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Recent Development
RECENT DEVELOPMENTS IN MISCELLANEOUS RELEVANT LAW^{dt}
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Miscellaneous relevant law refers to state and federal case law or legislative developments on procedure, discovery and evidence issues. The following are some of the more current and substantial pronouncements:

I. United States Supreme Court

A. Daubert: No Need to Frye Expert Testimony

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹ the Supreme Court held that the *Frye* “general acceptance” test applied by the majority of the courts of appeals for admitting novel scientific evidence at trial was superseded by Rule 702 of the Federal Rules of Evidence, and is no longer the controlling test.

*84 This is a products liability case. The plaintiffs/petitioners contended that the prenatal ingestion of Bendectin, a prescription anti-nausea drug, caused birth defects. The trial court granted summary judgment based on a lack of causation

due to an expert affidavit stating that maternal use of Bendectin has not been shown in the scientific community to be a risk for human birth defects after more than thirty published studies representing over 130,000 patients. The plaintiffs did not dispute this characterization of the published studies, but provided evidence from eight other experts who opined that Bendectin could cause human birth defects because of animal studies showing birth defects in animals, chemical structure analysis that other compounds similar to Bendectin cause birth defects in humans, and unpublished “reanalysis” of published statistical studies for humans. The Ninth Circuit affirmed, citing *Frye v. United States*.² Due to a split between the circuits concerning the applicability of *Frye*, the Supreme Court granted certiorari, and vacated and remanded for further proceedings consistent with its opinion.³

In *Frye*, the Court of Appeals for the District of Columbia refused to admit expert testimony concerning an early polygraph test because such tests had not received “general acceptance” in the particular scientific community.⁴ According to the Supreme Court, the *Frye* test has been superseded by Rule 702 of the Federal Rules of Evidence, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.⁵

The Supreme Court concluded that there is nothing in Rule 702 to establish “general acceptance” as an absolute prerequisite to admissibility.⁶ Instead, such a rigid requirement would be at odds with the “liberal thrust” of the Federal Rules.⁷

At the same time, the requirement in Rule 702 that “scientific . . . knowledge” may be admitted does require that the trial court act to some degree as the “gatekeeper” to limit the admissibility of evidence that is not “scientific.”⁸ When making this determination, the trial court must consider whether the proposed “scientific” evidence has been tested, whether it has been subjected to peer review and publication, whether there is a known or potential rate of error or standards of control, and whether there is “general acceptance” in the scientific community.⁹

The Supreme Court also indicated that “shaky but admissible evidence” can be countered by vigorous cross-examination, contrary evidence and careful instructions on the burden of proof.¹⁰ In addition, the trial court remains free to direct a verdict or grant summary judgment.¹¹ According to the Supreme Court, “[t]hese conventional devices, rather than wholesale exclusion under an uncompromising ‘general acceptance’ test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.”¹²

*85 Finally, the Supreme Court concluded:

To summarize: “general acceptance” is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence -- especially Rule 702 -- do assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.¹³

II. The Federal Circuit

A. Haworth: *Discovery Starts at Home*

In *Haworth, Inc. v. Herman Miller, Inc.*,¹⁴ the Federal Circuit affirmed a refusal to compel discovery in an ancillary proceeding brought in Illinois against a non-party to a lawsuit pending in Georgia on the basis that the defendant in the Georgia district court should first seek to obtain the information from the plaintiff rather than the non-party.¹⁵

This is a patent infringement case brought in Georgia by Haworth. After receiving thousands of pages of documents, the defendant, Miller, sought to compel Allsteel, Inc., a non-party to the Georgia action, to also produce a copy of a settlement agreement between Allsteel and the plaintiff. Miller filed an ancillary proceeding in Illinois’ district court against Allsteel, a resident of Illinois. The Illinois district court denied the motion, holding that Miller should first seek to obtain the settlement agreement from the plaintiff, Haworth, in Georgia.¹⁶

The Federal Circuit affirmed, applying the law of the Seventh Circuit and reviewing the Illinois district court’s decision

under the abuse of discretion standard.¹⁷ The Federal Circuit explained that the Illinois court acted within the scope of its authority under Rule 26(b) of the Federal Rules of Civil Procedure, because that rule “expressly acknowledges that a court may limit discovery if it determines that the discovery sought ‘is obtainable from some other source that is more convenient, less burdensome, or less expensive.’”¹⁸ Therefore, the Illinois district court did not abuse its discretion by requiring Miller to first seek discovery against the plaintiff.¹⁹ The Federal Circuit characterized the defendant’s approach and arguments as “overzealous,” a “fishing net,” a “convoluted scenario,” and a “semantic quibble.”²⁰

B. Additive Controls: Accusation of Patent Infringement Gives Federal Court Jurisdiction over Texas Business Disparagement Claim

In *Additive Controls & Measurements Systems, Inc. v. Flowdata, Inc.*,²¹ the Federal Circuit held that the plaintiff’s, Additive Controls & Measurements Systems (Adcon), cause of action for business disparagement under Texas law was properly removed to and within the original jurisdiction of federal court because proof of noninfringement of the defendant’s patents was a necessary element of the disparagement cause of action. At the same time, the Federal Circuit vacated a permanent injunction *86 against patent infringement entered by the district court and remanded with instructions to enter an order with greater specificity.²²

Flowdata accused Adcon of infringing Flowdata’s patents and sent letters to Adcon’s customers and potential customers warning that Adcon’s products infringed and that Flowdata was taking legal action. Adcon filed suit in Texas state court alleging business disparagement as a result of Flowdata’s false accusations of patent infringement. Flowdata removed the case to federal court (the Southern District of Texas, Houston Division) and filed a counterclaim for patent infringement against Adcon.²³

In 1991, the federal district court granted a motion for partial summary judgment that Adcon infringed one of Flowdata’s patents. Because Adcon did not contest validity, a permanent injunction was entered stating that Adcon “is forever barred from infringing Flowdata’s patent.”²⁴ Thereafter, Adcon moved to remand the business disparagement cause of action to state court. The district court denied the motion to remand and Adcon appealed the denial of remand and the entry of the injunction.²⁵

Regarding jurisdiction, the Federal Circuit concluded that the federal district court had original jurisdiction of the state law business disparagement cause of action under 28 U.S.C. § 1338(a). According to the Federal Circuit, jurisdiction under 28 U.S.C. § 1338(a) is available for two types of actions: first, “causes of action created by federal patent law and [[second] causes of action whose resolution depends on a substantial question of federal patent law.”²⁶ Here, the business disparagement cause of action falls into the second category of actions because “proof relating to patent infringement is a necessary element of Adcon’s business disparagement claim.”²⁷ The Federal Circuit distinguished a prior Supreme Court case, *American Well Works Co. v. Layne & Bowler Co.*,²⁸ that found no jurisdiction because *American Well Works* applied Massachusetts law where “truth was a defense to the plaintiff’s claim” as opposed to Texas law where falsity of the patent infringement claim was part of the plaintiff’s case-in-chief.²⁹

The Federal Circuit concluded: “In sum, the district court correctly determined that Adcon’s business disparagement claim ‘arises under’ federal patent law because Adcon’s right to relief depends upon the resolution of a substantial question of patent law.”³⁰

At the same time, the Federal Circuit concluded that the terms of the injunction were not sufficiently specific to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and remanded “with instructions to issue an injunction that meets the specificity requirements of Rule 65(d).”³¹ The Federal Circuit explained the necessity for the remand and greater specificity, as follows:

The brief injunction does not use specific terms or describe in reasonable detail the acts sought to be restrained. The terse order does not state which acts of Adcon constitute infringement of the ‘318 patent. The order does not limit its prohibition to the manufacture, use, or sale of the specific infringing device, or to infringing devices no more than colorably different from the infringing device.³²

****87 C. Katz: Discovery from Non-Party Properly Denied as Burdensome and Overly Broad***

The Federal Circuit held in *Katz v. Batavia Marine & Sporting Supplies, Inc.*³³ that “the district court did not abuse its discretion in denying the requested discovery [from a non-party], on the grounds that Mr. Katz had not shown a need for the broad range of information requested.”³⁴

Acting pro se, Mr. Katz sued Batavia Marine & Sporting Supplies for patent infringement regarding the sale of a combined key ring and mace holder. During discovery, Katz learned that Batavia had purchased certain components from a non-party, Def-Tech Corporation. Katz served a subpoena duces tecum on Def-Tech seeking five broad categories of documents including all documents concerning the purchase of assets of Def-Tech from a predecessor, concerning Def-Tech's patents or trademarks, concerning patents or trademarks relating to mace, concerning the sale of mace products, or concerning the design or development of mace products.³⁵ On motion for protection by Def-Tech, the district court held that Mr. Katz "had not established that the discovery was necessary and relevant, in response to Def-Tech's *prima facie* showing that it was oppressive."³⁶

The Federal Circuit observed that although discovery rulings are ordinarily not appealable, "an order denying discovery of a non-party, issued by a court ancillary to the pending action, is final and appealable," and reviewed under the abuse of discretion standard.³⁷ Affirming the district court's decision, the Federal Circuit reasoned that Mr. Katz failed "to establish a need for the breadth of the information sought" and that the request for documents on its face exceeded the narrow scope of the issues involved in the case.³⁸

At the same time, the Federal Circuit awarded costs on appeal to Mr. Katz. According to the Federal Circuit, although Mr. Katz had arranged with Def-Tech to review documents at Def-Tech's offices on a date certain, Def-Tech's lawyer filed a motion for protection without a courtesy call to Mr. Katz, who learned of the motion only after traveling to Def-Tech's offices and being denied the documents. The Federal Circuit stated that Def-Tech had "an obligation to advise Mr. Katz in a timely way of its changed position" and the Federal Circuit disapproved of "such uncivil behavior on the part of Def-Tech and its counsel. . . ."³⁹

D. L.A. Gear: Withholding Opinion of Counsel May Support Inference that Opinion Was Adverse

In *L.A. Gear, Inc. v. Thom McAn Shoe Co.*,⁴⁰ the Federal Circuit reversed a finding by the trial court of no willful infringement and remanded for determination of patent infringement damages and consideration of the award of attorney fees.

L.A. Gear sued the defendants for design patent infringement and unfair competition under § 43(a) of the Lanham Act⁴¹ based on the design of certain athletic shoes. The district court found liability under both theories, but awarded damages only under the Lanham Act. The district court found no willful *88 infringement and declined to award attorney fees.⁴² At trial, the defendants did not offer to support their actions with evidence that opinion of counsel had been obtained as to whether the patent was valid or whether the acts in question might be infringement.⁴³

The Federal Circuit affirmed the finding of design patent infringement, but reversed the finding of liability under § 43(a). Because no damages for patent infringement had been assessed, the Federal Circuit remanded for determination of damages for patent infringement.⁴⁴ The Federal Circuit reversed the finding of no willful infringement because "the accused infringer presented no probative evidence of a good faith belief in noninfringement."⁴⁵ Because the finding that the infringement was not willful was reversed, the trial court was also directed to reconsider the refusal to award attorney fees on remand.⁴⁶

The defendants argued that counsel's defensive pleadings complied with Rule 11 of the Federal Rules of Civil Procedure, alleged unenforceability and invalidity by reason of functionality, and established the defendants' good faith belief that they could continue their activities. The Federal Circuit rejected this argument because the "defense of unenforceability was not pursued at trial" and the functionality issue "did not present a close question of fact or law."⁴⁷

Focusing on the defendants' refusal to submit evidence of whether they obtained an opinion of counsel "or any other support for a good faith belief that it was entitled to perform the infringing acts," the Federal Circuit concluded that this lack of evidence could result in the drawing of an adverse inference against the infringer, stating:

Although a party to litigation may indeed withhold disclosure of the advice given by its counsel, as a privileged communication, it will not be presumed that such withheld advice was favorable to the party's position. We have held that the assertion of privilege with respect to infringement and validity opinions of counsel may support the drawing of adverse inferences.⁴⁸

III. United States District Courts

A. Kabb: Patent Venue for Sole Proprietorships is Solely Under § 1400(b)

In *Kabb, Inc. v. Sutera*⁴⁹ in Louisiana, the U.S. District Court for the Eastern District of Louisiana transferred a patent infringement case to Massachusetts for improper venue in Louisiana.⁵⁰

Kabb sued Sutera in Louisiana for patent infringement relating to distribution of certain water purification equipment. Sutera, a resident of Massachusetts, did not have a place of business in Louisiana. Sutera did business with independent dealers in Louisiana who distribute his products, and advertised in national trade publications distributed in Louisiana. Sutera moved to dismiss for lack of personal jurisdiction and improper venue.⁵¹ Rather than dismiss, the Louisiana district court chose to transfer under 28 U.S.C. § 1406(a).⁵²

*89 The first issue presented was “which venue statute?”⁵³ According to the district court, until recently, the only venue statute applicable to patent actions was 28 U.S.C. § 1400(b). However, in 1988, 28 U.S.C. § 1391(c) was amended to allow suit against a corporation in any district where personal jurisdiction could be obtained over the corporation, and this statute has since been applied to patent actions. At the same time, at least one court has held that a sole proprietorship is not a “corporation” for purposes of § 1391(c).⁵⁴ Because Sutera is a sole proprietor, the applicable venue provision is § 1400(b) that requires acts of infringement and a regular and established place of business in the district.⁵⁵

The district court concluded that venue was improper because Sutera had no regular and established place of business in Louisiana. “It is well settled that the mere presence of independent sales representatives does not constitute ‘a regular and established place of business’ for purposes of Section 1400(b).”⁵⁶

B. Texas Instruments: First Filed Court Should Decide Whether to Transfer

In *Texas Instruments, Inc. v. Micron Semiconductor, Inc.*,⁵⁷ the U.S. District Court for the Eastern District of Texas (Marshall Division) held that when two cases are filed covering the same patents in different courts, as a matter of comity, the first court to obtain jurisdiction should determine the issue of which court should first proceed. Because the Texas court was the situs of the second filed suit, the Texas action would be stayed, not transferred, while the Idaho court either proceeded on the merits or ruled on a motion to transfer.⁵⁸

The day before a license agreement was set to expire, Micron sued Texas Instruments (hereinafter TI) in Idaho for infringement of certain Micron patents and a declaration of noninfringement of certain TI patents.⁵⁹ About three weeks later, TI filed the present suit in Texas.⁶⁰ Micron moved to transfer the Texas case to Idaho, arguing that the first-to-file rule required that the first forum selected resolve the controversy.⁶¹ Rather than transfer, the Texas court stayed the Texas action pending a decision by the Idaho court as to whether to transfer to Texas or proceed.⁶²

The Texas court indicated that the first-to-file rule is a “generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district.”⁶³ At the same time, the first-to-file rule is not a rigid rule, but is discretionary and is to be applied with flexibility.⁶⁴

The Texas court noted that TI had presented persuasive reasons for the Texas case to proceed to determine the infringement of TI’s patents by Micron including the principle that a patent owner should be permitted to choose the forum to litigate its patent rights rather than an infringer through a declaratory judgment action in a race to the courthouse, the fact that the Texas court had a more current docket than *90 the Idaho court, the fact that there would be no judicial savings because TI sued another party in Texas on the same patents, and the principle that to protect its patent rights, TI ought to receive a speedy and efficient resolution of the case.⁶⁵ However, these arguments should be presented to the Idaho court because “the first-to-file rule gives the *first-filed* court the responsibility to determine which case should proceed.”⁶⁶ Further, the second-filed court “simply may not, consistent with the principles of comity and conservation of judicial resources, usurp the first-filed court’s role.”⁶⁷

IV. Texas Supreme Court

A. Elbaor: Mary Carter Agreements -- Gone, but Not Forgotten

In *Elbaor v. Smith*,⁶⁸ the Texas Supreme Court held that Mary Carter agreements are void as against the public policy of the State of Texas.

This is a medical malpractice case brought by Smith against D/FW Medical Center, Arlington Community Hospital (ACH), and Doctors Elbaor, Syrquin, Stephens and Gatmaitan. Before trial, Smith entered into Mary Carter agreements with Syrquin, Stephens and ACH. Smith non-suited Gatmaitan and settled and dismissed her claim against D/FW Medical Center.⁶⁹

Under the Mary Carter agreements, the settling defendants were required to participate in the trial of the case and would receive all or part of the settlement monies paid by them from any recovery obtained by Smith against Dr. Elbaor, the last non-settling defendant. The jury found for Smith and awarded over \$2,250,000, finding Elbaor 88% responsible and Syrquin 12% responsible. Judgment was rendered against Elbaor for over \$1,870,000, and the court of appeals affirmed.⁷⁰ The Texas Supreme Court reversed.⁷¹

According to the Texas Supreme Court, Mary Carter agreements are “void as violative of sound public policy.”⁷² This declaration applies to “the present case, to those cases in the judicial pipeline where error has been preserved, and to those actions tried on or after December 2, 1992.”⁷³ The Court defined a Mary Carter agreement as an agreement where “the settling defendant retains a financial stake in the plaintiff’s recovery *and* remains a party at the trial of the case.”⁷⁴ The Court reasoned that, in effect, Mary Carter agreements promote litigation rather than settlement because they “nearly always ensure a trial against the non-settling defendant.”⁷⁵ As such, the “Mary Carter agreement is simply an unwise and champertous device that has failed to achieve its intended purpose” of promoting settlements.⁷⁶

***91 B. NATCO: “Control Group” Test Controls Attorney-Client Privilege and “Substantial,” Not “Imminent,” Chance of Litigation Controls Work Product Privilege**

In *National Tank Co. v. Brotherton*,⁷⁷ the Texas Supreme Court held that the “control group” test, and not the “subject matter” test, applies to determine if communications between a corporate employee and the company’s lawyer are privileged because Texas Rule of Civil Evidence 503 “clearly adopts the control group test.”⁷⁸ In addition, prior Texas law was modified so that investigative communications and reports are privileged under the work product privilege if the totality of the circumstances surrounding the investigation would indicate to a reasonable person that there was a “substantial” chance of litigation; litigation no longer need be “imminent” for the work product privilege to apply.⁷⁹

An explosion killed one worker and injured others at the National Tank Company (NATCO). NATCO’s general counsel, Mr. Pease, sent Mr. Townsend to investigate. Mr. Townsend was NATCO’s safety and risk coordinator, and though not a lawyer, was employed in the legal department under Mr. Pease’s supervision. Mr. Pease also contacted NATCO’s liability insurer, American International Adjustment Company (AIAC), and recommended that AIAC also investigate this incident. AIAC did so through Mr. Precht, an AIAC employee.⁸⁰

On the plaintiffs’ motion, Judge Brotherton ordered NATCO to produce: (1) transcripts of four interviews of NATCO employees conducted by Townsend; (2) transcripts of nine interviews of NATCO employees conducted by Precht; and (3) three accident reports prepared by Precht and sent to Pease.⁸¹ Judge Brotherton also ordered Townsend and others to disclose the substance of these investigations during their depositions. The judge’s orders were stayed pending this mandamus proceeding. The Court of Appeals denied the writ of mandamus, but the Supreme Court remanded for reconsideration in view of the principles announced.⁸²

First the Texas Supreme Court rejected NATCO’s arguments that the communications with the NATCO employees were privileged.⁸³ Because the NATCO employees interviewed were not in a position to control or direct any action that NATCO might take on the advice of counsel, these employees were not within NATCO’s “control group.” In Texas, the attorney client privilege extends only to the “control group,” and not to other employees. Therefore, the communications with these NATCO employees were not protected by the attorney-client privilege.⁸⁴

Most states and the Federal Courts apply the “subject matter” test. Under this approach, the attorney-client privilege extends to a lawyer’s communications with lower level employees for the purpose of gathering information about a subject in order to give the corporation proper legal advice. However, the “subject matter” test has not been adopted in Texas.⁸⁵

Regarding the “work product” doctrine, the Texas Supreme Court modified the test to be applied. Under prior Texas law, the “work product” doctrine applied only to investigations conducted in anticipation of litigation where litigation was “imminent.”⁸⁶ The Texas Supreme Court now modifies *92 that requirement to provide that the doctrine applies even if litigation is not “imminent,” but there is only a “substantial chance of litigation.”⁸⁷ This new test was set forth as follows:

In summary, an investigation is conducted in anticipation of litigation for purposes of Rule 166b(3) when
a) a reasonable person would have concluded from the totality of the circumstances surrounding the

investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.⁸⁸

Footnotes

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¹ 113 S.Ct. 2786, 27 U.S.P.Q.2d (BNA) 1200 (1993).

² 293 F. 1013 (D.C. Cir. 1923).

³ *Daubert*, 27 U.S.P.Q.2d (BNA) at 1201-03, 1208.

⁴ 293 F. at 1014.

⁵ *Id.*

⁶ *Daubert*, 27 U.S.P.Q.2d (BNA) at 1204.

⁷ *Id.*

⁸ *Id.* at 1204-05, 1204 n.7.

⁹ *Id.* at 1206.

¹⁰ *Id.* at 1207.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 1208.

¹⁴ 998 F.2d 975, 27 U.S.P.Q.2d (BNA) 1469 (Fed. Cir. 1993).

¹⁵ *Haworth*, 998 F.2d at 975, 977.

16 *Id.* at 976.

17 *Id.* at 977.

18 *Id.* at 978.

19 *Id.*

20 *Id.*

21 986 F.2d 476, 25 U.S.P.Q.2d (BNA) 1798 (Fed. Cir. 1993).

22 *Additive Controls*, 986 F.2d at 477.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.* at 478.

27 *Id.*

28 241 U.S. 257 (1916).

29 *Additive Controls*, 986 F.2d at 478-79.

30 *Id.* at 479.

31 *Id.* at 480.

32 *Id.* at 479-80.

33 984 F.2d 422, 25 U.S.P.Q.2d (BNA) 1547 (Fed. Cir. 1993).

34 *Katz*, 984 F.2d at 425.

35 *Id.* at 423-24.

36 *Id.* at 424.

37 *Id.* at 424.

38 *Id.* at 425.

39 *Id.*

40 988 F.2d 1117, 25 U.S.P.Q.2d (BNA) 1913 (Fed. Cir. 1993).

41 15 U.S.C. § 1125(a) (1992).

42 *L.A. Gear*, 988 F.2d at 1120-21.

43 *Id.* at 1126.

44 *Id.* at 1128.

45 *Id.* at 1127.

46 *Id.* at 1128.

47 *Id.* at 1126.

48 *Id.*

49 25 U.S.P.Q.2d (BNA) 1554 (E.D. La. 1992).

50 *Id.* at 1556.

51 *Id.* at 1554-55.

52 *Id.* at 1556.

53 *Id.* at 1555.

54 *Id.* at 1555 (citing to *Blue Compass Corp. v. Polish Masters of America*, 777 F. Supp. 4, 5, 21 U.S.P.Q.2d 1399, 1400 (D. Vt. 1991)).

55 *Id.*

56 *Id.* at 1555-56.

57 815 F. Supp. 994, 26 U.S.P.Q.2d (BNA) 1863 (E.D. Tex. 1993).

58 *Texas Instruments*, 815 F. Supp. at 999-1000.

59 *Id.* at 995-96.

60 *Id.*

61 *Id.* at 996.

62 *Id.* at 1000.

63 *Id.* at 997.

64 *Id.*

65 *Id.* at 998-99.

66 *Id.* at 999 (emphasis in original).

67 *Id.*

68 845 S.W.2d 240 (Tex. 1992).

69 *Id.* at 242.

70 *Id.* at 242-43.

71 *Id.* at 252.

72 *Id.* at 250.

73 *Id.* at 251.

74 *Id.* at 247 (emphasis in original).

75 *Id.* at 248.

76 *Id.* at 249.

77 851 S.W.2d 193 (Tex. 1993).

78 *Id.* at 198.

79 *Id.* at 204.

80 *Id.* at 195.

81 *Id.* at 196.

82 *Id.* at 195.

83 *Id.* at 197.

84 *Id.* at 197-200.

85 *Id.* at 198 (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)).

86 *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 40-41 (Tex. 1989).

87 *Elbaor*, 851 S.W.2d at 204.

88 *Id.* at 207.