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Civil Evidence

Kelli M. Hinson

Jennifer Evans Morris

Elizabeth A. Snyder

CIVIL EVIDENCE

*Kelli M. Hinson**
*Jennifer Evans Morris***
*Elizabeth A. Snyder****

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I. INTRODUCTION

THIS Survey period found the courts reviewing expert cases more than any other topic. The timing of an expert report received the greatest attention, while expert loyalty and party subterfuge followed closely behind. The Texas Supreme Court weighed in on the application of the peer review privilege to nursing homes, and the courts of appeals addressed the appropriateness of deposing counsel. And, although sanctions cases focused more on procedural issues, the Eastland Court of Appeals reminded us that sometimes a client is not accountable

* Kelli M. Hinson is a partner at Carrington, Coleman, Sloman & Blumenthal, L.L.P. in Dallas, Texas. Ms. Hinson's practice includes a wide variety of complex commercial litigation cases, but focuses on professional and executive liability. She graduated magna cum laude and Order of the Coif from SMU Law School in 1995.

** Jennifer Evans Morris is an associate at Carrington, Coleman practicing in the area of complex commercial litigation. She graduated magna cum laude and Order of the Coif from SMU Law School in 1999.

*** Elizabeth A. Snyder is an associate at Carrington, Coleman. She graduated magna cum laude and Order of the Coif from SMU Law School in 2005 and now practices in the area of complex commercial litigation.

for his lawyer's conduct—in that case, neglect that resulted from severe depression.

II. ADMISSIBILITY OF EXPERT TESTIMONY

Expert testimony was the topic of many opinions this Survey period. The reliability of expert testimony was explored in drug and DNA-testing cases, and expert qualifications were addressed in two cases concerning chiropractors. Whether or not an expert can switch sides also was addressed in two different cases. While no topic was covered more than the timeliness of expert reports, there were also new cases interpreting the *Daubert* and *Robinson* requirements for expert testimony.

A. THE FEDERAL *DAUBERT* CASES

In *Easter v. Aventis Pasteur, Inc.*, the United States District Court for the Eastern District of Texas granted the defendants' motion to preclude the testimony of the plaintiffs' expert witness. The plaintiffs alleged that their son, Jordan, suffered neurological injuries after he was given a vaccine containing the chemical thimerosal, which contains ethyl mercury. Although the plaintiffs' son also suffered from autism, the plaintiffs conceded that they could not prove the autism was caused by thimerosol. Instead, they sought to prove that other co-morbid conditions that the child suffered were caused by thimerosol. The defendants filed a motion to preclude the testimony of the plaintiffs' expert, arguing that the expert could not prove specific causation between the exposure to thimerosal and Jordan's condition. The plaintiffs' expert relied on the technique of differential diagnosis, in which one attempts to eliminate possible causes for a patient's symptoms until reaching one cause that cannot be ruled out. That one cause is then determined to be the most likely cause of an illness or condition.[1] The court excluded the expert testimony because the plaintiffs' expert could not rule out the possibility that the co-morbid conditions were caused by the autism and not by the vaccine.[2]

B. THE STATE *ROBINSON* CASES

In *In re S.E.W. and S.A.W.*, parents appealed the termination of their parental rights. The parents alleged that the trial court erred in allowing an expert to testify on behalf of the Texas Department of Protective and Regulatory Services. The expert, James Turnage, was called to testify about drug testing performed on both parents. After his company conducted drug and DNA hair testing, he provided a report that included his opinion that both the mother and father recently had ingested cocaine. Although Turnage was certified in the administration and collection of such hair specimens, he did not personally perform the tests to determine the presence of drugs. He admitted that he had no knowledge of how the

1. 358 F. Supp. 2d 574, 575 (E.D. Tex. 2005).
2. *Id.* at 576.

actual tests were performed on the samples, what protocols were used, or what standards might have applied. He also admitted that he was not an expert on the operation of the instruments used to conduct such a test. Therefore, the Dallas Court of Appeals found that Turnage was not qualified to give an opinion as to the results of these tests based on evidence that his company had collected. His interpretation of the laboratory results was not reliable because "he did not have expertise concerning the actual subject about which he offered his expert opinion."[3] The court stated that it was not suggesting that the testing methods used by the laboratory were unreliable; rather, it was only holding that the record did not establish the reliability of the methods by evidence or through request for judicial notice. The court could not accept that the results were reliable simply because Turnage claimed that they were. Therefore, the court concluded that the trial court had abused its discretion in admitting Turnage's testimony after the *Daubert/Robinson* challenge.[4]

C. Expert Reports and Affidavits

In the case of *Group v. Vicento*, the Fourteenth District Court of Appeals in Houston held that an anesthesiologist was practicing healthcare in a field involving the same type of care as a chiropractor, and therefore the anesthesiologist was allowed to testify as an expert witness in a chiropractic medical-malpractice case. In this case, a police officer, Mark Vicento, suffered back injuries in an automobile accident and sought treatment from a chiropractor, Edward Group. Vicento alleged negligence against Group, arguing that Group should have referred him to an expert in spinal surgery and that the delay caused him injury and pain. To support his medical-malpractice claim, Vicento filed an expert report from Rezik Saqer, M.D. Group attempted to dismiss Vicento's case, claiming that Dr. Saqer's expert report did not comply with Texas Civil Practice and Remedies Code section 74.351. Specifically, he alleged that Dr. Saqer was not qualified to discuss the chiropractic standard of care to which Group should be held because he was not a chiropractor.[5] The court, however, found that Group's interpretation of the Code was restrictive and contrary to the statute's plain language, which "does not require an expert to be practicing healthcare *in the same field* as the defendant healthcare provider," but only "in a field of practice *involving the same type of care or treatment.*"[6] Dr. Saqer stated in his expert report that his qualifications as an anesthesiologist specializing in anesthesia and pain management overlapped with chiropractic care. He stated that the forms of treatment he used, including massage therapy and "[o]scillation of pain centers," "overlap[ped] and intertwine[d] with chiropractic practice," and that "chiropractors and pain management physicians use simi-

3. 168 S.W.3d 875, 882-83 (Tex. App.—Dallas 2005, no pet. h.).
4. *Id.* at 884-85.
5. 164 S.W.3d 724, 726 (Tex. App.—Houston [14th Dist.] 2005, pet. filed).
6. *Id.* at 731 (emphasis in original).

lar methods to evaluate patients and determine whether to refer them to a specialist for surgical consultation."[7] In addition, he claimed that he knew the accepted standard of care required of chiropractors for the type of injury involved in the case because more than 20% of the patients that he treated suffered from similar conditions. Because of these qualifications, the court concluded that Dr. Saqer was practicing healthcare in a field of practice involving the same type of care and treatment as the chiropractor. Therefore, Dr. Saqer was competent to serve as an expert witness against the chiropractor.[8]

In another case involving a chiropractor, *Hayhoe v. Henegar*, the issue on appeal concerned the qualifications of a chiropractor expert to testify as to what caused plaintiff Henegar's need for back surgery. Henegar, while stopped at a red light, was hit from behind by Hayhoe. Henegar's treating physician and expert witness was a chiropractor, Bobby Hollander. Hayhoe alleged that Dr. Hollander was not qualified to testify about Henegar's need for surgery because he was not a surgeon.[9] The Eastland court, however, noted that Dr. Hollander had 20 years of chiropractic experience, that he had done post-graduate work in the field, and that he had treated other patients with the same condition as the plaintiff and knew when to refer those patients to a surgeon. Therefore, because of his "extensive experience with chiropractic medicine in general and herniated discs in particular," the court found that the trial court had not abused its discretion in finding Dr. Hollander qualified to testify regarding the plaintiff's need for surgery and that his report and testimony were factually sufficient evidence of causation.[10]

In the case of *State Office of Risk Management v. Escalante*, the plaintiff, Escalante, was injured in a car accident as he drove between work sites. The State Office of Risk Management ("SORM") attempted to avoid paying workers' compensation for Escalante's claimed injuries by alleging that he had failed to present the necessary expert evidence as to the extent of his injuries. Under the Workers' Compensation Act, a compensable injury is "damage or harm to the physical structure of the body."[11] Even though Escalante had no injuries that resulted in a visible change to his body, the Eighth Court of Appeals in El Paso held that his evidence was sufficient to sustain the jury's findings of compensable injuries to the plaintiff's spine because "[i]t is not necessary to present expert medical testimony in order to establish a compensable new injury."[12] Therefore, the court determined that the jury reasonably could have concluded from Escalante's medical records and his own testimony that he had been injured.[13]

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7. *Id.* at 732-33.
8. *Id.* at 734.
9. 172 S.W.3d 642, 643-44 (Tex. App.—Eastland 2005, no pet. h.).
10. *Id.* at 644.
11. 162 S.W.3d 619, 624 (Tex. App.—El Paso 2005, no pet. h.).
12. *Id.* at 625.
13. *Id.*

In *Formosa Plastics Corp., USA v. Kajima International, Inc.*, the court dealt with an issue of first impression in Texas—whether an expert who switches sides in a lawsuit should be disqualified. In this case, Formosa retained an associate at A.W. Hutchison & Associates, Inc. ("AWH") to be a consulting expert during the lawsuit. AWH performed work for Formosa and received over $20,000 for that case. Later, Kajima contacted AWH about working on the same case as its consulting expert, and two associates of AWH were designated as Kajima's testifying experts. After a jury trial, the trial court rendered judgment for Kajima, and Formosa appealed, alleging that the trial court erred when it refused to disqualify Kajima's expert witnesses.[14] The Corpus Christi Court of Appeals adopted the U.S. Fifth Circuit Court of Appeals' two-part test for determining whether to disqualify an expert who switches sides. The court considered two issues: "(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?"[15] As to the first issue, the appellate court considered the information that had passed between Formosa and AWH. This information included a letter identifying AWH's work product and plans for how to handle the case against Kajima. Based on this, the court concluded that it was reasonable for Formosa to believe that a confidential relationship had been established with AWH.[16] As to the second issue, whether Formosa actually disclosed confidential information to the AWH associate, the court concluded that Formosa had discussed confidential information, including the potential advantages of deposing certain witnesses, the data gathered from witnesses, and Formosa's strategies for handling the case.[17] Therefore, the court held that Formosa met both burdens: 1) it was reasonable to conclude that a confidential relationship had been established between Formosa and AWH, and 2) that it had indeed disclosed confidential information to the AWH associate. The court therefore reversed the judgment for Kajima and remanded for a new trial.[18]

In *Aguilar v. Morales*, the Eighth Circuit Court of Appeals in El Paso considered the issue of side-switching experts. In that case, the Aguilars filed suit against Morales, the executrix of an estate, for the alleged breach of an oral agreement granting an easement. They also sought damages for the alleged discharge of agricultural waste from the defendant's farm onto plaintiffs' land. The plaintiffs eventually dropped the breach-of-contract claim, but added claims for nuisance and trespass, contending that their well had been contaminated by manure from the defendant's farm. The defendant served a request for production and

14. No. 13-02-385-CV, 2004 WL 2534207, at *1 (Tex. App.—Corpus Christi Nov. 10, 2004, no pet. h.).
15. *Id.* at *2.
16. *Id.* at *3.
17. *Id.* at *3-6.
18. *Id.* at *7.

inspection on the plaintiffs to test the well water. The plaintiffs demanded the identity of the person doing the testing. The defendant initially refused to disclose the identity of the consulting expert to the plaintiffs because she was concerned that the plaintiffs would attempt to contact the expert witness, but the trial court required the disclosure. Shortly after the samples were drawn, the plaintiffs contacted the defendant's consulting expert and hired him to serve as an expert witness for them.[19] At trial, the court granted summary judgment in favor of the defendant and refused to allow the plaintiffs' expert witness to testify. In addition, the trial court sanctioned the plaintiffs for violating Rule 4.02(b) of the Rules of Professional Conduct. In rebuttal, the plaintiffs argued that the expert that they consulted was not a consulting expert of the defendant.[20] A consulting expert is defined in the Texas Rules as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert."[21] The plaintiffs claimed that, because the expert had not entered into a written contract with the defendant, he was not a consulting expert for the defendant. The appellate court disagreed, noting that the defendant's attorney considered the expert to be a consulting expert. In fact, the attorney initially refused to disclose his information specifically because he feared that the plaintiffs would try to contact the expert without his consent. The court said that a "lack of a written contract or payment of a consulting expert retainer is not dispositive of the issue."[22] The court thus found the evidence sufficient to support the lower court's finding that the expert had been consulted and employed by the defendant as a consulting expert. Therefore, the court concluded that the plaintiffs' contact with the expert was an abuse of the discovery process that justified sanctions.[23]

In *Kendrick v. Garcia*, the Eleventh Circuit Court of Appeals in Eastland dealt with two procedural issues of first impression. First, the court addressed the appropriate construction of the terms "serve" and "served" in Texas Civil Practice and Remedies Code section 74.351 regarding the requirement of expert reports in healthcare-liability cases. In addition, the court determined whether an unsuccessful effort to serve an expert report could be excused if the effort was made in good faith. In this case, plaintiff's counsel alleged that she placed a copy of the expert's reports in a box in the district clerk's office that was assigned to the law firm representing the defendant, and she mailed a copy of the reports to the co-defendant's attorney via first class mail. However, opposing counsel stated that they did not receive those copies of the reports; instead they first received the expert report via fax after the deadline to serve such

19. 162 S.W.3d 825, 830 (Tex. App.—El Paso 2005, no pet. h.) (citing TEX. R. CIV. P. 192.7(d)).
20. *Id.* at 831-32.
21. *Id.* at 832.
22. *Id.* at 833.
23. *Id.*

reports had passed.[24] As to the first issue, the court determined that the terms "serve" and "served" as used in the statute were synonymous with service under Rule 21a of the Texas Rule of Civil Procedure, which specifies the methods by which litigation documents may be served. Since the terms "serve" and "served" have distinct legal meaning, the court applied that legal meaning to the terminology within the statute. Rule 21a requires service to a party or its agent in person, by agent, by courier, by registered or certified mail, or telephonic document transfer. Thus, neither placing a copy of the reports in the opposing party's box nor mailing the reports by first-class mail met Rule 21a's requirements.[25] On the topic of a good-faith exception, the court ruled that, in an update to the statute regarding healthcare-liability claims, the legislature withdrew the accident or mistake exception by which a claimant could attempt to excuse the failure to timely furnish an expert report. Therefore, the court concluded that "the new statute precludes the existence of a good-faith exception to the requirement of timely serving expert reports,"[26] and thus, the expert report was not served on the defendant in a timely manner. Consequently, the court reversed the trial court's order denying the defendant's motion to dismiss and rendered judgment in his favor, dismissing the plaintiff's claims.[27]

In *Mokkala v. Mead*, the Fourteenth District Court of Appeals in Houston held that a plaintiff cannot avoid the expert filing requirements in section 74.351 of the Texas Civil Practice and Remedies Code merely by nonsuiting. In this case, the plaintiff filed suit twice, failed to file expert reports twice, nonsuited its claims against the healthcare providers twice, and finally filed the same claim against the healthcare providers in the ultimate 2004 case.[28] The court concluded that the 120-day period set forth in section 74.351(a) ran from the date of the first petition asserting a healthcare-liability claim. As the court stated, "under the plain language of section 74.351(a), the 120-day period is triggered on the date the claimant files a petition alleging a particular healthcare liability claim, not the date she files another lawsuit asserting that same claim."[29] This period expired before the plaintiff nonsuited its claims against the healthcare providers. Therefore, because the plaintiff did not serve the report within the 120-day period after the first filing, the trial court had erred in denying the health care providers' motion to dismiss.[30]

In *Marks v. St. Luke's Episcopal Hospital*, the First District Court of Appeals in Houston made a distinction between premises-liability and healthcare-liability claims. In that case, the plaintiff had tried to push himself up from his hospital bed when the footboard upon which he was

24. 171 S.W.3d 698, 700-01 (Tex. App.—Eastland 2005, pet. filed).
25. *Id.* at 704.
26. *Id.* at 705.
27. *Id.*
28. 178 S.W.3d 66, 68 (Tex. App.—Houston [14th Dist.] 2005, pet. filed).
29. *Id.* at 71.
30. *Id.* at 76.

leaning fell off, causing him to fall and experience severe injuries. The plaintiff alleged breach of the duty of ordinary care against the hospital; however, he did not file an expert report on the matter within 180 days of filing as required by section 74.351. The hospital filed a motion to dismiss the plaintiff's claims on the basis that the claims were actually healthcare-liability claims that required the filing of an expert report.[31] The court, however, stated that the plaintiff did not need to file an expert report because "[t]he underlying nature of his allegations is of an unsafe condition created by an item of furniture. Such a complaint relates to premises liability, not health care liability, and is governed by the standard of ordinary negligence."[32] Therefore, because the plaintiff's complaint was based on a premises-liability and not a healthcare-liability claim, no expert report was required under the statute.[33]

Alvarez v. Thomas concerned another plaintiff who failed to file an expert report within 180 days of the petition filing. On March 22, 2004, the doctor defendant mailed the district clerk a motion to dismiss the plaintiff's petition for failure to file an expert report. On March 23, the plaintiff hand-filed his fourth amended petition, which included a nonsuit of the doctor defendant. The doctor's motion to dismiss was not received by the clerk of court until March 25. The doctor sought the application of the mailbox rule under Rule 5 of the Texas Rules of Civil Procedure because he deposited the motion to dismiss in the mail before the plaintiff's nonsuit was filed.[34] The court held "that Rule 5's 'mailbox rule' does not apply where there is no preset deadline for filing a document, so [the plaintiff] actually filed his nonsuit before [the defendant] filed his motion to dismiss."[35] However, because the plaintiff did not argue the inapplicability of Rule 5 to a situation in which there was no preset deadline for filing a document, the court held that the plaintiff did not preserve his error and affirmed the trial court's dismissal of his action with prejudice.[36]

In re Huag dealt with a discovery stay imposed before the filing of an expert report in a medical-malpractice action. In this case, the defendant medical providers sought mandamus relief against the trial court's order granting the plaintiffs' motion to compel deposition testimony. At issue was subsection 74.351(s) of the Texas Medical Liability Act ("TMLA"), which "stays all discovery in a medical malpractice suit until the expert report has been filed, unless excepted."[37] All discovery is "stayed except for the acquisition by the claimant of information, including medical or hospital records or other documents or tangible things, related to the pa-

31. 177 S.W.3d 255, 257-58 (Tex. App.—Houston [1st Dist.] 2005, pet. filed).
32. *Id.* at 259.
33. *Id.* at 260.
34. 172 S.W.3d 298, 300-01 (Tex. App.—Texarkana 2005, no pet. h.).
35. *Id.* at 301.
36. *Id.*
37. 175 S.W.3d 449, 451-52 (Tex. App.—Houston [1st Dist.] 2005, no pet. h.) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s)(1)-(3) (Vernon 2005)).

tient's health care through: . . . (2) depositions on written questions under Rule 200, Texas Rules of Civil Procedure."[38] Subsection 74.351(u), however, states: "[n]otwithstanding any other provision of this section, after a claim is filed all claimants, collectively, may take not more than two depositions before the expert report is served as required by [s]ubsection (a)."[39] The plaintiffs claimed that subsection (u) expanded the discovery permitted in subsection (s), allowing claimants to take two oral or written depositions of parties or non-parties in addition to the depositions permitted by subsection (s).[40] To the contrary, the defendants argued that subsection (u) only served to further restrict the exceptions permitted in subsection (s). The court considered the construction of the statute and noted that "the numerical limitation in subsection 74.351(u) would be given no effect if unlimited depositions were permitted by subsection 74.351(s) and two additional depositions were permitted by subsection 74.351(u)."[41] The court also considered the goals of the Texas Legislature in promulgating the Texas Medical Liability Act, which included decreasing the cost, frequency, and severity of healthcare-liability claims. Thus, the court held "that subsection 74.351(s) of the TMLA defines the type of permissible discovery excepted from the stay imposed prior to service of the expert's report and that subsection 74.351(u) restricts all claimants collectively to taking not more than two depositions of the types permitted by subsection 74.351(s) during the stay."[42] Because of this holding, the court concluded that the trial court had abused its discretion when it compelled the relators to give deposition testimony.[43]

In *Hillcrest Baptist Medical Center v. Wade*, the Tenth Court of Appeals in Waco considered the sufficiency of three expert reports filed to support a medical-malpractice claim. The defense argued that the plaintiff had not made a good-faith effort to comply with expert report requirements. The plaintiff argued that the three expert reports, taken together, demonstrated a good-faith effort at meeting the elements required for a sufficient expert report.[44] The court agreed with the plaintiff, finding that one of the expert's reports established the specific conduct of the nursing staff that breached an accepted standard of nursing care, and two of the expert's reports established that this breach resulted in harm to the plaintiff. Thus, the reports, taken together, established a causal relationship between the breach in care and the plaintiff's injuries. Therefore, the court

38. *Id.* at 452 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s)(2) (Vernon 2005)).

39. *Id.* at 453 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(u) (Vernon 2005)).

40. *Id.*

41. *Id.* at 454 (citing *In re* Miller, 133 S.W.3d 816 (Tex. App.—Beaumont 2004, orig. proceeding)).

42. *Id.* at 456.

43. *Id.*

44. 172 S.W.3d 55, 60 (Tex. App.—Waco 2005, pet. filed). The elements required for a sufficient expert report are: (1) standard of care; (2) breach of the standard of care; and (3) causation."

found that the trial court did not abuse its discretion in concluding that the three expert reports, considered together, contained the three statutory requirements.[45]

In *Cunningham v. Columbia/St. David's Healthcare System, L.P.*, the court considered how an expert should be designated as a testifying expert so that his testimony is relevant for summary judgment consideration. In this case, the plaintiff, Cunningham, sued Columbia, alleging that medical negligence led to her father's death. The trial court granted a no-evidence summary judgment motion, dismissing Cunningham's claim because the plaintiff had not offered expert testimony on the essential elements of her claim.[46] On appeal, the Third Court of Appeals in Austin held that "the rules requiring an expert to be designated before any testimony from that expert can be admitted apply in summary judgment proceedings, such that a non-designated expert's affidavit cannot be considered as summary judgment evidence absent a showing of good cause or a lack of unfair surprise or prejudice."[47] Therefore, the court had to determine whether the plaintiff showed either good cause for the untimely designation of her expert or a lack of unfair surprise or prejudice to the defense. The plaintiff argued that Columbia was not prejudiced because she filed the expert's initial report. However, the court stated that "[m]erely filing a medical malpractice expert's 4590i report does not 'designate' that expert as a testifying witness so as to put the opposing party on notice to prepare a rebuttal."[48] Therefore, a non-designated expert's initial report will not serve to prevent unfair surprise or prejudice if that expert's testimony is later presented as evidence for summary-judgment purposes. Ruling that Columbia would be unfairly surprised or prejudiced by the admission of the plaintiff's affidavit, the court found that the trial court did not abuse its discretion by preventing the plaintiff from presenting her expert.[49]

In the case of *In re Wharton*, Dr. George Wharton was retained as an expert witness by the defendant in a personal-injury action. The plaintiff had served Wharton with a deposition notice requesting him to produce all of his 1099s for the five years prior, all reports that he had presented in various cases, and the tax returns for his orthopedic-rehabilitation practice.[50] Wharton sought mandamus relief to compel the trial court to withdraw its order requiring production of these documents. The Tenth Court of Appeals in Waco considered whether Wharton's potential bias or credibility issues permitted such broad discovery. The court considered the effects of the 1999 amendment to the Rules of Civil Procedure on Rule 192.3(e)(5), which permits the discovery of any bias of a testifying or con-

45. *Id.*
46. 185 S.W.3d 7, 10 (Tex. App.—Austin 2005, no pet. h.).
47. *Id.* at 13.
48. *Id.* at 14.
49. *Id.*
50. *In re* Wharton, No. 10-04-00315-CV, 2005 WL 1405732, at *1-2 (Tex. App.—Waco June 15, 2005, no pet. h.).

sulting expert. The court found that the amendments did not change the standard for a party seeking documents from a non-party expert for impeachment purposes—the party seeking discovery "must first present evidence 'raising the possibility that [the expert] is biased.'"[51] In this case, the requesting party had presented no evidence that Wharton was biased. Therefore, the court held that the lower court had abused its discretion in ordering the discovery of Wharton's financial records and expert reports from previous cases.[52]

At issue in *Palladian Building Company v. Nortex Foundation Designs, Inc.* was a motion to dismiss a negligence claim against a design professional for failure to file an expert's affidavit. In this case of first impression, the court was required to correctly construe Chapter 150 of the Texas Civil Practice and Remedies Code addressing lawsuits against design professionals. A design professional is defined as "a registered architect or licensed professional engineer."[53] Under the statute, a plaintiff alleging professional negligence against a design professional must file an affidavit from a third-party design professional identifying at least one negligent act, error, or omission on which the claim is based. In this case, the plaintiff Palladian filed an original petition and an amended petition but not the required expert's affidavit, and the trial court dismissed the case without prejudice. Palladian attempted to appeal based on a claim that the defendant, Nortex, had "waived its right to complain that Palladian failed to file the required expert's affidavit because Nortex substantially invoked the judicial process prior to filing its motion to dismiss."[54] Palladian alleged that because Nortex filed its original answer with the court and sought affirmative relief by filing motions for summary judgment, the doctrine of waiver applied and precluded Nortex from complaining of Palladian's non-compliance with section 150.002. The Second Court of Appeals in Fort Worth considered the issue of waiver but decided that it need not determine "whether a plaintiff may in fact assert the doctrine of waiver in response to a defendant's motion to dismiss under section 150.002."[55] Nortex had taken "no action that would preclude it from seeking dismissal of Palladian's lawsuit," because "it was not unreasonable or inconsistent for Nortex to elect to file an original or amended answer prior to filing its motion to dismiss for Palladian's failure to file the required expert's affidavit."[56] Therefore, the court held that there was no abuse of discretion when the trial court dismissed Palladian's suit for failure to file an expert affidavit.[57]

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51. *Id.* at *3 (citing Walker v. Packer, 827 S.W.2d 833, 838 (Tex. 1992)).

52. *Id.* at *4.

53. 165 S.W.3d 430, 431 (Tex. App.—Fort Worth 2005, no pet. h.) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 150.001 (Vernon 2005)).

54. *Id.* at 434.

55. *Id.* at 435.

56. *Id.*

57. *Id.*

III. PRIVILEGES

The physician-patient privilege, the peer-review privilege, and the attorney-client privilege were all addressed this Survey period. While the Texas Supreme Court ruled that nursing homes enjoy the same medical committee, medical peer-review, and nursing peer-review privileges as hospitals, the Corpus Christi and Beaumont Courts of Appeals grappled with when an attorney can be deposed.

A. PHYSICIAN-PATIENT PRIVILEGE

In the case of *In re Christus Health Southeast Texas*, St. Mary Hospital sought mandamus relief from an order requiring the hospital to produce documents to one of the real parties in interest, Terry Russell. The plaintiff in the case, Russell, requested all documents outlining the chief complaints and the triage codes of all the patients in the emergency room on the day that he allegedly received negligent treatment. The hospital objected on grounds of physician-patient privilege. Russell argued that the privilege did not apply because he was requesting the hospital's records and not a physician's. In addition, he argued that the privilege belongs to the patient, not the hospital, and that the hospital failed to show that it was acting on behalf of the patients in resisting disclosure.[58] Under Rule 509 of the Texas Rules of Evidence, the patient or the patient's representative must claim the privilege of confidentiality.[59] The Court of Appeals in Beaumont noted, however, that just because the hospital could not claim or control the privilege, "does not mean the privilege does not exist or can be ignored."[60] The court also pointed out that the plaintiff neither included the patients as parties to the action nor served the non-party patients with the request for production as required by Rule 196.1(c)(1) of the Texas Rules of Civil Procedure; thus, the patients had not been given an opportunity to claim the privilege. Because there was nothing in the record to suggest that the non-parties had consented to the disclosure, the court stated that it was "loath" to allow the parties to unilaterally waive the patients' privacy rights by failing to adhere to the discovery rules.[61] The appellate court therefore cautioned the trial court to "be vigilant in ensuring the protection" of the non-parties' privacy rights and "to give serious consideration to the interests of the nonparties, who are unaware of this litigation, in maintaining the confidentiality of their medical records."[62] The appellate court also considered Rule 509 of the Texas Rules of Evidence, which provides an exception to the physician-patient privilege when the physical, mental, or emotional condition of a patient is *part of any party's claim or defense*. The court noted that this exception

58. 167 S.W.3d 596, 597-98 (Tex. App.—Beaumont 2005, no pet. h.).
59. *Id.* at 601 (citing TEX. R. EVID. 509(d)(1)).
60. *Id.*
61. *Id.* (quoting *In re* CI Host, Inc., 92 S.W.3d 514, 517 (Tex. 2002)).
62. *Id.* at 603.

applies "even though the patient is not a party to the litigation."[63] However, the Texas Supreme Court has stated that relevance alone cannot be the test for overruling the privilege. The court therefore returned the case to the trial court for further proceedings to determine whether "the other patients' medical conditions [were] part of plaintiffs' claims as pleaded and not merely evidentiary or intermediate issues of fact."[64] Even if some of the non-parties' information fell into this exception or was not privileged, the court cautioned that "any privileged information not meeting an exception must be protected."[65] Thus, the trial court had the responsibility to ensure that any production of documents was "no broader than necessary" and that any privileged information not within the exception was redacted or otherwise protected.[66] Therefore, the court conditionally granted a writ of mandamus ordering the lower court to vacate its order for discovery.[67]

B. Peer Review Privilege

In the case of *In re Living Centers of Texas, Inc.*, the Texas Supreme Court held that "nursing homes are protected by the medical committee, medical peer-review, and nursing peer-review privileges to the same extent as hospitals."[68] After being sued by the survivor of a resident who died in their care, Living Centers of Texas, Inc., a nursing home, withheld several documents, asserting that they were protected by the medical peer-review privilege. After the trial court ordered the nursing home to produce any documents that were not stamped "privileged" and any privilege log documents that did not have the word "committee" in the name, the nursing home requested mandamus relief.[69] The Texas Supreme Court noted that the point of the peer-review privilege is to protect the reviewing process itself and not necessarily the documents produced by it. The court stated, "the peer review privilege is intended to extend far enough to foster candid internal discussions for the purpose of making improvements in the quality of care, but not so far as to permit the concealment of 'routinely accumulated information.'"[70] Therefore, the privilege would not prevent the discovery of otherwise-discoverable material that had been presented to a peer-review committee. However, the peer-review committee could not be forced to reveal such documents; rather, the party seeking the disclosure would be required to find the documents from a non-privileged source. While the privilege does not protect material presented to the committee, it does protect the products of the process itself, including reports, records, and deliberations. The court found

63. *Id.* at 601.
64. *Id.* at 603.
65. *Id.* at 602.
66. *Id.* at 603.
67. *Id.*
68. 175 S.W.3d 253, 259 (Tex. 2005).
69. *Id.* at 255.
70. *Id.* at 260 (quoting Barnes v. Whittington, 751 S.W.2d 493, 496 (Tex. 1988)).

that some of the documents that the trial court had ordered to be produced should have been protected by the peer-review privilege, and thus ordered the trial court to conduct further *in camera* review of the documents according to its holding in order to protect the privilege. The Texas Supreme Court wrote that

> [u]pon further review, the trial court must determine: (1) whether the existing evidence establishes the privileged status of any documents without the need for an *in camera* inspection; (2) whether to conduct an *in camera* inspection of additional documents or categories of documents in light of this opinion; (3) whether the additional documents, if furnished, are privileged; and (4) whether [the nursing home], by failing to produce all documents for *in camera* inspection, failed to satisfy its burden to prove privilege.[71]

Concluding that the nursing home was entitled to mandamus relief, the supreme court directed the trial court to vacate its discovery order and to further examine the documents based on this holding.[72]

C. Attorney-Client Privilege

In the case of *In re Mason & Co. Property Management*, the defendant sought a writ of mandamus compelling the respondent, the judge of the 107th District Court of Cameron County, Texas, to vacate his order denying the defendant the opportunity to depose two attorneys involved with the case. In this case, the plaintiff alleged that the defendant negligently drafted a commercial lease. The defendant stated that he needed the testimony of the attorney witnesses in order to establish the affirmative defense of ratification and estoppel. According to the defendant, the plaintiff adopted and ratified terms of the original lease in an extension, which thereby ratified the allegedly defective clause in the option and estopped the plaintiff from claiming that the lease was improperly drafted. The defendant claimed that he wanted to discover only the communications between the two attorneys involved and not those between the attorneys and their clients.[73] The Thirteenth Court of Appeals in Corpus Christi held that it was an abuse of discretion to refuse to allow the defendant to depose the two attorneys. The court stated that "an attorney may be deposed, even if he or she represents a party to the litigation in issue."[74] The court further stated that:

> [t]he attorney-client privilege was never intended to foreclose any opportunity to depose an attorney, but rather only precludes those questions which may somehow invade upon the attorney-client confidences. An attorney may not avoid a deposition in its entirety merely because some matters may be privileged, but must object when those inquiries are raised during the deposition. Other matters

71. *Id.* at 261-62.
72. *Id.* at 261.
73. 172 S.W.3d 308, 311 (Tex. App.—Corpus Christi 2005, no pet. h.).
74. *Id.* at 313.

> may exist which are not privileged and which an attorney may be called upon to answer.[75]

The court did note that, although deposing a party's attorney is a possibility, it is disfavored because of the importance of protecting the attorney-client privilege. In this case, however, each of the claims was premised on the attorney's drafting of the option to purchase contained in the lease. Therefore, whether or not the affirmative defense of ratification and estoppel could be pursued depended on the communications between the two attorneys.[76] The defendant had "shown that it [was] seeking discovery relevant to the claims and defenses at issue in this lawsuit and that discovery [was] necessary to the presentation of its case."[77] The court also noted that "to the extent that [the defendant] seeks to discover communications between [the attorneys], such communications would not be covered by the attorney-client privilege."[78] Therefore, the court held that mandamus should be granted, allowing the attorneys to be deposed and to raise the attorney-client privilege when appropriate during the questioning.[79]

In *In re Baptist Hospitals of Southeast Texas*, the plaintiff filed a motion to quash the deposition of one of its attorneys. The trial court denied the motion and allowed the defendant to proceed with the deposition. The plaintiff sought mandamus relief from the Ninth Court of Appeals in Beaumont.[80] While considering the case, the appellate court stated that an issue crucial to the outcome of the mandamus hearing was whether "the attorney noticed for deposition [was] the attorney of record in ongoing litigation who [had] been ordered to testify concerning the subject matter of the litigation."[81] The defendant attempted to argue, based on the attorney's involvement in a building project, that the attorney was not actually working as an attorney, but rather as an engineer or a manager. Since the attorney's work was not actually work product, it was proper subject matter for deposition.[82] The court disagreed with the defendant's assessment of the plaintiff's attorney:

> Performing the function of a lawyer does not preclude a litigation attorney from observing, investigating, monitoring, and evaluating the facts surrounding the matter in controversy. The evidence does not show [the attorney] was a fact witness divorced from the litigation. His work was reasonably related to and in furtherance of the prosecution of [the plaintiff's] case against the defendants.[83]

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75. *Id.* (quoting Borden Inc. v. Valdez, 773 S.W.2d 718, 720 (Tex. App.—Corpus Christi 1989, orig. proceeding)).
76. *Id.*
77. *Id.* at 314.
78. *Id.*
79. *Id.*
80. 172 S.W.3d 136, 139 (Tex. App.—Beaumont 2005, no pet. h.).
81. *Id.* at 140.
82. *Id.* at 142.
83. *Id.* at 143.

Therefore, the court held that the attorney's activities fell under the work-product privilege and conditionally granted mandamus relief preventing his deposition.[84]

At issue in *In re Graco Children's Products, Inc.* was whether a general attorney-client objection could function as a waiver of each specific objection. In this products-liability action, the plaintiff alleged that the child car seat manufacturer's design defect caused the death of her five-week-old son. The defendant made a general assertion of attorney-client and work-product privileges to all of the plaintiff's requests and produced a withholding statement. The judge in the lower court ruled that, by making such blanket objections, the defendant failed to preserve all privileges. The Thirteenth Court of Appeals in Corpus Christi held that the judge had abused her discretion in reaching this conclusion.[85] The defendant's withholding statement said that, based on the attorney-client privilege, the defendant was withholding documents otherwise responsive to plaintiff's Fourth Request for Production, numbering each question. The appeals court stated that "[a]s such, the withholding statement complied with the requirements of the rule."[86] Therefore, the defendant did not waive any privileges with this broad attorney-client objection and maintained a specific objection for each document.[87]

At issue in *Bright v. Addison* was whether enough evidence existed to support a trial judge's finding of an attorney-client relationship between the plaintiffs and the defendant that would imply a fiduciary duty between the parties. After a bench trial, the trial judge found that the defendant usurped the plaintiffs' opportunity to manage a casino. The court also found that the defendant was the plaintiffs' attorney and thus awarded the plaintiffs damages based on, inter alia, breach of fiduciary duty. The defendant, however, claimed that he was merely the plaintiffs' business associate and never acted as their attorney. On appeal, the Fifth Court of Appeals in Dallas found that the evidence suggested that the defendant acted both as the plaintiffs' attorney and business associate. For example, the defendant oversaw construction at casinos, purchased furniture, bought equipment, and participated in various other activities related to casino operations. But the defendant also incorporated corporations, negotiated contracts, and advised the plaintiffs on legal issues. Further, the defendant admitted at trial that he had performed legal work for the plaintiffs and advised the plaintiffs of the attorney-client privilege. The plaintiffs even sent the defendant an engagement letter based on this advice in order to preserve attorney-client privilege; when the defendant received the letter, he never contradicted the fact that the plaintiffs had engaged his services as an attorney. Therefore, the appeals court held that "there was legally and factually sufficient evidence to support the

84. *Id.* at 143-44, 146.
85. 173 S.W.3d 600, 601 (Tex. App.—Corpus Christi 2005, no pet. h.).
86. *Id.* at 604.
87. *Id.* at 605.

trial judge's finding of an attorney-client relationship between" the plaintiffs and the defendant.[88]

IV. SPOLIATION

In *Texas Electric Cooperative v. Dillard*, plaintiff sued Texas Electric Cooperative ("TEC") and the driver of a TEC truck for her husband's death. In this case, a TEC driver ran into a cow, left the cow in the road, and did not attempt to warn motorists of its presence. The cow carcass caused another accident in which the plaintiff's husband died. The defendants contended that the trial court erred in submitting a spoliation instruction to the jury regarding the truck driver's logs for that trip. The defendant admitted that it destroyed the driver's log books and documents relating to the trip, but claimed that it was the policy of the company to destroy records after six months. The trial court instructed the jury that if the disappearance or non-production of the logs was not "satisfactorily explained," the jury could "consider that such evidence contained information adverse to the position taken by the party" who was in "exclusive possession and control" of the document.[89] The Twelfth Court of Appeals in Tyler noted that in order to establish a spoliation claim, the party alleging spoliation had to show that the opposing side that destroyed the evidence "had notice both of the potential claim and of the evidence's potential relevance thereto."[90] Further, the test "for anticipation of litigation is whether a reasonable person would conclude from the severity of the accident and other circumstances surrounding it that there was a substantial chance for litigation."[91] In this case, correspondence between the plaintiff's attorney and the defendants began well within the six-month period during which the logs were kept. Therefore, the court held that the trial judge had not abused his discretion in instructing the jury on spoliation because the defense had reasonable notification of upcoming litigation.[92]

V. SANCTIONS

In *State v. PR Investments & Specialty Retailers, Inc.*, a condemnation case, the State of Texas appealed the trial court's dismissal of a suit that sought condemnation of part of a privately owned tract of land. Five days before the trial date, the State changed the specifics of the project, but did not change the allegations in the pleadings or the portion of property it sought to condemn. The trial court dismissed the action and sanctioned the State with attorney's fees and expenses. The trial court justified its imposition of sanctions against the State on the grounds that the State had proceeded to trial using a fictitious building plan, knowing that it

88. 171 S.W.3d 588, 596-97 (Tex. App.—Dallas 2005, pet. filed).
89. 171 S.W.3d 201, 208 (Tex. App.—Tyler 2005, no pet. h.).
90. *Id.* at 209.
91. *Id.*
92. *Id.*

would change the project at the last moment to an altogether different plan. The trial court found that this constituted bad faith and harassment. The Fourteenth District Court of Appeals in Houston found that the trial court had abused its discretion in basing sanctions on this change of plans because "Rule 13 sanctions are not based on a party's conduct during the prosecution of the action; rather, they are based on the signing and filing of pleadings in violation of the duties imposed by Rule 13."[93] Because the trial court did not find that the State's counsel signed the original condemnation or the amended condemnation petition knowing that it was groundless or brought in bad faith or that State's counsel signed the amended condemnation petition believing it to be groundless or brought in bad faith, no evidence would support Rule 13 sanctions. The appellate court could find no evidence "that any party or attorney filed this condemnation action or any pleading herein as an experiment to get an opinion from the court. Therefore, the trial court erred to the extent that it assessed Rule 13 sanctions on this basis."[94]

In *Sadeghian v. Webb*, the plaintiff sued multiple defendants, alleging trespass and destruction of property. One of the defendants, Wilson, filed an original answer with a general denial and a counterclaim requesting sanctions, alleging that the plaintiff's claims were groundless and brought in bad faith. Co-defendants Jerry and Janice Webb also filed an original answer with a denial; however, they did not file a counterclaim seeking sanctions. After a sanctions hearing, the court signed a judgment that gave the plaintiff nothing and awarded sanctions both to Wilson and the Webbs. The sanctions order stated that the court, on its own motion, applied Wilson's request for sanctions under Rule 13 to the Webbs because the sanctions issues were identical.[95] After the trial court entered the sanctions order in favor of the Webbs, the plaintiff appealed the granting of sanctions against him, alleging that the sanctions were improper because he did not have fair notice under Rule 13 that the court might award them to the Webbs.[96] On appeal, the Second Court of Appeals in Fort Worth concluded that the plaintiff was never put on notice by the Webbs or by the trial court that sanctions might be awarded against him as to the Webbs. Therefore, the court held that the trial court abused its discretion in awarding those sanctions.[97]

In the case of *In re K.A.R.*, an ex-husband brought a custody action against his former wife and then nonsuited his claims. The ex-wife counter-petitioned for modification and moved for sanctions against her ex-husband and his counsel.[98] The trial court granted the requested relief, and the ex-husband appealed on various grounds, including the fact

93. 180 S.W.3d 654, 663 (Tex. App.—Houston [14th Dist.] 2005, pet. filed).
94. *Id.* at 671-72.
95. No. 2-03-367-CV, 2005 WL 737424, at *1 (Tex. App.—Fort Worth Mar. 31, 2005, no pet. h.).
96. *Id.* at *4.
97. *Id.* at *7.
98. 171 S.W.3d 708-09, 713 (Tex. App.—Houston [14th Dist.] 2005, no pet. h.).

that he had only received four days' notice before the sanctions hearing. He claimed that he was entitled to six days' notice under Rules 21 and 21a of the Texas Rules of Civil Procedure and that the trial court had abused its discretion and violated his due-process rights by failing to give him such notice. The Fourteenth District Court of Appeals in Houston disagreed, noting that even if the three-day notice period under Rule 21 was extended to six days by Rule 21a, Rule 21 still would allow the trial court to shorten the notice period. The ex-husband's counsel admitted to receiving a fax regarding the motion for sanctions and the hearing to be held four days later. The following afternoon, the ex-husband and his counsel filed a motion for continuance of the trial setting, but did not file a motion to continue the sanctions hearing, a motion to reset the sanctions hearing, or any objection based on insufficient notice. Therefore, the court held that "even if the rules ordinarily would have required six days' notice, the trial court did not abuse its discretion or violate [the ex-husband's and his counsel's] due process rights in shortening the notice period to four days."[99] Thus, the notice issue was not held to be adequate grounds for overturning the sanctions.[100]

In *Greene v. Young*, a sanctions order was reversed on the basis of lack of proper notice. In this case, the family court granted sanctions based on authority other than Rule 13. The appellants appealed because the sanctions originally were sought only under Rule 13. The motion made no mention of Chapter 10, the family court's inherent power to sanction, the Disciplinary Rules, or the Lawyers' Creed, all of which the family court had cited as legal bases for the sanctions that it imposed. The court held that the family court improperly relied on rules other than Rule 13 and did not give appellants proper notice that the questionable conduct would be under consideration for sanctions under these rules. Therefore, the appellants could not prepare an appropriate defense to sanctions other than the Rule 13 sanctions. Thus, the court held that it was an abuse of the family court's discretion to sanction the appellants on the basis of claims about which they had no notice.[101]

In *Mantri v. Bergman*, the Fifth Court of Appeals in Dallas had to determine whether a claim for sanctions under Chapter 10 of the Texas Civil Practice and Remedies Code could be brought in an independent lawsuit in a court and county different from the underlying litigation. In this case, the plaintiff, Angela Allen, sued Dr. Suhas Mantri for medical malpractice. Allen nonsuited Dr. Mantri in December of 2002 in Denton County, where she originally brought suit. In August of 2003, Mantri sued Allen in Dallas County, seeking sanctions for frivolous litigation under Chapter 10. The trial court held that a party seeking such sanctions was required to bring the sanctions motion in the same action as the friv-

99. *Id.* at 713.

100. *Id.*

101. 174 S.W.3d 291, 298-99 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

olous litigation and therefore could not seek sanctions independently.[102] The appellate court noted that the terminology of the rule suggested that a party could file a motion for sanctions regarding litigation proceedings, but no language suggested the existence of an independent cause of action. Additionally, "[w]hen a motion for sanctions is filed following the entry of a final judgment, the motion is treated as a motion to modify, correct, or reform the existing judgment within the meaning of rule of civil procedure 329b(g)."[103] Therefore, the court held that the "only court with jurisdiction over a request for sanctions (whether styled as a motion or otherwise) under Chapter 10 is the court where the allegedly frivolous litigation was pending, and then only while the court has plenary jurisdiction over the cause in which the allegedly frivolous litigation was pending."[104] Therefore, the court held that the Dallas County district court did not have jurisdiction over any proceeding for sanctions arising from the Denton County claims.[105]

The case of *Leon's Fine Foods of Texas, Inc. v. Merit Investment Partners, L.P.* "demonstrates what may happen to a client when its attorney suffers from severe depression."[106] In this case, Leon's former attorney had failed to file a response to any of Merit's requests for disclosures, failed to answer interrogatories, and failed to produce witnesses for deposition. Thereafter, Merit moved to strike the pleadings and to impose sanctions. The trial court imposed death-penalty sanctions against Leon's. Leon's attorney, however, did not attend the sanctions hearing; Leon's did not even know about the sanctions hearing. Leon's former attorney also falsely told the company's president that the trial court had rescheduled the trial date. Therefore, Leon's did not know about the default-judgment hearing. However, "despite the fact that Leon's had no part in the discovery abuse by its former attorney and had no knowledge of the sanctions hearing or the February 27 and March 13 hearings, the trial court denied Leon's motion for new trial."[107] On appeal, the Eleventh Court of Appeals in Eastland found that the trial court erred in imposing death-penalty sanctions against Leon's. Quoting the Texas Supreme Court, the court stated "that 'death penalty sanctions should not be used to deny a trial on the merits' unless the guilty party's conduct is so bad that it 'justifies a presumption that its claims or defenses lack merit.'"[108] Finding it reasonable that Leon's had trusted its attorney under the circumstances, the court held that the trial court abused its discretion in issuing sanctions against Leon's, which neither knew of the hearings nor engaged in any bad conduct.[109]

102. 153 S.W.3d 715, 716-17 (Tex. App.—Dallas 2005, pet. denied).
103. *Id.* at 718.
104. *Id.*
105. *Id.*
106. 160 S.W.3d 148, 149 (Tex. App.—Eastland 2005, no pet. h.).
107. *Id.*
108. *Id.* at 153 (quoting Hamill v. Level, 917 S.W.2d 15 (Tex. 1996)).
109. *Id.*

VI. MISCELLANEOUS DECISIONS OF NOTE

A. HEARSAY

In the case of *Gabriel v. Lovewell*, the plaintiff, a horse owner, attempted to introduce his conversation with a veterinarian into evidence. In this conversation, the veterinarian allegedly attributed part of the cause of the horse's death to the defendant. The court would not allow such testimony because it was hearsay. However, by asking the veterinarian if he told the horse owner that the horse died because the defendant did not bring it to the veterinary clinic sooner, the defense opened the door to the testimony and the trial court allowed it.[110] The Sixth Court of Appeals in Texarkana held that, because the horse owner's testimony pertained to the same subject matter as the veterinarian's and directly contradicted the veterinarian's testimony, the horse owner's testimony was admissible for the limited purpose of impeaching the veterinarian. Therefore, the trial court was held to have properly admitted the testimony over the defense's objection.[111]

At issue in *In re Estate of Steed* was whether the deceased's assistant, Daniel Hutton, could testify as to statements made by the deceased about why he created his will. The assistant stated that the deceased wanted to pacify his wife and get her "off the 'warpath.'"[112] The testator's son wanted the evidence to be admitted in order to show that his father was under undue influence when he wrote his will. The Texas Supreme Court has held that a decedent's statements can be used to show the second element of undue influence, the collapse of the testator's own will, because the statements show the testator's mental condition. But the supreme court has also stated that such testimony is not admissible when offered to prove the first element, that an external pressure was exerted on the testator, because the testimony would be offered to prove the matter asserted and would thus be hearsay. However, Rule 802 of the Texas Rules of Evidence now provides that inadmissible hearsay made without objection should not be denied probative value. In this case, the statements were admitted without objection, and therefore the evidence could not "be said to have no probative value even if the statements were hearsay."[113] Therefore, the court of appeals held that the testator's declarations to his assistant could be "considered on both components of undue influence: the external factor (pressure by another party) and the internal factor (class of the testator's mind or will)."[114]

In *Tri-Steel Structures, Inc. v. Baptist Foundation of Texas*, the Second Court of Appeals in Fort Worth held that an unsigned letter was not admissible under the Rule 803(15) hearsay exception for documents affecting an interest in property. The issue in this case was whether portions of

110. 164 S.W.3d 835, 841-42 (Tex. App.—Texarkana 2005, no pet. h.).
111. *Id.* at 842-43.
112. 152 S.W.3d 797, 807 (Tex. App.—Texarkana 2004, pet. denied).
113. *Id.* at 808.
114. *Id.*

an unsigned letter between two of the parties were subject to the hearsay exception. The court of appeals noted that most cases interpreting this rule of evidence "require that the document have some sort of official or formal nature, which an unsigned letter does not possess. Further, the rule requires that dealings with the property not be inconsistent with the statement after it was made."[115] In this case, even though a letter was exchanged between the parties, the letter was unsigned. In addition, following the letter exchange, the landlord did not treat the tenant's interpretation of its property interests consistently with the letter allegedly exchanged between them. Therefore, the court held that the letter was properly excluded from evidence.[116]

B. Judicial Notice

The Texas Supreme Court in *In re J.L.* held that expert testimony heard during criminal proceedings against a mother and her husband for the death of her child was not subject to judicial notice in a parental-rights-termination proceeding concerning her other child. The expert doctor, testifying in criminal proceedings against the parents of the child who died, seemed to contradict the autopsy performed by a different doctor. Nevertheless, the appellate court purported to take "judicial notice" of the doctor's testimony from the criminal trial in the civil proceeding to determine custody.[117] Considering the requirements for a judicially noticed fact, which must either be generally known or capable of accurate and ready determination, the supreme court held that because the doctor's testimony "concerned disputed facts and opinions, it should not have been judicially noticed."[118]

In the case of *In re A.C.S. & G.E.S.*, former spouses filed motions to modify child-custody orders after the former wife moved with the children to South Carolina. At issue in the case was whether the former wife interfered with the former husband's visitation rights. During trial, testimony was taken about travel expenses for visitation. The judge compared the costs and time of travel between Houston and either Dallas or San Antonio and travel between Texas and South Carolina. The trial judge stated that he knew that a person could get an airline ticket from Houston to Dallas for about $100 with flight times lasting only about an hour, and therefore took judicial notice of those facts. Based on this, the court found that the former wife's move to South Carolina substantially increased the cost of transportation and time required for the former husband to share custody, making it nearly prohibitive.[119] The appellate court acknowledged that a trial court may take judicial notice of a fact that is generally known or capable of accurate and ready determination.

115. 166 S.W.3d 443, 450-511 (Tex. App—Fort Worth 2005, pet. denied).
116. *Id.* at 451.
117. 163 S.W.3d 79, 83 (Tex. 2005).
118. *Id.* at 84.
119. 157 S.W.3d 9, 21 (Tex. App.—Waco 2004, no pet. h.).

However, the court asserted that "personal knowledge is not judicial knowledge, and a judge may personally know a fact of which he cannot take judicial knowledge."[120] Therefore, the court found that the lower court had abused its discretion by finding that an increase in transportation costs after a move to South Carolina was prohibitive and that costs and travel times would be less if the former wife returned with the children to Texas. The trial judge could not take notice of his own personal knowledge about flight prices and flight times within Texas.[121]

C. Parol Evidence Rule

In *Baroid Equipment, Inc. v. Odeco Drilling, Inc.*, the First District Court of Appeals in Houston considered whether Odeco, which operated a semi-submersible drilling rig and worked as the purchasing agent for a rig builder, entered into an oral contract with Baroid, which supplied equipment to the rig. Odeco claimed that an oral contract existed that created warranties running to Odeco in excess of, and in addition to, the warranties Baroid had already given to the rig builder through a written contract.[122] The lower court found that an oral contract did exist between Odeco and Baroid. Baroid appealed the ruling, claiming that the alleged oral contract was not enforceable because the parol evidence rule barred consideration of earlier oral warranties inconsistent with the written warranty in the purchase order. Specifically, Baroid claimed that any earlier warranties that it made were merged into the final written contract and, therefore, could not be used to contradict the terms of the written contract. In order to determine whether or not the parol evidence rule applied, the appellate court had to determine the relationship between the parties. Although in general, two contracts must be between the same two parties in order to merge, the court stated that "in some instances, the third party has been so involved with the creation of the written contract, or is claiming rights under the contract such that he is bound to abide by its terms, i.e., he is no longer a stranger to the contract."[123] The court determined that Odeco was not a stranger to the written contract between Baroid and the rig operator, and therefore Odeco could not "offer parol evidence of an oral agreement that conflict[ed] with or add[ed] to the terms of the written contract that it negotiated on behalf of [the rig operator]."[124]

120. *Id.* at 22.
121. *Id.*
122. 184 S.W.3d 1, 4 (Tex. App.—Houston [1st Dist.] 2005, pet. filed).
123. *Id.* at 13-14.
124. *Id.* at 15.