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CIVIL PROCEDURE: PRE-TRIAL & TRIAL

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I. INTRODUCTION

The major developments in the field of civil procedure during the Survey period occurred through judicial decisions and a handful of legislative enactments.

II. SUBJECT MATTER JURISDICTION

During the Survey period, several cases addressed sovereign immunity. In *City of El Paso v. High Ridge Construction*, a contractor brought a breach of contract claim against the city relating to a conservation services contract.¹ The trial court denied the city's plea to the jurisdiction. On appeal, the contractor argued that the city was not entitled to sovereign immunity based on the "proprietary-dichotomy" applied to cities, for example, under the Tort Claims Act.² Recognizing that the Texas Supreme Court expressed doubt the dichotomy applied to contract claims in *Tooke v. City of Mexia*, the El Paso Court of Appeals examined the interplay between the Tort Claims Act, which addresses waiver in certain instances, and the source of the city's immunity.³ Noting disagreement in the appellate decisions, the El Paso Court of Appeals followed its sister courts in San Antonio and Amarillo in holding that "we must begin our analysis with the presumption that the City is immune from suit for breach of contract."⁴ Starting from that proposition, the court of appeals

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1. *City of El Paso v. High Ridge Constr.*, 442 S.W.3d 660, 664 (Tex. App.—El Paso 2014, pet. denied).

2. *Id.* at 666–67.

3. *Id.* (discussing *Tooke v. City of Mexia*, 197 S.W.3d 325, 343 (Tex. 2006), in which the Texas Supreme Court observed, "[W]e have never held that this same distinction determines whether immunity from suit is waived for breach of contract claims.").

4. *Id.* at 667 (following *City of San Antonio ex rel. City Pub. Serv. Bd. v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597, 603–04 (Tex. App.—San Antonio 2012, pet. denied), *abrogated by* *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d

analyzed whether the contractor's agreement, under which it provided services to city residents rather than the city itself, was sufficient to invoke the limited waiver of immunity under Chapter 271 of the Local Government Code, and ultimately determined it was not.⁵ The court of appeals therefore remanded to give the contractor the opportunity to cure and plead facts supporting a waiver of the city's immunity as to the contract claim.⁶

Humana Insurance Company v. Mueller and several other cases in the Survey period addressed the extent to which governmental immunity applies to agents, contractors, or other third parties. In *Mueller*, plaintiff brought claims against a third-party administrator of a governmental self-funded health plan.⁷ The third-party administrator asserted governmental immunity as an agent of a governmental unit by plea to the jurisdiction, which the trial court denied. On interlocutory appeal, plaintiff argued there was no appellate jurisdiction under § 51.014 of the Civil Practice and Remedies Code.⁸ The San Antonio Court of Appeals disagreed, noting that subsection (a)(8) applied to governmental units, and because the third-party administrator was seeking protection under a governmental unit's immunity, there was jurisdiction over the appeal. Turning to the basis for immunity, the court of appeals examined Chapter 2259 of the Government Code governing a governmental unit's establishment of health plans, and found providing a health plan is not a proprietary function and does not waive immunity. The court of appeals therefore held that the immunity of the governmental unit extended to the third-party administrator of the plan.⁹

Whether sovereign immunity extends to a county toll road authority's contractor was at issue in *Brown & Gay Engineering, Inc. v. Olivares*.¹⁰ The defendant engineering firm was hired to design and construct a toll road. In 2007, a drunk driver sped over eight miles down the toll road going the wrong way, resulting in a crash with an oncoming vehicle killing both drivers. The parents of one of the drivers sued the contractor for failure to design and install appropriate signs and traffic devices. The contractor filed a plea to the jurisdiction, asserting that it was immune from suit and liability as an employee of the toll road authority.¹¹ The trial court granted the plea, the court of appeals disagreed, and the issue was appealed to the Texas Supreme Court. After tracing the origins of immu-

427 (Tex. 2016); *Republic Power Partners, L.P. v. City of Lubbock*, 424 S.W.3d 184 (Tex. App.—Amarillo 2014, no pet.), *abrogated by Wasson Interests, Ltd.*, 489 S.W.3d 427).

5. *Id.* at 668–70.

6. *Id.* at 676.

7. *Humana Ins. Co. v. Mueller*, No. 04–14–00752–CV, 2015 WL 1938657, at *2 (Tex. App.—San Antonio Apr. 29, 2015, pet. denied) (mem. op.).

8. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (West 2015) (providing for interlocutory appeal of specified orders).

9. *Mueller*, 2015 WL 1938657, at *5 (discussing *Foster v. Teacher Retirement Sys.*, 273 S.W.3d 883, 889 (Tex. App.—Austin 2008, no pet.), which also held that immunity extends to a governmental plan's third-party administrator).

10. 461 S.W.3d 117, 119 (Tex. 2015).

11. *Id.* at 119–20.

nity and reviewing federal and lower state court opinions, the supreme court observed that, in these cases, “the complained-of conduct for which the contractor was immune was effectively attributed to government. That is, the alleged cause of the injury was not the independent action of the contractor, but the action taken by the government *through* the contractor.”¹² Focusing on the government’s level of control over a private contractor’s work, the supreme court explained that “no control is determinative,” and held that immunity does not extend to private contractors “exercising independent discretion.”¹³

Justice Hecht, joined by Justices Willett and Guzman, wrote a concurring opinion, in which he proffered a supposedly simple syllogism: “Immunity protects the government. An independent contractor is not the government. Therefore, immunity does not protect an independent contractor.”¹⁴ Even under this approach, however, immunity could extend to private contractors under certain circumstances: “An independent contractor may act *as* the government, in effect becoming the government for limited purposes, and when it does, it should be entitled to the government’s immunity.”¹⁵ Further, “insofar as [the contractor] is simply implementing the government’s decisions it is entitled to the government’s immunity. . . . [T]he ultimate issue is whether the independent contractor is actually authorized by the government to act in its place.”¹⁶ Given that the majority limited its holding to instances where there was no control over the contractor, coupled with the potential applications in the concurrence, *Brown & Gay Engineering* leaves open the question of whether governmental immunity could extend to a private contractor under an appropriate set of facts.

In *City of Ingleside v. City of Corpus Christi*, Ingleside sued Corpus Christi over an ordinance that set the boundary between the Ingleside and Corpus Christi.¹⁷ Ingleside sought a declaration that the term “shoreline” in the ordinance delineating the common boundary included fixtures on the shore. Corpus Christi filed a plea to the jurisdiction, which the trial court denied. The court of appeals reversed the trial court’s denial of the plea, holding that “selection of a political subdivision’s boundary is a ‘purely political question . . . not subject to judicial review.’”¹⁸

12. *Id.* at 125.

13. *Id.* at 124, 126. The supreme court distinguished *Foster v. Teacher Retirement System*, in which a private company serving as the third-party administrator for the Teacher Retirement System’s self-funded health plan was granted immunity. *Id.* at 127 (distinguishing *Foster*, 273 S.W.3d 883). The supreme court noted that even though the third-party administrator had discretion to interpret the plan document, its duties were still described as essentially ministerial in helping the governmental unit administer the plan. *Id.* Factors that supported extension of immunity in *Foster* were the terms of the contract between the state agency and the contractor and the “direct implication of state funds in that case” by virtue of the governmental unit self-funding claims for health benefits. *Id.*

14. *Id.* at 129 (Hecht, J., concurring).

15. *Id.*

16. *Id.* at 130.

17. *City of Ingleside v. City of Corpus Christi*, 469 S.W.3d 589, 590 (Tex. 2015).

18. *Id.* at 590.

The Texas Supreme Court disagreed, explaining there was a distinction between a claim seeking to select or change a municipal boundary, on one hand, and a claim seeking interpretation of a term in an ordinance that indisputably sets the cities' common boundary, on the other. In support, the supreme court cited Texas courts' adjudications of various types of boundary disputes between political subdivisions, including the determination of the location of a boundary defined by a shoreline. The supreme court therefore held Ingleside's requested declaration was not "a political question beyond the Court's competence or authority."¹⁹

In *In re Crawford & Company*, the Texas Supreme Court clarified the scope of the Division of Workers' Compensation's exclusive jurisdiction over disputes arising during the workers' compensation claims and settlement process.²⁰ An employee, who was injured at work, and his wife filed suit separately from the administrative proceedings against the employer's workers' compensation insurer and its claims handlers. The plaintiffs asserted various tort, contract, and statutory causes of action. The plaintiffs specifically pled the Workers' Compensation Act did not require them to pursue these independent and unrelated claims for damages through the Act's administrative procedures. The supreme court disagreed, holding all plaintiffs' causes of action were related to the investigation, processing, and settlement of the employee's claim for worker's compensation benefits; thus, those claims were subject to the exclusive jurisdiction of the division with the Act providing the exclusive procedures and remedies for addressing those complaints.²¹ The supreme court further addressed an issue left open in *Ruttiger*, and expressly held that a claim for misrepresentation of an insurance policy during the claims-settlement process under § 541.061 of the Insurance Code falls within the exclusive jurisdiction of the workers' compensation division.²² Finally, the supreme court rejected the argument that the nonemployee wife could bring claims independent of the act because all her claims arose out of the investigation, handling, and settlement of the employee worker's claim for benefits and were thus barred.²³ Accordingly, the supreme court conditionally granted mandamus, directing the trial court to withdraw its order denying the plea to the jurisdiction and to dismiss the plaintiffs' claims.²⁴

19. *Id.* at 592–93.

20. *See generally In re Crawford & Co.*, 458 S.W.3d 920 (Tex. 2015).

21. *Id.* at 925–26 (discussing *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430 (Tex. 2012)) (noting the court of appeals read *Ruttiger* too narrowly, and emphasizing that courts must focus on the substance of the claim being asserted to determine whether it falls within the exclusive jurisdiction of the division rather than labels or the nature of relief sought).

22. *Id.* at 927–28.

23. *Id.* at 928 (citing *Rodriguez v. Naylor Indus., Inc.*, 763 S.W.2d 411, 412 (Tex. 1989)). In *Rodriguez*, the Texas Supreme Court held that nonemployee spouse was barred from bringing claims compensable under the act except for intentional torts. *Rodriguez*, 763 S.W.2d at 412.

24. *In re Crawford & Co.*, 458 S.W.3d at 929.

III. SPECIAL APPEARANCE

Texas courts in this Survey period continued to analyze the type and quantum of evidence sufficient to establish a nonresident is subject to specific personal jurisdiction in Texas. In *Henkel v. Emjo Investments, Ltd.*,²⁵ investors intervened in a suit against a defunct corporation, alleging fraud and conspiracy to commit fraud against former members of its board of directors.²⁶ One of the former board members, who was a citizen of Austria and a resident of London, filed a special appearance, which the trial court denied.²⁷ On interlocutory appeal, the First Houston Court of Appeals held the nonresident's two meetings with a co-conspirator in Texas demonstrated his purposeful availment of the forum, and not "simply a fortuitous connection to it."²⁸ The court of appeals found the two meetings, coupled with the conspiracy allegations, provided a sufficient nexus with Texas for suit to be brought there.²⁹ The court of appeals rejected the nonresident's argument that evidence of two meetings alone, without proof of the meetings' substance, was not enough to demonstrate specific jurisdiction, explaining at the jurisdictional phase the relevant inquiry is the nonresident's actual contacts with the forum state, not "what the parties thought, said or intended."³⁰ The court of appeals also rejected the nonresident's argument that the court's analysis must be limited to the jurisdictional facts alleged in the petition, noting it considers both the plaintiff's original pleadings and response to the special appearance in determining whether a plaintiff has met the burden to allege adequate jurisdictional facts.³¹

In *Waller Marine, Inc. v. Magie*, the Fourteenth Houston Court of Appeals held the allegations and evidence were insufficient to establish specific jurisdiction over two nonresident consultants for plaintiff's claims of fraud, unjust enrichment, and money had and received.³² The plaintiff had enlisted a Texas contractor to complete a multi-million-dollar turbine conversion project.³³ The Texas contractor hired the two nonresident consultants to assist it, and thereafter ran into problems completing the project. The plaintiff later sued the Texas contractor, its officers, and the nonresident consultants. The nonresidents filed special appearances, which the trial court granted, and the plaintiff sought interlocutory review. The court of appeals rejected plaintiff's argument that the nonresident consultants' alleged partnership with the Texas contractor to complete the project was dispositive of specific jurisdiction. Instead, the

25. 480 S.W.3d 1 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

26. *Id.* at 3.

27. *Id.* at 1.

28. *Id.* at 6 (citing *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 147 (Tex. 2013)).

29. *Id.* at 6–7.

30. *Id.* at 6 (citing and quoting *Moncrief Oil Int'l Inc.*, 414 S.W.3d at 147).

31. *Id.* at 7.

32. *Waller Marine, Inc. v. Magie*, 463 S.W.3d 614, 619–20 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

33. *Id.* at 617–18.

court of appeals focused on the type and quantity of the nonresidents' contacts with Texas while working for the alleged partnership, and whether those contacts were connected with the plaintiff's claims.³⁴ The court of appeals noted that beyond vague allegations, the plaintiff had not alleged that the nonresidents provided substandard services or that any of their Texas contacts gave rise to the Texas contractor's alleged breach of contract.³⁵ Likewise, the court of appeals found the nonresidents' contacts with the state had no connection to the factual basis of either the unjust enrichment or the money had and received claims because plaintiff paid money to the Texas contractor, not the nonresidents. Similarly, the court of appeals noted that all of plaintiff's fraud allegations preceded the nonresidents' involvement in the project, showing their later Texas contacts lacked any nexus with plaintiff's fraud claims. The court of appeals held the lack of connection between the nonresidents' contacts and the operative facts of the litigation made exercise of specific jurisdiction inappropriate and affirmed the trial court's order granting the special appearances.³⁶

Texas courts also addressed other procedural and substantive issues arising in connection with special appearance motions during the Survey period. In these decisions, the Texas courts affirmed a strict application of the due-order requirements of Rule 120a of the Rules of Civil Procedure and the freedom of parties to consent to personal jurisdiction by contract. In *Global Paragon Dallas, LLC v. SBM Realty, LLC*, the Fourteenth Houston Court of Appeals held that the defendant waived its special appearance and violated Rule 120a's "due-order-of-hearing requirement" by obtaining a ruling on its motion for new trial before obtaining a ruling on its special appearance motion.³⁷ In *Stauffer v. Nicholson*, the Dallas Court of Appeals reaffirmed its prior holdings that a consent-to-jurisdiction clause that encompasses claims against a nonresident defendant obviates the need to rely solely on traditional analysis of minimum contacts.³⁸

IV. SERVICE OF PROCESS

The Texas Supreme Court held that evidence that a plaintiff had knowledge of a defendant's valid address, but effected service at and verified another last known address to obtain a no-answer default judgment under Rule 239a of the Rules of Civil Procedure raised a fact issue, rendering the judgment subject to challenge by bill of review.³⁹ In *Katy Ven-*

34. *Id.* at 621.

35. *Id.* at 622.

36. *Id.* at 623.

37. *Glob. Paragon Dall., LLC v. SBM Realty, LLC*, 448 S.W.3d 607, 613 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

38. *Stauffer v. Nicholson*, 438 S.W.3d 205, 210 (Tex. App.—Dallas 2014, no pet.); see also *In re Fisher*, 433 S.W.3d 523, 532 (Tex. 2014) (orig. proceeding), *reh'g denied*, No. 12-0163, 2014 Tex. LEXIS 379 (Tex. May 2, 2014).

39. *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 164 (Tex. 2015).

ture, Ltd. v. Cremona Bistro Corp., a landlord-tenant dispute, the tenant obtained a default judgment against the landlord and its general partner claiming they were responsible for fire damage to its rented restaurant space.⁴⁰ The tenant had attempted to serve the landlord and general agent at their registered address on file with the Secretary of State's office but was unable to do so because the entities had moved to a new address years earlier.⁴¹ Service was ultimately accomplished through the Secretary of State, and the default judgment was entered when defendants failed to answer. In its motion for default judgment, the tenant certified that defendants' last known mailing address was their outdated address.⁴² After learning of the default judgment, the landlord and its general partner "filed a petition for an equitable bill of review, asserting that [the tenant] had not properly served them with process and had not properly certified their last known mailing address for notice of default judgment under Rule 239a" because tenant had actual knowledge of their current mailing address.⁴³ The trial and appellate courts rejected the landlord defendants' arguments, respectively granting and affirming traditional summary judgment in favor of tenant. The Texas Supreme Court disagreed, holding that the landlord defendants presented "some evidence that their failure to receive notice of the default judgment was not the result of their fault or negligence," and that there was a genuine issue of material fact as to whether the tenant gave the trial court clerk defendants' "last known mailing address" as required by Rule 239a.⁴⁴ The supreme court therefore reversed the judgment and remanded the case to the trial court.⁴⁵

The Fort Worth Court of Appeals applied the *Katy Venture* analysis in *Nussbaum v. Builders Bank*.⁴⁶ In the case, the plaintiff obtained a default judgment against a loan guarantor.⁴⁷ The loan guarantor timely filed a bill of review challenging the default judgment, claiming he had changed addresses from the one included in the guaranty agreement where service was effected, had not received service of process, and that plaintiff had put the old address on the certificate of last known address even though plaintiff had knowledge of the new address (evidenced by the fact plaintiff sent a copy of the entered default judgment to the new address).⁴⁸ The court of appeals initially affirmed the default judgment but granted rehearing following the Texas Supreme Court's *Katy Venture* decision.⁴⁹ On rehearing, the court of appeals held that the defendant's evidence raised "a genuine issue of material fact as to whether [plaintiff] gave the

40. *Id.* at 162.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 164.

45. *Id.* at 165.

46. 478 S.W.3d 104, 109–10 (Tex. App.—Fort Worth 2015, pet. denied).

47. *Id.* at 105–06.

48. *Id.* at 107–09.

49. *Id.* at 105.

trial court [guarantor's] last *known* mailing address as Rule 239a requires," reversing the default judgment, and remanding to the trial court.⁵⁰

V. VENUE

During the Survey period, the Texas Supreme Court continued to grapple with the Texas-resident-plaintiff exception to the forum nonconveniens statute.⁵¹ In *In re Ford Motor Company*, the Texas Supreme Court interpreted the exception, noting, "The formula is simple: plaintiff + legal residence = right to a Texas forum."⁵² The case arose from a fatal single-car accident from a tire blowout in Mexico that injured the driver and killed the driver's brother. The driver sued his brother's estate, which joined Ford as a third-party defendant. Neither of them was a legal resident of Texas. Two statutory wrongful death beneficiaries who were Texas residents intervened and asserted claims against Ford. Ford argued that because the intervenors were not original plaintiffs, their residency should be disregarded for purposes of Ford's motion to dismiss for forum nonconveniens. In a 6-3 ruling, the supreme court held that the exclusion of "counterclaimant, cross-claimant, or third-party plaintiff" from the definition of "Plaintiff" in § 71.051(h)(2) of the Civil Practice and Remedies Code meant "*only defendants who file third-party claims, cross-claims, or counterclaims.*"⁵³ As such, the supreme court framed the question presented as whether the intervenors who asserted claims against Ford were more properly characterized as plaintiffs or defendants asserting third-party claims.⁵⁴

Five justices concluded that the intervenors were more like plaintiffs, reasoning that when an intervenor seeks affirmative relief and is not being sued by another party, "we should operate under a presumption that the intervenor is a plaintiff."⁵⁵ The supreme court also rejected Ford's argument that as wrongful death beneficiaries, the intervenors' claims were merely derivative of the estate meaning that the decedent's foreign resident statutes should be imputed to them. The supreme court reasoned that wrongful death claims seek to recover distinct damages from survival claims asserted by an estate. The majority therefore determined that the intervenors were "distinct plaintiffs" whose Texas residency satisfied the exception, keeping the entire case in Texas.⁵⁶

50. *Id.* at 109–11.

51. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(e) (West 2015) (generally providing a court may not stay or dismiss a plaintiff's claim if the "plaintiff is a legal resident of this state").

52. *In re Ford Motor Co.*, 442 S.W.3d 265, 270 (Tex. 2014) (orig. proceeding).

53. *Id.* at 271–72 (emphasis in original).

54. *Id.* at 271–74.

55. *Id.* at 275. In his dissent, Justice Boyd makes a good case that the intervenors' claims were aligned most perfectly with the defendant, who was likewise asserting third-party claims against Ford. *Id.* at 295 (Boyd, J., dissenting).

56. *Id.* at 284.

Less than a year later, in *In re Bridgestone Americas Tire Operations LLC*, the Texas Supreme Court heard another case involving a family's single-car accident in Mexico and the forum nonconveniens statute's Texas-resident-plaintiff exception.⁵⁷ In the accident, the parents died, but their two minor children survived. None of them were legal Texas residents. The minors sued in Texas through their uncle, who was a Texas resident, as next friend. After deciding that the minors could sue through their uncle as the minors' next friend,⁵⁸ the supreme court analyzed whether a next friend legally residing in Texas should be considered a "Plaintiff" for purposes of the forum nonconveniens statute when the minors are not.⁵⁹ The supreme court concluded a Texas resident serving as a next friend for a non-Texas minor is not a plaintiff for purposes of the Texas-resident-plaintiff exception, and thus the exception did not preclude dismissal for forum non conveniens.⁶⁰

An amendment to the forum nonconveniens statute, effective June 16, 2015, narrowed the scope of the Texas-resident-plaintiff exception.⁶¹ The bill's sponsor asserted the changes were necessary because Texas courts were applying the statute too broadly, enabling "resident intervenors or derivative plaintiffs to bring a case from nonresidents into the state."⁶² Unlike the prior version of the statute, the residency of a single Texas plaintiff cannot anchor an entire multiparty case in Texas; instead, the statute now provides for consideration of each plaintiff's claims separately, allowing dismissal or stay of nonresident plaintiffs' claims.⁶³ Nor can a legal Texas resident who is a wrongful death beneficiary, personal representative, or next friend keep a case in Texas if the real party in interest is not—or if a decedent was not—a legal Texas resident.⁶⁴ While

57. See generally *In re Bridgestone Ams. Tire Operations LLC*, 459 S.W.3d 565 (Tex. 2015) (orig. proceeding).

58. *Id.* at 570–71. The defendant argued Rule 44 of the Rules of Civil Procedure permits suits through a next friend only when the minor has "no legal guardian," and that the minors' grandparents, who resided in Mexico, automatically became the minors' legal guardians under Mexican law. *Id.* at 570. The supreme court determined that the purpose of Rule 44 is "to enable minors to prosecute their claims . . . when they otherwise could not through a legal guardian." *Id.* Given the grandparents' status as guardians in Mexico did not give them authority to act for the minors in Texas, the supreme court held Rule 44 permitted the minors to sue through a next friend. *Id.* at 570–72.

59. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(e) (West 2015) (generally providing a court may not stay or dismiss a plaintiff's claim if the "plaintiff is a legal resident of this state").

60. *In re Ford Motor Co.*, 442 S.W.3d at 573–75.

61. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.051.

62. Bill Analysis of Tex. H.B. 1692, 84th Leg., R.S. (May 14, 2015) (statement of Representative Sheets).

63. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(e) (Texas-resident-plaintiff exception now provides the "determination of whether a claim may be stayed or dismissed . . . shall be made with respect to each plaintiff without regard to whether the claim of any other plaintiff may be stayed or dismissed . . . If an action involves both plaintiffs who are legal residents of this state and plaintiffs who are not, the court shall consider the factors provided by Subsection (b) and determine whether to deny the motion or to stay or dismiss the claim of any plaintiff who is not a legal resident of this state").

64. The Legislature expressly narrowed the definition of "Plaintiff" to exclude a "representative, administrator, guardian, or next friend," unless that person is "otherwise a

these changes appear to be aimed at narrowing the scope of *In re Ford Motor Company*, they do not affect the supreme court's holding that the exclusion of "counterclaimant, cross-claimant, or third-party plaintiff" from the definition of plaintiff for purposes of the Texas-resident-plaintiff exception "excludes only defendants who file third-party claims, cross-claims, or counterclaims."⁶⁵ The scope of the Texas-resident-plaintiff exception to the forum nonconveniens statute will likely continue to be an issue litigated in Texas courts in future survey periods.

The mandatory venue statute for "major transactions" over \$1 million was at issue in *In re Fisher*.⁶⁶ In the underlying case, the plaintiff received partnership interests and a \$6.5 million promissory note in exchange for selling his oil services company to the defendants. Several distinct but related agreements made up the entire transaction, and each agreement had its own venue provision. When the oil services company filed for bankruptcy, plaintiff sued defendants for financial mismanagement. The defendants moved to transfer or dismiss under § 15.020 of the Civil Practice and Remedies Code.⁶⁷ On mandamus review of the trial court's order denying the motion, the defendants argued that the plaintiff's claims arose in connection with the overall transaction, which included agreements with venue provisions. In response, plaintiff argued that his claims did not arise from the agreements effecting the sale but instead from the parties' partnership agreement, which did not have a venue provision. The Texas Supreme Court noted it had not yet addressed when an action "arises from" a major transaction under § 15.020, but had addressed similar questions with regard to forum selection clauses.⁶⁸ Relying on the same analysis used to determine the scope of forum selection provisions, the supreme court conducted a "common-sense examination of the substance of the [plaintiff's] claims to determine whether the [mandatory venue] statute applie[d]."⁶⁹ In doing so, the supreme court concluded plaintiff's claims arose out of the sales transaction insofar as he was seeking to recover the balance due under the uncollectible promissory note as

derivative claimant of a legal resident of this state." *Id.* § 71.051(h)(2)(B). A "derivative claimant" is "a person whose damages were caused by personal injury to or the wrongful death of another." *Id.* § 71.051(h)(1).

65. *In re Ford Motor Co.*, 442 S.W.3d 265, 271 (Tex. 2014) (orig. proceeding) (emphasis in original).

66. 433 S.W.3d 523, 529 (Tex. 2014) (orig. proceeding) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 15.020).

67. TEX. CIV. PRAC. & REM. CODE ANN. § 15.020 (generally requiring action for "major transaction" to be brought where parties agreed, providing suit may only be brought in county "party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought" and "may not be brought in a county if . . . the party bringing the action has agreed in writing that an action arising from the transaction may not be brought in that county . . . or . . . agreed in writing that an action arising from the transaction must be brought in another county of this state or in another jurisdiction, and the action may be brought in that other county").

68. *In re Fisher*, 433 S.W.3d at 529.

69. *Id.* at 529–31 (discussing *In re Int'l Profit Assocs.*, 274 S.W.3d 672 (Tex. 2009) (forum selection case); *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880 (Tex. 2010) (same)).

damages.⁷⁰ The supreme court examined the venue provision in the promissory note, determined the provision was mandatory rather than permissive, and then held the mandatory venue provision in § 15.020 required suit to be brought in the venue agreed upon in the promissory note.⁷¹ Thus, the supreme court conditionally granted mandamus relief directing the trial court to vacate its order denying and to grant the defendants' motion to transfer venue.⁷²

VI. PARTIES

Several cases during the Survey period dealt with the distinction between standing and capacity. In *Highland Credit Opportunities CDO, L.P. v. UBS AG*, a hedge fund manager sued an investment bank for breach of contract in connection with trades it made with the bank in distressed loans.⁷³ One of the hedge fund entities was a party to the original contract with the bank, but a different, related hedge fund entity, which was the named plaintiff, was listed as the entity on the final, revised trade confirmation order.⁷⁴ The bank argued that there was no evidence of an assignment from the hedge fund entity on the original contract to the named plaintiff, framing the issue as a lack of privity and standing.⁷⁵ After a bench trial, the trial court found plaintiff failed to prove the bank breached the contract and entered a take-nothing judgment against it.⁷⁶ On plaintiff's appeal of the take-nothing judgment, the bank again asserted the plaintiff hedge fund entity lacked standing because there was no competent evidence of an assignment of the original contract. The Dallas Court of Appeals explained the distinctions between the frequently confused concepts of standing and capacity, and held the bank's complaint regarding whether plaintiff was "entitled to sue on the contract [was] a question of capacity," not standing.⁷⁷ The court of appeals emphasized that, unlike standing, lack of capacity was procedural and could be waived if not challenged by verified denial under Rule 93 of the Rules of Civil Procedure.⁷⁸ The court of appeals then noted while the bank had not challenged plaintiff's capacity by affidavit under Rule 93, the parties had clearly tried the issue by consent thereby preserving the issue for review on appeal.⁷⁹ In its review, the court of appeals ultimately deter-

70. *Id.* at 531.

71. *Id.* at 531–34.

72. *Id.* at 535.

73. *Highland Credit Opportunities CDO, L.P. v. UBS AG*, 451 S.W.3d 508, 514–15 (Tex. App.—Dallas 2014, no pet.).

74. *Id.* at 518.

75. *Id.* at 515–16.

76. *Id.* at 515.

77. *Id.* at 515–16. The court of appeals noted that it had "previously held numerous times, that a challenge to a party's privity of contract is a challenge to capacity, not standing." *Id.* at 516 (quoting *Transcon. Realty Inv'rs, Inc. v. Wicks*, 442 S.W.3d 676, 679 (Tex. App.—Dallas 2014, pet. denied)).

78. *Id.* (citing Tex. R. Civ. P. 93).

79. *Id.* at 517 (noting five days prior to the bench trial the parties signed a Rule 11 agreement acknowledging the "proper party" issue remained for trial).

mined plaintiff had capacity to sue under the contract despite the lack of a written assignment.⁸⁰

The Dallas Court of Appeals also addressed the distinctions between standing and capacity in *Fitness Evolution, L.P. v. Headhunter Fitness, L.L.C.*, which involved a “complicated web of claims” relating to a lease of shopping center space.⁸¹ In the trial court, one of the defendants challenged another party’s status to pursue claims as a putative assignee by summary judgment, framing it as standing issue. The court of appeals first addressed the standing challenges to confirm its subject matter jurisdiction, then explained the differences between capacity and standing, and finally reaffirmed that a challenge to a party’s privity of contract by assignment or otherwise is a capacity issue, not a challenge to jurisdictional standing.⁸² The court of appeals declined to review the capacity issue on appeal because no verified denial under Rule 93 had been filed to preserve it, and the record did not show capacity was adjudicated or tried by consent since all the briefing and argument in the trial court related to standing.⁸³

At issue in *Transcontinental Realty Investors, Inc. v. Wicks* was whether a retroactive assignment of rights under a lease effectively cured a defect in the plaintiff trust’s capacity.⁸⁴ The lease was between landlord and tenant, but landlord’s trust with no rights under the lease was the named plaintiff at the time summary judgment on tenant’s liability for breach of the lease was obtained. Before the trial on damages, landlord assigned the lease to the trust with a retroactive effective date. The trial court then entered a money judgment in favor of the trust. On appeal, the tenant challenged the trust’s “standing.”⁸⁵ The Dallas Court of Appeals once again explained that privity of contract challenges raise capacity rather than standing issues. The court of appeals held the retroactive assignment was effective under the terms of the lease and cured any capacity defects because the trust received no more under the assignment than it had alleged it had the right to enforce all along.⁸⁶ The trial court’s judgment was therefore affirmed.⁸⁷

80. *Id.* at 517–18.

81. *Fitness Evolution, L.P. v. Headhunter Fitness, L.L.C.*, No. 05-13-00506-CV, 2015 WL 6750047, at *1–2 (Tex. App.—Dallas Nov. 4, 2015, pet. denied) (mem. op.).

82. *Id.* at *12–19.

83. *Id.* at *19–21 (noting the record did not show trial by consent because the only expressly stated ground for summary judgment was standing; the only case law cited in the brief related to standing; and the trial court’s order granting the motion did not refer to either standing or capacity).

84. *Transcon. Realty Inv’rs, Inc. v. Wicks*, 442 S.W.3d 676, 678–80 (Tex. App.—Dallas 2014, pet. denied).

85. *Id.* at 679.

86. *Id.* at 679–80.

87. *Id.* at 682.

VII. PLEADINGS

In *Zorilla v. Aypco Construction II, LLC*, the Texas Supreme Court resolved a conflict among the courts of appeal over whether the exemplary damages cap⁸⁸ must be pled under Rule 94 of the Rules of Civil Procedure's residual clause as "any other matter constituting an avoidance or affirmative defense."⁸⁹ In the underlying residential construction dispute, the trial court affirmed an exemplary damages award in excess of the statutory cap when defendant failed to plead the cap as an affirmative defense; instead, the defendant raised the cap for the first time in her motion for new trial.⁹⁰ The court of appeals affirmed the trial court's exemplary damages award, holding that the cap did not apply because it had not been pled as an affirmative defense.⁹¹ The Texas Supreme Court analyzed whether the exemplary damages cap constituted an avoidance or an affirmative defense within the meaning of Rule 94, and concluded it was neither.⁹² The supreme court reasoned that, unlike the "hallmark characteristic" of affirmative defenses or avoidances, which impose the burden of proof on a defendant, the exemplary damages cap "does not require proof of any additional fact to establish its applicability; moreover, there is no defense to it."⁹³ The supreme court therefore held the exemplary damages cap was not subject to Rule 94's affirmative pleading requirement and was timely raised by motion for new trial.⁹⁴ It reversed and rendered the exemplary damages award subject to the statutory cap in the judgment.⁹⁵

In *In re Memorial Herman Hospital System*, the Texas Supreme Court also addressed whether a doctor's pleading sufficiently alleged claims under the Texas Free Enterprise and Antitrust Act of 1983 (TFEAA).⁹⁶ Relying heavily on federal antitrust case law, the supreme court held that a cardiovascular surgeon's allegations that a hospital's statements adversely affected his reputation among cardiologists, his primary source of referrals, was sufficient to support the doctor's antitrust claim. The doctor claimed these statements cast doubt on the viability of robotic heart surgeries in Houston, resulting in increased costs for consumers' longer hospital stays. The supreme court found these allegations to be enough to plead "injury to competition" generally, rather than to a single competitor, under the TFEAA.⁹⁷ The supreme court further found the doctor's

88. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (West 2015).

89. *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 155 (Tex. 2015). The supreme court also noted that the Fort Worth, Corpus Christi, and First Houston courts of appeals held the statutory cap must be pled as an affirmative defense while the San Antonio, Fourteenth Houston, and Amarillo courts of appeals had held it was not. *Id.* at 151 n.6.

90. *Id.* at 151.

91. *Id.*

92. *Id.* at 155–57.

93. *Id.* at 156–57.

94. *Id.* at 158.

95. *Id.*

96. *In re Mem'l Herman Hosp. Sys.*, 464 S.W.3d 686, 709–13 (Tex. 2015).

97. *Id.* at 708–12.

allegations were sufficient to support several viable relevant markets for the doctor's claims under the TFEAA, and the number of potential alternative service and geographical markets alleged did not qualify as pleading defects.⁹⁸ The supreme court therefore concluded that the doctor had sufficiently pled "multiple viable anticompetitive actions" under the TFEAA.⁹⁹

Several cases in the Survey period addressed timeliness of pleading amendments under Rule 63 of the Rules of Civil Procedure. In *Holmes v. GMAC, Inc.*, the defaulting purchaser of a vehicle sought to amend his counterclaim to add purported class claims on behalf of Texas residents with GMAC "Smart Buy" contracts eight days after the scheduling order pleading amendment deadline.¹⁰⁰ The trial court struck the amendment on GMAC's motion, and the El Paso Court of Appeals affirmed, holding that the proposed amendment was both untimely despite continuation of the initial trial setting and prejudicial on its face because the class action claims drastically altered the straightforward nature of the case.¹⁰¹ The three weeks of discovery remaining at the time of the proposed amendment was inadequate to allow GMAC to defend those claims, and there was no evidence GMAC could have anticipated the class action amendment.¹⁰²

By contrast, in *Crosstex North Texas Pipeline v. Gardiner*, the Fort Worth Court of Appeals found the trial court abused its discretion by not allowing an amendment adding an "abnormal and out-of-place" culpability theory to plaintiffs' nuisance claim requested during the charge conference, only four days after trial began.¹⁰³ In denying leave to amend, the trial court determined plaintiffs' pleadings did not put defendant on notice of the "abnormal and out-of-place" nuisance theory even though it had no doubt the evidence would support submission of that theory to the jury.¹⁰⁴ The court of appeals reviewed the record, finding plaintiffs' entire case was grounded on complaints that the noise generated by the defendant's compressor station was "abnormal and out-of-place" in the rural surroundings of their homes.¹⁰⁵ The court of appeals further found the defendant had offered no evidence of prejudice or surprise; nor could it reasonably do so given the requested amendment merely conformed the pleadings to the evidence.¹⁰⁶ The court of appeals therefore reversed the trial court's judgment and remanded the case for a new trial to allow plaintiffs to add the additional "abnormal and out-of-place" nuisance

98. *Id.* at 712–13.

99. *Id.* at 713.

100. *Holmes v. GMAC, Inc.*, 458 S.W.3d 85, 94 (Tex. App.—El Paso 2014, no pet.).

101. *Id.* at 95.

102. *Id.* at 94–95.

103. *Crosstex N. Tex. Pipeline v. Gardiner*, 451 S.W.3d 150, 178–79 (Tex. App.—Fort Worth 2014), *aff'd* by No. 15-0049, 2016 WL 3483165 (Tex. June 24, 2016).

104. *Id.* at 177.

105. *Id.*

106. *Id.* at 178–79.

theory.¹⁰⁷

Whether a general plea for attorneys' fees in a prayer was sufficient to authorize recovery was at issue in *Compass Bank v. Nacim*.¹⁰⁸ In this case, the defendant bank sought recovery of its attorneys' fees as the prevailing party in a suit based on a 2007 customer account contract after establishing its customers' claims for 2007 losses were barred by limitations.¹⁰⁹ The trial court denied the bank's request, finding it had neither pled nor proved its entitlement to recovery of fees.¹¹⁰ On appeal, the bank argued its prayers in amended pleadings for "exemplary damages, attorney's fees, post-judgment interest, and all courts [sic] of court" were sufficient to allow recovery of its attorneys' fees.¹¹¹ While noting a general request in a prayer authorizes an award of attorneys' fees if the pleading as a whole provides fair notice of the legal basis of or facts supporting the claim, the El Paso Court of Appeals held that the bank's bare requests in prayers of two amended pleadings were insufficient because the 2007 transactions were not at issue at the time of the first pleading.¹¹² Further, neither pleading alleged facts about the 2007 transactions or the 2007 account contract attorneys' fee provision.¹¹³ In absence of these allegations, the court of appeals held the bank's general prayers did not provide fair notice that the bank would seek its attorneys' fees for defending against customers' claimed 2007 losses based on the account contract.¹¹⁴ The court of appeals affirmed the trial court's denial of the bank's request.¹¹⁵

VIII. DISCOVERY

In *In re Memorial Hermann Hospital System*, the Texas Supreme Court analyzed the applicability of the medical committee and the medical peer review committee privileges.¹¹⁶ In this case, the real party in interest was a cardiothoracic surgeon who sued, among others, the hospital at which he had formerly practiced. He alleged claims for "business disparagement, defamation, tortious interference with prospective business relations, and improper restraint of trade under the [TFEAA]" arising out of the "whisper campaign" that followed his decision to move his practice to another hospital.¹¹⁷ When the surgeon filed a motion to compel, the hos-

107. *Id.* at 179.

108. 459 S.W.3d 95, 111–14 (Tex. App.—El Paso 2015, no pet.).

109. *Id.* at 111–12.

110. *Id.* at 112.

111. *Id.*

112. *Id.* at 112–13.

113. *Id.*

114. *Id.*

115. *Id.* at 113–14. The court of appeals also rejected the bank's argument that its entitlement to attorneys' fees as the prevailing party under the 2007 contract was tried by consent. *Id.*

116. *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 695 (Tex. 2015) (orig. proceeding).

117. *Id.* at 695–97.

pital invoked the medical committee and medical peer review committee privileges,¹¹⁸ and the trial court ordered the production of certain documents.¹¹⁹ On mandamus review, the supreme court found that the trial court did not abuse its discretion in holding that the “anticompetitive action” exception to the medical peer review committee privilege¹²⁰ applied, because the plaintiff had asserted one or more claims requiring proof of conduct having “a tendency to reduce or eliminate competition” that [was] not offset by countervailing procompetitive justifications.”¹²¹ After analyzing whether the specific documents at issue were relevant, the supreme court then inquired as to whether the documents were exempt from disclosure by the medical committee privilege in § 161.032 of the Health and Safety Code.¹²² Because the documents were subject to both sections, the specific exception in § 160.007(b) of the Occupations Code applied and required the production of the documents.¹²³

The propriety of post-judgment discovery was at issue in *In re Longview Energy Company*.¹²⁴ Following a substantial judgment on the plaintiff’s breach of fiduciary duty claim, the trial court ordered, in accordance with Rule 24.1(e) of the Rules of Appellate Procedure,¹²⁵ that one defendant had to produce, on a monthly basis, “essentially all documents pertaining to the operation of the Eagle Ford shale assets” the defendants had wrongfully obtained.¹²⁶ The court of appeals rejected the defendants’ argument that the discovery order was an abuse of discretion.¹²⁷ The defendants then sought mandamus relief from the Texas Supreme Court, contending that Rule 24.1(e) had to be read in light of Rule 621a of the Rules of Civil Procedure, which allows discovery only “for the purpose of obtaining information to aid in the enforcement” of a judgment that has not been superseded and “for the purpose of obtaining information relevant to” Rule 24 motions.¹²⁸ The supreme court disagreed, finding that “nothing in Rule 621a purports to limit Rule 24.1(e).”¹²⁹ The supreme court held that the trial court did not abuse its discretion in giving the

118. TEX. HEALTH & SAFETY CODE ANN. § 161.032 (West 2015) (defining the medical committee privilege); TEX. OCC. CODE ANN. § 160.007 (West 2015) (defining the medical peer review committee privilege).

119. *In re Mem’l Hermann Hosp. Sys.*, 464 S.W.3d at 697.

120. *See* TEX. OCC. CODE ANN. § 160.007(b) (“If a judge makes a preliminary finding that a proceeding or record of a medical peer review committee or a communication made to the committee is relevant to an anticompetitive action, or to a civil rights proceeding brought under 42 U.S.C. Section 1983, the proceeding, record, or communication is not confidential to the extent it is considered relevant.”).

121. *In re Mem’l Hermann Hosp. Sys.*, 464 S.W.3d at 706, 708–13.

122. *Id.* at 716–17 (citing TEX. HEALTH & SAFETY CODE § 161.032).

123. *Id.* at 718–19.

124. 464 S.W.3d 353, 361–62 (Tex. 2015) (orig. proceeding).

125. TEX. R. APP. P. 24.1(e) (“The trial court may make any order necessary to adequately protect the judgment creditor against loss or damage that the appeal might cause.”).

126. *In re Longview Energy Co.*, 464 S.W.3d at 356.

127. *Huff Energy Fund, L.P. v. Longview Energy Co.*, No. 04-12-00630-CV, 2014 WL 661710, at *6 (Tex. App.—San Antonio Feb. 12, 2014, pet. denied).

128. *In re Longview Energy Co.*, 464 S.W.3d at 362 (citing TEX. R. CIV. P. 621a).

129. *Id.*

plaintiff, in lieu of a bond superseding the constructive trust portion of its judgment, “access to information . . . to protect itself from any dissipation of assets” by the defendants during the pendency of the appeal.¹³⁰

In *In re Doe*, the Texas Supreme Court addressed the interplay between pre-suit depositions under Rule 202 of the Rules of Civil Procedure and personal jurisdiction.¹³¹ “Rule 202 . . . allows ‘a proper court’ to authorize a [pre-suit] deposition to investigate . . . claims.”¹³² The issue was whether that a proper court must have personal jurisdiction over the would-be deponent.¹³³ The real party in interest had been the subject of some less-than-flattering internet postings, and he filed a Rule 202 petition in Harris County to depose Google—the host of the blog at issue—to ascertain the identity of the blog’s owner, against whom suit was anticipated.¹³⁴ The blog owner filed a special appearance, claiming that his sole contact with Texas was that his blog could be read there, and contending there was no proper court that could order a Rule 202 deposition of him.¹³⁵ In a 5–4 decision, the supreme court agreed, holding that it was implicit in Rule 202 and its predecessors that a court has subject matter jurisdiction over the anticipated action and personal jurisdiction over the potential deponent defendant.¹³⁶ If the supreme court held otherwise, a potential defendant would have less protection under Rule 202 than he would have if a lawsuit had actually been filed, which he could challenge through a special appearance under Rule 120a. Thus, Rule 202 “could be used by anyone in the world to investigate a claim against anyone else in the world against whom suit could be brought within the trial court’s subject matter jurisdiction.”¹³⁷

The impact of parties’ failure to comply with Rule 47 on their previously served discovery requests was the subject of *In re Greater McAllen Star Properties, Inc.*¹³⁸ Rule 47, which was amended effective March 1, 2013, requires a party to provide some measure of specificity regarding the amount of monetary relief the party seeks and prohibits the party from conducting any discovery until it files an amended pleading complying with Rule 47’s requirements.¹³⁹ The plaintiff filed a motion to compel regarding the discovery responses of the defendant, who contended that the underlying requests were invalid because the plaintiff’s pleading did not comply with Rule 47 at the time she served them. The trial court granted the motion to compel, and the defendant sought mandamus re-

130. *Id.*

131. *In re Doe*, 444 S.W.3d 603, 604 (Tex. 2014).

132. TEX. R. CIV. P. 202.2(b).

133. *In re Doe*, 444 S.W.3d at 604.

134. *Id.* at 604–05.

135. *Id.* at 605.

136. *Id.* at 608–10.

137. *Id.* at 610. Justice Lehrmann dissented, concluding that the majority’s analysis effectively abolished defamation claims against persons who claimed anonymity, particularly online. *Id.* at 611 (Lehrmann, J., dissenting).

138. 444 S.W.3d 743, 751 (Tex. App.—Corpus Christi 2014, orig. proceeding).

139. *Id.* at 750–51 (citing TEX. R. CIV. P. 47).

lief, arguing that the plaintiff had to re-propound her discovery requests after she amended her petition to comply with Rule 47.¹⁴⁰ The Corpus Christi Court of Appeals rejected this argument, finding that, in light of the liberal construction afforded to the Rules of Civil Procedure, the plaintiff did not have to re-propound her discovery requests; instead, the time to respond to the requests began to run on the date she filed an amended petition complying with Rule 47.¹⁴¹

Efforts to withdraw deemed admissions were the subject of multiple opinions during the Survey period. In *Soto v. General Foam & Plastics Corp.*, the defendant, who was at the time represented by counsel, did not respond to the plaintiff's requests for admissions.¹⁴² At a subsequent hearing, the trial court allowed the defendant's counsel to withdraw and deemed admitted the plaintiff's requests.¹⁴³ The defendant, proceeding pro se, did not file a response to the plaintiff's motion for summary judgment, which was based in large part upon the deemed admissions. After the trial court entered summary judgment, the defendant retained his original counsel, who alleged that the defendant was entitled to a new trial under the equitable standard challenging a no-answer default judgment.¹⁴⁴ The trial court declined to hold a hearing on the motion for new trial, which "was overruled by operation of law," and the defendant appealed.¹⁴⁵ The El Paso Court of Appeals found that *Craddock* did not apply, as the defendant had notice of the hearing and the opportunity to either seek a continuance or file a late response to the plaintiff's motion.¹⁴⁶ The court of appeals then held that good cause did not exist for the withdrawal of the deemed admissions, because the defendant had been represented by counsel during the time discovery was ongoing, his counsel had sought to withdraw based on the defendant's refusal to cooperate during discovery, and the trial court had deemed the requests admitted as a sanction for the defendant's discovery abuse.¹⁴⁷

On the other hand, in *In re Sewell*, the Texarkana Court of Appeals held that the trial court erred in denying the relator's motion to withdraw his deemed admissions.¹⁴⁸ The relator received the requests for admissions during the time he was not represented by counsel, but when his subsequently retained counsel requested copies of the previously served documents, the real party in interest did not tender copies of the requests

140. *Id.* at 750–51.

141. *Id.* at 751 (citing TEX. R. CIV. P. 1). The court of appeals also held that the defendant was not entitled to mandamus relief regarding the trial court's decision to compel the defendant to respond to discovery while refusing to hear its motion for summary judgment. *Id.* at 748–50.

142. *Soto v. Gen. Foam & Plastics Corp.*, 458 S.W.3d 78, 80 (Tex. App.—El Paso 2014, no pet.).

143. *Id.*

144. *Id.* at 80–81 (citing *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 125–26 (Tex. 1939)).

145. *Id.* at 81.

146. *See id.* at 82 (citing TEX. R. CIV. P. 166a(c)).

147. *Id.* at 84–85.

148. *In re Sewell*, 472 S.W.3d 449, 453 (Tex. App.—Texarkana 2015, orig. proceeding).

for admissions.¹⁴⁹ The morning of the trial, the real party in interest filed a certificate of deemed admissions; after the trial court granted a continuance, the relator filed a motion to withdraw the deemed admissions.¹⁵⁰ The trial court denied the motion to withdraw, and when the relator sought mandamus relief, the real party in interest withdrew eight of the requests for admissions, which it acknowledged were merit-preclusive.¹⁵¹ The trial court affirmed its denial of the motion with respect to the other eight requests on the ground that the relator had acted with conscious indifference.¹⁵² The court of appeals, however, found that the trial court applied the wrong standard to two of the requests for admissions that were merit-preclusive, because allowing such requests to be deemed admitted was essentially “a case-ending discovery sanction.”¹⁵³ Rather, the standard for the withdrawal of deemed admissions that are merit-preclusive is whether the responding party’s failure to answer resulted from blatant bad faith or shameless disregard for the rules.¹⁵⁴ Because the real party in interest admitted that two of the remaining eight requests were merit-preclusive and the record did not affirmatively show that the other six requests were not merit-preclusive, the court of appeals found that the relator was entitled to withdraw the deemed admission of all eight requests.¹⁵⁵

The trial court’s order compelling the defendant landlord to turn over its computer hard drive to a third-party forensic examiner was at issue in *In re VERP Investment, LLC*.¹⁵⁶ The landlord had changed the locks due to the plaintiff tenant’s failure to pay rent for ten months. In the tenant’s action for wrongful lockout and breach of contract, he alleged he had received neither invoices for many of the months in dispute nor accountings of various offsets he claimed were applicable. In his discovery requests, the tenant sought electronic information and data concerning the invoices, to which the landlord objected on grounds of burdensomeness and that the information could be obtained “through more appropriate means.”¹⁵⁷ The trial court ordered the landlord to permit a mutually satisfactory forensic examiner to make a mirror image of the accounting software and the supporting data relating to the invoices at issue.¹⁵⁸ The landlord sought mandamus relief, contending that the trial court’s ruling

149. *Id.* at 453–54.

150. *Id.* at 454.

151. *Id.*

152. *Id.*

153. *See id.* at 455–56.

154. *Id.* at 456 (citing *Time Warner, Inc. v. Gonzalez*, 441 S.W.3d 661, 666 (Tex. App.—San Antonio 2014, pet. denied)).

155. *Id.* at 461–62; *see also* *ConocoPhillips Co. v. Noble Energy, Inc.*, 462 S.W.3d 255, 265 (Tex. App.—Houston [14th Dist.] 2015, pet. filed) (holding that the trial court did not abuse its discretion in permitting the defendant to withdraw its admissions to requests that stemmed from the scope of the contractual obligations in dispute and there was insufficient evidence that the plaintiff would suffer delay or prejudice as a result of the withdrawal).

156. 457 S.W.3d 255, 258 (Tex. App.—Dallas 2015, no pet.).

157. *Id.*

158. *Id.* at 258–59.

failed to comply with either Rule 196.4 of the Rules of Civil Procedure, which addresses e-discovery, or the key case that analyzed those discovery procedures.¹⁵⁹ The Dallas Court of Appeals granted mandamus relief, finding that the landlord's objections sufficiently preserved its rights to challenge the trial court's order and that the tenant had failed to make the threshold showing that the landlord was in default of its obligation to search its records and produce the requested data.¹⁶⁰

IX. DISMISSAL

In *In re Conner*, the Texas Supreme Court held that mandamus relief was available due to the trial court's failure to dismiss for want of prosecution.¹⁶¹ The supreme court held a plaintiff's unreasonably long delay without sufficient explanation "will raise a conclusive presumption of abandonment" justifying dismissal under the court's inherent authority and Rule 165a of the Rules of Civil Procedure.¹⁶² As far as quantifying unreasonable delay, the supreme court noted the plaintiffs' ten-year delay in that case far exceeded the eighteen months allowed for disposing of most civil cases under the Rules of Judicial Administration.¹⁶³ The case was filed in 2004, and plaintiffs cited their counsel's health issues in response to defendants' 2011 motion to dismiss. Two years later in 2013, defendants moved to dismiss for the continued lack of activity, and plaintiffs again cited their counsel's health as an excuse (despite defendants' introduction of court records showing plaintiffs' counsel appeared in many matters in the intervening two years). The trial court nonetheless denied the 2013 motion to dismiss, and the court of appeals denied defendants' requested mandamus relief.¹⁶⁴ The supreme court held plaintiffs' inability to show good cause for the almost ten-year delay mandated dismissal under Rule 165a(1), and mandamus relief was appropriate both because the trial court's refusal to dismiss could not be effectively challenged on appeal and "[t]o deny relief by mandamus permits the very delay dismissal is intended to prevent."¹⁶⁵ The supreme court therefore conditionally granted mandamus relief, directing the trial court to vacate its order denying the 2013 motion to dismiss and to dismiss the case for want of prosecution.¹⁶⁶

159. *Id.* at 260–61; see *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 313–15 (Tex. 2009) (orig. proceeding).

160. *In re VERP Inv.*, 457 S.W.3d at 261–62. The court of appeals also noted that, even if the tenant had made this showing, mandamus relief would nonetheless have been appropriate because he had failed to show that retrieval of the information he sought was feasible. See *id.* at 263.

161. *In re Conner*, 458 S.W.3d 532, 535 (Tex. 2015) (orig. proceeding).

162. *Id.* at 534. The supreme court also noted that a court may dismiss for want of prosecution if a plaintiff fails to "prosecut[e] the suit to a conclusion with reasonable diligence." *Id.* (quoting *Callahan v. Staples*, 161 S.W.2d 489, 491 (Tex. 1942)).

163. *Id.* (quoting TEX. R. JUD. ADMIN. 6.1(b)(1)).

164. *Id.*

165. *Id.* at 535.

166. *Id.*

In *Molina v. Alvarado*, the Texas Supreme Court analyzed whether the election of remedies provision of the Tort Claims Act required dismissal of a city employee where the plaintiff's original petition named the city.¹⁶⁷ The supreme court held a plaintiff must choose at the outset whether to sue a governmental employee individually for acts outside the scope of his employment and conduct discovery within that scope or to seek redress from the city and forego any claims against the employee individually.¹⁶⁸ If the plaintiff joins the city, the supreme court held an employee is entitled to dismissal of the individual claims against him under § 101.106(f) of the Civil Practice and Remedies Code.¹⁶⁹ Although the supreme court acknowledged plaintiffs are sometimes faced with a difficult choice at the outset, it held that under § 101.106(a), plaintiff's choice to sue the city barred all claims against city employees (rather than just claims brought against employees in their official capacity as found by the court of appeals).¹⁷⁰ The supreme court therefore reversed the court of appeals' judgment, and rendered judgment for the employee.¹⁷¹

In *Tic N. Central Dallas 3, L.L.C. v. Envirobusiness, Inc. and CTL/Thompson Texas, LLC v. Starwood Homeowner's Association, Inc.*, the Dallas and Fort Worth Courts of Appeals, respectively, examined the statute that requires a certificate of merit for "damages arising out of the provision of professional services" of an architect firm.¹⁷² Under the statute, a trial court must dismiss an action if the plaintiff fails to file a certificate with its complaint, which the courts have uniformly held means the first-filed petition.¹⁷³ The "dismissal may be with prejudice."¹⁷⁴ Despite some procedural differences, after each case was dismissed without prejudice because the plaintiffs failed to comply with § 150.002(e), the defendants in both cases moved to dismiss subsequent petitions, arguing that "no certificate of merit may be attached to a dismissed-without-prejudice-then-subsequently-refiled-claim."¹⁷⁵ The Dallas Court of Appeals concluded, and the Fort Worth Court of Appeals later agreed, that

167. *Molina v. Alvarado*, 463 S.W.3d 867, 869 (Tex. 2015) (discussing Tort Claims Act election of remedies provision § 101.106 of the Civil Practice and Remedies Code).

168. *See id.* at 871 (concluding that if a plaintiff at the outset possesses insufficient information to determine whether employee was acting within the course and scope, the "prudent choice" would be to sue the employee, conduct scope discovery to resolve that question, and later substitute the city as permitted by Tex. Civ. Prac. & Rem. Code § 101.106(f)).

169. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f) (West 2015); *Molina*, 463 S.W.3d at 871.

170. *Molina*, 463 S.W.3d at 871.

171. *Id.* at 871-72.

172. *Tic N. Cent. Dall. 3, L.L.C. v. Envirobusiness, Inc.*, 463 S.W.3d 71, 74 (Tex. App.—Dallas 2014, pet. denied); *CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n, Inc.*, 461 S.W.3d 627, 628 (Tex. App.—Fort Worth 2015, pet. denied); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(e) (requiring certificate of merit to be filed).

173. *Tic N. Cent. Dall. 3, L.L.C.*, 463 S.W.3d at 76 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(e)).

174. *Id.* at 75 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(e)).

175. *CTL/Thompson Tex., LLC*, 461 S.W.3d at 630; *see Tic N. Cent. Dall. 3, L.L.C.*, 463 S.W.3d at 76-77.

“when a plaintiff files a new action and includes a certificate of merit with the first-filed petition in that action, the plaintiff has complied with the plain language of the statute” even if the court dismissed an earlier action without prejudice for failure to include that document.¹⁷⁶

Since its addition to the procedural landscape, dismissal practice under Rule 91a of the Rules of Civil Procedure has generated a number of inconsistent intermediate court opinions on various issues,¹⁷⁷ but only one from the Texas Supreme Court, *In re Essex Insurance Company*.¹⁷⁸ In that case, the plaintiff sued the defendant for “personal injuries and then added a declaratory judgment claim against [defendant’s] insurer” to determine coverage.¹⁷⁹ The insurer moved to dismiss under Rule 91a, arguing that there was no basis in law for a direct action against it before its insured’s liability to the plaintiff had been established.¹⁸⁰ The trial court denied the insurer’s Rule 91a motions to dismiss the claims against it, and the court of appeals denied mandamus relief. However, given the insured defendant’s liability had yet to be determined and in light of the “no direct action” rule, the supreme court conditionally granted mandamus relief “to spare the parties and the public the time and money spent on fatally flawed proceedings.”¹⁸¹

Gaskill, III, M.D. v. VHS San Antonio Partners, LLC arose from a dispute over the interplay between Rule 91a’s provision requiring fourteen days’ notice of hearing and its forty-five-day mandatory deadline for deciding a motion to dismiss.¹⁸² As in the summary judgment context, the hearing date for a Rule 91a motion determines the deadline for filing a response.¹⁸³ The defendant movant argued that the mandatory forty-five-day deadline for deciding motions under the rule effectively gave the plaintiff notice that the court would rule on the motion on the forty-fifth day, even without plaintiff being served with formal notice of hearing. After the trial court granted the Rule 91a motion, plaintiff filed a motion for new trial complaining the motion had been heard and decided without notice to him, effectively giving him no meaningful opportunity to respond.¹⁸⁴ The trial court denied the motion for new trial and plaintiff appealed.¹⁸⁵ The San Antonio Court of Appeals concluded Rule 91a’s

176. *Tic N. Cent. Dall. 3, L.L.C.*, 463 S.W.3d at 77; see *CTL/Thompson Tex., LLC*, 461 S.W.3d at 631.

177. For example, the courts of appeals are divided on whether Rule 91a leaves Texas’ liberal “fair notice” standard unaltered, or whether it is analogous enough to Fed. R. Civ. P. 12(b)(6) to permit applying federal authority requiring a claim for relief to be plausible on its face. See, e.g., *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied) (analogous to Rule 12(b)(6)); *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (unaltered).

178. 450 S.W.3d 524, 526 (Tex. 2014) (orig. proceeding).

179. *Id.* at 525.

180. *Id.* at 526.

181. *Id.* at 528.

182. *Gaskill, III, M.D. v. VHS San Antonio Partners, LLC*, 456 S.W.3d 234, 236 (Tex. App.—San Antonio 2014, pet. denied) (discussing TEX. R. CIV. P. 91a.).

183. *Id.*

184. *Id.* at 238.

185. *Id.*

notice provisions must be strictly construed, refused to imply notice of hearing (which in turn would set a response date for the non-movant) from the rule's forty-five-day decision deadline, and held that formal notice of hearing is required regardless of whether the court will hold an oral hearing.¹⁸⁶ Finding the trial court ruled on the motion without providing plaintiff with notice of hearing or meaningful opportunity to respond, the court of appeals reversed and remanded the case to the trial court without reaching the merits of the dismissal ruling.¹⁸⁷

X. JURY PRACTICE

In *State v. Treeline Partners, Ltd.*, the Fourteenth Houston Court of Appeals addressed the limitations a trial court may place upon counsel during voir dire.¹⁸⁸ This action arose out of a condemnation proceeding in which the court awarded the landowner almost \$4.9 million. During voir dire, the landowner's counsel implied that the State improperly minimized its payments to landowners, informed the potential jurors of the parties' failure to settle, and detailed the parties' valuations. But when the State's lawyer announced her plans to ask potential jurors "whether anybody believes that the State lowballs," the trial judge prohibited her from asking that question or anything similar and told her that, if she tried to do so, she would probably be held in contempt.¹⁸⁹ The court of appeals found that these rulings were an abuse of discretion, as they improperly prevented the State from determining "whether the venire members held a preexisting bias or prejudice that the State underestimates property values" and thereby challenging such a member, whether for cause or through a peremptory strike.¹⁹⁰ The court of appeals then found that the trial court's abuse of discretion was harmful, as it was impossible to determine whether additional jurors would have been challenged or removed, especially where the trial judge prohibited questioning about whether "the State lowballs" or "anything similar" and threatened its attorney with contempt if she asked such questions.¹⁹¹

In *DeWolf v. Kohler*, the Fourteenth Houston Court of Appeals considered the waiver of complaints about improper jury argument.¹⁹² Where improper jury argument is curable, the complaining party preserves error "by obtaining an adverse ruling on a timely objection, mo-

186. *Id.* at 238–39.

187. *Id.* at 239.

188. *State v. Treeline Partners, Ltd.*, 476 S.W.3d 572, 573 (Tex. App.—Houston [14th Dist.] 2015, pet. filed).

189. *Id.* at 575.

190. *Id.* at 577. The court of appeals also took issue with the trial judge's refusal to provide any clarification during the bench conference regarding what the State's attorney could and could not ask. *Id.* at 577–78.

191. *Id.* at 578–79.

192. *DeWolf v. Kohler*, 452 S.W.3d 373, 380 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

tion to instruct the jury, or motion for mistrial.”¹⁹³ On the other hand, if the probable harm is incurable, then the complaining party may preserve the error with a motion for new trial and a timely objection is not required.¹⁹⁴ The court of appeals found the plaintiff waived any complaint to defendant counsel’s references to her assumption of the risk and improper personal attacks on her counsel by failing to make a contemporaneous objection or a timely motion for an instruction or a new trial.¹⁹⁵ Also, in her motion for new trial, the plaintiff did not allege that such statements constituted an incurable jury argument.¹⁹⁶ Moreover, although the plaintiff had raised a contemporaneous objection to a third complaint, she neither secured a ruling on it from the trial court nor raised the issue in her motion for new trial, resulting in a failure to preserve that complaint as well.¹⁹⁷

Finally, in *Berwick v. Wagner*, the First Houston Court of Appeals reviewed the standards associated with the disqualification of jurors for cause.¹⁹⁸ In this conservatorship dispute between two same-sex partners, the petitioner contended that five venire members were improperly stricken not because they were unable to pass judgment, but instead because of the nature of their religious beliefs about sexual behavior. On the other hand, the respondent argued that the members were properly stricken because they “admitted harboring personal biases and/or prejudices that would [have] prevent[ed] [them from] deciding the case” using the evidence and the law presented.¹⁹⁹ A challenge for cause is appropriate where a venire member’s feelings are so strong in favor of one side on a given issue that either his “verdict will be based on those feelings and not on the evidence,”²⁰⁰ or a member “cannot revive his or her eligibility by recanting an earlier expression of bias or prejudice.”²⁰¹ Applying these standards, the court of appeals found that the trial court did not abuse its discretion because it did not strike each panel member who disclosed possible religious objections to homosexuality.²⁰² Rather, the

193. *Id.* at 396 (citing TEX. R. APP. P. 33.1(a); *Living Ctrs. of Tex., Inc. v. Penalver*, 256 S.W.3d 678, 680 (Tex. 2008); *Tex. Emp. Ins. Ass’n v. Haywood*, 266 S.W.2d 856, 858 (Tex. 1954)).

194. *Id.* (citing TEX. R. CIV. P. 324(b)(5); *Clark v. Bres*, 217 S.W.3d 501, 509 n.1 (Tex. App.—Houston [14th Dist.] 2006, pet. denied)).

195. *Id.*

196. *Id.* at 396–97.

197. *Id.* at 397. The court of appeals also rejected the plaintiff’s challenges to the trial court’s refusal to include two requested instructions in the charge and inclusion of one question, finding that she had cited no evidence of some of the elements of the omitted instructions, had provided only a partial reporter’s record that prevented the court of appeals from finding harmful error, and complained of matters that were rendered irrelevant by the jury’s findings on other issues. *Id.* at 394–96.

198. *Berwick v. Wagner*, No. 01-12-00872-CV, 2014 WL 4493470, at *8 (Tex. App.—Houston [1st Dist.] Sept. 11, 2014, pet. denied) (not designated for publication).

199. *Id.*

200. *Id.* at *9 (citing *Buls v. Fuselier*, 55 S.W.3d 204, 210 (Tex. App.—Texarkana 2001, no pet.)).

201. *Id.* (citing *Smith v. Dean*, 232 S.W.3d 181, 190 (Tex. App.—Fort Worth 2007, pet. denied)).

202. *Id.*

lower court struck only those members who unequivocally indicated that they could not base their decisions on the law and evidence because of their religious beliefs.²⁰³

XI. JURY CHARGE

In *Nabors Well Services, Ltd. v. Romero*, the Texas Supreme Court overruled two of its prior decisions by holding that relevant evidence of a party's use or nonuse of seat belts is admissible for the purpose of apportioning responsibility in a civil action.²⁰⁴ The supreme court then provided some guidance on how its holding might impact the admissibility of seat-belt evidence and “how to construct a jury charge” when such evidence (or other pre-occurrence, injury-causing conduct) is admitted.²⁰⁵ Under § 33.003(a) of the Civil Practice and Remedies Code, the fact finder may consider a plaintiff's failure to wear a seat belt negligent or in violation of the law.²⁰⁶ The supreme court thus concluded that trial courts could continue to use a single apportionment question, as a jury could consider the “plaintiff's pre-occurrence, injury-causing conduct” alongside his and other persons' occurrence-causing conduct.²⁰⁷

The deadline for trial courts to stop entertaining charge objections was the subject of *King Fisher Marine Service, L.P. v. Tamez*.²⁰⁸ Under maritime law, a “specific order” is one that requires a seaman to complete a specific task in a specific way.²⁰⁹ The defendant first requested the jury be instructed on specific orders “the morning after the formal charge conference and minutes before the trial court [would] read the charge.”²¹⁰ The trial judge refused to consider the request on the ground that it was untimely, and the court of appeals affirmed, finding that the defendant had “ample opportunity to present its proposed instruction.”²¹¹ In its appeal to the Texas Supreme Court, the defendant contended that Rule 272 of the Rules of Civil Procedure²¹² requires trial courts to “accept objections to the charge up to the moment it is read to the jury” and does not give trial courts discretion to shorten that deadline.²¹³ The supreme court disagreed, concluding that Rule 272 merely sets a broad deadline for charge

203. *Id.*

204. *Nabors Well Servs., Ltd. v. Romero*, 456 S.W.3d 553, 563 (Tex. 2015), *aff'd in part and rev'd in part* by No. 08-09-00319-CV, 2016 Tex. App. LEXIS 2074 (Tex. Feb. 26, 2016) (overruling *Kerby v. Abilene Christian Coll.*, 503 S.W.2d 526 (Tex. 1973); *Carnation Co. v. Wong*, 516 S.W.2d 116 (Tex. 1974)).

205. *Id.* at 563–64.

206. *Id.* at 563.

207. *Id.* at 564.

208. 443 S.W.3d 838, 840 (Tex. 2014).

209. *Id.* at 842.

210. *Id.*

211. *Id.* (citing *King Fisher Marine Serv., L.P. v. Tamez*, No. 13-10-00425-CV, 2012 WL 1964567, at *6 (Tex. App.—Corpus Christi May 31, 2012) (mem. op.), *aff'd* by 443 S.W.3d 838 (Tex. 2014)).

212. TEX. R. CIV. P. 272 (providing that objections must be presented in writing or dictated to the court reporter “before the charge is read to the jury”).

213. *Tamez*, 443 S.W.3d at 842–43.

objections that a trial court has discretion to shorten, provided it affords the parties a reasonable time to inspect and object to the charge.²¹⁴

The Texas Supreme Court addressed the preservation of jury charge error in *Burbage v. Burbage*.²¹⁵ *Burbage* involved a defamation action between brothers, and the defendant (who was pro se) contended that six of the ten statements at issue were qualifiedly privileged, as they were made in letters he sent to individuals who had interests “sufficiently affected by the communication.”²¹⁶ The trial court submitted the ten statements to the jury for a determination of whether the statements were substantially true and it also included a broad-form question on damages that integrated the jury’s findings on the ten statements. But in the event the qualified privilege applied to any of the statements, the trial court’s damages questions might have improperly incorporated both valid and invalid bases for liability raising the possibility of harmful error.²¹⁷ After the court of appeals held the defendant had waived any complaint by failing to object to the submission of the broad-form damages question, the defendant appealed, contending that his qualified privilege objection preserved error with respect to the derivative damages question.²¹⁸ The supreme court disagreed, finding that the applicable rules of procedure require the complaining party to point out the objectionable matter, set forth the grounds of the objection, and secure a ruling from the trial court.²¹⁹ According to the supreme court, it was incumbent on the defendant to communicate to the trial court that it was improper to submit the six statements that were the subject of the qualified privilege to the jury, but since he failed to specifically detail his complaint regarding the liability question and did not challenge the form of the broad-form damages question, he waived any complaint.²²⁰

The trial court’s refusal to give a jury instruction was at issue in *Telesis/Parkwood Retirement I, Ltd. v. Anderson*.²²¹ The plaintiff sustained injuries in a fall in the shower of an independent-retirement community owned by the defendant, and the jury found in her favor on her negligence and gross negligence claims. On appeal, the defendant alleged that the trial court erred by instructing the jury to answer a broad-form negligence question rather than one based on a negligent undertaking, while the plaintiff contended the defendant had failed to preserve its challenge to the broad-form question.²²² The El Paso Court of Appeals noted that the basic test “for determining whether a party has preserved error in the

214. *Id.* at 843. The supreme court then found that the defendant had preserved error by objecting prior to the time the charge was read to the jury and securing a ruling from the trial judge but nonetheless held that the time afforded was reasonable. *Id.* at 845.

215. 447 S.W.3d 249, 252 (Tex. 2014).

216. *Id.* at 254 (quoting *Cain v. Hearst Corp.*, 878 S.W.2d 577, 582 (Tex. 1994)).

217. *Id.* at 255 (citing *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000)).

218. *Id.*

219. *Id.* at 256 (citing TEX. R. CIV. P. 274; TEX. R. APP. P. 33.1).

220. *Id.* at 257–58.

221. 462 S.W.3d 212, 232 (Tex. App.—El Paso 2015, no pet.).

222. *Id.* at 232.

jury charge” is “whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.”²²³ Because the defendant had requested a granulated question and objected to the submission of the broad-form question, the court of appeals found that the defendant had preserved error.²²⁴ The court of appeals, however, then held that “the trial court did not abuse its discretion,” as the plaintiff’s claims, properly construed, were for negligence based upon one or more duties arising from an ordinary duty of care, not negligent undertaking.²²⁵

XII. JUDGMENTS

The Texas Supreme Court clarified and addressed what constitutes “compensatory damages” for purposes of suspending the execution of a money judgment on appeal pursuant to § 52.006 of the Civil Practice and Remedies Code and Rule 24 of the Texas Rules of Appellate Procedure in *In re Longview Energy Co.*²²⁶ In this case, plaintiff oil company filed suit against two members of its own board of directors, as well as their separately owned entities. The oil company alleged the two directors had breached their fiduciary duties after it learned that the board members and their entities were pursuing the same prospects that plaintiff oil company was pursuing in the south Texas Eagle Ford shale. The jury found that the board members breached their fiduciary duty and that their entities had knowingly participated; thus, the defendants collectively had “wrongfully obtain[ed] assets in the Eagle Ford shale.”²²⁷ The plaintiff oil company sought disgorgement but not damages. In addition to creating a constructive trust for the assets defendants acquired in the Eagle Ford shale, the trial court originally awarded plaintiff a monetary award of \$95.5 million “based on the jury’s finding regarding the value of past-production revenues derived from the [assets] . . . minus the amount the jury found that the defendants paid to acquire [the assets,] . . . but without credit for” development or production expenses related to such revenues.²²⁸ The trial court subsequently amended the judgment to omit this statement such that there was no explanation for the final judgment’s \$95.5 million monetary award. The defendants appealed, posting a \$25 million bond as security to stay enforcement of the trial court’s judgment. They then moved for relief from any additional security requirement, which the trial court denied but a divided court of appeals found should have been granted.²²⁹ On mandamus review by the supreme court, the defendants argued they need not post security for the monetary award in the judgment because the award “[did] not constitute ‘compensatory

223. *Id.* at 233 (quoting *State Dep’t of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992)).

224. *Id.*

225. *Id.* at 234.

226. 464 S.W.3d 353, 355 (Tex. 2015).

227. *Id.* at 356.

228. *Id.*

229. *Id.* at 356–57.

damages.”²³⁰ The supreme court agreed, holding that “in no sense can the monetary award . . . be said to be compensatory,” and that it was instead punitive.²³¹ Likening the award to attorneys’ fees, the supreme court explained that disgorgement damages are compensatory like attorney’s fees, interest, and costs are, but cannot be considered compensatory damages within the meaning of § 52.006.²³² Accordingly, the supreme court concluded that the defendants were not required to post security on that portion of the judgment.²³³

XIII. MOTIONS FOR NEW TRIAL

In the prior Survey period, in *In re Columbia Medical Center of Las Colinas*, the Texas Supreme Court announced the rule that when a trial court grants a motion for new trial, it must articulate a reasonably specific basis for doing so beyond “in the interest of justice and fairness.”²³⁴ The purpose of this rule is to allow the court of appeals to conduct a merits-based mandamus review of the trial court’s articulated reasons for granting the new trial.²³⁵ During this Survey period, Texas courts analyzed the sufficiency of new trial orders under this precedent. In *In re E.I. du Pont de Nemours and Company*, the Beaumont Court of Appeals held that the trial court’s new trial order met this burden.²³⁶ The order was six pages long, and while not exhaustive, the order listed multiple examples of evidence from the record supporting the trial court’s grant of a new trial. The order also claimed that a new trial was proper because the cited evidence was “of such great weight and preponderance.”²³⁷ While the court of appeals ultimately disagreed with the trial court’s rationale for ordering a new trial, it held the trial court’s order was sufficiently specific to allow the defendant to use a mandamus proceeding to attack the new trial order.²³⁸ But the court of appeals found the trial court’s stated reasons were not legitimate and held the trial court abused its discretion in granting the motion for new trial.²³⁹

XIV. DISQUALIFICATION OF COUNSEL

In *In re RSR Corp.*, the Texas Supreme Court held the law firm of Bickel & Brewer was improperly disqualified based on lower courts’ ap-

230. *Id.* at 360.

231. *Id.* at 360–61.

232. *Id.*

233. *Id.* at 361.

234. *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding).

235. See *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 755–59 (Tex. 2013) (orig. proceeding).

236. See *In re E.I. du Pont de Nemours & Co.*, 463 S.W.3d 80, 86 (Tex. App.—Beaumont, 2015, orig. proceeding).

237. *Id.*

238. *Id.* at 86, 96.

239. *Id.* at 96.

plication of the incorrect legal standard.²⁴⁰ The trial and appellate courts applied the “bright-line rule” of *In re American Home Products Corp.*²⁴¹ The courts concluded that Bickel & Brewer should be disqualified after it met with a former executive of the adverse party, who was in possession of former employer’s confidential information, “at least 19 times, for a total of more than 150 hours.”²⁴² The supreme court explained that the former finance manager of the adverse party was also a witness,²⁴³ not only a non-lawyer “directly supervised by attorneys . . . retained to assist in litigation,” thus the *American Home Products* screening rule did not apply.²⁴⁴ Instead, the supreme court held that the lower courts should have analyzed the firm’s potential disqualification for receipt of an adversary’s privileged and confidential information from a former employee fact witness under the factors outlined by *In re Meador*.²⁴⁵ The supreme court reasoned that treating a fact witness like “a side-switching employee that *American Home Products* contemplated” would restrict informal discovery and hinder attorneys’ ability to gather relevant facts from witnesses with firsthand knowledge.²⁴⁶ Additionally, the supreme court noted that attorneys who improperly solicit privileged or confidential information from fact witnesses could be disqualified under *In re Meador*.²⁴⁷ Having found an abuse of discretion, the supreme court conditionally granted mandamus relief directing the trial court to vacate

240. *In re RSR Corp.*, 475 S.W.3d 775, 776 (Tex. 2015) (orig. proceeding).

241. *See In re Am. Home Products Corp.*, 985 S.W.2d 68, 74–75 (Tex. 1998) (orig. proceeding) (holding law firm that hired its opposing counsel’s former legal assistant must be disqualified unless hiring law firm has screening measures in place because of presumption paralegals and legal assistants who have worked on case have received confidences and will share those confidences with new employer).

242. *In re RSR Corp.*, 475 S.W.3d at 777.

243. The following facts were significant to the supreme court’s determination the executive was a fact witness: the former executive’s position with the employer “existed independently of litigation” and he did not report primarily to the former employer’s in-house or outside attorneys. *See id.* at 780.

244. *Id.* at 780–82.

245. *Id.* at 778–79. These factors include:

- 1) whether the attorney knew or should have known the material was privileged;
- 2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
- 3) the extent to which the attorney reviews and digests the privileged information;
- 4) the significance of the privileged information; i.e., the extent to which the its disclosure may prejudice the movant’s claim or defense, and the extent to which return of the documents will mitigate that prejudice;
- 5) the extent to which the movant may be at fault for the unauthorized disclosure;
- 6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.

Id. at 779 (quoting *In re Meador*, 968 S.W.2d 346, 351–52 (Tex. 1998) (orig. proceeding)).

246. *Id.* at 780–81.

247. *Id.* at 781 (citing Tex. Disciplinary Rules of Prof’l Conduct R. 4.02, cmt. 4, noting the rule did not prohibit attorneys from communicating with former employees of an organization as client).

its order disqualifying Bickel & Brewer.²⁴⁸

XV. MISCELLANEOUS

In *Ross v. St. Luke's Episcopal Hospital*, the Texas Supreme Court resolved a split among the courts of appeals as to whether Chapter 74 of the Civil Practice and Remedies Code requires an expert report for garden variety slip-and-fall claims against a health care provider.²⁴⁹ Based on language in a 2012 Texas Supreme Court opinion, a minority of the courts of appeals had held that an expert report was required for all safety-related claims.²⁵⁰ Applying other supreme court precedents, the majority view held that not “all safety claims that occur in a health care setting—even claims that are otherwise completely untethered from health care”—require a report under Chapter 74.²⁵¹ In *Ross*, the supreme court rejected the minority view, explaining:

[F]or a safety standards-based claim to be a [health care liability claim subject to Chapter 74] . . . there must be a substantive nexus between the safety standards allegedly violated and the provision of health care. And that nexus must be more than a ‘but for’ relationship. . . . The pivotal issue in a safety-standards-based claim is whether the standards on which the claim is based implicate the defendant’s duties as a health care provider, including its duties to provide for patient safety.²⁵²

Concluding that a hospital visitor’s fall on recently waxed floors outside the patient treatment areas did not satisfy this nexus test (under seven non-exclusive considerations), the supreme court reversed and remanded.²⁵³

248. *Id.* at 782. The supreme court did not decide whether Bickel & Brewer’s disqualification would have been proper under the correct *In re Meador* standard since the trial court had not addressed the issue and “did not resolve all fact issues relevant” to that analysis. *Id.*

249. *Ross v. St. Luke’s Episcopal Hosp.*, 462 S.W.3d 496, 500 (Tex. 2015).

250. *See id.* at 499; *Tex. West Oaks Hosp., L.P. v. Williams*, 371 S.W.3d 171, 186 (Tex. 2012); *Williams v. Riverside Gen. Hosp., Inc.*, No. 01-13-00335-CV, 2014 WL 4259889, at *4–7 (Tex. App.—Houston [1st Dist.] Aug. 28, 2014, no pet.) (mem. op.) (cataloging opinions and adopting the majority view).

251. *Riverside Gen. Hosp., Inc.*, 2014 WL 4259889, at *7.

252. *Ross*, 462 S.W.3d at 504–05.

253. *Id.* at 505–06. The supreme court suggested the following set of non-exclusive factors:

- 1) Did the alleged negligence of the defendant occur in the course of the defendant’s performing tasks with the purpose of protecting patients from harm;
- 2) Did the injuries occur in a place where patients might be during the time they were receiving care, so that the obligation of the provider to protect persons who require special medical care was implicated;
- 3) At the time of the injury, was the claimant in the process of seeking or receiving health care;
- 4) At the time of the injury, was the claimant providing or assisting in providing health care;
- 5) Is the alleged negligence based on safety standards arising from professional duties owed by the health care provider;

XVI. CONCLUSION

The Texas Legislature has narrowed the scope of the Texas-resident-plaintiff exception to the forum nonconveniens statute in response to Texas decisions, and how those amendments will fare in practice of applying the exception remains to be seen. In the meantime, the Texas Supreme Court and intermediate courts of appeals will continue to grapple with new Rule 91a of the Rules of Civil Procedure governing motion to dismiss practice and continue to expand precedent on existing procedural rules to guide the trial courts in properly managing their dockets.

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- 6) If an instrumentality was involved in the defendant's alleged negligence, was it a type used in providing health care; or
 - 7) Did the alleged negligence occur in the course of the defendant's taking action or failing to take action necessary to comply with safety-related requirements set for health care providers by governmental or accrediting agencies?

Id. at 505.

