IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 12- 9191

ADOPTION OF RULES FOR DISMISSALS AND EXPEDITED ACTIONS

ORDERED that:

1. In accordance with the Act of May 25, 2011, 82nd Leg., R.S., ch. 203, §§ 1.01, 2.01 (HB 274), amending section 22.004 of the Texas Government Code, Rules 91a and 169 of the Texas Rules of Civil Procedure and Rule 902(c) of the Texas Rules of Evidence are adopted as follows, and Rules 47 and 190 of the Texas Rules of Civil Procedure are amended as follows, effective March 1, 2013.

2. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

c. send a copy of this Order to each elected member of the Legislature; and

d. submit a copy of the Order for publication in the *Texas Register*.

3. These amendments may be changed in response to comments received on or before February 1, 2013. Any interested party may submit written comments directed to Marisa Secco, Rules Attorney, at P.O. Box 12248, Austin, TX 78711, or marisa.secco@txcourts.gov.

Dated: November 13, 2012

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

Eva M. Guzman, Justice

Debra H. Lehrmann, Justice

PER CURIAM

In 2011, the 82nd Texas Legislature passed House Bill 274[1] (HB 274). HB 274 called upon the Court to promulgate four sets of procedural rule amendments in order to implement certain legislative policy initiatives. Two of those sets of rules — governing permissive appeals and offers of judgment — were completed by the Court last year.[2] This Order promulgates the remaining rules: a dismissal rule and a set of rules for expedited actions.

The Court is charged by the Texas Constitution with providing for "the efficient and uniform administration of justice".[3] The Legislature by enacting HB 274, and the Governor by signing it into law, have directed that a more determined effort be made to reduce the expense and delay of litigation, while maintaining fairness to litigants. Small measures cannot achieve that directive. These rules are a significant effort to improve the efficiency of the Texas court system while protecting the rights of litigants.

HB 274 added Government Code § 22.004(g), which calls for rules "for the dismissal of causes of action that have no basis in law or fact on motion and without evidence . . . [to be] granted or denied within 45 days of the filing of the motion to dismiss."[4] The Court referred the study of the

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[1] Act of May 25, 2011, 82nd Leg., R.S., ch. 203, §§ 1.01, 2.01.

[2] *See* Misc. Docket Nos. 11-9182, 11-9183.

[3] TEX. CONST. art. V, § 31(b).

[4] Tex. Gov't Code § 22.004(g).

dismissal rule to the Supreme Court Advisory Committee. A ten-member subcommittee, chaired by Hon. David Peeples, worked on drafting the dismissal rule. The full Committee reviewed the subcommittee's proposal, a second proposal drafted by a voluntary Working Group of representatives from the Texas Chapters of the American Board of Trial Advocates, the Texas Association of Defense Counsel, and the Texas Trial Lawyers Association, and a third proposal drafted by the State Bar of Texas Court Rules Committee. The Supreme Court Advisory Committee debated the proposals on November 18, 2011, and again on December 9, 2011. Following the Committee's review, the Court revised the subcommittee proposal. This Order contains the final proposed rule, Texas Rule of Civil Procedure 91a, "Dismissal of Baseless Causes of Action".

HB 274 also added Government Code § 22.004(h), which calls for "rules to promote the prompt, efficient, and cost-effective resolution of civil actions . . . in which the amount in controversy, inclusive of all claims for damages of any kind, whether actual or exemplary, a penalty, attorney's fees, expenses, costs, interest, or any other type of damage of any kind, does not exceed $100,000."[5] The Court appointed a Task Force to propose rule changes for these "expedited actions."[6] The Task Force was chaired by Hon. Thomas R. Phillips, former Chief Justice of the Court. The other members of the Task Force were: David Chamberlain, Denis Dennis, Martha S. Dickie, Wayne Fisher, Jeffrey J. Hobbs, Lamont Jefferson, Hon. Scott Jenkins, Kennon Peterson,

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[5] Tex. Gov't Code § 22.004(h).

[6] Misc. Docket No. 11-9193.

Bradley Parker, Ricardo Reyna, and Alan Waldrop. In drafting its proposal, the Task Force reviewed the expedited actions rules proposed by the Working Group following the passage of HB 274. Two members of the Working Group were also members of the Task Force. The Task Force also studied expedited trial rules implemented in other states.

The Task Force completed its work and sent a report, proposing new rules and rule amendments, to the Court. The Court again referred study of the rules to the Supreme Court Advisory Committee, which reviewed the proposals of the Task Force on January 27 and 28, 2012. The Court also received a proposal from the State Bar of Texas Court Rules Committee. The Court reviewed the various proposals and drafted a set of rules that implements a mandatory expedited actions process for cases under $100,000. The final proposed rules — including new Texas Rule of Civil Procedure 169 and amendments to Texas Rules of Civil Procedure 47 and 190 and Texas Rule of Evidence 902 — are contained in this Order.

An important issue in formulating rules for expedited actions has been whether the rules should have a compulsory element to them or merely encourage lawyers to agree to more expedited procedures in smaller cases. Having carefully weighed the arguments of the Working Group, the report of the Task Force, the deliberations of the Supreme Court Advisory Committee, and the experience of other jurisdictions, the Court has concluded that the objectives of HB 274 cannot be achieved, or the benefits to the administration of justice realized, without rules that compel expedited procedures in smaller cases.

DISMISSAL RULE

New Rule 91a, Texas Rules of Civil Procedure:

91a. Dismissal of Baseless Causes of Action

91a.1 Motion and Grounds. Except in a case brought under the Family Code or a case governed by Chapter 14 of the Texas Civil Practice and Remedies Code, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.

91a.2 Contents of Motion. A motion to dismiss must state that it is made pursuant to this rule, must identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both.

91a.3 Time for Motion and Ruling. A motion to dismiss must be:

(a) filed within 60 days after the first pleading containing the challenged cause of action is served on the movant;

(b) filed at least 21 days before the motion is heard; and

(c) granted or denied within 45 days after the motion is filed.

91a.4 Time for Response. Any response to the motion must be filed no later than 7 days before the date of the hearing.

91a.5 Effect of Nonsuit or Amendment; Withdrawal of Motion.

(a) The court may not rule on a motion to dismiss if, at least 7 days before the date of the hearing, the respondent files a nonsuit of the challenged cause of action, or the movant files a withdrawal of the motion.

(b) If the respondent amends the challenged cause of action at least 7 days before the date of the hearing, the movant may, before the date of the hearing, file a withdrawal of the motion or an amended motion directed to the amended cause of action.

(c) Except by agreement of the parties, the court must rule on a motion unless it has been withdrawn or the cause of action has been nonsuited in accordance with (a) or (b). In ruling on the motion, the court must not consider a nonsuit or amendment not filed as permitted by paragraphs (a) or (b).

(d) An amended motion filed in accordance with (b) restarts the time periods in this rule.

91a.6 Hearing; No Evidence Considered. Each party is entitled to at least 14 days notice of the hearing on the motion to dismiss. The court may, but is not required to, conduct an oral hearing on the motion. The court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59.

91a.7 Award of Costs and Attorney Fees Required. Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court. The court must consider evidence regarding costs and fees in determining the award.

91a.8 Effect on Venue and Personal Jurisdiction. This rule is not an exception to the pleading requirements of Rules 86 and 120a, but a party does not, by filing a motion to dismiss pursuant to this rule or obtaining a ruling on it, waive a special appearance or a motion to transfer venue. By filing a motion to dismiss, a party submits to the court's jurisdiction in proceedings on the motion and is bound by the court's ruling, including an award of attorney fees and costs against the party.

91a.9 Dismissal Procedure Cumulative. This rule is in addition to, and does not supersede or affect, other procedures that authorize dismissal.

Comment to 2013 change: Rule 91a is a new rule implementing section 22.004(g) of the Texas Government Code, which was added in 2011 and calls for rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. A motion to dismiss filed under this rule must be ruled on by the court within 45 days unless the motion, pleading, or cause of action is withdrawn, amended, or nonsuited as specified in 91a.5. If an amended motion is filed in response to an amended cause of action in accordance with 91a.5(b), the court must rule on the motion within 45 days of the filing of the amended motion and the respondent must be given an opportunity to respond to the amended motion. The

term "hearing" in the rule includes both submission and an oral hearing. Attorney fees awarded under 91a.7 are limited to those associated with challenged cause of action, including fees for preparing or responding to the motion to dismiss.

RULES FOR EXPEDITED ACTIONS

Amendments to Rule 47, Texas Rules of Civil Procedure:

Rule 47. Claims for Relief

An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain:

(a) a short statement of the cause of action sufficient to give fair notice of the claim involved;;

(b) ~~in all claims for unliquidated damages only the~~ a statement that the damages sought are within the jurisdictional limits of the court;;

(c) a statement that the party seeks:

(1) only monetary relief of $100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees; or

(2) monetary relief of $100,000 or less and non-monetary relief; or

(3) monetary relief over $100,000 but not more than $500,000; or

(4) monetary relief over $500,000 but not more than $1,000,000; or

(5) monetary relief over $1,000,000; and

(ed) a demand for judgment for all the other relief to which the party deems himself entitled.

Relief in the alternative or of several different types may be demanded; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed. A party that fails to comply with (c) may not conduct discovery until the party's pleading is amended to comply.

Comment to 2013 change: Rule 47 is amended to require a more specific statement of the relief sought by a party. The amendment requires parties to plead into or out of the expedited actions process governed by Rule 169, added to implement section 22.004(h) of the Texas Government Code. A pleading other than a counterclaim that contains the statement in paragraph (c)(1) is governed by the expedited actions process. The further specificity in paragraphs (c)(2)-(5) is to provide information regarding the nature of cases filed and does not affect a party's substantive rights.

New Rule 169, Texas Rules of Civil Procedure:

Rule 169. Expedited Actions

(a) *Application.*

(1) The expedited actions process in this rule applies to a suit in which all claimants, other than counter-claimants, affirmatively plead that they seek only monetary relief aggregating $100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees.

(2) The expedited actions process does not apply to a suit in which a party has filed a claim governed by the Family Code, the Property Code, the Tax Code, or Chapter 74 of the Civil Practice & Remedies Code.

(b) *Recovery.* In no event may a party who prosecutes a suit under this rule recover a judgment in excess of $100,000, excluding post-judgment interest.

(c) *Removal from Process.*

(1) A court must remove a suit from the expedited actions process:

(A) on motion and a showing of good cause by any party; or

(B) if any claimant, other than a counter-claimant, files a pleading or an amended or supplemental pleading that seeks any relief other than the monetary relief allowed by (a)(1).

(2) A pleading, amended pleading, or supplemental pleading that removes a suit from the expedited actions process may not be filed without leave of court unless it is filed

before the earlier of 30 days after the discovery period is closed or 30 days before the date set for trial. Leave to amend may be granted only if good cause for filing the pleading outweighs any prejudice to an opposing party.

(3) If a suit is removed from the expedited actions process, then the court must continue the trial date and reopen discovery under Rule 190.2(c).

(d) *Expedited Actions Process.*

(1) Discovery. Discovery is governed by Rule 190.2.

(2) Trial Setting. On any party's request, the court must set the case for a trial date that is within 90 days after the discovery period in Rule 190.2(b)(1) ends.

(3) Time Limits for Trial. Each side is allowed five hours to complete jury selection, opening statements, presentation of evidence, examination and cross-examination of witnesses, and closing arguments.

(A) The term "side" has the same definition set out in Rule 233.

(B) Time spent on objections, bench conferences, and challenges for cause to a juror under Rule 228 are not included in the time limit.

(4) Alternative Dispute Resolution. Unless the parties have agreed to engage in alternative dispute resolution or are required to do so by contract, the court must not — by order or local rule — require the parties to engage in alternative dispute resolution.

(5) Expert Testimony. Unless requested by the party sponsoring the expert, a party may only challenge the admissibility of expert testimony as an objection to summary judgment evidence under Rule 166a or during the trial on the merits. This paragraph does not apply to a motion to strike for late designation.

Comments to 2013 change:

1. Rule 169 is a new rule implementing section 22.004(h) of the Texas Government Code, which was added in 2011 and calls for rules to promote the prompt, efficient, and cost-effective resolution of civil actions when the amount in controversy does not exceed $100,000.

2. The expedited actions process created by Rule 169 is mandatory; any suit that falls within the definition of 169(a)(1) is subject to the provisions of the rule. If multiple claimants each seek the monetary relief allowed under 169(a)(1) against the same defendant, the defendant may move to remove the case from the rule pursuant to 169(c)(1)(a).

3. Rule 169(b) specifies that a party who prosecutes a suit under this rule cannot recover a judgment in excess of $100,000. Thus, the rule in *Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938 (Tex. 1990), does not apply.

4. The discovery limitations for expedited actions are set out in Rule 190.2, which is also amended to implement section 22.004(h) of the Texas Government Code.

Amendments to Rule 190, Texas Rules of Civil Procedure:

Rule 190. Discovery Limitations

. . .

190.2. Discovery Control Plan — ~~Suits Involving $50,000 or Less~~ Expedited Actions and Divorces Involving $50,000 or Less (Level 1)

(a) *Application.* This subdivision applies to:

(1) ~~any suit in which all plaintiffs affirmatively plead that they seek only monetary relief aggregating $50,000 or less, excluding costs, pre-judgment interest and attorneys' fees~~ any suit that is governed by the expedited actions process in Rule 169, and

(2) any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $50,000.

~~(b) Exceptions. This subdivision does not apply if:~~

~~(1) the parties agree that Rule 190.3 should apply;~~

~~(2) the court orders a discovery control plan under Rule 190.4; or~~

~~(3) any party files a pleading or an amended or supplemental pleading that seeks relief other than that to which this subdivision applies.~~

~~A pleading, amended pleading (including trial amendment), or supplemental pleading that renders this subdivision no longer applicable may not be filed without leave of court less than 45 days before the date set for trial. Leave may be granted only if good cause for filing the pleading outweighs any prejudice to an opposing party~~.

(~~c~~b) *Limitations.* Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:

(1) Discovery Period. All discovery must be conducted during the discovery period, which begins when the suit is filed and continues until ~~30 days before the date set for trial~~ 180 days after the date the first request for discovery of any kind is served on a party.

(2) Total Time for Oral Depositions. Each party may have no more than six hours in total to examine and cross-examine all witnesses in oral depositions. The parties may agree to expand this limit up to ten hours in total, but not more except by court order. The court may modify the deposition hours so that no party is given unfair advantage.

(3) Interrogatories. Any party may serve on any other party no more than ~~25~~ 15 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.

(4) Requests for Production. Any party may serve on any other party no more than 15 written requests for production. Each discrete subpart of a request for production is considered a separate request for production.

(5) Requests for Admissions. Any party may serve on any other party no more than 15 written requests for admissions. Each discrete subpart of a request for admission is considered a separate request for admission.

(6) Requests for Disclosure. In addition to the content subject to disclosure under Rule 194.2, a party may request disclosure of all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. A request for disclosure made pursuant to this paragraph is not considered a request for production.

(~~d~~c) Reopening Discovery. ~~When the filing of a pleading or an amended or supplemental pleading renders this subdivision no longer applicable,~~ If a suit is removed from the expedited actions process in Rule 169 or, in a divorce, the filing of a pleading renders this subdivision no longer applicable, the discovery period reopens, and discovery must be completed within the limitations provided in Rules 190.3 or 190.4, whichever is applicable. Any person previously deposed may be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery.

. . .

190.5. Modification of Discovery Control Plan

The court may modify a discovery control plan at any time and must do so when the interest of justice requires. Unless a suit is governed by the expedited actions process in Rule 169, t~~T~~he court must allow additional discovery:

(a) related to new, amended or supplemental pleadings, or new information disclosed in a discovery response or in an amended or supplemental response, if:

(1) the pleadings or responses were made after the deadline for completion of discovery or so nearly before that deadline that an adverse party does not have an adequate opportunity to conduct discovery related to the new matters, and

(2) the adverse party would be unfairly prejudiced without such additional discovery;

(b) regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends.

Comment to 2013 change: Rule 190 is amended to implement section 22.004(h) of the Texas Government Code, which calls for rules to promote the prompt, efficient, and cost-effective resolution of civil actions when the amount in controversy does not exceed $100,000. Rule 190.2 now applies to expedited actions, as defined by Rule 169. Rule 190.2 continues to apply to divorces not involving children in which the value of the marital estate is not more than $50,000, which are otherwise exempt from the expedited actions process. Amended Rule 190.2(b) ends the discovery period 180 days after the date the first discovery request is served; imposes a fifteen limit maximum on interrogatories, requests for production, and requests for admission; and allows for additional disclosures. Although expedited actions are not

subject to mandatory additional discovery under amended Rule 190.5, the court may still allow additional discovery if the conditions of Rule 190.5(a) are met.

New Rule 902(c), Texas Rules of Evidence:

Rule 902. Self-Authentication

. . .

(c) *Medical expenses affidavit.* A party may make prima facie proof of medical expenses by affidavit that substantially complies with the following form:

Affidavit of Records Custodian of

_____

STATE OF TEXAS §
§
COUNTY OF _____ §

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

My name is _____. I am of sound mind and capable of making this affidavit, and personally acquainted with the facts herein stated.

I am a custodian of records for _____. Attached to this affidavit are records that provide an itemized statement of the service and the charge for the service that _____ provided to _____ on _____. The attached records are a part of this affidavit.

The attached records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the service provided, to make the record or to transmit information to be included in the record. The records were made in the regular course of business at or near the time or reasonably soon after the time the service was provided. The records are the original or a duplicate of the original.

The services provided were necessary and the amount charged for the services was reasonable at the time and place that the services were provided.

The total amount paid for the services was $_____ and the amount currently unpaid but which _____ has a right to be paid after any adjustments or credits is $_____.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, _____.

_____
Notary Public, State of Texas

Notary's printed name: _____ My commission expires: _____

Comment to 2013 Change: Rule 902(c) is added to provide a form affidavit for proof of medical expenses. The affidavit is intended to comport with Section 41.0105 of the Civil Practice and Remedies Code, which allows evidence of only those medical expenses that have been paid or will be paid, after any required credits or adjustments. *See Haygood v. Escabedo*, 356 S.W.3d 390 (Tex. 2011).