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ARBITRATION AGREEMENTS CANNOT EXPAND GROUNDS FOR JUDICIAL REVIEW BEYOND THOSE STATED IN THE FAA

Hall Street Associates, L.L.C. v. Mattel, Inc., ___ U.S. ___, 128 S. Ct. 1396, 170 L.Ed.2d 254 (03/25/08)

For years, the federal circuits have split over whether parties to an arbitration agreement can contract to expand the grounds for judicial review of an arbitration award, with some saying the recitations are exclusive and others regarding them as mere threshold provisions open to expansion by agreement. Indeed, the Fifth Circuit was the first circuit court to expressly allow parties to contract for expanded judicial review. *Gateway Technologies, Inc. v. MCI Telecommunications Corp.,* 64 F.3d 993, 997 (5th Cir. 1995)(holding arbitration agreement provision that "errors of law shall be subject to appeal" is acceptable). In *Hall Street Associates v. Mattel*, the U.S. Supreme Court finally resolved the split, holding that the grounds stated in the Federal Arbitration Act (FAA) for vacating, modifying, or correcting an arbitration award are ***exclusive***.

This case began as a lease dispute between Hall Street Associates (as landlord) and Mattel (as tenant). After Mattel gave notice of intent to terminate the lease in 2001, Hall Street filed this suit, contesting Mattel's right to vacate and claiming that the lease obliged Mattel to indemnify Hall Street for costs of cleaning up the TCE, among other things. Following a bench trial, Mattel won on the termination issue; and after an unsuccessful try at mediating the indemnification claim, the parties proposed to submit to arbitration. The District Court was amenable; and the parties drew up an arbitration agreement, which the District Court approved and entered as an order. One paragraph of the agreement provided:

> "[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."

Arbitration took place, and the arbitrator decided for Mattel. Hall Street then challenged the arbitration award in District Court asserting legal error by the arbitrator. The District Court agreed, vacated the award, and remanded for further consideration by the arbitrator. The District Court expressly invoked the standard of review chosen by the parties in the arbitration agreement, which included review for legal error. On remand, the arbitrator followed the District Court's ruling and amended the decision to favor Hall Street.

The Ninth Circuit reversed in favor of Mattel in holding that the terms of the arbitration agreement controlling the mode of judicial review are unenforceable. The U.S. Supreme Court granted certiorari to decide whether the grounds for vacatur and modification provided in the FAA are exclusive. The Supreme Court ultimately agreed with the Ninth Circuit that they are.

Hall Street argued, among other things, that the agreement to review for legal error ought to prevail simply because arbitration is a creature of contract, and the FAA is "motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered," citing the Court's decision in *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 220, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). In response, the Court held that–

> Hall Street is certainly right that the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law. But to rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration.

To that particular question the Court held that the answer is yes, that the text compels a reading of the FAA §§ 10 and 11 categories as exclusive. There is no hint of flexibility in the statutory language. Section 9 expressly states that on application for an order confirming an arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." There is nothing malleable about "must grant," which unequivocally tells courts to grant confirmation in all cases, except when one of the "prescribed" exceptions applies.

Nonetheless, the Supreme Court remanded the case for consideration of additional issues. Because the arbitration agreement had been drafted and entered into during litigation, the Court raised the question of whether the agreement should "be treated as an exercise of the District Court's authority to manage its cases under Federal Rules of Civil Procedure 16."

Stay tuned because Congress may act and change the contours of the FAA.

ARBITRATION AGREEMENTS CANNOT EXPAND GROUNDS FOR JUDICIAL REVIEW BEYOND THOSE STATED IN THE TAA

***Quinn v Nafta Traders, Inc.*, 257 S.W.3d 795 (Tex. App.–Dallas 06/17/08, pet. filed)**

Former employee Quinn brought an action to confirm arbitration award in her favor in sexual discrimination dispute with her employer, Nafta Traders, Inc., and moved for additional attorney's fees incurred in enforcing the award. Nafta moved to vacate award. The District Court confirmed the award but denied Quinn's request for additional attorney's fees. The Dallas Court of Appeals affirmed, holding that parties seeking judicial review of an arbitration award covered under the Texas General Arbitration Act ("TAA") cannot contractually agree to expand the scope of that review and are instead limited to judicial review based on the statutory grounds enumerated in the statute. The TAA specifically mandates confirmation in all cases except where statutory grounds are offered for vacation, modification, or correction.

Nafta argued that the parties' arbitration agreement expanded the scope of judicial review authorized under the TAA to include grounds not expressly identified in the statute. Specifically, the agreement provided:

> The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law.

In essence, Nafta argued that the arbitrator made several errors of law and that those alleged errors are subject to judicial review under the arbitration agreement. The Court of Appeals disagreed that the parties could expand the scope of judicial review to include grounds not expressly authorized under the TAA. In so holding, the Court of Appeals cited the U.S. Supreme Court's decision in *Hall Street Associciates, L.L.C. v. Mattel, Inc.,* ___ U.S. ___, 128 S. Ct. 1396, 170 L.Ed.2d 254 (2008) discussed above.

Like the FAA, the statutory grounds for vacating and modifying an award under the TAA are extremely narrow and there is no language allowing parties to contract for expanded judicial review. The grounds listed in section 171.088 include:

(1) corruption, fraud, or other undue means,
(2) prejudice resulting from arbitrator partiality, corruption, misconduct or wilful misbehavior,
(3) arbitrators exceeding their powers, refusing to postpone a hearing after a showing of good cause, refusing to hear material evidence, or conducting a hearing contrary to enumerated statutory provisions resulting in substantial prejudice to a party, and
(4) absence of an agreement to arbitrate.

These grounds reflect severe departures from an otherwise proper arbitration process and are of a completely different character than ordinary legal error. Similarly, the statutory grounds for judicial modification or correction include:

(1) evident miscalculation of numbers,
(2) evident mistake in a description referred to in the award,
(3) awards on matters not submitted, and
(4) imperfect form of the award not affecting the merits.

These grounds speak to errors that are clerical in nature rather than legal. As the U.S. Supreme Court noted in *Hall Street,* "it would stretch basic interpretive principles to expand the [statutory] grounds to the point of evidentiary and legal review generally." *Hall,* 128 S.Ct. at 1404.

In addition, Nafta argued that even if an expanded scope of judicial review is not available, the award should still be vacated under the TAA because the arbitrator "exceeded his authority" by making legal errors in contravention of the arbitration agreement. Recall that the arbitration clause at issue was *not* expressed in terms of expanding the scope of judicial review of an award; rather, it was expressed as a *limitation on the arbitrator's authority*–the violation of which would be reviewable under the TAA. The Court of Appeals was apparently not impressed with this distinction and rejected Nafta's argument. As explained by the Court of Appeals, "our adoption of Nafta's argument would allow Nafta to accomplish indirectly what we have already concluded it cannot do directly, that is, contractually expand judicial review of the arbitration decision."

Note that petition for review has been filed in the Texas Supreme Court. There has been no action on the petition by the Court as of the date this Newsletter was submitted.

MANDAMUS AVAILABLE TO REVIEW ORDER COMPELLING ARBITRATION UNDER FAA

PROVISIONS ELIMINATING WORKERS' COMPENSATION ACT ANTI-RETALIATION REMEDIES ARE SUBSTANTIVELY UNCONSCIONABLE

FEE-SPLITTING AND DISCOVERY LIMIT PROVISIONS ARE NOT SUBSTANTIVELY UNCONSCIONABLE

In re Poly-America L.P., 2008 WL 3990993, 51 Tex. Sup. Ct. J. 1237 (Tex. 08/29/08)(No. 04-1049)

Former employee sought mandamus relief from order of the trial court granting employer's motion to compel arbitration and to stay employee's action for wrongful discharge and retaliation for filing a workers' compensation claim. The employee's employment contract contained an arbitration agreement that required the employee to split arbitration costs, limited discovery, eliminated punitive damages and reinstatement remedies available under the Workers' Compensation Act, and imposed other conditions on the arbitration process. The arbitration agreement provided that it was governed by the Federal Arbitration Act. At issue was whether these provisions are unconscionable and, if they are, whether the contract's severability clause preserved the arbitration right. The Supreme Court held that:

(1) provisions of the arbitration agreement, eliminating two types of remedies available under anti-retaliation provisions of the Texas

Workers' Compensation Act, were substantively unconscionable and void;

(2) fee-splitting provision of the arbitration agreement was not substantively unconscionable;

(3) as a matter of first impression, discovery limits in the arbitration agreement were not substantively unconscionable; and

(4) the substantively unconscionable provisions were not integral to the parties' overall intended purpose to arbitrate their disputes and were therefore severable from the remainder of the arbitration agreement, which the Court concluded was otherwise enforceable.

Because the invalid remedies-limitation provisions were severable from the arbitration agreement, the trial court did not abuse its discretion in compelling arbitration; and mandamus was accordingly conditionally granted.

In his Dissent, Justice Brister noted that the Court's opinion conflicted with its 2006 decision in *In re Palacios* that mandamus review was available for "orders that ***deny*** arbitration, ***but not*** orders that ***compel*** it." (See *TADC Appellate Newsletter Fall 2006 Edition*). The majority opinion responded:

> Although federal precedent in this area is not uniformly clear, it appears a federal court would be permitted–albeit not compelled–to address the merits of the mandamus arguments in this case. If such review were categorically unavailable and unconscionability determinations the sole realm of arbitrators, as the dissenting Justice proposes, development of the law as to this threshold issue would be substantially hindered if not precluded altogether.

As noted in the Fall 2006 Edition of the TADC Appellate Newsletter, the Court in *In re Palacios* did not decide whether mandamus review of an order staying a case for arbitration is entirely precluded, as where a party can meet a "particularly heavy" mandamus burden to show "clearly and indisputably that the district court did not have the discretion to stay the proceedings pending arbitration." In *In re Poly-America L.P.*, the Court expressed the federal standard as follows:

> Federal courts grant mandamus only upon demonstration of a "clear and indisputable" right to issuance of the writ: "First, the party seeking the issuance of the writ must have no other adequate means to attain the relief he desires.... Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Third ... the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances."

Because arbitration is intended to provide a lower-cost, expedited means to resolve disputes, mandamus proceedings will often, if not always, deprive the parties of these intended benefits when a compel-and-stay order is at issue. Accordingly, courts should be hesitant to intervene.

SUPREME COURT REINFORCES MANDAMUS STANDARD OF *IN RE PRUDENTIAL*

DISSENT CLAIMS IT'S A "A WHOLE NEW WORLD IN MANDAMUS PRACTICE"

In re McAllen Medical Center Inc., 2008 WL 4051053, 51 Tex. Sup. Ct. J. 1302 (Tex. 08/29/08) (No. 05-0892)

In this case, filed as a class action by 400 plaintiffs representing 224 former patients, the hospital was sued for negligent credentialing of a physician on its staff. As required by statute, the plaintiffs submitted expert reports on all 224 patients. All the reports were signed by the same expert. The hospital filed a motion to dismiss, challenging the plaintiffs' expert; and the trial

court denied the hospital's motion. This was a pre-2003 case governed by the old Article 4590i, and an interlocutory appeal was not available. The hospital sought mandamus relief, which was denied by the Corpus Christi Court of Appeals.

The Supreme Court granted the hospital's petition for mandamus. Of significance is the Court's lengthy discussion of the second prong of the mandamus standard–whether the hospital lacked an adequate remedy by appeal. In holding that appeal was not an adequate remedy, the Court summarized it's reasoning as follows:

> "Appellate courts cannot afford to grant interlocutory review of every claim that a trial court has made a pre-trial mistake. But we cannot afford to ignore them all either. Like 'instant replay' review now so common in major sports, some calls are so important-and so likely to change a contest's outcome-that the inevitable delay of interim review is nevertheless worth the wait."

Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of the costs and benefits of interlocutory review. *In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 136 (Tex. 2004). Applying that standard in this case, the Court noted that the Legislature has already balanced most of the relevant costs and benefits when it studied and adopted the expert report procedure in Article 4590i. The Legislature found that the cost of conducting plenary trials of claims as to which no supporting expert could be found was affecting the availability and affordability of health care-driving physicians from Texas and patients from medical care they need. The courts are in no position to contradict this statutory finding. The statute was intended to preclude extensive discovery and prolonged litigation in frivolous cases. If the legislative purposes behind the statute are attainable through mandamus review, Texas courts should not frustrate those purposes by a too-strict application of our own procedural devices. Accordingly, the Court held the hospital has shown it has no adequate remedy by appeal.

> "If (as appears to be the case here) some trial courts are either confused by or simply opposed to the Legislature's requirement for early expert reports, denying mandamus review would defeat everything the Legislature was trying to accomplish."

The Court's opinion provides a helpful list of cases in which it has held that the very act of proceeding to trial–regardless of the outcome–would defeat the substantive right involved. Thus, the Court has held appeal is not an adequate remedy when it will mean:

- forcing parties to trial in a case they agreed to arbitrate. *In re D. Wilson Constr. Co.,* 196 S.W.3d 774, 780 (Tex.2006); *Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 272-73 (Tex.1992).

- forcing parties to trial on an issue they agreed to submit to appraisers. *In re Allstate County Mut. Ins. Co.,* 85 S.W.3d 193, 196 (Tex.2002).

- forcing parties to a jury trial when they agreed to a bench trial. *In re Prudential,* 148 S.W.3d 124, 138 (Tex. 2004).

- forcing parties to trial in a forum other than the one they contractually selected. *In re AIU Ins. Co.,* 148 S.W.3d 109, 115 (Tex.2004); *accord, In re Automated Collection Techs., Inc.,* 156 S.W.3d 557, 558 (Tex.2004).

- forcing parties to trial with an attorney other than the one they properly chose. *In re Cerberus Capital Mgmt., L.P.,* 164 S.W.3d 379, 383 (Tex.2005); *In re Sanders,* 153 S.W.3d 54, 56 (Tex.2004); *In re Epic Holdings, Inc.,* 985 S.W.2d 41, 52 (Tex.1998); *Nat'l Med. Enters. v. Godbey,* 924 S.W.2d 123, 133 (Tex.1996).

- forcing parties to trial with an attorney who should be attending the Legislature. *In re Ford Motor Co.,* 165 S.W.3d 315, 322 (Tex.2005).

- forcing parties to trial with no chance for one party to prepare a defense. *In re Allied Chem. Corp.,* 227 S.W.3d 652, 658 (Tex.2007).

Responding to the Dissent's charge that the Court's decision was a sudden departure from *Walker v. Packer*, 827 S.W.2d 833 (Tex.1992), the Court noted that *Walker* serves as an example, not a limit, on when mandamus is appropriate. *Walker* listed several decisions in the discovery context when an appeal would be "inadequate:"

- when disclosure of privileged information or trade secrets would "materially affect the rights of the aggrieved party";

- when discovery "imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party";

- when a "party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error"; and

- when "the missing discovery cannot be made part of the appellate record ... and the reviewing court is unable to evaluate the effect of the trial court's error."

The Court did not limit mandamus to these situations and, after *Walker*, began recognizing additional instances in which an appeal would be inadequate, including:

- when a trial court refused to compel arbitration. *Jack B. Anglin Co., Inc. v. Tipps,* 842 S.W.2d 266, 272 (Tex.1992).

- when an appellate court denied an extension of time to file an appellate record. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Ninth Court of Appeals,* 864 S.W.2d 58, 61 (Tex.1993).

- when a trial court refused to compel discovery until 30 days before trial. *Able Supply Co. v. Moye,* 898 S.W.2d 766, 772 (Tex.1995).

- when a trial court denied a special appearance in a mass tort case. *CSR Ltd. v. Link,* 925 S.W.2d 591, 596-97 (Tex.1996).

- when a trial court imposed a monetary penalty on a party's prospective exercise of its legal rights. *In re Ford Motor Co.,* 988 S.W.2d 714, 723 (Tex.1998).

The Court noted that *Walker's ad hoc* categorical approach (defining "inadequate" appeals as each situation arose) resulted in it being hard to tell when mandamus was proper until the Court said so. So in *In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 136 (Tex.2004), the Court tried to describe the public and private interest factors that courts should balance in deciding whether the benefits of mandamus outweighed the detriments in each particular case. According to the Court, there is no reason the *Prudential* analysis should entangle appellate courts in incidental trial court rulings any more than *Walker's ad hoc* categorical approach. The *Prudential* balancing merely recognizes that the adequacy of an appeal depends on the facts involved in each case.

In the strongly worded Dissent, Justice Wainwright (who was a member of the majority in *Prudential*) made the case that–

> **"A whole new world in mandamus practice . . . is here.**

According to Justice Wainwright, the majority's opinion signals a new mandamus jurisprudence not tied to the check against reviewing incidental trial court rulings. According to the majority opinion, the Court will act on mandamus petitions when "some calls are so important" and sufficiently incorrect that they move the Court to action, notwithstanding the former limitations imposed by the requirement that there be no adequate remedy by appeal.

> "There are egregious cases that compel action by mandamus on grounds that may not fit neatly within the traditional mandamus standards established by our precedents. Such cases should be the exception; they may now have become the rule."

INTERLOCUTORY ORDER DENYING MOTION FOR SANCTIONS CAN BE APPEALED AFTER NON-SUIT

Villafani v. Trejo, 251 S.W.3d 466 (Tex. 04/18/08); *Regent Care Center of San Antonio v. Hargrave*, 251 S.W.3d 517 (Tex. 04/18/08); and *Barrera v. Rico*, 251 S.W.3d 519 (Tex. 04/18/08)

Villafani was a medical malpractice case brought under Article 4590i (since recodified). The Texas Supreme Court considered whether the trial court's interlocutory order denying a motion to dismiss and for sanctions was rendered unappealable by Plaintiff's non-suit.

Plaintiff brought suit against two physicians and others. Plaintiff timely filed expert reports as required by the medical malpractice statute. Dr. Villafani filed a motion for sanctions and dismissal, claiming that the expert report did not comport with the statute's requirements. The trial court denied that motion. The plaintiff filed a notice of nonsuit without prejudice as to Dr. Villafani. The trial court severed the plaintiff's claims against Villafani and dismissed the claims without prejudice, rendering the dismissal a final judgment as to Villafani. Villafani appealed the trial court's denial of his motion for sanctions and dismissal, and the court of appeals dismissed Villafani's appeal for lack of jurisdiction.

The Supreme Court held that the trial court's denial of the sanctions motion was appealable even after the plaintiff's nonsuit and that the appeal was therefore within the court of appeals' jurisdiction.

The general rule on nonsuit is that a party has an absolute right to nonsuit affirmative claims any time during the litigation. As the Supreme Court explained: "One unique effect of a nonsuit is that it can vitiate certain interlocutory orders, rendering them moot and unappealable." However, there is an exception to this rule.

Although a party decides whether to pursue or abandon its own claims, that decision does not control the fate of a non-moving party's independent claims for affirmative relief. In this case, the independent claim was for sanctions. The plaintiff argued that TRCP Rule 162 prohibited the appeal because the denial of the sanctions motion meant there was no longer a (pending) claim for affirmative relief. The Court was not persuaded. Rather, the Court reasoned that the protection of pending claims for affirmative relief following a nonsuit set forth in Rule 162 "does not by negative implication permit a nonsuiting party to control another party's already decided or not yet made claims for affirmative relief."

However, not all sanctions are created equal. Ultimately, whether a sanction is considered a claim for affirmative relief that survives a nonsuit for later enforcement or appeal depends on the purpose of the sanction. If the purpose of the sanction survives the lawsuit, so does the sanction itself. The Court noted by way of example, that exclusion of a witness as a discovery sanction would not survive a nonsuit because the purpose of the sanction was to protect the integrity of the proceeding. As a practical matter, that purpose is coextensive with the proceeding itself. Whereas, monetary sanctions can serve both compensatory and punitive purposes which continue to exist even though the underlying suit does not. Therefore, a nonsuit has no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal.

The Court held *Villafani* was controlling and reiterated the analysis by per curiam opinions in both *Barrera v. Rico* and *Regent Care Center of San Antonio v. Hargrave*.

One thing to note about these three cases is that each of them was brought under the predecessor medical malpractice statute. The current statute at Chapter 74 of the CPRC provides for an interlocutory appeal from the denial of the same brand of motions to dismiss that provided for the Court's interpretation of Rule 162.

EVIDENCE OF WEALTH IS INADMISSIBLE AND WAS HARMFUL ERROR

(SUPREME COURT FINDS WAY TO RULE ON FACTUAL INSUFFICIENCY AS TO DAMAGES)

Reliance Steel & Aluminum Co. v. Sevcik, (Tex. 09/26/08) (No. 06-0422)

This was a collision case in which judgment was rendered for the plaintiff based on a $3,000,000 jury verdict. The trial court admitted evidence that the defendant's annual revenues were $1.9 ***billion***, even though punitive damages were not at issue. The Supreme Court reversed and remanded, holding that (1) it was error to admit such evidence because it was not relevant to the issue of whether the company's driver had been negligent and (2) such error was harmful–i.e., probably caused an improper verdict.

It is the harmful error ruling that is interesting. The Court found that the admission of such evidence was harmful because the size of the verdict showed that the jury's damages findings "probably were the result of something other than the admissible evidence in the case" and that "something beyond the relevant evidence was guiding the jury's deliberations." Translated, the Court essentially found that the evidence was insufficient to support the $3,000,000 verdict. Of course, the Supreme Court is without jurisdiction to make a factual insufficiency determination. Only the courts of appeals may review factual sufficiency challenges. In this case, the Court of Appeals had reduced the award of past medical expenses by $6,000 but otherwise held that the evidence was legally and factually sufficient to support the damages as found by the jury. The Court of Appeals also held that the evidence of the defendant's annual revenues was harmless error.

The harmless-error analysis applied by the Supreme Court involved looking at the whole case from voir dire to closing argument and evaluating:

(1) the role the evidence played in the context of the trial;

(2) the efforts by trial counsel to emphasize the erroneous evidence; and

(3) whether admission of improper evidence was calculated or inadvertent.

(1) The Evidence
In this case, liability was largely uncontested. Most of the damages were difficult to gauge, stemming as they did from soft-tissue injuries and impairments whose effects were hard to measure objectively. Given that the trial focused primarily on setting damage amounts as to which jurors have few clear guideposts, it is probable that proof of the defendant's huge revenues played a crucial role on the key issue at trial.

(2) The Emphasis
The Court of Appeals held that evidence of the defendant's wealth was harmless because it was mentioned only once in the trial. While plaintiffs' counsel mentioned the gross revenues figures only once, he mentioned the defendant's large size from voir dire to closing argument. Just like gross sales, the size of the defendant and the number of its employees or divisions had no apparent relation to this traffic accident other than to suggest that it could pay a big judgment. Evidence of the defendant's wealth was not rendered harmless merely because it was emphasized in surrogate forms.

(3) The Effort
When attorneys insist that prejudicial evidence be admitted, that can be some evidence that at least they thought it would have some likely effect. In this case, admission was no accident. Proof of the defendant's income was not offered in the heat of the moment, but as a deposition excerpt prepared in advance and offered outside the presence of the jury, giving the plaintiffs time to overcome the defendant's objection and the trial court's reservations.

Irrelevant evidence of wealth is not rendered harmless merely because it is proffered in surrogate forms - such as the size of the defendant and the number of its employees or divisions.

REQUEST FOR AFFIRMANCE INCLUDES THE LESSER INCLUDED RELIEF OF REMAND

Martinez-Partido v. Methodist Specialty and Transplant Hospital, (Tex. 09/26/08) (No. 06-0611)

In this health care liability case, the plaintiff served expert reports within 120 days of filing suit, as required by CPRC §74.351(a). The defendants objected to the sufficiency of those reports. Prior to a hearing on the reports' sufficiency, the plaintiff requested a

30-day extension to cure any deficiencies in the reports that the trial court might find. The trial court, however, found that the expert reports were adequate; and the defendants appealed. The Court of Appeals found the reports deficient and, without considering the plaintiff's extension request, reversed and rendered judgment in the defendants' favor. The Supreme Court reversed and remanded to the trial court to consider the plaintiff's request for a 30-day extension. Although the plaintiff did not expressly request remand in the Court of Appeals, he did argue that the trial court's finding was correct and should be affirmed. A party seeking affirmance need not request the lesser included relief of remand. *See* TRAP 25.1(c).

SUCCESSFUL PARTY NOT REQUIRED TO SUBMIT ACCOUNTING OF COURT COSTS BEFORE JUDGMENT MAY BE ENTERED AS TO COSTS

Labor v. Warren, (Tex. App.–Beaumont 10/02/2008)(No. 07-07-0134-CV)

In this case the Court of appeals held, among other things, that the trial court did not abuse its discretion in awarding costs to the appellees based on the appellees' failure to prove up their costs. A successful party in a lawsuit is not required to submit an accounting of its court costs to the trial court or opposing counsel before judgment may be entered adjudicating costs. Rather, the successful party is responsible to submit a record of its court costs to the court clerk so that the clerk can perform its ministerial duty and tax costs in accordance with Rule 622.

The allocation of costs is a matter for the trial court's discretion and cannot be overturned on appeal absent an abuse of discretion. The Court of Appeals concluded that the trial court did not abuse its discretion in awarding costs to the appellees even though the appellees did not submit an itemized accounting of their costs to the trial court or opposing counsel.

REPLY BRIEF CANNOT ASSERT NEW GROUNDS FOR REVERSAL AFTER THE OMITTED GROUNDS ARE POINTED OUT IN OPPONENT'S BRIEF

In re TCW Global Project Fund II, Ltd., (Tex. App.–Houston [14th Dist.] 09/22/2008) (No. 14-08-00116-CV)

In this mandamus proceeding, the relators challenged the trial court's order denying their motion to dismiss based on a forum-selection clause. The Court of Appeals denied writ because the relators waived any challenge to the scope of the forum-selection clause by not addressing it in their Petition.

The real party in interest addressed the omission in its Response, and the relators addressed it for the first time in their Reply. It is well-settled that TRAP Rule 38.3 does not allow an appellant to include in a reply brief a new issue in response to a matter pointed out in the appellee's brief but not raised by the appellant's original brief. *Dallas County v. Gonzales*, 183 S.W.3d 94, 104 (Tex. App.–Dallas 2006, pet. denied); *Howell v. Tex. Workers' Comp. Comm'n*, 143 S.W.3d 416, 439 (Tex. App.–Austin 2004, pet. denied); *In re M.D.H.*, 139 S.W.3d 315, 318 (Tex. App.–Fort Worth 2004, pet. denied); *Barrios v. State*, 27 S.W.3d 313, 322 (Tex. Ap.–Houston [1st Dist.] 2000, pet. ref'd). TRAP Rule 52.5, providing for reply briefs in original proceedings, states that "[t]he relator may file a reply addressing any matter in the response." TRAP Rule 38.3 similarly provides that "[t]he appellant may file a reply brief addressing any matter in the appellant's brief." Except for identifying the parties as "relator" and "appellant," Rules 52.5 and 38.3 are identical. Because Rule 38.3 does not permit an appellant to assert new grounds for reversal in a reply brief after the omitted grounds have been pointed out in a response, there is no reason to interpret Rule 52.5 to permit such a practice.

BAYLOR MEDICAL SCHOOL IS STILL NOT A GOVERNMENTAL UNIT:

Klein v. Hernandez, 260 S.W.3d 1 (Tex. App.–Houston [1st Dist.] 04/17/08)

The First Court of Appeals, after rehearing *en banc*, issued this opinion and judgment in place of its earlier opinion of August 3, 2007, and vacated that judgment accordingly. Baylor College of Medicine and Dr. Klein, a staff physician, took this interlocutory appeal from the denial of their joint motion to dismiss for want of subject matter jurisdiction premised upon the erroneous argument that Baylor was a "governmental unit" entitled to the attendant liability limitations or immunity protections from suit. The Court dismissed Baylor's and Dr. Klein's interlocutory appeals for want of jurisdiction.

The question of whether the Court of Appeals had jurisdiction over the interlocutory appeal was intertwined with the issue of whether Baylor was a "governmental unit." The general rule is a party may not appeal an interlocutory order unless authorized by statute, and courts must strictly construe such statutes. Baylor relied upon CPRC § 51.014, which expressly allows an interlocutory appeal from the denial of a dispositive motion asserting entitlement to immunity by "a government unit, a political subdivision, or an employee of the state."

Baylor argued that sections 312.006(a) and 312.007 of the Health & Safety Code conferred upon it and Dr. Klein respectively "the equivalent status and immunities of a state agency and the employee of a state agency." Baylor College of Medicine, a non-profit medical school, was under contract with the Texas Higher Education Coordinating Board to provide medical training to physicians who provided medical care and services at public-health-care facilities. Dr. Klein was a resident physician assigned to provide medical services to patients at Ben Taub Hospital which is owned and operated by the Harris County Hospital District.

The Court of Appeals noted that while Baylor did present summary judgment evidence that it is a supported medical school engaged in the type of medical clinical education required under §312.006, that section's references to the Tort Claims Act do not make Baylor the equivalent of a governmental unit that enjoys immunity from suit and would be entitled to take an interlocutory appeal.

The Court explained that § 312.006 made no reference to sovereign or governmental immunity from suit. The Court then relied on the 14th Court's opinion in *Baylor College of Medicine v. Hernandez,* which held that section 312.006(a) does not purport to grant immunity from suit to a supported medical school or to its residents, faculty, or employees. 208 S.W.3d 4, 10 (Tex. App.-Houston [14th Dist.] 2006, pet. denied). The Court also reiterated the Texas Supreme Court's holding that the Tort Claims Act does not confer sovereign or governmental immunity, but rather it waives such immunity to the extent of the damages caps. *See Wichita Falls State Hosp. v. Taylor,* 106 S.W.3d 692, 698 (Tex.2003).

The Court continued that in *Hernandez,* the Fourteenth Court of Appeals had already considered and rejected Baylor's argument that section 312.006(a) grants it immunity from suit. The First Court set forth the Fourteenth Court of Appeals analysis verbatim:

> By importing the damage caps of section 101.023(a), the Health and Safety Code limits the damages for which a supported medical school is liable. The plain language of neither statute purports to grant immunity from suit to a supported medical school or to its residents, faculty, or employees. Nevertheless, this is the interpretation appellants urge us to adopt. We are unable to do so.... A damages cap limits damages but does not imply immunity from suit. To the contrary, damages caps such as section 101.023 that "insulate public resources from the reach of judgment creditors" indicate immunity from suit has been waived.

Accordingly, the First Court of Appeals held that section 312.007 of the Health & Safety Code does not bestow upon Baylor status equivalent to a governmental unit immune from suit and thus, it did not deprive the trial court of subject matter jurisdiction. Thus, the trial court's denial of Baylor's plea to the jurisdiction was not subject to an interlocutory appeal.

The Court's analysis applied with equal force to Dr. Klein. Just as Baylor was not a state agency, Dr. Klein was not an employee of a state agency entitled to the protections attendant to such status.