“I’D RATHER BE FISHING”

DISCOVERY IN TEXAS

VOL. I

SCOPE OF DISCOVERY

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2017 UPDATE

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1. INTRODUCTION

The title of this paper derives from the trilogy of cases handed down by the Texas Supreme Court in the late 90's admonishing the bar that no discovery device should be used as a tool for "fishing." For a number of years, the bar knew that it was not supposed to "fish," but it was not very clear exactly what fishing was. Over the next nearly 15 years, Texas courts have made clear that discovery is supposed to be tailored to the claims and defenses pled in the case. Discovery that is not tethered to the pleadings is considered fishing and is proscribed.

The purpose of this paper is to highlight how the scope of discovery has been shaped over the last 15 years and how it continues to be refined both in Texas and at the Federal level. While the focus of the paper will be on Texas jurisprudence, important Federal cases also will be discussed, as Texas's rules in large part are patterned after the Federal Rules and what happens on the Federal level tends to influence decisions and practice at the state level. The biggest development both at the Federal level, beginning with the 2015 amendments to Fed. R. Civ. P. 26 and now with the Texas Supreme Court decision in ***In re State Farm Lloyds,*** --S.W.3d --***,*** 2017 WL 2323099 (Tex. 2017), is the increasing emphasis on "proportionality." I will discuss this concept both in terms of how it has been interpreted thus far by the Federal Courts and through a review of ***In re State Farm Lloyds***.

A word about the organization of the paper. I have been writing on discovery for now over 35 years. Over the course of time, the discovery paper got so massive, that it could not be covered adequately at one course. So, I decided to break the paper into two volumes. This is Volume 1: Scope of Discovery. Volume 2, "Rooting for Acorns," deals with tools of Discovery. So, while tools of discovery will be discussed operationally to some extent in this paper, they will not be covered comprehensively. At some point, the two papers may once again be conjoined, and if so, it will have the title "Rooting for Acorns," which will cover the entire area of discovery in Texas except for privileges, which is discussed extensively by other authors. The newest cases are indicated by [UPDATE].

2. OVERVIEW

A. CHANGES TO THE FEDERAL RULES GO INTO EFFECT REGARDING SCOPE OF DISCOVERY

Significant changes have been made to FED. R. CIV. P. 26. A comprehensive discussion of the proposed new Federal Rules is beyond the scope of this paper. However, because of the "trickle down" phenomenon, it is worthwhile to point out that the Federal practice is modifying the scope of discovery to embrace a "proportionality" requirement. In other words, the Court now may consider whether the cost of the discovery is warranted by the nature and extent of the underlying suit. The apparent concern being addressed is the judicial cost when a great deal of discovery is sought in a case with nominal damages. However, even with the addition of this

requirement, Courts will need to be sensitive to not denying a party due process in the interest of judicial economy (i.e. the importance of the discovery in resolving the issues in dispute). One could make the argument that Courts, both on the state level and the federal level, already are vested with the discretion to conduct such a proportionality analysis. TEX. R. CIV. P. 192.4; ***In re Alford Chevrolet-Geo,*** 997, S.W.2d 173 (Tex. 1999); ***In re Weekley Homes, L.P.,*** 295 S.W.3d 309, 314-315 (Tex. 2009) (discussed below). As discussed in ***Walker v. Alta Colleges, Inc.***, 2010 WL 2710769, (W.D. Tex. – Austin Div. 2010):

> Ultimately, much of what a Court must decide in determining the scope of discovery that will be permitted in any given case is a balancing decision, where the Court must balance the potential probative value of the requested materials against the **cost** and burden that would be incurred if the discovery is permitted.

However, what is new, and what frankly needs to be seriously scrutinized, is the concept of requiring the requesting party to demonstrate that the discovery being sought not only is relevant to the claims and defenses in the lawsuit, but that the requested discovery, from a "proportionality" perspective, is warranted given the size and scope of the underlying dispute and the significance of the issue in that dispute for which the discovery is sought.

> **(b) Discovery Scope and Limits.**
> **(1) *Scope in General.*** Unless otherwise limited by Court Order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.** — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the Court may Order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be

28 admissible at the trial if the discovery
29 appears reasonably calculated to lead to the
30 discovery of admissible evidence. All
31 discovery is subject to the limitations
32 imposed by Rule 26(b)(2)(C).

This begs the question of what the burden of proof will be in these regards. Will requests for discovery now be subjected to the same type of scrutiny as pleadings under ***Iqbal/Twombley?***[1] Is the "proportionality" test the new "facial plausibility" test for discovery? What nature of proof must be submitted? Will there be satellite hearings on whether the representations are accurate? Arguably, as much time and expense could wind up being incurred in meeting the new burden as in obtaining discovery in most cases. The "fix" might be counter-productive to the intended goal. Granted, there is an increasing concern about the expense of eDiscovery. However, one must question the wisdom of adding yet "another layer of complexity" to the determination of scope for the great number of civil cases that do not warrant such an exercise. **This rule went into effect on December 1, 2015.**[2]

1) FEDERAL COURT INTERPRETATION OF THE 2015 AMENDMENTS TO FRCP 26.

There is a growing body of case law interpreting the application of the new amendments.

a) ***Booth v. City of Dallas and Officer Ryan Lowman***, 2015 WL 9259060 (N. D. Tex. Dallas Div. 2015). This is a significant case because it is one of the first Federal opinions to comment on the amendments to Rule 26, although the amendments did not play a dispositive role in the decision. The underlying case involves a claim of excessive force. The Court issued a preliminary Order limiting initial discovery to the issue of qualified immunity. The City of Dallas issued a subpoena to the fire department to obtain paramedic records pertaining to care provided to Plaintiff following the incident in question. Plaintiff filed a motion for protection on the basis that the discovery sought exceeded the scope of the Court's Order. The Court found that the discovery sought by the City was relevant to the first prong of an excessive force claim (whether or not there was a violation of the Plaintiff's constitutional rights) and, therefore, denied Plaintiff's motion for protection.

b) ***Carr v. State Farm Mutual Automobile Insurance Company***, 2015 WL 8010920 (N.D. Tex. Dallas Div. 2015) discusses the burden of opposing a discovery request in the context of the new amendments. The Court found that the historical burdens for resisting discovery, as imposed in the Fifth Circuit, remain unchanged by the 2015 amendments to Rule 26:

The amendments to Rule 26 govern in all proceedings in civil cases

[1] ***Bell Atlantic Corp. v. Twombly,*** 550 U.S.544 (2007); ***Ashcroft v. Iqbal,*** 129 S.Ct. 1937 (2009).
[2] http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf.

> thereafter commenced [December 1, 2015] and, insofar as just and practicable, in all proceedings then pending. The Court finds that applying the standards of Rule 26(b)(1), as amended, to State Farm's motion to compel is both just and practicable.
>
> Further, these amendments to Rule 26 raise the possibility that the burdens imposed on the party resisting discovery discussed above must fundamentally change as well. The Court concludes that is not so.

In support of its conclusion, the Court cites the Advisory Committee Notes regarding Rule 26:

> The present amendment restores the proportionality factors to their original place in defining the scope of discovery. <u>This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.</u>
>
> <u>Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the Court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.</u>
>
> <u>Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the Court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.</u>

2) [UPDATE] ***In re State Farm Lloyds,*** --S.W.3d --**,** 2017 WL 2323099 (Tex. 2017). The Texas Supreme Court recently discussed the concept of plausibility in the context of electronic discovery. While the opinion dealt primarily with the issue of whether any party could dictate the form in which electronic discovery is produced, the Court was clear in pointing out the proportionality concept must not only be taken into account in the Court's determination of how electronic discovery should be produced, but that the concept applies to all forms of discovery in Texas.

> all discovery is subject to the proportionality overlay embedded in our discovery rules and inherent in the reasonableness standard to which our electronic-discovery rule is tethered.[5]

Footnote 5 refers to Tex. R. Civ. P. 192.4, which is the rule limiting discovery, adapted from the Federal Rules and added to the Texas Rules in the 1999 amendments:

> 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 parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Comment 7 to Tex. R. Civ. P. 192 pertains to Rule 192.4 and is noteworthy:

> 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. [emphasis added].

The Court's interpretation of Rule 192.4 probably is best stated in the following sentence from the opinion.

> To put it succinctly,

While the opinion focuses on whether producing electronic discovery was reasonable under the circumstances, the Court noted that reasonable and proportionality are conjoined; therefore, the following observation is noteworthy with regard to how the Court is instructing the bench and bar as to how proportionality is to be considered in the context of all discovery in Texas:

> Reasonableness and its bedfellow, proportionality, require a case-by-case balancing of jurisprudential considerations, which is informed by factors the discovery rules identify as limiting the scope of discovery[6] and geared toward the ultimate objective of "obtain[ing] a just, fair, equitable and impartial adjudication"

As we go forward from this point, the practice of discovery in Texas will likely be informed by the following paragraphs at the conclusion of ***In re State Farm Lloyds***:

> "our rules as written are not inconsistent with the Federal Rules or the case law interpreting them," even though they may not "mirror the federal language."

In this regard, we observe the proportionality principles under the Federal Rules similarly limit discovery of otherwise discoverable information. Rule 26 delineates the scope of discovery as inherently limited by proportionality:

> Unless otherwise limited by Court Order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

The factors expressly identified as limitations on the scope of discovery accord with the proportionality analysis we have explicated under our discovery rules, keeping our procedures in line with their federal counterparts.

Though the proportionality factors were recently relocated within the Federal Rules, proportionality has long been a required constraint on the scope of discovery, enacted decades ago "'to deal with the problem of over discovery.'" Proportionality, it is said, acts as a governor "'to guard against redundant or disproportionate discovery by giving the Court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.'" ***The 2015 amendments to the Federal Rules have not altered "the existing responsibilities of the Court and the parties to consider proportionality," do not require the requesting party to address all proportionality considerations, and do not permit the opposing party to rely on boilerplate objections of disproportionality***. Rather, the amendment is directed to changing the existing "mindset" that relevance is enough, restoring proportionality as the "collective responsibility" of the parties and the Court.

Discovery is necessarily a collaborative enterprise, and particularly so with regard to electronic discovery. ***The opposing party must object and support proportionality complaints with evidence if the parties cannot resolve a discovery dispute without Court intervention,*** but the party seeking discovery must comply with proportionality limits on discovery requests and "may well need to . . . make its own showing of many or all of the proportionality factors." Recent federal cases provide helpful examples of proportionality analyses in e-discovery cases. Consistent with an individualized, case-specific inquiry, all manner of outcomes are represented—denials of requested discovery on proportionality grounds,

> rejection of proportionality complaints, and cases taking a more graduated approach by allowing limited bell-weather discovery to inform the propriety of further discovery. Ultimately, the "Court's responsibility, using all the information provided by the parties, is to consider [the proportionality] factors in reaching a case-specific determination of the appropriate scope of discovery." The same applies with regard to electronic-discovery practices under the Texas Rules of Civil Procedure. [footnotes omitted, emphasis added]

3) FACIAL PLAUSIBILITY COMING TO TEXAS?

See, Tex. R. Civ. P. 91a Dismissal of Baseless Causes of Action; and ***Zheng v. Vaction Network, Inc. and Linh C. Dinh***, 468 S.W.3d 180 (Tex. App.– Houston [14th Dist.] 2015, pet.denied).

B. DISCOVERY MUST BE TIED TO ISSUES PLED IN THE CASE

A question I am asked frequently is why I believe the pleadings are the foundational basis for determining relevancy. I often respond that it is intuitive, but people continue to ask for citations to support this concept. Some recent cases will be discussed below. However, it is important to understand the importance pleadings play regarding relevance. The Texas Supreme Court has made clear that a party may not "fish" for discovery to establish an unpled claim. ***Texaco, Inc. v. Sanderson****, 898 S.W.2d 813, 815 (Tex. 1995) (orig. proceeding).* Additionally, the Court has held that whenever feasible, discovery must be tailored to the claims and defenses pled in the case. ***In re CSX Corp.*** 124 S.W. 3d 149, 153 (Tex. 2003) (orig. proceeding). These two opinions alone should be sufficient to convince the bench and bar that for a discovery request to be relevant, it must be tied to a pleading in the case. Similarly, if discovery is tied to a pleading in the case, it will be incumbent upon the Court to allow a reasonable degree of discovery relevant to the allegation and it will be an abuse of discretion to totally disallow discovery on the allegation. This is merely a matter of due process.

1) ***In re Booth*****,** Not Reported In S.W.3d, 2014 WL 5796726 (Tex. App. – Houston. [14th Dist.] 2014, mandamus dismissed), a case involving discovery on the issue of net worth, reiterates that the scope of discovery is determined by the live pleadings, citing ***In re Citizens Supporting Metro Solutions, Inc.***, No. 14-07-00190-CV, 2007 WL 4277850, at *3 (Tex. App.-Houston [14th Dist.] Oct. 18, 2007, orig. proceeding) (mem. op.).

The opinion in ***Booth*** is significant because it emphasizes the importance of the live pleadings with regard to the scope of discovery and concomitantly notes the importance of specially excepting to improper, insufficient, or legally untenable claims and defenses AND obtaining rulings on such exceptions. A failure to obtain rulings on special exceptions may result in a party obtaining discovery on a legally insufficient or legally untenable claim (See more discussion of this case, below, under Scope, Net Worth).

2) The following passage from Justice McCally's dissent in ***In re Eurecat US, Inc.***, 425 S.W.3d 577, 585 (Tex. App. – Houston. [14th Dist. 2014, orig. proceeding) is instructive:

> I note that it is axiomatic that the scope of discovery is measured by the live pleadings regarding the pending claims. Stated differently, a party's right to discovery is not conditioned upon proof of the merits of the claims. *See* ***In re Citizens Supporting Metro Solutions, Inc.,*** No. 14-07-00190-CV, 2007 WL 4277850, at *3 (Tex. App. – Houston. [14th Dist. Oct. 18, 2007, orig. proceeding) (mem. op); *see also* ***In re Jacobs****, 300 S.W.3d 35, 40 (Tex. App. – Houston. [14th Dist.] 2009 orig. proceeding)* (citing ***Lundsford v. Morris****,* 746 S.W.2d 471, 473 (Tex. 1988), *overruled on other grounds by* ***Walker v. Packer****, 827 S.W.2d 833, 842 (Tex. 1992).*

3) ***In re Moor***, Not Reported in S.W.3d, 2012 WL 5463193 (Tex.App.-Houston. (14 Dist.)). In a motor vehicle collision, in order for discovery of telephone records to be relevant, there must be a pleading that the use of a phone played a role in the collision:

> The pleadings are specific as to the acts of recklessness and incompetence and do not include any allegation that the driver of the go-cart was using a mobile phone at the time.

4) [UPDATE] ***Lifeguard Licensing Corp. v. Ann Arbor T-Shirt Company***, L.L.C, 2016 WL 3144049, (S.D. N.Y 2016). This case involved an intellectual property dispute. The first sentence of the opinion is instructive, "Just as a plaintiff may not take discovery regarding unpled claims, so a defendant is precluded from seeking discovery concerning unpled defenses." The Court points out that the 2015 amendments to the Federal Rules deleted the provision that allowed Courts to expand discovery to the "subject matter of the lawsuit," reinforcing that discovery must be relevant to the claims and defenses pled.

> The 2015 amendments, however, deleted the second tier, so that discovery now extends only as far as information relevant to claims or defenses. Fed. R. Civ. P. 26 advisory committee's note to 2015 amendment ("The amendment deletes the former provision authorizing the Court, for good cause, to Order discovery of any matter relevant to the subject matter involved in the action."). Id, at *2

The Court went on to point out the prior authority for confining discovery to the matters actually pled.

> Even before 2015 amendment, it was well-established that information relevant only to claims not yet pled was beyond the scope of discovery, at least without leave of Court. Thus, in ***United States v. $17,980.00 in United States Currency***, No. 3:12-cv-1463,

2014 WL 4924866 (D. Or. Sept. 30, 2014) a forfeiture case, the Court reasoned:

> ***3** A party must be able to rely on its opponent's pleadings in guiding discovery. *See,* ***McHenry v. Renne***, 84 F.3d 1172, 1177-78 (9th Cir. 1996) (providing that an affirmative pleading must "fully set[ ] forth who is being sued, for what relief, and on what theory, with enough detail to guide discovery."). Thus, the fact that Plaintiff arguably had notice of Claimant's allegation of factual ownership of the Defendant Currency does not mitigate the prejudice to Plaintiff in relying on Claimant's pleading of a possessory interest while conducting discovery. To hold otherwise would force parties to conduct often wasteful discovery on myriad unpled, but arguably factually-plausible claims.

Id. at *4. Similarly, another Court explicitly stated that the Federal Rules prohibit discovery on unpled claims. **Altman v. Ho Sports, Co**., No. 1:09-CV-1000, 2010 WL 4977761, at *2 (E.D. Cal. Dec. 2, 2010); *see also* ***246 Sears Road Realty Corp. v. Exxon Mobile Corp***., No. 09 CV 889, 2012 WL 4174862, at *8 (E.D.N.Y. Sept. 18, 2012) (noting that Court had denied discovery of unpled fraud claims); ***Travelers Insurance Co. v. Broadway West Street Associates,*** 164 F.R.D.154, 158 (S.D.N.Y. 1995).

5) CASE STUDIES:

There are four cases that I believe very clearly highlight the important role of pleadings in defining the scope of discovery. Two of the cases deal with scope in the setting of premises liability and the other two cases discuss scope in the context of seeking medical records. In each of the examples, one of the cases has a pleading basis for the requested discovery and the party seeking the discovery prevails. In the instances in which the party seeking discovery fails, in each instance the request is unsupported by pleadings.

a) DISCOVERY SOUGHT PREMISES LIABILITY CASES:

i) ***In re HEB Grocery Company*****,** Not Reported in S.W.3d, 2010 WL 4523765 (Tex. App.-Corpus Christi) arose out of a personal injury case in which an elderly woman was struck by a store patron driving an automated cart. Plaintiff sought the following discovery, to which HEB objected as being overbroad and fishing, citing ***Dillard Dep't Stores, Inc. v. Hall***, 909 S.W.2d 491, 492 (Tex. 1995) (holding that a request for a 227 store search in twenty states over a five-year period was overly broad); and ***K Mart Corp. v. Sanderson***, 937 S.W. 2d 429, 431 (Tex. 1996) (holding that a request for all criminal activity on all K Mart property over last seven years was overly broad).:

> All incident reports of injuries to property, displays, and people related to motorized vehicles ridden by customers inside the HEB stores in any of the HEB stores in Texas or any complaint of such for the years 2004-November 30, 2009.

The Trial Court's Order compelling the requested discovery was sustained by the Appellate Court, which rejected HEB's request petition for mandamus. The primary basis for the Appellate Court's ruling was based upon Plaintiff's pleadings:

> In the instant case, in her original petition, Campbell alleged that HEB provided electric motorized carts to its customers to increase its profits, but "began seeing injuries caused by drivers hitting other people while operating the motorized carts." According to Campbell, her injury occurred "after many prior occurrences of drivers hitting customers, hitting displays, and causing damage inside HEB stores." Campbell's petition specifically alleges:
>
> HEB did not monitor drivers, train or check operators to see if they were competent to operate the vehicles inside the store, or establish any rules or procedures for their use. Anyone who desired to drive around the stores was allowed to do so with no restrictions, no supervision, and no regulations.
>
> Campbell thus argues that HEB's general corporate policies regarding the management of electric carts are deficient insofar as, for example, the carts are keyless, unsupervised, and accessible to anyone. Campbell seeks discovery regarding other accidents involving motorized electric carts to show that HEB had notice of other incidents pertaining to electric cart usage and considered but failed to make appropriate changes in its nation-wide policies and procedures. Campbell also seeks this discovery to counter HEB's defensive allegations that Campbell's injuries were caused by the manufacturer of the electric cart and its driver, rather than any action or inaction on the part of HEB. Supra at *3
>
> ***
>
> the instant case ***concerns allegations of negligence on the part of HEB based not only on a premises defect specific to a particular location, or on employee conduct at a specific location, or on criminal conduct occurring at a particular location, but on its nation-wide policy decisions regarding the provision and utilization of mechanized electronic carts for customers.*** Thus, unlike ***Dillard Department Stores*** and ***K Mart,*** the discovery sought in this case is relevant to the specific allegations at issue in this lawsuit. Supra at *5 [emphasis added]

ii) Now compare the above holding in ***HEB Grocery Company***, with the holding two years later in ***In re HEB Grocery Company, L.P.,*** ---

S.W.3d ----, 2012 WL 2782602 (Tex. App.-Houston. (14 Dist.) 2012). The latter case involved a claim of injuries resulting from a slip and fall on the premises of an HEB grocery store. Plaintiff sought discovery "including information concerning: (A) incidents involving premises conditions at all Houston, Texas HEB stores; (B) incidents involving premises conditions at the HEB store at issue; and (C) certain HEB employee and training files." The Trial Court compelled the requested discovery and HEB sought a petition for mandamus relief. The Appellate Court found that the Trial Court had abused its discretion in compelling the discovery because the discovery requests were overbroad and exceeded the allegations set out in Plaintiff's pleadings.

> ***Lara's allegations are specific to the premises at issue***. Thus, the requests for discovery at other HEB stores is more akin to the discovery in *Dillard Dep't Stores* and *K Mart Corp.,* in which the incidents from other stores would not lead to relevant evidence of the HEB owner/operator's actual or constructive knowledge of a condition *on the premises* that posed an unreasonable risk of harm. Supra at *5. [emphasis added]

b) DISCOVERY SEEKING HEALTHCARE INFORMATION

i) ***In re Kristensen***, Not Reported in S.W.3d, 2014 WL 3778903 (Tex. App. Houston [14th Dist.] 2014) (this case is discussed in greater detail below, under Medical Authorizations) arose out of a rear end truck collision. Plaintiff alleged that the Defendant driver was not qualified to operate a tractor-trailer under applicable federal regulations as part of Plaintiff's claim of negligence against the Defendants. Plaintiff sent a request for production to the Defendant driver seeking a medical records release authorization for a five-year period in order to obtain Kristensen's medical records pertaining to alcohol abuse, diabetes, and hypertension. Defendant objected merely that this request was outside the scope of permissible discovery. The Trial Court Ordered the production of the authorization. Defendants sought a petition for writ of mandamus arguing that Plaintiff had not put the Defendant's medical condition in issue and further that the Defendant had produced a medical certification for the Defendant driver which showed that he was qualified to drive. Defendant's petition was denied. While Defendant failed to sustain its burden as to whether the requested medical records were protected under the physician/patient privilege, the Court went on to discuss why the records were discoverable, the privilege notwithstanding. The Appellate Court found that the requested medical information formed a part of Plaintiff's alleged claims.

> Castillo ***alleges*** that Kristensen was not qualified to operate a tractor-trailer under applicable federal regulations as part of Castillo's claim of negligence against the Defendants. [emphasis added] Supra at *
>
> ****
>
> If, as Castillo suggests, Kristensen had a disqualifying condition that was not disclosed in connection with his medical certification, that could be

> germane to whether any of the Defendants acted with negligence. Therefore, relators have not demonstrated that discovery of Kristensen's medical records is outside the scope of permissible discovery. *Cf.* ***R.K. v. Ramirez,*** 887 S.W.2d 843-844 (concluding in context of privilege claim under Tex. R. Evid. 509) that doctor's medical and mental condition was relevant in a medical malpractice claim). Supra at *6.

ii) The Plaintiff in ***In Re: Union Pacific Railroad Company and Wanda Heckel,*** 459 S.W.3d 127 (Tex. App. – El Paso, 2015, no pet.) was not as successful as the Plaintiff in ***Kristensen*** in obtaining the Defendant's medical records. This is because the Plaintiff in ***Union Pacific*** failed to place the Defendant's medical condition in issue through Plaintiff's pleadings. ***Union Pacific*** involved claims for wrongful death damages arising from a railroad crossing motor vehicle collision. Plaintiff sought the medical records of the engineer in part because the engineer testified on deposition that she had been treated for diabetes and for sleep apnea. The Trial Court reviewed the medical records in camera and ordered them produced. Defendant filed a petition for mandamus, which was granted. The primary basis for the Appellate Court's ruling was that Plaintiff had never placed Defendant's medical condition in issue by Plaintiff's pleadings. [Plaintiff did not assert an exception to Tex. R. Evid. 509].

> The pleadings do not directly allege that Heckel was physically or mentally impaired due to sleep apnea or any other medical condition at the time of the incident . . . there are neither pleadings nor evidence in the record demonstrating that she [Plaintiff] is relying on Heckel's medical condition as the basis for her negligence claims such that it is an ultimate or central issue in the case. Supra at 133

The intended take away from this discussion is that for a party to meet its burden of establishing relevancy for a discovery request, first and foremost, there must be a pleading as to which the requested discovery is relevant. Without such pleading, it will be difficult, if not highly unlikely, to meet the requisite burden.

C. PLEADING NEED MEET ONLY NOTICE PLEADING REQUIREMENTS

In re Ming Chu Chang, Ken Mok and Jorge Gonzalez III 2015 WL 5895197 (Tex. App. – Corpus Christi 2015) provides a good insight into the interplay between pleadings and scope of discovery. The Plaintiff pled claims for exemplary damages and deceptive trade practice damages. Defendant argued that the claims were unsubstantiated. The Court found that the pleadings met the special damages requirement for specificity and that once that threshold had been met, no further substantiation of the claims was necessary to entitle the Plaintiff to discovery relevant to such claims.[3]

In the instant case, Williams has raised causes of action for, inter alia, fraud

[3] Tex. Civ. Prac.& Rem. Code Ann. §41.003(a)(1) subsequent to this opinion has been amended to require that a party first demonstrate a substantial likelihood of prevailing on its gross negligence claim before being entitled to discovery on net worth.

and deceptive trade practices in connection with precise and detailed factual allegations regarding the real estate transaction at issue. In an action for common law fraud, the Plaintiff can recover exemplary damages. *See* Tex. Civ. Prac. & Rem. Code Ann. §41.003(a)(1) (West, Westlaw through 2015 R.S.); ***Tony Gullo Morotrs 1, L.P. v. Chapa***, 212 S.W.3d 299, 304 (Tex. 2006).

Under Texas's basic pleadings requirements, Williams's live pleadings sufficiently allege specific facts supporting the imposition of exemplary damages for the purposes of showing that he is entitled to discovery of net worth information from the relators. Supra at *3.

D. MUST A VALID CLAIM BE SUBSTANTIATED TO OBTAIN DISCOVERY RELEVANT TO IT?

1) As the foregoing case analysis demonstrates, pleadings are the groundwork upon which the scope of discovery in a particular case is built. However, as also demonstrated in ***Chang, Mok and Gonzalez***, discussed above, litigants still argue that before there can be discovery on a claim, the party making the claim must first substantiate or present prima facie evidence of the claim. This thinking is reflected in the recent amendments to the statute allowing discovery of net worth in a gross negligence case.[4] While this concept is being clarified by the Courts, it has not always been clear 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).

2) 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.

[4] See, Tex. Civ. Prac.& Rem. Code Ann. §41.003, discussed in detail below.

3) 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.[5] 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 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.

4) 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's alleged breach of an implied duty to the Plaintiffs to develop Bass's 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.

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[5] 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.

> 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.

5) Lastly, there is ***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 effect, but Castillo moved to strike the affidavits as hearsay, which the court granted. Ford moved to delay the settlement agreement and for leave to obtain discovery. The Trial Court observed that Ford did not need to conduct formal discovery, but could and had conducted an independent investigation in support of its claim of jury misconduct. Ford, additionally, argued that when it withdrew its agreement to settle, Castillo's only remedy was to file a claim for a breach of contract (presumably as to which Ford would assert an affirmative defense of mistake). Castillo did not plead breach of contract, but instead merely filed a motion for summary judgment without a pleading. The Trial Court overruled Ford's motions for continuance to allow Ford 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 filing 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].

It would seem from this analysis that a party seeking discovery does not have to first prove a *prima facia* 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.

6) The above conclusion is supported by the opinion of the Texas Supreme Court in, ***In re Memorial Hermann***, 464 S.W. 3d 686 (Tex. 2015).

> Furthermore, it is counter to the notion that "[a]ffording parties full discovery promotes the fair resolution of disputes by the judiciary," to condition access to documents that could substantiate a Plaintiff's claim on the Plaintiff's ability to substantiate his claim without the documents' aid. Supra at *6. [footnote omitted].

7) [COMMENT] **The question of what needs to be pled to obtain discovery on a matter probably has not been answered completely by Texas Courts. While Texas is a notice pleading state, the Texas Rules in this regard mirror the Federal Rules, and the US Supreme Court has, in recent years, made clear in the *Iqbal/Twombley*** line of cases that pleadings must have facial plausibility. What this means is still being hashed out in the Federal Courts. Arguably, Tex. R. Civ. P. 91a is a step in this direction. However, this rule talks more in terms of the plausibility of the cause of action pled rather than focusing on the factual bases for the pleadings. The Texas Supreme Court in ***Castillo v. Ford,*** as discussed above, stated clearly that a pleading in Texas did not have to meet a threshold prima facie demonstration for a party to obtain discovery on the point. Does this mean that a pleading (a claim or a defense) may merely be a conclusory allegation without any factual support? The Comments to Tex. R. Civ. P. 194 (c) acknowledge that Texas is a notice pleading jurisdiction and state that the Disclosure Rule was intended to allow exploration of the factual bases for pleadings, but must there be a factual basis for a pleading to obtain discovery on such pleading? What if, in response to a request for disclosure, a party does not or cannot state a factual basis for a legal theory or defense? What should be the recourse? Should a party be allowed to "fish" for facts in support of a pleading that has no initial factual basis? The Texas Supreme Court should at some point clarify the answer to the following question: May a party obtain discovery on a pled allegation (claim or defense), even if the party does not have any facts to support the allegation?

E. ABANDONED CLAIMS

While it is quite clear that the scope of discovery is circumscribed by the pleadings in the case, the *Willie* case points out that discovery may not be limited to the live pleadings. ***In re Willie,*** Not Reported in S.W.3d, 2012 WL 457789 (Tex.App.-Houston (14 Dist.)). This case holds that discovery may be obtained that is relevant to abandoned pleadings, citing Rule 801(e)(2). This rule provides that a prior statement by a party is admissible against that party. The opinion notes that the Texas Supreme Court has held that Rule 801(e)(2) includes superseded pleadings. *See* ***Bay Area Healthcare Group, Ltc. V. Mcshane,*** 239 S.W. 3d 231, 234-35 (Tex. 2007). There is an odd dichotomy between pleadings and discovery in this regard. Abandoned pleadings may be used as impeachment and as a basis for discovery. However, an abandoned interrogatory or disclosure response regarding a legal theory may not be used for impeachment. See Comment 3 to Tex. R. Civ. P. 194. 3.

> Responses under Rule 194.2(c) and (d) that have been amended or supplemented are inadmissible and cannot be used for impeachment, but other evidence of changes in position is not likewise barred.

F. A FACT ISSUE MUST EXIST

Mont Belvieu Caverns, LLC v. Texas Com'n on Environmental Quality, 382 S.W.3d 472 (Tex. App.-Austin 2012, no writ). Discovery is only relevant and warranted if there is a material issue of fact to which it is relevant. If only a question of law is to be decided, it is unlikely discovery is going to be warranted.

> The central issues . . . turned on questions of law—specifically construction of statutes and rules. **There were no disputed material facts bearing on those inquiries**. Thus, discovery would not have aided in the resolution of these claims and, accordingly, we cannot say that the Trial Court abused its discretion in denying discovery regarding these claims. *See* ***In re CSX Corp****., 124 S.W.3d 149, 151-153 (Tex. 2003)* (noting that discovery requests must show a reasonable expectation of obtaining information that will aid in resolution of the dispute).

G. 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).

2) ***In re EOG Resources, Inc.,*** Not Reported in S.W.3d, 2011 WL 455280 (Tex. App.-Waco) provides a good discussion of what is meant by “tailoring” 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. However, marshaling 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.

3) ***In re Family Dollar Stores of Texas, LLC*****,** Not Reported in S.W.3d, 2011 WL 5299578 (Tex. App.-Beaumont). Discussed further, below.

4) ***In re Halliburton Energy Services, Inc.,*** Not Reported in S.W.3d, 2011 WL 4612726 (Tex. App.-Houston. [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].

5) ***In re HEB Grocery Co., L.P.,*** Not Reported in S.W.3d, 2010 WL 4523765 (Tex. App.- Corpus Christi). An eighty-five year old woman was shopping at an HEB store in Corpus Christi, Texas, when she was struck by another customer driving a motorized electric cart provided by HEB. She sustained severe physical injuries requiring hospitalization and surgery. She filed suit and propounded the following request for production:

> All incident reports of injuries to property, displays, and people related to motorized vehicles ridden by customers inside the HEB stores in any of the HEB stores in Texas or any complaint of such for the years 2004-November 30, 2009.

HEB did not object that the request at issue was unduly burdensome or that the five-year period of time for production was overbroad. Instead, HEB objected that the Discovery Order was overly broad as ***a matter of law*** insofar as it required the production of incident reports from HEB stores other than the one where the incident involved in the lawsuit occurred. In other words, HEB advanced the argument that, as a matter of law, discovery of incidents occurring at other stores is always irrelevant and impermissibly overbroad. This is a common and provocative argument. Has the Texas Supreme Court ruled that any request for information regarding incidents beyond the site of the incident involved in the lawsuit is beyond the scope of discovery? And has the Texas Supreme Court ruled that a request beyond a certain time period (e.g. 3, 5, 10 years) is, as a matter of law, beyond the scope of permissible discovery? HEB argued that the Texas Supreme Court had answered these questions affirmatively in ***Dillard Dep't Stores, Inc. v. Hall,*** 909 S.W.2d 491 (Tex. 1995) and ***K Mart Corp. v. Sanderson,*** 947 S.W.2d 428 (Tex. 1996) (orig. proceeding). The Court in HEB; however, found that the answer was no and that ***Dillard Department Stores*** and ***K Mart*** were distinguishable from the facts in ***HEB*****.** The ***HEB Grocery*** Court's analysis supports the proposition that these determinations are fact specific, and are influenced by the pleadings and material issues in the case. *See also,* ***In re Waste Management of Texas, Inc.,*** Not Reported in S.W.3d, 2011 WL 3855745 at p. 9 (Tex. App.-Corpus Christi) ("In examining the appropriate breadth of discovery, it is fundamental that each lawsuit concerns a specific claim arising from a specific set of facts), discussed below.

Notably, the Plaintiff in ***HEB Grocery*** alleged that HEB was negligent in the formulation of its policies and procedures that were in effect at all its stores and that these policies derived from HEB's experience at all its stores nationwide. In other words, Plaintiff argued that the experience at all HEB's stores went to the issue of foreseeability.

> Campbell thus argues that HEB's general corporate policies regarding the management of electric carts are deficient insofar as, for example, the carts are keyless, unsupervised, and accessible to anyone. Campbell seeks discovery regarding other accidents involving motorized electric carts to show that HEB had notice of other incidents pertaining to electric cart usage and considered but failed to make appropriate changes in its nation-wide policies and procedures.

In distinguishing HEB Grocery from ***Dillard Department Stores*** and ***K Mart,*** the Appellate Court observed that the Plaintiffs in ***Dillard Department Stores*** and ***K Mart*** failed to demonstrate a nexus between their allegations and the scope of discovery requested. There was, in a sense, the same type of "analytical gap" often discussed in limiting the testimony of experts under ***Daubert.*** The Plaintiffs were unable to show the relevancy of occurrences at other stores to the issue alleged in their respective cases; therefore, the discovery requests in those instances were vulnerable to the charge of "fishing." The situation, however, in ***HEB Grocery*** was different.

> In contrast, the instant case concerns allegations of negligence on the part of HEB based not only on a premises defect specific to a particular location, or on employee conduct at a specific location, or on criminal conduct occurring at a particular location, but on its nation-wide policy decisions regarding the provision and utilization of mechanized electronic carts for customers. Thus, unlike ***Dillard Department Stores*** and ***K Mart,*** the discovery sought in this case is relevant to the specific allegations at issue in this lawsuit.
>
> * * *
>
> There is a direct relationship between the claims at issue and the discovery sought. Significantly, ***Texaco v. Sanderson*** [898 S.W.2d 813 (Tex. 1995)] confirmed that the "Plaintiffs are entitled to discover evidence of Defendants' safety policies and practices ***as they relate to the circumstances involved in their allegations"*** [emphasis added].

6) ***In re Waste Management of Texas, Inc.,*** Not Reported in S.W.3d, 2011 WL 3855745 (Tex. App.- Corpus Christi 2011).

This was a motor vehicle collision case. The Plaintiff's vehicle was hit by a garbage truck that Plaintiff alleged was being operated in the ordinary course of business for Waste Management. Plaintiff claimed Waste Management was negligent particularly with regard

to faulty safety practices and training. Later, after taking the deposition of a Waste Management Corporate representative and learning that there were no safety directors in the area where the incident occurred, Plaintiff amended his petition to allege gross negligence in these regards.

The discovery dispute centered on the following request for production:

> Produce pleadings, discovery (including corporate representative depositions, answers to: interrogatories, requests for disclosure, requests to produce documents, and requests to admit), on all other lawsuits involving incidents in which Waste Management of Texas, Inc. has been sued in Texas and in which unsafe driving on the part of a Waste Management of Texas, Inc. driver has been alleged and/or in which it is alleged Waste Management of Texas, Inc. did not employ proper safety and/or was negligent with regard to its policies for the operation of its vehicles, the training of its drivers, or in setting safety policies.

Waste Management objected with what at this point could be considered the "standard objection" to a request for production served in Texas:

> Defendant objects that the request is overly broad, not relevant, not reasonably calculated to lead to the discovery of admissible evidence and not reasonably limited in subject matter, geography or time.... Further, this request is unduly burdensome and harassing because the burden or expense of the proposed discovery outweighs its likely benefits, taking into account the needs of the case the amount in controversy, and the importance of the proposed discovery in resolving the issues.... Finally, Defendant objects that this request is compound and confusing.

Waste Management provided no further response. Plaintiff filed a motion to compel and in response Waste Management served an affidavit from one of its attorneys describing the undue burden involved in responding to the request. **Plaintiff responded that the discovery was relevant to its allegation of faulty safety practices and training.** The Court granted the motion to compel but limited the scope to *"those litigation files relating to garbage trucks in Texas in the past five years."*

Waste Management filed a motion for re-hearing and submitted a second affidavit from the same attorney who produced the first affidavit. This affidavit, too, discussed the putative cost in time and money in attempting to comply with the request. The Court then conducted a non-evidentiary hearing on the motion for reconsideration and issued the following Order:

> Produce pleadings, discovery (including representative depositions, answers to interrogatories, requests for disclosure, requests to produce documents, and requests to admit), on all other lawsuits involving garbage truck accidents in which Waste Management of Texas, Inc. has been sued

> in Texas in the five years preceding the date of this Order, and in which unsafe driving on the part of a Waste Management of Texas, Inc. driver has been alleged and/or in which it is alleged Waste Management of Texas, Inc. did not employ proper safety and/or was negligent with regard to its policies for the operation of its vehicles, the training of its drivers, or in setting safety policies. Any material related to any person's healthcare information subject to HIPAA is excluded from production and may be redacted by Defendants. [footnote omitted]

The new Order essentially tracked Plaintiff's original request, but excluded healthcare information. Waste Management pursued mandamus relief claiming that the Order required the production of irrelevant and overbroad discovery that was unduly burdensome to produce.

Waste Management first argued that Plaintiff had wrongfully attempted to distract from the ordinary negligence claim in the case and arbitrarily expanded the scope of discovery by pleading gross negligence. However, as the Appellate Court pointed out, Waste Management never attacked Plaintiff's pleadings by filing special exceptions, motions for sanctions, or motions for summary judgment. This raises a noteworthy point that comes up frequently in discovery disputes involving scope of discovery. Whose burden is it with regard to relevancy? Must the requesting party establish that the request is relevant or must the responding party establish that the request is not relevant? The answer was provided by the Texas Supreme Court in ***Ford Motor Co. v. Castillo,*** 279 S.W.3d 656 (Tex. 2009).

> 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. This record does not demonstrate such a situation. [emphasis added]
> *Supra*, at 664.

Arguably, all that the requesting party must do to satisfy its burden of seeking "relevant" discovery is demonstrate that there is a nexus between what is sought and the claims and defenses alleged in the lawsuit. The burden then shifts to the responding party to demonstrate that in fact the request is not relevant in whole or in part:

> We note that this Court and others have placed the burden of proof regarding relevance, or lack thereof, on the party seeking to avoid discovery. *See e.g., **In re Frank A. Smith Sales, Inc.,*** 32 S.W.3d 871, 874 (Tex. App. – Corpus Christi 2000, orig. proceeding) ("Generally, the party resisting discovery has the burden to plead and prove the basis of its objection."); ***Valley Forge Ins. Co. v. Jones,*** 733 S.W.2d 319, 321 (Tex. App. – Texarkana 1987, orig. proceeding) (holding that, as a general rule, the burden of pleading and proving the requested evidence is not relevant falls upon the party seeking to prevent discovery).

The Appellate Court disposed of the **"fishing expedition"** argument with the following observations:

> This is not a case where Garza is attempting to justify an overbroad discovery request by proving a general corporate strategy regarding unspecified safety laws, but a discovery request specifically targeted to the safety policies and practices as they relate to the circumstances involved in this lawsuit, and as evidenced in previous discovery responses. *See **Texaco, Inc. v. Sanderson**, 898 S.W.2d 813, 815 (Tex. 1985) (orig. proceeding).*

The opinion next addressed Waste Management's **overbreadth** argument. The Court found that the request for production was tied to the Plaintiff's allegations regarding a time period that was set out as well as a geographical area. Accordingly, there was no basis for finding that the Trial Court had abused its discretion.

> In the instant case, the Trial Court's Order limits the request for production to the temporal period of five years, the geographical region of Texas, and the subject matter of litigation files concerning garbage truck accidents where the case involved unsafe driving, and negligent or improper policies regarding vehicle safety, training, or operation. The cases cited by Waste Management do not support the proposition that any of these limitations is per se overbroad. The litigation files sought are factually similar to the case at hand, are closely related in temporal proximity, and concern similar legal issues. Accordingly, the Trial Court may have concluded that the request for production at issue was relevant and not overbroad.

Further, with regard to Waste Management's argument that some of the litigation files might contain private, confidential information such as healthcare information, social security or tax information, the Court noted that the proper procedure would be for Waste Management to produce that which is not privileged and then follow Tex. R. Civ. P. 193 with regard to those file contents for which protection is warranted.

The opinion then turns to Waste Management's **undue burden** argument. This analysis is less clear than the Court's analysis of the fishing and overbreadth issue, in large part because of the "lack of objective data." While Waste Management provided

affidavits setting out estimated time and expense, the Appellate Court observed that the Trial Court could have discounted the representations as being exaggerated. Also, the Court noted that there was no evidence in the record regarding the size of Plaintiff's claims. This is a noteworthy point, which often is overlooked in the day to day fights over the scope of discovery. It is one thing to claim that the expense of complying with a request is substantial. However, the test is whether the burden is "undue."

> The fact that a discovery request is burdensome is not enough to justify protection; "it is only undue burden that warrants nonproduction." ***ISK Biotech Corp. v. Lindsay,*** 933 S.W.2d 585, 568 (Tex. App. – Houston [1st Dist.] 1996, no pet.).

In this regard, Tex. R. Civ. P. 192 requires a balancing test, comparing the size of the claims in the litigation with the costs.

> Discovery should be limited if 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 parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. *See* TEX. R. CIV. P. 192.4(b) [emphasis added]; ***In re Weekley Homes, L.P.,*** 295 S.W.3d 309, 317 (Tex. 2009) (orig. proceeding).

When the Court is only provided data on one side of the scales, there is insufficient data upon which the Court may make a reasonable determination. For the same reason, the Appellate Court will have insufficient evidence to weigh as to whether the Trial Court abused its discretion in allowing the discovery.

7) ***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 a 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.

8) ***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].

9) ***In re Hernandez,*** Not Reported in S.W.3d, 2011 WL 4600706 (Tex. App.-Houston[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).

10) ***In re Univar USA, Inc.,*** 311 S.W.3d 183 (Tex. App- Beaumont 2010, no pet h.), ***K Mart Corp. v. Sanderson,*** 937 S.W.2d 429, 431 (Tex. 1996) (per curiam). While most discovery disputes involving the scope of discovery and overbreadth involve requests for production, it is important to remember and note that the scope of discovery in Tex. R. Civ. P. 192 pertains to all discovery tools, including oral depositions. This point is emphasized in this ***Univar*** opinion. The Plaintiffs brought a wrongful death case arising from the decedent's alleged exposure to benzene. The Plaintiffs sought the deposition of

a Defendant that reportedly supplied benzene to plants at which the decedent worked. Apparently, Plaintiffs produced testimony that the decedent recalled that benzene was delivered to the plants at which he worked in either black or green and white 55-gallon drums. There was evidence that the supplier from whom the Plaintiff was requesting a corporate representative deposition had supplied benzene to one of decedent's employers in black drums. Accordingly, the Trial Court found that the deposition (the topics on which the representative was to testify unfortunately are not delineated or discussed in the opinion) was designed to lead to admissible evidence. Therefore, the scope was relevant. The Appellate Court agreed. In conjunction with the deposition, the Plaintiffs requested various documents. Many of the requests were not adequately limited to place and time:

> Most of the topics listed in both the notice and the subpoena contain no geographical restrictions. Both the notice and the subpoena require discovery regarding medical policies and medical surveillance that is not limited to benzene.

Defendant objected on the basis of over breadth. The Appellate Court held that the Trial Court had abused its discretion in not tailoring or requiring that the discovery be tailored to the places and times relevant to the claims and defenses pled.

11) ***In re Swift Transp. Co.,*** Not Reported in S.W.3d, 2011 WL 4031029 (Tex. App.- Houston. [14th Dist.]). This case, like ***Univar***, above, deals with the scope of discovery in the context of an oral deposition.

This case arose from injuries allegedly sustained by the Plaintiff in a truck wreck. Amongst other allegations, the Plaintiff alleged that Swift was negligent and grossly negligent based upon theories of negligent hiring, negligent supervision, negligent training and respondeat superior. The Plaintiff issued a notice of deposition for a witness relevant to these issues and pertinent documents:

> Swift's "risk manager or person(s) most knowledgeable about any and all injury or death claims, ***for the ten (10) years prior to the wreck*** made the basis of this lawsuit, filed against Swift; this request includes, but is not limited to, the person or persons who have the ability to produce loss run reports and/or other summary information regarding claims, as well as claims information and/or claims files." [emphasis added]

Swift filed an objection to the scope of the topic and request, a motion for protection and a motion to quash. All were overruled. The Appellate Court found that the Trial Court had abused its discretion in not tailoring the topic and the request.

> Shealey has not established the relevance of the information requested. Shealey asserts that the information sought "might well show" that Swift has engaged in a pattern of negligent hiring and supervising that would support her gross negligence claim. It appears that the information sought amounts

> to an impermissible "fishing expedition." *See* ***In re Lowe's Companies, Inc.,*** *134 S.W.3d 876, 879 (Tex. App. – Houston [14th Dist.] 2004, orig. proceeding).*

The take away point from this opinion is that the time period must have a relevancy nexus to the pleadings. While it often is going to be difficult to establish a relevant time period with precision, there is going to need to be some demonstration of at least why the selected time period is reasonable. Sometimes this might mean taking the deposition of a representative to attempt to determine whether the party uses particular time periods for evaluation or industry standards apply particular time periods for review assessments. While ten (10) years may not, as a matter of law, be beyond the scope of permissible discovery (See discussion of ***In re HEB Grocery Co., L.P.,*** Not Reported in S.W.3d, 2010 WL 4523765 (Tex. App.-Corpus Christi), above), in ordinary circumstances it often will be considered a lengthy period of time. Such a time period, if merely arbitrary, will be vulnerable to the objection that it is not sufficiently "tailored." It is predictable that when the request period exceeds 3-5 years, particularly when unduly burdensomeness is alleged, that the Courts may require a greater showing of relevance. The requesting party in such circumstances should be prepared to demonstrate a factual basis for the time period and not just a conclusory argument that "under the circumstances, it is warranted." In this regard, it might be a good practice to consider serving such requests in increasing time increments, starting first with a generally accepted time period and expanding upon it.

12) ***Wararosky v. Fast Group Houston, Inc.*** 2015 WL 730819 (Tex. App. – Houston [1st Dist.] 2015) involved a motion for summary judgment that had been granted against the Plaintiff on a unlawful termination claim. Plaintiff sought review on several grounds, including that the Trial Court abused its discretion in not granting a motion to compel responses to requests for production that Plaintiff had propounded. The Court found that the requests were overbroad:

> Wararosky did not tailor his interrogatories to violations of the same polices or types of policies, or even to violations of policies that justify immediate termination. Rather, interrogatories 1 and 3 sought information about reports, discipline, and terminations involving employees who committed *any* safety violations and violated *any* company policy in the last four years.

Id at *2.

G. COURT DISCRETION TO REQUIRE DISCOVERY TO BE TAILORED

1) *In re Smith*, 2015 WL 4940363 (Tex. – Beaumont 2015).

> "The Trial Court has the discretion to deny a request if it is an overly broad discovery request that it determines could have been more narrowly tailored

to include only relevant matters or should have been limited in time and scope." ***In re Indeco Sales, Inc.,*** No. 09-14-00405-CV, 2014 WL 5490943 at *1 (Tex. App. – Beaumont Oct. 30, 2014, orig. proceeding) (mem.op.).

2) It is the requesting party who must tailor the discovery that is found to be overbroad, not the Trial Court. ***In re Master Flo Valve Inc***., ---S.W.3d --- 2016 WL 316491 at *3 (Tex. App. – Houston [14TH Dist.] 2016).

> "The burden to propound discovery complying with the rules of discovery should be on the party propounding the discovery, and not on the Courts to redraft overly broad discovery so that, as re-drawn by the Court, the requests comply with the discovery rules." ***In re TIG Ins. Co.,*** 172 S.W.3d 160, 168 (Tex. App. – Beaumont 2005, orig. proceeding).

H. DISCOVERY THAT GOES TO THE HEART OF A VIABLE CLAIM OR DEFENSE SHOULD NOT DENIED

1) 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. Peeples,*** 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].

2) A Trial Court may abuse its discretion by denying discovery that goes to the heart of a party's claims or defenses.[6] *See* ***Ford Motor Co. v. Castillo***, 279 S.W. 3d 656, 663 (Tex. 2009). This principle is reiterated in ***In re Willacy County Appraisal District,*** --- S.W.3d ---, 2013 WL 5942707 (Tex. App. Corpus Christi 2013, orig. proceeding), which involved a property tax appraisal challenge. Plaintiff asserted that it had an agreement with the County tax appraisal district that it would not be assessed

[6] "[A] denial of discovery going to the heart of a party's case may render the appellate remedy inadequate." [omitting citations] An appeal will not be an adequate remedy where the party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error. ***Walker v. Packer***, 827 S.W.3d 833, 843 (Tex. 1992). The relator must establish the effective denial of a reasonable opportunity to develop the merits of his or her case, so that the trial would be a waste of judicial resources. *Id.*

taxes on a parcel of property for a particular year and that the appraisal district had wrongly reneged on the agreement in assessing taxes against Plaintiff on the property. The appraisal district answered by asserting an affirmative defense that the agreement was procured through fraud. The district propounded written discovery and sought to take the deposition of Plaintiff's corporate representative on topics relevant to its affirmative defense of fraud. The appraisal district sought a petition for mandamus with regard to the Trial Court's denial of its motion to compel responses to the written discovery and the Trial Court's grant of Plaintiff's motion to quash the deposition of its corporate representative. The petition was granted on both counts, relying heavily on the Texas Supreme Court's holding in ***Ford Motor Co. v. Castillo****,* above. It also is notable that the Appellate Court observes that it does not determine the actual validity of the fraud claim, but merely that such a claim is viable and that discovery relevant to such a claim is proper and should be allowed:

> We determine solely whether such a defense [fraud] is merely *capable* of succeeding, and in light of the foregoing, we conclude that such a defense in this case is viable. To rule otherwise would be premature, advisory, and not necessary to the final disposition of this original proceeding. *See* TEX. R. APP. P. 47.1. Accordingly, we conclude that the Trial Court abused its discretion by denying the District's requested discovery to develop this affirmative defense and granting Sebastian's motion to quash. *See* ***Ford Motor Co.,*** 279 S.W.3d at 663.

3) ***In re Staff Care, Inc.,*** 422 S.W. 3d 876 (Tex. App. – Dallas 2014, orig. proceeding). While a Trial Court has broad discretion to limit discovery, a trial judge must be very careful with regard to denying a party the right to depose individuals with knowledge of relevant facts, particularly when the individuals potentially have knowledge of facts that go to the heart of the requesting party's claims or defenses. In ***In re Staff Care, Inc.,*** the trial judge was found to have abused his discretion in granting a motion to quash a number of depositions of parties and fact witnesses. The party moving to quash the notices did not claim that the depositions sought irrelevant information. Rather, they claimed that the notices for the depositions were untimely and Staff Care did not exercise due diligence in seeking the depositions earlier. The facts did not support this allegation, nor does the applicable law. The facts were that the notices and the dates selected for the depositions both preceded the discovery cutoff deadline. Also, there were a number of communications about trying to set up the depositions earlier. There was in effect no good cause for granting the motion to quash and granting the motion deprived Staff Care of potential evidence to support its case.

4) A Trial Court abuses its discretion when it quashes a corporate representative deposition on topics that are relevant and go to the heart of a party's claims. ***In re Garza,*** Not Reported in S.W.3d, 2007 WL 1481897 (Tex. App. – San Antonio 2007).

> We conclude the Trial Court erred in quashing the deposition in its entirety because doing so unreasonably restricted Garcia's access to relevant

> information. Without the opportunity to fully discover information about State Farm's multiple defenses, Garcia is effectively prevented from verifying or refuting those defenses. . . . Thus, quashing the deposition in its entirety severely compromises Garcia's ability to present and prove her case. [omitting citations] *Supra* at *2.

See also ***In re Campbell,*** Not Reported in S.W.3d, 2010 WL 3431712 (Tex. App. – Austin 2010).

5) *See also,* ***In re Memorial Hermann***, 464 S.W.3d 686 (Tex. 2015). The Texas Supreme Court discusses the importance of pleading with respect to the scope of discovery and offers the following observation with regard to how the scope of discovery may be modified by utilizing special exceptions to challenge pleadings:

> Defendants may further limit the scope of discovery through the judicious use of special exceptions, which are "the appropriate vehicle ... by which an adverse party may force clarification of vague pleadings," thereby narrowing the range of facts that will be of consequence in the action. [footnotes omitted] at *6.

I. DISCOVERY AND PLEAS TO JURISDICTION

The precise nature of the underlying claim in ***In re Hoa Hao Buddhist Congregational Church Texas Chapter and Dung Anh Nguyen,*** -- S.W.3d--, 2014 WL 7335188 (Tex. App. – Houston. [1st Dist.] 2014) is unclear. However, it can be gleaned that the Plaintiff was dissatisfied with the management of the organization that controls the church. Plaintiff requested access to the company's books and when this request was declined, Plaintiff included breach of fiduciary duty claims in her petition. She then served discovery on the organization, including requests for production of the organization's books for inspection and copying.[7] Hoa Hao filed a motion for summary judgment on the issue of standing/jurisdiction and a motion for protection requesting that Plaintiff demonstrate that she had standing (establish that she was a member of the church) before requiring Defendant to produce any records. The Trial Court ordered Hoa Hao to produce the requested documents and deferred ruling on the motion for summary judgment pending a review of the requested documents. Hoa Hao filed a petition for mandamus. The Appellate Court found that the Trial Court had abused its discretion in not making a determination on the issue of Plaintiff's standing and jurisdiction before allowing discovery, particularly discovery that was not confined to the issue of jurisdiction.

[7] There was no dispute that Hoa Hao was a non-profit organization. A member of a nonprofit corporation has a right, "on written demand stating the purpose of the demand ... at any reasonable time and for any proper purpose" to examine and copy books and records relevant to that purpose, at the member's expense. Tex. Bus. Orgs. Code Ann. §§22.001-.365, 22.351 (West 2012).

The Appellate Court notes that when there is a challenge to jurisdiction, limited discovery relevant to the challenge to jurisdiction may be appropriate, citing ***Diocese of Galveston-Houston v. Stone****,* 892 S.W.2d 169, 178 (Tex. App. – Houston. [14th Dist.] 1994, orig. proceeding). However, in this instance, the Court found that the discovery being requested was not tailored to the issue of jurisdiction, i.e. Plaintiff's membership in Hoa Hao. Plaintiff continued to argue that the discovery sought went to the heart of her "tortious conduct" complaints. The Court noted the relevancy of the discovery to Plaintiff's legal theory in the case, but held that the jurisdictional issue must be resolved before discovery on the merits could proceed. "We understand Huynh to contend that the requested discovery is appropriate to test her potential claims against Nguyen, but merits discovery should wait until a ruling on the jurisdictional plea." ***Hoa Hao,*** *supra* *4.

3. DISCOVERABLE INFORMATION, DATA AND THINGS

A. OTHER SIMILAR CLAIMS

1) ***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).

For further discussion about the concept that a party is not required to create evidence, see ***In re Goodyear Tire & Rubber Company***, 2014 WL 3845229 (Dallas), discussed below under REQUESTS TO ENTER AND INSPECT PREMISES.

2) [UPDATE] **WINDSTORM DISCOVERY [OVERBREADTH]**: Over the several years, there have been an increasing number of opinions arising from Windstorm litigation. A common thread running through these cases is the search for other similar instances in which the defendant insurance carrier has putatively engaged in same or similar wrongful conduct: bad faith. For the most part, the opinions have come down against the party seeking the discovery on the basis that the requests are overbroad (particularly regarding the time period for which the discovery is sought and because there is no commonality or sufficient similarity between the prior conduct and the conduct at issue in the instant case). Ironically, the opinions themselves have a continuity because the parties seeking discovery keep repeating the same mistakes. A very important discovery concept to grasp is that the subject matter of a request may be relevant, but the expanse of the request can make the request objectionable because it expands the inquiry into areas that are not relevant to the issues pled in the case, either in terms of the type of condition, product or act that is the subject of the request, the time, or the places from which the discovery is sought. This is the primary take away from the Texas Supreme Court opinion in ***In re Nat'l Lloyds Ins. Co***., 449 S.W. 3d 486, 488 (Tex. 2014) orig. proceeding). A proper discovery request cannot be overbroad. An overbroad request is one that is not tailored to the claims and defenses pled in the case.

a) [UPDATE] ***In re Nat'l Lloyds Ins. Co***., 449 S.W. 3d 486, 488 (Tex. 2014) orig. proceeding). National Lloyds arose out of an insurance bad faith claim. Plaintiffs were attempting to demonstrate that the insurance carrier had paid more for other claims than for the claim at issue. Arguably to prove this claim, Plaintiffs would have to demonstrate that the other claims were sufficiently similar. Generally, in the discovery context, admissibility is not the test so one might think that the sufficiently similar test would not apply to discovery requests. National Lloyds makes clear, that even in the discovery context, the claims must be sufficiently similar to the claim at issue to be relevant to the claims and defenses pled. The opinion's introductory sentence succinctly communicates what was in issue:

> In this case involving allegations of underpaid insurance claims, we consider whether a Trial Court abused its discretion in ordering the defendant insurer to produce evidence related to insurance claims other than the plaintiff's. We hold that it did.

What was requested in discovery is important to a clear understanding of the ruling:

> During discovery, Erving requested production of all claim files from the previous six years involving three individual adjusters. She also requested all claim files from the past year for properties in Dallas and Tarrant Counties involving Team One Adjusting, LLC, and Ideal Adjusting, Inc., the two adjusting firms that handled Erving's claims. Erving sought, via interrogatory, the names, addresses, phone numbers, policy numbers, and claim numbers associated with the requested claim files.

The Court's central theme in analyzing these discovery requests is that there are many variables associated with a particular claim. Serving broad requests such as the ones in question, without more connecting them to other claims, essentially is a "fishing expedition." The Court cites with approval ***In re GMAC Direct Ins. Co.*** No. 09-10-00493-CV, 2010 WL 5550672, at *1 (Tex. App.–Beaumont Dec. 30, 2010, orig. proceeding) (mem. op.) (holding, in the context of plaintiffs' tort and contract claims in connection with the adjustment of their homeowner's insurance claim, that requests for information about damage to other properties that were not tailored to include the information "actually used in adjusting the [plaintiffs'] claim" amounted to an improper fishing expedition).

No doubt, given the nature of pretrial litigation, it is predictable that insurance defense counsel will seize upon this decision to argue that discovery regarding "other claim files" has been held to be irrelevant in all circumstances. This would be a misinterpretation and improper expansion of the holding. The reader is referred to footnote *2 of the Court's opinion.

> We do not hold that evidence of third-party insurance claims can never be relevant in coverage litigation. We simply hold that, in this case, on this plaintiff's allegations, there is at best a remote possibility that such claims could lead to the discovery of admissible evidence. That possibility is not sufficient to render the claims discoverable under Rule 192.3 (a).

b) [UPDATE] ***In re Texas Windstorm Insurance Association, Brush Country Claims Ltd***, Not Reported in S.W.3d, 2016 WL 6518614 (Tex. App. Beaumont 2016). The issue in this windstorm case was whether the Trial Court had abused its discretion in compelling the insurance company to produce all photographs and damage estimates on Hurricane Rita claims that they adjusted or investigated on property located within a one-mile radius of the property in question. It appears that the discovery in issue was served after experts had been designated and that the purpose of the discovery was to assist in bolstering the testimony of the Plaintiffs' experts, which had been challenged on the basis of methodology and scientific reliability. The experts submitted supplemental affidavits opining that the photographs would be beneficial and provide scientifically reliable data. However, that did not cure the problem that even the experts recognized which is wind force in a storm from mircobursts is not consistent and the effect on different properties can be different. Accordingly, consistent with the holding in Natl' Lloyds, the Beaumont Court of Appeals held that the Trial Court

had abused its discretion in compelling the requested discovery.

c) [UPDATE] ***In re National Lloyds Insurance Company,*** ---- S.W.3d ---- (2016), 2016 WL 6311286 (Tex. 2016) The Texas Supreme Court again addressed the issue of overbreadth in this case, which was before the Court on the issue of sanctions that had been assessed against the relator for discovery abuse. (This aspect of the case will be discussed in Vol. 2 of my discovery paper, which deals with discovery tool). The case has an involved procedural history which is not pertinent to this analysis. The issues in this case were similar to the issues before the Supreme Court in the prior National Lloyds case. The distinction is that in the prior case, the discovery request was overbroad. In this instance, the Court found that the requests were relevant to the time, period, and place at issue. (Requests 12 and 13 are specifically tailored to the Hidalgo County hail storms that occurred in March and April of 2012. Id *5). The problem in this instance was that the Order not only was broader than the request, the Order itself was overbroad. The important point to derive from the holding is that not only must the discovery request be tailored to the claims and defenses pled, so too must the discovery order.

> Here, the Discovery Order is not limited by location or weather event and exceeds the scope of requests for production 12 and 13. . . , but the ordered discovery is for "all emails, reports attached to emails, and any follow-up correspondence and information related to those reports which were sent or received by a National Lloyds employee or any affiliated adjusting company employees."

Id. *5-6. The Court pointed out that there was testimony from a National Lloyds representative that the reports and email ordered by the Court encompassed claims in different counties, experiencing different causes of loss on different dates from the Hidalgo County storms occurring March 29 and April 20, 2012. The Order, therefore, was not sufficiently tailored. ***In re CSX Co***rp., 124 S.W.3d 149, 153 (Tex. 2003) (orig. proceeding) (per curiam)

d) *See also,* ***In re Hallmark County Mutual Insurance Company***, 504 S.W. 3d 916 (Tex. App. – El Paso 2016, orig. proceeding) dealing with virtually the same issues as dealt with in the National Lloyds case and reaching the same conclusions. The opinion also dealt with the argument that an allegation of punitive damages somehow overcame the arguments that other claims involving different insuring agreements were relevant to the claims handling in the instant case. The Court held that it did not.

B. OTHER SIMILAR LAWSUITS

1) ***In re Family Dollar Stores of Texas, LLC*****,** Not Reported in S.W.3d, 2011 WL 5299578 (Tex. App. – Beaumont 2011). In this premises liability case, Plaintiff served a request for production requesting "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, the discovery request 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.** (Compare this analysis with the analysis of the Court in the Abraham Watkins case discussed below, considering the phrase "other similarly situated clients"). 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.

2) ***In re Waste Management of Texas, Inc.,*** Not Reported in S.W.3d, 2011 WL 3855745 (Tex. App.- Corpus Christi 2011). This was a motor vehicle collision case. The Plaintiff's vehicle was hit by a garbage truck that Plaintiff alleged was being operated in the ordinary course of business for Waste Management. Plaintiff claimed Waste Management was negligent particularly with regard to faulty safety practices and training. Later, after taking the deposition of a Waste Management Corporate representative and learning that there were no safety directors in the area where the incident occurred, Plaintiff amended his petition to allege gross negligence in these regards.

> The discovery dispute centered on the following request for production:
>
> Produce pleadings, discovery (including corporate representative depositions, answers to: interrogatories, requests for disclosure, requests to produce documents, and requests to admit), on all other lawsuits involving incidents in which Waste Management of Texas, Inc. has been sued in Texas and in which unsafe driving on the part of a Waste Management of Texas, Inc. driver has been alleged and/or in which it is alleged Waste Management of Texas, Inc. did not employ proper safety and/or was negligent with regard to its policies for the operation of its vehicles, the training of its drivers, or in setting safety policies.

Waste Management objected with what at this point could be considered the "standard objection" to a request for production served in Texas:

> Defendant objects that the request is overly broad, not relevant, not reasonably calculated to lead to the discovery of admissible evidence and not reasonably limited in subject matter, geography or time.... Further, this

> request is unduly burdensome and harassing because the burden or expense of the proposed discovery outweighs its likely benefits, taking into account the needs of the case the amount in controversy, and the importance of the proposed discovery in resolving the issues.... Finally, Defendant objects that this request is compound and confusing.

Waste Management provided no further response. Plaintiff filed a motion to compel and in response Waste Management served an affidavit from one of its attorneys describing the undue burden involved in responding to the request. **Plaintiff responded that the discovery was relevant to its allegation of faulty safety practices and training.** The Court granted the motion to compel, but limited the scope to *"those litigation files relating to garbage trucks in Texas in the past five years."*

Waste Management filed a motion for re-hearing and submitted a second affidavit from the same attorney who produced the first affidavit. This affidavit, too, discussed the putative cost in time and money in attempting to comply with the request. The Court then conducted a non-evidentiary hearing on the motion for reconsideration and issued the following Order:

> Produce pleadings, discovery (including representative depositions, answers to interrogatories, requests for disclosure, requests to produce documents, and requests to admit), on all other lawsuits involving garbage truck accidents in which Waste Management of Texas, Inc. has been sued in Texas in the five years preceding the date of this Order, and in which unsafe driving on the part of a Waste Management of Texas, Inc. driver has been alleged and/or in which it is alleged Waste Management of Texas, Inc. did not employ proper safety and/or was negligent with regard to its policies for the operation of its vehicles, the training of its drivers, or in setting safety policies. Any material related to any person's healthcare information subject to HIPAA is excluded from production and may be redacted by Defendants. [footnote omitted]

The new Order essentially tracked Plaintiff's original request, but excluded healthcare information. Waste Management pursued mandamus relief claiming that the Order required the production of irrelevant and overbroad discovery that was unduly burdensome to produce.

Waste Management first argued that Plaintiff had wrongfully attempted to distract from the ordinary negligence claim in the case and arbitrarily expanded the scope of discovery by pleading gross negligence. However, as the Appellate Court pointed out, Waste Management never attacked Plaintiff's pleadings by filing special exceptions, motions for sanctions, or motions for summary judgment. This raises a noteworthy point that comes up frequently in discovery disputes involving scope of discovery. Whose burden is it with regard to relevancy? Must the requesting party establish that the request is relevant or must the responding party establish that the request is not relevant? The answer was provided by the Texas Supreme Court in ***Ford Motor Co. v. Castillo,*** 279

S.W.3d 656 (Tex. 2009).

> 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. This record does not demonstrate such a situation. [emphasis added]
> *Supra*, at 664.

Arguably, all that the requesting party must do to satisfy its burden of seeking "relevant" discovery is demonstrate that there is a nexus between what is sought and the claims and defenses alleged in the lawsuit. The burden then shifts to the responding party to demonstrate that in fact the request is not relevant in whole or in part:

> We note that this Court and others have placed the burden of proof regarding relevance, or lack thereof, on the party seeking to avoid discovery. *See e.g.,* ***In re Frank A. Smith Sales, Inc.,*** 32 S.W.3d 871, 874 (Tex. App. – Corpus Christi 2000, orig. proceeding) ("Generally, the party resisting discovery has the burden to plead and prove the basis of its objection."); ***Valley Forge Ins. Co. v. Jones,*** 733 S.W.2d 319, 321 (Tex. App. – Texarkana 1987, orig. proceeding) (holding that, as a general rule, the burden of pleading and proving the requested evidence is not relevant falls upon the party seeking to prevent discovery).

The Appellate Court disposed of the **"fishing expedition"** argument with the following observations:

> This is not a case where Garza is attempting to justify an overbroad discovery request by proving a general corporate strategy regarding unspecified safety laws, but a discovery request specifically targeted to the safety policies and practices as they relate to the circumstances involved in this lawsuit, and as evidenced in previous discovery responses. *See* ***Texaco, Inc. v. Sanderson****, 898 S.W.2d 813, 815 (Tex. 1985) (orig. proceeding).*

The opinion next addressed Waste Management's **overbreadth** argument. The Court found that the request for production was tied to the Plaintiff's allegations regarding a time period that was set out as well as a geographical area. Accordingly, there was no

basis for finding that the Trial Court had abused its discretion.

> In the instant case, the Trial Court's Order limits the request for production to the temporal period of five years, the geographical region of Texas, and the subject matter of litigation files concerning garbage truck accidents where the case involved unsafe driving, and negligent or improper policies regarding vehicle safety, training, or operation. The cases cited by Waste Management do not support the proposition that any of these limitations is per se overbroad. The litigation files sought are factually similar to the case at hand, are closely related in temporal proximity, and concern similar legal issues. Accordingly, the Trial Court may have concluded that the request for production at issue was relevant and not overbroad.

Further, with regard to Waste Management's argument that some of the litigation files might contain private, confidential information such as healthcare information, social security or tax information, the Court noted that the proper procedure would be for Waste Management to produce that which is not privileged and then follow TEX. R. CIV. P. 193 with regard to those file contents for which protection is warranted.

The opinion then turns to Waste Management's **undue burden** argument. This analysis is less clear than the Court's analysis of the fishing and overbreadth issue, in large part because of the "lack of objective data." While Waste Management provided affidavits setting out estimated time and expense, the Appellate Court observed that the Trial Court could have discounted the representations as being exaggerated. Also, the Court noted that there was no evidence in the record regarding the size of Plaintiff's claims. This is a noteworthy point, which often is overlooked in the day to day fights over the scope of discovery. It is one thing to claim that the expense of complying with a request is substantial. However, the test is whether the burden is "undue."

> The fact that a discovery request is burdensome is not enough to justify protection; "it is only undue burden that warrants nonproduction." ***ISK Biotech Corp. v. Lindsay,*** 933 S.W.2d 585, 568 (Tex. App. – Houston [1st Dist.] 1996, no pet.).

In this regard, TEX. R. CIV. P. 192 requires a balancing test, comparing the size of the claims in the litigation with the costs.

> discovery should be limited if 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 parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. *See* TEX. R. CIV. P. 192.4(b) [emphasis added]; ***In re Weekley Homes, L.P.,*** 295 S.W.3d 309, 317 (Tex. 2009) (orig. proceeding).

When the Court is only provided data on one side of the scales, there is insufficient data upon which the Court may make a reasonable determination. And for the same reason, the Appellate Court will have insufficient evidence to weigh as to whether the Trial Court abused its discretion in allowing the discovery.

3) For a good discussion of the importance of establishing a relevancy nexus between the prior litigation and the present litigation, *see* ***In re Nolle*****,** 265 S.W.3d 487, 493 (Tex. App.– Houston [1 Dist.], 2008, orig. proceeding).

4) While a discovery request is not improper because it seeks information that may not be admissible at trial, it often is wise to know the rules of admissibility in crafting discovery requests so that arguments regarding admissibility may be easily deflected. In this regard, the recent Texas Supreme Court decision in ***Kia Motors v. Ruiz***, 432 S.W.3d 865 (Tex. 2014) might be informative on the issue of discovery regarding other similar claims or incidents, notwithstanding the case involved admissibility of other similar claims in the context of a product liability case.

5) *See also,* ***In re Hallmark County Mutual Insurance Company***, 504 S.W. 3d 916 (Tex. App. – El Paso 2016, orig. proceeding). This case was against a defendant's insurer for wrongful denial of coverage and a defense. The insurance carrier had paid Plaintiffs under its property coverage, but denied a defense under its liability coverage. The insurance company then intervened in the underlying case to recoup the payment it made for property damage. Plaintiffs sought amongst other things, all "other lawsuits in the last ten years that have been filed against Hallmark regarding a denial of coverage or the denial of a defense." The Court found that such a request was fishing for the same reasons expressed by the Texas Supreme Court in the ***National Lloyds cases. Supra***. The opinion also dealt with the argument that an allegation of punitive damages somehow overcame the arguments that other claims involving different insuring agreements were relevant to the claims handling in the instant case. The Court held that it did not.

C. PRODUCTS – OTHER SIMILAR PRODUCTS

1) ***In re Deere & Co.***, 299 S.W.3d 819 (Tex.2009). The finding in ***In re Cooper Tire*** that the Texas Supreme Court has held that discovery in a product liability case is always limited to the product in question appears to be at odds with the most recent Texas Supreme Court opinion dealing with this matter. In ***In re Deere & Co.***, the Plaintiff allegedly was injured when a step on a Deere backhoe broke and the Plaintiff fell under the moving backhoe. Plaintiff sought discovery of other Deere models:

> Martinez served requests for production on Deere, including a request seeking "all [non-governmental] documents of customer complaints received by [Deere] relative to the sidestep on any model backhoe." Deere objected to the request as overly broad, and Martinez moved to compel production. The Trial Court conducted a hearing, and the

> parties agreed to limit production to documents relating to models with similar handles and step assemblies, and only going back approximately 12 to 15 years (when production began on the 410D). [footnote omitted]. At the Trial Court's request, Martinez then filed a Proposed Order. The Proposed Order included more than 30 product lines such as backhoes, tractors, and other loaders and did not include a time limit.

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

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

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

2) ***In re Exmark Mfg. Co****.* 299 S.W.3d 519 (Tex. App.—Corpus Christi Oct. 30, 2009, orig. proceeding [mand. dismissed]). While the central question in ***In re Exmark Mfg. Co.***. is whether in a product liability case a Plaintiff may seek discovery of products "the Plaintiff never used," (See ***In re Graco Children's Prods.***, 210 S.W.3d 598, 600-01 (Tex. 2006) (orig. proceeding) the opinion informs a number of issues that arise in disputes regarding the scope of discovery.[8]

[8] "Exmark complains that: (1) it should not be compelled to produce documents regarding products that were not used by the injured party and incidents that have no discernible connection to the accident in question; (2) it should not be compelled to produce documents over an unreasonably long time period, including a time period that exceeds ten years prior to the accident in question and, in some cases, pre-dates the date of manufacture for the exact product at issue; (3) the Trial Court awarded the real parties more relief than was sought in their original discovery requests or in their motion to compel; (4) the Trial

The case arose from injuries the Plaintiff sustained when the riding mower he was operating overturned. Plaintiff alleged that the mower was defectively designed and that there was a safer alternative design. The Trial Court entered an Order that allowed discovery of mowers manufactured by the Defendant that had not been used by Plaintiff, but it narrowed the number and scope of inquiries it allowed Plaintiff to propound. The Appellate Court noted that Exmark "offered no evidence regarding any objections or privileges to the Proposed Discovery Order, or any evidence suggesting an alternative scope of discovery. . ."

The first issue is whether Exmark had properly objected to the scope of discovery. The opinion observed that mere conclusory objections regarding the scope or burden are insufficient. *See* ***In re Alford Chevrolet-Geo,*** 997 S.E.2d 173, 181 (Tex. 1999) ("A party resisting discovery ... cannot simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing. The party must produce some evidence supporting its request for a protective order."); and ***In re CI Host, Inc.***, 92 S.W.3d 514, 516-517 (Tex. 2002) (orig. proceeding). If the request is not patently irrelevant,[9] or the burden is not self-evident,[10] then the party objecting to the discovery must produce evidence that the discovery is neither relevant or will be unduly burdensome to produce. The Appellate Court found that Exmark had failed to meet this burden.

> We conclude that the Discovery Order at issue here was reasonably tailored to the relevant product defect and was not impermissibly overbroad. ***In re SCI Tex. Funeral Serv.*** 236 S.W.3d 759, 761 (Tex. 2007) (orig. proceeding). The Order focuses on the production of documents about the inclusion or the lack of rollover protective systems on zero-turn riding lawnmowers and focuses on different models of the same basic product rather than different products. The Order at issue is saliently different from the Discovery Orders that were reversed by the Supreme Court insofar as, in the instant case, there is a connection between the alleged defect and the discovery ordered. The Order compels discovery of documents that are reasonably calculated to lead to the discovery of admissible evidence regarding whether Exmark knew about the necessity for, or defects in, its rollover

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Court improperly restricted the production of documents to one of two manners of production set forth in Tex. R. Civ. P. 196.3 (c)., especially because real parties never asked for such relief in their motion to compel; and (5) the Trial Court abused its discretion in compelling the production of documents within ten days instead of thirty days."

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

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

> protective systems. In reaching this conclusion, we note that we do not consider countervailing factors such as the burden, expense, and time needed to produce the proposed discovery given that Exmark did not provide evidence on these issues.

In re Exmark Mfg. Co., Inc., 299 S.W.3d 519 at 530.

D. PRODUCT LIABILITY - POST INCIDENT OCCURRENCES

In re Terex USA, L.L.C., Not Reported in S.W.3d, 2013 WL 127373 (Tex. App.-Corpus Christi 2013)

It is not only the Plaintiff's pleadings that define the scope of discovery. A Defendant's defensive theories may also influence the scope of discovery. ***Terex*** involved a personal injury suit arising from a crane incident. Plaintiff filed a product liability claim alleging that the crane was defective. Terex's product safety director testified on deposition that "most of these incidents [involving Terex cranes] are simply operator faults." Plaintiff argued that this testimony raised a fact question as to whether Terex "had a problem with the way it was instructing the operators to use the crane" and whether it had knowledge that "on a regular and reoccurring basis its cranes were misused." Terex had pled the affirmative defense of "misuse." One of the elements of the "misuse" defense is showing that the misuse was not reasonably foreseeable by the manufacturer. Plaintiff obtained an Order compelling Terex to produce all files relating to all incidents involving Terex-made cranes which were reported to Terex's product safety director between 2007 and 2011. This included incidents subsequent to the incident giving rise to the lawsuit. Terex filed a petition for mandamus. The Appellate Court found no abuse of discretion based on multiple grounds: 1) the safety director was a testifying expert and Plaintiff was entitled to disclosure of all documents and things the expert had reviewed in connection with the litigation, regardless of source; 2) ***accidents post-dating Burnett's injury would be relevant as to whether Terex could have reasonably foreseen the particular operator misuse alleged here;*** and 3) Terex waived its overly-broad and date-related complaints because it failed to raise those complaints with the Trial Court. Further, the safety director testified in deposition that assembling a list of all accident reports—without regard to the particular crane or accident type—would not be difficult.[11]

E. SETTLEMENT AGREEMENTS

1) ***In re Univar USA, Inc.,*** 311 S.W.3d 175 (Tex. App.–Beaumont 2010, orig. proceeding). 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.

[11] There also was a procedure in place in the case for documents to first be reviewed by a Special Master for relevancy, so the documents were not automatically produced to Plaintiff.

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 Plaintiffs 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 Plaintiffs' objection to producing the contents of the settlement agreements. The Appellate Court found that the ***Palo Duro*** case and the other cases cited by Plaintiffs 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 Plaintiffs' argument that the settlement agreements were confidential, that Plaintiffs 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,*** Not Reported in S.W.3d, 2011 WL 4600706 (Tex. App.- Houston. [14 Dist.],

orig. proceeding).

2) It seems like a part of handling mass tort litigation is dealing with clients who believe that they were not treated the same as other clients, particularly with regard to the size of their respective settlements. This was the basis of the dispute in ***Hernandez v. Abraham, Watkins, Nichols, Sorrels & Friend***, --S.W.3d--, 2014 WL 5780388 (Tex. App. - Houston. [14th Dist]). The law firm represented the three Plaintiffs on all of their respective claims arising out of the 2005 BP Plant explosion. The firm apparently represented a number of Plaintiffs arising out of this event. It negotiated the Plaintiffs' claims at a mediation and obtained settlements for each which each Plaintiff approved. Plaintiffs then became dissatisfied with their settlements.

The procedural history of the case is a little involved. In summary, Plaintiffs hired an attorney who sent a demand letter, which in part requested that the firm turn over the "entire original file," including "all of the documents and other material in your constructive possession regarding" the BP Explosion litigation that had been filed in Galveston County District Court. The Law Firm in turn filed a declaratory judgment action and interpleader. Four of the declarations concerned whether documents being requested were protected by Protective Orders in the BP litigation. The Plaintiffs then filed their DTPA action and had the Declaratory Judgment action consolidated. Plaintiffs then served requests for discovery "relating to the claims of the Law Firm's other BP Explosion clients, particularly the amounts for which the claims settled and the types of injuries the other clients experienced as a result of the explosion." The Law Firm resisted the discovery, and appellants moved to compel. The motion to compel was denied. There were a couple of successive petitions for mandamus which reportedly went against Plaintiffs. The Plaintiffs in this action are trying to get documents for the third time. This time Plaintiffs are seeking documents relevant to the firm's "other similarly situated clients." (There are some interesting arguments about jurisdiction and declaratory judgment actions but, while interesting, they are beyond the scope of this paper, which will focus solely on the discovery issues that were raised).

3) In ***Elizondo v. Krist***, 415 S.W.3d 259, 263 (Tex. 2013), another lawsuit arising out of the BP explosion, in which Plaintiffs were claiming inadequacy of settlement compared to other settlements obtained in the case, the Texas Supreme Court observed that "we see no reason why an expert cannot base his opinion of malpractice damages on a comparison of what similarly situated Plaintiffs obtained from the same Defendant." This apparently was the basis for the discovery request for information pertinent to the Law Firm's other similarly situated clients.

Plaintiffs requested several categories of discovery but all the discovery requests asked The Law Firm to produce documents based on a comparison among Plaintiffs' claims and alleged injuries and its other clients' claims or injuries arising out of the BP Explosion. The problem was that Plaintiffs did not describe in their live pleadings the nature of their injuries, nor did they describe them in their discovery requests. Hence, there was no basis for comparison.

> Because Appellants' Original Petition and discovery requests do not explain what injuries appellants claim to have suffered as a result of the BP Explosion, we hold the Trial Court could reasonably have concluded that appellants' discovery requests were impermissibly vague. *In re Baker*, No. 10-10-00354-CV, 2011 WL 1679841, at *5 (Tex. App. – Waco May 4, 2011, orig. proceeding) (mem. op.) (holding Trial Court did not abuse its discretion when it sustained vagueness objection because interrogatory was unclear as worded).

The Appellate Court also pointed out that the requests were overbroad and could have been more narrowly tailored. In this regard, the Court notes that the burden to tailor the requests must be borne by the party propounding the discovery. It is not the obligation of the responding party to tailor the requests.

4) ***In re DCP Midstream, L.P.***, 2014 WL 5019947 (Tex. App. – Corpus Christi 2014).

This opinion provides a very analytical discussion of a situation in a multi-party suit in which the Plaintiff and one of the Defendants attempt to keep significant details in their settlement agreement from the non-settling Defendant. The case arises out of an injury to real property claim arising from oil and gas operations. The procedural history is quite involved. However, important to our discussion are the following points: 1) the settling parties attempted to exclude the settlement agreement on the basis of confidentiality terms negotiated in the settlement, and 2) the Court allowed the settling parties to redact those portions of the settlement agreement that they considered confidential and irrelevant to the remaining issues in the lawsuit. The issue before the Appellate Court is summarized as follows:

> By one issue, DCP contends the Trial Court erred in refusing to order the disclosure of (a) the settlement amount, and (b) the full contents of the settlement agreement. In connection with this issue, DCP asserts that existing law requires the disclosure of the settlement agreement; the settlement agreement is relevant and necessary for DCP to receive credit for the injuries for which the Mays have already been compensated; the settlement agreement is relevant and necessary for DCP to be able to effectively examine the witnesses at trial; and discovery of the settlement agreement is necessary in view of the numerous overlapping claims and alleged injuries. DCP further contends that the Mays failed to carry their burden to demonstrate that the settlement agreement is not relevant to the issues remaining in this case.

The Court begins its analysis by pointing out that two rules of discovery authorize the discovery of settlement agreements. TEX. R. CIV. P. 192(3)(g) and 194.2(h). The Court further observes that settlement agreements have been found to be relevant to determining credits in relation to the common law "one satisfaction rule", and for determining credits under TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(b). The Court also

notes that settlement agreements may be relevant to demonstrate bias or prejudice that a party or witness may have for testifying a certain way. The Court then shifts its focus to the issue about whether relevant settlement agreements or terms of settlement may be shielded from discovery by confidentiality agreements negotiated within the settlement. The Court points out that merely because parties to a settlement agreement make confidentiality a term of the agreement does not absolutely preclude the subsequent discovery of the settlement agreement as a matter of law. The Court finds that such agreements do not preclude otherwise warranted discovery of settlement agreements or terms of settlement as a matter of law. DCP, supra *5.

Given the nature of pretrial litigation, it is predictable that insurance defense counsel will seize upon this decision to argue that discovery regarding "other claim files" has been held to be irrelevant in all circumstances. This would be a misinterpretation and improper expansion of the holding. The reader is referred to footnote *2 of the Court's opinion.

> We do not hold that evidence of third-party insurance claims can never be relevant in coverage litigation. We simply hold that, in this case, on this Plaintiff's allegations, there is at best a remote possibility that such claims could lead to the discovery of admissible evidence. That possibility is not sufficient to render the claims discoverable under Rule 192.3 (a).

Another noteworthy observation is that Rule 194.2(h) requires the disclosure of settlement agreements, and objection to the disclosure requirement is invalid. While a party may not object to a disclosure requirement, a party may file a request for protection relative to a disclosure requirement. The ***DCP Midstream*** Court observes that the settling parties did not seek appropriate protective relief. DCP, supra *6. The Court found that the amount of the settlement agreement was relevant to the issues of credits and the one satisfaction rule. Further, the Court found that the Trial Court had not taken steps to identify and shield irrelevant, "confidential" provisions within the agreement, but instead had improperly delegated that responsibility to the settling parties.

> According to the record filed in this case, the Trial Court directed the disclosure of "[o]nly those portions of the settlement agreement which outline the claims released and preserved," and directed the "parties to that agreement" to "jointly redact those portions not relevant to the legal concerns of Defendant DCP." The Trial Court did not exercise its discretion in redacting the settlement agreement; rather it instructed the Mays and Apache to determine the "relevant" portions of the settlement agreement. This is akin to putting the fox in charge of the henhouse. The parties to the settlement have incentives to minimize the settlement's effects on the non-settling Defendant. *See* ***In re Univar USA, Inc.,*** 311 S.W.3d at 181 [Discussed, above].

F. MEDICAL/MENTAL HEALTH RECORDS

The search for medical records, particularly in personal injury cases (but

also in family law and employment cases) often can be very contentious. The controversy often arises whether any medical records are relevant and, if so, to what extent. A couple of cases decided recently help inform the discussion on these issues.

1) ***In re Whipple,*** 373 S.W.3d 119 (Tex. App.–San Antonio 2012, no pet.). Interestingly, ***Whipple*** arises out of a business dispute. Whipple sued Keller Williams alleging that her agency with the company was wrongfully and fraudulently terminated in breach of contract. In addition to economic damages, Whipple sought damages for mental anguish.

Keller Williams subpoenaed all mental health records relating to treatment provided to Whipple by her therapist. The Court denied Whipple's Motion to Quash and ordered production of Whipple's mental health records in conjunction with the therapist's deposition. There does not appear to have been any limitation placed on what mental health records could be obtained or for what time period and there does not appear to have been any request initially for such limitations. Keller Williams obtained the mental health records shortly thereafter. However, the therapist's deposition was not scheduled for over a year later. When the deposition commenced, Whipple objected to any questioning about communications or therapy prior to the date of her termination, but did not object to any questioning regarding communications or therapy after the date of the termination. Whipple instructed the witness not to respond to questioning about healthcare information after the date of the termination. Keller Williams moved for sanctions. A hearing was conducted and an Order ultimately was issued allowing the deposition to be continued and preventing Whipple from asserting any privileges under TEX. R. CIV. P. 509 and 510 and preventing her from instructing the witness not to respond to questioning. Whipple filed a petition for writ of mandamus.

Whipple first challenged the Court's Order requiring the production of all of her mental health records. The problem here was that Whipple had waited over one and a half years to challenge the Court's ruling allowing Keller Williams to obtain all of her mental health records. Therefore, the Appellate Court found, applying equitable principles, that Whipple had waived her right to complain about this arguable abuse of discretion.

> Mandamus is an extraordinary remedy, and "its issuance is largely controlled by equitable principles." ***Rivercenter Assocs. v. Rivera,*** 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding). "One such principle is that '[e]quity aids the diligent and not those who slumber on their rights.'" Id. (quoting ***Callahan v. Giles*****,** 137 Tex. 571, 576, 155 S.W.2d 793, 795 (Tex. 1941) (orig. proceeding). ***Whipple,*** *supra* at 122-123.

After dispensing with the mental health records issue, the Appellate Court moved to the crux of the issue: that Keller Williams contends the communications between Whipple and her therapist fall squarely within the patient-litigant exception (TEX. R. EVID. 510(d)(5)) because Whipple was seeking damages for mental anguish. The Court's analysis of this issue centered on its interpretation of the holding in ***R.K. v. Ramirez,*** 887

S.W.2d 836 (Tex. 1994) (orig. proceeding). The critical question under ***R.K.*** is whether the medical condition is a substantive part of the claim that must be resolved by the jury. The Court observed that Courts applying ***R.K.*** have consistently found that a claim for mental anguish will not, standing alone, make a Plaintiff's mental or emotional condition a part of their claim.

> "The Plaintiff must assert a mental injury that exceeds the common emotional reaction to an injury or loss." ***Coates v. Whittington*****,** 758 S.W.2d 749, 753 (Tex. 1988) (orig. proceeding). "The fact that a Plaintiff has had past mental problems is distinct from the mental anguish associated with a personal injury or loss; a tortfeasor takes a Plaintiff as he finds her." ***In re Pennington*****,** No. 02-08-00233-CV, 2008 WL 2780660 at *4 (Tex. App. – Fort Worth July 16, 2008, orig. proceeding) (mem. op.); ***In re Nance,*** 143 S.W.3d 506, 512 (Tex. App. – Austin 2004, orig. proceeding); ***In re Doe***, 22 S.W.3d 601, 606 (Tex. App. – Austin 2000, orig. proceeding). ***Whipple,*** *supra* 123-124.

The Court concluded that Whipple had not met the above criteria. It found that her mental condition before the termination had not been placed in issue and that the Trial Court abused its discretion in holding that the deposition could be continued to go into that healthcare. [**Comment:** It may fall into the "water under the bridge" category, but one wonders if any of Whipple's mental healthcare actually had been placed in issue. Also, one wonders if an argument could not be made that by not timely objecting to the production of all her mental health records, Whipple effectively waived her argument about Keller Williams being allowed to cross examine the therapist regarding all Whipple's healthcare covered by the records].

2) ***In re Drews,*** Not Reported in S.W.3d, 2012 WL 4854716 (Tex.App.-Texarkana). It seems like no matter what injury is alleged, if the Plaintiff is a woman of child-bearing age, the defense always asks for the Plaintiff's OB/Gyn records, even when such records have no conceivable relationship to the claims of injury for which the Plaintiff is seeking damages. While there is no reason that in the proper case where OB/Gyn records (i.e. gynecological complications or birth trauma) cannot be relevant and discoverable, the question is begged why OB/Gyn records seem to be on all Defendants' things to get list, even when no obstetric or gynecological claims are in issue. Perhaps it is because women often form close bonds with these physicians and are candid about information that a Defendant might find useful (extra-marital sex, affairs, sexual diseases, complaints of depression, etc.) if not for the legitimate purpose of aiding in the resolution of the case, perhaps for the questionable purpose of embarrassment and intimidation. Whatever the motivation, OB/Gyn and pregnancy records often are the focus of discovery disputes. ***In re Drews*** helps inform the discussion regarding this area of controversy.

The Plaintiff brought a medical malpractice case against a surgeon who performed surgery on her ankle. The surgeon sought all of Plaintiff's medical records regarding two pregnancies prior to the ankle surgery. The Plaintiff sought protection from this discovery on the basis of privacy and relevancy; however, the Trial Judge ordered unrestricted

discovery of these records. On petition for mandamus relief, the Appellate Court ordered the Trial Court to vacate the Order compelling production. Here is why it was an abuse of discretion for the Trial Court not to grant protection of these records.

Plaintiffs argued that the pregnancy records were irrelevant to the claims and defenses pled in the case and that the records were protected under TEX. R. EVID. 509 (c)(1) ("Confidential communications between a physician and a patient, relative to or in connection with any professional services rendered by a physician to the patient are privileged and may not be disclosed."). TEX. R. CIV. P. 509(e)(1), (4) provides an exception in a proceeding against a care provider if the records are relevant to the issues in the proceeding. Defendant made the following arguments regarding relevancy:

> (1) that some information in the records of **Delona's** pregnancies could be relevant to her gait, and therefore could be relative to any difficulties she had experienced with her gait before Shackelford's surgery on her ankle; (2) that there may be evidence of **Delona's** history of being noncompliant with rehabilitative instructions; and (3) that any evidence of a history of drug abuse could be relevant to her body's ability to heal properly.

The opinion points out, however, that under ***R.K. v. Ramirez,*** relevancy is not enough. Mere relevance to a claim or defense is not enough "to fall within the litigation exception to the privilege, the condition itself ***must be of legal consequence to a party's claim or defense." R.K. v. Ramirez***, 887 S.W.2d 836, 843 (Tex. 1994) (orig. proceeding). (emph. added). While the Trial Court had conducted an *in camera* review of the documents, the Appellate Court also believed it was entitled to conduct its own review and did so. The Appellate Court found only a smattering of references in the records that might have any legal consequence or that might lead to discovery of evidence having legal significance. Accordingly, the matter was referred back to the Trial Court to look again and this time "taking care to ensure any production of documents "is no broader than necessary, considering the competing interests at stake***." R.K.,*** 887 S.W.2d 843. ***In re Drews*** at *2.

3) ***In re Jarvis***, 431 S.W.3d 129 (Tex. App. Houston [14th Dist.] 2013, orig. proceeding). One of the most interesting recent discovery opinions, and one that might have a significant influence on discovery in personal injury cases, arises out of a dog bite case. It is one of the first cases to explore the impact of ***Haygood v. De Escabedo***, 356 S.W.3d 390 (Tex. 2012) on pre-trial discovery.

Plaintiff received a bite to her hand that allegedly resulted in two surgeries. One surgery took place at a hospital and the subsequent surgery at a facility owned by the surgeon. Plaintiff filed a lawsuit and Defendant in its answer alleged that the charges for which Plaintiff sought compensation were in excess of what was "paid or incurred." From the outset, Defendant questioned whether he was being asked to pay for plastic surgery that was performed on Plaintiff unrelated to the dog bite in issue.

Defendant initially issued depositions on written questions to the care providers who reportedly had provided care for Plaintiff's injuries. In the subpoena duces tecum directed toward the custodian of records for these entities, Defendant requested ***"the entire billing record file dated 04/09/2011 to present"*** pertaining to Plaintiff. From one of the surgeons and the facility at which the care reportedly was provided, Defendant also sought ***"the entire medical records file"*** pertaining to Plaintiff. Plaintiff filed a motion for protection based upon over-breadth of the requests. However, no ruling is reported in the decision. Defendant then served a deposition on written questions to Plaintiff's healthcare insurance provider, Blue Cross Blue Shield. These requests included information pertaining to contracts and agreements relevant to billing and reimbursement between the healthcare provider and the insurer. Given the apparent first impression nature of this type request, the request is set out in full below:

> **"[a]ll managed care contracts, other contracts regarding patient billing, payments, adjustments, write-offs, correspondence and notes** relating to services provided to Joan Jarvis" by Dr. Polsen; **"[a]ll managed care contracts [by South Shore or S.T.A.E.C. (an ambulatory surgical center)] to accept BCBS payments as full payment for services** provided Joan Jarvis"; and **"[a]ll payments made"** to any of these entities "for services rendered to Joan Jarvis."

Defendant, additionally, issued new depositions on written questions to the healthcare provider and healthcare facility, also requesting billing information and contracts and agreements with the insurance carrier.

> **"[a]ll billing records** relating to Joan Jarvis"; **"[a]ll contracts and agreements relating to you [sic] bills and/or payment for your services, including managed care contracts, you had in effect with [BCBS]** when Joan Jarvis received treatment and/or services from you;" and **"[a]ll letters, emails and notes of communications with [BCBS] regarding billing** for services provided to Joan Jarvis."

Plaintiff again filed motions for protection, claiming that the requests were overbroad, that the requests to BCBS violated the collateral source rule, violated a statutory anti-trust provision, and violated HIPAA.

The first issue analyzed is whether the medical billing records in this instance should be afforded the same protection under TEX. R. EVID. 509 as medical records. The answer is yes. In this instance, the request for billing records that were not relevant to the claims and defenses pled, and the records clearly identified Plaintiff. Therefore, the request for billing records was ruled improper and was overruled. However, the Court did not extend the ruling to "all medical billing records."

> Parkan cites no authority distinguishing between medical billing records and medical records for purposes of application of the physician-patient privilege. At least one of our sister Courts of Appeals has included medical

> billing records within the privilege as contemplated by Rule of Evidence 509. *See* ***In re Dolezal****,* 970 S.W.2d 650, 653 (Tex. App. Corpus Christi 1998, orig. proceeding) (concluding billing records were privileged under Rule 509).
>
> We need not decide, however, whether all medical billing records are covered by the privilege. Because the medical bills at issue here record the identity, diagnosis, evaluation, or treatment of Jarvis, they are covered by the privilege. Tex. R. Evid. 509 (c) (2).

Plaintiff's next argument was that the requests were in violation of HIPAA. Since there have been few, if any, Texas cases addressing the issue of discoverability of healthcare information under HIPAA, the Court's discussion of this issue is noteworthy. The Court points out that HIPAA does not preclude discovery of healthcare information in litigation. Rather, HIPAA requires that if such information is produced, it be protected from dissemination outside the litigation. This protection reportedly was requested and afforded in this instance, so the Court ruled HIPAA was not an issue.

> HIPAA permits protected health information to be revealed in response to a discovery request if the parties agree to a Protective Order and have presented it to the Court, or if they have asked the Court for a Protective Order (as Jarvis did). 45 C.F.R. § 164.512 (e) (1). The HIPAA provisions do not create a privilege against production or admission of evidence; they merely create a procedure for obtaining protected medical records in litigation. ***Nw. Mem'l Hosp. v. Ashcroft***, 362 F.3d 923, 925, 925-926 (7th Cir. 2004); *see also* Fed. R. Evid. 501. Thus, HIPAA does not alter our privilege analysis.

After holding that the billing for other procedures did not meet the ***R.K. v. Ramirez*** test for relevancy, the Appellate Court then turned to the issue of requests for contracts and agreements between the healthcare providers and Plaintiff's health insurer, BCBS. The Court first summarily rejected Plaintiff's claim that such discovery was prevented by the collateral source rule. The Court found that the discovery of agreements and contracts was a relevant inquiry pursuant to Section 41.0105 TEX. CIV. PRAC. & REM. CODE (which provides that "recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant,") and the Texas Supreme Court's interpretation of that provision in ***Haygood v. De Escabedo***, 356 S.W.3d 390 (Tex. 2012).

> Parkan is entitled to discovery of the insurance contracts between BCBS and Jarvis's healthcare providers to aid in determining whether the providers are required to accept payments of less than the amounts billed.

4) ***In re Gillham***, Not Reported In S.W.3d, 2014 WL 5474788 (Tex. App. – Dallas 2014)

The law is well-established that a trial judge abuses his/her discretion in requiring a party to execute a blanket authorization because such an authorization does not afford the party the opportunity to protect healthcare information that is irrelevant to the claims and defenses at issue and which presumptively retains confidentiality. ***Mutter v. Wood,*** 744 S.W.2d 600 (Tex.1988).

> The question, then, is whether Judge Wood abused her discretion in ordering Mutter to execute a 509(d)(2) waiver of the privilege. We hold that she did.
>
> Judge Wood's Order should have been drawn more restrictively to respect whatever privileged communications or records might exist after suit was filed and to allow those privileges to be preserved. [citation omitted]

However, requiring a party to execute a blanket authorization to care providers who have provided care to her relevant to the claims that are in issue or that are a part of the claims that are in issue may not be an abuse of discretion if the Court implements a procedure for protecting the privacy of irrelevant healthcare information that might be swept up in the discovery process. It is this latter situation that is discussed in ***Gillham.***

This case arises from an employment discrimination lawsuit in which the Plaintiff was complaining that she had been discriminated against because she suffered from a number of disabling conditions. Defendant sought medical records from each of the Plaintiff's healthcare providers against which the Plaintiff sought a Protective Order that was denied. The Court ordered the Plaintiff to execute a medical records release that required that the medical records be delivered directly to the Court for *in camera* review. Plaintiff contended that the release was overbroad because it required each treating physician to release her entire medical history with that healthcare provider, even if that history included care that was not for a condition that was the subject of the lawsuit. Further, the Plaintiff objected because the Order did not allow her to redact what she considered irrelevant and private healthcare information before the records were delivered to the Court. The Appellate Court found that this procedure was not an abuse of discretion.

The Court first conducts an analysis of TEX. R. EVID. 509(e)(4) (exception to physician-patient privilege exists in civil proceedings as to records relevant to physical, mental, or emotional condition of patient where any party relies upon condition as part of party's claim or defense). The Court points out that the condition does not actually have to be decided in a jury question, but must be considered by the jury in answering a question in the charge.

> the requirement that a jury must make a factual determination about the condition does not have the effect of limiting discovery only to issues that will be submitted to the jury. ***Easter v. McDonald***, 903 S.W.2d 887, 890 (Tex. App. 1995, orig. proceeding). The exception to the privilege also "include[s] factual issues that the factfinder might have to decide in order to

> decide the questions actually asked of it." ***Easter,*** 903 S.W.2d at 890*; see also* ***In re Leatherwood,*** No. 04-98-00814-CV, 1998 WL 800341, at *2 (Tex. App.—San Antonio Nov. 18, 1998, orig. proceeding) (not designated for publication) (condition is central to the asserted claim when in the absence of the condition, there would be no liability.)

The Court then acknowledges that even with regard to conditions that are a part of a claim or defense, the Texas Supreme Court has admonished Courts to closely scrutinize the records to ensure that private healthcare matters that are irrelevant are protected, citing ***R.K. v. Ramirez,*** 887 S.W.2d 836 (Tex. 1994) (orig. proceeding).

The Court observed that the Trial Judge ordered that the records be delivered to him for *in camera* review, presumably so that he could carry out his responsibility of tailoring the records, in accordance with the Texas Supreme Court admonition in ***Ramirez***. The Court also noted that there was nothing that prevented Plaintiff from reviewing the records concurrently when they were delivered to the Court and asserting whatever objections and requests for production she deemed appropriate.

5) ***In re Kristensen***, Not Reported in S.W.3d, 2014 WL 3778903 (Tex. App. Houst [14th Dist.] 2014). This case deals with discovery of ***Defendant's*** healthcare information (See discussion above under Scope: Overview, below under Disclosures: Medical Authorizations).

6) ***In Re: Union Pacific Railroad Company and Wanda Heckel,*** 459 S.W.3d 127 (Tex. App. – El Paso, 2015, np pet.) involved claims for wrongful death damages arising from a railroad crossing motor vehicle collision. Plaintiff sought the medical records of the engineer in part because the engineer testified on deposition that she had been treated for diabetes and for sleep apnea. The Trial Court reviewed the medical records in camera and ordered them produced. Defendant filed a petition for mandamus, which was granted. The primary basis for the Appellate Court's ruling was that Plaintiff had never placed Defendant's medical condition in issue by Plaintiff's pleadings. [Plaintiff did not assert an exception to Tex. R. Evid. 509].

G. [UPDATE] HARD DRIVES and ESI (Electronically Stored Data)

1) ***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.

2) ***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.

3) ***In re Pinnacle Engineering, Inc.,*** 405 S.W.3d 835 (Tex.App.-Houston [1st Dist.] 2013, no pet.).

This case is instructive because it meticulously applies ***In re Weekley Homes's*** analysis to a very broad request for electronic data. Below are some of the requests:

> **1.** a forensic image of the hard drives of the computer(s) used by Liggett from 2001–2006

> **2.** a forensic image of the hard drives of the computer(s) used by Townend from 2001–2006
>
> **3.** a forensic image of the hard drives of the computer(s) used by Pete Cruz from 2001–2006
>
> **4.** a forensic image of the network server for Pinnacle
>
> **5.** native files of all of Houde's alleged "resumes."

Applying the ***Weekley Homes*** protocols, the Court found that all these requests were overbroad because the predicates required by ***Weekley Homes*** had not been met. Specifically, the Trial Court had not taken adequate steps to protect the privacy and confidentiality of data on hard drives that was not relevant; further, the requests were not for "specific data." A request just for hard drives is improper. The request must state the specific nature of the data on the hard drives that is to be produced. Supra at 6. Also, the requesting party failed to meet the ***Weekley Homes*** criteria for conducting an examination of the other party's hard drives under Rule 196.4. Supra at 6. "Houde presented no evidence that relator's production has been inadequate or a search of relators' computer and network server hard drives could recover relevant materials." Supra at 7. Accordingly, the Appellate Court found that the Trial Court had abused its discretion in compelling the production of requested data.

4) ***In re Verp,*** *457* S.W.3d 255 (Tex. App. – Dallas 2015, orig. proceeding), Plaintiff in this wrongful eviction case sought to have a forensic imaging of the Defendant's computer. The Trial Court, without evidence in support of Plaintiff's Rule 196.4 request, granted Plaintiff's motion. Petition for writ of mandamus was granted. This opinion emphasizes the importance of understanding the burdens under Rule 196.4 with regard to obtaining electronic data that is believed to have not been produced in response to a proper request for production. The requesting party bears the burden of demonstrating compliance with Rule 196.4. Most importantly, the requesting party must produce **evidence** on each element of the Rule 196.4 protocol. Failure of the requesting party to produce evidence in support of each element likely will result in a denial of the request or a finding of abuse of discretion, if the request is allowed, which is what was found in the ***Verp.***

5) ***In re Master Flo Valve Inc***., ---S.W.3d --- 2016 WL 316491 (Tex. App. – Houston [14TH Dist.] 2016). There are many issues raised in this case, which will be discussed under other topics in this paper. However, important for consideration of discovery of hard drives is the Court's finding that the Trial Court abused its discretion in ordering that it would conduct a keyword search of Defendant's hard drive. Before any such search may take place, either by an opposing party or the Court, the requesting party must demonstrate that the responding party has "defaulted" in its obligation to produce documents and things in response to a request for production. Id. at *8:

> the requesting party must show that the responding party has defaulted in its obligation to search its records and produce the requested data. ***In re Weekly Homes, L.P.***, 295 S.W.3d 309, 317 (Tex. 2009) (orig. proceeding) The requesting party must show that the responding party's production has been inadequate. *Id.*;

In this instance, the requesting party failed to demonstrate such a default. Therefore, the Appellate Court found that the Court had abused its discretion in ordering a key word search. Id. at *9. Additionally, it should be noted that even if the requesting party were able to demonstrate prior discovery abuse, unless the abuse involved defaulting on its obligation to produce responsive data. Id. at *9.

6) ***In re State Farm Lloyds***, Not Reported in S.W.3d, 2015 WL 6520998 *5 (Tex. App. – Corpus Christi/Edinburg 2015). Under Rule 196.4 a responding party must produce the requested data in the format specified by the requesting party. It does not have the discretion to produce the data in any format it chooses.

> The rule does not offer State Farm the unilateral option to produce ESI in a "reasonably usable" format. *See Id.* Rather, Rule 196.4 incorporates the same procedure applicable to other forms of discovery—that is, the responding party is required to produce the information in the form requested unless the party serves timely objections or assertions of privilege. *See Id.* R. 193.2, 193.3; ***In re CI Host, Inc***., 92 S.W.3d 514, 516 (Tex. 2002) (orig. proceeding); ***In re Fisher & Paykel Appliances, Inc***. 420 S.W. 3d 842, 847 (Tex. App. – Dallas 2014, orig. proceeding [mand. denied]) [footnotes omitted]
>
> Under the express terms of the Rule 196.4, the real parties are required to specify the form of production for requested ESI, and State Farm has the obligation to either produce the responsive ESI that is reasonably available to it in the ordinary course of business or to object if it cannot produce the ESI in the requested form through "reasonable efforts." *Id.*

7) [UPDATE] ***In re State Farm Lloyds,*** --S.W.3d --**,** 2017 WL 2323099 (Tex. 2017). Mining for metadata was the primary focus of this recent, landmark decision out of the Texas Supreme Court. Metadata basically is the data behind electronic data. It shows on which the date it was created, to whom it was sent, modifications, and the date and time of each entry. This data in certain circumstances may be very useful in getting to the truth. However, Courts have noted that it has become almost commonplace for every discovery request for electronic data to demand that the metadata be produced, whether necessary for the resolution of the claims in the lawsuit or not.

> To put it succinctly, "the simple fact that requested information is discoverable ... does not mean that discovery must be had." So, while metadata may generally be discoverable if relevant and unprivileged, that

> does not mean production in a metadata-friendly format is necessarily required. Indeed, as a Federal District Court recently observed, "a weak presumption against the production of metadata has taken hold," which may be due to "metadata's status as 'the new black,' with parties increasingly seeking its production in every case, regardless of size or complexity." ***In re State Farm Lloyds,*** --S.W.3d --***,*** at *6 [footnotes omitted]

This potentially can pose a problem because generating the data with metadata can sometimes be an expensive endeavor. This is one of the areas in which the Courts have found a need to emphasize proportionality. However, the first issue the Texas Supreme Court dealt with is whether a party under Rule 196.4 may require another party to produce electronic data in a particular format, i.e. native format, including metadata. The Texas Supreme Court has now held "neither the requesting nor the producing party has a unilateral right to specify the format of discovery under Rule 196.4." ***In re State Farm Lloyds,*** --S.W.3d --***,*** at *5.

Thus, if the responding party objects that electronic data cannot be retrieved in the form requested through "reasonable efforts" and asserts that the information is readily "obtainable from some other source that is more convenient, less burdensome, or less expensive," the Trial Court is obliged to consider whether production in the form requested should be denied in favor of a "reasonably usable" alternative form. In line with Rule 192.4, the Court must consider whether differences in utility and usability of the form requested are significant enough—in the context of the particular case—to override any enhanced burden, cost, or convenience. If the burden or cost is unreasonable compared to the countervailing factors, the Trial Court may order production in (1) the form the responding party proffers, (2) another form that is proportionally appropriate, or (3) the form requested if (i) there is a particularized need for otherwise unreasonable production efforts and (ii) the Court orders the requesting party to "pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information." ***In re State Farm Lloyds,*** --S.W.3d --***,*** at *7. [footnotes omitted]

H. TELEPHONE RECORDS AND DATA

Cell phone records and social media postings are fast becoming key targets of discovery in personal injury cases. The few opinions that have been issued by Texas Appellate Courts discussing these discovery requests make clear that the Courts are focused both on the relevancy of the inquiries to the matters pled in the case and to the breadth and intrusiveness of the requests. Further, it is important to keep in mind when sending out requests for data on a cell phone or data from a social networking site, the request is at its core a request for electronic data. Requests for electronic data more often than not are going to have to comply with the protocol set out in ***In re Weekley Homes***, 295 S.W.3d 309, 314 (Tex. 2009).

1) ***In re Moor***, Not Reported in S.W.3d, 2012 WL 5463193 (Tex.App.-Hous. (14 Dist.)). In a motor vehicle collision in order for discovery of telephone records to be relevant, there must be a pleading that the use of a phone played a role in the

collision:

> The pleadings are specific as to the acts of recklessness and incompetence and do not include any allegation that the driver of the go-cart was using a mobile phone at the time.

2) ***In re Indeco Sales, Inc.,*** Not Reported in S.W.3d, 2014 WL 5490943 (Tex. App. – Beaumont 2014). This case involved a motor vehicle collision. The matters in dispute were whether the Trial Court abused its discretion in granting Plaintiff's motion for protection and denying Defendant's motion to compel (1) production of the Plaintiff's cell phone and a forensic examination and data extraction of the Plaintiff's cell phone, and (2) production of information, data, posts, and conversations from the Plaintiff's Facebook page. [Also see discussion of case below, under Social Media]. Because the requests for production are characteristic of many requests for production that are being served in personal injury cases, it is probably informative to set them out here for discussion. Keep in mind that the Defendant was not only requesting that the Plaintiff produce documents and data; Defendant was actually requesting that the Plaintiff **produce her phone for a forensic examination to extract the following data:**

> **(1)** Currently stored and deleted photographs depicting Plaintiff subsequent to the accident.
>
> **(2)** Currently stored and deleted videotapes depicting Plaintiff subsequent to the accident.
>
> **(3)** Currently stored and deleted text messages referencing or reflecting Plaintiff's alleged depression, anxiety, injuries, memory or cognition problems, frustration, irritability and withdrawal from family, friends, work and school.
>
> **(4)** Currently stored and deleted e-mails referencing or reflecting Plaintiff's alleged depression, anxiety, injuries, memory or cognition problems, frustration, irritability and withdrawal from family, friends, work and school.
>
> **(5)** Currently stored and deleted audio recordings referencing or reflecting Plaintiff's alleged depression, anxiety, injuries, memory or cognition problems, frustration, irritability and withdrawal from family, friends, work and school.
>
> ***3 (6)** Currently stored and deleted electronic postings referencing or reflecting Plaintiff's alleged depression, anxiety, injuries, memory or cognition problems, frustration,

irritability and withdrawal from family, friends, work and school.

(7) Currently stored and deleted electronic communications referencing or reflecting Plaintiff's alleged depression, anxiety, injuries, memory or cognition problems, frustration, irritability and withdrawal from family, friends, work and school.

(8) Currently stored and deleted electronic data referencing or reflecting Plaintiff's alleged depression, anxiety, injuries, memory or cognition problems, frustration, irritability and withdrawal from family, friends, work and school.

(9) Currently stored and deleted text messages referencing or reflecting Plaintiff engaged in social activities with family and friends since the date of the accident made the basis of this suit, including parties, dinners, shopping, church, concerts, traveling, appointments, meetings and gatherings.

(10) Currently stored and deleted e-mails referencing or reflecting Plaintiff engaged in social activities with family and friends since the date of the accident made the basis of this suit, including parties, dinners, shopping, church, concerts, traveling, appointments, meetings and gatherings.

(11) Currently stored and deleted audio recordings referencing or reflecting Plaintiff engaged in social activities with family and friends since the date of the accident made the basis of this suit, including parties, dinners, shopping, church, concerts, traveling, appointments, meetings and gatherings.

(12) Currently stored and deleted electronic postings referencing or reflecting Plaintiff engaged in social activities with family and friends since the date of the accident made the basis of this suit, including parties, dinners, shopping, church, concerts, traveling, appointments, meetings and gatherings.

(13) Currently stored and deleted communications referencing or reflecting Plaintiff engaged in social activities with family and friends since the date of the accident made the basis of this suit, including parties, dinners, shopping,

church, concerts, traveling, appointments, meetings and gatherings.

(14) Currently stored and deleted electronic data referencing or reflecting Plaintiff engaged in social activities with family and friends since the date of the accident made the basis of this suit, including parties, dinners, shopping, church, concerts, traveling, appointments, meetings and gatherings.

(15) Currently stored and deleted text messages referencing the present lawsuit.

(16) Currently stored and deleted e-mails referencing the present lawsuit.

(17) Currently stored and deleted audio recordings referencing the present lawsuit.

(18) Currently stored and deleted electronic postings referencing the present lawsuit.

(19) Currently stored and deleted electronic communications referencing the present lawsuit.

(20) Currently stored and deleted electronic data referencing or relating to the present lawsuit.

(21) Currently stored and deleted entries and postings to Plaintiff's calendar since the accident.

Both the Trial Court and the Appellate Court were concerned with the intrusiveness of the above requests. "Undoubtedly, there are many ways for the Defendants to propound narrow requests for relevant items without requiring the plaintiff to produce her cell phone for a forensic examination in this personal injury suit." ***Indeco**, supra* at *3. The Court also pointed out that to the extent the request was seeking electronic data, the request had to conform with the protocol set out in ***In re Weekley Homes***, 295 S.W.3d 309, 314 (Tex. 2009), which it did not. And aside from these deficiencies, the Court found that the requests were overbroad and not properly tailored to the claims and defenses in the lawsuit.

3) ***In re Master Flo Valve Inc***., ---S.W.3d --- 2016 WL 316491 (Tex. App. – Houston [14TH Dist.] 2016). The same requirements pertain to requesting phone records that pertain to any other request for production. The request must contain a relevant subject matter and it must be for a relevant time period. The pleadings will inform the scope. For instance, requesting all phone records for a specified time period, but

without a specific relevant subject matter will render the request overbroad. Similarly, requesting phone records for a relevant subject matter, but without a nexus to a relevant time period also will render the request overbroad. Id. at *5.

I. EMAIL

Baker Hughes Incorporate v. Homa, Slip Copy, 2013 WL 684699 (S.D.Tex.).

Discovery of email transmissions often is a critical, if incredibly complex and tedious task in the discovery process, particularly, but not exclusively, in business and product disputes. Considerations include the scope of the request, including the various servers, computers, and devices to be searched, the time period for the search, the search terms to be used, whether the email has been deleted and must be retrieved, and whether metadata is to be included. Judge Rosenthal of the Southern District of Texas in this opinion has crafted a very comprehensive and excellent order that in whole or in part may serve as a template for constructing orders in other cases involving discovery of email.

J. SOCIAL MEDIA

As yet, there is just a smattering of Texas cases addressing the issue of the scope of discovery relevant to social media. The cases that have addressed the issue, unfortunately, have not provided a detailed analysis.[12] There really is nothing mystical about social media sites that warrants handling discovery of them differently than other sources of discovery. Requests are going to have to be for specific types and categories of data, the requests are going to have to be tailored to the claims and defenses in the lawsuit, and the requests will be subject to limitations under TEX. R. CIV. P. 192.4.

No doubt many practitioners will send overbroad requests for all the opponent's social networking sites, without regard to the actual content of the site. The rationale will be similar to that of parties who send requests for the opponent's complete medical history, without regard to whether the medical history is relevant to the claims and defenses in the lawsuit. The operative term will be "may." The site may contain information that is relevant (or if the requesting party is completely candid with the Court, that is incredibly embarrassing and prejudicial). In order to establish relevancy, the requesting party is going to have to demonstrate more than that the site may contain relevant information. Also, it is likely to avoid an objection of that the request is overbroad that the requesting party will have to be specific with regard to precisely what information on the site is relevant to the claims and defenses in the lawsuit.

[12] ***In re Magellan Terminals Holdings, L.P.,*** Not Reported in S.W.3d, 2011 WL 2150422 (Tex.App.-Hous. [1st Dist.]). Petition for mandamus denied with respect to Court order granting motion for protection from defendant seeking deposition on written questions of Facebook, Inc. and MySpace, Inc.

It is likely that ***In re David Weekley Homes,*** 295 S.W.3d 309 (Tex. 2009) will inform the scope allowed for such discovery, as will cases from other jurisdictions. A Court should not allow a requesting party merely to ferret through all an opponent's social networking sites in search of something useful, as much of what is on the social networking site will be irrelevant (although, unlike issue in the context of healthcare information, much of may or may not be considered private and confidential, which is an entire issue unto itself. *See* ***Mutter v. Wood***, 744 S.W.2d 600 (Tex. 1988), holding that blanket medical authorizations should not be permitted, when objected to.

1) ***Tompkins v. Detroit Metropolitan Airport,*** 278 F.R.D. 387 (E.D. Mich. 2012).

Tompkins is one of the seminal cases on discovery of social media sites. This was a slip/fall case in which the Airport sought release of Plaintiff's entire Facebook account, both public and private postings. The following passage from the opinion is most instructive:

> I agree that material posted on a "private" Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy. Nevertheless, the Defendant does not have a generalized right to rummage at will through information that Plaintiff has limited from public view. Rather, consistent with Rule 26(b) and with the cases cited by both Plaintiff and Defendant, there must be a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence. Otherwise, the Defendant would be allowed to engage in the proverbial fishing expedition, in the hope that there *might* be something of relevance in Plaintiff's Facebook account. [Omitting footnotes] ***Supra*** at 388.

2) ***Davenport v. State Farm Mut. Auto. Ins. Co***., Slip Copy, 2012 WL 555759 (M.D.Fla.)

This appears to be a personal injury claim, although the opinion does not detail the facts of the underlying lawsuit. Instead it focuses on the following two requests:

> **1.** All photographs posted, uploaded, or otherwise added to any social networking sites or blogs, including but not limited to Facebook.com, Myspace.com, Twitter.com, or any similar websites posted since the date of the accident alleged in the Complaint. This includes photographs posted by others in which Chelsea Davenport has been tagged or otherwise identified therein.

> **2.** All computers, cell phones, laptops, smart phones, or any similar electronic devices used by, owned by, or in any way accessible by Chelsea Davenport to gain access or post any material on any social networking sites or blogs, including but not limited to Facebook.com, Myspace.com, Twitter.com, or any similar websites.

The Court observes that while the requests arguably are relevant to Plaintiff's claims, they are terribly overbroad. They are not tailored to Plaintiff's specific allegations and therefore constitute patent fishing expeditions. For instance, note that request number 1 is not even limited to Plaintiff's claims of injury. Similarly, request no. 2 is not tied to any particular issue in the lawsuit, but is instead on its face designed to allow the requesting party carte blanche to peruse through Plaintiff's electronic communication devices.

3) ***In re Christus Health Southeast Texas***, 399 S.W.3d 343(Tex.App.-Beaumont 2013, orig. proceeding)

The Plaintiffs in this case brought a wrongful death action for the death of Arthur Lowe resulting from an allegedly negligent cardiac catheterization. Christus sent Plaintiffs a couple of discovery requests that resulted in dispute. The first request is discussed above, under REQUESTS FOR PRODUCTION- OVERBREADTH. The second discovery request was for "copies of any postings pertaining to Arthur or Arthur's death on any social media site." Plaintiffs did not withhold any information on the basis of privilege, nor did they object on the basis of undue burden. Instead, they objected that the request for social networking postings was "an invasion of privacy and any such information would be unreliable and constitute hearsay and a fishing expedition and this request is meant for the purpose of harassment." The Court notes that the Plaintiffs did not establish an "expectation of privacy" with regard to postings on social media. [Texas jurisprudence has not yet addressed whether postings on social media sites may be excluded from discovery, even if relevant, on the basis of privacy]. The Court, however, intimates that Plaintiffs had established a basis for Defendant to seek discovery of social media postings because one of the Plaintiffs had testified in deposition that there had been postings about Arthur. The Court noted that while discovery about the time period before Arthur's death (i.e. "pertaining to Arthur") was relevant, the time period was not infinite. The request was found to be overbroad because it was not tailored to pertain only to a relevant time period. The take away is that even if requests for information on social networking sites may be relevant to the claims and defenses in a lawsuit, setting out clear time periods for which the information is relevant is required at the risk of the request for production being denied because of over breadth.

4) ***Root v. Balfour Beatty Construction L.L.C.***, 2014 WL 444005, - - - So.3d - - - (DC Appeal – Florida [2d Dist.] 2014). This case is notable, even though from a different jurisdiction, because it addresses an issue increasingly seen in Texas Courts. The case arises out of a motor vehicle collision resulting in an injury to a minor child. The mother brought claims for the child and for loss of parental consortium. The Defendant

sought copies of postings on the mother's Facebook account which included any counseling the mother had sought before or after the incident, any and all postings, statuses, photos, "likes" or videos related to the mother's relationship with the minor and her other children, relationships with other family members, boyfriends, husbands, and significant others, mental health and stress complaints, etc. Defense counsel conceded, "These are all things that we would like to look under the hood, so to speak, and figure out whether that's even a theory worth exploring."

The request was found to be absolute fishing, overbroad, and improper. The Defendant was unable to show the relevancy of any of the requests to the claims or defenses pled in the case. The Court cited some useful references in dealing with the discovery of social media:

a) ***E.E.O.C. v. Simply Storage Mgmt.,*** LLC 270 F.R.D. 430, 434 (S.D. Ind. 2010) (discovery of information on social networking sites simply requires applying "basic discovery principles in a novel context.").

b) ***Higgins v. Koch D. Corp.,*** No. 3:11 – cv – 81-RLY-WGH, 2013 WL 3366278, at *3 (S.D. Ind. July 5, 2013) (holding that the Defendant was entitled to discovery of the Plaintiff's Facebook pages limited to the specific material that is relevant to the Plaintiffs' claims).

c) Michael B. Pullano & Matthew G. Laver, ***Discovery Rulings Increasingly Unfriendly to Facebook Users' Privacy Rights***, 82 U.S.LW. 867, 892-95 (Dec. 17, 2013) (discussing various approaches Courts have taken to ensure that Facebook material requested in discovery is not overbroad).

5) ***In re Indeco Sales, Inc.,*** Not Reported in S.W.3d, 2014 WL 5490943 (Tex. App. – Beaumont 2014). This case involved a motor vehicle collision. The matters in dispute were whether the Trial Court abused its discretion in granting Plaintiff's motion for protection and denying Defendant's motion to compel (1) production of the Plaintiff's cell phone and a forensic examination and data extraction of the Plaintiff's cell phone, and (2) production of information, data, posts, and conversations from the Plaintiff's Facebook page. Because the requests for production are characteristic of many requests for production that are being served in personal injury cases, it is probably informative to set them out here for discussion:

> **(1)** A color copy of any and all photographs and/or videos of you (whether alone or accompanied by others) posted on your Facebook page(s)/account(s) since the date of the accident on August 23, 2013.
>
> **(2)** A color copy of all Facebook posts, Facebook messages and/or Facebook chat conversations, other than those protected by the attorney-client privilege, authored, sent or received, and/or otherwise entered into by you since

August 23, 2013.

***2 (3)** A color copy of any and all photographs and/or videos of you (whether alone or accompanied by others) posted on your Facebook page(s)/ account(s) prior to August 23, 2013.

(4) A color copy of all Facebook posts, Facebook messages and/or Facebook chat conversations, other than those protected by the attorney-client privilege, authored, sent or received, and/or otherwise entered into by you prior to August 23, 2013.

Many trial attorneys mistakenly believe that if they merely include an arbitrary time period and arbitrary geographical range in a request for production, the request is presumptively proper. What this analysis overlooks is that a request must be relevant to the claims and defenses pled in the lawsuit and it must be narrowly tailored to such pleadings. It is not the burden of the responding party or the Court to tailor the request. Rather, this burden remains at all times on the propounding party. As the Appellate Court in this instance points out "the Trial Court may refuse to compel discovery of information that "would require the responding party to include matters that are unlikely to fall within the scope of discovery permissible under the rules of procedure." ***In re AWC Frac Valves Inc.,*** No. 09-13-00247-CV, 2013 WL 4314377, at *2 (Tex. App.-Beaumont Aug. 15, 2013, orig. proceeding) (mem. op.)." The Court, in this instance, concluded that the Trial Court had not abused its discretion in granting the Plaintiff's requested protective relieve and denying the Defendant's Motion to Compel because the above requests were overbroad. They were not tailored to the pleadings in the lawsuit, but instead were quite broad in terms of time periods, topics, subject, and content. As such, the requests could be seen as both overly broad and unduly intrusive, particularly with regard to subjects, content, and topics that were irrelevant to the claims and defenses pled in the case.

K. FINANCIAL DOCUMENTS

1) ***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).

2) ***In re Gonzalez****,* Not Reported in S.W.3d, 2010 WL 5132590 *1 (Tex. App.-Houston. [14 Dist.]). The underlying case 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. – Houst. [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).

3) ***In re Chinn Exploration Co.,*** 349 S.W.3d 805 (Tex. App.–Tyler 2011, no pet.). This case arose from an oil and gas lease. The Plaintiffs were claiming conversion of funds and additionally pled for an accounting of proceeds from a particular well. Plaintiff served the following requests for production:

> ***Request No. 103****:* Produce any accounting records related to the Subject Well.
>
> ***Request No. 113****:* Produce all documents concerning royalty payments on production from the Subject Well.
>
> ***Request No. 114****:* Produce all documents concerning royalty payments being held in suspense on production from the Subject Well.

The Defendant exploration company objected that the requests were overbroad. One of the Defendant's accounting employees testified by deposition that the exploration company maintained only three accounts for all its producing wells: a revenue account, a distribution account, and an operating account. She testified that most of their pipeline companies deposit directly into the revenue account, but that some deposit directly into the distribution account. When the exploration company pays its royalty and working interest owners, it transfers funds from the revenue account into the distribution account. The exploration company confided that its revenue was commingled into one account, but that it could generate reports regarding particular suspense funds by using a computer program. Plaintiffs then sent an informal request for the following additional documents:

> **(4)** A report indicating the amount in suspense for Wood Gas Unit and the Wood No. 9 Well;
>
> **(5)** A report indicating the amount in suspense from all of Chinn's Gas Units;
>
> **(6)** A report indicating the balances kept in the Wells Fargo

Revenue Account (the suspense account); and

(7) A report indicating the balances held in the Wells Fargo Distribution Account.

The Trial Court issued an Order overruling all objections to the above requests and ordering the exploration company to produce all documents responsive to the requests. The Appellate Court found that the Trial Court had not abused its discretion. Important to this determination was the fact that Plaintiffs had pled "conversion". Critical to proving conversion was evidence that the exploration company continued to have Plaintiff's funds in one of its accounts. Because of the way the exploration company maintained its accounts, there was no other way (and the exploration company in fact did not offer another way) for Plaintiffs to obtain discovery relevant to their conversion claim:

> Although Chinn Exploration has strenuously objected to the production of these records, its own accounting and financial procedures created Plaintiffs' need for the records to establish their conversion claim and possible damages. And Chinn Exploration has not suggested any other means by which Plaintiffs can accurately determine what happened to the proceeds attributable to their claimed mineral interests.

Supra, 810-811

4) 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).

5) *See also* ***In re Verp,*** 457 S.W.3d 255 (Tex. App. – Dallas 2015, orig. proceeding).

L. ASSETS

1) ***In re Booth***, Not Reported in S.W.3d, 2014 WL 5796726 (Tex. App. – Houst. [14th Dist.] 2014). In this case involving allegations of gross negligence against a passenger in a vehicle, the Appellate Court approved the Trial Court's Order requiring the Defendant to produce "information about any trust in which she was a beneficiary or had an interest or received distributions from July 17, 2013 to July 17, 2014." Arguably, this information probably should have appeared in a financial statement relevant to current net worth.

2) PRE-JUDGMENT

In re Sambrano Corp., 441 B.R. 562, 107 A.F.T.R.2d 2011-457, 2011-1 USTC P 50,127, 54 Bkrtcy. Ct. Dec. 39 Bkrtcy. (W.D.Tex.,2010) is a bankruptcy opinion that deals extensively with production of documents and the Fifth Amendment; however, it also is a useful reference with regard to the general rule that whether a Defendant is capable of satisfying a judgment is ***not relevant*** to the question of whether the Plaintiff is entitled to a judgment. This seems inconsistent with the policy underlying disclosure of all insurance policies available to pay a judgment, TEX. R. CIV. P. 194.2(g) and 193.2(f) but regardless of the ostensible inconsistency, asset discovery has not generally been allowed (in Texas or federal civil litigation) absent a specific showing of relevancy, such as in establishing an element of the Plaintiff's case, the request for production of these items typically will be denied as beyond the scope of discovery**.** Two such examples are offered in ***Sambrano***:

> For example, when the cause of action itself directly invokes the identification of specific assets, then discovery might be appropriately compelled. *See, e.g.,* ***Ayyash v. Bank of Al-Madina****,* 233 F.R.D. 325, 327 (S.D.N.Y. 2005) (fraud and embezzlement); ***Andrews v. Hollodway,*** 1995 WL 875883. 1995 WL 875883, 1995 U.S. Dist. LEXIS 22121 (D.N.J. Nov. 9, 1995) (action to enjoin the Defendant from transferring assets).

3) POST JUDGMENT

a) ***U.S. v. McGill,*** Not Reported in F.Supp.2d, 2010 WL 3359482 (N.D.Tex.)

While discovery of assets prior to judgment is extremely restricted, when allowed at all, the scope of discovery of assets post judgment is quite broad. ***McGill,*** while a federal case involving restitution, is a useful case for stating the general proposition.

> The government has a right to discover information pertaining to McGill's ability to satisfy the Restitution Order entered in this case. *See* ***FDIC v. LeGrand,*** 43 F.3d 163, 172 (5th Cir. 1995) ("The scope of post-judgment discovery is very broad to permit a judgment creditor to discover assets upon which execution may be made.").

b) In Texas, the law is that post judgment discovery is mediated by the same rules and guidelines as pre-judgment discovery. The usual rules governing the scope of pre-trial discovery apply in the post-judgment context. *See* TEX. R. CIV. P. 621a. This means that not only must discovery be relevant, but it is must be reasonably tailored. In ***In re Wythe II Corp*****.,** Not Reported in S.W.3d, 2009 WL 3380028 (Tex.App.-Beaumont) the judgment debtor posted a cash bond and the judgment creditor sought discovery on the sufficiency of a cash bond versus a supersedes bond. The Court held that such discovery was irrelevant because the cash bond as a matter of statute was

deemed sufficient.

M. ATTORNEY'S FEES

1) ***In re Texas Mutual Insurance Co.,*** 358 S.W.3d 869 (Tex. App.–Dallas 2012, no pet.). This case mainly dealt with the discretion of a trial judge with regard to an appellate mandate on remand; however, it also contains some useful observations about discovery of attorney's fees. Texas Mutual Insurance Company sued Ralf G. Boetsch to appeal an administrative determination that Boetsch was disabled as a result of a workplace injury. Texas Mutual lost at the trial level and appealed. The Appellate Court reversed the Trial Court's judgment in part and remanded in part to allow the Trial Court to apportion Boetsch's attorney's fees between the claims on which he prevailed and those on which he lost. The Trial Court, on remand, overruled Texas Mutual's objections to discovery propounded by Boetsch seeking information about how Texas Mutual calculated attorney's fees. Texas Mutual Insurance Company sought a writ of prohibition that the Trial Court is limited to awarding attorney's fees as stated in the mandate issued by the clerk of this Court after an appeal of the case underlying this proceeding. It additionally sought a writ of mandamus ordering the Trial Court to vacate its overly broad Discovery Order. The Appellate Court granted both writs. The following footnote is informative with regard to discovery of attorney's fees generally:

> FN 3. Even if calculating attorney's fees fell within the scope of the mandate, Texas Mutual has not requested that Boetsch pay its attorney's fees. When a party does not seek to shift its fees to its opponent, the party's attorney's fees are not subject to discovery because they are "patently irrelevant." *See* ***MCI Telecomms. Corp. v. Crowley****,* 869 S.W.2d 399, 403-404 (Tex. App. – Ft. Worth 1995, orig. proceeding) (Trial Court abused its discretion by ordering discovery of Defendant's legal fees, which were "patently irrelevant," when the Defendant did not seek reimbursement); *see also* ***Walker v. Packer****, 827 S.W.2d 833, 843 (Tex. 1992);* ***In re Dillard Dept. Stores, Inc.,*** No. 05-99-00750-CV, 1999 WL 605593 at *2 (Tex. App. – Dallas Aug. 12, 1999, orig. proceeding).

2) **See *Jespersen v. Sweetwater Ranch Apartments***, 390 S.W.3d 644 (Tex.App.-Dallas 2012, no pet.) above, under Disclosures. Attorney's fees are not economic damages for which calculations must be disclosed.

N. INCOME TAX RETURNS

1) The general rule with regard to discovery of 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*****,** 378 S.W.3d 8 (Tex. App.- Houston [1st Dist.] 2011), 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.

2) While it is clear that Courts have protected income tax returns from disclosure on the basis of privacy and have required that the requesting party meet a strenuous test before allowing such discovery, the responding party must first timely and properly assert the privilege. Failure to timely and properly assert the privilege can result in waiver. ***Valdez v. Progressive County Mutual Insurance Co.,*** Not Reported in S.W.3d, 2011 WL 6208702 (Tex. App.-San Antonio).

> We hold that even if Valdez had a valid Fifth Amendment or other constitutional privilege to refuse production of his tax returns, he waived these rights by failing to timely object in writing to the discovery request on this basis. *See* TEX. R. CIV. P. 193.2(e); ***In re Gore,*** 251 S.W.3d 696, 700-01 (Tex. App. San Antonio 2007, no pet.) (stating that failure to timely plead and prove privilege from discovery can operate as waiver); TEX. R. APP. P. 33.1(a) (requiring timely objection to Trial Court in order to preserve the right to appeal). A specific objection to each discovery request must be brought to the Trial Court's attention so the Court can make a proper decision. [citations omitted].

3) ***In re Arnold****,* Not Reported in S.W.3d, 2012 WL 6085320 (Tex. App.-Corpus Christi). Arnold is an interesting and informative case regarding the discoverability

of tax returns. The case arose out of premises personal injury. One of the key issues was who owned and controlled the premises and equipment on which the Plaintiff was injured. This was very murky. The murkiness was compounded by the allegation of an "oral" lease agreement and the fact that the same property had been leased to multiple lessees. As evidence of the oral lease, the owner of the property produced the "Schedule E" attachments from his 2003, 2004, 2005, 2007, and 2008 federal tax returns, each of which indicated that Arnold received $84,000 annually in rental income. Plaintiff sought to depose the owner's accountant, who negotiated the oral lease and to obtain in conjunction with the deposition the putative property owner's complete 2010 income tax return. The Court notes in its opinion the cases holding that tax returns may be discoverable subject to a showing not only of relevancy but materiality. In determining materiality, the Courts should balance the privacy of the returns against the requesting party's demonstrated need to obtain the returns because they go to the heart of a claim or defense and a demonstration that the information cannot be obtained from any other source. See ***In re Arnold,*** supra *4. The Court also reiterates that unlike most all other discovery, if the party from whom the return is being requested objects, the burden is on the requesting party first to prove materiality.

> When a party objects to the production of tax returns, the party seeking to obtain the tax returns has the burden to show that they are relevant and material to the issues in the case. ***El Centro del Barrio, Inc. v. Barlow,*** 894 S.W.3d 775, 779 (Tex. App. – San Antonio 1994, no writ). The burden is thus unlike general discovery requests, which place the burden on the party resisting the discovery. *See* ***In re Patel,*** 218 S.W.3d 911, 916 (Tex. App. – Corpus Christi 2007, orig. proceeding).

The Court, in this instance, found that the requesting party had sustained its burden and that the entire 2010 tax return was discoverable:

> Arnold is utilizing a portion of his tax returns to substantiate his claims about the ownership and rental of the property. The income tax returns are both relevant and material regarding the ownership and control over 2300 Vo–Tech given the nature of this matter as a premises liability case, particularly given that a prior similar accident occurred on the premises. If AW Produce paid Arnold $84,000 annually in rentals, as evidenced by the Schedule E forms produced by Arnold, then AW Produce's income tax returns should similarly reflect these transactions. In this regard, we note that the record is undisputed that Arnold owns AW Produce, controls it, and has made affirmative misrepresentations regarding ownership of the subject property. Moreover, the production of tax returns in this case is not duplicative of other discovery. Further, there are no other adequate methods to examine the rental issues given that the leasehold at issue was allegedly oral in nature.

In re Arnold, supra at *5.

4) ***In re Ming Chu Chang, Ken Mok and Jorge Gonzalez III*** 2015 WL 5895197 (Tex. App. – Corpus Christi 2015). Plaintiff pled fraud and violation of the Deceptive Trade Practices Act. Accordingly, discovery was sought of Defendant's net worth, including Defendant's federal tax returns. While the Court found that Plaintiff was entitled to discovery on the Defendant's net worth, this did not include Defendant's federal income tax returns because Plaintiff failed to meet its burden of showing that the returns contained information that could not be obtained through less intrusive means.

> Williams has shown that relators' net worth is relevant to his claim for exemplary damages, and on this record, relators have produced no other documentation regarding their net worth. However, Williams has neither argued nor shown that relators' net worth information cannot be discovered through other, less-intrusive means than their federal income tax returns. Supra at *5.

O. LOST PROFITS

Most discovery cases deal with the scenario in which a discovery request has been made that is irrelevant, overbroad, or unduly burdensome. A trial judge can abuse his or her discretion in ordering discovery when these objections are valid. However, a trial judge also may abuse his or her discretion if a party makes proper, relevant discovery that goes to the heart of one or more issues in the case. This latter situation is thoroughly discussed in ***In re City of Houston****,* Not Reported in S.W.3d, 2013 WL 85097 (Tex. App.-Houston. (14 Dist.)), (also discussed above, under Duty to Respond).

City of Houston involved a claim of inverse condemnation. This is an important point upon which the case pivots. Inverse condemnation occurs when the property owner sues for actions taken by the government that harm the property owner's property or diminish the property's value, without adequate compensation. When the government takes actions such as permitting or zoning which diminishes the value of the property, this is referred to as a "regulatory taking." In this instance MEB brought an action for declaratory relief against the City of Houston, claiming that the City had taken regulatory actions that had diminished the value of property MEB owned and that it had wanted to develop. After filing suit, the City learned that MEB had sold the property, so the City propounded discovery regarding the terms of the sale. MEB refused to answer the discovery, claiming it was irrelevant because it was after the harm (the inverse condemnation) had occurred. More than thirty days before trial, the City of Houston filed and set for hearing a Motion to Compel. The City argued that the information sought directly related to MEB's claim that government action damaged its property and interfered with its investment-backed expectations.

MEB wrongly argued that in an inverse condemnation case the only time period that is relevant is the period during which the wrongful taking occurs and that what the property owner subsequently does with the property is irrelevant. This would be true for "statutory condemnation proceedings" in which the measure of damages is the lost

market value of the land at the time of the condemnation. However, in this case MEB's damage model in its inverse condemnation case is based on the lost profits that MEB expected to earn in the future if the City had approved the replat. Therefore, the City's discovery regarding the subsequent sale of the property was very relevant to MEB claim of damages and the Appellate Court held that the Trial Court had abused its discretion in disallowing this discovery.

P. PUNITIVE DAMAGES – NET WORTH

1) § 41.0115 Tex. Civ. Prac. & Rem. Code Ann.

a) In response to demands from various entities dismayed with having to reveal their net worth in cases involving gross negligence, the Texas legislature in 2015 crafted a new amendment to Ch. 41, defining net worth and establishing new judicial hurdles for being able to obtain discovery of information that the jury will be instructed to consider at the end of the case if the element of punitive damages still is in the case***. See,*** § 41.011(a) Tex. Civ. Prac. & Rem. Code Ann.**.**

b) A full discussion of this new statute is beyond the scope of this paper. Further, there already is an excellent paper that discusses the rule available through the State Bar of Texas. Chamberlain & Choate, ***"Net Worth Discovery in Texas, Setting an Example,"*** State Bar of Texas, Winning Your Case Before Trial: The Hottest Tips on Discovery & Depositions, January 12, 2016 (Austin).

c) The basics are that a party seeking net worth must now file a motion. The Court may make a determination based upon affidavits and discovery that there is a substantial likelihood that the party will prevail on the merits of its gross negligence claim. § 41.0115 (a) Tex. Civ. Prac. & Rem. Code. If the Court makes this determination, it may order the disclosure of the opposing party's net worth, but must attempt to require the least intrusive method for the opposing party to do so. § 41.0115 (b) Tex. Civ. Prac. & Rem. Code. Once the party seeking the net worth files a motion, the party is tacitly stating that an adequate time for discovery has passed and the Court will entertain a no evidence motion for summary judgment on the claim of gross negligence. §41.0115 (d) Tex. Civ. Prac. & Rem. Code. The provision takes effect September 1, 2015 and applies to cases filed after that date.

d) [COMMENT]: This author believes the issue of net worth is overblown and that the new act creates more needless procedure than is warranted. Once the Courts and the legislature put caps on the amount of punitive damages that could be recovered. Tex. Civ. Prac. & Rem. Code § 41.008, the significance of net worth was diminished in many instances. Further, even though the basic formula for net worth is well known and now statutorily defined, there still is a lot of deception and manipulation involved in the calculations and the disclosures. The new statute does nothing to aid transparency in this regard, but instead, provides cover for those who might be less than candid about the true description of their net worth. The statute now provides that if the net worth is ordered disclosed that the Court should require the least intrusive

and simplest method of revealing the information. This means that the ability to challenge the representations through written discovery and oral depositions could be significantly impaired, if not eliminated. There is not even a requirement that the net worth be certified. A Court arguably could just have the Defendant jot down the net worth on a piece of paper and produce it. The statute now provides that if a party seeks an opposing party's net worth that the Court must determine whether there is a substantial likelihood that the party will succeed on its claim of its claim of gross negligence. Evidence submitted by a party to the Court in support of or in opposition to a motion made under this subsection may be in the form of an affidavit or a response to discovery. What "substantial likelihood" means and what will be required to prove is anyone's guess. There is some legislative history to provide guidance, but in recent Court decisions such history has largely been ignored or marginalized. Further, if the party seeks the net worth, it will need to be prepared to respond to a no evidence motion for summary judgment. This is a peculiar procedure. Conceivably, a party seeking punitive damages could prevail on a no evidence motion for summary judgment, but have the Court find that although there is some evidence to support the claim, there is not a substantial likelihood that the party will prevail on the claim. This would arguably be a self-fulfilling prophecy, since it could result in the party proceeding to trial on a gross negligence/punitive damages claim without evidence that the Court's charge will likely say the jury can consider in awarding punitive damages. Although the whole concept appears unwarranted and misguided, if more vetting for the revelation of net worth is a fait accompli, a more efficient approach may have been simply to state that if a party prevails on a no evidence motion for summary judgment, or the Court *sua sponte* finds that there is legally sufficient evidence to support a claim of gross negligence, then the net worth would be discoverable. If a no evidence motion for summary judgment were not pursued timely, then the net worth would be required to be disclosed no later than thirty days before the end of the discovery period, or some other time to be determined by the Trial Court.

2) DISCOVERY RE PUNITIVE DAMAGES

The following cases are offered to help guide attorneys and Courts in what information has been found to be discoverable in the past relevant to punitive damages and net worth. It is believed that much of this case law will still be pertinent in informing the Courts' decision-making with regard to the type and extent of information that can and should be allowed relevant to net worth, should the party seeking the discovery meet the substantial likelihood test.

a) ***In re Brewer Leasing, Inc.,*** 255 S.W.3d 708 (Tex. App. Houston [1stDist.], 2008, orig. proceeding [mand. denied]). This opinion deals with the issue of scope of discovery relevant to net worth when gross negligence is alleged. *See* ***Lunsford v. Morris,*** 746 S.W.2d 471, 473 (Tex.1988). More specifically, the Plaintiff sought financial records and corporate income tax returns. While a Trial Court may order documents produced relevant to net worth when gross negligence is alleged, a Trial Court abuses its discretion by ordering the production of financial records "that would not necessarily evidence" net worth. ***In re Garth,*** 214 S.W.3d 190, 194 (Tex. App.-Beaumont 2007, orig. proceeding).

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

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

b) ***In re House of Yahweh,*** 266 S.W.3d 668 (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.

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

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

e) ***In re Arnold***, Not Reported in S.W.3d, 2012 WL 6085320 (Tex. App.-Corpus Christi), discussed above with regard to discovery of federal income tax returns, also is informative on discovery of net worth. The Plaintiff in Arnold sought non-current financial information, including the Defendant's tax return, regarding net worth. More specifically, Plaintiff sought financial information and the Defendant's tax return for the year of the incident giving rise to the lawsuit. The Court reiterated that only financial information relevant to the Defendant's "current" net worth is discoverable and tax returns are not discoverable on net worth unless the requesting party may demonstrate materiality and that the information sought cannot be obtained from any other source. *See also* ***In re Shaw,*** No. 13–10–00487–CV, 2010 Tex. App. LEXIS 8744, at *7 (Tex. App.-Corpus Christi Oct. 27, 2010, orig. proceeding) ("Moreover, discovery regarding net worth must be narrowly crafted to show current net worth.").

f) ***In re Booth***, Not Reported In S.W.3d, 2014 WL 5796726 (Tex. App. – Houston. [14th Dist.] 2014). This is an interesting opinion, but noteworthy for a proposition that has not been discussed frequently. The case arises out of a motor vehicle fatality. The Defendant driver is convicted of murder and failure to stop and render aid. Booth was a passenger in the Defendant driver's vehicle. She is added to the case on allegations of negligence and gross negligence. Plaintiff sought discovery regarding Booth's net worth. Booth attacked Plaintiff's allegations, claiming there was no legal basis for the claim of gross negligence. However, very importantly, Booth did not get rulings on these exceptions. So, when Plaintiff served discovery for Booth's net worth, there were live pleadings of gross negligence. Since there were live pleadings in this regard, the Appellate Court ruled the Trial Court had not abused its discretion in ordering Booth to produce documents relevant to her net worth.

g) ***In re Ming Chu Chang, Ken Mok and Jorge Gonzalez III*** 2015 WL 5895197 (Tex. App. – Corpus Christi 2015). Discussed above, under Income Tax Returns.

4. OBJECTIONS

A. OVERVIEW: While a great deal has been written about the necessity of tailoring discovery requests to the issues plead in the case so that they are relevant, to making the requests specific as to particular types and categories of documents and to attempting to limit discovery requests so that they are not unduly burdensome, duplicative or unnecessarily invasive, not so much has been written about the requirements for and manner of making objections, at least in Texas jurisprudence. The Federal Courts, however, have focused on objections and set out requirements that should be equally applicable to Texas practice.

B. OBJECTION MUST BE MADE OR WAIVED

1) The case that probably had the most dramatic effect on Texas objection practice was ***Gutierrez v. Dallas I.S.D.***, 729 S.W.2d 691 (Tex. 1987). The responding party failed to timely except to an interrogatory which the Texas Supreme Court noted in its opinion it had previously found to be an improper request for a witness list. Even though the interrogatory was clearly improper, by failing to specifically and timely serve an objection, the responding party waived its objection and was obliged to answer the interrogatory as propounded and provide appropriate supplementation to it. *See also* ***Rogers v. Stell***, 835 S.W.2d 100 (Tex. 1992). Attorneys already anxious about waiving an objection, now felt compelled to prophylactically raise every objection they could imagine, whether applicable or not, to avoid waiver.

2) Waiver remains an issue. ***In re City of Houston***, Not Reported in S.W.3d, 2013 WL 85097 (Tex. App.-Houston. [14 Dist.]). MEB claimed lost profits as a result of what it claimed was inverse condemnation. The City of Houston propounded a series of discovery requests focused on MEB's subsequent sale of the property. MEB took the position that the discovery was irrelevant, but did not object on this ground. The Appellate Court found that the discovery "went to the heart" of MEB's claim; therefore, it was relevant and was ground to accept the petition for mandamus relief. Since MEB failed to object on the basis of relevancy, it waived this objection. The Appellate Court held that the Trial Court had abused its discretion in not granting the City's motion to compel disclosure.

C. OBJECTIONS MUST BE SPECIFIC

1) Tex. R. Civ. P. 193.2 requires that a party making an objection state either the factual or legal basis for the objection. "The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request.

2) Many attorneys continue to ignore the requirement of Tex. R. 193.2. Further, some attorneys also continue to improperly assert prophylactic objections, and they compound the transgression by often propounding a litany of general objections at the

beginning of a set of responses. Arguably, such tactics should result in waiver of the objections.

3) Indeed, voluminous objections that obscure specific, pertinent objections may result in a waiver of the pertinent objections. See Tex. R. Civ. P. 193.2(e):

> **(e)** ***Waiver of objection.*** An objection that is not made within the time required, or that is obscured by numerous unfounded objections, is waived unless the Court excuses the waiver for good cause shown.

See, Gonzalez v. Volkswagen Group of America, Inc., 2015 WL 5097271 (W.D. Tex. Austin Div. 2015):

> In particular, "the practice of asserting a general objection 'to the extent' it may apply to particular requests for discovery" has been found ineffective to preserve the objection. *Id.* (citing ***Sonnino v. Univ. of Kan. Hosp. Auth.*** 221 F.R. D. 661, 666-67 (D. Kan. 2004). Such general objections "are considered mere 'hypothetical or contingent possibilities' where the objecting party makes 'no meaningful effort to show the application of any such theoretical objection to any request for discovery.' " ***Heller,*** 303 F.R.D. at 483 (citing ***Sonnino,*** 221 F.R.D. at 666–67).

D. OBJECTIONS MUST HAVE FACTUAL AND LEGAL SUPPORT: If an objection is challenged, by a party setting the objection for hearing, in order for the objection to be properly sustained, it must be supported by facts and law. Moreover, there must be evidence to support the objection. The following excerpt from ***In re Exmark Mfg. Co****.* 299 S.W.3d 519 (Tex. App.—Corpus Christi Oct. 30, 2009, orig. proceeding [mand. dismissed]) informs this point:

> The party objecting to discovery must present any evidence necessary to support its objections. *See* Tex. R. Civ. P. 193.4(a), 199.6. Evidence is not always required to support an objection or claim of privilege. ***In re Union Pacific Resources Co***., 22 S.W.3d 338, 341 (Tex. 1999) (orig. proceeding) (holding that evidence is not required to support an "an assertion relating to discovery when evidence is unnecessary to decide the matter"). For example, when a request is overly broad as a matter of law, the presentation of evidence is unnecessary to decide the matter. *See,* ***In re Am. Optical Corp,*** 988 S.W.2d 711, 712 (Tex. 1988) (orig. proceeding); ***In re CSX Corp****.,* 124 S.W. 3d 149, 153 (Tex. 2003)) (orig. proceeding) (per curium)*;* ***In re Union Pac. Res. Co****.,* 22 S.W. 3d at 341.
>
> Accordingly, there are circumstances where a Discovery Order might be so overbroad that an objection to the overbreadth is self-evident from the Order itself when considered in light of the issues raised in the pleadings. *See,*

e.g., ***Loftin v. Martin****, 776 S.W.2d 145, 148 (Tex.1989)* (orig. proceeding). However, this is not always the case and is not the case in the matter now before us. *See, e.g.****, In re Alford Chevrolet-Geo****,* 997 S.W.2d 173, 181 (Tex. 1999) ("A party resisting discovery cannot simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing. The party must produce some evidence supporting its request for a Protective Order.");

E. ANSWERING SUBJECT TO BOILER PLATE OBJECTIONS:

1) ***Heller v. City of Dallas***, 303 F.R.D 466 (N. D. Tex. Dallas Div. 2014), is a very significant decision out of the Northern District of Texas that analyses the effect of Fed. R. Civ. P. 26(g) particularly with regard to objections. The opinion examines just about every standard objection that is used in federal and state practice and explains why many of these objections do not conform to the requirements of Fed. R. Civ. P. 26(g) (and arguably Tex. R. Civ. P. 191.3). Magistrate Horan takes particular aim at the pervasive practice of answering "subject to objections," and shows that this is often a dilatory response that should not be condoned in most instances. The main emphasis of the opinion is that objections should be the result of "reflection," not merely a "reaction."

2) While ***Heller*** may help inform Texas practice, there is a slight difference between Texas practice and Federal practice, which is noteworthy. Under Texas practice a party may object to the scope of a discovery request, but still answer portions of the discovery that are not objectionable. So, while the practice of asserting boiler plate objections is disfavored in both Texas and Federal practice, it is arguably permissible under Texas practice to make a legitimate objection to the scope of the discovery request (e.g. 10 years of employment records may not be relevant to the claims alleged in the lawsuit, while 5 years of employment may be relevant) and provide an answer to the remainder of the discovery request to which there is no objection, "subject to" the objection to permissible or relevant scope.
See Comment 2 to Tex. R. Civ. P. 193:

> An objection to written discovery does not excuse the responding party from complying with the request to the extent no objection is made. . . . A party who objects to production of documents from a remote time period should produce documents from a more recent period unless that production would be burdensome and duplicative should the objection be overruled.

F. [UPDATE] **PROPORTIONALITY:**

1) There has been much discussion over the last several years about the new amendments to Fed. R. Civ. P. 26 particularly with regard to the requirement of proportionality. As we will see from some recent federal cases, the rule that went into effect at the end of 2015 is basically a return to the rule that existed in 1983. There has been a proportionality requirement in both the Federal Rules and the Texas rules for a

number of years. Consider Tex. R. Civ. P. 191.3, which in many regards is a mirror image of Fed. R. Civ. P. 26(g), except with regard to applicable sanctions.

> **(c)** ***Effect of signature on discovery request, notice, response, or objection.*** The signature of an attorney or party on a discovery request, notice, response, or objection constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, notice, response, or objection:
>
> > **(1)** is consistent with the rules of civil procedure and these discovery rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
> >
> > **(2)** has a good faith factual basis;
> >
> > **(3)** is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
> >
> > **(4)** ***is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.*** [emphasis added]

2) An important case to read concerning the effect of the Federal Rules' new emphasis on proportionality is ***Carr v. State Farm Mutual Automobile Insurance, Co***. 2015 WL 8010920 (N.D. Tex. (Dall Div.) 2015) (also discussed above). The opinion first observes that under the Federal Rules, the burden falls on the party resisting discovery to show that the discovery falls within the permissible scope of discovery under Fed. R. Civ. P. 26(b)(1). The Court then discusses the impact of the 2015 amendments to Fed. R. Civ. P. 26.

> these amendments to Rule 26 raise the possibility that the burdens imposed on the party resisting discovery discussed above must fundamentally change as well. The Court concludes that is not so. . . . the amendments do not change the essential text of Rule 26(c)(1), which the Fifth Circuit has interpreted to place the burden on the moving party to specifically show good cause and a specific need for protection. *See* ***In re Terra Int'l,*** 134 F.3d 302, 306 (5th Cir. 1998)*;* ***Landry v. Air Line Pilots Ass'n,*** 901 F.2d

404, 435 (5th Cir. 1990).

The opinion in ***Carr*** could and should help inform the practice in Texas going forward, in light of the Texas Supreme Court decision in ***In re State Farm Lloyds,*** --S.W.3d --***,*** 2017 WL 2323099 (Tex. 2017) which embraces the focus on proportionality adopted by the Federal Rules and which also suggests that Federal practice should help inform Texas practice in applying this concept. See, ***In re State Farm Lloyds,*** --S.W.3d --***,*** 2017 WL 2323099 (Tex. 2017).

5. MOTIONS FOR PROTECTION and TO LIMIT DISCOVERY

A. While the scope of discovery in Texas is quite broad, a party may still seek protection (limitation or denial of discovery) from requests that impose an unreasonable invasion of personal, constitutional, or property rights. *See* Tex. R. Civ. P. 192.6. ***See, In re M,*** 2012 WL 1808236 (Tex. App. – Beaumont 2012).

B. Rule 192.4 was added to the Texas Rules of Procedure in 1999. It largely mirrors Federal Rule 26(g).

> **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 parties= resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

C. Fifth Circuit law is clear that the party opposing discovery bears the burden to "show specifically how ... each [request] is not relevant or how each [request] is overly broad, burdensome or oppressive." ***McLeod, Alexander, Powel & Apffel, P.C. v. Quarles,*** 894 F.2d 1482, 1485 (5th Cir.1990)

D. ***In re Master Flo Valve Inc***., ---S.W.3d --- 2016 WL 316491 at fn. 2 (Tex. App. – Houston [14TH Dist.] 2016). The following footnote is informative and accurately states what is required to limit discovery under Tex. R. Civ. P. 192.6:

> A party resisting discovery cannot simply make conclusory allegations that the requested discovery is unduly burdensome. ***In re Alford Chevrolet-***

Geo, 997 S.W.3d 173, 181 (Tex. 1999) (orig. proceeding) (orig. proceeding). "The party must produce some evidence supporting its request for a Protective Order." *Id.* Any party who seeks to exclude matters from discovery on grounds that the requested information is unduly burdensome or costly has the affirmative duty to prove the work necessary to comply with discovery. ***Independent Insulating Glass/Southwest, Inc. v. Street,*** 722 S.W. 2d 798, 802 (Tex. App. – Fort Worth 1987, writ dism'd). *See* ***In re State Farm Lloyds****,* 13–14–00616–CV, 2015 WL 6520998 at *7 (Tex. App. – Corpus Christi Oct. 28 2015, orig. proceeding) (rejecting unduly burdensome claim because State Farm did not provide the Trial Court any evidence regarding the estimated cost or expense of producing the ESI data or of the time that it would take to produce the ESI data) (reversed, see below).

E. [UPDATE] ***In re State Farm Lloyds,*** --S.W.3d --***,*** 2017 WL 2323099 (Tex. 2017). The Texas Supreme Court has recently addressed the issue of proportionality in the context of discovery requests for edata, specifically metadata. The reader is referred to the discussion of this case under the topics of proportionality and discovery e-data, above.