CIVIL OPINION SUMMARIES
March 1, 2008-March 31, 2008
(compiled by Byron K. Henry)

Supreme Court

INSURANCE DEFENSE. Texas Supreme Court. In a closely watched case dealing with insurance companies' increased use of staff counsel to represent insureds, the Texas Supreme Court held that an insurer can use staff counsel to represent insureds so long as the parties are "united in simple opposition to a claim." A "serious coverage issue" may disqualify staff counsel, but issuance of a routine reservation of rights letter does not automatically require outside counsel. *Unauthorized Practice of Law Committee v. American Home Assurance Co., Inc.*, No. 04-0138 (Tex. March 28, 2008).

CPRC CH. 82. Texas Supreme Court. In answering a certified question from the Fifth Circuit, the Texas Supreme Court held 5-4 that "[w]hen an innocent seller is forced to defend itself in a products liability action, its remedy under [Chapter 82] is to seek indemnity from the product manufacturer." The Court also held that "the statute does not extend a manufacturer's obligations under Section 82.002 to claims related to the sale of other manufacturers' products." "[T]the product manufacturers satisfy their statutory duty by offering to indemnify and defend it only for any costs associated with their own products." Justice Brister's concurring opinion notes that the statute was enacted so that "innocent retailers would not be sued at all" and encourages litigants to "decide early on which defendants are really involved, and discharge those that are not." The dissent argued that the statute required a manufacturer to indemnify the seller for the entire products liability action as opposed to a share of the action depending on whether its products were implicated. *Owens & Minor, Inc. v. Ansell Healthcare Prods., Inc.*, No. 06-0322 (Tex. March 28, 2008).

Courts of Appeals

TEX. GOV'T CODE CH. 554; PLEA TO THE JURISDICTION. Dallas. The court of appeals held that the trial court properly denied the City's plea because a fact issue existed as to whether the employee "initiated" the City's grievance or appeal procedures prior to filing suit. *City of Dallas v. Watts*, No. 05-07-00996-CV (Tex. App.—Dallas March 31, 2008).

SPECIFIC PERFORMANCE. Dallas. The court of appeals held that a party seeking specific performance must establish that he performed or tendered performance under the contract by proving he was ready, willing, and able to perform. Because financing was contingent and not firm, the plaintiff failed to prove he was ready, willing, and able to close the transaction. Thus, summary judgment for the defendant was affirmed. *Petras v. Criswell*, No. 05-06-01053-CV (Tex. App.—Dallas March 20, 2008).

DISQUALIFICATION. Dallas. The court of appeals held that the trial court abused its discretion by entering a disqualification order that fails to contain findings establishing a "substantial relationship" regarding prior representation or that an attorney's testimony was necessary to establish an essential fact. As a result, the court of appeals granted the petition for writ of mandamus. *In re Eagan*, No. 05-07-01780-CV (Tex. App.—Dallas March 20, 2008).

TEX. FAM. CODE 153.433(3)(D). Dallas. The court of appeals held that the factors contained in section 153.433(3)(D) are written in the disjunctive. Thus, a grandparent seeking access must establish all of the elements of the statute and that a parent does not have (1) actual possession, (2) court ordered possession, or (3) access to the child. Because the parent in this case had court ordered possession, the court reversed the trial court's order granting the grandparents' possession of the child. *In the Interest of B.N.S.*, No. 05-07-00016-CV (Tex. App.—Dallas March 19, 2008).

BREACH OF CONTRACT. Dallas. Quoting prior precedent, the court of appeals held that a contractual obligation cannot be avoided simply because its has become more burdensome than anticipated. "[A]bsent consent of the parties, a contract will not be modified or set aside absent fraud, accident, or mutual mistake of fact." *Schwartz v. Schwartz*, No. 05-07-00202-CV (Tex. App.—Dallas March 19, 2008).

TRCP 174; CONSOLIDATION. Dallas. The court of appeals held that a party must show common issues of law or fact in order to be entitled to consolidation. The court also held that mandamus was proper because there was no adequate remedy at law. The court stated: "However, on this record, were these lawsuits to be tried together, there exists a likelihood that an appellate court could not untangle how or whether prejudice and confusion infected the jury's deliberations." Accordingly, the court conditionally granted mandamus ordering the trial court to vacate the consolidation order. *In re Gulf Coast Bus. Devel. Corp.*, No. 05-07-01742-CV (Tex. App.—Dallas March 17, 2008).

CPRC 74.351; EXPERT REPORT. Houston 14th. The court of appeals held that a trial court has no discretion but to dismiss a party's claims with prejudice if it fails to file an expert report that complies with section 74.351(r)(6). The trial court abused its discretion by granting the plaintiff a 90-day extension as opposed to dismissing the case with prejudice. Accordingly, the court reversed the trial court and rendered judgment dismissing the case with prejudice. The court remanded the case for determination of defendant's attorney's fees and costs. *Rivens v. Holden*, No. 1407-00438-CV (Tex. App.—Houston [14th Dist.] March 11, 2008).

ARBITRATION. Houston 14th. The court of appeals held that a right to revise an agreement from time to time is not equivalent to an unilateral, unrestricted right to modify or terminate the arbitration provision. Thus, the arbitration agreement was not illusory. The court also held the agreement was not substantively unconscionable because the party failed to establish an inability to cover projected arbitration costs of over $17,000 *at the time the agreement was executed*. Consequently, the court granted mandamus and ordered the trial court to compel arbitration.

Aspen Technology, Inc. v. Shasha, No. 14-07-00303-CV (Tex. App.—Houston [14th Dist.] March 27, 2008).

TRCP 299; CPRC 38.001. Houston 14th. The court of appeals held that when a trial court's findings address at least one of the elements of a claim but are silent on the remaining elements, and more specific findings are not requested, the appellate court presumes findings in support of the judgment on the remaining elements. The court also held that a party that fails to deny presentment of a claim as a condition precedent in its pleadings cannot complain of lack of presentment on appeal. Finally, the court held that excessive demand is an affirmative defense that must be pleaded and proved and that a finding of unreasonableness or bad faith must be obtained. *Beauty Elite Group, Inc. v. Palchick*, No. 14-07-00058-CV (Tex. App.—Houston [14th Dist.] March 18, 2008).

CPRC 65.023(b). Houston 14th. The court of appeals held that "a writ of injunction granted to stay proceedings in a suit or execution on a judgment must be tried in the court in which the suit is pending or the judgment was rendered." *Cedyco Corp. v. Tubbs*, No. 14-07-00399-CV (Tex. App.—Houston [14th Dist.] March 13, 2008).

TRCP 60; MANDAMUS. Fort Worth. The court of appeals held that the trial court abused its discretion by failing to dismiss a plea in intervention. The interesting holding concerns the court's discussion regarding whether relator had an adequate remedy by appeal. Quoting *In re Prudential*, the court stated that making this determination "demands a careful balance of the jurisprudential considerations that determine when appellate courts will use mandamus . . ." The court also noted that the supreme court has held that appeals are frequently inadequate to protect the interests in child-custody cases. Because of the trial court's error, the uncertain delay, and the interests involved, the court granted the petition and ordered the trial court to dismiss the intervention. *In re Roxsane R.*, No. 2-07-382-CV (Tex. App.—Fort Worth March 28, 2008).

PLEA TO THE JURISDICTION. Fort Worth. The court of appeals held that a plea to the jurisdiction should be denied if a fact issue exists but that a plea can be granted as a matter of law if the evidence undisputed or fails to raise a fact issue. The court stated that the procedure "generally mirrors that of a summary judgment" under Rule 166a(c) and the burden is on the party urging the plea to meet the summary judgment standard of proof. *City of Arlington v. Barnes*, No. 2-07-249-CV (Tex. App.—Fort Worth March 27, 2008).

TRCP 107; SERVICE OF PROCESS. Fort Worth. In this restricted appeal, the court of appeals held that error was apparent on the face of the record because the clerk had simply attached the postal return receipt in lieu of completing the return. Because the requirement of Rule 107 were not strictly complied with, the court reversed the judgment and remanded to the trial court. *Arrington v. Coalson*, No. 2-07-268-CV (Tex. App.—Fort Worth March 13, 2008).

TRCP 166a; NOTICE OF HEARING. Fort Worth. The court of appeals set forth a four step process when addressing constructive notice and selective acceptance/refusal of mail relating to the case. First, the party claiming notice must demonstrate the method and manner of service. Second, the party claiming no notice must present evidence that no actual service (delivery) was had. Third, the party claiming notice must present evidence of selective or refusal of service. Fourth, if it does so, the party claiming no notice must explain why the apparent selective refusal does not constitute constructive service under Rule 21a. *Mark Rotella Custom Homes, Inc. v. Cutting*, No. 2-07-133-CV (Tex. App.—Fort Worth March 6, 2008).

ARBITRATION; WAIVER. Fort Worth. The court of appeals held that "allowing a party to conduct full discovery, file motions going to the merits, and seek arbitration on the eve of trial, defeats the FAA's goal of resolving disputes without the delay and expense of litigation." Because the defendant waited nineteen months to request arbitration and, during that time, served full discovery on all parties, filed counterclaims and cross-claims, a partial motion for summary judgment, and agreed to one extension of the trial date, the court held the defendant waived its right to arbitration by "substantially invoking the judicial process." The court also held that the opposing party was prejudiced by the defendant's actions. The dissent would have held that the party failed to show prejudice as a result of defendant's actions. *Northwest Constr. Co. v. The Oak Partners, L.P.*, No. 2-07-293-CV (Tex. App.—Fort Worth March 6, 2008).

TEX. R. EVID. 803(6); BUSINESS RECORDS. El Paso. The court of appeals held that documents received from another entity are not admissible under Rule 803(6) if the witness is not qualified to testify about the entity's record keeping. Because the affiant failed to establish qualifications to testify on the entity's record keeping, how the records were acquired, or that the records were otherwise trustworthy, the documents were not admissible. The court also noted that summary judgment cannot be based on admissions contained in superseded pleadings. *Martinez v. Midland Credit Mgt., Inc.*, No. 08-07-00031-CV (Tex. App.—El Paso March 13, 2008).

STATUTE OF FRAUDS; PARTIAL PERFORMANCE. Waco. The court of appeals held that the plaintiff raised a fact issue precluding summary judgment by presenting evidence that he took possession of the property and paid more than $25,000 "to fulfill the agreement." Chief Justice Gray's argued in dissent that in order to remove an agreement to purchase real property from the statute of frauds based upon partial performance, the party seeking to enforce the oral agreement must prove that the acts constituting performance were done with *no other design than to fulfill the particular agreement sought to be enforced*. Because taking possession and making payments are just as consistent with renting as purchasing, the dissent would have concluded the oral agreement was subject to the statute of frauds and not enforceable. *Lovett v. Lovett*, No. 10-06-00410-CV (Tex. App.—Waco March 19, 2008).

LIMITATIONS; SERVICE OF PROCESS. Waco. The court of appeals held that an unexplained three month delay between filing and service demonstrated a lack of due diligence as a matter of law. As a result, because service was accomplished after the statute of limitations

ran, plaintiff's suit was barred. *Cunningham v. Champion Technologies, Inc.*, No. 10-06-00365-CV (Tex. App.—Waco March 12, 2008).

SPECIAL APPEARANCE; TRCP 277; DAMAGES Austin. First, the court of appeals held that a party may wait to appeal the denial of a special appearance until a final judgment is rendered, Noting a split with the Waco court of appeals, the court held that jurisdiction to review a special appearance is not limited to an interlocutory appeal under CPRC 51.014(a)(7). Second, the court of appeals held that whether a contract was "as-is" under *Prudential v. Jefferson Assocs.* is an inferential rebuttal question negating the element of causation and should not be submitted as a separate question. Third, the court held that evidence of the amount to repair property damage is evidence of loss in value. *GJP, Inc. v. Ghosh*, No. 03-04-00611-CV (Tex. App.—Austin March 28, 2008).

TRCP 174; CONSOLIDATION. Austin. The court of appeals held that failure to consolidate eleven separate suits arising out of the same conduct and resulting in the same injury was an abuse of discretion. The court stated: "Whether the claim is split at the time of filing or after filing, the effect is the same from the standpoint of the single-action rule." Thus, the court granted mandamus requiring the trial court to consolidate the suits. *In re Stonebridge Life Ins. Co.*, No. 03-08-000124-CV (Tex. App.—Austin March 21, 2008).

TEX. FAM. CODE 153.433; GRANDPARENT ACCESS. Austin. The court of appeals held that the strict requirement for grandparent access under Chapter 153 do not apply in modification suits under Chapter 156 because the two are "distinct statutory schemes that involve different issues. Thus, a parent does not receive the strong parental presumption in a modification suit. *Spencer v. Vaughn*, No. 05-05-00077-CV (Tex. App—Austin March 6, 2006).

DOMINANT JURISDICTION; MANDAMUS. Corpus Christi. In this interlocutory appeal of a temporary injunction, the court of appeals held that a court that grants a temporary injunction in a case in which another court has dominant jurisdiction is subject to mandamus regardless of whether a plea in abatement has been filed or ruled upon. *Joe Williamson Constr. Co. v. Raymondville Indep. Sch. Dist.*, No. 13-06-608-CV (Tex. App.—Corpus Christi March 13, 2008).

PERSONAL JURISDICTION; ALTER-EGO. Corpus Christi. The court of appeals held that jurisdictional veil-piercing involves "different elements of proof than veil-piercing for the purpose of liability." The court found that the company's amenability to suit in Texas was imputed to the individual owner and, therefore, he was reached by the Texas long-arm statute. *Gonzalez v. Lehtinen*, No. 13-06-441-CV (Tex. App.—Corpus Christi March 13, 2008).

DUTY TO DEFEND; INSURANCE. Corpus Christi. The court of appeals held that an insurer's duty to defend does not encompass a duty to prosecute counterclaims that "were aimed at reducing its total liability." The court also held that the insurer's providing a defense in light

of a reservation of rights letter did not estop the insurer from claiming that it was not obligated to pay for the insured's "purely offensive" counterclaims. *Vansteen Marine Supply, Inc. v. Twin City Fire Ins. Co.*, No. 13-05-00231-CV (Tex. App.—Corpus Christi March 6, 2008).

FEE FORFEITURE. Amarillo. The court of appeals held that an attorney owes no fiduciary duty to a party with which it has no attorney-client relationship. The court also held that a party that does not pay attorney's fees is not entitled to recover fees through disgorgement under *Burrow v. Arce* because such recovery would constitute a windfall to the requesting party. *Swank v. Cunningham*, No. 11-06-00172-CV (Tex. App.—Amarillo March 27, 2008).

ARBITRATION; WAIVER. Eastland. The court of appeals held that a party does not waive its right to compel arbitration by simply filing suit. Even if it did, the opposing party failed to establish prejudice. *In re Phillips & Cohen Assocs. Ltd.*, No. 11-07-00276-CV (Tex. App.—Eastland March 6, 2008).

TRAP 33.1; PRESERVATION OF ERROR. Houston 1st. The court of appeals held that a party that fails to present a record to the appellate court that demonstrates the party objected to the trial court's action waives error. Further, the court noted that the trial court's order was not void because the trial court had jurisdiction to determine its own jurisdiction. *Ebrahim v. Middlebury Props. II, L.L.P.*, No. 01-06-01175-CV (Tex. App.—Houston [1st Dist.] March 6, 2008).

TEX. FAM. CODE 153.002; TRCP 166. Houston 1st. The court of appeals held that the trial court had authority to impose sanctions for violating a pre-trial order under court's inherent authority but that the "best interests of child" standard must be considered when imposing sanctions. Because the trial court's sanction excluding witnesses was contrary to best interest of the child and probably caused the rendition of an improper judgment, the court reversed the judgment and remanded to the trial court. *Taylor v. Taylor*, No. 01-07-00571-CV (Tex. App.—Houston [1st Dist.] March 20, 2008).

ATTORNEY IMMUNITY. Houston 1st. The court of appeals held that an attorney is immune from civil liability for actions taken in connection with representing a client in litigation. The rule focuses on the kind rather than nature of the conduct. Because signing a verification and filing a request for temporary restraining order was conduct in which an attorney engages to discharge his duties to his client, the attorneys were entitled to immunity. *Dixon Fin. Servs., Ltd. v. Greenberg, Peden, Siegmeyer & Oshman, P.C.*, No. 01-06-00696-CV (Tex. App.—Houston [1st Dist.] March 20, 2008).

TRCP 166a; EVIDENCE. Houston 1st. The court of appeals held that an objection that the attached documents were not business records was an objection to form, not substance. Further, the court held that a party must present and obtain a ruling on the objections to preserve error. The court noted it had previously adopted the majority position refusing to presume a non-movant's objections are implicitly overruled when a court grants a motion for summary

judgment. The court also noted that manual delivery of a contract is immaterial if the parties manifest through words and actions that they intended a contract to become effective. *Duran v. Citibank*, No. 01-06-00636-CV (Tex. App.—Houston [1st Dist.] March 20, 2008).

DTPA; CERTIFICATE OF INSURANCE. Houston 1st. A divided court of appeals held that a person that is not a party to an insurance contract cannot recover from the insurance company or agent based upon information outside of the actual policy. In this case both the agent and the certificate of insurance represented that there was coverage. The court held that a third-party could only reasonably rely on the policy itself. The dissent questioned the value of a certificate of insurance under the majority opinion and fears the majority immunizes fraud and misrepresentation by insurance companies and agents against entities such as health care providers that routinely rely upon verification of benefits by the company or certificates of insurance to provide medical care. *Brown & Brown of Texas, Inc. v. Omni Metals, Inc.*, 01-05-01190-CV (Tex. App.—Houston [1st Dist.] March 20, 2008).

TRAP 39.2; JUDICIAL ADMISSIONS. Houston 1st. The court of appeals held that it was improper to consider arguments raised for the first time at oral argument. The court noted that oral argument should emphasize and clarify the written arguments in the briefs. The court also held that judicial admissions can be found in live motions, responses, petitions, and answers. However, the statements must be clear, deliberate, and unequivocal. Because the party judicially admitted that the hospital was a governmental unit, the opposing party was relived of any burden to present evidence on the issue. *Poland v. Willerson*, No. 01-07-00198-CV (Tex. App.—Houston [1st Dist.] March 13, 2008).