SMU DEDMAN SCHOOL OF LAW

SMU Law Review

Volume 59
Issue 3 *Annual Survey of Texas Law*

Article 3

January 2006

Appellate Practice and Procedure

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Recommended Citation

LaDawn H. Conway & Holly M. Church, *Appellate Practice and Procedure*, 59 SMU L. REV. 923 (2006)
https://scholar.smu.edu/smulr/vol59/iss3/3

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Appellate Practice and Procedure

*LaDawn H. Conway**
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I. APPELLATE REVIEW BEFORE FINAL JUDGMENT

A. Mandamus and Other Original Proceedings

DURING the Survey period,[1] the Texas Supreme Court continued its trend of granting mandamus to compel arbitration, to resolve conflicting court orders regarding jurisdiction, to vacate overly broad discovery orders, and to remedy erroneous orders disqualifying counsel.

1. *Disqualification Rulings*

Historically, mandamus relief has been available to correct an erroneous order disqualifying counsel.[2] In fact, during the Survey period, the Texas Supreme Court twice granted writs of mandamus to vacate trial courts' orders disqualifying counsel.[3] In both instances, the court noted that disqualification is a severe remedy that can cause immediate harm by depriving a party of its chosen counsel and disrupting court proceedings.[4]

First, in *In re Sanders*, a divorce and child-custody dispute, the wife moved to disqualify the husband's attorney, arguing that because he agreed to partially pay his attorney by performing remodeling work on her office, his attorney was his employer and thus would be a material witness in the lawsuit.[5] The trial court denied the wife's motion, but a divided court of appeals ordered disqualification.[6] The supreme court granted mandamus relief to vacate the disqualification order because the wife failed to show that other sources in the record were insufficient to establish what the testimony of the husband's attorney would establish.[7]

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1. The Survey period is from October 31, 2004, to October 31, 2005.
2. *See In re* Epic Holdings, Inc., 985 S.W.2d 41, 54 (Tex. 1998) (citing Nat'l Med. Enters. v. Godbey, 924 S.W.2d 123, 133 (Tex. 1996)).
3. *In re* Sanders, 153 S.W.3d 54, 58 (Tex. 2004); *In re* Cerberus Capital Mgmt., L.P., 164 S.W.3d 379, 383 (Tex. 2005).
4. *In re Sanders*, 153 S.W.3d at 57; *In re Cerberus*, 164 S.W.3d at 382.
5. *In re Sanders*, 153 S.W.3d at 56.
6. *Id.*
7. *Id.* at 57-58.

Then, in *In re Cerberus Capital Management., L.P.*,[8] a trustee appointed for WSNet Holdings, Inc. moved to disqualify Vinson & Elkins ("V&E") from representing relators in a shareholder derivative suit against WSNet based on work V&E had previously done for WSNet.[9] Because the relators had obtained a conflict-of-interest waiver in accordance with Disciplinary Rule 1.09, the supreme court found that the disqualification order constituted an abuse of discretion.[10]

Mandamus, however, is not available to review the denial of a motion to recuse a trial court judge because Texas Rule of Civil Procedure 18a(f) provides an adequate remedy at law by allowing such a denial to be reviewed on appeal from the final judgment.[11]

2. *Compelling Arbitration under the FAA*

The supreme court has consistently held that the denial of a motion to compel arbitration is reviewable by mandamus.[12] During the Survey period, the court granted mandamus relief in two separate instances to compel arbitration pursuant to the Federal Arbitration Act ("FAA").[13]

Most notably, the court for the first time granted mandamus relief to compel a party to arbitrate that did not sign an arbitration agreement.[14] In *In re Weekley Homes, L.P.*, Forsting contracted with Weekley Homes to have a home built for himself and his daughter's family. Forsting executed a Purchase Agreement, which contained an arbitration clause providing that any dispute had to be resolved by arbitration. Shortly after he closed on the home, Forsting transferred the home to a family trust, of which his daughter was the sole beneficiary. After problems arose with the home, Forsting, the trust, and his daughter sued Weekley Homes. The daughter, however, asserted only a personal-injury claim against Weekley, alleging that repairs made to the home caused her to develop asthma.[15]

Weekley moved to compel arbitration under the FAA, but the trial court refused to compel the daughter to arbitrate because she did not sign the Purchase Agreement.[16] Ultimately, the supreme court granted mandamus relief, holding the daughter to the arbitration clause because she received direct benefits from the Purchase Agreement. As the court ex-

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8. *In re Cerberus*, 164 S.W.3d at 379.
9. *Id.* at 380-81.
10. *Id.* at 382-83.
11. *In re* Lutz, 164 S.W.3d 721, 723-24 (Tex. App.—El Paso 2005, orig. proceeding).
12. *See* Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 271-72 (Tex. 1992); *In re* Nexion Health at Humble, Inc., 173 S.W.3d 67, 69-70 (Tex. 2005).
13. *In re* McKinney, 167 S.W.3d 833, 834 (Tex. 2005) (rejecting a party's contention that he did not understand the significance of signing a contract, which mandated arbitration under the FAA, the Texas Supreme Court compelled him to arbitrate his dispute because he signed the contract); *In re* Weekley Homes, L.P., 180 S.W.3d 127, 135 (Tex. 2005).
14. *In re Weekley Homes*, 180 S.W.3d at 135.
15. *Id.* at 129.
16. *Id.* at 129-30.

plained: "A nonparty cannot both have his contract and defeat it too."[17]

Conflicting opinions have emerged from the courts of appeals regarding whether a trial court abuses its discretion by deferring to rule on a motion to compel arbitration until after the completion of discovery. The Corpus Christi Court of Appeals has held that a trial court does not abuse its discretion by precluding arbitration until after discovery is completed,[18] whereas the Houston First District Court of Appeals has granted mandamus relief directing a trial court to vacate its decision to delay ruling on a motion to compel arbitration until after the completion of discovery.[19]

In *In re Champion Technologies, Inc.*, the Eastland Court of Appeals joined the First District Court of Appeals and granted mandamus relief directing a trial court to vacate its order deferring ruling on a motion to compel arbitration.[20] Delaying a ruling on a motion to compel defeats the purpose of arbitration—to resolve issues promptly—and forces parties to litigate their dispute even though their claims may be subject to arbitration.[21]

3. *Appellate Court Jurisdiction*

The Texas Supreme Court has long held that mandamus relief is appropriate to resolve conflicting orders asserting jurisdiction over the same case.[22] This Survey period was no different—the court granted mandamus three times to resolve conflicting court orders asserting jurisdiction.

For instance, in *In re U.S. Silica Co.*, "[t]en silicosis cases involving hundreds of plaintiffs were filed in Cameron County and randomly assigned to six different courts."[23] The first case filed was assigned to the 197th District Court, which granted the plaintiff's motion to transfer and consolidate all ten cases in the 404th District Court.[24] The next day, another court granted the defendants' motion to consolidate all ten cases in the 197th District Court.[25] The remaining courts responded in different ways: one transferred the cases to the 197th District Court, one entered an anti-transfer order, one recused itself and transferred the case to the local administrative judge, and one simply did nothing.[26] The Corpus Christi Court of Appeals refused to intervene, concluding that the local

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17. *Id.* at 135.
18. CP & Assocs. v. Pickett, 697 S.W.2d 828, 831 (Tex. App.—Corpus Christi 1985, no writ).
19. *In re* MHI P'ship, Ltd., 7 S.W.3d 918, 923 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding).
20. *In re* Champion Techs., Inc., 173 S.W.3d 595, 600 (Tex. App.—Eastland 2005, orig. proceeding).
21. *Id.* at 599.
22. *In re* U.S. Silica Co., 157 S.W.3d 434, 438 (Tex. 2005) (citing Bigham v. Dempster, 901 S.W.2d 424, 428 (Tex. 1995)); Abor v. Black, 695 S.W.2d 564, 567 (Tex. 1985); Curtis v. Gibbs, 511 S.W.2d 263, 267 (Tex. 1974).
23. *In re U.S. Silica Co.*, 157 S.W.3d at 437.
24. *Id.*
25. *Id.*
26. *Id.*

administrative judge should resolve the dispute among the courts.[27] The Texas Supreme Court rejected the appellate court's reasoning and held that enforcing or overruling competing orders is the duty of a higher court.[28] Guided by the local rules that permit a unilateral transfer only by the court in which the first case was filed, the high court ordered the other courts to vacate their orders and allow the 197th District Court to proceed.[29]

The Texas Supreme Court also granted mandamus relief to vacate orders by probate courts transferring cases without statutory authority.[30] In *In re Reliant Energy, Inc.*, the widow of a power-plant worker killed on the job filed a wrongful-death and survival action against Reliant in Hidalgo County probate court.[31] Reliant moved to transfer the action to Harris County, the location of Reliant's principal place of business.[32] The widow then filed the same wrongful-death and survival action in Harris County and successfully petitioned the Hidalgo County probate court to transfer the newly filed Harris County action to itself.[33]

The supreme court held that in a wrongful-death or personal injury case, the venue provisions of Chapter 15 of the Civil Practice and Remedies Code are paramount, not section 5B of the Probate Code.[34] Because the Hidalgo County probate court transferred the Harris County action to itself without statutory authority, the Texas Supreme Court granted mandamus to vacate the Hidalgo County transfer order.[35]

The supreme court similarly granted mandamus relief to enforce compliance with the jurisdictional requirements of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").[36] In *Powell v. Stover*, the court granted mandamus to resolve two states' claims to jurisdiction over a child-custody case.[37] After living in Texas for over 12 years, the Powell family (husband, wife, and one child) moved to Tennessee.[38] Almost a year later, the wife—then pregnant with their second

27. *Id.*
28. *Id.*
29. *Id.* at 439.
30. *See, e.g.*, *In re* Reliant Energy, Inc., 159 S.W.3d 624, 626 (Tex. 2005); *In re* Wilson N. Jones Mem'l Hosp., 159 S.W.3d 629, 630 (Tex. 2005); *In re* Terex Corp., 159 S.W.3d 630, 630 (Tex. 2005). The Texas Supreme Court also exercised jurisdiction over two interlocutory appeals in *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615 (Tex. 2005) involving the same parties and issues in *In re Reliant Energy, Inc.* The Texas Supreme Court had conflicts jurisdiction to review the interlocutory appeals because (1) there were dissents in the court of appeals; and (2) the court of appeals' opinion held differently from another court of appeals opinion, which resulted in uncertainty in the law. *Gonzalez*, 159 S.W.3d at 619-20 (citing TEX. GOV'T CODE ANN. § 22.001(e) (Vernon 2005)).
31. *In re Reliant*, 159 S.W.3d at 625.
32. *Id.*
33. *Id.*
34. *Id.* at 626.
35. *Id.*
36. 165 S.W.3d 322, 323 (Tex. 2005).
37. *Id.*
38. *Id.*

child—moved back to Texas with the child and filed for divorce.[39] Two weeks later, the husband filed for divorce in Tennessee, and the Tennessee court held that it had jurisdiction over the child.[40] In the meantime, the second child was born, in Texas. The husband then filed a plea in abatement in Texas and a motion to dismiss for lack of jurisdiction, arguing that the Tennessee court had jurisdiction over the divorce.[41] The trial court denied the plea in abatement because both children were born in Texas, and the home state of the youngest child was Texas.[42] The Texas Supreme Court held that even though the older child was born in Texas and lived there nearly 12 years before the move to Tennessee, the child's home state was Tennessee under the UCCJEA because the child had lived in Tennessee with his parents for at least 6 consecutive months before the child-custody proceeding was commenced.[43]

Finally, while an appellate court has jurisdiction to issue a writ of mandamus only against an entity other than a trial court when it needs to enforce its jurisdiction over a pending appeal, a writ of mandamus may not be issued against a district clerk for failure to file an original petition in a matter not affecting a pending appeal.[44]

4. *Discovery*

During the Survey period, the Texas Supreme Court granted mandamus relief to vacate an erroneous order to disclose privileged documents.[45] In *In re Living Centers of Texas, Inc.*, Cline sued Living Centers for medical malpractice and served Living Centers with requests for production.[46] Living Centers asserted the medical peer-review privilege and the quality-assessment and assurance privilege to several documents.[47] Thereafter, the Living Centers privilege committee submitted a privilege log and representative sample of the documents to be reviewed *in camera* by the trial court.[48] After a limited review, the court ordered the production of all documents that lacked a privilege stamp and that did not have the word "committee" in the name.[49] The supreme court granted mandamus relief, holding that the trial court abused its discretion by using superficial indicators to overrule privilege objections.[50]

Mandamus is also appropriate to cure orders compelling discovery beyond that permitted by the Texas Rules of Civil Procedure.[51] For exam-

39. *Id.*
40. *Id.* at 324.
41. *Id.*
42. *Id.*
43. *Id.* at 323.
44. *In re* Hayes, No. 07-05-0262-CV, 2005 WL 1743821, at *1 (Tex. App.—Amarillo July 25, 2005, orig. proceeding).
45. 175 S.W.3d 253, 255 (Tex. 2005).
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 262.
51. 158 S.W.3d 603, 605 (Tex. App.—San Antonio 2005, orig. proceeding).

ple, in *In re Elmer*, the San Antonio Court of Appeals vacated a trial court's order compelling discovery in aid of judgment under Texas Rule of Civil Procedure 621a because the order was made in the absence of a final, appealable judgment in violation of Texas Rule of Civil Procedure 621a.[52]

5. *Forcing Courts to Rule on Pending Motions*

Mandamus is appropriate to compel a trial court to rule on a motion properly filed and pending before a court after a reasonable time has passed and the movant has requested that the court rule on the motion.[53]

6. *Forum Selection Clauses*

Mandamus relief is appropriate when a lower court fails to enforce a forum-selection clause.[54] In *In re Automated Collection Technologies, Inc.*, PSC filed suit against Automated in Texas, despite a written contract providing that Montgomery County, Pennsylvania was the exclusive jurisdiction for any dispute over the contract.[55] Four months after appearing in the case, asserting counterclaims, and serving discovery on PSC, Automated moved to dismiss the lawsuit based on the forum-selection clause.[56] Rejecting PSC's arguments that the forum-selection clause was permissive and that Automated waived enforcement of the clause through its inconsistent act of seeking affirmative relief in a Texas court, the Texas Supreme Court directed the trial court to dismiss the case based on the forum-selection clause.[57] In response to PSC's argument that dismissal would result in an unnecessary duplication of time and resources, the court noted that PSC could hardly complain about such duplication when it chose to file the lawsuit in a forum other that the one to which it had contractually agreed.[58]

7. *Continuances*

During the Survey period, the Texas Supreme Court addressed, for the first time, the scope of the *Waites* exception to mandatory legislative con-

52. *Id.*
53. *See In re* Greenwell, 160 S.W.3d 286, 288 (Tex. App.—Texarkana 2005, orig. proceeding) (granting mandamus to order the trial court to rule on a pending motion for partial summary judgment that the judge refused to rule on and had been pending for over six months); *In re* Garrett, No. 07-05-0141-CV, 2005 WL 1038860, at *1 (Tex. App.—Amarillo May 3, 2005, orig. proceeding) ("While it may be that a trial court has the ministerial duty to act upon motions pending before it, authority accords it a reasonable time within which to act.") In this case, the court of appeals denied mandamus relief to force a trial court to rule on a post-judgment motion where the relator sought mandamus relief during the 75-day post-judgment period before such motions would be overruled by operation of law. The court could not say as a matter of law that withholding action before the expiration of that time constituted unreasonable delay. *Id.*
54. 156 S.W.3d 557, 558 (Tex. 2004).
55. *Id.*
56. *Id.* at 558-59.
57. *Id.* at 559.
58. *Id.* at 560.

tinuances.[59] Under section 30.003 of the Civil Practice and Remedies Code, "a court [must] grant a motion for continuance if an attorney representing a party is a member of the legislature and will be attending a legislative session."[60] In *Waites v. Sondock*, the Texas Supreme Court recognized a constitutional limitation on this section by holding that a legislative continuance is not mandatory if the party opposing the continuance alleges that a substantial existing right will be defeated or abridged by delay.[61] In *In re Ford Motor Co.*, Fuentes, a woman rendered paraplegic after an accident, sued Ford and Goodyear Tire for damages arising from alleged tire failure.[62] Counsel for Ford met the statutory requirements for a legislative continuance; however, Fuentes opposed the motion because her temporary funding for rehabilitation services would end soon and any continuance would prevent her from access to medical care.[63] The supreme court held that the *Waites* exception did not apply because, in the absence of a final judgment against Ford, Fuentes had no substantial existing right to access to medical care enforceable against Ford.[64]

The Amarillo Court of Appeals was faced with a similar continuance issue in the mandamus context and granted mandamus relief to remedy an erroneous grant of a grace period not authorized by law.[65] In *In re Brown*, Brown moved to dismiss Fraley's expert report claiming that it was insufficient under Article 13.01(r) of the Texas Revised Statutes.[66] Fraley argued that the expert report was sufficient, but in the that event the trial court disagreed, Fraley moved for a 30-day grace period under section 13.01(g) based on his mistaken belief that the report was sufficient.[67] As the supreme court explained in *Walker v. Guterrez*, "Section 13.01(g) requires a trial court to grant a grace period if . . . the court finds that the" inadequacy of the expert report "was not intentional or the result of conscious indifference but was the result of an accident or mistake."[68] Attempting to apply this standard in *In re Brown*, the trial court found that the expert report did not satisfy standard of care and causation elements and granted Fraley the 30-day grace period.[69] The Amarillo Court of Appeals, however, reversed, directing the trial court to vacate the grace period because a belief by Fraley and his attorney that the report complied with section 13.01(r)(6), although it actually lacked the standard-of-care element, was not sufficient to support a finding of acci-

59. *In re* Ford Motor Co., 165 S.W.3d 315, 319 (Tex. 2005).
60. *Id.* at 317-18.
61. 561 S.W.2d 772, 776 (Tex. 1977).
62. *In re Ford Motor Co.*, 165 S.W.3d at 317.
63. *Id.* at 319-20.
64. *Id.* at 320.
65. *In re* Brown, 190 S.W.3d 4 (Tex. App.—Amarillo 2005, orig. proceeding).
66. *Id.*
67. *Id.*
68. Walker v. Gutierrez, 111 S.W.3d 56, 62-63 (Tex. 2003).
69. *In re Brown*, 190 S.W.3d at 4.

dent or mistake.[70]

8. *Appellate Procedure*

In *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, the Texas Supreme Court granted mandamus relief to vacate a trial court's order allowing execution before the entry of final judgment.[71] After Garcia obtained a default judgment against Burlington for negligence damages, the trial court granted Burlington a new trial.[72] Garcia argued that the order granting a new trial was void for lack of jurisdiction because the trial court's plenary power had expired.[73] Shortly thereafter, the court entered a docket notation that the new trial was cancelled.[74] Garcia then attempted to enforce her judgment through execution, and Burlington put funds in the court's registry to prevent execution.[75] The trial court denied Burlington's motion to quash execution and ordered release of the funds.[76]

The Texas Supreme Court held that the default judgment was interlocutory and could not be enforced through execution.[77] Because the judgment was interlocutory, the trial court retained jurisdiction to set it aside by granting Burlington's motion for new trial.[78] Further, when the trial court permitted execution, there was no judgment in effect.[79] The trial court vacated the default judgment by granting the motion for new trial, and the docket entry canceling the new trial did not set aside the order granting a new trial.[80]

9. *Expiration of Plenary Power*

In *In re Goss*, the Texarkana Court of Appeals stated that "Mandamus is appropriate relief when a trial court issues an order after its plenary power has expired, because such an order is void."[81] After Goss obtained a favorable jury verdict against Brookshire, Brookshire filed a motion for judgment notwithstanding the verdict and a motion for new trial.[82] The trial court denied both motions, but impliedly granted permission to Brookshire to file an amended motion.[83] Brookshire filed another motion for new trial almost two months after the trial court's ruling, and the

70. *Id.* at 6-7.
71. 167 S.W.3d 827, 828 (Tex. 2005).
72. *Id.* at 828-29.
73. *Id.* at 829.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 831.
78. *Id.*
79. *Id.*
80. *Id.*
81. 160 S.W.3d 288, 289 (Tex. App.—Texarkana 2005, orig. proceeding); *In re* Sw. Bell Tel. Co., 35 S.W.3d 602, 605 (Tex. 2000).
82. *In re Goss*, 160 S.W.3d at 289.
83. *Id.* at 291.

trial court granted it.[84] The court of appeals granted mandamus to vacate the trial court's order because Texas Rule of Civil Procedure 329b gives a court plenary power only for another 30 days after it overrules a motion for new trial.[85] Thus, the trial court had lost plenary power before it granted Brookshire's second motion for new trial.[86]

10. *Exceeding Court Authority*

In *In re El Paso Healthcare System, Ltd.*, the El Paso Court of Appeals granted mandamus relief to vacate a trial court's order requiring that the relator retain local counsel within seven days or be forced to used appointed local counsel.[87] Finding an abuse of discretion, the court of appeals first observed that no El Paso County local rule required "out-of-town licensed Texas attorneys to appear with local counsel before a state court in El Paso County" or authorized the trial court to appoint local counsel for a party already represented by counsel.[88] The court of appeals further acknowledged the right of a litigant to be represented by counsel of their choice.[89] Rejecting the argument that section 24.016 of the Texas Government Code authorized the trial court to appoint counsel, the court of appeals noted that the order made no appointment of counsel, and thus that issue was not before the court.[90] Further, no statutory authority to appoint counsel in civil cases exists.[91] The appellate court concluded that a trial court's inherent power to appoint counsel is contingent upon a party's indigent status and the existence of exceptional circumstances, none of which were applicable in *El Paso Healthcare*.[92]

11. *Mandatory Venue*

During the Survey period, the Texas Supreme Court construed for the first time section 15.020 of the Texas Civil Practice and Remedies Code.[93] In *In re Texas Ass'n of School Boards, Inc.*, the TASB sought mandamus relief to have a suit against them transferred to Travis County based on a contractual choice-of-venue provision.[94] Under section 15.020, if there is a written agreement in a suit arising from a major transaction that provides for venue in a particular county, "suit must be brought in that county."[95] A major transaction is one that is "evidenced by a written agreement under which a person pays or receives, or is obligated to pay

84. *Id.* at 289-90.
85. *Id.* at 291-92.
86. *Id.* at 292.
87. No. 08-05-00098-CV, 2005 WL 2241024, at *1 (Tex. App.—El Paso Sept. 15, 2005, orig. proceeding).
88. *Id.* at *5.
89. *Id.*
90. *Id.* at *6.
91. *Id.*
92. *Id.*
93. 169 S.W.3d 653, 656 (Tex. 2005).
94. *Id.* at 654.
95. *Id.* (citing Tex. Civ. Prac. & Rem. Code Ann. § 15.020 (Vernon 2005)).

or receive, consideration with an aggregate stated value equal to or greater than $1 million."[96]

In the underlying lawsuit, BISD and the Fund entered into an agreement, whereby BISD made an annual contribution to the Fund in the amount of $41,973 and the Fund in exchange provided coverage for potential losses or liabilities in excess of $17 million.[97] BISD sued TASB and the Fund for indemnity for water and physical damage to school-district buildings.[98] The trial court denied the Fund and TASB's motion to transfer venue to Travis County.[99] In denying mandamus relief, the Texas Supreme Court explained that the mandatory venue provision of section 15.020 did not apply to the agreement because the aggregate stated value was $41,973, the amount of the annual contribution for assumption of the risk of loss, not the coverage limits.[100]

B. Interlocutory Appeals

1. *Interlocutory Appeals in the Texas Supreme Court*

a. Conflicts Jurisdiction

While jurisdiction over interlocutory appeals is generally final in the courts of appeals, Texas Government Code section 22.225(c) grants conflicts jurisdiction to the Texas Supreme Court "if the court of appeals 'holds differently from a prior decision of another court of appeals or of the [Texas] [S]upreme [C]ourt.'"[101] To determine whether conflicts jurisdiction applies, the test "is whether the decision in one case would operate to overrule the decision in another case on the same question of law if both were rendered by the same court."[102]

During the Survey period, the Texas Supreme Court exercised its conflicts jurisdiction numerous times to resolve courts of appeals decisions inconsistent with supreme court authority. For instance, the court granted two petitions for review, requiring the lower courts to observe the prerequisites for class certification as set forth in *Southwestern Refin-*

96. *Id.* (citing Tex. Civ. Prac. & Rem. Code Ann. § 15.020).
97. *Id.* at 655.
98. *Id.*
99. *Id.* at 656.
100. *Id.* at 659-60.
101. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Lopez, 156 S.W.3d 550, 553-54 (Tex. 2004) ("Our conflicts jurisdiction arises when, applying the same standards, two decisions cannot stand together; that is, one decision would operate to overrule the other had it been issued by the same court."); Hoff v. Nueces County, 153 S.W.3d 45, 47 (Tex. 2004) ("This Court has jurisdiction because the court of appeals' decision conflicts or holds differently from a prior decision of this Court on a question of law material to a decision of the case.")); N. Am. Mortgage Co. v. O'Hara, 153 S.W.3d 43, 45 (Tex. 2004) ("We have jurisdiction over this interlocutory appeal because of the direct conflict between the court of appeals' judgment and our opinion in *Bernal*."); Gonzalez v. Reliant Energy, Inc., 159 S.W.3d 615, 619-20 (Tex. 2005) ("We have jurisdiction over these interlocutory appeals because there were dissents in the court of appeals and because the court of appeals' opinion expressly declined to follow and conflicts with the holding in [another court of appeals case].").
102. *Hoff*, 153 S.W.3d at 47.

ing Co. v. Bernal.[103] Texas Rule of Civil Procedure 42(a) provides that all class actions must satisfy four threshold requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.[104] In addition to these threshold requirements, "class actions must satisfy at least one of the four subdivisions of Rule 42(b)."[105] The supreme court held in *Bernal* that a trial court cannot certify a class without performing a rigorous analysis of the prerequisites for class certification and without indicating how the claims will likely be tried.[106]

In *State Farm Mutual Automotive Insurance Co. v. Lopez*, State Farm policyholders sued State Farm, asserting a right to a surplus of funds under their policies, and moved to certify a class of all State Farm policyholders from 1994 until the time of trial.[107] State Farm opposed the motion, arguing that "Illinois law govern[ed] the action and would operate to bar the class representatives' claims."[108] State Farm further contended that "the class representatives could not adequately represent the class" because of irreconcilable economic conflicts between "present policyholders . . . , who [were] more interested in assuring that adequate reserves are available to pay claims, and past policyholders, who [were] more interested in receiving maximum dividend payments."[109] Despite State Farm's contentions, the trial court granted the policyholders' motion to certify, but limited the class to all Texas policyholders from 1994 to the time of trial.[110]

The court of appeals affirmed certification, and on rehearing, held that (1) State Farm had waived any argument that *Bernal* required a trial plan for certification, and (2) *Bernal* did not require a trial plan in every certification order.[111] The supreme court initially dismissed State Farm's petition for review for want of jurisdiction, finding that the court's statement that a trial plan was unnecessary was mere *dicta* because the court of appeals first determined that State Farm waived the issue by not raising it.[112] However, on rehearing, the court granted review because the court of appeals had made alternative holdings—waiver and the unnecessity of the trial plan—and thus, the appellate court's holding that a trial plan was unnecessary could not be reconciled with *Bernal.*[113] The court concluded

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103. *Lopez*, 156 S.W.3d at 555 ("Because the trial court's certification order addressed neither the choice-of-law issue State Farm raised nor the potential antagonism between present and past policyholders, it failed to reflect the rigorous analysis that we require for all class-certification prerequisites . . . ."); *O'Hara*, 153 S.W.3d at 43 ("We hold that it was error to order the class certified before a trial plan was prepared.").

104. 22 S.W.3d 425 (Tex. 2000).

105. *Id.*

106. *Id.*

107. *Lopez*, 156 S.W.3d at 552.

108. *Id.* at 555.

109. *Id.*

110. *Id.* at 553.

111. *Id.*

112. *Id.* at 554.

113. *Id.* at 554-55. The court changed its opinion based on its holding in Tex. Natural Res. Conservation Comm'n v. White, 46 S.W.3d 864, 868 (Tex. 2001).

that the trial court abused its discretion by certifying the class without formulating a trial plan or rigorously applying the requirements of Rule 42.[114]

The supreme court similarly exercised conflicts jurisdiction in *Hoff v. Nueces County*.[115] In this case, the court addressed the issue of whether the Eleventh Amendment of the United States Constitution barred a lawsuit brought by current and former employees of the Nueces County Sheriff's Department.[116] The trial court held that sovereign immunity did not bar the employees' claims; however, the court of appeals held that Nueces County possessed Eleventh Amendment immunity.[117] The supreme court accepted the interlocutory appeal, relying on cases wherein it had held that cities and counties are not entitled to Eleventh Amendment immunity.[118] Although "Eleventh Amendment immunity has been extended to state agencies that are viewed as arms of the state," courts must consider the nature of the entity seeking immunity to determine whether it should be treated as an arm of the state."[119] Because Texas counties may levy taxes, sell or lease real property, and issue bonds, they are not arms of the state for Eleventh Amendment immunity purposes.[120]

b. Statutory Jurisdiction

Under Texas Government Code section 22.225(d), the Texas Supreme Court has jurisdiction to review a trial court's denial of a media defendant's motion for summary judgment in a defamation case.[121] In *The Hearst Corp. v. Skeen*,[122] the supreme court exercised this jurisdiction, holding that the public figures asserting defamation "failed to raise a fact issue on actual malice, [and] the media defendants were entitled to summary judgment." In *Hearst Corp.*, three Smith County prosecutors filed suit against the publisher and the author of an article about aggressive prosecutors and sentences in Smith County.[123] To survive summary judgment, the prosecutors needed to establish actual malice, namely that "Hearst and Moore published the article with either knowledge of [its] falsity or reckless disregard for the truth."[124] The prosecutors alleged that Moore and Hearst relied on a relatively insignificant amount of cases for the article, "avoided the truth, relied on dubious information from bias sources, deviated from professional standards of care, and were motivated to fabricate."[125]

114. *Id.* at 557.
115. 153 S.W.3d at 45, 47 (Tex. 2004).
116. *Id.* at 46-47.
117. *Id.* at 47.
118. *Id.* at 48.
119. *Id.* at 49.
120. *Id.* at 50.
121. *See* Tex. Gov't Code Ann. § 22.225(d) (Vernon 2004 & Supp. 2005).
122. 159 S.W.3d 633, 636 (Tex. 2005).
123. *Id.*
124. *Id.* at 637.
125. *Id.*

The evidence, however, established that "Moore's five months of research involved interviewing parties on both sides . . . and reviewing the court records of the cases discussed."[126] Further, because no sources of evidence existed to easily disprove the criticisms in the article, the evidence did not support a purposeful avoidance theory.[127] Finally, Moore and Hearst had a great deal of evidence corroborating the criticisms in the article, and thus, no fact issue existed as to whether Moore relied on doubtful sources of information.[128]

2. Interlocutory Appeals in the Courts of Appeals

If there is no final appealable order, the courts of appeals only have "jurisdiction to hear interlocutory appeals as authorized by statute."[129]

In *Academy of Oriental Medicine, L.L.C. v. Andra*,[130] two healthcare providers appealed the district court's denial of their motion to strike their former patient's expert report. The court of appeals determined that the healthcare providers' motion was filed for relief under section 74.351(l) of the Texas Civil Practice and Remedies Code, which provides that "a court shall grant a motion challenging the adequacy of an expert report . . . if it . . . does not represent a good faith effort to comply with the definition of an expert report in Subsection (r)(6)."[131] In healthcare-liability claims, the grant of jurisdiction for an interlocutory appeal in section 51.014(a)(10) is limited to an order that "grants relief sought by a motion under Section 74.351(l)."[132] Because the healthcare providers sought relief from an order denying (as opposed to granting) such relief, the court of appeals could not exercise jurisdiction over this appeal.[133]

In *In re Nikolouzos*,[134] the court of appeals had no jurisdiction over the interlocutory order, but due to exigent and sympathetic circumstances, the court temporarily accepted the appeal. In that case, Mrs. Nikolouzos filed directly in the First District Court of Appeals a notice of appeal and petition for writ of injunction on Saturday to prevent St. Luke's Episcopal Hospital from taking her husband off of life support.[135] "Because the notice of appeal was filed directly with [the court, rather than the trial court clerk,] on a Saturday and an emergency existed," the court of appeals "accepted the notice of appeal . . . and issued a writ of injunction to prevent the appeal from becoming moot."[136] However, on the following Monday, the clerk of the First District Court of Appeals "sent a copy of

126. *Id.* at 638.
127. *Id.*
128. *Id.* at 638-39.
129. Acad. of Oriental Med., L.L.C. v. Andra, 173 S.W.3d 184, 185 (Tex. App.—Austin 2005, no pet. h.).
130. *Id.*
131. *Id.* at 186-87.
132. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(10) (Vernon 1997 & Supp. 2005).
133. *Acad. of Oriental Med., L.L.C.*, 173 S.W.3d at 187, 189.
134. 179 S.W.3d 581 (Tex. App.—Houston [1st Dist.] 2005, no pet. h.).
135. *Id.* at 581.
136. *Id.*

the notice of appeal to the trial-court clerk," who then "randomly assigned the appeal to the Fourteenth [District] Court of Appeals," thus depriving the First District court of jurisdiction.[137] Accordingly, the First District court dismissed the appeal.

In a concurring opinion, Justice Jennings disagreed with the majority's reasoning in dismissing the appeal, arguing that the court of appeals "never had jurisdiction [in the first place] to review the interlocutory denial of the applications for a temporary restraining order."[138] Specifically, "appellate courts have jurisdiction to consider . . . appeals of interlocutory orders 'only if a statute explicitly provides [the] jurisdiction.'"[139] No statutory authority provides jurisdiction to appellate courts to review temporary restraining orders.[140] While "a temporary injunction is an appealable interlocutory order" and the appeal of a temporary restraining order is permitted if "the force and effect . . . is indistinguishable from that of a temporary injunction," it is only appealable if relief is granted, not denied.[141] In an opinion issued a few days later, the Fourteenth District Court of Appeals agreed with the First District Court of Appeal's concurring opinion.[142]

Texas Civil Practice & Remedies Code section 51.014(a)(7) provides that an order granting or denying a special appearance is an interlocutory, appealable order.[143] Such appeals are accelerated, and thus must be brought within 20 days after the interlocutory order is signed. A motion for new trial will not extend the time to perfect an accelerated appeal.[144] In addition, "the denial of a plea to the trial court's jurisdiction based on lack of proper notice under the Texas Tort Claims Act may not serve as a basis for interlocutory appeal," "because a lack of notice is not jurisdictional."[145]

II. PRESERVATION OF ERROR IN THE TRIAL COURT

To preserve error for appeal, the record must show a specific, timely objection and a ruling from the trial court.[146] With respect to preserving error in the admission of testimony at trial, the general rule is that error is deemed harmless and waived "if the objecting party subsequently permits

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137. *Id.* at 581-82.
138. *Id.* at 582-83 (Jennings, J., concurring).
139. *Id.* at 582 (quoting Stary v. DeBord, 967 S.W.2d 352, 352-53 (Tex. 1998)).
140. *Id.*
141. *Id.*
142. Nikolouzos v. St. Luke's Episcopal Hosp., 162 S.W.3d 678, 681-82 (Tex. App.—Houston [14th Dist.] 2005, no pet. h.). In any event, in a concurring opinion, Judge Fowler stated that, even if the court of appeals had jurisdiction, the appellant would not have prevailed because the trial court did not abuse its discretion in denying the temporary restraining order. *Id.* at 682-83 (Fowler, J., concurring).
143. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon 1997 & Supp. 2005).
144. Digges v. Knowledge Alliance, Inc., 176 S.W.3d 463, 463-64 (Tex. App.—Houston [1st Dist.] 2004, no pet. h.).
145. Metro Transit Auth. v. Salazar, 175 S.W.3d 804, 805 (Tex. App.—Houston [1st Dist.] 2004, no pet. h.).
146. TEX. R. APP. P. 33.1(a).

the same or similar evidence to be introduced without objection."[147] During the Survey period, the Texas Supreme Court recognized that, if specific enough, a "running objection" can preserve error in the admission of testimony for more than one witness.[148] To do so, however, the initial objection must comply with Rule 33.1(a) of the Texas Rules of Appellate Procedure, and the requested "running objection" must clearly identify "the source of the objectionable testimony, the subject matter of the witness's testimony and the ways the testimony would be brought before the jury."[149] Under these circumstances, a "running objection" expressly recognized by a trial court can preserve error.[150]

The Texas Supreme Court further clarified the procedure for preserving error in the jury selection process. The supreme court explained that, "when a challenge for cause is denied, a party must use a peremptory challenge against the veniremember involved, exhaust its remaining challenges, and notify the trial court that a specific objectionable veniremember will remain on the jury list."[151] Notably, the litigant does not have to state why the remaining veniremember is objectionable; however, the notice must be given before the jury is seated, so that the trial court has time to determine if the litigant was in fact forced to take objectionable jurors.[152] Also, significantly, if a trial court errs in denying a challenge for cause, the error is presumed harmful because the court on appeal "cannot know for certain that [the objectionable juror's] inclusion did not affect the verdict."[153]

As a general rule, to be "timely," an objection must be made when the objectionable conduct occurs. This is *unless* "the conduct or comment cannot be rendered harmless by proper instruction."[154] For example, in *General Motors Corp. v. Iracheta*, defense counsel was not required to immediately object when the plaintiff, Mrs. Iracheta, stood and thanked the jury at the beginning of her lawyer's closing argument.[155] Counsel instead properly waited until the lawyer's argument ended to move for a mistrial at the bench.[156] The supreme court concluded that not only was the defense counsel's objection timely under the circumstances, but also that it was not even necessary: "A party's personal expression of gratitude to the jury at the close of a case is error that cannot be repaired and therefore need not be objected to."[157]

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147. Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 907 (Tex. 2004).
148. *Id.*
149. *Id.*
150. *Id.*
151. Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87, 90-91 (Tex. 2005).
152. *See id.* at 91.
153. *Id.*
154. Dow Chem. Co. v. Francis, 46 S.W.3d 237, 241 (Tex. 2001).
155. Gen. Motors Corp. v. Iracheta, 161 S.W.3d 462, 472 (Tex. 2005).
156. *Id.* The supreme court recognized that defense counsel "was not required to object to a grandmother's expression of appreciation on behalf of her deceased daughter and deceased grandchildren, thereby risking the jury's ire, and it is entirely impractical to think otherwise." *Id.*
157. *Id.*

An objection may also be "timely" if the error is not apparent until after the evidence comes in. For example, in *Iracheta*, the supreme court held the reliability of an expert's testimony may not become apparent until the end of cross-examination.[158] While an objection must be timely, "it need not anticipate a deficiency before it is apparent."[159]

III. JUDGMENT FORMATION

During the Survey period, Texas courts grappled with judgment-formation issues, including the calculation of prejudgment interest in the wake of House Bill 4's amendments to the Texas Finance Code. Specifically, in *Pringle v. Moon*,[160] a personal-injury case, the trial court applied the higher, pre-amendment interest rates to a judgment entered October 30, 2003, even though the new interest rate applies in cases in which a final judgment is "signed or subject to appeal on or after September 1, 2003," the effective date of the amendments. The appellee in *Pringle* argued that the prejudgment interest award was correct because the trial court had originally entered judgment on July 7, 2003, and the October 30, 2003 judgment "related back" to the July judgment.[161]

The court of appeals rejected the appellee's argument, noting that the trial court had expressly vacated the July judgment, and a judgment that has been vacated has no legal effect.[162] "The October 30 judgment could not relate back because the July 7 judgment no longer existed."[163] Because the final judgment was signed after the effective date of the amended Finance Code, the new (and lower) interest rate applied.[164]

The appellant in *Pringle* also complained that "the trial court [had] improperly calculated prejudgment interest on the entire amount of damages found by the jury rather than the amount awarded to [the counter-plaintiff] after [a] credit for [a] worker's compensation lien."[165] The court of appeals agreed, holding that "[p]rejudgment interest is calculated on the judgment amount, not the amount of damages awarded by the jury."[166] Accordingly, "[a]ny credits or offsets due a defendant should be deducted from the total damages awarded before—not after—prejudgment interest is calculated."[167] In *Pringle*, therefore, prejudgment interest should have been calculated on the amount of the damages that the

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158. *Id.* at 741.
159. *Id.* ("The unreliability of expert opinions may be apparent as early as the discovery process but also may not emerge until trial, during or after the expert's testimony, or even later.").
160. 158 S.W.3d 607, 609-10 (Tex. App.—Fort Worth 2005, no pet. h.).
161. *See id.* at 610.
162. *Id.*
163. *Id.* at 611.
164. *Id.*
165. *Id.*
166. *Id.* (quoting C & H Nationwide, Inc. v. Thompson, 810 S.W.2d 259, 275 (Tex. App.—Houston [1st Dist.] 1991, writ granted), *aff'd in part and rev'd in part on other grounds*, 903 S.W.2d 315 (Tex. 1994)).
167. *Id.*

jury awarded less the offsetting credit for the worker's compensation lien.[168]

IV. EXTENDING THE APPELLATE TIMETABLE

In *Wilkins v. Methodist Health Care System*,[169] the Texas Supreme Court clarified a number of important issues related to extending the appellate timetable. In that case, the trial court granted the defendant's motion for summary judgment, and the plaintiff filed a motion for new trial. Thereafter, in a single order, the trial court (1) granted the plaintiff's motion for new trial, (2) reconsidered the defendant's motion for summary judgment in light of new evidence submitted by the plaintiff, and (3) again granted the defendant's motion for summary judgment.[170] The plaintiff filed a notice of appeal 90 days later. The court of appeals considered the merits of the plaintiff's appeal after concluding that her "motion for new trial 'assailed' the second judgment and therefore extended the appellate deadlines."[171]

The Texas Supreme Court reversed.[172] The Rules of Appellate Procedure allow appellate courts to "treat actions taken before an appealable order is signed as relating to an appeal of that order and [to] give them effect as if they had been taken after the order was signed."[173] Further, the Rules of Civil Procedure allow a prematurely-filed motion for new trial to assail a subsequent judgment.[174] But what about a motion for new trial that has been ruled on? Can it "assail" a subsequent judgment for purposes of extending the appellate deadlines? According to the supreme court in *Wilkins*, it depends.

First, the supreme court clarified that a premature motion for new trial that has not been ruled on "generally operates to extend the appellate timetable as to the judgment that it assails."[175] Second, the supreme court resolved a split among the courts of appeals on whether the premature-filing rules apply only to "live" pleadings—for instance, a motion for new trial that has not been expressly denied or overruled by operation of law.[176] The supreme court determined that there is no "live" pleading requirement in the premature-filing rules unless the premature motion for new trial has become moot (as discussed below).[177] Accordingly, a motion for new trial that has been expressly denied or overruled by operation of law can still "assail" a subsequent judgment for purposes of ex-

168. *Id.*
169. 160 S.W.3d 559 (Tex. 2005).
170. *Id.* at 561.
171. *Id.*
172. *Id.* at 564.
173. TEX. R. APP. P. 27.2.
174. TEX. R. CIV. P. 306c.
175. *Wilkins*, 160 S.W.3d at 562.
176. *Id.* (citing A.G. Solar & Co. v. Nordyke, 744 S.W.2d 646, 647 (Tex. App.—Dallas 1988, no writ); Harris County Hosp. Dist. v. Estrada, 831 S.W.2d 876, 880 (Tex. App.—Houston [1st Dist.] 1992, writ denied)).
177. *Id.* at 563.

tending the appellate timetable.[178]

Finally, the supreme court concluded that there *is* a "live" pleading requirement in the premature-filing rules when the premature motion has become moot.[179] For example, a motion for new trial that has been *granted* becomes moot as to any effect that it may have on a subsequent judgment because the relief sought in the motion was granted. Accordingly, "a motion for new trial that has been granted cannot 'assail' a subsequent judgment for purposes of determining the deadline for filing a notice of appeal."[180] Those were the circumstances in *Wilkins*—the motion for new trial was granted and could not assail the subsequent judgment. Accordingly, the appellate deadlines did not extend, the notice of appeal filed ninety days after the second judgment was late, and the appellate courts had no jurisdiction, requiring dismissal of the appeal.[181]

As in *Wilkins*, *In re Goss*[182] involved a ruling on a premature motion for new trial. The appellant filed a post-verdict, but pre-judgment, motion for judgment notwithstanding the verdict and, alternatively, a motion for new trial. At the hearing on the motions, the trial court entered judgment. Typically, a premature motion for new trial like the appellant's in *Goss* would "assail" the subsequent judgment, languish until overruled by operation of law 75 days after judgment, and operate to extend the appellate deadlines in the usual manner. Unfortunately, the day after entering judgment, the trial court in *Goss* signed an order expressly overruling the combined motion for judgment notwithstanding the verdict and for new trial. Twenty-eight days later, the appellant filed a second motion for new trial. A few weeks later, the trial court held a hearing and granted the appellant's second motion for new trial.[183]

On mandamus, the Texarkana Court of Appeals concluded that the trial court acted outside its plenary power in granting the new trial.[184] The court based its conclusion on the provisions of Rule 329b of the Texas Rules of Civil Procedure, which state that a trial court "[retains] plenary power over its judgment until 'thirty days after all such timely-filed motions [for new trial] are overruled, either by a written and signed order or by operation of law, whichever occurs first.'"[185] Because the appellant's prematurely-filed motion for a new trial in *Goss* assailed the subsequently entered judgment, it was effective to extend the appellate timetable. *However*, the trial court expressly overruled the motion the day after judgment, triggering the time restraints of Rule 329b as well as the supreme court's holding in *In re Dickason*: "once the trial court overrules a motion for new trial, the court retains plenary jurisdiction for an-

178. *Id.*
179. *Id.*
180. *Id.* at 564.
181. *See id.*
182. 160 S.W.3d 288 (Tex. App.—Texarkana 2005, orig. proceeding).
183. *Id.* at 289.
184. *Id.*
185. *Id.* at 290.

other thirty days, and . . . 'filing an amended motion for new trial does not extend the court's plenary power.'"[186] As a result, the appellant's second motion for new trial in *Goss* did not operate to extend the trial court's jurisdiction, and the court acted outside its plenary authority in granting the motion.[187]

V. FINALITY OF THE JUDGMENT

During the Survey period, the Texas Supreme Court applied the principles of *Lehmann v. Har-Con Corp.*[188] in the default-judgment context. In *In re Burlington Coat Factory Warehouse of McAllen, Inc.*,[189] the trial court entered a default judgment on the plaintiff's negligence claim, but did not address her request for exemplary damages. The default judgment, however, contained a Mother Hubbard Clause, stating that "all other relief not expressly granted is hereby denied," awarded pre- and post-judgment interest, and ordered that the plaintiff was "entitled to enforce this judgment through abstract, execution and any other process necessary."[190] With two justices dissenting, the supreme court held the default judgment interlocutory, reversing the lower courts.[191]

In so holding, the supreme court reiterated that the presumption of finality in a judgment following a trial on the merits does not exist following a summary or default judgment.[192] Instead, "a default judgment that fails to dispose of all claims can be final only if 'intent to finally dispose of the case' is 'unequivocally expressed in the words of the order itself.'"[193] The default judgment in *Burlington* failed to meet this criterion. First, as established in *Lehmann*, a Mother Hubbard clause in a default judgment does not establish finality.[194] Further, language permitting execution does not "'unequivocally express' finality in the absence of a judgment that actually disposes of all parties and all claims."[195] Unequivocal language expressing finality would state, for example, "This judgment finally disposes of all parties and all claims and is appealable."[196] In addition, the supreme court stressed the importance of reading a judgment "in light of the importance of preserving a party's right to appeal."[197] If finality is implied from "anything less than an unequivocal expression, a party's right to appeal may be jeopardized."[198] Finding no such "unequivocal

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186. *Id.* at 290-91 (citing *In re* Dickason, 987 S.W.2d 570, 571 (Tex. 1998)).
187. *Id.* at 292.
188. 39 S.W.3d 191 (Tex. 2001).
189. 167 S.W.3d 827 (Tex. 2005).
190. *Id.* at 828-30, 832.
191. *Id.* at 829, 832.
192. *Id.* at 829.
193. *Id.* at 830.
194. *Id.* at 829-30 (citing Lehmann v. Har-Con Corp., 39 S.W.3d 191, 203-04 (Tex. 2001)).
195. *Id.* at 830.
196. *Id.*
197. *Id.* (citations omitted).
198. *Id.* at 830. The dissenting justices argued that the awards of pre- and post-judgment interest, coupled with the language permitting execution, indicated finality. *Id.* at 832

expression" in *Burlington*, the supreme court held the default judgment interlocutory and not subject to execution.[199]

VI. PERFECTING THE APPEAL

Once a party has attempted to invoke appellate court jurisdiction, it is the court of appeals, not the trial court, which has the power to determine appellate jurisdiction. For example, in *Tri-Steel Structures, Inc. v. Baptist Foundation of Texas*,[200] the trial court struck the appellant's notice of appeal after concluding that the notice was filed without proper authority under Rule 12 of the Texas Rules of Civil Procedure, which allows a party to a lawsuit to challenge the prosecuting party's authority to act. The court of appeals rebuked this action, holding that once a party attempts to invoke appellate jurisdiction, the court of appeals, not the trial court, decides whether appellate jurisdiction was properly invoked.[201]

VII. THE RECORD ON APPEAL

Texas Rule of Appellate Procedure 13.1 provides that, absent an agreement of the parties, a court reporter must make a full record of all proceedings.[202] The reporter's record "consists of [either] the court reporter's transcription of . . . the proceedings" or certified copies of all recordings of the proceedings with "certified copies of the logs prepared by the court recorder" and "any . . . exhibits that the parties to the appeal designate."[203] In the event that the court reporter fails to report a proceeding, the record must contain an objection to the failure of the court reporter to record the proceedings to preserve the error.[204] In addition, "when a [court] reporter's record is necessary for appellate review and the appellant fails to file the . . . record, a presumption arises that the . . . record would support the trial court's judgment."[205]

(O'Neill, J., joined in part by Johnson, J., dissenting). The courts of appeals continued to apply the principles of *Lehmann* during the Survey period. For example, in *Fisher v. DeFord Properties*, the record on appeal failed "to illustrate that the trial court disposed of all claims" and parties, so the court of appeals, as instructed by the supreme court in *Lehmann*, abated the appeal and remanded with instructions to the trial court "to disclose whether it intended the judgment to completely dispose of all claims and all parties." No. 07-04-0389-CV, 2005 WL 146959, at *1 (Tex. App.—Amarillo Jan. 20, 2005, no pet. h.).

199. *Burlington*, 167 S.W.3d at 831.

200. 166 S.W.3d 443, 452-53 (Tex. App.—Fort Worth 2005, pet. denied).

201. *Id.* at 453. In reaching this conclusion, the court of appeal relied on the Texas Government Code, which authorizes the courts of appeals "to determine matters of fact necessary to proper exercise of jurisdiction," and the Texas Rules of Appellate Procedure, which prohibit trial courts from "making order[s] interfering with appellate . . . jurisdiction" in the interlocutory appeal context. *Id. See* TEX. GOV'T CODE ANN. § 22.220(c) (Vernon 2004); TEX. R. APP. P. 29.5(b). The court of appeals ultimately concluded that Rule 12 did not apply and that it had jurisdiction over the appeal. *Tri-Steel Structures, Inc.*, 166 S.W.3d at 454.

202. TEX. R. APP. P. 13.1.

203. TEX. R. APP. P. 34.6(a).

204. Rittenhouse v. Sabine Valley Ctr. Found., 161 S.W.3d 157, 162 (Tex. App.—Texarkana 2005, no pet. h.).

205. *Id.* at 165.

A reporter's record is required only if evidence is introduced in open court beyond that filed with the clerk.[206] The presumption is that "pretrial hearings are nonevidentiary absent a specific indication or assertion to the contrary."[207] Thus, "if the proceeding's nature, the trial court's order, the party's briefs, or other indications show that an evidentiary hearing took place in open court," then the burden is on the "complaining party [to] present a record of [the] hearing to establish harmful error."[208] In the absence of any such evidence, the appellate court presumes that the hearing was nonevidentiary and that "the trial court considered only the evidence filed with the clerk."[209] To allege that a hearing was evidentiary, the party must specifically allege "that exhibits or testimony [were] presented in open court beyond that filed with the clerk."[210]

On appeal of summary judgment, the complaining party bears the burden of presenting a record of the summary-judgment evidence so that the court of appeals has a basis for reviewing the appellant's claim of harmful error.[211] In one case decided during the Survey period, the court held that "if the pertinent summary judgment evidence . . . is not included in the appellate record, an appellate court must presume that the omitted evidence supports the trial court's judgment."[212]

VIII. WAIVER ON APPEAL

Texas Rule of Appellate Procedure 38.1(h) requires that a brief contain concise arguments and appropriate citations to authorities. However, the Texas Supreme Court has "instructed the courts of appeals to construe the Rules of Appellate Procedure reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule."[213] In *Republic Underwriters Insurance Co. v. Mex-Tex, Inc.*, the Amarillo Court of Appeals held that Republic waived its argument regarding a statute because it failed to cite any authority, aside from the statute itself, as required by Rule 38.1(h).[214] Holding that Republic did not waive its argument, the supreme court said that it was not sure what other authority the court of appeals wanted Republic to include, especially in light of the fact that the court of appeals relied solely on the statutory language as well.[215]

The Rules of Appellate Procedure also require a petition for review to "state concisely all issues . . . presented for review" and confine the peti-

206. Michiana Easy Livin' Country, Inc. v. Holten, 168 S.W.3d 777, 782-83 (Tex. 2005).
207. *Id.* at 783.
208. *Id.*
209. *Id.*
210. *Id.*
211. Enter. Leasing Co. of Houston v. Barrios, 156 S.W.3d 547, 549 (Tex. 2004).
212. *Id.* at 550.
213. 150 S.W.3d 423, 427 (Tex. 2004).
214. *Id.*
215. *Id.*

tioner's brief to the issues stated in the petition.[216] During the Survey period, the supreme court liberally applied these rules.

For example, in *Volkswagen of America, Inc. v. Ramirez*, the only issue presented to the court in the petition for review was the legal sufficiency of the accident reconstruction expert's evidence of causation.[217] The Ramirezes argued that Volkswagen had thus waived the issue of the legal sufficiency of the metallurgical expert (Cox). The supreme court disagreed, reasoning that "if the Ramirezes decided to rely on Cox" for causation opinions in response to Volkswagen's arguments, then "the issue fairly included both experts."[218] A dissenting justice in the case, however, pointed out that Volkswagen did not complain in its petition about the legal sufficiency of Cox's testimony.[219] Rather, Volkswagen first challenged Cox's causation testimony in its reply brief, and even then devoted only two sentences to the argument.[220] The dissent concluded that allowing review of Cox's testimony rendered the mandates of Rules 53.2(f) and 55.2 "merely aspirational."[221]

Similarly, in *Michiana Easy Livin' Country, Inc. v. Holten*, the Texas Supreme Court rejected Holten's argument that Michiana had waived its right to assert a minimum-contacts challenge by raising it for the first time in its brief on the merits, rather than its petition for review.[222] The supreme court found that by challenging the court of appeals' only basis for finding personal jurisdiction, Michianna's petition necessarily included a challenge to minimum contacts because, without that ground, jurisdiction did not exist.[223]

Again, in *Tittizer v. Union Gas Corp.*,[224] the Texas Supreme Court reiterated that issues "should be liberally construed to fairly and equitably adjudicate the rights of litigants" and that courts should consider the parties' arguments supporting each issue, rather than the mere wording of the issues. The supreme court cautioned appellate courts to avoid being "overly technical in their application."[225]

In *Bunton v. Bentley*,[226] the Texas Supreme Court held that the petitioner did not waive his complaint "that the exemplary damages awarded by the trial court were unconstitutionally excessive," even though he did not raise that complaint until after the court of appeals issued its judgment. In that case, the court of appeals "reduced the trial court's award

216. TEX. R. APP. P. 53.2(f), 55.2(f).
217. 159 S.W.3d 897, 909-10 (Tex. 2005).
218. *Id.*
219. *Id.* at 914 n.1 (Jefferson, J., dissenting).
220. *Id.*
221. *Id.*
222. 168 S.W.3d 777 (Tex. 2005).
223. *Id.* at 781.
224. 171 S.W.3d 857, 863 (Tex. 2005) (holding that Union Gas preserved the error and did in fact appeal the award of attorney's fees, even though its point of error included no challenges to the attorney's-fee award, because the body of the argument referred to challenges to the attorney's-fee award).
225. *Id.*
226. 153 S.W.3d 50 (Tex. 2004).

of compensatory damages but left the exemplary damages intact."[227] Allowing the complaint of excessiveness, the supreme court explained that "because . . . exemplary damages must bear a reasonable relation to the . . . actual harm suffered, a claim that exemplary damages are grossly disproportionate may . . . arise any time . . . compensatory damages are . . . adjusted."[228] "Ideally, the court of appeals should automatically reevaluate exemplary damages whenever compensatory damages are reduced."[229]

The supreme court similarly held that State Farm did not waive its no-trial-plan challenge to the trial court's class-certification order in *State Farm Mutual Automobile Insurance Co.*,[230] even though it did not raise this argument until the motion for rehearing stage. State Farm had argued in its initial brief "that a trial court has a duty to identify the substantive legal issues that will control the litigation's outcome"—one of the underpinnings of the trial-plan requirement—and the Texas Supreme Court's opinion in *Bernal* requiring a trial plan was issued after the parties filed their initial briefs with the court of appeals.

IX. STANDARDS OF REVIEW

During the Survey period, the Texas Supreme Court addressed the standard of review that should be applied to a trial court's determination regarding the necessity of expert testimony. Noting the absence of any Texas precedent addressing the issue, the court in *FFE Transportation Services, Inc. v. Fulgham* concluded that *de novo* is the proper standard of review in this context—the trial court's determination as to the requirement of expert testimony is not entitled to deference on appeal.[231]

The supreme court also answered the question of whether an elevated standard of proof at trial (for instance, clear and convincing evidence) requires a correspondingly elevated standard of evidentiary review on appeal. After describing in detail how legal and factual sufficiency review developed in Texas, the supreme court in *Southwestern Bell Telephone Co. v. Garza* concluded that "a finding that must meet an elevated standard of proof must also meet an elevated standard of review."[232]

To explain the elevated standard of review for legal sufficiency of the evidence, the supreme court compared the clear and convincing and preponderance of the evidence standards of proof.[233] Under a preponder-

227. *Id.*
228. *Id.* at 54.
229. *Id.*
230. 156 S.W.3d 550 (Tex. 2004).
231. 154 S.W.3d 84, 89-90 (Tex. 2004). The supreme court noted that it had implicitly recognized *de novo* as the proper standard of review in numerous previous cases. *Id.* at 90 (citing Alexander v. Turtur & Assocs., 146 S.W.3d 113, 119 (Tex. 2004); Texarkana Mem'l Hosp., Inc. v. Murdock, 946 S.W.2d 836, 841 (Tex. 1997); Haddock v. Arnspiger, 793 S.W.2d 948, 954 (Tex. 1990); Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 355 (Tex. 1987); Rabb v. Coleman, 469 S.W.2d 384, 388 (Tex. 1971)).
232. 164 S.W.3d 607, 619-22 (Tex. 2004).
233. *Id.* at 621.

ance-of-the-evidence standard of proof, evidence that does no more than create "a mere surmise or suspicion" (the "scintilla" rule) cannot show that something is more likely than not.[234] But when the proof required is clear and convincing, "even evidence that does more than raise surmise and suspicion will not suffice unless it is capable of producing a firm belief or conviction that the allegation is true."[235] "Evidence of lesser quality is, in legal effect, no evidence."[236]

Accordingly, a court "reviewing a finding that must be proved by clear and convincing evidence" cannot be guided by the "scintilla" rule because, even if the evidence supporting the finding amounts to more than a scintilla (and, therefore, would be legally sufficient to support a finding under a preponderance-of-the-evidence review), "the finding is invalid unless the evidence is also clear and convincing."[237] Instead, "a finding that must meet an elevated standard of proof must also meet an elevated standard of review."[238]

The supreme court in *Garza* went on to explain that, in conducting a no-evidence review in a case requiring clear and convincing evidence, the reviewing court "should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true."[239] Significantly, in viewing the evidence in the light most favorable to the finding, the reviewing court can and should "disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible."[240] Additionally, the reviewing court is *not* required to "disregard all evidence that does not support the finding."[241] As the court explained, "[d]isregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence."[242]

In two cases decided shortly after *Garza*, the supreme court in *Quest International Communications v. AT & T Corp.*[243] and *Diamond Shamrock Refining Co., L.P. v. Hall*[244] applied *Garza*'s elevated standard of review to reverse jury findings of malice (*Quest International*) and gross negligence (*Hall*). The supreme court in *Quest International* held that its

234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at 622.
239. *Id.* at 627.
240. *Id.*
241. *Id.*
242. *Id.* In a concurring opinion (concurring only in the majority's judgment), Justice O'Neill argued that, by "stretch[ing] the definition of 'undisputed evidence' to include any testimony that was not directly contradicted," the majority was essentially (and improperly) weighing the evidence relevant to the jury's malice finding and "misstat[ing] the role that truly undisputed evidence should play in a legal sufficiency analysis." *Id.* at 632 (O'Neill, J., concurring).
243. 167 S.W.3d 324 (Tex. 2005) (per curiam).
244. 168 S.W.3d 164 (Tex. 2005).

job was to review "all the evidence in the light most favorable to the jury's finding, taking into account contrary undisputed facts, to determine whether reasonable jurors could have formed a firm belief or conviction regarding malice."[245] Applying this standard, the supreme court concluded that "based on all the evidence, reasonable jurors could have formed a firm belief that [defendant] acted with negligence, but not malice."[246]

Again, in *Hall*, the supreme court applied *Garza*'s elevated standard of review in assessing the evidence supporting the jury's finding of gross negligence.[247] And, once again, after combing through all of the evidence, the supreme court concluded that, while the defendant might have been negligent, there was no clear and convincing evidence of the lack of concern necessary for a finding of gross negligence.[248]

The Survey period also saw the supreme court revisiting the standard of review for determining whether an award of exemplary damages is excessive. In *Bunton v. Bentley*, the court of appeals ordered a significant remittitur of compensatory damages (from $7 million to $150,000), but failed to reevaluate the exemplary damage award ($1 million) to determine if it was reasonably proportionate to the reduced compensatory damage amount.[249]

The supreme court held that this failure was error and remanded the case to the court of appeals to conduct a reevaluation of the exemplary damage award.[250] In doing so, the supreme court reiterated that "exemplary damages must be reasonably proportionate to compensatory damages, and an . . . adjustment of compensatory damages . . . requires reevaluation of the factors supporting an award of exemplary damages."[251] Those factors include "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[252] The supreme court specifically warned that "these factors . . . cannot be viewed in isolation" but "are intertwined with each other."[253] Accordingly, a reviewing court cannot conclude that due-process requirements are met based simply on the ratio of compensatory to exemplary damages.[254] Instead, the court on appeal must examine, *de novo*, the ratio "in light of

245. *Quest Int'l*, 167 S.W.3d at 326.
246. *Id.* at 327.
247. *Hall*, 168 S.W.3d at 170.
248. *Id.* at 173 ("What separates ordinary negligence from gross negligence is the defendant's state of mind; in other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrate that he did not care.").
249. 153 S.W.3d 50 (Tex. 2004) (per curiam).
250. *Id.* at 54.
251. *Id.* at 53.
252. *Id.* at 53-54 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996)).
253. *Id.* at 54.
254. *Id.*

the other factors and in light of the actual harm to the plaintiff."[255]

Finally, in *City of Keller v. Wilson*, the Texas Supreme Court clarified the standard for no-evidence review. While the issue was whether the City's approval of drainage plans, which resulted in flooding of the plaintiff's property, was an intentional governmental taking, the bulk of the opinion addresses the proper standard for no-evidence review.[256] As framed by the court, the question is this: "Must an appellate court reviewing a verdict for legal sufficiency start by considering all the evidence or only part?"[257] The answer is this: It does not matter, so long as both standards are properly applied.[258] The court explained:

> Rules and reason sometimes compel that evidence must be credited or discarded whether it supports a verdict or contradicts it. Under either scope of review, appellate courts must view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.[259]

In its analysis, the supreme court identified the two prevailing articulations of the standard of review for no-evidence, calling them the "exclusive" and "inclusive" standards of review.[260] Under the "exclusive" standard of review, the court on appeal "consider[s] only the evidence and inferences that tend to support the [jury's] finding and disregard all evidence and inferences to the contrary."[261] Under the "inclusive" standard, the "reviewing court must consider all of the evidence in the light favorable to the verdict.[262]

The supreme court found the two standards not inconsistent.[263] Rather, the court's principle point seemed to be that sometimes evidence contrary to the verdict cannot be ignored.[264] Contrary "contextual evidence" cannot be ignored because, in some cases, the lack of evidence supporting the existence of a vital fact may not appear until all the evidence is reviewed in context.[265] Further, "evidence that might be 'some evidence' when considered in isolation is nevertheless rendered 'no evi-

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255. *Id.* The supreme court similarly took the Austin Court of Appeals to task in *National Western Life Insurance Co. v. Rowe* for failing to apply the "rigorous analysis" standard of review for class-certification rulings that it had laid down in *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000). Nat'l W. Life Ins. Co. v. Rowe, 164 S.W.3d 389, 390 (Tex. 2005). Instead of applying *Bernal*, the court of appeals reviewed the ruling by "view[ing] the evidence in the light most favorable to the trial court's action." *Id.* at 392. Condemning this deferential standard of review, the supreme court reiterated that "actual, not presumed, conformance with [TEX. R. CIV. P. 42] remains . . . indispensable." *Id.*

256. 168 S.W.3d 802 (Tex. 2005).

257. *Id.* at 807.

258. *Id.*

259. *Id.*

260. *Id.* at 809.

261. *Id.* at 808-09.

262. *Id.* at 809.

263. *Id.* at 822.

264. *See id.* at 807.

265. *Id.* at 811.

dence' when contrary evidence shows it to be incompetent."[266] Such evidence, the supreme court held, "cannot be disregarded."[267] Similarly, conclusive evidence that is contrary to the verdict cannot be ignored:

> Proper legal-sufficiency review prevents reviewing courts from substituting their opinions on credibility for those of the jurors, but proper review also prevents jurors from substituting their opinions for undisputed truth. When evidence contrary to a verdict is conclusive, it cannot be disregarded.[268]

The supreme court, of course, also acknowledged that much contrary evidence—such as credibility evidence, conflicting evidence, and conflicting inferences—must be disregarded.[269] "[R]eviewing courts must disregard evidence contrary to the verdict far more often than they must consider it."[270]

> The final test for legal sufficiency . . . must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. Whether a reviewing court begins by considering all the evidence or only the evidence supporting the verdict, legal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.[271]

266. *Id.* at 813.
267. *Id.* at 812.
268. *Id.* at 816-17.
269. *Id.* at 818-21.
270. *Id.* at 818-19.
271. *Id.* at 827. Ultimately, the supreme court reversed the judgment of the court of appeals, concluding that the court of appeals had improperly felt compelled by the scope of review to disregard evidence that the City presented. This evidence would have shown that the City had approved the plan only because three sets of engineers had said that no drainage ditch was necessary across plaintiff's property to prevent flooding. *Id.* at 829. Finding the court of appeals' refusal to consider this evidence in error, the supreme court noted: "A reviewing court cannot evaluate what the City knew by disregarding most of what it was told." *Id.*