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CIVIL PROCEDURE

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

I. SUBJECT MATTER JURISDICTION

The Texas Supreme Court examined several important issues relating to subject matter jurisdiction during the Survey period. In the high-profile school-finance case, *Neely v. West Orange-Cove Independent School District*,[1] the court held that school districts have standing to bring claims challenging the constitutionality of the public-school-financing system in Texas.[2] The court also rejected the argument that the constitutionality of the school-financing system is a political question that is not suitable for judicial review.[3]

In *Hoff v. Nueces County*[4] and *Mills v. Warner Lambert Co.*,[5] the Texas Supreme Court was required to interpret federal law in deciding the jurisdictional issues. In *Hoff*, the court held that a county is not an arm of the State of Texas for purposes of immunity under the Eleventh Amendment to the United States Constitution, although it is an arm of the state under Texas law.[6] In *Mills*, the court held that even if a putative class's state-law claims were preempted under the federal Food, Drug and Cosmetic Act (an issue that the court did not decide), such preemption would not deprive the trial court of subject matter jurisdiction over the class claims. Instead, federal statutory preemption will only strip a state court of subject matter jurisdiction if Congress, either explicitly or by unmistakable implication, requires that certain claims be resolved exclusively in a federal forum.[7]

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1. 176 S.W.3d 746 (Tex. 2005).
2. *Id.* at 772-76.
3. *Id.* at 776-81.
4. 153 S.W.3d 45 (Tex. 2004).
5. 157 S.W.3d 424 (Tex. 2005).
6. *Hoff*, 153 S.W.3d at 49.
7. *Mills*, 157 S.W.3d at 427.

Whether an insurance-coverage dispute was moot was the issue in *Allstate Insurance Co. v. Hallman*.[8] Although Allstate had filed a declaratory judgment action asserting that it had no duty to defend or indemnify its insured in the underlying case, it did in fact provide a defense, which culminated in a favorable jury verdict while the coverage case was on appeal. The Texas Supreme Court nevertheless held that the case was not moot since the insured was still seeking to recover her attorney's fees in connection with the declaratory judgment action.[9]

The supreme court once again explained the distinction—often ignored or overlooked by practitioners—between standing and capacity in *Austin Nursing Center v. Lovato*.[10] As the supreme court explained, standing focuses on whether the plaintiff has a sufficient relationship with the lawsuit such that he has a justiciable interest in its outcome; capacity, in contrast, focuses on whether the person has the legal authority and qualifications to litigate. While standing is a component of subject matter jurisdiction and can be raised for the first time on appeal, capacity is not. Thus, for example, in *Spurgeon v. Coan & Elliott*,[11] the court held that whether a successor law partnership was entitled to bring a suit for recovery of attorney's fees was a question of capacity, not standing, and the defendant waived her argument by failing to challenge capacity by a verified pleading.[12]

In *Pinnacle Gas Treating, Inc. v. Read*,[13] the Texas Supreme Court held that, even in the absence of a formal order for an exchange of benches, two district-court judges whose districts included Leon County both had jurisdiction over an eminent-domain case initiated by the county. The venue provisions requiring such condemnation cases to be assigned equally among those courts having jurisdiction did not confer exclusive jurisdiction upon the court to which the case was initially assigned.[14]

Finally, *Thompson v. Velasquez*[15] held that a district court had jurisdiction to issue a writ of mandamus to a justice of the peace in connection with a municipal-court criminal matter. The court distinguished prior Texas Supreme Court authority, concluding that those cases could be read "narrowly" as only addressing a district court's jurisdiction to issue writs of prohibition. In addition, the court concluded that the 1985 amendments to the constitutional provisions governing district-court jurisdiction evidenced an intent to broadly allow writs of mandamus and

8. 159 S.W.3d 640 (Tex. 2005).

9. *Id.* at 642-43. *See also In re* State, 159 S.W.3d 203 (Tex. App.—Austin 2005, orig. proceeding [mand. denied]) (district court had jurisdiction to consider request for attorneys' fees on remand of declaratory judgment action; the question of whether an award of fees was outside the scope of the appellate mandate would not deprive the court of jurisdiction).

10. 171 S.W.3d 845 (Tex. 2005).

11. 180 S.W.3d 593 (Tex. App.—Eastland 2005, no pet.).

12. *Id.* at 597-98 (citing TEX. R. CIV. P. 93).

13. 160 S.W.3d 564 (Tex. 2005).

14. *Id.* at 566-67.

15. 155 S.W.3d 551 (Tex. App.—San Antonio 2004, no pet.).

prohibition to be issued against inferior tribunals with respect to both civil and criminal matters.[16]

II. SERVICE OF PROCESS

Southwest Construction Receivables, Ltd. v. Regions Bank[17] presented the unusual question of whether one defendant may object to a defect in the service made on another defendant. At a co-defendant's request, the trial court found that defendant Michael McNew had not been properly served and therefore, was not before the court. This ruling hurt the plaintiffs' case because the plaintiffs intended to rely on McNew's previous conviction on federal bank-fraud charges as part of its proof of a conspiracy among the defendants. On appeal, the court held that only McNew had standing to object to the sufficiency of the service upon him, and the trial court erred in striking him as party on the motion of a co-defendant.[18]

The court in *Aguilar v. Livingston*[19] held that a return of service was not defective and that the trial court should have granted a default judgment. The court rejected the appellee's argument that the return must show the city and state where service was made. Similarly, the court held that there is no requirement that the return of service, as opposed to the citation itself, show the date and time that the officer received the citation.[20]

Two appellate courts reached differing conclusions on the validity of substituted service. In *Furst v. Smith*,[21] the court held that substituted service on the defendant's father in Pennsylvania was ineffective, despite his tangential involvement in the litigation, because there was nothing in the record to show that he was the defendant's "proper representative" for purposes of service.[22] In *Hubicki v. Festina*,[23] on the other hand, the court affirmed a default judgment in which the plaintiff sent substituted service to the defendant by regular mail to an address in Acapulco, Mexico and received no answer. Significantly, a prior attempt to serve the defendant by certified mail at the same address had been unsuccessful. Nevertheless, the court approved the substituted service, noting that there was evidence from plaintiff's process server that the defendant could usually be found at that address and that it was reasonably likely that he would receive the process if it was sent by first-class mail.[24]

Rule 103,[25] which governs who may serve process, was amended during

16. *Id.* at 553-54.
17. 162 S.W.3d 859 (Tex. App.—Texarkana 2005, pet. denied).
18. *Id.* at 864.
19. 154 S.W.3d 832 (Tex. App.—Houston [14th Dist.] 2005, no pet.).
20. *Id.* at 834-35.
21. 176 S.W.3d 864 (Tex. App.—Houston [1st Dist.] 2005, no pet.).
22. *Id.* at 870-71 (citing TEX. R. CIV. P. 106(b)).
23. 156 S.W.3d 897 (Tex. App.—Dallas 2005, pet. filed).
24. *Id.* at 902.
25. TEX R. CIV. P. 103.

the Survey period. The new rule allows persons who meet certain requirements and are certified by the Texas Supreme Court to serve process, including citation. This amendment will assist those practitioners who wish to use private process servers by allowing them to bypass the requirement of obtaining individual trial-court orders authorizing persons to serve.[26]

III. SPECIAL APPEARANCE

The interplay between pleadings and special-appearance practice was at issue in several noteworthy decisions during the Survey period. In *Nichols v. Bridges*,[27] the court held that the rule governing pleading amendments before trial applies to special-appearance hearings as well.[28] In holding that the defendant successfully negated specific jurisdiction, the court explained that if the special appearance movant establishes the nonexistence of an act or omission on which jurisdiction rests, the fact that such showing also tends to demonstrate the absence of liability is irrelevant to the decision on jurisdiction.[29] Conversely, *A&J Printing, Inc. v. DSP Enterprises*[30] held that the defendant in a sworn-account case successfully negated personal jurisdiction even though he failed to file a sworn denial of the account, which would have been necessary to defend on the merits.[31]

The court in *Zimmerman v. Glacier Guides, Inc.*[32] held that a specially appearing defendant must negate all jurisdictional allegations raised by the plaintiff, whether in its petition or otherwise. The defendants in *Zimmerman* claimed that, since the plaintiff failed to make any factually specific jurisdictional allegations in his petition, they satisfied their burden merely by proving that they were nonresidents. Disavowing one of its own prior holdings, the court of appeals disagreed that the issues in a special-appearance hearing are necessarily limited to the specific jurisdictional allegations contained in the petition. Instead, the court held that the plaintiff may introduce additional allegations, either in his response to the special appearance or through unobjected-to evidence at the special-appearance hearing, and the movant then bears the burden of negating these claimed jurisdictional bases as well.[33]

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26. *Id.* (describing those authorized to serve, in addition to sheriffs/constables and persons certified by the supreme court, to include any person over eighteen authorized by written order of the trial court).

27. 163 S.W.3d 776 (Tex. App.—Texarkana 2005, no pet.).

28. *Id.* at 782-83 (citing TEX. R. CIV. P. 63).

29. *Id.* at 783.

30. 153 S.W.3d 676 (Tex. App.—Dallas 2004, no pet.).

31. *Id.* at 681-82.

32. 151 S.W.3d 700 (Tex. App.—Waco 2004, no pet.).

33. *Id.* at 703-04.

IV. VENUE

In *In re Texas Association of School Boards, Inc.*,[34] the Texas Supreme Court had its first opportunity to interpret the requirements of a "major transaction" under section 15.020 of the Civil Practice & Remedies Code. Section 15.020 is a mandatory venue provision that provides, in part, that "[a]n action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county."[35] A "major transaction" is a "transaction evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than $1 million."[36]

The Texas Association of School Boards' Risk Management Fund ("Fund") is a non-profit, statewide administrative agency consisting of cooperating public school districts in Texas. The Fund offers self-funded liability coverage plans to education-based political subdivisions. The Texas Association of School Boards ("TASB") is the Fund's servicing contractor. In this case, Benavidez Independent School District ("BISD") and the Fund entered into a written agreement, wherein the Fund agreed to provide vehicle and general-liability coverage as well as coverage for certain casualty losses in return for an annual contribution from BISD. Under the agreement, coverage for potential losses or liabilities was in excess of $17 million for an annual contribution of $41,973. The suit arose from BISD's claim for indemnity under the parties' written agreement for water damage totaling more than $17 million. The Fund and TASB denied the claim, and BISD filed suit in Duval County. The Fund and TASB filed a motion to transfer venue to Travis County based on the written agreement's venue provision. The Fund and TASB contended that venue was mandatory in Travis County under section 15.020 because the agreement was a "major transaction." Based upon the total amount of coverage provided under the agreement, the Fund and TASB contended that the aggregate value of the consideration exceeded the $1-million threshold. Conversely, BISD contended that the consideration for the agreement was the amount that it had paid in premiums, which was far less than the $1-million threshold. After determining that the legislative history was silent on this issue, the Texas Supreme Court held that the "consideration" should be measured by the premium amount, not the coverage limits. Based on that reasoning, the court found that the mandatory-venue provision did not apply.[37]

In *In re United States Silica Co.*,[38] the Texas Supreme Court held that local administrative judges do not have authority to review and reverse

34. 169 S.W.3d 653 (Tex. 2005).
35. TEX. CIV. PRAC. & REM. CODE ANN. § 15.020(b) (Vernon 2002).
36. *Id.* § 15.020(a).
37. *In re Tex. Ass'n of Sch. Bds.*, 169 S.W.3d at 655-60.
38. 157 S.W.3d 434 (Tex. 2005).

conflicting rulings of coordinate courts. Rather, enforcing or overruling competing orders of coordinate courts is the duty of a higher court. This suit arose when ten silicosis cases involving hundreds of plaintiffs were filed in Cameron County and randomly assigned to six different courts. The first case was assigned to the 197th District Court. Thereafter, as the supreme court noted, a "scramble for possession" ensued.[39]

First, the plaintiffs moved to transfer and consolidate all ten cases into the 404th District Court. That motion was granted on January 6. Thereafter, many of the defendants moved to consolidate all of the cases in the 197th District Court. That motion was granted on January 7. The reaction of the remaining courts varied. Ultimately, unable to determine the winner of the forum contest, the parties sought mandamus relief in the court of appeals. That court declined to referee, holding that the local administrative judge should resolve the issue. The court of appeals relied on a Texas Government Code provision that assigns local administrative judges the statutory duty (among others) to "implement and execute the local rules of administration, including the assignment, docketing, transfer, and hearing of cases."[40] On review, the Texas Supreme Court disagreed and held that, while the local administrative judge may transfer cases under local rules, enforcing or overruling competing orders is the duty of a higher court.[41]

In *In re Automated Collection Technologies, Inc.*,[42] the Texas Supreme Court considered whether a party had waived a mandatory-venue provision. Professional Systems Corporation ("PSC") and Automated Collection Technologies, Inc. executed a written contract that provided, among other things, that "the parties hereto consent to the exclusive jurisdiction of the courts of Montgomery County, Pennsylvania."[43] Despite this provision, PSC sued Automated on the written contract in Dallas County, Texas, which was Automated's principal place of business. Automated answered and filed counterclaims for declaratory judgment, fraudulent inducement, breach of contract, negligence, and attorney's fees. Additionally, Automated served requests for disclosure, production, admissions, and interrogatories, and thereafter filed a motion to compel discovery. Approximately four months later, Automated filed a motion to dismiss based on the forum-selection clause and amended its answer to request dismissal. On appeal, PSC argued that Automated had "waived enforcement of the clause by acting inconsistently with its right to enforce same by seeking affirmative relief and invoking the jurisdiction of the court under the specific contract."[44] The Texas Supreme Court disagreed and, relying on its prior opinions in the arbitration arena, held that substantially invoking the judicial process did not waive a party's right to

39. *Id.* at 437.
40. TEX. GOV'T CODE ANN. § 74.092(1) (Vernon 2005).
41. *In re Silica*, 157 S.W.3d at 438.
42. 156 S.W.3d 557 (Tex. 2004).
43. *Id.* at 558.
44. *Id.* at 558-59.

enforce a mandatory venue provision in a written contract, unless the opposing party proved that it was prejudiced as a result.[45]

V. PARTIES

During the Survey period, two cases dealt with pleas in intervention that were filed after a judgment was rendered. In *Attorney General of Texas v. Casner*,[46] the purchaser of property at a foreclosure sale intervened in a foreclosure proceeding, seeking, among other things, a determination that the redemption provisions of the Texas Property Code were unconstitutional and an order enjoining the former owners from attempting to redeem the property. On appeal, the Attorney General argued that the intervenor's petition was untimely because it was filed after judgment was rendered. In response, the intervenor relied upon *Breazeale v. Casteel*,[47] which permitted post-judgment intervention. In *Breazeale*, a judgment creditor filed a turnover motion against the judgment debtor after the latter obtained a judgment against an insurance company in an unrelated suit. Assignees of the debtor's interest in the judgment filed petitions to intervene in the creditor's lawsuit. The *Breazeale* court held that intervention is not necessarily barred after the trial court has rendered final judgment if the intervenor does not attack the substance of the judgment itself, but merely seeks to protect his interest in property that is the subject of a turnover motion. The *Casner* court, however, found that the holding in *Breazeale* was limited to post-judgment motions for turnover relief and was thus inapplicable to this case.[48]

In *Lerma v. Forbes*,[49] the same court took a slightly broader view of *Breazeale*. This case has a convoluted procedural history, involving two attorney's-fees disputes. The first attorney, Lerma, sued his client to collect attorney's fees from a previous suit. Lerma hired Forbes to represent him in the attorney's-fee dispute. Lerma's fee claim was arbitrated, and he prevailed. Thereafter, Forbes withdrew as Lerma's counsel, the court entered judgment in accordance with the arbitration award, and Lerma pursued collection through a writ of garnishment. Ironically, Lerma did not pay Forbes the attorney's fees incurred in connection with the arbitration. Thus, Forbes filed a plea in intervention in the garnishment proceeding, which the trial court allowed. On appeal, Lerma argued that it was error to allow a post-judgment plea in intervention. However, the court found that the trial court did not abuse its discretion by allowing a post-judgment intervention. The court relied on *Breazeale*, which recognized the "unique situation" that occurs when the intervenor has no complaint with the merits of the judgment obtained in the underlying lawsuit,

45. *Id.*
46. No. 08-03-00437-CV, 2004 WL 2966904 (Tex. App.—El Paso Dec. 22, 2004, no pet.).
47. 4 S.W.3d 434 (Tex. App.—Austin 1999, pet. denied).
48. *Casner*, 2004 WL 2966904, at *5.
49. 166 S.W.3d 889 (Tex. App.—El Paso 2005, pet. denied).

but only seeks to protect his or her own interest in the post-judgment proceeding.[50]

VI. PLEADINGS

In *In re Unitech Elevator Services Co.*,[51] the First District Court of Appeals considered the timing requirements for designating responsible third parties under the Texas Civil Practice and Remedies Code.[52] The plaintiffs, who were injured in an elevator accident, sued the entities responsible for manufacturing and maintaining the elevator. The defendants filed three separate motions to designate responsible third parties, all of which were denied by the trial court. First, defendants filed a motion to designate CenterPoint Energy Houston Electric, LLC on January 5, 2005, less than sixty days before the February 7, 2005 trial setting. Under the Texas Civil Practice and Remedies Code, the motion would be considered untimely unless the trial court found good cause to allow the motion to be filed. The defendants argued that good cause existed because the plaintiffs had non-suited their claims against CenterPoint within sixty days of trial. The plaintiffs had originally filed suit against CenterPoint claiming that it had negligently caused a power surge, which may have caused the elevator to malfunction. CenterPoint subsequently filed a motion for summary judgment on November 8, 2004, and the plaintiffs non-suited their claims against CenterPoint on December 27, 2004. Since CenterPoint had been a defendant in the suit, the other defendants argued that the plaintiffs' last-minute non-suit should not destroy the defendants' right to designate CenterPoint as a responsible third party. In response, the plaintiffs argued that the trial court did not abuse its discretion because defendants had waited over eighteen months after plaintiffs named CenterPoint as a defendant to seek to designate it as a responsible third party, and defendants knew that plaintiffs could non-suit their claims at any time. Based on the foregoing record, the court held that the trial court had not abused its discretion in denying leave to designate CenterPoint as a responsible third party.[53]

Second, on December 2, 2004, defendants filed an amended answer containing an allegation against "unknown vandals" and filed a second motion for leave to designate "unknown vandals" as responsible third parties. In response, plaintiffs contended that the defendants' designation of unknown vandals was untimely under section 33.004(j), which provides, in pertinent part, that a defendant seeking to designate an unknown person as a responsible third party based on the person's commission of criminal acts, must file an answer containing such allegations no later than sixty days from filing its original answer.[54] The court held

50. *Id.* at 893.
51. 178 S.W.3d 53 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding).
52. TEX. CIV. PRAC. & REM. CODE ANN. § 33.004 (Vernon 2002).
53. *In re Unitech Elevator Servs. Co.*, 178 S.W.3d at 66.
54. *Id.* at 60 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(j)).

that the record affirmatively established that defendants did not file an answer containing such allegations until well after sixty days after the filing of the original answer, and therefore, the motion was properly denied.[55]

Finally, defendants filed a motion to designate SBC as a responsible third party on the grounds that SBC owned the building where the incident occurred and had the right to control the building, its elevators, and its electrical power. Rather than arguing the merits of section 33.004, plaintiffs claimed that, because defendants had filed a request for reconsideration and an amended motion to designate SBC as a responsible party, which were still pending, mandamus relief was premature. However, because the trial court had originally entered a written order denying defendants' motion for leave to designate SBC as a responsible third party and the court could discern no reason for the trial court's original denial of that motion, it would consider mandamus relief. After concluding that it could consider the issue, the court then found that defendants had an adequate remedy by appeal and, therefore, denied the mandamus relief.[56]

In *Rodriguez v. U. S. Securities Associates, Inc.*,[57] the court reviewed the propriety of a "motion to strike," which arose after several bizarre procedural twists. Hermann Hospital first sued an insured's benefit plan and administrator in state district court, alleging various claims arising from the defendants' representation of Rodriguez's insurance coverage. The defendants removed the case to federal court, alleging that the claims were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"). The case was remanded to state court, and the defendants filed a third-party petition against Rodriguez for contribution and indemnity. In response, Rodriguez lodged counterclaims against the defendants, including fraud, wrongful termination, promissory estoppel, and negligent misrepresentation. The defendants again removed the case, claiming that Rodriguez's claims implicated ERISA. While in federal district court, the defendants moved for summary judgment against Rodriguez. The federal district court granted the summary judgment in favor of the defendants on all of Rodriguez's claims, except for wrongful termination, which the court remanded to state court. The case was then set for trial in state court in August 2002. However, in July 2002, Rodriguez amended his cross-claim to "reassert" the claims that the federal district court had already ruled upon. In response, the defendants moved to strike the amended cross-claim, which the trial court granted in full. Accordingly, the parties proceeded to trial on Rodriguez's only remaining claim for wrongful termination.[58]

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55. *Id.*

56. *Id.* at 66.

57. 162 S.W.3d 868 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

58. *Id.*

On appeal, Rodriguez argued that the Texas Rules of Civil Procedure do not include a method for attacking the substance of an amended pleading filed more than seven days before trial by using a motion to strike. Although the court expressly recognized the defendants' "apparent frustration" with the amended pleading, the court explained that the trial court erred because the proper way for a defendant to claim that a plaintiff failed to plead a cause of action is by special exception.[59]

VII. DISCOVERY

The Texas Supreme Court discussed whether a nursing home preserved its privilege in *In re Living Centers of Texas, Inc.*[60] The nursing home had submitted four items to the trial court: a privilege log; the affidavit of its director of nursing; a representative sample of the documents withheld; and the home's quality assessment and assurance ("QA&A") policy. The trial court ordered the home to produce any documents that lacked a QA&A privilege stamp, which was required by the QA&A policy, as well as any of the logged documents that did not identify the QA&A committee by name. The Texas Supreme Court criticized the trial court's reliance on just these "superficial" indicators in ordering nearly all the documents produced. The supreme court held that, while the lack of a privilege stamp might be relevant, it was not dispositive as long as other evidence was offered. Moreover, the court rejected the argument that the nursing home waived its privilege by submitting only a representative sample of the *in camera* documents.[61]

The intermediate appellate courts also grappled with the proper method of preserving privilege during the Survey period. *In re Graco Children's Products, Inc.*[62] arose out of a products-liability suit. The defendant manufacturer made a "general" privilege objection to all of the plaintiff's document requests and, after plaintiff filed a motion to compel, filed a withholding statement indicating that documents had been withheld in response to specified requests based on attorney-client privilege. The court of appeals held that while the defendant's interposition of its general privilege objection caused confusion, its withholding statement was ultimately timely; the defendant had not, therefore, waived its privilege claim.[63] In *In re Anderson*,[64] on the other hand, the court held that the defendant did waive its claim of privilege to a legal memorandum from its attorney because it had neither asserted that it was withholding such document nor provided any basis for such withholding. Instead, the defendant only asserted its privilege *after* the plaintiff discovered the exis-

59. *Id.* at 874.

60. 175 S.W.3d 253 (Tex. 2005).

61. *Id.* at 261. The court cautioned, however, that it was not holding that a representative sample of the privileged documents would always be sufficient. *Id.*

62. 173 S.W.3d 600 (Tex. App.—Corpus Christi 2005, orig. proceeding).

63. *Id.* at 604.

64. 163 S.W.3d 136 (Tex. App.—San Antonio 2005, orig. proceeding).

tence of the memorandum.[65]

The Texas Supreme Court discussed the relationship between deemed admissions and due process in *Wheeler v. Green*.[66] In this child-custody proceeding, the trial court entered a summary judgment terminating the pro se wife's status as joint managing conservator based on deemed admissions. The husband's summary judgment motion failed to point out, however, that the wife had responded to the requests for admissions months before the motion was heard, albeit two days after such responses were actually due. Perhaps not surprisingly, the supreme court found that the wife should have been allowed to withdraw the deemed admissions when she later hired an attorney who raised the issue on motion for new trial.[67]

The supreme court also took the opportunity in *Wheeler* to explain that deemed admissions, like every other form of discovery sanction, are subject to the due-process constraints set out in *TransAmerican Natural Gas Corp. v. Powell*.[68] The court recognized that, while requests for admissions were once unique in including an automatic sanction for untimely responses, the failure to comply with other forms of discovery requests now carry similar consequences. Moreover, the court noted that when requests for admissions are used as intended—for instance, to address truly uncontroverted matters or evidentiary issues such as document authentication—there is little risk that the automatic sanctions of deeming admissions will operate to preclude a party's presentation of its case on the merits. It is only when a party attempts to use such requests to obtain case-dispositive admissions from its opponent that this due-process concern is implicated.[69]

Discovery sanctions were also at issue in several courts of appeals cases. Both *Cunningham v. Columbia/St. David's Healthcare System, L.P.*[70] and *F.W. Industries, Inc. v. McKeehan*[71] held that a party could not rely on expert testimony in opposing a summary judgment motion if it had failed to designate the expert by the deadline established in the trial court's scheduling order. In *Jones v. American Flood Research, Inc.*,[72] an order imposing sanctions against an attorney was upheld. Overruling an appellate-court decision to the contrary, the supreme court held that Rule 215.3[73] does not require that the court find that the "party" is in fact abusing discovery as a prerequisite to sanctions against either the party or

65. *Id.* at 141. The court also concluded that the earlier failure to identify the memorandum on the withholding statement was not inadvertent. *Id.* at 141 n.4.

66. 157 S.W.3d 439 (Tex. 2005).

67. *Id.* at 444.

68. 811 S.W.2d 913 (Tex. 1991).

69. *Wheeler*, 157 S.W.3d at 443.

70. 185 S.W.3d 7 (Tex. App.—Austin 2005, no pet.).

71. No. 11-04-00053-CV, 2005 WL 1639078 (Tex. App.—Eastland July 14, 2005, no pet.).

72. No. 05-0271, 2006 WL 1195394 (Tex. May 2, 2006).

73. TEX. R. CIV. P. 215.3.

the attorney.[74]

In *In re Wharton*, the Waco Court of Appeals waded into the developing issue of whether an expert witness's financial records and reports from other cases are discoverable to show the expert's bias.[75] The court held that the 1999 amendments to the rules of procedure, which added a specific provision allowing discovery of any bias of an expert witness, did not overrule the prior authority that generally precluded such discovery when sought solely for impeachment of the expert.[76] Another appellate court reached a similar conclusion in *In re Weir*,[77] which held that, because an expert could not say at his deposition how much of his income was litigation-related, the trial court erred in ordering him to reconstruct that information from his financial records so that he could give a further deposition on the issue.[78]

Requests for protection were at issue in several noteworthy cases during the Survey period. In *In re Edge Capital Group, Inc.*,[79] the court held that a party was not entitled to postpone all discovery based on the threat of a criminal indictment against him, particularly if the trial court had not stayed the civil case. Rather, if a party seeks to invoke his Fifth Amendment privilege against self-incrimination, the court reasoned that he must do so in response to specific discovery requests. *In re Baptist Hospitals of Southeast Texas*[80] and *In re Mason & Co. Property Management*[81] involved requests for depositions of attorneys. In *Baptist Hospitals*, the court refused to allow an intervenor to depose the attorney of record for the plaintiff. Although the intervenor alleged that the attorney had also undertaken the roles of engineer and construction manager, and thereby became a fact witness, the court held that all of the attorney's activities were in the context of the litigation. Therefore, the requested deposition ran squarely afoul of the work-product protection.[82] In *Mason*, on the other hand, the court had no difficulty holding that a party could depose two attorneys who were involved in the transaction giving rise to the litigation. The court noted that any concerns about impinging on the attorney-client privilege could be addressed with respect to specific questions

74. *Jones*, 2006 WL 1195394, at *2 (quoting TEX. R. CIV. P. 215.3).

75. No. 10-04-00315-CV, 2005 WL 1405732 (Tex. App.—Waco June 15, 2005, orig. proceeding).

76. *Id.* at *3. The concurring justice agreed that the order requiring production of the requested documents was inappropriate, but would have reached that result by balancing the need for the information against the burden of the broad requests for production propounded to the expert. *Id.* at *5-6 (Gray, J., concurring).

77. 166 S.W.3d 861 (Tex. App.—Beaumont 2005, orig. proceeding).

78. *Id.* at 865.

79. 161 S.W.3d 764 (Tex. App.—Beaumont 2005, orig. proceeding).

80. 172 S.W.3d 136 (Tex. App.—Beaumont 2005, orig. proceeding).

81. 172 S.W.3d 308 (Tex. App.—Corpus Christi 2005, orig. proceeding).

82. *In re Baptist Hosps. of Se. Tex.*, 172 S.W.3d at 142-43. The court noted that the intervenor could pursue less-intrusive methods of obtaining the information through written discovery, and if the plaintiff's attorney truly was a necessary fact witness, the proper remedy might well be a motion for disqualification, which the intervenor had not filed. *Id.* at 145.

to which such objections were made.[83]

Texas Rule of Civil Procedure 205.3(f)[84] requires a party to reimburse a nonparty for the latter's "reasonable costs of production" in responding to a subpoena. In *BASF Fina Petrochemicals Limited Partnership v. H.B. Zachry Co.*,[85] the court held that this provision did not authorize recovery of the attorney's fees that the nonparty incurred in responding to a subpoena. Finding no cases interpreting the rule, the court relied on the general principle that attorney's fees are not recoverable in the absence of a statute or rule explicitly authorizing the same. Moreover, the court reasoned that it would have been a simple matter for the Texas Supreme Court to include a provision for the recovery of attorney's fees, as it had in other discovery rules, if that had been intended.[86]

City of Willow Park v. Squaw Creek Downs, L.P.[87] addressed subject matter jurisdiction over a Rule 202[88] petition to take a pre-suit deposition. The court held that, because the district court would have jurisdiction over at least one of the claims that the deposition was designed to investigate, it likewise had jurisdiction over the Rule 202 petition. Moreover, the court rejected the opposing party's contention that the Texas Commission on Environmental Quality had primary jurisdiction over the underlying dispute and that the district court should not, therefore, exercise its jurisdiction over the Rule 202 petition.[89]

Finally, two cases during the Survey period discussed post-judgment discovery. In *In re Emeritus Corp.*,[90] the court held that the prevailing party was entitled to pursue discovery even though the judgment had been properly superseded. The court noted that the requested discovery was relevant to a pending motion to enjoin the judgment debtor from dissipating assets and was, therefore, permissible, even though the judgment had been superseded.[91] *In re Elmer*,[92] on the other hand, held that the trial court abused its discretion in compelling answers to interrogatories propounded in aid of an interlocutory, rather than a final, judgment.[93]

VIII. SUMMARY JUDGMENT

In *Progressive County Mutual Insurance Co. v. Boyd*,[94] the Texas Su-

83. *In re Mason*, 172 S.W.3d at 313-14.
84. TEX. R. CIV. P. 205.3(f).
85. 168 S.W.3d 867 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).
86. *Id.* at 873-74. The court also rejected the nonparty's argument that TEX. R. CIV. P. 176.7, which allows the trial court to protect a nonparty from undue burden or expense in responding to a subpoena, authorized an award of the attorney's fees incurred in complying with a subpoena. *Id.* at 874.
87. 166 S.W.3d 336 (Tex. App.—Fort Worth 2005, no pet.).
88. TEX. R. CIV. P. 202.
89. *City of Willow Park*, 166 S.W.3d at 340-41.
90. 179 S.W.3d 112 (Tex. App.—San Antonio 2005, orig. proceeding).
91. *Id.* at 115-17 (citing TEX. R. CIV. P. 621a).
92. 158 S.W.3d 603 (Tex. App.—San Antonio 2005, orig. proceeding).
93. *Id.* at 605.
94. 177 S.W.3d 919 (Tex. 2005).

preme Court held that, although a summary judgment cannot be affirmed on grounds not pled, the granting of summary judgment may nonetheless be affirmed if the error proves to be harmless. In this insurance dispute, the insured sued for breach of contract, bad faith, and other extra-contractual claims. The trial court initially granted summary judgment on all the plaintiff's claims except the breach-of-contract claim. Following a trial on the merits, the jury determined that the insurer did not breach the policy in failing to pay the insured's claim. In the subsequent appeal, the supreme court held that any error in granting summary judgment on the extra-contractual claims was harmless because the jury's finding that the insurer had not breached the insurance contract conclusively negated those claims as a matter of law.[95]

In *Proctor v. White*,[96] the court extended the rule that if a party relies on an unpleaded affirmative defense to support a summary judgment motion, the non-movant must object to that ground in its summary judgment response to avoid trying the issue by consent. Specifically, the court held that, when the *non-movant* relies on an unpleaded affirmative defense or other matter constituting a confession and avoidance, the summary judgment movant must likewise object to avoid trying the unpleaded issue by consent.[97]

In *Etheridge v. Hidden Valley Airpark Ass'n, Inc.*,[98] the court reversed a summary judgment on a restricted appeal because the evidence before the trial court conclusively showed that the non-movant had been sent, but had not picked up, certified-mail packages containing the underlying motion and the subsequent hearing notice. Specifically, because the record before the court showed that both certified-mail letters had been returned as "unclaimed," the court found that the appellate record on its face negated the presumption of service under Rule 21a.[99]

IX. DISMISSAL

The court in *Brown v. Vann*[100] addressed the tension between a trial court's obligation to render a judgment based on the jury's verdict and Rule 165a,[101] which gives the trial court discretion to dismiss a case for want of prosecution. In this restricted appeal, the trial court dismissed the action for want of prosecution after a jury verdict in the defendant's favor. Following the trial, the district court sent two separate letters to counsel scheduling hearings on the entry of a judgment. Neither side appeared at either hearing, and the trial court dismissed the case for want of prosecution. The appellate court affirmed, holding that the trial court was not required to enter a judgment on the verdict when two hearings

95. *Id.* at 921.
96. 172 S.W.3d 649 (Tex. App.—Eastland 2005, no pet.).
97. *Id.* at 652.
98. 169 S.W.3d 378 (Tex. App.—Fort Worth 2005, pet. denied).
99. TEX. R. CIV. P. 21a. *See Etheridge*, 169 S.W.3d at 382.
100. 167 S.W.3d 627 (Tex. App.—Dallas 2005, no pet.).
101. TEX. R. CIV. P. 165a.

had been noticed and no proposed judgment had been supplied.[102]

The court in *Bailey v. Gardner*[103] affirmed the dismissal of a medical-malpractice suit based on limitations. The suit was originally filed when the plaintiff was still a minor (thus tolling limitations) and was later non-suited without prejudice after the trial court denied a motion for continuance. The plaintiff refiled the case the next day; however, this time, the plaintiff had been of majority age for more than two years. Under these facts, the court held that the statute of limitations had run and was not tolled by the pendency of the lawsuit that the plaintiff voluntarily non-suited. Moreover, the court rejected an "equitable tolling" argument and affirmed the trial court's dismissal of the case.[104]

In *Mokkala v. Mead*,[105] also involving a medical-malpractice claim, the plaintiff failed to timely file the initial expert reports mandated by section 74.351(a) of the Texas Civil Practice and Remedies Code.[106] The plaintiff then twice non-suited the case and refiled it. The appellate court held on interlocutory appeal that a party could not circumvent the requirements of section 74.351(a) by non-suiting a case and then attempting to re-start the time period for filing such reports from the date of the filing of each new suit. Rather, the time period began to run on the date of the original filing of suit. Thus, the appellate court held that it was error for the trial court not to dismiss the case.[107]

Finally, in *Cordero v. American Home Assurance Co.*,[108] the court held that, although the local rules of El Paso County provide for parties to be notified of orders from the court via facsimile, the Texas Rules of Civil Procedure require the clerk of the court to "immediately give notice to the parties or their attorneys of record *by first class mail* advising that the judgment or order was signed."[109] Thus, an order of dismissal that was sent only by facsimile was not delivered in compliance with the Texas Rules of Civil Procedure, and the failure to properly give notice was grounds for reversal.[110]

X. JURY PRACTICE

The Texas Supreme Court addressed the issue of potential juror bias in two cases during the Survey period. In *Cortez v. HCCI- San Antonio, Inc.*,[111] the court rejected the notion that a potential juror can never be rehabilitated during voir dire. The court began its analysis by first reiterating that, if the record clearly shows that a veniremember is materially

102. *Brown*, 167 S.W.3d at 632-33.
103. 154 S.W.3d 917 (Tex. App.—Dallas 2005, no pet.).
104. *Id.* at 920.
105. 178 S.W.3d 66 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).
106. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon 2002).
107. *Mokkala*, 178 S.W.3d at 70.
108. No. 08-04-00109-CV, 2005 WL 1077456 (Tex. App.—El Paso May 5, 2005, no pet.).
109. TEX. R. CIV. P. 306a.
110. *Cordero*, 2005 WL 1077456, at *6.
111. 159 S.W.3d 87 (Tex. 2005).

biased, any subsequent recantation of that bias at the suggestion of counsel would be ineffective to prevent the veniremember's disqualification. However, if a potential juror only expresses an apparent bias, it does not constitute improper rehabilitation to continue to question that veniremember in order to flesh out the extent, if any, of the perceived bias. In *Cortez*, for example, the potential juror stated that, based upon his prior experiences as an insurance adjuster, he was familiar with lawsuit abuse and felt that the defendant was "starting out ahead." However, he later agreed that some claims have merit and that he was "willing to try" to listen to the case and decide it upon the law and evidence as presented. The court held that it is not error to continue to question a panel member in this manner because further questioning may illuminate whether the juror is biased or not. If not, the questioning prevents that person from being disqualified by mistake.[112]

In *El Hafi v. Baker*,[113] a medical-malpractice case, the supreme court held that a veniremember was not biased as a matter of law simply because of his background as a medical-malpractice defense attorney and his answers during voir dire that he would tend to view things from that perspective. Citing *Cortez*, the court noted that, although the panel member stated that he could relate to the defense side of the case because of his prior background, he expressly rejected the suggestion that he could not be impartial.[114]

At the beginning of closing argument in *General Motors Corp. v. Iracheta*,[115] the plaintiff's counsel stated that the plaintiff wanted to stand and thank the jury for its time. Immediately thereafter and without leave of court or permission from opposing counsel, the plaintiff stood and thanked the jury on behalf of herself and her deceased daughter and grandchildren for their service. Not surprisingly, counsel for the defendant elected not to interrupt and object at the time, but instead moved for a mistrial at the conclusion of the plaintiff's closing argument. The court held that the defendant did not waive any objection by raising the matter after the conclusion of the plaintiff's argument because of the "unusual circumstances." The defendant had been placed in the awkward position of saying nothing or objecting at the time and risk incurring the jury's ire. The court further held that the clear error in allowing the plaintiff to express gratitude to the jury was both harmful and incurable.[116]

XI. JURY CHARGE

The Texas Supreme Court discussed the proper way to instruct the jury on inferential rebuttal defenses in *Dillard v. Texas Electric Coopera-*

112. *Id.* at 92-94.
113. 164 S.W.3d 383 (Tex. 2005).
114. *Id.* at 385.
115. 161 S.W.3d 462 (Tex. 2005).
116. *Id.* at 472.

tive.[117] The defendant in this wrongful-death case claimed that the accident in question was not caused by its driver's negligence, but was either an unavoidable accident or was proximately caused by the negligence of a third party, the unknown owner of cows who wandered onto the highway. The trial court submitted only an unavoidable-accident instruction, however, and refused to instruct the jury on sole proximate cause. The supreme court held that this was not error. The court noted that the Texas Pattern Jury Charge currently parses inferential rebuttal issues into five separate instructions: sole proximate cause; unavoidable accident; new and independent cause; sudden emergency; and act of God. Many of these defenses overlap, however, which leads defendants to request multiple inferential rebuttal instructions in order to emphasize the point. According to the court, this has the potential to "skew" the jury's consideration of the liability question. Thus, the court held that the jury was adequately informed about the defendant's defensive theory through the unavoidable-accident instruction, and it was not entitled to anything further in the way of inferential rebuttal instructions.[118] While the supreme court did not explicitly hold that defendants will never be entitled to the submission of more than one inferential rebuttal instruction, defense counsel would be wise to focus their efforts in future cases on obtaining the submission of the instruction that most closely fits their defensive theory.

The Texas Supreme Court also found no charge error in *Southwestern Bell Telephone Co. v. Garza*.[119] The plaintiff in this case sued under the Texas Anti-Retaliation Law, which prohibits an employer from discriminating against an employee who files a workers'-compensation claim in good faith. The plaintiff alleged that he had been disqualified from certain job duties and ultimately discharged in violation of this statute. The issue was submitted to the jury in just those terms—whether the employer disqualified or discharged the plaintiff in violation of the statute rather than whether the employer discriminated against the plaintiff. On appeal, the supreme court agreed with the employer that, as a rule, when a statutory ground for liability is asserted, the jury question should track the language of the statute as closely as possible. Under the facts of the case before it, however, the court did not think that it was reasonable to conclude that the jury could have been confused in any meaningful way by the form of the question submitted and, therefore, held that there was no reversible error in the charge.[120]

The Texas Supreme Court did find reversible error in the failure to submit the issue of whether a seaman was killed while acting in the course and scope of his employment in *Diamond Offshore Management Co. v. Guidry*.[121] In this Jones Act case, the trial court instructed the jury that

117. 157 S.W.3d 429 (Tex. 2005).
118. *Id.* at 433-34.
119. 164 S.W.3d 607 (Tex. 2004).
120. *Id.* at 616.
121. 171 S.W.3d 840 (Tex. 2005).

the employer could only be liable if the seaman was injured in the course and scope of his employment. The actual liability question, however, made no reference to this requirement and did not allow the jury to take it into account. The supreme court held that this was error. In doing so, the court rejected the plaintiff's argument that submitting a separate course and scope question would be inconsistent with the mandate that broad-form questions be used. The court noted that the employer's complaint was not that the course and scope issue wasn't submitted separately, but that it wasn't submitted at all. The court stated that "Broad-form submission does not entail omitting elements of proof from the charge."[122]

Finally, two intermediate appellate-court cases addressed issues regarding preservation of error in objecting to a jury charge. In *Fish v. Dallas Independent School District*,[123] the plaintiffs complained of a definitional error in one of the two questions submitted to the jury, arguing that the jury's answers were in fatal conflict and that the trial court should have retired the jury for further deliberations. They did not raise the issue, however, until after the verdict. Under these circumstances, the court of appeals found that any error was waived.[124] In *Sears, Roebuck & Co. v. Abell*,[125] the court held that the defendant waived its complaint that the trial court failed to submit a proportionate-responsibility question, because it neither objected to the omission nor submitted a proposed question of its own in a substantially correct form.[126]

XII. JUDGMENTS

The Texas Supreme Court again addressed the issue of finality of judgments during the Survey period, continuing to show how critical drafting the actual judgment can be. In *In re Burlington Coat Factory Warehouse of McAllen, Inc.*,[127] the plaintiff sued for personal injuries and sought both actual and exemplary damages. The defendant failed to answer, and the trial court entered a default judgment awarding the plaintiff actual damages but failed to specifically address the claim for punitive damages. The judgment stated that "all other relief not expressly granted herein is denied," but did not state that it disposed of all issues and parties or that it was appealable. When the plaintiff then sought to enforce the judgment, the defendant filed a petition for writ of mandamus claiming that the judgment could not be enforced because it was not yet final. The supreme court agreed and granted the writ of mandamus, holding that the trial court's judgment was not final because it failed to address the plaintiff's punitive-damages claim. The court held that the language con-

122. *Id.* at 844.
123. 170 S.W.3d 226 (Tex. App.—Dallas 2005, pet. denied).
124. *Id.* at 229-30.
125. 157 S.W.3d 886 (Tex. App.—El Paso 2005, pet. denied).
126. *Id.* at 893.
127. 167 S.W.3d 827 (Tex. 2005).

tained in the judgment was insufficient to establish its finality, even though it stated that it awarded costs to the plaintiff and that she was entitled to enforce the judgment through abstract, execution, and any other process necessary. Thus, the court held that the judgment lacked finality and halted the enforcement proceedings.[128]

The supreme court in *Mathis v. Lockwood*[129] reversed a post-answer default judgment entered against a pro se litigant, holding that counsel's oral assurance that notice of the trial setting had been properly sent to the opposing side was not sufficient evidence to overcome the pro se litigant's sworn motion that such notice was never received. Specifically, the record contained no certificate of service, no return receipt card from certified or registered mail, and no affidavit certifying service of the trial setting notice. Thus, the court remanded the case for further proceedings.[130]

Caldwell v. Barnes[131] involved a bill-of-review proceeding challenging the issue of proper service of process in the underlying action. The Texas Supreme Court held that, in such a case, the trial court did not need to inquire initially whether a meritorious defense to the claim exists, and the plaintiff did not need to show that fraud, accident, a wrongful act, or official mistake prevented it from presenting such a defense. Rather, the court held that the sole initial focus of the bill of review must be on whether proper service of process was made. Moreover, the plaintiff is entitled to a jury trial on the issue of whether it was properly served with process in the underlying suit.[132]

The appellate court in *Boateng v. Trailblazer Health Enterprises, L.L.C.*[133] held that it was error for the trial court to dispose of a bill of review proceeding at a preliminary *Baker*[134] hearing, during which the trial court is only to determine whether there is prima facie proof of a meritorious defense. If such proof exists, the matter should then proceed to full resolution on the merits. In this case, following the *Baker* hearing, the trial court entered an order granting the bill of review and setting aside the default judgment as void for lack of jurisdiction, all without proceeding to discovery and a trial on the merits. The appellate court held that such a determination on the merits based on the *Baker* hearing constituted reversible error and deprived the parties of their due-process rights.[135]

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128. *Id.* at 831. The dissent opined that, by including the language "all relief not expressly granted is hereby denied," the trial court implicitly disposed of the punitive-damage claim; thus, she would have treated the judgment as final. *Id.* at 832-33 (O'Neill, J., dissenting).

129. 166 S.W.3d 743 (Tex. 2005).

130. *Id.* at 746.

131. 154 S.W.3d 93 (Tex. 2004).

132. *Id.*

133. 171 S.W.3d 481 (Tex. App.—Houston [14th Dist.] 2005, pet. filed).

134. Baker v. Goldsmith, 582 S.W.2d 404 (Tex. 1979).

135. *Boateng*, 171 S.W.3d at 492-93.

XIII. MOTION FOR NEW TRIAL

In *Wilkins v. Methodist Health Care System*,[136] the Texas Supreme Court held that, in the summary-judgment context, a motion for new trial that has been granted does not extend the time for filing a notice of appeal on a subsequently granted summary judgment motion. In this case, the plaintiff sued two entities for medical malpractice. Those entities successfully moved for summary judgment based on limitations and that they were not responsible for the surgical procedures at issue. Following the entry of the initial summary judgment, the plaintiff timely filed a motion for new trial, which the trial court granted. Those same defendants then successfully moved for summary judgment again on the same bases. Because the plaintiff did not move for a new trial within thirty days after the second summary judgment motion had been granted, the supreme court dismissed the appeal for lack of jurisdiction, holding that a motion for new trial that has been granted cannot "assail" a subsequent judgment for purposes of extending the deadline for filing a notice of appeal.[137]

In *In re K.A.F.*,[138] the supreme court held that post-judgment motions do not operate to extend the appellate deadlines for filing an accelerated appeal. In this child-custody dispute, a jury determined that the mother's parental rights should be terminated. Seven days after the trial court signed the final termination order, the mother filed a motion for either a new trial or a modification of the judgment, which the trial court denied the following week. The mother did not file her notice of appeal for seventy-four days. The supreme court held that the notice of appeal was untimely, rejecting the mother's argument that her post-judgment motion extended the twenty-day period for filing a notice of an accelerated appeal under Appellate Rule of Procedure 26.1.[139] The court further held that the mother's motion, which was filed within twenty days, did not constitute a bona fide attempt to invoke the court's appellate jurisdiction. Although there are many reasons why a party may choose to file a motion for new trial, invoking the appellate court's jurisdiction could not be one of them.[140]

XIV. DISQUALIFICATION OF JUDGES

The two Houston appellate courts reached opposite conclusions on the question of whether a trial judge may determine if a motion to recuse is procedurally deficient before either recusing himself or referring the motion to the presiding judge as required by Rule 18a.[141] In *Hudson v. Texas Children's Hospital*,[142] the court held that the trial judge erred in

136. 160 S.W.3d 559 (Tex. 2005).
137. *Id.* at 562.
138. 160 S.W.3d 923 (Tex. 2005).
139. TEX. R. APP. P. 26.1(b).
140. *In re K.A.F.*, 160 S.W.3d at 928.
141. TEX. R. CIV. P. 18a(c).
142. 177 S.W.3d 232 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

deciding for himself that the motion for recusal was untimely.[143] In *Johnson v. Sepulveda*,[144] on the other hand, the court held that the requirement that the trial judge either recuse herself or refer the motion to the presiding judge was never triggered because the appellant's motion for recusal was not timely presented, was not verified, and did not state with particularity the grounds for recusal.[145] As the concurring justice in *Hudson* noted, the courts of appeals have taken divergent positions on whether a trial judge may deny a recusal motion directed against him as procedurally deficient—and, if so, on what bases—leading to uncertainty for courts and practitioners alike.[146] Thus, this question appears to be ripe for review by the Texas Supreme Court.

XV. DISQUALIFICATION OF COUNSEL

The Texas Supreme Court issued two opinions of note regarding attorney disqualification during the Survey period. At issue in *In re Sanders*[147] was the attorney-witness rule. The wife in this divorce and child-custody dispute sought to disqualify her husband's attorney because the husband had agreed to perform carpentry work for the attorney in lieu of paying legal fees. By becoming the husband's employer, the wife argued, the attorney had made herself a material witness on the issues of the husband's ability to care for their minor child and pay child support. Noting that disqualification should not be used for tactical purposes and should not be based on speculative harm, the supreme court held that the wife had failed to demonstrate that the attorney's testimony was necessary to establish an essential fact.[148]

A bankruptcy trustee's attempt to avoid the effect of a corporation's pre-bankruptcy conflict waiver was rebuffed in *In re Cerberus Capital Management, L.P.*[149] The trustee argued that the corporation's waiver letter was ineffective because it did not fully and accurately disclose the conflicts. The supreme court disagreed, stating that the waiver adequately disclosed the law firm's proposed representation, the subject of its prior work for the corporation, the time period and attorneys involved, and how the prior representation concluded.[150]

In re El Paso Healthcare System, Ltd.[151] reversed a trial court's order requiring a party to retain local counsel even though it was already represented by a duly-licensed Texas attorney in another city. The court noted that there was no local rule in El Paso County requiring out-of-town

143. *Id.* at 236.
144. 178 S.W.3d 117 (Tex. App.—Houston [14th Dist.] 2005, no pet.).
145. *Id.* at 119-20.
146. *Hudson*, 177 S.W.3d at 239 n.2 (Bland, J., concurring) (citing cases).
147. 153 S.W.3d 54 (Tex. 2004).
148. *Id.* at 58.
149. 164 S.W.3d 379 (Tex. 2005).
150. *Id.* at 382-83.
151. No. 08-05-00098-CV, 2005 WL 2241024 (Tex. App.—El Paso Sept. 15, 2005, no pet.).

Texas attorneys to appear with local counsel and that a litigant is entitled to be represented by the attorney of its choice. The trial court required local counsel because the out-of-town attorney refused to accept an appointment to represent an indigent criminal defendant, which the trial judge asserted was a burden associated with the privilege of practicing law in El Paso County. The court of appeals refused to recognize any inherent authority in trial judges to enforce any such requirement, however, holding that only the Texas Supreme Court has the authority to regulate the practice of law in the State of Texas. The trial judge's order requiring the out-of-town attorney to participate in a local pro bono program would usurp the supreme court's exclusive authority in that arena.[152]

XVI. MISCELLANEOUS

In *Kendrick v. Garcia*,[153] the court analyzed recent changes made to the requirements regarding service of expert reports under healthcare-liability claims. Section 74.351(a) of the Texas Civil Practice and Remedies Code requires a plaintiff asserting a healthcare-liability claim to "serve on each party or the party's attorney one or more expert reports" not later than the 120th day after the claim is filed.[154] In this case, the plaintiff "served" one defendant by placing a copy of the report in a box located in the district clerk's office that was assigned to the law firm that represented that defendant. The plaintiff served the other defendant by sending the expert report by first-class mail. Both defendants denied receiving the required reports within the 120-day period and moved to dismiss the action.[155]

The trial court denied the motions to dismiss. With respect to the first defendant, the court found that the plaintiff had complied with the "spirit" of section 74.351 by placing the report in the box located in the clerk's office. With respect to the second defendant, the trial court found that the defendant did not rebut the "presumption of receipt" that arises from the certificate of service. On appeal, the trial court was reversed on both grounds.[156]

First, the appellate court found that placing the report in a box in the clerk's office did not comply with the "spirit" of section 74.351. In particular, the court held that there was no "good faith" exception to service of the expert reports. Second, the court noted that section 74.351 specifically used the words "serve" and "served," which have distinct legal meanings under the Texas Rules of Civil Procedure, and that the legislature intended claimants to comply with Rule 21a to fulfill the service requirements of this section. Accordingly, because service by "regular

152. *Id.* at *7.
153. 171 S.W.3d 698 (Tex. App.—Eastland 2005, pet. filed).
154. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon 2002).
155. *Kendrick*, 171 S.W.3d at 701.
156. *Id.* at 703.

mail" did not comply with Texas Rule of Civil Procedure 21a, the plaintiff had not properly served the expert report.[157]

In *In Re Weekly Homes, LP*,[158] the Texas Supreme Court, in a matter of first impression, held that an arbitration clause was binding on the contracting party's adult child, even though she was not a party to the contract. In this matter, Forsting contracted with Weekly Homes to construct a home. At the time, Forsting was a 78-year-old widower who intended to build a home where he could live with his daughter, Von Bargen, and her husband and three sons. The contract between Forsting and Weekly Homes contained an arbitration provision. Dissatisfied with how the house was built, Forsting and Von Bargen both filed suit against Weekly Homes, alleging various common-law causes of action. Weekly Homes moved to compel arbitration.

On appeal, the Texas Supreme Court held that, although Von Bargen was not a signatory to the contract and was not seeking any direct claim under the contract, she was nonetheless estopped from avoiding the arbitration clause. In particular, the court found that her prior exercise of contractual rights and equitable entitlement to other contractual benefits prevented her from avoiding the arbitration clause.[159]

157. TEX. R. CIV. P. 21a (authorizing the following methods of service: (1) physical delivery in person, by agent, or by courier-receipted delivery; (2) certified or registered mail; (3) telephonic document transfer; or (4) such other manner as the trial court in its discretion may direct); *see Kendrick*, 171 S.W.3d at 703-04.

158. 180 S.W.3d 127 (Tex. 2005).

159. *Id.* at 133-35. *See also In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 739-40 (Tex. 2005) (holding that a party could be compelled to arbitrate a claim, even if that party was not a signatory to the contract containing the arbitration provision, under a theory of "direct benefits estoppel").