



1986

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### Recommended Citation

Ernest E. Figari Jr., et al., *Texas Civil Procedure*, 40 Sw L.J. 491 (1986)  
<https://scholar.smu.edu/smulr/vol40/iss1/18>

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# TEXAS CIVIL PROCEDURE

by

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THE major developments in the field of civil procedure during the survey period occurred through judicial decisions, a statutory enactment,<sup>1</sup> and amendments to the Texas Rules of Civil Procedure.<sup>2</sup> This Article examines these developments and considers their impact on existing Texas procedure.

## I. JURISDICTION OVER THE SUBJECT MATTER

A recent decision of the Texas Supreme Court, *Seay v. Hall*,<sup>3</sup> addressed the jurisdiction of a statutory probate court to adjudicate the claims of a wife-administratrix for wrongful death and for personal injury arising from her husband's death. Section 5(d) of the Texas Probate Code<sup>4</sup> authorizes a statutory probate court to hear all matters incident to estates. According to section 5A(b) all claims by estates fall within this grant.<sup>5</sup> Relying on the legislative history of these enactments, however, the court concluded that they limited probate court jurisdiction to matters in which settlement, partition, or distribution of an estate was the controlling issue.<sup>6</sup> The court concluded that the state district court was the proper forum for survival and wrongful death actions,<sup>7</sup> noting that neither settlement, partition, nor distri-

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1. The enactment of the Civil Practice and Remedies Code has several procedural implications. Act of May 15, 1985, ch. 959, 1985 Tex. Gen. Laws 7043 (codified as TEX. CIV. PRAC. & REM. CODE ANN. (Vernon Pam. 1986)). As noted in the introductory section to the codification, the Code represents a "revision of the state's general and permanent statute law without substantive change." *Id.* § 1.001(a) (emphasis added).

2. As a result of these amendments, eight rules were modified. These changes became effective Apr. 1, 1985. See *Rules of Civil Procedure*, 48 TEX. B.J. 182 (Feb. 1985).

3. 677 S.W.2d 19 (Tex. 1984), *rev'g* 663 S.W.2d 468 (Tex. App.—Dallas 1984). See generally Figari, Graves & Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 38 SW. L.J. 421, 422 (1984) [hereinafter cited as *1984 Annual Survey*] (discussing court of appeals opinion).

4. TEX. PROB. CODE ANN. § 5(d) (Vernon 1980).

5. *Id.* § 5A(b).

6. 677 S.W.2d at 23.

7. *Id.* at 25.

bution of an estate was the controlling issue in those actions.<sup>8</sup>

The Texas Declaratory Judgment Act,<sup>9</sup> which provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed,"<sup>10</sup> was the subject of recent jurisdictional scrutiny. Given the broad language of the Act, uncertainty had existed as to whether it empowered a trial court to entertain a potential defendant's action in a tort case seeking a declaration of nonliability. Answering in the affirmative, the supreme court in *Abor v. Black*<sup>11</sup> found the necessary jurisdictional grant in the Act. The court emphasized, however, that the trial court should have declined to exercise such jurisdiction, as it deprived the real plaintiff of the traditional right to choose the time and place of suit.<sup>12</sup>

The court in *Gannon v. Payne*<sup>13</sup> addressed an international tug-of-war in which the plaintiff, a Texas resident, had filed suit against a Canadian resident, seeking damages for alleged fraud. After entering a general appearance, the defendant initiated a competing action in Canada against the plaintiff. The plaintiff countered with a request in the Texas court to temporarily enjoin the defendant from prosecution of the Canadian action. After a hearing on the matter, the trial court granted the request. Appealing from this injunction, the defendant challenged the power of the trial court to halt the Canadian action. The court of appeals affirmed, reiterating that when a plaintiff files suit in a court that has jurisdiction of the parties and subject matter, "that court may proceed to judgment and may protect its jurisdiction by enjoining the parties from prosecution of another suit subsequently filed in another court, involving the same subject matter."<sup>14</sup>

## II. JURISDICTION OVER THE PERSON

The most significant development in the area of jurisdiction over the person was the decision of the United States Supreme Court in *Burger King Corp. v. Rudzewicz*.<sup>15</sup> The plaintiff, a Florida corporation and franchisor of Burger King restaurants, granted a twenty-year franchise to the defendant, a Michigan resident, for the operation of one of its restaurants in the Detroit area. The negotiations leading up to the grant occurred in both Michigan and Florida. The resulting agreements provided, however, that the franchise relationship was established in Miami where the plaintiff was headquartered and stipulated that payment of all required fees should be sent to that location. The parties further agreed that Florida law would govern their rela-

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8. *Id.* at 24.

9. TEX. REV. CIV. STAT. ANN. art. 2524-1 (Vernon 1965), *repealed and recodified as* TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001-.011 (Vernon Pam. 1986).

10. *Id.* § 1, *repealed and recodified as* TEX. CIV. PRAC. & REM. CODE ANN. § 37.003 (Vernon Pam. 1986).

11. 695 S.W.2d 564 (Tex. 1985).

12. *Id.* at 566.

13. 695 S.W.2d 741 (Tex. App.—Dallas 1985, no writ).

14. *Id.* at 744; *accord* *V.D. Anderson Co. v. Young*, 128 Tex. 631, 636, 101 S.W.2d 798, 800 (1937); *Cleveland v. Ward*, 116 Tex. 1, 16-17, 285 S.W. 1063, 1072-73 (1926).

15. 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

tionship. When the business of the Michigan restaurant later declined, the defendant fell behind in the monthly payments. The plaintiff eventually terminated the franchise. After the defendant refused to cease operations at the restaurant, the plaintiff commenced suit in Florida seeking damages and injunctive relief. The defendant, whose physical ties to Florida were virtually nonexistent, contested the assertion of personal jurisdiction. The trial court overruled the objection, but the court of appeals disagreed, concluding that the defendant was without reasonable notice and financially unprepared to litigate the franchise matter in Florida due to the circumstances surrounding the franchise negotiations.<sup>16</sup>

The United States Supreme Court reversed, finding that the defendant had “established a substantial and continuing relationship with Burger King’s Miami headquarters, [had] received fair notice from the contract documents and the course of dealing that he might be subject to suit in Florida, and [had] failed to demonstrate how jurisdiction in that forum would otherwise be fundamentally unfair . . . .”<sup>17</sup> While conceding the absence of physical presence on the part of the defendant in the forum, the Court reiterated that “[j]urisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State.”<sup>18</sup> In this regard, the Court observed that an absence of physical contacts will not defeat personal jurisdiction in a state when a commercial actor purposefully directs its efforts toward residents of that state.<sup>19</sup>

The Court noted a division among lower courts as to whether and to what extent a contract constitutes a contact for due process analysis.<sup>20</sup> The Court emphasized that a contract is merely an intermediate step tying up business negotiations, whereas the consequences of these negotiations are the main purpose of the business transaction.<sup>21</sup> These consequences and negotiations, along with the terms of the contract and actual dealings, are all important factors in determining whether the defendant purposefully established minimum contacts with the forum.<sup>22</sup> Finally, the court pointed to the defendant’s envisioned twenty-year relationship with Burger King in Florida, to his refusal to make the contractual payments in Miami, and to the foreseeability of injuries caused by his use of Burger King’s trademark and confidential business information even after his termination, in holding that the defendant could reasonably be hailed to Florida to account for the injuries.<sup>23</sup>

The Supreme Court rejected the court of appeals’ conclusion that the choice-of-law provision was irrelevant to the question of personal jurisdiction.<sup>24</sup> The Court observed that although the provision alone was insuffi-

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16. *Burger King Corp. v. MacShara*, 724 F.2d 1505, 1513 (11th Cir. 1984) (2-1 decision), *rev’d*, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

17. 105 S. Ct. at 2190, 85 L. Ed. 2d at 550.

18. *Id.* at 2184, 85 L. Ed. 2d at 543 (emphasis in original).

19. *Id.*

20. *Id.* at 2185, 85 L. Ed. 2d at 544.

21. *Id.*

22. *Id.* at 2186, 85 L. Ed. 2d at 545.

23. *Id.*, 85 L. Ed. 2d at 545-46.

24. *Id.* at 2187, 85 L. Ed. 2d at 547.

cient to confer jurisdiction, the choice-of-law provision, combined with the twenty-year interdependent relationship between the defendant and Burger King's Miami headquarters, made it reasonably foreseeable to the defendant that litigation was possible there.<sup>25</sup>

The reach of the Texas long-arm statute, article 2031b,<sup>26</sup> is continually the subject of judicial measurement. Section 3 of article 2031b authorizes the exercise of jurisdiction over a nonresident when he is doing business in Texas.<sup>27</sup> Doing business, as defined by section 4, includes "entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State."<sup>28</sup> A recent Fifth Circuit decision, *Stuart v. Spademan*,<sup>29</sup> reiterated a two-pronged test for meeting the requirements of due process when effecting service under article 2031b. First, "the nonresident must have some minimum contact with the forum which results from an affirmative act on his part" and, second, "it must be fair and reasonable to require the nonresident to defend the suit in the forum state."<sup>30</sup>

The plaintiffs, two residents of Texas, sued the defendant, formerly a resident of California, to recover damages for breach of contract. At the outset of their relationship the plaintiffs had contacted the defendant in California regarding an improved ski binding they had invented and attempted to interest him in marketing it for sale. Following several exchanges by mail, a meeting in Colorado, and the defendant's transmission of prototype bindings to the plaintiffs in Texas, a written agreement was signed by the plaintiffs in Texas and by the defendant in California. The agreement provided for an assignment of the plaintiffs' invention and payments totaling \$85,000 to be made to the plaintiffs in Texas. A subsequent problem with the payments precipitated the execution of an amendment to the original agreement. The amendment, which the plaintiffs signed in Texas and the defendant signed in Nevada where he had recently moved, required the defendant to make payment directly to the plaintiffs' bank in Texas. It also substituted a neutral

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25. *Id.* The Court's ruling reinforces the importance of a choice of law provision in a jurisdictional context. See *D.J. Invs., Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 548 (5th Cir. 1985) (lack of choice of law provision emphasized); *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1027-31 & n.3 (5th Cir. 1983) (choice of law provision emphasized in deciding jurisdiction), *cert. denied*, 104 S. Ct. 2180, 80 L. Ed. 2d 561 (1984). See generally 1984 Annual Survey, *supra* note 3, at 423 (discussing the Fifth Circuit's decision in *Hydrokinetics*).

26. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964), amended by Act of May 17, 1979, ch. 245, § 1, 1979 Tex. Gen. Laws 522, 522-23, repealed and recodified as TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.043-.045 (Vernon Pam. 1986).

27. *Id.* § 3, repealed and recodified as TEX. CIV. PRAC. & REM. CODE ANN. § 17.044 (Vernon Pam. 1986).

28. *Id.* § 4, repealed and recodified as TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon Pam. 1986).

29. 772 F.2d 1185 (5th Cir. 1985).

30. *Id.* at 1189; accord *D. J. Invs., Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 545 (5th Cir. 1985); *C&H Transp. Co. v. Jensen & Reynolds Constr. Co.*, 719 F.2d 1267, 1269 (5th Cir. 1983); *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1028 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2180, 80 L. Ed. 2d 561 (1984); *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 152 (5th Cir. 1980).

choice-of-law provision<sup>31</sup> for the one in the original agreement that specified that California law was to govern.<sup>32</sup> When the defendant was later unable to obtain patent coverage on the assigned invention, he advised the plaintiffs he was discontinuing payments under the agreement. The plaintiffs countered with a suit against him in Texas, and service was effected on the defendant under article 2031b. The defendant responded with a motion to dismiss for lack of personal jurisdiction. The trial court dismissed the suit and an appeal from that ruling ensued. The Fifth Circuit affirmed, holding that minimum contacts consisting of the negotiation and closing of a contract using interstate commerce, a few shipments of goods to the forum at the instigation of the plaintiff, and the mailing of payments to the forum, are not sufficient constitutionally to exercise jurisdiction over the defendant.<sup>33</sup>

In addition to acting in an individual capacity in his interstate dealings with the plaintiffs, the defendant was also the president of a corporation that licensed and proposed to market the improved bindings in Texas. Apparently realizing the weakness of their primary position, the plaintiffs argued that the corporation's Texas activities should be attributed to the defendant so as to sustain jurisdiction over his person. In this connection *Stuart* is instructive for its obverse consideration of the fiduciary shield principle.<sup>34</sup> Under that principle the acts performed by an officer of a corporation in the forum state on behalf of a corporation generally cannot be attributed to him individually so as to sustain nonresident service over his person. Acknowledging that an individual's contacts as a corporate representative may be attributed to him individually when the individual has completely dominated the corporation,<sup>35</sup> the Fifth Circuit nevertheless concluded that an insufficient showing had been made to justify in this instance disregarding the corporate entity for jurisdictional purposes.<sup>36</sup>

The Supreme Court of Texas concluded during a previous survey period that service under article 2031b is not complete until the secretary of state

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31. The choice-of-law provision in the amendment stated: "All of the terms of this agreement as amended shall be subject to and shall be construed and enforced according to the laws of the state in which the aggrieved party under the terms of the contract is residing at the time such breach of contract or grievance occurs." 772 F.2d at 1188.

32. *Id.* As the court noted, "this particular choice-of-law provision adds little to the mix of contacts previously considered since the provision is tied to the residence of the parties—a factor already taken into account as a part of the minimum-contacts analysis." *Id.* at 1196 n.9.

33. *Id.* at 1194.

34. The fiduciary shield principle provides: "[I]f an individual has contact with a particular state only by virtue of his acts as a fiduciary of the corporation, he may be shielded from the exercise, by that state, of jurisdiction over him personally on the basis of that conduct." *Marine Midland Bank v. Miller*, 664 F.2d 899, 902 (2d Cir. 1981); *accord* *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 929 (5th Cir. 1974) (jurisdiction over corporation's individual officers cannot be based solely upon jurisdiction over corporation); *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277, 1281 n.8 (10th Cir. 1969) (even if foreign corporation is subject to service because it transacts business through agents operating in forum state, such agents are not engaged in business so as to allow application of long-arm statute to them as individuals unless agents transact business on their own behalf apart from corporation).

35. 772 F.2d at 1198.

36. *Id.*

forwards process to the nonresident defendant.<sup>37</sup> In order to establish the jurisdiction of the trial court over the defendant's person the record must therefore affirmatively show that the process was forwarded.<sup>38</sup> This showing may be made by filing a certificate of mailing issued by the secretary of state.<sup>39</sup> In the case of an unreceptive defendant, the trial practitioner has been concerned with the question of whether a certificate indicating that process was forwarded but returned unclaimed by the defendant satisfied this service requirement. Answering in the affirmative, the court of appeals held in *BLS Limousine Service, Inc. v. Buslease, Inc.*<sup>40</sup> that service to the appellants was in accordance with article 2031b despite the return of the citations to the secretary with a notation "refused" upon them.<sup>41</sup>

In *Southern Distributing Co. v. Technical Support Associates, Inc.*<sup>42</sup> the court addressed a relatively obscure provision of article 2031b. Section 5 of that article stipulates that when process is delivered to the secretary of state for forwarding to a nonresident defendant, the secretary of state "shall require a statement of the name and address of the home or home office of the nonresident" to facilitate such forwarding.<sup>43</sup> The record before the court revealed that the secretary of state received only the address of the corporate defendant's service agent under California law and that he forwarded the process to that location. The plaintiff thereafter obtained a default judgment based on that service. The corporate defendant sought to have the default judgment set aside, arguing noncompliance with section 5. Finding that the address of the California service agent was not the equivalent of the home or home office address required by the statute, the court ruled the plaintiff had not fulfilled the requirements of section 5 and set aside the judgment.<sup>44</sup>

### III. SPECIAL APPEARANCE

Two cases during the survey period, *Liberty Enterprises, Inc. v. Moore Transportation Co.*<sup>45</sup> and *Portland Savings & Loan Association v. Bernstein*,<sup>46</sup> illustrate the risks of taking action in the trial court inconsistent with the prosecution of a special appearance. After nonresident service was effected on the defendant in *Liberty Enterprises*, the time within which the defendant had to file an answer expired, and the trial court entered a default judgment. Three weeks later the defendant filed a special appearance and a motion for

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37. *Whitney v. L&L Realty Corp.*, 500 S.W.2d 94, 96 (Tex. 1973); see Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 28 Sw. L.J. 248, 248 (1974).

38. 500 S.W.2d at 96.

39. *Vanguard Inv. v. Fireplaceman, Inc.*, 641 S.W.2d 655, 656 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

40. 680 S.W.2d 543 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (en banc).

41. *Id.* at 546.

42. 105 F.R.D. 1 (S.D. Tex. 1984).

43. TEX. REV. CIV. STAT. ANN. art. 2031b, § 5 (Vernon 1964), *repealed and recodified as* TEX. CIV. PROC. & REM. CODE ANN. § 17.045 (Vernon Pam. 1986).

44. 105 F.R.D. at 2; *accord Verges v. Lomas & Nettleton Fin. Corp.*, 642 S.W.2d 820, 823 (Tex. App.—Dallas 1982, no writ).

45. 690 S.W.2d 570 (Tex. 1985).

46. 693 S.W.2d 478 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

new trial. The trial court entered an agreed order granting a new trial. The trial court denied the defendant a hearing on its special appearance, however, concluding that its actions in the case amounted to a general appearance. The defendant perfected an appeal on this point and the supreme court reviewed the ruling. Pointing to the defendant's statement in its motion for new trial that it was ready to try the case when properly set for trial and noting that the defendant had agreed to the order allowing the new trial, the supreme court found that the defendant had made a general appearance.<sup>47</sup>

The conduct of the defendant in *Portland Savings & Loan Association* was more precarious. After asserting a special appearance, the defendants filed a motion for sanctions arising from a discovery dispute and a motion to disqualify the plaintiff's counsel, neither of which was conditioned on the earlier jurisdictional challenge. More importantly, the motion for sanctions was principally directed to discovery on the merits and concluded with a request that it be decided "*before any other matter is heard.*"<sup>48</sup> The court relied on rule 120a<sup>49</sup> in finding that the defendants had entered a general appearance.<sup>50</sup> The court found that the defendant failed to comply with the requirement in rule 120a that jurisdictional challenges must be heard before any other matter, since the defendant's motion for sanctions are directed on the merits rather than the jurisdictional hearing.<sup>51</sup>

The Texas supreme court's decision in *Kawasaki Steel Corp. v. Middleton*<sup>52</sup> is instructive as to the permissible scope of a challenge by special appearance. Resolving a conflict among decisions of the courts of appeals,<sup>53</sup> the court emphasized that "defective jurisdictional allegations in the petition, defective service of process, and defects in the citation must be challenged by a motion to quash, not a special appearance."<sup>54</sup> Thus, under rule 120a a nonresident defendant may not contest curable defects in service of

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47. 690 S.W.2d at 571.

48. 693 S.W.2d at 480 (emphasis in original).

49. TEX. R. CIV. P. 120a (a motion challenging jurisdiction must be heard before any other plea).

50. 693 S.W.2d at 480.

51. *Id.*

52. 699 S.W.2d 199 (Tex. 1985).

53. Compare *Steve Tyrell Prod., Inc. v. Ray*, 674 S.W.2d 430, 435 (Tex. App.—Austin 1984, no writ); with *TM Prod., Inc. v. Blue Mountain Broadcasting Co.*, 623 S.W.2d 427, 431-33 (Tex. Civ. App.—Dallas 1981), writ ref'd n.r.e. per curiam, 639 S.W.2d 450 (Tex. 1982); *Menchaca v. Chrysler Life Ins. Co.*, 604 S.W.2d 287, 289 (Tex. Civ. App.—San Antonio 1980, no writ); *In re D.N.S.*, 592 S.W.2d 35, 37 (Tex. Civ. App.—Beaumont 1979, no writ); *Mills v. Stinger Boats, Inc.*, 580 S.W.2d 106, 107-08 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.); *Gathers v. Walpace Co.*, 544 S.W.2d 169, 170-71 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.); *Burgess v. Ancillary Acceptance Corp.*, 543 S.W.2d 738, 739-40 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.); and *Curry v. Dell Publishing Co.*, 438 S.W.2d 887, 890 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.). See generally *Thode, In Personam Jurisdiction; Article 2031b, the Texas "Long-Arm" Jurisdiction Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEX. L. REV. 279, 312-13 (1964) (rule 120a only allows a special appearance to challenge jurisdiction).

54. 699 S.W.2d at 203.



process by a special appearance.<sup>55</sup>

#### IV. SERVICE OF PROCESS

Several decisions during the survey period invalidated service of process on the basis of inadvertent errors occurring in the course of service. In *Uvalde Country Club v. Martin Linen Supply Co.*<sup>56</sup> the petition stated that service could be effected by serving "Henry Bunting, Jr.," the registered agent of the corporate defendant. The citation and officer's return, however, reflected that service was effected on "Henry Bunting." Finding that the omission of "Jr." from the name on the citation and return represented a material deviation from service requirements, the supreme court invalidated the service and set aside the default judgment founded on such service.<sup>57</sup>

The use of an outdated form by the clerk was the apparent source of error in *Smith v. Commercial Equipment Leasing Co.*<sup>58</sup> The clerk of the court in which a case is pending is authorized under rule 103<sup>59</sup> to effectuate service on a defendant by registered or certified mail. The citation used for this purpose in *Smith*, however, advised that "[t]his citation may be served by the sheriff or constable . . . and he shall deliver to the above named party, in person, a true copy of citation with the date of delivery endorsed thereon."<sup>60</sup> Although it was undisputed that the defendant received the process, the supreme court pointed out that the citation's language might mislead a defendant to believe that personal delivery of the citation was required and would subsequently occur.<sup>61</sup> For this reason, the court concluded that the manner of service conflicted with the terms of the citation and it invalidated the default judgment founded on such service.<sup>62</sup>

Finally, in *Cox Marketing, Inc. v. Adams*<sup>63</sup> the court was concerned with a default judgment based on a return that recited merely that the executing officer had served the defendant's agent on a specified date. Relying on rule 107, which stipulates that the return of the executing officer shall specify the manner of service,<sup>64</sup> the court admonished that "[a] recitation that the agent 'was served' states only a conclusion as to service being perfected and does not show the manner of service."<sup>65</sup> Finding noncompliance with rule 107,

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55. *Id.*; accord *Steve Tyrell Prod., Inc. v. Ray*, 674 S.W.2d 430, 435 (Tex. App.—Austin 1984, no writ).

56. 690 S.W.2d 884 (Tex. 1985).

57. *Id.* at 885. *Contra* *Salazar v. Tower*, 683 S.W.2d 797, 799 (Tex. App.—Corpus Christi 1984, no writ) (omission of suffix "Jr." did not render service of process fatally defective).

58. 678 S.W.2d 917 (Tex. 1984).

59. TEX. R. CIV. P. 103. See generally *Pope & McConnico, Practicing Law with the 1981 Texas Rules*, 32 BAYLOR L. REV. 457, 485-86 (1980) (discussing the duties of sheriffs and constables under rule 103).

60. 678 S.W.2d at 917.

61. *Id.* at 918.

62. *Id.*

63. 688 S.W.2d 215 (Tex. App.—El Paso 1985, no writ).

64. TEX. R. CIV. P. 107.

65. 688 S.W.2d at 218.

the court set aside the default judgment.<sup>66</sup>

Article 2.11 of the Texas Business Corporation Act<sup>67</sup> sets forth the procedure for effecting service on a corporation. The statute allows for service of process on the secretary of state if a corporation's registered agent cannot be located.<sup>68</sup> The secretary of state must then send a copy of the process by registered mail to the corporation's registered office.<sup>69</sup> In *Houston's Wild West, Inc. v. Salnas*<sup>70</sup> service of process on the defendant corporation was made in this fashion at a private post office box, but the postal service returned the copy of process with the notation "Returned to Sender."<sup>71</sup> Since the plaintiff had fulfilled the requirements of article 2.11, the trial court entered a default judgment against the corporation on the basis of this service. The defendant corporation subsequently attacked the default judgment, contending that service was improper because it had not received actual notice of the suit. The court of appeals found the service to be in compliance with article 2.11 since the corporation had a duty to maintain a registered office in this state, and "[i]f a corporation elects to maintain a private postal box as its registered address in lieu of an actual location where the registered agent himself may be found, the corporation then assumes the risk of not receiving notices delivered."<sup>72</sup>

The decision in *Global Truck & Equipment, Inc. v. Plaschinski*,<sup>73</sup> which also arose under article 2.11, stands as a warning to plaintiffs' attorneys that in order to support a default judgment under article 2.11 the pleadings must adequately allege the registered office. In *Plaschinski* the petition merely alleged that service could be effected at a particular address. Pursuant to article 2.11, the secretary of state made the required forwarding of process to that location. The trial court entered a default judgment, and the defendant subsequently attacked it by writ of error. The court of appeals found the record devoid of any allegation that the location to which process was forwarded was the registered office of the defendant.<sup>74</sup> The court of appeals thus concluded that strict compliance with article 2.11 was lacking and set aside the default judgment.<sup>75</sup>

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66. *Id.*

67. TEX. BUS. CORP. ACT ANN. art. 2.11 (Vernon 1980).

68. *Id.*

69. *Id.*

70. 690 S.W.2d 30 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

71. *Id.* at 31.

72. *Id.* at 32; see *TXXN, INC. v. D/FW STEEL CO.*, 632 S.W.2d 706, 709 (Tex. App.—Fort Worth 1982, no writ) (corporation cannot assert as ground of error failure to receive service of process when failure was caused by corporation).

73. 683 S.W.2d 766 (Tex. App.—Houston [14th Dist.] 1984, no writ).

74. *Id.* at 769.

75. *Id.*; accord *Travis Builders, Inc. v. Graves*, 583 S.W.2d 865, 867 (Tex. Civ. App.—Tyler 1979, no writ); see *Encore Builders v. Wells*, 636 S.W.2d 722, 723 (Tex. App.—Corpus Christi 1982, no writ) (company failed to designate properly agent for service of process); *Charles Cohen, Inc. v. Adams*, 516 S.W.2d 464, 465 (Tex. Civ. App.—Tyler 1974, no writ) (strict compliance with art. 2.11 is necessary to uphold a default judgment against attack based on invalid service of process); *White Motor Co. v. Loden*, 373 S.W.2d 863, 865 (Tex. Civ. App.—Dallas 1963, no writ) (record must show strict compliance with the provided mode of service).

*Lawyers Civil Process, Inc. v. State ex rel. Vines*<sup>76</sup> grew out of an uprising of service officers. The sheriff and constables of Dallas County commenced the suit seeking a permanent injunction against the process serving activities of two private firms. The State of Texas intervened with a claim in quo warranto. The trial court found that the private firms were executing civil processes without an order authorizing such action. The trial court enjoined the conduct, and the defendants appealed. Rule 106(a) of the Texas Rules of Civil Procedure provides that "[u]nless the citation or an order of the court otherwise directs, the citation shall be served by any officer authorized by Rule 103 . . . ."<sup>77</sup> Rule 103, in turn, authorizes a sheriff, constable, or clerk to effect service.<sup>78</sup> Discerning no general authorization in the rules for the use of a private process server, the court of appeals held that one of the named officers must first attempt service under rule 106(a).<sup>79</sup> The court concluded that if this requirement is met, a motion for substituted service may be filed.<sup>80</sup> Upon the proper showing, the trial court may order service by a private process server in accordance with rule 106(b).<sup>81</sup>

## V. VENUE

Cases interpreting the Texas venue scheme as it existed before the 1983 amendments continue to linger in the courts. In *Bohnert v. Barbour*<sup>82</sup> a third-party defendant who was impleaded in a negligence action filed a third-party action seeking indemnity from an architect. After the trial court sustained the architect's plea of privilege to be sued in the county of his domicile, the original third-party defendant appealed, claiming that article 2212a<sup>83</sup> controlled the venue determination. The court of appeals agreed, holding that the architect became a named defendant in the primary suit for purposes of article 2212a when the contribution claim was filed against him.<sup>84</sup> Following the rule announced in *Arthur Brothers, Inc. v. U.M.C., Inc.*,<sup>85</sup> the court ruled that the special venue provision included in the comparative negligence statute extended to third-party defendants whom the

76. 690 S.W.2d 939 (Tex. App.—Dallas 1985, no writ).

77. TEX. R. CIV. P. 106(a) (emphasis added).

78. *Id.* 103.

79. 690 S.W.2d at 942-43; accord *Garcia v. Gutierrez*, 697 S.W.2d 758, 759 (Tex. App.—Corpus Christi 1985, no writ).

80. 690 S.W.2d at 942-43.

81. *Id.*; accord *Garcia v. Gutierrez*, 697 S.W.2d 758, 759 (Tex. App.—Corpus Christi 1985, no writ).

82. 679 S.W.2d 700 (Tex. App.—San Antonio 1984, no writ).

83. Act of Apr. 9, 1973, ch. 28, § 1, 2, 1973 Tex. Gen. Laws 41, 41-42 provided that all claims for contribution between named defendants in the primary suit were to be determined in the primary suit. Article 2212a was repealed effective Sept. 1, 1985, by Act of May 15, 1985, ch. 959, § 9(1), 1985 Tex. Gen. Laws 7043, 7218, which enacted the CPRC. Section 2(g) of the prior statute has been substantially recodified as TEX. CIV. PRAC. & REM. CODE ANN. § 33.017 (Vernon Pam. 1986).

84. 679 S.W.2d at 703.

85. 647 S.W.2d 244 (Tex. 1982) (purpose of art. 2212a, § 2(g) is to maintain all contribution claims in the original suit). See generally Figari, Graves & Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 37 Sw. L.J. 289, 296-97 (1983) [hereinafter cited as *1983 Annual Survey*] (discussing the supreme court decision in *Arthur Bros.*).

plaintiff had not originally named as defendants.<sup>86</sup>

Before its amendment in 1983, the Texas venue statute provided generally that "[n]o person who is an inhabitant of this State shall be sued out of the county in which he has his domicile . . . ."<sup>87</sup> Following earlier authorities,<sup>88</sup> the court in *Canales v. Estate of Canales*<sup>89</sup> held that an out-of-state resident had no right under the general venue provision to be sued in any particular county unless venue was controlled by some mandatory provision of the statute.<sup>90</sup> The defendant in *Canales*, who had relocated to Dallas before the venue hearing, asserted in an amended plea that venue against her was proper only in Dallas County. The court ruled, however, that she had waived her venue rights by filing an answer subject to the original plea of privilege.<sup>91</sup> According to the court, the original defective plea was a nullity and the subsequent amended plea thus failed to conform with the requirements of pleading in due order, since it came after the defendant had already filed an answer on the merits.<sup>92</sup>

The court in *Hendrick Medical Center v. Howell*<sup>93</sup> appears to have answered a question that was settled under the old venue statute<sup>94</sup> but was raised anew by the successor statute.<sup>95</sup> In *Hendrick* the plaintiffs filed suit against several defendants in Jefferson County, who responded by filing motions to transfer venue to Jones County. After the trial court sustained the defendants' motions and transferred the cause to Jones County, the plaintiffs took a nonsuit. The plaintiffs then refiled the same action in Dallas County, naming a different group of defendants. After the Dallas court overruled the second group of defendants' motions to transfer venue, the plaintiffs amended their original petition and named the original Jefferson County defendants as additional defendants in the second suit. These defendants also filed motions to transfer venue, which the trial court overruled on the ground that similar motions by the co-defendants had already been determined and rule 87(5) of the Texas Rules of Civil Procedure proscribes a

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86. 679 S.W.2d at 703. The court found that the clear intent of the statute was to consolidate in one primary suit all issues of contribution and indemnity that were otherwise unresolved through settlement. *Id.* The court therefore rejected the architect's attempt to distinguish his suit from *Arthur Bros.* on the basis that the party claiming against him was a third party defendant himself rather than an original named defendant. *Id.*

87. TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964), amended by Act of June 17, 1983, ch. 385, § 1, 1983 Tex. Gen. Laws 2119-24, repealed and recodified as TEX. CIV. PRAC. & REM. CODE ANN. § 15.001 (Vernon Pam. 1986).

88. See *Pegram v. Owens*, 64 Tex. 475, 477 (1885); *Nolte v. Saenz*, 153 S.W.2d 281, 282-83 (Tex. Civ. App.—San Antonio 1941, no writ).

89. 683 S.W.2d 77 (Tex. App.—San Antonio 1984, no writ).

90. *Id.* at 79.

91. *Id.* at 79.

92. *Id.*; see TEX. R. CIV. P. 86.

93. 690 S.W.2d 42 (Tex. App.—Dallas 1985, no writ).

94. See *supra* note 87 and accompanying text.

95. The so-called "new" Texas venue statute, TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964), amended by Act of June 17, 1983, ch. 385, § 1, 1983 Tex. Gen. Laws 2119-24, effective Sept. 1, 1983, has itself been repealed and recodified as TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.011-.064 (Vernon Pam. 1986). Apart from a recodification and renumbering of sections, the statute remains unchanged.

second hearing.<sup>96</sup> The defendants then petitioned the Dallas court of appeals for a writ of mandamus directing the trial court to transfer the cause to Jones County.

The court of appeals agreed with the defendants that venue was conclusively established in Jones County as a result of the Jefferson County judge's prior order of transfer and the subsequent nonsuit by the plaintiffs.<sup>97</sup> In reaching that conclusion, the court specifically noted that amended rule 87 contemplates only one venue determination in a cause of action.<sup>98</sup> A plaintiff could easily circumvent the intent of rule 87, according to the court, if the plaintiff could avoid a binding venue determination simply by nonsuiting and subsequently refiling the same suit in a county other than that in which venue was determined to be proper.<sup>99</sup> Although the court acknowledged that the correct venue result was obtained under the old statute by judicial imposition of a *res judicata* rule,<sup>100</sup> the court based its holding upon the pertinent provisions of the new venue statute itself rather than resorting to notions of *res judicata*.<sup>101</sup>

In spite of its agreement with the defendants' position regarding venue, the court in *Hendrick* denied the requested mandamus.<sup>102</sup> Section 4(d)(1) of article 1995 as amended in 1983 expressly provided that no interlocutory appeal should lie from the venue determination.<sup>103</sup> According to the court, acceding to the defendants' request for issuance of a writ of mandamus would allow what amounted to an impermissible interlocutory appeal.<sup>104</sup> Moreover, since section 4(d)(2)<sup>105</sup> of amended article 1995 preserves a defendant's right to appeal the trial court's improper venue ruling, and reversal in this situation is automatic, the court concluded that an adequate remedy other than mandamus was available to the defendants.<sup>106</sup>

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96. TEX. R. CIV. P. 87(5) provides that once a venue determination has been made by the trial court "no further motions to transfer shall be considered regardless of whether the movant was a party to the prior proceedings or was added as a party subsequent to the venue proceedings . . ." *Id.*

97. 690 S.W.2d at 44.

98. 690 S.W.2d at 44; *see supra* note 96.

99. *Id.* Of course, a plaintiff who believes that a venue determination has been incorrectly made may still challenge that determination on appeal from the trial on the merits. *Id.* at 45.

100. *Id.* at 44 (citing *Wichita Falls & S.R. Co. v. McDonald*, 141 Tex. 555, 558, 174 S.W.2d 951, 952 (1943); *Poynor v. Bowie Indep. School Dist.*, 627 S.W.2d 517, 519 (Tex. App.—Fort Worth 1982, writ *dism'd*)).

101. 690 S.W.2d at 45 n.2.

102. *Id.* at 45.

103. TEX. REV. CIV. STAT. ANN. art. 1995, § 4(d)(1) (Vernon 1964), *amended by* Act of June 17, 1983, ch. 385, § 1, 1983 Tex. Gen. Laws 2119, 2124, *repealed and recodified as* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a) (Vernon Pam. 1986).

104. 690 S.W.2d at 45-46. The court specifically noted that this latter holding conflicts with dictum in a sister court's opinion that suggested mandamus would lie in such a situation. *Id.* at 45 n.3; *see Ramcon Corp. v. American Steel Bldg. Co.*, 668 S.W.2d 459, 461 (Tex. App.—El Paso 1984, no writ).

105. TEX. REV. CIV. STAT. ANN. art. 1995, § 4(d)(2) (Vernon 1964), *amended by* Act of June 17, 1983, ch. 385, § 1, 1983 Tex. Gen. Laws 2119, 2124, *repealed and recodified as* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon Pam. 1986) provides that an improper venue determination constitutes reversible error on appeal from the trial on the merits.

106. 690 S.W.2d at 45; *see State v. Archer*, 163 Tex. 234, 353 S.W.2d 841, 841 (1962) (mandamus ordinarily does not lie if another remedy is adequate and available).

Although only one venue determination is permitted under the amended statute and rules, *U.S. Resources, Inc. v. Placke*<sup>107</sup> held that a trial court that orders the transfer of a cause of action may reconsider and rescind its order before the case has been transferred.<sup>108</sup> Under the appellate court's interpretation of rule 87(5), subsequent motions to transfer are not permitted once the action has actually been transferred.<sup>109</sup> Finding no authorities holding that an order to transfer immediately effects a transfer of the case, the court of appeals concluded that a trial court may reconsider its original order if the case has not yet been transferred and the decision of the trial court is timely made.<sup>110</sup>

## VI. LIMITATIONS

The limitations provision contained in the Texas health care statute<sup>111</sup> again generated a flurry of cases during the survey period. During the last survey period the supreme court held in *Nelson v. Krusen*<sup>112</sup> that article 5.82 of the Texas Insurance Code<sup>113</sup> was unconstitutional insofar as it cut off a cause of action belonging to the parents of a diseased minor before the plaintiffs could have known about their son's affliction.<sup>114</sup> This term, as predicted,<sup>115</sup> the supreme court extended that holding to article 4590i, section 10.01,<sup>116</sup> the successor to article 5.82. In *Neagle v. Nelson*<sup>117</sup> the court confirmed the view it expressed in *Krusen* that the open courts provision of the Texas Constitution<sup>118</sup> protected a citizen from legislative acts that abridged his right to sue before he had a reasonable opportunity to discover the wrong and bring suit.<sup>119</sup> Accordingly, the court held that section 10.01 of article 4590i unconstitutionally deprived the plaintiff of his right to sue the defendant for medical malpractice since the plaintiff was unable to discover that his

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107. 682 S.W.2d 403 (Tex. App.—Austin 1984, no writ).

108. *Id.* at 405.

109. *Id.*; see TEX. R. CIV. P. 87(5).

110. 682 S.W.2d at 405. Unfortunately, the court's opinion fails to set forth clearly what is considered a timely reconsideration. Although the opinion contains a lengthy discussion aimed at answering this question, the analysis pertains only to Act of May 17, 1971, ch. 236, § 5, 1971 Tex. Gen. Laws 1086, 1087, a special statute governing post-judgment filing periods in Lee County that was subsequently repealed by Act of June 7, 1985, ch. 297, § 1, 1985 Tex. Gen. Laws 2444, 2444.

111. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1986) (two-year statute of limitations on health care claims).

112. 678 S.W.2d 918 (Tex. 1984). See generally Figari, Graves & Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 39 SW. L.J. 421, 427-29 (1985) [hereinafter cited as *1985 Annual Survey*] (discussing the supreme court's opinion).

113. Act of June 3, 1975, ch. 330, § 4, 1975 Tex. Gen. Laws 864, 865, repealed by Act of June 16, 1977, ch. 817, § 41.03, 1977 Tex. Gen. Laws 2039, 2064, purported to establish an absolute two-year statute of limitations for filing malpractice suits against physicians or hospitals carrying liability insurance.

114. 678 S.W.2d at 923.

115. See *1985 Annual Survey*, *supra* note 112, at 429.

116. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1986) (essentially recodifying former art. 5.82, § 4 of the Texas Insurance Code).

117. 685 S.W.2d 11 (Tex. 1985).

118. TEX. CONST. art. I, § 13 (all courts are open to every person).

119. 685 S.W.2d at 12.

surgeon had left a surgical sponge in his abdomen following an appendectomy until more than two years after the operation.<sup>120</sup>

Implicit in the court's reasoning was a reaffirmation of its earlier holding in *Krusen*<sup>121</sup> that the discovery rule<sup>122</sup> is inapplicable when the health care limitations statute governs the case.<sup>123</sup> In light of the concurring opinions filed in *Neagle*, however, that assumption is no longer free from doubt.<sup>124</sup> Moreover, as Justice Kilgarlin correctly pointed out in his concurrence, the majority opinions in both *Krusen* and *Neagle* failed to discuss how much time a plaintiff has in which to file suit after discovering his injury, assuming that the discovery rule is inapplicable.<sup>125</sup>

At least two other courts during the survey period wrestled with the issues the supreme court left unanswered. The court in *Reed v. Wershba*<sup>126</sup> interpreted *Neagle* as holding only that a plaintiff who could not have discovered his injury until after the two-year limitations period had already expired could file his suit within a reasonable time after discovering the injury.<sup>127</sup> After expressly noting that *Neagle* did not decide what period of time would be considered reasonable,<sup>128</sup> the court concluded that section 10.01 was not unconstitutional as applied to the plaintiff since she discovered her injury a full thirteen months before the two-year limitations period had expired.<sup>129</sup> In *Melendez v. Beal*<sup>130</sup> the court avoided the question entirely by holding that section 10.01 did not abrogate the discovery rule.<sup>131</sup> According to the *Melendez* court, whose opinion preceded the decision in *Neagle*, a suit filed within two years of the injury is timely if there is no showing that the patient knew or could have known of the injury earlier.<sup>132</sup> Although this view of the law finds support in Justice Robertson's concurrence in *Neagle*, the holding in *Melendez* is of doubtful validity in light of the subsequent majority opinion issued in *Neagle*.<sup>133</sup>

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120. *Id.*

121. 678 S.W.2d at 920.

122. The discovery rule provides that the statute of limitations will not start running until the plaintiff discovers the true facts giving rise to his claimed damage or until the date of discovery should reasonably have been made. See *Hays v. Hall*, 488 S.W.2d 412, 414 (Tex. 1972); *Gaddis v. Smith*, 417 S.W.2d 577, 579-80 (Tex. 1967). See generally *1983 Annual Survey*, *supra* note 85, at 300-01 (discussing the discovery rule and its effect on the statute of limitations).

123. If the discovery rule were applicable, the limitations statute could not abridge an individual's rights under the open courts provision because the limitations period would not commence until the plaintiff discovered or could have discovered the injury.

124. Compare 685 S.W.2d at 13 (Robertson, J., concurring) (discovery rule issue remains an open question) with 685 S.W.2d at 14 (Kilgarlin, J., concurring) (article 4590i, § 10.01 abolished discovery rule).

125. 685 S.W.2d at 14 (Kilgarlin, J., concurring).

126. 698 S.W.2d 369 (Tex. App.—Houston [14th Dist.] 1985, no writ).

127. *Id.* at 371.

128. *Id.*

129. *Id.*

130. 683 S.W.2d 869 (Tex. App.—Houston [1st Dist.] 1985, no writ).

131. *Id.* at 873.

132. *Id.*

133. The court in *Melendez* also reversed the defendant's summary judgment on the basis that the health care provider adduced no summary judgment evidence that it carried liability

The effect of article 5537<sup>134</sup> on the limitations period prescribed in article 4590i was considered in *Hill v. Milani*.<sup>135</sup> The court held that the tolling provision of article 5537 does not affect the two-year limitations period established by the health care statute.<sup>136</sup> Stating that article 5537 was not part of the "statutory scheme for medical malpractice claims envisioned by the legislature," the supreme court ruled that the tolling provision was part of the "other law" expressly made inapplicable by the language of article 4590i.<sup>137</sup> In reaching the same result earlier,<sup>138</sup> the court of appeals attempted to distinguish the decision in *Valdez v. Texas Children's Hospital*.<sup>139</sup> The *Valdez* court held that article 5538 suspends the commencement of the article 4590i limitations period in the case of a party's death.<sup>140</sup> Although the supreme court's opinion in *Hill* did not specifically address this apparent conflict, the court's analysis casts serious doubt on the *Valdez* holding.<sup>141</sup>

Finally, in *Vanklaret v. Cane*<sup>142</sup> the Austin court of appeals held that under article 4590i the statute of limitations begins to run at the end of the last treatment for the condition that gave rise to the suit.<sup>143</sup> A year earlier the same court had ruled that the statute was not tolled for the entire duration of the physician-patient relationship if the relationship continued only with respect to medical matters unassociated with the claim.<sup>144</sup>

As noted in last year's survey,<sup>145</sup> the Fifth Circuit held in *Mann v. A.H. Robins Co.*<sup>146</sup> that the Texas discovery rule applied in a Dalkon Shield case and tolled the applicable statute of limitations until the plaintiff discovered the cause of her injury.<sup>147</sup> The court repeated its conclusion in *Woodruff v. A.H. Robins Co.*,<sup>148</sup> again predicting that Texas courts would apply the discovery rule in Dalkon Shield litigation if called upon to decide the issue.<sup>149</sup> The hapless defendant finally made its way into Texas state court during the current survey period, and the Fifth Circuit's prediction about Texas law

insurance. *Id.* According to the court, even if the limitations statute abolished the discovery rule, it did so only as to insured health care providers. *Id.*

134. TEX. REV. CIV. STAT. ANN. art. 5537 (Vernon 1958), *repealed and recodified as* TEX. CIV. PRAC. & REM. CODE ANN. § 16.063 (Vernon Pam. 1986), suspends the running of certain limitations periods during a defendant's temporary absence from the state.

135. 686 S.W.2d 610 (Tex. 1985).

136. *Id.* at 613.

137. *Id.*

138. *Hill v. Milani*, 678 S.W.2d 203, 205 (Tex. App.—Austin 1984), *aff'd*, 686 S.W.2d 610 (Tex. 1985).

139. 673 S.W.2d 342 (Tex. App.—Houston [1st Dist.] 1984, no writ), *discussed in* 1985 *Annual Survey*, *supra* note 112, at 429-30.

140. 673 S.W.2d at 344; *see* TEX. REV. CIV. STAT. ANN. art. 5538 (Vernon 1958), *repealed and recodified as* TEX. CIV. PRAC. & REM. CODE ANN. § 16.062 (Vernon Pam. 1986).

141. *See* 686 S.W.2d at 611-13.

142. 691 S.W.2d 108 (Tex. App.—Austin 1985, writ *ref'd n.r.e.*).

143. *Id.* at 110.

144. *See* *Atha v. Polsky*, 667 S.W.2d 307, 308 (Tex. App.—Austin 1984, writ *ref'd n.r.e.*).

145. *See* 1985 *Annual Survey*, *supra* note 112, at 427 n.89.

146. 741 F.2d 79 (5th Cir. 1984).

147. *Id.* at 81-82.

148. 742 F.2d 228 (5th Cir. 1984).

149. *Id.* at 230.



proved correct.<sup>150</sup>

In addition to medical malpractice cases the courts handed down several decisions concerning limitations in other areas of professional malpractice. In *Nelson v. Metallic-Braden Building Co.*<sup>151</sup> the court considered the constitutionality of article 5536a, the statute of limitations governing malpractice claims against engineers and architects for defective design and construction of improvements.<sup>152</sup> Although the same court had previously upheld the constitutionality of article 5536a on two occasions,<sup>153</sup> the plaintiff, encouraged by the recent decision in *Krusen*, argued that the limitations statute violated the open courts provision by effectively abrogating his established common law cause of action against the designers of an allegedly defective building. The court rejected the plaintiff's contention, however, because his claim for damages against other defendants, including the owner and operator of the building in question, survived the application of article 5536a.<sup>154</sup> The court held that unlike the litigants in *Krusen*, the plaintiff was not effectively denied a cause of action for his injuries.<sup>155</sup>

The holding in *McCulloch v. Fox & Jacobs, Inc.*<sup>156</sup> appears more expansive. The *McCulloch* court applied article 5536a to a defendant homebuilder that did not actually design or construct the community swimming pool in question. After examining the facts, the court concluded that the defendant functioned as a builder or supervisor, rather than as an owner, of the improvements since the defendant furnished money, planners, engineers, and subcontractors for the swimming pool and periodically performed supervisory and inspection duties.<sup>157</sup>

In *Allright, Inc. v. Guy*<sup>158</sup> the court held that the Texas saving statute<sup>159</sup> operates from the date an order of dismissal becomes final.<sup>160</sup> Article 5539a permits a plaintiff who files an action within the applicable limitations period that is later dismissed for want of jurisdiction to refile the action in a court of proper jurisdiction within sixty days of dismissal even if the statute of limita-

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150. See *Corder v. A.H. Robins Co.*, 692 S.W.2d 194, 196-97 (Tex. App.—Eastland 1985, no writ).

151. 695 S.W.2d 213 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

152. Act of June 2, 1969, ch. 418, § 1, 1969 Tex. Gen. Laws 1379, 1379, *repealed and recodified as* TEX. CIV. PRAC. & REM. CODE § 16.008-.009 (Vernon Pam. 1986). The statute provides a ten-year period of limitations for filing suits against architects and engineers alleging injury arising out of defective improvements. TEX. CIV. PRAC. & REM. CODE ANN. § 16.008(a) (Vernon Pam. 1986). The period commences to run after the substantial completion of the improvements. *Id.*

153. See *Sowders v. M.W. Kellog Co.*, 663 S.W.2d 644, 648 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870, 873 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.), *appeal dismissed*, 459 U.S. 802 (1982).

154. 695 S.W.2d at 215.

155. *Id.*

156. 696 S.W.2d 918 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

157. *Id.* at 922.

158. 696 S.W.2d 603 (Tex. App.—Houston [14th Dist.] 1985, no writ).

159. TEX. REV. CIV. STAT. ANN. art. 5539a (Vernon 1958), *repealed and recodified as* TEX. CIV. PRAC. & REM. CODE ANN. § 16.064 (Vernon Pam. 1986).

160. 696 S.W.2d at 605.

tions has since expired.<sup>161</sup> In *Allright* the court of appeals dismissed the original action for want of jurisdiction in the trial court. The plaintiff then filed a writ of error with the supreme court, which was refused. Since the plaintiff refiled his lawsuit in the proper court within sixty days of the supreme court's action on the writ of error, his second suit was timely filed under article 5539a.<sup>162</sup>

The court in *Aetna Casualty & Surety Co. v. Martin Surgical Supply Co.*<sup>163</sup> held that an amendment asserting claims under the Deceptive Trade Practices Act (DTPA)<sup>164</sup> relates back to the time the suit was initially filed.<sup>165</sup> The court's decision was in accord with an earlier decision<sup>166</sup> holding that the "relation back" doctrine applies to DTPA claims.<sup>167</sup>

## VII. PARTIES

Few decisions during the survey period addressed issues involving parties. Only two cases of importance were reported, and both of those concerned mandamus proceedings brought with respect to third-party interventions in the trial court. In *First Alief Bank v. White*<sup>168</sup> a bank sued the defendants to collect on two promissory notes and to foreclose attachment liens on property owned by the defendants. Following commencement of the litigation, the defendants sold the property to a third party. After the bank obtained a judgment from the trial court awarding recovery on the notes and ordering a foreclosure of the attachment liens, the third party intervened in the case in an effort to block the property sale. The trial court overruled the bank's motion to dismiss the plea in intervention and set aside its earlier judgment in favor of the bank. In a subsequent mandamus proceeding the supreme court held that the trial court lacked jurisdiction to set aside the earlier judgment because more than thirty days had expired since the judgment was signed.<sup>169</sup> The court also held that the plea in intervention came too late since it was filed after judgment.<sup>170</sup> According to the court, a plea in intervention filed after judgment may not be considered unless and until the judgment has been set aside.<sup>171</sup> In *Brown v. Barlow*<sup>172</sup> the court ruled that a writ

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161. TEX. REV. CIV. STAT. ANN. art. 5539a (Vernon 1958), *repealed and recodified as* TEX. CIV. PRAC. & REM. CODE ANN. § 16.064 (Vernon Pam. 1986).

162. 696 S.W.2d at 605.

163. 689 S.W.2d 263 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

164. TEX. BUS. & COM. CODE ANN. §§ 17.46-.63 (Vernon Supp. 1986).

165. 689 S.W.2d at 271-72.

166. *See* Providence Hosp. v. Truly, 611 S.W.2d 127 (Tex. Civ. App.—Waco 1981, writ dism'd).

167. *Id.* at 133-34.

168. 682 S.W.2d 251 (Tex. 1984).

169. *Id.* at 252; *see* TEX. R. CIV. P. 329b(d) (court has plenary power to grant new trial or to vacate, modify, correct, or reform the judgment within 30 days after judgment is signed); *id.* 329b(f) (after expiration of 30-day period, court cannot set aside judgment except by bill of interpleader for sufficient cause).

170. 682 S.W.2d at 252.

171. *Id.* (citing Comal County Rural High School Dist. No. 705 v. Nelson, 158 Tex. 564, 314 S.W.2d 956 (1958)).

172. 685 S.W.2d 406 (Tex. App.—San Antonio 1985, no writ).

of mandamus cannot be used to review a trial court's order refusing a party's request to intervene in an action.<sup>173</sup> The court held that an appeal is the unsuccessful intervenor's remedy when his request is denied.<sup>174</sup>

### VIII. DISCOVERY

An extraordinary number of decisions during the survey period, including several supreme court decisions, concerned questions of privilege raised in the context of discovery. In *Giffin v. Smith*<sup>175</sup> an officer of the defendant corporation refused to answer certain questions on grounds of the investigative privilege set forth in rule 166b(3)(d)<sup>176</sup> and the attorney-client privilege. After the trial court refused to order further answers, the plaintiff instituted a mandamus proceeding in the supreme court. After reviewing the record, the supreme court concluded that no evidence showed any communications to the officer to be privileged.<sup>177</sup> Significantly, the supreme court held that the burden was on the party asserting a privilege to produce evidence that demonstrated its applicability and, unless such evidence was offered, the trial court should have allowed discovery.<sup>178</sup>

A similar holding was handed down in *Peeples v. Fourth Supreme Judicial District*.<sup>179</sup> The defendant in the underlying cause had subpoenaed certain financial records of the corporation of which the plaintiff was president. Both the plaintiff and the corporation filed motions claiming that the records were not material and that disclosure of the records would constitute an invasion of the corporation's personal, constitutional, and property rights. The trial court denied the motion. The plaintiff and the corporation then instituted mandamus proceedings claiming that the trial court should have conducted an in camera inspection of the records before ruling on the motion.

The supreme court held that the trial court had not acted erroneously because no showing had been made to demonstrate the applicability of any privilege and no specific privilege was claimed.<sup>180</sup> The court outlined the procedure that must be followed in order to exclude documents from discovery on grounds of privilege or immunity.<sup>181</sup> The steps include: (1) the party seeking to exclude the documents must specifically plead the particular privilege or immunity and request a hearing on the motion; (2) the trial court should determine whether an in camera inspection is necessary; and (3) if an inspection is ordered, the documents must be segregated and produced to

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173. *Id.* at 408.

174. *Id.* at 408 (citing *Matthaei v. Clark*, 110 Tex. 114, 126-27, 216 S.W. 856, 861 (1919)).

175. 688 S.W.2d 112 (Tex. 1985).

176. TEX. R. CIV. P. 166b(3)(d); see *infra* text accompanying note 185.

177. 688 S.W.2d at 114.

178. *Id.* The supreme court held that the trial court should have compelled the deponent to answer questions concerning names and addresses of persons having knowledge of relevant facts related to the suit, notwithstanding any claim of privilege, and the trial court abused its discretion by refusing so to do. *Id.* at 113; see TEX. R. CIV. P. 166b(3).

179. 29 Tex. Sup. Ct. J. 13 (Oct. 16, 1985).

180. *Id.* at 14.

181. *Id.*

the trial court.<sup>182</sup> Failure to follow this procedure results in a waiver of any complaint about the trial court's action.<sup>183</sup>

Several courts of appeals addressed the scope of the investigative privilege under rule 166b(3)(d).<sup>184</sup> The rule renders undiscoverable:

[A]ny communication passing between agents or representatives or the employees of any party to the action or communication between any party and his agents, representatives or their employees, [1] where made subsequent to the occurrence or transaction upon which the suit is based, and [2] made in connection with the prosecution, investigation or defense of the claim or the investigation of the occurrence or transaction out of which the claim has arisen . . . .<sup>185</sup>

In *Terry v. Lawrence*<sup>186</sup> the court concluded that communications as used in rule 166b(3)(d) does not include photographs taken by an investigator hired by the defendant.<sup>187</sup> Upholding prior decisions, the supreme court noted that under the prior version of the discovery rules,<sup>188</sup> the privilege extended only to written communications.<sup>189</sup> Despite the absence of the term "written" in new rule 166b(3)(d), the court concluded that visual communications such as photographs are excluded from the privilege.<sup>190</sup>

The plaintiff in *Bearden v. Boone*<sup>191</sup> brought an invasion of privacy suit against a private investigator. The plaintiff claimed that the investigative privilege did not apply to communications between the investigator and her husband or her husband's attorney that occurred in connection with a pending divorce action. The court of appeals held that the privilege that attached to the communications could not be abrogated by the filing of a separate suit.<sup>192</sup>

The applicability of the investigative privilege to investigations taking place before any suit has been filed was considered in three cases decided during the survey period. In *Kupor v. Solito*,<sup>193</sup> a wrongful death case, the court refused to apply the investigative privilege to information received by the defendant doctor the day after the decedent's death.<sup>194</sup> The doctor claimed that at the time of the communications he was engaging in an inves-

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182. *Id.*

183. *Id.*

184. TEX. R. CIV. P. 166b(3)(d).

185. *Id.*

186. 700 S.W.2d 912 (Tex. 1985).

187. *Id.* at 193.

188. See TEX. R. CIV. P. 167, 186a, 186b (Vernon 1976).

189. See *Allen v. Humphreys*, 559 S.W.2d 798, 802 (Tex. 1977) (photographs not protected under investigative privilege); *Houdaille Indus., Inc. v. Cunningham*, 502 S.W.2d 544, 549 (Tex. 1973) (same).

190. 700 S.W.2d at 913.

191. 693 S.W.2d 25 (Tex. App.—Amarillo 1985, no writ).

192. *Id.* at 28. The court also held that the investigator's statute was not applicable after the trial court had ordered discovery. *Id.* at 27; see TEX. REV. CIV. STAT. ANN. art. 4413(29bb), § 28(a) (Vernon Supp. 1986) (investigator must divulge information when law so requires). The court did, however, recognize that communications between the husband's attorney and the investigator were privileged under the attorney-client privilege. 693 S.W.2d at 28.

193. 687 S.W.2d 441 (Tex. App.—Houston [14th Dist.] 1985, no writ).

194. *Id.* at 444.

tigation of the death out of which the claim arose. The appellate court noted that the privilege did not apply because no claim was pending at the time of the communications and the doctor admitted that the communications were not made in connection with the prosecution or defense of a lawsuit.<sup>195</sup>

Applying the investigative privilege less strictly, the court in *Turbodine Corp. v. Heard*<sup>196</sup> did not limit its application to an investigation made in connection with a pending lawsuit. In the underlying suit, which arose out of an explosion at a refinery, the plaintiff insurance company began investigating the cause and resulting damage immediately after the explosion. The insurance company thereafter made payment under its policy and brought suit to recover from the defendant pursuant to its right of subrogation. The defendants sought production of documents that had been prepared prior to payment on the policy, but after the explosion. Based on a literal reading of rule 166b(3)(d),<sup>197</sup> which extends the privilege to investigations in connection with the occurrence or transaction out of which the claim arose, the court held that the insurance company was not required to produce the requested documents.<sup>198</sup> A similar result was reached in *Cupples Products Co. v. Marshall*<sup>199</sup> with respect to the scope of the investigative privilege.

Two cases during the survey period concerned the application of the psychiatrist-patient privilege to discovery requests. In *Ginsberg v. Fifth Court of Appeals*<sup>200</sup> defendants sought to set aside a lower court order prohibiting discovery of certain psychiatric records. In the underlying action the plaintiff claimed that the defendants had tricked her into signing a 1972 deed, thereby obtaining ownership of a building from her. In response the defendants contended that the plaintiff was aware of the 1972 conveyance and the statute of limitations thus barred her claims. During the course of discovery and in response to a court order, medical records were produced, which revealed that the plaintiff had told her psychiatrist in 1972 that the building had been sold. The defendants then sought to depose the psychiatrist and his records' custodian, but were prevented from doing so because the plaintiff secured a writ of mandamus from the court of appeals prohibiting further inquiry into the matter on the basis of the psychiatrist-patient privilege.

In its review of the matter, the supreme court disagreed with the court of appeals and held that the plaintiff could not seek affirmative relief against the defendants and at the same time make offensive use of the privilege to prevent discovery of information relevant to her claim.<sup>201</sup> The court noted that the medical records contained information materially relevant to the defend-

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195. *Id.* at 443.

196. 698 S.W.2d 703 (Tex. App.—Houston [14th Dist.] 1985, no writ).

197. TEX. R. CIV. P. 166b(3)(d).

198. 698 S.W.2d at 706.

199. 690 S.W.2d 623, 625 (Tex. App.—Dallas 1985, no writ).

200. 686 S.W.2d 105 (Tex. 1985).

201. *Id.* at 107; *accord* Hensen v. Citizens Bank, 559 S.W.2d 446 (Tex. Civ. App.—Eastland 1977, no writ) (offensive use of fifth amendment privilege prohibited); *see also* Addison, *Mental Health Information: Shrinking Plaintiff's Privilege*, 48 TEX. B.J. 1222 (1985) (discussing the increasingly limited availability of the psychiatrist-patient privilege).

ants' limitations defense and, accordingly, were discoverable.<sup>202</sup>

In a similar case the court in *Wimberly Resorts Property, Inc. v. Pfeuffer*<sup>203</sup> ruled that the plaintiff's psychiatric records were discoverable when the plaintiff was seeking damages for emotional trauma resulting from an accident.<sup>204</sup> As support for its position, the court relied on rule 510(d)(5) of the Texas Rules of Evidence,<sup>205</sup> which authorizes disclosure of otherwise privileged matters when the patient relies upon a physical, mental, or emotional condition as an element of his claim or defense.<sup>206</sup> The court of appeals determined that rule 510(d)(5) was validly enacted pursuant to the supreme court's procedural rule-making authority,<sup>207</sup> even if the statute<sup>208</sup> that created the privilege did not contain the same exception.<sup>209</sup>

In *Gulf Oil Corp. v. Fuller*<sup>210</sup> the court discussed the doctrine of inadvertence as applied to the attorney-client privilege.<sup>211</sup> Having produced documents during discovery that contained attorney-client communications, the defendant subsequently sought to assert the attorney-client privilege with respect to certain of the documents, and claimed that their prior production was inadvertent. Although the court recognized the existence of cases<sup>212</sup> supporting exemption from discovery when production was inadvertent, the court held that the exemption did not apply in this case.<sup>213</sup> The trial court was thus justified in finding that no inadvertence had occurred and that the defendant had merely changed its position about the documents' confidentiality after a new claim had been asserted in the action.<sup>214</sup>

On the basis of the work product privilege, the defendants in *Fuller* also objected to the production of certain documents generated by a technical committee that the defendants had formed to study a problem related to the case. The court of appeals noted that communications exchanged among commonly aligned parties may be privileged if they further common defenses.<sup>215</sup> In the present case, however, the court of appeals held that the potential liability of the defendants to each other defeated any community of

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202. 686 S.W.2d at 108.

203. 691 S.W.2d 27 (Tex. App.—Austin 1985, no writ).

204. *Id.* at 29.

205. TEX. R. EVID. 510(d)(5).

206. 691 S.W.2d at 29.

207. See Act of May 15, 1939, ch. 25, 1939 Tex. Gen. Laws 201, *repealed by* Act of June 13, 1985, ch. 480, § 26, 1985 Tex. Sess. Law Serv. 4086 (Vernon) (current version codified at TEX. GOV'T CODE ANN. § 22.004 (Vernon Pam. 1986)).

208. TEX. REV. CIV. STAT. ANN. art. 5561h (Vernon Supp. 1986).

209. 691 S.W.2d at 29.

210. 695 S.W.2d 769 (Tex. App.—El Paso 1985, no writ).

211. *Id.* at 772-74.

212. See, e.g., *Transamerica Computer Co. v. International Business Mach. Corp.*, 573 F.2d 646, 651-53 (9th Cir. 1978) (doctrine held applicable when mistake made during very short discovery period); *Fuller v. Preston State Bank*, 667 S.W.2d 214, 220 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (privilege waived when no evidence of mistaken production shown); *Gass v. Baggerly*, 332 S.W.2d 426, 430 (Tex. Civ. App.—Dallas 1960, no writ) (privilege not waived when attorney examines opposing counsel's files left on desk).

213. 695 S.W.2d at 773, 775.

214. *Id.* at 773-74.

215. *Id.* at 774; *accord* *Magnaleasing, Inc. v. Staten Island Mall*, 76 F.R.D. 559 (S.D.N.Y. 1977); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974).

interest and the documents were not privileged.<sup>216</sup>

Although decided under a prior version of the discovery rules, *Texas Employers' Insurance Association v. Garza*<sup>217</sup> is indicative of the supreme court's insistence on compliance with the requirements regarding disclosure of experts. Appealing from an adverse judgment, the defendant complained that the trial court had abused its discretion by allowing the testimony of an expert whose identity had not been disclosed within the appropriate time limit prior to trial.<sup>218</sup> While the supreme court refused the defendant's application for writ of error, the court nonetheless disapproved the court of appeals' ruling that a finding of good cause need not be made in order to allow the expert's testimony at trial.<sup>219</sup> Presumably, the supreme court's decision will continue to be good law since the current version of the discovery rules also requires a demonstration of good cause before a court can allow the testimony of undisclosed experts.<sup>220</sup> In *Temple v. Zimmer U.S.A., Inc.*<sup>221</sup> the identity of the plaintiff's expert was not disclosed prior to trial, and the court of appeals held that the trial court did not abuse its discretion by limiting the expert's testimony to rebuttal matters.<sup>222</sup>

*GATX Tank Erection Corp. v. Tesoro Petroleum Corp.*<sup>223</sup> illustrates a common oversight that is often made regarding disclosure of experts. The plaintiff's attorney, although he failed to identify himself as an expert in response to interrogatories, was allowed to testify, over the defendant's objection, as an expert on attorneys' fees. Pointing to the lack of evidence demonstrating good cause for the allowance of such testimony, the court of appeals held that the attorney's testimony should have been barred.<sup>224</sup> Faced with a similar situation, the court in *Doyle v. Members Mutual Insurance Co.*<sup>225</sup> concluded that allowing the plaintiff's attorney to testify on attorneys' fees, even though the attorney was not listed as an expert prior to the trial, was not error.<sup>226</sup> The appellate court found good cause for admission of this expert's testimony, noting that the attorney had represented the plaintiff at all times in the action, the petition contained a prayer for recovery of attorneys' fees, and a considerable portion of the attorney's work on this case was known to the defendant.<sup>227</sup>

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216. 695 S.W.2d at 774.

217. 687 S.W.2d 299 (Tex. 1985).

218. Under the 1981 version of the Texas Rules of Civil Procedure, rule 168 required that, in response to appropriate interrogatories, the identity of experts and related information had to be disclosed not less than 14 days prior to trial. TEX. R. CIV. P. 168 (West 1981). See also *New Amendments*, 43 Tex. B.J. 767, 774 (1980) (wording of 1981 version of rule 168. Under new rule 166b(5)(b), such disclosure must be made "as soon as is practical, but in no event less than thirty days" prior to trial. TEX. R. CIV. P. 166(5)(b).

219. 687 S.W.2d at 299.

220. TEX. R. CIV. P. 215(5).

221. 678 S.W.2d 723 (Tex. App.—Houston [14th Dist.] 1984, no writ).

222. *Id.* at 724.

223. 693 S.W.2d 617 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

224. *Id.* at 620.

225. 679 S.W.2d 774 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

226. *Id.* at 778.

227. *Id.* For a discussion on the subject of undisclosed experts, see Kilgarlin, *What to Do With the Unidentified Expert?*, 48 TEX. B.J. 1192 (1985). As noted by Justice Kilgarlin, the

In analogous situations the courts have also considered cases involving witnesses and items of evidence not disclosed prior to trial in response to discovery requests. In *Yeldell v. Holiday Hills Retirement & Nursing Center, Inc.*<sup>228</sup> the plaintiff sought affirmation of a trial court judgment in her favor. The trial court had prohibited a defense witness's testimony, basing its decision on the fact that the defendant had not amended its answer to a prior interrogatory requesting the names of all witnesses having knowledge about the subject at issue. The defendant's appeal succeeded, and the plaintiff filed an application for writ of error to the supreme court. The court held that former rule 168(7)<sup>229</sup> required defendant to amend his answers when a witness having knowledge of the case was found after the answers were made.<sup>230</sup> The trial court's refusal to hear the witness's testimony was a proper exercise of discretion under the circumstances, and the trial court's judgment was affirmed.<sup>231</sup>

In *Evans v. State Farm Mutual Automobile Insurance Co.*<sup>232</sup> the plaintiffs were requested and later ordered to produce a taped statement between their counsel and one of the defendant's employees. When they failed to produce the tape after two opportunities to do so, the trial court dismissed their action. The plaintiff argued that dismissal was too severe a sanction and should not have been imposed immediately since the tape was subsequently produced. The court of appeals held, however, that the trial court did not abuse its discretion by dismissing the case.<sup>233</sup>

In *Harris County v. Jenkins*<sup>234</sup> the trial court allowed the plaintiff's expert to use a videotape in connection with his testimony at trial, even though the plaintiff had stated in his answer to interrogatories that he would use no videotapes and did not inform the defendant of the videotape until seven days before trial. The court of appeals found no abuse of discretion by the trial court because it had authority to allow late-filed answers to interrogatories based on a finding of good cause.<sup>235</sup>

Two other cases addressed issues related to discovery sanctions. After the defendant served a notice to take the deposition of the plaintiff's two handwriting experts, the trial court in *Mahan v. Stover*<sup>236</sup> entered a protective order requiring the defendant to deposit reasonable fees into the registry of the court for the experts' deposition time. In this case of first impression, the appellate court held that the trial court had discretionary authority to issue

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supreme court has recently granted a writ in a case involving issues about the guidelines for allowance of undisclosed expert's testimony. See *Yeldell v. Holiday Hills Retirement & Nursing Center, Inc.*, 28 Tex. S. Ct. J. 567 (July 17, 1985).

228. 701 S.W.2d 243 (Tex. 1985).

229. TEX. R. CIV. P. 168(7) (West 1984). See also *New Amendments, supra* note 218, at 774 (wording of rule 168 prior to recent amendment).

230. 701 S.W.2d at 246.

231. *Id.* at 246-47.

232. 685 S.W.2d 765 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

233. *Id.* at 768.

234. 678 S.W.2d 639 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

235. *Id.* at 642.

236. 679 S.W.2d 707 (Tex. App.—Beaumont 1984, writ dism'd).



the order in question.<sup>237</sup> In *Smith v. White*<sup>238</sup> the defendants effectively blocked discovery into certain matters by claiming their privilege under fifth amendment. The court of appeals held that the trial court abused its discretion in imposing a cost bond as a sanction for defendant's refusal to allow discovery.<sup>239</sup>

Finally, a number of miscellaneous discovery points were discussed by the courts. In *Lindsey v. O'Neill*<sup>240</sup> the plaintiff served a deposition notice on one of the defendant corporations and specified the subject areas in which testimony was sought. After the trial court ordered that a number of the subject areas be stricken on the ground that they called for the defendant to produce testimony from consulting experts, the plaintiff sought a writ of mandamus. The supreme court granted the writ. In its opinion the court stated that discovery of mental impressions and opinions of a party's nontestifying experts is not exempt from discovery when those impressions and opinions were formulated neither "(1) in the course and scope of the 'prosecution, investigation or defense' of a claim or a transaction or occurrence giving rise to a claim [nor] (2) 'in anticipation of litigation or preparation for trial.'" <sup>241</sup> The trial court may exempt from discovery an entire category of expert opinion evidence only if there is proof "that all such evidence was either acquired or developed in anticipation of litigation."<sup>242</sup>

Rule 167<sup>243</sup> governs the procedure for requests for production of documents and provides that the requests shall describe the items sought to be inspected "with reasonable particularity."<sup>244</sup> The request in *City of Abilene v. Davis*<sup>245</sup> sought production of "any and all documents, wherever located in this state" that "relate to the physical or mental health" of several persons, the documents to include but not be limited to "any statements, affidavits, video tapes . . . and any . . . documents . . . which bear upon the allegations in this litigation or which may be used in this litigation."<sup>246</sup> The court of appeals held that the designation was insufficient, as it failed to recite precisely what was requested.<sup>247</sup> Accordingly, the court of appeals held that the trial court's order requiring production of such documents was an abuse of discretion.<sup>248</sup>

Finally, for the international lawyer, *Goldschmidt v. Smith*<sup>249</sup> considered the effect of the Hague Evidence Convention<sup>250</sup> on the efforts of a plaintiff to

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237. *Id.* at 709-10; see TEX. R. CIV. P. 166b(4) ("[T]he court may make any order . . . necessary to protect the movant from . . . unnecessary expense . . .").

238. 695 S.W.2d 295 (Tex. App.—Houston [1st Dist.] 1985, no writ).

239. *Id.* at 297-98.

240. 689 S.W.2d 400 (Tex. 1985).

241. *Id.* at 402.

242. *Id.*

243. TEX. R. CIV. P. 167.

244. *Id.* 167(1)(c).

245. No. 11-84-229-CV (Tex. App.—Eastland, Nov. 1, 1984, no writ) (not yet published).

246. *Id.*, slip op. at 2.

247. *Id.*

248. *Id.*

249. 676 S.W.2d 443 (Tex. App.—Houston [1st Dist.] 1984, no writ).

250. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar.

take a defendant's deposition in West Germany for use in a Texas action. Although refusing to recognize the Hague Evidence Convention's procedures as mandatory, the court of appeals held that, as a matter of comity, the plaintiff should resort to those procedures first when seeking discovery in West Germany rather than the normal Texas rules of procedure.<sup>251</sup> The court implied that if discovery reaches an impasse under the Convention's procedures, then the trial court may enter appropriate orders outside the Convention.<sup>252</sup>

### IX. DISQUALIFICATION OF JUDGES

Rule 18a,<sup>253</sup> which governs the disqualification of judges, provides that a motion for disqualification may be filed at least ten days before the date set for trial.<sup>254</sup> If a judge is assigned to a case within ten days of the date set for trial, the motion shall be filed at the earliest practicable time prior to commencement of trial.<sup>255</sup> After the motion to disqualify is filed, the judge to whom the motion is directed is required to recuse himself or, failing to do so, refer the motion to the presiding judge of the district.<sup>256</sup> In *Gaines v. Gaines*,<sup>257</sup> a divorce action, the appellant filed a motion to disqualify five days after the case had been called for trial. Given the untimeliness of the motion, the court of appeals concluded that there was no need to consider the disqualification point of error under rule 18a.<sup>258</sup> Apparently unsure whether rule 18a controlled the application of a related statute governing disqualification,<sup>259</sup> the court of appeals also concluded that the appellant's contentions based on the statute were also without merit because the appellant did not establish enough information to warrant referral of the motion to disqualify to the presiding judge.<sup>260</sup> Finally, the court held that in view of the belated nature of the filing and the broad discretion allowed trial courts in family law matters, the error, if any, was harmless.<sup>261</sup>

In *Manges v. Martinez*<sup>262</sup> the court of appeals did not consider the untimeliness of the motion, even though the motion was not filed until the day of trial. The court concluded that the trial court did not err in refusing to refer

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18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in U.S.C.S., CONVENTIONS, *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* 523 (Law. Co-op. 1983).

251. 676 S.W.2d at 445.

252. *Id.*

253. TEX. R. CIV. P. 18a.

254. *Id.* 18a(a).

255. *Id.* 18a(e).

256. *Id.* 18a(c), (d).

257. 677 S.W.2d 727 (Tex. App.—Corpus Christi 1984, no writ).

258. *Id.* at 730; *accord* *Autry v. Autry*, 646 S.W.2d 586, 587-88 (Tex. App.—Tyler 1983, no writ).

259. TEX. REV. CIV. STAT. ANN. art. 200a, § 6 (Vernon 1977), *repealed by* Act of June 13, 1985, ch. 480, § 26(1) & ch. 732, § 5(1), 1985 Tex. Sess. Law Serv. 4085, 5309 (Vernon). The court indicated that rule 18a may control the application of article 200a, § 6. If that is the case, noncompliance with rule 18a also defeats a motion under article 200a, § 6. 677 S.W.2d at 731; *see* *Limon v. State*, 632 S.W.2d 812 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd).

260. 677 S.W.2d at 731.

261. *Id.*

262. 683 S.W.2d 137 (Tex. App.—San Antonio 1984, no writ).

a motion to disqualify to the presiding judge due to the nature of the allegations made in the motion.<sup>263</sup> In this regard the motion in *Manges* requested that the trial judge voluntarily recuse himself due to his pecuniary relationship with one of the plaintiff's attorneys. The court of appeals concluded that the sole grounds for mandatory disqualification of a trial judge are found in the Texas Constitution<sup>264</sup> and that the instant motion to disqualify did not allege a basis for disqualification under the constitutional provision.<sup>265</sup> The court ruled that as a result the trial court did not have to refer the disqualification motion to the presiding judge since the movant had failed to state appropriate grounds for mandatory disqualification.<sup>266</sup> The court also upheld the trial court because the motion did not speak in terms of mandatory disqualification but requested only a voluntary recusal.<sup>267</sup>

In *District Judges v. Commissioner's Court*<sup>268</sup> the court considered whether (1) an order granting a motion to recuse is reviewable by appeal and (2) whether the judge assigned to hear the motion to recuse after referral may hear the trial on the merits of the case if recusal is granted. Based upon the express language of rule 18a(f)<sup>269</sup> the court held that if a motion to recuse is granted, the order is not reviewable by appeal.<sup>270</sup> The court also ruled that the judge assigned to preside over the recusal motion is not barred from thereafter hearing the case on the merits.<sup>271</sup>

#### X. DISQUALIFICATION OF COUNSEL

Disciplinary rule 5-102<sup>272</sup> provides that an attorney who may be called as a witness other than on behalf of his client may continue to represent his client until it becomes apparent that the attorney's testimony is or may be prejudicial to his client. In a suit involving a buy-sell agreement between certain corporate shareholders, the defendants in *Stocking v. Biery*<sup>273</sup> sought to disqualify the plaintiff's counsel on the basis that he had represented the purchasers in negotiating the agreement. Although the defendants had announced that they would call the plaintiff's counsel as a witness, the trial court denied the motion for disqualification. In the ensuing mandamus pro-

263. *Id.* at 139.

264. TEX. CONST. art. V, § 11. The constitutional grounds for disqualification are: (1) the trial judge has an interest in the case; (2) the trial judge is connected to either of the parties by affinity or consanguinity, as proscribed by law; or (3) the trial judge was counsel in the case. *Id.*

265. 683 S.W.2d at 139.

266. *Id.*

267. *Id.* *But see* Greenburg, Fisk & Fiedler v. Howell, 676 S.W.2d 431 (Tex. App.—Dallas 1984, no writ) (trial court judge cannot rule on motion's procedural sufficiency; he must either recuse himself or refer the motion).

268. 677 S.W.2d 743 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

269. TEX. R. CIV. P. 18a(f) ("If the motion is granted, the order shall not be reviewable . . .").

270. 677 S.W.2d at 745.

271. *Id.*

272. SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. XII, § 8 (Code of Professional Responsibility) DR 5-102 (1973).

273. 677 S.W.2d 792 (Tex. App.—San Antonio 1984, no writ).

ceeding the court of appeals recognized that the mere announcement by the defendant that he intended to call the opposing counsel as a witness was insufficient to require disqualification.<sup>274</sup> It must be further demonstrated that the attorney's testimony would be material to the movant's defense and prejudicial to his client's interests before disqualification would be ordered.<sup>275</sup> Reviewing the record, the court of appeals found no basis upon which to reach a conclusion that the attorney's testimony was material as well as prejudicial to the interests of his clients and, accordingly, refused to issue a writ of mandamus.<sup>276</sup>

*Gleason v. Coman*<sup>277</sup> addressed issues related to the propriety of an attorney acting as adverse counsel in a proceeding against his former client and the proper mechanism by which to raise disqualification issues before the court of appeals. Faced with a situation in which his former counsel in a divorce action was now representing his wife in a second divorce case, the husband sought to disqualify his former counsel. The husband's motion was denied, and his subsequent appeal was dismissed for lack of jurisdiction. The husband's separate action for an injunction against his former attorney was also dismissed, leading to this appeal.<sup>278</sup> The court of appeals recognized that a clear conflict of interest existed and applied the substantially related test to determine whether the attorney could represent the wife.<sup>279</sup> Under the substantially related test, an attorney is disqualified if the movant can show a substantial relationship between the subject matter of the attorney's former representation and a subsequent adverse representation.<sup>280</sup>

Although the court found that a substantial relationship had been shown, it did not overturn the trial court's refusal to disqualify the attorney.<sup>281</sup> The husband had sought to challenge the ruling by appealing on the basis that a trial court had abused its discretion by refusing to enjoin the attorney from further representation. Recognizing that an applicant for a temporary injunction must demonstrate that he would suffer irreparable injury or has no adequate remedy at law, the court of appeals concluded that the proper procedure for testing the trial court's decision was by way of mandamus, rather than by attempting to appeal the denial of a temporary injunction.<sup>282</sup>

Finally, *Sloan v. Rivers*<sup>283</sup> considered the application of rule 12,<sup>284</sup> which

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274. *Id.* at 794.

275. *Id.*

276. *Id.* at 795.

277. 693 S.W.2d 564 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

278. *Id.* at 565-66.

279. *Id.* at 566-67.

280. *Id.* at 566; accord *Howard Hughes Medical Institute v. Lumis*, 596 S.W.2d 171, 174 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

281. 693 S.W.2d at 567.

282. *Id.*; cf. *Dillard v. Berryman*, 683 S.W.2d 13, 15-16 (Tex. App.—Fort Worth 1984, no writ) (trial court abused its discretion in not enjoining attorney's continued representation); *Braun v. Valley Ear, Nose & Throat Specialists*, 611 S.W.2d 470, 472 (Tex. Civ. App.—Corpus Christi 1980, no writ) (reviewed trial court's refusal to disqualify opposing counsel and found no clear abuse of discretion).

283. 693 S.W.2d 782 (Tex. App.—Fort Worth 1985, no writ).

284. TEX. R. CIV. P. 12.

governs the procedure used to challenge the authority of an attorney to represent parties in proceedings before Texas courts. After an injunction petition had been filed in the court of appeals in order to protect its jurisdiction and preserve the subject matter of another pending appeal, an unverified motion was filed under rule 12 challenging the authority of an attorney to represent certain parties in the injunction proceeding. Although the court of appeals recognized that rule 12 requires verification of a motion to strike, the court concluded that the requirement of verification is waived when no exception is taken by the opposing party.<sup>285</sup> The court also ruled that the challenge was properly made in the court of appeals because the injunction proceeding originally commenced before that court.<sup>286</sup> Given the admission by the attorney in question that he did not have authority to represent the parties, the motion was granted.<sup>287</sup>

### XI. SUMMARY JUDGMENT

A number of decisions during the survey period discussed the type of proof that will support or defeat a motion for summary judgment. The plaintiff in *Sparks v. Cameron Employees Credit Union*<sup>288</sup> sought to collect the balance due on a promissory note and filed a motion for summary judgment asserting that the defendant's answer was insufficient in law to constitute a defense to a cause of action, as shown by pleadings, pretrial discovery, and affidavits on file with the court.<sup>289</sup> The defendant had filed an answer in which she claimed that the note had been paid in full by insurance policies payable to the plaintiff. The defendant submitted an affidavit in support of her answer that stated that the vehicle securing the note was stolen and she assumed there was ample insurance coverage to pay the debt owed to the plaintiff. The trial court granted the plaintiff's motion for summary judgment. The defendant claimed on appeal that the plaintiff's motion for summary judgment did not set forth specific grounds in support of the motion as required by rule 166-A(c).<sup>290</sup> The court of appeals disagreed and held that the notice as to grounds required by rule 166-A was similar to the general pleading requirements applicable to petitions and answers.<sup>291</sup> The court further held that the defendant's controverting affidavit failed to raise a fact issue because she had merely assumed the debt had been retired by the insurance proceeds.<sup>292</sup>

The court also considered certain attacks made by the defendant on the

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285. 693 S.W.2d at 783, 784.

286. *Id.* at 784 (quoting *Angelina County v. McFarlland*, 374 S.W.2d 417, 423 (Tex. 1964)).

287. 693 S.W.2d at 785.

288. 678 S.W.2d 600 (Tex. App.—Houston [1st Dist.] 1984, no writ).

289. *Id.* at 602.

290. TEX. R. CIV. P. 166-A(c) (motion for summary judgment shall state specific grounds therefor).

291. 678 S.W.2d at 602; *see* TEX. R. CIV. P. 45(b), 47(a) (both requiring notice sufficient to apprise party of claim).

292. 678 S.W.2d at 602.

proof submitted in support of the motion for summary judgment.<sup>293</sup> The defendant contended that the affidavits submitted in support of the motion were insufficient because they simply stated an amount as the balance due under the note and, according to the defendant, the statement was conclusory in nature. The court of appeals rejected this argument and found that the statement of the balance due was competent summary judgment evidence.<sup>294</sup> The defendant further argued that an affidavit relating to attorneys' fees merely contained an opinion and a fact issue as to such fees therefore existed. The defendant apparently failed to object to the affidavit at trial and, accordingly, the court of appeals held that the defendant had waived error with respect to the proof regarding attorney's fees.<sup>295</sup>

In contrast, the appellate court in *General Specialities Inc. v. Charter National Bank—Houston*<sup>296</sup> held that an affidavit which contained a total balance due for seven promissory notes without a breakdown of principal and interest was ambiguous and could not, therefore, form the basis of a summary judgment.<sup>297</sup> The court also found that a material issue of fact existed with respect to the reasonableness of attorneys' fees.<sup>298</sup> In this case, unlike the *Sparks* case, the defendant had filed a controverting affidavit with respect to those fees.

In *Beaumont Enterprise & Journal v. Smith*<sup>299</sup> the supreme court discussed the sufficiency of summary judgment proof in a libel action against a newspaper. In support of a motion for summary judgment, the defendant reporter submitted an affidavit wherein she stated that she believed her article about the plaintiff was factually accurate and true. Although recognizing that in a libel action brought by a public official an element of the action is that a false statement be made with actual malice, the supreme court determined that the reporter's affidavit was insufficient to support a summary judgment.<sup>300</sup> The court noted that the reporter was an interested party and that evidence as to the reporter's state of mind was not of a type that could be readily controverted.<sup>301</sup> Accordingly, the court held that summary judgment could not be sustained on the basis of the reporter's evidence because rule 166-A provides that a summary judgment may be based on the uncontroverted testimony evidence of an interested party provided that the evidence is " 'clear, positive, direct, otherwise credible . . . and could have been readily controverted.' " <sup>302</sup>

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293. *Id.* at 603.

294. *Id.*; accord *Ecurie Cerveza Racing Team, Inc. v. Texas Commerce Bank*, 633 S.W.2d 574, 575 (Tex. App.—Houston [14th Dist.] 1982, no writ).

295. 678 S.W.2d at 603.

296. 687 S.W.2d 772 (Tex. App.—Houston [14th Dist.] 1985, no writ).

297. *Id.* at 774.

298. *Id.*

299. 687 S.W.2d 729 (Tex. 1985).

300. *Id.* at 730.

301. *Id.*

302. *Id.* (quoting TEX. R. CIV. P. 166-A(c)).

## XII. SPECIAL ISSUE SUBMISSION

As trial practitioners are aware, Texas procedure allows the trial court to submit special issues broadly rather than by separate questions with respect to each element of a case.<sup>303</sup> In recent years the supreme court has strongly indicated its preference for the broad submission form.<sup>304</sup> *Island Recreational Development Corp. v. Republic of Texas Savings Association*,<sup>305</sup> a recent decision of the Texas Supreme Court, may indicate a reversal in that trend. In this suit involving a claim for breach of a loan commitment, the trial court had submitted an issue inquiring whether the plaintiff had performed its obligations under the commitment letter in question. The jury answered in the affirmative. It was apparently undisputed, however, that the plaintiff had not filed a loan application within a certain time deadline as required by the commitment. The court of appeals thus held that the plaintiff had failed to satisfy a condition precedent and judgment should have been rendered for the defendant.<sup>306</sup> On review by the supreme court, the plaintiff claimed that the defendant was estopped from asserting or had waived the condition. Since the plaintiff had not complained on appeal about the trial court's refusal to submit waiver and estoppel issues, the supreme court concluded that waiver or estoppel had to be established as a matter of law for the plaintiff to prevail and the record did not support such a finding.<sup>307</sup> A vigorous dissent argued that the issue submitted to the jury subsumed any questions about waiver and estoppel and the majority's holding was thus contrary to prior decisions favoring broad submission.<sup>308</sup>

Two cases during the survey period concerned the use of a separate instruction to place the burden of proof on the proper party. Recognizing that the trial court has the discretion to place the burden of proof in this fashion, the court of appeals in *Texas Employers' Insurance Association v. Olivarez*<sup>309</sup> found error in such a submission stating that "[a] 'yes' answer must be based on a preponderance of evidence." In support of its holding, the appellate court noted that the first special issue, which inquired about the date and nature of an injury, could not be answered "yes" or "no" and, accordingly, the instruction did not properly place the burden of proof.<sup>310</sup>

In *Chasewood Construction Co. v. Rico*<sup>311</sup> the trial court had given a general instruction that every finding by the jury must be made by a preponderance of the evidence. Thereafter, an issue was submitted that asked whether the defendants had acted in bad faith in breaching the contract with the plaintiff. The court of appeals held that the instruction and issue were am-

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303. See TEX. R. CIV. P. 277.

304. See *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984) (reiterating supreme court approval of broad issue submission).

305. 28 Tex. Sup. Ct. J. 534 (July 3, 1985).

306. *Id.* at 534.

307. *Id.* at 535.

308. *Id.* at 535-39 (Wallace, J., dissenting).

309. 694 S.W.2d 92 (Tex. App.—San Antonio 1985, no writ).

310. *Id.* at 94.

311. 696 S.W.2d 439 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

biguous in that the jury was possibly misled to believe that it must base both a positive and a negative answer on a preponderance of the evidence.<sup>312</sup> Since the burden was on the plaintiff to prove the defendant's bad faith, only a positive answer required a finding on a preponderance of the evidence.<sup>313</sup> The ambiguity was held to constitute reversible error and the breach of contract issue was thus remanded to the trial court.<sup>314</sup>

On the basis of rule 277,<sup>315</sup> Texas courts have ruled that instructions are permitted when they are necessary to aid the jury in its deliberations.<sup>316</sup> The trial court in *Mader v. Aetna Casualty & Surety Co.*<sup>317</sup> found that as a matter of law the plaintiff was not a consumer within the meaning of the Deceptive Trade Practices Act.<sup>318</sup> The trial court subsequently instructed the jury concerning the legal ruling in connection with an issue that inquired whether the plaintiff's claim under the Act was brought in bad faith or for purposes of harassment. The court of appeals concluded that the instruction was an impermissible comment on the evidence and was unnecessary for consideration of the issue submitted.<sup>319</sup> Similarly, in *American Petrofina, Inc. v. PPG Industries*<sup>320</sup> the trial court instructed the jury as to the relation of the parties and their obligations regarding the delivery of diesel fuel. The court of appeals held the instructions erroneous since they were unnecessary to aid the jury in deciding an issue about conversion of the fuel and were impermissible comments on the weight of the evidence.<sup>321</sup> Finally, in *K-Mart Corp. v. Trotti*<sup>322</sup> the court of appeals ruled that, in an invasion of privacy action, the definitions of "invasion of privacy" and "mental anguish" were technical, legal terms that required definition in the charge.<sup>323</sup> The charge in *Trotti* did not contain the required definitions, and the case was thus reversed.<sup>324</sup> Although denying an application for writ of error, the supreme court refused to approve the lower court's holding that "mental anguish" was a term requiring definition.<sup>325</sup>

The defendant in *Shell Oil Co. v. Chapman*<sup>326</sup> appealed from a judgment based on jury findings in the same dollar amount for claims of negligence and deceptive trade practices. The defendant argued that the award of dam-

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312. *Id.* at 441-42.

313. *Id.* at 441-42 (quoting *Southern Pine Lumber Co. v. King*, 138 Tex. 473, 475, 161 S.W.2d 483, 483-84 (1942)).

314. 696 S.W.2d at 442.

315. TEX. R. CIV. P. 277 (court can submit explanatory instructions to aid jury in rendering verdict).

316. *See Board of Regents v. Denton Constr. Co.*, 652 S.W.2d 588, 595 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

317. 683 S.W.2d 731 (Tex. App.—Corpus Christi 1984, no writ).

318. TEX. BUS. & COM. CODE ANN. §§ 17.41-.826 (1979).

319. 683 S.W.2d at 733-34.

320. 679 S.W.2d 740 (Tex. App.—Fort Worth 1984, writ dism'd).

321. *Id.* at 757.

322. 677 S.W.2d 632 (Tex. App.—Houston [1st Dist.] 1984), writ ref'd n.r.e. per curiam, 686 S.W.2d 593 (Tex. 1985).

323. 677 S.W.2d at 636, 639.

324. *Id.* at 637, 639.

325. 686 S.W.2d 593 (Tex. 1985).

326. 682 S.W.2d 257 (Tex. 1984).



ages based on a total of the two findings constituted a double recovery. The supreme court disagreed, stating that the damage issues were predicated on separate claims and the defendant failed to preserve its point of error by not objecting to the issues or requesting an issue to prevent any double recovery.<sup>327</sup>

The form of objections to the charge was the subject of two recent cases. In *Spellman v. American Universal Investment Co.*,<sup>328</sup> a suit to rescind or reform a deed, the plaintiff complained that a take-nothing judgment could not be based on adverse findings of ratification with respect to the reformation claim because ratification had been pleaded as a defense to the rescission claim only. The court of appeals noted that rule 274<sup>329</sup> requires that objections to an issue must distinctly point out the defective matter.<sup>330</sup> Since plaintiff's general objection to the ratification issue failed to point out defendant's lack of pleading on the reformation claim, plaintiff failed to preserve the error for appeal.<sup>331</sup>

The appellant in *Vick v. George*<sup>332</sup> failed to participate in the trial, but sought to object orally to the charge after the close of the evidence. Despite allowing the other parties to object orally before a court reporter, the trial court refused to allow the appellant to follow that procedure. The trial court instead required that the appellant submit his objections in writing, which appellant failed to do before the charge was submitted to the jury. The court of appeals ruled that the trial court did not abuse its discretion by requiring written objections from appellant and that any objections were waived because they were not submitted before the charge was read to the jury.<sup>333</sup>

### XIII. JURY PRACTICE

Rule 216 provides that a demand for a jury be made and the necessary fee paid "on or before appearance day or, if thereafter, a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than ten days in advance."<sup>334</sup> In *Huddle v. Huddle*<sup>335</sup> one of the litigants paid a jury fee more than ten days prior to the trial setting, but did not make a jury request until the day before such setting. Affirming the trial court's denial of a jury trial, the supreme court held that the time limitations contained in rule 216 apply not only to the time that a jury fee must be deposited, but also "apply with equal force to the application for jury trial."<sup>336</sup>

In *Daley v. Wheat*<sup>337</sup> the trial court granted the appellant a jury trial in a

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327. *Id.* at 259.

328. 687 S.W.2d 27 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

329. TEX. R. CIV. P. 274.

330. 687 S.W.2d at 32.

331. *Id.*

332. 696 S.W.2d 160 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

333. *Id.* at 162.

334. TEX. R. CIV. P. 216.

335. 696 S.W.2d 895 (Tex. 1985).

336. *Id.* at 895; *see also* Texas Oil & Gas Corp. v. Vela, 429 S.W.2d 866, 877 (Tex. 1968) (demand made 10 days in advance is not always timely).

337. 681 S.W.2d 747 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

statutory probate court. The appellant maintained, however, that she had been denied her constitutional right to equal protection because the case was tried before six jurors, rather than twelve jurors as permitted in district court. The appellant argued that section 5 of the Probate Code<sup>338</sup> was unconstitutional because it allows contested probate matters filed in counties without statutory probate courts to be heard by the district courts. The appellant complained that the effect of such legislation was to permit probate litigants to receive district court trials with twelve jurors in less populated counties while limiting the right of probate litigants in larger counties with statutory probate courts to juries composed of only six jurors. Rejecting this contention, the appellate court noted that legislation limited in operation to only a portion of the state or prescribing different rules for a distinct geographical area does not deny equal protection when a reasonable basis for the distinction exists and "all persons similarly situated in the same place are equally treated."<sup>339</sup> The court thus held that section 5 is constitutional.<sup>340</sup> The court also found that the appellant had waived her right to complain about this matter on appeal because she had requested a jury trial and had waited until after an adverse verdict before making objection to the number of jurors hearing the case.<sup>341</sup>

A number of courts during the survey period addressed questions related to challenges to jurors, either for cause or as peremptory challenges. In *Hallett v. Houston Northwest Medical Center*<sup>342</sup> the supreme court set forth the procedure that a litigant must follow in order to preserve error with respect to a challenge for cause. The court stated that a litigant who believes that a district court has improperly denied a challenge for cause to a prospective juror must, prior to the exercise of peremptory challenges, advise the trial court of two things: "(1) that he would exhaust his peremptory challenges; and (2) that after exercising his peremptory challenge, specific objectionable jurors would remain on the jury list."<sup>343</sup> Absent such notice, the litigant waives any error committed by the trial court in refusing to discharge jurors who are challenged for cause.<sup>344</sup>

As noted in the previous survey,<sup>345</sup> rule 233 now provides that in multiparty cases the trial court must first decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury and, in the event of a finding of antagonism, may grant additional peremptory challenges in order to equalize the challenges available to the parties.<sup>346</sup> In a personal injury action against two

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338. TEX. PROB. CODE ANN. § 5 (Vernon 1984).

339. 681 S.W.2d at 758.

340. *Id.*

341. *Id.*; accord *Mouton v. State*, 627 S.W.2d 765 (Tex. App.—Houston [1st Dist.] 1981, no writ).

342. 689 S.W.2d 888 (Tex. 1985).

343. *Id.* at 890.

344. *Id.*

345. See 1985 Annual Survey, *supra* note 112, at 452.

346. TEX. R. CIV. P. 233.

defendants, the plaintiff in *Lopez v. Foremost Paving, Inc.*<sup>347</sup> claimed that the trial court had improperly allowed the two defendants more than six peremptory challenges between them. The two defendants had filed cross-actions against each other for contribution and indemnity, but they had not claimed that either defendant's conduct was the sole cause of the plaintiff's injury. Recognizing that questions of indemnity, contribution, and subrogation are generally questions of law,<sup>348</sup> the court of appeals determined that there was no antagonism among the defendants with respect to an issue of fact that would be submitted to the jury.<sup>349</sup> Accordingly, the appellate court held the the trial court had committed error in allowing additional peremptory challenges to the two defendants.<sup>350</sup> The court nonetheless determined that the error was not so materially unfair as to require reversal because it determined that the evidence with respect to the negligence was not conflicting enough to warrant a new trial.<sup>351</sup> The court of appeals also found no merit in the appellant's complaint that the defendants exercised their peremptory challenges to exclude Hispanics.<sup>352</sup> The record on appeal demonstrated, however, that at least three of the jurors serving bore Hispanic surnames. The court of appeals thus held that the appellant failed to carry the burden of demonstrating that jurors were excluded solely on the basis of race.<sup>353</sup>

In connection with peremptory challenges and multiparty litigation, *Sisco v. Hereford*<sup>354</sup> considered generally the right of co-parties to confer with each other in the exercise of peremptory challenges. Although the court of appeals recognized that parties to a multiparty lawsuit may confer with each other in the exercise of peremptory challenges, it also stated that the issue of whether multi-defendants were to be permitted or denied collaboration in the exercise of such challenges is addressed to the trial court's discretion and is subject to review only for an abuse of that discretion.<sup>355</sup>

Finally, the courts continue to grapple with issues concerning the scope of jury argument. Appealing an adverse result involving claims of deceptive trade practices and fraud, the appellant in *American Petrofina, Inc. v. PPG Industries, Inc.*<sup>356</sup> claimed that statements made by the plaintiff's counsel that compared the case to a criminal proceeding were improper jury argument and resulted in an excessive jury award. The plaintiff's counsel had stated in closing argument: (1) that the defendants were "just going to commit a little bit of white-collar crime"; (2) "down the hall they're trying some

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347. 699 S.W.2d 232 (Tex. App.—San Antonio 1985, no writ).

348. See *Employers Cas. Co. v. Peterson*, 609 S.W.2d 579, 584 (Tex. Civ. App.—Dallas 1980, no writ) (claim for contribution or indemnity must fall under some legal theory).

349. 699 S.W.2d at 234.

350. *Id.* at 235.

351. *Id.*

352. *Id.*

353. *Id.*; see *Garcia v. Texas Employers' Ins. Ass'n*, 622 S.W.2d 626, 630-31 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.) (plaintiff must prove systematic and arbitrary discrimination).

354. 694 S.W.2d 3 (Tex. App.—San Antonio 1984, no writ).

355. *Id.* at 8-9.

356. 679 S.W.2d 740 (Tex. App.—Fort Worth 1984, writ dism'd).

fellow for stealing \$43 to send him to the penitentiary"; (3) you can't send [the defendant] to Huntsville"; and (4) "[i]s it right to let [the defendants] go free to take something that belongs to [the plaintiff]"; and "[c]an you say, 'I have been a just juror,' when juries that have sat in these very chairs before you have sent people to the penitentiary for stealing . . . ." <sup>357</sup> The defendants objected to this argument and moved for a mistrial. The court of appeals found that any analogy in a civil action made to criminal conduct was improper. <sup>358</sup> The court also held that closing argument statements by the plaintiff's counsel concerning improper grammar used by opposing counsel in closing argument was an attack upon the professional ethics and integrity of counsel and could not be condoned. <sup>359</sup> The court of appeals concluded that the plaintiff's counsel's closing argument was sufficiently improper to constitute reversible error. <sup>360</sup> Similarly, in *In re Knighton* <sup>361</sup> the court in a custody dispute held that a final argument by the husband's attorney that the jury should deprive the wife of managing conservatorship rights because of her religious beliefs constituted prejudicial error. <sup>362</sup> The husband's attorney had referred to the wife as being a member of a cult designed to collect money and that the jury should not condemn the two children to that kind of life and to "figuratively being burned at the stake." <sup>363</sup>

In contrast, the defendant's counsel in *Plains Insurance Co. v. Evans* <sup>364</sup> had referred to the plaintiff as the "worst insurance company I have ever seen" and further stated that "I am ashamed that they're permitted to sell insurance in the State of Texas . . . ." <sup>365</sup> Notwithstanding the improper nature of such argument, the court of appeals held that it was not grounds for reversal because the defendant's counsel invited the remarks by telling the jury that his company was "a good company" and that he was "proud to be their lawyer." <sup>366</sup>

Rule 286 provides that the court may give additional instructions to the jury after their retirement and that, in the event additional instruction is provided, the trial court has the discretion to allow additional arguments. <sup>367</sup> In *Vantage Management Co. v. Vision Industries Corp.* <sup>368</sup> the trial court submitted additional issues to the jury after they had retired for deliberation. The additional submission was in response to a note about a related issue. The defendant objected to the submission of this new issue, claiming it required new argument. Using its own discretion, the trial court overruled the

357. *Id.* at 754.

358. *Id.* at 755; *accord* International Harvester Co. v. Zavala, 623 S.W.2d 699 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

359. 679 S.W.2d at 755.

360. *Id.* at 756; *see* Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 839-40 (Tex. 1979) (complainant must prove that opponent's argument constituted harmful error).

361. 685 S.W.2d 719 (Tex. App.—Amarillo 1985, no writ).

362. *Id.* at 722.

363. *Id.* at 721.

364. 692 S.W.2d 952 (Tex. App.—Fort Worth 1985, no writ).

365. *Id.* at 958.

366. *Id.*

367. TEX. R. CIV. P. 286.

368. 689 S.W.2d 490 (Tex. App.—Eastland 1985, no writ).

objection without permitting additional argument. Reversing the trial court's judgment, the court of appeals held that the revised issue was, in effect, a new and different issue and that appellant should have been allowed to present argument to the jury concerning the new issue.<sup>369</sup>

#### XIV. JUDGMENTS, DISMISSALS, AND MOTIONS FOR NEW TRIAL

*A. Copeland Enterprises, Inc. v. Tindall*<sup>370</sup> serves as a warning to trial attorneys who rely on their staff to monitor notices from the trial court. Appealing from a judgment that dismissed its cause of action for want of prosecution, the plaintiff contended that it had not received proper notice of the proposed dismissal. The record demonstrated that the trial court had sent a notice of dismissal to the appellant's law firm that specifically listed the number and style of the case in question. Further, the defendant demonstrated that the form of notice was the usual method employed by the clerk and was not new or unfamiliar to the law firm. The notice was handled by the firm's docket secretary, who apparently never informed the attorney handling the case of the court's intent to dismiss the action for want of prosecution. Despite the law firm's claim that no attorney had been given notice, the court of appeals held that receipt of the notice by the law firm's docket secretary was sufficient.<sup>371</sup> Further, the court construed the meaning of "attorney of record" and determined that such term includes a "law firm as a whole," as opposed to individual attorneys in the firm.<sup>372</sup> The court therefore held that a notice addressed to a law firm representing a party was sufficient notice to the attorney of record of the trial court's intent to dismiss for want of prosecution, irrespective of whether the notice was addressed to an individual attorney at the firm.<sup>373</sup>

Although raised in a slightly different context, the sufficiency of a notice was also addressed in *Wilson v. Industrial Leasing Corp.*<sup>374</sup> In *Wilson* the appellant contended that it had not received notice of a trial setting. The appellant thus argued that a judgment resulting from nonappearance was erroneous. In the ensuing writ of error proceeding, the court of appeals held that, notwithstanding a recitation in the judgment that notice of the trial setting was provided to the defendant, the recitation could be rebutted by other evidence in the record and the record demonstrated that the defendant had not received actual or constructive notice of the trial setting.<sup>375</sup>

Finally, the supreme court in *Philbrook v. Berry*<sup>376</sup> addressed questions arising from the filing of a motion for new trial when the original action had

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369. *Id.* at 492; accord *Boler v. Coughran*, 304 S.W.2d 290, 291 (Tex. Civ. App.—San Antonio 1957, writ ref'd).

370. 683 S.W.2d 596 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

371. *Id.* at 598.

372. *Id.* at 599; see TEX. R. CIV. P. 10 (defining attorney of record); *id.* 165a (court can dismiss case for failure to take action within 15 days of mailing of notice of intent to dismiss for want of prosecution); *id.* 306a (discussing relationship of notice to running of time periods).

373. 683 S.W.2d at 599.

374. 689 S.W.2d 496, 497-98 (Tex. App.—Houston [1st Dist.] 1985, no writ).

375. *Id.* at 498.

376. 683 S.W.2d 378 (Tex. 1985).

been severed into different causes. In this case an original products liability action had been brought against several defendants, but a severance was granted with respect to the plaintiff's claims against one of the defendants. Thereafter, the court awarded the plaintiff a default judgment in the severed cause and the defendant filed a motion for new trial after becoming aware of the default judgment. The defendant filed the motion, however, in the original cause rather than in the severed cause. Notwithstanding this misfiling, the trial court considered the motion and entered an order granting a new trial within fifty-three days after the default judgment was entered. The supreme court recognized that in the absence of a timely motion for new trial, the court retains plenary power over its judgment for a period of thirty days, as opposed to the possible 105-day period in the event a timely motion for new trial is filed.<sup>377</sup> The supreme court ruled that because the motion for new trial was filed in the wrong cause, it did not operate to extend the court's plenary power over its judgment beyond the thirty days prescribed in rule 329b.<sup>378</sup> Accordingly, the court held that the trial court lacked power to set aside the judgment except by bill of review.<sup>379</sup>

#### XV. APPELLATE PROCEDURE

Although the rules governing appellate procedure sustained no major changes during the survey period, the supreme court did make several noteworthy revisions. An appellate party desiring oral argument in the court of appeals must now file a specific request for oral argument at the time he files his brief in the case.<sup>380</sup> Rule 423 previously permitted any party filing a brief to submit an oral or written argument when the court called the case for submission.<sup>381</sup> Under the amended rule, written arguments are apparently no longer permitted, and failure to make a specific request for argument constitutes a waiver of oral argument.<sup>382</sup> If a party waives his right to argument under rule 423, the court of appeals may nevertheless direct that party to appear and submit argument upon submission of the case.<sup>383</sup> The court may also advance submission of the case without argument if, in its discretion, argument would not materially aid the court in determining the issues presented in the appeal.<sup>384</sup> Finally, while former rule 423 allowed the court to extend the time for argument in cases involving difficult questions, the amended rule now also permits the court to exercise its discretion in shortening the time permitted for oral argument.<sup>385</sup>

Minor changes were also made with respect to the rules governing prepa-

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377. *Id.* at 379; *see* TEX. R. CIV. P. 329b (addressing motions for new trial and the court's plenary power).

378. 683 S.W.2d at 379; *see* TEX. R. CIV. P. 329b(d).

379. 683 S.W.2d at 379.

380. TEX. R. CIV. P. 423(f).

381. TEX. R. CIV. P. 423(a) (West 1984).

382. TEX. R. CIV. P. 423(a), (f).

383. *Id.* 423(f).

384. *Id.* In such a case, the clerk is required to give all parties or their attorneys notice that the case is being submitted without argument at least 21 days prior to the submission date. *Id.*

385. *Id.* 423(d).

ration of the transcript and the statement of facts. The clerk preparing the transcript must now deliver it directly to the appropriate court of appeals, rather than to the party who requested it.<sup>386</sup> Further, amended rule 377 requires the court reporter to include his certification number, business address, telephone number, and expiration date of certification in the certificate accompanying the statement of facts.<sup>387</sup>

*Fidelity & Casualty Co. v. Central Bank*<sup>388</sup> is a warning to parties who succeed in obtaining a judgment non obstante veredicto to preserve for appeal all grounds supporting the judgment. In that case the defendant obtained a jury finding supporting one of its affirmative defenses. The plaintiff argued that the defense was not properly raised by the pleadings and that there was no evidence to support the jury's finding. Agreeing with the plaintiff's latter contention, the trial court disregarded the jury finding and entered judgment n.o.v. in favor of the plaintiff. On appeal by the defendant, however, the court of appeals found some evidence to support the jury's finding.<sup>389</sup> With respect to the plaintiff's alternative contention that the defense was not raised properly by the pleadings, the court noted that rule 324<sup>390</sup> required the plaintiff to assign its no-pleadings complaint as a cross-point that would vitiate the verdict.<sup>391</sup> Nevertheless, because the plaintiff had actually raised the issue on appeal, but simply mislabelled its argument as a reply point, the court liberally construed the plaintiff's brief and chose to consider the point anyway.<sup>392</sup> After concluding that the defendant's pleadings sufficiently raised the affirmative defense, the court was compelled to render judgment for the defendant since the plaintiff failed to preserve an issue raising factual insufficiency of the evidence in support of the jury's finding.<sup>393</sup>

A number of decisions considered questions related to filing deadlines in the courts of appeals. In *Monk v. Dallas Brake & Clutch Service Co.*<sup>394</sup> the court of appeals granted the appellant's motion to extend the time for filing the statement of facts even though the appellant had failed to request preparation of the statement "at or before the time for perfecting the appeal" as required by rule 377.<sup>395</sup> After analyzing recent amendments to the various rules governing time periods on appeal, the court concluded that a failure to make a written request within the time prescribed by rule 377(a) could be excused under rule 21c if reasonably explained.<sup>396</sup> Finding that the appellant's late request did not delay the preparation and filing of the statement of

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386. *Id.* 376-a(g).

387. *Id.* 377(e).

388. 672 S.W.2d 641 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

389. *Id.* at 650.

390. TEX. R. CIV. P. 324(c).

391. 672 S.W.2d at 645.

392. *Id.* at 646; see TEX. R. CIV. P. 422 (briefing rules to be liberally construed).

393. 672 S.W.2d at 650 n.1.

394. 683 S.W.2d 107 (Tex. App.—Dallas 1984, no writ).

395. *Id.* at 108; see TEX. R. CIV. P. 377(a).

396. 683 S.W.2d at 109; see TEX. R. CIV. P. 21c (court of appeals may grant extension of filing time upon reasonable explanation).

facts, the court held that the appellant's delay was reasonably explained, as required by rule 21c.<sup>397</sup> As noted by the supreme court in *Coulson v. Lake LBJ Municipal Utility District*,<sup>398</sup> this reasonable explanation standard, which appears throughout the amended appellate rules, is less stringent than the good cause standard applicable before 1981.<sup>399</sup> A reasonable explanation requires only a plausible statement of circumstances indicating that a party's failure to file within the required period was not deliberate or intentional but resulted from inadvertence or mistake.<sup>400</sup>

Resolving a conflict in the courts of appeals,<sup>401</sup> the supreme court held in *Chojnacki v. The Court of Appeals for the First Supreme Judicial District*<sup>402</sup> that the requirements of rule 21c are not limited to initial motions for an extension of time to file the transcript or statement of facts.<sup>403</sup> The Supreme Court thus held that the court of appeals lacked authority to grant the appellant's third motion for an extension of time to file the statement of facts since the motion was filed more than fifteen days after the statement of facts was due.<sup>404</sup>

The court in *Moody House, Inc. v. Galveston County*<sup>405</sup> held that a party prosecuting an independent appeal cannot simply rely on rule 428<sup>406</sup> and supplement the record filed by his opponent in order to include those portions of the record relevant to his own appeal.<sup>407</sup> Instead, the cross-appellant must comply with the pertinent timing requirements set forth in the rules for filing his own record.<sup>408</sup>

Mandamus procedures continue to be the subject of judicial scrutiny. According to the court in *Superior Trans-Med, Inc. v. Hall*,<sup>409</sup> mandamus is not an appropriate remedy for the "thicket" of incidental pre-trial rulings which appellate courts cannot enter without serious disruption of the orderly pro-

397. 683 S.W.2d at 109. The court's holding accorded with its earlier decision in *Moore v. Davis*, 644 S.W.2d 40, 43 (Tex. App.—Dallas 1982, no writ). *But see* *Odum v. Olafson*, 675 S.W.2d 581, 582 (Tex. App.—San Antonio 1984, no writ) (court has no discretion to allow statement to be filed by appellant who does not comply with rule 377(a)).

398. 678 S.W.2d 943 (Tex. 1984).

399. *Id.* at 944; *see* TEX. R. CIV. P. 414 comment (noting change from good cause to reasonable explanation standard); *Montgomery Ward & Co. v. Dalton*, 602 S.W.2d 130, 131 (Tex. Civ. App.—El Paso 1980, no writ) (explaining good cause standard).

400. 678 S.W.2d at 944.

401. *Compare* *Better Construction, Inc. v. H.E. Reeves, Inc.*, 675 S.W.2d 612, 613 (Tex. App.—San Antonio 1984, no writ) (appellate court lacks authority to grant third motion for extension if not filed timely under rule 21c) *with* *Gibraltar Sav. Ass'n v. Hamilton Air Mart, Inc.*, 662 S.W.2d 632, 634 (Tex. App.—Dallas 1983, no writ) (court has jurisdiction to consider second motion for an extension even though filed 15 days after time allowed).

402. 699 S.W.2d 193 (Tex. 1985).

403. *Id.* at 194.

404. *Id.* (citing *B.D. Click Co. v. Safari Drilling Corp.*, 638 S.W.2d 860, 862 (Tex. 1982), *discussed in* 1983 *Annual Survey*, *supra* note 85, at 319); *see also* TEX. R. CIV. P. 21c (imposing 15-day deadline on filing of motion to extend).

405. 687 S.W.2d 433 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

406. TEX. R. CIV. P. 428 permits the filing of a supplemental record to supply matter material to either party that was omitted from the transcript or statement of facts.

407. 687 S.W.2d at 435.

408. *Id.* at 436.

409. 683 S.W.2d 496 (Tex. App.—Dallas 1984, no writ).



cess of trial and appeals."<sup>410</sup> As a result, the court refused to interfere with a trial court's order directing a defendant to respond to requests for admissions aimed at the defendant's alternative defenses.<sup>411</sup> In *Bailey v. Baker*<sup>412</sup> the court denied the relator's motion for leave to file a petition for writ of mandamus since he did not file his motion until two weeks before the date set for trial.<sup>413</sup> Although the court commented favorably on the merits of the relator's motion, it could find no explanation for his long delay in seeking a remedy by way of mandamus.<sup>414</sup> Finally, the court in *Parks v. Hopkins*<sup>415</sup> denied an application for writ of mandamus because the relator failed to attach to his petition a copy of the allegedly erroneous trial court order.<sup>416</sup> The court stated that because of that omission the relator had failed to comply with the procedural prerequisites for filing a mandamus.<sup>417</sup>

Two decisions during the survey period concerned parties. In *George v. Vick*<sup>418</sup> no party appealed from a trial court's judgment insofar as it disposed of actions by and against certain defendants. Accordingly, the supreme court affirmed the trial court's judgment as to those defendants and reversed the court of appeals' judgment, which remanded the entire case for a new trial.<sup>419</sup> *Jernigan v. Jernigan*,<sup>420</sup> after acknowledging that appeals are generally available only to parties of record, held that trust beneficiaries bound by a trial court's judgment had standing to file an appeal even though they were not named in the judgment.<sup>421</sup> The court in *Jernigan* recognized that past decisions had afforded a right to appeal to nonparties under the doctrine of virtual representation.<sup>422</sup>

Rule 377(d) permits a party to file a partial statement of facts on appeal so long as the party's request for the partial statement of facts includes a listing of the points of error that he will rely on for appeal.<sup>423</sup> If the appellant

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410. *Id.* at 498 (citing *Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969), *cert. denied*, 397 U.S. 997 (1970)).

411. *Id.* According to the court, the case could be reversed on appeal and remanded if the trial court's ruling improperly deprived the defendant of presenting an alternative defense. *Id.* at 497.

412. 696 S.W.2d 255 (Tex. App.—Houston [14th Dist.] 1985, no writ).

413. *Id.* at 256.

414. *Id.* Since the discovery complaint related to production of records, the court concluded that the records could be subpoenaed for trial and, if the trial court again refused to order disclosure, a sufficient record could be made for appellate review. *Id.*

415. 677 S.W.2d 791 (Tex. App.—Fort Worth 1984, no writ).

416. *Id.* at 792.

417. *Id.* TEX. R. CIV. P. 383(1)(b)(4) provides that the petition for writ of mandamus shall be accompanied by a certified or sworn copy of the order complained of and other relevant exhibits.

418. 686 S.W.2d 99 (Tex. 1984).

419. *Id.* at 100.

420. 677 S.W.2d 137 (Tex. App.—Dallas 1984, no writ).

421. *Id.* at 140.

422. *Id.*; *see, e.g.*, *Gunn v. Cavanaugh*, 391 S.W.2d 723, 725 (Tex. 1965) (petitioner has right to appeal when party to suit purported to represent him); *California & Hawaiian Sugar Co. v. Bunge Corp.*, 593 S.W.2d 739, 740 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (test is whether trial court's judgment binds petitioner due to fact that a party to the suit represented him); *Grizzaffi v. Lee*, 517 S.W.2d 885, 891 (Tex. Civ. App.—Fort Worth 1974, writ dismissed) (virtual representation can bind a party).

423. TEX. R. CIV. P. 377(d).

complies with the requirements of this rule, it is presumed that nothing omitted from the record is relevant to the points specified.<sup>424</sup> As the appellant in *Watson v. State*<sup>425</sup> learned the hard way, however, an opposite presumption applies when the appellant ignores the strictures of rule 377. In *Watson* the court presumed that the omitted portions of the record fully supported the judgment because the appellant filing the partial statement of facts did not file a statement of the points that he intended to rely on for appeal.<sup>426</sup>

## XVI. MISCELLANEOUS

*Civil Practice and Remedies Code.* As part of Texas's continuing statutory revision program,<sup>427</sup> the Sixty-Ninth Legislature enacted the Texas Civil Practice and Remedies Code during the survey period.<sup>428</sup> The new Code, effective September 1, 1985, collects, renumbers, and rearranges numerous statutes formerly addressing venue, limitations, and other trial matters;<sup>429</sup> judgments;<sup>430</sup> appeals;<sup>431</sup> attachment, sequestration, injunctions, and other extraordinary remedies;<sup>432</sup> wrongful death, survival, and other matters involving tort liability;<sup>433</sup> government liability;<sup>434</sup> and various miscellaneous provisions.<sup>435</sup> Although the new Code also eliminates those statutory provisions that were duplicative, unconstitutional, or expired, and restates the law in "modern American English,"<sup>436</sup> it attempts only to recodify existing law and effects no substantive changes.<sup>437</sup>

*Attorney's Fees and Costs.* Article 2226 allows a party in certain cases to recover its attorney's fees if payment for the amount owing on that party's claim has not been tendered within thirty days after presentment of the claim.<sup>438</sup> Until recently the courts of appeals had almost uniformly denied attorney's fees under the statute to a party whose recovery on its claim was more than offset by an opponent's recovery on a counterclaim.<sup>439</sup> Disap-

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424. *Id.*

425. 687 S.W.2d 51 (Tex. App.—Houston [14th Dist.] 1985, no writ).

426. *Id.* at 53.

427. See TEX. CIV. PRAC. & REM. CODE ANN. § 1.001 (Vernon Pam. 1986). The program of revision was begun by the Texas Legislative Council in 1963 and contemplates a topic-by-topic revision of the state's general and permanent statute law without substantive change. *Id.*; see TEX. GOV'T CODE § 323.007 (Vernon Pam. 1986).

428. Act of June 16, 1985, ch. 959, § 1, 1985 Tex. Gen. Laws 7043 (enacting TEX. CIV. PRAC. & REM. CODE ANN. (Vernon Pam. 1986)).

429. TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.001-30.003 (Vernon Pam. 1986).

430. *Id.* §§ 31.001-38.006.

431. *Id.* §§ 51.001-014.

432. *Id.* §§ 61.001-66.003.

433. *Id.* §§ 71.001-79.002.

434. *Id.* §§ 101.001-106.003.

435. *Id.* §§ 121.001-129.003.

436. *Id.* § 1.001(b).

437. *Id.* § 1.001(a).

438. Act of June 6, 1979, ch. 314, § 1, 1979 Tex. Gen. Laws 718, 718, *repealed and recodified* as TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.001-006 (Vernon Pam. 1986).

439. See, e.g., *Hoffman v. Deck Masters, Inc.*, 662 S.W.2d 438, 441 (Tex. App.—Corpus Christi 1983, no writ) (winning party cannot claim attorney's fees when claim is less than

proving this line of authority, the supreme court in *McKinley v. Drozd*<sup>440</sup> held that a plaintiff who successfully prosecuted his claim under article 2226 could recover his attorney's fees even though the defendant recovered a greater amount on his counterclaim.<sup>441</sup> The court reasoned that a 1977 amendment to article 2226 authorized recovery of attorney's fees for any just claim and, as a result, prior cases recognizing a net recovery requirement in the earlier wording of article 2226 were no longer authoritative.<sup>442</sup> According to the court, the justness of a claim within article 2226 is not dependent upon the outcome of other claims or counterclaims joined in the lawsuit.<sup>443</sup> For analogous reasons, the court further held that a consumer can recover his attorney's fees incurred in the successful prosecution of a Deceptive Trade Practices Act claim<sup>444</sup> whether or not he ultimately obtains a net recovery in the lawsuit.<sup>445</sup>

*Buffalo Title of Houston, Inc. v. House*<sup>446</sup> addressed the problem of allocating attorney's fees among various claims, which often arises in proving the amount of recoverable attorney's fees. Appealing from an adverse judgment that allowed recovery under the Deceptive Trade Practices Act, the appellant claimed that the trial court had erred in awarding attorney's fees because the appellee's attorney failed to differentiate the time spent on causes of action for which attorney's fees were recoverable from those for which no attorney's fees could be recovered. Distinguishing the case from an earlier decision that involved several distinct theories for which no overlap in preparation existed,<sup>447</sup> the court concluded that allocation was not required since the various theories that the appellee advanced were closely related.<sup>448</sup>

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defendant's); *Greene v. Bearden Enterprises, Inc.*, 598 S.W.2d 649, 655 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (contractor cannot recover attorney's fees when owner's successful counterclaim is greater); *LQ Motor Inns v. Boysen*, 503 S.W.2d 411, 412 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.) (unjust to award attorney's fees to party whose claim is less than opponent's counterclaim). *But cf.* *Esparza v. Nolan Wells Communications, Inc.*, 653 S.W.2d 532, 538-39 (Tex. App.—Austin 1983, no writ) (questioning net recovery requirement).

440. 685 S.W.2d 7 (Tex. 1985).

441. *Id.* at 10.

442. *Id.* (citing Figari, Graves & Gordon, *Texas Civil Procedure, Annual Survey of Texas Law*, 36 Sw. L.J. 435, 468-69 (1982)).

443. 685 S.W.2d at 11. The court noted additionally that, while courts formerly construed art. 2226 strictly, the amendment to the statute mandated a liberal construction. *Id.*

444. TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon Supp. 1986) provides that any consumer who prevails on his DTPA claim shall be awarded court costs and reasonable and necessary attorney's fees.

445. 685 S.W.2d at 9 (overruling *Widmar v. Stamps*, 663 S.W.2d 875, 882-83 (Tex. App.—Houston [14th Dist.] 1983, no writ), and *Birds Constr., Inc. v. McKay*, 657 S.W.2d 514, 516 (Tex. App.—Corpus Christi 1983, no writ)).

446. No. B14-82-652-CV (Tex. App.—Houston [14th Dist.], June 14, 1984, no writ) (unpublished). Note that TEX. R. CIV. P. 452 expressly forbids citation of unpublished opinions as authority.

447. *See Kosberg v. Brown*, 601 S.W.2d 414, 418 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (party asserting a cause of action has duty to segregate fees connected with causes of action for which attorney's fees are recoverable from those for which they are not recoverable).

448. No. B14-82-652-CV, slip op. at 9; *accord Schepps Grocery Co. v. Burroughs Corp.*, 635 S.W.2d 606 (Tex. App.—Houston [14th Dist.] 1982, no writ), *discussed in 1983 Annual Survey, supra* note 85, at 322-23.

Finally, *Rogers v. Walmart Stores, Inc.*<sup>449</sup> held that a trial court's assessment of costs against a prevailing party cannot be disturbed on appeal absent a showing of abuse of discretion.<sup>450</sup> Rule 131 provides that the successful party to a suit shall recover all costs from his adversary unless otherwise provided.<sup>451</sup> A corollary to that rule, according to the court, is rule 141,<sup>452</sup> which permits a court to adjudge costs differently for good cause as shown on the face of the record.<sup>453</sup> After finding evidence in the record to support the trial court's determination that the defendant's trial strategy unnecessarily increased costs by prolonging the trial, the supreme court concluded that the trial court did not abuse its discretion in taxing costs against the successful defendant.<sup>454</sup>

*Prejudgment Interest.* Acknowledging past criticism of the rationale underlying the distinction between liquidated and unliquidated damages as a basis for awarding prejudgment interest,<sup>455</sup> the supreme court in *Cavnar v. Quality Control Parking, Inc.*<sup>456</sup> revised the Texas prejudgment interest rule.<sup>457</sup> Overruling a long line of authority,<sup>458</sup> the court held as a matter of law that a prevailing plaintiff in a personal injury case could recover prejudgment interest on damages that had accrued by the time of judgment.<sup>459</sup> As noted by the court, courts had previously allowed prejudgment interest on both liquidated and unliquidated claims in all cases except personal injury, and no logical basis existed for distinguishing between such suits.<sup>460</sup> According to the court, therefore, the revised prejudgment interest rule would restore equity and symmetry to this area of the law by making injured parties whole.<sup>461</sup>

Under the *Cavnar* rule prejudgment interest, compounded daily, accrues at the prevailing rate that exists on the date judgment is rendered according to the provisions of article 5069-1.05, section 2.<sup>462</sup> In order to avoid difficulty in determining from what date this rate of interest should accrue, the

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449. 686 S.W.2d 599 (Tex. 1985).

450. *Id.* at 601.

451. TEX. R. CIV. P. 131.

452. TEX. R. CIV. P. 141.

453. 686 S.W.2d at 601.

454. *Id.*

455. See *Funkhouser v. Preston Co.*, 290 U.S. 163, 168-69 (1933) (criticizing difference as unsound).

456. 696 S.W.2d 549 (Tex. 1985).

457. *Id.* at 551-55.

458. See, e.g., *Texas & N.O.R. Co. v. Carr*, 91 Tex. 332, 334, 43 S.W. 18, 18 (1897) (court will not allow interest for period between dates of injury and judgment); *Watkins v. Junker*, 90 Tex. 584, 587, 40 S.W. 11, 12 (1897) (courts cannot grant interest in personal injury suits); *State v. Weller*, 666 S.W.2d 362, 363 (Tex. App.—Houston [14th Dist.]), *writ ref'd n.r.e. per curiam*, 682 S.W.2d 234 (Tex. 1984) (awarding prejudgment interest in personal injury suits is erroneous).

459. 696 S.W.2d at 554.

460. *Id.* at 553.

461. *Id.* at 553-54.

462. *Id.* at 554; see TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 2 (Vernon Supp. 1986) (establishing manner of calculation for post-judgment interest rates to be set by the Texas consumer credit commissioner).

court adopted two arbitrary accrual methods that it believed would most closely approach the goal of full compensation for plaintiffs.<sup>463</sup> First, interest in wrongful death and nondeath personal injury cases begins to accrue from a date six months after the incident giving rise to the cause of action.<sup>464</sup> Interest in survival actions, on the other hand, accrues from the date of death, unless the decedent lingers for more than six months after the injury-causing incident, in which case the method selected for wrongful death actions again applies.<sup>465</sup> Prejudgment interest is recoverable only with respect to damages awarded for past losses.<sup>466</sup> Consequently, the *Cavnar* court also held that the decedent's children could not recover any prejudgment interest on a lump sum awarded them for both past and future losses since they failed to tender jury issues segregating these categories of damages.<sup>467</sup>

Following the rule posited in *Cavnar*, the supreme court in *Monsanto Co. v. Johnson*<sup>468</sup> denied prejudgment interest to a plaintiff in a wrongful death action who failed to segregate future damages from damages that preceded the date of trial.<sup>469</sup> Both *Cavnar* and *Monsanto* also held that prejudgment interest is not allowable on punitive damages.<sup>470</sup>

*Res Judicata.* *Jeanes v. Henderson*<sup>471</sup> considered the effect of a prior federal court judgment on a subsequent declaratory judgment action brought in a state district court. In this case the plaintiff sued two defendants seeking a determination of her royalty rights under certain mineral leases. Specifically, the plaintiff sought a declaration that certain oil and gas options that one of the defendants purportedly granted to her also bound another defendant who subsequently purchased the lease in question. The plaintiff also sued the second defendant, claiming that he tortiously interfered with the option contract between her and the first defendant. Both defendants responded that res judicata barred the suit since the plaintiff had earlier sued the first defendant in federal court on the same contract and lost on her damage claims for breach of contract and fiduciary duty.

After the trial court rendered a summary judgment for the defendants, the plaintiff appealed, asserting that res judicata did not apply because the declaratory judgment suit involved a different cause of action from the federal court litigation. The plaintiff also argued that the federal court would not have exercised its pendant jurisdiction over her state-related declaratory judgment claim and, therefore, she had not split her cause of action and later asserted a claim that she could have litigated in the first instance. Employ-

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463. 696 S.W.2d at 555.

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.* at 556.

468. 696 S.W.2d 558 (Tex. 1985) (decided on same day as *Cavnar*).

469. *Id.* at 559.

470. *Id.*; *Cavnar*, 696 S.W.2d at 556.

471. 688 S.W.2d 100 (Tex. 1985).

ing the Fifth Circuit's primary right test,<sup>472</sup> the supreme court ruled that the plaintiff had only changed her theory of recovery and that the declaratory judgment suit involved the same cause of action that she had already litigated in federal court.<sup>473</sup> With respect to the plaintiff's second argument, the supreme court concluded that the federal court, having exercised jurisdiction over plaintiff's other pendent claims against the first defendant, would certainly have exercised its discretion to entertain pendent jurisdiction over the declaratory judgment claim as well.<sup>474</sup> The supreme court likewise opined that the federal court would have exercised pendent party jurisdiction over the second defendant, at least with respect to the declaratory judgment claim, since the plaintiff had also asserted a securities claim in the federal litigation that was within the exclusive jurisdiction of the federal court.<sup>475</sup> Accordingly, the supreme court held that *res judicata* barred the plaintiff from pursuing her declaratory judgment action against both defendants.<sup>476</sup>

*Agreements between Counsel. Kennedy v. Hyde*<sup>477</sup> considered an unusual set of circumstances in which numerous parties embroiled in a lawsuit concerning the sale of securities became involved in settlement discussions. These discussions resulted in the drafting and eventual signing of documents settling the suit. When one of the original defendants refused to execute the settlement papers, the plaintiffs amended their pleadings and introduced the oral settlement as an additional basis for relief. The trial court ordered a separate trial on the existence and validity of the alleged oral agreement and, pursuant to appropriate jury findings, entered a judgment enforcing the settlement agreement against the recalcitrant defendant. The court of appeals affirmed, holding that rule 11<sup>478</sup> did not prohibit the enforcement of disputed oral settlement agreements.<sup>479</sup>

Pointing to at least two recent occasions when it had strongly implied that

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472. Under this test the causes of action are the same if the primary right and duty and the delict or wrong are the same in each action. *Hall v. Tower Land & Inv. Co.*, 512 F.2d 481, 483 (5th Cir. 1975). The court felt constrained to follow this federal rule of *res judicata* since the original lawsuit took place in federal court even though it involved both federal and state-related claims. 688 S.W.2d at 103 (citing *Commercial Box & Lumber Co. v. Uniroyal, Inc.*, 623 F.2d 371, 373 (5th Cir. 1980)).

473. 688 S.W.2d at 104.

474. *Id.*

475. *Id.* at 105, *see Boudreaux v. Puckett*, 611 F.2d 1028, 1031 (5th Cir. 1980) (assertion of pendent party jurisdiction is most compelling when federal court maintains exclusive jurisdiction over the underlying federal claim).

476. 688 S.W.2d at 104, 106. Although the court also held that plaintiff's interference claim against the second defendant with respect to the contract was barred for the same reasons, it remanded the case to the trial court for consideration of plaintiff's interference claims involving other contracts that were not the subject of the federal court action. *Id.* at 107.

477. 682 S.W.2d 525 (Tex. 1984).

478. TEX. R. CIV. P. 11 provides: "No agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record."

479. *Kennedy v. Hyde*, 666 S.W.2d 325 (Tex. App.—Fort Worth), *rev'd*, 682 S.W.2d 525 (Tex. 1984).

settlement agreements were subject to the strictures of rule 11,<sup>480</sup> the Texas Supreme Court reversed the judgments of the trial court and the court of appeals.<sup>481</sup> Stating that it would not eviscerate the rule, the court held that rule 11 is a minimum requirement for enforcement of all agreements concerning pending suits, including agreed judgments.<sup>482</sup> Since the oral agreement was disputed and unenforceable at the moment its existence was denied in defendant's pleadings, rule 11 prohibited further inquiry.<sup>483</sup>

The court of appeals in *Smith v. Morris & Co.*<sup>484</sup> reiterated the well known rule that parties cannot validly stipulate to the legal conclusions to be drawn from the facts of the case.<sup>485</sup> Accordingly, a stipulation that appellant was a bona fide purchaser for value was without effect and did not bind the parties or the trial court.<sup>486</sup>

*Notice.* In *Costello v. Johnson*<sup>487</sup> the court held that a party's compliance with rule 21a<sup>488</sup> by attaching a certificate of service upon opposing counsel constituted a prima facie showing of notice.<sup>489</sup> In affirming the trial court's rendition of a summary judgment, the court of appeals rejected the defendant's contention that he was entitled to a reversal unless the record affirmatively demonstrated his receipt of the notice.<sup>490</sup> That argument, according to the court, was contrary to the plain language of rule 21a.<sup>491</sup>

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480. See *Williams v. Hollingsworth*, 568 S.W.2d 130, 131 (Tex. 1978); *Vickrey v. American Youth Camps, Inc.*, 532 S.W.2d 292, 292 (Tex. 1976).

481. 682 S.W.2d at 528.

482. *Id.*

483. *Id.* at 530.

484. 694 S.W.2d 37 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

485. *Id.* at 39.

486. *Id.*

487. 680 S.W.2d 529 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

488. TEX. R. CIV. P. 21a (providing methods of giving notice).

489. 680 S.W.2d at 531.

490. *Id.*

491. *Id.* In reaching this conclusion the court expressly disagreed with the statement in *Booker v. Hill*, 570 S.W.2d 460 (Tex. Civ. App.—Waco 1978, no writ), that the record must show receipt of notice of the motion. 680 S.W.2d at 532.