

Texas Procedure Update

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Appellate Procedure

In *Hone v. Hanafin*, 104 S.W.3d 884 (Tex. 2003), the Supreme Court held that an appellant need not concede untimeliness to obtain an extension of time under TRAP 26.3. Here the appellant claimed that the request for findings and conclusions after a grant of a special appearance extended the time for filing the notice of appeal. The notice was filed 2 days after the original deadline, and the court of appeals implied a motion to extend time. The court of appeals rejected the argument that the request for findings extended the timetable, and concluded that because appellant did not concede untimeliness, it was not entitled to an extension because it failed to establish a reasonable explanation for the late filing. The Supreme Court holds that the court of appeals cannot require appellants to admit untimely filing if they offer a plausible good faith justification for filing when they did. “Absent a finding that an appellant’s conduct was deliberate or intentional, the court of appeals should ordinarily accept the appellant’s explanations as reasonable.” Noting the disagreement about whether a request for finding extends deadlines in accelerated appeals, the court found the appellant’s explanation plausible.

The Supreme Court again addressed whether a request for findings of fact and conclusions of law extended appellate timetables. In *Gene Duke Builders, Inc. v. Abilene Housing Authority*, 2004 WL 422492 (Tex. 2004), the court held that the request after the grant of a plea to the jurisdiction extended deadlines because the trial court heard evidence, so the findings “could properly be considered by the appellate court.”

However, a request for findings and conclusions *does not* extend the *plenary power* of the trial court. In *re Gillespie*, 124 S.W.3d 699 (Tex.App.—Houston [14th Dist.] 2003, no pet.). Overruling *Electronic Power Design, Inc. v. R.A. Hanson Co.*, 821 S.W.2d 170, (Tex.App.—Houston [14th Dist.] 1991, no writ), the en banc 14th court reviews Rule 329b and *Lane Bank Equipment Co. v. Smith Southern Equipment*, 10 S.W.3d 308 (Tex. 2000). Noting that findings and conclusions do not vacate or change a judgment, but merely explain the reasons for it, the court concluded that the trial court is not prevented from making properly requested findings and conclusions even if the court’s plenary power has expired. The opinion has a summary of when the court’s plenary power is extended—by the timely filing of (1) a motion for new trial, (2) motion to vacate, modify or correct the judgment, or (3) any motion seeking a substantive change in the judgment. However, I would change the list a little—(2) should read “motion to vacate, modify or correct the judgment (but *not* a motion to make a clerical change). Thus, (2) and (3) are actually the same. Note also that if the judgment is actually changed, *any* change in the judgment (even a clerical change) made during the court’s plenary power restarts the appellate timetable. Rule 329b(h).

Rule 34.6 of the Texas Rules of Appellate Procedure, which allows a partial record on appeal, was at issue in *Bennett v. Cochran*, 96 S.W.3d 227 (Tex. 2002). The supreme court said the rule means what it says—an appellant need not file a complete record to preserve legal and factual sufficiency points. However, to obtain the rule’s presumption that the partial record constitutes the entire record, the appellant must include in the request for the partial record a statement of the points to be presented on appeal. The

appellant in this case did not present such a statement. Nevertheless, the court found that he was entitled to the presumption because he did file the statement tardily, and appellee made no claim that the tardiness caused him any prejudice. Thus, the court adopted a “flexible approach” to the rule, disapproving of courts of appeals opinions that required “strict compliance.”

In *Ray Insurance Agency v. Jones*, 92 S.W.3d 530 (Tex. 2002), the Texas Supreme Court denied petition for review, but felt the need to express its disapproval of a court of appeals’ use of TRAP 2 “to suspend rules governing pleading practice before the trial courts.” The court of appeals had suspended the operation of Rule 94 (affirmative defenses) and upheld the appellant’s estoppel claim despite the failure to plead it.

The supreme court granted mandamus relief to the Board of Disciplinary Appeals to stop a district court from interfering with its jurisdiction over attorney license suspensions. In *In re State Bar of Texas*, 113 S.W.3d 730 (Tex. 2003), the district court had granted a declaratory judgment declaring the BODA’s suspension judgment invalid. The Supreme Court took the unusual step of finding a “compelling reason” to bypass the court of appeals in seeking mandamus. It also found that the ordinary appellate remedy was invalid because the order directly interfered with BODA’s jurisdiction.

A respondent to a petition for review waives the right to seek reversal of the court of appeals judgment if he raises the issue only in the responsive brief on the merits 8 months after the petition for review. He did not file a petition for review and did not raise the issue in the response to the petition. *The Center for Health Care Services v. Quintanilla*, 121 S.W.3d 733 (Tex. 2003).

A divided supreme court in *In the Interest of L.M.I.*, 119 S.W.3d 707 (Tex. 2003), affirmed termination of a parent/child relationship following attempted revocation of the parents’ voluntary relinquishment affidavits because the parents did not preserve issues raised on appeal in the trial court. Justices Hecht and Owen wrote dissenting opinions (Hecht’s is especially acerbic), in which Justices Jefferson and Phillips joined.

TRCP 306a, which tolls appellate deadlines when a party receives late notice of the judgment, does not apply to forcible entry and detainer judgments being appealed from justice court. *Richter v. Normandy Apartments*, 2003 WL 69554 (Tex.App.—Ft. Worth 2003, pet. dismissed by agreement)(memorandum opinion).

A restricted appeal must (1) be brought within 6 months of the judgment, (2) by a party who did not participate at trial, and (3) the error must be apparent from the face of the record. Although a restricted appeal is not available to a party who takes part in all the necessary steps of the summary judgment proceedings, but merely fails to attend the summary judgment hearing, relief is available to a party who did not respond to the motion or appear at the hearing. *Rivero v. Blue Keel Funding, L.L.C.*, 127 S.W.3d 421 (Tex.App.—Dallas 2004, no petition). However, in this case, there was no error on the face of the record, so relief was denied.

The Corpus Court of Appeals held that trial court erred in granting summary judgment for defendant while the plaintiff's interlocutory appeal of an order dissolving a temporary injunction was pending. *Lee-Hickman's Investments v. Alpha Invesco Corp.*, 2004 WL 396976 (Tex.App.—Corpus Christi 2004, no pet. history). The 14th Court of Appeals dismissed the interlocutory appeal as moot because of the summary judgment. The Corpus Court of Appeals held that the trial court interfered with and impaired the jurisdiction of the 14th court of appeals, and prevented the appellant from presenting its case to the court of appeals. The court also held that the trial court abused its discretion in dissolving the temporary injunction because the summary judgment motion did not present changed circumstances, and reinstates the temporary injunction.

A motion to reinstate that is not properly verified does not extend appellate deadlines. *Guest v. Dixon*, 2004 WL 34740 (Tex.App.—Amarillo 2004, pet. filed). The dissenting justice would find that the affidavit of a former attorney submitted with the motion was sufficient to extend the deadlines.

A motion for new trial is conditionally filed when it is not accompanied by the requisite filing fee, and the appellate deadlines are extended. If the fee is never filed, the motion remains conditionally filed, and the deadlines are extended. However, the trial court is not required to review a conditional motion, so any point of error raised only in the motion for new trial is waived. *Garza v. Garcia*, 2004 WL 1087302 (Tex. 2004).

Attorneys

In *Jocson v. Crabb*, 2004 WL 326681 (Tex. 2004), the Supreme Court reversed the court of appeals and found that the defendants had not waived their objection to the fee that the trial court awarded to the ad litem. In this case, the trial court appointed a guardian ad litem for the minor on whose behalf the parents brought suit for injuries allegedly suffered during birth. The ad litem attended depositions, reviewed correspondence, and as part of the settlement the defendants agreed to pay a reasonable ad litem fee. The trial court awarded \$117,150. The defendants objected to the fee as unreasonable because, as there was no conflict between the parents and the minor, the ad litem did not need to be present at depositions and review routine correspondence, for which he billed. The court of appeals found that waiver because, although the defendants objected to the ad litem's attendance at depositions, they did not get a ruling during discovery. The Supreme Court disagreed—although it would be wise to seek direction from the court if they disagree about the ad litem's role, the final fee hearing is an appropriate forum to assert objections to the fee request. And the Supreme Court found no waiver for not pursuing the ad litem's failure to produce documents supporting his invoice. The court characterized the primary objection as being that no conflict existed, so the ad litem did unnecessary work. The case was remanded to the court of appeals to address the merits of the defendant's objections to the award. *Note: the Supreme Court Advisory Committee has submitted to the Supreme Court new rules for ad litem that specifically address the role of the ad litem.*

Bill of Review

The Chapman heirs attacked by bill of review an 1883 agreed judgment conveying a disputed interest in the King Ranch from the Widow Chapman to Richard King, claiming a conspiracy between King and Chapman's attorney, Kleberg, who later become King's lawyer and son-in-law. The trial court granted summary judgment for the King heirs and the court of appeals reversed. In *King Ranch, Inc. v. Chapman*, 2003 WL 22025017 (Tex. 2003), the supreme court reversed the court of appeals, finding that the "series of interesting historical tidbits and Texas folklore" did not amount to more than a scintilla of evidence of extrinsic fraud.

Contempt

The 14th Court of Appeals distinguished between criminal contempt, which seeks to punish a party for disobeying a court order, and civil contempt, which seeks to coerce compliance with the court's order. In *Galtex Property Investors, Inc. v. City of Galveston*, 113 S.W.3d 922 (Tex.App.—Houston [14th Dist.] 2003, no pet.), the trial judge had signed an agreed order that stipulated to civil penalties if the defendant did not obey the terms of the order. When the defendant did not comply, the trial court signed a "Judgment of Contempt" enforcing the penalties. The court found this was not a contempt order but simply a money judgment for one party, which could not be obtained through contempt proceedings.

Class Actions

The Texas Supreme Court issued several class action opinions this year.

The Supreme Court reversed a certification order, and once again reaffirmed *Bernal* in *Compaq Computer Corp. v. Lapray*, 79 S.W.3d 779 (Tex. 2003). First, the court placed limitations on mandatory Rule 42(b)(2) class actions. In Texas, some parties had used "artful pleading" to seek certification under Rule 42(b)(2) "to circumvent what are perceived as stricter certification requirements under (b)(3)" [(b)(4) before the 2004 amendments]. Recognizing that (b)(2) classes plays a valuable role in class action, such as suits seeking injunctive relief in the civil rights arena, the court nevertheless expressed reluctance to affirm any class action that includes claims for damages where the class members were not afforded the protections of notice and opt-out. Moreover, the court held that parties cannot evade the rigorous analysis requirements of *Bernal* by seeking certification under (b)(2) instead of (b)(3). The court emphasized that (b)(2) requires a rigorous analysis of "cohesiveness." Finally, the court held that to comply with *Bernal*, courts must rigorously analyze choice of law issues before certification.

In *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675 (Tex. 2002), the court emphasized *Bernal*'s "rigorous analysis" requirement and contrasted it with courts who certified classes on "a lick and a prayer." The court reversed the trial court's certification order because common issues did not predominate in proving reliance or consequential damages, and in choice of law issues for a nationwide class. At the end of the opinion,

Justice Hecht’s opinion notes that the plaintiffs “failed to show that a class action is either more fair or more efficient in these circumstances” followed by a critique of the “central planning” model of class actions as compared to the “free market” model of individual trials. Justices O’Neill, Enoch and Hankinson dissented on grounds of lack of jurisdiction.

In *City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750 (Tex. 2003), the court held that unnamed class members are not required to intervene formally in the trial court to appeal a trial court’s judgment approving a class settlement. Moreover, the court held that class members can wait until the fairness hearing seeking approval of the settlement to opt out. Thus, six cities that filed requests to opt out and objected to the settlement were properly before the court of appeals.

In *Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240 (Tex. 2002), the supreme court decided that when the class representative has no claim against the defendant (the defendant was successful in obtaining summary judgment against the plaintiff), new pleadings that attempted to add new class representatives were properly stricken. Other individual plaintiffs or putative class members are free to file their own claims.

The Supreme Court has under consideration other class action cases. *State Farm Mutual Automobile Ins. Co. v. Lopez* (01-0540), asks whether the class certification order conflicts with *Bernal*. *State Farm Mutual Automobile Ins. Co. v. Lopez*, 45 S.W.3d 182 (Tex.App.—Corpus Christi 2001, pet. granted). In *BMG Direct Marketing Inc. v. Peake* (03-0547), the court of appeals affirmed class certification in a class action challenging late-payment fees on mail-order compact discs. *BMG Direct Marketing Inc. v. Peake*, 2003 1989413 (Tex.App.—Beaumont 2003, pet. granted) (memorandum opinion). The issue is whether the company’s voluntary-payment defense precludes the trial court’s finding that common issues predominate for the class.

The Beaumont Court of Appeals also addressed Rule 42(b)(2) in *American National Ins. Co. v. Cannon*, 86 S.W.3d 801 (Tex.App.—Beaumont 2002, no pet.). In this opinion, however, the court found that a (b)(2) class was appropriate only where injunctive or declaratory relief predominates over any monetary relief sought. In other words, where monetary relief was incidental to related injunctive or declaratory relief. Because the monetary damages sought were not incidental, and because the individual issues predominated, the trial court’s certification order under (b)(2), (b)(1)(a) and (b)(4) was reversed.

The Beaumont Court of Appeals also reversed a class action judgment that was rendered after trial on the merits—the certification order was not the subject of an interlocutory appeal. *Hardy v. Wise*, 92 S.W.3d 650 (Tex.App.—Beaumont 2002, no pet.). The court certified a plaintiff class and a defendant class in a case concerning restrictive covenants and property assessments in a residential subdivision. The defendant class seemed to trouble the court most—the court found that individual issues and defenses should be resolved before a money judgment is imposed on absent defendants.

The courts of appeals have been applying the *Bernal* standards to interlocutory appeals of class certifications. In *Enron Oil & Gas Co. v. Joffrion*, 116 S.W.3d 215 (Tex.App.—Tyler 2003, no pet.), the court of appeals reversed certification of a class of oil and gas royalty owners seeking damages for alleged breaches of express and implied warranties in oil and gas leases, because individual issues concerning each of the leases at issue predominated. In *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548 (Tex.App.—Houston [14th Dist.] 2002, no pet.), the court of appeals reversed certification of a class of employees required to work through rest and meal breaks and to work off the clock without pay because individual issues concerning employment agreements predominated.

The Texarkana Court of Appeals affirmed certification of a class of automobile buyers who were misled by automobile dealers into paying a tax that the dealers were to have paid in *Alford Chevrolet-Geo v. Jones*, 91 S.W.3d 396 (Tex.App.—Texarkana 2002, pet. filed). The court found that the common issues predominated, justifying certification. This case was before the Texas Supreme Court in a 1999 mandamus action where the trial court was found to have abused discretion in bifurcating class and merits discovery.

The Fort Worth Court of Appeals, in *Philadelphia American Life Ins. Co. v. Turner*, 2004 WL 393155 (Tex.App.—Ft. Worth 2004, no pet. history), reversed certification of a class of insureds who were allegedly charged an unauthorized administrative fee on their group health insurance policy. First, the court determined that the trial court did not meaningfully analyze the contract's ambiguity. The trial plan contained two steps—a determination of ambiguity, and an analysis of parole evidence if the contract was ambiguous. Because ambiguity is a question of law it should be determined before class certification. Also, if the contract is ambiguous, the class representative's claims are not typical of the class members because his claim is based on subjective factors particular to his own agreement with the defendant.

In re H&R Block, 2004 WL 575211 (Tex.App.—Corpus Christi 2004, no pet. history), is a mandamus proceeding addressing the order of proceedings in a class action. Here the defendant filed a special appearance, and subject to the special appearance, a motion to compel arbitration, motion to transfer venue, and a plea to the jurisdiction. The plaintiff filed a motion for partial summary judgment. The trial court scheduled hearings, with the plea to jurisdiction, motion to compel arbitration, and motion to transfer venue to be heard first, motion for partial summary judgment later that day, and the special appearance two weeks later. The defendant requested that the special appearance be heard first and that the summary judgment be determined only after deciding whether to certify the class. The court of appeals held that there was no abuse of discretion in deciding the partial summary judgment before the class certification, but the court did abuse its discretion in hearing the other motions before the special appearance. Nevertheless, the court was not impressed with the defendant's arguments that it was not fair for it to have to participate in the other hearings if it was not subject to the court's jurisdiction. The court found that the defendant was not in danger of losing substantial rights, and no "special circumstances" were present, so mandamus relief was denied.

Court Reporters

In *Dallas County v. Halsey*, 87 S.W.3d 552 (Tex. 2002), the Texas Supreme Court held that a court reporter is not entitled to judicial immunity for failure to accurately prepare an accurate record of the proceedings.

Discovery

The Supreme Court concluded that the trial court did not abuse its discretion in striking a plaintiff's pleadings as a discovery sanction without first testing the effectiveness of lesser sanctions in *Cire v. Cummings*, 2004 WL 877538 (Tex. 2004). The plaintiff in a legal malpractice case was ordered three times to produce numerous tapes of conversations she had with her lawyers. This was the only objective evidence available that would have supported or disproved the plaintiff's claims. She refused to comply with the order, and it became apparent that she had destroyed the tapes in the interim. First, the Supreme Court determined that this was an "exceptional case" warranting death penalty sanctions. Second, the court held that the trial court's order, which contained "an extensive, reasoned explanation" that less stringent sanctions would not be effective, was sufficient "because of the egregious conduct and blatant disregard for the discovery process demonstrated here." The Supreme Court held that the egregious conduct allowed the trial court to choose a more severe sanction than a spoliation instruction.

The Supreme Court addressed spoliation of evidence in *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718 (Tex. 2003), the falling reindeer case. While Mr. Johnson was shopping, one or more decorative reindeer fell on his head and arm, causing injuries. At issue was the composition and weight of the reindeer—the plaintiff claimed they were made of wood and very heavy; Wal-Mart claimed they were made of papier mache and very light. Wal-Mart could not produce a reindeer—they had all been sold, broken or thrown away. The plaintiffs obtained a spoliation instruction that told the jury to presume the reindeer, if produced, would be unfavorable to Wal-Mart if they found that Wal-Mart had possession of the reindeer at a time when they knew or should have known it would be evidence in the suit. Wal-Mart challenges the instruction. The Supreme Court characterized the issue as one of duty—did Wal-Mart know or reasonably should know that there was a substantial chance that evidence in its possession or control will be material and relevant to the claim. This mirrors the objective test of *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993) for when litigation may be reasonably anticipated. The court agreed with Wal-Mart that nothing about the accident or investigation immediately following indicated that there was a substantial chance that litigation would occur. The court rejected the plaintiff's argument that Wal-Mart's discovery privilege objections in this case were an admission that it anticipated litigation on the date of the accident. Nevertheless, one should be thoughtful about discovery objections and their possible effect upon spoliation issues. Thus, the Supreme Court found that the trial court erred in giving the instruction. It further found that the instruction caused harm, and reversed and remanded for a new trial.

The Supreme Court remains serious in prohibiting fishing expeditions in discovery. In *In re CSX Corp.*, 124 S.W.3d 149 (Tex.2003), the court applied the opinions cited in Comment 1 to Rule 292 and found the trial court abused its discretion in requiring a defendant to answer interrogatories “outside the applicable time period” In *CSX*, the plaintiff alleged toxic exposure to various chemicals while he worked for the defendant in 1958 and from 1972 to 1977. The interrogatories sought the identity of personnel with responsibilities for safety from 1970 to the present.

Likewise, in *In re American Home Assurance Co.*, 88 S.W.3d 370 (Tex. App. – Texarkana 2002, no pet.), the Texarkana Court of Appeals stopped a fishing expedition that sought discovery of materials relevant to the interpretation of an allegedly ambiguous contract, because the Texas Supreme Court had previously held that the pollution exclusion provision of the insurance contract at issue was not ambiguous. *See National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517 (Tex. 1995). The court of appeals sent the matter back to the trial court with instructions to allow the discovery only if the court found that the provisions in the policy were ambiguous.

The scope of discovery in employment discrimination cases was addressed in *In re Greyhound Lines, Inc.*, 2004 WL 730736 (Tex.App.—San Antonio 2004, no pet. history). The court of appeals held that in a claim for individual acts of discrimination, the plaintiff is not necessarily entitled to information about other employees, unless those other employees are “similarly situated.” Similarly situated generally means activity at the same plant or office, by the same supervisory personnel, and by the same pattern of conduct. This is distinguished from a claim against company-wide claims that the company has a pattern or practice of discrimination, where broader discovery is generally allowed. The plaintiff here alleged an individual claim, so discovery should be limited to the San Antonio terminal where she worked, and to employees similarly situated, and the trial court abused its discretion in ordering broader discovery. The time period is not limited to the time of her employment because the relevant information is the conduct of her supervisor. The court found that defendant did not waive the scope objection although the written objections were “not a model of clarity.” Further, the court found that there was no agreement to limit time period for 5 years, but the trial court did not abuse its discretion in so limiting the time period of discovery.

Rule 202 depositions were at issue in *In re Hochheim Prairie Farm Mut. Ins. Assn.*, 115 S.W.3d 793 (Tex.App.—Beaumont 2003, no pet.). The court of appeals granted mandamus to prevent an automobile accident victim from taking depositions relating to an anticipated suit against the insurer of the victim’s litigation opponent for negligent failure to settle, an unaccrued cause of action based upon anticipation that the victim might become the judgment creditor of the insured. Because there was no evidence of imminent loss of the witnesses’ testimony, the court of appeals held that the prejudice to the insurance company far outweighed any benefit.

The Eastland Court of Appeals addressed discovery sanctions in *In re Western Star Trucks US, Inc.*, 112 S.W.3d 756 (Tex.App.—Eastland 2003, no pet.). The court first held that allegations in plaintiff’s pleadings seeking recovery of exemplary damages was

sufficient to allow discovery of net worth. Next, the court found that the trial court abused its discretion in ordering the Nolan County deposition of defendant's employee, who lived and worked in Seattle, because there was nothing in the record to show that it was reasonable or convenient to require travel to Nolan County. Finally, the court held that the trial court's deemed finding that the parent was jointly and severally liable for all liability imposed on the subsidiary was unjust and excessive under the circumstances.

De-designation of experts was the issue in *In re State Farm Mutual Automobile Ins. Co.*, 100 S.W.3d 338 (Tex.App.—San Antonio 2002, pet. denied). The insurance company de-designated two witnesses as experts after the trial court that certain documents were discoverable, because the expert witness designation waived any privilege over the documents. The court of appeals held that the refusal to permit de-designation was not an abuse of discretion because the de-designation was after the trial court's ruling, and could have been for an improper purpose. However, the court found the trial court erred in finding the designation of a party as an expert waives the privilege on the documents at issue. The court followed the Ft. Worth court's opinion in *D.N.S. v. Schattman*, 937 S.W.2d 151 (Tex. App. – Fort Worth 1997, no pet.), which held that a privilege was waived for documents only if the document was prepared for the expert's testimony. The documents in question were prepared in anticipation of litigation, but not provided to or prepared for the party-expert's testimony in this case.

In *Vaughn v. Ford Motor Co.*, 91 S.W.3d 387 (Tex.App.—Eastland 2002, pet. denied), the trial court excluded all but one of the plaintiff's expert witnesses for failure to comply with TRCP 195 and the court's scheduling order. The plaintiff designated 97 experts and narrowed the list to 6 only shortly before trial. The plaintiff opposed the defendant's request for additional time to conduct discovery, and produced a report for only one of the 6 experts. Thus, the court of appeals agreed that the plaintiff's counsel was guilty of sanctionable conduct. However, the court found that the automatic exclusion sanction of Rule 193.6 did not apply because the experts were timely identified. Instead, the court analyzed the sanction under Rule 215 and found that excluding the testimony was excessive and an abuse of discretion. However, the court found that the exclusion did no harm because directed verdict for defendants was proper regardless of the expert testimony.

Late designation of experts was also addressed in *Frazin v. Hanley*, 130 S.W.3d 373 (Tex.App.—Dallas 2004, no pet.). The defendants designated their experts 50 days after the deadline for designating experts, but 8 days after plaintiff's counterclaim was filed and 31 days before trial. The court of appeals concluded that the trial court abused its discretion in excluding the experts for late designation because the late filing of the counterclaim made it impossible for the defendant to comply with the designation schedule. The designation made eight days later was "reasonably prompt" and there was no evidence of delay.

The court of appeals found that the trial court was within its discretion in refusing to exclude an expert's testimony for failure to supplement a change in an expert's opinion from "asbestosis with no impairment" to "asbestosis with mild impairment." The

defendant in *Norfolk Southern Railway Co. v. Bailey*, 92 S.W.3d 577 (Tex.App.—Austin 2002, pet. filed), was not unfairly surprised because it had the later pulmonary test, and allowed it to be admitted into evidence without objection. The revised diagnosis was a refinement or an expansion, not a new opinion.

In *Response Time, Inc. v. Sterling Commerce (North America), Inc.*, 95 S.W.3d 656 (Tex.App.—Dallas 2002, no pet.), the trial court struck the defendant's pleadings and imposed a \$50,000 sanction after the defendant's president admitted to fabricating important evidence produced in discovery. The court of appeals affirmed the sanctions under the *TransAmerican* standards. Of interest, the court found that the trial court did not err in imposing lesser sanctions before striking pleadings because the trial court had considered lesser sanctions but determined that lesser sanctions were not appropriate considering the defendant's egregious conduct.

Dismissal for Want of Prosecution

The Supreme Court considered a restricted appeal that argued that the trial court erred in dismissing the case for want of prosecution after the plaintiff failed to appear for a mandatory pretrial scheduling conference. The Supreme Court first followed *General Electric Co. v. Falcon Ridge Apartments*, 811 S.W.2d 942 (Tex. 1991), and held that it could not consider an affidavit that was not part of the trial court record, and that the failure of the record to affirmatively show that the notice of the order of dismissal was sent to counsel is not error on the face of the record. Next, the court held that the notice, satisfied the requirement for notice and opportunity to be heard required by Rule 165(1) governing dismissals for failure to appear. The notice warned the parties that the failure to attend the hearing would result in dismissal or sanctions as the court deems appropriate. Justice Schneider, joined by Jefferson and Smith, dissent because they believe Rule 165(1) requires a separate hearing before dismissal for want of prosecution, and prevents dismissal immediately after a single missed hearing without further notice.

The trial court's refusal to reinstate a case dismissed for want of prosecution after four years of almost no activity was affirmed in *Binner v. Limestone County*, 129 S.W.3d 710 (Tex.App.—Waco 2004, pet. filed). The plaintiff received a notice stating that the case would be dismissed if it were not tried or good cause shown why it should not be dismissed. The notice required appearance at a docket call on Dec. 27, 2001, but no appearance was required if a Motion to Retain was filed by Dec. 21. The plaintiff filed no motion, but called the clerk and asked that the case be set for trial instead of being dismissed. The plaintiff did not appear at the Dec. 27 hearing and the case was dismissed. The court of appeals characterizes the dismissal as one under the court's inherent authority to dismiss for failure to prosecute a case with due diligence and failure to prosecute within the applicable time periods. Thus, Rule 165a(3)'s standard for reinstatement, "conscious indifference", does not apply (it only applies for dismissal for failure to appear). The plaintiff made a showing that the failure to appear for the dismissal docket was not the result of conscious indifference, but she failed to address the failure to diligently prosecute her suit.

Forums

The Texas Supreme Court addressed the forum non conveniens statute, CPRC § 71.052, in *In re E.I. Du Pont de Nemours & Co.*, 92 S.W.3d 517 (Tex. 2002). The statute requires a court to dismiss an asbestos case filed by a non-resident plaintiff, arising outside of Texas, and commenced after 8/1/95 but before 1/1/97 unless the plaintiff agrees to a damages cap. The act applies to actions pending on 5/29/97 unless trial had already begun. The issue was whether the statute applied to cases where DuPont was added as a defendant on 9/10/96, and original defendants were sued well before 8/1/95. The court held that claims filed against one defendant did not relate back to the date that claims were originally filed against an earlier defendant, and held that a trial of severed plaintiffs did not mean that a “trial” had begun. Mandamus was appropriate because this was a mass tort case with thousands of claimants, litigation pending over 8 years, with no end in sight.

Billy Sims mortgaged his Heisman Trophy, then sold it to Goodman, who took it to Florida, and put it on the equivalent of E-Bay. The company holding the mortgage, Crown, was understandably upset and filed suit in Florida for a temporary injunction preventing the sale. The Florida court denied relief, so Crown filed suit in Texas to prevent the sale. Goodman filed a plea in abatement, asserting Florida’s dominant jurisdiction, which the trial court denied. In *Crown Leasing Corp. v. Sims*, 92 S.W.3d 924 (Tex. App.—Texarkana 2002, pet. denied), the court of appeals affirmed, holding that the trial judge did not abuse his discretion under principles of comity in staying proceedings until the Florida suit reached final judgment.

In another comity case, Texas plaintiffs employed by the State of New Mexico, filed a class action in Texas challenging the New Mexico state employee retirement plan. The court of appeals in *State of New Mexico v. Caudle*, 108 S.W.3d 319 (Tex.App.—Tyler 2002, pet. denied), the court of appeals held that the Texas courts were compelled to dismiss the case under principles of comity.

A forum selection clause in an employment contract containing a covenant not to compete was at issue in *Holeman v. National Business Institute, Inc.*, 94 S.W.3d 91 (Tex.App.—Houston [14 Dist.] 2002, pet. denied). The court of appeals rejected the plaintiff’s argument that *DeSantis v. Wackenhut Corp.*, (Tex. 1990) (refusing to enforce choice of law provision for covenant not to compete), and public policy requires invalidation of forum selection clauses in these contracts. Thus, the court evaluated the forum selection clause under Texas law, which enforces such clauses if (1) the parties have contractually consented, and (2) the other state recognizes the validity of the provision, unless the witnesses’ and public’s interests strongly favors jurisdiction in a forum other than the one selected in the contract. The trial court did not abuse its discretion in upholding the forum selection clause.

Panda Energy Corp. v. Allstate Ins. Co., 91 S.W.3d 29 (Tex.App.—Dallas 2002, pet. granted, judgment vacated w.r.m) concerns an anti-suit injunction issued more than 30

days after the judgment was signed, so after the trial court had lost plenary power. The court of appeals held that the trial court had jurisdiction to “cause its judgments and decrees to be carried into execution” under TRCP 308. This power is more limited than the power to grant anti-suit injunctions during the court’s plenary power, as set out in the Supreme Court’s opinion in *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649 (Tex. 1996). Here, the court found that the Johnson County proceeding did not interfere with execution of the final Dallas judgment—the Dallas judgment could be asserted as res judicata in the Johnson County trial court. Thus the anti-suit injunction was reversed.

Injunctions

In *In re Walkup*, 2003 WL 21805469 (Tex.App.—Houston [1st Dist.] 2003, no pet.), the court of appeals interpreted the meaning of the word “day” to Tex. R. Civ. P. 680, concerning temporary restraining orders. The rule provides that the TRO shall expire at a time “not to exceed 14 days” after it is signed. The TRO in this case was issued on 1/30/03 at 2:30 p.m. It was extended by an order signed on 2/13/03 at 4:12 p.m. Petitioners claim that the TRO expired 102 minutes before the extension was filed. The court of appeals disagreed, holding that “day” is a calendar day, “the 24-hour period of time beginning immediately after midnight of the previous day and ending at the next midnight.” Thus, the original TRO had not expired when extended.

Joinder

An intervenor has no duty to serve a defendant with citation if that defendant later makes a general appearance. In *Baker v. Monsanto*, 111 S.W.3d 158 (Tex. 2003), the intervenor mailed the petition in intervention to the defendant’s lawyer before the defendant answered, and never had a citation issued and served on the defendant. The trial court granted summary judgment for the defendant on limitations when the limitations period passed without the defendant being served. The Supreme Court reversed, holding that the defendant’s general appearance before limitations ran made citation and service unnecessary.

The Tyler and Texarkana Courts of Appeals were presented with those “rare indeed” situations where a party’s “presence in the suit is so indispensable to the resolution of a cause of action that their absence can deprive a court of jurisdiction. In *Gilmer Indep. School Dist. v. Dorfman*, 2003 WL 22047831 (Tex.App.—Tyler 2003, no pet.), the court found that the trial court did not have jurisdiction over a taxpayer’s suit to declare provisions of the Education Code unconstitutional when the taxpayer had not joined the commissioner of education as a defendant. In *Simpson v. Afton Oaks Civic Club, Inc.*, 117 S.W.3d 480 (Tex.App.—Texarkana 2003, pet. filed), the court found the fundamental error of lack of subject matter jurisdiction when the plaintiff did not join all property owners of the subdivision in the declaratory action seeking to invalidate a mandatory property owner’s association.

A similar issue was presented in *April Sound Management Corp. v. Concern Property Owners for April Sound, Inc.*, 2004 WL 573877 (Tex.App.—Amarillo 2004, no pet.

history), where the court of appeals reversed the trial court's summary judgment and held that the cause should have been abated until all property owners were joined. The suit was for declaratory judgment that the developers had the power under deed restrictions to change the maintenance charge for the subdivision. The court relied on the nature of property rights and also noted that this may be a situation where the failure to join all property owners deprives the court of jurisdiction.

Judges

In *In re Torres*, 130 S.W.3d 409 (Tex.App.—Corpus Christi 2004, no pet.), the court of appeals determined that it had no jurisdiction to issue mandamus against the regional presiding judge acting in that capacity in appointing a judge to sit in a case, following *In re Hettler*, 110 S.W.3d 152 (Tex.App.—Amarillo 2003, no pet.). Although the court had jurisdiction to issue mandamus against a district judge, the presiding judges are appointed by the governor and have different qualifications and duties than district judges.

F.S. New Products, Inc. v. Strong Industries, Inc., 129 S.W.3d 594 (Tex.App.—Houston [1st. Dist.] 2003, no pet.), addresses recusal and disqualification of appellate judges. After the opinion was issued, the appellant contended that the justice who authored the opinion was disqualified because the justice had worked for Baker Botts while Baker Botts represented the appellee. The appellant also sought to recuse the other justices on the panel because they participated in deciding the case with a disqualified justice. First, the court holds that the procedure for disqualification is the same as that for recusal, even though disqualification is not included in the rule—TRAP 16 provides that a challenged justice must remove himself or herself from all participation in the case and certify the matter to the entire court en banc. The en banc court held that the justice was not disqualified because the Constitution and statutes limit disqualification to when the *justice* has previously represented one of the parties. While TRCP 18b(1)(a), requires disqualification when a lawyer with whom the judge previously practiced serves as a lawyer, the court holds that TRCP 18a is not applicable to disqualification of appellate judges, distinguishing *In re O'Connor*, 92 S.W.3d 446 (Tex.2002). The court also declined to find grounds for recusal for the other justices on the panel.

In re Gonzalez, 115 S.W.3d 36 (Tex.App.—San Antonio 2003, no pet.), presents the unusual situation of a county judge constitutionally disqualified from sitting because he had previously worked as a lawyer on the case. The judge's order appointing the previous judge as the judge was affirmed because it simply put into place the agreement of the parties and did not involve the exercise of discretion—the Constitution allows the parties to agree to a special judge in such a situation. However, his order transferring the case to another county did involve discretion, therefore was void.

In *Parker v. Parker*, 2004 WL 221173 (Tex.App.—Fort Worth 2004, no pet.history), the trial judge left a voice mail message for counsel orally recusing himself. Later, however, he rescinded the recusal and ruled on a pending summary judgment motion. The party that lost the motion now contends that the orders are void. The court of appeals holds that since there was no order of recusal, no evidence of an order of recusal other than the

letter rescinding the recusal, no objection to the rescission of recusal, no motion for recusal following rescission, and no facts indicating any grounds for recusal, the party could not now complain.

In re Naylor, 120 S.W.3d 498 (Tex.App.—Texarkana 2003, no pet.), addresses an assigned judge removing himself from a case after a party filed an *untimely* objection under Section 74.053 of the Gov't Code. The statute requires that the objection be filed before the judge presides over any hearing—this objection was filed after the judge signed an order following a hearing. Clearly, mandamus would lie to require the judge to remove himself if he had not done so after a timely objection. But this is the opposite situation, and the court finds no mandatory language *requiring* the court to deny the motion and remain in place as the trial judge. Thus, mandamus is denied.

The overlapping jurisdiction of judges with jurisdiction over multiple counties was at issue in *In re McGuire*, 2004 WL 177898 (Tex.App.—Waco 2004, no pet.). The underlying case was filed in Leon County. Both the 278th District Court and the 87th District Court have jurisdiction over Leon County. The case was pending in the 87th District Court. The judge of the 278th District court signed an order for discovery sanctions, after hearing the motion in Walker County, where the 87th does not have jurisdiction. The court of appeals looks at the Constitution and applicable statutes and determines that the order is void for lack of jurisdiction. The judge unquestionably could hear the motion in any county in which the 87th has jurisdiction. But while an *assigned* judge can hear matters in his or her own court, the court of appeals finds that this was an exchange of benches, not an assignment. Thus, the judge was limited to acting in the counties over which the 87th has jurisdiction. Because the order was void and because the order for immediate payment of sanctions had the effect of adjudicating the dispute, mandamus was appropriate.

Judgments

Once again, the Supreme Court addresses the thorny issues of when a judgment becomes final. In *Moritz v. Preiss*, 121 S.W.3d 715 (Tex. 2003), the court first finds that the presumption of finality after a regular trial on the merits makes a judgment that omits a defendant final when it was signed. Next, the court concluded that an amended motion for new trial, filed 35 days after the judgment was signed and ultimately overruled, did not preserve any issues for appeal. An amended motion for new trial filed more than 30 days after the judgment is filed is untimely, and cannot be the basis for appellate review. An untimely motion's only purpose is to guide the trial court in the exercise of its inherent authority to grant a new trial before it loses plenary power.

In *Naaman v. Grider*, 126 S.W.3d 73 (Tex. 2003), the trial court signed a final judgment after a jury trial, while a motion for new trial and motion for judgment on the verdict were pending. Thereafter, the court held a hearing on these motions and signed an order granting the motion for judgment. The issue before the Supreme Court was whether the appellate deadlines ran from the date of the judgment or the date of the later order granting the motion for judgment. The court held that the order granting the motion for judgment was in no sense a judgment—it did not modify, reform or correct the

original judgment. The appellate timetable ran from the date of the original judgment and the appeal was not timely perfected.

In re Jackson Person & Assoc., Inc. 94 S.W.3d 815 (Tex.App.—San Antonio 2002, no pet.) presents the situation of a mandamus granted to stop a trial court's grant of a motion for new trial. The underlying suit was one to enforce a Tennessee default judgment. The trial court granted a new trial that attempted to put the parties back in the same position as they were before the Tennessee default judgment—in effect, it invalidated the Tennessee judgment because it found that the defendant had equitable reasons for its failure to answer that satisfied *Craddock*. However, the court of appeals holds that when a duly authenticated foreign judgment is filed in Texas, the trial court can do one of two things—enforce it or declare it void for want of jurisdiction. A new trial was not available.

In re Nasir, 2004 WL 594978 (Tex.App.—El Paso 2004, pet. filed) also concerns a trial court's grant of motion for reconsideration of a summary judgment after its plenary power expired. Here the trial court granted a summary judgment for defendants that disposed of all parties except one—a defendant who had never been served and did not answer. This situation is exactly the same as presented in *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230 (Tex. 1962), where the court held that the judgment was final. The court of appeals held that *Youngstown* survives *Lehman*, and the judgment was final when signed. The order setting aside the judgment was signed after plenary power expired, so was void.

In *Hawkins v. Howard*, 97 S.W.3d 676 (Tex.App.—Dallas 2003, no pet.), the court of appeals considered a trial court's order denying a motion for new trial following entry of an agreed judgment without hearing evidence. Because an agreed judgment is not invalidated by subsequent failure to perform a condition upon which consent is based, nor by the lack of a signature, the trial court was justified in refusing to hear evidence on these issues. However, the trial court should have heard evidence on alleged fraud in inducing the settlement agreement because a judgment obtained by fraud is voidable. Thus, the court of appeals remanded with instructions to conduct a hearing on this issue.

In *Panatrol Corp. v. Emerson Electric Co.*, 2004 WL 241512 (Tex.App.—San Antonio 2004, no pet. history), the court of appeals held that it had no jurisdiction because the notice of appeal was not timely filed. The issue was whether a summary judgment disposing of claims between a defendant and third-party contribution defendant was final when it was severed from the main claims. The court held that it was because the order disposed of all the claims between the parties in their entirety and severed them into a separate cause without reserving the right to enter a final judgment at a later time.

Lentino v. Frost National Bank, 2003 WL 23274536 (Tex.App.—Houston[14th Dist.] 2003, no pet. history), is a complicated situation involving claims, counterclaims, nonsuits, counter-counterclaims, interventions, and orders striking interventions. The court of appeals concluded that there was no order finally disposing of all of the claims and parties, thus it dismissed the case for want of jurisdiction.

In *Straza v. Friedman, Driegert & Hsueh, L.L.C.*, 124 S.W.3d 404 (Tex.App.—Dallas 2003, pet. filed), the court of appeals held that orders granting summary judgments were final although costs were not addressed, and stricken language in the order arguably showed that the judge did not intend for the orders to be final judgments. Thus, the court dismissed the appeal for failure to timely file the notice of appeal.

The judgment in *Fresh Coat Inc. v. Life Forms, Inc.*, 125 S.W.3d 765 (Tex.App.—Houston [1st Dist.] 2003, no pet. history), contained a “Mother Hubbard clause” (“All relief not expressly granted is denied”) and a statement that it was “a final judgment disposing of all parties and all issues.” The trial judge treated the judgment as a final judgment. Thus, the court of appeals held the judgment was final, and the notice of appeal was not timely filed.

A final judgment in a bill of review proceeding requires the court to deny any relief to the petitioner or grant the bill of review, setting aside the former judgment, and substituting a new judgment which properly adjudicates the original controversy. The judgment in *In the Interest of J.B.A.*, 127 S.W.3d 850 (Tex.App.—Fort Worth 2004, no pet.), only vacated the prior judgment without substituting a new judgment. The court had found that the prior judgment erroneously identified the petitioner as the father, but did not sign a new judgment addressing the issue of paternity.

The trial judge in *In re Helena Chemical Co.*, 2003 WL 22976519 (Tex.App.—Waco 2003, no pet. history), signed a summary judgment after learning that mediation had not been successful. Four days later the judge was informed that the parties were still talking, so the judge sent a letter saying “I will withdraw my ruling and the summary judgment previously signed.” Almost four months later the judge signed an interlocutory summary judgment, which the mandamus petitioners claim was made outside the court’s plenary power. The court of appeals holds that the letter was an order vacating the summary judgment. Justice Gray dissents, on grounds that the letter is not an order.

The Austin Court of Appeals affirmed continuing viability of the doctrine of the extinguishment of judgment debts (the extinguishment rule) under Texas law. In *Hageman v. Luth*, 2004 WL 314968 (Tex.App.—Austin 2004, pet. filed). It is a general principle of Texas law that, if two parties are jointly and severally liable on a judgment, the acquisition of the judgment by one judgment debtor extinguishes the judgment for all judgment debtors. This prevents one judgment debtor from satisfying the judgment and enforcing the judgment against the others. The court rejected the appellant’s arguments that the rule was inconsistent with the right of contribution and Texas’ rejection of the unity of release rule. The court also held that the judgment debtor’s discharge in bankruptcy did not extinguish the judgment debt, although it did make it legally unenforceable against him. Thus, the assignment of the judgment debt to the debtor who was discharged in bankruptcy discharged the debt, extinguished the judgment.

If you have ever needed a reason not to get involved with planning your high school reunion, read *Sprowl v. Taylor*, 2003 WL 57743 (Tex.App.—Dallas 2003, pet. denied)

(memorandum opinion). Sprowl handled the finances and refused to pay some bills. When questioned about it, she filed suit against her classmates for slander and libel because of what others had said about her during the course of reunion planning and afterwards. The classmates filed a class action in Louisiana seeking an accounting of the reunion funds, where they obtained a default judgment finding that she had misrepresented debts and was obligated to return \$2500 in reunion funds. The court of appeals affirmed the summary judgment against Sprowl because her claims in the Texas action were collaterally estopped by the Louisiana judgment, even though the Texas suit was filed first and she took a default without appearance in the Louisiana suit.

Jury

The en banc San Antonio Court of Appeals unanimously held that questions concerning juror bias against non-users of seat belts should be allowed where the evidence of seat belt non-use is relevant to the issues in the case. In *Vasquez v. Hyundai Motor Co.*, 119 S.W.3d 848 (Tex.App.—San Antonio 2003, pet. filed) (en banc), the court allowed the parties to ask the prospective jurors in two separate panels whether the non-use of seatbelts would be dispositive. The number of jurors who answered “yes” was so overwhelming that the court dismissed both panels, and refused to let the question be asked to the third panel. The court of appeals held that the court’s failure to allow the plaintiffs to ask the questions exposing the bias denied them their right to trial by a fair and impartial jury.

In *Styers v. Schindler Elevator Co.*, 115 S.W.3d 321 (Tex.App.—Texarkana 2003, pet. denied), the court of appeals addressed alleged errors in the jury selection process. The plaintiff claimed that four veniremen should have been stricken for cause. However, the court of appeals reviewed the record and found that the record supported the trial judge’s determination that they were willing to reach a decision only after weighing all of the evidence.

Jury Charge

In *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002) the Texas Supreme Court extended *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000) to damages questions submitted to the jury. The court held that when a particular element of damage is submitted to the jury, but has no support in the evidence, the error in submitting the unsupported element is harmful even though the amount of damages awarded is supported by the evidence on the other damage elements. The court applied the reasoning of *Casteel*—there is no way for the reviewing court to determine whether the jury based its award on an improperly submitted element of damages. Justices O’Neill, Hankinson and Enoch dissented.

Romero v. KPH Consolidation, Inc. (03-0497), which also raises the issue of feasibility of the broad form jury question, is currently pending at the Supreme Court. The court of appeals held that the trial judge erred in submitting a broad form apportionment question

predicated on either negligence or malicious credentialing. *KPH Consolidated, Inc. v. Romero*, 102 S.W.3d 135 (Tex.App.—Houston [14th Dist.] 2003, pet. granted).

The Supreme Court has also granted petition for review in *Southwestern Bell Telephone Co. v. Garza*, 58 S.W.3d 214 (Tex.App.—Corpus Christi 2001, pet. granted), where the Corpus Christi Court of Appeals affirmed a jury verdict over challenges of insufficient evidence, and excessive compensatory and punitive damages. The court also found that *Crown Life v. Casteel* did not invalidate a disjunctive jury question despite the defendant's claim that the question commingled valid and invalid liability theories. The court rejected the claim that one of the theories was not in the pleadings, finding that the petition gave "fair notice" of both theories.

Inferential rebuttals are before the Supreme Court in *Dillard v. Texas Electric Cooperative* (03-0655). Dillard's husband was killed at night on a rural highway when a car hit a dead cow, went airborne and hit Dillard's pickup. The cow had been hit by the Electric Coop truck a short time before. The owner of the cow was never found. The trial court gave the jury an unavoidable accident instruction, but refused to give a sole proximate cause instruction. The court of appeals reversed the plaintiff's judgment on the verdict, finding error in the refusal to instruct on sole proximate cause because it left them unable to consider fault by the owner of the cow. *Texas Electric Cooperative v. Dillard*, 2003 WL 1884296 (Tex.App.—Tyler 2003, pet. granted). The Supreme Court has granted the petition to determine whether the sole proximate cause instruction should be given, whether unavoidable accident applies only to non-human conduct, and whether a presumption of human conduct exists when livestock are on a public road.

In a termination of parental rights case, *In the Interest of B.L.D.*, 113 S.W.3d 340 (Tex. 2003), the supreme court held that a parent in a termination of parental rights case waives an unreserved charge error, rejecting the claim that the error was fundamental error. The error complained of was that the broad-form charge violated the parent's right to have 10 jurors agree to the specific statutory findings underlying the verdict. The court noted that the charge followed *Texas Dep't of Human Services v. E.B.*, 802 S.W.2d 647 (Tex. 1990), but also noted that the courts of appeals were divided on the issue of whether *E.B.*'s endorsement of broad-form was still correct. The Waco Court of Appeals in *B.L.D.* and in at least one other opinion, *In the Interest of A.F.*, 91 S.W.3d 410 (Tex.App.—Waco 2002), *rev'd*, 113 S.W.3d 363 (Tex. 2003)(following *B.L.D.*), held that *E.B.* should no longer be followed. In *In the Interest of J.F.C.*, 96 S.W.3d 256 (Tex. 2002), the parents also complained of the broad-form charge, but the court held that the evidence conclusively established parental conduct justifying termination, so any error in failing to submit an instruction regarding juror agreement on specific conduct was harmless.

The trial court in *Commercial Bank of Texas, N.A. v. Luce*, 92 S.W.3d 636 (Tex.App.—Beaumont 2002, no pet.) actually submitted a general charge to the jury. "Over the objections of both parties, and after rejecting proposed jury questions submitted by both parties, the trial court asked the jury the following question: 'On Walter Luce, Jr.'s claim against Commerical Bank of Texas for breach of contract do you find in favor of Walter

Luce, Jr., or Commercial Bank of Texas.” The court of appeals reversed the judgment on the verdict for Luce because it did not submit “controlling fact issues” and did not “instruct the jurors on the law.”

Medical Expert Reports

In *Walker v. Gutierrez*, 111 S.W.3d 56 (Tex. 2003), the Supreme Court addressed the grace period contemplated by section 13.01(g) of the Medical Liability and Insurance Improvement Act (art. 4590i). First the court finds that the grace period applies to inadequate but timely filed reports—thus, the plaintiff can use the grace period to cure an inadequate report. Next, the court holds that the court reviews the trial court’s grant or denial of a grace period under an abuse of discretion standard of review. The standard for allowing a grace period mirrors the standard of *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939), which applies to equitable motions for new trials after a default judgment. The question presented then is whether the plaintiff’s alleged mistake of law (the lawyer was mistaken about what the statute required the reports to contain) was sufficient to excuse the inadequate report. The court holds that some mistakes of law will negate a finding of conscious indifference or intentional conduct, not all mistakes of law will do so. The plaintiff’s attorney’s mistake of law here was not enough—the statute is clear as to what it requires and the report obviously was missing two of the three requirements. The court also held that the dismissal as a sanction did not violate due process. The trial court did not abuse its discretion in not allowing a grace period and in dismissing the plaintiff’s claims.

New Trial

GJR Management Holdings, L.P. v. Jack Raus, Ltd., 126 S.W.3d 257 (Tex.App.—San Antonio 2003, pet.denied), reviews a motion for new trial for newly discovered evidence. The suit was to vacate an arbitration award on grounds of arbitrator misconduct and gross mistake. The trial court confirmed the award, and the appellant filed a motion for new trial claiming newly discovered evidence of arbitrator partiality. The trial court denied the motion and the court of appeals affirmed, holding that the appellant had failed to show (1) that the evidence came to appellant’s knowledge after trial, because the information was presented to appellant before the date of the judgment; (2) the motion does not show due diligence because the information was publicly available almost a year before this trial concluded; and (3) there is no showing that the information is so material that it would have produced a different result—because there was no record of the evidence presented at the arbitration hearing or the motion for new trial, the court cannot determine how the new evidence would bear on the issue.

The trial court abused its discretion in denying a new trial to a defendant that did not get notice of the trial date. *Pressel v. Jenkins*, 125 S.W.2d 807 (Tex.App.—Texarkana 2004, no pet.). The notice of trial was sent to the defendants by certified mail, returned unclaimed, and by regular mail, which was not returned. The defendants denied receiving any notice of the trial date. Regular mail is not an authorized method of

service, and the plaintiffs offered no proof of selective acceptance/refusal of certified mail.

Personal jurisdiction.

There is a conflict between the courts of appeals as to whether filing a Rule 11 agreement before filing a special appearance is a general appearance that waives the special appearance. The 14th Court of Appeals held that it was not a general appearance. *Angelou v. Afr. Overseas Union*, 33 S.W.3d 269 (Tex.App.—Houston [14th Dist.] 2000, no pet.). The Corpus Christi Court of Appeals last year held that it was a general appearance. *Exito Electronics Co. v. Trejo*, 99 S.W.3d 350 (Tex.App.—Corpus Christi 2003, pet. filed). This year, in *Crystalix Group International, Inc. v. Vitro Laser Group USA, Inc.*, 127 S.W.3d 425 (Tex.App.—Dallas 2004, pet. filed), the Dallas Court of Appeals weighs in with the Houston court, holding that under *Dawson-Austin v. Austin*, 968 S.W.2d 319 (Tex. 1998), the Rule 11 agreements that did not change the status of a TRO nor requested any action from the court, did not invoke the jurisdiction of the court and was not a general appearance.

In *Allianz Risk Transfer (Bermuda) Ltd. v. S.J. Camp & Co.*, 117 S.W.3d 92 (Tex.App.—Tyler 2003, no pet.), the court of appeals found that the defendant had waived the special appearance by filing it one minute after filing the motion to transfer venue and answer. The court also held that the defendant was subject to jurisdiction of the court under due process analysis because the transaction involved a contract with a Texas corporation that contemplated suit in Texas and the application of Texas law.

In *Dowdy v. Miller*, 122 S.W.3d 816 (Tex.App.—Amarillo 2003, no pet.), the court addressed a claim of specific jurisdiction over a person sued in his individual capacity for breach of a lease by a corporation of which he was an officer and director. The court of appeals reversed the trial court's denial of the special appearance, finding that the non-compete agreement signed with the original lease did not satisfy the standard for specific jurisdiction, and rejecting an argument that control persons of foreign corporations were automatically subject to personal jurisdiction in Texas. There are not allegations of alter ego, misrepresentations or other evidence that indicates that the individual defendant conducted individual tortuous activities towards Texas.

In *North Coast Commercial Roofing Systems, Inc. v. RMAX, Inc.*, 130 S.W.3d 491 (Tex.App.—Dallas 2004, no pet. history), an Ohio corporation contacted the South Carolina office of a Texas corporation to purchase materials that were manufactured in Texas. The purchase was made on a credit account established many years earlier in Texas. The invoices showed that payment was to be made in Texas and disputes were governed by Texas law. The court of appeals held that these were sufficient contacts for specific jurisdiction for the claim for failure to pay the full purchase price charged to the credit account. Further, the court held that the assertion of jurisdiction comports with fair play and substantial justice.

In *Equitable Production Co. v. Canales-Trevino*, 2004 WL 383484 (Tex.App-San Antonio 2004, no pet. history), the decedent was killed in Kentucky while working for Schlumberger, a Texas corporation, which was performing services for Equitable, which had its headquarters and principal place of business in Houston. After the accident, but before suit was filed, Equitable merged with another company and closed its Houston office. Only one employee was left in Houston, an accountant who was working on the transition. Equitable filed a special appearance, which the trial court overruled. The court of appeals affirmed. First, the court of appeals held that there was no specific jurisdiction because there was no nexus between the claims and the contacts with the forum. However, the court held that Equitable continued to have continuous and systematic contacts with Texas, justifying the imposition of general jurisdiction. The relocation was merely one fact to consider.

In *Moni Pulo Ltd. v. Trutec Oil & Gas, Inc.*, 2003 WL 22077177 (Tex.App.—Houston [14th Dist.] 2003, no pet. h.), the court of appeals reversed the trial court's denial of the Nigerian defendant's special appearance in a lawsuit filed by a Nigerian plaintiff concerning agreements related to developing Nigerian oil fields. Because the causes of action do not arise from funds passing through Texas bank accounts, the only related Texas contact, there is no specific jurisdiction. And the court finds that other Texas contacts are insufficient for general jurisdiction. Moreover, even if the contacts were sufficient for general jurisdiction, the court finds that exercising jurisdiction would offend notions of fair play and substantial justice.

In *Yfantis v. Balloun*, 115 S.W.3d 175 (Tex.App.—Fort Worth 2003, no pet.), the court of appeals reversed the denial of the Nevada defendant's special appearance. The court first found that the defendant's contacts with Texas, including his position as an officer/director of a Texas corporation (that was not his alter ego) were not sufficient to confer general jurisdiction. The court also declined to find specific jurisdiction for the constructive trust suit at issue. While Texas might have jurisdiction over the defendant for breach of the contract with Texans, those contacts could not confer jurisdiction over a different cause of action.

In *Zamarron v. Shinko Wire Co.*, 125 S.W.3d 132 (Tex.App.—Houston [14th Dist.] 2003, pet.denied), the court of appeals affirmed the trial court's grant of the Japanese corporation's special appearance. The court found conflicting evidence concerning the defendant's contacts with Texas from which the cause of action arose, and thus followed the trial court's resolution in favor of the defendant. It found that the evidence did not support general jurisdiction either as the alter ego of Texas corporations or through continuous and systematic activity in Texas. Further, it found that the defendant had not filed a lawsuit in Texas arising from same the same general transaction as this one.

In *Silbaugh v. Ramirez*, 126 S.W.3d 88 (Tex.App.—Houston [1st Dist.] 2002, no pet.), the trial judge filed findings of fact and conclusions of law supporting her denial of the special appearance nine days after the deadline. Because there was no showing of harm, the court of appeals considered the late filed findings and conclusions. First, the court of appeals continued its refusal to follow Texas Supreme Court dicta in *Austin v. Dawson-*

Austin, and held that the defendant's use of discovery unrelated to the special appearance did not waive the special appearance. But the court of appeals agreed that the defendant was subject to specific personal jurisdiction in Texas, despite not having any physical presence in Texas, because she had used "wire communications" to conduct business in Texas.

D.H. Blair Investment Banking Corp. v. Reardon, 97 S.W.3d 269 (Tex. App.—Houston [14th Dist.] 2002, pet. dismissed w.o.j.) involved claims of investor fraud against two non-resident officer/directors of the company and the company's underwriter for the deal. The court of appeals found that the underwriter was not subject to Texas jurisdiction because any contacts with Texas were a fortuitous result of another entity's solicitation of Texas investors. The two individuals did have sufficient contact with Texas, however, because they made statements at meetings in Texas to induce Texans to invest. The court refused to apply the "fiduciary-shield doctrine."

In *French v. Glorioso*, 94 S.W.3d 739 (Tex.App.—San Antonio 2002, no pet.), the court of appeals reviewed the trial court's finding that a Louisiana lawyer who filed suit in Louisiana on behalf of Texas plaintiffs did not have sufficient contacts for jurisdiction in Texas in the subsequent legal malpractice suit. Here the court of appeals presumed that the non-resident defendant did not make the liability producing statement to the plaintiffs, and found sufficient evidence, although conflicting, to support the finding.

In *Ryone Manufacturing Corp. v. Republic Industries, Inc.*, 96 S.W.3d 636 (Tex.App.—Texarkana 2002, no pet.) the Pennsylvania defendant manufactured countertops for a Texas company and installed them in New York and Connecticut. Apparently, the countertops had problems, and the Texas company sued the Pennsylvania defendant in Texas. As is often the case, the dealings between the companies were by phone, fax and mail, not in person. The court of appeals found that the defendant was subject to Texas jurisdiction because it originally solicited the Texas company's business, from which the lawsuit ultimately arises.

In *Botter v. American Dental Assn.*, 124 S.W.3d 856 (Tex.App.—Austin 2003, no pet.), the court of appeals affirmed the trial court's grant of the defendant dental association's special appearance in a case claiming birth defects were caused when a woman had fillings put in her teeth while pregnant. The court finds that the ADA's testing and approval of dental products that may be sold in Texas is not a purposeful contact with Texas, so there is no specific jurisdiction. Moreover, the ADA's activities in Texas is not sufficient to provide a basis for general jurisdiction.

A professional baseball player (Detroit Tigers) received physical therapy in Texas (at his request) following elbow surgery in Detroit. He sued his Detroit doctor who prescribed the physical therapy in Texas. The trial court granted the doctor's special appearance and the court of appeals affirmed, calling it a "close case," in *Brocail v. Anderson*, 2004 WL 438672 (Tex.App.—Houston [14th Dist.] 2004, no pet. hist.).

The Waco court of appeals has expressed concern for an appellant challenging the denial of a special appearance having to incur the expense and expense of discovery pending resolution of the interlocutory appeal. Thus, in *Lattin v. Barrett*, 127 S.W.3d 276 (Tex.App.—Waco 2003, no pet.), it ordered all discovery at the trial court be stayed pending final determination of the interlocutory appeal.

Pleadings

Trespass-to-try-title is the exclusive means to resolve a boundary dispute. Thus, a declaratory judgment action to declare the boundary is not proper, and an attorney's fee award is not available. *Martin v. Amerman*, 2004 WL 326679 (Tex. 2004)(resolving a conflict between the courts of appeals).

In *Community Bank & Trust, S.S.B. v. Fleck*, 107 S.W.3d 541 (Tex. 2002), the Texas Supreme Court held that a plaintiff was entitled to summary judgment against a bank in a claim for wrongfully paying forged checks. The bank had defended by asserting the failure to provide notice of the forgeries within the time required by the deposit agreement. However, the bank had failed to specifically deny the plaintiff's Rule 54 allegation that all conditions precedent had been satisfied, so the plaintiff was relieved of her burden to prove notice.

In an opinion that seems written for the purpose of going into a Texas civil procedure casebook, Justice Brister, while on the 14th Court of Appeals, holds that "misidentification" is an issue that must be raised by a Rule 93 verified pleading (whether labeled "capacity" or "defect of parties"). *CHCA East Houston, L.P. v. Henderson*, 99 S.W.3d 630 (Tex. App.—Houston [14th Dist] 2003, no pet.). Thus, the issue is not one of "standing" that may be asserted for the first time on appeal, or of part of the facts to be proven at trial and subject to objection for the first time at trial.

A sanction against a DTPA plaintiff for filing a frivolous suit was upheld in *Mosk v. Thomas*, 2003 WL 22901046 (Tex.App.—Houston [14th Dist] 2003, no pet.). The court found no abuse of discretion. The suit was groundless in law because the plaintiff was not a consumer and thus not authorized to bring suit under the DTPA. The concurring opinion notes that the DTPA sanctions provision is different from Rule 13.

Privileges

The Texas Supreme Court clarified the procedure and proof requirements for claiming privileges in response to discovery requests in *In re E.I. DuPont de Nemours & Co.*, 2004 WL 1087321 (Tex. 2004). In response to a request for production, and upon request, the defendant provided a Rule 192.5 privilege log describing documents withheld. The plaintiffs then requested a hearing and the defendant filed an affidavit of a paralegal identifying the names of persons listed on the privilege log as "legal" and "non-legal" personnel. The affidavit is set out in detail and should be used as a form for affidavits of this type in the future. The court holds:

- (1) if a party asserting privilege claims makes a prima facie showing of privilege and tenders the documents to the trial court, the trial court must conduct an in camera inspection of those documents before deciding to compel production;
- (2) The prima facie standard requires only the minimum quantum of evidence necessary to support a rational inference that the allegation is true. The documents themselves may constitute sufficient evidence to make a prima facie showing;
- (3) An affidavit filed with the privilege log can address groups of documents rather than each document individually. However, an affidavit that merely presents global allegations that documents come within the asserted privilege are of no probative value. The affidavit here sets forth the factual basis of the applicability of the privilege at issue and is sufficient with the log to make a prima facie showing of privilege;
- (4) An affiant's acknowledgement of the sources from which he gathered his knowledge (the human resources database for the legal department), does not violate the personal knowledge requirement;
- (5) Trial court did not abuse its discretion in holding a hearing after plaintiffs' global challenge to the privilege log. Rule 193.4(a) does not require the party seeking discovery to specify their rationale for objecting to each document identified in the privilege log before requesting a hearing. A trial court also would not abuse its discretion in requiring more specific objections at the hearing or otherwise to promote judicial economy;
- (6) The trial court was correct in not compelling production of the legal only documents; erred in failing to review in camera the legal/non-legal documents; and was correct in compelling production of the non-legal only documents as there was no prima facie showing of privilege for those documents

The Texas Supreme Court further defined the TRCE 507 trade secret privilege in *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730 (Tex. 2003) and *In re Bass*, 113 S.W.3d 735 (Tex. 2003), expanding on the 1998 opinion of *In re Continental General Tire*, and once again refused to allow discovery.

In *Bridgestone/Firestone*, the court reviewed the showing that the party seeking discovery must make to overcome the privilege by showing that discovery is necessary for a fair adjudication of the claim. The court rejects the defendant's argument that discovery should be precluded absent a showing that the requesting party cannot prevail without the trade secret information. Instead, the court held that the party seeking the information must provide detailed information, not merely asserting unfairness but demonstrating with specificity exactly how the lack of information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than merely possible, threat. Justice O'Neill, joined by Schneider, concurs, seeking to provide more useful guidance to the bench and bar.

In *Continental General Tire*, the court looked at the definition of "trade secrets." It applied the Restatement (Third) of Unfair Competition § 39 cmt. d, and endorsed a "comparative evaluation of all the relevant factors, including the value, secrecy, and definiteness of the information as well as the nature of the defendant's misconduct." The

court rejected the strict application of the six-factor test set out in Restatement of Torts §757 cmt B (1939) in favor of the more flexible approach of the newer Restatement and majority of other jurisdictions. Applying this standard, the court determined that seismic and its interpretations are trade secrets. The court further found that the data was not necessary for fair adjudication because it determined that the record did not establish the existence of a duty necessary for a valid claim for breach of implied covenant to develop or a breach of fiduciary duty.

The proper procedure for claiming privilege was at issue in *In re Lincoln Electric Co.*, 91 S.W.3d 432 (Tex.App.—Beaumont 2002, pet. denied). The defendant was served with a deposition notice and subpoena duces tecum, and in response filed a motion for protective order, then objections to the requested documents, and finally a privilege log and produced documents for in camera inspection. The trial court found that privileges were waived. The court of appeals conditionally granted mandamus relief, noting that Rules 192.6, 193.2 and 193.3 show significant effort by the rules drafters to avoid waiver.

In *In re Jobe Concrete Products, Inc.*, 101 S.W.3d 122 (Tex.App.—El Paso 2002, pet. denied), the trial court sustained the plaintiffs’ “human subjects protection privilege” when they refused to produce the underlying phone lists from a telephone survey that their testifying expert conducted for the litigation. The court of appeals conditionally granted mandamus. The court held that the Code of Federal Regulations does contain a general policy for the protection of human research subjects conducted or supported by a federal department or agency. However, there is no evidence that the regulations even apply to the research conducted for the litigation and there is no privilege mentioned in the regulations. Further, public policy does not create a privilege in this case.

The medical peer review privilege was at issue in *In re Tollison*, 92 S.W.3d 632 (Tex.App.—El Paso 2002, pet. denied). In the underlying case, the plaintiffs had obtained copies of the peer review records from the public records of a federal lawsuit, where the hospital had filed them in defense of another suit. The court of appeals reluctantly held that the trial court did not abuse its discretion in refusing to allow the plaintiff to use the records in a deposition to cross-examine the defendant, following *In re University of Texas Health Science Center at Tyler*, 33 S.W.3d 822 (Tex. 2000)(holding that voluntary disclosure did not waive peer review privilege). Nevertheless, neither the trial court nor the court of appeals were happy about this decision. The court of appeals observed that “it seems unfair and illogical that this statute could prevent plaintiffs from using information available to, and punishable by, any newspaper reporter. Common sense dictates there must be some point at which privilege ceases to serve its intended purpose.

In re Toyota Motor Corp., 94 S.W.3d 819 (Tex.App.—San Antonio 2002, pet. denied) contains a document by document discussion of the court of appeals’ analysis of work product and attorney-client privilege claims on documents submitted for in camera review. Probably the most interesting part of the discussion is the court’s refusal to allow production of test results contained in communications between counsel. “Although the communications contain material relevant facts, the plaintiffs must find another discovery

approach to obtain those test results.” Justice Hardberger dissented because the test results had been requested, and no one had been able to determine whether they had been produced in other documents or not. He notes that “Toyota cannot cloak the test results with a privilege by attaching the results to an attorney communication or enclosing it in a binder.”

The Supreme Court addresses the phrase “possession, custody, or control” that governs the duty to produce documents in *In re Kuntz*, 124 S.W.3d 179 (Tex. 2003). In a divorce case, Wife requested Husband to produce documents that were in his custody, but were the property of his clients, and for which he was obligated to maintain confidentiality. The plurality opinion held that his mere access to the documents does not constitute physical possession under TRCP 192.7(b). The opinion notes that if Wife wants the documents, she should get them from the client, not Husband. Justice Hecht, joined by Owen, Schneider and Wainwright, concurred, and would also hold that Wife was not entitled to the documents because they were trade secrets. Justice O’Neill concurred in the judgment only.

Sealing Orders

The San Antonio Court of Appeals addressed Rule 76a as it related to sealing documents submitted for *in camera* review and sealing an entire file, in *Roberts v. West*, 123 S.W.3d 436 (Tex.App.—San Antonio 2003, pet.denied). The court first held that confidential documents that the plaintiff allegedly stole from the defendant, submitted for *in camera* review on request of the defendant as part of a motion to return the documents, were not “court records” subject to Rule 76a. The court analogized the situation to that of discovery submitted for *in camera* review, and found that they were properly sealed without the 76a procedure. Next the court determined that the court’s orders sealing and then unsealing the entire record of the case were not valid because they did not satisfy the Rule 76a procedure. Thus, the court remanded to the court of appeals, with the record remaining under seal until further order of the trial court.

Service of Process

In *North Carolina Mutual Life Ins. Co. v. Whitworth*, 124 S.W.3d 714 (Tex.App.—Austin 2003, pet.denied), the court reviewed by restricted appeal a \$1,725,000 default judgment. The restricted appeal looks to see if there is any error reflected in the record. Because the address where the citation was served and the party on whom it was served reflected in the return of service differ from that set out in the petition, the default judgment is invalidated, despite indications that the right company actually did receive the citation. There is substantial discussion over the misnomer rule, concluding that the omission of “Life” in the defendant’s name was significant absent a contrary showing.

The Supreme Court addressed the misnomer rule in *Flour Bluff Indep. School Dist. v. Bass*, 2004 WL 389428 (Tex. 2004). The Supreme Court holds that the statute of limitations will be tolled if there are two separate but related entities that use a similar trade name and the correct entity has notice of suit and was not misled or disadvantaged

by the mistake. Here, Bass filed her judicial petition for review of her worker's compensation claim denial against the wrong party—the Texas Assn. of School Boards instead of the Flour Bluff School District. Since she did not sue Flour Bluff within the statute of limitations, summary judgment was appropriate.

In *Tate v. Beal*, 119 S.W.3d 378 (Tex.App.—Fort Worth 2003, pet. denied), the court of appeals reversed a summary judgment for defendant granted on limitations—the defendant was served three months after suit was filed and limitations ran. The court found that the evidence raised a fact issue concerning whether the plaintiff used due diligence in effecting service.

In *Kindle v. Wood County Electric Co-op, Inc.*, 2004 WL 212571 (Tex.App.—Tyler 2004, pet. filed), the court of appeals affirmed summary judgment for defendant granted on limitations. The defendant filed a traditional motion for summary judgment on the affirmative defense of limitations, establishing that it had been served three and one-half months after suit was filed. Although the defense was not in the defendant's pleadings and raised only in the summary judgment, the plaintiff waived any objection by not objecting in the response to the motion or before judgment. Summary judgment was justified because the plaintiff did not produce any summary judgment evidence to explain the delay in service.

In *All Commercial Floors, Inc. v. Barton & Rasor*, 97 S.W.3d 723 (Tex.App.—Fort Worth 2003, no pet.), a default judgment was overturned because the record shows that the return receipt for certified mail service was not signed by the addressee or registered agent. The corporation is not capable of being served, except through its agents, so a return of service stating that the corporation had been served, without stating the person served, does not satisfy the rules.

Another return receipt signed by someone other than the registered agent was problematic in *Ramirez v. Consolidated HGM Corp.*, 124 S.W.3d 914 (Tex.App.—Amarillo 2004, no pet.). Raised in a motion to quash, the defendant later answered, but then filed a motion for summary judgment on grounds of limitations, claiming lack of diligence in service. The court of appeals affirmed summary judgment—the plaintiff did not validly serve the defendant before the defendant moved to quash service, years after the accident. The defendant did not investigate any service problems although the defendant did not make an appearance for three years.

In *TAC Americas, Inc. v. Boothe*, 94 S.W.3d 315 (Tex.App.—Austin 2002, no pet.), the process server's return contains a time conflict—the citation was apparently served before the process server received it. This failure to strictly comply with the rules invalidated the default judgment.

Subject Matter Jurisdiction

A divided Supreme Court clarified the procedure for determining pleas to the jurisdiction in *Texas Dept. of Parks & Wildlife v. Miranda*, 2004 WL 726901 (Tex. 2004). In this

case the jurisdictional issue was based upon sovereign immunity—the court had jurisdiction only if the Department was guilty of gross negligence. The trial court denied the plea and the court of appeals affirmed because the plaintiffs adequately pled gross negligence and held that the trial court was not authorized to inquire into the substance of the claims unless the Department alleged that the allegations were plead as a sham for wrongfully obtaining jurisdiction. The majority (Wainwright opinion, joined by Phillips, Hecht, Owen, and Smith) reversed, holding that the trial court was required to examine the evidence upon which the parties relied to determine if a fact issue existed regarding the alleged gross negligence. The court recognizes that a plea to the jurisdiction can challenge pleadings or can challenge the existence of jurisdictional facts. When the plea challenges pleadings, the court is to determine if the pleader alleged facts affirmatively demonstrating the court’s jurisdiction. If the pleadings are insufficient, the plaintiff should be afforded the opportunity to amend, unless the pleadings affirmatively negate jurisdiction. If the plea challenges the existence of jurisdictional facts, however, the court considers relevant evidence submitted by the parties—the court decides the fact issue. If the jurisdictional facts implicate only jurisdiction, the court exercises discretion in deciding whether the determination should be made at a preliminary hearing or await fuller development of the case, mindful that the decision must be made as soon as practicable. But if the jurisdictional challenge implicates the merits of the case, the court reviews the relevant evidence to determine if a fact issue exists, much like the resolution of a summary judgment. If the evidence creates a fact issue, the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact-finder. If the relevant evidence is undisputed or fails to raise a fact question, the trial court rules on the plea as a matter of law. In this case, the majority holds that the plaintiffs’ pleadings stated a claim for gross negligence, satisfying the pleading requirements for jurisdiction. But, the majority holds that evidence in the record establishes that the department was not grossly negligent and that the plaintiffs failed to raise a fact question regarding gross negligence. Thus, the court lacked subject matter jurisdiction.

Justice Jefferson dissents on two grounds. He would hold that a plea to the jurisdiction that implicates the merits should be decided only on the basis of pleadings and not evidence. He would also hold that the plaintiffs had not adequately pled gross negligence, and would remand to allow them to attempt to replead. Justice Brister, joined by O’Neill and Schneider, would not use the plea to the jurisdiction as a vehicle to challenge jurisdiction. Instead, they would have the defendant file special exceptions to challenge jurisdictional pleadings and motion for summary judgment to challenge the evidence supporting those pleadings. He would remand to allow the Department to specify whether the plea is based upon pleadings or evidence and file the proper motion.

In a law-school-worthy fact situation, the San Antonio Court of Appeals finds itself addressing the subject matter jurisdiction of the county court in an appeal from small claims court. In *Oropeza v. Valdez*, 2004 WL 431491 (Tex.App.—San Antonio 2004, no pet. history), Plaintiff obtained a judgment in small claims court for \$4950 because Defendant sold his car without his consent. Defendant appealed by trial de novo to the county court at law. Plaintiff won again, this time for \$5600. An attempt to appeal this judgment to the court of appeals was dismissed because the court of appeals had no jurisdiction over an appeal of a judgment from the county court rendered on appeal from

the small claims court. The defendant then filed an application for injunction in district court claiming the county court judgment was void because it was in excess of the jurisdictional limit of the small claims court. The court dismissed the claim. The court of appeals held that the judgment was not void, and thus not subject to collateral attack, because the petition sought damages for an amount within the small claims court's jurisdictional limits. Once the county court's jurisdiction was invoked, the court was empowered to grant complete relief, even if in excess of jurisdictional limits. Note that the court says only that the judgment is not void for lack of jurisdiction. It did not say it was correct—that would be reviewable only on direct attack by appeal, which was not available.

The 1st Court of Appeals also addressed its subject matter jurisdiction over cases tried de novo in the county court on appeal from the small claims court. In *In re Jones*, 2004 WL 585917 (Tex.App.—Houston [1st Dist.] 2004, no pet. history), the court held that its lack of jurisdiction to hear an appeal in such a case could not be used to satisfy the no-adequate-remedy-by-appeal requirement for mandamus. Otherwise, the mandamus power would effectively circumvent the legislative restriction upon the court's appellate jurisdiction.

In yet another case involving appeals to the county court from the small claims court, *Morin v. Boecker*, 122 S.W.3d 911 (Tex.App.—Corpus Christi 2003, no pet.), the appeal had been dismissed for failure to timely pay filing fees. The court of appeals finds that proper notice was not sent because it was sent to the party, not to the attorney in charge as Rule 8 requires.

Sufficiency of Evidence

In *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757 (Tex.2003), Justice Owen's opinion establishes a standard for factual sufficiency review of a jury's verdict on an element of damages that is zero or too low. The court rejected the "zero damages" rule, which generally provides that once a jury has found an injury and some resulting damages, the failure to compensate for non-economic damages such as pain and suffering is against the great weight and preponderance of the evidence. Instead, the court should look carefully at the evidence for each category, recognizing that often evidence supporting non-economic damages is overlapping. The court approves a specific instruction that informs juries that they should not compensate twice for the same loss, and articulates a standard of review that ensures that juries zero damage verdicts are not being reversed when the jury may have compensated the plaintiff under a different category of damages. When only one category of damages is challenged, the court should consider only the evidence unique to that category of damages to determine if the verdict is so against the great weight and preponderance as to be manifestly unjust. The court is not to consider evidence that is applicable to other categories of damages that overlap with the challenged category. If the verdict in more than one overlapping category of damages is challenged, the court should first look at each individual category with evidence unique to it. If the evidence is not factually sufficient to support the verdict, then the court should consider all of the overlapping evidence to determine if it is

factually sufficient to support the total amount of damages awarded in all the challenged categories. Justices O’Neill and Schneider concur, stating that they would apply a straightforward requirements of *Pool v. Ford Motor Co.* and come to the same result.

In a termination of parental rights case, *In the Interest of J.F.C.*, 96 S.W.3d 256 (Tex. 2002), the supreme court, again Justice Owen writing the opinion, articulates the standard for legal sufficiency review for the clear and convincing standard of proof. The “court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that the its finding was true.” Further, the court “should disregard all evidence that a reasonable factfinder could have disbelieved or found to be incredible.” The factfinder does not disregard undisputed facts that do not support the finding. The court then conducted this analysis on the deemed finding that termination was in the best interest of the child, finding legally sufficient evidence to support the finding. The court held that the legal sufficiency analysis is required when a finding is deemed to support the judgment. However, factual sufficiency review is required on a deemed finding only if it is preserved in the trial court. Justices Hankinson, Schneider and Enoch dissented.

In *St. Joseph Hospital v. Wolff*, 94 S.W.3d 513 (Tex. 2002), the supreme court elaborated on its holding in *Osterburg v. Peca*, 12 S.W.3d 31 (Tex. 2000). In *Osterberg*, the court held that the reviewing court should measure the sufficiency of the evidence against the jury charge that was actually submitted when the opposing party fails to object to the charge. In *St. Joseph*, the defendant properly preserved error to the defective charge. Thus, the court measured the legal sufficiency of the evidence supporting the finding against the *correct* charge. Justice O’Neill and Chief Justice Phillips concurred. Justices Enoch and Hankinson dissented. Justices Rodriguez and Schneider did not participate. Justice Mosely of the 5th Court of Appeals sat by designation.

In *Kerr-McGee Corp. v. Helton*, 2004 WL 224458 (Tex. 2004), the Supreme Court considered the reliability of expert testimony. Oil and gas lessors brought suit for breach of the implied covenant to prevent drainage. In a bench trial, the lessor’s sole evidence of damages was expert testimony of the amount of gas a hypothetical offset well would have produced. The trial court rendered judgment for the plaintiffs and the defendant argues that there is no evidence of damages. First, the court held that the objection to the reliability of the expert’s testimony made after cross-examination was timely—a pretrial objection, or objection before the testimony is admitted, is not required. The court also overruled other points relating to the defendant’s failure to preserve error. Then the court held that the testimony was not reliable, even though the data was generally relied upon by petroleum engineers to estimate production, and the underlying facts and data was accurate, because of an “analytical gap between the data and Riley’s conclusions for the conclusions to be reliable and therefore some evidence.” The court refused to remand in the interest of justice.

The Supreme Court addressed the timing of an objection to the unreliability of expert testimony again in *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 2004 WL 1091423 (Tex. 2004). There the defendant did not object either to the expert’s

qualifications or to the reliability of his testimony. Instead, in its motion for directed verdict, the defendant claimed that the testimony was no more than a “bare conclusion” that was “factually unsubstantiated” and therefore constituted no evidence of conscious indifference to support the plaintiff’s gross negligence claim. The court of appeals held that the defendant waived the right to assert no evidence because it did not object to the testimony as unreliable. The Supreme Court holds that its opinion in *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402 (Tex. 1998) requires an objection only when the challenge to the expert testimony questions the underlying methodology, technique or foundation data used by the expert witness. However, no objection is required when the testimony is conclusory, speculative, and non-probative on its face—unobjected-to conclusory testimony cannot be some evidence to support a judgment. Thus, the defendant did not waive its no evidence challenge, and the court agreed that the evidence was too conclusory to defeat a motion for directed verdict.

The Supreme Court held that the plaintiff’s circumstantial evidence of causation and manufacturing defect did not exceed a scintilla in *Ford Motor Co. v. Ridgway*, 2004 WL 250898 (Tex. 2004). The expert testimony only established that a fire occurred, and that the expert “suspects” the electrical system caused the fire. Thus, the trial court properly granted the no evidence summary judgment. The plaintiffs made no motion for further testing and did not complain of any failure to allow adequate time for or sufficient scope of discovery.

Summary Judgment

The Supreme Court addressed traditional and no evidence summary judgment motions in *Binur v. Jacobo*, 2004 WL 1048332 (Tex. 2004). The court holds that Rule 166a does not prohibit a party from combining in a single motion a request for traditional summary judgment with a request for a no evidence summary judgment. The court disapproves of decisions that hold or imply that, if a party attaches evidence to a motion for summary judgment, any request for a no evidence summary judgment will be disregarded. The court agrees that clearly delineating the two parts of the motion would be helpful, but it is not required. Thus, because the defendant’s motion here asserted no evidence of proximate cause, the court of appeals erred in disregarding that ground because evidence was attached to the motion.

The 14th Court of Appeals addressed traditional and no evidence summary judgments in a case with law-school-worthy facts, *Johnson v. Felts*, 2004 WL 414379 (Tex.App.—Houston [14th Dist.], no pet.history). Plaintiffs filed suit against Wife and her boyfriend for Husband’s wrongful death. Wife and Boyfriend were never charged with a crime, and there was only circumstantial evidence offered of murder. Defendants’ motions for summary judgment were granted and the plaintiffs appealed. The court first affirms the general proposition that one may address the legal sufficiency of a summary judgment motion for the first time on appeal. It next addresses the Wife’s traditional motion, and found it lacking because she only made a conclusory objection to the wrongful death action, asserting simply that she did not murder her husband. She did not identify and address the elements of the various causes of action, thus the trial court erred in granting

this motion. Likewise, the order granting her first no-evidence motion was reversed, because she did not identify or address any specific elements of any cause of action. However, her second no-evidence motion was legally sufficient because she specifically contends that there is no evidence of causation, an element common to all causes of action brought in the suit. The court then looks at the record to determine if the plaintiffs submitted some evidence of causation, entitling them to trial on the merits—Wife and Husband were having marital problems at the time of his death, he transferred large sums of money to his account the day he was killed, she had numerous affairs (which she denied), she misled police about the presence of guns in the house, as well as her whereabouts on the night of the murder. Although the information in the record is tantalizing, the court of appeals agrees with the trial court that this circumstantial evidence constituted “not one scintilla of causation evidence.”

In *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682 (Tex. 2003), the Texas Supreme Court addressed untimely responses to motions for summary judgment. The court decided that the equitable *Craddock* standard applicable to motions for new trial did not apply when the nonmovant was aware of the failure to timely respond at or before the summary judgment hearing. Instead, a motion for leave to file a late response should be granted under TRCP 5 when the litigant establishes “good cause” by showing that (1) the failure to respond was not intentional or the result of conscious indifference, but the result of accident or mistake, and (2) allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment. This standard does not require a showing of a meritorious defense, as does *Craddock*. The court found that the defendant in this case did not satisfy this standard because it offered no explanation for the failure to timely respond and no supporting affidavits or other evidence.

A litigant generally cannot force a trial judge to rule on a motion for summary judgment, holds the San Antonio Court of Appeals in *In re American Media Consolidated*, 121 S.W.3d 70 (Tex.App.—San Antonio 2003, no pet.). There the defendant filed a motion less than 30 days before trial, and claimed the trial judge had a duty to rule on the motion before commencing trial. The court of appeals refused to so hold, finding that the situation differed from *Grant v. Wood*, 916 S.W.2d 42 (Tex.App.—Houston [1st Dist.] 1995, orig. proceeding), where the trial court refused to rule on the summary judgment expressly to prevent an interlocutory appeal.

Thomas v. Omar Investments, Inc., 129 S.W.3d 290 (Tex.App.—Dallas 2004, no pet.) reaffirms that defendants are not entitled to summary judgment on an affirmative defense unless they conclusively prove all elements of the affirmative defense. The defendant asserted a disclaimer in a breach of warranty claim, which the court characterized as an affirmative defense. Because all defendant’s evidence was stricken from the summary judgment record, there was no evidence to justify a traditional motion for summary judgment. And an affirmative defense cannot be the basis of a no evidence summary judgment.

In *Daystar Residential, Inc. v. Collmer*, 2004 WL 550678 (Tex.App.—Houston [1st Dist.] 2004, no pet. history), the appellant claimed that the trial court erred in denying discovery

before ruling on the motion for summary judgment. Because there was no dispute over the relevant facts, the court held that discovery was immaterial to the motion at issue, and there was no error.

In *Branum v. Northwest Texas Healthcare System*, 2003 WL 22735411 (Tex.App.—Amarillo 2003, pet. denied), the plaintiff contended that the trial court erred in granting the no evidence summary judgment before granting her motion for a Level 3 discovery plan. She argues that the “adequate time for discovery” provision of Rule 166a(i) controlled the Level 3 discovery plan, thus the summary judgment could not be granted until the discovery period designated in the discovery plan expired. The court of appeals disagreed, holding that adequate time for discovery is case specific—it is not controlled by a bright-line rule that requires expiration of a discovery period. Moreover, the plaintiff did not file a motion for continuance.

The plaintiff in *Howard v. East Texas Baptist University*, 122 S.W.3d 407 (Tex.App.—Texarkana 2003, no pet.) did file a motion for continuance seeking additional time for discovery before the no evidence motion for summary judgment was heard. The court of appeals holds the issue is to be resolved on a case by case basis and there was no abuse of discretion in denying the motion. The motion was heard only two months after suit was filed, but there was an initial lawsuit that had been pending for some time that plaintiff nonsuited to get additional time. The affidavit accompanying the motion failed to show diligence.

Venue

The Supreme Court addressed convenience and justice transfers in *Garza v. Garcia*, 2004 WL 1087302 (Tex. 2004). The defendant sought transfer from Starr County to Hidalgo County either because Starr County was not proper venue or for convenience and justice. The trial court granted the motion without specifying the grounds. After trial in Hidalgo County, the plaintiff appealed seeking a new trial based on venue. Venue transfers on convenience grounds are not reviewable, but the court of appeals nevertheless reversed, refusing to presume that the order was granted on convenience grounds unless it said so. The Supreme Court found that the court of appeals erred—the usual presumption for nonspecific orders requires a presumption that the court made whatever findings will uphold the order. Although this will make many venue orders non-reviewable, the Supreme Court finds that this is what the Legislature intended. Justices Phillips and Wainwright dissent

There is a conflict between the courts of appeal on an apparent conflict between the Probate Code provisions that allow probate judge to transfer a proceeding incident to an estate pending in another court to the probate court and § 15.007 of the venue statute, which provides that the venue statute controls over venue provisions of the probate code. The Austin Court of Appeals, in *In re Houston Northwest Partners, Ltd.*, 98 S.W.3d 777 (Tex.App.—Austin 2003, pet. filed), held that the Probate Code provisions were jurisdictional, and thus were not controlled by § 15.007. Thus, the probate judge properly transferred a medical malpractice case filed in Harris County to Travis County where the

guardianship proceeding was pending. The El Paso Court of Appeals agrees. See *In re Terex Corp.*, 123 S.W.3d 673 (Tex.App.—El Paso 2003, pet. stayed). However, the en banc 1st Court of Appeals, in *Reliant Energy, Inc. v. Gonzalez*, 102 S.W.3d 868 (Tex.App.—Houston [1st Dist.] 2003, pet. granted), held that the venue statute controls over the Probate Code, thus it affirmed an anti-suit injunction enjoining the plaintiff from proceeding in the probate court in Hidalgo County. *Note: House Bill 4 makes clear that proper venue for such cases by or against a personal representative is determined by Civil Practices and Remedies Code section 15.007, for actions after September 1, 2003.*

In *In re Pepsico, Inc.*, 87 S.W.3d 787 (Tex.App.—Texarkana 2002, no pet.) the court of appeals conditionally ordered mandamus to require the trial court to consider the defendants' mandatory venue arguments that were added in an amended motion to transfer. The court found that mandamus was appropriate under the venue statute because review of the trial court's ruling that the mandatory venue argument was waived was an effort to "enforce" a mandatory venue provision. And the court found that the amended motion related back to the original motion, so was not waived, and the trial court was required to consider the amended grounds.

In re Shell Oil Co., 128 S.W.3d 694 (Tex.App.—Beaumont 2004, no pet.), makes another trip up the appellate courts on venue issues. Plaintiffs sued Shell in Orange County for injuries caused by exposure to benzene. Shell filed a motion to transfer to Harris County, which was granted. While the motion was pending, plaintiffs filed an identical suit in Jefferson County and sought consolidation in Jefferson County, which was denied. Plaintiffs then nonsuited the suit that was transferred to Harris County (initially the trial court denied the motion to nonsuit, but the court of appeals granted mandamus compelling dismissal). Now we are in the Jefferson County suit, where Shell filed a motion to transfer, claiming that once venue was determined in Orange County, Rule 87.5 precluded a rehearing. The trial court refused to transfer the case, and Shell filed mandamus. The court of appeals agrees that venue was established in Harris County, and finds exceptional circumstances justifying mandamus because the trial court "clearly violated the required procedure for venue determination and refused to enforce the prior venue order of another judge." One justice dissents on grounds that this does not present exceptional circumstances, and mandamus relief is not justified.