

**“I’D RATHER BE FISHING”
SCOPE OF DISCOVERY IN TEXAS
2010 SUPPLEMENTAL UPDATE**

PAUL N. GOLD
AVERSANO & GOLD
“CUTTING EDGE JUSTICE”™
933 STUDEWOOD, 2ND FLOOR
HOUSTON, TEXAS 77008
TEL: 1/866-654-5600
pgold@agtriallaw.com
www.agtriallaw.com

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ACKNOWLEDGMENT

I wish to thank my partner, Donna M. Aversano, for editing the final draft of this paper for proper form and accuracy. However, if there are errors, it is not Donna's fault. They are mine, for which I accept total responsibility.

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(Cases from July 2009 through March 31, 2010)

A. OVERVIEW

The scope of discovery continues to be defined by the courts generally and on a case by case basis. It is becoming clearer what constitutes “fishing,” and the role that pleadings play in defining the parameters of discovery. This concept becomes even more significant as e-discovery becomes more common-place and parties begin to struggle with the cost-shifting discretion afforded trial courts.

B. BURDEN OF ESTABLISHING RELEVANCY

1. ***Allstate Ins. Co. v. Plambeck***, Slip Copy, 2008 WL 5411435 (N.D.Tex. Dec.29, 2008)

This is a federal court opinion dealing with the relevancy of discovery sought from a non-party. It is informative because the general rule regarding relevancy in federal court is similar to the standard in Texas. The opinion makes clear that it is the burden of the party seeking discovery to demonstrate the relevancy of the request. See ***E.E.O.C. v. Renaissance III Organization***, No. 3-05-CV-1063-B, 2006 WL 832504 at *1 (N.D.Tex. Mar. 30, 2006) (Kaplan, J.), *citing* ***Vardon Golf Co., Inc. v. BBMG Golf Ltd.***, 156 F.R.D. 641, 650 (N.D.Ill.1994) (“To place the burden of proving that the evidence sought is not reasonably calculated to lead to the discovery of admissible evidence on the opponent of discovery is to ask that party to prove a negative. This is an unfair burden, as it would require a party to refute all possible alternative uses of the evidence, possibly including some never imagined by the proponent.”). Once plaintiffs establish that the documents requested are within the scope of permissible discovery, the burden shifts to Chateau to show why discovery should not be permitted. See ***Spiegelberg Manufacturing, Inc. v. Hancock***, No. 3-07-CV-1314-G, 2007 WL 4258246 at *1 (N.D.Tex. Dec. 3, 2007) (Kaplan, J.) (citing cases).

What is particularly noteworthy about this decision that informs our practice is that the non-party agreed to produce discovery relevant and limited to plaintiffs’ pleading. The Court held that to allow discovery beyond this would amount to a fishing expedition.

C. BURDEN WITH REGARD TO IRRELEVANCY

1. ***In Re Exmark Manufacturing Co., Inc.***, --- S.W.3d ----, 2009 WL

3647395 (Tex.App.-Corpus Christi, 2009)

While the central question in the case is whether in a product liability case a plaintiff may seek discovery of products “the plaintiff never used,” (See *In re Graco Children’s Prods.*, 210 S.W.3d 598, 600-01 (Tex. 2006) (orig. proceeding) the opinion informs a number of issues that arise in disputes regarding the scope of discovery.¹

The case arose from injuries the plaintiff sustained when the riding mower he was operating overturned. Plaintiff alleged that the mower was defectively designed and that there was a safer alternative design. The trial court entered an order that allowed discovery of mowers manufactured by the defendant that had not been used by Plaintiff, but it narrowed the number and scope of inquiries it allowed Plaintiff to propound. The appellate court noted that Exmark “offered no evidence regarding any objections or privileges to the proposed discovery order, or any evidence suggesting an alternative scope of discovery. . .”

The first issue is whether Exmark had properly objected to the scope of discovery. The opinion observed that mere conclusory objections regarding the scope or burden are insufficient. See *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999) (“A party resisting discovery ... cannot simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing. The party must produce some evidence supporting its request for a protective order.”); and *In re CI Host, Inc.*, 92 S.W.3d 514, 516-517 (Tex. 2002) (orig. proceeding). If the request is not patently irrelevant,² or the burden is not self-evident,³ then the party objecting to the discovery must produce evidence that the discovery is neither relevant or will be unduly burdensome to produce. The appellate court found that Exmark had failed to meet this burden.

We conclude that the discovery order at issue here was reasonably tailored to the relevant product defect and was not impermissibly overbroad. *In re SCI Tex. Funeral Serv.* 236 S.W.3d 759, 761 (Tex. 2007) (orig. proceeding). The order focuses on the production of

¹ “Exmark complains that: (1) it should not be compelled to produce documents regarding products that were not used by the injured party and incidents that have no discernible connection to the accident in question; (2) it should not be compelled to produce documents over an unreasonably long time period, including a time period that exceeds ten years prior to the accident in question and, in some cases, pre-dates the date of manufacture for the exact product at issue; (3) the trial court awarded the real parties more relief than was sought in their original discovery requests or in their motion to compel; (4) the trial court improperly restricted the production of documents to one of two manners of production set forth in Tex. R. Civ. P. 196.3 (c), especially because real parties never asked for such relief in their motion to compel; and (5) the trial court abused its discretion in compelling the production of documents within ten days instead of thirty days.”

² See *In re CSX Corp.*, 124 S.W.3d 149, 152, 153 (Tex. 2003) (orig. proceeding) (per curiam).. (The information sought is not “patently irrelevant.”)

³ *In re Union Pacific Resources Co.*, 22 S.W.3d 338, 341 (Tex. 1999) (orig. proceeding) (holding that evidence is not required to support an “an assertion relating to discovery when evidence is unnecessary to decide the matter”).

documents about the inclusion or the lack of rollover protective systems on zero-turn riding lawnmowers and focuses on different models of the same basic product rather than different products. The order at issue is saliently different from the discovery orders that were reversed by the Supreme Court insofar as, in the instant case, there is a connection between the alleged defect and the discovery ordered. The order compels discovery of documents that are reasonably calculated to lead to the discovery of admissible evidence regarding whether Exmark knew about the necessity for, or defects in, its rollover protective systems. In reaching this conclusion, we note that we do not consider countervailing factors such as the burden, expense, and time needed to produce the proposed discovery given that Exmark did not provide evidence on these issues.

In re Exmark Mfg. Co., Inc., --- S.W.3d ----, 2009 WL 3602078 at 7.

D. PLEADINGS DEFINE SCOPE OF DISCOVERY

1. *Ford Motor Co. v. Castillo*, 259 S.W.3d 390 (Tex.2009).

This case presented extraordinary issues to the parties to the litigation and the courts that had to rule on the issues. The issues arose because of what one may surmise was the improper conduct of a juror that led to an injustice. Because of the juror misconduct, the parties entered into a settlement rather than let the jury reach a verdict. The Texas Supreme Court ultimately was faced with the task of restoring the opportunity for justice. However, in attempting to reach a just end in this case, the Court made what arguably are some extraordinary, result oriented rulings, that may affect the practice of discovery in Texas long after the issues in the case are resolved.

During jury deliberations, the presiding juror sent out a note asking what the maximum amount of damages was that could be awarded. Based upon this note, Ford reportedly entered into a settlement agreement with Castillo. Thereafter, Ford learned from other jurors that the note was not authorized by the other jurors. Ford obtained affidavits to this effect, but Castillo moved to strike the affidavits as hearsay, which the court granted. Ford moved to delay the settlement agreement and for leave to obtain discovery. The trial court observed that Ford did not need to conduct formal discovery, but could and had conducted an independent investigation in support of its claim of jury misconduct. Ford additionally argued that when it withdrew its agreement to settle, Castillo's only remedy was to file a claim for a breach of contract (presumably as to which Ford would assert an affirmative defense of mistake). Castillo did not plead breach of contract, but instead merely filed a motion for summary judgment without a pleading. The trial court overruled Ford's motions for continuance to allow it to obtain discovery and granted Castillo's motion for summary judgment. The appellate court upheld the Court's ruling. The Texas Supreme Court agreed with Ford and reversed:

Ford asserts that the court of appeals erred by holding that Ford waived error as to its discovery requests. Next, Ford urges that the trial court erred in denying it the right to conduct discovery because Castillo's claim for breach of the settlement agreement is the same as any other claim for breach of contract and is subject to the same procedures, including discovery procedures, that apply to any other breach of contract claim. We agree with Ford.

At the heart of this dispute is the consensus that when a party withdraws its consent to a settlement agreement, even if prior to entry of judgment on the agreement, the remedy is a claim for breach of contract. Castillo effectively made such a claim when it filed a motion to enforce the settlement agreement. In other words, regardless of whether Castillo filed a formal complaint for breach of contract or a motion for enforcement of the settlement agreement, the effect was the same. In either event, the Texas Supreme Court ruled that Ford was entitled to obtain discovery in support of its defense to such claim or motion.

Parties are “entitled to full, fair discovery” and to have their cases decided on the merits. ***Able Supply Co. v. Moye***, 898 S.W.2d 766, 773 (Tex.1995) (orig. proceeding); see ***State v. Lowry***, 802 S.W.2d 669, 671 (Tex.1991) (“Only in certain narrow circumstances is it appropriate to obstruct the search for truth by denying discovery.”).

The Texas Supreme Court ruled that the trial court had denied Ford discovery that went to the heart of Ford’s defense; therefore the trial court abused its discretion:

A trial court abuses its discretion when it denies discovery going to the heart of a party's case or when that denial severely compromises a party's ability to present a viable defense. ***Able***, 898 S.W.2d at 772.

Ford sought discovery regarding its defense of “mutual mistake.” Castillo argued that the discovery Ford sought was immaterial because “mutual mistake” was not a valid defense in this instance. The court’s response contains language that on first blush appears inconsistent with the narrow view of scope of discovery it has taken over the last decade (see ***Texaco v. Sanderson***, 898 S.W.2d 813 (Tex., 1995).

The parties disagree as to whether mutual mistake is applicable in this case, ***but a party is not required to demonstrate the viability of defenses before it is entitled to conduct discovery***. Rather, a party may obtain discovery “regarding any matter that is not privileged and is relevant to the subject matter of the pending action.”TEX.R. CIV. P. 192.3. The phrase “relevant to the subject matter” is to be “liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial.” ***Axelson, Inc. v. McIlhany***, 798 S.W.2d 550, 553

(Tex.1990). ***The trial court's preemptive denial of discovery could have been proper only if there existed no possible relevant, discoverable testimony, facts, or material to support or lead to evidence that would support a defense to Castillo's claim for breach of contract.*** [emphasis added].

2. ***In re Jacobs***, --- S.W.3d ----, 2009 WL 3347486 (Tex.App.-Hous. [14 Dist.] 2009) (see discussion below).

The opinion turns on ***Lunsford v. Morris***, 746 S.W.2d 471, 473 (Tex.1988) (orig. proceeding), overruled on other grounds with regard to scope of discovery relative to net worth when gross negligence is alleged. Also see the concurring decision, which encourages the Texas Supreme Court to revisit ***Lundsford v. Morris***).

3. ***In re Pennington***, Not Reported in S.W.3d, 2008 WL 2780660 (Tex.App.-Fort Worth,2008, orig. proceeding) (discussed below).
4. ***In re Manion***, Not Reported in S.W.3d, 2008 WL 4180294 (Tex.App.-Amarillo,2008, no pet.)

This case involved a breach of syndication agreement relating to the care and breeding of a stallion. Various claims and counterclaims of breach of contract were alleged, including a claim that the syndication really was not a legitimate business entity. Defendant served written discovery requests for numerous financial documents relating to Plaintiff's purchase and sale of horses, and also served a deposition with subpoena *duces tecum* for documents from Plaintiff's bank. Plaintiff moved to quash the notices and Defendant filed a motion to compel claiming the documents were relevant to its allegation that Plaintiff had breached its fiduciary duty. Plaintiff claimed the records requests were unduly burdensome and that the records were confidential. However, Plaintiff produced no evidence to support his claims. The Amarillo Court of Appeals pointed out that the general rule in financial records production cases is that the party attempting to prevent or restrict discovery has the burden of pleading and proving the basis for the desired limitation. ***In re Patel***, 218 S.W.3d 911, 915 (Tex. App.-Corpus Christi 2007, orig. proceeding). This court previously had ruled that there is no constitutionally protected privacy right in one's personal financial records. ***Martin v. Darnell***, 960 S.W.2d 838, 844-45 (Tex. App.-Amarillo 1997, no writ). The records in this instance were found to be relevant to the allegations alleged in Defendant's petition. Given the absence of evidence supporting a claim of privilege and the demonstration of relevancy, the trial court was found to have not abused its discretion in ordering the production of the financial records.

E. OVERBREADTH

1. ***In re Mallinckrodt, Inc.***, 262 S.W.3d 469 (Tex.App.-Beaumont 2008, no pet.).

The discovery dispute arises out of a benzene case that allegedly resulted in a worker developing non-Hodgkins lymphoma that caused his death. Plaintiffs notice Defendant's corporate representatives and in conjunction with the depositions, requested the production of a number of documents regarding Defendants use of benzene from 1945-1985 (forty years). The trial court overruled Mallinckrodt's motion to quash.

The appellate court cites *In re Dana* for the proposition that before a court can order production based on discovery requests that cover multiple decades, the discovery proponent must make a threshold evidentiary showing to demonstrate the relevance of the requested documents. See *In re Dana Corp.*, 138 S.W.3d 298, 301 (Tex.2004) (per curiam). The trial court failed to define the universe of relevancy and hence abused its discretion. "In this case, Mallinckrodt's motion to quash required the trial court to address a preliminary scope-of-discovery issue and define the universe of Mallinckrodt products for which Strother's evidence demonstrated an exposure." The court held that the trial court abused its discretion by not tailoring the requests to the products to which Plaintiff alleged to have been exposed and by not tailoring the requests to dates of alleged exposure.

2. *In re Steadfast Insurance*, Not Reported in S.W.3d, 2009 WL 1424634 (Tex. App.-Hous. [1st Dist.] 2009, no pet.)

The fact situation in this case is fairly convoluted. There was a wrongful death occurrence. The owner of the property settled with the survivors but reserved the right to sue a subcontractor for indemnification. The subcontractor in turn sued the owner's insurance carrier for bad faith. The subcontractor issued discovery requests. Two are in issue in this decision:

Request No. 28: Your entire claim file for each claim in which you have been alleged to have acted in bad faith or in breach of an insurance policy with respect to a claim against an employee, borrowed servant, consultant or subcontractor for your insured for the period beginning on January 1, 1998 through the present.

Interrogatory No. 8: Identify each insurance claim in which you have been alleged to have acted in bad faith or in breach of an insurance policy with respect to a claim against an employee, borrowed servant, consultant or subcontractor for your insured for the period beginning on January 1, 1998 through the present including for each such claim the court and case number; contact information for all parties, attorneys, adjusters, insurance agents, insurance brokers, insureds and claimants involved.

Discovery requests must be limited by time, place, and subject matter. *In re*

Xeller, 6 S.W. 3d 618, 626 (Tex. App. – Houston [14th Dist.] 1999, orig. proceeding). The court found that Law, the party seeking the discovery, was engaged in an improper fishing expedition:

Law, too, seeks to conduct a fishing expedition. Specifically, Law seeks insurance claims in which Steadfast is alleged to have “acted in bad faith or in breach of an insurance policy.” This broad language encompasses conduct beyond Law's allegation of conspiracy to prevent him from claiming insurance coverage. Additionally, Law is seeking discovery whose production entails, according to evidence, approximately a fifty-state search over a ten-year period. A discovery request requiring a fifty-state search over a ten-year period is overbroad as a matter of law. [omitting citations].

3. *In re Memorial Hermann Healthcare System*, 274 S.W.3d 195(Tex. App.-Houston [14thDist.],2008, pet. filed)

This case arises out of a dispute between two rival hospitals. Stealth Limited filed an anti-trust suit against Memorial Hermann Healthcare claiming that it caused the demise of a hospital owned and operated by Stealth. The Texas Attorney General, independent of that litigation, issued a civil investigative demand (CID) on Memorial Hermann Healthcare. In the instant lawsuit Stealth sought that Memorial Hermann produce copies of all materials previously disclosed to the attorney general in response to the CID. Memorial Hermann took the position that the requested materials were privileged from discovery in private antitrust litigation and that Stealth's requests were overly broad. The trial court ordered production and Memorial Hermann filed a petition for writ of mandamus.

The appellate court held that “any privilege created by section 15.10(i) of the Texas Free Enterprise and Antitrust Act does not extend to CID materials held by the defendant in private antitrust litigation.” It also found the requests were not “facially” overbroad.

Essentially, Memorial Hermann claimed that when it turned over approximately 87,000 pages of documents to the State Attorney General in connection with the Attorney General's CID, it created a blanket privilege with regard to all such documents in a private anti-trust action against Memorial Hermann. The Court found that the statute clearly did not contemplate such a privilege and that to engraft such a privilege would be against good public policy as it would hamstring any private litigant in obtaining documents relevant to its cause of action. The Court goes on to construe the Texas statute in harmony with the sister federal statute, finding that federal courts have not afforded private defendants the privilege that Memorial Hermann sought in this case.

The next complaint the Court addressed was whether Plaintiffs' request was

improperly overbroad. Memorial Hermann contended that, because the attorney general is authorized to conduct a “fishing expedition” through a civil investigative demand, any discovery request that echoes a CID therefore must be patently overbroad. The Court disagreed. The peculiar thing about Memorial Hermann’s position is that the statute limits what the Attorney General may request to only materials that would be discoverable under the Texas Rules of Civil Procedure. A demand may require the production of documents “only if the material or information sought would be discoverable under the Texas Rules of Civil Procedure or other state law relating to discovery.” Tex. Bus. & Comm. Code Ann. § 15.10. The Court points out that Memorial Hermann never demonstrated that the discovery being sought was not relevant to Stealth’s cause of action. There was no demonstration that the discovery request would capture irrelevant documents requiring that the discovery request needed to be tailored. “When a party’s attempted reach exceeds its legal grasp, we routinely limit the reach; we do not amputate the hand.” *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 191-92 (Tex.1999) (orig. proceeding) (citations omitted) (Hecht, J., concurring in part and dissenting in part).

4. *Heaney v. Time Warner Cable, Inc.*, Slip Copy, 2010 WL 56068 (W.D.Tex. 2010).

This is another federal case that I include because it addresses a very common and frustrating response tactic. A party sends a request for production and the responding party neither objects to the time period set out in the requests for responding nor provides a proposed alternative date. Rather the responding party merely states that it will produce responsive documents when they are located or it will supplement at a later time. This decision points out that such a response is improper.

[T]he Court cannot agree with Defendant’s implicit claim that it may produce documents over a time frame it views as reasonable. The rules of procedure allow the requesting party to initially set the time and place of production. FED. R. CIV. P. 34(b)(1)(B).. “Absent a court order or an agreement among the litigants, a party from whom discovery is sought cannot unilaterally alter these directives to suit its fancy.” *Resolution Turst Corp. v. North Bridge Assocs., Inc.* 22 F.3d 1198, 1205 (1st Cir. 1994). The burden is on the responding party to object to the time and place provided, and to demonstrate that the time and place are not reasonable. See *Wernecke V. Texas Dept. of Family and Protective Services*, No. C-07-238, 2008 WL 1776509 at *1 (S.D. Tex. April 16, 2008). Thus, a party may not serve a written response stating that “responsive documents will be produced,” and then take whatever time they deem reasonable to make the documents available.

This also would be true under Texas practice. If the time and place for responding to a request for production are set out in the request and the responding party believes the time or place are inconvenient, then the responding party should

timely object and propose a reasonable alternative time or place. If an agreement is not reached, then the responding party should seek a protective order or the requesting party may seek a motion to compel.

F. REQUEST MUST BE FOR SPECIFIC TYPES AND CATEGORIES OF DOCUMENTS AND DATA

1. ***In re Premcor Refining Group, Inc.***, Not Reported in S.W.3d, 2009 WL 2253290 (Tex.App.-Beaumont 2009).

This case deals with yet another aspect of scope of discovery. A discovery request must be reasonable. The discovery request also must be tailored to the issues in the case and should be made as narrow as practicable to obtain relevant discovery, and the request must be confined to a reasonable time period. This opinion addresses the issue of specificity of the request and reiterates that the request must be for specific types and categories of documents. General requests for “information,” are improperly too broad.

The dispute arose out of appraisal of a chemical plant acquired by Valero in a merger with Premcor. Valero contended the appraisal was very inflated. A lawsuit ensued and the appraisal district sought discovery from Valero. Valero contended that the discovery was overbroad and sought trade secrets. The trade secrets issue really is not a primary focus because as the court observed, without specific requests it is difficult to determine what types and categories of documents may contain trade secrets.

The decision focuses on the construction of the requests.

Here is a sample request:

6. Please provide the following information (for each month from January 2001 through the valuation date) for each of the following:

A. Facility Material Balances

1. Inputs

a. Primary inputs (e.g. crude oils, ethane-propane (EP) mix, etc., itemized by name and internal accounting code).

b. Secondary or other inputs, itemized by name and internal accounting code.

c. Defining physical or chemical properties of each input, e.g.

I API or specific gravity

- ii. Sulfur content
- iii. Viscosity
- iv. Distillation cut point
- v. Other, as appropriate

The court found that these type requests were improperly overbroad and did not comply with the admonition in ***Loftin v. Martin***, 776 S.W.2d 145, 148 (Tex. 1989) (orig. proceeding) that requests must be for specific types and categories of documents.

Instead of requesting items or even categories of items, JCAD's requests are general requests for information and do not define the document or category of document that JCAD wanted Valero to produce. Because these requests did not ask for specific items or identifiable categories of items, the requests are overly broad.

In our opinion, the requests at issue are like the requests the Supreme Court determined to be overly broad in ***Loftin***, 776 S.W.2d 148. The Court stated that Loftin's request was "merely a request that Loftin be allowed to generally peruse all evidence Lumbermens might have." *Id.* These requests appear to us to be similarly flawed.

For the reader thinking that merely substituting "documents," for "information" and defining "documents" broadly would have solved the problem, the appellate court had a different answer. It would not.

"Document" as defined by JCAD in its requests, includes, among other things: "books, manual[s], instructions, financial reports, working papers, records, notes, letters, ... interoffice and intraoffice communications, contracts, cables, notations or memoranda of any sort of conversations, telephone calls, meetings or other communications" and also "other written, printed, typed or other graphic or recorded matter of any kind or nature, however produced or reproduced." Even when we consider the limitations the trial court placed in its order, in light of the expansive definition of documents, the requests on their face would require the production of substantial amounts of tenuous information. . .

Here, even if we substituted the word document for information, all of the requests at issue still suffer from JCAD's expansive definition of "document." Request nine expands the problem of breadth even further by using the phrase, "any and all."

2. SEE ALSO, E-DISCOVERY- REQUESTS FOR PRODUCTION, subpart Q, below.

G. PARTY MAY NOT BE FORCED TO CREATE DOCUMENTS THAT DO NOT EXIST

1. ***Baughn v. Capps***, Not Reported in S.W.3d, 2010 WL 730369 (Tex.App.-Waco, 2010).

This case stands for the proposition that a party may not be forced to create a document that does not exist in that party's possession in response to a request for production. See also ***In re Guzman***, 19 S.W.3d 522, 525 (Tex. App. –Corpus Christi 2000, orig. proceeding (“The rules do not permit the trial court to force a party to create documents which do not exist, solely to comply with a request for production.”)). The court reached this opinion in ruling upon an argument about whether a request for production is a proper vehicle under Tex. R. Civ. P. 791 for making a demand for an abstract of title. The court held that a request for production was not a proper tool to activate Tex. R. Civ. P. 791. A party may demand that an abstract be created under Tex. R. Civ. P. 791, but the court held that such a demand cannot be made under the guise of a request for production under Tex. R. Civ. P. 196 because a responding party may not be required to create a document that does not already exist. Since the request was improper, the sanction under Tex. R. Civ. P. 792 of disallowing proof of title for not timely providing an abstract of title in response to a demand was not available.

H. PRIVILEGED MATTERS

1. TRADE SECRETS

- a. ***In re Cooper Tire & Rubber Co.***, --- S.W.3d ----, 2010 WL 343509 (Tex.App.-Hous. [14 Dist.] 2010) See discussion below, under Other Similar Incidents and Products.
- b. ***Dos Santos v. Bell Helicopter Textron, Inc.***, Slip Copy, 2009 WL 3734147 (N.D.Tex. 2009).

This case is included because it is one of the few cases I have read over the last number of years holding that requested documents, even if considered trade secrets, were “material and necessary to the litigation.” See ***In re Continental General Tire, Inc.***, 979 S.W. 609, 615 (Tex. 1998). Bell sought to establish itself as a third party beneficiary of a lease between Textron and Helisul. Helisul sought discovery from Bell regarding its relationship with Textron. The court held that the information sought was material to the issues in the litigation and therefore were discoverable:

Evidence related to Bell's ability to enforce the lease agreement is not merely relevant - it is essential to Bell's claim for indemnity. These topics seek discovery of information regarding Bell's relationship with Textron and TFC as a means to assess that ability. Hence, the topics seek relevant information.

More importantly, even assuming they are trade secrets, they are subject to discovery if they are "material and necessary to the litigation." *In re Continental General Tire, Inc.* 979 S.W.2d 609, 615 (Tex. 1998).

2. WORK PRODUCT

- a. *In re Boxer Property Management Corp.*, Not Reported in S.W.3d, 2009 WL 4250123 (Tex.App.-Hous.[14 Dist.] 2009).

This is a very thoughtful and nuanced opinion that should be read by anyone dealing with the issue of corporate representative depositions. However, for purposes of this discussion, we are going to focus solely on the macro issue in the case which was whether a party may notice the deposition of a corporate party to produce a corporate representative to explain what due diligence the corporate party used in responding to a request for production that no responsive documents could be located. Plaintiffs believed that the defendant was "hiding documents," and sought the deposition of a corporate representative to explore what the defendant had done to investigate its files to respond to the request. The defendant objected on a number of grounds, but the main argument was that the topic impermissibly sought to invade attorney work product. The appellate court found that the trial court had abused its discretion in allowing the deposition, albeit by allowing only 13 written questions. The court noted that the topic inherently involved interrogation regarding attorney work product and that the only witness who could appropriately be designated to respond would be in house counsel, which would only re-enforce the finding that the deposition was an invasion of attorney work product.

The assertion of discovery abuse rests entirely on relators' representation that responsive documents do not exist. Under these circumstances, a deposition of relators' general counsel aimed at exploring how this attorney responded to discovery constitutes an impermissible fishing expedition. . .

The only purpose here is to police relators' discovery compliance. Bare assertions that an opponent is hiding documents do not justify deposing in-house counsel at the courthouse about whether a diligent document search really was conducted. *In re Boxer Property Management Corp.*, Not Reported in S.W.3d, 2009 WL 4250123 at 6

I. INVESTIGATIONS AND CONSULTING EXPERT DATA

1. *In re Energy Transfer Partners, L.P.*, Not Reported in S.W.3d, 2009 WL 1028056 (Tex.App.-Tyler 2009).

Energy built a compressor station and some neighbors complained about the noise. Transfer responded that it would investigate the complaint. Upon receiving a promise from Energy that the “results” of the testing would be shared with them, the neighbors allowed a consulting company hired by Energy to conduct sound testing on the neighbor’s property. The testing was conducted but the results were never shared. A group of neighbors filed suit against Energy and send a request for production that sought “reports relating to sound at or around the subject pump station.” Defendant agreed to produce non-privileged documents responding to the request. This production did not include the report of the consultant because Energy asserted that the consultant was a consulting expert hired in anticipation of litigation and that the report and consultant’s conclusions were protected. The trial court found that the “raw data” was discoverable, but not the consultant’s opinions that were formulated in anticipation of litigation.

The appellate decision centers first on whether the consultant was a consulting expert. The court does a *National Tank Co. v. Brotherton* analysis and finds that in examining the “totality of the circumstances” Energy proved that it anticipated litigation when it hired the consultant and that the consultant’s work was done in anticipation of litigation (even if there were other ostensible purposes for the report). Energy conceded that the consultant was a “dual capacity witness,” one who possessed both expert opinions and knowledge of relevant facts. *Axelson, Inc. v. McIlhaney*, 798 S.W.2d 550, 555 (Tex. 1990). Interestingly, the appellate court uses this to overrule Plaintiffs’ argument that Energy had waived the consulting expert exemption by identifying the consulting expert.

The opinion next focuses on the implied finding that Energy had waived the consulting expert privilege by “agreement/consent” in that Energy had agreed to share the “results” of the testing. The appellate court concludes that there was no agreement to share the specific sound test or the consultant’s conclusions drawn from the test.

Moreover, Energy Transfer’s promises to provide “what we find” and that “the results” of the sound tests are not sufficiently definite to encompass the privileged report and information.

This finding is less than compelling. However, there is one argument that does not appear to be raised or considered by the appellate court. In *Axelson, Inc. v. McIlhaney*, 798 S.W.2d supra at 555 (which is cited by the appellate court as authority for the “dual capacity” rule, see above), the Texas Supreme Court upheld a trial court

finding that individuals designated as consultants could not be deposed about their conclusions; but they could be deposed as fact witnesses about the facts they possessed.

Axelson sought only factual discovery from Biel, Fowler and Hill regarding the condition of wellhead equipment in addition to the condition of Axelson's relief valve. The trial judge limited the scope of discovery from these consulting-only experts to the Axelson valve. The trial judge abused his discretion in refusing discovery of these facts because the exemption for consulting-only experts does not extend to facts known to them. *Id* at 555.

Similarly, in this instance, one could ask why the trial court was found to have abused his discretion in allowing discovery of the "raw data" which arguably would be considered the core "factual" data compiled by the consultant.

2. ***In re Fast-Trak Const., Inc.***, --- S.W.3d ----, 2010 WL 730581 (Tex.App.-Dallas, 2010)

Fast Trak reaches a result similar to that reached in ***In re Energy Transfer Partners, L.P.*** The case involved an alleged construction defect and whether the soil was properly prepared prior to construction. The parties entered into a Rule 11 agreement allowing the defendant's consulting expert to conduct destructive soil testing. The parties agreed that the defendants would "produce photographs or electronic images taken during the investigation as may be required under Rule 192.5." A dispute arose about the discoverability of "underlying data." The trial court issued an order that defendant produce "the underlying facts and data from the laboratory testing of the soil samples." The appellate court found that underlying data equated with mental impressions which are protected from discovery and therefore the trial court abused its discretion in ordering the discovery of "underlying data." See comments above regarding how this type finding reconciles with the holding in ***Axelson, Inc. v. McIlhaney***, 798 S.W.2d 550, 555 (Tex. 1990).

J. OTHER SIMILAR INCIDENTS AND PRODUCTS

1. *In re Cooper Tire & Rubber Co.*, --- S.W.3d ----, 2010 WL 343509 (Tex. App.--Houston [14 Dist.] Feb. 2, 2010, orig. proceeding) (motion for en banc rehearing pending).

The underlying claim in this personal injury, product liability lawsuit is that the Cooper tire in question was defectively designed because it failed to incorporate a design element known as belt edge gumstrips ("BEGs") into the design for the Weather-Master S/T, and that the incorporation of this design element would have resulted in a safer alternative design. It is important to know with regard to tire cases that tire

companies can manufacture several different model tires using the same basic “green tire specification.” In this instance, Plaintiffs sought discovery of a model tire different from the one involved in the alleged injury, but which presumably was made from the same green stock. (It is not clear from the opinion whether the plaintiffs made or the court accepted the argument that the green tire specification was the same for the tire in question and for the model tires for which plaintiffs sought discovery). Cooper Tire argued that the requested documents contained trade secrets which are not relevant because they concern information on a tire other than the tire involved in the accident. The plaintiffs contended that the documents for green tire specification they sought (GTS 2257) were relevant because they show when BEGs were added and removed and the circumstances surrounding tire failures both with and without BEGs. The trial court conducted an in camera review and issued the following order:

To prevail on their design defect claim at trial, Plaintiffs have the burden of proving Defendant could have provided a safer alternative. Documents which show that Cooper Tire knew of possible design changes that could have made the tire at issue less likely to fail are relevant and a proper subject for discovery. Any danger of disseminating this information is remedied by the Protective Order that is in place.

IT IS THEREFORE ORDERED that Defendant Cooper Tire shall produce the documents reviewed in camera on October 5, 2009, to Plaintiffs within 5 business days of this order.

In re Cooper Tire & Rubber Co., --- S.W.3d ----, 2010 WL 343509 at 2. The trial court determined the documents are relevant. The appellate court noted that the trial court did not address whether the documents contained trade secret information. The appellate court reiterated the recognized law in Texas with regard to raising and overcoming an assertion of trade secret:

The party asserting the trade secret privilege has the burden of proving that the discovery information sought qualifies as a trade secret. ***In re Bass***, 113 S.W.3d 735, 737 (orig. proceeding). If the resisting party meets its burden, the burden shifts to the party seeking the trade secret discovery to establish that the information is necessary for a fair adjudication of its claim. *Id.* It is an abuse of discretion for the trial court to order production once trade secret status is proven if the party seeking production has not shown necessity for the requested materials. *Id.* at 738.

While six factors are recognized as criteria in determining whether a trade secret exists,⁴ ***In re Union Pac. R.R. Co.***, 294 S.W.3d 589, 592 (Tex. 2002) (orig. proceeding)

⁴ (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the

(per curiam), a party does not necessarily have to demonstrate all six factors. **In re Bass**, 113 S.W.3d at 740. To add to the murkiness of this area, the Texas Supreme Court has not provided a bright line test for what is necessary to show a “necessity for a fair adjudication of the facts.” **In re Bridgestone/Firestone, Inc.**, 106 S.W.3d 730, 732 (Tex. 2003) (orig.proceeding). Cooper presented three affidavits, which the appellate court found established the information being sought as a trade secret. Consistent with most appellate and Texas Supreme Court holdings addressing the issue of trade secrets, the Fourteenth Court of Appeals found that the plaintiffs had failed to meet their burden of demonstrating that the trade secret information was necessary for a fair adjudication of the facts. **In re Cooper Tire & Rubber Co.**, --- S.W.3d ----, 2010 WL 343509 at 9.

For the most current Supreme Court of Texas opinion on trade secrets, which reiterates many of the same points and cases as found in **In re Cooper**, See **In re Union Pacific R. Co.**, 294 S.W.3d 589 (Tex.,2009). In that case, the Texas Supreme Court found that the defendant railroad had met the criteria for establishing that its rate structure was a trade secret and that the plaintiff had failed to demonstrate that the information it sought about rate structures was necessary for a fair adjudication of the case.

While a Texas appellate court finding (or for that matter a Supreme Court of Texas finding) that the party resisting discovery had established that the information being sought was a trade secret and that the party seeking the information had failed to demonstrate that the information was necessary for a fair adjudication of facts is not extraordinary, the next ruling of the Fourteenth Court of Appeals in **In re Cooper** is notable. After deciding that the information sought by plaintiffs could not be discovered because it was trade secrets, the court went on to find that the information was not relevant, holding that discovery was limited to the tire in question:

Cooper Tire argues that discovery sought in a product liability case is limited to the product at issue in the case. We agree.

In re Cooper Tire & Rubber Co., --- S.W.3d ----, 2010 WL 343509 at 9.

This holding arguably is dicta; moreover, it also arguably is incorrect. It would be one thing if the court had said that Cooper Tire argues that the discovery sought about the tire in question under the circumstances appearing in the record should be limited to the product in issue. It is quite another to state boldly that in every product liability case, regardless of the circumstances and allegations, discovery is limited to the product at issue in the case (which tacitly is how the statement above may be interpreted). If valid, this would be similar to saying that discovery of other similar events are never discoverable regardless of the circumstances or the reason for which such discovery is

secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

sought. Such discovery frequently is and should be allowed depending upon the purpose of the discovery and the similarity of events. See, **Nissan Motor Co. Ltd. v. Armstrong**, 145 S. W. 3d 131, 138-139 (Tex. 2004) and **In re Brookshire Grocery Company**, Not Reported in S.W.3d, 2006 WL 2036569 (Tex.App.-Tyler). The Texas Supreme Court has never issued a blanket holding that discovery is limited to the product in issue. Rather, discovery of other models or products may be discoverable, *provided there is a rational nexus (connection) between the products*. See **In re Graco Children's Prods., Inc.**, 210 S.W.3d 598, 601 (orig.proceeding) (per curiam) ("In this case, there is again no apparent connection between the alleged defect and the discovery ordered."), a case cited by the Fourteenth Court of Appeals in support of its finding. See also, **Jampole v. Touchy**, 673 S.W.2d 569, (Tex. 1984), **Cantrell v. Hennessy Industries, Inc.**, 829 S.W.2d 875 (Tex.App.-Tyler Mar 31, 1992) (NO. 12-89-00251-CV), rehearing denied (Jun 18, 1992), writ denied (Oct 21, 1992), rehearing of writ of error overruled (Dec 02, 1992) cert. denied, **Coats Co. v. Cantrell**, 508 U.S. 912, 113 S.Ct. 2347, 124 L.Ed.2d 256, 61 USLW 3684, 61 USLW 3767, 61 USLW 3772 (U.S.Tex. May 17, 1993) (NO. 92-1580); and **Independent Insulating Glass v. Street**, 722 S.W.2d 798 (Tex. App. – Fort Worth, 1987 writ dism'd). Whether other prior events are admissible at trial depends on the degree of similarity.

2. **In re Deere & Co.**, --- S.W.3d ----, 2009 WL 4877773 (Tex.2009).

The finding in **In re Cooper Tire** that the Texas Supreme Court has held that discovery in a product liability case is always limited to the product in question appears to be at odds with the most recent Texas Supreme Court opinion dealing with this matter. In **In re Deere & Co.**, the plaintiff allegedly was injured when a step on a Deere backhoe broke and the plaintiff fell under the moving backhoe. Plaintiff sought discovery of other Deere models:

Martinez served requests for production on Deere, including a request seeking "all [non-governmental] documents of customer complaints received by [Deere] relative to the sidestep on any model backhoe." Deere objected to the request as overly broad, and Martinez moved to compel production. The trial court conducted a hearing, and the parties agreed to limit production to documents relating to models with similar handles and step assemblies, and only going back approximately 12 to 15 years (when production began on the 410D).[footnote omitted]. At the trial court's request, Martinez then filed a proposed order. The proposed order included more than 30 product lines such as backhoes, tractors, and other loaders and did not include a time limit.

The defendant reportedly produced no evidence of dissimilarity among the various model backhoes, while the plaintiff produced expert testimony from which it could be inferred that the various models had similarity relevant to the issue in question. The court found that discovery of the other model backhoes under these circumstances was within the permissible scope of discovery.

Here, the trial court made a proper effort to narrow discovery from “any model backhoe,” as stated in the request for production, to only those products with handles and step assemblies similar to the allegedly defective 410D. Deere presented no evidence to meet its burden of supporting its objection, failing to show that any of the specific product lines lacked such assemblies.[footnote omitted] Thus, it was not error for the trial court to permit discovery as to the list of product lines proposed by Martinez. See Tex. R. Civ. P. 193.4.

However, relevancy among the products is only one factor. Another factor is reasonableness of the time period. Here a reasonable time period was not included in the trial court’s order. The Texas Supreme Court found that without a reasonable time period (it specifically pointed out that it was not ruling on whether a 15 year time period, which is what the parties reportedly agreed upon, under these circumstances would be reasonable) the defendant could have to produce documents from many decades and that this would be unreasonable. For this reason, it was held that the trial court had abused its discretion and the case was remanded so that this defect in the trial court’s order could be corrected. *In re Deere & Co.*, --- S.W.3d ----, 2009 WL 4877773 at 2.

In *In re Cooper Tire & Rubber Co.*, --- S.W.3d ----, 2010 WL 343509 (Tex.App.-Hous. [14 Dist.] 2010), the Fourteenth Court of Appeals makes the following observation regarding its holding that in a product liability case, discovery is limited to the product in question.

The Texas Supreme Court has granted mandamus relief in several product-liability cases when the discovery order covered products the plaintiff never used.^{FN3}

In footnote 3, it notes only one opinion to the contrary, *In re Exmark Mfg Co.* noting the following,

but see In re Exmark Mfg. Co. 12-09-00438-CV, 299 S.W.3d 519, 2009 WL 3602078 (Tex. App.—Corpus Christi Oct. 30, 2009, orig. proceeding [mand. pending.]) (denying relief on order allowing discovery regarding lawnmowers not used by plaintiffs).

In re Exmark Mfg. Co. is the next opinion we discuss. While the central question in the case is whether in a product liability case a plaintiff may seek discovery of products “the plaintiff never used,” (See *In re Graco Children’s Prods.*, 210 S.W.3d 598, 600-01 (Tex. 2006) (orig. proceeding) the opinion informs a number of issues that

arise in disputes regarding the scope of discovery.⁵

The case arose from injuries the plaintiff sustained when the riding mower he was operating overturned. Plaintiff alleged that the mower was defectively designed and that there was a safer alternative design. The trial court entered an order that allowed discovery of mowers manufactured by the defendant that had not been used by Plaintiff, but it narrowed the number and scope of inquiries it allowed Plaintiff to propound. The appellate court noted that Exmark “offered no evidence regarding any objections or privileges to the proposed discovery order, or any evidence suggesting an alternative scope of discovery. . .”

The first issue is whether Exmark had properly objected to the scope of discovery. The opinion observed that mere conclusory objections regarding the scope or burden are insufficient. See *In re Alford Chevrolet-Geo*, 997 S.E.2d 173, 181 (Tex. 1999) (“A party resisting discovery ... cannot simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing. The party must produce some evidence supporting its request for a protective order.”); and *In re CI Host, Inc.*, 92 S.W.3d 514, 516-517 (Tex. 2002) (orig. proceeding). If the request is not patently irrelevant,⁶ or the burden is not self-evident,⁷ then the party objecting to the discovery must produce evidence that the discovery is neither relevant or will be unduly burdensome to produce. The appellate court found that Exmark had failed to meet this burden.

We conclude that the discovery order at issue here was reasonably tailored to the relevant product defect and was not impermissibly overbroad. *In re SCI Tex. Funeral Serv.* 236 S.W.3d 759, 761 (Tex. 2007) (orig. proceeding). The order focuses on the production of documents about the inclusion or the lack of rollover protective systems on zero-turn riding lawnmowers and focuses on different models of the same basic product rather than different products. The order at issue is saliently different from the discovery orders that were reversed by the Supreme Court insofar as, in the instant case, there is a connection

⁵ “Exmark complains that: (1) it should not be compelled to produce documents regarding products that were not used by the injured party and incidents that have no discernible connection to the accident in question; (2) it should not be compelled to produce documents over an unreasonably long time period, including a time period that exceeds ten years prior to the accident in question and, in some cases, pre-dates the date of manufacture for the exact product at issue; (3) the trial court awarded the real parties more relief than was sought in their original discovery requests or in their motion to compel; (4) the trial court improperly restricted the production of documents to one of two manners of production set forth in Tex. R. Civ. P. 196.3 (c), especially because real parties never asked for such relief in their motion to compel; and (5) the trial court abused its discretion in compelling the production of documents within ten days instead of thirty days.”

⁶ See *In re CSX Corp.*, 124 S.W.3d 149, 152, 153 (Tex. 2003) (orig. proceeding) (per curiam).. (The information sought is not “patently irrelevant.”)

⁷ *In re Union Pacific Resources Co.*, 22 S.W.3d 338, 341 (Tex. 1999) (orig. proceeding) (holding that evidence is not required to support an “an assertion relating to discovery when evidence is unnecessary to decide the matter”).

between the alleged defect and the discovery ordered. The order compels discovery of documents that are reasonably calculated to lead to the discovery of admissible evidence regarding whether Exmark knew about the necessity for, or defects in, its rollover protective systems. In reaching this conclusion, we note that we do not consider countervailing factors such as the burden, expense, and time needed to produce the proposed discovery given that Exmark did not provide evidence on these issues.

In re Exmark Mfg. Co., Inc., --- S.W.3d ----, 2009 WL 3602078 at 7.

3. *In Re Exmark Manufacturing Co., Inc.*, --- S.W.3d ----, 2009 WL 3647395 (Tex.App.-Corpus Christi, 2009) discussed above under Burden With Regard to Irrelevancy.

K. AUTHORIZATIONS

1. *In re Mitsubishi Heavy Industries America, Inc.*, 269 S.W.3d 679 (Tex. App.-Dallas 2008, no pet.)

In this original proceeding, Mitsubishi complained that the trial court abused its discretion in ordering it to sign an authorization permitting the release of proprietary documents in the files and databases of the Federal Aviation Administration, or within the FAA's custody or control, pertaining to Mitsubishi MU-2 aircraft.

The Court found that the trial court could order the parties to sign authorizations and that it was in the discretion of the trial court to harmonize the competing interests and fashion an authorization that protected any asserted privileges. *See Mutter v. Wood*, 744 S.W.2d 600, 601 (Tex.1988); *Martinez v. Rutledge*, 592 S.W.2d 398, 400 (Tex .Civ. App.-Dallas 1979, writ ref'd n.r.e.) The parties apparently had in place a protective order that prevented dissemination of materials marked confidential. This protective order, however, would not provide much protection in obtaining documents from the FAA. The Court inquired of Mitsubishi's attorney whether the order was inadequate and should be modified. The appellate court notes that there is no evidence in the record that Mitsubishi's attorney ever offered any modification. Accordingly, no abuse of discretion was found.

2. *In re Pennington*, Not Reported in S.W.3d, 2008 WL 2780660 (Tex. App.-Fort Worth, 2008, orig. proceeding)

This case involved a motor vehicle collision resulting in personal injuries. The trial court issued an order requiring the Plaintiff to sign a blanket medical release that encompassed any records relating to her mental health history. Of course, that does not tell the full story. In this instance, not only did the Plaintiff refuse to sign a blanket medical authorization, but she also refused to provide the names of her mental health care providers and asserted that this information was privileged. Plaintiff, however, did

provide the names of her healthcare providers for the 10 years prior to the collision and she provided the actual records of all of her medical care providers relating to the injuries sustained in the collision. These records revealed that Plaintiff was taking antidepressant and anti-anxiety medication at the time of the accident.

Naturally, upon learning the above information, Defendants amended their answer to claim that Plaintiff's injuries pre-existed the collision. They also filed a motion to compel ostensibly claiming that the identity of the mental health professionals was relevant to their defense that Plaintiff's claims of emotional/psychological injury were pre-existing at the time of the collision.

Plaintiff argued that the applicable rules allowed her to choose whether to produce an authorization or the records:

Pennington responded to the motion, claiming that she was not required to sign the medical release because she had tendered all the medical records related to her injuries in lieu of signing a release under rule 194.2(j) of the rules of civil procedure. TEX.R. CIV. P. 194.2(j) (providing that in suit alleging physical or mental injury and damages for same, opponent may request "all medical records and bills that are reasonably related to the injuries or damages asserted or, *in lieu thereof*, an authorization permitting the disclosure of such medical records and bills" (emphasis added)); *In re Shipmon*, 68 S.W.3d 815, 820 (Tex. App.-Amarillo 2001, orig. proceeding [mand. denied]) (interpreting rule 194.2(j) as authorizing party to obtain discovery of medical records through request for disclosure **or** by obtaining records through obtaining opposing party's authorization for disclosure).

Defendants, not being content with merely alleging "pre-existing condition," filed a second amended answer, which is reprinted because of its artfulness:

All injuries, damages and/or liabilities complained of by [Pennington] herein are the result, in whole or in part, of pre-existing mental, emotional and/or physical conditions and disabilities, and are not the result of any acts or omissions on the part of [McBride and Zachry]. Such conditions and disabilities specifically include but are in [no] way limited to [Pennington's] ... depression, [and] anxiety ... and/or resulting from each and every one of the foregoing. Such conditions and disabilities also include but again are in no way limited to any and all ... emotional and/or mental consequences of [Pennington's] 1998 low back injury, [Pennington's] 1999 motor vehicle collision, [Pennington's] numerous surgical treatments, and/or [Pennington's] marital, criminal and employment history over the ten years preceding the incident in question, as well as any and all conditions or disabilities treated or in any way

caused by [Pennington's] use of Lithium, Xanax, Wellbutrin, Trazadone....

A key case in this analysis is **R.K. v. Ramirez**, 887 S.W.2d 836, 843 (Tex.1994).

As a general rule, a mental condition will be a 'part' of a claim or defense if the pleadings indicate that the jury must make a factual determination concerning the condition itself. In other words, information communicated to a doctor or psychotherapist may be relevant to the merits of an action, but in order to fall within the litigation exception to the privilege, the condition itself must be of legal consequence to a party's claim or defense.

Ramirez, 887 S.W.2d at 843;*In re Toyota Motor Corp.*, 191 S.W.3d 498, 502 (Tex.App.-Waco 2006, orig. proceeding [mand. denied])

"[O]nly if the patient's condition itself is a fact that carries legal significance and only to the extent necessary to satisfy the discovery needs of the requesting party" will discovery be allowed. **Ramirez**, 887 S.W.2d at 843.

Another important case in the analysis is **In re Nance**, 143 S.W.3d 506, 511-12 (Tex. App.-Austin 2004, orig. proceeding).

Defensive claims that a plaintiff's damages and injuries were caused by pre-existing conditions do not involve the resolution of ultimate issues of fact that have legal significance standing alone. **In re Nance**, 143 S.W.3d at 512. Instead, these types of defensive assertions are in the nature of inferential rebuttal claims and, thus, are not sufficient to put a plaintiff's mental condition at issue so as to make medical records about that condition discoverable. **Id.** at 512-13;

Based upon the holding in **Nance** case, the appellate court found that the order for a blanket authorization for all of the Plaintiff's mental health records going back to 1996 was an abuse of discretion. See also, **In re Robert L. Williams, Individually and on behalf of the Estate of Alberta Sue Williams, deceased and on behalf of Wrongful Death Beneficiaries Robert L. Williams and Dustin Strom**, --- S.W.3d ----, 2009 WL 540961 (Tex.App.-Waco, 2009) (mental health records of a plaintiff merely alleging mental anguish held not discoverable).

3. In re Soto, 270 S.W.3d732 (Tex. App. Amarillo- 2008, orig. proceeding [man.denied])

This opinion centers on the interpretation of Tex. R. Civ. P. 194.2(j). The case involved a motor vehicle collision. Most of the Plaintiffs alleged personal injuries. Defendant served a request for disclosure. Plaintiffs responded that they would make

available to Defendant all medical records obtained and filed with the court. Defendant filed a motion to compel Plaintiffs each to sign a medical authorization for all medical records from birth. The Court modified the request to require that each Plaintiff sign a medical authorization for medical records from and after 2004.

The Amarillo court deferred to its earlier opinion in *In re Shipmon*, 68 S.W.3d 815 (Tex. App.-Amarillo 2001, orig. proceeding). In that case, the court held that under the “new rules [of civil procedure] a party may obtain discovery of medical records of another party or obtain an authorization from another party by request for disclosure.” The Amarillo court interpreted this rule to allow the requesting, not the responding party, to choose whether it wished to accept production of records or compel production of an authorization so it could obtain the records itself.

The court goes on to point out that Plaintiffs raised neither an “objection” or a “privilege” to the request for disclosure or the request for an authorization. This is a curious observation because Tex. R. Civ. P. 194.5 states specifically that “no objection or assertion of work product is permitted to a request under this rule.” Arguably, particularly under this opinion, a party may and should raise an objection to a request for a medical authorization if the scope of the authorization is outside the scope of permissible discovery (i.e. a fishing expedition) and if the requested authorization invades privileged matters (see, *Mutter v. Wood* 744 S.W.2d 600 (Tex. 1988) the responding party should assert a privilege under Tex. R. Civ. P. 193 and file a motion for protection.

L. FINANCIAL INFORMATION

1. NON-GROSS NEGLIGENCE CASES

- a. See *In re Manion*, Not Reported in S.W.3d, 2008 WL 4180294 (Tex.App.-Amarillo,2008, no pet.) (discussed above).

2. GROSS NEGLIGENCE CASES

- a. *In re Brewer Leasing, Inc.*,255 S.W.3d 708 (Tex.App. Houston[1stDist.],2008,orig. proceeding [mand. denied]).

This opinion deals with the issue of scope of discovery relevant to net worth when gross negligence is alleged. See *Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex.1988). More specifically, the Plaintiff sought financial records and corporate income tax returns. While a trial court may order documents produced relevant to net worth when gross negligence is alleged, a trial court abuses its discretion by ordering the production of financial records “that would not necessarily evidence” net worth. *In re Garth*, 214 S.W.3d 190, 194 (Tex.App.-Beaumont 2007, orig. proceeding).

Defendants in this instance produced an unaudited, uncertified balance.

The appellate court noted that **Garth** does not provide guidance with regard to the nature of the balance sheet required to foreclose discovery regarding net worth, but noted that in **Sears, Roebuck & Co. v. Ramirez**, 824 S.W.2d 558, 559 (Tex.1992) Sears disclosed its net worth “by providing its audited and certified annual reports” and by including an affidavit by the Manager of Federal Income Tax Returns for Sears that stated that the annual reports accurately reflected Sears's net worth.” In view of the uncertified, unaudited balance sheet, the appellate court concluded that the court’s order compelling production of additional financial records was not an abuse of discretion.

The Court next turned to the issue of whether the corporate tax returns were relevant and discoverable on the issue of net worth. While Plaintiffs argued that there were schedules in a corporate tax return that might be relevant on the issue of net worth and that corporate tax returns did not have the same protection as personal income tax returns (See **Hall v. Lawlis**, 907 S.W.2d 493, 494-95 (Tex.1995). The appellate court disagreed and held that corporate income tax returns should be given the same consideration as personal tax returns (See **Sears, Roebuck & Co. v. Ramirez**, *supra*) and that “[t]ax returns may be discovered only when the “pursuit of justice between litigants outweighs protection of their privacy.” **Maresca v. Marks**, 362 S.W.2d 299, 301 (Tex.1962). The Court found that Plaintiffs had not made such a showing in this instance and that the court had abused its discretion in ordering the production of corporate income tax returns. However, the following caveat is noteworthy:

We are mindful that our opinion is based solely on the record before us and we express no opinion regarding whether, after additional discovery, the tax returns could be shown to be material. See **Kern v. Gleason**, 840 S.W.2d 730, 735-37 (Tex.App.-Amarillo 1992, no writ) (noting that if alternate source of information proves to be incomplete, renewed request for income tax returns could be made).

b. **In re House of Yahweh**, 266 S.W. 3d668 (Tex.App.-Eastland,2008, orig. proceeding)

This case also dealt with the issue of discovery of financial data and tax returns relevant to a claim of gross negligence. The trial court ordered production of all the requested information. The issues in this case were slightly different from those in **Brewer**, *supra*. In this case, Defendant objected to the production of tithing records and also argued that a prima facie showing of gross negligence was required before a Defendant has to disclose net worth information.

The Court first disposed of the argument that a prima facie showing of gross negligence was a pre-requisite to allowing discovery of net worth. A party seeking discovery of net worth information is not required to make a prima facie showing of a right to recover exemplary damages before discovery is permitted. **Lunsford**, 746 S.W.2d at 473.

Citing **Brewer**, supra, the appellate court held that the trial court did not abuse its discretion in allowing broad discovery of net worth, but that the court likely abused its discretion in not narrowing the discovery to the issue of net worth. In this regard, it held that the trial court erred in failing to limit discovery to Defendants' **current** balance sheet because earlier balance sheets would not be relevant to Defendants' current net worth.

The appellate court also held that, to the extent the court's order required the production of documents not relevant to net worth, the court had exceeded its discretion. In this regard, the following types of documents were found not to be relevant to net worth: property lists (Request No. 20), bank statements (Request No. 21), stock ownership statements (Request No. 22), tithing records (Request No. 23), donation records (Request No. 24), income tax returns (Request No. 25), asset lists (Request No. 26), income and budget forecasts (Request No. 29), evaluations of financial performance (Request No. 30), and correspondence relating to House of Yahweh's profitability (Request No. 31). The appellate court observed that there was no evidence in the record linking these documents to net worth. Therefore, the court order compelling production of these categories of documents was an abuse of discretion.

Once again, as in **Brewer**, income tax returns were not found to have relevancy to the Defendants net worth in this instance.

c. **In re Jacobs**, --- S.W.3d ----, 2009 WL 3347486 (Tex.App.-Hous. [14 Dist.] 2009)

This opinion provides a great overview of the current state of the law with regard to discovery of net worth in cases in which gross negligence is alleged, as well as the current tensions. It reiterates that all that is required is a valid allegation of gross negligence to entitle a party to discovery of the opponent's net worth. The concurring opinion, however, encourages the Texas Supreme Court to re-visit the law in this regard despite the fact that every time the Texas Supreme Court has addressed the issue, it has followed *stare decisis* and reiterated the ruling in **Lunsford v. Morris**, 746 S.W.2d 471, 473 (Tex.1988) (orig. proceeding), overruled on other grounds. The Court does however, provide some very good guidance on the scope of discovery with regard to net worth. For instance, the Court holds that only the party's current net worth is discoverable (discovery of net worth beyond the current net worth is described as "fishing"). The Court also holds that the responding party need not create affidavits such as it would to a lending institution regarding its net worth, as a party is not required to create documents that do not already exist. Finally, the Court outlines the scope of permissible deposition questioning regarding the party whose net worth is in issue:

Accordingly, with respect to net-worth discovery during the oral depositions of Dr. Jacobs and Dr. Gunn, the McCoys are limited to asking each physician to state (1) his or her current net worth, i.e., the amount of

current total assets less current total liabilities determined in accordance with generally accepted accounting principles (“GAAP”), and (2) the facts and methods used to calculate what each physician alleges is his or her current net worth. Any questioning beyond these two narrow inquiries shall be allowed only upon leave of the trial court after a showing that the McCoy's have reason to believe that the information provided was incomplete or inaccurate.

M. EX PARTE COMMUNICATIONS

1. *In Re Collins*, 286 S.W.3d 911 (Tex. 2009)

In this case the Texas Supreme Court dealt with the issue of *ex parte* communications, particularly in the context of a medical malpractice action under Ch. 74 Tex.Civ. Prac. & Rem. Code. While the case will no doubt be cited by some for the proposition that *ex parte* communications are proper and cannot be restricted, this author believes the opinion is not so broad and is much more nuanced. While the Court reviews the arguments for and against allowing *ex parte* communications, and finds that neither HIPAA nor Ch. 74 disallows *ex parte communications* regarding a plaintiff's health care information when the plaintiff provides and authorization, (see *In re Collins*, 286 S.W.3d at 918), the Court did not decide whether all *ex parte* communications with a plaintiff's treating physician are always proper. (“We need not decide, however, whether section 74.052(c) *919 authorizes *ex parte* contacts in all situations because, as explained below, the Regians failed to carry their burden in obtaining a protective order.” *In re Collins* 286 S.W.3d at 918-19.). Arguably, the opinion is more informative about the requirements of seeking a protective order than about the scope of *ex parte* communications.

The plaintiffs served a Ch. 74 notice of intent to prosecute a medical negligence claim. Attached to the notice, as required by Ch. 74, were three authorizations setting out the identities of medical care providers that the plaintiffs had seen prior to the incident, those physicians that the plaintiff had seen for treatment of the alleged injuries, and the identity of physicians who plaintiff contended had not provided care relevant to the plaintiff's claims. The issue in the case arose when plaintiffs filed a motion to prevent defendants from conducting *ex parte* communications with plaintiff's treating physicians. The Court observed that plaintiff did not set out either in her authorization or in her motion what healthcare information her treating physicians might possess that would be irrelevant to plaintiff's claims and hence retain protection under the physician/patient privilege. This turned out to fatally undermine plaintiff's position.

Plaintiff reportedly relied heavily in support of her argument on *Mutter v. Wood*, 744 S.W.2d 600, 601 (Tex.1988). The Court reiterated its holding in *Mutter*, but distinguished its applicability in *Collins*:

we held that the trial court abused its discretion by requiring the plaintiffs to sign an authorization permitting the defendant-hospital's attorney to discuss the plaintiff's medical information with treating physicians. We did so, however, **not because the authorization allowed ex parte contacts, but because it allowed access to information that was not relevant to the underlying suit and thus remained privileged. In re Collins**, 286 S.W.3d at 919. [emph. added]

Similar to the issue discussed above with regard to overbroad medical authorization, the Texas Supreme Court saw the main issue before it as a failure by the plaintiffs to seek proper protection:

A party seeking a protective order “must show particular, specific and demonstrable injury by facts sufficient to justify a protective order.” **Masinga v. Whittington**, 792 S.W.2d 940, 940 (Tex.1990), (citing **Garcia v. Peeples**, 734 S.W.2d 343, 345 (Tex.1987)).

A party confronting in a similar situation in the future should identify what medical providers may possess health-care information irrelevant to the claims pled in the case, and seek protection limiting discovery and ex parte communications regarding these matters which if found by the court to be irrelevant should be protected from discovery under the physician/patient privilege.

N. PRE-ARBITRATION DISCOVERY

1. **In re Houston Pipe Line Co.**, --- S.W.3d ----, 2009 WL 1901640 (Tex.2009)

This case dealt with the discretion of a trial court to allow pre-arbitration discovery. The Supreme Court noted that when deciding a motion to compel arbitration under the Federal Arbitration Act, a Texas trial court should apply Texas procedure, which **permits** discovery to be taken when it is needed before the arbitration or to permit the arbitration to be conducted in an orderly manner. TEX. CIV. PRAC. & REM.CODE § 171.086(a)(4),(6); *see also* **Jack B. Anglin Co. v. Tipps**, 842 S.W.2d 266, 268 (Tex.1992). Nonetheless, in this instance the Texas Supreme Court found that the trial court abused had abused its discretion by permitting over broad discovery on damage calculations and other potential defendants, instead of deciding the motion to compel arbitration.

The Court notes that pre-arbitration discovery is expressly authorized under the Texas Arbitration Act when a trial court cannot fairly and properly make its decision on the motion to compel because it lacks sufficient information regarding the scope of an arbitration provision or other issues of arbitrability. See TEX. CIV. PRAC. & REM.CODE §§ 171.023(b), 171.086(a)(4),(6).

This, however, is not an authorization to order discovery as to the merits of the underlying controversy. Motions to compel arbitration and any reasonably needed discovery should be resolved without delay. *Tipps*, 842 S.W.2d at 269.

2. *In re Houston Pipe Line Co.*, --- S.W.3d ----, 2009 WL 3403924(Tex. 2009)(Rehearing)

On re-hearing the Texas Supreme Court clarified that it's ruling notwithstanding, a trial court has discretion to allow limited discovery "on issues of scope or arbitrability, if necessary." The discovery ordered by the trial court in this instance was found to exceed the scope of permissible discovery allowed by TEX. CIV. PRAC. & REM.CODE §§ 171.023(b), 171.086(a)(4),(6) and was over broad.

O. BREACH OF CONTRACT

1. *Ford Motor Co. v. Castillo*, 259 S.W.3d 390,(Tex.2009) (see discussion above and below).

P. JURY MISCONDUCT

1. *Ford Motor Co. v. Castillo*, 259 S.W.3d 390,(Tex.2009) (Also see discussion above).

Discovery involving jurors will not be appropriate in most cases, but in this case there was more than just a suspicion that something suspect occurred-there was some circumstantial evidence that it did. . .

We believe the better policy, in general, is to conform discovery involving jurors to those matters permitted by Rule of Civil Procedure 327 and Rule of Evidence 606. That is, discovery involving jurors should ordinarily be limited to facts and evidence relevant to (1) whether any outside influence was improperly brought to bear upon any juror, and (2) rebuttal of a claim that a juror was not qualified to serve.^{FN3} And although we have determined that the trial court abused its discretion by entirely depriving Ford of discovery on the breach of contract claim, it remains within the trial court's discretion to reasonably control the limits of discovery and the manner in which the discovery may be obtained. *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex.2003) (per curiam).

Q. E-DISCOVERY- REQUESTS FOR PRODUCTION

1. *In re Honza*, 242 S.W.3d 578, (Tex. App.-Waco 2008, mandamus denied).

Surprisingly it was not until 2008, that a Texas Court first addressed the issue of scope of e-discovery under the Texas Rules of Civil Procedure. *In re Honza*, decided by the Waco Court of Appeals, was a self-described case of first impression. The Waco court approved the following protocol with regard to discovery of hard drives:

- a) The party seeking discovery selects a forensic expert to make a mirror image of the computer hard drives at issue.
- b) After creating the mirror images and analyzing them for relevant documents or partial documents, courts typically require the expert to compile the documents or partial documents obtained and provide copies to the party opposing discovery.
- c) That party is then to review the documents, produce those responsive to the discovery request, and create a privilege log for those withheld.
- d) Finally, the trial court will conduct an in-camera review should any disputes arise regarding the entries in the privilege log.

2. *In re Weekley Homes, L.P.*, --- S.W.3d ----, 2009 WL 2666774 (Tex. Aug. 28, 2009).

This is a significant opinion from the Supreme Court of Texas, which sets out a specific protocol for obtaining discovery of an entity's hard drive:

In this mandamus proceeding, we must decide whether the trial court abused its discretion by ordering four of the defendant's employees to turn over their computer hard drives to forensic experts for imaging, copying, and searching for deleted emails. Because the plaintiff failed to demonstrate the particular characteristics of the electronic storage devices involved, the familiarity of its experts with those characteristics, or a reasonable likelihood that the proposed search methodology would yield the information sought, and considering the highly intrusive nature of computer storage search and the sensitivity of the subject matter, we hold that the trial court abused its discretion. *In re Weekley Homes, L.P.*, --- S.W.3d ----, 2009 WL 2666774 (Tex. Aug. 28, 2009).

Since at this seminar, others will be speaking specifically on the topic of electronic discovery, I will confine my discussion of this case solely to the issue of scope of discovery. The court discussed this issue in terms of the need for specificity of the

request.

Without devoting a lot of space to a description of the underlying litigation out of which the discovery dispute arose, the pertinent fact is that the plaintiff sought electronic mail reportedly between Weekley and another entity that it suspected was on Weekley's servers and backup tapes. Weekley explained that in the ordinary course of its business that its employees' email boxes were of limited size and purged when the maximum amount of email was reached. While information was transferred to back up, this was only for a limited time period of thirty days. The bottom line was that Weekley claimed additional emails, if any, responsive to plaintiffs requests were not readily or easily accessible. The trial court denied Plaintiff's motion to compel. Plaintiff then filed a "Motion for Limited Access to [Weekley's] Computers." Essentially, the motion sought access to Weekley's employees' hard-drives to recover the deleted emails. During the hearing, Weekley complained about the intrusiveness of the protocol which would intrude into trade secrets and the privacy of its employees, would be disruptive of the company's business, and that no evidence was produced showing that it was feasible for the protocol to retrieve information that had been deleted in the ordinary care of business. The trial court granted the motion and ordered a procedure to be followed similar to that endorsed *in In re Honza*. Weekley sought mandamus relief. The Supreme Court granted writ to decide whether the trial court had abused its discretion in allowing Plaintiff's forensic experts access to Weekley's employees' hard drives.

The Court found that deleted emails clearly are "electronic information" and therefore Tex. R. Civ. P. 196.4 applies to requests for production of such items. Second, the key to the opinion is that the Court observes and holds that while the plaintiff wanted deleted emails, *it never specifically requested deleted emails*. Although the decision does not hinge on this technicality (the Court finds that the intent became clear and that Weekley was not prejudiced by the lack of a specific request in this instance), the Court emphasized the importance of specificity:

To ensure compliance with the rules and avoid confusion, however, parties seeking production of deleted emails should expressly request them.

3. *MRT, Inc. v. Vounckx*, 299 S.W.3d 500 (Tex.App.-Dallas, 2009)

MRT follows *In re Weekley* with regard to back up tapes. The court found that where the requesting party did not specifically request back-up tapes, the responding party does not have an obligation to object that such tapes or the documents contained on them are not reasonably available. The court reiterates the importance of specificity, particularly with regard to electronic data. Another inference from the decision is that unless data are described with particularity either in a preservation letter or a request for production, it may be difficult to obtain a spoliation instruction that the responding party intentionally destroyed data knowing that it was potentially relevant to the issues in the case.

Because appellants did not meet their burden of demonstrating IMEC knew or should have known the pre-2000 backup tapes contained material and relevant evidence with respect to their claims, they failed to establish that IMEC had a duty to preserve the backup tapes in question.

MRT, Inc. v. Vounckx, 299 S.W.3d at 511.