Temporary Injunctive Relief In Texas

By

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David's broad appellate experience includes:

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David previously taught Appellate Advocacy at Texas Wesleyan University School of Law located in Fort Worth. David is licensed and has practiced in the U.S. Supreme Court; the Fifth, Seventh, and Eleventh Federal Circuits; the Federal District Courts for the Northern, Eastern, Southern and Western Districts of Texas; the Texas Supreme Court and various Texas intermediate appellate courts. Although David is based in Fort Worth (Tarrant County, Texas), he has a state-wide practice.

David is board certified in civil trial law, civil appellate law, and personal injury trial law by the Texas Board of Legal Specialization. Out of approximately 100,000 licensed attorneys in Texas, David is one of fewer than 30 practicing attorneys in the State of Texas with this particular triple certification. David was a member of the Civil Trial Law Commission of the Texas Board of Legal Specialization that writes and grades the exam for new applicants for civil trial law certification. David typically works on sophisticated cases dealing with trust and probate litigation and commercial litigation.

David has authored many legal articles and spoken at numerous legal education courses on both trial and appellate issues. His articles have been cited as authority by the Texas Supreme Court and the Texas Courts of Appeals located in El Paso, Waco, Texarkana, Beaumont, Tyler and Houston (Fourteenth District), and a federal district court in Pennsylvania. David's articles also have been cited by McDonald and Carlson in their Texas Civil Practice treatise, William v. Dorsaneo in the *Texas Litigation Guide*, and various authors in the *Baylor Law Review*, *St. Mary's Law Journal*, *South Texas Law Review* and *Tennessee Law Review*.

Education

Baylor Law School
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- Mid-Year Law Award, *Baylor Law Review*

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Professional & Community Involvement

- Board Member for the Texas Association of Bank Counsel (2017-2020)
- Board Member Fort Worth Sister Cities (2013-present)
- Board Member for the Texas Supreme Court Historical Society (2011-2017)

- Board Member for Junior Achievement of the Chisholm Trial (2012-2015)
- Active member of First United Methodist Church, Fort Worth, Texas
- American Bar Association
  - Appellate Rules and Statutes Sub-Committee, 2008-2009
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- State Bar of Texas
  - Appellate Section Member Services Sub-Committee, 2005-2008; Co-Chair, 2007-2008
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- Bar Association of the Fifth Federal Circuit
- Eldon B. Mahon Chapter of the American Inns of Court (Master)
- Tarrant County Bar Association
  - Appellate Section Leadership Committee, 2005-2007; President 2009-2010; Vice Chairperson 2008-2009; Secretary 2007-2008
  - Judicial Liaison Committee, 2015-2017, Vice Chairperson 2016; President 2017
  - Brown Bag Committee, 2004-2008
- College of the State Bar of Texas
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Awards & Recognition

- Named by Fort Worth's 360 West Magazine's as One of Tarrant County's Top Attorneys in 2017
- Named "Power Attorney" Award Winner By Fort Worth Business Press in 2014
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- Named as one of "The Best Lawyers in America" for 2013 through 2015
- Named by Fort Worth Texas Magazine as One of Tarrant County's Best Appellate Lawyers in 2004-2017, and in Civil Litigation in 2009
- Named by Texas Monthly as a "Super Lawyer" in 2013-17
- Named by Texas Monthly as a "Texas Rising Star" in 2004, 2006-2012
- Named One of D Magazine's "Best Business Lawyers in Dallas" in 2009
- Named One of D Magazine's "Best Lawyers in Dallas" in appellate law 2008
- Named One of D Magazine's "Best Lawyers Under 40 in Dallas" in 2004, 2006, 2007
- Named One of Fort Worth Business Press's "Forty Under Forty" in 2003
- The Editors of Texas Tech Law Review selected article entitled "Narrowing the Ability to Strike Jurors: The Texas Supreme Court Addresses Important Voir Dire Issues" as the Outstanding Lead Article in 2007
- State Bar of Texas awarded "Best Series Of Articles – Substantive Law" to the Tarrant County Bar Association based on various articles authored by David Johnson from 2008-2009
- Named Top Author in Estate Planning in 2016 in JD Supra's 2017 Readers' Choice Awards

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I. Introduction

One of the most important aspects of protecting a client's rights is obtaining temporary injunctive relief from a court. This relief usually takes the form of an order precluding a defendant from closing a deal, selling real estate, secreting funds, using certain information, contacting certain clients, or performing work for certain competitors.

Without this type of relief, a party may lose valuable rights – forever. For example, the loss of trade secrets and confidential information can be like humpty dumpty falling off the wall – you cannot put him back together again. Additionally, it is often impossible to truly value the loss or damage to the plaintiff after the confidential information or trade secrets have been improperly used. Even if the damage is measurable, there may be no way to collect it from the party improperly using the information. Therefore, it is often necessary for a plaintiff to obtain immediate injunctive relief to protect its rights.

On the other hand, defendants have their own right to act as they choose. Defendants will need to be armed with all of the procedural and substantive law of injunctions to defend against the plaintiff's request for injunctive relief. This paper attempts to give a general overview of the procedural requirements for obtaining and defending against temporary restraining orders and temporary injunctions in Texas state court.[1]

[1] It should be noted that some courts have held that state substantive law governs in federal diversity cases in determining the merits of a request for injunctive relief. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 327-328 (1938) (under Wisconsin law, injunction to prevent peaceful picketing could not be granted); *Mid-America Pipeline v. Lario Enterprises*, 942 F.2d 1519 (10th Cir. 1991) ("We apply the law of the forum state in determining whether to grant mandatory injunctive relief in diversity cases."); *Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 647 (9th Cir. 1988) (federal court applying California law could not issue injunction due to California anti-injunction statute); *Genovese Drug Stores, Inc. v. Bercrose Assocs*., 563 F. Supp. 1299, 1304 (D.Conn. 1983) ("Where injunctive relief is sought, a federal court must look to state law to determine whether a party is entitled to equitable remedial rights.").

II. Purpose of Temporary Injunctive Relief: Status Quo

A. Status Quo Requirement

The basic purpose of all orders granting temporary injunctive relief is to maintain the status quo until the next procedural stage of the case can be heard. *Butnaru v. Ford Motor Co*., 84 S.W.3d 198, 204, (Tex. 2002); *Williard Capital Corp. v. Johnson*, 2017 Tex. App. LEXIS 7844 (Tex. App.—Houston [14th Dist.] August 17, 2017, no pet.).

A temporary restraining order serves to provide emergency relief and to preserve the status quo until a hearing may be had on a temporary injunction. *Cannan v. Green Oaks Apts., Ltd.*, 758 S.W.2d 753, 755 (Tex. 1988); *Texas Aeronautics Commission v. Betts*, 469 S.W.2d 394, 398 (Tex. 1971). Texas Rule of Civil Procedure 680 expressly states that a temporary restraining order shall not exceed fourteen days unless the court finds good cause to extend it for fourteen more days "or unless the party against whom the order is directed consents that it may be extended for a longer period." Tex. R. Civ. P. 680. *See also In re Tex. Nat. Res. Conserv. Comm'n*, 85 S.W.3d 201, 204-05 (Tex. 2002).

The purpose of a temporary injunction is to preserve the status quo pending a full trial on the merits. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993); *Williard Capital Corp. v. Johnson*, 2017 Tex. App. LEXIS 7844; *Trostle v. Trostle*, 77 S.W.3d 908, 916 (Tex. App.—Amarillo 2002, no pet.). A temporary injunction maintains the status quo by preventing "any act of a party which would tend to render the final judgment in the case ineffectual." *Baucum v. Texam Oil Corp.*, 423 S.W.2d 434, 441 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.) (quoting *Moffitt v. Lloyd*, 98 S.W.2d 860 (Tex. Civ. App.—Waco 1936, no writ)); *Hartwell v. Lone Star, PCA*, No. 06-17-00030-CV, 2017 Tex. App. LEXIS 5628 (Tex. App.—Texarkana June 21, 2017, no pet.).

The status quo is the last actual peaceable, noncontested status that preceded the controversy. *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004); *Big Three Indus v. Railroad Comm'n*, 618 S.W.2d 543, 548 (Tex. 1981); *Texas Aeronautics Comm'n v. Betts*, 469 S.W.2d 394, 398 (Tex. 1971); *Hartwell*, 2017 Tex. App. LEXIS 5628; *Texas Pet Foods, Inc. v. State*, 529 S.W.2d 820, 829 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.). In other words, when one party takes action altering the relationship

between the parties and the other party contests it, the status quo is the relationship that existed prior to that action. *See, e.g.*, *Benavides Indep. School Dist. v. Guerra*, 681 S.W.2d 246 (Tex. Civ. App.—San Antonio 1984, writ ref'd n.r.e.) (court held that relevant time period for status quo was before the employee left employment); *Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570 (Tex. App.—Austin 2000), *rev'd on other grounds*, 121 S.W.3d 742 (Tex. 2003); *Hidden Valley Civic Club v. Brown*, 702 S.W.2d 665 (Tex. App.—Houston [14th Dist.] 1985, no pet.) (status quo measured at time before cause of action arose).

B. Prohibitive and Mandatory Injunctions

Sometimes the status quo is one of action, not rest. Correspondingly, there are two types of injunctions: prohibitive and mandatory. *Hartwell v. Lone Star, PCA*, No. 06-17-00030-CV, 2017 Tex. App. LEXIS 5628 (Tex. App.—Texarkana June 21, 2017, pet. filed); *Tri-Star Petroleum Co. v. Tipperary Corp*., 101 S.W.3d 583, 592 (Tex. App.—El Paso 2003, pet. denied). A "prohibitive" injunction forbids or restrains conduct, whereas a "mandatory" injunction requires it. *Tri-Star*, 101 S.W.3d at 592 (citing *Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 576 (Tex. App.—Austin 2000, no pet.) and *LeFaucheur v. Williams*, 807 S.W.2d 20, 22 (Tex. App.—Austin 1991, no writ)). The issuing of a temporary mandatory injunction is proper "only if a mandatory order is necessary to prevent irreparable injury or extreme hardship." *Tri Star Petroleum*, 101 S.W.3d at 592 (citing *LeFaucheur*, 807 S.W.2d at 22); *G-M Water Supply Corp. v. City of Hemphill*, No. 12-16-00129-CV, 2016 Tex. App. LEXIS 12464 (Tex. App.—Tyler November 22, 2016, no pet.). While granting a mandatory injunction is within the sound discretion of the trial court, it "should be denied absent a clear and compelling presentation of extreme necessity or hardship. *Tri Star Petroleum*, 101 S.W.3d at 592 (citing *Rhodia, Inc. v. Harris County*, 470 S.W.2d 415, 419 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ)); *Pharaoh Oil & Gas, Inc. v. Ranchero Esperanza, Ltd*., 343 S.W.3d 875, 883 (Tex. App.—El Paso 2011, no pet.). A trial court has the power to grant a mandatory injunction at a hearing for a temporary injunction only where the circumstances justify it. *RP&R, Inc. v. Territo*, 32 S.W.3d 396, 400 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

The Houston Fourteenth court has noted that "[g]enerally, the preservation of the status quo can be accomplished by an injunction in form, but it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury on complainant." *Id*. at 400 n.3 (citing *Rhodia*, 470 S.W.2d at 419). In such cases, courts of equity issue mandatory writs before the case is heard on the merits, but this character of cases has been repeatedly held to constitute "an exception to the general rule that temporary injunction may not be resorted to obtain all relief sought in the main action; such temporary injunction may be mandatory in character." *Id*. While the purpose of a temporary injunction is to preserve the status quo pending a trial on the merits, "[a] temporary mandatory injunction changes the status quo and should be granted only in a case of extreme hardship." *Id*. at 400-01. *See also S.W. Tel. & Tel. Co. v. Smithdeal*, 136 S.W. 1049, 1052 (Tex. 1911) (noting general rule governing mandatory injunctions is that mandatory injunctions "will never be granted unless extreme or very serious damage at least will ensue from withholding that relief."); *Boatman v. Lites*, 888 S.W.2d 90, 92 (Tex. App.—Tyler 1994, no writ); *Dallas Indep. Sch. Dist. v. Daniel*, 323 S.W.2d 639, 641 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.) ("Courts are reluctant to issue mandatory injunctions, and will not do so except in most serious cases where the injury complained of is not capable of compensation in damages.").

Sometimes the status quo is one of action. For example, in *Lewis v. Tex. Power & Light Co*., the court of appeals affirmed injunctive relief permitting a power company's engineers and surveyors to enter upon a landowner's property for surveying purposes. 276 S.W.2d 950, 954-55 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.). In directly confronting the landowner's argument that a temporary injunction would upset the status quo and would improperly grant the ultimate relief in the suit, the court held to the contrary, that the status quo was being protected by the injunction:

> Appellants say that the order granting the temporary injunction should not be allowed to stand because it in effect grants all the relief appellee might obtain in a trial on the merits and thereby changes the status quo of the parties. [A]ppellants' position is untenable for two reasons.
>
> In the first place if appellee has the right under our statute to enter onto appellants' property to make

> its preliminary survey, and we have held that it has, the status quo was one of action, not of rest. Under such circumstances even mandatory injunctions are upheld. We quote from the opinion of this Court in *Texas Pipe Line Co. v. Burton Drilling Co*.: "appellant contends that the trial court erred in issuing the writ in question because its effect is to award in advance to appellee all relief it could obtain on final trial. We have heretofore seen that the status quo in actions of this nature 'is a condition not of rest but of action, and the condition of rest is what will inflict the irreparable injury complained of, in which circumstances courts of equity may issue mandatory writs before the case is heard on its merits.'"
>
> In the second place, the trial court no doubt weighed the relative convenience and inconvenience and the comparative injuries to the parties and to the public which would arise from the granting or refusing of this temporary injunction, and found the equities to lie with appellee. There can be little if any doubt that appellee under the facts shown in this record, is entitled to acquire easement rights over appellants' land, either by voluntary conveyance, or by condemnation. That being so, the injury suffered by appellants from the survey will be small compared to the injury suffered by appellee and the public if appellee were denied the right to proceed with its preliminary survey.

Id. at 955-56.

Finally, the status quo can never be a state that allows a party to continue violating the law. *San Miguel v. City of Windcrest*, 40 S.W.3d 104, 109 (Tex. App.—San Antonio 2000, no pet.); *Houston Compressed Steel Corp. v. State*, 456 S.W.2d 768, 773 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ).

III. Requirements for Temporary Restraining Orders or Temporary Injunctions

A. Equitable Requirements For Temporary Injunctive Relief

To be entitled to a temporary injunction, a plaintiff must plead a cause of action, prove a probable right to relief, and prove an immediate, irreparable injury if temporary relief is not granted:

> The issuance of a writ of injunction is an extraordinary equitable remedy, and its use should be carefully regulated. The only question before the trial court at the hearing for a temporary injunction is whether the applicant is entitled to the preservation of the status quo pending a trial on the merits. The applicant must plead a cause of action, prove a probable right and that a probable injury will be sustained during the pendency of the trial if the temporary injunction is not issued. It is an abuse of discretion for a trial court to grant a temporary injunction unless it is clearly established that the applicant is threatened with an actual irreparable injury if the injunction is not granted.

City of Arlington v. City of Fort Worth, 873 S.W.2d 765, 767 (Tex. App.—Fort Worth 1994, orig. proc.). Otherwise stated, "[t]o be entitled to a temporary injunction, the applicant must plead and prove "(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Townson v. Liming*, No. 06-10-00027-CV, 2010 Tex. App. LEXIS 5459, 2010 WL 2767984, at *2 (Tex. App.—Texarkana July 14, 2010, no pet.)

One court stated: "The principles governing courts of equity govern injunction proceedings unless superseded by specific statutory mandate. In balancing the equities, the trial court must weigh the harm or injury to the applicant if the injunctive relief is withheld against the harm or injury to the respondent if the relief is granted." *Seaborg Jackson Partners v. Beverly Hills Sav.*, 753 S.W.2d 242, 245 (Tex. App.—Dallas 1988, writ dism'd). Further, a trial court is not free to ignore the equities on both sides, and abuses its discretion in so doing. *See id*. In balancing equities for an injunction, a court may consider whether the party opposing the injunction would suffer slight or significant injury if the injunction is issued. *NMTC*

Corp. v. Conarroe, 99 S.W.3d 865, 869 (Tex. App.—Beaumont 2003, no pet.).

B. Statutory Grounds For Injunctions

The most common statutory grounds for injunctive relief are found in Texas Civil Practice and Remedies Code section 65.011. That provision authorizes injunctive relief: 1) when the applicant is entitled to the relief demanded, and all or part of the relief requires the restraint of some act prejudicial to the applicant; 2) when a party performs or is about to perform, or is procuring or allowing the performance of, an act relating to the subject of pending litigation, in violation of the applicant's rights, and the act would tend to render the judgment in that litigation ineffectual; 3) when the applicant is entitled to a writ of injunction under the principles of equity and the laws of Texas relating to injunctions; 4) when a cloud would be placed on the title of real property being sold under an execution, against a party having no interest in the real property, irrespective of any remedy at law; and 5) when irreparable injury to real or personal property is threatened, irrespective of any remedy at law. Tex. Civ. Prac. & Rem. Code § 65.011. Furthermore, Texas Business and Commerce Code section 15.51(a) provides for injunctive relief to enforce a covenant not to compete. Tex. Bus. & Com. Code §15.51(a).

Some courts interpreted subsection one of this statute as not requiring an irreparable harm element. For example, in *Coastal Marine Service of Texas, Inc. v. City of Port Neches*, the court held that a condemning authority has the right to seek a temporary injunction for access to a private landowner's tract for surveying purposes. 11 S.W.3d 509, 514 (Tex. App.—Beaumont 2000, no pet.). The court held that this type of claim fell into an exception to the general rule and that there was no irreparable harm requirement. *Id*. at 515. The Texas Supreme Court has since held: "[A]lthough [section 65.011(1)] does not expressly make the lack of an adequate legal remedy a prerequisite for injunctive relief, this requirement of equity continues. [T]he statute does not permit injunctive relief without the showing of irreparable harm otherwise required by equity." *Town of Palm Valley v. Johnson*, 87 S.W.3d 110, 111 (Tex. 2001).

C. Burden Of Proof

To be entitled to temporary injunctive relief, the applicant must plead a cause of action and show a probable right to recover on that cause of action and a probable, imminent, and irreparable injury in the interim. *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191 (Tex, App.—Fort Worth 2005, no pet.); *see, generally,* Tex. Civ. Prac. & Rem. Code, chapter 65.

The party seeking injunctive relief has the burden to establish all of the elements for that relief. *Butnaru v. Ford Motor Co.*, 84 S.W.3d at 204; *N. Cypress Med. Ctr. Operating Co. v. St. Laurent*, 296 S.W.3d 171, 175 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Harbor Perfusion, Inc. v. Floyd*, 45 S.W.3d 713, 718 (Tex. App.—Corpus Christi 2001, no pet.); *Tom James Co. v. Mendrop*, 819 S.W.2d 251, 253 (Tex. App.—Fort Worth 1991, no writ). The party applying for a temporary injunction has the burden of production, which is the burden of offering some evidence that establishes a probable right to recover and a probable interim injury. *In re Tex. Natural Res. Conservation Comm'n*, 85 S.W.3d 201, 204 (Tex. 2002) (quoting *Camp v. Shannon*, 162 Tex. 515, 348 S.W.2d 517, 519 (1961)); *Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc*., NO. 01-11-00323-CV, 2011 Tex. App. LEXIS 7654 (Tex. App.—Houston [1st Dist.] Sept. 22, 2011, no pet. history); *Dallas Anesthesiology Associates, P.A. v. Texas Anesthesia Group, P.A.*, 190 S.W.3d 891 (Tex. App.—Dallas 2006, no pet.). If the applicant for temporary injunction does not discharge its burden of pleading and proof as to any one element for temporary injunctive relief, the applicant is not entitled to a temporary injunction. *Dallas Anesthesiology Associates, P.A.*, 190 S.W.3d at 891.

This burden does not change because the applicant is a defendant and cross-plaintiff. In suits where the plaintiff seeks injunctive relief, a defendant can assert cross-actions and counterclaims. *City of Dallas v. Megginson*, 222 S.W.2d 349 (Tex. Civ. App.—Dallas 1949, writ refused n.r.e). A cross-action for an injunction puts the cross-petitioner in the position of a plaintiff. *Cunningham v. City of Corpus Christi*, 260 S.W. 266 (Tex. Civ. App.—San Antonio 1924, no writ). And a defendant is only entitled to an injunction where the case would have supported an injunction had the defendant been an original plaintiff. *Pearce v. Atlantic Life Ins. Co.*, 36 S.W.2d 553 (Tex. Civ. App.—Dallas 1931, no writ). Otherwise stated, a party seeking an injunction must plead and tender evidence to support all of the necessary equities. *Smith v. Switzer*, 293 S.W. 850 (Tex. Civ. App.—San Antonio 1927), *aff'd*, 300 S.W. 31 (Tex. Comm'n App. 1927).

IV. Preliminary Issues: Jurisdiction, Venue, Parties

A. Subject Matter Jurisdiction

A plaintiff should prepare an application for a temporary injunction or restraining order. This may be included in the original petition or in a separate document. District, county, or statutory probate courts have jurisdiction to hear applications for injunctive relief. Tex. Const. Art. 5, §§8, 16; Tex. Civ. Prac. & Rem. Code §65.021(a); Tex. Gov't Code § 24.007, 25.0026, 26.051.

The most common courts for injunctions are the district courts. The district courts are constitutional courts of general jurisdiction. Tex. Const. Art. 5 §§ 1, 8; Tex. Gov't Code Ann. §§ 24.007, 24.008. A district court has "exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body." Tex. Const. Art. 5 § 8; *Subaru of America v. David McDavid Nissan*, 84 S.W.3d 212, 220 (Tex. 2002) (courts of general jurisdiction are presumed to have subject matter jurisdiction unless contrary showing is made). Specifically, district courts have jurisdiction to issue writs of injunction. Tex. Const. Art. 5 § 8; Tex. Gov't Code Ann. §§ 24.008; Tex. Civ. Prac. & Rem. Code Ann. §65.021.

An injunction will be reversed where the trial court does not have jurisdiction. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 512 (Tex. 2010) (affirmed reversal of anti-suit injunction where trial court did not have jurisdiction); *Counsel Fin. Servs., L.L.C. v. Leibowitz*, No. 13-10-00200-CV, 2011 Tex. App. LEXIS 5079, *32-33 (Tex. App.—Corpus Christi July 1, 2011, pet. denied) (same).

B. Personal Jurisdiction

It is very common for a plaintiff to file a petition and seek temporary restraining order relief before the defendant is served. A trial court has the ability to hear such a request and grant relief. But a plaintiff should provide the defendant notice of a temporary injunction hearing. Due to the fact that it takes time to file a special appearance and set a hearing thereon, it is very common for a trial court to hear applications for temporary restraining orders and/or temporary injunctions before ruling on a special appearance. The most common issue is whether a defendant waives its right to assert a special appearance if it participates in a hearing regarding an application for temporary injunctive relief. Plaintiffs have argued that by participating in the hearing, the defendants made a general appearance that waived their right to assert a special appearance.

1. Objecting To Personal Jurisdiction

A special appearance permits a nonresident defendant to object to personal jurisdiction in a Texas court. Tex. R. Civ. P. 120a; *Boyd v. Kobierowski*, 283 S.W.3d 19, 21 (Tex. App.—San Antonio 2009, no pet.). A nonresident defendant may be subject to personal jurisdiction in a Texas court if that defendant enters a general appearance. *Boyd*, 283 S.W.3d at 21 (citing Tex. R. Civ. P. 120a; *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 201 (Tex. 1985) (per curiam)). "A general appearance entered before a special appearance waives any special appearance complaint." *Boyd*, 283 S.W.3d at 21 (citing *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 304-05 (Tex. 2004) (per curiam)). "[A] party enters a general appearance when it (1) invokes the judgment of the court on any question other than the court's jurisdiction, (2) recognizes by its acts that an action is properly pending, or (3) seeks affirmative action from the court." *Exito*, 142 S.W.3d at 304; *Dawson-Austin v. Austin*, 968 S.W.2d 319, 322 (Tex. 1998). *See, e.g., Liberty Enters., Inc. v. Moore Transp. Co.*, 690 S.W.2d 570, 571-72 (Tex. 1985) (defendant waived special appearance by filing motion for new trial and agreeing to reinstate cause of action); *Phoenix Fireworks, Mfg. v. DM Plastics*, No. 04-98-00209-CV, 1998 Tex. App. LEXIS 7395, 1998 WL 354927, at *2 (Tex. App.—San Antonio, June 30, 1998, no pet.) (not designated for publication) (same). A party must strictly comply with rule 120a to avoid making a general appearance. *Dawson-Austin v. Austin*, 920 S.W.2d 776, 783 (Tex. App.—Dallas 1996, no writ); *Morris v. Morris*, 894 S.W.2d 859, 862 (Tex. App.—Fort Worth 1995, no writ).

2. Participating In Temporary Injunction Procedure Does Not Waive Objection To Personal Jurisdiction

Texas courts have recognized that appearing in matters ancillary and prior to the main suit does not constitute a general appearance in the main suit and will not waive a plea to the jurisdiction or special appearance. *See, e.g., In re M.G.M*, 163 S.W.3d 191, 200-01 (Tex. App.—

Beaumont 2005, no pet.); *Valsangiacomo v. Americana Juice Import*, 35 S.W.3d 201 (Tex. App.—Corpus Christi 2000, no pet.); *Turner v. Turner*, No. 14-98-00510-CV, 1999 Tex. App. LEXIS 491, 1999 WL 33659, at *3 (Tex. App.—Houston [14th Dist.], Jan. 28, 1999, no pet.) (holding attorney's presence at temporary restraining order hearing did not constitute general appearance because hearing related to ancillary matter); *Cleaver v. George Staton Co., Inc.*, 908 S.W.2d 468, 470 (Tex. App.—Tyler 1995, writ denied) (concluding that where wife's counsel offered observations relevant to questions involving the merits of her husband's trust suit, to which the wife was a necessary party, but did not seek relief on issues pending before the court, was not a general appearance); *Smith v. Amarillo Hosp. Dist.*, 672 S.W.2d 615, 617 (Tex. App.—Amarillo 1984, no writ) (holding that where party, who was not served, sat at counsel's table at the court's request, but did not file any pleadings, take any affirmative action, or participate in the trial, was not a general appearance); *Perkola v. Koelling & Assocs., Inc*., 601 S.W.2d 110, 111-12 (Tex. Civ. App.—Dallas 1980, writ dism'd) (holding defendant did not waive his plea by contesting interlocutory temporary injunction); *Green v. Green*, 424 S.W.2d 479, 481 (Tex. Civ. App.—Tyler 1968, no writ). *See also Alliant Group, L.P. v. Feingold*, 2009 U.S. Dist. LEXIS 34730 (S.D. Tex. Apr. 24, 2009) (party did not waive objection to personal jurisdiction by appearing at temporary restraining order hearing in Texas state court before removal).

For example, one court of appeals held: "We hold that [appellant] did not waive his plea by contesting the interlocutory temporary injunction. [Appellant's] appearance at this hearing on an ancillary matter was not an appearance in the main case. The main suit, for permanent injunction and damages, will be litigated subsequently, and this temporary injunction hearing did not resolve an issues of law or fact in the main case." *Perkola*, 601 S.W.2d at 112. Therefore, a trial court can conduct a hearing on an application for temporary injunctive relief before ruling on a defendant's special appearance.

3. Impact Of Agreement To Extend Temporary Injunctive Relief On Personal Jurisdiction

Another issue is whether a defendant can agree to extend an order granting temporary injunctive relief without waiving its right to object to personal jurisdiction. In *Carey v. State*, the defendants entered into an agreed extension of the temporary restraining order and agreed temporary injunction, enjoining them from, among other things, selling their travel-related software licenses. No. 04-09-00809-CV, 2010 Tex. App. LEXIS 5683 (Tex. App.—San Antonio July 21, 2010, pet. denied). The plaintiff argued that "by agreeing to those trial court orders prior to filing their special appearances, the Careys made general appearances, and therefore waived any special appearance complaint." *Id*. The court of appeals disagreed:

> Although in some instances an agreement to a trial court order constitutes a general appearance, Texas courts have also recognized that appearing in matters ancillary and prior to the main suit does not constitute a general appearance in the main suit and will not waive a plea to the jurisdiction. In fact, this court held the filing of a writ of mandamus and motion for emergency relief did not waive a defendant's special appearance because, among other things, "an original proceeding is a formally independent matter." Recognizing the distinction between the main suit and an ancillary proceeding, we hold the Careys' agreement to the extension of the temporary restraining and temporary injunction orders do not constitute general appearances. Accordingly, we hold the Careys did not waive their special appearances by agreeing to an extension of the temporary restraining order or agreed temporary injunction.

Id. at *7-9.

Similarly, in *In re M.G.M.*, the court of appeals refused to hold that a defendant waived his special appearance when defendant agreed to the entry of a collateral order. 163 S.W.3d 191, 200-01 (Tex. App.—Beaumont 2005, no pet.). The court of appeals held:

> Under the facts and circumstances contained in the record, we agree with Matthew that the trial court erred in ruling that he waived his special appearance plea by making a general appearance on

> June 24, 2003. As previously noted, the temporary emergency ex parte protective order was extended by agreement of the parties on June 24, 2003. This extended order expressly provided that Matthew's trial counsel "agreed to extend the Ex-Parte Protective Order . . . subject to and without prejudicing or waiving any plea to the jurisdiction or special appearance of [Matthew]." We cannot permit a trial court to find a party's special appearance motion waived because the party entered into an agreed collateral order, signed by the trial judge, which explicitly recognized that the party did not waive special appearance by entering into the agreed order. . . . Here, the trial court abused its discretion in ruling that Matthew waived his plea of special appearance after signing an order explicitly recognizing the special appearance issue had been preserved. Our holding does not decide the personal jurisdiction issue regarding Matthew. We simply hold that the trial court erred in finding he waived a hearing and ruling on the merits.

Id.

Further, in *Aduli v. Aduli*, the court of appeals addressed the issue of whether a defendant waived a special appearance by entering into a set of agreed temporary injunctions after his special appearance was denied. 368 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2012, no pet.). The court held that the defendant did not waive his special appearance. *See id*. (citing Tex. R. Civ. P. 120a(4) (if objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose, and any such appearance shall not be deemed a waiver of the objection to jurisdiction); *Antonio v. Marino*, 910 S.W.2d 624, 628 (Tex. App.—Houston [14th Dist.] 1995, no writ) (filing stipulation, even without expressly making it subject to special appearance, did not waive objection to personal jurisdiction)). Accordingly, though it is uncertain due to a lack of Texas Supreme Court authority, Texas precedent would support the position that a party does not waive an objection to personal jurisdiction by agreeing to extend a temporary restraining order.

4. Impact of Jurisdiction Ruling On Temporary Injunction

Another issue is whether the injunction is valid and enforceable where a court later determines that the trial court lacks personal jurisdiction. Persons subject to an injunctive order issued by a court with jurisdiction must obey the decree until it is modified or reversed, even if they have proper grounds to object to it. *GTE Sylvania, Inc. v. Consumers Union of U. S., Inc*., 445 U.S. 375 (1980). An injunction or restraining order improperly issued, unless it is a total nullity, must be obeyed even though the irregularities may result in its subsequent dissolution. *Ex parte Coffee*, 160 Tex. 224, 328 S.W.2d 283 (1959); *Green Oaks, Ltd. v. Cannan*, 749 S.W.2d 128 (Tex. App.—San Antonio 1987), writ denied with per curiam opinion, 758 S.W.2d 753 (Tex. 1988).

If a temporary restraining order or temporary injunction is void, it will not support an order of contempt for noncompliance. *Ex parte Lesher*, 651 S.W.2d 734, 736 (Tex. 1983). In *Lesher*, a temporary restraining order was void on its face because the trial court waived the bond requirement. *See id*. The Texas Supreme Court held that because the order did not comply with Rule 684, which is mandatory, it was void on its face and "will not support an order of contempt." *Id*. at 736.

A judgment or order entered without jurisdiction over a party is void. *In re Green Oaks Hosp. Subsidiary, L.P*., 297 S.W.3d 452 (Tex. App.—Dallas 2009, no pet.); *In re M.R.M. & E.E.M.*, 807 S.W.2d 779, 782 (Tex. App.—Houston [14th Dist.] 1991, writ denied). A court cannot issue an antisuit injunction or, for that matter, any other kind of injunctive judgment unless it has jurisdiction over the person to be enjoined. *See Greenpeace, Inc. v. Exxon Mobil Corp.*, 133 S.W.3d 804, 809–10 (Tex. App.—Dallas 2004, pet. denied) (stating that injunctive relief is available "[s]o long as the court issuing the injunction has in personam jurisdiction over the entity or individual" to be enjoined); *Walker v. Loiseau*, No. 03-02-328-CV, 2003 WL 21705253, at *9 (Tex. App.—Austin 2003, no pet.). Accordingly, one justice has stated that where a court of appeals holds that a special appearance should be granted, that it should also hold that a previously granted temporary injunction should be vacated. *Murray v. Epic Energy Res., Inc*., 300 S.W.3d 461, 472-73 (Tex. App.—Beaumont 2009, no pet) (Kreger, J., dissenting) ("I would conclude the trial court did not have specific jurisdiction over

Murray and should have granted his special appearance. I would vacate the trial court's order granting the temporary injunction for lack of jurisdiction.").

For example, in *Valsangiacomo v. Americana Juice Import*, a defendant filed a special appearance and the trial court denied same and entered a temporary injunction. 35 S.W.3d 201 (Tex. App.—Corpus Christi 2000, no pet.). The defendant appealed the special appearance, and the court of appeals reversed the trial court's denial. The court of appeals ordered that the case be dismissed for lack of personal jurisdiction. This resulted in the vacating of the temporary injunction. Accordingly, if a special appearance is ultimately affirmed, the trial court has no personal jurisdiction over the case and any orders that have been entered are void. A party should not be held in contempt for violating a void order. For example, the Texas Supreme Court has held in a mandamus proceeding that a trial court abused its discretion in holding a defendant in contempt for violating a void injunction order. *See Ex parte Shaffer*, 649 S.W.2d 300, 301-02 (Tex. 1983) (holding that trial court abuses its discretion by holding party in contempt for violating void order). A void order has no force or effect and confers no rights; it is a mere nullity. *Slaughter v. Qualls*, 139 Tex. 340, 345, 162 S.W.2d 671, 674 (1942). A trial court that holds a party in contempt for violating a void order necessarily abuses its discretion. *Ex parte Shaffer*, 649 S.W.2d at 301-02.

But a party certainly takes a risk in intentionally violating an injunction with the expectation that a court of appeals will ultimately reverse a trial court's ruling as to a special appearance motion. If the party is wrong, a contempt charge will be sustained. For example, if a court of appeals affirms the denial of a special appearance, then it may also affirm a temporary injunction. *See, e.g., Walker v. Loiseau*, 2003 Tex. App. LEXIS 6337 (Tex. App.—Austin July 24, 2003, no pet.) (affirmed denial of special appearance and affirmed granting of temporary injunction); *Smith v. Lanier*, 998 S.W.2d 324 (Tex. App.—Austin 1999, pet. denied) (same).

A trial court should consider a special appearance before determining the merits of a request for a temporary injunction. Texas Rule of Civil Procedure 120a expressly states: "Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard." Tex. R. Civ. P. 120a(2). "Courts cannot ignore the plain meaning of the Texas Rules of Civil Procedure, which have the same effect as statutes, and must construe the rules to ensure a fair and equitable adjudication of the rights of litigants." *Esty v. Beal Bank S.S.B.*, 298 S.W.3d 280, 297 (Tex. App.—Dallas 2009, no pet.).

For example, in *In re GM Oil Properties, Inc.*, a trial court heard and denied a motion to compel arbitration before ruling on a defendant's special appearance. No. 10-000001-CV, 2010 Tex. App. LEXIS 5115 (Tex. App.—Houston [1st Dist.] July 1, 2010, original proceeding). The court of appeals granted mandamus relief and held that the trial court abused its discretion in ruling on the motion to compel arbitration before ruling on the special appearance: "Personal jurisdiction concerns the court's power to bind a particular person or party. Thus, it follows that personal jurisdiction must be determined before a trial court grants a plaintiff's requested relief against a defendant who challenges personal jurisdiction." *Id.* at *8. The court of appeals ordered the trial court to vacate its ruling on the motion to compel arbitration. *See id.; IRN Realty Corp. v. Hernandez*, 300 S.W.3d 900, 902-03 (Tex. App.—Eastland 2009, no pet.) (trial court erred in ruling on motion to compel merits-based discovery before ruling on special appearance).

C. Venue For Injunction Suits

If the injunctive relief is ancillary to a lawsuit, venue for the injunctive relief is with the lawsuit. *O'Quinn v. Hall*, 77 S.W.3d 452, 456 (Tex. App.—Corpus Christi 2002, orig. proc). If the injunctive relief is the primary relief requested, then the suit for injunctive relief should be in the county where the defendant is domiciled. Tex. Civ. Prac. & Rem. Code § 65.023(a); *Billings v. Concordia Heritage Ass'n*, 960 S.W.2d 688, 693 (Tex. App.—El Paso 1997, pet. denied). "The statute placing venue for injunction suits in the county of the defendant's domicile is mandatory." *In re Continental Airlines, Inc.*, 988 S.W.2d 733, 736 (Tex. 1998); *Burton v. Rogers*, 504 S.W.2d 404, 407 (Tex. 1973). One court has even called it jurisdictional. *Butron v. Cantu*, 960 S.W.2d 91, 94-95 (Tex. App.—Corpus Christi 1997, no writ).

A court has provided some guidance as to when a suit is primarily for injunctive relief such that this provision is applicable:

> In determining whether a lawsuit constitutes a suit for permanent injunction for the purpose of

> determining proper venue, we only look to the express relief sought in the allegations and prayer of the plaintiff's petition. When those pleadings show that the issuance of a permanent injunction is the primary and principal relief sought in the lawsuit, venue is mandatory in the county of the defendant's domicile. On the other hand, if a review of the allegations and the prayer in the plaintiff's petition shows that issuance of a permanent injunction would be merely ancillary to a judgment awarding declaratory relief, the requirement that the suit be brought in the county of the defendant's domicile does not apply.

In re City of Dallas, 977 S.W.2d 798, 803 (Tex. App.—Fort Worth 1998, orig. proceeding).

Moreover, a defendant can participate in a hearing on an application for temporary injunctive relief without waiving its right to seek a transfer of venue. *Perkola v. Koelling & Assocs., Inc*., 601 S.W.2d 110, 111-12 (Tex. Civ. App.—Dallas 1980, writ dism'd) (holding defendant did not waive his objection to venue by contesting interlocutory temporary injunction). For example, the one court held: "We hold that [appellant] did not waive his [objection to venue] by contesting the interlocutory temporary injunction. [Appellant's] appearance at this hearing on an ancillary matter was not an appearance in the main case. The main suit, for permanent injunction and damages, will be litigated subsequently, and this temporary injunction hearing did not resolve an issues of law or fact in the main case." *Perkola*, 601 S.W.2d at 112. *See also Greene v. Barker*, 806 S.W.2d 274 (Tex. App.—Fort Worth 1991, no writ); *Calloway v. Calloway*, 442 S.W.2d 926 (Tex. Civ. App.—Eastland 1969, no pet.); *Pugh v. Borst*, 237 S.W.2d 1021 (Tex. Civ. App.—San Antonio 1951, no writ).

D. Parties

There is precedent that before a court can issue a temporary injunction, that all necessary parties should be joined in the suit. The Texas Supreme Court held "that the refusal of a temporary injunction when there is an absence of necessary parties, who might readily be joined in the suit, cannot be deemed an abuse of discretion." *Scott v. Graham*, 156 Tex. 97, 292 S.W.2d 324, 325 (Tex. 1956). Likewise, the San Antonio Court of Appeals has explained that "parties [who] have contract rights, which would be affected by such an injunction, . . . are necessary parties without whose presence the injunction is unauthorized." *Bourland v. City of San Antonio*, 347 S.W.2d 660, 661 (Tex. Civ. App.—San Antonio 1961, no writ); *see also Davis v. Turner*, 145 S.W.2d 258, 260 (Tex. Civ. App.—Galveston 1940, no writ) (reversing order granting temporary injunction because only four of forty-six officers were joined in suit). In *Bays*, the Waco Court of Appeals articulated the "well settled rule that in a suit of this kind to cancel a contract or to restrain the enforcement thereof, all parties to such contract are necessary parties to the suit." *Bays v. Wright*, 132 S.W.2d 144, 145 (Tex. Civ. App.—Waco 1939, no writ). The court noted that a suit for temporary injunctive relief is "an equitable suit and the primary object of equity is to grant full relief and to adjust in one suit the rights and duties of all interested parties that grow out of or are connected with the subject matter of the suit." *Id*. For this reason, the court held as follows:

> All persons in whose favor or against whom there might be a recovery, however partial, and all persons who are so interested that their rights or duties might be affected by the decree, must be made parties in order that their rights may be adjudicated and finally determined, and all parties bound by a single decree.

Id.; see also Conrad Constr. Co. v. Freedmen's Town Pres. Coal., 491 S.W.3d 12 (Tex. App.—Houston [14th Dist.] March 8, 2016, no pet.) (reversed temporary injunction because trial court did not have necessary parties); *Down Time-South Tex., LLC v. Elps*, No. 13-13-00495-CV, 2014 Tex. App. LEXIS 3047 (Tex. App.—Corpus Christi Mar. 20, 2014, no pet. hist.) (affirmed denial of temporary injunction where injunction would terminate employment relationship and the new employer was not joined in the suit).

However, other "courts have held that a party with rights to be preserved pending final trial need not join all necessary parties before obtaining interim orders, such as a temporary injunction." *Hyde v. Ray*, No. 2-03-339-CV, 2004 Tex. App. LEXIS 5129, 2004 WL 1277869, at *2 (Tex. App.—Fort Worth June 10, 2004, no pet.) (mem. op.); *see also Speedman Oil Co. v. Duval Cty. Ranch Co*., 504 S.W.2d 923, 926 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.) ("Persons

against whom no complaint of wrongdoing is lodged and against whom no injunctive relief is sought are not indispensable parties (to a proceeding for temporary injunction). . . . [I]t may well be that other parties will have to be brought into the suit. . . . This, however is not fatal to the temporary equitable relief granted." (internal citations omitted)). "Before a case is called for trial, additional parties necessary or proper parties to the suit, may be brought in, either by the plaintiff or the defendant, upon such terms as the court may prescribe." Tex. R. Civ. P. 37. "Thus, on appeal of a preliminary matter, such as the issuance of [the] temporary injunction, the question of necessary and indispensable parties [to the suit] is not reached." *Hyde*, 2004 Tex. App. LEXIS 5129, 2004 WL 1277869, at *2-3.

V. Technical Rules For Requesting Temporary Injunctive Relief

A. Rules For Temporary Restraining Orders

A party should refer to Texas Rule of Civil Procedure 680 for the requirements for obtaining a temporary restraining order:

> No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after signing, not to exceed fourteen days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. No more than one extension may be granted unless subsequent extensions are unopposed. In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence of all matters except older matters of the same character; and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.
>
> Every restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought.

Tex. R. Civ. P. 680. This Rule provides that a court may issue a temporary restraining order *ex parte*, however, the application must be verified and there must be a showing that the plaintiff will incur irreparable injury before notice a hearing can be set. *See id*.

An *ex parte* temporary restraining order must be in writing and have the following items: 1) identify the person or entity to be restrained; 2) state why the injunction should be issued without notice and *ex parte*; 3) state the reasons for the issuance by defining in detail the injury and describing why it is irreparable; 4) define in detail the act to be restrained; 5) date and hour of issuance; 6) date it will expire, which shall not exceed fourteen days; 7) shall set a date for a hearing for a temporary injunction; 8) set an amount for the required bond; and 9) be verified or otherwise supported by affidavits. Tex. R. Civ. P. 680, 683, 684. Note that the allowance of an ex parte hearing is in

contravention of the general rule that the moving party must provide not less than three-days notice for any hearing. Tex. R. Civ. P. 21.

After filing the bond and paying the required fees, the temporary restraining order should be filed and entered of record immediately. Texas Rule of Civil Procedure 685 provides:

> Upon the grant of a temporary restraining order or an order fixing a time for hearing upon an application for a temporary injunction, the party to whom the same is granted shall file his petition therefore, together with the order of the judge, with the clerk of the proper court; and, if such orders do not pertain to a pending suit in said court, the cause shall be entered on the docket of the court in its regular order in the name of the party applying for the writ as plaintiff and of the opposite party as defendant

Tex. R. Civ. P. 685. The clerk's office will prepare the citation and writ.

B. Extending Temporary Restraining Orders

A temporary restraining order may be extended by written order. The plaintiff may ask the trial court to extend the order by filing a motion before the order expires and showing good cause. Tex. R. Civ. P. 680; *In re Texas Nat. Res. Conserv. Comm'n*, 85 S.W.3d 201, 203 (Tex. 2002). The court can grant one extension of an additional fourteen days. *See id.* However, if the extension is by agreement, it can be for more than fourteen days. Tex. R. Civ. P. 680.

An oral extension is not effective. *In re Lesikar*, 899 S.W.2d 654 (Tex. 1995); *Ex parte Conway*, 419 S.W.2d 827, 828 (Tex. 1967). A party may not be held in contempt of a temporary restraining order that has been orally extended. *Ex parte Lesikar*, 899 S.W.2d 654 (Tex. 1995). "An oral extension of a [temporary restraining order] is ineffective, and the contemnor must have notice of the actual written extension before he can be charged with contempt." *Id*. For example, a trial court may not orally extend a temporary restraining order at the end of a temporary injunction hearing for any period of time. *In re Edward D. Jones & Co*., No. 03-98-00545-CV, 1999 Tex. App. LEXIS 1229 (Tex. App.—Austin February 25, 1999, original proceeding).

C. Example Of Obtaining Temporary Restraining Order

Many jurisdictions have local rules regarding *ex parte* or emergency applications. For example, in Tarrant County, the local rules provide:

> Rule 3.30 Matters Requiring Immediate Action:
>
> (a) Filing. No application for action or relief of any kind shall be presented to a judge until the application or case had been filed with the clerk and assigned to the court, unless it is impossible to do so. If it is impossible to file an application or case before it is presented to a judge, then it shall be filed as soon thereafter as possible, and the clerk notified of all actions taken by the judge.
>
> (b) Presentment. Every application for action or relief of any kind shall be presented first to the judge of the court to which it is assigned. If that judge is not available to hear the application, then it may be presented to any other court with subject matter jurisdiction. After a judge has announced a ruling on the application or deferred ruling, the application shall not be presented to any other judge without leave of the judge to which it was first presented.
>
> (c) Ex Parte Applications. Every application for relief ex parte shall contain a certificate signed by counsel that: (1) to the best of his or her knowledge that party against whom relief is sought ex parte is not represented by counsel in the matter made the basis of the relief sought; or, (2) counsel for the party against whom relief is sought ex parte has been notified of the application and has stated whether he or she wishes to be heard; or (3) diligent attempts to notify counsel for the party against whom ex party relief is sought have been unsuccessful,

and the circumstances to not permit additional efforts to give notice.

Accordingly, in Tarrant County, a party must do the following to obtain a temporary restraining order:

1) File an adequate petition with sufficient factual allegations and requesting injunctive relief with a verification and certificate for emergency relief in the clerk's office and pay the required filing fees. A party should also have a form of an order for the court's consideration, a bond, a motion for expedited discovery with attached discovery requests that the party wants served on the defendant, and an order granting expedited discovery. File the motion for expedited discovery.

2) Walk with the clerk's office representative to the court that the case has been assigned and talk to the court's specific clerk. That clerk will tell the party if the assigned court is available to hear the request for a temporary restraining order. If the assigned court is not available, the court clerk will normally attempt to locate a judge that is available. Once an available judge has been located, proceed to that court.

3) Present the application and discovery motion to the available judge, as well as forms of your orders. The judge will review the application and may ask questions. The court will look for a certificate regarding the opposing parties' counsel. If the party has stated that the opposing party is represented by counsel, and that the opposing party wants to be heard, the court will likely attempt to call the opposing counsel to receive arguments or may set a hearing on the application so that both sides may appear and present evidence. If the certificate states that the defendant is not represented by counsel or that the plaintiff has attempted to give notice to opposing counsel but to no avail, then the court may hear the application *ex parte*.

4) If the court grants relief, he or she will sign the proposed order with any changes that the court feels are appropriate. The court will fill in a date for a temporary injunction hearing and will set the amount of the bond. The party should take a pre-approved bond with a blank in the form. Normally, the bonding company will authorize the attorney to fill in the blank with the amount set by the court up to a pre-approved limit.

5) Take the signed orders and completed bond to the court's clerk. That clerk will enter the order and bond and proceed to issue the writ. The party must now pay an additional fee for the writ, and take the receipt back to the court specific clerk.

6) The clerk's office will issue the citation, writ, and deliver them to a sheriff or private process server for service of process along with the original application and any other motions or discovery orders that have been executed.

D. Citation, Writ, Service, and Return of Service

1. Citation

Texas Rule of Civil Procedure 686 provides:

> Upon the filing of such petition and order not pertaining to a suit pending in the court, the clerk of such court shall issue a citation to the defendant as in other civil cases, which shall be served and returned in like manner as ordinary citations issued from said court; provided, however, that when a temporary restraining order is issued and is accompanied with a true copy of plaintiff's petition, it shall not be

> necessary for the citation in the original suit to be accompanied with a copy of plaintiff's petition, nor contain a statement of the nature of plaintiff's demand, but it shall be sufficient for said citation to refer to plaintiff's claim as set forth in a true copy of plaintiff's petition which accompanies the temporary restraining order; and provided further that the court may have a hearing upon an application for a temporary restraining order or temporary injunction at such time and upon such reasonable notice given in such manner as the court may direct.

Tex. R. Civ. P. 686.

Texas Rule of Civil Procedure 686, which addresses the citation requirements for injunctive relief, "provides that when a petition for injunction is filed and the petition is not ancillary to an action then pending in that court, the clerk of the court shall issue a citation and cause it to be served on the defendant and returned as in other civil cases." *In re Poe*, 996 S.W.2d 281, 282-83 (Tex. App.—Amarillo 1999) (emphasis added) (citing TEX. R. CIV. P. 686). But when the petition for the injunction is ancillary to the underlying suit, the citation requirement in Rule 686 does not apply. "Although a trial on a petition for permanent injunction requires citation to be served and returned as ordinary citations, such a process is not necessary on an application for a temporary injunction." *Rapid Settlements, Ltd. v. Settlement Funding, LLC*, 358 S.W.3d 777, 788 (Tex. App.—Houston [14th Dist.] 2012) (citing *Long v. State*, 423 S.W.2d 604, 605 (Tex. App.—Houston [14th Dist.] 1968, no pet.)).

2. Writ of Injunction

Texas Rule of Civil Procedure 687 provides:

> The writ of injunction shall be sufficient if it contains substantially the following requisites:
>
> (a) Its style shall be, "The State of Texas."
>
> (b) It shall be directed to the person or persons enjoined.
>
> (c) It must state the names of the parties to the proceedings, plaintiff and defendant, and the nature of the plaintiff's application, with the action of the judge thereon.
>
> (d) It must command the person or persons to whom it is directed to desist and refrain from the commission or continuance of the act enjoined, or to obey and execute such order as the judge has seen proper to make.
>
> (e) If it is a temporary restraining order, it shall state the day and time set for hearing, which shall not exceed fourteen days from the date of the court's order granting such temporary restraining order; but if it is a temporary injunction, issued after notice, it shall be made returnable at or before ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of service thereof, as in the case of ordinary citations.
>
> (f) It shall be dated and signed by the clerk officially and attested with the seal of his office and the date of its issuance must be indorsed thereon.

Tex. R. Civ. P. 687. Furthermore, Rule 688 provides:

> When the petition, order of the judge and bond have been filed, the clerk shall issue the temporary restraining order or temporary injunction, as the case may be, in conformity with the terms of the order, and deliver the same to the sheriff or any constable of the county of the residence of the person enjoined, or to the applicant, as the latter shall direct. If several persons are enjoined, residing in different counties, the clerk shall issue such additional copies of the writ as shall be requested by the applicant.

Tex. R. Civ. P. 688.

3. Service and Return

Texas Rule of Civil Procedure 689 provides:

> The officer receiving a writ of injunction shall indorse thereon the date of its receipt by him, and shall forthwith execute the same by delivering to the party enjoined a true copy thereof. The original shall be returned to the court from which it issued on or before the return day named therein with the action of the officer indorsed thereon or annexed thereto showing how and when he executed the same.

Tex. R. Civ. P. 689. There is some authority that if the injunction is not properly issued or served, then it is improper and not enforceable. *Schliemann v. Garcia*, 685 S.W.2d 690, 693 (Tex. App.—San Antonio 1984, orig. proc.).

But other courts would imply the opposite – that service of the writ is not a condition precedent to enforcement where the defendant has notice of the injunction. *See, e.g., Pacheco v. Allala*, 261 S.W. 148 (Tex. Civ. App. 1924, no writ) ("It is also contended by appellants that service of the restraining order is void, first, because the order was served before it was issued, and, second, because it was served on the sheriff, one of the defendants, by that officer's deputy. If these circumstances constituted irregularities, the consequences are immaterial. They do not affect the validity of the injunction, of the issuance of which the defendants seem to have been apprised in some efficient way. It is sufficient that they received notice, and are observing the order."). If a party has notice of a restraining order or injunction it should not disobey the injunction; instead, if the party believes that the service is erroneous, it should take steps to have the order or return of service set aside. *P.H. Vartanian, Annotation, Right to Punish for Contempt for Failure to Obey Court Order or Decree Either Beyond Power or Jurisdiction of Court or Merely Erroneous*, 12 A.L.R. 2d 1059 § 44(c) (1950). *See also Gillie v. Fleming*, 133 N.E. 737 (1922). Due process is satisfied when the parties have notice and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

One case held that just because service may not be proper, the injunction or restraining order is not absolutely void as to the defendants who did not have notice before the hearing. If those defendants violate the injunction after they have learned of its issuance and before they have made any effort to have it set aside, they may, under a proper hearing and showing be held in contempt of court for such violation. *Romero v. Grande Lands, Inc.*, 288 S.W.2d 907 (Tex. Civ. Apps.—San Antonio 1956, no writ). The failure of a court to comply with the state injunction statutes by failing to give defendants effective notice before entering a temporary restraining order and stating why the order is issued without notice, although error, does not void the restraining order and consequently does not invalidate contempt proceedings based on such order. 17 AM. JUR. 2D Contempt § 132 (2012). *See also Board of Trustees of Community College Dist. v. Cook County College Teachers Union*, 356 N.E.2d 1089 (1st Dist. 1976).

Rule 683 requires actual notice by personal service or otherwise. *Ex parte Jackman*, 663 S.W.2d 520, 524 (Tex. App.—Dallas 1983, orig. proceeding). A party's argument that the injunction was improperly served and therefore his noncompliance was justified failed. The contempt order was proper because the evidence showed that he had actual notice. If the disobeyed order is clear and unambiguous and the contemnor had knowledge of it, any disobedience of the order raises an inference of willfulness. *Ex parte Chambers*, 898 S.W.2d 257, 261 (Tex. 1995). Accordingly, if the defendant has notice of the temporary restraining order or temporary injunction, it should comply.

E. Pleadings To Support Temporary Injunctive Relief

1. Basic Requirements

The basic pleading requirements for a temporary injunction are the same for a temporary restraining order except that there does not need to be an *ex parte* provision. The purpose of pleadings is to give fair notice of claims and defenses and notice of the relief sought. *Perez v. Briercrogt Serv. Corp.*, 809 S.W.2d 216, 218 (Tex. 1991). To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor*, 84 S.W.3d 198, 204 (Tex. 2002).

The party requesting temporary injunctive relief should name as defendants all persons who have interests that will be affected to make the injunction effective. *Texas Liquor Control Board v. Diners' Club, Inc.*, 347 S.W.2d 763, 767 (Tex. Civ. App.—Austin 1961, writ ref. n.r.e.).

2. Must Assert Independent Cause of Action

"A trial court lacks the authority to grant any injunctive relief unless a claim or cause of action is alleged." MCDONALD AND CARLSON, TEXAS CIVIL PRACTICE 2D, § 11.119 (2000). An injunction is an equitable remedy and not a cause of action. *Brittingham v. Ayala*, 995 S.W.2d 199, 201 (Tex. App.—San Antonio 1999, pet. denied). If a claim or cause of action is not alleged, the trial court lacks authority to issue an injunction. *AG of Tex. v. Hawes*, No. 14-99-00275-CV, 2000 Tex. App. LEXIS 851 (Tex. App.—Houston [14th Dist.] August 24, 2000, no pet.) (not designated for publication) (finding trial court had no jurisdiction to enter temporary injunction where plaintiff asserted no cause of action); *Patten v. Quirl*, 447 S.W.2d 470, 472 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.). Therefore, a plaintiff must assert some cause of action in order to obtain injunctive relief.

3. Specificity of Cause of Action

Texas Rule of Civil Procedure 682 states: "No writ of injunction shall be granted unless the applicant therefore shall present his petition to the judge verified by his affidavit and *containing a plain and intelligible statement of grounds for such relief*." Tex. R. Civ. P. 682 (emph. added). A petition not purely for injunctive relief need only disclose facts showing that an injunction may be properly granted as incidental relief. *Vasquez v. Bannworths, Inc.*, 707 S.W.2d 886, 888 (Tex. 1986); *Texas State Board of Examiners in Optometry v. Lane, 349 S.W.2d 763, 764* (Tex. Civ. App.—Fort Worth 1961, no writ). The applicant must also state that it is willing to post a bond, and verify the application. Tex. R. Civ. P. 682, 684.

The Texas Supreme Court has not been hyper-technical in its approach to determining whether a party has fair notice of the relief requested in a temporary injunction proceeding. *Sharma v. Vinmar International Ltd.*, No. 14-05-01088, 2007 WL 177691 (Tex. App.—Houston [14th Dist.] January 25, 2007, no pet.). The Court has held that a trial court is obliged to look at all pleadings, not just the original petition, in determining what relief the party is seeking. *Vasquez v. Bannworths, Inc.*, 707 S.W.2d at 888. Further, the Texas Supreme Court has held that a trial court can award specific performance in a temporary injunction where that request was not included in the petition. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993).

Some courts of appeals have been lenient in pleading requirements. For example, in *Flores v. Gutschow*, the court of appeals held that the trial court had authority to award permanent injunctive relief although it was not plead for because previous requests for temporary injunctive relief put the other side on notice that it was in issue. No. 13-00-556-CV, 2001 Tex. App. LEXIS 8506 *16 (Tex. App.–Corpus Christi December 13, 2001, pet. denied) (not design. for pub.). *See also Miller v. Armogida*, 877 S.W.2d 361, 364-65 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (holding that general request for relief sufficient basis for injunction imposed as sanction). In *Skinner v. DVL Holdings, L.L.C.*, the plaintiff sued an ex-employee under a common law cause of action for misappropriation of trade secrets and did not raise any contractual, non-compete arguments. No. 05-03-00785-CV, 2004 Tex. App. LEXIS 703 n. 1 (Tex. App.—Dallas 2004, no pet.). Although the temporary injunction order differed from the relief sought in the underlying pleading, the court held that the temporary injunction was proper as it narrowed the more general language found in the pleading. *Id*. at *7.

Furthermore, because the purpose of a temporary injunction is solely to keep the status quo, the pleading requirements for a temporary injunction are less than for a permanent injunction. *Lubbock v. Green*, 312 S.W.2d 279 (Tex. Civ. App.—Amarillo 1958, no writ). Accordingly, in *Biodynamics, Inc. v. Guest*, the court held that a trial court does not abuse its discretion in granting a temporary injunction that exceeds the relief the applicant seeks so long as the terms of the injunction are necessary to give full effect to the injunction sought. 817 S.W.2d 128, 130 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd by agr.). *See also, Khaledi v. H.K. Global Trading, Ltd.*, 126 S.W.3d 273, 285 (Tex. App.—San Antonio 2003, no pet.); *Anderson v. CMGP, Inc.*, No. 14-01-01259-CV, 2002 Tex. App. LEXIS 4702 (Tex. App.—Houston [14th Dist.] June 27, 2002, no pet.) (not design. for pub.); *Liberty Lending Servs. v. Muselwhite*, No. 14-98-01372-CV, 1999 Tex. App. LEXIS 6407 (Tex. App.—Houston [14th Dist.] August 26, 1999, no pet.) (not design. for pub.).

However, there are cases that have a more exacting standard and requirement for pleading requests for injunctive relief. "Texas courts have uniformly held that in obtaining injunctive relief, '[an] applicant must specify the precise relief sought and that a court is without jurisdiction to grant relief beyond and in addition to that particularly

specified.'" *Tarrant County, Texas, Comm'r Court v. Markham*, 779 S.W.2d 872 (Tex. App.—Fort Worth 1989, writ denied); *Birds Const., Inc. v. Gonzalez*, 595 S.W.2d 926 (Tex. Civ. App.—Corpus Christi 1981, no writ); *American Precision Vibrator Co. v. Nat'l Air Vibrator Co*., 764 S.W.2d 274 (Tex. App.—Houston [1st Dist.] 1988, no writ); *Fairfield v. Stonehenge Ass'n Co*., 678 S.W.2d 608 (Tex. App.—Houston [14th Dist.] 1984, no writ); *Scoggins v. Cameron Co. Water Imp. Dist.* No. 15, 264 S.W.2d 169 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.); *Fletcher v. King*, 75 S.W.2d 980 (Tex. Civ. App.—Amarillo 1934, writ ref'd). "[W]here the injunctive relief granted exceeds the relief requested by the applicant in the petition, the trial court exceeds its jurisdiction." *RP&P, Inc. v. Territo*, 32 S.W.3d 396 (Tex. App.—Houston [14th Dist.] 2000, no pet.). *See also Fairfield v. Stonehenge Ass'n Co*., 678 S.W.2d 608, 611 (Tex. App.—Houston [14th Dist.] 1984, no writ) (holding trial court exceeded its jurisdiction by entering injunction precluding home building company from selling homes where applicant's petition for injunctive relief did not specifically request trial court to enjoin the sale of homes).

To be safe, a plaintiff should request broad injunctive relief in its petition, and the court can always narrow the request and award less than that requested. In *Sharma v. Vinmar International Ltd*., the court of appeals affirmed a trial court's temporary injunction that awarded relief that did not match the exact relief requested in the application. No. 14-05-01088, 2007 WL 177691 (Tex. App.—Houston [14th Dist.] January 25, 2007, no pet.). The appellant argued that the trial court did not have authority to award relief that was not exactly requested in the application. *Id*. The court of appeals found that the application requested broader relief than that awarded, and the trial court did not err in narrowing the relief. *Id.*

VI. Issues With Verification Requirement

A. Verification Requirement

Rule 682 provides that a court may not issue a writ of injunction unless the applicant presents his petition to the judge verified by his affidavit and containing a plain and intelligible statement of the grounds for such relief. Tex. R. Civ. P. 682. The necessity of a proper affidavit is of paramount importance. *Ex parte Rodriguez*, 568 S.W.2d 894 (Tex. Civ. App.—Fort Worth 1978, no writ). The standard for the sufficiency and the efficacy of an affidavit is: "the facts must be set forth in a manner that if they are falsely sworn to, the affiant may be prosecuted and convicted of perjury." *Williams v. Bagley*, 875 S.W.2d at 808. An affidavit sworn to on knowledge and belief is insufficient and the insufficiency and inadequacy is based upon the reliance that the affiant is acting on his belief. *See id.* Therefore, if he had a belief that was entirely erroneous and not based on knowledge or fact, the affiant could not be successfully prosecuted and convicted of perjury. *See id; Ex parte Miller*, 604 S.W.2d 324 (Tex. Civ. App.—Dallas 1980, no writ); *Schultz v. City of Houston*, 551 S.W.2d 494 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ). *See also Industrial State Bank of Houston v. Wylie*, 493 S.W.2d 293 (Tex. Civ. App.—Beaumont 1973, no writ). A temporary restraining order is a writ of injunction within the meaning of Texas Rule of Civil Procedure 682 and must comply with the verification requirement. *Ex parte Coffee*, 160 Tex. 224, 328 S.W.2d 283 (1959); *Williams v. Bagley*, 875 S.W.2d 808 (Tex. App.—Beaumont 1994, no writ).

B. Objection To Lack Of Verification

A trial court should not grant a temporary injunction based on a petition verified by defective affidavit when the question of the sufficiency of the affidavit has been raised prior to the introduction of evidence. *Kern v. Treeline Golf Club, Inc.*, 433 S.W.2d 215 (Tex. App.—Houston [14th Dist.] 1968, no writ). Granting an injunction under these circumstances amounts to reversible error. *See id*.; *Kern v. Treeline Golf Club, Inc.*, 433 S.W.2d 215 (Tex. App.—Houston [14th Dist.] 1968, no writ) (filed pre-trial objection to pleading defect); *Atkinson v. Arnold*, 893 S.W.2d 294 (Tex. App.—Texarkana 1995, no writ) (same).

However, a verified petition is not essential to the granting of a temporary injunction granted after a full hearing on the evidence independent of the petition. *Williams v. Bean*, 688 S.W.2d 618 (Tex. App.—Dallas, no writ) (where party did not file special exception or other pleading challenging defective verification; but rather, objected to lack of verification during temporary injunction hearing, and objection was overruled, trial court did not err in granting temporary injunction); *Atkinson v. Arnold*, 893 S.W.2d 294 (Tex. App.—Texarkana 1995, no writ); *Georgiades v. DiFerrante*, 871 S.W.2d 878, 882 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

Courts consider it a waiver of rights when a party waits to object to the verification defect until after evidence is presented. *See Crystal Media, Inc.*

v. HCI Acquisition Corp., 773 S.W.2d 732 (Tex. App.—San Antonio 1989, no writ) (non-movant waived any right to object to verification defect when it objected to the defect at the close of its evidence). The reason for not requiring literal compliance with Rule 682 is that the writ of injunction is not granted upon the averments of the petition alone, but upon sworn and competent evidence admitted upon a full hearing. *See Atkinson*, 893 S.W.2d at 297. Consequently, where a movant's temporary injunction application contains a verification defect and the movant fails to present any evidence at the temporary injunction hearing, it is error to grant the temporary injunction. *Id*.

C. Attorney Should Not Verify Application For Injunction

An attorney should not verify a pleading, because he or she then becomes a witness. Rule 3.08(a) of the Texas Disciplinary Rules of Professional Conduct provides that a lawyer shall not continue as an advocate before a tribunal if the lawyer "is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client," unless the lawyer's testimony relates to an uncontested issue, a matter of formality, or legal fees, the lawyer is appearing pro se, or "the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client." Tex. Disciplinary R. Prof'l Conduct 1.02(a)(2), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon Supp. 1997) (Tex. State Bar R. art. X, § 9). Comment 4 to Rule 3.08 further explains that "the principal concern over allowing a lawyer to serve as both an advocate and witness for a client is the possible confusion that those dual roles could create for the finder of fact" and that, if the testimony "concerns a controversial or contested matter, combining the roles of advocate and witness can unfairly prejudice the opposing party." *Id*.

The Comment further states: "A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof." *Id*.

Although Rule 3.08 "was promulgated as a disciplinary standard rather than one of procedural disqualification, [the Texas Supreme Court has] recognized that the rule provides guidelines relevant to a disqualification determination." *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004); *Anderson Producing Inc. v. Koch Oil Co*., 929 S.W.2d 416, 422 (Tex. 1996). Analyzing the issue under the dictates of Rule 3.08, the Texas Supreme Court, in *Anderson Producing*, stated that the rule "prohibits a testifying attorney from acting as an advocate before a tribunal[.]" *Id*. The court recognized both the potential for confusion by the finder of fact when an attorney serves as both an advocate and witness and "the concern that an opposing party may be handicapped in challenging the credibility of a testifying attorney." *Id. See also Aghili v. Banks*, 63 S.W.3d 812 (Tex. App.—Houston [14th Dist.] 2001, pet denied) (attorney who conducted foreclosure sale was disqualified from appearing as both a witness and counsel in action to set aside the non-judicial foreclosure); *Gonzales v. State*, 117 S.W.3d 831 (Tex. Crim. App. 2003).

One leading Texas treatise states: "attorneys are well advised to use caution in swearing to pleadings because (1) they usually lack the requisite personal knowledge about the matters to be verified and (2) they risk becoming fact witnesses and, thus, ethically disqualified to continue as trial attorneys in the case." MCDONALD & CARLSON, TEXAS CIVIL PRACTICE 2d, §7:23 (2002). Therefore, a party defending against an application for injunction may argue that it will be prejudiced if the applicant's attorney is permitted to serve as both counsel and a witness.

VII. Discussion Of Equitable Elements For Temporary Injunctive Relief

A. Probable Right of Recovery

To show a probable right of recovery, an applicant need not establish that it will finally prevail in the litigation, rather, it must only present some evidence that, under the applicable rules of law, tends to support its cause of action. *Camp v. Shannon*, 162 Tex. 515, 348 S.W.2d 517, 519 (Tex. 1961); *Butnaru v. Ford Motor Co*., 84 S.W.3d 198, 211, (Tex. 2002); *IAC, Ltd. v. Bell Helicopter Textron, Inc*., 160 S.W.3d 191, 197 (Tex. App.—Fort Worth 2005, no pet.).

The expression "probable right to recovery" is a term of art; it does not imply any kind of determination that becomes the law of the case. *Gatlin v. GXG, Inc*., No. 05-93-01852-CV, 1994 Tex. App. LEXIS 4047 (Tex. App.—Dallas April 19, 1994, no pet.); *183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901, 904 (Tex. App.--Austin 1989, writ dism'd). To establish a probable right of recovery, a party need not prove conclusively that it will prevail on the merits;

instead, it need only show that a bona fide issue exists as to its right to ultimate relief. *Gatlin*, 1994 Tex. App. LEXIS at 4047; *183/620 Group Joint Venture*, 765 S.W.2d at 904; *Camp v. Shannon*, 162 Tex. 515, 348 S.W.2d 517, 519 (1961). Under this standard, it is sufficient for an applicant merely to adduce evidence that tends to support its right to recover on the merits. *183/620 Group*, 765 S.W.2d at 904. The common law clothes the trial court with broad discretion in determining whether an applicant has met its burden. *Recon Exploration, Inc. v. Hodges*, 798 S.W.2d 848, 851 (Tex. App.—Dallas 1990, no writ). However, if the evidence fails to furnish any reasonable basis for concluding that the applicant has a probable right of recovery, the granting of the temporary injunction is an abuse of discretion. *Camp*, 348 S.W.2d at 519.

Other courts have held that with regard to proving a probable right to the relief sought, the applicant is not required to prove that it will prevail on final trial and, instead, the only question before the trial court is whether the applicant is entitled to preservation of the status quo pending trial. *INEOS Grp. Ltd. v. Chevron Phillips Chem. Co.*, 312 S.W.3d 843, 848 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

In a fiduciary case, the usual burden of establishing a "probable right of recovery" may not apply if the gist of the complaint is that a fiduciary is guilty of self-dealing. *See Health Discovery Corp. v. Williams*, 148 S.W.3d 167, (Tex. App.—Waco 2004, no pet.) (interested directors had burden to establish fairness of transaction in temporary injunction proceeding). In a fiduciary self-dealing context, the "presumption of unfairness" attaches to the transactions of the fiduciary, shifting the burden to the defendant to prove that the plaintiff will not recover. *See Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508-09 (Tex. 1980) (a profiting fiduciary has the burden of showing the fairness of the transactions). If the presumption cannot be rebutted at the temporary injunction stage, then the injunction should be granted as the plaintiff, by simply presenting a prima facie case of the existence of a fiduciary relationship and a probable breach of that duty has adduced sufficient facts tending to support his right to recover on the merits. *Camp v. Shannon*, 348 S.W.2d 517, 519 (Tex. 1961); *Health Discovery Corp. v. Williams*, 148 S.W.3d at 169-70; *Jenkins v. Transdel Corp.*, 2004 WL 1404464 (Tex. App.—Austin 2004, no pet.).

B. Evidence of Probable, Imminent, Irreparable Injury Requirement

To be entitled to a temporary injunction, the applicant must plead a cause of action and show a probable right to recover on that cause of action and a probable, imminent, and irreparable injury in the interim. *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191 (Tex. App.—Fort Worth 2005, no pet.). Evidence of this injury requirement is important. For example, where a plaintiff failed to produce evidence that it faced probable, imminent, and irreparable injury in the absence of a temporary injunction, the trial court did not abuse its discretion in denying the request for a temporary injunction. *Reach Group, L.L.C. v. Angelina Group*, 173 S.W.3d 834, (Tex. App.—Houston [14th Dist.] 2005, no pet.). A trial court abuses its discretion if it issues a temporary injunction when the applicant has an adequate remedy at law, such as money damages that can be calculated with reasonable certainty. *Jordan v. Rash*, 745 S.W.2d 549 (Tex. App.—Waco 1988, no writ); *Alert Synteks, Inc. v. Jerry Spencer*, L.P., 151 S.W.3d 246 (Tex. App.—Tyler 2004, no pet.) (where no evidence showed that defendant did not have the ability to pay damages, the trial court abused its discretion in granting an injunction); *Doerwald v. MBank Fort Worth, N.A.*, 740 S.W.2d 86 (Tex. App.—Fort Worth 1987, no writ) (injunction denied because plaintiff could recover ascertainable lost profits).

"Imminent" means that the injury is relatively certain to occur rather than being remote and speculative. *Limon v. State*, 947 S.W.2d 620, 625 (Tex. App.—Austin 1997, no writ); *City of Arlington v. City of Fort Worth*, 873 S.W.2d 765, 768-69 (Tex. App.—Fort Worth 1994, writ dism'd w.o.j.). The harm inquiry is not the harm that a plaintiff would incur without the ultimate relief requested in the suit, but rather, it is the harm the plaintiff would sustain in the interim without temporary injunctive relief. *Mejerle v. Brookhollow Office Prod. Inc.*, 666 S.W.2d 192, 193 (Tex. App.—Dallas 1983, no writ). As one court has stated: "An injunction that fails to identify the harm that will be suffered if it does not issue must be declared void and be dissolved." *Fasken v. Darby*, 901 S.W.2d 591, 593 (Tex. App.—El Paso 1995, no writ). *See also Metra United Escalante, L.P. v. Lynd Co.*, 158 S.W.3d 535, 541 (Tex. App.—San Antonio 2004, no pet.).

The Texas courts have held that the mere possibility of an injury in the future is insufficient to justify the issuance of a temporary injunction. *Mother & Unborn Baby Care v. Doe*, 689 S.W.2d 336 (Tex. App.—Fort Worth 1985, writ dism'd w.o.j.). Damages are usually an adequate remedy at law and the requirement of demonstrating an interim injury necessitating a temporary injunction is not to be taken lightly. *Walling v. Metcalfe*, 863 S.W.2d 56 (Tex. 1993). *See also N. Cypress Med. Ctr. Operating Co. v. St. Laurent*, 296 S.W.3d 171 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

The burden to prove harm is normally on the applicant. *N. Cypress Med. Ctr. Operating Co. v. St. Laurent*, 296 S.W.3d at 177. For example, an applicant has the burden to establish that its damages cannot be calculated and is not on the non-movant to disprove that notion. *See id.; Reach Group, L.L.C. v. Angelina Group*, 173 S.W.3d 834, 838 (Tex. App.—Houston [14th Dist.] 2005, no pet.). "An existing remedy is adequate if it 'is as complete and as practical and efficient to the ends of justice and its prompt administration as is equitable relief.'" *Blackthorne v. Bellush*, 61 S.W.3d 439, 444 (Tex. App.—San Antonio 2001, no pet.).

In determining imminent harm, "the trial court may determine that, when violations are shown up to or near the date of trial, the defendant has engaged in a course of conduct and the court may assume that it will continue, absent clear proof to the contrary." *Operation Rescue-Nat'l v. Planned Parenthood of Houston & Se. Tex., Inc*., 937 S.W.2d 60, 77 (Tex. App.—Houston [14th Dist.] 1996), *aff'd as modified*, 975 S.W.2d 546 (Tex. 1998) (citing *State v. Tex. Pet Foods*, 591 S.W.2d 800, 804 (Tex. 1979)).

There is no adequate remedy at law if the damages cannot be calculated or the damages cannot be measured by a certain pecuniary standard. *Butnaru v. Fort Motor Co*., 84 S.W.3d 198, 204 (Tex. 2002); *Texas Indus. Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d 529, 533 (Tex. App.—Houston [1st Dist.] 1992, no writ). For example, courts have routinely held that when an ex-employee leaves and starts competing against the employer, the employer's damages are difficult to calculate because of the unknown effect. *Wright v. Sport Supply Group, Inc.*, 137 S.W.3d 289 (Tex. App.—Beaumont 2004, no pet.). *See also, Universal Health Serv., Inc. v. Thompson*, 24 S.W.3d 570, 578 (Tex. App.—Austin 2000, no pet.); *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 597 (Tex. App.—Amarillo 1995, no pet.). In *Beasley v. Hub City Texas, L.P.*, the court of appeals held in a covenant not to compete case that there was sufficient evidence to prove that the plaintiff suffered irreparable harm from the defendant's competition, attempts to steal employees, and use of confidential information where the plaintiff was "a non-asset-based company, making its relationships with vendors and customers and its reputation its primary assets." No. 01-03-00287-CV, 2003 Tex. App. LEXIS 8550 *24-26 (Tex. App.—Houston [1st Dist.] September 29, 2003, no pet.).

One issue is when is the inquiry for the inability to calculate damages: at the time of the injunction hearing or in the future. At least one court has held that whether damages are not quantifiable at the time of the injunction hearing is not the issue, rather it is whether they will be quantifiable in the future. *Haq v. America's Favorite Chicken Co*., 921 S.W.2d 729, 731 (Tex. App.—Corpus Christi 1996, writ dism'd) (upholding the denial of a temporary injunction, finding that even though the movants' potential damages for lost profits and loss of customers were not quantifiable, the movants had failed to show that their claim on the merits would not provide an adequate remedy). *See also Southwestern Chem. & Gas Corp. v. Southeastern Pipe Line Co.*, 369 S.W.2d 489, 495 (Tex. App.—Houston [1st Dist.] 1963, no writ) ("The courts draw a distinction in damage suits between uncertainty merely as to the amount and uncertainty as to the fact of legal damages.").

Evidence that the defendant does not have sufficient assets to cover the amount of damages that the plaintiff will incur will support a finding that an applicant has no adequate remedy at law. *Hartwell v. Lone Star, PCA*, No. 06-17-00030-CV, 2017 Tex. App. LEXIS 5628 (Tex. App.—Texarkana June 21, 2017, pet. filed); *Loye v. Travelhost, Inc*., 156 S.W.3d 615 (Tex. App.—Dallas 2004, no pet.).

Even if a party can calculate damages and the defendant has the ability to pay them, if there is evidence that the defendant will secret away funds and attempt to avoid payment, a trial court has discretion to award injunctive relief. *Hartwell v. Lone Star, PCA*, 2017 Tex. App. LEXIS 5628. For example, injunctive relief was proper in a case in which the defendants had followed a pattern of transferring funds to corporations that were under their control. *Minexa Arizona, Inc. v. Staubach*, 667 S.W.2d 563, 567-68 (Tex. App.—Dallas 1984, no writ). The court found that the fact that damages are calculable is irrelevant if, absent injunction, defendants would be able to dissipate specific funds,

contributed by members of plaintiff class, that would otherwise be available to pay judgments. Additionally, in *R.H. Sanders Corporation v. Haves*, the court found that there was no adequate remedy at law when the plaintiff established that the defendant diverted corporate assets to personal use, removed funds from the corporation, drew excessive sums for travel and was stripping the corporation of its assets. 541 S.W.2d 262, 265 (Tex. Civ. App.—Dallas 1976, no writ). *See also TCA Bldg. Co. v. Northwestern Resources Co*., 890 S.W.2d 175, 179 (Tex. App.—Waco 1994, no writ); *Ohlhausen v. Thompson*, 704 S.W.2d 434, 1986 Tex. App. LEXIS 11853 (Tex. App.—Houston [14th Dist.] 1986, no pet.) (no adequate remedy of law where party spend part of funds in controversy); *Abramov v. Royal Dallas, Inc*., 536 S.W.2d 388 (Tex. Civ. App.—Dallas 1976, no writ) (affirmed injunction requiring party to deposit funds in registry of court where evidence showed party had no ability to pay damages); *Baucum v. Texam Oil Corp*., 423 S.W.2d 434, 442 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.) (upholding temporary injunction restraining defendant from disposing of a number of different kinds of assets and properties in order to maintain status quo, and explaining that "the mere fact that there exists a remedy at law is not conclusive, but the remedy at law must be complete, practical and efficient, and subject to prompt administration. This means, of course, that equity will step in with its injunctive processes where the remedy at law may not be sufficient or effective").

It is important to review the plaintiff's causes of action and the substantive law for same to determine if there are any exceptions to the normal requirement of no adequate remedy at law. For example, in the context of covenants not to compete, some courts have presumed that an employer has no adequate remedy at law when an important employee leaves and begins improperly competing against the employer – in that situation the burden is arguably on the employee, or conspirator with the employee, to rebut the prima facie presumption that there is no adequate remedy at law. *Wright v. Sport Supply Group, Inc.*, 137 S.W.3d 289 (Tex. App.—Beaumont 2004, no pet.); *Beasley v. Hub City Texas, L.P.*, 2003 Tex. App. LEXIS 8550 *27; *Unitel Corp. v. Decker*, 731 S.W.2d 636, 641 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Hartwell's Office World, Inc. v. Systex Corp*., 598 S.W.2d 636, 639 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

Courts have held that provisions for injunctive relief in agreements are evidence that there is no adequate remedy at law, and that they will support a trial court's temporary injunction. *See, e.g., Wright v. Sport Supply Group, Inc.*, 137 S.W.3d 289 (Tex. App.—Beaumont 2004, no pet.); *Henderson v. KRTS, Inc.*, 822 S.W.2d 769 (Tex. App.—Houston [1st Dist.] 1992, no writ). For example, in *Henderson v. KRTS, Inc*., there was a dispute over the attempted purchase and relocation of a radio station. *Henderson*, 822 S.W.2d at 771. The parties signed a contract that included a provision that Seller agreed that Buyer's remedy at law would be inadequate, and that if Seller breached the agreement Buyer could seek temporary or permanent injunctive relief in any action to enforce the agreement. *Id*. at 772. The trial court granted a temporary injunction. On appeal, in response to an argument that the plaintiff had an adequate remedy at law, the court quoted the parties' contract, and held that defendant "by agreement, stipulated that [buyer] could seek injunctive relief without the necessity of proof of actual damages." *Id.* As a result, the court rejected defendant's argument that plaintiff had shown no inadequate remedy at law. *Id.*

However, in *W. R. Grace & Co.- Conn v. Taylor*, the court found that irreparable harm contractual provisions were not sufficient to support a trial court's finding of irreparable harm. No. 14-06-01056-CV, 2007 Tex. App. LEXIS 3779 (Tex. App.—Houston [14th Dist.] May 17, 2007) (citing *Dominion Video Satellite, Inc. v. Echostar Satellite Corp*., 356 F.3d 1256, 1266 (10th Cir. 2004); *Smith, Bucklin & Assocs., Inc v. Sonntag*, 317 U.S. App. D.C. 364, 83 F.3d 476, 481 (D.C. Cir. 1996); *Baker's Aid, Inc. v. Hussmann Foodservice Co*., 830 F.2d 13, 16 (2d Cir. 1987); *Traders Int'l, Ltd. v. Scheuermann*, No. H-06-1632, 2006 U.S. Dist. LEXIS 61995, 2006 WL 2521336, at *8 (S.D. Tex. Aug. 30, 2006) (not designated for publication); *Sec. Telecom Corp. v. Meziere*, No. 05-95-01360-CV, 1996 Tex. App. LEXIS 806, 1996 WL 87212, at *2 (Tex. App.—Dallas Feb. 28, 1996, no writ.) (not designated for publication)).

In a fiduciary case, the beneficiary may not required to show that he has an inadequate remedy at law. *183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901 (Tex. App.—Austin 1989, writ dism. w.o.j.) (and authorities cited therein). Since a breach of fiduciary duty claim is by nature an "equitable" action, even in cases where damages may be sought, if the fiduciary relationship is still continuing, the beneficiary has an equitable right to be protected from further harm. *See id*. Thus, there is never an adequate remedy at law for a breach of fiduciary duty claim. *See id*. *Minexa Arizona, Inc. v. Staubach*, 667 S.W.2d 563 (Tex. App.—Dallas

1984, no writ). In *183/620 Group Joint Venture*, the appellee and other landowners entrusted a large sum of money to the appellants to be held by them as fiduciaries and expended according to the parties' contracts. 765 S.W.2d at 902-03. Pursuant to the contracts, the appellants were to serve as "project manager" of the landowners' properties and expend the money to improve the properties. *Id*. at 902. The appellee subsequently sued the appellants, asserting that the appellants failed to properly manage the construction improvement projects. *Id*. The appellee sought an injunction to require the appellants to repay funds expended in defense of the pending lawsuit and to restrain the appellants from any future expenditures for the same purpose. *Id*. at 902-03. The trial court found that the parties' contracts did not authorize the appellants to use the money entrusted to them for their defense. *Id*. at 903. The trial court further found that a temporary injunction was necessary to maintain the existing status of the trust funds even though there was no showing that appellants would be unable to pay a judgment for damages that might be based on their misappropriation of the funds. *Id*. The court of appeals initially noted that an inadequate legal remedy must generally be shown before a trial court can grant a temporary injunction. *Id*. The court reasoned, however, that such a showing "is only an ordinary requirement; it is not universal or invariable." *Id*. Where the injunction seeks to restrain a party from expending sums held by them as fiduciaries, the court held that damages would not be an adequate remedy "because the funds will be reduced, pending final hearing, so they will not be available in their entirety, in the interim, for the purposes for which they were delivered to the holder in the first place." *Id*. at 904. *See also Hibbs v. Hibbs*, No. 13-97-755-CV, 1998 Tex. App. LEXIS 1876 (Tex. App.—Corpus Christi March 26, 1998, no pet.) (not designated for publication); *Farr v. Hall*, 553 S.W.2d 666, 672 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.) (court affirmed injunction and held that when there is a clear statutory prohibition to the transaction, there is no necessity to show the absence of an adequate legal remedy). *But see Zaffirini v. Guerra*, No. 04-14-00436-CV, 2014 Tex. App. LEXIS 12761 (Tex. App.—San Antonio November 26, 2014, no pet.) (court disagreed with the *183/620 Group Joint Venture* court and held that there must be a showing if irreparable injury even in a breach of fiduciary duty case.).

C. Inadequate Remedy At Law Requirement

Where the law furnishes a clear and adequate remedy, a court of equity will not grant relief by way of an injunction. *Cardinal Health Staffing Network, Inc. v. Bowen*, 106 S.W.3d 230 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *McDonnell v. Campbell-Taggart Associated Bakeries, Inc*., 376 S.W.2d 915 (Tex. Civ. App.—Dallas 1964, no writ). A party requesting a temporary injunction has the duty to negate the existence of adequate legal remedies. *Hancock v. Bradshaw*, 350 S.W.2d 955, 957 (Tex. Civ. App.—Amarillo 1961, no writ). "Adequate remedy at law preventing relief by injunction means a remedy which is plain and complete, and as practical and efficient to the end of justice and its prompt administration as a remedy in equity." *Id*. "Injunctive relief ought not be granted unless it appears that the complainant has no adequate remedy at law for prevention or redress of wrongs and grievance of which complaint is made." *Id*. "The granting of an injunction in the face of an adequate remedy at law is an erroneous abuse of the courts discretionary powers." *Id. See also Alert Synteks, Inc. v. Jerry Spencer, L.P*., 151 S.W.3d 246 (Tex. App.—Tyler 2004, no pet.).

For example, the Texas Supreme Court has expressly held that an injunction preventing access to condemned property pending further litigation of the right to condemn is improper since there is an adequate remedy at law by appeal to the county court at law. *Harris County v. Gordon*, 616 S.W.2d 167, 169 (Tex. 1981). Another example is that an antisuit injunction is not appropriate if a plea in abatement in the second court would provide an adequate remedy. *Atkinson v. Arnold*, 893 S.W.2d 294, 297-298 (Tex. App.—Texarkana 1995, no writ) (temporary injunction set aside when party failed to secure ruling on plea in abatement).

VIII. Avenues To Discover Facts To Support Application for Injunctive Relief

A. Motion To Expedite Discovery

A plaintiff may need discovery from the defendant to help prove its claims. However, under normal discovery practice, discovery cannot be initiated soon enough for the plaintiff to receive responses in time to use them in support of an application for temporary injunctive relief. Accordingly, along with the filing of the application, the plaintiff should consider filing a motion for expedited discovery. Texas Rule of Civil Procedure 191.1 provides that "the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by agreement of the parties or by court order for good cause." Tex. R. Civ. P. 191.1. As the court in *In re Home State County*

Mutual Insurance Co. stated: "The discovery rules provide the only permissible forms of discovery. However, a court may order, or the parties may agree to, discovery methods other than those provided in the discovery rules." No. 12-06-00144-CV, 2006 Tex. App. LEXIS 9919 (Tex. App.—Tyler November 15, 2006, orig. proc.). *See also Estate of Hunt v. St. Paul Fire & Marine Ins. Co*., No. 04-05-00334-CV, 2006 Tex. App. LEXIS 3087 (Tex. App.—San Antonio April 19, 2006, pet. denied).

Although not in the context of a temporary injunction, one court has held that it was harmful error to deny a motion to expedite discovery. In *Collins v. Cleme Manor Apartments*, Cleme Manor filed complaint in JP court for forcible detainer against Collins. 37 S.W.3d 527 (Tex. App.—Texarkana 2001, no pet.). After JP court ruled against her on July 21, 1999, Collins filed appeal w/ county court on July 26. On August 17, Collins sent discovery requests to Cleme Manor (due 30 days later). On August 18, county court set the trial for August 30 (20 days before Cleme Manor's responses were due). Collins filed a Motion for Continuance and a "Motion to Shorten Time to Answer Discovery," which the county court denied. On appeal, the Texarkana court held the trial court abused its discretion by denying Collins' motion to expedite. The court stated: "The Texas Supreme Court has commented on the importance of the discovery process to the administration of justice, saying that it makes 'a trial less of a game of blind man's bluff and more a fair contest with the issues and facts disclosed to the fullest practicable extent.'" *Id*. at 532 (citing *State v. Lowry*, 802 S.W.2d 669, 671 (Tex. 1991) (orig. proceeding) (quoting *United States v. Procter & Gamble Co*., 356 U.S. 677, 682 (1958))). The Texarkana court held that the county court had denied Collins's motion "in total disregard of her right to discovery," which was an abuse of discretion. *See id*. at 533.

Rule 191.1 requires a showing of good cause for a court to alter the normal discovery rules. Good cause exists where a hearing on temporary injunctive relief will be held on or before fourteen calendar days. The plaintiff should allege that it must engage in expedited discovery to fully prepare for the evidentiary burden that the plaintiff must carry at the hearing. The plaintiff should explain the need before the temporary injunction hearing, and before a deposition, for responses to requests for disclosure, requests for production (with actual documents, not just "will produce" language), and interrogatories. The plaintiff should request the court to order that the responses are due a certain number of days after service of the order granting the motion to expedite. The actual discovery requests should be attached to the motion, and served with the motion on the defendant. The plaintiff should request in the motion that the court order the defendant or its representative appear for a deposition within a certain number of days after it produces the responses to written discovery. Obviously, this should all be done before the temporary injunction hearing. The motion with discovery attached thereto should be served on the defendant with the citation, application, and temporary restraining order.

When a defendant is served with an order requiring expedited discovery, the defendant has more than a few things to do: retain an attorney, meet with the attorney, investigate defenses, obtain responsive documents, obtain other responsive information, prepare an answer, etc. Due to this amount of activity, it is not uncommon for the defendant and plaintiff to agree to extend the temporary restraining order to enable the parties time to respond to discovery and set mutually agreeable deposition dates. Texas Rule of Civil Procedure 680 allows the court to extend a temporary restraining order after the initial fourteen day extension by the agreement of the parties. If the injunction is extended by agreement, this will also allow the defendant time to request documents and the depositions of the plaintiff's key witnesses to prepare a defense for the temporary injunction hearing. The defendant should request that the expedited discovery order be a two-way street. In the unlikely event that a plaintiff would deny such a request, the defendant an always file an emergency motion to expedite discovery as well.

B. Production of Computer Equipment

As our society becomes more and more electronically adept, almost every case that deals with trade secrets or confidential information will have some association with a computer. The plaintiff may want to seek the production of the defendants' personal and work computers, blackberries, and other personal communication devices. Texas Rule of Civil Procedure 196 deals with the production of documents and "items." Accordingly, the plaintiff should place a request for computers and electronic devices in is initial request for production. This request for production is then attached to the motion to expedite discovery. The proposed order should have a place in it setting a deadline to produce computers and other electronic devices.

If the defendant voluntarily produces the requested equipment, the plaintiff can simply give it to its computer expert, who will make a copy of the hard drive and start searching for relevant information, communications, documents, etc. However, the defendant may object to producing his or her computers and personal electronic devices in that those items contain non-relevant, personal, private information. If the defendant objects, it should file a motion for protection and set a hearing on it.

In *In re Weekley Homes*, the Texas Supreme Court established requirements before an opponent can gain access to another's computer. 295 S.W.3d 309 (Tex. 2009). The opinion includes a summary of the proper procedures for seeking electronic discovery under Texas Rule of Civil Procedure 196.4:

- The party seeking to discover electronic information must make a specific request for that information and specify the form of production.

- The responding party must then produce any electronic information that is "responsive to the request and . . . reasonably available to the responding party in its ordinary course of business."

- If "the responding party cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested," the responding party must object on those grounds.

- The parties should make reasonable efforts to resolve the dispute without court intervention.

- If the parties are unable to resolve the dispute, either party may request a hearing on the objection, at which the responding party must demonstrate that the requested information is not reasonably available because of undue burden or cost.

- If the trial court determines the requested information is not reasonably available, the court may nevertheless order production upon a showing by the requesting party that the benefits of production outweigh the burdens imposed, again subject to Rule 192.4's discovery limitations.

- If the benefits are shown to outweigh the burdens of production and the trial court orders production of information that is not reasonably available, sensitive information should be protected and the least intrusive means should be employed. The requesting party must also pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

- Finally, when determining the means by which the sources should be searched and information produced, direct access to another party's electronic storage devices is discouraged, and courts should be extremely cautious to guard against undue intrusion.

Id. (internal citations omitted). *See also In re Harris*, No. 01-09-00771-CV, 2010 Tex. App. LEXIS 5122 (Tex. App.—Houston [1st Dist.] July 1, 2010, orig. proceeding); *In re Howard K. Stern*, No. 01-09-00438-CV, 2010 Tex. App. LEXIS 5580 (Tex. App.—Houston [14th Dist.] July 12, 2010, orig. proceeding).

Otherwise, both the plaintiff and defendant can agree to produce all computers and personal electronic devices to a neutral, court-appointed expert. Normally, that expert would have his fees paid by the parties equally. The benefit of this procedure is that both parties will provide search terms and parameters for the expert to search for relevant information on the items. This protects the defendant from unfair invasion of his or her privacy.

C. Spoliation Issues

If a party violates an injunction and destroys evidence or fails to safeguard it, then the party may be liable for contempt of court. However, even if not expressly precluded from destroying evidence in an injunction, if the destruction happens, the other party may be entitled to a spoliation instruction in the jury charge. Although Texas does not recognize an independent claim for spoliation of evidence, it does recognize that the intentional spoliation of evidence raises a presumption that the evidence was unfavorable to the spoliator. *See Trevino v. Ortega*, 967 S.W.2d 950 (Tex. 1998); *Brewer v. Dowling*, 862 S.W.2d 156, 159 (Tex. App.—Fort Worth 1993, writ denied). The result of this presumption is that the non-spoliating party is entitled to an instruction the jury charge. *See Whiteside v. Watson*, 12 S.W.3d 614, 621-22 (Tex. App.—Eastland 2000, pet. dism'd by agr.). This instruction may read as follows:

> A party is entitled to show that the opposing party has destroyed documents that would bear on a crucial issue in the case. You are instructed that the destruction of

> relevant evidence raises a presumption that the evidence would have been unfavorable to the spoliator or to the one destroying the document.

Id. Certainly, evidence of spoliation can be very persuasive at a temporary injunction hearing as well. A trial court would likely not err in presuming destroyed evidence did not favor the destroying party in the context of a temporary injunction hearing.

One court of appeals denied an attempt to use a spoliation presumption to support a temporary injunction where the trial court did not make an express finding on spoliation. *Reliant Hosp. Partners, LLC v. Cornerstone Healthcare Grp. Holdings, Inc.*, 374 S.W.3d 488, 495 (Tex. App.—Dallas 2012, pet. denied). The court stated: "Cornerstone has not cited to any case in which a trial court has applied the spoliation doctrine to support a temporary injunction, and we have found none. Under the facts of this case, we decline Cornerstone's invitation to apply the spoliation doctrine to support the injunction." *Id*.

IX. Potential Equitable Defenses to Injunctive Relief

A party defending against a request for injunctive relief should argue that the substantive and procedural requirements set forth above have not been met. Additionally, a party defending against a request for injunctive relief has other equitable arguments that can be made to defeat a request. An application for injunctive relief invokes a court's equity jurisdiction. *In re Gamble*, 71 S.W.3d 313, 317 (Tex. 2002). Therefore, the defending party can assert equitable defenses. Texas Rule of Civil Procedure 693 states: "The principles, practice and procedure governing courts of equity shall govern proceedings in injunctions when the same are not in conflict with these rules or the provisions of the statutes." TEX. R. CIV. P. 693. Accordingly, a defendant may, and should, raise various equitable defenses to a plaintiff's request for injunctive relief. *See Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006); *In re Gamble*, 71 S.W.3d 313, 317 (Tex. 2002); *Ethan's Glen Community Ass'n v. Kearney*, 667 S.W.2d 287 (Tex. App.—Houston [1st Dist.] 1984, no pet.). Although any equitable defense may apply, the two most common defenses – laches and unclean hands – are described below.

A. Equity Follows The Law

Courts generally adhere to the maxim that equity follows the law. *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 648 (Tex. 2007). Equitable doctrines conform to contractual and statutory mandates, not vice versa. *Texas Health Ins. Risk Pool v. Sigmundik*, 315 S.W.3d 12, 14 (Tex. 2010).

B. Party Seeking Equity Must Do Equity

Courts require a party seeking relief in equity to offer or plead willingness to do equity. *LDF Const., Inc. v. Bryan*, 324 S.W.3d 137, 149 (Tex. App.—Waco 2010, no pet.). When a party resorts to equity to assert a right not available under law, that party's own actions are to be measured by equitable standards, and he or she may not be relieved of the strict letter of the law to invoke equitable standards against an adversary and take cover under the strict letter of the law when his or her own acts are measured by equitable standards. *Meadows v. Bierschwale*, 516 S.W.2d 125, 132 (Tex. 1974); *Deep Oil Dev. Co. v. Cox*, 224 S.W.2d 312, 317 (Tex. Civ. App.—Fort Worth 1949, writ ref'd n.r.e.).

C. Lex Nil Frustra Facit

The law does nothing in vain. If the act sought to be enjoined has occurred prior to the granting of a temporary injunction, the issue has become moot and a court should deny the request for a temporary injunction. *Houston Transit Benefit Ass'n v. Carrington*, 590 S.W.2d 744, 745 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ) (citing *Cameron v. Saathoff*, 345 S.W.2d 281 (Tex. 1961)). "No effect can be given to an order enjoining the doing of that which has already been done." *Id*. This rule reflects the reality that when acts sought to be restrained have already occurred, a request to prevent the happening of certain events comes too late. *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001); *Rawlings v. Gonzalez*, 407 S.W.3d 420, 428 (Tex. App.—Dallas 2013, no pet.).

The same is true when the initial request to temporarily enjoin those acts was denied and the acts thereafter occurred before the resolution of the appeal from the denial of the temporary injunction. *Day v. First City Nat'l Bank*, 654 S.W.2d 794, 795 (Tex. App.—Houston [14th Dist.] 1983, no writ). Thus, while a damages claim may remain, the appeal from the denial of a temporary injunction is moot. *Gilpin v. Am. Fed'n of State, Cty., & Mun.*

Employees, 875 F.2d 1310, 1313 (7th Cir. 1989). *Powe v. Burdette*, No. 02-03-00383-CV, 2004 WL 1799947, at *1 (Tex. App.—Fort Worth Aug. 12, 2004, no pet.) (mem. op.) (dissolution of church and transfer of assets after temporary injunction denied mooted appeal from denial); *Day*, 654 S.W.2d at 795 (vote of trusts' share for proposed shareholders' resolution mooted appeal from denial of temporary injunction seeking to restrain that vote); *Scattergood v. Perelman*, 945 F.2d 618, 621 (3d Cir. 1991) (completion of challenged merger following denial of a preliminary injunction mooted the appeal from the denial).

D. Estoppel

A defendant may argue that a plaintiff is not entitled to temporary injunctive relief due to the equitable defense of estoppel. *City Of Houston*, No. B14-85-646-CV, 1985 Tex. App. LEXIS 12630 (Tex. App.—Houston [14th Dist.] December 19, 1085, no writ). The City of Houston Court stated:

> We further note that principals of estoppel are also relevant to our decision to deny the Broussards a temporary injunction. Mrs. Broussard testified that although she was aware in advance of the August 9, 1984 hearing, she chose not to attend. After the commissioner's hearing, objections to the commissioner's actions were timely filed by the Broussards; however, they waited ten months before pursuing this temporary injunction. During that interval the City had made substantial progress toward completion of the large project.

Id. See also Krenek v. South Texas Electrical Cooperative, 502 S.W.2d 605, 609 (Tex. Civ. App.—Corpus Christi 1973, no writ) (landowners did not pursue their temporary injunction, but stood by and permitted condemnor to erect the transmission line across their property, and were estopped as a matter of law from complaining). *See, generally, City of Houston v. Broussard*, No. B14-85-646-CV, 1986 Tex. App. LEXIS 12498 (Tex. App.—Houston [14th Dist.] March 27, 1986, no writ).

E. Laches

Since an injunction is an equitable remedy, the complaining party must have acted promptly to enforce its right. *See Jamail v. Stoneledge Condo Owners Assn.*, 970 S.W.2d 673, 676-77 (Tex. App.—Austin 1998, no pet.); *Landry's Seafood Inn & Oyster Bar v. Wiggins*, 919 S.W.2d 924, 927 (Tex. App.—Houston [14th Dist.] 1996, no writ) (denying temporary injunction because Landry's sat on its hands and allowed damages to accrue before raising a claim); *Foxwood Homeowners Assn. v. Ricles*, 673 S.W.2d 376, 379-80 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (trial court did not abuse discretion where delay constituted lack of due diligence). Equity aids the diligent and not those who slumber on their rights. *See Galtex Property Investors, Inc. v. City of Galveston*, 113 S.W.3d 922 (Tex. App.—Houston [14th Dist.] 2003, no writ).

The theory behind laches is that at times it is inequitable to allow a claim against a party when the delay in bringing the claim will work an injury or is a disadvantage to the party. *See Regent International Hotels, Ltd. v. Las Colinas Hotels Corporation*, 704 S.W.2d 101, 106 (Tex. App.—Dallas 1985, no writ). Otherwise stated, laches consists of an unreasonable delay in asserting one's legal or equitable rights coupled with a good-faith change of position by another to his detriment because of the delay. *Barfield v. Howard M. Smith Co.*, 426 S.W.2d 834, 840 (Tex. 1968). There are two essential elements in order to prove the affirmative defense of laches. *Stevens v. State Farm Fire & Casualty Co.*, 929 S.W.2d 665 (Tex. App.—Texarkana 1996, writ denied). First, the party must show that there has been an unreasonable delay in asserting legal or equitable rights. *See id.* at 672. Second, the party must show "a good faith change of position by another to his detriment because of the delay." *Id.*

Since injunctive relief is equitable, a party may defend against an injunctive request by pleading and presenting evidence of laches. *See Jamail v. Stoneledge Condo Owners Assn.*, 970 S.W.2d 673, 676-77 (Tex. App.—Austin 1998, no pet.). However, Texas caselaw does not prevent injunctive relief merely because a potential plaintiff did not file a claim as quickly as possible. *See Garth v. Staktek Corp.*, 876 S.W.2d 545, 550-51 (Tex. App.—Austin 1994, writ dism. w.o.j.). The Texas Supreme Court allowed a case to be brought a year after a competitor began production using the first producer's trade secrets.

> As a rule equity follows the law and generally in the absence of some element of estoppel or something akin thereto, the

> doctrine of laches will not bar a suit short of the period set forth in the limitation statutes. Considering the past business relations between the parties and the lack of any positive action or deliberate nonaction on the part of petitioners which could reasonably be considered as having induced respondents to act to their disadvantage, there is no basis for a shortening of the limitation period, so to speak.

K & G Oil Tool & Serv. Co., v. G&G Fishing Tool Serv., 314 S.W.2d 782, 790-91 (Tex. 1950). *See also*, *Garth v. Staktek Corp*., 876 S.W.2d at 550-51.

F. Unclean Hands

One equitable defense to a request for a temporary injunction is the unclean hands defense. *See Landry's Seafood Inn & Oyster Bar v. Wiggins*, 919 S.W.2d 924, 927 (Tex. App.—Houston [14th Dist.] 1996, no writ); *Foxwood Homeowners Ass'n v. Ricles*, 673 S.W.2d 376, 379-80 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Equitable relief is not warranted when the plaintiff has engaged in unconscionable, unjust, or inequitable conduct with regard to the issue in dispute. *See Dunnagan v. Watson*, 204 S.W.3d 30 (Tex. App.—Fort Worth 2006, no pet.); *Grella v. Berry*, 647 S.W.2d 15 (Tex. App.—Houston [1st Dist.] 1982, no writ). For a complainant to be entitled to relief in equity, it is necessary that it comes to equity with cleans hands; this rule comprehends not only the previous conduct of the complainant toward the defendant but also the attitude of the complainant toward the defendant throughout the litigation. *See Union Gas Corp. v. Gisler*, 129 S.W.3d 145 (Tex. App.—Corpus Christi 2003, no pet.).

Whether a party has come into court with clean hands is a matter for the sound discretion of the court. *See Willis v. Donnelly*, 118 S.W.3d 10, 38 (Tex. App.—Houston [14th Dist.] 2003, pet. granted); *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15 (Tex. App.—Tyler 2000, pet. denied); *Thomas v. McNair*, 882 S.W.2d 870 (Tex. App.—Corpus Christi 1994, no writ); *Hand v. State ex rel. Yelkin*, 335 S.W.2d 410 (Tex. Civ. App.—Houston 1960, writ ref'd).

In Texas, the unclean hands defense has two prongs: (a) the litigation must arise out of, or be connected to, the improper conduct on which the defense is based; and (b) the defendant must be injured by a wrong that is done to him personally rather than to some third party. *Omohundro v. Matthews*, 341 S.W.2d 401 (Tex. 1960). The Supreme Court stated:

> The party to a suit, complaining that his opponent is in court with "unclean hands" because of the latter's conduct in the transaction out of which the litigation arose, or with which it is connected, must show that he himself has been injured by such conduct, to justify the application of the principle to the case. The wrong must have been done to the defendant himself and not to some third party.

Id. at 410.

The defense cannot be used if the unlawful or inequitable conduct of the plaintiff is merely collateral to the plaintiff's cause of action. *Grohn v. Marquardt*, 657 S.W.2d 851, 855 (Tex. App—San Antonio 1983, writ ref'd n.r.e.). For example, in *Thomas v. McNair*, a defendant appealed a trial court's decision to partition property and alleged that the trial court erred because the plaintiff had unclean hands due to his conduct in wrongfully defaulting on a note that led to a foreclosure and in wrongfully instituting bankruptcy proceedings. 882 S.W.2d 870 (Tex. App.—Corpus Christi 1994, no writ). The court of appeals affirmed, holding that the conduct was not sufficient to support unclean hands:

> Appellants contend that the evidence shows conclusively that McNair's hands were not clean and that his wrongdoing caused injury to appellants. Appellants allege that McNair defaulted on the note and clearly hoped that the bank would foreclose and force appellants from their homestead, and that Thomas had to sell his Corpus Christi home as a result. We hold that this evidence, even if taken as true, is insufficient to show that the court erred by granting the equitable remedy of partition. As for appellants' allegations of conversion, wrongful institution of bankruptcy suit, and purposeful infliction of

> emotional pain, the unclean hands doctrine cannot be used as a defense since the alleged unlawful or inequitable conduct is merely collateral to the plaintiff's cause of action.

Id. at 880-81.

The party asserting an unclean hands defense must show that it personally has been injured by such conduct in order to justify the application of the defense. *See Omohundro v. Matthews*, 161 Tex. 367, 341 S.W.2d 401 (1960); *Montgomery v. Silva*, No. 02-03-385-CV, 2005 Tex. App. LEXIS 1854 (Tex. App.—Fort Worth March 19, 2005, no pet.). Otherwise stated, the clean hands doctrine should not be applied where the defendant has not been seriously harmed, the wrong complained of can be corrected without applying the doctrine, or where the party suffered no harm at all. *See Norris of Houston, Inc. v. Gafas*, 562 S.W.2d 894 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

For example in *Omohundro v. Matthews*, a defendant argued that the trial court erred in finding for the plaintiffs on their request for a constructive trust regarding the sharing of oil and gas interests. 341 S.W.2d at 401. The defendant argued that the plaintiff's claim was barred by unclean hands because the plaintiff improperly discovered the oil and gas interests by using confidential information from their employer. The Texas Supreme Court stated that the clean hands rule is not absolute and affirmed the trial court's constructive trust:

> The party to a suit, complaining that his opponent is in court with "unclean hands" because of the latter's conduct in the transaction out of which litigation arose, or with which it is connected, *must show that he himself has been injured by such conduct*, to justify the application of the principle to the case. *The wrong must have been done to the defendant himself and not to some third party.*
>
> Any improper use of information obtained from their employers by Matthews or Thompson aided rather than injured Omohundro and will not prevent recovery here.

Id. at 381 (emph. added). The Court therefore denied the defendant's unclean hands defense solely because he was not harmed by the alleged wrongful conduct.

In *Arrow Chemical Corp. v. Anderson*, Anderson signed a non-compete agreement with Arrow and left to form a competing business, Anko Products Co., with one Maurice Tharp. 386 S.W.2d 309 (Tex. App.–Dallas 1965, writ ref'd n.r.e.). The trial court granted Arrow's request for a temporary injunction against competition by Anderson. Anko and Tharp claimed that the trial court improperly enjoined Anderson because Arrow had unclean hands because Arrow had hired Anderson away from a previous employer, Paper Supply Company, in violation of a non-compete agreement. However, the trial court excluded evidence concerning the prior non-compete because it was not relevant. The court of appeals affirmed:

> The trial court ruled that the question of fact as to unclean hands was limited to dealings between the same parties and refused [Anko's and Tharp's] tender of certain other testimony dealing with the transaction between Anderson and Paper Supply Company. We think the action of the trial court in limiting the issue of unclean hands to transactions between the parties, and not permitting same to extend to third parties, was proper.

Id. at 314.

X. Determining Request For Temporary Injunctive Relief

A. No Right To Jury On Temporary Injunctive Relief

A party has no right to submit the question of whether it is entitled to an injunction to a jury. The Texas Supreme Court stated: "Although a litigant has the right to a trial by jury in an equitable action, only ultimate issues of fact are submitted for jury determination. The jury does not determine the expediency, necessity, or propriety of equitable relief. The determination of whether to grant an injunction based upon ultimate issues of fact found by the jury is for the trial court, exercising chancery powers, not the jury." *State v. Texas Pet. Foods, Inc*., 591 S.W.2d 800, 803 (Tex. 1979). Similarly, in

Miller v. Stout, the court was "unwilling to extend the right to a jury to preliminary and incidental proceedings which do not involve the question of liability," noting "[o]nly ultimate issues of fact are to be submitted to a jury." 706 S.W.2d 785, 787 (Tex. App.—San Antonio 1986, no writ). The court reasoned, "[l]itigation would be interminably prolonged if all issues of fact which might arise in connection with preliminary motions and motions not involving the merits must, at the demand of a party, be determined by a jury." *Id*.

Indeed, the purpose of a temporary injunction is to preserve the status quo of the litigation's subject matter pending a trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). A temporary injunction does not involve the merits of the case. *Davis v. Huey*, 571 S.W.2d 859, 861 (Tex. 1978). Because a temporary injunction does not involve the merits of a case, a party is not entitled to a jury trial on an application for a temporary injunction. *L.D. Brinkman Inv. Corp. v. Brinkman*, No. 04-16-00651-CV, 2017 Tex. App. LEXIS 3680 (Tex. App.—San Antonio April 26, 2017, no pet. history); *Ross v. Sims*, No. 03-16-00179-CV, 2017 Tex. App. LEXIS 1264, 2017 WL 672458, at *7 (Tex. App.—Austin Feb. 15, 2017, no. pet.) (mem. op.) ("And, regardless of his demand for a jury trial, he was not entitled to one as to the application for a temporary injunction."); *Miller*, 706 S.W.2d at 787; *Loomis Int'l, Inc. v. Rathburn*, 698 S.W.2d 465, 468 (Tex. App.—Corpus Christi 1985, no writ) (noting "there is no right to a jury at a hearing on [an] application for temporary injunction"); *Walling v. Kimbrough*, 365 S.W.2d 941, 943 (Tex. Civ. App.—Eastland), *aff'd*, 371 S.W.2d 691 (Tex. 1963) ("No jury may be demanded at a hearing for a temporary injunction.").

Accordingly, a party has to submit any request for temporary injunctive relief to a trial court judge, not a jury. In the event that the party wants further permanent injunctive relief, it should submit fact questions to a jury that would entitle it to that relief, and it is then up to the trial court to issue the remedy of an injunction if the trial court determines in its discretion that same is warranted.

B. Notice Of Temporary Injunction Hearing

The trial court will set a hearing for a temporary injunction, if that has not already been done by way of a temporary restraining order. The party to be enjoined must been given notice of the hearing and an opportunity to present evidence and argument. Tex. R. Civ. P. 681; *PILF Invs. Inc. v. Arlitt*, 940 S.W.2d 255, 259-60 (Tex. App.—San Antonio 1997, no writ). Rule 21a addresses general service requirements and states that all court documents, except the citation associated with the filing of a cause of action or as otherwise stated in the Rules "may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be." Tex. R. Civ. P. 21a. Rule 681 states that a temporary injunction cannot be issued without notice to the adverse party. It does not specify how that notice should be given, or attempt to modify Rule 21a. Rule 683 only requires actual notice of the order "by personal service or otherwise." Tex. R. Civ. P. 683. Accordingly, the notice of a hearing on a temporary injunction can be done by serving an attorney.

C. Continuance of Temporary Injunction Hearing

If a party opposing a temporary injunction hearing needs additional time, it should file a motion to continue the hearing. *Hartwell v. Lone Star, PCA*, No. 06-17-00030-CV, 2017 Tex. App. LEXIS 5628 (Tex. App.—Texarkana June 21, 2017, pet. filed). It is advisable to file the motion as soon as possible, i.e., as soon as the party receives the notice of the hearing and the grounds for the continuance become apparent. *Id*. The party should also agree to extend a temporary restraining order until the hearing can be reset. *Id*.

Further, the party requesting the continuance should follow the normal rules for seeking continuances. Rule 251 provides that a continuance shall not "be granted except for good cause supported by affidavit." Tex. R. Civ. P. 251.

A trial court's ruling on a motion for a continuance is reviewed for abuse of discretion. *Hartwell v. Lone Star, PCA*, 2017 Tex. App. LEXIS 5628 (citing *In re D.W.*, 353 S.W.3d 188, 192 (Tex. App.—Texarkana 2011, pet. denied)). A court of appeals will not disturb the trial court's decision unless the record shows a clear abuse of discretion. Id. (citing *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986); *D.W.*, 353 S.W.3d at 192.

D. Temporary Injunction Hearing

"The issuance of a writ of injunction is an extraordinary equitable remedy, and its use should be carefully regulated." *City of Arlington v. City of Fort Worth*, 873 S.W.2d 765, 767 (Tex. App.—Fort Worth 1994, orig. proceeding); *see also Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

The only issue presented at the temporary injunction hearing is the need for immediate relief pending the trial on the merits. *Transport Co. v. Robertson Transp. Inc.*, 261 S.W.2d 549, 552 (Tex. 1953); *Coastal Mar. Serv. v. City of Port Neches*, 11 S.W.3d 509, 515 (Tex. App.—Beaumont 2000, no pet.).

Texas Rule of Civil Procedure 680 requires evidence at the hearing on irreparable injury and probable recovery. *Prappas v. Entezami*, 2006 Tex. App. LEXIS 2157 (Tex. App.—San Antonio Mar. 22 2006, no pet.). The applicant has the burden of production to introduce competent evidence to support a probable right and a probable injury. *True Blue Animal Rescue, Inc. v. Waller Cnty.*, No. 01-16-00967-CV, 2017 Tex. App. LEXIS 3557 (Tex. App.—Houston [1st Dist.] April 26, 2017, no pet); *Bay Fin. Sav. Bank, FSB v. Brown*, 142 S.W.3d 586 (Tex. App.—Texarkana 2004, no pet.). If the applicant does not meet that burden, then it is not entitled to any injunctive relief. *True Blue Animal Rescue, Inc.*, 2017 Tex. App. LEXIS 3557.

The party to be enjoined must been given notice of the hearing and an opportunity to present evidence and argument. Tex. R. Civ. P. 681; *PILF Invs. Inc. v. Arlitt*, 940 S.W.2d 255, 259-60 (Tex. App.—San Antonio 1997, no writ); *Daniel v. Kittrell*, 188 S.W.2d 871 (Tex. Civ. App.—Waco 1944, writ refused w.o.m.). The notice required implies the opportunity to be heard and to present evidence on the involved issue or issues of fact. *Oertel v. Gulf States Abrasive Mfg. Inc.*, 429 S.W.2d 623 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ). Even if the defendant does not appear, there must still be a hearing and evidence is required. *Millwrights Local Union v. Rust Eng'g*, 433 S.W.2d 683, 686-87 (Tex. 1968).

For example, in one case the debtor offered no evidence to the trial court, called no witnesses, and sworn pleadings alone were insufficient evidence to support the issuance of a temporary injunction. *Brown*, 142 S.W.3d at 586. Because no evidence was offered to the trial court in support of the temporary injunction, the trial court's ruling was not supported by evidence. *See id*.

There are issues concerning whether a trial court can admit affidavit evidence in a temporary injunction hearing, and if so, whether that evidence, alone, can support the injunction. Certainly, if a party is going to rely on affidavit testimony, it must admit it into evidence. Where affidavits are not before the trial court, a party cannot rely upon them to support the temporary injunction order. *Millwrights Local Union No. 2484*, 433 S.W.2d at 686; *Tex. State Bd. of Educ. v. Guffy*, 718 S.W.2d 48 (Tex. App.—Dallas 1986, no writ). In *Millwrights*, Rust Engineering sought a temporary injunction to prevent union members from picketing on its property. *Millwrights*, 433 S.W.2d at 684. Rust Engineering did not present any evidence at the temporary injunction hearing. The issue before the Texas Supreme Court was whether the applicant's sworn petition could be treated as an affidavit and constitute sufficient evidence to support the temporary injunction. *See id*. at 686. The Court analyzed the requirement of a hearing in rule 680 and concluded that "the conduct of a 'hearing' implies that evidence will be offered." *Id*. at 687. In reaching its holding, the Court noted that although a temporary restraining order may issue on a sworn petition, a temporary injunction requires evidence admitted at a hearing. *See id*. at 686-87.

In *Guffy*, a teacher, Freeman Guffy, obtained a temporary injunction preventing the enforcement of a new testing requirement for teachers. *Guffy*, 718 S.W.2d at 49. Guffy failed to present any evidence at the temporary injunction hearing. *See id*. Accordingly, following the Texas Supreme Court's holding in *Millwrights*, the court of appeals dissolved the temporary injunction. *See id*. at 50. *See also Bay Fin. Sav. Bank, F.S.B. v. Brown*, 142 S.W.3d 586, 589-90 (Tex. App.—Texarkana 2004, no pet.) (temporary injunction dissolved where movant offered no evidence at the hearing and where it appeared trial court considered only the documents attached to the verified motion for temporary injunction).

But in *Pierce v. The State of Texas*, the court of appeals affirmed a temporary injunction based on affidavit testimony that was admitted in the hearing. 184 S.W.3d 303 (Tex. App.—Dallas 2005, no pet.). In its order setting the date for the temporary injunction hearing, the trial court ordered that all testimony was to be reduced to affidavits or deposition excerpts. The State offered affidavit evidence at the hearing, and Pierce objected. The trial court granted injunctive relief based on this evidence. The court of appeals affirmed the trial court's injunction: "The record before this Court contains the affidavit evidence admitted during the temporary injunction hearing. We conclude a trial court may issue a temporary injunction based on affidavit testimony admitted into evidence at the hearing thereon." *Id*.

Finally, the trial court can impose reasonable limits on the parties' presentation of evidence in the hearing. *Reading & Bates Constr. Co. v. O'Donnell*, 627 S.W.2d 239, 244 (Tex.

App—Corpus Christi 1982, writ ref'd n.r.e.). However, the trial court cannot deny a party a right to be heard. *City of Houston v. Houston Lighting & Power Co*., 530 S.W.2d 866, 869 (Tex. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.). If a party wants to object to a trial court's refusal to allow additional time to present evidence, the party should object to the court's refusal to hear additional evidence, state what evidence the party would present, and give some indication how that evidence would be material and relevant to the issues in the injunction proceeding.

E. Evidence Of Contempt Does Not Support Injunctive Relief

Whether defendants violated a temporary restraining order is not relevant to whether a trial court enter the temporary injunction. *Millrights Local Union No. 2484 v. Rust Engineering Co*., 433 S.W.2d 683, 685 (Tex. 1968) (even though party presented evidence regarding contempt of restraining order, court held that there was no evidence to support temporary injunction); *Houston v. Millennium Insurance Agency, Inc.*, No. 13-03-00235-CV, 2006 Tex. App. LEXIS 3156 (Tex. App.—Corpus Christi April 20, 2006, pet. denied) (court reversed judgment where trial court erred in admitting evidence of contempt because it was no relevant); *Spruell v. Goelzer*, No. 13-98-070-CV, 1999 Tex. App. LEXIS 6493 (Tex. App.—Corpus Christi August 26, 1999, no pet.) (not designated for publication) (court affirmed trial court's exclusion of evidence concerning alleged contempt of temporary injunction because it was not relevant to issues).

For example, in *Avco Corp. v. Interstate Southwest, Ltd*., a plaintiff seeking an anti-suit injunction argued that the injunction was valid in part due to the fact that the defendant violated a temporary restraining order issued by a Texas court. 145 S.W.3d 257, 264 (Tex. App.—Houston [14th Dist.] 2004, no pet.). The court of appeals held that such evidence did not support the issuance of an anti-suit injunction: "Whether or not Lycoming violated the Texas TRO might be relevant in a contempt proceeding for violation of the TRO, but it is not particularly germane to issuance of the anti-suit injunction." *Id*. The court then reversed the anti-suit injunction.

XI. Order Granting Injunctive Relief

A. Required Elements

Texas Rule of Civil Procedure 683 provides the form and scope of an injunction or restraining order:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.
>
> Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought. The appeal of a temporary injunction shall constitute no cause for delay of the trial.

Tex. R. Civ. P. 683. Furthermore, Rule 684 requires in part: "In the order granting any temporary restraining order or temporary injunction, the court shall fix the amount of security to be given by the applicant." *Id*. at 684.

Pursuant to Rule 683, a valid order for a temporary injunction must: (1) state the reasons for the injunction's issuance by defining the injury and describing why it is irreparable; (2) define the acts sought to be enjoined in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him; and (3) set the cause for trial on the merits and fix the amount of the bond. *Bankler v. Vale*, 75 S.W.3d 29 (Tex. App.—San Antonio 2001, no pet.). The Texas Supreme Court "interpret[s] Rule [683] to require . . . that the order set forth the reasons why the court deems it proper to issue the writ to prevent injury to the applicant in the interim; that is, the reasons why the court believes the applicant's probable right will be endangered if the

writ does not issue." *Transp. Co. of Tex. v. Robertson Transps., Inc*., 152 Tex. 551, 261 S.W.2d 549, 553 (Tex. 1953).

In *State v. Cook United, Inc*., the Texas Supreme Court stated that a trial court need not explain its reasons for believing an applicant has shown a probable right of recovery on the merits, but must give the reasons why injury will be suffered if the temporary injunction is not ordered. 464 S.W.2d 105, 106 (Tex. 1971).

Some courts, however, hold that where a temporary injunction order fails to provide the reasons for its issuance, set a trial date, or fix the amount of security, that it is void. *See, e.g., In re Medistar Corp.*, 2005 Tex. App. LEXIS 9556 (Tex. App.—San Antonio Nov. 16 2005, no pet.); *Bay Fin. Sav. Bank, FSB v. Brown*, 142 S.W.3d 586 (Tex. App.—Texarkana 2004, no pet.); *Armstrong-Bledsoe v. Smith*, 2004 Tex. App. LEXIS 1944 (Tex. App.—Fort Worth Feb. 26 2004, no pet.). In *Dahl v. City of Houston*, the court of appeals held that an injunction was void where it did not state that the plaintiff had established a probable right of recovery. No. 14-03-00122-CV, 2003 Tex. App. LEXIS 3064 (Tex. App.—Houston [14th Dist.] Apr. 10, 2003, no pet.); *Southwestern Bell Tel. Co. v. Gravitt*, 522 S.W.2d 531 (Tex. Civ. App.—San Antonio 1975, no pet.)

Furthermore, an injunction order must specifically identify the harm to be prevented. "An injunction that fails to identify the harm that will be suffered if it does not issue must be declared void and be dissolved." *Fasken v. Darby*, 901 S.W.2d 591, 593 (Tex. App.—El Paso 1995, no writ). *See also Metra United Escalante, L.P. v. Lynd Co.*, 158 S.W.3d 535, 541 (Tex. App.—San Antonio 2004, no pet.). In *Merjerle*, the court reversed a temporary injunction where it did not make an express finding regarding harm in the interim:

> The statement in the trial court's order that, if the temporary injunction is not issued, "plaintiff will be without any adequate remedy at law in that the measure of damage due to loss of business and goodwill would be incapable of ascertainment and exceed the combined financial worth of defendants" is insufficient reason to issue a temporary injunction because it does not show probable injury in the interim.

Mejerle v. Brookhollow Office Prod. Inc., 666 S.W.2d 192, 193 (Tex. App.—Dallas 1983, no writ).

In *University Interscholastic League v. Torres*, the temporary injunction order merely recited the trial court's finding "that the Plaintiffs have no adequate remedy at law and that the Plaintiff … would suffer irreparable harm if the Defendants … are not restrained and enjoined pending the final disposition of the … cause…." 616 S.W.2d 355, 357 (Tex. Civ. App.—San Antonio 1981, no writ). The court of appeals vacated the injunction, holding that the recitals in "the order lack[] the specificity required by Rule 683." *Id*. at 358. The court stated and applied the rule that "[t]he reasons given by the trial court for granting … a temporary injunction must be specific and legally sufficient, and must not be mere conclusionary [sic] statements." *Id. See also Seib v. Am. Sav. & Loan Ass'n of Brazoria County*, No. 05-89-01231-CV, 1991 WL 218642, *4 (Tex. App.—Dallas 1991, no writ) (not designated for publication); *Byrd Ranch, Inc. v. Interwest Sav. Ass'n*, 717 S.W.2d 452, 454 (Tex. App.—Fort Worth 1986, no writ); *Smith v. Hamby*, 609 S.W.2d 866 (Tex. Civ. App.—Fort Worth 1980, no writ) (vacated temporary injunction because recital in order that plaintiff testified he has no adequate remedy at law is not a legally sufficient reason for granting a temporary injunction); *Charter Med. Corp. v. Miller*, 547 S.W.2d 77 (Tex. Civ. App.—Dallas 1977, no writ) (dissolving temporary injunction because order reciting only that "[p]laintiffs have established … irreparable damage herein and injury" does not meet the specificity requirements of Rule 683).

A court held that a temporary injunction was valid where it properly identified the manufacturer's harm and explained why it was irreparable. *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191 (Tex. App.—Fort Worth 2005, no pet.). The injunction explicitly stated that the manufacturer had shown that the competitors had possession of the manufacturer's data entitled to trade secret protection and were actively using that information to compete with the manufacturer in the replacement helicopter blade market. *See id*. Other courts have also been less demanding in the specificity of harm in the order. *See, e.g., Occidental Chemical Corp. v. ETC NGL Transport, LLC*, No. 01-11-00536-CV, 2011 WL 2930133 (Tex. App.—Houston [1st Dist.] July 20, 2011, pet. dism.); *Tex. Tech Univ. Health Scis. Ctr. v. Rao*, 105 S.W.3d 763, 768 (Tex. App.—Amarillo 2003, pet. dism'd); *Pinebrook Properties, Ltd. v. Brookhaven Lake*

Prop. Owners Ass'n, 77 S.W.3d 487 (Tex. App.—Texarkana 2002, pet. denied).

An injunction decree "must spell out the details of compliance in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him. *Ex Parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967). For example, a permanent injunction was void where it enjoined the competing business and its owner from taking specific actions involving specific clients of the business who were not identified or listed in the permanent injunction and from using or disclosing information and files that were not specifically identified in the permanent injunction – the lack of specificity as to the business's clients was not cured by any knowledge the competing business and its owner might have had outside the permanent injunction. *Computek Computer & Office Supplies, Inc. v. Walton*, 156 S.W.3d 217 (Tex. App.—Dallas 2005, no pet.).

These requirements are mandatory and must be strictly followed. *Operation Rescue-National v. Planned Parenthood*, 937 S.W.2d 60 (Tex. App.—Houston [14th Dist.] 1996), *modified by, affirmed by* 975 S.W.2d 546 (Tex. 1998). While every order granting an injunction must set forth the reasons for its issuance in the order itself, if the enjoined party wishes additional, detailed findings, the party may make a request for additional findings. *See id*. Where a trial court's injunctive order adequately states the specific reasons for its issuance, the party opposing it cannot complain about additional findings if it did not request them. *See id*.

Several courts have held that there can be an oral injunction order entered by a court. *In re Guardianship of Olivares*, No. 07-07-0275-CV, 2008 Tex. App. LEXIS 9232 (Tex. App.—Amarillo December 12, 2008, pet denied); *Ex parte Barnes*, 581 S.W.2d 812, 814 (Tex. Civ. App.--Fort Worth 1979, no writ) (stating that while an oral order for temporary injunction is effective, it must be as clear and specific as a written order). However, an oral order must still contain all of the requirements set forth above, and if it does not, it is void and/or unenforceable. *In re Guardianship of Olivares*, No. 07-07-0275-CV, 2008 Tex. App. LEXIS 9232.

B. Can Lack Of Findings In An Injunction Order Be Waived?

Many cases hold that a party can raise on appeal for the first time the failure of an injunction order to have necessary findings because the order is allegedly "void." *See, e.g., City of Sherman v. Eiras*, 157 S.W.3d 931, 931 (Tex. App.—Dallas 2005, no pet.) (appellate court held temporary injunction order was void even though neither party complained of the failure of the order to contain a trial setting in the trial court). Other courts of appeals hold to the contrary; that a party has to preserve error on the allegedly improper form of an injunction order before complaining about it on appeal. Texas Rule of Appellate Procedure 33.1 requires a party to present an objection or complaint to the trial court before that party can complain about it on appeal. Tex. R. App. P. 33.1. In *Emerson v. Fires Out, Inc.*, the court noted that the general principles of sound judicial administration require that any objections to the form and content of a temporary injunction be pointed out to the trial court at a time when the errors could be corrected. 735 S.W.2d 492 (Tex. App.—Austin 1987, no writ). It further observed that "it serves no good purpose to permit appellants to lie in wait and present this error in form for the first time on appeal." *Id*. at 494. Applying Texas Rule of Appellate Procedure 52(a), the progenitor of present Rule 33.1(a), the court held that the failure to make a trial objection to the form of the injunction waived the right to an appellate complaint on that basis. *See id*. at 493-94. *See also Tex. Tech Univ. Health Scis. Ctr. v. Rao*, 105 S.W.3d at 768; *Shields v. The State of Texas*, 27 S.W.3d 267 (Tex. App.—Austin 2000, no pet.); *Vandiver v. Star-Telegram*, 756 S.W.2d 103 (Tex. App.—Austin 1988, no pet.).

This conflict in the courts of appeals may be resolved by determining whether the injunction is truly void or merely voidable. "In general, as long as the court entering the judgment has jurisdiction of the parties and the subject of the matter and does not act outside of its capacity as a court, the judgment is not void. Errors other than lack of jurisdiction, such as a court's action contrary to a statute or statutory equivalent merely render the judgment voidable so that it may be corrected through the ordinary appellate process or other proper proceedings." *Reiss v. Reiss*, 118 S.W.3d 439 (Tex. 2003). *See also Tesco Am., Inc. v. Strong Indus.*, 221 S.W.3d 550 (Tex. 2006); *Longhurst v. Clark*, NO. 01-07-00226-CV, 2008 Tex. App. LEXIS 6402 (Tex. App.—Houston [1st Dist.] Aug. 21, 2008, no pet.). Moreover, at least one court has held that an injunction that does not comply with Rule 683 requirements (trial setting, etc.) is voidable, not void. *In re Burlington N. & Santa Fe Ry. Co.*, 12 S.W.3d 891 (Tex. App.—Houston [14th Dist.] 2000, original proceeding). That court stated:

> An injunction order that does not comply with Rule 683 "is subject to being declared void and dissolved." Because an injunction order that does not comply with Rule 683 is merely voidable, it is subject to review by appeal; it is not subject to a mandamus. . . . In short, the failure to company with Rule 683 does not make the order void, and, therefore does not authorize this Court to issue a mandamus." *See also Desai v. Reliance Machine Works, Inc.*, 813 S.W.2d 640 (14th 1991); *Ludewig v. Houston Pipeline Company*, 737 S.W.2d 15 (CC 1987) (error was waived by not timely appealing voidable TI order).

Id. Generally, if an order is voidable (not void), the error that makes it so is waivable. *In re Jodeen Bolton*, No. 05-10-01115-CV, 2010 Tex. App. LEXIS 8275 (Tex. App.—Dallas 2010, original proceeding); *Davis v. Crist Industries, Inc*., 98 S.W.3d 338 (Tex. App.—Fort Worth 2003, pet. denied).

Further, while every order granting an injunction must set forth the reasons for its issuance in the order itself, if the enjoined party wishes additional, detailed findings, the party may make a request for additional findings. *Operation Rescue-National v. Planned Parenthood*, 937 S.W.2d 60 (Tex. App.—Houston [14th Dist.] 1996) (citing *Transport Co. v. Robertson Transports, Inc.*, 152 Tex. 551, 261 S.W.2d 549, 553 (1953)), *modified by, affirmed by* 975 S.W.2d 546 (Tex. 1998). Where a trial court's injunctive order adequately states the specific reasons for its issuance, the party opposing it cannot complain about additional findings if it did not request them. *See id.* (citing *McDuffie v. Blassingame*, 883 S.W.2d 329, 337 (Tex. App.—Amarillo 1994, writ denied)).

By failing to request additional findings, a party appealing an injunction waives any right to complain about omitted or incorrect findings. *See id*. (citing *Dallas Morning News Co. v. Board of Trustees Dallas ISD*, 861 S.W.2d 532, 538 (Tex. App.—Dallas 1993, writ denied)). And without a request, omitted findings will be presumed in support of the injunction. *See id*. (citing *James Holmes Enters., Inc. v. John Bankston Constr. & Equip. Rental, Inc*., 664 S.W.2d 832, 834 (Tex. App.—Beaumont 1983, writ ref'd n.r.e.)).

Where a party has never requested any additional or more specific findings of fact, there is an argument that it has waived any complaint that the trial court's findings are not sufficiently specific and any omitted specific findings are found in favor of the prevailing party. *See id. See also City of Garland v. Walnut Villa Apts.*, No. 05-01-00234-CV 2001 Tex. App. LEXIS 4729 (Tex. App.—Dallas July 12, 2001, no pet.) (appellant waived complaint about temporary injunction harm finding by failing to request additional findings).

Further, a party should be careful about agreeing to the "form" of an injunction order if it wants to later complain that the order does not recite necessary elements. There are cases that hold that a party has waived objections to the form of an order where it previously agreement as to form. *Brashear v. Victoria Gardens of McKinney*, 302 S.W.3d 542 (Tex. App.—Dallas 2009, no pet.) ("Appellees agreed "as to form" of one of the orders containing the automatic stay language, and as far as our record reveals they were otherwise silent on the subject. We conclude it would be unfair to allow appellees to challenge the trial court's determination for the first time on appeal when Brashear may have relied on that determination in her appellate deadlines. Appellees should have challenged the determination in the trial court as to put Brashear on notice that there was disagreement as to the true procedural posture of the case."); *Henke v. Peoples State Bank*, 6 S.W.3d 717 (Tex. App.—Corpus Christi 1999, pet. dism.) (party could not challenge form of injunction order because it had agreed to the order).

C. Breadth of Relief In Order

A temporary injunction should not award more relief than is necessary. *Matlock v. Data Processing Sec., Inc.*, 618 S.W.2d 327 (Tex. 1981) (injunction prohibiting former employees from competing anywhere with anybody was overbroad). There must be some connection between the claims alleged and the conduct sought to be enjoined. *Alliance Royalties, LLC v. Boothe*, 313 S.W.3d 493, 496–497 (Tex. App.—Dallas 2010, no pet. h.) (trial court abused its discretion by enjoining the termination of a contract that was not related to the cause of action); *Kaufmann v. Morales*, 93 S.W.3d 650, 655–656 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (temporary injunction that attempted to freeze defendants' assets and legal rights unrelated to plaintiffs' claim was void); *Harper v. Powell*, 821 S.W.2d 456, 456–458 (Tex. App.—Corpus Christi 1991, no writ) (improper to enjoin former husband from disposing of proceeds from sale of inherited real property in suit for breach of divorce decree agreement).

Further, an appellate court may modify an injunction if it is overbroad. *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917 (Tex. 1998). For example, one court has held that when trade secrets are involved, an temporary injunction should be tailored to address the improper use of the specific trade secrets. *Southwest Research Institute v. Keraplast Technologies, Ltd*., 103 S.W.3d 478 (Tex. App.—San Antonio 2003, no pet.). A court should not go further than protecting the actual trade secrets and may not forbid lawful competition. *Center for Economic Justice v. American Ins. Ass'n*, 39 S.W.3d 337 (Tex. App.—Austin 2001, no pet.).

When the injunction order is overly broad, courts of appeals have been willing to modify the order. *See, e.g., See Southwest Research Institute*, 103 S.W.3d at 478 (court modified order to allow defendant to do research with publicly available materials); *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc*., 965 S.W.2d 18 (Tex. App.—Houston [1st Dist.] 1998, no writ) (court modified injunction to cover only those items proven as trade secrets); *Wright v. Sport Supply Group Inc*., 137 S.W.3d 289 (Tex. App.—Beaumont 2004, no pet.); *Clohset v. Joseph Chris Personnel Services, Inc*., 1988 WL 143158, *4 (Tex. App.—Houston [14th Dist.] 1988, no pet.); *Bertotti v. C.E. Shepherd Co., Inc*., 752 S.W.2d 648 (Tex. App.—Houston [14th Dist.] 1988, no writ).

For example, one court held that a permanent injunction issued to a business on its claim that alleged that a competing business's owner used trade secrets obtained during his employment with the business to form a competing company was too broad because it enjoined activities the competing business and its owner had a legal right to perform, such as deleting records and files that had nothing to do with the business. *Computek Computer & Office Supplies, Inc. v. Walton*, 156 S.W.3d 217 (Tex. App.—Dallas 2005, no pet.). "An injunction must not be so broad as to enjoin [defendant] from activities that are a lawful and proper exercise of his rights. [W]here a party's acts are divisible, and some acts are permissible and some are not, an injunction should not issue to restrain actions that are legal or about which there is no asserted complaint." *Id*.

However, "[w]here an employee will acquire trade secrets by virtue of his employment, the law permits greater restrictions to be imposed on the employee than in other contracts of employment." *Weed Eater, Inc. v. Dowling*, 562 S.W.2d 898, 901 (Tex. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.). Injunctive relief in trade-secret cases must protect the secrecy of data and remedy the violence to the confidential relationship through which confidential information was acquired. *Mabrey v. Sandstream Inc*., 124 S.W.3d 302, 311 (Tex. App.—Fort Worth 2003, no pet.); *Simplified Telesys. Inc. v. Live Oak Telecom, L.L.C*., 68 S.W.3d 688, 692-93 (Tex. App.—Austin 2000, pet. denied); *Miller Paper Co. v. Roberts Paper Co*., 901 S.W.2d 593, 598 (Tex. App.—Amarillo 1995, no writ) (upholding temporary injunction against former employee despite unenforceability of covenants not to compete or disclose in contract, when evidence supported inference that data taken was not within public domain and gave applicant an advantage over competitors); *Rugen v. Interactive Bus. Sys. Inc.*, 864 S.W.2d 548, 552 (Tex. App.—Dallas 1993, no writ) (affirming temporary injunction even though non-competition agreement was unenforceable when parties stipulated information was intended to be kept secret and defendant would gain competitive advantage by use).

In perhaps the most often cited case in this area, the Texas Supreme Court explained:

> The injunction should ordinarily operate as a corrective rather than a punitive measure, but when, through inadequacies in the processes and methods of the law, a choice must be made between the possible punitive operation of the writ and the failure to provide adequate protection of a recognized legal right, the latter course seems indicated and the undoubted tendency of the law has been to recognize and enforce higher standards of commercial morality in the business world.

Hyde Corp. v. Huffines, 314 S.W.2d 763, 773 (Tex. 1958). It is well-settled that injunctive relief "must, of necessity, be full and complete so that those who have acted wrongfully and have breached their fiduciary relationship, as well as those who willfully and knowingly have aided them in doing so, will be effectively denied the benefits and profits flowing from the wrongdoing." *Elcor Chemical Corp. v. Agri-Sul, Inc.*, 494 S.W.2d 204, 208 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.). *See also Mabrey*, 124 S.W.3d at 317.

Numerous trade-secret cases have affirmed broad injunctive relief. *See, e.g., F. S. New Prods.,*

Inc. v. Strong Indus., Inc., 129 S.W.3d 606, 630-31 (Tex. App.—Houston [1st Dist.] 2004, pet. granted) (upholding permanent, lifetime injunction enjoining defendant from ever "designing, manufacturing, testing, selling, offering to sell, distributing, installing, repairing or altering any trailing axle assembly); *Mabrey*, 124 S.W.3d at 307 (permanently enjoining defendant from "making any commercial, business, or personal use" of employer's confidential information); *Forscan Corp. v. Dresser Indus., Inc.*, 789 S.W.2d 389, 394 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (upholding lifetime ban enjoining defendant from "making, having made, offering for sale, supplying, or otherwise disposing" of any well logging components).

For example, in *Rugen v. Interactive Business Systems, Inc*., the court found that even though a non-competition agreement was void, Sharon Rugen, a former employee of Interactive Business Systems, Inc. (IBS), had confidential information of IBS which deserved protection. 864 S.W.2d 548, 550 (Tex. App.—Dallas 1993, no writ). The trial court had entered a temporary injunction prohibiting Rugen from calling on, soliciting, or transacting business with consultants retained by IBS or IBS customers until a final judgment was rendered. Rugen complained on appeal that the order was an abuse of discretion because it enjoined competition, the information was not a trade secret, there was no showing she would wrongfully use the information, and the order did not describe in reasonable detail the acts to be enjoined. The court found no abuse of discretion because Rugen was not prevented from organizing a competing firm and developing her own clients, Rugen herself considered the identity of clients, prospective clients, potential projects, and pricing information to be confidential, Rugen had such information and it was probable she would use it to IBS's detriment, and the information contained in exhibits referred to in the injunction explicitly defined the prohibited conduct. *Id*. at 551-53.

Further, precluding an employee from treating patients on a list before trial was not an unreasonable method of preserving the status quo pending a trial on the merits regarding a covenant not to compete and confidentiality agreement; thus, the trial court properly entered a temporary injunction against the employee pursuant to an employer's request. *Pizzini v. O'Neal*, No. 09-05-102, 2005 Tex. App. LEXIS 7104 (Tex. App.—Beaumont Aug. 31 2005, no pet.).

Finally, the Texas Supreme Court recognizes that an injunction may be necessarily broad to prevent evasive defendants from creating an "end run" around injunction orders. For example, in *San Antonio Bar Ass'n v. Guardian Abstract & Title Co.*, a bar association appealed the trial court's modification of an injunction against a defendant company that engaged in the unauthorized practice of law. 291 S.W.2d 697 (Tex. 1956). The defendant employed a group of attorneys, who were also engaging in the unauthorized practice of law through the use of scriveners and forms. *See id*. at 699. The trial court originally enjoined both the defendant company and its attorneys from engaging in the unauthorized practice of law. *See id*. However, upon request, the trial court modified the order to enjoin only the company and not the attorneys. On appeal, the Texas Supreme Court reversed the modification recognizing that injunctive relief must be broad enough to be effective:

> [an injunction] must be in broad terms to prevent repetition of the evil sought to be stopped, whether the repetition be in form identical to that employed prior to the injunction or (what is far more likely) in somewhat different form calculated to circumvent the injunction as written.

Id. The court went on to state that an injunctive decree "cannot prejudge new situations," otherwise it would "take longer to write the decree that it would to try the case." *Id*. *See also Khaledi v. H.K. Global Trading, Ltd.*, 126 S.W.3d 273 (Tex. App.—San Antonio 2003, no pet.) (upholding a temporary injunction against former business partner); *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App.—San Antonio 1985, no writ) (upholding an injunction, in part, against school board trustees).

If a party wants to complain on appeal about the overbreadth of an injunction order, the party should first present that concern to the trial court. *Hartwell v. Lone Star, PCA*, No. 06-17-00030-CV, 2017 Tex. App. LEXIS 5628 (Tex. App.—Texarkana June 21, 2017, pet. filed). For example, in *Smith v. Texas Department of Family and Protective Services*, Smith sought to challenge a permanent injunction contending, inter alia, that the terms of the injunction were overly broad and effectively precluded her from engaging in her lawful business. No. 03-13-00204-CV, 2015 Tex. App. LEXIS 785, 2015 WL 410487, at *2 (Tex. App.—Austin Jan. 29, 2015, no pet.) (mem. op.) The Austin Court of Appeals held that since Smith

had not raised any of her complaints in the trial court, as required by Rule 33.1(a), she had failed to preserve any error on appeal. 2015 Tex. App. LEXIS 785, [WL] at *4. In *Snell v. Spectrum Association Management L.P.*, Snell sought to challenge the terms of a temporary injunction, asserting that he had informed the trial court of his disagreement. No. 04-10-00285-CV, 2010 Tex. App. LEXIS 7617, 2010 WL 3505139, at *3 (Tex. App.—San Antonio Sept. 8, 2010, no pet.) [*22] (mem. op.). Since the record did not show that Snell had asserted any objection at the trial court, the San Antonio Court of Appeals held he had waived his argument under Rule 33.1(a). *Id*.

D. Injunction's Breadth May Impact Actions Outside Of Texas

Courts are reluctant to grant injunctions when they have the effect of operating extraterritorially. *Cohen v. Lewis*, 504 S.W.2d 820 (Tex. Civ. App.—San Antonio 1973, writ refused n.r.e.). However, a court can do so. An injunction may be addressed to conduct in any geographical area as long as the court has personal jurisdiction of the party to be enjoined. *City of Dallas v. Wright*, 120 Tex. 190, 36 S.W.2d 973, 976 (1931); *Cunningham v. State*, 353 S.W.2d 514, 516-517 (Tex. Civ. App.—Dallas 1962, ref. n.r.e.). *See generally Ex parte Davis*, 470 S.W.2d 647 (Tex. 1971) (injunction operates in personam, not in rem). The limits on the extent of the order may more often be a question of the reasonableness of the remedy rather than of the extent of the court's jurisdiction. *See, e.g., Williams v. Powell Elec. Mfg. Co., Inc.*, 508 S.W.2d 665, 668 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (injunction was properly national in scope because business being sold was national).

For example, in *Greenpeace, Inc. v. Exxon Mobil Corp.*, Exxon obtained an injunction prohibiting Greenpeace from trespassing on Exxon's property outside of Texas. 133 S.W.3d 804 (Tex. App.—Dallas 2004, pet. denied). Greenpeace appealed and challenged the scope of the injunction, arguing that a Texas trial court did not have jurisdiction to enter such an order. The court of appeals affirmed the injunction, stating:

> Exxon Mobil urges that the injunction action is not local or in rem, but is in fact in personam and transitory, and the injunction only enjoins tortious or illegal conduct. Exxon Mobil argues that an in personam injunction entered in this state that prohibits tortious and illegal activity is effective wherever a tortfeasor may be found, including other states of the union. For the foregoing reasons, we agree with Exxon Mobil.
>
> . . .
>
> An action in personam is one which has for its object a judgment against the person, as distinguished from a judgment against the property. As far as suits for injunctive relief are concerned, it is well settled that an injunction acts in personam and not in rem. The general rule is that equitable remedies act in personam. The fact that an equitable decree will indirectly affect title to or an interest in land does not preclude the characterization of the action as one in personam, where the remedy will be enforced against the person.
>
> For transitory in personam actions, a court can enjoin activities of an individual wherever he or she may be found. So long as the court issuing the injunction has in personam jurisdiction over the entity or individual, the power of the injunction is not restricted to the issuing state.
>
> In this case, . . . [t]he injunction prohibits Greenpeace and the individual protestors from performing tortious or illegal acts. We conclude that this injunction action is transitory and in personam. The trial court did not abuse its discretion [in awarding injunctive relief].

Id.

Moreover, one court held that a "[A] national injunction is reasonable, since it is necessary to protect the national business sold from competition." *Williams v. Powell Elec. Mfg. Co.*, 508 S.W.2d 665, 668 (Tex. Civ. App.—Houston

[14th Dist.] 1974, no pet.). *See also Vais Arms, Inc. v. Vais*, 383 F.3d 287 (5th Cir. Tex. 2004) (affirming national scope of injunction). Courts have affirmed injunctions that apply to conduct in foreign countries where the scope was reasonable. *See, e.g., Sharma v. Vinmar Int'l, Ltd*., 231 S.W.3d 405 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (injunction affirmed even though it precluded a party from entering into contracts in other countries); *Pittsburgh-Corning Corp. v. Askewe*, 823 S.W.2d 759 (Tex. App.—Texarkana 1992, no writ) (injunction affirmed that precluded a party from filing suit in foreign country); *Owens-Illinois, Inc. v. Webb*, 809 S.W.2d 899 (Tex. App.—Texarkana 1991, writ dism'd w.o.j.) (same). *See also Gannon v. Payne*, 706 S.W.2d 304 (Tex. 1986) (issue of awarding injunctive relief that impacts a party's ability to file suit in a foreign county is not one of jurisdiction but of comity). Accordingly, theoretically, a Texas trial court can enter an injunction that has an effect outside the borders of Texas where the court has jurisdiction over the defendant.

E. Trial Court Cannot Award Ultimate Relief Sought In The Suit

A trial court cannot award the ultimate relief sought in the suit via a temporary injunction. The sole purpose of a temporary injunction is to maintain the status quo pending a resolution of the merits at a trial. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993); *Munson v. Milton*, 948 S.W.2d 813, 815 (Tex. App.—San Antonio 1997, pet. denied). The status quo is the last actual peaceable, noncontested status that preceded the controversy. *Tex. Aeronautics Comm'n v. Betts*, 469 S.W.2d 394, 398 (Tex. 1971). In other words, when one party takes action altering the relationship between the parties and the other party contests it, the status quo is the relationship that existed prior to that action. *See, e.g., Benavides Indep. School Dist. v. Guerra*, 681 S.W.2d 246 (Tex. Civ. App.—San Antonio 1984, writ ref'd n.r.e.) (court held that relevant time period for status quo was before the employee left employment); *Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570 (Tex. App.—Austin 2000), *rev'd on other grounds*, 121 S.W.3d 742 (Tex. 2003); *Hidden Valley Civic Club v. Brown*, 702 S.W.2d 665 (Tex. App.—Houston [14th Dist.] 1985, no pet.) (status quo measured at time before cause of action arose).

A trial court abuses its discretion if it provides more relief than that necessary to maintain the status quo. A trial court should not grant a temporary injunction if it affects a change in the original status of the parties' rights even though its purpose may appear reasonable and appropriate to prevent damage or injury to one of the parties. *Getz v. Boston Sea Party of Houston, Inc.*, 573 S.W.2d 836, 837 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); *McCan v. Mo. Pac. R.R. Co.*, 526 S.W.2d 754 (Tex. Civ. App.—Corpus Christi 1975, no writ). For example, in *Elliott v. Lewis*, a trial court abused its discretion in awarding a plaintiff its ultimate requested relief in a temporary injunction order. 792 S.W.2d 853, 854-55 (Tex. App.—Dallas 1990, no writ). In *Elliot*, the plaintiff, a tenant of the defendant, sued for specific performance of an option for the sale of real estate. *See id*. The trial court awarded the plaintiff a temporary injunction that allowed the plaintiff to remain on the property, but also allowed a title company to prepare documents and obtain financing for the sale of the property. *See id.* The defendant land owner appealed the temporary injunction order, and this Court reversed the injunction order because it provided the ultimate relief:

> [I]t is not the purpose of a temporary injunction to transfer property from one person to another, but rather to preserve the original status of the property pending a final decision on the rights of the parties. The only question before the trial court in a temporary injunction hearing is whether the applicant is entitled to preservation of the status quo of the subject matter of the suit pending a trial on the merits. . . .
>
> The trial court's temporary injunction should have been limited in its function and should only have addressed the requested injunction, rather than granting the exact relief sought by [the plaintiffs] upon final hearing. The effect of entering this order did more than preserve the status of the property. A temporary injunction is defective when it purports to grant the same relief being sought upon final hearing. We hold that the trial court abused its discretion in entering an order which exceeded the proper function of the temporary injunction and sustain the tenth point.

Id. See also Khaledi v. H.K. Global Trading, Ltd., 126 S.W.3d 273 (Tex. App.—San Antonio 2003, no pet.) (in part reversed a temporary injunction that adjudicated ultimate issue in case); *Suntech Processing Sys., LLC v. Sun Commc'ns, Inc.*, No. 05-98-00799-CV, 1998 Tex. App. LEXIS 6926 (Tex. App.—Dallas November 5, 1998, no pet.) (not designated for publication) (equitable temporary receivership order was overly broad where it provided ultimate relief in suit); *Fina Oil & Chem. Co. v. Ewen*, No. C14-92-00288-CV, 1994 Tex. App. LEXIS 851 (Tex. App.—Houston [14th Dist.] April 14, 1994, writ dism'd w.o.j.) (not designated for publication) (temporary injunction order determining ownership of property was overly broad as it determined ultimate issue in case). But at least one case has held that it is not error to issue an injunction that gives all the relief requested in a case. *Gunnels v. No. Woodland Hills Community Ass'n*, 563 S.W.2d 334, 337 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

XII. Termination of Temporary Injunction

Normally, a temporary injunction terminates or expires with the rendition of final judgment. *Independent Amer. Real Estate v. Davis*, 735 S.W.2d 256, 261 (Tex. App.—Dallas 1987, no writ). This is one reason that the rules require that temporary injunction order contain a trial setting in it. Further, the final judgment should contain a permanent injunction or otherwise resolve the issue that required temporary injunctive relief.

XIII. Bond Issues

A. Court Must Set A Bond Amount In An Injunction Order

The trial court is required to set a bond amount when it grants a temporary restraining order or temporary injunction. Tex. R. Civ. P. 684. Rule 684 states:

> In the order granting any temporary restraining order or temporary injunction, the court shall fix the amount of security to be given by the applicant. Before the issuance of the temporary restraining order or temporary injunction the applicant shall execute and file with the clerk a bond to the adverse party, with two or more good and sufficient sureties, to be approved by the clerk, in the sum fixed by the judge, conditioned that the applicant will abide the decision which may be made in the cause, and that he will pay all sums of money and costs that may be adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part.
>
> Where the temporary restraining order or temporary injunction is against the State, a municipality, a State agency, or a subdivision of the State in its governmental capacity, and is such that the State, municipality, State agency, or subdivision of the State in its governmental capacity, has no pecuniary interest in the suit and no monetary damages can be shown, the bond shall be allowed in the sum fixed by the judge, and the liability of the applicant shall be for its face amount if the restraining order or temporary injunction shall be dissolved in whole or in part. The discretion of the trial court in fixing the amount of the bond shall be subject to review. Provided that under equitable circumstances and for good cause shown by affidavit or otherwise the court rendering judgment on the bond may allow recovery for less than its full face amount, the action of the court to be subject to review.

Tex. R. Civ. P. 684. The applicant must post the bond, and it is payable to the adverse party if the temporary injunction is dissolved at trial. *See id.* The purpose of a bond is to provide protection to the enjoined party for any possible damages occurring as a result of the injunction. *Topheavy Studios, Inc. v. Doe*, No. 03-05-00022-CV, 2005 Tex. App. LEXIS 6462, 2005 WL 1940159, at *7 (Tex. App.—Austin Aug. 11, 2005, no pet.) (citing *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 203 (Tex. App.—Dallas 2005, no pet.)); *Bayoud v. Bayoud*, 797 S.W.2d 304, 312 (Tex. App.—Dallas 1990, writ denied). The determination of the adequacy of the bond set by the trial court is to be made on a case-by-case basis based upon the record before the reviewing court. *Hartwell v. Lone Star, PCA*, No. 06-17-00030-CV, 2017 Tex. App. LEXIS 5628 (Tex. App.—Texarkana June 21, 2017, pet. filed); *Maples v. Muscletech, Inc.*, 74 S.W.3d

429, 431 (Tex. App.—Amarillo 2002, no pet.). The amount of a bond is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. *Hartwell v. Lone Star, PCA*, No. 06-17-00030-CV, 2017 Tex. App. LEXIS 5628 (Tex. App.—Texarkana June 21, 2017, pet. filed); *Four Stars Food Mart, Inc. v. Texas Alcoholic Beverage Comm'n*, 923 S.W.2d 266, 269 (Tex. App.—Fort Worth 1996, no writ). A party restrained by an injunction may challenge the adequacy of the bond by filing a motion to increase bond amount. *Maples v. Muscletech, Inc.*, 74 S.W.3d at 430. The challenging party must make a "clear showing" that its potential losses are greater than the amount of the bond. *Id*. at 432.

For example, where the appellants introduced no evidence regarding the profit margin of each video game or provide estimates of projected sales, and considering that losses resulting from the injunction were difficult to calculate, the trial court did not abuse its discretion by setting a bond at a particular amount. *Topheavy Studios, Inc. v. Doe*, No. 03-05-00022-CV, 2005 Tex. App. LEXIS 6462 (Tex. App.—Austin Aug. 11 2005, no pet.). In *Hartwell v. Lone Star, PCA*, the court held that the trial court did not err in setting a bond at $10,000 where the party contesting same did not introduce any evidence that a higher amount should be set. 2017 Tex. App. LEXIS 5628; *Genssler v. Harris Cty*., No. 01-10-00593-CV, 2010 Tex. App. LEXIS 8170, 2010 WL 3928550, at *7 (Tex. App.—Houston [1st Dist.] Oct. 7, 2010, no pet.).

Generally, the court cannot use the same bond for temporary injunction as for a temporary restraining order. "A bond for a temporary restraining order does not continue on and act as security for a temporary injunction unless expressly authorized by the trial court." *Bay Fin. Sav. Bank v. Brown*, 142 S.W.3d 586, 590 (Tex. App.—Texarkana 2004, no pet.).

The trial court may expressly provide in its order that the bond securing the temporary restraining order be continued as the bond for the temporary injunction. *Henry v. Cox*, 483 S.W.3d 119, 158-59 (Tex. App.—Houston [1st Dist.] 2015), *rev'd on other grounds*, No. 15-0993, 2017 Tex. LEXIS 464, 2017 WL 2200344 (Tex. May 19, 2007) (citing *Ex parte Coffee*, 160 Tex. 224, 328 S.W.2d 283, 285, 291-92 (Tex. 1959) (orig. proceeding)). If a court is going to hold over a temporary restraining order bond to satisfy the temporary injunction requirement, the order has to have express language to that effect. *Hartwell v. Lone Star, PCA*, 2017 Tex. App. LEXIS 5628; *Bay Fin. Sav. Bank v. Brown*, 142 S.W.3d 586, 590 (Tex. App.—Texarkana 2004, no pet.). In addressing the language needed in the order, the court stated:

> In addition, the temporary injunction failed to comply with the Rules of Civil Procedure. Those rules require that an order granting a temporary injunction set the cause for trial on the merits and fix the amount of security to be given by the applicant. See Tex. R. Civ. P. 683, 684. These procedural requirements are mandatory, and an order granting a temporary injunction that does not meet them is subject to being declared void and dissolved. *See InterFirst Bank San Felipe, N.A. v. Paz Constr. Co.*, 715 S.W.2d 640, 641 (Tex. 1986) (finding temporary injunction void for not setting cause for trial on merits); *see also Lancaster v. Lancaster*, 155 Tex. 528, 291 S.W.2d 303, 308 (1956) (holding bond provisions of Rule 684 mandatory).
>
> In this case, the order granting the temporary injunction did not set the cause for trial on the merits as required by TEX.R. CIV. P. 683. Also, the court did not fix the amount of security to be given. There is in the record a "temporary injunction" bond in the amount of $5,000.00. It is file-marked September 18, 2003, well before the February 19, 2004, hearing on the motion for the temporary injunction and the March 17, 2004, temporary injunction order. It appears that bond was filed for the temporary restraining order, because that order required security in that amount, and because the order and the bond were signed and filed on the same date. A bond for a temporary restraining order does not continue on and act as security for a temporary injunction unless expressly authorized by the trial court. *See Ex parte Coffee*, 160 Tex. 224, 328 S.W.2d 283, 285, 291-92 (1959) (finding bond filed

> for temporary restraining order continued in full force and effect as bond for temporary injunction where order granting temporary injunction provided that "the bond heretofore filed with the Clerk upon issuance of the restraining order herein be, and is hereby continued in full force and effect as a temporary injunction bond").

Id. If a party intends to rely on a temporary restraining order bond for a temporary injunction order, in addition to having the language from *Ex parte Coffee* cited above, the party should make sure that the bond itself is broadly worded enough to cover both a temporary restraining order and a temporary injunction. If the bond only expressly requires the surety to pay for damages in the event that the restraining order is dissolved, it may not be sufficient to cover a temporary injunction as well.

Once the need for the injunction ceases, the party posting the bond should file a motion asking the court to release the bond. If there are no outstanding claims for wrongful injunction, the trial court abuses its discretion in refusing to release the bond. *Energy Transfer Fuel, L.P. v. Head Management Ltd.*, No. 12-09-00062, 2010 Tex. App. LEXIS 8981 (Tex. App.—Tyler November 10, 2010, no pet.) (citing *Goodin v. Jolliff*, 257 S.W.3d 341, 353 (Tex. App.—Fort Worth 2008, no pet.); *Am. Jet Charter, Inc. v. Cobbs*, 184 S.W.3d 369, 377 (Tex. App.—Dallas 2006, no pet.)).

It should be noted that there is a statutory procedure by which an indigent applicant can seek an injunction seeking to stop a foreclosure sale of the applicant's residence. Tex. Civ. Prac. & Rem. Code Ann. §65.041-.044.

B. Claims On Bonds

A party who wrongfully obtains injunctive restraint against another is liable for damages caused by the issuance of the injunction. *Parks v. O'Connor*, 70 Tex. 377, 388, 8 S.W.104, 107 (1888). An injunction is wrongful if its issuance was wrongful at its inception or if it was continued in effect due to some wrong on the part of the proponent. *I.P. Farms v. Exxon Pipeline Co*., 646 S.W.2d 544, 545 (Tex. App.—Houston [1st Dist.] 1982, no writ); *Craddock v. Overstreet*, 435 S.W.2d 607, 609 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.). Texas recognizes two separate causes of action for wrongful in-junction, one upon the bond ordinarily filed to obtain the injunction and the other for malicious prosecution. *DeSantis v. Wackenhut Corp*., 793 S.W.2d 670, 685 (Tex. 990). The two actions differ in the kind of wrong that must be shown to establish liability and in the amount of recovery. *See id*.

A cause of action upon an injunction bond is predicated upon a breach of the condition of the bond. *See id*. at 685. The claimant must prove that the injunction was issued when it should not have been, and that it was later dissolved. *See id*. at 685-86. The claimant need not prove that the injunction was obtained maliciously or without probable cause. *See id*. at 686. The damages under this claim are limited by the amount of the bond. *See id*.

A cause of action for malicious prosecution requires the claimant prove the injunction suit was prosecuted maliciously and without probable cause, and was terminated in his favor. *See id*. In this instance, the injunction defendant recovers the full amount of his damages. *See id*. Under either cause of action, the claimant must prove that issuance of the injunction resulted in damages. *See id*.

XIV. Motions To Dissolve Injunctions

The purpose of a motion to dissolve an injunction is "to provide a means to show changed circumstances or changes in the law that require modification or dissolution of the injunction; the purpose is not to give an unsuccessful party an opportunity to relitigate the propriety of the original grant." *Tober v. Turner*, 668 S.W.2d 831, 836 (Tex. App.—Austin 1984, no writ). Otherwise, a litigant would file numerous motions to dissolve until the trial court resistance is exhausted or until a hearing before a different judge secures a different result. *See id*. at 835. "Such actions needlessly add to the judicial caseload, both at the trial and appellate level." *Id*. Thus, a trial court generally has no duty to dissolve an injunction unless fundamental error has occurred or conditions have changed. *Murphy v. McDaniel*, 20 S.W.3d 873 (Tex. App.—Dallas 2000, pet. denied); *Cellular Mktg., Inc. v. Houston Cellular Tel. Co*., 784 S.W.2d 734, 735 (Tex. App.—Houston [14th Dist.] 1990, no writ).

When changed circumstances are the basis of a motion to dissolve, the moving party must show some substantial change has occurred since the proper issuance of the temporary injunction such that the order should be dissolved. *Murphy v. McDaniel*, 20 S.W.3d at 873. "Change in circumstances" may include an agreement of the parties, newly revealed facts, or a change in the law that makes the temporary injunction unnecessary or

improper. *See id*. A "change in circumstances" refers to a change in conditions occurring since the granting of the temporary injunction. *Id*. Fundamental error exists when the record shows the court lacked jurisdiction. *Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 580 (Tex. App.—Austin 2000, no pet.). *See also Kassim v. Carlisle Interests, Inc*., 308 S.W.3d 537 (Tex. App.—Dallas 2010, no pet.) (affirmed dissolution of TI where district court did not have jurisdiction over underlying claim).

The law applicable to the dissolution of a temporary injunction does not allow a party to relitigate the initial grant of an injunction:

> Much of the confusion as to the proper scope of a motion to dissolve arises from cases decided at a time when no distinction was made as between injunctive relief granted before and injunctive relief granted after a full evidentiary hearing. Apparently, under prior law it was standard procedure for a trial court to issue a temporary injunction solely upon the applicant's sworn petition; therefore, upon filing a motion to dismiss, the opposite party had a right to a full evidentiary hearing upon the issue of whether the temporary injunction should have, in the first instance, been granted.
>
> Under current rules the trial court may not enter a temporary injunction against a party before that party has presented its defenses and has rested its case. Under this procedure the party opposing the temporary injunction has an opportunity to fully litigate the issue of whether the temporary injunction should be granted prior to the granting of such; there is no longer any reason for requiring the trial court to reexamine the legal and factual basis of the preliminary injunction upon motion to dissolve. The purpose of the motion to dissolve is to provide a means to show that changed circumstances or changes in the law require the modification or dissolution of the injunction; the purpose is not to give an unsuccessful party an opportunity to relitigate the propriety of the original grant.

Tober v. Turner of Texas, Inc., 668 S.W.2d 831, 836 (Tex. App.—Austin 1984, no writ). Indeed there are important prudential reasons for limiting a motion to dissolve to new or changed circumstances:

> From a practical standpoint, if a litigant could, by motion to dissolve, force reconsideration of the original grant, without a showing of changed conditions, then there is an incentive for him to do so at least once, or more often, in hope that he will be able to wear down the resistance of the original trial judge, or in hope that he will be able to secure a hearing before a different trial judge who may be more sympathetic. Such actions needlessly add to the judicial caseload, both at the trial and appellate level. Recognition of the principle that the trial court has no duty to reconsider the validity of the original grant of temporary injunction upon motion to dissolve enables the trial court to dispose of motions to dissolve solely upon the pleadings when the motion to dissolve, on its face, shows that the litigant offers no new evidence.

Tober, 668 S.W.2d at 835.

There is caselaw that a court cannot dissolve an injunction because the substance of the underlying claim does not merit an injunction. Rather, the review should be limited to the narrow question of whether elements for dissolution have been met. *Desai v. Reliance Mach. Works, Inc.*, 813 S.W.2d 640, 641 (Tex. App.—Houston [14th Dist.] 1991, no writ). For example, in *Murphy*, a trial court entered a temporary injunction. *Murphy*, 20 S.W.3d at 876-77. The defendant then filed a motion for summary judgment on the merits of the plaintiff's claim and filed a motion to dissolve the temporary injunction. *See id*. The trial court then granted the motion to dissolve the injunction because it also granted the merits-based summary judgment motion. The court of appeals reversed the dissolution stating:

> We are of the opinion that, absent changed circumstances, a determination of the parties' claims should serve as the basis for dissolution of a temporary injunction only upon final adjudication. At that time, the temporary injunction becomes moot. Because the trial court's sole basis for granting appellee's motion to dissolve was its interlocutory judgment, we conclude the trial court abused its discretion by granting appellee's motion to dissolve.

Id. at 879 (citations omitted). *See also Lee-Hickman's Invs. v. Alpha Invesco Corp*., 139 S.W.3d 698 (Tex. App.—Corpus Christi 2004, no pet.) (reversing dissolution of injunction based on merits of summary judgment motion).

XV. Right To Nonsuit

A plaintiff's right to take a nonsuit is unqualified and absolute as long as the defendant has not made a claim for affirmative relief. *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 840-41 (Tex. 1990). A nonsuit may be taken after a temporary restraining order has been obtained but before the hearing on the temporary injunction. *See Payne v. Nichols*, 176 S.W.2d 961, 963-64 (Tex. Civ. App.—Galveston 1943, writ ref'd w.o.m.) (holding that nonsuit may be taken after temporary injunction obtained but before hearing on permanent injunction, even where suit had been pending for two years and nonsuit was taken when case came up for trial). But the nonsuit does not defeat the right of a restrained party who is damaged by the temporary restraining order to sue for wrongful injunction. *See id*. at 963.

Moreover, one court has held that by introducing proof of voluntary dismissal of a temporary injunction, the defendant established a prima facie right to damages. *See id*. Despite nonsuit, to defeat those claims the plaintiff had to prove that the temporary injunction was justified. This approach prevents the plaintiff in an injunction suit from improving his or her position by anticipating the defendant's damages claims and nonsuiting to shift the burden of proof regarding the legitimacy of the temporary injunction to the defendant. *See id.; Futerfas v. Park Towers*, 707 S.W.2d 149, 159 (Tex. App.—Dallas 1986, ref. n.r.e.).

XVI. Anti-Suit Injunctions

One particular type of injunction is an anti-suit injunction. This injunction precludes a party from pursuing litigation in another forum, either another court in this state, a court in a sister state, or in a foreign country.

In issuing the anti-suit injunction, a trial court consider the fundamental jurisprudential principle of comity and judicial restraint recognized by the Texas Supreme Court, the United States Supreme Court and every state in this nation since the country was founded. The Texas Supreme Court has defined "comity" as "a principle of mutual convenience whereby one state or jurisdiction will give effect to the laws and judicial decisions of another." *Gannon v. Payne*, 706 S.W.2d 304, 307 (Tex.1986). The Texas Supreme Court has followed the United States Supreme Court in recognizing the unique grounds within which comity lies:

> 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Gannon, 706 S.W.2d at 306. No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. *See id*.

"Only comity can compel courts to act in a manner designed to advance the rule of law among and between nations." *Gannon*, 706 S.W.2d at 306. Any abuse of comity, that "principal of mutual convenience," would result in the devastation of Texas courts' ability to effect judgment outside the borders of this state. *Id*. Indeed, the Texas Supreme Court has recognized the exceptional judicial restraint with which comity, especially in cases of anti-suit injunctions, should be exercised: "[t]he principle of comity requires that courts exercise the power to enjoin foreign lawsuits 'sparingly, and only in very special circumstances.'" *Golden Rule*

Insurance Co. v. Harper, 925 S.W.2d 649, 651 (Tex.1996) (quoting *Gannon*, 706 S.W.2d at 306).

Moreover, "[w]hen the sovereigns involved are not sister states but a state and a foreign nation, the policy of allowing parallel court proceedings to continue simultaneously requires more scrupulous adherence." *Id*. A party seeking to enjoin litigation in another jurisdiction must show that "a clear equity" demands the Texas court's intervention. *Christensen v. Integrity Ins. Co*., 719 S.W. 2d 161, 163 (Tex. 1986); *Total Minatome Corp. v. Santa Fe Materials, Inc.*, 851 S.W.2d 336, 339 (Tex. App.—Dallas 1993, no writ).

A. Requirements For An Anti-Suit Injunction

In the three leading Supreme Court of Texas decisions over the last twenty-five years on this subject, the Court each time considered whether a Texas court should issue an injunction to prevent a party before that court from litigating exactly the same case in the courts of another state. Each time the Texas Supreme Court has unanimously reversed a court of appeals that upheld such an injunction. *Golden Rule*, 925 S.W.2d 649; *Gannon*, 706 S.W.2d 304; *Christensen*, 719 S.W.2d 161. *See also Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494 (Tex. 2010) (reversing anti-suit injunction); *In re Auto Nation*, 228 S.W.3d 663 (Tex. 2007) (same).

"The principle of comity requires that courts exercise the power to enjoin foreign lawsuits 'sparingly, and only in very special circumstances.'" *Golden Rule*, 925 S.W.2d at 651 (quoting and citing *Christensen*, 719 S.W.2d at 163; *Gannon*, 706 S.W.2d at 306). The party seeking the injunction must show that "a clear equity demands" the injunction. *Golden Rule*, 925 S.W.2d at 651. "[O]nly in the most compelling circumstance does a court have discretion to issue an anti-suit injunction." *Gannon*, 706 S.W.2d at 306 (citations omitted). Indeed, a court may only issue the anti-suit injunction granted by the trial court in order "to prevent an irreparable miscarriage of justice." *Golden Rule*, 925 S.W.2d at 652; *Marketshare Telecom, L.L.C. v. Ericsson, Inc*., 198 S.W.3d 908 (Tex. App.—Dallas 2006, no pet.).

The Texas Supreme Court's three most recent opinions on the propriety of issuing anti-suit injunctions in jurisdictions outside of Texas have found an abuse of discretion by the issuing court in violation of the principle of comity. *Golden Rule*, 925 S.W.2d at 651-52; *Christensen*, 719 S.W.2d at 162; *Gannon*, 706 S.W.2d at 308. Taking these three cases together, the settled holding is that only in extraordinary circumstances amounting to an irreparable miscarriage of justice would an anti-suit injunction be proper. In *Gannon*, the risk of inconsistent judgments did not justify the anti-suit injunction, with the Court noting that "ordinarily parallel actions should be allowed to proceed simultaneously." *Gannon*, 706 S.W.2d at 307. Ultimately, the Court stated, "there should be only one judgment recognized in both forums." *Id*. at 307. The Court in *Christensen* again permitted parallel lawsuits to proceed simultaneously in Texas and in California. *Christensen*, 719 S.W.2d at 164. "A single parallel proceeding in a foreign forum, however, does not constitute a multiplicity nor does it, in itself create clear equity justifying an anti-suit injunction." *Id*. at 163. In *Golden Rule*, the Court, building on its decisions in *Gannon* and *Christensen*, agreed that neither "added inconvenience" nor "expense" will justify an injunction as both are common to and largely inevitable where dual proceedings are taking place simultaneously and are, therefore, not "very special circumstances." *Golden Rule*, 925 S.W.2d at 651. Additionally, "mirror image" suits are also an insufficient reason to ignore the strong principle of comity and issue an anti-suit injunction. *See id*. The fact that judicial resources of both trial and appellate courts may be wasted is also not sufficient reason for issuing such injunctive relief. *See id*.

In the end, the Court in *Golden Rule* affirmed four narrow bases that can possibly be grounds for the anti-suit injunction granted by the lower court: "1) to address a threat to the court's jurisdiction; 2) to prevent the evasion of important public policy; 3) to prevent a multiplicity of lawsuits; or 4) to protect a party from vexatious or harassing litigation." *Golden Rule*, 925 S.W.2d at 651; *Harbor Perfusion, Inc. v. Floyd*, 45 S.W.3d 713, 718 (Tex. App.—Corpus Christi 2001, no pet.) (trial court abused discretion in awarding anti-suit injunction where no evidence to support four Golden Rule factors).

Typically, the multiplicity argument supports issuance of an anti-suit injunction when a party files numerous lawsuits to re-litigate issues in different courts. *Counsel Fin. Servs., L.L.C. v. Leibowitz*, 2011 Tex. App. LEXIS 5079 at *37. *See also Gannon*, 706 S.W.2d at 307; *AVCO Corp. v. Interstate Sw., Ltd.*, 145 S.W.3d 257, 266 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Nguyen v. Intertex, Inc.*, 93 S.W.3d 288, 299 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (concluding that an anti-suit injunction was warranted where appellant filed at least five lawsuits relating to the

same judgment); *Chandler v. Chandler*, 991 S.W.2d 367, 403 (Tex. App.—El Paso 1999, pet. denied) (concluding that an anti-suit injunction was warranted where appellant filed ten lawsuits attempting to relitigate matters which had been resolved against him).

"Such a suit must be allowed to proceed absent some other circumstances which render an injunction necessary 'to prevent an irreparable miscarriage of justice.' Merely because the lawsuits present identical issues does not make their proceeding an 'irreparable miscarriage of justice.'" *Golden Rule*, 925 S.W.2d at 652 (citations omitted). Moreover, the Supreme Court held that an anti-suit injunction is especially inappropriate when, while the two actions "concern the same general subject matter," the foreign lawsuit "raises issues and involves parties that differ from those in the Texas litigation." 719 S.W.2d at 163.

A lawsuit is not vexatious simply because defending it requires resources. *Gannon*, 706 S.W.2d at 307; *In re Dawson*, No. 13-02-138-CV, 2002 Tex. App. LEXIS 6405, *5 (Tex. App.—Corpus Christi Aug. 29, 2002, original proceeding). This reasoning applies even when the cases are "mirror images" of one another. *Golden Rule*, 925 S.W.2d at 651.

A lack of connection between the parties' dispute and the forum of the second lawsuit suggests that it was filed for purposes of harassment. *Total Minatome Corp. v. Santa Fe Materials, Inc*., 851 S.W.2d 336, 340 (Tex. App.—Dallas 1993, no writ). "Texas cases that have approved injunctive relief to protect a party from vexatious or harassing litigation have done so based on evidence that a multiplicity of suits had been filed or on other evidence of harassment." *Counsel Fin. Servs., L.L.C. v. Leibowitz*, 2011 Tex. App. LEXIS 5079 at *37 (citing *Nguyen v. Intertex, Inc*., 93 S.W.3d 288, 299 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (concluding that an anti-suit injunction was warranted where appellant filed at least five lawsuits relating to the same judgment); *Chandler v. Chandler*, 991 S.W.2d 367, 403 (Tex. App.—El Paso 1999, pet. denied) (concluding that an anti-suit injunction was warranted where appellant filed ten lawsuits attempting to relitigate matters which had been resolved against him and finding that the continuous barrage of lawsuits against appellant's former wife and all attorneys involved in case was vexatious and meant to harass); *In re Estate of Dilasky*, 972 S.W.2d at 767-68 (concluding that an anti-suit injunction was warranted where appellant filed at least seven lawsuits attempting to re-litigate same or similar issues)).

A party will not normally be enjoined from filing or pursuing proceedings in its home jurisdiction. *Travelers Ins. Co. v. J. Ray McDermott, Inc.*, No. 09-05-110 CV 2006 Tex. App. LEXIS 3047, *15-16 (Tex. App.—Beaumont April 13, 2006, no pet.) (principal of comity outweighed any public policy concerns); *Herzog Servs. v. Kan. City S. Ry. Co*., No. 09-02-262 CV, 2002 Tex. App. LEXIS 6353, *6 (Tex. App.—Beaumont Aug. 30, 2002, no pet.) ("We have no indication that HSI fraudulently created jurisdiction in the other state; the parties' principal offices were in Missouri and the contracts were executed in Missouri and called for the application of Missouri law.").

B. Normal Prerequisites for Injunctions May Also Apply For Anti-Suit Injunctions

Although there is a split in the court of appeals, the majority rule is that the normal prerequisites (probable right of recovery, inadequate remedy at law, irreparable injury) for injunctive relief also apply for anti-suit injunctions. *Counsel Fin. Servs., L.L.C. v. Leibowitz*, No. 13-10-00200-CV, 2011 Tex. App. LEXIS 5079, *32-33 (Tex. App.—Corpus Christi July 1, 2011, pet. denied); *Harris v. Guerra & Moore, Ltd., L.L.P*., No. 13-04-676-CV, 2005 Tex. App. LEXIS 7166 (Tex. App.—Corpus Christi Aug. 31, 2005, no pet.) ("[T]he majority rule in Texas is that in addition to meeting the requirements necessary to obtain an anti-suit injunction, the traditional pre-requisites to injunctive or equitable relief (probable right of recovery, imminent injury, irreparable harm, inadequate remedy at law, and the requirements of Texas Rule of Civil Procedure 683) must be met by a party seeking an anti-suit injunction."); *Bay Fin. Sav. Bank v. Brown*, 142 S.W.3d 586, 591 (Tex. App.—Texarkana 2004, no pet.) (holding that anti-suit injunctions must also comply with requirements provided in the rules of civil procedure); *Marroquin v. D & N Funding, Inc.*, 943 S.W.2d 112, 114 (Tex. App.—Corpus Christi 1997, no pet.) (assessing whether a trial court erred in denying request for an anti-suit injunction by assessing whether party had pleaded and proven a probable injury if relief was denied and a probable right to recovery); *Total Minatome Corp. v. Santa Fe Materials, Inc.*, 851 S.W.2d 336, 339 (Tex. App.—Dallas 1993, no writ) (holding that "clear equity" justifying injunctive relief requires a showing of irreparable injury, inadequate remedy at law, and probable right of recovery); *Mfr. Hanover Trust Co. v. Kingdom Investors Corp.*, 819 S.W.2d 607, 610 (Tex. App.—Houston [1st Dist.] 1991, no writ) (holding

applicant for anti-suit injunctive relief must show probable right to recovery, probable injury in interim, and inadequate remedy at law).

For example, several courts have reversed an anti-suit injunction where there was no evidence to support a probable right of recovery. *Snell v. Spectrum Ass'n Mgmt. L.P.*, No. 04-10-00285-CV, 2010 Tex. App. LEXIS 7617 (Tex. App.—San Antonio Sept. 8, 2010, no pet.) (reversing anti-suit injunction where no evidence admitted to support probable right of recovery); *Withem v. Deison*, No. 09-08-00467-CV, 2009 Tex. App. LEXIS 5438 (Tex. App.—Beaumont July 16, 2009, no pet.) (same).

Moreover, an anti-suit injunction may not be appropriate if a plea in abatement in the other jurisdiction would provide an adequate remedy. *Rouse v. Tex. Capital Bank, N.A.*, No. 05-11-0422-CV, 2011 Tex. App. LEXIS 9371 (Tex. App.—Dallas November 30, 2011, no pet.) (no adequate remedy found where party attempted to abate proceeding in other jurisdiction but jurisdiction refused to abate); *Atkinson v. Arnold*, 893 S.W.2d 294, 297-298 (Tex. App.—Texarkana 1995, no writ) (temporary injunction set aside when party failed to secure ruling on plea in abatement).

This majority rule should be correct. The Texas Supreme Court has held that to obtain temporary injunctive relief, an applicant must demonstrate a probable right to the relief sought and a probable, imminent, and irreparable injury. *Butnaru v. Ford Motor Co*., 84 S.W.3d 198, 204 (Tex. 2002). The Court did not limit these requirements to any particular types of injunctions, and it certainly did not except anti-suit injunctions from these requirements. *See id*.

A temporary injunction is an equitable remedy prior to trial. *State v. Texas Pet Foods, Inc.*, 591 S.W.2d 800 (Tex. 1979); *NMTC Corp. v. Conarroe*, 99 S.W.3d 865, 868 (Tex. App.—Beaumont 2003, no pet.). A temporary injunction as a remedial writ through which the court exercises its equity jurisdiction. *GXG, Inc. v. Texacal Oil & Gas, Inc.*, 882 S.W.2d 850, 852 (Tex. App.—Corpus Christi 1994, no writ).

Indeed, Texas Civil Practice and Remedies Code chapter 65 provides that "the principles governing courts of equity govern injunction proceedings if not in conflict with this chapter or other law." Tex. Civ. Prac. & Rem. Code Ann. §65.001. The Rules of Civil Procedure similarly provide: "The principles, practice and procedure governing courts of equity shall govern proceedings in injunctions when the same are not in conflict with these rules or the provisions of the statutes." Tex. R. Civ. P. 693. Anti-suit injunctions must comply with the requirements provided in the rules of civil procedure. *Bay Fin. Sav. Bank v. Brown*, 142 S.W.3d 586, 591 (Tex. App.—Texarkana 2004, no pet.). Therefore, "the default rule, created by chapter 65 and the rules of civil procedure, is that the rules of equity control the granting of the temporary injunctive relief unless a particular statute provides otherwise." *Cardinal Health Staffing Network, Inc. v. Bowen*, 106 S.W.3d 230, 234 n.2 (Tex. App.—Houston [1st Dist.] 2003, no pet.). As there is no statute or rule that excludes anti-suit injunctions from the normal equitable requirements for injunctions, those requirements apply.

There is another reason that the normal equitable requirements for injunctions apply to anti-suit injunctions: to hold otherwise would be to countenance vain and useless acts. From the dawn of legal philosophy, courts have always held that equity will not do a vain or useless thing. *See O'Neil v. Powell*, 470 S.W.2d 775 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.). *See also McDaniel v. Hale*, 893 S.W.2d 652, 663 n. 23 (Tex. App.—Amarillo 1994, writ denied); *Davis v. Carothers*, 335 S.W.2d 631 (Tex. Civ. App.—Waco 1960, writ dism'd); *Gambrell v. Chalk Hill Theatre Co*., 205 S.W.2d 126, (Tex. Civ. App.—Austin 1947, writ ref'd n.r.e.); *Henderson v. Jones*, 227 S.W. 736 (Tex. Civ. App. 1921, no writ). The Latin phrase "lex nil facit frustra" means "the law does nothing in vain." www.inrebus.com/legalmaxims. Pursuant to this maxim, for example, Texas courts have held that a petition for an equitable bill of review will not be granted where the petitioner has no meritorious defense because without such a defense, the same judgment would be entered on retrial. *McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706, 710 (1961) (where a defendant "has no meritorious defense to the suit, the setting aside of the judgment would be a vain act and a trespass on the time of the court").

Specifically, Texas courts have held that a trial court cannot grant a temporary injunction where it would be a vain and useless act. *Panos v. Foley Bros. Dry Goods Co*., 198 S.W.2d 494 (Tex. Civ. App—Galveston 1946, no writ). In *In re Hassler*, the court of appeals denied a party's request for a writ of mandamus to order a trial court to enter a temporary restraining order where the party's case did not have merit: "We would be doing relator no favor to exercise our discretion to encourage him in the vain pursuit of a proceeding

that is void and of no force or effect." No. 07-03-0119-CV, 2003 Tex. App. LEXIS 2833 (Tex. App.—Amarillo April 2, 2003, original proceeding). *See also Davis v. Carothers*, 335 S.W.2d at 642.

Granting an anti-suit injunction without considering the traditional requirements for injunctions would violate this long-held principle of equity. It is pointless to order an anti-suit injunction and preclude litigation in another forum where the party seeking such an injunction does not first establish a probable right of recovery or inadequate remedy at law in this forum.

C. Anti-Suit Injunctions Should Not Be Overly Broad And Must Contain Findings

An order granting anti-suit injunctive relief cannot be overly broad and award more relief than is necessary. *Fleming v. Ahumada*, 193 S.W.3d 704, 715 (Tex. App.—Corpus Christi 2006, no pet.) (holding that anti-suit injunction was overly broad); *Sparkman v. Kimmey*, 970 S.W.2d 654, 657 (Tex. App.—Tyler 1998, writ denied) (even when an anti-suit injunction is warranted, it must be specific and limited, barring suit only on the same claims against the same defendants.). Moreover, an anti-suit injunction must contain the necessary findings for an injunction. *Monsanto Co. v. Davis*, 25 S.W.3d 773, 789 (Tex. App.—Waco 2000, pet. dism'd) (the court held that an anti-suit injunction was void and set it aside for failing to comply with the mandatory requirements of Rule 683 because a detailed explanation for the reason for the injunction's issuance was not made.); *Atkinson v. Arnold*, 893 S.W.2d 294, 297 (Tex. App.—Texarkana 1995, no writ).

XVII. Review of Orders Granting or Denying Temporary Injunctive Relief

A. Cannot Use Temporary Injunction Appeal For Ruling on Merits

Because an appeal of an order granting a temporary injunction is an appeal from an interlocutory order, the merits of the applicant's case are not presented for appellate review. As one court stated:

> The only legitimate purpose of a temporary injunction is to preserve the status quo pending trial, and the most expeditious relief from an unfavorable preliminary [ruling] is a prompt trial on the merits. An interlocutory appeal should not be used to obtain an advance ruling on the issues, and we may not give full consideration to the merits of the underlying lawsuit.

Murphy v. McDaniel, 20 S.W.3d 873, 878 (Tex. App.—Dallas 2000, no pet.).

Appeals from interlocutory injunctions may not be used as vehicles for getting an advance ruling on the merits. One court of appeals has considered imposing damages for delay on an appellant for prosecuting an interlocutory appeal to obtain a ruling on the merits. In *Hiss v. Great North American Companies*, the appellant sought an interlocutory appeal from a trial court's grant of a temporary injunction. 871 S.W.2d 218 (Tex. App.—Dallas 1993, no writ). In dismissing an appeal as frivolous, the appellate court commented that the only issue before a trial court is whether the status quo should be maintained pending a trial on the merits, and that an applicant may not use an appeal from a temporary injunction in an effort to get an advance ruling on the merits:

> Appellants, with the acquiescence of appellee, are attempting to use the trial court's ruling on the temporary injunction to get an advance ruling on the merits. The function of a court of appeals in a case like this is to determine only whether the trial court abused its discretion in granting or denying the temporary injunction. Any resolution of issues on their merits must await appeal from a final judgment in the underlying suit. We continue to adhere to our position that this appeal, like many temporary injunction appeals, is unnecessary. We again affirm our conclusion that the fastest way of curing the hardship of an unfavorable preliminary order is to try the case on the merits.
>
> Because appellants brought this appeal to obtain a ruling on the merits and not for a determination of whether the trial court abused its discretion, we conclude this appeal is frivolous. We refuse to condone or approve the

> abatement, stay, or continuance of trial court proceedings expressly to obtain an advance ruling on the merits of the underlying lawsuit. We admonish the litigants and the trial court to proceed expeditiously to a full consideration of the merits of this case.

Id. at 200 (internal citations omitted). *See also Thomas CYR v. Tompkins*, No. 05-93-00850-CV, 1994 Tex. App. LEXIS 3302 (Tex. App.—Dallas March 30, 1994, no writ); *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 889 (Tex. App.—Dallas 2003, no pet.) (noting that appeal of temporary injunction was unnecessary and improper due to the fact that the most appropriate relief was a trial on the merits); *Spring v. Walthall, Sachse & Pipes, Inc*., No. 04-05-00228, 2005 Tex. App. LEXIS 6825 n. 7 (Tex. App.—San Antonio August 24, 2005, no pet.). Accordingly, a party should carefully review whether a temporary injunction should be appealed, and should not do so if the only issue is the merits of the underlying case.

B. Findings of Fact and Conclusions of Law

In the context of a temporary injunction, the trial court must make certain minimal findings in the order. Tex. R. Civ. P. 683 (every order granting an injunction shall set forth the reasons for its issuance . . .). However, normally, these "findings" do not meet the requirements of Texas Rule of Civil Procedure 299a. Tex. R. Civ. P. 299a (requiring findings of fact to be separately filed and not simply recited in judgment); *Casino Magic Corp. v. King*, 43 S.W.3d 14, 20 n.6 (Tex. App.—Dallas 2001, pet. denied). Accordingly, a party challenging a trial court's order on a temporary injunction should request findings of fact and conclusions of law. *Hopkins v. NCNB Tex. Nat. Bank*, 822 S.W.2d 353, 355 (Tex. App.—Fort Worth 1992, no pet.). Indeed, this is routinely done in temporary injunction cases. *Mattox v. Jackson*, 336 S.W.3d 759 (Tex. App.—Houston [1st Dist] 2011, no pet.) (trial court entered findings of fact and conclusions of law after temporary injunction ruling); *Koepp v. Koepp*, No. 04-08-00760-CV, 2009 Tex. App. LEXIS 4697 (Tex. App.—San Antonio June 24, 2009, no pet.) (same); *Glenwood Acres Landowners Ass'n v. Alvis*, No. 12-07-00072-CV, 2007 Tex. App. LEXIS 6060 (Tex. App.—Tyler July 31, 2007, no pet.).

Moreover, the appeal will be an interlocutory appeal. Texas Rule of Appellate Procedure 28.1 provides that a trial court may file findings of fact and conclusions of law within thirty days after an interlocutory order is signed. Tex. R. App. P. 28.1. Therefore, whether a court issues findings and conclusions is discretionary. In an appeal of an order granting a temporary injunction, the Texas Supreme Court recognized that a request for findings of fact and conclusions of law was appropriate. *Transport Co. of Texas v. Robertson Transports*, 152 Tex. 551, 261 S.W.2d 549, 553 (1953); *Zuniga v. Wooster Ladder Co.*, 119 S.W.3d 856, 864 (Tex. App.—San Antonio 2003, no pet.).

The purpose of findings of fact is the same as a jury verdict in that they resolve the factual issues in the case. The party must file a request for findings of fact and conclusions of law within twenty days of the signing of the order. Tex. R. Civ. P. 296. The court is supposed to file its findings of fact and conclusions of law within twenty days of the request. *See id*. at 297. If the court fails to do so, then the requesting party must file a notice of past due findings of fact and conclusions of law within thirty days of the filing of the original request. *See id.* Thereafter, the court should file findings of fact and conclusions of law within forty days from the filing of the original request. *See id.* If a party fails to file a notice of past due findings of fact and conclusions of law, he has waived any error in the court failing to file such, and all facts will be presumed in favor of the judgment. *Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 227, 232 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Once the court files findings, a party can file a request for additional findings of fact within ten days after the original findings are filed. Tex. R. Civ. P. 298. This request for additional findings must be specific and must contain proposed findings, otherwise any error in refusing the request is waived. *Alvarez v. Espinoza*, 844 S.W.2d 238, 241-42 (Tex. App.—San Antonio 1992, writ dism'd).

However, if none are entered by the trial court, a court of appeals should use the standard of review applicable to cases where no findings have been requested or filed. *Casino Magic Corp. v. King*, 43 S.W.3d at 20 n.6. Where no findings of facts or conclusions of law are filed, the trial court's determination of whether to grant or deny a temporary injunction "must be upheld on any legal theory supported by the record." *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978). In the context of interlocutory orders, where no findings are made, a court should presume that the trial court made all findings necessary to support the interlocutory order. *John W. Cox Partners, Ltd. v. 55 Acre Joint*

Venture, No. 09-16-00363-CV, 2017 Tex. App. LEXIS 3017 (Tex. App.—Beaumont April 6, 2017, no pet) (In a temporary injunction appeal, court stated: "[b]ecause neither party requested findings of fact and conclusions of law, we presume all findings necessary to support the trial court's order, and we will affirm if it is supported by any legal theory that is sufficiently raised by the evidence."); *Dresser Industries, Inc. v. Forscan Corp.*, 641 S.W.2d 311, 316 (Tex. App.—Houston [14th Dist.] 1982, no writ).

Some courts have held that traditional legal and factual sufficiency standards may be used in challenging findings in temporary injunction proceedings. A court should review the findings and conclusions under the appropriate standards of review. *TMC Worldwide, L.P. v. Gray*, 178 S.W.3d 29, 36 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Beasley v. Hub City Tex., L.P.*, No. 01-03-00287-CV, 2003 Tex. App. LEXIS 8550 * 12 (Tex. App.—Houston [1st Dist.] September 29, 2003, no pet.) (mem. op.); *Green v. Stratoflex*, 596 S.W.2d 305, 307 (Tex. Civ. App.—Fort Worth 1980, no writ). A court should sustain fact findings if there is evidence to support them and should review legal conclusions *de novo*. *Beasley v. Hub City Tex., L.P.*, No. 01-03-00287-CV, 2003 Tex. App. LEXIS 8550 * 12; *CRC-Evans Pipeline Int'l, Inc. v. Myers*, 927 S.W.2d 259, 263 (Tex. App.—Houston [1st Dist.] 1996, no writ). An appellant should treat the findings of fact as if they were jury findings, and may challenge them for legal or factual sufficiency of the evidence. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994); *Beasley*, 2003 Tex. App. LEXIS 8550 * 12. The review of a trial court's conclusions of law is *de novo*. *Beasley*, 2003 Tex. App. LEXIS 8550 * 12; *Hydrocarbon Mgmt. v. Tracker Expl.*, 861 S.W.2d 427, 431 (Tex. App.—Amarillo 1993, no writ).

Other courts have held that findings of fact in a temporary injunction proceeding is not reviewed by legal and factual sufficiency standards. *See, e.g., CSSC Inc. v. Carter*, 129 S.W.3d 584, 593 (Tex. App.—Dallas 2003, no pet.); *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 883 (Tex. App.—Dallas 2003, no pet.). In an appeal from an interlocutory order, the trial judge may file findings and conclusions, but is not required to do so. Tex. R. App. P. 28.1; *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d at 883; *Humble Exploration Co. v. Fairway Land Co.*, 641 S.W.2d 934, 937 (Tex. App.—Dallas 1982, writ ref'd n.r.e.). Findings of fact and conclusions of law filed in conjunction with an order on interlocutory appeal may be "helpful" in determining if the trial court exercised its discretion in a reasonable and principled fashion. *See Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 852 (Tex. 1992) (orig. proceeding) (mandamus review of sanction order); *Tamina Props. LLC v. Texoga Techs. Corp.*, No. 09-08-00542-CV, 2009 Tex. App. LEXIS 4241 (Tex. App.—Beaumont June 11, 2009, no pet.); *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d at 883. However, they do not carry the same weight on appeal as findings made under rule 296, and are not binding when a court of appeals reviews a trial court's exercise of discretion. *IKB Indus., Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997); *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d at 883.

Further, while every order granting an injunction must set forth the reasons for its issuance in the order itself, if the enjoined party wishes additional, detailed findings, the party may make a request for additional findings. *Operation Rescue-National v. Planned Parenthood*, 937 S.W.2d 60 (Tex. App.—Houston [14th Dist.] 1996) (citing *Transport Co. v. Robertson Transports, Inc.*, 152 Tex. 551, 261 S.W.2d 549, 553 (1953)), *modified by, affirmed by* 975 S.W.2d 546 (Tex. 1998). Where a trial court's injunctive order adequately states the specific reasons for its issuance, the party opposing it cannot complain about additional findings if it did not request them. *See id.* (citing *McDuffie v. Blassingame*, 883 S.W.2d 329, 337 (Tex. App.—Amarillo 1994, writ denied)).

C. Review of Temporary Restraining Orders By Appeal

A temporary restraining order is generally not appealable. *Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992). The fact that the order is denominated as a temporary restraining order does not control whether the order is appealable. *In re Tex. Nat. Res. Conservation Comm.*, 85 S.W.3d 201, 205 (Tex. 2002). Whether an order is a non-appealable temporary restraining order or an appealable temporary injunction depends on the order's characteristics and function, not its title. *Qwest Communications Corp. v. AT & T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000), *rev'd on other grounds*, 167 S.W.3d 324; *Del Valle*, 845 S.W.2d at 809. In *Del Valle*, the Supreme Court explained the roles the different orders serve: "A temporary restraining order is one entered as part of a motion for a temporary injunction, by which a party is restrained pending the hearing of the motion. A temporary injunction is one which operates until dissolved by an interlocutory order or until the final hearing." *Id*. (quoting *Brines v.*

McIlhaney, 596 S.W.2d 519, 523 (Tex.1980)). The Court further stated:

> An order such as that at issue here, which directs the conduct of a party but does not contemplate imminent disposition of a request for a temporary or permanent injunction, cannot be categorized as a non-appealable temporary restraining order. To reject the order's status as a temporary injunction based on a deficiency in form is to deny review of any defects that may render the order void. Because the order constitutes a temporary injunction, and not a temporary restraining order, the District was entitled to seek review in the court of appeals pursuant to Tex. Civ. Prac & Rem. Code § 51.014(4).

Del Valle, 845 S.W.2d at 809.

Accordingly, a party should carefully review the temporary restraining order. If it provides relief that is more appropriate in a temporary injunction, it may be just that – a temporary injunction, which is appealable.

D. No Interlocutory Appeal of Permanent Injunction

Parties have no right to an interlocutory appeal of a permanent injunction. Texas Civil Practice and Remedies Code section 51.014(a)(4) only mentions temporary injunctions: "A person may appeal from an interlocutory order of a district court, county court at law, or county court that: . . . (4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65." Tex. Civ. Prac. Rem. Code § 51.014(a)(4). Therefore, courts have refused to allow an interlocutory appeal of a permanent injunction. *Qwest Communications Corp v. AT&T Corp.*, 24 S.W.3d 334 (Tex. 2000); *Brelsford v. Old Bridge Lake Community Serv. Corp.*, 787 S.W.2d 700 (Tex. App.—Houston [14th Dist.] 1989, no writ).

Further, whether an injunction is temporary or permanent does not depend on the title given to the injunction. A court must review the nature of the injunctive relief to determine whether it is in fact temporary or permanent. One threshold test is whether the injunction depends on further action or order of the trial court. The Texas Supreme Court stated that this was just an initial factor. *Qwest Communications Corp v. AT&T Corp*., 24 S.W.3d at 334. If the relief immediately places restrictions on the party pending resolution of the suit, it may be considered temporary. However, if the relief extends beyond the suit and the result is complete relief, it may be considered permanent. *Brelsford v. Old Bridge Lake Community Serv. Corp.*, 787 S.W.2d at 702; *Aloe Vera of America, Inc. v. CIC Cosmetics Internat'l*, 517 S.W.2d 433, 435 (Tex. Civ. App.—Dallas 1974, no writ). When a party faces an interlocutory permanent injunction, the party may should consider severing that order from the remainder of the case. The severed injunction would be a final order that can then be appealed.

E. Review of Temporary Injunctions By Appeal

An appeal from an interlocutory order granting or refusing a temporary injunction or granting or overruling a motion to dissolve a temporary injunction is permitted. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(4) ("A person may appeal from an interlocutory order of a district court, county court at law, or county court that: . . . (4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65."); *Greathouse Ins. Agency v. Tropical Investments, Inc*., 718 S.W.2d 821, 822 (Tex. App.—Houston [14th Dist.] 1986, no writ). Not only is the initial decision to grant or deny a temporary injunction appealable, but subsequent decisions on the dissolution of an injunction may be appealable, i.e., motion to dissolve based on changed circumstances. *Desai v. Reliance*, 813 S.W.2d 640, 641 (Tex. App.—Houston [14th Dist.] 1991, no writ).

1. Procedure of Appealing Temporary Injunction Order

An appeal of a temporary injunction is an accelerated appeal. Tex. R. App. P. 28.1. An appellant must file its notice of appeal within 20 days after the signing of the order. Tex. R. App. P. 26.1(b); *Denton County v. Huther*, 43 S.W.3d 665, 666 (Tex. App.—Fort Worth 2001, no pet.). Post-order motions will not extend this deadline. Tex. R. App. P 28.1; *In re K.A.F.*, 160 S.W.3d 923, 927 (Tex. 2005); *In re T.W.*, 89 S.W.3d 641 (Tex. App.—Amarillo 2002, no pet.).

The notice of appeal must contain the following information: the identity of the trial court,

the style of the case, the cause number, the date the trial court signed the order, the order appealed from, a statement that the party filing the notice wants to appeal, the identity of the court of appeals to which the appeal is being made, the name of the party or parties filing the notice, and an statement that the appeal will be accelerated. Tex. R. App. P. 25.

Generally, the appellee does not need to file a notice of appeal unless it seeks to alter the trial court's judgment or seek more favorable relief than that awarded by the trial court. Tex. R. App. P. 25.1(c); *Lubbock Cty v. Trammel's Lubock ail Bonds*, 80 S.W.3d 580, 584 (Tex. 2002). If an appellee desires to file a notice of appeal, it must do so either by the time that the appellant's notice is due or within 14 days of the appellant's notice being filed, whichever is later. Tex. R. App. P. 25.1(d); *Charette v. Fitzgerald*, 213 S.W.3d 505, 509 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

The original notice must be filed with the trial court, and a copy of the notice filed with the court of appeals. Tex. R. App. P 25.1(a); *Ace Ins. Co. v. Zurich Am. Ins. Co.*, 59 S.W.3d 424, 426 n.1 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). If the county where the trial court is located can send appeals to two courts of appeals, the copy of the notice should be filed with the court of appeals that is randomly selected if there is a random selection procedure, or otherwise in the court of appeals of the appellant's choice. *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 137-38 (Tex. 1995). The appellant should serve all other parties in the proceeding with the notice of appeal. Tex. R. App. P. 25.1(e); *Pena v. McDowell*, 201 S.W.3d 665, 666 (Tex. 2006). The appellant should also file the appropriate filing fee with the court of appeals and prepare a docketing statement to file with the court of appeals. Tex. R. App. P. 5, 32.

2. Record For Appeal

The appellate record must be forwarded to the court of appeals. The purpose of the record is to bring the trial court's proceedings to the appellate court so that the appellate court can review the trial court's temporary injunction order. There are two parts to the record: the clerk's record and the reporter's record. Tex. R. App. P. 34.1. The clerk's record is a bound volume prepared by the trial court's clerk that contains the items filed with the clerk, i.e., pleadings, motions, and orders. *See id*. at 34.5. The reporter's record is the verbatim transcription of the oral proceedings in the trial court and is prepared by the court reporter. *See id*. at 34.6. The trial court and appellate courts are jointly responsible for filing the record. *See id*. at 35.3. The trial court clerk is responsible for filing the clerk's record as soon as a notice of appeal is filed and the appealing party makes arrangements to pay for the record. *See id*. 37.3. The Texas Rules of Appellate Procedure provide what items are normally included in the clerk's record, however, if either party wants some other document included that is not expressly listed, then that party has the duty to file a written request with the clerk for such documents. The court reporter is responsible for filing the reporter's record when a notice of appeal is filed, and when the appealing party makes a written request for it and makes arrangements to pay for it. *See id*. at 35.3. The written request should clarify what portions of the proceedings need to be transcribed. In an accelerated appeal, the appellate record is due to be filed within 10 days of the notice of appeal. *See id*. at 35.1(b).

Although rarely done, an appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn and uncontroverted copies of those papers. Tex. R. App. P. 28.3. Further, the court of appeals may consider the appeal without appellate briefing. *See id.*

3. Supersedeas – General Rules

Unless the law or the rules of appellate procedure provide otherwise, any judgment may be superseded and enforcement of the judgment suspended pending appeal. Tex. R. App. P. 24.1(a). Supersedeas preserves the status quo of the matters in litigation as they existed before the issuance of the order or judgment from which an appeal is taken. *Renger v. Jeffrey*, 182 S.W.2d 701, 702 (1944) (orig. proceeding); *Kantor v. Herald Publ'g Co.*, 632 S.W.2d 656, 657-58 (Tex. App.—Tyler 1982, no writ). Generally, the right to supersede a judgment is one of absolute right and is not a matter within the trial court's discretion. *Houtchens v. Mercer*, 29 S.W.2d 1031, 1033 (Tex. 1930, orig. proceeding); *State ex rel. State Highway & Pub. Transp. Comm'n v. Schless*, 815 S.W.2d 373, 375 (Tex. App.—Austin 1991, orig. proceeding [leave denied]).

A judgment debtor may supersede the judgment by filing with the trial court a good and sufficient bond. Tex. R. App. P. 24.1(a)(2). A supersedeas bond must be in the amount required by Rule 24.2 of the Texas Rules of Appellate Procedure. Tex. R. App. P. 24.1(b)(1)(A). Under Rule 24.2, the amount of the bond depends on the type of judgment. Tex. R. App. P. 24.2(a). For

example, when the judgment is for the recovery of money, the amount of the bond must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. Tex. R. App. P. 24.2(a)(1).

When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post:

> When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. But the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that relief was improper.

Tex. R. App. P. 24.2(a)(3). Absent the posting of the judgment creditor's own bond, which acts to basically supersede the judgment debtor's supersedeas, the trial court must allow the judgment debtor to supersede. *Haedge v. Cent. Tex. Cattleman's Ass'n*, No. 07-15-00368, 2016 Tex. App. 2311, at *5–6 (Tex. App.—Amarillo Mar. 3, 2016, no pet.). Upon the request of the judgment debtor, a trial court is required to set a supersedeas amount. *Orix Capital Mkts., LLC v. La Villita Motor Inns, J.V.*, No. 04-09-00573, 2010 Tex. App. LEXIS 435 (Tex. App.—San Antonio January 27, 2010, orig. proceeding) (court of appeals ordered trial court to set supersedeas amount on order requiring a lender to release its liens).

Under Rule 24.2(a)(3), this type of relief could be injunctive or declaratory relief. This "language is mandatory" and, thus, a judgment debtor must be given the opportunity to preserve the status quo during its appeal:

> The purpose of Rule of Appellate Procedure 24 is to provide the means for a party to suspend enforcement of a judgment pending appeal in civil cases. By superseding a judgment against it, the judgment debtor may "preserve[ ] the status quo of the matters in litigation as they existed before the issuance of the order or judgment from which an appeal is taken."

Alpert v. Riley, 274 S.W.3d 277, 297 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

However, under Rule 24, a judgment debtor's right to supersede the enforcement of a judgment during the pendency of an appeal is not absolute. Rule 24.2(a)(3) recognizes that a trial court may refuse to allow a judgment debtor to supersede the judgment so long as the judgment is considered an "other" judgment and the judgment creditor posts security "in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted . . . ." Tex. R. App. P. 24.2(a)(3); *Devine*, 2015 Tex. App. LEXIS 5173, at *2; *Orix Capital Mkts*, 2010 Tex. App. LEXIS 435, at *3. In such cases, the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if the appellate court reverses. *Id. See also El Caballero Ranch, Inc. v. Grace River Ranch, LLC*, No. 04-16-00298-CV, 2016 Tex. App. LEXIS 9180 (Tex. App.—San Antonio August 24, 2016, mot. denied) (court affirmed trial court's order denying supersedeas to judgment debtor where creditor posted security).

Therefore, an appellate court's determination regarding whether a judgment is primarily one for money, the recovery of real property, or for something "other than money or an interest in real property" has serious ramifications for a judgment debtor. *El Caballero Ranch, Inc.*, 2016 Tex. App. LEXIS 9180, *14. In the event that a court determines that the judgment awarded the recovery of money or an interest in real property, the trial court abuses its discretion by failing to allow the debtor to post bond and supersede the enforcement of the judgment during the pendency of the appeal. *Id*. However, in the event the court determines that the judgment awarded something "other than money or an interest in real property," the trial court has discretion to decline a debtor's request to supersede the judgment so long as the creditor posts security in an amount that would secure the debtor against any loss or damage. Id.

The amount that the creditor must post would be in the discretion of the trial court after an evidentiary hearing on that issue. *Id*.

Nevertheless, a trial court's discretion to refuse to permit a judgment to be superseded under Rule 24.2(a)(3) does not extend to denying a party its appeal by rendering the appeal moot. *In re Dallas Area Rapid Transit*, 967 S.W.2d 358, 360 (Tex. 1998); *Mossman v. Banatex, L.L.C.*, 440 S.W.3d 835, 839 (Tex. App.—El Paso 2013, order); *Hydroscience Techs., Inc. v. Hydroscience, Inc.*, 358 S.W.3d 759, 761 (Tex. App.—Dallas 2011, no pet.).

4. Supersedeas For Interlocutory Orders

Generally, supersedeas rights apply to final judgments. However, a trial court has discretion to allow a party to supersede an interlocutory order as well:

> The trial court may permit an order granting interlocutory relief to be superseded pending an appeal from the order, in which event the appellant may supersede the order in accordance with Rule 24. If the trial court refuses to permit the appellant to supersede the order, the appellant may move the appellate court to review that decision for abuse of discretion.

Tex. R. App. P. 29.2. Further, if the trial court refuses supersedeas, the appellant may also consider filing a motion to stay the order pending appeal. *Id*. at 29.3 ("When an appeal from an interlocutory order is perfected, the appellate court may make any temporary order necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security. But the appellate court may not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas or another order made under Rule 24."). For example, an appellate court does not have to wait for a trial court's refusal to set supersedeas before entering orders to protect its jurisdiction. *Maples v. Muscletech, Inc*., 74 S.W.3d 429, 431 (Tex. App.—Amarillo 2002, no pet.).

5. Appellate Review of Supersedeas Rulings

Rule 24.4 authorizes appellate courts to engage in supersedeas review, specifically to review (1) the sufficiency or excessiveness of the amount of security, (2) the sureties on a bond, (3) the type of security, (4) the determination whether to permit suspension of enforcement, and (5) the trial court's exercise of discretion in ordering the amount and type of security. Tex. R. App. P. 24.4(a); Tex. Civ. Prac. & Rem. Code Ann. § 52.006(d).

An appellate court reviews the trial court's determination of the amount of security under an abuse of discretion standard. *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 909 (Tex. App—Houston [14th Dist.] 2005, published order). "Generally, the test for abuse of discretion is whether the trial court acted without reference to any guiding rules and principles or whether the trial court acted arbitrarily and unreasonably." *Id*. at 910. A failure by the trial court to analyze or apply the law correctly is an abuse of discretion. *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 623-24 (Tex. 2005).

To complain of a trial court's net worth determination in connection with setting a supersedeas bond amount, a party must file a motion in the court of appeals. Tex. R. App. P. 24.4. A petition for writ of mandamus is the proper vehicle to present a complaint in the Supreme Court of Texas.

A court of appeals may also "issue any temporary orders necessary to preserve the parties' rights" to seek appellate review of the trial court's determination. Tex. R. App. P. 24.4(c). A stay may be necessary to preserve the status quo and prevent execution on the underlying judgment pending a court's resolution of the issues raised with the trial court's supersedeas determinations. *Id*. For example, one court has stayed enforcement of an underlying judgment that awarded possession of real property while the court reviewed a trial court's actions on supersedeas determinations. *See In re It's The Berry's, LLC*, No. 12-06-00298-CV, 2006 Tex. App. LEXIS 9146, at *13 (Tex. App.—Tyler Oct. 25, 2006, order) (imposing stay while Court considered issues regarding right to and amount of supersedeas).

6. Briefing Schedule

The appellant's brief is due to be filed twenty days after the record is filed. Tex. R. App. P. 38.6. The appellee's brief is due to be filed twenty days after the appellant's brief is filed. *See id*. The appellant's reply brief is due twenty days after the appellee's brief is filed. Disposition of the appeal is also accelerated because interlocutory appeals are

required to be given priority over other appeals. *See id.* at 40.1(b). The court of appeals has discretion to extend these deadlines, or in the interests of justice, can also shorten the time for filing briefs and for submission of the case. *See id*. at 38.6.

7. Court of Appeals Standard of Review

Whether to grant or deny a temporary injunction is within the trial court's sound discretion. *Butnaru v. Ford Motor Co*., 84 S.W.3d 198, 204 (Tex. 2002); *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc*., 965 S.W.2d 18, 21 (Tex. App—Houston [1st Dist.] 1998, no pet.). The applicant for the temporary injunction is not required to establish that he or she will prevail upon a final trial on the merits. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). A reviewing court must not substitute its judgment for the trial court's judgment unless the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion. *Butnaru*, 84 S.W.3d at 204. In doing so, the court will draw all legitimate inferences from the evidence in the light most favorable to the trial court's order. *See id.; T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 21 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd.).

The trial court does not abuse its discretion if the applicant pleads a cause of action and presents some evidence tending to sustain that cause of action. *RP&R, Inc. v. Territo*, 32 S.W.3d 396, 402 (Tex. App.—Houston [14th Dist.] 2000, no pet.). A court of appeals will not assume the evidence taken at the preliminary hearing will be the same as the evidence developed at a full trial on the merits. *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978). Furthermore, as the trial court functions as the fact finder in a temporary injunction hearing, an abuse of discretion does not exist where the trial court based its discretion on conflicting evidence. *Davis*, 571 S.W.2d at 862; *CRC-Evans Pipeline, Int'l, Inc. v. Myers*, 927 S.W.2d 259, 262 (Tex. App.—Houston [1st Dist.] 1996, no writ) (citations omitted). *See also Flake v. EGL Eagle Global Logistics, L.P*., No. 14-01-01069-CV, 2002 Tex. App. LEXIS 6593 *3 (Tex. App.—Houston [14th Dist.] September 5, 2002, no pet.) (not design. for pub.).

8. Challenge Each Ground That Could Support Injunctive Relief

Furthermore, where an appellant challenges a trial court's temporary injunction order, it must challenge all potential grounds that would sustain the order. *Hartwell v. Lone Star, PCA*, No. 06-17-00030-CV, 2017 Tex. App. LEXIS 5628 (Tex. App.—Texarkana June 21, 2017, pet. filed); *Hyperion Holdings, Inc. v. Tex. Dept. of Housing & Comm. Affairs*, No. 03-05-00563-CV, 2006 Tex. App. LEXIS 1366 (Tex. App.—Austin February 16, 2006, no pet.). Absent a specific complaint as to each potential ground, the court of appeals should summarily affirm the judgment on those unchallenged grounds. *See id. See also Specialty Retailers v. Demoranville*, 933 S.W.2d 490, 493 (Tex. 1996); *Carone v. Retamco Operating, Inc*., 138 S.W.3d 1, 7 (Tex. App.—San Antonio 2004, pet. denied) ("Generally, when a trial court's judgment rests upon more than one independent ground or defense, the aggrieved party must assign error to each ground, or the judgment will be affirmed on any ground with merit to which no complaint is made."). *See also* TEX. R. APP. P. 38.1 (appellant's brief must contain "a clear and concise argument . . . with appropriate citations to authorities"). As the First Court of Appeals has stated:

> An appellant must attack all independent bases or grounds that fully support a complained-of ruling or judgment. If an appellant does not, then we must affirm the ruling or judgment. This rule is based on the premise that an appellate court normally cannot alter an erroneous judgment in favor of a civil appellant who does not challenge that error on appeal. If an independent ground is of a type that could, if meritorious, fully support the complained-of ruling or judgment, but the appellant assigns no error to that independent ground**,** then we must accept the validity of that unchallenged independent ground. Thus, any error in the grounds challenged on appeal is harmless because the unchallenged independent ground could, if meritorious, fully support the complained-of ruling or judgment.

Yazdchi v. Bennett, No. 01-04-01057-CV, 2006 Tex. App. LEXIS 3122 (Tex. App.—Houston [1st Dist.] April 20, 2006, no pet.) (internal citations omitted). *See also Pearson v. Visual Innovations Co. Inc.*, No. 03-04-00563-CV, 2006 Tex. App. LEXIS 2795

(Tex. App.—Austin April 6, 2006, no pet.) ("by presenting no argument to this Court on whether the trial court erred in determining that Pearson was liable for fraud, breach of a fiduciary relationship, misappropriation of a trade secret, conversion of confidential information, and tortious interference with a business relationship, Pearson has waived the right to contest Visual Innovations' monetary relief on those grounds."). Where the appellant fails to challenge all of the potential claims that support the injunctive relief, the court of appeals should affirm the temporary injunction because the applicant pled and proved alternative grounds for its issuance that has not been challenged on appeal by the appellant. *See, e.g., Hartwell v. Lone Star, PCA*, No. 06-17-00030-CV, 2017 Tex. App. LEXIS 5628 (Tex. App.—Texarkana June 21, 2017, pet. filed); *Collum v. Neuhoff*, 507 S.W.2d 920 (Tex. Civ. App.—Dallas 1974, no writ) (injunction was affirmed where appellant failed to challenge all independent grounds for its issuance).

9. Appellate Review Confined to Temporary Injunction Determination

A court of appeals generally has no jurisdiction to review interlocutory rulings other than those specifically set forth in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. C. Ann. §54.014. However, in the context of a temporary injunction appeal, an appellant may attempt to appeal otherwise unappealable orders. An appeal cannot be taken from an otherwise non-appealable order by seeking to disguise it as an injunction. *Elm Creek Villas Homeowner Ass'n, Inc. v. Beldon Roofing & Remodeling Co.*, 940 S.W.2d 150, 154 (Tex. App.—San Antonio 1996, no writ). An appeal from an interlocutory order granting or refusing a temporary injunction may not be used as a vehicle for carrying other non-appealable interlocutory orders and judgments to the appellate court. *Browne v. Bear, Stearns & Co., Inc*., 766 S.W.2d 823, 824 (Tex. App.—Dallas 1989, writ denied). For example, in *Sobel v. Taylor*, the court previously held that a party cannot challenge a discovery ruling that was appealed in the context of a temporary injunction appeal. 640 S.W.2d 704, 707-08 (Tex. App.—Houston [14th Dist.] 1982, no writ) (court reviewed temporary injunction issues and refused to consider discovery rulings). Accordingly, the temporary injunction appeal should be limited to the trial court's ruling on the application for temporary injunction. *Letson v. Barnes*, 979 S.W.2d 414, 417 (Tex. App.—Amarillo 1998, pet. denied).

However, there is precedent that other orders that affect the validity of the interlocutory order may also be reviewed. *Texas State Bd. Of Examiners in Optometry v. Carp*, 343 S.W.2d 242 (Tex. 1962). In fact, the Texas Rules of Appellate Procedure provide that some subsequent orders may be brought forward for review:

> While an appeal from an interlocutory order is pending, on a party's motion or on the appellate court's own initiative, the appellate court may review the following: (1) a further appealable order concerning the same subject matter; and (2) any interlocutory order that interferes with or impairs the effectiveness of the relief sought or that may be granted on appeal.

Tex. R. App. P. 29.5(a); *Public Utility Commission of Texas v. Coalition of Cities for Affordable Utility Rates*, 776 S.W.2d 222 (Tex. App.—Austin 1989, no pet.).

10. Effect On Appeal Of Dissolution Of Injunction

An appeal from an order granting an application for temporary injunction is moot and the appeal should be dismissed if the temporary injunction expires before the appellate court makes a decision. *Isuani v. Manske-Sheffield Radiology Group, P.A.*, 802 S.W.2d 235, 236 (Tex. 1991); *Jordan v. Landry's Seafood Rest., Inc*., 89 S.W.3d 737, 741 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). A court of appeals is prohibited from reviewing a temporary injunction that is moot because such a review would constitute an impermissible advisory opinion. *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999). When a temporary injunction becomes inoperative, the issue of its validity is moot. *See id.* The court of appeals should dismiss the case once it becomes moot on appeal. *Isuani v. Manske-sheffield Radiology Group, P.A.*, 802 S.W.2d 235, 236 (Tex. 1991). *See also N.W. Enters. v. City of Houston*, No. 14-09-00561-CV, 2010 Tex. App. LEXIS 791 (Tex. App.—Houston [14th Dist.] February 4, 2010, no pet.). Accordingly, if a temporary injunction becomes inoperative, a court of appeals should dismiss the appeal because of mootness. *Reeves v. City of Dallas*, No. 05-01-00356- CV, 2001 Tex. App. LEXIS 2956, *3, 2001 WL 474405, at *1-2

(Tex. App.—Dallas May 7, 2001, pet. denied) (holding new injunction may vacate previous injunction thus rendering appeal of previous injunction moot).

The issue can arise as to what happens to an opinion that has been issued before a case becomes moot. Previously, the general rule was that when a case becomes moot while on appeal, the proper course was not to merely dismiss the appeal, but to vacate the judgments and orders of the lower courts. *See, e.g., United Services Automobile Ass'n v. Lederle*, 400 S.W.2d 749 (Tex. 1966); *Guajardo et al v. Alamo Lumber Co.*, 159 Tex. 225, 317 S.W.2d 725, 726 (1958); *International Association of Machinists, Local Union No. 1488 et al. v. Federated Association of Accessory Workers et al*, 133 Tex. 624, 130 S.W.2d 282 (1939); *Service Finance Corporation v. Grote*, 133 Tex. 606, 131 S.W.2d 93 (1939). The rule prevented what might have been an erroneous opinion and judgment from becoming final in a moot case. *Lederle*, 400 S.W.2d at 749. *See also Speer v. Presbyterian Children's Home*, 847 S.W.2d 227 (Tex. 1993); *Raborn v. Davis*, 795 S.W.2d 716 (Tex. 1990). "To grant the motion [to dismiss without vacating opinion] would leave in effect the judgment of the Court of Civil Appeals in which respondents obtained relief and would deny to petitioner the right to have that judgment reviewed." *Texas Foundries, Inc. v. International Moulders & Foundry Workers' Union*, 151 Tex. 239, 241, 248 S.W.2d 460, 461 (1952).

More recently, in reviewing mootness due to settlement, appellate courts have not had to vacate an opinion if it concerns matters of public importance. In *Houston Cable TV, Inc. v. Inwood West Civic Ass'n, Inc.*, after the court of appeals issued its opinion, a party filed an application for writ of error to the Texas Supreme Court. 860 S.W.2d 72 (Tex. 1993). The parties subsequently settled, and then pursuant to settlement, filed a joint motion asking the Texas Supreme Court to grant its writ, vacate the judgment and opinion of the court of appeals, and vacate the trial court's judgment. *See id*. The Texas Supreme Court, noting that "a private agreement between litigants should not operate to vacate a court's writing on matters of public importance," refused to vacate and indicated that the precedential authority of the court of appeals' opinion is equivalent to a "writ dismissed" case. *Id. See also Ritchey v. Vasquez*, 986 S.W.2d 611 (Tex. 1999) (Texas Supreme Court may decline to vacate a court of appeals's opinion even though the judgment is dismissed as moot).

Other courts have followed the Texas Supreme Court's lead on this point. *See, e.g., Dallas/Fort Worth Int'l Airport Bd. v. Funderburk*, 2006 Tex. App. LEXIS 9786 (Tex. App.—Fort Worth Nov. 9, 2006, no pet.); *Polley v. Odom*, 963 S.W.2d 917, 918 (Tex. App.—Waco 1998, order, no pet.) (per curiam) ("Because our opinion in this case addresses matters of public importance, our duty as a public tribunal constrains us to publish our decision."); *Vida v. El Paso Employees' Fed. Credit Union*, 885 S.W.2d 177, 182 (Tex. App.—El Paso 1994, no writ) ("Although this Court certainly encourages the settlement of controversies . . . we do not sit as a purely private tribunal to settle private disputes. We believe that our opinion in this case involves matters of public importance, and our duty as an appellate court requires that we publish our decision.").

In one temporary injunction appeal, the court of appeals vacated its judgment because the parties settled the controversy between them while the appeal was pending in the Texas Supreme Court. *Swanson Broadcasting, Inc. v. Clear Channel Communications, Inc*., 762 S.W.2d 360 (Tex. App.—San Antonio 1988, no writ). The court of appeals did not, however, withdraw or vacate its opinion, and it was still authority for future cases.

The Texas Rules of Appellate Procedure also allow a court of appeals to maintain its opinion even if the underlying case becomes moot. In dismissing a proceeding upon a voluntary dismissal or settlement, Rule 42.1(c) provides that the court of appeals will determine whether to withdraw any opinion that it has already issued. Tex. R. App. P. 42.1(c). Further, if a case becomes moot while a petition for review is pending in the Texas Supreme Court, Rule 56.2 provides: "If a case is moot, the Supreme court may, after notice to the parties, grant the petition and, without hearing argument, dismiss the case or the appealable portion of it without addressing the merits of the appeal." *See id*. at 56.2. Further, if a case is settled while on appeal in the Texas Supreme Court, the Court can effectuate the parties' settlement, but the order will not vacate the court of appeals' opinion unless it specifically provides otherwise. *See id.* at 56.3. *See also Tex. Mut. Ins. Co. v. Howell*, No. 05-0806, 2007 Tex. LEXIS 587 (Tex. June 22, 2007) (vacated court of appeals's judgment on temporary injunction appeal but refused to vacate opinion).

In any event, after a trial on the merits, the party can appeal the final injunctive relief awarded. *See Triantaphyllis v. Gamble*, No. 14-02-00190-CV, 2002 Tex. App. LEXIS 3747 (Tex. App.—Houston [14th Dist.] May 23, 2002, pet. dism.) (dismissed

temporary injunction appeal after trial was conducted, but retained permanent injunction appeal from final trial).

11. Evidentiary Errors As Ground For Reversal Of Temporary Injunction

Generally, an evidentiary ruling will not be overturned absent an abuse of discretion. *See Texas Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles. *See Landry v. Burge*, No. 05-99-01217-CV, 2000 Tex. App. LEXIS 6606 (Tex. App.—Dallas Oct. 2, 2000, no pet.) (not designated for publication). Where a trial court improperly excludes evidence in a temporary injunction hearing that is relevant to a critical issue in the hearing, a trial court can reversibly err. *See Landry*, 2000 Tex. App. LEXIS at 6606 (reversing temporary injunction order based on trial court's erroneous exclusion of evidence). *See also Benefield v. Texas*, 266 S.W.3d 25, 33–34 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (reversing a trial court's temporary-injunction order because, inter alia, the trial court abused its discretion by admitting documents that were not properly authenticated, constituted hearsay, or were irrelevant); *Shamoun & Norman, LLP v. Yarto Int'l Group LP*, No. 13-11-00087-CV, 2012 Tex. App. LEXIS 4384 (Tex. App.—Corpus Christi May 31, 2012, pet. filed) (trial court erred in admitting unauthenticated documents in an anti-suit injunction hearing).

One court set out the "test" for a challenge to the exclusion of evidence in a temporary injunction hearing as follows: "An appellant must show that: (1) the trial court erred in not admitting the evidence; (2) the excluded evidence was controlling on a material issue dispositive of the case and was not cumulative; and (3) the error in the exclusion of the evidence probably cause the rendition of an improper judgment." *Sharma v. Vinmar Int'l, Ltd*., 231 S.W.3d 405, 421–23 (Tex. App.—Houston [14th Dist.] 2007) (citing *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000)). This standard does comply with the Texas Rule of Appellate Procedure 44, which requires that error probably cause the rendition of incorrect judgment before it is reversible. *See* TEX. R. APP. P. 44.

Realistically, an experienced trial judge will not exclude evidence in a temporary injunction hearing, even incompetent evidence. Courts have great latitude in considering testimony in rendering its decision in a bench trial. In a bench trial, there is a presumption that the trial court disregards any incompetent evidence that it receives into evidence. *See Gillespie v. Gillespie*, 644 S.W.2d 449 (Tex. 1982); *Williford Energy Co. v. Submergible Cable Services, Inc*., 895 S.W.2d 379, 389 (Tex. App.—Amarillo 1994, no writ) (in appeal from bench trial, appellate court generally assumes the trial court disregarded incompetent evidence if competent evidence was admitted to support the judgment). The admission of such evidence would therefore be harmless error. As the Fifth Circuit noted regarding expert evidence: "Most of the safeguards provided for in *Daubert* are not as essential in a case such as this where a District Judge sits as the trier of fact in place of a jury." *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000). The only exception to this general rule or presumption is where the only evidence to support a trial court's necessary finding is incompetent.

12. Effect of Appeal on Trial Proceedings

a. Appeal Does Not Suspend Order

Perfecting an appeal does not normally suspend the order appealed from unless the order is suspended by the trial court or the court of appeals suspends the order on a motion by the appealing party. Tex. R. App. P. 29.1. The trial court may allow an order to be suspended pending appeal and may require the appealing party to post security. There are limited exceptions where the filing of the notice of appeal does suspend the order: governmental defendants can suspend an order without providing any security. *See, e.g., In re Long*, 984 S.W.2d 623, 625-26 (Tex. 1999). Normally, a party should seek an order suspending an order from the trial court first, and then from the court of appeals.

Staying an injunction would in effect be a temporary dissolution of the injunction. *Triantaphyllis v. Gamble*, No. 14-02-00190-CV, 2002 Tex. App. LEXIS 3747 (Tex. App.—Houston [14th Dist.] May 23, 2002, pet. denied) ("To grant a stay would have effectively reversed the temporary injunction."). Moreover, courts have not generally stayed injunctions pending appeal. *Livingston v. Arrington*, No. 03-11-00197-CV, 2011 Tex. App. LEXIS 4421 (Tex. App.—Austin June 10, 2011, no pet. history) (court denied motion to stay injunction and underlying proceedings).

However, when an appeal from an interlocutory order is perfected, an appellate court "may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security." Tex. R. App. P. 29.3. One court has stated:

> Proving one is clearly entitled to relief under Rule 29.3 would, at the very least, require discussion of how the "parties' rights" are in jeopardy if relief is not forthcoming. Implicit in that is citation by the movant to authority not only supporting the position urged but also legitimizing the scope or breadth of the relief sought under the particular circumstances.

Castleman v. Internet Money, Ltd., No. 07-16-00320-CV, 2016 Tex. App. LEXIS 13149 (Tex. App.—Amarillo December 9, 2016, no pet.).

In *Oryon Techs., Inc. v. Marcus*, the party was seeking a stay of a sealing order. 429 S.W.3d 762 (Tex. App.—Dallas 2014, no pet.). The court of appeals held:

> A stay is not a writ of prohibition: a stay is intended to be only temporary, and the requisite showing for a stay is less formal than the requisite showing for a writ of prohibition. Particularly in cases such as this one, where the actions of the trial court during the pendency of the appeal endanger this Court's jurisdiction over the appeal, just as under Rule 29.3, the question on a motion for stay is not whether the trial court acted within its discretion in issuing the order in question, but rather whether a stay is needed to preserve the rights of the parties pending appeal.

Id.

If necessary to protect the parties' rights, a court of appeals may hear a motion to stay without the issue first going to the trial court. *Maples v. Muscletech, Inc.*, 74 S.W.3d 429, 431 (Tex. App.—Amarillo 2002, no pet.); *Hailey v. Texas New-Mexico Power Co*., 757 S.W.2d 833 (Tex. App.—Waco 1988, writ dism'd w.o.j.). There are only two cases in Texas that directly address when a court should stay an injunction. In *Lamar Builders, Inc. v. Guardian Sav. & Loan Ass'n*, the court considered former Rule of Appellate Procedure 43(c), the progenitor of current Rule 29.3. 786 S.W.2d 789, 791 (Tex. App.—Houston [1st Dist.] 1990, no writ). The court noted there were no clear procedural prerequisites under Rule 43. However, noting the similarity of an action for temporary stay to an injunction to protect appellate jurisdiction under section 22.221 of the Texas Government Code and former Rule of Appellate Procedure 121, the court opined, "logic dictates that to obtain temporary orders under Rule 43, a movant must make a clear showing that it is entitled to relief." *Lamar Builders*, 786 S.W.2d at 791. That showing might be made, the court said, by stating the relief sought, the basis for the relief, and setting forth the facts necessary to establish a right to the relief sought. *See id*. In *Maples v. Muscletech, Inc*., the court of appeals cited to *Lamar Builders* and held that the party seeking to stay an injunction based on the alleged inadequacy of a bond did not provide sufficient evidence to support that motion and denied same. 74 S.W.3d 429 (Tex. App.—Amarillo 2002, no pet.). *See also Flat Wireless, LLC v. Cricket Communs., Inc*., No. 07-14-00036-CV, 2014 Tex. App. LEXIS 2328 (Tex. App.—Amarillo, February 24, 2014, no pet.) (denied motion to grant injunction pending appeal).

Furthermore, because Texas precedent does not discuss the elements required for staying an injunction, it may be appropriate to look to Federal precedent for assistance. Federal precedent shows that a court must consider four factors to determine whether a movant has made a sufficient showing for a court to grant a stay of an injunction pending appeal. These factors are (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. *Ruiz v. Estelle*, 650 F.2d 555 (5th Cir. Tex. 1981); *Hall v. Dixon*, 2011 U.S. Dist. LEXIS 18645 (S.D. Tex. Feb. 25, 2011).

b. Appeal Does Not Stay Trial

An interlocutory appeal of a temporary injunction does not have the effect of staying the commencement of trial pending resolution of the appeal. Tex. Civ. Prac. & Rem. Code Ann. §51.014(b); Acts 2001, 77th Leg., ch. 1389 § 3 (effective as to suits commenced on or after September 1, 2001); *Tasso Triantaphyllis v. Gamble*, No. 14-02-00190-CV, 2002 Tex. App. LEXIS 3747 (Tex. App.—Houston [14th Dist.] May

23, 2002, pet. dism.). Section 51.014(b) provides: "An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4) [providing for interlocutory appeal of temporary injunction orders] stays the commencement of a trial in the trial court pending resolution of the appeal." Tex. Civ. Prac. & Rem. Code Ann. §51.014(b).

From 1997 to 2001, the Texas Civil Practice and Remedies Code required that the court stay commencement of trial pending resolution of all types of interlocutory appeals, including appeals from temporary injunctions. former Tex. Civ. Prac. & Rem. Code Ann. §51.014(b) (2000). The 2001 amendment to Section 51.014(b) expressly excludes temporary injunctions from its stay provisions. In other words, in 2001, the Texas Legislature amended the statute to provide that trial proceedings were not stayed pending an appeal from a temporary injunction decision. This would show an intent from the Legislature that trials are not supposed to be delayed or stayed pending an appeal. *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 889 (Tex. App.—Dallas 2003, no pet.) ("The legislature and our rules of civil and appellate procedure disfavor abatements such as employed here.").

However, under some circumstances, courts of appeals have stayed trial court proceedings pending the disposition of a temporary injunction appeal. For example, in *Hardwicke v. City of Lubbock*, the plaintiff sought declaratory relief to hold that certain ordinances were unconstitutional and sought injunctive relief to stay any condemnation proceedings until the constitutional questions were answered. 150 S.W.3d 708 (Tex. App.—Amarillo 2004, no pet.). The trial court denied the temporary injunction but stayed the condemnation proceedings for a time certain so that the plaintiff could seek an interlocutory appeal of the denial of the injunctive relief request. After the initial stay expired, the court of appeals similarly granted a stay of the condemnation proceedings pending the outcome of the interlocutory appeal. *See id. See also, TMC Mechanical v. Lasaters French Quarter P'shp.*, 880 S.W.2d 789, 790 (Tex. App.—Tyler 1993, no writ) (court of appeals stayed proceeding pending determination of appeal from denial of temporary injunction). Similarly, in *Ranchos Real Dev. Inc. v. County of El Paso*, the trial court denied a request for a temporary injunction to enjoin the sale of real property. 138 S.W.3d 441 (Tex. App.—El Paso 2004, no pet.). The plaintiff appealed the denial of the temporary injunction in an interlocutory appeal and sought a stay of the trial court's proceedings dealing with the property. The court of appeals granted the stay, but required the plaintiff to post security.

c. Trial Courts Can Enter Other Orders

Texas Rule of Appellate Procedure 29 governs the pendency of interlocutory appeals in civil cases. It expressly provides that a trial court can proceed to trial while an interlocutory appeal is pending:

> While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and may make further orders, including one dissolving the order appealed from, and if permitted by law, may proceed with the trial on the merits.

Tex. R. App. P. 29.5; *Waite v. Waite*, 76 S.W.3d 222, 223 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (the trial court retained jurisdiction of the case pending the interlocutory appeal and could make further orders including one dissolving the temporary order on appeal).

However, a trial court cannot make an order that: "(a) is inconsistent with any appellate court temporary order; or (b) interferes with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal." Tex. R. App. P. 29.5. *See also McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227, 238 (Tex. 2001) (finding that under the facts of a class action certification case, a severance order impaired the effectiveness of the relief that the appellant sought and therefore vacated that decision). The purpose of this provision is to prevent a trial court from interfering with a party's right to appellate review or the appellate court's power to grant relief in interlocutory appeals. *See In re M.M.O.*, 981 S.W.2d 72, 78 (Tex. App.—San Antonio 1998, no pet.); *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984) (construing a predecessor to Rule 29, former Tex. R. Civ. P. 385b(d)); *Eastern Energy, Inc. v. SBY P'shp.*, 750 S.W.2d 5, 6 (Tex. App.—Houston [1st Dist. 1988, no writ).

Furthermore, Rule 29.3 provides that an appellate court can make any order that is necessary to preserve the parties' rights until the interlocutory appeal is determined. Tex. R. App. P. 29.3. It is not always clear whether an order is ''necessary to

preserve the parties' rights" under Appellate Rule 29.3. One court of appeals stayed discovery in an underlying case while considering a trial court's ruling on a motion to compel arbitration. *In re Scott*, 100 S.W.3d 575, 578 (Tex. App.—Fort Worth 2003, no pet.) (appellate court noting it had stayed trial court's discovery order pending outcome of ruling on arbitration). Further, in *H & R Block, Inc. v. Haese*, the Texas Supreme Court issued an order in a mandamus proceeding staying a trial court order while an interlocutory appeal of an order certifying a class action was pending. 992 S.W.2d 437, 439 (Tex. 1999). The Court concluded that the appeal would become moot unless the trial court's order was stayed, thus suggesting that a stay is necessary any time it is required to prevent the appeal from becoming moot. *Id*.

In *Lacefield v. Electronic Financial Group, Inc.*, the court of appeals ordered a stay of trial court proceedings in an appeal from the denial of a special appearance motion. 21 S.W.3d 799, 800 (Tex. App.–Waco 2000, no pet.), *overruled on other grounds*, 151 S.W.3d 300. The court reasoned that requiring the appellant to participate in pretrial discovery pending resolution of his appeal would be an unfair and onerous burden on his time and finances. *See id*. Similarly, in *Teran v. Valdez*, the court of appeals stayed trial court proceedings pending resolution of an interlocutory appeal on the issue of official immunity of the defendant to prevent the imposition of an unnecessary burden on the defendant. 929 S.W.2d 37, 38 (Tex. App.—Corpus Christi 1996, no writ).

d. Trial Court Can Enter Final Judgment And Moot Appeal

If a trial court renders a final order while an appeal from its grant or denial of a temporary injunction is pending, the appeal of the ruling on the injunctive relief becomes moot and should be dismissed. Tex. R. App. P. 47.1; *Thomas v. Meritage Homes of Tex. LLC*, No. 01-15-00863-CV, 2017 Tex. App. LEXIS 4179 (Tex. App.—Houston [1st Dist.] May 9, 2017, no pet.); *Isuani v. Manske—Sheffield Radiology Group, P.A.*, 802 S.W.2d 235, 236 (Tex. 1991).

F. Texas Supreme Court's Review of Temporary Injunction Appeals

Generally, an interlocutory appeal of a temporary injunction order is final in the court of appeals. However, the Texas Supreme Court may have jurisdiction over such an appeal.

1. Historical Standards For Supreme Court Jurisdiction

Historically, the Texas Government Code granted the Texas Supreme Court jurisdiction to review interlocutory temporary injunction orders only when: (1) the court of appeals's opinion conflicts with a prior decision of the Texas Supreme Court or another court of appeals ("conflicts jurisdiction"); or (2) if one member of the court of appeals disagrees on a material question ("dissent jurisdiction"). Former Tex. Gov't Code Ann. §§ 22.001(a)(1), 22.225(c).

The Texas Supreme Court interpreted its conflicts jurisdiction very narrowly. *Wagner & Brown, Ltd, v. Horwood*, 53 S.W.3d 347, 349 (Tex. 2001) (Hecht, J. dissent from denial of rehearing of petition for review). It found that to have jurisdiction, the conflicting decisions must not merely be an implicit conflict, but a decision based on practically the same state of facts and announcing antagonistic conclusions. *Christy v. Williams*, 298 S.W.2d 565, 567 (Tex. 1957).

In 2003, House Bill 4 expanded the scope of the Court's conflicts jurisdiction by re-defining "holds differently" as: "For purposes of Subsection (c) one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to the litigants." Tex. Gov't Code Ann. § 22.225(e); Claudia Wilson Frost & J. Brett Busby, *HB4's New Appellate Rules: Interlocutory Appeals and Stays, Conflict Jurisdiction, Judgment Interest, and Stays of Foreign Judgments*, THE APPELLATE ADVOCATE 9 (Winter 2003). Since this amendment, the Court accepted interlocutory appeals without having a detailed discussion of jurisdiction. *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163 (Tex. 2007). Moreover, the Court held that it will use its traditional definition of conflicts jurisdiction if the case was filed before the effective date of the amendment. *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653 n.3 (Tex. 2007).

The Court's dissent jurisdiction applied when there is a disagreement on a material question. This did not require a dissent where the justices of the court of appeals disagree in a concurrence. *See, e.g., Travis County v. Pelzel & Assocs.*, 77 S.W.3d 246, 248 n.2 (Tex. 2002). However, if a disagreeing

justice issued a concurrence, there was an argument that the disagreement was not really "material." *Brown v. Todd*, 53 S.W.3d 297, 301 (Tex. 2001) (party requesting dissent jurisdiction must argue that the issue sought for review was the basis for the dissent). Further, the Court held that a dissent from a denial of a motion for rehearing en banc who did not sit on the original panel was sufficient to support dissent jurisdiction if there was a "direct clash between the justice and the court on the appropriate analysis for the case." *American Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801 (Tex. 2002).

If the Texas Supreme Court determined that they have conflicts or dissent jurisdiction, then it can review all of the issues in the case under the doctrine of "extended jurisdiction." *Brown v. Todd*, 53 S.W.3d 297, 301-02 (Tex. 2001); *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 432 (Tex. 2000).

The Texas Supreme Court had specific jurisdiction to hear appeals from temporary injunctions based on the constitutionality of a state statute. Tex. Gov't Code Ann. § 22.001(c); Tex. R. App. P. 57.1; *Owens Corning v. Carter*, 997 S.W.2d 560, 567-68 (Tex. 1999); *Perry v. Del Rio*, 67 S.W.3d 85, 89 (Tex. 2001). Moreover, the Court could determine an intermediate court of appeals's jurisdiction over an interlocutory appeal or review any action by a court of appeals that defeats Texas Supreme Court review. *See, e.g., Qwest Comms. Corp. v. AT & T Corp.*, 24 S.W.3d 334, 335-36 (Tex. 2000); *Banales v. Jackson*, 610 S.W.2d 732, 733 (Tex. 1980).

2. New Jurisdictional Statute

Effective September 1, 2017, the Texas Legislature's HB 1761 substantially modified the Texas Supreme Court's jurisdiction over final and interlocutory orders. This statutory change impacts temporary injunction orders executed on or after September 1, 2017. This bill provides that Texas Government Code Section 22.001 is amended to state that the Texas Supreme Court has jurisdiction via one basis: any judgment or order that the Court determines raises an issue of law that is important to the jurisprudence of Texas. That is it. The Legislature omitted any other basis for jurisdiction. That same statute still allows direct appeal to the Texas Supreme Court of a temporary injunction dealing with the constitutionality of a statute.

It is unclear how this will impact the Texas Supreme Court's review of temporary injunction appeals. One thought is that a court of appeals's opinion on a temporary injunction appeal will almost never be important to the jurisprudence of Texas as it only deals with the status quo and should not delve into the merits of the case. However, those opinions may still discuss important legal issues in determining substantive law in discussing a probable right to recovery and may still make important rulings on the standards for the other elements of a temporary injunction. In the end, the statutory changes give ultimate responsibility for determining whether the Texas Supreme Court takes a case to the Texas Supreme Court. What is important to the jurisprudence of Texas is in the eye of the beholder, and the Court will rule, on a case-by-case basis, on this issue. In the end, it may well be worth the expense to take a shot, file a petition for review, and see if the Court thinks that a particular temporary injunction appeal is worthy of jurisdiction.

G. Review By Mandamus

In Texas, a person may obtain mandamus relief from a court action only if (1) the trial court abused its discretion and (2) the party requesting mandamus has no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). A trial court can abuse its discretion in granting or denying an application for temporary restraining order or temporary injunction. Moreover, depending upon the circumstances, this ruling may result in no adequate remedy by appeal.

The "no adequate remedy at law" requirement "has no comprehensive definition," and the determination of whether a party has an adequate remedy by appeal requires a "careful balance of jurisprudential considerations" that "implicate both public and private interests." *In re Prudential*, 148 S.W.3d at 136. "When the benefits [of mandamus review] outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate." *Id. See also In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005). The Supreme Court stated:

> The operative word, 'adequate', has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate

> both public and private interests. . . Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is "adequate" when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.

In re Prudential, 148 S.W.3d at 136.

The Texas Supreme Court has repeatedly held that orders from requests for temporary restraining orders and temporary injunctions are subject to mandamus where there is not sufficient time to set a hearing on the temporary injunction or to appeal a temporary injunction before the complained of act occurs. For example, in *In re Francis*, the Supreme Court held that: "This Court may review a temporary injunction from a petition for writ of mandamus when an expedited appeal would be inadequate; if, for example, the appeal could not be completed before the issue became moot." 186 S.W.3d 534, 538 (Tex. 2006); *In re Newton*, 146 S.W.3d 648 (Tex. 2004) (the Supreme Court held that it could review a temporary restraining order via mandamus where the merits of the dispute would be mooted if the parties were required to wait to appeal a temporary injunction determination); *In re Texas Natural Resource Conservation Commission*, 85 S.W.3d 201 (Tex. 2002) (party could utilize a petition for writ of mandamus to challenge a TRO wrongfully extended); *Republican Party of Texas v. Dietz*, 940 S.W.2d 86 (Tex. 1997) (party entitled to challenge trial court's temporary injunction by mandamus in Supreme Court); *Sears v. Bayoud*, 786 S.W.2d 248 (1990) (Supreme Court mandamus review available for election mandamus based on its "statewide application," "urgency of time constraints," and potential for the case to become moot without immediate attention).

In fact, the Texas Supreme Court has held that it could entertain a mandamus proceeding while an interlocutory appeal is still ongoing in the court of appeals:

> While appeal to the court of appeals of the temporary injunction order is final absent Supreme Court conflicts or dissent jurisdiction, *see* Tex. Gov't Code § 22.225(b)(3), we have mandamus jurisdiction in the pending cause regardless of the finality of the court of appeals' ruling in the interlocutory appeal of the temporary injunction. We are not divested of mandamus jurisdiction because we lack appellate jurisdiction. *See Deloitte & Touche LLP v. Fourteenth Court of Appeals*, 951 S.W.2d 394, 396 (Tex. 1997).

In re AutoNation, Inc., 228 S.W.3d 663 (Tex. 2007).

Moreover, the Fort Worth Court of Appeals has granted a petition for writ of mandamus challenging a trial court's failure to grant an application for a temporary restraining order. *In re Spiritas Ranch Enterprises, LLP*, No. 02-06-463-CV, 2007 Tex. App. LEXIS 1345 (Tex. App.—Fort Worth February 22, 2007, orig. proc.).

Accordingly, if a party's rights are going to be lost before a party has the opportunity to set a hearing on an application for temporary injunction or appeal that determination, it should consider whether a petition for writ of mandamus would be appropriate. Of course, the party must still prove a clear abuse of discretion. If there is a fact question regarding the merits of a claim or defense, the court of appeals will likely deny the petition.

XVIII. Effect Of Court Of Appeals's Decision

A. Trial Court Cannot Modify Affirmed Injunction Absent Changed Circumstances

When a court of appeals affirms a temporary injunction, the injunction becomes the judgment of both the trial court and court of appeals. *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984). And as such, the trial court cannot modify or dissolve the injunction absent changed circumstances. *See id.; Desai v. Reliance Mach.*

Works, Inc., 813 S.W.2d 640, 642 (Tex. App.—Houston [14th Dist.] 1991, no pet.). Any action by the trial court in contravention of this rule should be correctable by mandamus.

B. Application of Law Of The Case

Once the court of appeals rules and issues its opinion, the issue then becomes what impact does that opinion have on the underlying case moving forward. This implicates the law of the case doctrine. Under the law of the case doctrine, a court of appeals is ordinarily bound by its initial decision if there is a subsequent appeal in the same case. *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003). The law of the case doctrine provides as follows:

> The "law of the case" doctrine is defined as that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages. By narrowing the issues in successive stages of the litigation, the law of the case doctrine is intended to achieve uniformity of decision as well as judicial economy and efficiency. The doctrine is based on public policy and is aimed at putting an end to litigation.

Id. (quoting *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986) (citations omitted)).

In *Glattly v. Air Starter Components, Inc*., the appellate court held that an appeal of a temporary injunction only holds its decision on the "probable right to recovery" standard and whether the trial court abused its discretion in maintaining the status quo, and therefore the opinion will not become law of the case because no underlying question of law is decided. 332 S.W.3d 620 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

But other precedent may support a contrary result, at least as to issues of law. Where a question of law is decided by an appellate court, that decision becomes the "law of the case." *Ralph Williams Gulfgate Chrysler Plymouth, Inc. v. State*, 466 S.W.2d 639, 640 (Tex. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.). "This is true despite the fact that the former appeal was from a temporary injunction and this is from a permanent injunction. In the former appeal those same questions of law applicable to the same fact situation were decided." *Id*. at 640-41. One court of appeals has upheld the doctrine as also applying to a question of law decided on the first appeal of a partial summary judgment to be binding upon the subsequent trial on the merits and second appeal, so long as a question of law is actually decided by the appellate court. *Brown & Brown of Texas, Inc. v. Omni Metals, Inc*., 317 S.W.3d 361, 374 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

C. Application of Res Judicata And Collateral Estoppel

Res judicata and collateral estoppel may also apply following a court of appeals's opinion on a temporary injunction order. The Texas Supreme Court has held:

> [I]f in a former suit an issue which goes to the foundation and existence of a cause of action has been litigated, such issue cannot be again litigated in a later suit, regardless of the form it may take.
>
> The scope of the term 'final judgment' within the meaning of the rule here under consideration, has been declared not to be confined to a final judgment in an action but to include any judicial decision upon a question of fact or law which is not provisional and subject to change in the future by the same tribunal.

Brooks v. Jones, 578 S.W.2d 669, 672-673 (Tex. 1979). "[T]he general rule that an interlocutory judgment will not support a plea of res judicata may have its exceptions. It depends on what was done." *Texaco, Inc. v. Parker*, 373 S.W.2d 870, 872 (Tex. Civ. App.—El Paso 1963, writ ref'd n.r.e.) (citing *Wilson v. Abilene Indep. Sch. Dist*., 204 S.W.2d 407 (Tex. Civ. App.—Eastland 1947, writ ref'd n.r.e.)). As the court stated in *Wilson*, "The general principle, announced in numerous cases, is that a right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense, cannot be disputed in a subsequent suit between the same parties or their privies." 204 S.W.2d at 411. The Texas Supreme Court has agreed with this principle:

> A corollary rule is aptly stated in [Texaco, Inc. v. Parker], 373 S.W.2d 870 (Tex. Civ. App.[--]El

> Paso 1963, writ ref'd n. r. e.), dealing with the choices of a losing litigant in a hearing on temporary injunction: ["]A dissatisfied litigant has a choice—he may appeal or seek a trial on the merits. Having elected to appeal, he should thereafter be bound by matters fully litigated and determined in the same manner as appeals from final judgments.["] In cases such as this, where the losing party elects not to pursue an appeal, but instead proceeds to the trial on the merits of a permanent injunction, such party will not be bound, under the doctrine of res judicata, by those issues decided in the prior hearing on the temporary injunction.

Brooks v. Jones, 578 S.W.2d at 673. *Brooks*, *Parker* and *Wilson* all involve prior orders on applications for temporary injunction, which are interlocutory orders, and attempted continued litigation following the entry of those orders. All of the courts held that if the record showed matters of fact and law were fully developed in the trial court by virtue of the interlocutory motions, and the losing party elected to appeal from the court's order on those issues, then the interlocutory order had res judicata effect. *Brooks*, 578 S.W.2d at 672; *Parker*, 373 S.W.2d at 872-73; *Wilson*, 204 S.W.2d at 410. In *Wilson*, the court noted: "The pleadings and the evidence put in direct issue, the controlling and ultimate questions forming the very basis and foundation of the suit, and all of such questions were litigated. There were not collateral issues involved, nor were said issues ancillary to any others." *Id*.

This rule applies when (1) the parties elect distinctly to put in issue matters of law or fact, (2) they fully develop these matters before trial, (3) the trial court directly determines the matters, and (4) the parties appeal those matters so that their determination becomes final. *Towers v. Grogan*, No. 01-97-000946-CV, 1998 Tex. App. LEXIS 2403, 1998 WL 191760, at *6 (Tex. App.—Houston [1st Dist.] Apr. 23, 1998, no pet.) (not designated for publication); *Visage v. Marshall*, 763 S.W.2d 17, 19 (Tex. App.—Tyler 1988, no writ) (stating exception in *Brooks* applies "[w]hen the denial of a temporary injunction follows a hearing in which the merits of the issues raised were fully developed"); *Garza v. Mitchell*, 607 S.W.2d 593, 600 (Tex. Civ. App.—Tyler 1980, no writ) (stating exception in Brooks applies "[w]here the parties elect in a temporary injunction suit to put in issue a right or a question of fact . . . and have it directly determined by the court"); *Int'l Longshoremen's Ass'n v. Galveston Maritime Ass'n*, 358 S.W.2d 607, 613 (Tex. Civ. App.—Houston 1962, no writ); *Wilson v. Abilene Indep. Sch. Dist*., 204 S.W.2d 407, 410 (Tex. Civ. App.—Eastland 1947, writ ref'd n.r.e.). As one court aptly stated:

> Even though in the strict sense the decision on appeal from the granting or refusal of a temporary injunction may not be res judicata of the issues on final hearing, it may become the law of the case as to the legal principles declared. This is as it should be, for a dissatisfied litigant has a choice – he may appeal or seek a trial on the merits. Having elected to appeal, he should thereafter be bound by matters fully litigated and determined in the same manner as appeals from final judgments. The desirability of ending all litigation as soon as possible is further justification for these exceptions to the general rule.

Texaco, 373 S.W.2d at 872-3 (internal citations omitted).

D. Stare Decisis

The court of appeals's opinion in a temporary injunction appeal also implicates the stare decisis doctrine. That concept is "so central to Anglo-American jurisprudence that it scarcely need be mentioned." *Allegheny Gen. Hosp. v. Nat'l Labor Relations Bd*., 608 F.2d 965, 969-70 (3d Cir. 1979). Although the term stare decisis is applied in three different situations, it clearly involves the judgments of higher courts having conclusive effect on lower courts and leave to the latter no scope for independent judgment or discretion. *See* H.C. BLACK, LAW OF JUDICIAL PRECEDENTS, 10 (1912). In fact, it is not the function of a lower court to abrogate or modify established precedent. *Lubbock County, Tex. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 585 (Tex. 2002).

Stare decisis does not apply to only Texas Supreme Court precedent, and the fact that only a panel of an intermediate appellate court issues an opinion does not impact the opinion's stare decisis impact. In fact, a court of appeals is bound by its own prior precedent. *Guest v. Cochran*, 993 S.W.2d 397, 404 n.6 (Tex. App.—Houston [14th Dist.]

1999, no pet.). One panel of a court of appeals should be bound by a prior panel's opinion. *Davis v. Covert*, 983 S.W.2d 301 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd) (en banc). The Texas Supreme Court has stated that: "Unless a court of appeals chooses to hear a case en banc, the decision of a panel constitutes the decision of the whole court." *O'Connor v. First Court of Appeals*, 837 S.W.2d 94, 96 (Tex. 1992).

Accordingly, the court of appeals's temporary injunction opinion may be binding precedent for the trial court and may have stare decisis effect. The legal holdings and framework set out by the court of appeals would be binding on the trial court.

E. Risk vs. Reward: Should A Party Appeal An Injunction?

The obvious reward in appealing a temporary injunction, is that a court of appeals may reverse the order and relieve a party from the impact of an injunction. Further, a court of appeals may assist an appealing party by setting out legal authority that will have an impact on the case moving forward. For example, if a court of appeals holds that an injunction was erroneously entered because there was no probable right of recovery due to a covenant not to compete being unenforceable, that holding may have a huge impact on the case moving forward and potentially settlement. Of course, the opposite may happen. As one commentator has stated: "Remembering that a party can neutralize an interlocutory order either by appeal or by securing a trial on the merits, it may not be strategically wise to permit legal issues that can affect the final outcome of the case to be decided by the court of appeals in an interlocutory appeal, after a nonjury hearing, and where presumptions in favor of the trial court's ruling run high, and where the court of appeals' decision is probably not subject to review by the supreme court." MCDONALD & CARLSON, TEXAS CIVIL PRACTICE 2D, § 25.9 (1998).

XIX. Court of Appeals' Jurisdiction To Award Temporary Injunctive Relief

Courts of appeals have a limited right to issue injunctive relief. An appellate court's authority to issue writs of injunction is limited to occasions where doing so is necessary to enforce its jurisdiction. Tex. Gov't Code Ann. § 22.221(a); *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 683 (Tex.1989) (writ of injunction is to enforce or protect appellate court's jurisdiction); *In re Sheshtawy*, 161 S.W.3d 1, 1 (Tex. App.—Houston [14th Dist] 2003, orig. proceeding). A court of appeals "has no original jurisdiction to grant writs of injunction, except to protect its jurisdiction over the subject matter of a pending appeal, or to prevent an unlawful interference with the enforcement of its judgments and decrees." *Ott v. Bell*, 606 S.W.2d 955, 957 (Tex. Civ. App.—Waco 1980, no writ). An injunction will not lie in the courts of appeals merely to preserve the status quo pending appeal. *EMW Mfg. Co. v. Lemons*, 724 S.W.2d 425, 426 (Tex. App.—Fort Worth 1987, orig. proceeding). Nor will injunction lie merely "to protect a party from damage pending appeal." *Gibson v. Waco Indep. Sch. Dist.*, 971 S.W.2d 199, 204 (Tex. App.—Waco 1998, no pet.) (quoting *Parsons v. Galveston County Employees Credit Union*, 576 S.W.2d 99, 99 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ)), *Gibson vacated on other grounds*, 22 S.W.3d 849 (Tex. 2000).

Following this precedent, one court of appeals held that it did not have jurisdiction to enter an anti-suit injunction. *In re Lee*, No. 10-04-00286-CV 2004 Tex. App. LEXIS 9058 (Tex. App.—Waco October 13, 2004, pet. denied). A wife and husband entered into a settlement, but the trial court refused to accept it. After a jury trial, the trial court entered a decree of divorce. The wife appealed and argued that the trial court was required to enter a decree of divorce based on the settlement agreement. The court of appeals affirmed the trial court's judgment. Before the court of appeals could issue its mandate, and not long after the trial court entered its divorce decree, the wife filed suit in another county alleging that the husband breached the settlement agreement. The husband requested that the court of appeals issue a writ of injunction prohibiting his former wife from prosecuting the second lawsuit. The court of appeals refused to issue the writ because it did not have jurisdiction. The court held that an injunction will not issue merely to protect a party from damage pending an appeal. *See id*.

XX. Potential Unintended Consequences Of Temporary Injunction Order

A. Admissibility of Temporary Injunction Order At Trial Of Case

On most occasions, the fact that a temporary injunction is issued will not be relevant in the trial on the merits, and therefore, would not be admissible. However, in Texas, where relevant, a judicial record or the issuance of a temporary injunction is admissible "to prove the fact that a

judgment [or injunction] has been rendered, the time of its rendition and the terms of and effect of the judgment [or injunction]." *See, e.g., Adams v. State Bd. of Ins*., 319 S.W.2d 750, 754 (Tex. Civ. App.—Houston [1st Dist.] 1958, writ ref'd n.r.e.). *See also Bell v. Stroope*, 568 S.W.2d 703, 705 (Tex. Civ. App.—Tyler 1978, no writ) (holding that a temporary injunction was admissible "to show its existence and legal consequences"). Although an injunction is admissible, the findings of fact relied upon by the trial court in issuing the injunction are inadmissible. *Bell*, 568 S.W.2d at 706. The admission of the findings of fact is "improperly prejudicial and invade[s] the province of the jury." *Id*.

Bell involved a dispute over the ownership of a roadway. *See id*. J.R. Stroope sued Ross Dean Childers to determine whether the road running between their properties was a public roadway. *See id.* at 705. During the pendency of the litigation, the trial court issued a temporary injunction prohibiting Childers from locking the gates or interfering with Stroope's use of the roadway. *See id*. During a trial on the merits, the temporary injunction was admitted into evidence, along with the associated findings of fact. *See id*. The appellate court found that the part of the temporary injunction restraining Childers from obstructing or blocking the roadway was admissible. *See id*. at 705-706. However, the portion including the findings of fact was inadmissible. *See id.* at 706 (finding the admission of the findings of fact prejudicial and an invasion of the province of the jury).

If only a portion of an injunction is admissible, upon timely objection, the party offering the evidence must select only the admissible portions to offer into evidence. *Davis v. Zapata Petroleum Corp.*, 351 S.W.2d 916, 922 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.) (noting that when a document is offered in its entirety "and no effort was made . . . to select the admissible parts . . . the offer [may be] rejected by the judge on proper objection").

B. Seeking Temporary Injunctive Relief To Enforce A Contract Can Foreclose Ability To Rescind Contract

The election of remedies doctrine may prohibit a plaintiff from obtaining a temporary injunction granting specific performance under a contract from then attempting to recover other inconsistent remedies. In *Kingsbery v. Phillips Petroleum Co.*, Kingsbery, a jobber agency in Austin, Texas, entered into an agreement with Phillips whereby Kingsbery would provide retail services for the petroleum products supplied by Phillips for twenty years. 315 S.W.2d 561, 563 (Tex. Civ. App.—Austin 1958, writ ref'd n.r.e.). Despite Kingsbery's performance under the terms of the agreement, Phillips notified him about two years into the deal that it would no longer sell or deliver its product, and Phillips subsequently hired a new jobber agency to sell its products. *Id.* at 565.

In Kingbery's original petition, he prayed that a temporary injunction be granted restraining Phillips from discontinuing the delivery of petroleum products to him. *Id.* at 566. The trial court obliged Kingbery's request by granting a temporary injunction, and, as ordered, Phillips continued to supply him with the products until Kingsbery requested that the injunction be dissolved more than a year later. *See id.* Thus, Kingsbery abandoned his prayer for specific performance so that he could pursue damages for Phillip's breach of contract at trial. *See id.*

On appeal, Phillips argued that Kingsbery "by seeking and obtaining injunctive relief compelling specific performance of the contract for the breach of which [Kingsbery] also sought damages ha[s] irrevocably elected to sue for specific performance of the contract and ha[s] waived [his] right to sue for damages for its breach." *Id.* at 567. The Austin Court of Appeals recognized that for more than a year Phillips was being compelled to retain a jobber agency it did not desire and "[t]he right to conduct business as one pleases is certainly a valuable right and is one which the law protects." *Id.* at 568. Thus, the court agreed with Phillips and held that, after pursuing specific performance and obtaining a temporary injunction which (1) had been in force for over one year, and (2) benefitted Kingsbery to Phillips' detriment, Kingsbery was foreclosed from abandoning his election of specific performance and seeking damages for breach of contract. *See id.* at 567-68.

This same logic would also apply to a party initially seeking an injunction for specific performance under a contract and then later attempting to rescind the same contract. Thus, a party should be careful to only seek temporary injunctive relief when that relief will not limit other remedies that the party may want to pursue.

XXI. Disobeying the Injunction

The act of disobeying an injunctive order is punishable as contempt. Tex. R. Civ. P. 692; *Ex*

Parte Smyers, 529 S.W.2d 769, 770 (Tex. 1975). Rule 692 provides:

> Disobedience of an injunction may be punished by the court or judge, in term time or in vacation, as a contempt. In case of such disobedience, the complainant, his agent or attorney, may file in the court in which such injunction is pending or with the judge in vacation, his affidavit stating what person is guilty of such disobedience and describing the acts constituting the same; and thereupon the court or judge shall cause to be issued an attachment for such person, directed to the sheriff or any constable of any county, and requiring such officer to arrest the person therein named if found within his county and have him before the court or judge at the time and place named in such writ; or said court or judge may issue a show cause order, directing and requiring such person to appear on such date as may be designated and show cause why he should not be adjudged in contempt of court. On return of such attachment or show cause order, the judge shall proceed to hear proof; and if satisfied that such person has disobeyed the injunction, either directly or indirectly, may commit such person to jail without bail until he purges himself of such contempt, in such manner and form as the court or judge may direct.

Tex. R. Civ. P. 692. *In re Long*, 984 S.W.2d 623 (Tex. 1999); *Ex parte Smyers*, 529 S.W.2d 769, 770 (Tex. 1975); *Ex parte Jackman*, 663 S.W.2d 520, 524 (Tex. App.—Dallas 1983, orig. proceeding). Specifically, a party can be held in contempt for violating a temporary restraining order where the party has notice of its provisions. *Ex Parte Lesikar*, 899 S.W.2d 654 (Tex. 1995); *Ex Parte Wright*, No. C14-92-00924-CV, 1992 Tex. App. LEXIS 2394 (Tex. App.—Houston [14th Dist.] August 21, 1992, original proceeding) (denied writ of habeas corpus filed by defendant who was placed in jail for up to six months and fined $500 for violating a temporary restraining order). A temporary restraining order is a "writ of injunction" within the meaning of Texas Rule of Civil Procedure 682. *Ex parte Coffee*, 160 Tex. 224, 328 S.W.2d 283, 290 (1959). Ordinarily, the trial court enforces its order following a motion for contempt filed by the party in whose favor the injunction was issued. When an appeal is taken from the order granting injunctive relief and the order has not been superseded or stayed pending an appeal, either the trial court or the court of appeals may entertain a motion for contempt. If the motion is filed in a court of appeals, the court of appeals should ordinarily refer the motion to the trial court for hearing and fact-finding. *In re Sheshtawy*, 154 S.W.3d 114, 124-25 (Tex. 2004).

An injunction must be definite, clear, and as precise as possible. When practical, it should inform the defendant of the acts from which the defendant is restrained without calling on the defendant to make inferences or conclusions about which reasonable persons may differ. If an injunction does not sufficiently inform the defendant that the actions made the subject of the motion for contempt were in violation of the injunction, the injunction may not be enforced by contempt. *See, e.g., McGlothin v. Kliebert*, 663 S.W.2d 2, 3 (Tex. App.—Houston [14th Dist.] 1983), *rev'd on other grounds*, 672 S.W.2d 231 (Tex. 1984). *See also Ex Parte Blasingame*, 748 S.W.2d 444, 446-47 (Tex. 1988) (in light of wording of injunction, Court was not convinced parties' acts violated trial court's order). The Texas Supreme Court has made clear that the underlying order should be reduced to writing, and that oral orders may not provide an adequate basis for a judgment of contempt. *Ex Parte Price*, 741 S.W.2d 366, 367-68 (Tex. 1987).

A court order is insufficient to support a judgment of contempt only if its interpretation requires inferences or conclusions about which reasonable persons might differ. That is, the order need not be full of superfluous terms and specifications adequate to counter any flight of fancy a contemnor may imagine to declare it vague. *Ex parte Chambers*, 898 S.W.2d 257, 260 (Tex. 1995); *Ex parte Durham*, 921 S.W.2d 482, 486 (Tex. App.—Corpus Christi 1996, orig. proceeding). In one case concerning a failure to pay child support, the order required that all of the obligor's paychecks be endorsed and turned over to a court-appointed receiver as soon as the obligor received them. Although the order failed to specify a payee, a due date, or an amount, the court held that a reasonable person could ascertain, with minimal inquiry, any details necessary to comply with the order. *Ex parte Wessell*, 807 S.W.2d 17, 19 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding).

For example, in *Ex parte Travis*, a trial court entered a temporary injunction restraining defendant company and its agents from handling crude petroleum. 73 S.W.2d 487, 123 Tex. 480 (Tex. 1934). The defendants appealed that order, and while on appeal, the plaintiff filed a motion to hold them in contempt for not complying with the injunction. The trial court granted that motion and ordered that they be confined to jail for twenty-four hours. In *In re Long*, a trial court fined a district clerk $500 a day that he violated an injunction order in receiving fees. 984 S.W.2d 623 (Tex. 1999). In *In re Nunu*, a defendant was ordered by injunction to comply with certain covenants. 960 S.W.2d 649 (Tex. 1997). After not complying, the trial court held him in contempt and placed him in jail until he did comply. The Texas Supreme Court affirmed this ruling, but did reverse a condition that the defendant pay the plaintiff's expenses as a party cannot be imprisoned to pay a debt. *See id. See also In re Shed, LLC*, No. 12-09-00202-CV, 2010 Tex. App. LEXIS 4070 (Tex. App.—Tyler May 28, 2010, original proceeding) (affirmed trial court's finding of contempt and fine of $500 for violating injunction).

But even upon a proper finding of contempt, attorney's fees are not recoverable in a contempt action because no statutory authority exists allowing such an award. *See Equitable Trust Co. v. Lyle*, 627 S.W.2d 824, 826 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.) (citing *Marriage of Neidert*, 583 S.W.2d 461, 462 (Tex. Civ. App.—Amarillo 1979, no writ)).

There is no right to appeal a contempt order, but it may be remedied by a mandamus or habeas corpus proceeding. *In re Reece*, 341 S.W.3d 360 (Tex. 2010). Contempt orders that do not involve confinement cannot be reviewed by writ of habeas corpus, and the only possible relief is a writ of mandamus. *See id.; In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding); *Rosser v. Squier*, 902 S.W.2d 962, 962 (Tex. 1995) (orig. proceeding).

A party complaining of a state trial court's action can file a petition for writ of mandamus with a court of appeals or the Texas Supreme Court. Tex. Const. Art V, § 3; Tex. Gov't Code Ann. § 22.002, 22.221(a). The petition should ordinarily first be filed with the court of appeals. Tex. R. App. P. 52.3(e). If that court does not grant any relief, the party can then file a mandamus action in the Texas Supreme Court. If there is some exigency, a party can file directly with the Texas Supreme Court. *See id*.

XXII. Injunctive Relief and Arbitration

Texas Civil Practice and Remedies Code section 171.086 allows a trial court to enter a temporary injunction pending arbitration under the Texas Arbitration Act. Tex. Civ. Prac. & Rem. Code § 171.086; *CMH Homes v. Perez*, 340 S.W.3d 444, 450 n.4 (Tex. 2011). Among the orders a trial court has jurisdiction to render before or during an arbitration proceeding is an injunction in support of the arbitration. Tex. Civ. Prac. &Rem. Code Ann. § 171.086(a)(3), (b)(2) (allowing trial court to grant injunctions before or during arbitration proceedings and to enforce such orders); *Menna v. Romero*, 48 S.W.3d 247, 251 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.) (affirming temporary injunction, but reversing trial court's denial of motion to compel arbitration).

For example, a court of appeals held that a temporary injunction entered pending arbitration was proper because the trial court reasonably could have concluded that the plaintiff/company established that it faced probable, imminent and irreparable injury and injunction was issued in support of arbitration to preserve the status quo and the meaningfulness of the arbitration process. *Frontera Generation Ltd. P'ship v. Mission Pipeline Co.*, 400 S.W.3d 102 (Tex. App.—Corpus Christi 2012, no pet.). *See also Comed Med. Sys., Co. v. AADCO Imaging, LLC*, No. 03-14-00593-CV, 2015 Tex. App. LEXIS 1762 (Tex. App.—Austin Feb. 25, 2015, no pet.); *Senter Invs., L.L.C. v. Amirali & Asmita Veerjee & Al-Waahid, Inc.*, 358 S.W.3d 841, 2012 Tex. App. LEXIS 523 (Tex. App.—Dallas 2012, no pet.) (temporary injunction order pending arbitration did not have to have trial setting and the order was not void).

The Texas Arbitration Act is a substantive act that grants a party an independent cause of action. *Quanto Int'l Co. v. Lloyd*, 897 S.W.2d 482, 487 (Tex. App.—Houston [1st Dist.] 1995, orig. proc.). The Texas Arbitration Act's grant of a temporary injunction remedy is substantive in nature and not procedural. *See generally, In re L & J Anaheim, Assocs.*, 995 F.2d 940, 943 (9th Cir. 1993); *Freeman v. Package Machinary Co.*, 865 F.2d 1331, 1348 (1st Cir. 1988).

There is currently a split in Texas courts of appeals regarding whether a trial court can enter injunctive relief pending arbitration under the Federal Arbitration Act.

One line of precedent holds that under the Federal Arbitration Act, if the trial is stayed, the trial court is prohibited from any action that involves any form of adjudication of the merits. *Feldman/Matz Interests, L.L.P. v. Settlement Capital Corp*., 140 S.W.3d 879, 881, 888 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding); *Galtney v. Underwood Neuhaus and Co.*, 700 S.W.2d 602, 604 (Tex. App.—Houston [14th Dist.] 1985, no writ). State and federal courts in Texas hold that the trial court is without jurisdiction to enter any injunction at all. *See, e.g.*, *Smith v. Merrill Lynch Pierce Fenner & Smith Inc*., 575 F. Supp. 904, 905 (N.D. Tex. 1983); *Merrill Lynch, Pierce, Fenner v. McCollum*, 666 S.W.2d 604, 608-609 (Tex. App.—Houston [14th Dist.] 1984, ref. n.r.e.); *Feldman/Matz Interests, L.L.P. v. Settlement Capital Corp.*, 140 S.W.3d 879, 881, 888 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding); *Galtney v. Underwood Neuhaus and Co.*, 700 S.W.2d 602, 604 (Tex. App.—Houston [14th Dist.] 1985, no writ).

A trial court is precluded by the Federal Arbitration Act from entering a temporary injunction to maintain the status quo pending arbitration in any arbitrable dispute because a determination of a temporary injunction can only be done after the trial court has made some determination of the merits of the plaintiff's claim, which is precluded by the Federal Arbitration Act. *Feldman/Matz Interests, L.L.P.*, 140 S.W.3d at 881, 888; *Galtney*, 700 S.W.2d at 602; *Merrill Lynch, Pierce, Fenner and Smith v. Maghsoudi*, 682 S.W.2d 593 (Tex. App.—Houston [1st Dist.] 1984, no writ); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 666 S.W.2d 604 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). *See also Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984); *Smith v. Merrill Lynch Pierce Fenner & Smith Inc*., 575 F. Supp. 904, 905 (N.D. Tex. 1983)*; Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Thompson*, 574 F. Supp. 1472 (ED Mo. 1983); *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Thompson*, 575 F. Supp. 978, 979 (N.D. Fla. 1983); *JAB Industries, Inc. v. Silex SPA*, 601 F. Supp. 971-979 (S.D. N.Y. 1985); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shubert*, 577 F. Supp. 406 (M.D. Fla. 1983). One commentator has explained:

> Many of the judicial benefits parties forgo by agreeing to arbitrate are certainly no less substantial, and often more substantial, than the right to request injunctive relief. Courts should not relieve one party from its; decision to waive any of these rights, including whatever rights they would have — but for their agreement to arbitrate — to seek an injunction to preserve the status quo. This is especially so when one considers the fact that, unlike a trial by jury, or appellate review, the arbitrators themselves can consider and, if appropriate, grant a motion for preliminary injunctive relief. If the parties themselves have failed to include the right to seek injunctive relief in their agreement, a court should not do it for them.

Michael A. Hanzman, Pre-Arbitration "Status Quo" Injunctions Do They Protect The Arbitration Process or Impari Agreements to Arbitrate, 72 Fla. Bar. J. 20 (1998). Moreover, Texas Arbitration Act cannot supersede or overrule the Federal Arbitration Act's provisions. *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Jack B. Anglin Co., Inc., v. Tipps*, 842 S.W.2d 266, 270-71 (Tex. 1992). Under one line of precedent, if a plaintiff wants to enforce an arbitration provision and seek injunctive relief from a trial court, it may do so under the Texas Arbitration Act, but may not do so under the Federal Arbitration Act.

Another line of precedent in Texas would hold that trial courts can issue temporary injunctive relief pending arbitration to maintain the status quo. *Frontera Generation Ltd. P'ship v. Mission Pipeline Co.*, 400 S.W.3d 102 (Tex. App.—Corpus Christi 2012, no pet.). The *Frontera* court stated:

> We conclude that, under the FAA, the trial court may enter injunctive relief to preserve the status quo pending arbitration. As stated previously, this determination is supported by the majority of federal circuits that have considered this issue and current Texas federal district court analysis. Moreover, this determination is congruent with the Texas Arbitration Act. *See* Tex. Civ. Prac. & Rem. Code Ann. § 171.086(a) (West 2011) (allowing for a court to enter orders restraining or enjoining the destruction of all or an essential part of the subject matter to be arbitrated). This position also

> comports with the concept that courts may issue other orders pending arbitration. *See, e.g., CMH Homes v. Perez*, 340 S.W.3d 444, 450 n.4 (Tex. 2011) (stating that a stay, rather than dismissal, is appropriate for a state court following a determination that a matter should be arbitrated because "a court order may be needed to replace an arbitrator, compel attendance of witnesses, or direct arbitrators to proceed promptly"). Holding otherwise could render arbitration meaningless if parties are able to alter the status quo before arbitrators are able to address the merits of a dispute. In this case, the temporary injunction was issued in support of arbitration to preserve the status quo and the meaningfulness of the arbitration process.

Id.

This precedent relies on federal court cases that so hold. *See, e.g., Toyo Tire Holdings of Americas Inc. v. Cont'l Gen. Tire N. Am. Inc.*, 609 F.3d 975, 980-81 (9th Cir. 2010); *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1380 (6th Cir. 1995); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 214 (7th Cir. 1993); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1052 (2d Cir. 1990); *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 812 (3d Cir. 1989); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dutton*, 844 F.2d 726, 726-28 (10th Cir. 1988); *Teradyne, Inc. v. Mostek Corp*., 797 F.2d 43, 51 (1st Cir. 1986); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1051-54 (4th Cir. 1985); *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co. of N.Y.*, 749 F.2d 124, 125 (2nd Cir. 1984); *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1983); *Amegy Bank N.A. v. Monarch Flight II, LLC*, 870 F. Supp. 2d 441 (S.D. Tex. 2012).

Some courts have held that injunctive relief is only proper if the parties' contract contemplated it. *Metra United Escalante, L.P., v. The Lynd Co.*, 158 S.W.3d 535, 539-40 (Tex. App.—San Antonio 2004, no pet.) (concluding that the contract at issue contained no express language demonstrating that the parties contemplated court intervention to maintain the status quo, and "[w]e therefore follow the general rule applied by federal courts in Texas and conclude that the issuance of a preliminary injunction is not appropriate when the underlying claims are subject to arbitration under the FAA"); *Peabody Coalsales Co. v. Tampa Elec. Co.*, 36 F.3d 46, 47-48 (8th Cir. 1994) (holding that the court may issue injunctive relief in arbitrable dispute only if contract contains "qualifying language" that permits such relief and only if such relief can be granted without addressing the merits).

XXIII. Conclusion

This article was intended to provide sufficient information to help a party prosecute or defend an application for temporary injunctive relief. To be entitled to a temporary injunction, the applicant must plead a cause of action and show a probable right to recover on that cause of action and a probable, imminent, and irreparable injury in the interim. This paper was intended to describe the various arguments that can be made to show a probable, imminent, and process for obtaining temporary injunctive relief and appellate review of the outcome of that process. When an attorney has a client walk in the door that seeks to either prosecute or defend against injunctive relief, there is not much time to research and think about the various issues that come up. The Author hopes that this paper assists in that busy time.