

**IS IT BIGGER THAN A BREADBOX?
IS IT SMALLER THAN A BARN?**

**DISCOVERY OF DAMAGES IN TEXAS
2012**



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State Bar of Texas
4TH ANNUAL DAMAGES IN CIVIL LITIGATION
February 16 - 17, 2012
Dallas

CHAPTER 14



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ACKNOWLEDGMENT

I wish to thank my partner, Donna M. Aversano, for her patience and support while I was formulating ideas for (helping me keep the good ones and getting rid of the bad ones, mostly) and writing this paper, and for editing the final draft for accuracy.

TABLE OF CONTENTS

I. OVERVIEW: 1

II. SCOPE 1

III. PLEADINGS DEFINE SCOPE 2

IV. OBJECTIONS 5

V. COURT DISCRETION TO LIMIT DISCOVERY 10

VI. DISCOVERABLE DOCUMENTS AND THINGS REGARDING DAMAGES 12

VII. DISCLOSURE 23

VIII. SUPPLEMENTATION 28

IX. DISCOVERY RESPONSES AND SUMMARY JUDGMENT 29

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DISCOVERY OF DAMAGES IN TEXAS 2012

I. OVERVIEW:

Discovery of damages in civil litigation in Texas does not differ in significant regard from discovery of liability issues. The same rules and policies apply. Discovery still must be relevant to the claims and defenses plead. They must be tailored to the claims in the lawsuit and not be overly broad or unduly burdensome. They are limited also by privileges. Disclosure must provide fair notice and responses must be complete. After reviewing many of the more recent discovery cases, there seems to be a concentration of disputes regarding the sufficiency of disclosure and timely disclosure of expert opinions. There also still seems to be considerable controversy about discovery of documents relevant to net worth in cases involving punitive damages. Another interesting area concerns what must be alleged in order to obtain discovery. Does any allegation provide a basis for discovery or must the pleading be legally viable? Must there be a *prima facie* demonstration that there is legally sufficient evidence to support the allegation before discovery will be allowed relevant to the allegation? These are questions that are being raised and answered in the case law.

This paper is not intended to be a comprehensive survey of all Texas cases involving discovery of damages. Instead it is intended to provide some guidelines with respect to making the discovery of damages more focused and efficient and highlighting potential traps so that they may be avoided.

The primary areas of focus will be relevancy, requests for disclosure of economic models and disclosure of experts regarding damages. The paper also will discuss different types of information, documentation and data that have been sought in discovery in support of damages, when those attempts have been successful and when not.

II. SCOPE

A. Probably still the best and most elegant statement of the purpose of discovery in Texas is found in *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984).

we note that the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed.

While this is a profound statement, it does little to answer the question about how much and what type of discovery is necessary to reveal the truth. The scope of permissible discovery is now outlined generally in Rule 192. Parties may obtain generally discovery regarding:

any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party.

CIV. P. 192.3(a). In its comments to Rule 192, the Supreme Court makes the following observation:

While the scope of discovery is quite broad, it is nevertheless confined by the *subject matter of the case* and reasonable expectations of obtaining information that will aid resolution of the dispute. The rule must be read and applied in that context.[emph. added].

The most current and forceful statement of policy regarding the scope of discovery in Texas is set forth by the Texas Supreme Court in *Ford Motor Co. v. Castillo*, 279 S.W.3d 656 (Tex.2009).

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 v. McIhaney*, 798 S.W.2d 550, 553 (Tex. 1990).

Ford Motor Co. v. Castillo, 279 S.W.3d at 664.

B. The Supreme Court, in *In re American Optical Corp.*, 988 S.W.2d 711 (Tex. 1998) emphasized that discovery must be relevant to the subject matter of the case and requests must be tailored to include only matters that are relevant to the case. By the same token, there is some latitude with regard to what may be included in a tailored request.

A reasonably tailored discovery request is not overbroad merely because it may include some information of doubtful relevance, and we have specifically recognized that “[p]arties must have some latitude in fashioning proper discovery requests.” [omitting citations] *In re American Optical*, at 713

C. *Ford Motor Co. v. Castillo*, 279 S.W.3d 656 (Tex.2009). This case dealt with jury misconduct. In the

course of dealing with this issue, the Court emphasizes how low the threshold is for obtaining discovery that is relevant to the claims and defenses in the case.

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 affect, 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.*** [emph. added].

III. PLEADINGS DEFINE SCOPE

A. As demonstrated in *Ford v. Costillo*, discussed above, at this point in Texas jurisprudence, it should be clear that the pleadings are an important consideration in determining the scope of discovery. This point is illustrated by the comments of the Beaumont Court of

Appeals in *In re Starflite Management Group, Inc.*,
162 S.W. 3d 409, 414 (Tex. App.- Beaumont, 2005):

As our procedural rules tie scope of discovery to any unprivileged information that is “relevant to the subject of the action,” **it would seem necessary to have a properly-pleaded cause of action before us in order to determine if the various documents ordered produced are “relevant to the subject of the action,” or if the order is fatally overbroad.**

B. What should be emphasized, particularly with regard to discovery damages is that there is no black letter rule that allows discovery of certain types of documents, albeit those set out in the disclosure rule, in every case. Discoverability is based on relevancy and relevancy is tied to the pleadings in a particular case. Discoverability is case specific. Oftentimes, attorneys will find a case holding that a particular type of document was found to be discoverable in a reported case and the attorney will adopt that holding for the proposition that the type of document held to be discoverable is always discoverable. That is invalid reasoning and the conclusion is incorrect. Information and materials that may be relevant in one action based upon the pleadings may be found irrelevant in another action because there are no predicate pleadings. For instance in *In re Manion*, 2008 WL 4180294 *3 (Tex. App. – Amarillo, orig. proceeding) a number of financial documents were held to be discoverable because the pleading put the documents in issue and because the request for production was within the timeframe circumscribed by the pleading allegations. The case involved multiple claims and counterclaims arising from an alleged breach of a syndication agreement pertaining to a Quarter Horse. The allegations included breach of contract, torts and breach of fiduciary duty. The plaintiff served a subpoena for various financial and banking records, including account records, bank statements, signature cards, canceled checks, loan files, and financial statements.

While *Manion* does not specifically deal with discovery of damages, the holding is informative because in a number of cases financial and bank records are going to be relevant to claims of damages. In this instance the court held that the records were relevant to the claims that were pleaded and that they were within the time period alleged in the pleadings.

Manion's financial documents are also relevant to Freeman's underlying action. Freeman's third amended petition alleges Manion misused his position as a Stallion Manager for financial gain in violation of his

fiduciary duties. Consequently, Manion's financial information for the period he served as Stallion Manager is relevant and discoverable.

In re Manion, supra at *3.

The question then arises whether there is a legal basis for preventing discovery if the requests are relevant to the claims or defenses in the lawsuit. There is not a recognized privilege with regard to personal financial records and there is not a recognized restriction for protection of privacy:

Manion cites no authority in support of an asserted constitutional right to privacy, and it has previously been determined 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); *Miller v. O'Neill*, 775 S.W.2d 56, 59 (Tex. App. – Houston [1st Dist.] 1989, no writ) (“[T]he supreme court has allowed such discovery, despite the inevitable intrusion.”).

In re Manion, supra at *3. See also, *In re Gonzalez*, Not Reported in S.W.3d, 2010 WL 5132590 *1 (Tex.App.-Hous. [14 Dist.]).

C. MUST A VALID CLAIM BE DEMONSTRATED?

While it is clear at this point that the pleadings are the beginning point for determining whether a discovery request is relevant, there does seem to be a lack of clarity on whether the party seeking discovery must first demonstrate that the claim for relief or defense is viable as a matter of law. (Of course, the requirement that there be legally sufficient evidence to support the claim would result in a circular analysis, since the party seeking discovery would be able to argue that due process was being denied if the party were unable to obtain the necessary evidence to establish the predicate). There are several cases that touch on this issue, but it is difficult to tease a hard rule from them. For instance, in *Lunsford v. Morris*, 746 S.W.2d 471 (Tex.1988) with regard to discovery of net worth, the Texas Supreme Court made the following observations:

We hold that in cases in which punitive or exemplary damages may be awarded, parties may discover and offer evidence of a defendant's net worth...*Some states allowing discovery of net worth require a prima facie*

showing of entitlement to punitive damages before information about a defendant's net worth may be sought. . . ***Our rules of civil procedure and evidence do not require similar practices before net worth may be discovered.***

Absent a privilege or specifically enumerated exemption, our rules permit discovery of any "relevant" matter; thus, there is no evidentiary threshold a litigant must cross before seeking discovery. Tex. R. Civ. P. 166b(2)(a). [emph. added]

Lunsford, 746 S.W.2d at 473.

The Dallas Court of Appeals in *In re Islamorada Fish Co. Texas, L.L.C.*, 319 S.W.3d 908 (Tex. App.-Dallas 2010, orig. proceeding) noted the holding in *Lundsford* and observed that the corollary "is that when punitive damages clearly are not recoverable, information about net worth is not relevant and, as a result, not discoverable." *Supra* at 912. The case involved a dram shop action. Plaintiffs alleged that Islamorada wrongfully served the defendant driver alcohol and that the defendant driver was intoxicated at the time that he collided with Plaintiffs. Plaintiffs sought discovery of Islamorada's net worth. The appellate court noted that under Tex. Civ. Prac. & Rem. Code §41.005(a) punitive damages were not allowed.¹ Since Plaintiffs had pled the defendant driver was intoxicated, the statute was implicated. Since there was *no legal basis* for punitive damages, discovery of Islamorada's net worth was disallowed.

On this record, we conclude that section 41.005(a) applies to bar recovery of punitive damages in this case as a matter of law. The trial court did not properly apply the law relating to punitive damages and ordered Islamorada to produce discovery that is not relevant. [footnote omitted]

In re Islamorada Fish Co. Texas, L.L.C., 319 S.W.3d at 913.

From *Lundsford* and *Islamorada*, we may conclude that if there is a legal basis for a claim of punitive damages, then net worth is discoverable without first

¹ Section 41.005(a) of chapter 41 states:

In an action arising from harm resulting from an assault, theft, or other criminal act, a court may not award exemplary damages against a defendant because of the criminal act of another.

proving the factual basis for the claim. However, if there is no legal basis for the claim of punitive then discovery of net worth may be denied. This begs the question of whether this rationale extends to other claims and defenses.

The discovery issue in *In re Bass*, 113 S.W.3d 735 (Tex. 2003) did not involve gross negligence or punitive damages. Rather, the Plaintiffs who were non-participating royalty interest owners sued Bass, the mineral estate owner, for multiple claims in the trial court. The claim in issue before the Texas Supreme Court was Bass' alleged breach of an implied duty to the plaintiffs to develop Bass' land. The discovery issue concerned the Plaintiffs' request for seismic information, which Bass claimed was protected by the trade secret privilege. The court found that seismic data was in fact protected as a trade secret, but that Plaintiffs might be able to obtain discovery of trade secrets upon a showing that information was necessary to a fair adjudication of their breach of an implied duty claim. "However, in order for trade secret production to be material to a litigated claim or defense, a claim or defense must first exist." *Supra* at 743. The Court then analyzed whether the Plaintiffs had established a legal basis for a claim of breach of fiduciary duty and found that Plaintiffs had not established such a legal basis. Accordingly, the discovery of trade secret seismic data was disallowed.

No lease exists in this case. Furthermore, without exercising his power as an executive, Bass has not breached a fiduciary duty to the McGills as non-executives. Because the record both fails to demonstrate the existence of an oil and gas lease that would create an implied duty to develop and fails to show that Bass has breached his duty as the executive, we hold the trial court abused its discretion in compelling trade secret production. *In re Continental General Tire, Inc.*, 979 S.W.2d 609, 615 (Tex. 1998); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992).

In re Bass, 113 S.W.3d at 745.

Lastly, there is *Ford Motor Co. v. Castillo*, 279 S.W.3d 656 (Tex., 2009). See discussion above, under II. SCOPE, C.

It would seem from this analysis that a party seeking discovery does not have to first prove a *prima facie* factual basis for the claim or defense in order to obtain discovery relevant to the claim or defense. As long as there is a potential legal basis for a claim or defense, discovery should be allowed that is relevant to the

allegation, subject to the rules limiting the scope of discovery.

IV. OBJECTIONS

A. TAILORED REQUESTS: As pointed out throughout this the paper, the Texas Supreme Court has made clear that discovery requests must be tailored to the claims and defenses in the case. This applies both to plaintiffs and to defendants and to all discovery devices. See, *In re American Optical Corp.*, 988 S.W.2d 711 (Tex. 1998).

1. *In re EOG Resources, Inc.*, Not Reported in S.W.3d, 2011 WL 455280 (Tex. App.-Waco) provides a good discussion of the “tailoring” concept, as well as the issue of specificity.

The case arises out of a personal injury incident. A worker was seriously injured when a mobile trailer on a well site was toppled during a severe storm. A number of entities were sued. The plaintiff sought production of documents pertaining to all similar trailers at all similar sites in the United States and several other countries. Additionally, the request sought documentation regarding other types of trailers than the one involved in the incident as follows:

all documents relating to “portable offices and sleeping quarters,” “any other trailer leased by EOG for use as temporary offices and living quarters,” “temporary trailers used as dwellings and temporary offices at EOG drilling sites,” “trailers,” and “substantially similar trailers at its drilling sites.”

The trial court granted the motion in part, but limited the production requested to all of EOG’s well sites in the United States for the five years preceding the date of the accident as to certain requests.

The appellate court found that while the Court had appropriately tailored the time period for the request, the Court had failed to adequately tailor the request as to the geographical area and type of structures involved. In these latter regards, the appellate court considered the request and the court’s order overbroad.

The opinion also addressed two very common requests. The first request sought “*all Documents on which you will rely to support any defense you assert in this case.*” The appellate court found that this request was improperly overbroad because it was not specific as to particular types and categories of documents requested. While this is true, it also would appear that the request is for the responding party to “marshal” its evidence on this particular issue, which is improper. The issue of

marshaling, however, is not discussed in the opinion. The other request was for “*all Documents relating to the damages claimed by Plaintiffs in this case.*” The court found that this request was improper because it is not specific with regard to the type of damages for which the discovery is requested (i.e. lost earning capacity, physical impairment). However, even if the request were specific as to the damages, it would still appear to be in violation of the rule against “marshaling” evidence.

2. *In re GMAC Direct Ins. Co.*, Not Reported in S.W.3d, 2010 WL 5550672 (Tex. App.-Beaumont).

The discovery dispute in this matter highlights the need to tailor discovery as narrowly as possible to avoid sweeping up tenuous data.

“A central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information.” *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003).

The appellate court found that plaintiffs’ requests in this instance on their face failed to comply with this admonition. The underlying case dealt with a claim of unfair insurance practices in relation to a Hurricane Ike claim. Plaintiff alleged various claims of tort and breach of contract. Plaintiff served the following requests, which the court compelled by submission:

- (1) “[a]ll computer files, databases, electronically-stored information or computer-stored information regarding property damage, hurricane damage, water damage and/or roof damage that have been [compiled], prepared and/or supervised by Defendant, whether or not they are in Defendant’s possession or in the possession of another entity[.]”
- (2) “[a]ny and all correspondence from Defendant to and from vendors regarding any instructions, procedures, changes, training, payments and billing for property, property damage, hurricane, flood and catastrophe claims for 2000 through the present, including but not limited to computer disk, e-mails, paperwork and manuals [.]” and
- (3) “[a]ll documents and communications, including electronic, between any engineer(s) or engineering company(s), used to evaluate this Plaintiffs’ claim(s), or other

person(s) used in handling Plaintiffs' claim(s) and Defendant in the last five years regarding, in any way, the investigation of a homeowners residence, commercial building or church involving damages to the structures or its contents.”

Plaintiffs contended they were harmed by the Relators' “deliberate business practice of fraudulently adjusting property-damage claims in an outcome-oriented manner so as to minimize the amounts they paid out under the homeowners' policies they issued.” Based upon these allegations, Plaintiffs argued that their requests were designed to produce evidence of a company-wide business practice for which the Plaintiffs were entitled to recover statutory additional damages and exemplary damages.

The appellate court found that the above requests were not tailored for a particular time period. Nor were they tailored for the specific allegations in the case. Instead, the court found that Plaintiffs were fishing for larger claims, which it found improper.

Rather than tailor the request to include the electronic information actually used in adjusting the Carlsons' claim, the request asks for any electronically-stored information regarding any property damage without regard to time or geographical location. The tenuous connection to the Carlsons' claim is that if an analysis of the data shows that it is somehow “skewed” in favor of the insurance company, then the Carlsons might be able to use that information to establish exemplary damages.

This is precisely the sort of fishing expedition that harvests vast amounts of tenuous information along with the pertinent information that was used in adjusting the Carlsons' claim. [emph. added].

3. The concept of tailoring discovery also applies to depositions. See, *In re West*, 346 S.W.3d 612 (Tex.App.-El Paso, 2009, no pet.), discussed above, under COURT DISCRETION.

B. OVERBREADTH:

1. While the scope of permissible discovery in Texas is quite broad, there are limits. The broad scope of discovery is limited by the legitimate interests of the opposing party in avoiding overly broad requests, harassment, or the disclosure of privileged information. *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding). As a general rule in determining

overbreadth, the focus is on whether the request could have been more narrowly tailored to avoid including tenuous information. See *In re CSX Corp.* 124 S.W. 3d 149, 153 (Tex. 2003) (orig. proceeding). *In re EOG Resources, Inc.*, Not Reported in S.W.3d, 2011 WL 455280 (Tex. App.-Waco) provides a good discussion of this concept as well as the issue of specificity. See discussion above under TAILORED REQUESTS.

2. *In re Family Dollar Stores of Texas, LLC*, Not Reported in S.W.3d, 2011 WL 5299578 (Tex.App.-Beaumont). See discussion below, under Computer Files.

3. *In re Halliburton Energy Services, Inc.*, Not Reported in S.W.3d, 2011 WL 4612726 (Tex. App.-Hous. [1st Dist.]). It is an abuse of discretion to issue orders that allow for overbroad discovery. This means that it could be an abuse of discretion for a trial court to overrule an objection to an overbroad request for production, and it also could be an abuse of discretion for the trial court to craft an order that is even more overbroad than the discovery request. This latter indiscretion is what was at issue in *In re Halliburton*.

The discovery ordered by the trial court was much broader even than Lane's original discovery request, as the trial court compelled production of “all documents evidencing fees paid by [HESI] to outside law firms.” This order compels discovery that is overbroad, and it “could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information.” See *In re CSX*, 124 S.W.3d at 153.

The discovery dispute arose in the context of a breach of contract claim. An attorney was claiming that Halliburton had breached a contract to retain the attorney on various personal injury claims arising in the Gulf of Mexico region. The attorney sought discovery regarding what firms Halliburton had hired and what it had paid those firms in an effort to develop evidence of damages. After negotiations, the Plaintiff asked the court to issue an order requiring production of documents. However, instead of tracking the Plaintiff's request, the Court effectively broadened the scope of the request.

When the parties were unable to come to a resolution, Lane informed the trial court that he had narrowed his discovery request to “**documents that show outside counsel fee information for matters related to offshore, longshoremen, automobile accident, and blowout claims originating in Louisiana and**

the Gulf of Mexico Region since July 1, 2007 to present” and requested that the court rule on his motion to compel. On April 13, 2011, the trial court ordered that HESI “shall produce all documents evidencing fees paid by [HESI] to outside law firms *for legal matters* originating in Louisiana and the Gulf of Mexico region since July 1, 2007 to the present and through the trial of this cause.” [emphasis added].

4. *In re Baker*, Not Reported in S.W.3d, 2011 WL 1679841 (Tex. App.-Waco). How many times have you been involved in litigation in which a party sent discovery requests that you considered overbroad, only to have the requesting party at the motion to compel hearing say something like “Judge, what we really want and need is this. . .” The opinion in *Baker* pivots on such a situation.

Baker involves claims of breach of warranty, deceptive trade practices and fraud with regard to a Chrysler dealer failing to inform a purchaser that diesel fuel injectors were prone to contamination from water. The purchaser did not know this and believed that Chrysler and the Dealer should be responsible for replacing the contaminated injectors estimated to cost about \$10,000. The litigation was complicated by Chrysler Corporation filing for bankruptcy. Chrysler, a new corporation, came in and assumed limited liabilities for the prior corporation. Plaintiffs limited their claims against Chrysler to these assumed liabilities. However, they sought the full range of claims against the dealer. Here is a sample of the discovery requests:

INTERROGATORY NO. 5: Identify by customer/purchaser name, address, and telephone number and date all reports and/or complaints made or received by Chrysler, either directly or through any of its dealers or other sources concerning the failure of or problems with the ejectors [sic] in engines like that in the vehicle in question resulting from or connected with alleged water in the fuel used in said engines.

INTERROGATORY NO. 6: Identify by name or title and by location any and all documents or records of any kind whatsoever, whether created and/or stored electronically, manually, or mechanically that constitute or tend to evidence each of the reports or complaints made the subject of Interrogatory 5 above.

INTERROGATORY NO. 7: Identify by city, county, state, cause number, and / or any dealer in Chrysler products or other party purporting

to act on behalf or to represent Chrysler in any capacity arising out of or connected in any way with the failure of or problems with the injectors in engines like that in the vehicle in question resulting from or connected with alleged water in the fuel used is [sic] said engines.

REQUEST NO. 5: Any and all documents identified by defendant in its answer to Interrogatory 6 above.

The defendant objected to these requests on the basis of vagueness, relevancy, overbreadth and undue burden. A hearing was conducted on the objections, at which the plaintiff’s attorney confided the following:

“Our whole lawsuit is based on the diesel engines in these trucks in 2007 and 2008. And the inquiry is to vehicles with engines like the one involved in this transaction. That’s what we’re asking.”

The appellate court noted that an party may limit a discovery request orally in open court citing *Gen. Motors Corp. v. Lawrence*, 651 S.W.2d 732 (Tex. 1983). (orig. proceeding) (holding that discovery was to be limited in scope to that represented by plaintiffs’ counsel in trial-court hearing and in mandamus pleading). Nonetheless, the trial court sustained the objections.

The appellate court on the issue of **relevance** concludes that while the discovery was not relevant to the claims against Chrysler (recall the claims against Chrysler were limited by the bankruptcy), but were relevant to the claims against the Dealer. The appellate court noted that Chrysler had not provided any authority that it did not have to produce discovery that was relevant to a claim against a co-defendant.

It is important to note, however, that a request may be relevant but overbroad. This is what the appellate court determined in this instance. The court noted the oral representations by the plaintiffs’ attorney limiting the scope of necessary discovery and held that the discovery requests exceeded that scope and therefore were overbroad. The appellate court upheld the trial court’s order granting the defendant’s objections and granted plaintiffs leave to redraft their discovery more narrowly.

5. *In re GMAC Direct Ins. Co.*, Not Reported in S.W.3d, 2010 WL 5550672 (Tex. App.-Beaumont).

The discovery dispute in this matter highlights the need to tailor discovery as narrowly as possible to avoid sweeping up tenuous data.

“A central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information.” *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003).

The appellate court found that Plaintiffs’ requests in this instance on their face failed to comply with this admonition. The underlying case dealt with a claim of unfair insurance practices in relation to a Hurricane Ike claim. Plaintiff alleged various claims of tort and breach of contract. Plaintiff served the following requests, which the court compelled by submission:

- (1) “[a]ll computer files, databases, electronically-stored information or computer-stored information regarding property damage, hurricane damage, water damage and/or roof damage that have been [compiled], prepared and/or supervised by Defendant, whether or not they are in Defendant’s possession or in the possession of another entity[.]”
- (2) “[a]ny and all correspondence from Defendant to and from vendors regarding any instructions, procedures, changes, training, payments and billing for property, property damage, hurricane, flood and catastrophe claims for 2000 through the present, including but not limited to computer disk, e-mails, paperwork and manuals [.]” and
- (3) “[a]ll documents and communications, including electronic, between any engineer(s) or engineering company(s), used to evaluate this Plaintiffs’ claim(s), or other person(s) used in handling Plaintiffs’ claim(s) and Defendant in the last five years regarding, in any way, the investigation of a homeowners residence, commercial building or church involving damages to the structures or its contents.”

Plaintiffs contended they were harmed by the Relators’ “deliberate business practice of fraudulently adjusting property-damage claims in an outcome-oriented manner so as to minimize the amounts they paid out under the homeowners’ policies they issued.” Based upon these allegations, Plaintiffs argued that their requests were designed to produce evidence of a company-wide

business practice for which the Plaintiffs were entitled to recover statutory additional damages and exemplary damages.

The appellate court found that the above requests were not tailored for a particular time period. Nor were they tailored for the specific allegations in the case. Instead, the court found that Plaintiffs were fishing for larger claims, which was found improper:

Rather than tailor the request to include the electronic information actually used in adjusting the Carlsons’ claim, the request asks for any electronically-stored information regarding any property damage without regard to time or geographical location. The tenuous connection to the Carlsons’ claim is that if an analysis of the data shows that it is somehow “skewed” in favor of the insurance company, then the Carlsons might be able to use that information to establish exemplary damages. ***This is precisely the sort of fishing expedition that harvests vast amounts of tenuous information along with the pertinent information that was used in adjusting the Carlsons’ claim.*** [emphasis added].

6. *In re Hernandez*, Not Reported in S.W.3d, 2011 WL 4600706 (Tex. App.-Hous.[14th Dist.]). The discovery dispute here arises from a wrongful settlement suit. The Plaintiffs appear to have alleged that they had gotten short shrift by a “global settlement” obtained by the Abraham Watkins firm in the BP Explosion litigation. Plaintiffs served a request for all settlement agreements that had been entered into by Abraham Watkins for all its clients in the BP Explosion litigation. It is noteworthy that Abraham Watkins filed an affidavit in support of its opposition to the request demonstrating that Abraham Watkins had not commingled the expenses of the various clients and had not entered into a global settlement. Accordingly, the court found that there was not a “joint client” exception to the attorney client privilege. The law firm also alleged that the other settlements were protected by confidentiality agreements and that the plaintiffs had not tailored the request to other “similar claims.”

The Attorneys correctly point out that the Clients seek information about all of the Attorneys’ BP clients. Moreover, the Clients concede that their claim for improper settlement depends upon a showing that “the Lawyers settled claims similar to those of the Clients for a higher

amount.” The Clients' discovery is not tailored to discover information about similarly situated clients—rather the Clients' discovery requests are directed to “joint clients.”

See also, *In re Rogers*, 200 S.W.3d 318, 324 (Tex. App. – Dallas 2006, orig. proceeding) (holding that trial court abused its discretion in compelling production of documents from another lawsuit that were subject to confidentiality agreement or protective orders).

7. Just as a trial judge may abuse his/her discretion by granting discovery that is overbroad, the judge also may abuse his/her discretion by wrongly limiting discovery. This is the focus of the opinion in *In re State Auto Property & Cas. Ins. Co.*, 348 S.W.3d 499 (Tex. App. –Dallas 2011, orig. proceeding [mandamus dismissed]).

The plaintiff brought a personal injury claim and an uninsured motorist claim. For those who do not handle personal injury cases, this means that the plaintiff brought a personal injury claim against a third party and then sued his own insurance carrier for failing to pay uninsured (underinsured) insurance benefits. The first action is a tort. The second is a breach of contract claim. Additionally, there can be an allegation that the carrier committed bad faith in not paying the underinsured benefits, which is in the nature of a tort action. These actions frequently are brought together subject to the trial court's discretion to sever them.

In this instance, the plaintiff settled his claim with the third party tortfeasor and then brought suit against his insurance carrier for UIM (underinsured motorist) benefits and extra-contractual damages for bad faith in failing to pay such benefits. The bad faith action is in the nature of a tort action. The insurance company moved to sever and abate the UIM claims from the extra-contractual claims. The trial court denied this motion, but ordered separate trials with separate juries, as well as a stay of discovery and proceedings on the extra-contractual claims until the disposition of the UIM claim. It is important to understand the following legal concept in this regard:

A UIM insurer is under no contractual duty to pay benefits until the insured, here Graeber, obtains a judgment establishing the liability and underinsured status of the other motorist, who was Anderson in the negligence suit below. *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006). While Graeber was entitled to settle, rather than proceed to judgment against Anderson, neither that settlement nor an admission of liability from

Anderson establishes UIM coverage. *Id.* A jury could find that Anderson was not at fault or award damages that do not exceed Anderson's liability insurance. *Id.*

The insurance carrier served the plaintiff with a notice of deposition, which the plaintiff moved to quash based on a claim that he had been deposed in the underlying suit against the third party tortfeasor and that it would be unduly burdensome, harassing, and duplicative to be “re-deposed” in the UIM lawsuit. Recall that the lawsuit against the third party tortfeasor had been brought and settled before the lawsuit against the insurance carrier was filed. The trial court issued an order allowing the deposition, but only within the following parameters:

only as to (1) any diagnosis or treatment he “has had since he gave his prior deposition” in the Anderson lawsuit, (2) “any additional damages he claims to have incurred since the prior deposition; and (3) anything that has happened since the date of the prior deposition.” The trial court further ordered that State Auto “shall pay \$100 for any question asked of Mr. Graeber that was covered in his prior deposition.”

The appellate court observed two points in finding that the trial court had abused its discretion. First, the appellate court pointed out that the insurance company was not a party to the underlying action and was not bound by the evidence in that case, including the deposition testimony of the plaintiff. Second, the plaintiff had failed to demonstrate with evidence as opposed to conclusory statements that an articulated harm that would result to him by giving a complete deposition. See *Garcia v. Peebles*, 734 S.W.2d 343, 345 (Tex. 1987) (evidence of an articulated harm is a pre-requisite to a protective order).

The trial court's denial of discovery that prevents a party's ability to present a viable claim or defense at trial renders an appellate remedy inadequate. *Able v. Moye*, 898 S.W.2d 766, 772 (Tex. 1995) [Denial of discovery that severely compromises a party's ability to present a viable claim or defense at trial renders an appellate remedy inadequate].

C. HARASSMENT AND UNDUE BURDEN:

Parties often object to discovery requests, including those pertaining to damages, on the basis that the requests are overbroad and unduly burdensome. As discussed above, once a party demonstrates that the request is

relevant, the burden shifts to the party resisting or attempting to limit discovery to demonstrate with evidence that the request is unduly burdensome or harassing. The cases below provide guidance in these regards:

1. *ISK Biotech Corp. v. Lindsay*, 933 S.W.2d 565 (Tex. App. --Houst.[1st Dist.] 1996) provides a refreshingly commonsense analysis to the standard “solely for harassment” and “unduly burdensome” objections.

We have already concluded, however, that these discovery requests were reasonably calculated to lead to the discovery of admissible evidence, a request that meets that criterion is manifestly not. Sought *solely* for the purpose of harassment merely showing that a discovery request is burdensome is not enough; it is only *undue* burden that warrants non-production. To the extent that a discovery request is burdensome because of the responding party’s own conscious, discretionary decisions, that burdensomeness is not properly laid at the feet of the requesting party, and cannot be said to be undue. *Id.* at 569.

2. *Independent Insulating Glass/Southwest v. Street*, 722 S.W.2d 798 (Tex. App.--Fort Worth 1987, writ *dism’d*) the appellate court in this case observed that, where the defendant manufacturer opposed the production of complaints regarding windows it had manufactured other than the model in question on the ground that said complaints were not relevant to the subject matter of the lawsuit, the discovery would be permitted because the defendant had failed to prove that the other window units were so dissimilar as to make discovery unnecessary. “Any party seeking to limit discovery has the burden of pleading and proving that contention.” *Independent Insulating Glass v. Street*, *Id.* at 802.

D. BURDENS

1. Requests must be reasonably tailored to include only matters relevant to the case. *In re American Optical*, 988 S.W.2d 711, 713 (Tex. 1998). [The party resisting discovery] bears the burden of proving that the [requesting parties’] request is overbroad. *See Miller v. O’Neill*, 775 S.W.2d 56, 59 (Tex. App. – Houston [1st Dist.] 1989, orig. proceeding. *In re Gonzalez*, Not Reported in S.W.3d, 2010 WL 5132590 *1 (Tex.App.-Hous. [14 Dist.]). Once the moving party establishes that the information and materials sought are within the scope of permissible discovery, [RELEVANT] the burden shifts to the nonmovant to show why the discovery is irrelevant,

overly broad, unduly burdensome, or should not be permitted. *Bouaziz v. AZT Corp.*, Slip Copy, 2010 WL 5300838 (N.D.Tex.)

2. In pretrial discovery matters, the party attempting to restrict discovery has the burden of pleading and proving the basis for the desired limitation. *See Kern v. Gleason*, 840 S.W.2d 730, 735-36 (Tex. App. – Amarillo 1992, orig. proceeding). *In re StarFlite Management Group, Inc.*, 162 S.W.3d 409, 414 (Tex. App. Beaumont, 2005). This is particularly true with regard to restricting discovery of relevant financial records. *In re Gonzalez*, Not Reported in S.W.3d, 2010 WL 5132590 *1 (Tex.App.-Hous. [14 Dist.]).

3. The party objecting to discovery on basis of relevancy must do more than offer conclusory objection. *In Re Exmark Manufacturing Co., Inc.*, --- S.W.3d ---, 2009 WL 3647395 (Tex. App.-Corpus Christi, 2009).

V. COURT DISCRETION TO LIMIT DISCOVERY

A. As the cases below illustrate, a trial court has the discretion to limit discovery. This discretion is particularly provided in Tex. R. Civ. P. 192.4. However, in addition, the trial court has inherent power to modify the scope, manner and timing of discovery in the interest of fair administration of justice. The following excerpt from *In re West* (discussed below) is instructive in concisely explaining the scope of the trial court’s discretion:

In discovery situations, the trial court is granted latitude in limiting or tailoring discovery. Tex. R. Civ. P. 193.4. Generally, a trial court should limit discovery methods to those which are more convenient, less burdensome, and less expensive, or when the burden or expense of the proposed discovery outweighs its likely benefit. *In re Alford Chevrolet-Geo*, 997 S.W.2d 173 (Tex. 1999)(orig. proceeding); Tex. R. Civ. P. 192.4. Discovery requests themselves must be reasonably tailored to matters relevant to the case at issue. *In re Xeller*, 6 S.W.3d 618, 626 (Tex. App.-Houston [14th Dist.] 1999, orig. proceeding. Consequently, the trial court has broad discretion to limit discovery requests by time, place, and subject matter. *See Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995) (orig. proceeding).

B. See also TEX. R. CIV. P. 192.4:

192.4 Limitations on Scope of Discovery.

The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that:

- (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or
- (b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the party's resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

COMMENT

7. The court's power to limit discovery based on the needs and circumstances of the case is expressly stated in Rule 192.4. The provision is taken from Rule 26(b)(2) of the Federal Rules of Civil Procedure. Courts should limit discovery under this rule only to prevent unwarranted delay and expense as stated more fully in the rule. A court abuses its discretion in unreasonably restricting a party's access to information through discovery.

C. DISCRETION TO CONDITIONALLY LIMIT SCOPE OF DISCOVERY:

In re Watson, 259 S.W.3d 390 (Tex.App.-Eastland,2008, no pet.) The discovery dispute in this instance arose in the context of a will contest. There was an issue about testamentary capacity. The plaintiff sought medical records regarding the testator. The administrator of the estate objected to the scope of the discovery and the Court issued a "conditional" order limiting the scope of discovery provisionally to a specific time period (seven days) before the will was signed, "and conditioned further discovery requests upon a good-faith showing that Watson had a meritorious challenge to the 2003 will." Plaintiff filed a petition for writ of mandamus which was denied. The appellate court held that the trial court was within its discretion to limit discovery, particularly since the plaintiff was given the opportunity to have the scope

of discovery expanded upon a demonstration of relevancy and need.

D. DISCRETION TO MODIFY SCOPE OF DEPOSITIONS:

In re West, 346 S.W.3d 612 (Tex.App.-El Paso, 2009, no pet.) Just as the scope of discovery is the same for oral depositions as it is for written discovery (see, Tex. R. Civ. P. 192.3 and 199 comment 3), a trial judge has the same discretion to modify the scope of a deposition as with written discovery. This is illustrated in *In re West*.

In light of the evidence presented, we find that it was reasonable for the trial judge to require that the deposition of CPA Henderson be tailored so as to protect Real Party's privileged matters and to limit the deposition to matters relevant to the case. We also find that in light of Relator's refusal to agree to a limited scope of discovery, it was reasonable for the judge to grant the Motion for Protective Order and to Quash the Notice of Deposition. See Tex. R. Civ. P. 192.6(b).

E. LIMITATION ON DISCRETION: *In re Liberty*

Mut. Ins. Co., Not Reported in S.W.3d, 2009 WL 441897 (Tex.App.- Hous. [14th Dist.] 2009, no pet.). A trial court has broad discretion to limit the scope of discovery. *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex.2003) (orig.proceeding) (per curiam). However, a writ may issue where the trial court's order improperly restricts the scope of discovery defined by the Texas Rules of Civil Procedure. *Lindsey v. O'Neill*, 689 S.W.2d 400, 401 (Tex.1985) (orig.proceeding) (per curiam). In this case, the insurance companies being sued for bad faith claimed that the trial court had improperly denied their discovery from non-parties regarding the plaintiff's knowledge of policy provisions and the scope of coverage, prior to the alleged bad faith. The appellate court agreed that the information sought was relevant to defendants' defense, not in terms of whether the information was admissible at trial, but only that it could lead to admissible evidence regarding its defense. Accordingly, the appellate court found that the trial court had abused its discretion in denying the discovery sought by the insurance companies relevant to their defenses.

VI. DISCOVERABLE DOCUMENTS AND THINGS REGARDING DAMAGES

A. ACTUAL DAMAGES

1. FINANCIAL DOCUMENTS

a. While I could not find any cases directly dealing with the issue of discovery of financial records relevant to damages, the two opinions below should sufficiently inform the discussion, as the same considerations that affect discovery of financial records with regard to liability should affect the discovery of financial records relevant to damages. The key once again is what is pleaded both as a claim and as a defense.

Real parties' request for relator's bank records is relevant to their claim that he received payment in exchange for the sale of the routes. Consequently, relator has failed to show the discovery request is overbroad. See *In re Manion*, 2008 WL 4180294 *3 (Tex. App. – Amarillo, 2008 orig. proceeding) (memo. op.) (bank records found discoverable when plaintiff alleged defendant misused management position for financial gain).

In re Gonzalez, Not Reported in S.W.3d, 2010 WL 5132590 *2 (Tex. App.-Hous. [14 Dist.]).

b. See discussion of *re Manion*, 2008 WL 4180294 *3 (Tex. App. – Amarillo, orig. proceeding, 2008) above.

c. *In re Gonzalez*, Not Reported in S.W.3d, 2010 WL 5132590 *1 (Tex. App.-Hous. [14 Dist.]). The underlying case in dealt with a claim that Federal Express had wrongfully prevented some independent contract drivers from selling their routes, as provided under the terms of their contract with Federal Express. Plaintiffs more specifically alleged that a manager, Gonzalez, had sold their routes in exchange for under the table payments. Plaintiffs sought production of several documents from Gonzalez, including his “monthly bank records for the time period January 1, 2008 until present.” Gonzalez objected to the request for his bank records on the grounds that the request exceeded the scope of discovery, violated his privacy rights, and was irrelevant and harassing. The appellate court observed that a party attempting to restrict access to his financial records bears the burden of pleading and proving a basis for the restriction, citing *Peebles v. Hon. Fourth Supreme Jud. Dist.*, 701 S.W.2d 635, 637 (Tex. 1985). The court next noted that financial records are not privileged:

This court specifically held, however, that an individual's bank records were “clearly not privileged.” [*Weilgosz v. Millard*, 679 S.W.2d 163, 167 (Tex. App. – Hous. [14th Dist.] 1984, orig. proceeding)]. The United States Supreme Court has held that there are no constitutional rights to privacy affected by disclosure of banking records. See *United States v. Miller*, 425 U.S. 435, 442 (1976) (involving the subpoena of banking records served on a third party); *Neely v. Commission for Lawyer Discipline*, 302 S.W.2d 331, 341 (Tex. App.-Houston [14th Dist.] 2009, pet. denied).

See also, *In re Williams*, --- S.W.3d ----, 2010 WL 3704202 (Tex. App.-Corpus Christi), discussed below.

d. In addition to the general rule that there is no recognized privilege for financial records, the sword/shield principal also can come into play. If an attorney for instance sues a client over fees, the attorney will not be able to claim privilege for the attorney’s billing records. A party will not be allowed to make a claim and then assert privilege to prevent the opposing party the evidence to controvert the claim. See *In re Beirne, Maynard & Parsons, L.L.P.*, 260 S.W.3d 229, Tex. App.-Texarkana 2008, mand. denied).

2. TAX RETURNS

a. The Texas Supreme Court has written on the subject of discoverability of income tax returns several times in recent history, mainly in cases dealing with punitive damages and discovery of net worth. The Court has made clear that the privacy of income tax returns should be protected absent a rigorous examination of the claims of relevancy and materiality. Since parties often request income tax returns in attempting to disprove claims of lost profits or lost earning capacity, an examination of the key cases should be helpful.

b. The general rule with regard to discovery of in financial records is that the burden on the discovery of financial records lies with the party seeking to prevent production. However, as observed by the court in *In re Beeson*, --- S.W.3d ----, 2011 WL 3359711 (Tex. App.-Hous. [1st Dist.]), tax returns are treated differently from other financial records.

Tax returns are treated differently than other types of financial records, as evidenced by the Supreme Court’s

expressed “reluctance to allow uncontrolled and unnecessary discovery of federal income tax returns.” *Hall v. Lawlis*, 907 S.W.2d 493, 494-495 (Tex. 1995) (citing *Sears, Roebuck & Company v. Ramirez*, 824 S.W.2d 558, 559 (Tex. 1992)).

Provided a responding party objects to a request for income tax returns, the burden shifts to the party seeking to obtain the documents to show that the tax returns are both relevant and material to the issues in the case. *El Centro del Barrio, Inc. v. Barlow*, 894 S.W.2d 775, 779 (Tex. App. – San Antonio 1994, no writ). Federal income tax returns are not material if the same information can be obtained from another source. *In re Sullivan*, 214 S.W.3d 622, 624-625 (Tex. App. – Austin 2006, orig. proceeding).

An important take away from Beeson is how the objection may be perfected. Beeson objected to the request on the basis of privacy rather than relevancy. The court agreed with Beeson that privacy and relevancy are intertwined and that relevancy was invoked by Beeson objecting on the basis of privacy.

Also noteworthy is the court’s handling of the requesting party’s assertions that it had attempted to obtain the information through less intrusive means and that the discovery responses of the responding party were inconsistent; therefore, warranting production of the income tax returns. The Court held that such assertions were conclusory. More was needed including facts showing what steps the requesting party had employed to obtain the material information and how the tax returns specifically and uniquely could resolve the putative inconsistencies.

c. *In re Williams*, --- S.W.3d ----, 2010 WL 3704202 (Tex. App.-Corpus Christi). This relatively recent case does a good job of stating the law and citing the leading precedents on the issue of discoverability of income tax returns in Texas. The plaintiffs in this case obtained a judgment, including exemplary damages. Defendant sought a supersedeas bond and filed affidavits regarding net worth.² The plaintiffs challenged the

affidavits. Plaintiffs sought post-judgment discovery on the issue of net worth, which included income tax returns of the corporate defendant’s president (and for purposes for this discussion, presumptive alter ego). The trial court effectively granted the motion to compel in its entirety. The following passage from *Williams* is informative on the discoverability of income tax returns in Texas for all circumstances:

Subjecting federal income tax returns of our citizens to discovery is sustainable only because the pursuit of justice between the litigants outweighs protection of their privacy. But sacrifices of the latter should be kept to the minimum, and this requires scrupulous limitation of discovery to information furthering justice between the parties which, in turn, can only be information of relevancy and materiality to the matters in controversy.

Maresca v. Marks, 362 S.W.2d 299 (Tex. 1962) (orig. proceeding); see *Hall v. Lawlis*, 907 S.W.2d 493, 494 (Tex. 1995) (orig. proceeding) (per curiam) (concluding that income tax returns are discoverable to the extent that they are relevant and material to issues presented in the lawsuit); *Sears, Roebuck & Co. v. Ramirez*, 824 S.W.3d 558, 559 (Tex. 1992) (orig. proceeding) (per curiam) (concluding that the issuance of mandamus was “**guided by our reluctance to allow uncontrolled and unnecessary discovery of federal income tax returns**”); *In re Garth*, 214 S.W.3d at 193 (“Because tax returns do not necessarily show an individual’s net worth, a tax return is not automatically discoverable.”) (citing *Chamberlain v. Cherry*, 818 S.W.2d 201, 205-206 (Tex. Amarillo 1991, orig. proceeding) (stating that income tax returns are not necessarily indicative of net worth because they only

² When the judgment is for money, as is the case here, the amount of the bond, deposit or security must equal the sum of the compensatory damages awarded in the judgment, interest for the estimate duration of the appeal, and costs awarded in the judgment. TEX. R. APP. P. 24.2(a)(1); see TEX. CIV. PRAC.& REM. CODE ANN. §52.006 (a) (Vernon 2008). However, the amount must not exceed the lesser of fifty percent of the judgment debtor’s current net worth or twenty-five million dollars. See TEX. R. APP. P. 24(a)(1); TEX. CIV.

PRAC. & REM. CODE ANN. §52.006(b); . . . A judgment debtor who provides a bond, deposit, or security under Rule 24.2(a)(1)(A) in an amount based on the debtor’s net worth must simultaneously file an affidavit that states the debtor’s net worth and states complete, detailed information concerning the debtor’s assets and liabilities from which net worth can be ascertained. TEX. R. APP. P. 24.2(c)(1). . . ;

show income for each year for which the returns are filed)).

The burden is upon the party seeking income tax returns not only to demonstrate relevancy and materiality, but that the information sought cannot be obtained from a less intrusive source. *Chamberlain v. Cherry*, 818 S.W.2d 201, 205-206 (Tex. Amarillo 1991, orig. proceeding), see also Tex. R. Civ. P. 192.4(a). The Court found that the plaintiff failed to sustain its burden in these regards.

d. Question whether TEX. CIV. PRAC. & REM. CODE §18.091 alters in any regard the prior law regarding the discoverability of income tax returns.

a. Notwithstanding any other law, if any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, evidence to prove the loss must be presented in the form of a net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law.

To date there have been no cases interpreting this statute in terms of discovery of income tax returns. Considerations in this regard could be whether the statute has to be pleaded as an affirmative defense, and whether the information needed to make the determination could be made without the income tax returns. In other words, could the determination be made from a source other than the income tax returns?

3. COMPUTER FILES

a. *In re Clark*, 345 S.W.3d 209 (Tex. App.–Beaumont 2011, no pet.). Litigants and courts are continuing to etch out standards and parameters pertaining to electronic discovery, particularly with regard to requests for hard drives. *In re Clark* helps inform the area with regard to the balancing the interests of full discovery with concerns for privacy. The case arose from a dispute between a bank and a former loan officer. The loan officer signed a confidential information non-competition agreement. During her employment with the bank, the loan officer was privy to the bank’s confidential information. The loan officer subsequently left the bank’s employment and a dispute arose over whether the loan officer had violated the confidential information, non-competition agreement. A forensic examination of the officer’s work computer revealed that the officer had communicated proprietary information to a bank competitor. The bank sought production:

of all communications since June 1, 2010 between Clark and any person who was a TCB customer. TCB also requested all documents that Clark downloaded from a TCB computer, and all communications reflecting her involvement in the creation of the competitor’s facility in Tomball. TCB requested production for inspection and copying any and all computers used or accessed by Clark since June 1, 2010.

The officer denied possessing any relevant information and objected to producing a personal computer that contained personal information pertaining to the officer and her family members. An issue also developed about whether the officer had intentionally tried to remove incriminating email from her work computer and transport such to her personal computer. The officer claimed that she had inadvertently deleted all the email from her personal computer. The bank filed a motion to compel the officer to produce her personal computer. The bank represented that it would have a forensic expert “carve” out all communications that contained key words suggesting protected attorney-client communications. The bank also produced affidavit testimony from its forensic expert that a search of the officer’s personal computer would likely result in evidence that the data from the work computer had been improperly retrieved and was still on the officer’s personal computer. The trial court granted the request.

The appellate court applied the analysis set out in *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 314-315 (Tex. 2009). The court found that the trial court had not abused its discretion in ordering the production of the officer’s personal computer, given the evidence that had been adduced:

The trial court could reasonably conclude that Clark’s persistence in asserting that she did not produce any electronic data because she had “cleaned” her personal e-mail account shows that she did not adequately search for relevant deleted e-mails.

The problem, however, was that the trial court had not imposed sufficient protection to protect the officer’s privacy regarding matters on her computer that were irrelevant to the issue involved in the discovery exercise.

The sole protection directed by the trial court consisted of excluding the surnames of Clark’s lawyers, and the words “attorney” and “lawyer.” No search

parameters limited TCB's access to information of a personal and confidential nature that has no possible relevance to the litigation. The trial court's order failed to address privilege, privacy, and confidentiality concerns adequately.

If it is not possible for the trial court to describe search protocols with sufficient precision to capture only relevant, non-privileged information, the trial court may order the forensic examination to be performed by an independent third-party forensic analyst. Moreover, the trial court must provide a mechanism through which Clark can withhold from discovery any documents or information that is privileged or confidential and provide instead a privilege log subject to in camera review by the trial court. [*In re Honza*, 242 S.W.3d 578, 583-584 (Tex. App. – Waco 2008, orig. proceeding [mand. denied]). Some method for screening privileged information must be provided that does not depend on the opposing party to do the screening. The current order essentially requires production of information claimed to be privileged to the opposing party for that party to screen.

b. *In re Family Dollar Stores of Texas, LLC*, Not Reported in S.W.3d, 2011 WL 5299578 (Tex. App.-Beaumont). The opening sentence of this opinion tells you things are not going to turn out well for the requesting party: “This mandamus proceeding concerns an order requiring a defendant to create a document or report that does not currently exist.” As the appellate court properly points out:

The Texas Supreme Court, with respect to discovery requests, has specifically stated that a party “cannot be forced to prepare an inventory of the documents for plaintiffs.” *In re Colonial Pipeline Co.*, 989 S.W.2d 938, 942 (Tex. 1998).

The context of the discovery dispute is a falling merchandise case. The plaintiff claimed to have been injured when some frames and other merchandise fell on her at a Family Dollar Store. Plaintiff served Family Dollar Store with a request for production of all “documents and records of similar incidents relating to falling merchandise in Family Dollar's stores on a nationwide basis.” The scope of this request probably

would have been problematical to begin with, however, the Court modified the request by order to require Family Dollar Store to produce a “computerized listing ... of all incidents and lawsuits[.]”

It appears that the plaintiff in this instance failed to obtain and produce the necessary predicate for pursuing computerized reports. While the plaintiff additionally sought reports created in the ordinary course of business, there is no evidence in the record that plaintiff ever established that Family Dollar Store created reports in the ordinary course of business or maintained such reports. Accordingly, the appellate court found that while the trial court's effort to tailor what was a very broad request was laudable, it was flawed and an abuse of discretion because it required Family Dollar Store to produce something that presumably did not exist.

We conclude that requiring a party to reduce raw data from an electronic database to a paper report or to a list in an electronic form requires Family Dollar to make a list that does not currently exist. *See id.* (quoting *McKinney v. Nat'l Union Fire Ins. Co.*, 772 S.W.2d 72, 73 n.2 (Tex. 1989).

The next part of the opinion deals with specificity and relevancy. Recall that the original request for production served by Plaintiff requested “the production of documents and records of similar incidents relating to falling merchandise in Family Dollar's stores on a nationwide basis.” The appellate court observed that the plaintiff failed to establish the relevancy of the nationwide geographical range. Therefore, it was overbroad. The trial court attempted to correct this deficiency by limiting its order to “Family Dollar stores located in the county in which I–45 runs and all stores east to the Texas border of the store at issue in this lawsuit [located in Beaumont, Texas,] for the five (5) years prior to September 11, 2009.” However, the appellate court found that the request still was overbroad because “similar lawsuits” was not defined. To the extent that the request could be narrowed to lawsuits involving facts similar to the facts involved in the instant case, the court should have further narrowed the request. *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003).

Here, the discovery could have been easily narrowed to require production for a relevant geographic area of claims involving merchandise that fell off shelves of a similar design as the one involved in the incident leading to Walters's injury.

The last aspect of the opinion also is informative with regard to the proper role of the trial court. “Generally, the scope of discovery is within the trial court’s discretion, but the trial court must make an effort to impose reasonable discovery limits.” *In re Graco Children’s Prods., Inc.*, 210 S.W.3d 598, 600 (Tex. 2006) (orig. proceeding) (per curiam) (internal quotations omitted). However, there is a subtle difference between the court providing direction and shape to the discovery through orders and the court writing or re-writing the discovery propounded by the parties. The appellate court in *Family Dollar Stores* observed that it is not the role of the trial court to redraft the discovery. Instead, the trial court should provide the requesting party the opportunity to redraft the discovery in accordance with the Rules of Civil Procedure and the court’s instructions.

Under these circumstances, we conclude that the better practice is to require the parties to draft proper requests; therefore, we direct the trial court to withdraw its orders compelling production of lists. See Tex. R. App. P. 52.8(c). Should Walters desire to pursue further discovery about other similar incidents at other locations where Family Dollar conducts its business, we are confident that her requests will be narrowly tailored to the subject matter of her claims.

4. SETTLEMENT AGREEMENTS

a. *In re Univar USA, Inc.*, 311 S.W.3d 175 (Tex. App.–Beaumont, 2010). Under Tex. R. Civ. P. 192.3 (g) “A party may obtain discovery of the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial.” This opinion addresses the scope of this provision.

The plaintiff filed a lawsuit against various manufacturers and suppliers of chemicals alleging that he had suffered injuries resulting from exposure to benzene. While the plaintiff was alive, a master set of requests for disclosure were served upon him. In response to the request for settlement agreements, he responded none. Subsequently, the plaintiff died presumably from his injuries and the action was amended to become a wrongful death and survivor case. Univar was added as a party at this time. Univar subsequently requested the plaintiffs to supplement their responses to disclosure particularly with regard to any settlements that had been entered into and “the total amounts of the settlements reached with any defendants listed individually by party.”

Univar filed a motion to compel which was heard. At the hearing, the plaintiff produced no evidence. Instead they argued that they would reveal the defendants with whom they had settled, but the amounts of the settlements were subject to confidentiality agreements. No ruling was rendered, and the trial court did not require the settlement agreements to be produced for an in camera inspection. Consequently, the settlement agreements were not in the record before the appellate court. Thereafter, plaintiffs served the following supplemental response to disclosure:

“Plaintiff objects to this Request for Disclosure pursuant to the holdings of *Palo Duro Pipeline Co., Inc. et al[.] v. Hon. Ann Cochran, Judge*, 785 S.W.2d 455 (Tex. App. – Houston [14th Dist. 1990).”

The opinion points out that the above response also contained no evidence to support the plaintiff’s objection to producing the contents of the settlement agreements. The appellate court found that the *Palo Duro* case and the other cases cited by plaintiff were inapposite because they predated the 1999 amendments to the Texas Rules of Civil Procedure. The appellate court found that the trial court accordingly had abused its discretion.

Because Univar demonstrated that the contents of the settlement agreements were relevant, and the Thompsons failed to establish that the provisions in the agreements prohibited disclosing the settlement amounts to nonsettling parties, the trial court was required by the Rules of Procedure to allow the discovery of the individual settlement amounts.

It also is important to note that with regard to the plaintiff’s argument that the settlement agreements were confidential, that plaintiff failed to bring forth evidence on this point and thus waived it.

Moreover, in this case, the Thompsons failed to follow the Texas Rules of Civil Procedure to support their claim that the settlement agreements contain provisions that would prohibit a court from disclosing the amount that each settling party paid to non-settling parties.

Compare how the argument of confidentiality was asserted and preserved in *In re Hernandez*, discussed below.

b. See *In re Hernandez*, Not Reported in S.W.3d, 2011 WL 4600706 (Tex. App.- Hous. [14 Dist.]), discussed above under Overbreadth.

c. See also, *In re Rogers*, 200 S.W.3d 318, 324 (Tex. App. – Dallas 2006, orig. proceeding) (holding that trial court abused its discretion in compelling production of documents from another lawsuit that were subject to confidentiality agreement or protective orders).

5. MEDICAL INFORMATION AND RECORDS

a. In personal injury litigation considerable energy is expended in obtaining medical information and records. In many cases, liability is stipulated and the trial centers on the extent of damages. An individual who files a personal injury claim waives physician patient privilege with regard to healthcare information that is relevant to the claims or the medical/psychological conditions that are placed in issue. A party cannot assert a claim for relief and then assert privilege to protect information that would be relevant to the claim or the defense against the claim. While the physician privilege is waived with regard to information relevant to the claim or defense alleged in the case, the privilege is not waived as to matters that are not relevant to the plead claims and defenses. An opposing party may only obtain discovery of medical/psychological conditions that have been placed in issue. Merely making a claim for mental anguish, for instance, does not entitle the opposing party to obtain discovery regarding the claimant's prior psychiatric or psychological history. In order to place a medical or psychological condition in issue, it must constitute an ultimate issue, a condition that the jury must determine. The following discussion will outline the general principals guiding discovery in this area.

b. A party may object to the attempt to obtain discovery of the party's mental health or health care information on the basis of privilege. However, failure to specifically assert the privilege could waive the right to protect on the basis of such privilege. See *Jordan v. Fourth Court of Appeals*, 701 S.W.2d 644, 648-49 (Tex. 1985). (orig. proceeding) and *In re Nance*, 143 S.W.3d 506, 510-11 (Tex.App.-Austin,2004). Further a party may waive these privileges by seeking affirmative relief, to the extent the records or information sought are relevant to the claims and defenses alleged in the lawsuit. This is referred to as the offensive use doctrine.

This doctrine is a type of waiver that occurs if the plaintiff uses a privilege offensively to shield information that

would be material and relevant to the defense against the plaintiff's claims. See *Ginsberg v. Fifth Court of Appeals*, 686 S.W.3d 105, 106 (Tex. 1985).

c. Once again, as is evident from much of the discussion in this paper, the critical determination that must be made in determining whether medical/mental/healthcare information is discoverable on the issue of damages is whether the information is relevant to the claims and defenses plead. *Mutter v. Wood* dealt with the issue of a blanket medical authorization. The Texas Supreme Court held that when a plaintiff files a personal injury lawsuit she does not waive her privilege as to all medical/ mental/ healthcare records, but only with regard to those that are relevant to the claims made in the lawsuit or to the defenses to such claims. *Mutter v. Wood*, 744 S.W.2d 600, 601 (Tex. 1988)

d. As pointed out in *In re Nance*, 143 S.W.3d at 511, simply because a party's medical records are relevant to a claim or defense may not be adequate to overcome the assertion of privilege. The party seeking the records or information must show that the information is relevant to the claims and defenses plead *and* that a party to the lawsuit relies on the condition as a claim or defense:

The supreme court analyzed the patient-litigant exception to the physician-patient privilege and the parallel exception to the mental health information privilege in *R.K. v. Ramirez*, 887 S.W.2d 836, 840 (Tex. 1994). The court held that this exception applies when: (1) the records are relevant to the condition at issue in the litigation, *and* (2) the condition contained in the records is relied upon as a "part" of a party's claim or defense.

The pleadings are also critical with regard to determining whether the party's condition is a "part" of a claim is determined from the pleadings. *R.K.* 887 S.W.2d at 843 no. 7; *In re Doe*, 22 S.W.3d 601, 609 (Tex. App. – Austin 2000, orig. proceeding). To be a "part" of a claim, the information or records must have legal significance with regard to one or more claims or defenses plead in the case. *R.K.* 887 S.W.2d at 842- 843. This means that the jury must be required to make a factual determination about the existence and effect of the condition. *Nance* is a very important case for any attorney dealing with discovery of medical records for purposes of damages. It really is the plaintiff who determines whether to place a condition in issue. For instance, in *Nance*, defendants

sought the decedent's records from the Mental Health and Retardation center to help prove its defense that decedent was an alcoholic and that her relationship with the family members was attenuated because of it. Also, defendant sought the records to prove a pre-existing condition. The appellate court points out that an inferential rebuttal issue is not an issue that must be determined by the jury, hence the allegation does not have legal significance. If it does not have legal significance, discovery on the matter is unwarranted.

e. Simply because a party alleges that she has sustained mental anguish does not necessarily put her mental health information and records in issue. *Coates v. Whittington*, 758 S.W.2d 749, 753 (Tex. 1988). As pointed out above, for there to be a waiver of the party's mental health records privilege there must be allegations that the party's mental health is an ultimate issue in the case, an issue that must be determined by the finder of fact.

f. *Ex parte* communications often are a contentious issue in personal injury cases. The concern is how to protect confidential information (i.e. healthcare information that is not relevant to the claims in the law and does not form a part of a claim). In *In Re Collins*, 286 S.W.3d 911 (Tex. 2009) 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, I believe 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) authorizes *ex parte* contacts in all situations because, as explained below, the Regents 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. Peebles*, 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.

6. MEDICAL AUTHORIZATIONS

a. For reasons that are not clear to me, attorneys seem to forget the rule about tailoring discovery

requests to the claims or defenses alleged in the case when it comes to subpoenas attached to depositions on written questions to care providers and when it comes to requesting medical authorizations. These, too, are discovery tools and the same rule applies to them. The Texas Supreme Court addressed the issue scope of medical authorizations in *Mutter v. Wood*, 744 S.W.2d 600, 601 (Tex.1988). In that case the trial court had required that Plaintiff sign a blanket medical authorization allowing Defendant to obtain all medical records pertaining to the plaintiff without tailoring the authorization to the relevant claims and defenses plead in the case. The Texas Supreme Court disapproved of such blanket authorizations. The Court's discussion in *In re Collins* of its holding in *Mutter* is informative:

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]

b. *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).

c. *In re Soto*, 270 S.W.3d732 (Tex. App. Amarillo- 2008, orig. proceeding [mand.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" nor 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.

7. ADVERSE MEDICAL/PSYCHOLOGICAL EXAMINATIONS

a. Frequently in personal injury cases, the defendant seeks an adverse medical examination. This may be to obtain an "independent" assessment of the plaintiff's alleged injuries (independent meaning a

physician who does not have a physician/patient relationship with the plaintiff and who thus may be sympathetic to the plaintiff) and extent of damages. Some attorneys treat these as a matter of right, but in fact certain criteria must be met in order to entitle a defendant to such an examination. A party must show good cause, the condition for which the defendant seeks an examination must be in controversy (see discussion above about healthcare information/communication privileges, relevance and that the information may not be obtained through less intrusive means.

b. A Plaintiff may place her medical or psychological condition in issue through her allegations. See *Beamon v. O'Neill*, 865 S.W.2d 583, 586 (Tex. App. – Houston [14th Dist.] 1993, orig. proceeding). But a mere allegation of mental distress or anguish will not place the plaintiff's psychological condition in issue. *In re Doe*, 22 S.W.3d 601, 605 (Tex. App.-Austin 2000, orig. proceeding). See also *Amis v. Ashworth*, 802 S.W.2d 374, 378 (Tex. App. – Tyler 1990, orig. proceeding) (holding that an allegation of self defense is insufficient to warrant granting an examination by a mental health professional.)

c. In addition to demonstrating that the Plaintiff has affirmatively placed her mental or medical condition in controversy, the Defendant must also demonstrate good cause for the examination. In *Coates v. Whittington, supra*, the manufacturer alleged that there was good cause for a mental examination based on notes in the medical records and testimony that Ms. Coates had suffered from depression prior to the incident. The Court rejects this argument observing that the Defendant had failed to demonstrate a “nexus” between the prior alleged condition and the claims that Plaintiff alleged resulting from the occurrence.

Mrs. Coates' prior problems and attendant complaints of depression are distinct from the mental anguish she claims as a result of her injury. Drackett has failed to show any connection or “nexus” between Mrs. Coates' pre-injury depression and her post-injury embarrassment. *Coates*, 758 S.W. 2d at 752

The opinion instructs that there are three essential components of “good cause,” and that each must be demonstrated:

RELEVANCY

An examination is relevant to issues that are genuinely in controversy in the case. *It must be shown that the requested examination will produce, or is likely to lead to, evidence of relevance to the case.* See *Schlagenhauf*, 379 U.S. at 117-18, 85 S.Ct. at 242-43. (emph. added)

NEXUS

There must be shown a reasonable nexus between the condition in controversy and the examination sought.

LESS INTRUSIVE MEANS NOT FEASIBLE

A movant must demonstrate that it is not possible to obtain the desired information through means that are less intrusive than a compelled examination. See *Schlagenhauf*, 379 U.S. at 118, 85 S.Ct. at 242;

See also, *In re Caballero*, 36 S.W.3d 143, 145, (Tex. App. Corpus Christi 2000, orig. proceeding) (reiterating requirement of meeting three above criteria).

Good cause is effectively established as a matter of law if the examinee designates a medical expert to prove his/her mental condition:

“[i]f, however, a [party] intends to use expert medical testimony to prove his or her alleged mental condition, that condition is placed in controversy and the [other party] would have good cause for an examination under Rule 167a.”

Coates, 758 S.W.2d at 753. See also, *Amis v. Ashworth*, 802 S.W.2d 374, 378 (Tex. App. – Tyler 1990, orig. proceeding) (Designating a treating physician to testify about mental state at a particular point relevant to the occurrence is not the same as designating an expert on the plaintiff's mental or medical condition resulting from the occurrence).

d. Finally, even if the Defendant demonstrates that the Plaintiff has affirmatively placed her medical or mental condition in issue and that there is good cause for the examination, the court should still balance the competing interests.

The “good cause” requirement of Rule 167a recognizes that competing interests come into play when a party's mental or physical

condition is implicated in a lawsuit-the party's right of privacy and the movant's right to a fair trial. A balancing of the two interests is thus necessary to determine whether a compulsory examination may properly be ordered.

Coates, 758 S.W.2d 753.

B. PUNITIVE DAMAGES – NET WORTH

1. *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).

2. *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*, (discussed above) income tax returns were not found to have relevancy to the Defendants net worth in this instance.

3. *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 McCoys have reason to believe that the information provided was incomplete or inaccurate.

Also see discussion of *Ford Motor Co. v. Castillo*, 259 S.W.3d 390 (Tex.2009), above, holding that no predicate demonstration of a prima facie case is required for discoverability so long as the discovery request is relevant to the claims and defenses in the case.

4. See also *In re Williams*, --- S.W.3d ---, 2010 WL 3704202 (Tex.App.-Corpus Christi), discussed above.

5. See discussion of *In re Islamorada Fish Co. Texas, L.L.C.*, 319 S.W.3d 908 (Tex. App.-Dallas, 2010), above, under PLEADINGS DEFINE SCOPE.

VII. DISCLOSURE

The area of discovery in which most of the activity regarding damages has occurred in recent years is disclosure. The disclosure rule requires disclosure of the amount of economic damages being claimed and the method used to calculate such damages. Also, the disclosure rule requires timely designation of experts, including those who will be offering opinions on damages. This disclosure requires the general subject matter of the topic on which the expert will offer opinions, the general substance of the opinions that will be discussed and the documents reviewed or relied upon by the expert in formulating the opinions. The disclosure rule when coupled with the automatic sanction of Tex. R. Civ. P. 193.6 can and has caused considerable controversy and at times great peril.

A. DISCLOSURE OF ECONOMIC DAMAGES

Rule 194.1 (d) provides that disclosure must be made with regard to the "amount and any method of calculating economic damages." Comment 2 to the rule, which carry as much force as the rule itself explains the disclosure obligation as follows:

Paragraphs (c) and (d) are intended to require disclosure of a party's basic assertions, whether in prosecution of claims or in defense. Thus, for example, a plaintiff would be required to disclose that he or she claimed damages suffered in a car wreck caused by defendant's negligence in speeding, and **would be required to state how loss of past earnings and future earning capacity was calculated**, but would not be required to state the speed at which defendant was allegedly driving.

Paragraph (d) does not require a party, either a plaintiff or a defendant, to state a method of calculating non-economic damages, such as for mental anguish. In the same example, **defendant would be required to disclose his or her denial of the speeding allegation and any basis for contesting the damage calculations**. [emphasis added].

I have observed in practice and from a review of recent discovery cases that the above rule and comments are frequently not followed, either because attorneys do not understand the rule or hope that there will be no consequence to ignoring it. Plaintiffs will respond that damages are on-going which prevents the Plaintiff from stating an amount of economic loss or a model for computing them. Similarly, Defendants will often respond with the inane response that Defendant is not seeking damages; therefore, it is not applicable. As will be seen from the cases highlighted below, it is a mistake not to take the rule seriously and to follow it literally. A failure to disclose properly in accordance with the rule may result in evidence being excluded pursuant to Tex. R. Civ. P. 193.6. By the same token, the disclosure requirement only requires fair notice, and as will be seen from the case law, the courts are reluctant to approve sanctions if notice of the amount of economic damages and the economic model used to compute them is discernable from the pleadings or other discovery response.

1. *Allan v. Nersesova*, 307 S.W.3d 564, 575 (Tex. App. Dallas, 2010). In this case, the plaintiff was prevented from putting on evidence of damages for failing to timely and properly disclose with regard to economic damages and the method used to calculate them. The case arose from a breach of contract allegation and diminution in value of condominium claim. Allan claimed his unit was damaged by water intrusion caused by the conduct of another condominium owner. The court disallowed testimony from Allan at trial regarding diminished value. Allan had been served with a request for disclosure requiring her to set out the amount of damages [i.e. diminished value] and the method she used to calculate them. Here response is set out below because it is illustrative of how many attorneys respond to this request for disclosure. Most respond evasively and non-responsively:

Plaintiff has suffered inconvenience, nuisance, negative health consequences and mental anguish, as would any person of ordinary sensibilities, from the repeated intrusion of raw sewage into her residence. In addition, while awaiting repairs following these episodes, she was constructively evicted from portions of her residence. When repairs were being attempted, Plaintiff (who is self-employed) was required to be present to allow access and supervise such repairs and was unable to pursue her occupation, thus suffering lost earnings. Certain of her personal property suffered damage from the leaks, and *as such water damages must be*

disclosed should Plaintiff list her residence for sale, such disclosure will result in a diminution in market value. Furthermore, the failure of CCMC and the Association to fulfill the fiduciary duty owed to members of the Association requires the forfeiture of any fees Plaintiff paid to the Association. The refusal of Defendants to act forced Plaintiff to engage counsel and incur legal fees and expenses, and eventually lead [sic] to the filing of this litigation.

To date, Plaintiff believes she has suffered actual damages totaling \$100,000.00 exclusive of attorney's fees and exemplary damages. [emph. added].

The court found that Allan's response had two fatal flaws. First, Allan combined her economic and non-economic damages so that it was not feasible to determine from the total amount of damages what amount was being claimed for diminished value. Second, Allan failed to set out her method by which she calculated her economic loss from diminished value. The appellate court found that the trial court did not abuse its discretion in disallowing evidence on diminished value. See also, *Reservoir Systems, Inc. v. TGS-NOPEC Geophysical Co., L.P.*--- S.W.3d ---, 2010 WL 4467534 (Tex.App.-Hous. [14 Dist.]).

2. If a party fails to properly or timely disclose the amount of economic damages or the method for calculating them, the party may be able to overcome the exclusion of evidence she can demonstrate that the other party has not been unfairly surprised or prejudiced. However, failure to sustain this burden likely will result in an exclusion of evidence. This was result in *Didur-Jones v. Family Dollar, Inc.*, Not Reported in S.W.3d, 2009 WL 3937477 (Tex.App.-Fort Worth).

One of the points that is highlighted in *Didur-Jones* is the argument that while the responding party may not have properly or timely disclosed the amount and method of calculating economic damages, and did not timely supplement, there was effective supplementation because the opposing party had received notice of the amount and method by implication through either pleadings or other discovery produced by the responding party. (See discussion of "fair notice" argument below in analysis of *McGehee v. Campbell*, Not Reported in S.W.3d, 2010 WL 1241300 (Tex.App.-Hous. [1 Dist.]) As will be seen in several of the cases discussed in this paper, sometime this argument works and sometimes it does not. In *Didur-Jones* it did not and it is worth exploring why.

The plaintiff in *Didur-Jones* argued that her care was ongoing and that because of the ongoing nature of

her treatment and care she could not provide an accurate amount of economic damages. She claimed that she attempted to provide bills as they became available, but she never was able to provide a persuasive argument as to why before the discovery deadline she was unable to provide the amount of economic damages she was seeking and the method used to calculate that amount:

It is undisputed that Didur-Jones failed to formally supplement her response to the portion of Family Dollar's request for disclosure seeking the amount and method of calculating economic damages. *See* Tex. R. Civ. P. 194.2(d); *see also* Tex. R. Civ. P. 193.5(b) (“An amended or supplemental response must be in the same form as the initial response.”). And there is nothing in the record to show why economic damages incurred up to the time of trial could not have been provided in response to Family Dollar's request for disclosure, despite Didur-Jones's argument that she was still under treatment.

Didur-Jones v. Family Dollar, Inc., supra at * 4.

Another noteworthy argument in *Didur-Jones* was plaintiff argument that the Court in striking her evidence on economic damages was invoking “death penalty” sanctions and that the court had abused its discretion in not attempting to find a lesser sanction under *TransAm. Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918-20 (Tex. 91) The court rejected this argument first by observing that *Transamerican* pertains to discretionary sanctions and not to automatic sanctions under Tex. R. Civ. P. 193.6. Further, the court pointed out that the court did not impose a death penalty sanction, as the court did not strike plaintiff's evidence of non-economic damages. The court surgically applied the Rule 193.6 sanctions to plaintiff's economic damages because she did not timely provide, either in the first instance or in supplementation the amount and method of calculation with regard to economic damages. *Didur-Jones v. Family Dollar, Inc.*, supra at * 2, 3.

3. As noted above, a party who fails to make timely make proper discovery or to timely and properly supplement risks having evidence on the pertinent issue stricken, subject to the responding party meeting the burden of demonstrating both good cause for failure to timely and properly provide discovery (i.e. disclosure) and that the admission of the evidence will not cause unfair surprise or prejudice to the opposing party. Tex. R. Civ. P. 193.6. The following cases provide illustrations of responding parties meeting this burden to allow

supplementation and admission of evidence, untimely disclosure notwithstanding.

a. *Gundogan v. Woodgrove Condominium Ass'n*, Not Reported in S.W.3d, 2009 WL 4856449 (Tex.App.-Hous. [1 Dist.] 2009). this case involved a claim for damages to real property. There were numerous issues on appeal; however, we are only going to focus on the claim that the trial court erred in finding that the plaintiff did not provide timely discovery of damages and therefore wrongly excluded evidence of damages. The plaintiff proved that he was out of the country when the requests for production were served upon him. Further, he proved he never received the motion to compel for the same reason. To make matters worse, it was established that the party propounding the discovery knew that the plaintiff was going to be out of the country when the party served the discovery and the motion. The appellate court held that the trial court abused its discretion in finding that the plaintiff had been served with discovery. Under these circumstances it was therefore error to exclude evidence on the basis that plaintiff had not timely responded to discovery.

b. *McGehee v. Campbell*, Not Reported in S.W.3d, 2010 WL 1241300 (Tex.App.-Hous. [1 Dist.] 2010). This case is particularly informative with regard to the “fair notice” argument. The case involved a suit to partition property. McGehee complained that the trial court erred in allowing into evidence information that had not been timely disclosed. The evidence concerned damages for loss of use of the home. The appellate court found no error, observing that Campbell had provided fair notice of the loss of use damages and how they were calculated:

The record on appeal reveals that McGehee sent Campbell a request for disclosures, including a calculation of damages. Campbell appropriately responded to McGehee's discovery requests regarding his damages, providing notice in his response six weeks before trial that he specifically sought damages for his wrongful exclusion from the property, beginning in August 2001, and that he alleged the reasonable rental value of the property was \$3,000.00 per month. **These statements were sufficient to provide notice to McGehee that Campbell would seek \$1,500 per month for the period of time during which he alleged that he was wrongfully excluded from the home, beginning in August 2001, and to support the trial court's admission of the evidence upon which it based its award to**

Campbell. We overrule McGehee's sole issue on appeal. [emph. added]

McGehee v. Campbell, supra at * 4.

c. *Cano v. Nino's Paint & Body Shop*, Not Reported in S.W.3d, 2009 WL 1057622 (Tex.App.-Hous. (14 Dist.)). This case arose over a dispute regarding a contract to repair/paint an airplane. Cano claimed that the trial court erred by admitting five documents offered by Nino that were attached as an exhibit to Nino's first amended answer and counterclaim but were not produced in response to Cano's discovery requests. The appellate court found that the documents attached to the petition at least 10 months before trial provided fair notice of Nino's intention to rely upon the documents at trial and established that there was no unfair surprise. *Cano v. Nino's Paint & Body Shop*, supra at *3.

d. *Marin v. IESI TX Corp.*, 317 S.W.3d 314 (Tex. App.-Houston [1st Dist.] 2010) is another case that highlights the "fair notice" exception to the application of Rule 193.6 sanctions. IESI TX Corporation ("IESI") sued Marin for forgery, misapplication of fiduciary property, fraud, and conversion. A judgment was returned in favor of IESI and Marin appealed. One of his points of error on appeal was that court erred in admitting evidence that had not been timely disclosed in discovery. There were a couple of bases for this argument; however, **both are predicated on the ground that documents reviewed by an expert that are not disclosed in discovery should not be admitted into evidence.**

IESI had disclosed that a couple of its employees might also offer expert opinions at trial. Recall that a witness may be both a fact and expert witness. (A witness may qualify as both a fact witness and an expert witness. *Rogers v. Dep't of Family & Protective Serv.*, 175 S.W.3d 370, 377 (Tex. App. – Houst. [1st. Dist.] 2005, pet. Dism'd w.o.j (stating witness may qualify and testify as both fact and expert witness), cited in *Marin*, 317 S.W.3d at 320)). Marin argued that the two individuals were testifying experts and that as such IESI was required to disclose the documents each had reviewed or relied upon in forming their respective opinions. Marin sought to keep out the documents that were not disclosed. In this instance, however, the court found that the witnesses did not in fact render expert opinions but lay opinions and that the expert disclosure requirements do not pertain to lay witnesses offering lay opinions. Further, the documents did not need to be disclosed as having been reviewed or relied upon.

We conclude the mere fact that the witness list identified Moody and Martin as possibly giving

expert testimony does not establish that they did actually give expert testimony. *See Rogers*, 175 S.W.3d at 377; . . . The documents admitted through Moody, however, were not admitted as hearsay evidence relied on by an expert. Rather, as detailed below, the documents were admitted as either non-hearsay evidence, under an exception to the hearsay rule, or were repetitive of unobjected to testimonial evidence. . . We conclude the trial court properly characterized Moody's testimony concerning these exhibits as that of a fact witness and not an expert witness. *See Harris v. Century Furniture Indus., Inc.* 230 S.W.3d 723, 736 (Tex. App. – Houst. [14th Dist.] 2007, no pet.) (furniture store's controller's opinion testimony concerning fair market price admissible as fact witness testimony because*324 it was based on controller's perception and experience in selling furniture). The provisions of Rule 194.2(f) do not apply to fact witnesses

Marin v. IESI TX Corp., 317 S.W.3d at 321 – 322, 323.

Later in the opinion, Marin the court again addresses the argument that a summary of attorneys' fees should be excluded because one of the witnesses would only be able to give expert testimony as to the reasonableness and necessity of the fees and therefore, the summary should have been excluded because it had not been disclosed as having been reviewed or relied upon by the witness. The court found no unfair surprise or prejudice because the amounts being sought previously had been disclosed in pleadings and discovery, thus providing "fair notice":

Both the petition and discovery responses gave her notice that IESI sought as damages its costs for investigating the Alvin Division. *See Williams v. County of Dallas*, 194 S.W.3d 29,33 (Tex. App. - 2006, pet. denied) (upholding trial court's determination of lack of unfair surprise concerning back taxes accrued after filing of suit where petition gave notice lawsuit covered all claims for delinquent taxes, including taxes becoming delinquent after filing of suit until judgment).

Marin v. IESI TX Corp., 317 S.W.3d at 323.

B. DISCLOSURE OF EXPERT WITNESSES

1. DUAL CAPACITY EXPERTS AND LAY OPINION. *See Marin v. IESI TX Corp.*, 317 S.W.3d

314 (Tex. App.-Houston [1st Dist.] 2010) discussed above.

2. **Reynolds v. Nagely**, 262 S.W.3d 521 (Tex.App.-Dallas,2008). This case deals with an issue that comes up quite frequently, whether an expert has been properly and timely designated on the issue of attorneys' fees. The underlying case dealt with a dispute between a plaintiff in a UIM (uninsured motorist) case and her attorney over funds interpleaded into the registry of the court by the insurance carrier. Reynolds contended on appeal that Nagely's attorney should not have been allowed to testify regarding reasonable and necessary attorneys' fees because he had not been properly and timely designated as an expert on attorneys' fees in response to Requests for Disclosure Reynolds had propounded. In fact, Nagely had filed an amended response to Requests for Disclosure, which the appellate court found adequately sufficient to provide Reynolds fair notice. The disclosure stated in part that

[Nagely's attorney] is an attorney licensed in the State of Texas. Although he is still formulating his opinions and may form further and/or supplemental opinions following the depositions of the other parties' alleged expert(s), if any, and/or following the testimony of witnesses at trial, it is anticipated that [counsel] will testify concerning Nagely's attorney's fees and costs in prosecuting this litigation and attorney's fees and costs incurred in defending against any claims, including but not limited to discovery costs, court costs, investigative fees, and other related costs and fees incurred by Nagely in this action. [Counsel] will further testify to the reasonableness and necessity of any attorney's fees and costs incurred by Nagely in this action and the reasonableness and necessity of any attorney's fees and costs incurred by Nagely in prosecuting Reynolds's claims, including not only the propriety of his representation, but also the impropriety of his termination. [Counsel] will also testify to the reasonableness and necessity of any attorney's fees and costs incurred by the other parties, if necessary, including but not limited to discovery costs, court costs, investigative fees, and other related costs and fees incurred by the other parties in this action.

The court found that this disclosure couple with the fact that Nageley had pleaded for attorneys' fees and had previously listed his counsel as a trial witness lead the

court to conclude that the trial court had not abused its discretion in allowing the testimony. **Reynolds v. Nagely**, 262 S.W.3d at 531.

3. **BP America Production Co. v. Marshall**, 288 S.W.3d 430 (Tex.App.-San Antonio 2008). This case involved a dispute over an oil and gas lease, so of course revenue calculations were an important factor in the case, and where there are revenue calculations there are of course experts and predictably disputes over the completeness of expert designations. This case followed convention. Plaintiffs moved to exclude testimony of Defendant's expert on revenue calculations claiming that the expert's opinions had not been timely disclosed. Plaintiffs responded by showing that the expert's testimony was based upon numbers provided by an important witness who had only been produced by Plaintiff's one month before trial. The trial court allowed the testimony. The appellate court found that this demonstration was sufficient to show good cause for the late disclosure of the expert's opinions and that based upon this record the trial court had made an "implicit" finding of good faith.

Another noteworthy holding is that the Court found the expert's contested calculations were in the nature of "refinements," which prior Texas courts have been held to be admissible without additional disclosure:

were updates of previously disclosed information, altered due to the passage of time. This court has held that an expert may "modify his testimony based on refinements in his calculations ... through the time of trial without ... the need to supplement." **Vela v. Wagner & Brown, Ltd.** 203 S.W.3d 37, 53 (Tex. App. – San Antonio 2006, no pet.) ("When an expert simply applies different data of record to a previously disclosed formula to render an alternate opinion than the opposing expert, that qualifies as a mere refinement of his opinion without the need to supplement." **Vela, supra**. The provision of the calculations shortly before trial was not a bar to the admission of Graham's testimony. *See id.*

4. **Stonehill-PRM WC I, L.P. v. Chasco Constructors, Ltd.**, Not Reported in S.W.3d, 2009 WL 349136 (Tex.App.-Austin 2009). While Tex. R. Civ. P. 193.6 allows a court to grant a continuance of the trial to allow the supplementation and examination of it by the opposing side, the party who failed to make untimely discovery must properly seek a continuance or trial postponement. Failure to properly petition the court for a continuance can result in waiver and imposition of the

Rule 193.6 sanction. In this case, Stonehill failed to timely disclose an alternate measure of damages. In fact it did not disclose the alternate measure until after the discovery control plan deadline. The court struck the alternative measure of damages and Stonehill sought mandamus review. The appellate court found that the trial court was within its discretion to strike the late disclosure because Stonehill had failed to meet its burden for obtaining leniency for its late disclosure. Further, Stonehill had not requested a continuance to allow the late supplementation and the opponents' examination of it:

Stonehill has failed to address its burden to show good cause for its failure to disclose that it was seeking its cost to complete the Project as an alternative measure of damages or why there is a lack of unfair prejudice or unfair surprise to appellees. Nor did Stonehill seek a continuance or trial postponement to amend its discovery responses or to allow Chasco to conduct discovery regarding the costs to complete the Project.

5. *Hilburn v. Providian Holdings, Inc.* Not Reported in S.W.3d, 2008 WL 4836840 (Tex.App.-Hous. [1st Dist.] 2008, no pet.). This case is informative on the issue of the Court's discretion to grant a continuance to allow further discovery, even if a party has not timely complied with the disclosure rules. The case involved a declaratory judgment on an easement dispute. The issue pertinent to the discovery discussion was whether the trial court abused her discretion during a bench trial in allowing testimony of an undisclosed expert on attorneys' fees.³ The decision focused on the court discretion provision of Tex. R. Civ. P. 193.6:

Rule 193.6 nonetheless allows the trial court to admit evidence violating (for example) Rule 195.2 upon a showing of good cause or if its use would not unfairly surprise or prejudice the other party. TEX.R. CIV. P. 193.6(a)(1)-(2).

Even if the party seeking to introduce testimony does not carry its burden of establishing the grounds for the exception, the court may grant a continuance or temporarily postpone the trial to allow the proponent to

make its discovery response and to allow the opponent to conduct discovery regarding any new information presented by that discovery response. See TEX.R. CIV. P. 193.6(c). In this case Hilburn objected to the Providence being able to put on expert testimony regarding attorney fees because the expert had not been timely designated. The court granted Hilburn the opportunity before trial to depose the expert, which Hilburn declined. The appellate court found that in this instance the trial court did not abuse his discretion in allowing the testimony of the expert.

VIII. SUPPLEMENTATION

PopCap Games, Inc. v. MumboJumbo, LLC., 350 S.W.3d 699 (Tex.App.-Dallas, 2011). The underlying litigation involved claims of breach of contract and business disparagement between companies that were in the business of developing and distributing computer games.

On appeal, MumboJumbo contended that the trial judge abused his discretion by denying MumboJumbo leave to designate a new expert witness on damages after its original expert was stricken for being unreliable. MumboJumbo complied with the original scheduling order with regard to designating its damages expert, but the court struck the expert on PopCap's motion shortly before trial. The Court then continued the trial for about a month. A month before the new trial setting, MumboJumbo had a substitution of counsel who requested a continuance of the new trial setting. The court moved the trial setting again for about 120 days. About a month later (about three and a half months before the new trial date), MumboJumbo filed a motion for leave to supplement its expert disclosures by naming a new expert on damages. MumboJumbo claimed both good cause and absence of unfair surprise or prejudice to PopCap. The court denied the motion. See ***Fort Brown Villas III Condominium Association v. Gillenwater***, 285 SW3d 879(Tex.2009) for discussion of good cause and absence of unfair surprise requirement.

The appellate court observed that the focus with regard to untimely supplementation is the effect on the opposing party, not whether the offending party really needs the expert.

The fact that a party needs an expert to establish its cause of action does not establish that other parties will not be unfairly surprised by the late designation of an expert. ***Ersek v. Davis & Davis, P.C.*** 69 S.W.3d 268, 272 (Tex. App. – Austin 2002, pet. denied). Offering other parties an opportunity to depose a late-

³ There was an unresolved issue of whether the defendant ever sent a request for disclosure requesting designation of experts and if not, whether plaintiff had an obligation to designate experts pursuant to Tex. R. Civ. P. 194.2(f) and 195. This question comes up relatively frequently, but it has yet to be ruled upon, and the court took a pass to do so in this case.

designated expert also does not ensure the absence of unfair surprise or prejudice. *Id.*

It is not often that you see the “ineffectiveness of counsel” defense in civil litigation, but that effectively was MumboJumbo’s pitch. The argument was that it should be given another shot at naming another expert because its prior counsel and expert were “incompetent.” The court held that this allegation does not meet the good cause criteria, citing *Alvarado v. Farah Mfg. Co. Inc.*, 830 S.W.2d 911, 915 (Tex. 1992). The failure to show good cause probably would have been sufficient to support the trial court’s ruling. However, the appellate court also addressed the unfair prejudice prong. Here, it found that the PopCap attorney had put on testimony about the time and expense PopCap had incurred in responding to the original MumboJumbo expert and that it would be unfairly prejudicial to make PopCap engage in the same exercise in response to a new expert only three months out from trial. The appellate court rejected MumboJumbo’s argument that there would not be any prejudice because its new expert would use the same data as the first expert, only the new expert’s methodology and conclusions would be different.

An additional take away from this opinion is the court’s observation that MumboJumbo had failed to preserve error by not making a bill of exceptions. Without evidence that the new expert could have offered admissible testimony, there is no harm.

Without an offer of proof, we would be speculating if we were to assume that MumboJumbo’s new testifying expert would have furnished such evidence. *See* TEX.R. EVID. 103(a)(2) (error cannot be predicated on the exclusion of evidence unless the substance of the evidence was made known by offer of proof or was apparent from the context); *Bobbora v. Unitrin Ins. Servs.*, 225 S.W.3d 331, 335 (Tex. App. – Dallas 2008, no pet.) (“[W]ithout an offer of proof, we can never determine whether exclusion of the evidence was harmful.”).

IX. DISCOVERY RESPONSES AND SUMMARY JUDGMENT

A. EFFECT OF UNTIMELY EXPERT DESIGNATION: *Fort Brown Villas III Condominium Association v. Gillenwater*, 285 SW3d 879(Tex.2009)

There has been a heated debate since the inception of the amendments to the discovery rules in 1999 about

whether the discovery rules apply to a motion for summary. More specifically, the issue has been whether the disclosure/designation rule regarding testifying experts applied to motions for summary judgment, such that if a party had not timely designated the party could still use testimony from an undisclosed expert to controvert a motion for summary judgment. In this premises liability case, the Texas Supreme Court, resolves the issue by holding that Texas Rule of Civil Procedure 193.6, which provides for the exclusion of evidence due to an untimely response to a discovery request, applies in a summary judgment proceeding.

In this case a discovery control plan had been entered. Despite two extensions of the expert designation deadline, the plaintiff complied with none of the deadlines. Defendant filed a no evidence motion for summary judgment on the issues of whether the product in question (an allegedly defective pool-side chair) posed an unreasonable risk of harm and whether the property owner had notice of the condition. The plaintiff filed an affidavit of an undisclosed expert in response to the motion for summary judgment. The trial court struck the affidavit and granted the motion for summary judgment. The appellate court reversed the trial court, holding that Tex. R. Civ. P. 193.6 does not apply to summary judgment proceedings, thus framing the issue for the Texas Supreme Court. The Court answered with this rationale:

Because we have already held that evidentiary rules apply equally in trial and summary judgment proceedings, *Longoria v. United Blood Services*, 938 S.W.2d 29, 30 (Tex.1995), we also hold that the evidentiary exclusion under Rule 193.6 applies equally.

The Court points out that the discovery rules prior to the 1999 amendments were fluid, depending on a trial date. However, the 1999 amendments provide fixed deadlines independent of the trial date. Further, with regard to a no evidence motion for summary judgment, it is contemplated that all discovery has been completed. While this case did not involve a traditional motion for summary judgment, this author assumes that the same rational would apply.

B. NO EVIDENCE MOTIONS FOR SUMMARY JUDGMENT AND DISCOVERY

1. Rule 166i, allowing a motion for no evidence summary judgment, contains a provision that effectively provides that a motion for no evidence summary judgment should not be ruled upon before there has been

an “adequate time for discovery.” The comment to this rule provides the following insight:

A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before. . . .

It probably is imprudent to wait until the response for summary judgment to request additional time for discovery for the first time (although it is a very good idea to reassert the request at such time). Rather, if it appears that discovery is going to be impeded for whatever reason, the party seeking the discovery or the party who may be the respondent to a motion for no evidence summary judgment should consider promptly filing a motion for protection requesting the court’s aid in obtaining the discovery or the court’s protection with regard to extending the deadline for obtaining discovery or filing motions for no evidence summary judgment. *See Green Garden Packaging Co., Inc. v. Schoenmann Produce Co., Inc.*, Not Reported in S.W.3d, 2010 WL 4395448 (Tex. App.-Houston [1 Dist.],2010).

2. *Mancuso v. Cheaha Land Services, LLC.*, Not Reported in S.W.3d, 2010 WL 3193317 (Tex. App.-Fort Worth,2010). I particularly like this case because it ties together a couple of important points that I have wanted to get across in this paper with regard to discovery of damages. As pointed out above, disclosure of economic damages is a very important issue and one that is fraught with peril if it is ignored or not scrupulously attended to. In this case, Mancuso failed to respond to Requests for Disclosures timely or even before trial. The court set a motion for no evidence motion for summary judgment three days before trial. Again Mancuso did not respond timely, claiming that the attorney’s legal assistant forgot to file the supplement responses to disclosure and the request for continuance of the no evidence motion for summary judgment. The trial court granted the motion for summary judgment, and Mancuso appealed, claiming the trial court should have granted a continuance. What the appellate court focused on however was Mancuso’s failure to request and obtain leave to serve untimely disclosure responses. Therefore, under Tex. R. Civ. P. 194.6, Mancuso was precluded from offering evidence in response to the motion for summary judgment. If Mancuso was precluded in offering evidence and none was offered, then the trial court did not abuse its discretion in granting the motion.