez v. Consol. HGM Corp., 124 S.W.3d 914, 919 (Tex. App.—Amarillo 2004, no pet. h.).
38. *Id.* at 916-17.
39. *Id.* at 916.
40. *Id.* at 915.
41. *Id.* at 916.
42. *Id.* at 916-18.
43. *Id.* at 917.
44. *Id.* at 919.
45. 142 S.W.3d 302 (Tex. 2004).
46. TEX. R. CIV. P. 11 (requiring agreements relating to pending suit to be in writing, signed and filed of record to be enforceable).

ance.[47] The supreme court disagreed, holding that a Rule 11 agreement that merely extends the time for the defendant's initial pleading, even when filed before a special appearance and not expressly made subject to same, "does not violate Rule 120a's 'due-order-of-pleading' requirement and thus does not constitute a general appearance."[48] The supreme court also held that the manufacturer did not waive its special appearance by participating in motion practice with respect to discovery related to the special appearance.[49] Since Rule 120a[50] expressly allows a specially appearing defendant to participate in jurisdictional discovery without risk of waiver of its special appearance, the supreme court reasoned it would be illogical to prohibit it from seeking the trial court's ruling on disputes that may arise regarding such discovery.[51]

Waiver was also the issue in several intermediate appellate decisions during the Survey period. The Fort Worth Court of Appeals held in *HMS Aviation v. Layale Enterprises, S.A.*, that a motion to increase the plaintiff's sequestration bond did not waive the defendant's special appearance, where the motion was made subject to the special appearance and was not heard prior to the special appearance being heard or determined.[52] In *Carone v. Retamco Operating, Inc.*, the San Antonio Court of Appeals rejected an argument of waiver based on the attorney for the specially appearing defendant participating in a hearing on a motion for entry of a default judgment against several other defendants.[53] The court based its decision on two factors. First, the default judgment was sought as a sanction for discovery abuse and therefore related to discovery in which the defendant was entitled to participate.[54] Second, the defendant did not request affirmative relief inconsistent with his contention that the court lacked jurisdiction over him.[55]

Nguyen v. Desai addressed the proper form of an order granting a special appearance.[56] The Fourteenth District Court of Appeals held that a

47. *Exito*, 142 S.W.3d at 304.

48. *Id.* at 306; *see also* Crystalix Group Int'l v. Vitro Laser Group USA, Inc., 127 S.W.3d 425, 428 n.2 (Tex. App.—Dallas 2004, pet. denied) (holding that Rule 11 agreement extending a temporary restraining order did not waive special appearance, but declining to establish a bright-line rule for all Rule 11 agreements).

49. *Exito*, 142 S.W.3d at 306.

50. TEX R. CIV. P. 120(a)(1) (taking of depositions and use of discovery processes shall not constitute waiver of special appearance).

51. *Exito*, 142 S.W.3d at 306-07. Finally, the supreme court also held that defects in the special appearance's verification and supporting affidavit did not give rise to a waiver. *Id.* at 307-08.

52. HMS Aviation v. Layale Enters., S.A., 149 S.W.3d 182, 190 (Tex. App.—Ft. Worth 2004, no pet. h.).

53. Carone v. Retamco Operating, Inc., 138 S.W.3d 1, 9 (Tex. App.—San Antonio 2004, pet. denied).

54. *Id.*

55. *Id. But see* Seals v. Upper Trinity Reg'l Water Dist., 145 S.W.3d 291, 298 (Tex. App.—Fort Worth 2004, pet. filed) (holding that party's appearance at a status conference, without contesting personal jurisdiction at or before that time, constituted a general appearance).

56. Nguyen v. Desai, 132 S.W.3d 115 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).

dismissal with prejudice to refiling in Texas was error.[57] Although an order dismissing claims for lack of personal jurisdiction should preclude relitigation of the jurisdictional issues actually decided, the court held that it should not preclude a second action in Texas if the plaintiff "can establish personal jurisdiction based upon issues that were not decided in the first action."[58] For example, the court hypothesized, if the defendants were to become residents of Texas after the first case was dismissed, they would be subject to the Texas courts' general jurisdiction, and the dismissal of the first case on special appearance should not then preclude the assertion of personal jurisdiction over them in the second action.[59]

IV. VENUE

When a trial court transfers venue for the "convenience of the parties," the court's ruling cannot be appealed or reviewed by mandamus and cannot constitute reversible error.[60] In *Garza v. Garcia*, the Texas Supreme Court reversed a court of appeal's decision that refused to presume a venue order was granted on convenience grounds unless the order specifically so stated.[61] In particular, the defendant moved to transfer on the grounds that Starr County was not a county of proper venue and, "alternatively, [that] venue should be transferred to Hidalgo County for the convenience of the parties."[62] The trial court granted the defendant's motion to transfer venue but did not state the reasons for its decision.[63]

On appeal, the plaintiff sought reversal and a new trial based on the venue-transfer order.[64] "The court of appeals reversed, refusing to presume the venue order was granted on convenience grounds" because it did not specifically so state.[65] Although the court of appeals' decision was contrary to the traditional presumption applicable to other orders, it "refused to imply a finding on convenience grounds, because the statutory prohibition on appellate review precluded reviewing the record for evidence that might support such an implied finding."[66] The court of appeals' primary "concern was that the usual presumption in favor of nonspecific orders will make many venue orders immune from review."[67]

The Texas Supreme Court reversed, holding that because the transfer order did not include the reasons for the decision, the supreme court could not "ignore the legislature's ban on reviewing such orders by adopt-

57. *Id.* at 119.
58. *Id.* at 118.
59. *Id.* at 118-19.
60. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(b), (c) (Vernon 2002).
61. Garza v. Garcia, 137 S.W.3d 36 (Tex. 2004).
62. *Id.* at 38.
63. *Id.*
64. *Id.*; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 2002) ("if venue was improper it shall in no event be harmless error and shall be reversible error").
65. *Garza*, 137 S.W.3d at 39.
66. *See* TEX. CIV. PRAC. & REM. CODE ANN. §15.064(a) (Vernon 2002) ("the court shall determine venue questions from the pleadings and affidavits").
67. *Garza*, 137 S.W.3d at 38-39.

ing a new presumption" that would allow them to be reviewed anyway.[68] Although the supreme court acknowledged that in many cases transfer orders would therefore be immune from review, the supreme court recognized that with respect to orders based on convenience of the parties, that appears to have been precisely what the legislature intended.[69]

In *In re AIU Insurance Co.*, the Texas Supreme Court considered whether a defendant had waived its reliance on a forum selection clause.[70] The forum selection clause at issue required that any litigation, arbitration, or other form of dispute resolution take place in New York. The plaintiff argued that the defendant waived its right to seek enforcement of the forum selection clause because it did not file its motion to dismiss until five months after the suit was filed, and after the defendant had already requested a jury trial, paid the jury fee, and filed a general denial instead of a special appearance. The supreme court held that none of these activities constituted waiver of the forum selection clause.[71] Moreover, the supreme court specifically held that the defendant was not required to file a special appearance, as it did not challenge personal jurisdiction but sought only to enforce its contractual right to have the matter determined in a specified location.[72]

In *Carlisle v. RLS Legal Solutions, Inc.*,[73] the Fourteenth District Court of Appeals considered whether a defendant waived his venue argument. RLS, the plaintiff below, filed its original petition against Carlisle in November 2000. Carlisle filed his motion to transfer venue in January 2001. Before the motion to transfer was heard or decided, RLS filed its motion for summary judgment, which the court granted on June 26, 2001. On July 25, 2001, Carlisle filed a motion for a new trial.

Carlisle began the motion for new trial by arguing that he attempted to file a response to the summary judgment motion, entitled "Defendant's Motion for Continuance, Motion to Set a Hearing to Transfer Venue, Special Exceptions and Objections to the Plaintiff's Offer of Proof as to Plaintiff's Motion for Summary Judgment and Response to the Motion for Summary Judgment." Carlisle claimed that "the county clerk [had] mistakenly refused to file his response and, instead, returned it."[74] Following this initial paragraph, Carlisle's motion for new trial focused solely on his argument that the court should vacate the order granting summary judgment, without any argument in support of his venue motion.

Based on the foregoing, the court of appeals found that Carlisle waived his venue argument.[75] In particular, the court held that "by filing a motion for new trial when the venue motion was pending, the defendant

68. *Id.*
69. *Id.*
70. *In re* AIU Ins. Co., 148 S.W.3d 109 (Tex. 2004).
71. *Id.* at 120-21.
72. *Id.* at 121.
73. 138 S.W.3d 403 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).
74. *Id.* at 406.
75. *Id.* at 411.

engaged in 'an act seeking to invoke the authority of the court whose authority' he challenged."[76] The court of appeals found that "because Carlisle's motion for new trial was a pleading that addressed the merits of the summary judgment before Carlisle pursued a ruling on his venue motion, the motion for new trial could be construed as an 'affirmative action' by which he submitted to the jurisdiction of the trial court."[77] Finally, the court also noted that "a party filing a venue motion has the burden to diligently request a setting on the motion and obtain a ruling prior to a trial on the merits."[78] In this case, the delay in obtaining a hearing also provided a basis to deny the motion to transfer.[79]

In *Bench Co. v. Nations Rent of Texas, L.P.*, the Dallas Court of Appeals also addressed whether a defendant had waived its venue argument.[80] In this case, the plaintiff filed a motion for summary judgment on March 7, 2003 that was set for hearing on April 11, 2003. The defendant did not respond to the motion for summary judgment but on March 28, 2003 requested a hearing on its previously-filed motion to transfer venue. Pursuant to Rule 87, the plaintiff was entitled to forty-five days notice of the hearing on the motion to transfer venue.[81] Accordingly, the venue motion was set for hearing on May 30, 2003. On April 11, 2003, the day of the summary judgment hearing, the defendant filed a motion for continuance, arguing that the trial court needed to rule on the motion to transfer venue before addressing the summary judgment motion. The defendant requested that the summary judgment hearing be reset to the same time as the motion to transfer venue. Significantly, the defendant never asked for a hearing on its motion for continuance and never obtained a ruling on that motion from the trial court.

The trial court held the hearing on the motion for summary judgment as scheduled on April 11, 2003.[82] The defendant did not appear at the hearing, and the trial court granted judgment for the plaintiff. On appeal, the Dallas Court of Appeals determined that the defendant waived its motion to transfer venue by failing to obtain a written order on its motion to continue the summary judgment hearing and by failing to seek leave of court to have the venue motion heard earlier by requesting that the forty-five-day notice be shortened.[83]

V. PARTIES

Whether the misidentification of parties tolls limitations was a hot topic during the Survey period. In *Brinker Texas L.P. v. Looney*, the Fort

76. *Id.* at 407.
77. *Id.* at 407-08.
78. *Id.* at 408.
79. *Id.*
80. Bench Co. v. Nations Rent of Tex., L.P., 133 S.W.3d 907 (Tex. App.—Dallas 2004, no pet. h.).
81. TEX. R. CIV. P. 87.
82. *Bench*, 133 S.W.3d at 908-09.
83. *Id.*

Worth Court of Appeals analyzed the differences between "misidentification" and "misnomer" cases and how those differences impact the limitations analysis.[84] Here, the plaintiff brought a personal injury action against Brinker Chili's Texas, Inc. ("BCTI") doing business as Chili's Hamburger Grill & Bar, also known as Chili's Grill & Bar, prior to the expiration of the limitations period. BCTI filed an answer but waited six months until after limitations had run to amend its answer to deny that it was sued in the proper capacity or that it did business as Chili's Hamburger Grill & Bar, also known as Chili's Grill & Bar.[85] BCTI asserted that the proper party to the suit was Brinker Texas, L.P. ("BTLP"), which owned and operated the location where the injury occurred. BCTI was the general partner of BTLP. The plaintiff then amended her petition to assert that she was suing BCTI in its capacity as general partner of BTLP and also to name BTLP, the limited partnership, as a defendant. During trial, BTLP moved for directed verdict, arguing that the plaintiff's claims against it were barred by limitations. The trial court denied the motion, and BTLP appealed.

The Fort Worth Court of Appeals first clarified the distinctions between "misnomer" and "misidentification" cases. "A misnomer occurs when the plaintiff misnames [the correct defendant,] but the correct part[y is] actually served."[86] In misnomer cases, an amended petition correcting the name of the defendant relates back to the date of the original petition.[87] A misidentification case, on the other hand, "occurs when two separate but related legal entities use similar names and the plaintiff sues the wrong one because [he] is mistaken about which entity is the correct defendant."[88] In misidentification cases, the amended petition relates back to the date of the original petition only if the proper defendant had "notice of the suit and was not misled or disadvantaged by the mistake."[89] "The plaintiff's diligence is not a determining factor in misidentification cases because the plaintiff has brought suit within the limitations period, but has named the wrong party."[90] Rather, the emphasis is solely on the equitable application of the statute-of-limitation rules.[91]

In this case, the Fort Worth Court of Appeals concluded that the plaintiff's claims were not barred by limitations. With respect to the plaintiff's claim against BCTI, the court held that "the portion of [the plaintiff's] amended petition clarifying that BCTI was being sued in its capacity as

84. Brinker Tex. L.P. v. Looney, 135 S.W.3d 280 (Tex. App.—Fort Worth 2004, no pet. h.).

85. *Id.* at 284.

86. *Id.* at 284-85.

87. *Id.* at 285.

88. *Id.*

89. *Id.* During the Survey period, the Texas Supreme Court reaffirmed this general rule regarding the tolling of statute of limitations in misidentification cases. *See* Flour Bluff Indep. Sch. Dist. v. Bass, 133 S.W.3d 272, 274 (Tex. 2004).

90. *Brinker*, 135 S.W.3d at 285.

91. *Id.*

[the] general partner . . . relates back to [the] original petition."[92] With respect to the plaintiff's claims directly against BTLP, the court found that the claims were not time-barred because BTLP's general partner, BCTI, was properly and timely served before limitations ran, and notice of the suit and the underlying facts could be imputed to BTLC.[93]

In *Riston v. John Doe*, a case of first impression, the Fourteenth District Court of Appeals held that a "John Doe" petition would not toll limitations unless specifically authorized by statute.[94] On or about September 23, 2000, the plaintiff was allegedly injured when she was struck by an elevator door at Houston Intercontinental Airport. Although plaintiff originally sued only the City of Houston, she filed an amended petition on September 22, 2002 against various John Doe defendants who designed, manufactured, sold, installed, built, and/or maintained the elevator. On September 25, 2002, the plaintiff filed a second amended petition naming "John Doe No. 1 a/k/a Thyssenkrupp Elevator Corporation d/b/a Thyssenkrupp Elevator d/b/a Dover Elevator d/b/a Dover Elevator Company d/b/a Dover" in place of John Doe No. 1. Thyssenkrupp was served on October 25, 2002 and subsequently moved for summary judgment, asserting that the plaintiff's claims were barred by the two-year statute of limitations. The trial court granted Thyssenkrupp's motion for summary judgment, and the plaintiff appealed, arguing that the statute of limitations was tolled based on the "doctrines of misnomer, due diligence, and relation back."[95]

The Fourteenth District Court of Appeals first held that the "misnomer" doctrine was not applicable and, therefore, did not toll limitations.[96] Specifically, "the court noted that 'John Doe' is not a misnomer for any person or entity."[97] Rather, "John Doe" is a fictitious name used in legal proceedings to designate a person whose identity is unknown.[98] Thus, the plaintiff's naming of "John Doe" as a defendant instead of Thyssenkrupp was not a mistake, making the plaintiff's tolling arguments under the misnomer doctrine inapposite.[99]

The court also refused to hold that a John Doe petition tolls limitations as to an unknown defendant. First, the court noted that there was no specific statute generally authorizing a plaintiff to initiate a suit and toll limitations by suing an unknown defendant as "John Doe" or any other fictitious name.[100] Because the legislature has, under certain circumstances, allowed John Doe petitions to toll limitations with respect to certain causes of action, the court refused to infer that the legislature

92. *Id.* at 286.
93. *Id.*
94. Riston v. John Doe, No. 14-03-00869-CV, 2004 WL 1661030, at *2 (Tex. App.—Houston [14th Dist.] July 27, 2004, pet. denied).
95. *Id.* at *1.
96. *Id.* at *2.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*

intended to create such a blanket tolling doctrine.[101] Second, the court concluded that public policy supported the conclusion that a John Doe petition does not toll limitations.[102] In particular, the court noted that statutes of limitations would have little, if any, import if they could be so easily circumvented merely by filing a "John Doe" petition.[103]

VI. CLASS ACTIONS

In *Compaq Computer Corp. v. Lapray*,[104] the Texas Supreme Court held that trial courts considering certification under Texas Rule of Civil Procedure 42(b)(2) must consider whether class members are entitled to individual notice and opt out rights when the class representative seeks monetary damages under any theory.[105] Here, the trial court certified a nationwide class under both Rule 42(b)(2) and (b)(3).[106] The court of appeals affirmed the trial court's certification of a Rule 42(b)(2) class, holding that declaratory relief was appropriate.[107] The court of appeals then concluded that, because the trial court properly certified the class under Rule 42(b)(2), "it is unnecessary to address . . . the [Rule 42(b)(3)] requirements of predominance and superiority."[108]

The Texas Supreme Court first found that it had jurisdiction to consider the interlocutory appeal, because the effect of the court of appeals's decision was to affirm the Rule 42(b)(3) class without reviewing the predominance and superiority requirements.[109] Turning to the merits of the

101. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. §16.0045 (Vernon 2002)).
102. *Id.* at *3.
103. *Id.*
104. 135 S.W.3d 657 (Tex. 2004).
105. *Id.* at 668. Rule 42(b)(2) provides the following:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

TEX. R. CIV. P. 42(b)(2).
106. Rule 42(b)(3) provides the following:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . the questions 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. The matters pertinent to these issues include:
> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the difficulties likely to be encountered in the management of a class action.

TEX. R. CIV. P. 42(b)(3).
107. *Compaq*, 135 S.W.3d at 670.
108. *Id.* at 662.
109. *Id.*

certification order under Rule 42(b)(2), the supreme court noted that the plaintiff argued that certification was proper because the class plaintiffs had disclaimed consequential damages and primarily sought a declaration that the floppy disc controllers were defective and, therefore, Compaq breached its limited warranty. Compaq countered that the declaratory judgment claim regarding a breach of warranty was merely a predicate to a claim for damages and an attempt by plaintiff's counsel to "shoe horn" a damage claim into a Rule 42(b)(2) class claim for declaratory relief.

In its analysis, the Texas Supreme Court noted that the procedural distinctions between Rule 42(b)(2) and (b)(3) class actions are significant. In particular, Rule 42(b)(3) provides that class members are entitled to individual notice and an opportunity to opt out, while Rule 42(b)(2) contains no such requirements.[110] According to the Texas Supreme Court, both plaintiffs and defendants might be motivated to avoid the more rigorous Rule 42(b)(3) requirements. By way of example, plaintiff's counsel might be motivated to seek damages under the Rule 42(b)(2) framework because class members are deprived of notice and opt out protections, thus allowing plaintiff's counsel to gather thousands of clients by certification.[111] Defendants, on the other hand, might prefer Rule 42(b)(2) certification because of the possible *res judicata* effect on subsequent claims.[112]

The Texas Supreme Court noted that Rule 42 was silent on whether damages could be recovered in Rule 42(b)(2) class claims and, therefore, analyzed the applicable federal law governing class actions.[113] The supreme court concluded that due process concerns require trial courts addressing a request for certification under Rule 42(b)(2) to consider whether class members are entitled to individual notice and opt out rights whenever a class action seeks monetary damages under any theory.[114] While the supreme court did not expressly hold that there could be no such class certified absent notice and opt out rights to class members, it did state that "if damage claims are implicated, constitutional considerations will likely mandate such protections."[115]

VII. PLEADINGS

In *Bailey v. Hutchins*,[116] the Amarillo Court of Appeals considered whether the "mailbox rule" applied to a lawsuit mailed immediately before the effective date of a statute but received after such date.[117] In

110. *Id.* at 664.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 667.
115. *Id.* at 668.
116. 140 S.W.3d 448 (Tex. App.—Amarillo 2004, pet. denied).
117. The mailbox rule provides as follows: "If any document is sent to the proper clerk by first-class United States mail . . . on or before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time." TEX. R. CIV. P. 5.

this medical-malpractice action, the plaintiff's original petition was mailed, via United States first-class mail, to the district clerk on August 29, 2003 and was received by the district clerk on September 2, 2003. At the time the pleading was deposited in the mail, the statute obligated the plaintiff to serve her expert report on each party within 180 days of the date the suit was filed.[118] However, at the time the petition was actually received by the clerk, a new statutory provision had become effective that reduced the 180-day period to 120 days.[119] The plaintiff filed her expert report on February 26, 2004, which was within 180 days but more than 120 days later. Accordingly, the defendant moved to dismiss the suit on the ground that the report was tardy.[120] The trial court denied the motion, and the defendant appealed.[121]

The defendant argued that the trial court's interpretation of the mailbox rule resulted in an amendment to the terms of the statute by delaying the implementation of the legislature's decree that the statutory amendment take effect on September 1, 2003.[122] The Amarillo Court of Appeals rejected this argument, noting that while the statute addressed the time for "filing," it was silent on when a claim should be "deemed" filed.[123] The defendant also argued that Rule 5 contemplates the existence of a filing deadline, and that because the statute in question contained no such deadline, the mailbox rule was inapplicable. The court of appeals was not persuaded, holding that the plaintiff sought to avail herself of the greater relief provided under the old statute and had to act before a specific date to obtain that relief.[124] Accordingly, the effective date of the statute had, in fact, created a filing deadline for the plaintiff.

In *Williams v. Schneiber*, the Fort Worth Court of Appeals held that the mailbox rule was properly invoked if the clerk timely received a copy of the relevant pleading, even if it was not the one mailed.[125] Here, the plaintiff mailed her appeal bond on August 22, 2002 and faxed a copy of the appeal bond on August 27, 2002, which was within the prescribed time period. Although the clerk did not receive the appeal bond that was placed in the mail, the faxed copy was received. Under these circumstances, the court of appeals held that the appeal was timely perfected.[126]

In *Graham v. Adesa Texas, Inc.*, the Dallas Court of Appeals addressed the issue of pleading amendments. In their original petition, plaintiffs

118. TEX. REV. CIV. STAT. ANN. art. 4590i 13.01(d) (Vernon Supp. 2003), *repealed by* Acts 2003, 78th Leg., R.S., ch. 204, § 10.09.

119. *See* TEX. CIV. PRAC. & REM. CODE ANN. §74.351(a) (Vernon Supp. 2004-05).

120. *Bailey*, 140 S.W.3d at 450.

121. *Id.*

122. *Id.* at 451.

123. *Id.* at 452.

124. *Id.*

125. Williams v. Schneiber, 148 S.W.3d 581, 585-86 (Tex. App.—Fort Worth 2004, no pet. h.).

126. *Id.*; *see* Stokes v. Aberdeen Ins. Co., 917 S.W.2d 267, 268 (Tex. 1996) (holding that a requirement that the clerk must receive the same piece of paper actually mailed was reading the rules too restrictively).

asserted that defendants committed negligence and gross negligence but sought only exemplary damages, stating that both defendants were "co-employers" and thus were shielded from liability for compensatory damages under the Texas Worker's Compensation Act.[127] Immediately prior to the original trial setting, plaintiffs attempted to file an amended petition that sought, in the alternative, actual damages if defendants were unsuccessful in showing that they were shielded under the worker's compensation statute. The defendants objected, and the trial court struck the amended petition.[128] Because the original trial setting had passed, however, the trial court stated that "its ruling was without prejudice to plaintiffs seeking to file an amended petition in the future."[129] Accordingly, the plaintiffs filed a second motion for leave to file an amended petition, asserting that because the original trial setting passed and no new trial date was set, plaintiffs should be allowed to amend their petition. Plaintiffs did not request a hearing on the motion for leave, however, and defendants did not file a response.

The trial court ultimately granted the defendants' motion for summary judgment and denied all other relief.[130] "Accordingly, the trial court's order encompassed a denial of the [plaintiffs'] pending motion for leave to file an amended petition."[131] On appeal, the plaintiffs argued that the trial court erred in denying their motion for leave to file an amended petition.[132] The Dallas Court of Appeals agreed, finding that the trial court abused its discretion in refusing the amendment because (1) defendants did not present any evidence of surprise or prejudice, and (2) the amendment did not assert a new cause of action or defense and, therefore, was not prejudicial on its face.[133]

VIII. DISCOVERY

The Texas Supreme Court addressed a number of discovery issues during the Survey period. In *In re Kuntz*,[134] the supreme court was called on to interpret whether documents were within a party's "possession, custody, or control" within the meaning of Rule 192.7(b).[135] The trial court ordered the husband in this family law dispute to produce documents to which he had access at his place of employment.[136] It was undisputed, however, that the documents were in the physical possession of his employer, that the documents were owned by the employer's client, and that the client claimed the documents were trade secrets. The supreme court

127. Graham v. Adesa Tex., Inc., 145 S.W.3d 769, 775 (Tex. App.—Dallas 2004, pet. filed).
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* (citing Greenhalgh v. Serv. Lloyds Ins. Co., 787 S.W.2d 938, 939 (Tex. 1990)).
134. 124 S.W.3d 179 (Tex. 2003).
135. TEX. R. CIV. P. 192.7(b).
136. *Kuntz*, 124 S.W.3d at 183.

held that the husband's mere access to the documents did not constitute possession of the documents, and the trial court abused its discretion in ordering him to produce them.[137]

In re Dana Corp. presented the question whether a party is entitled to discovery of insurance information beyond the existence and terms of any potentially applicable policy.[138] The plaintiffs argued that they needed information about the extent to which any such policy had been eroded.[139] The Texas Supreme Court held that while Rule 192.3(f)[140] does not foreclose the possibility of discovery of other insurance information, it likewise does not provide a basis for a trial court to order discovery beyond production of the policy itself.[141] Instead, the supreme court concluded "a party may discover information beyond an insurance agreement's existence and contents only if the information is otherwise discoverable under our scope-of-discovery rule."[142] Thus, the supreme court rejected the plaintiffs' argument that the underlying purpose of Rule 192.3(f), namely to facilitate settlement negotiations, provided a sufficient basis to allow discovery about the extent of the remaining coverage under a policy.[143]

The issue in *Cire v. Cummings* was whether a trial court may ever strike a plaintiff's pleadings as a sanction without first testing the effectiveness of lesser sanctions.[144] The trial court in this legal malpractice case found that the plaintiff violated its prior orders by deliberately destroying tape recordings of conversations with the defendant-attorneys in order to avoid producing them. Based on this finding, the court presumed that her actions prevented the defendants from obtaining objective proof that they were not liable.[145] Although the only prior discovery sanction was a $250 sanction against the plaintiff's counsel (which had not been paid), the trial court struck plaintiff's pleadings, finding that less severe sanctions would be ineffective and would not cure the prejudice to the defendant.[146] The court of appeals reversed, holding that the trial court abused its discretion by failing to consider alternative lesser sanctions, including the possibility of a spoliation instruction.[147]

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137. *Id.* at 184. The supreme court's opinion also notes that, if required to produce the documents, the husband would have violated confidentiality agreements and potentially subjected himself to a significant damage claim. *Id.* In a concurring opinion joined by three other justices, Justice Hecht found similar fault with the trial court's order, stating that the trial judge found that the documents were privileged trade secrets of the employer's clients, but nevertheless ordering them produced without the required showing that they were necessary to a fair adjudication of the case. *Id.* at 185 (Hecht, J., concurring).

138. *In re* Dana Corp., 138 S.W.3d 298 (Tex. 2004).

139. *Id.* at 302.

140. TEX. R. CIV. P. 192.3(f).

141. *Dana*, 138 S.W.3d at 302.

142. *Id.*

143. *Id.* at 304.

144. Cire v. Cummings, 134 S.W.3d 835 (Tex. 2004).

145. *Id.* at 837-38.

146. *Id.* at 838.

147. *Id.*

The Texas Supreme Court reversed the court of appeals and reinstated the trial court's take-nothing judgment against the plaintiff.[148] The supreme court surveyed its own prior opinions on so-called "death penalty" sanctions, focusing on whether they required a trial court to only "consider" less severe sanctions before ordering death penalty sanctions or whether instead lesser sanctions must actually be "tested" first.[149] The supreme court concluded that its prior decisions stood for the proposition that a trial court must "consider the availability of less stringent sanctions, and in all but the most exceptional cases, [must] actually test such lesser sanctions before striking [a party's] pleadings."[150] Based on the "egregious conduct and blatant disregard for the discovery process demonstrated" by the plaintiff, however, the supreme court held that this was such an "exceptional case" where "no lesser sanctions would promote compliance with the discovery rules, and the trial court did not abuse its discretion in striking the [plaintiff's] pleadings."[151]

Rule 215.4(b)[152] provides that a party is entitled to recover the reasonable expenses incurred in adducing proof of a fact that the opposing party has refused, without reasonable justification, to admit in response to a request for admission.[153] In *Peralta v. Durham*, the Dallas Court of Appeals applied this rule to uphold an award of expenses to the plaintiff in a car accident case.[154] The plaintiff served various requests for admissions asking the defendant to admit she had been negligent in several specific ways; the defendant denied all of them.[155] Immediately before trial, however, the defendant stipulated to liability, and the case was tried on damages alone.[156] In affirming the trial court's award of expenses for her failure to admit, the court of appeals rejected the defendant's argument that the requests for admission were improper and that she was entitled to rely on her general denial and make the plaintiff prove his case.[157] The defendant did not object to the requests for admission, and the court disagreed with her characterization of the requests as improper.[158] The court also dismissed plaintiff's argument that the requisites of Rule 215.4(b)[159] were not established, because her eleventh-hour stipulation to liability relieved the plaintiff of the obligation to prove her negligence at

148. *Id.* at 836-37.
149. *Id.* at 839-41.
150. *Id.* at 841.
151. *Id.* at 842. The supreme court noted that the trial court could have chosen instead to give the jury a spoliation instruction, but the defendant would then "still have [had] to prepare for and attend a trial, despite a justified presumption that" the plaintiff's claims lacked merit. *Id.* at 843. Given this, as well as the extreme nature of the misconduct, the trial court did not abuse its discretion in foregoing the spoliation instruction in favor of an order striking plaintiff's pleadings. *Id.*
152. TEX. R. CIV. P. 215.4(b).
153. *Id.*
154. Peralta v. Durham, 133 S.W.3d 339 (Tex. App.—Dallas 2004, no pet. h.).
155. *Id.* at 341-42.
156. *Id.*
157. *Id.* at 341.
158. *Id.*
159. TEX. R. CIV. P. 215.4(b).

trial.[160] The court concluded that the defendant's reading of the rule was too narrow and "would defeat the purpose of the rule."[161]

One of the least-discussed aspects of requests for disclosure—the request for the identity of potential parties—took center stage in *In re Morse*.[162] The relators in this mandamus action complained of the trial court's refusal to compel the defendants to disclose the identities of their present and former shareholders whom relators contended were potential parties on relators' fraudulent transfer claims.[163] Relying on Rule 194[164] and the limited case law interpreting it, the Amarillo Court of Appeals held that the relators "were entitled to disclosure of the names and addresses of the shareholders" as potential parties, and the trial court therefore abused its discretion in denying their motion to compel.[165]

Texas courts also addressed several privilege questions during the Survey period. In *In re E.I. DuPont de Nemours & Co.*, the Texas Supreme Court reviewed the sufficiency of DuPont's privilege log in an asbestos case brought by nearly 400 plaintiffs against DuPont and over 100 other defendants.[166] After the plaintiffs requested a hearing on DuPont's privilege claims for all of the 607 documents in the privilege log, DuPont filed an affidavit of its paralegal in support of the privilege assertion and tendered the documents for in camera inspection.[167] The plaintiffs argued that the paralegal's affidavit lacked specificity because it addressed groups of documents rather than each document individually, and that it was not probative because it was not based on the affiant's personal knowledge.[168] The supreme court rejected both arguments.[169] Regarding the claimed lack of specificity, the supreme court noted that while the paralegal did not attest to the contents of each of the documents at issue, his affidavit did establish the factual basis for the application of "the attorney-client and/or work product privileges to the documents" by category and did not merely present global assertions that all of the documents came within those privileges.[170] Likewise, the supreme court held that the paralegal's explanation that his statements regarding the predicate facts establishing the privileges were based on his review of the human-resource database for DuPont's legal department satisfied the

160. *Peralta*, 133 S.W.3d at 341-42.

161. *Id.* at 342.

162. 153 S.W.3d 578 (Tex. App.—Amarillo 2004, no pet. h.).

163. *Id.* at 580.

164. TEX. R. CIV. P. 194.

165. *Morse*, 153 S.W.3d at 582.

166. *In re* E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 221 (Tex. 2004). As the court explained, a "'privilege log' is the commonly used term" for a party's identification of the documents it has withheld in discovery on the basis of privilege, which listing is required upon request pursuant to TEX. R. CIV. P. 193.3(b). *DuPont*, 136 S.W.3d at 221 n.1.

167. *Id.* at 222.

168. *Id.* at 223-24.

169. *Id.* at 224.

170. *Id.*

personal knowledge requirement.[171] Significantly, the supreme court's guidance on these two points should greatly assist practitioners called upon to support a corporate litigant's claim of privilege, particularly when the documents at issue span many years in the corporation's history.

Rule 193.3(d)[172] provides that the inadvertent production of a privileged document does not waive the privilege, unless the producing party fails to assert the privilege and seek to reclaim the document within ten days after it actually discovers the inadvertent production. *Warrantech Corp. v. Computer Adapters Services, Inc.* explored the proper application of this rule where the document in question, a letter from a client to her attorney, was listed on the adverse parties' trial exhibit list a month before trial.[173] The letter was attached to a series of invoices and described on the exhibit list only as "Invoice with attachments," as were hundreds of other exhibits.[174] Accordingly, it was not until the privileged letter was actually offered at trial that the producing parties asserted the attorney-client privilege.[175] Under these circumstances, the Fort Worth Court of Appeals held that the trial court did not abuse its discretion in ruling that the privilege had not been waived.[176]

Whether a plaintiff church can be compelled, consistently with the First Amendment, to produce church membership, tithing, and other financial records was at issue in *In re CFWC Religious Ministries, Inc.* The defendant argued that the "offensive use" doctrine waived any constitutional privilege the church could otherwise assert, because the church sought affirmative relief and the information sought was relevant to the church's alleged economic damages.[177] Although the Beaumont Court of Appeals agreed that the offensive use doctrine would apply if the church intended to prove actual damages by showing a reduction in membership, attendance, or revenue, the record did not clearly demonstrate that this was in fact the basis of the church's damage claim.[178] While the court was apparently sympathetic to the defendant's and the trial judge's frustration at being unable to get the church to make clear the basis for any economic damages claimed, the defendant simply had not exhausted all other discovery methods by which he could secure that information, which was required before any offensive use waiver could be found.[179]

171. *Id.*

172. TEX R. CIV. P. 193.3(d).

173. Warrantech Corp. v. Computer Adapters Servs., Inc., 134 S.W.3d 516, 525 (Tex. App.—Fort Worth 2004, no pet. h.).

174. *Id.*

175. *Id.*

176. *Id.* The court of appeals also rejected the opposing parties' arguments that the letter was not privileged under the crime-fraud exception, or that any privilege had been waived by the offensive use doctrine. *Id.* at 526-28.

177. *In re* CFWC Religious Ministries, Inc., 143 S.W.3d 891, 892 (Tex. App.—Beaumont 2004, no pet. h.).

178. *Id.* at 894.

179. *Id.* at 894-95.

Formosa Plastics Corp., USA v. Kajima International, Inc. addressed whether an expert witness who switches sides in a lawsuit should be disqualified from testifying.[180] Finding that the issue was one of first impression in Texas, the Corpus Christi Court of Appeals relied on federal case law to adopt a two-part test: "(1) was it objectively reasonable for the first party who claims to have retained the expert to conclude that a confidential relationship existed between that party and the expert; and (2) did the first party disclose any confidential or privileged information to the expert?"[181] The court held that the party seeking disqualification in this case carried its burden of proving both elements of this test and that the expert should have been disqualified.[182] In addition, because the expert's testimony was critical to the adverse party's case, the court held that the judgment in the latter's favor should be reversed and the case remanded for a new trial.[183]

Finally, *Branum v. Northwest Texas Healthcare System, Inc.* addressed the interplay between a level-3 discovery control plan[184] and a no-evidence motion for summary judgment.[185] In this medical-malpractice case, the plaintiff timely filed an expert report after filing suit, as required by the Medical Liability and Insurance Improvement Act.[186] Having originally alleged that she intended to conduct discovery under level 2, the plaintiff failed to designate any testifying experts by the deadline for doing so under level 2.[187] When the defendants filed a no-evidence summary judgment motion, plaintiff responded with a motion to adopt a level-3 discovery control plan to postpone the summary judgment hearing and in the alternative, permission to late-designate experts under level 2.[188] Following a six-month stay that intervened for unrelated reasons, the trial court held a hearing and granted summary judgment for the defendants.[189]

On appeal, the plaintiff complained that "the trial court erred in granting summary judgment before granting her motion" to adopt a level 3 discovery control plan and establishing new expert designation deadlines thereunder.[190] Contending that the trial court was required to convert discovery to level 3 upon her request, the plaintiff argued that there was

180. Formosa Plastics Corp., USA v. Kajima Int'l, Inc., No. 13-02-385-CV, 2004 WL 2534207, at *1 (Tex. App.—Corpus Christi, Nov. 10, 2004, no pet. h.).

181. *Id.* at *2.

182. *Id.* at *7.

183. *Id.* at *6.

184. Branum v. N.W. Tex. Healthcare Sys., Inc. 134 S.W.3d 340, 342 (Tex. App.—Amarillo 2004, pet. denied).

185. Rule 190.1 requires that every case be governed by a level 1, 2, or 3 discovery control plan. *See* TEX. R. CIV. P. 190.1. A level 2 discovery control plan is the default plan that governs the majority of civil cases. However, a level 3 plan must be entered by the trial court on the motion of any party. *See* TEX. R. CIV. P. 190.4.

186. *Branum*, 134 S.W.3d at 341.

187. *Id.*

188. *Id.*

189. *Id.* at 341-42.

190. *Id.* at 342.

not an "adequate time for discovery" as required under Rule 166a(i)[191] before the no-evidence motion was granted.[192] The Amarillo Court of Appeals disagreed, noting that it did not need to decide whether the trial court was required to convert discovery to level 3 because the question whether there has been an "adequate time for discovery" is case-specific in any event.[193] The plaintiff did not contend that she lacked adequate time for discovery, and the court declined to impose any bright-line rule tied to the discovery deadline under level 2 or 3.[194] Moreover, the plaintiff did not file a sworn motion for continuance of the summary judgment hearing as required by Rule 252,[195] nor did she file any affidavit describing her reasons for additional time for discovery as required by Rule 166a(g).[196]

IX. SUMMARY JUDGMENT

The Texas Supreme Court held in *Binur v. Jacobo* that parties may combine traditional and no-evidence summary judgment motions in a single filing.[197] The supreme court further held that attaching evidence to such a motion for purposes of the traditional motion does not foreclose the movant from also advancing no-evidence points under Rule 166a(i)[198] within the same instrument.[199] The supreme court noted that while the use of headings to delineate clearly between the traditional and no-evidence grounds in the motion "would be helpful to [both] the bench and bar," it is not required under Rule 166a.[200]

In *Joe v. Two Thirty Nine Joint Venture* the Texas Supreme Court held that the trial court did not err in denying the plaintiff's motion for continuance of a summary judgment hearing that was filed only two months after suit had been initiated because the sole issue to be decided on summary judgment was official immunity.[201] Because none of the discovery requested in the continuance would have raised a fact question on that point, the trial court did not abuse its discretion in denying the continuance and proceeding with the summary judgment hearing soon after suit had been filed.[202] Conversely, in *Nelson v. PNC Mortgage Corp.*, the trial court did abuse its discretion in denying the plaintiff's motion for continu-

191. TEX. R. CIV. P. 166a(i).
192. *Branum*, 134 S.W.3d at 343.
193. *Id.*
194. *Id.*
195. TEX. R. CIV. P. 252.
196. TEX. R. CIV. P. 166a(g); *Branum*, 134 S.W.3d at 343.
197. Binur v. Jacobo, 135 S.W.3d 646, 650 (Tex. 2004).
198. TEX. R. CIV. P. 166a(i).
199. *Binur*, 135 S.W.3d at 650-51.
200. TEX. R. CIV. P. 166a; *Binur*, 135 S.W.3d at 651. *But see* Martinez v. Wilson Plaza Assocs., L.P., No. 13-02-697-CV, 2004 WL 2471785 (Tex. App.—Corpus Christi Nov. 4, 2004, no pet. h.) (holding that the trial court erred in impliedly overruling special exceptions to a summary judgment motion where the non-movant could not determine whether such a motion was based upon traditional or no-evidence grounds).
201. Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 161-62 (Tex. 2004).
202. *Id.* at 162.

ance and ruling on the defendants' summary judgment motion, where the plaintiff had filed various discovery motions that the trial court had not ruled upon, and the discovery sought bore directly upon the merits of the case and the pending summary judgment motion.[203]

Several courts addressed the issue of the notice required for summary judgment hearings during the Survey period. In *Lester v. Capital Industries, Inc.* the San Antonio Court of Appeals reversed the trial court's default summary judgment, holding that once the defendant's attorney made an appearance in the case, all communications from opposing counsel in the suit should have been sent to him.[204] Because notice of the summary judgment hearing was not given to defendant's counsel, the trial court erred in granting summary judgment.[205] Likewise, in *Tanksley v. CitiCapital Commercial Corp.*,[206] the Dallas Court of Appeals reversed a summary judgment where the record did not contain adequate evidence that the non-movant was properly served with the summary judgment motion or advised of the hearing.[207] Because the certificate of service referred only to service by certified mail, which all parties acknowledged was returned undelivered, the court did not consider the plaintiffs' counsel's statements that the motion was also sent by regular mail.[208] On the other hand, the Amarillo Court of Appeals held in *Winn v. Martin Homebuilders, Inc.* that while a party is entitled to twenty-one days notice of a summary judgment hearing, no similar notice is required for a subsequent hearing on that same motion.[209]

The Dallas Court of Appeals addressed in *Cimarron Hydrocarbons Corp. v. Carpenter* the issue of preservation of error where the non-movant failed to timely respond to a summary judgment motion that included no-evidence grounds.[210] Arguing that it had alleged direct tort claims against the defendant-movant and not a claim based on piercing the corporate veil, the plaintiff noted that the defendant's motion failed to identify the elements of those claims that lacked evidentiary support.[211] The Dallas Court of Appeals held that the plaintiff's failure to file a response did not waive this complaint regarding the legal sufficiency of the no-evidence summary judgment motion.[212]

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203. Nelson v. PNC Mortgage Corp., 139 S.W.3d 442, 445-46 (Tex. App.—Dallas 2004, no pet. h.).

204. Lester v. Capital Indus., Inc., 153 S.W.3d 93, 96 (Tex. App.—San Antonio 2004, no pet. h.).

205. *Id.*

206. 145 S.W.3d 760 (Tex. App.—Dallas 2004, pet. filed).

207. *Id.* at 764-65.

208. *Id.* at 764.

209. Winn v. Martin Homebuilders, Inc., 153 S.W.3d 553, 556-57 (Tex. App.—Amarillo 2004, pet. denied).

210. Cimarron Hydrocarbons Corp. v. Carpenter, 143 S.W.3d 560, 561-62 (Tex. App.—Dallas 2004, pet. filed).

211. *Id.* at 562.

212. *Id.* at 563.

X. JURY PRACTICE

The Fort Worth Court of Appeals addressed the issue of equalization of peremptory strikes in *In re Interest of M.N.G.*[213] The court affirmed the termination of a mother's parental rights, even though counsel for the Texas Department of Family and Protective Services (DFPS) and the attorney ad litem for the minor child coordinated their peremptory strikes over the mother's objection at trial.[214] The court rejected the argument that the mother waived her complaint by failing to timely object, noting that counsel for the ad litem had represented prior to voir dire that he would not exercise any strikes and would leave the jury selection up to counsel for DFPS but then did not do so.[215] However, because the record showed that underlying facts in the suit were largely not in dispute, and there was no other indication of prejudice, the court concluded that any error was not harmful.[216]

In *Wells v. Barrow*, the Amarillo Court of Appeals held that the clerk's inadvertent failure to seat a panel member on the jury who was not struck did not constitute reversible error, because the final juror who was included as a result was not otherwise disqualified.[217] The court reasoned that a party's "right to have the jury selected in substantial compliance with the applicable procedural statutes and rules" does not equate to the right to select who would actually sit on the jury.[218] Rather, one's right to a jury trial is simply the "right to have fact questions resolved by an impartial jury."[219]

XI. JURY CHARGE

The Texas Supreme Court in *Mustang Pipeline Co. v. Driver Pipeline Co.* addressed the submission of competing breach of contract claims in a jury charge.[220] Noting that a prior material breach excuses further performance by the other party, the supreme court held that it is appropriate to submit the jury question disjunctively (*i.e.*, did Mustang or Driver fail to comply with the terms of their agreement), coupled with an "instruction directing the jury to decide who committed the first material breach."[221]

Texas courts continue to grapple with broad-form submission where valid and invalid theories of liability are presented. In *Laredo Medical Group Corp. v. Mireles*, the jury received a broad-form submission that inquired into the liability of two defendants under several different theo-

213. 147 S.W.3d 521, 530 (Tex. App.—Fort Worth 2004, pet. denied).
214. *Id.* at 532.
215. *Id.* at 532-33. The proper time to object, according to the court, was after voir dire and prior to the exercise of peremptory challenges. *Id.* at 532.
216. *Id.* at 533-34.
217. Wells v. Barrow, 153 S.W.3d 514 (Tex. App.—Amarillo 2004, no pet. h.).
218. *Id.* at 516.
219. *Id.* at 517.
220. Mustang Pipeline Co. v. Driver Pipeline Co., 134 S.W.3d 195, 200 (Tex. 2004).
221. *Id.* at 196-200.

ries, some of which were "not supported by legally sufficient evidence."[222] Because the appellants timely and specifically objected to this submission, it was necessary to reverse and remand the jury's verdict in favor of the plaintiff.[223] Similarly, in *Royal Maccabees Life Insurance Co. v. James*, the trial court conditioned certain questions regarding mental anguish damages upon the jury's answer to several underlying liability theories, including a claim for breach of contract.[224] Because "mental anguish damages are not recoverable for a breach of contract claim and the Dallas Court of Appeals could not conclude that the jury did not consider breach of contract as a basis for awarding mental anguish damages, it reversed and remanded the case.[225] In *Urista v. Bed, Bath & Beyond, Inc.*, a personal injury action, the trial court submitted a negligence question to the jury with an instruction regarding "unavoidable accident" that was not supported by the evidence.[226] The First District Court of Appeals held that this was reversible error.[227] The dissent chastised the majority, however, for abandoning a traditional harmful-error analysis in favor of the presumed-harm analysis under *Crown Life Insurance Co. v. Casteel*.[228]

In *Tesfa v. Stewart* the court held that where the defendants submitted no-evidence objections to each subsection of a damage question, they failed to preserve error because they did not plainly inform the trial court of the specific element of damages of which they were complaining.[229] The court in *Coley v. Baylor University* reversed and remanded an action where the court's charge failed to include a requested question and instruction on the issue of constructive discharge.[230] The court reasoned that the plaintiff complied with Rule 278[231] by tendering the proposed question and instruction to the court coordinator at the beginning of the trial and then, after the trial court failed to include them in its proposed charge, reading the question and instruction into the record during the charge conference and requesting that they be submitted.[232]

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222. Laredo Med. Group Corp. v. Mireles, 155 S.W.3d 417, 427 (Tex. App.—San Antonio 2004, pet. filed).

223. *Id.* at 425-27.

224. Royal Maccabees Life Ins. Co. v. James, 146 S.W.3d 340, 351 (Tex. App.—Dallas 2004, no pet. h.).

225. *Id.*

226. Urista v. Bed, Bath & Beyond, Inc., 132 S.W.3d 517, 523 (Tex. App.—Houston [1st Dist.] 2004, pet. filed).

227. *Id.*

228. *Id.* at 525-26 (Jennings, J., dissenting) (citing Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000)).

229. Tesfa v. Stewart, 135 S.W.3d 272, 275-76 (Tex. App.—Fort Worth 2004, pet. denied).

230. Coley v. Baylor Univ., 147 S.W.3d 567, 571 (Tex. App.—Waco 2004, pet. filed).

231. TEX. R. CIV. P. 278.

232. *Coley*, 147 S.W.3d at 569.

XII. JUDGMENTS

In *Gold v. Gold*, the Texas Supreme Court held that failing to file a restricted appeal does not bar a party from pursuing a bill of a review, particularly where all the elements of a restricted appeal cannot be met.[233] In this case, the appellant could have timely filed a restricted appeal but could not have shown error apparent on the face of the record as is required under that procedure.[234] Thus, the supreme court held that a restricted appeal was not available to appellant, and the failure to pursue that avenue did not bar the appellant's bill of review.[235] Moreover, the supreme court held that even if a restricted appeal would have been viable, the appellant still would have been entitled to file a bill of review instead.[236] The supreme court noted that foregoing a restricted appeal might be to a party's advantage and would not, therefore, necessarily constitute the fault or negligence that would preclude a bill of review.[237] Although a bill of review is available "only if a party has exercised due diligence in pursuing" its legal remedies, the supreme court noted that it had never held that a restricted appeal was an adequate legal remedy that a bill of review claimant must pursue.[238]

The Texas Supreme Court in *M.O. Dental Lab v. Rape* clarified that a summary judgment order is still final and appealable when it disposes of all issues and all parties that are before the court, even if one of the named defendants was never served and never entered an appearance.[239] Thus, even though the judgment was silent as to the unserved defendant, it was still final.[240] In *Fresh Coat, Inc. v. Life Forms, Inc.*, the First District Court of Appeals held that judgment was final and appealable, even absent language in the judgment expressly stating it "is appealable," where the judgment clearly and finally disposed of all parties and claims.[241] The San Antonio Court of Appeals held in *In re Vlasak* that a default judgment taken against a party over whom the trial court does not have jurisdiction was final, even though it would be void if challenged.[242]

In *In re Helena Chemical Co.*, the trial court issued a letter stating that because the parties were continuing to negotiate settlement, the Waco Court of Appeals was withdrawing a previously-signed summary judgment disposing of all issues.[243] When the trial court entered a more limited interlocutory summary judgment several months later, the plaintiff sought a writ of mandamus vacating the latter order on the ground that

233. Gold v. Gold, 145 S.W.3d 212, 213 (Tex. 2004).
234. *Id.*
235. *Id.*
236. *Id.* at 214.
237. *Id.*
238. *Id.*
239. M.O. Dental Lab v. Rape, 139 S.W.3d 671, 674-75 (Tex. 2004).
240. *Id.* at 675.
241. Fresh Coat, Inc. v. Life Forms, Inc., 125 S.W.3d 765, 767-68 (Tex. App.—Houston [1st Dist.] 2003, no pet.).
242. *In re* Vlasak, 141 S.W.3d 233, 237-38 (Tex. App.—San Antonio 2004, no pet. h.).
243. *In re* Helena Chem. Co., 134 S.W.3d 378, 379 (Tex. App.—Waco 2003, no pet.).

the trial court's plenary power had expired.[244] The Waco Court of Appeals denied the writ of mandamus, holding that the trial court's language in its letter and its subsequent actions indicated a present intent to withdraw the summary judgment, and therefore the subsequent summary judgment order was not void for lack of jurisdiction.[245] In *Perdue v. Patten Corp.*, on the other hand, the trial court sent a letter indicating that it granted a motion for new trial and asking counsel to prepare an order reflecting that ruling.[246] The court filed the letter while it still had plenary power, but the order granting the new trial was not filed until after the trial court's plenary power expired.[247] In holding the new trial order void, the Austin Court of Appeals concluded that the letter itself was legally insufficient to grant the motion for new trial because it contemplated that an order be signed afterwards.[248]

XIII. DISQUALIFICATION OF JUDGES

The authority of the judge of a district court that encompasses multiple counties was at issue in *In re McGuire*.[249] The judge of the 278th District Court, Kenneth H. Keeling, sitting for the judge of the 87th District Court, entered a discovery sanction order against the relator while physically present in Walker County.[250] While the two district courts shared jurisdiction over one county, the 278th Judicial District also included Walker County, but the 87th Judicial District did not.[251] In concluding that the sanction order was void, the Waco Court of Appeals held that Judge Keeling had jurisdiction to hear and decide matters for the 87th District Court only while physically present within any of the counties in the 87th Judicial District.[252]

XIV. DISQUALIFICATION OF COUNSEL

The Texas Supreme Court upheld the disqualification of a law firm in an asbestos lawsuit in *In re Mitcham*.[253] The disqualification battle centered around a legal assistant, Gayle Mortola-Strasser, who was involved with the representation of TXU in various asbestos cases and who later became a lawyer and was hired by Waters & Kraus, L.L.P.[254] As part of

244. *Id.*
245. *Id.* at 380.
246. Perdue v. Patten Corp., 142 S.W.3d 596, 600 (Tex. App.—Austin 2004, no pet. h.).
247. *Id.* at 601.
248. *Id.* at 603.
249. 134 S.W.3d 406, 408 (Tex. App.—Waco 2004, no pet. h.).
250. *Id.* at 409.
251. *Id.* at 408 (citing TEX. GOV'T CODE ANN. §§ 24.189, 24.455 (Vernon 2004)).
252. *Id.* at 409-10. The Court rejected the real party in interest's argument that the sanction order was saved by TEX. GOV'T CODE ANN. § 74.094(e) (Vernon 2005), which allows a judge to hear any pretrial matters in counties outside her jurisdiction if there is no objection. *McGuire*, 134 S.W.2d at 409. According to the court, Chapter 74 of the Government Code provides only for the assignment, docketing, and transfer of cases, not the exchange of benches between judges. *Id.*
253. 133 S.W.3d 274, 277 (Tex. 2004).
254. *Id.* at 275.

an "Agreement Regarding Conflicts of Interest," Waters & Kraus agreed that Mortola-Strasser would not share any information about TXU, and that the firm would not handle asbestos cases against TXU.[255] When Mortola-Strasser subsequently left Waters & Kraus, however, the firm filed an asbestos case against TXU.[256] The Waco Court of Appeals held that there was an irrebuttable presumption that the "other attorneys at Waters & Kraus had access to the confidences of TXU" that Mortola-Strasser obtained while working as a legal assistant. Therefore, Waters & Kraus was disqualified even though Mortola-Strasser no longer worked for the firm.[257]

The Texas Supreme Court agreed that Waters & Kraus was disqualified but based its decision solely on the "Agreement Regarding Conflicts of Interest."[258] The supreme court declined to imply a reasonable time limit on that agreement, which contained no express termination date.[259] The supreme court reasoned that, because the agreement also permanently prohibited Mortola-Strasser from sharing TXU's confidential information, which prohibition is permanent as to her, it could not imply a termination date that applied to only some of the agreement's provisions and some of the parties.[260] Thus, the supreme court did not reach the issue of whether, in the absence of the agreement, Waters & Kraus would have been disqualified from bringing asbestos claims against TXU after Mortola-Strasser left.[261]

In re Southwestern Bell Yellow Pages, Inc. teaches that a lawyer is not necessarily disqualified from simultaneously representing one client in a matter adverse to the interests of another client.[262] In that case, a law firm hired to defend a personal injury case for Star Shuttle was later hired to represent Southwestern Bell in an unrelated breach of contract suit by Star Shuttle and an affiliate.[263] The trial court disqualified the firm, but the San Antonio Court of Appeals conditionally granted mandamus relief.[264] Although noting that it is "not encouraged," the court of appeals held that "concurrent representation of adverse clients is permitted in Texas."[265] The court stated that the party moving for disqualification must not only demonstrate that the lawyer's representation would reasonably appear to be adversely limited by the representation of the other client, but also that the movant suffered actual prejudice as a result.[266]

255. *Id.*
256. *Id.*
257. *In re* TXU U.S. Holdings Co., 110 S.W.3d 62, 66-67 (Tex. App.—Waco 2002, no pet.), *mandamus denied*, 133 S.W.3d 274, 277 (Tex. 2004).
258. *Mitcham*, 133 S.W.2d at 276-77.
259. *Id.* at 277.
260. *Id.*
261. *Id.*
262. *In re* S.W. Bell Yellow Pages, Inc., 141 S.W.3d 229, 231 (Tex. App.—San Antonio 2004, no pet.).
263. *Id.* at 230-31.
264. *Id.* at 232-33.
265. *Id.* at 231.
266. *Id.* at 232.

Because the record in the trial court established, at most, only "potential prejudice," the court of appeals held that disqualification was inappropriate.[267]

In *In re Moore*,[268] the trial court disqualified an attorney from representing his client in a divorce proceeding based on the attorney having asserted his Fifth Amendment privilege when he was called to testify about certain financial dealings with the client that were at issue in the divorce.[269] The court of appeals concluded that this was an abuse of discretion.[270] The court noted that the determinative issue was not whether the attorney invoked his Fifth Amendment rights, but whether the trial court could have reasonably concluded that the attorney participated with the client in a conspiracy to defraud the community estate.[271] The court found there was no evidence the attorney engaged in such conduct, and it refused to allow the trial court to draw an inference of such wrongful conduct based solely on the attorney's assertion of his Fifth Amendment privilege.[272]

Finally, two cases decided during the Survey period refused to allow the disqualification of an attorney based on the adverse party's stated desire to call the attorney as a witness. In *In re Slusser*,[273] a trust dispute, the trustee sought to disqualify the beneficiary's counsel, arguing that his testimony was necessary to establish the beneficiary's motivation in filing suit, which the trustee claimed was a relevant, controverted issue.[274] The court of appeals rejected this argument, holding that the test for disqualification is not whether the attorney's testimony is relevant but whether it is "necessary to 'establish an essential element on behalf of the [testifying] lawyer's client.'"[275] Similarly, in *In re Chu*,[276] the appellate court upheld the trial court's refusal to disqualify the attorney ad litem in a custody proceeding, noting that the movant failed to demonstrate that the ad litem's testimony was necessary to establish any essential fact on behalf of his clients—that is, the children.[277]

XV. MISCELLANEOUS MATTERS

In *In re Prudential Insurance Co. of America*,[278] the Texas Supreme Court held that parties could contractually agree to waive a trial by jury

267. *Id.* at 232-33.
268. No. 12-03-00290-CV, 2004 WL 58368, at *3 (Tex. App.—Tyler March 24, 2004, orig. proceeding [mand. denied]).
269. *Id.* at *3.
270. *Id.* at *7.
271. *Id.* at *5-6.
272. *Id.* at *6.
273. 136 S.W.3d 245, 247-48 (Tex. App.—San Antonio 2004, orig. proceeding).
274. *Id.* at 247-48.
275. *Id.* at 248 (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005)).
276. 134 S.W.3d 459 (Tex. App.—Waco 2004, orig. proceeding).
277. *Id.* at 464-65.
278. 148 S.W.3d 124, 131 (Tex. 2004).

in any future lawsuit.[279] Primarily, the appellant argued that an agreement to waive a trial by jury was contrary to the public policy expressed in the Texas Constitution and Texas Rule of Civil Procedure 216.[280] The supreme court disagreed, noting that the same "public policy that permits parties to waive trials altogether," when, for example, they agree to arbitrate, "surely does not forbid a waiver of a jury."[281] However, the court did recognize the potential for some parties "to take unfair advantage of others, using bargaining position, sophistication, or other leverage to extract waivers from the reluctant or unwitting."[282] Accordingly, the supreme court emphasized that any "waiver of constitutional rights must be voluntary, knowing, and intelligent, with full awareness of the legal consequences."[283]

In *Southwest Bank v. Information Support Concepts, Inc.*, the Texas Supreme Court held that the proportional responsibility statute did not apply to a conversion claim under Article 3 of the Uniform Commercial Code.[284] In particular, the court held that applying the proportionate responsibility framework under Chapter 33 of the Texas Civil Practice & Remedies Code "to claims involving Article 3 could . . . disrupt the UCC's carefully allocated liability scheme."[285] Further, the supreme court noted that the Texas Legislature adopted the revised Article 3 in the same session in which it amended Chapter 33.[286] Because there is a tension between the two statutes, the court concluded it was "unreasonable to assume that the Legislature intended to adopt the UCC's comprehensive liability scheme while simultaneously undoing that framework by mandating the application of Chapter 33 to UCC-based conversion claims."[287]

In *Forist v. Vanguard Underwriters Insurance Co.*,[288] the San Antonio Court of Appeals held, as a matter of first impression, that the abuse of discretion standard applies to a review of a trial court's determination that a plaintiff is a "vexatious litigant."[289] As support for its conclusion, the court of appeals noted that courts had "applied [the] abuse of discretion standard for frivolous lawsuits under Texas Civil Practice & Remedies Code § 13.001.[290]

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279. *Id.* at 131.
280. TEX. R. CIV. P. 216.
281. *Prudential*, 148 S.W.3d at 131.
282. *Id.* at 132.
283. *Id.*
284. Southwest Bank v. Info. Support Concepts, Inc., 149 S.W.3d 104, 111 (Tex. 2004).
285. *Id.* at 108.
286. *Id.* at 111.
287. *Id.* at 110; *cf.* F.F.P. Operating Partners, L.P. v. Dueñez, No. 02-0381, 2004 WL 1966008, at *3 (Tex. Sept. 3, 2004) (applying Chapter 33's comparative responsibility provisions to a claim under the Dram Shop Act).
288. 141 S.W.3d 668 (Tex. App.—San Antonio 2004, no pet. h.).
289. *Id.* at 670; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 11.054(2) (Vernon 2002) (setting forth the criteria for determining whether a plaintiff is a vexatious litigant).
290. TEX. CIV. PRAC. & REM. CODE ANN. § 13.001 (Vernon 2002); *Forist*, 141 S.W.3d at 670.