ROOTING FOR ACORNS
DISCOVERY UPDATE
2020
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PART I

SCOPE OF DISCOVERY

1. TAX RETURNS:

In re Defy International, LLC**,** 2019 WL 6317725 (Tex. App. – Houston [14th Dist.] 2019). It is established law in Texas that a party seeking tax returns must demonstrate that the returns are material and relevant and must stay how the returns are relevant. Further, the requesting party must demonstrate a specific reason why tax returns should be produced and why the information sought through the income tax returns cannot be obtained through less obtrusive means. Defy stands for the proposition that if a requesting party does not explain how the requested tax returns are relevant to the claims and defenses pled in the lawsuit, the request should be denied.

> It was the Robbins Parties' burden to establish the relevance of Empower's tax returns. *See* ***In re Croft,*** No. 14-10-00106- CV, 2010 WL 3721870 at *2 (Tex. App.- Houston [14th Dist.] Sept. 22, 2010, orig. proceeding) (mem. op.). ;As discussed above, the Robbins Parties asserted in their motion to compel that Defy had not produced information regarding (1) why or how Defy's business at Shepherd Commons is losing $75,000 in profits or (2) the business details of the Lipshultz Clinic that Defy intended to operate at Shepherd Commons. The Robbins Parties further stated that they cannot identify the business arrangements among Defy, Empower, and the Lipshultz Clinic. **However, the Robbins Parties did not explain how the tax returns will**

> **provide the information they seek or why that information is not available from other sources.** *See* ***In re Patel,*** 218 S.W.3d 911, 919 (Tex. App. – Corpus Christi 2007, orig. proceeding). Therefore, the Robbins Parties failed to meet their burden, and the trial court abused its discretion by ordering Defy to produce Empower's tax returns. *See* ***In re Croft,*** *2010 WL 3721870, at *3.*

Defy at *4.

2. TEXAS CITIZENS PARTICIPATION ACT (TCPA)

The TCPA provides a procedure to expedite the dismissal of a "legal action" that appears to stifle the nonmovant's exercise of the rights protected by the statute. ***Youngkin v. Hines,*** 546 S.W.3d 675, 679 (Tex.2018); See generally, Prather & Bland, *The Developing Jurisprudence of the Texas Citizens Participation Act*, 50 **Tex. Tech L. Rev.** 633 (2017-2018). While the scope of the TCAP is controversial; that particular debate is beyond the scope of this paper. However, the scope of discovery under TEX. CIV. PRAC. & REM. CODE ANN §§ 27.001-.011 is of interest and germane. ***In re Great Lakes Insurance SE*** 2019 WL 6870352 (Tex. App. – Corpus Christi-Edinburg 2019) (orig. proceeding) is informative. A motion to dismiss was raised in response to a motion for sanctions asserted by one of the parties in litigation. The issue before the appellate court was whether the trial court had abused its discretion in allowing limited discovery relevant to the motion to dismiss. The appellate court found that the trial court had not abused its discretion.

> Here, relator has filed a TCPA motion to dismiss the real parties' motion for sanctions, which is based on the real parties' contention that relator filed a frivolous counterclaim under the TCPA. The discovery authorized by the trial court is "specific" and is "limited" to two, three-hour corporate representative depositions with the production of documents relied on by the deponents. *See* TEX. CIV. PRAC. & REM. CODE ANN. §27.006(b). The discovery is limited to five topics regarding Great Lake insurance policies in 2015 in Texas pertaining generally to knowledge of policies and procedures . . . We conclude that this abbreviated and truncated discovery comports with the statute's

> requirement for "specific" and "limited" discovery. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27006(b); ***In re SSCP Mgmt., Inc.,*** 573 S.W.3d 464, 471-2 (Tex. App.—Fort Worth 2019, orig. proceeding); We further conclude that the requested discovery is relevant to relator's motion to dismiss because it seeks information related to the allegations in the motion regarding the validity of relator's counterclaim and the real parties' motion for sanctions based on the alleged frivolity of relator's counterclaim. *See* ***In re SSCP Mgmt., Inc.,*** 573 S.W.3d at 471–72. *see also* ***In re SPEX Grp. US LLC,*** No. 05-18-00208-CV, 2018 WL 1312407, at *4-5 (Tex. App.—Dallas Mar. 14, 2018, orig. proceeding [mand. dism'd]) (mem. op.).

In re Great Lakes Insur. SE at *7

3. REQUESTS AND SUPOENAS DUCES TECUM TO NON-PARTIES

A. ***In re Jay Management Company, LLC,*** Not Reported in S.W. Rptr**,** 2019 WL 3720102 (Tex. App. – Beaumont 2019) (per curiam) involved a tax appraisal dispute. Unless you are a tax attorney, the facts are not going to be very interesting and probably even less comprehensible. Luckily the facts are not important. What is important is the proposition that the scope of discovery from a non-party is the same as that for a party. The discovery must be relevant to the claims and defenses pled and must be tailored to those claims and defenses.

> We conclude that the trial court clearly abused its discretion by ordering a non-party to comply with overbroad discovery requests. *See* Tex. R. Civ. P. 192.3; *see also* Tex. R. Civ. P. 205. The trial court abused its discretion by compelling responses to the requests because the requests are not narrowly tailored. *See* ***In re CSX Corp.,*** 124 S.W.3d 149, 153 (Tex. 2003) (orig. proceeding)

Jay Management at *4

B. Some litigants seem to believe that a discovery request to non-parties is not as constrained as discovery between parties. This is a terrible misconception. The scope of discovery to non-parties is the same as pertains to discovery between parties. ***In re United Fire Lloyds*** 2019 WL 1785345 (Tex. App. – Tyler 2019, orig. proceeding).

4. OBJECTIONS:

A. A common objection particularly to requests for production is that the request is overbroad. This means that the request, while relevant to the nature of the claim or defense is not limited temporally or geographically. A request that is not limited to a relevant time period or geographic region is subject to objection for being overbroad. An important concept to keep in mind, however, is that a request does not have to be unduly burdensome to be objectionable as being overbroad. Simply because a request is overbroad makes it objectionable regardless of whether the overbreath makes the request unduly burdensome.

> An overbroad request for irrelevant information is improper whether it is burdensome or not. I***n re Nat'l Lloyds Ins. Co.***, 449 S.W. 3d 486, 488 (Tex. 2014) (orig. proceeding).

In re United Fire Lloyds 2019 WL 1785345 at *5 (Tex. App. – Tyler 2019, orig. proceeding).

B. If a party makes a claim that a discovery is unduly burdensome, there are two important elements to keep in mind. First, the request is not objectionable because it is burdensome. All discovery is burdensome. Rather, the party must demonstrate that the request is "unduly" burdensome. Indeed, undue burden is in many ways the companion of "disproportionate." Second, it is not enough to merely state in a conclusory manner that the discovery request is unduly burdensome. There must be an evidentiary demonstration that the request is unduly burdensome.

> Any party who seeks to exclude matters from discovery on grounds that the requested information is unduly burdensome,

> costly, or harassing to produce, has the affirmative duty to plead and prove the work necessary to comply with discovery. ***Independent Insulating Glass/Southwest, Inc. v. Street***, 722 S.W.2d 798, 802 (Tex. App. – Fort Worth 1987, orig. proceeding).

In re United Fire Lloyds 2019 WL 1785345 at *6 (Tex. App. – Tyler 2019, orig. proceeding).

5. FIFTH AMENDMENT – PARALLEL LITIGATION

A. ***In re Nichol*****,** ---S.W.3d ---, 2019 WL 4565541 (Tex. App.- El Paso 2019) (orig. proceeding).

A party may not be compelled to answer interrogatories that may tend to incriminate him/her in parallel criminal proceedings, even if a protective order is issued limiting the dissemination of the response.

> We agree that while a civil protective order may restrict public access to certain information, the trial court's civil protective order likely would not place Nichol's potentially incriminatory answer completely beyond the reach of a grand jury criminal subpoena. That means that even with a civil protective order in place, the potentially incriminatory material could still end up being used against him in the parallel criminal proceedings.

In re Nichol at *7.

B. *See also,* ***In re Charles****,* No. 01-18-01112-CV, 2019 WL 2621749, at *3 (Tex. App. – Houston [1st Dist.] June 27, 2019, orig. proceeding (mem. op.).

C. Even if a party is found to have made unfounded assertions of the Fifth Amendment merely to thwart discovery, the Court may not reflexively impose death penalty sanctions. Instead, the party must be instructed of the potential consequences of not complying with discovery and lesser sanctions must first be considered. ***In the Matter of the***

Marriage of Peggy J. Mize and Lester D. Mize, 2018 WL 3636495(Tex. App. – Texarkana 2018, orig. proceeding).

6. PRE-ABITRATION DISCOVERY

A. The scope of discovery pertaining to the enforceability of an arbitration agreement is similar in concept to the scope of discovery pertaining when jurisdiction is challenged. See, ***In re Jaeman CHO***,Not Reported in S.W.3d, 2017 WL 3911002 (Tex. App. – Ft. Worth 2017)(orig. proceeding). Limited discovery is permissible but solely relevant to the enforceability of the arbitration agreement. Preliminary discovery is not allowed to intrude into the merits of the claim.

B. Plaintiff in ***In re Service Corporation International et al.,*** 2019 WL 2442881 (Tex. App. – Corpus Christi- Edinburg 2019) (orig. proceeding) was alleging that the arbitration agreement was unenforceable because it was unconscionable. The Court determined that Plaintiff really was not arguing that the arbitration agreement was unconscionable, but rather the conduct of the defendant relevant to Plaintiff's claims was unconscionable. In other words, the unconscionability claim pertained to the merits of the Plaintiff's claim and not the Plaintiff's challenge to the arbitration clause. Accordingly, the Court held that the trial court had abused its authority in allowing discovery that intruded into the merits of Plaintiff's claims. That said, the opinion is also a good vehicle for discussing the criteria for obtaining discovery relevant to a challenge to the enforceability of an arbitration provision.

C. Pre-arbitration discovery is not an authorization to order discovery on the merits of the underlying controversy. *See* ***In re Hous. Pipe Line Co****.,* 311 S.W.3d 449, 451 (Tex. 2009) (orig. proceeding) (per curiam).

D. Mandamus relief is appropriate when a trial court improperly orders pre-arbitration discovery. *See* ***In re Hous. Pipe Line Co.***, 311 S.W.3d at 451.

E. The trial court may order pre-arbitration discovery when it "cannot fairly and properly" make its decision on a motion to compel arbitration because "it lacks sufficient information regarding the scope of an

arbitration provision or other issues of arbitrability." ***In re Hous. Pipe Line Co.***, 311 S.W.3d at 451.

F. Discovery must be limited to obtaining information regarding the scope of the arbitration provision or a defense to the provision. *See* ***In re Hous. Pipe Line Co.***, 311 S.W.3d at 451.

G. A party opposing arbitration is entitled to pre-arbitration discovery on a defense "if and only if" the party "shows or provides a colorable basis or reason to believe that the discovery requested is material in establishing the defense." ***In re VNA, Inc.*** 403 S.W.3d. 483 at 487(Tex. App. – El Paso 2013)(orig. proceeding); and ***In re Hous. Pipe Line Co.***, 311 S.W.3d at 451. (stating that "motions to compel arbitration and any reasonably needed discovery should be resolved without delay").

In re Service Corp. Int'l at *4.

H. The above concepts should be qualified by the opinion in ***In re Western Dairy Transport, L.L.C.***, 574 S.W.3d 537 (Tex. App. – El Paso 2019) (orig. proceeding) which dealt with whether a forum selection clause applied to a non-signatory to an arbitration agreement.

The majority (there is a dissenting opinion) found that since the defendant was seeking to enforce a forum selection clause against a non-signatory to an arbitration agreement, the burden was on the party seeking to enforce the agreement to prove its applicability.

> Because the existence of a binding agreement with non-signatories remains in dispute, the jurisdiction of the trial court in this instance was not invoked in support of an existing agreement to determine scope or matters of arbitrability, but rather, independently to resolve a gateway matter committed to the court. ***Jody James Farms, JV v. Altman Group, Inc***., 547 S.W.3d 624, 631 (Tex. 2018).

The non-signatory was therefore entitled to pre-arbitration discovery and discovery prior to the motion to dismiss relevant to the motion to dismiss.

After reviewing our record, we hold that the discovery ordered by

the court related to establishing or defending against theories asserted by Relators and fell squarely within the trial court's discretion. TEX. R. CIV. P. 192.3(a). ***In re Western Dairy Transport, L.L.C.***, 574 S.W.3d at 551

* * *

Contrary to Relators' assertion of "merits-based" requests, the discovery order at issue here recites that it is ordering discovery based on a finding that the discovery requested by Plaintiffs is reasonably calculated to lead to the discovery of admissible evidence for the claims made the basis of "[Relators] matter pending before this Court." This reference clearly limits discovery to the pending motion to dismiss, not to the underlying case itself. *See* TEX. R. CIV. P. 192.4. . . . ***In re Western Dairy Transport, L.L.C.***, 574 S.W.3d at 551-2

7. POST JUDGMENT DISCOVERY

***Gene S. Hagood and William G. Neumann,* ---S.W.3d ---** 2019 WL 6795869 at *5 **(Tex. App- Corpus Christi-Edinburg 2019)** (orig. proceeding). A party is entitled to engage in post judgment discovery pursuant to Tex. R. Civ. P. 621.

8. TURNOVER ORDERS

In re Steven K. Topletz and Harper Bates & Champion LLP. 2019 WL 4027076 (Tex. App. – Dallas 2019) (orig. proceeding).

A party who obtains a judgment may seek a turnover order requiring the party to the judgment to turn over nonexempt property. Because the statute plays a central role in the holding of this case, I will quote from the opinion's introduction at length because it explains the statute, its purpose and its scope very clearly:

TURNOVER STATUTE

Section 31.002 of the Texas Civ. Practice and Remedies Code

(the turnover statute) authorizes a trial court to order a judgment debtor to turn over nonexempt property, including present or future rights to property, the judgment debtor owns. *See* CIV. PRAC. & REM. § 31.002(a); ***Alexander Dubose Jefferson & Townsend LLP v. Chevron Phillips Chemical Co. L.P.***, 540 S.W.3d 577, 581 (Tex. 2018) (per curiam). As pertinent here, the turnover statute provides:

> (a) A judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.
>
> (b) The court may:
>
> (1) order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control, together with all documents or records related to the property, to a designated sheriff or constable for execution.

See CIV. PRAC. & REM. § 31.002(a), (b)(1).

"The purpose of the turnover proceeding is merely to ascertain whether or not an asset is in the possession of the judgment debtor or subject to the debtor's control." ***Beaumont Bank N.A. v. Butler,*** 806 S.W.2d 223, 227 (Tex. 1991).. Turnover proceedings are limited to their purely procedural nature, and the turnover statute does not authorize the trial court to determine the substantive rights of non-judgment debtors. *See* ***Alexander Dubose****,* 540 S.W. 3d at 583; ***Beaumont Bank, N.A.,*** 806 S.W.2d at 227 ("Texas courts do not apply the turnover statute to non-judgment debtors.").

The opinion in this case is based on two fundamental holdings: 1) discovery can only be had from the party to the judgment. Discovery cannot be obtained from non-judgment debtors. This includes the attorneys of the judgment debtor. 2) Billing records are privileged documents and cannot be ordered produced absent a demonstration of compelling circumstances

(which was not done here). Further the billing records were found to belong to and be in the possession of the debtor's attorneys; therefore, since the attorneys were not judgment debtors the court could not compel the production of such records from them. ***Topletz*** at *4.

9. EXPERTS

Tex. R. Civ. P. 194.2(f) sets out the disclosure requirements for testifying expert witnesses. Failure to timely comply with these requirements as modified by court scheduling orders can be perilous. This is one of the take-aways from ***Hendryx v. Tucker,*** 2019 WL 3820421 (Tex. App. Corpus Christi-Edinburgh 2019). In that medical negligence case, there was a scheduling order setting out how and when testifying experts were to be disclosed. While the Plaintiff timely served Ch. 74 expert reports, the Plaintiff did not timely comply with the Court's scheduling order and did not timely seek a continuance of the deadlines. The Defendant filed a motion for summary judgment. Plaintiff attempted to use its Ch. 74 report in response to the motion. The Court found that this was unacceptable and invalid summary judgment evidence. First, the Court found that since Plaintiff had not timely complied with the Court's Scheduling Order or with Tex. R. Civ. P. 194.2(f) Plaintiff was precluded from offering expert testimony in response to the Defendant's motion for summary judgement. Plaintiff tried to argue that the Ch. 74 report was adequate to overcome the requirement of not causing unfair prejudice. However, the Court found that the Ch. 74 did not provide adequate notice, nor did it constitute compliance with Tex. R. Civ. P. 194.2(f).

> "In order for a trial court to consider the plaintiff's expert's testimony as summary judgment evidence, the plaintiff must have timely designated that expert as a testifying witness." *See* ***Cunningham v. Columbia/St. David's Healthcare Sys., L.P.,*** 185 S.W. 3d 7, 10-11 (Tex. App. – Austin 2005, no pet.)

> "[T]he fact that a non-designated expert's initial report has been filed does not prevent the opposing party from suffering unfair surprise or prejudice if that expert's testimony is then considered as evidence for summary judgment purposes." ***Cunningham v. Columbia/St. David's Healthcare Sys., L.P.,*** 185 S.W. 3d 7, 14 (Tex. App. – Austin 2005, no pet.)

Additionally, neither a Ch. 74 report nor an unsworn expert report, constitute valid summary judgment evidence.

10. MOTIONS FOR PROTECTION

A. It is very common in personal injury litigation, especially product liability cases, for defendants to demand that before serving Plaintiffs with responsive documents, the plaintiff agree to a confidentiality order. To expedite discovery, a plaintiff may agree to the defendant designating documents, data and testimony as confidential subject to the defendant having to demonstrate the confidential nature of the documents, data and testimony if challenged. That is what occurred in ***In re Toyota Motor Sales*,** Not Reported in S.W. Rptr., 2019 WL 3244490 (Tex. App. – Dallas 2019) (orig. proceeding). Toyota sought to protect depositions and deposition testimony that discussed databases that Toyoto claimed were confidential. Unfortunately, Toyota failed to produce sufficient evidence of a basis for confidentiality or the need to protect the testimony it sought to have protected; therefore, its motion for protection was denied. This is a common mistake made by litigants seeking protective orders. It is not enough to allege and argue a specific harm that will likely occur if the protection is not granted. The party seeking protection must offer evidence of the privilege and of the potential harm.

> We afford the trial court broad discretion in the granting of protective orders. ***In re Eurecat US, Inc***. 425 S.W.3d 577, 582 (Tex. App. – Houston [14th Dist.] 2014 orig. proceeding).. To justify a protective order, the party resisting discovery must present facts showing a, specific, and demonstrable injury. ***Garcia v. Peebles***, 734 S.W.2d 343, 345 (Tex. 1987) (orig. proceeding). Conclusory allegations are not adequate. *Id.* Further, the party seeking a protective order must provide detailed information to support its claim of privilege or confidentiality. *See* ***In re Bridgestone/Firestone, Inc.,*** 106 S.W.3d 730, 732-33 (Tex. 2003) ("a party who claims the trade secret privilege cannot do so generally but must provide detailed information in support of the claim").

In re Toyota Motor Sales at *1.

B. ADEQUATE TIME FOR DISCOVERY: SUMMARY JUDGMENT

A frequent objection or response to a motion for summary judgment is that there has been an insufficient time for discovery. Aside from the point that the party making this assertion has to demonstrate due diligence and that the failure to obtain discovery did not result from the parties own negligence or lack of diligence, the motion must be supported either by a verified pleading or an affidavit. ***Hendryx v. Tucker*** 2019 WL 3820421 at *4 (Tex. App. Corpus Christi-Edinburgh 2019) citing ***Tenneco Inc. v. Enter. Prods. Co.*** 925 S.W.2d 40,647 (Tex. 1996).

C. MOTION FOR PROTECTION REGARDING DISCOVERY TO NON-PARTIES

In re United Fire Lloyds 2019 WL 1785345 (Tex. App. – Tyler 2019, orig. proceeding). See discussion below under Depositions.

PART II

DISCOVERY TOOLS

1. REQUESTS FOR PRODUCTION:

A. Documents can be the most informative discovery obtained in a case and oftentimes will be the most persuasive evidence at trial. This is because documents compiled in the ordinary course of business tell the story in real time, before the parties began contemplating litigation or formulating a defense. By the same token, document discovery is often the most challenging and frustrating form of discovery. There is the difficulty in making requests comprehensive without making them objectionably overbroad. And there is the time and burden of perusing the potential universe of relevant, responsive documents, organizing them and evaluating them for objections and claims of privilege. The responses often fall into several categories, evasive, no production, or a document dump. This kabuki dance is played out dramatically in ***In re Bilfinger Westcon, Inc.*** 2019 WL 6795870 (Tex. App. – Corpus Christi-Edinburg 2019) and the Court's opinion provides us some meaningful guidance in dealing with these issues.

Without spending a lot of time outlining the substance of the dispute in litigation, suffice for our purposes that one side was requesting an enormous number of documents and the other side was resisting from having to produce the documents. But that is not the main focus of the decision. While the Court finds that many of the requests were improperly overbroad, the focus of the opinion is on the manner of production. The gist of the requesting party's complaint was that the responding party failed to organize the documents to correspond to its requests for production and alleged that relator's production constituted an impermissible "document dump."

The requesting party was asking the Court to require the responding party regarding prior productions to provide an inventory of what had been produced. The responding party objected, arguing that the Texas Supreme Court has held that a party does not have to create evidence for the other side or inventories. The Court rejected this argument, holding that the trial

court was not ordering the creation of an inventory, but instead ordering the responding party to comply with the applicable rules.

> . . . the trial court's order requires no such thing and instead requires relator to "amend its responses" to the requests for production "to identify each tangible item responsive to each" request for production "or by general categories of documents." . . . the trial court's order tracks the language of the Texas Rules of Civil Procedure. Accordingly, we reject relator's arguments to the extent that they are premised on the creation of a document or "inventory." Id at *9.

> We conclude . . . Texas Rule of Civil Procedure 196.3 (c) requires the responding party to "either produce documents and tangible things as they are kept in the usual course of business or organize and label them to correspond with the categories in the request." TEX. R. CIV. P. 196.3(c); *see* ***Poretto v. Tex. Gen. Land Office****,* 448 S.W.3d 393, 403 (Tex. 2014). Id at *10.

The responding party next order that requiring its attorneys to categorize the responsive documents and correlate them to the requests would be an invasion of the attorney's core work product. The claim was that the ordering of the responsive documents would reveal the attorney's mental impressions. The Court disposed of this argument as "non-sensical."

> Requiring relator to comply with the rules of civil procedure and produce documents and tangible things and "organize and label them to correspond with the categories in the request" does not violate the attorney work product doctrine. TEX. R. CIV. P. 196.3(c); *see* ***Porretto***, 448 S.W.3d at 403. Id. at *11.

The responding party's last argument was that compliance with the request would impose an enormous burden and would not be proportionate to the needs of the case for resolution. It is important to note that all discovery is burdensome. As the Court observes, a party may only be entitled to protection if they party can demonstrate that the request imposes and "undue burden." ***ISK Biotech Corp. v. Lindsay***, 933 S.W.2d 565, 568 (Tex. App. – Houston [1st Dist.] 1996, no pet.).

The Court found that the trial court could have applied a proportionality analysis in reaching its decision but did not specifically rule on the proportionality argument. Instead, the Court focused on the point that the responding party could have chosen to produce the documents as they were kept in the ordinary course of business rather than compiling them and producing them in a litigation format. A party cannot claim undue burden when the burden results from its own discretionary choices.

> Second, we note that relator could have, but did not, produce the M11 Contract documents as they were kept in the ordinary course of business. *See* TEX. R. CIV. P. 196.3 (c); ***Porretto***, 448 S.W. 3d at 403.
>
> . . . relator chose essentially to compress and compile all of the arbitration documentation into one file. We note that a discovery request will not result in an undue burden when the burdensomeness of responding to it is the result of the responding party's own "conscious, discretionary decisions." ***ISK Biotech Corp***. 933 S.W.2d 565, 568 (Tex. App. – Houston [1st Dist.] 1996, no pet.); *see* ***In re Whitely***, 79 S.W. 3d 729, 734-735 (Tex. App. – Corpus Christi – Edinburg 2002, orig. proceeding); s*ee also* ***In re Brookfield Infrastructure Grp., LLC*** No. 13-27-00486-CV, 2018 WL 1725467, at *12 (Tex. App.—Corpus Christi–Edinburg Apr. 9, 2018, orig. proceeding) (mem. op.).

B. Another opinion taking on the "document dump" tactic is ***In re Hite***, 2018 WL 2715300 at *3 (Tex. App. – Tyler 2018, orig. proceeding). Similar to the holding in ***In re Exmark Manufacturing Company,*** 299 S.W.3d 519 (Tex. App. – Corpus Christi 2009, orig. proceeding and ***In re Bilfinger Westcon, Inc.,*** *supra,* the Tyler Court of Appeals in ***Hite*** holds that a trial court does not abuse its discretion in ordering a producing party to precede its responses to requests for production with the request to which they apply in compliance with Tex. R. Civ. P. 193.1, regardless of whether the responding party produces the documents as they are maintained in the ordinary course of business.

2. REQUESTS FOR ADMISSIONS:

A. The use of requests for admissions continues to be an area of controversy. First there is the issue of the purpose of requests for admission. Requests often are used to eliminate issues, merits preclusion; however, the Texas Supreme Court has ruled that issue preclusion is not a proper purpose of requests for admission. ***Marino v. King,*** 335 S.W. 3d 629, 632 (Tex. 2011). Requests are more properly used to establish undisputed facts or elements of an issue rather than globally attempting to eliminate having to prove any element of the issue. The second are of controversy deals with withdrawal of admissions. Typically, a party will be permitted to withdraw a deemed admission upon a showing of good cause for failure to timely respond and a finding by the trial court that (1) the party relying upon the deemed admissions will not be unduly prejudiced, and (2) presentation of the merits of the action will be served by the withdrawal. TEX. R. CIV. P. 198.3, ***Marino v. King,*** supra at 633 (Tex. 2011). Good cause is established by showing the failure involved was an accident or mistake, not intentional or the result of conscious indifference. ***Wheeler v. Green,*** 157 S.W.3d 439, 442 (Tex. 2005) (per curium). However, if the responding party is attempting to withdraw a deemed admission to a merits preclusive request then the rule is different. ***Marino v. King,*** 335 S.W. 3d 629, 633 (Tex. 2011). When a party uses deemed admissions to try to preclude presentation of the merits, (admit you have no claim or defense), the deemed admission can amount to a death-penalty sanction. ***Medina v. Zuniga,*** 593 S.W.3d 238 (Tex. 2019). In that case, constitutional due process concerns need to be considered and addressed. ***Marino,*** 355 S.W. 3d at 632. The party opposing the withdrawal has to demonstrate that the responding party was flagrantly negligent in failing to timely respond and that the response will not cause unfair prejudice. When the requests for admission are merits preclusive, the party opposing the withdrawal of the admissions has the burden to show that the party seeking the withdrawal acted with bad faith or callous disregard of the rules. ***Marino,*** 355 S.W. 3d at 634.

B. In ***Ralls v. Funk***, 592 S.W.3d 178 (Tex. App. – Tyler 2019) (pet. denied) the Tyler Court of Appeals found that the following requests for admission in a collections case was an improper ***merits preclusive request***:

No. 2: Admit Plaintiff performed Plaintiff's obligations under the

> Consultant Agreement.

The Court's observation regarding this request is informative:

> This request did not seek to discover information. It relieved Funk of the burden to prove an ultimate issue of fact necessary to establish his case, that he performed as required by the consultant agreement. This was not a proper use of requests for admissions, and it implicates due process concerns

The Court found that the party opposing the motion to withdraw deemed admissions failed to demonstrate that the party seeking the withdrawal was flagrantly negligent in failing to timely respond to the request and that the withdrawal would not unfairly prejudice the party opposing the withdrawal because that party had supported its motion for summary judgment with other additional evidence. Id. at 184.

C. ***Medina v. Zuniga,*** 593 S.W.3d 238 (Tex. 2019). This is a very interesting opinion, which answers some questions, but I believe leaves others unanswered. The focus of the opinion from a discovery perspective is the use of issue preclusive requests to seek sanctions. The Plaintiff at the outset of the case served the defendant in a motor vehicle pedestrian case a number of requests for admission that fall into the category of issue preclusion requests. The opinion sets out all the requests, but I am going to only set out a couple, which will adequately illustrate the point:

> Do you admit or deny you were negligent on the date of the incident made the basis of this lawsuit?
>
> Do you admit or deny that your negligence on the date of the incident was a proximate cause of the Plaintiff's injuries and damages which [are] the subject of this lawsuit?

Medina at 243.

At the outset of the trial, after apparently denying the requests, the

defendant's attorney announced that the defendant was stipulating ordinary negligence and was only going to contest gross negligence. After the trial, the Plaintiff sought sanctions under Tex. R. Civ. 214 for an award of reasonable expenses and attorney's fees incurred in proving Defendant's negligence. The basis Plaintiff gave for her sanctions motion was Defendant's denial of Plaintiff's negligence-based requests for admissions and later concession of ordinary negligence at trial. Frankly, this motion did not make sense to me because the purpose of the sanction is to compensate the requesting party the time and expense of having to prove a point that is denied. If the party admits the proposition, arguably there is no time or expense that will be expended in proving the matter. The Court did not discuss this point, but instead observed that the same evidence that was presented on gross negligence would have been admitted had negligence not been admitted. The Court also was sympathetic to Defendant's argument that it had a reasonable basis for the denial and points out that the following defense will almost always be a viable defense to sanctions under Rule 215.4 when issue preclusive requests are served early in the case before meaningful discovery has been conducted:

> "The court shall make the order unless it finds that ... the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or ... there was other good reason for the failure to admit."

In other words, it is going to be very difficult to prove that the defendant knew from the outset of the case that he/she was going to stipulate liability at the end. Just as the Court has found that deemed admissions to issue preclusive requests for admissions constitute a denial of due process, it so too finds that sanctions for denying issue preclusive requests is a denial of due process:

> The same due-process concerns that arise in the deemed-admission context also come up when a trial court sanctions a party under Rule 215.4 for denying merits-preclusive requests for admissions.

Medina at 245

> It is clear the Court considered the motion for sanctions in this instance

ill-advised. The trial court granted the sanctions. The appellate court affirmed, but the Texas Supreme Court reversed.

The Court makes clear that it does not like issue preclusive requests for admission because it does not believe that is what requests for admission were intended to accomplish. Rather, requests for admissions are more effectively used to eliminate uncontested issues of fact, such as authenticity and admissibility of records.

> as we have held for almost 70 years, they were "never intended to be used as a demand upon a plaintiff or defendant to admit that he had no cause of action or ground of defense." ***Sanders v. Harder, 2***27 S.W.2d 206, 208 (Tex. 1950).; *see also* ***Marino v. King,*** 355 S.W.3d 629, 632 (Tex. 2011) (per curiam) ("Requests for admission were never intended for [the] purpose" of asking the defendant to "admit to the validity of [the plaintiff's] claims and concede [the defendant's] defenses—matters [the plaintiff] knew to be in dispute.").

Curiously, the Texas Supreme Court goes on to say that while it disapproves using requests for admissions to obtain sanctions such as were sought in this case, because it violates notions of due process, it acknowledges that issue preclusive requests for admission are properly within the scope of discovery.

> Our rules do not, strictly speaking, prohibit merits-preclusive requests for admissions. *See* TEX. R. CIV. P. 198.1 (requests may ask that a party "admit the truth of any matter within the scope of discovery, including statements of opinion or of fact or of the application of law to fact").

Medina at 245. This begs the question, to what end are issue preclusive requests for admissions permissible and efficacious? After reading the recent case law, I am left with the impression that issue preclusive requests may be propounded but that they cannot be used to deny the opponent due process, by seeking sanctions. But what happens if issue preclusive requests are served and there is not a timely motion to withdraw admissions, deemed or otherwise? Arguably, if the motion to supplement, amend or withdraw the admissions to issue preclusive requests is not timely filed, the admissions may be used to preclude evidence in contravention of the

admission. I would not bet the farm on that theory, but at this point the answer is less than clear.

3. DEPOSITIONS:

A. RULE 202 DEPOSITIONS:

1) A Rule 202 petition for pre-suit discovery is not a legal claim on the merits. As a result, the TCPA does not apply to Rule 202 proceedings. ***Caress v. Fortier,*** 576 S.W.3d 778 (Tex. App. – Houston [1st Dist.] 2019)**;** *see also***, *Hughes v. Giammanco,*** 570 S.W.3d 672 (Tex. App. – Houston [1st Dist.] 2019).

2) A point of controversy regarding Rule 202 depositions has been whether documents can be requested in conjunction with the deposition. There has been authority to the effect that Rule 202 does not allow document requests; however, I have questioned whether the parties in that case properly framed the argument for the court.

The Waco Court, in ***In re Pickrell*****, Not Reported in S.W.3d, 2017 WL 1452851 (Tex. App. – Waco 2017)**, citing the holding in ***In re Akzo Nobel Chem., Inc.***, ruled that Rule 202 does not provide the Court discretion to order anything but an oral deposition and that nothing in the rule provides the Court discretion to order the production of documents in conjunction with a pre-suit deposition either in anticipation of a lawsuit or to investigate a potential claim.

> "Neither by its language nor by implication can we construe Rule 202 to authorize a Trial Court, before suit is filed, to order any form of discovery but deposition." ***In re Akzo Nobel Chem., Inc.,*** 24 S.W.3d 919, 921 (Tex. App. -- Beaumont 2000, orig. proceeding).

I believe the Waco Court of Appeals is incorrect both in its interpretation of the holding in ***Akzo*** and on the interpretation of Rule 202 to the extent it has held that a notice of oral deposition under Rule 202 cannot

contain a request for production.

The Tyler Court of Appeals has provided some recent guidance on this point although the strength of the holding may be challenged because it arguably is dicta since the Court already had ruled that Petitioner had failed to produce sufficient evidence to justify a Rule 202 deposition and the trial court had abused its discretion in failing to set out in its order its findings support of the requested deposition. ***In re City of Tatum,*** 567 S.W.3d 800 (Tex. App. – Tyler 2018) (orig. proceeding). Nonetheless, the observations are informative:

> Nothing in the language of Rule 202 prohibits a petitioner from requesting that documents be produced along with the deposition. ***In re Anand***, No. 01-12-01106, 2013 WL 1316436 at *3 (Tex. App. – Houston [1st Dist.] Apr. 2, 2013, orig. proceeding); *see* ***City of Dallas v. City of Corsicana***, No. 10-14-00090-CV, 2015 WL 4985935, at *6 (documents can be requested in connection with a deposition under Rule 202). Rule 202.5 states, in pertinent part:
>
> > Except as otherwise provided in this rule, depositions authorized by this rule are governed by the rules applicable to depositions of nonparties in a pending suit. The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed....
>
> TEX. R. CIV. P. 202.5. Rule 199.2(b)(5) expressly allows a party noticing a deposition to include a request for production of documents or tangible things within the scope of discovery and within the witness's possession, custody, or control. TEX. R. CIV. P. 199.2(b)(5), 205.1(c) (authorizing party to compel discovery from a nonparty by court order or subpoena, including a request for production served with a deposition notice). The "language of these rules when read together permits a petition seeking a pre-suit deposition under Rule 202 to also request the production of documents." ***Anand***, 2013 WL 1316436 at *. Accordingly, it is not an abuse of discretion to require production of documents in conjunction with Rule 202 depositions. *See id.; see also* ***City of***

Dallas, 2015 WL 4985935, at *6. (footnotes deleted).

In re City of Tatum, 567 S.W.3d at 808.

It also is noteworthy that the Tyler Court of Appeals questions the decision in ***In re Pickrell,*** for the same reasons I have previously addressed. See fn 7.

B. RULE 199 DEPOSITIONS: WHO MAY BE DEPOSED and WHEN:

A thorny issue in medical malpractice cases has been whether a non-party physician could be deposed without the Plaintiff first having to serve a Ch. 74 report implicating the physician or waiving the right to sue the physician later in the litigation. ***In re Turner*** 591 S.W.3d 121 (Tex. 2019) has now resolved the issue.

> We are asked whether the Act [Tex. Civ. Prac. & Rem. Code Ch. 74] prohibits the deposition and accompanying document production unless and until the claimant serves an expert report on the provider whose deposition is sought. The court of appeals held that it does, but we disagree and conditionally grant mandamus relief.

The tension has existed between the interest of the Plaintiff attempting to discover facts relevant to a pled claim against care providers and the interest of a non-party care provider in not being exposed to pre-suit discovery without the Plaintiff first providing a Ch. 74 report setting out the non-party physician's negligence and the factual basis for how the negligence was causative of Plaintiff's injuries, or an express waiver that the non-party care provider would not be joined as a party defendant. Of course, this was an untenable situation for the plaintiff who merely wanted to obtain facts without having to commit before obtaining such facts whether the non-party care provider would be joined as a party. The difficulty comes in parsing who is a non-party (for whom the exception under Ch. 74 applies) and who is a potential party (for whom the exception under C. 74 does not apply). *See* ***In re Jorden,*** 249 S.W. 3d 416 (Tex. 2008).

The Texas Supreme Court resolved the matter in Turner by finding that

the Plaintiff had served an unchallenged Ch. 74 report against the party defendant Hospital and therefore had crossed the threshold for demonstrating a prima facie claim as to the hospital. Therefore the Plaintiff could take the deposition of the non-party care provider relevant to the Plaintiff's claims against the party defendant. The key is whether the testimony sought is relevant to the claim against the named defendant. In Turner the Court found that was the case. ***Turner*** at 127.

The Court goes on to discuss the obvious problem that testimony relevant to the party defendant could at the same time be relevant to a potential claim against the non-party defendant. The Court found that Ch. 74 tolerates that situation and that the fact that the testimony could be viewed as serving both purposes would not be a basis for denying the discovery. ***Turner*** at 126.

However, if it is obvious that the sole purpose of the deposition is to obtain pre-suit discovery relevant to prosecuting a potential claim against the non-party defendant, then such discovery should be disallowed.

> But we cannot foreclose the possibility that a question or request posed to Dr. Sandate could have such a tenuous connection to the claims for which an expert report has been served that the Act would prohibit it even if the rules of civil procedure would not. ***Turner*** at 127.

The Court's explanation, using the claim in Turner as an example is informative:

> Turner's cause of action against the Hospital calls into question the conduct of nurses and other Hospital employees during her labor and delivery, which conduct allegedly fell below the accepted standard of care. Dr. Sandate may be deposed as a fact witness with respect to that cause of action, and his testimony about his recollection of the circumstances surrounding the employees' actions and omissions is decidedly relevant, including his own conduct as it relates to those actions. But Turner may not engage in a fishing expedition by requesting information from Dr. Sandate that sheds no light on what the Hospital's employees did and why. With these limitations,

discovery may proceed.

Turner at 127.

C. DEPOSITIONS ON WRITTEN QUESTIONS TO NON-PARTIES

Depositions on written questions are routinely used to obtain documents and data pertaining to the parties from non-parties. We discuss above in the scope of discovery section that the same scope of discovery pertains to depositions on written discovery to non-parties as does between parties. Another issue, however, is whether or how a party may challenge a request for documents from a third party when the records pertain to the party. What objections are available and how can they be asserted? ***In re United Fire Lloyds*** 578 S.W.3d 572 (Tex. App. – Tyler 2019, orig. proceeding) addresses these issues and helps inform the answers.

United Fire Lloyds involves an insurance policy dispute. The insured, Inner Pipe, filed a claim for fire damage and United Fire Lloyds denied claiming the fire was caused by the insured committing arson. United Fire Lloyds served depositions on written questions to various non-parties relevant to its affirmative defense that the fire was resulted from arson. The insured objected and moved to quash the depositions in their entirety, claiming that the requests were overbroad, irrelevant, and unduly burdensome. The Court granted the motion to quash in its entirety. United Fire Lloyds sought mandamus. The first issue involved the insured "standing" to assert objections and to seek an order quashing the notices. We will look at each of the arguments and how the Court disposed of each.

STANDING: United Fire Lloyds first argued that the insured had no standing to assert objections to notices served on non-parties. The Court quickly and summarily rejected this argument.

> Rule 200.3 entitled "Questions and Objections," expressly provides that "*any party* may object to the direct questions [to be propounded to the witness] and serve cross-questions on all other parties." TEX. R. CIV. P. 200.3(b) (emphasis added). Rule 192.6, which addresses protective orders, provides in pertinent part as follows:

> A person from whom discovery is sought, and *any other person affected by the discovery request*, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought. A person should not move for protection when an objection to written discovery *e*motion does not waive the objection or assertion of privilege.

TEX. R. CIV. P. 192.6 (emphasis added). (emphasis added). The use of " 'and' means that both the potential deponent and any other person affected by the discovery request are entitled to seek protection by filing motions for protection." I***n re Garza,*** 544 S.W.3d 836, 842 (Tex. 2018) (orig. proceeding) . . . see also, ***In re R.C.K.***, No. 09-16-00132-CV, 2016 WL 319786, at *2 (Tex. App. – Beaumont June 9, 2016, orig. proceeding) (mem. op.) (rejecting contention that party lacked standing to object to production by third parties of own medical records, based on Rules 200.3(b) and 192.6(a).

It should be noted that the same analysis arguably can be applied under Rule 176 to challenge the **subpoena duces tecum**, if any, as that rule also allows any interested party to challenge the subpoena. Moreover, the non-party is not required to comply with the subpoena duces tecum until the interested party's motion for protection is resolved by agreement or court order. See, Tex. R. Civ. P. 176.

The Court found that while Inner Pipe had standing to assert challenges to the notices, it failed to demonstrate that the requests were unduly burdensome or irrelevant. These points are discussed above under scope of discovery. Inner Pipe did, however, win its point that the requests were overbroad. However, in this respect the Appellate Court found that the trial court abused its discretion in quashing the notices in their entirety and remanded the case so that the trial court could place appropriate limitations on the scope of the requests. ***In re United Fire Lloyds,*** at 583.

4. SANCTIONS

There are death penalty sanctions and then sanctions that arguably are death penalty in effect. At least this is an argument that sometimes is advanced. The question of whether evidence exclusion rises to the level of a death penalty sanction "requires a case -by-case analysis." ***Revco, D.S.***

Inc. v. Cooper, 873 S.W.2d 391, 396 (Tex. App. – El Paso 1994, orig. proceeding). This is one of the arguments that was advanced by the Plaintiff in an attorney/client fee dispute in ***Hogg v. Lynch, Chappell & Alsup, P.C.***, 553 S.W.3d 55 (Tex. App. – El Paso 2018, orig. proceeding). The Plaintiff sent her counsel an email indicating that she had surreptitiously recorded conversations between them that she intended to use to support her case. When the law firm sought the recordings through discovery, the Plaintiff alleged that she did not inadvertently send the email to her ex-attorneys, but instead purposefully sent it to them as a tactic to unnerve them and observe their response. The law firm filed a motion to compel and the trial judge (as the finder of fact) found that the recordings existed and ordered them produced. Plaintiff did not produce the recordings and a sanctions order was issued that precluded Plaintiff from admitting certain evidence at trial or any hearing. Plaintiff appealed.

It is important to note that when a court denies the admission of evidence, even by way of a sanctions order, the party seeking to reverse the ruling must make a bill of exceptions in order to show that the order materially affected the presentation of the party's case and the outcome of the case. *See,* ***Katy Int'l, Inc. v. Jinchun Jiang*****,** 451 S.W.3d 74, 96 (Tex. App. – Houston [14th Dist.] 2014, pet. denied). ("The party complaining about the exclusion of evidence must show by either a bill of exception or an offer of proof the substance of the evidence excluded.") "In the absence of such bill of exception or offer of proof, any error in excluding the evidence is not preserved for review.") Notably, the Plaintiff in ***Hogg*** failed to do this, which was critical.

The appellate court, in holding that the trial court did not abuse its discretion, found the facts and holding in ***Cire v. Cummings,*** 134 S.W.3d 835 (Tex. 2004) to be informative.

> Case law makes clear that in cases involving a party's intentional destruction of or refusal to turn over discovery materials, the trial court's discretionary authority to sanction the disobedient party encompasses all possible sanctions, up to and including a death penalty sanction.

* * *

> We conclude that any gossamer distinctions between this case and ***Cire*** are immaterial. The record shows both evidence of restraint on the trial court's part and continued discovery abuse on Hogg's part. As required by law, the trial court explained why it passed on lesser sanctions in its order. The evidence also shows despite LCA's request for harsher sanction, the trial court did not impose the harshest possible sanction of striking Hogg's pleadings.

Hogg v. Lynch, Chappell & Alsup, P.C., 553 S.W.3d at 70-71.