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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.¹

I. JURISDICTION OF THE SUBJECT MATTER

With the failure of several federally insured savings and loan associations in Texas² and the appointment of the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for those associations, the FSLIC and the courts of this state have engaged in a jurisdictional tug-of-war.³ The FSLIC has argued, relying on federal enactments,⁴ that when its appointment as a receiver occurs, state courts are ousted of jurisdiction to hear claims involving the failed association and, instead, the FSLIC has the exclusive power to adjudicate those claims.⁵ The FSLIC's opponents perceive it as less than

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1. One should note that the Texas Supreme Court is presently considering significant amendments to the Texas Rules of Civil Procedure and Appellate Procedure. See *Texas Supreme Court Invites Comments on Proposed Amendments to Texas Court Rules*, 52 TEX. B.J. 1147 (1989). Since these changes are in a preliminary stage and have not been adopted, they will be discussed in a future survey article when they actually become effective.

2. See, e.g., Glidden, *Portrait of an Industry in Crisis*, D Mag., May 1987, at 94; *Area S&L Declared Insolvent*, Dallas Morning News, May 21, 1987, at A1, col. 2; *Losses Leave S&L Insolvent*, Dallas Times Herald, Sept. 5, 1986, at A1, col. 3; *The Fall of an Empire—Auditors Untangle Web of Records to Find S&L Insolvent*, Dallas Times Herald, Mar. 25, 1984, at K1, col. 1.

3. See, e.g., *FSLIC v. Glen Ridge I Condominium, Inc.*, 750 S.W.2d 757 (Tex. 1988) (per curiam) *cert denied*, — U.S. —, 109 S.Ct. 1637, 104 L.Ed.2d 153 (1989); *FSLIC v. Kennedy*, 732 S.W.2d 1 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Summertree Venture III v. FSLIC*, No. C14-86-924CV (Tex. App.—Houston [14 Dist.] Nov. 5, 1987, no writ). See generally, Figari, Graves & Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 43 Sw. L.J. 485 (1989) [hereinafter Figari, 1989 Annual Survey].

4. See 12 U.S.C. § 1464(d)(6)(C)(1982 & Supp. 1989), which provides that "no court may . . . restrain or affect the exercise of powers or functions of a conservator or receiver [i.e., FSLIC]"; 12 U.S.C. § 1729(d), which provides that "[i]n connection with the liquidation of insured institutions, the [FSLIC] shall [be] . . . subject only to the regulation of the Federal Home Loan Bank Board."

5. See Felt, *FSLIC Receivership Claims Procedures*, 1987 ALI-ABA COURSE OF

impartial in deciding claims involving such an association. Furthermore, the asserted adjudicatory power in the FSLIC would serve to deprive those opponents of a jury trial. Thus, the FSLIC's opponents usually challenge the FSLIC's jurisdiction.

Coit Independence Joint Venture v. FSLIC,⁶ a recent decision of the United States Supreme Court, appears to have settled this jurisdictional dispute. The Supreme Court framed the question as "whether Congress granted the Federal Savings and Loan Insurance Corporation (FSLIC), as receiver, the exclusive authority to adjudicate the state law claims asserted against a failed savings and loan association."⁷ The Court concluded that "[t]he statutes governing FSLIC . . . do not grant FSLIC adjudicatory power over creditors' claims against insolvent savings and loan associations under FSLIC receivership, nor do they divest the courts of jurisdiction to consider those claims *de novo*."⁸

A recent decision of the Dallas Court of Appeals, *Gaynier v. Ginsberg*,⁹ considered the doctrine of primary jurisdiction as it relates to a statutory probate court. The personal representative of an estate had filed suit in the district court, asserting claims for fraud, breach of fiduciary duty, trespass to try title, and seeking the removal of a trustee. Virtually all of the claims were incident to the estate. On the eve of trial, the district court granted a motion to dismiss on the ground that the statutory probate court had primary subject matter jurisdiction of the suit. In this regard, section 5A(b) of the Texas Probate Code, which establishes the primary jurisdiction of the statutory probate court, stipulates that "[i]n situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, a cause appertaining to estates or incident to an estate *shall* be brought in a statutory probate court rather than in a district court."¹⁰ Holding that the claim for the removal of a trustee, though incident to the estate, was within the exclusive jurisdiction of the district court, the court of appeals concluded that the probate court was powerless to afford all of the relief requested and ordered the suit reinstated.¹¹ Reasoning that section 5A(b) did not divest the district court of jurisdiction over a matter which may be incident to an estate if the probate court cannot grant full relief, the court held that section 5A(b) did not reduce the jurisdiction of the district court and therefore the district court should have continued to exercise jurisdiction over the entire suit.¹²

STUDY: FAILING FINANCIAL INSTITUTIONS 529 (setting forth Federal Home Loan Bank Board procedures when FSLIC is receiver).

6. — U.S. —, 109 S.Ct. 1361, 103 L.Ed.2d 602 (1989).

7. *Id.* at 1364.

8. *Id.* at 1368. See generally Baxter, *Life in the Administrative Track: Administrative Adjudication of Claims Against Savings Institution Receiverships*, 1988 DUKE L.J. 422, 484-85 (1988); Note, 10 W. NEW ENG. L. REV. 227, 257-60 (1988).

9. 763 S.W.2d 461 (Tex. App.—Dallas 1988, no writ).

10. TEX. PROB. CODE ANN. § 5A(b) (Vernon Supp. 1990) (emphasis added).

11. 763 S.W.2d at 463.

12. *Id.*

II. JURISDICTION OVER THE PERSON

The reach of the Texas long-arm statute¹³ is continually the subject of judicial measurement. This statute authorizes the exercise of jurisdiction over a nonresident when he is doing business in Texas.¹⁴ A nonresident does business, according to the statute, if, among other things, the nonresident "commits a tort in whole or in part in this state."¹⁵ A recent Fifth Circuit decision, *Irving v. Owens-Corning Fiberglas Corp.*,¹⁶ reiterated a two-pronged test for meeting the requirements of due process when effecting service under the statute. In this regard, the court concluded that:

The due process clause permits a district court to exercise personal jurisdiction over nonresident defendants when (1) they have sufficient "minimum contacts" with the forum; and (2) the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice."¹⁷

Irving is also significant in its use of the stream of commerce analysis to determine whether a defendant had sufficient minimum contacts with the forum so as to satisfy the first part of the test.¹⁸ The plaintiffs, two residents of Texas, sued several defendants, one of whom was a Yugoslavian corporation, for products liability arising out of their exposure to asbestos during their employment with a Texas firm. Plaintiffs effected service over the Yugoslavian corporation under the Texas long-arm statute; and it responded with a motion to dismiss for lack of personal jurisdiction. Subsequently, the trial court dismissed the claims against the alien defendant and an appeal from that ruling ensued.

The record disclosed that the alien defendant, which was neither qualified to do business in Texas nor had any presence in the state, was a trading company that introduced the asbestos to America after it had been mined in Yugoslavia by a mining company there. An American broker purchased the

13. TEX. CIV. PRAC. & REM. CODE ANN. § 17.041-045 (Vernon 1986 & Supp. 1990) (formerly TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964) (repealed 1985)).

14. *Id.* § 17.044(b).

15. *Id.* § 17.042(2).

16. 864 F.2d 383 (5th Cir. 1989), *cert denied*, — U.S. —, 110 S.Ct. 83, 107 L.Ed.2d 49.

17. *Id.* at 385, citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945); accord *Beary v. Beech Aircraft Corp.*, 818 F.2d 370, 374-77 (5th Cir. 1987); *Stuart v. Spademan*, 772 F.2d 1185, 1189 (5th Cir. 1985); *D.J. Inv., Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 544-45 (5th Cir. 1985); *C & H Transp. Co. v. Jensen & Reynolds Constr. Co.*, 719 F.2d 1267, 1269 (5th Cir. 1983), *cert denied*, 466 U.S. 945, 104 S.Ct. 1390, 80 L.Ed.2d 475 (1984); *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1028 (5th Cir. 1983), *cert. denied*, 466 U.S. 962, 104 S.Ct. 2180, 80 L.Ed.2d 561 (1984).

18. *Id.* at 385-88. Under the so-called stream of commerce theory of personal jurisdiction, "[w]hen a nonresident defendant introduces a product into interstate commerce under circumstances that make it reasonable to expect that the product may enter the forum state, the forum may assert jurisdiction over the defendant in a suit arising out of injury caused by the product in the forum." *Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228, 1234 (5th Cir. 1973). Actual knowledge that the product will be marketed in the forum is unnecessary; if the nonresident defendant had reason to know that the product would reach the forum, the forum may exercise personal jurisdiction over the nonresident. See *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 201-02 (5th Cir. 1980).

asbestos from the alien defendant and, in turn, sold it to the Texas firm where the two plaintiffs were employed. This supply relationship encompassed fifteen years and, while the alien defendant did not know the identity of the ultimate purchaser, it was aware that the ultimate destination of the asbestos was Texas. Emphasizing the fact that it was neither the manufacturer of the asbestos nor the party who sold it to the plaintiffs' Texas employer, the alien defendant argued that its role in the supply chain was too minor to subject it to personal jurisdiction under a stream of commerce analysis. Rejecting this argument, the Fifth Circuit concluded that the defendant's ignorance of the ultimate purchaser's identity did not defeat the forum's exercise of jurisdiction, as "[p]ersonal jurisdiction does not require certain knowledge of the user's identity."¹⁹ Under its stream of commerce analysis, the Fifth Circuit concluded that the defendant's contacts with Texas were sufficient to satisfy the minimum contacts requirement of the test.²⁰

The appellate court next turned its attention to the fairness requirement of the test.²¹ The Fifth Circuit observed that the case was one of 106 consolidated suits against twenty-one defendants for alleged injuries arising in Texas and linked to the asbestos the Yugoslavian corporation distributed.²² Concluding that Texas was the most convenient and efficient forum in which to try these cases, and that Texas has a special interest in providing a forum to procure compensation for alleged injuries that occurred in Texas, the court held that the contacts were sufficient to meet the second part of the test.²³

While earlier cases have opened the door to a broadened use of the Texas long-arm statute,²⁴ the recent decision of the court of appeals in *Southern Clay Products, Inc. v. Guardian Royal Exchange Assurance, Ltd.*²⁵ seems to have torn the door from its hinges. The nonresident defendant, an English insurance company, with no ties to the United States, issued an insurance policy to an English company, which policy provided liability coverage to the policy holder and its subsidiaries, one of whom was noted in an endorsement to the policy merely as being located in the U.S.A. This subsidiary, a Texas corporation, subsequently settled a liability claim brought against it arising out of an accident that occurred in Texas. A dispute subsequently arose over the foreign insurance company's duty to reimburse the Texas subsidiary under the policy that had been issued to its English parent. The subsidiary, thereafter, sued the nonresident insurer in Texas for breach of contract and effected service under the long-arm statute. The defendant objected to personal jurisdiction and, after the trial court sustained the chal-

19. *Irving*, 864 F.2d at 386.

20. *Id.* at 386.

21. *Id.* at 387.

22. *Id.*

23. *Id.* at 387-88.

24. See *Reul v. Sahara Hotel*, 372 F. Supp. 995 (S.D. Tex. 1974); *Bland v. Kentucky Fried Chicken Corp.*, 338 F. Supp. 871 (S.D. Tex. 1971).

25. 762 S.W.2d 927 (Tex. App.—Corpus Christi 1988, writ granted).

lenge, an appeal followed. Conceding that the insurance agreement was between two English companies, was negotiated and implemented in England, and did not reference Texas, the court of appeals nevertheless reversed and held the nonresident defendant subject to suit in Texas.²⁶ The court concluded that the nonresident defendant had agreed to cover risks anywhere in the world, and that this was sufficient notice of potentially insured activities throughout the United States. Thus, the acceptance of this broad risk indicated the insurer's willingness to be haled into court in any state where a United States subsidiary was involved with a covered accident.²⁷

The plaintiff in *Luker v. Luker*²⁸ attempted to stretch the reach of the long-arm statute beyond due process limits. The plaintiff, a Texas resident, was injured in an automobile accident in Louisiana while riding in a car driven by her sister-in-law, a Louisiana resident. She later sued her sister-in-law in Texas to recover for the injuries she sustained and effected service on her under the statute. When the sister-in-law appeared, she challenged personal jurisdiction and the trial court sustained her plea. The plaintiff appealed, relying on the fact that her sister-in-law had once lived in Texas, had purchased and financed an automobile there, and currently possessed only a Texas driver's license. Affirming the dismissal, the appellate court held that these contacts were too few to satisfy the requirements of due process.²⁹

A relatively obscure provision³⁰ of the Texas long-arm statute received considerable attention during the survey period. A provision of that statute 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 nonresident's home or home office" to facilitate such forwarding.³¹ Two cases, *Carjan Corp. v. Sonner*³² and *Bank of America v. Love*³³, recently considered this address requirement as it related to a corporate defendant. The record before the court in *Carjan* revealed that the Secretary of State received only the last known address of the corporate defendant and that he forwarded process to that location. The plaintiff obtained a default judgment based on this service, and the defendant sought to set it aside, arguing noncompliance with the statutory provision. Finding that the last known address was not the equivalent of the home office address required by the statute, the court concluded the statute had not been satisfied and set aside the judgment.³⁴

Similarly, in *Love* the default judgment record reflected that a post office box had been designated as the service address for the corporate defendant;

26. *Id.* at 932.

27. *Id.*

28. 776 S.W.2d 624 (Tex. App.—Texarkana 1989, writ denied).

29. *Id.* at 626.

30. TEX. CIV. PRAC. & REM. CODE ANN. § 17.045(A) (Vernon Supp. 1990).

31. *Id.*

32. 765 S.W.2d 553 (Tex. App.—San Antonio 1989, no writ).

33. 770 S.W.2d 890 (Tex. App.—San Antonio 1989, writ denied).

34. *Id.* at 555; *accord* *Verges v. Lomas Nettleton Fin. Corp.*, 642 S.W.2d 820, 823 (Tex. App.—Dallas 1982, no writ); *see* *Southern Distrib. Co. v. Technical Support Assoc., Inc.*, 105 F.R.D. 1, 2 (S.D. Tex. 1984).

however, the record was devoid of any indication that it was the defendant's home office. Invalidating the default judgment based on that service, the court held that the statute's address requirement had not been fulfilled.³⁵ *Love* is also significant because the plaintiff argued that the defect was immaterial since the defendant had received actual notice of the suit. Rejecting this contention, the court ruled that a showing of actual notice was irrelevant because such notice is insufficient unless it is notice received in the manner prescribed by the statute.³⁶

The address provision of the statute was also interpreted in two instances where service was made on an individual defendant and a default judgment was subsequently taken on the basis of such service.³⁷ The record in *Chaves v. Todaro*³⁸ showed that the Secretary of State received only an office address for the individual defendant and that the Secretary forwarded process to that address. In an attempt to sustain a default judgment predicated on this service, the plaintiff argued that the statute had been satisfied because the individual's office address was the same as his home office. Rejecting this argument, the court reasoned that the reference to home office in the statute was inapplicable to an individual and that, in the case of a natural person, a home address must be utilized.³⁹ The second case, *Bannigan v. Market Street Developers, Ltd.*,⁴⁰ arose from a challenge to a default judgment taken against an individual defendant in a suit on a lease. Arguing that the address requirement of the statute had been fulfilled, the plaintiff noted that the lease, attached as an exhibit to its petition, included a "Notice Address" for the defendant. Since the record showed that process had been forwarded to that address, the plaintiff argued that the statute had been satisfied. The court set aside the default judgment, however, observing that nothing in the record indicated the Notice Address in the lease was the same as the defendant's home address.⁴¹

III. SERVICE OF PROCESS

Pleasant Homes, Inc. v. Allied Bank of Dallas,⁴² a recent decision of the Texas Supreme Court, appears to have settled a long-standing conflict among the intermediate appellate courts.⁴³ When a default judgment is taken against a corporate defendant, and the corporation thereafter seeks to

35. 770 S.W.2d at 891-92.

36. *Id.* at 892.

37. *Chaves v. Todaro*, 770 S.W.2d 944 (Tex. App.—Houston [1st Dist.] 1989, no writ); *Bannigan v. Market Street Developer's, Ltd.*, 766 S.W.2d 591 (Tex. App.—Dallas 1989, no writ).

38. 770 S.W.2d at 944.

39. *Id.* at 946.

40. 766 S.W.2d at 591.

41. *Id.* at 593.

42. 776 S.W.2d 153 (Tex. 1989) (*per curiam*), *denying appl'n for writ of error*, 757 S.W.2d 460 (Tex. App.—Dallas 1989).

43. *See, e.g.*, *Bronze & Beautiful, Inc. v. Mahone*, 750 S.W.2d 28, 29 (Tex. App.—Texarkana 1988, no writ); *Encore Builders v. Wells*, 636 S.W.2d 722, 723 (Tex. App.—Corpus Christi 1982, no writ).

set it aside on the basis of improper service, the authority of the person served is invariably the focus of the attack.⁴⁴ Previously, some intermediate appellate courts had invalidated the default judgment if the record did not contain proof, independent of statements in the pleadings, citation, and return, as to the agency of the individual served.⁴⁵ Other courts held that statements in the pleadings, citation, and return were sufficient to establish the agency or capacity of the representative served.⁴⁶ Finally, still other courts imposed the burden on the corporate defendant to prove at a hearing following the default judgment that the representative served was not its agent.⁴⁷

In *Pleasant Homes* a trial court had entered a default judgment against a bank. The only showing in the record of the authority or capacity of the party served was a statement by the service officer contained in the citation.⁴⁸ Finding this to be a sufficient showing, the supreme court emphasized that “[i]t is not necessary for either the petition or citation to designate the officer to be served by name if the face of the record affirmatively shows the person’s authority.”⁴⁹ The court noted that if a return indicates that the officer delivered process to a vice-president or president, the return serves as prima facie evidence that the person served was in fact the designated officer.⁵⁰ According to the supreme court, “[a] defendant who contends that the person served was not in fact a proper officer for service has the burden to present evidence to the trial court of improper service by motion for new trial or motion to set aside default judgment.”⁵¹

Rule 107 provides that “[n]o default judgment shall be granted in any cause until the citation . . . shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.”⁵² *Gerdes v. Marion State Bank*⁵³ and *Gibraltar Savings Association v. Kilpatrick*⁵⁴ con-

44. *Id.*

45. See *NBSS, Inc. v. Mail Box, Inc.*, 772 S.W.2d 470, 471 (Tex. App.—Dallas 1989, writ denied); *Hanover Modular Homes of Taft, Inc. v. Corpus Christi Bank & Trust*, 476 S.W.2d 97, 99 (Tex. Civ. App.—Corpus Christi 1972, no writ); *Texaco, Inc. v. McEwen*, 356 S.W.2d 809, 814 (Tex. Civ. App.—Dallas 1962, writ ref’d n.r.e.).

46. See *National Medical Enter. v. Wedman*, 676 S.W.2d 712, 715-16 (Tex. App.—El Paso 1984, no writ); *Hillson Steel Prod., Inc. v. Wirth Ltd.*, 538 S.W.2d 162, 164 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

47. See *Southland Paint Co. v. Thousand Oaks Racket Club*, 724 S.W.2d 809, 810 (Tex. App.—San Antonio 1986, writ ref’d n.r.e.); *Employer’s Reinsurance Corp. v. Brock*, 74 S.W.2d 435, 438 (Tex. Civ. App.—Eastland 1934, writ dismissed).

48. Under the applicable statute governing service on a bank, the president, a vice-president, a cashier or an agent for service of process may be served. See TEX. REV. CIV. STAT. ANN. art. 342-915 (Vernon Supp. 1990). In *Pleasant Homes* neither the petition nor the citation identified the person to be served by name; however, the citation recited the fact that “Beverly Walters, V.P.” was served. See *Allied Bank v. Pleasant Homes, Inc.*, 757 S.W.2d 460, 463 (Tex. App.—Dallas 1988), writ denied, 776 S.W.2d 153 (Tex. 1989).

49. *Id.* at 463.

50. 776 S.W.2d at 154; accord *Gibraltar Sav. Ass’n v. Kilpatrick*, 770 S.W.2d 14, 17 (Tex. App.—Texarkana 1989, writ denied); *West Texas Peterbilt, Inc. v. Paso Del Norte Oil Co.*, 768 S.W.2d 380, 381 (Tex. App.—El Paso 1989, writ denied).

51. 776 S.W.2d at 154.

52. TEX. R. CIV. P. 107.

53. 774 S.W.2d 63 (Tex. App.—San Antonio 1989, writ denied).

54. 770 S.W.2d 14 (Tex. App.—Texarkana 1989, writ denied).

sidered the validity of a default judgment where the omission of a file date on the citation caused uncertainty as to fulfillment of the ten day requirement. The court in *Gerdes*, joining with earlier cases,⁵⁵ set aside the default judgment because, in the absence of a file mark on the citation showing when it had been filed, the record did not affirmatively show compliance with Rule 107.⁵⁶

Gerdes is also significant because, after the defendant launched its appellate attack on the default judgment, the trial court conducted a hearing on the matter and found that the citation had in fact been in the possession of the clerk for the required ten days. On the basis of this finding, the trial court ordered that the omitted file mark be placed on the citation, and the newly-marked citation was made a part of the appellate record by way of a supplemental transcript. Although the evidence adduced at the hearing amply supported the trial court's action, the appellate court concluded that the trial court did not have the authority to add the file mark after the appeal had been perfected.⁵⁷

While the citation in *Kilpatrick* had no file mark showing that the ten day requirement had been met,⁵⁸ the default judgment record contained a verified computer report of the district clerk which provided the necessary filing information and, in turn, established compliance with Rule 107.⁵⁹ Nevertheless, the plaintiff argued that no record existed before the trial court at the time the judge signed the default judgment because, although the data was in the computer, the print-out was not prepared until after such signing. Observing that "[c]omputers are increasingly used to record filings and other events in judicial proceedings," and "[t]hose computer records can be displayed on screens for examination the same as records printed on paper," the appellate court held that "[t]he fact that the computerized record has not yet been reduced to paper writing does not mean it is not a part of the court record, so long as it is capable of being transcribed."⁶⁰

Former Rule 101 of the Texas Rules of Civil Procedure, which set forth the requirements of a citation, stipulated that the clerk should direct the citation to the defendant.⁶¹ The failure to comply with the requirement results in ineffective service and any default judgment based upon it is invalid.⁶² The court reviewed a clerk's noncompliance with this requirement in *ISO Production Management 1982, Ltd. v. M & L Oil & Gas Exploration*,

55. See *Citizens Nat'l Bank-Ennis v. Hart*, 321 S.W.2d 319, 320 (Tex. Civ. App.—Fort Worth 1959, writ ref'd); *Gentry v. Gentry*, 550 S.W.2d 167, 167-168 (Tex. Civ. App.—Austin 1977, no writ); *First Nat'l Bank v. Pacific Cotton Agency*, 329 S.W.2d 504, 505-06 (Tex. Civ. App.—San Antonio 1959, no writ).

56. 774 S.W.2d at 65.

57. *Id.* at 65; accord *Zaragoza v. De La Paz Morales*, 616 S.W.2d 295, 296 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.); *Midwest Piping & Supply Co. v. Page*, 128 S.W.2d 459, 461-62 (Tex. Civ. App.—Beaumont 1939, writ ref'd).

58. 770 S.W.2d at 17.

59. *Id.* at 17.

60. *Id.* at 17-18.

61. TEX. R. CIV. P. 101 (repealed Jan. 1, 1988). The same requirement has been incorporated in TEX. R. CIV. P. 99.

62. See, e.g., *Lemothe v. Cimbalista*, 236 S.W.2d 681, 682 (Tex. Civ. App.—San Antonio

*Inc.*⁶³ The plaintiff sued a limited partnership in its assumed name and, after service was effected, obtained a default judgment. The clerk, however, had directed the citation to the individual who was alleged in the petition to be the president of the corporate general partner, and service was effected on this basis. Emphasizing that the defendant partnership had been sued in its assumed name, the appellate court concluded that the partnership had to be cited in the same fashion in order for the rule to be satisfied and set aside the default judgment.⁶⁴

IV. PLEADINGS

Recently enacted Rule 13⁶⁵, which is aimed at deterring the filing of frivolous pleadings,⁶⁶ was the subject of judicial scrutiny during the survey period.⁶⁷ Rule 13 provides that the signatures of attorneys or parties on a court filing certify that they have read it and that the filing "is not groundless and brought in bad faith or groundless and brought for the purpose of harassment."⁶⁸ "'Groundless', for purposes of the rule, means no basis in law or fact and not warranted by good faith argument for the extension, modification or reversal of existing law."⁶⁹ If a party or attorney signs a filing in violation of the rule, "the court, upon motion or upon its own initiative, shall impose sanctions . . . upon the person who signed it, a represented party, or both."⁷⁰ Since the trial court is clearly empowered to levy sanctions on its own motion and the rule does not provide for advance notice to the offending party, *Goad v. Goad*⁷¹ held that prior notice is not required.

Notably, under Rule 13 a trial court may not impose sanctions except for good cause and, if imposed, the court must set forth the particulars of the

1951, writ ref'd); *Stafford Constr. Co. v. Martin*, 531 S.W.2d 667, 668-70 (Tex. Civ. App.—El Paso 1975, no writ).

63. 768 S.W.2d 354 (Tex. App.—Waco 1989, no writ).

64. *Id.* at 356.

65. TEX. R. CIV. P. 13.

66. See generally *Benedetto & Keltner, Changes in Pleading Practices (Including the Frivolous Suit Question)*, 1987 ST. MARY'S NINTH ANNUAL PROCEDURAL INSTITUTE: CIVIL PROCEDURE 1988—RULES AND STATUTORY CHANGES F-2 to -12 (discussing legislative history, purpose, and effect of rule 13); *Carlson, Procedural Changes Mandated by the 1988 Rule Changes*, 6 ADVOC. 22, 23 (1987) (discussing frivolous suit deterrence purpose of rule 13).

67. See *supra* notes 61-71 and accompanying text.

68. TEX. R. CIV. P. 13; see also FED. R. CIV. P. 11 (analogous federal rule regarding signing of pleadings). See generally 5 C. Wright & A. Miller, *FEDERAL PRACTICE AND PROCEDURE* §§ 1331-1335 (1969 & Supp. 1986) (discussing federal rule analogous to TEX. R. CIV. P. 13).

69. TEX. R. CIV. P. 13. Two filings are, however, exempt from the scope of the amended rule 13. Specifically, the rule provides that neither a general denial nor the amount requested for damages in a pleading constitute a violation. *Id.*

70. TEX. R. CIV. P. 13. The trial court may impose sanctions against the offending party which include disallowance of further discovery, assessment of discovery expenses or taxable costs, establishment of designated facts, refusing to allow the disobedient party to support or oppose claims or defenses, striking pleadings, dismissal of claims, rendition of a default judgment, and contempt. See TEX. R. CIV. P. 215(2)(b) (miscellaneous sanctions), and TEX. R. CIV. P. 215(2)(b)(8) (contempt).

71. 768 S.W.2d 356, 358 (Tex. App.—Texarkana 1989, writ denied), *cert denied*, — U.S. —, 110 S.Ct. 722, 107 L.Ed.2d 742 (1990).

good cause in its sanctions order.⁷² Despite this admonition in the rule, one case during the survey period held that the failure of the trial court to recite facts in its order constituting good cause was not fatal to a levy of sanctions, as it was harmless error.⁷³ The better practice, however, would be for the trial court to specify the factual basis for good cause which supports its sanction order.⁷⁴

Rule 13 loses some effectiveness since it further provides that a trial court may not impose sanctions if, before the earliest of either the 90th day after the court determines a violation or prior to the expiration of the trial court's plenary power, the offending party withdraws or amends the filing to the satisfaction of the court.⁷⁵ Focusing on this aspect of the rule, one court during the survey period held that the rule did not impose on the trial court the burden of notifying the litigant of his right to withdraw or amend the offending pleading.⁷⁶

The most significant interpretation of rule 13 during the survey period, *Powers v. Palacios*,⁷⁷ construed the remedial procedure of withdrawal or amendment. Faced with the likelihood of a summary judgment on her dog bite claim, the plaintiff nonsuited the claim shortly prior to a hearing on the matter. Before the nonsuit was entered, however, the defendant filed a motion for sanctions under Rule 13 and, after the dismissal, the defendant pursued her motion. On the basis of this motion, the trial court ordered the imposition of sanctions. Thereafter, arguing that the trial court had no power to act with respect to the motion, the plaintiff prosecuted an appeal from the order. Relying on Rule 162, which states that a nonsuit "shall have no effect on any motion for sanctions . . . pending at the time of the dismissal,"⁷⁸ the appellate court affirmed, ruling that the trial court retained jurisdiction to dispose of the defendant's motion for sanctions.⁷⁹

One court addressed the issue of whether a general prayer for relief can sustain the award of prejudgment interest.⁸⁰ A petition in a Texas Deceptive Trade Practices Act case, which contained only a general prayer for relief, was held in *Wise v. DeToca*⁸¹ not to authorize an award of prejudgment interest. The *Wise* decision, however, should be considered in light of other cases that have held, when prejudgment interest is permitted by contract or

72. TEX. R. CIV. P. 13.

73. See *Powers v. Palacios*, 771 S.W.2d 716, 718-19 (Tex. App.—Corpus Christi 1989, writ denied).

74. See *Cloughly v. NBC Bank-Seguin*, 773 S.W.2d 652, 656-57 (Tex. App.—San Antonio 1989, writ denied).

75. *Id.*

76. 773 S.W.2d at 657.

77. 771 S.W.2d at 716.

78. TEX. R. CIV. P. 162.

79. 771 S.W.2d at 718.

80. *Wise v. DeToca*, 761 S.W.2d 467, 470 (Tex. App.—Houston [14th Dist.] 1988, no writ).

81. 761 S.W.2d at 470. *Accord* *Texas Indus., Inc. v. Lucas*, 715 S.W.2d 683, 686-88 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); *Dawson V. Garcia*, 666 S.W.2d 254, 267-68 (Tex. App.—Dallas 1984, no writ).

statute, that a petition containing a general prayer for relief is sufficient.⁸²

V. DISQUALIFICATION

A. Disqualification of Judges

The use of assigned or visiting judges to hear pretrial matters or to preside over trials has generated its own body of case law in the disqualification area. The legislature recently amended the Texas Government Code to permit a litigant to disqualify an assigned or visiting judge, provided an objection is "filed before the first hearing or trial, including pretrial hearings, over which the assigned judge is to preside."⁸³ In *Lewis v. Leftwich*⁸⁴ upon receiving notice that the case would be tried before an assigned judge beginning that afternoon, counsel for one of the litigants filed a written objection to the assignment and then appeared at the docket call to present the matter. At the behest of the opposing party, the assigned judge overruled the objection as being untimely, presumably because it was not presented at an earlier conference in the judge's chambers. Reversing, the court of appeals held that an objection is timely if it is made in open court before the assigned judge calls the case to hearing or trial.⁸⁵ The court stated that a litigant need not risk wasting his one objection to an assigned judge by presenting it prematurely.⁸⁶ Rather, observed the court, it is only when an assigned judge has actually taken the bench and called the case to trial as a matter of record, that it is clear that the assigned judge will hear the trial, and only then can a litigant planning to object be assured that his objection will be effective.⁸⁷ Finally, the court concluded that, once a litigant files an objection to an assigned judge in accordance with the applicable statute, the trial judge is automatically disqualified as a matter of law.⁸⁸

*Money v. Jones*⁸⁹ is a warning that the requirement that an objection to a visiting judge be made before the first hearing must be strictly followed. When the plaintiff's attorney learned that a visiting judge would hear his case when it went to trial, the attorney appeared before the judge with a written motion for continuance and made an oral motion to excuse the visiting judge. The trial judge stated that, if a written objection to his sitting was filed, he would excuse himself. Moreover, when the judge asked the attorney

82. See *Sanchez v. Matthews*, 636 S.W.2d 455, 461 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); *Arndt v. National Supply Co.*, 633 S.W.2d 919, 924 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.); *Arkansas Louisiana Gas Co. v. Allison*, 620 S.W.2d 207, 212 (Tex. Civ. App.—Tyler, 1981), *rev'd on other grounds*, 624 S.W.2d 566 (Tex. 1981); *Golden v. Murphy*, 611 S.W.2d 914, 917 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). See also *Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109, 117 (Tex. 1978) (prejudgment interest recoverable as matter of right when ascertainable sum of money is determined to have been due and payable at date certain prior to judgment).

83. TEX. GOV'T CODE ANN. § 74.053(c) (Vernon Supp. 1990).

84. 775 S.W.2d 848 (Tex. App.—Dallas 1989, no writ).

85. *Id.* at 850.

86. *Id.* at 850.

87. *Id.* at 850.

88. *Leftwich*, 775 S.W.2d at 851.

89. 766 S.W.2d 307 (Tex. App.—Dallas 1989, writ denied).

if he wanted to file such an objection, the attorney responded that he would reserve his right to do so but wanted to proceed on his motion for continuance. When the judge proceeded with a hearing on the request for continuance and overruled it, the attorney refused to go forward with the trial and the trial judge dismissed the plaintiff's suit. On an appeal from the dismissal, the appellate court affirmed the trial court's actions, concluding that the plaintiff had waived his objection to the visiting judge by not presenting it before the hearing on the motion for continuance.⁹⁰

Rule 18a,⁹¹ which governs the disqualification of judges for cause, provides that a party may file a motion for disqualification at least ten days before the date set for trial.⁹² Before proceedings in the case can continue, the judge to whom the motion is directed must either excuse himself or refer the motion to the presiding judge of the district for determination.⁹³ In *Lamberti v. Tschoepe*⁹⁴ the court held that when a trial judge is presented with such a recusal motion, regardless of its sufficiency, it is mandatory that the judge either recuse himself or refer the case to the presiding judge.⁹⁵ The failure or the trial judge to pursue one of these two courses of action constitutes an abuse of discretion as a matter of law.⁹⁶

B. Disqualification of Counsel

Satellite skirmishes in civil litigation continue to occur over the disqualification of counsel. *NCNB Texas National Bank v. Coker*,⁹⁷ a recent decision of the Texas Supreme Court, dealt with one such situation. The plaintiff bank sought to recover from the two defendants funds allegedly due it on credit insurance policies. Counsel for the bank, however, had previously represented the two defendants in an earlier suit that they had brought against an insurance company seeking a declaration of rights under certain insurance treaties between the parties. Canon 9 of the Texas Code of Professional Responsibility mandates that lawyers avoid any activity that might give rise to an appearance of impropriety.⁹⁸ Canon 4 imposes on lawyers the duty to preserve the confidences of their clients, both present and former.⁹⁹ Relying on the combined effect of these two canons, the defendants obtained the disqualification in the trial court of the bank's counsel.

On review of the matter by mandamus, the supreme court reiterated that, before disqualifying counsel in a suit brought against a former client, the

90. *Id.* at 308.

91. TEX. R. CIV. P. 18a.

92. TEX. R. CIV. P. 18a(a).

93. TEX. R. CIV. P. 18a(c), (d).

94. 776 S.W.2d 651 (Tex. App.—Dallas 1989, writ requested).

95. *Id.* at 652; *accord* Greenberg, Benson, Fisk & Fiedler, P.C. v. Howell, 685 S.W.2d 694, 695 (Tex. App.—Dallas 1984, no writ).

96. 776 S.W.2d at 652.

97. 765 S.W.2d 398 (Tex. 1989).

98. SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, § 9 (Code of Professional Responsibility) DR 2-101 (Vernon Supp. 1990) [hereinafter TEXAS CODE OF PROFESSIONAL RESPONSIBILITY].

99. TEXAS CODE OF PROFESSIONAL RESPONSIBILITY at § 4.

trial court must find that the matters embraced within the pending suit are substantially related to the factual matters in the prior representation.¹⁰⁰ Furthermore, focusing on the movant's burden in such a situation, the court concluded that given the severity of the remedy, the movant has to establish by a preponderance of the facts the substantial relationship between the two representations.¹⁰¹ If the movant can meet this burden, concluded the court, the movant is entitled to a conclusive presumption that confidences relevant to the subject matter of the pending suit were imparted to the former counsel and, accordingly, the movant is not forced to reveal the very confidences he wishes to protect.¹⁰² By proving a substantial relationship between the two representations, the court reasoned that the party establishes as a matter of law that an appearance of impropriety exists and counsel must be disqualified.¹⁰³ Turning to the record before it and focusing on the trial court's order of disqualification, the supreme court concluded that the substantial relation test had not been followed and held that the trial court's use of an improper legal standard was an abuse of discretion.¹⁰⁴

VI. PARTIES

Texas Rule of Civil Procedure 42 provides that one or more members of a class may sue on behalf of the entire class if, among other things, the claims of the representative parties are typical of the claims of the class and the representative parties will fairly and adequately protect the interests of the class.¹⁰⁵ The case of *Texas Department of Mental Health & Mental Retardation v. Petty*¹⁰⁶ is informative in its interpretation of these requirements. The trial court, in a suit seeking to modify the state's involuntary commitment procedure brought by a mental patient and a non-profit corporation formed to advocate the interests of mentally ill persons, approved the corporation as a representative of the class. On an interlocutory appeal from the order certifying the class, the court stated that, since the corporation was neither aggrieved by the challenged procedure nor composed of members who were, it lacked standing to pursue a claim against the state agency and, therefore, possessed no claims typical of the class.¹⁰⁷ Moreover, since the corporation occupied the dual role of class representative and, through its full-time legal staff, was appearing as counsel of record and seeking the recovery of attor-

100. 765 S.W.2d at 400; *accord*, P & M Elec. Co. v. Godard, 478 S.W.2d 79, 80-81 (Tex. 1972); Hogard v. Snodgrass, 770 S.W.2d 577, 582 (Tex. App.—Dallas 1989, no writ); J.K. & Susie L. Wadley Research & Blood Bank v. Morris, 776 S.W.2d 271, 278 (Tex. App.—Dallas 1989, no writ); Enstar Petroleum Co. v. Mancias, 773 S.W.2d 662, 664 (Tex. App.—San Antonio 1989 mand. overr.); Lott v. Lott, 605 S.W.2d 665, 667-68 (Tex. Civ. App.—Dallas 1980, writ dism'd).

101. *Coker*, 765 S.W.2d at 400; *accord* Snodgrass, 770 S.W.2d at 582.

102. *Coker*, 765 S.W.2d at 400; *accord* Morris, 770 S.W.2d at 281; *see* Godard, 478 S.W.2d at 78, 80-81.

103. *Coker*, 765 S.W.2d at 400; *accord* Snodgrass, 770 S.W.2d at 582-83.

104. *Coker*, 765 S.W.2d at 400.

105. TEX. R. CIV. P. 42

106. 778 S.W.2d 156 (Tex. App.—Austin, 1989, writ requested).

107. *Id.* at 164-65.

ney's fees, the court concluded it had a conflict of interest.¹⁰⁸

Specifically, the court noted that any attorney acting simultaneously as a class representative and as class counsel has an inherent conflict of interest due to his duty as representative and his economic interest in his attorney's fees. The court concluded, therefore, that the corporation could not satisfy the adequacy requirement to becoming a representative.¹⁰⁹ Based on both grounds, the court vacated the trial court's order insofar as it allowed the corporation to serve as a class representative.¹¹⁰

*Tarrant County Commissioners Court v. Markham*¹¹¹ also focused on the requirement that the class representative have a personal stake in the outcome of the controversy. The plaintiff, a former pretrial detainee who was incarcerated briefly in the county jail, filed a class action complaining of the conditions in the jail. After the trial court certified the class, approving the plaintiff as its representative, an interlocutory appeal of the matter was taken. Emphasizing that the plaintiff had been released from jail by the time suit was filed, the court concluded that the plaintiff lacked standing to sue since he was not affected by the jail's conditions at the time suit was brought.¹¹²

Finally, *Express-News Corp. v. Spears*¹¹³ considered an unusual set of procedural events. After entry of a final judgment and an order sealing the record in a well-publicized suit, a newspaper, one of its reporters, and a local taxpayer sought to intervene, presumably to unseal the record. After the trial court struck their intervention, the plaintiffs filed a mandamus proceeding with the court of appeals seeking reversal of the trial court's action. Finding their attempted intervention to be untimely, the court held that the plaintiffs could not intervene after entry of the judgment.¹¹⁴

VII. VENUE

Two cases decided during the survey period addressed the mandatory venue provision for suits involving real property.¹¹⁵ In *Trafalgar House Oil & Gas Inc. v. De Hinojosa*¹¹⁶ the plaintiff sued for liquidated damages alleging that defendants had breached the notice of assignment provision in an oil and gas lease. Because the lease provided that all payments due to plaintiff would be made in Jim Wells County, plaintiff filed his suit in that county on

108. *Id.* at 167.

109. *Id.* at 167-68.

110. *Petty*, 778 S.W.2d at 168.

111. 779 S.W.2d 872 (Tex. App.—Fort Worth 1989, writ requested).

112. *Id.* at 875. The court also admonished the trial court for certifying a larger class than the plaintiff sought in his pleadings, so as to include former inmates and thereby avoid the defect in standing. *Id.* at 876. Striking down the unsupported order, the court held that the trial court lacked jurisdiction to issue such a ruling. *Id.* at 876; see *Birds Constr., Inc. v. Gonzales*, 595 S.W.2d 926, 929 (Tex. Civ. App.—Corpus Christi 1981, no writ).

113. 766 S.W.2d 885 (Tex. App.—San Antonio 1989, mand. overr.) (2-1 decision).

114. *Id.* at 888; accord *First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex. 1984); *Comal County Rural High School Dist. v. Nelson*, 158 Tex. 564, 314 S.W.2d 956, 957 (1958).

115. See TEX. CIV. PRAC. & REM. CODE ANN. § 15.011 (Vernon 1986).

116. 773 S.W.2d 797 (Tex. App.—San Antonio 1989, no writ).

the basis of § 15.035(a) of the venue statute.¹¹⁷ In their motion to transfer, defendants contended that venue was mandatory in the county where the lease was located pursuant to § 15.011,¹¹⁸ because the case involved an action to recover an interest in real property. The court of appeals disagreed, holding that the suit was a breach of contract action to recover liquidated damages rather than an action to recover land or quiet title.¹¹⁹ According to the court, the ultimate or dominant purpose of the suit determines whether the case falls under § 15.011.¹²⁰ Because § 15.011 must be strictly construed due to its mandatory nature, the court held further that it should not be applied when a suit does not fall clearly within one of the categories specified by the statute.¹²¹

Likewise, in *Stiba v. Bowers*¹²², the court refused to apply § 15.011 in a declaratory judgment suit seeking the construction of a will and an accounting. The plaintiff in *Stiba* had filed his suit in the county where the will was originally probated. Although the decedent's estate consisted primarily of real property that was also located in the county of suit, the court concluded that the dominant purpose of the suit was for the construction of the will and not for the recovery of the land forming the corpus of the decedent's estate.¹²³ The court did acknowledge, however, that a suit could be governed by § 15.011 in an appropriate case even though it was cast as a declaratory judgment action.¹²⁴

The court in *Stiba* also rejected plaintiff's alternative contention that venue was proper in the county of suit because the will had been probated in that county.¹²⁵ Relying on the general venue rule,¹²⁶ plaintiff argued that the cause of action accrued in the county of suit because the act of probating the will was part of the cause of action for its construction. According to the court, however, probate is merely a part of the process by which courts recognize the validity of a will, and the probating of a will is not a part of the cause of action for its construction.¹²⁷

117. TEX. CIV. PRAC. & REM. CODE ANN. § 15.035(a) (Vernon 1986) provides: "[I]f a person has contracted in writing to perform an obligation in a particular county, expressly naming the county or a definite place in that county by that writing, suit on or by reason of the obligation may be brought against him either in that county or in the county in which the defendant has his domicile."

118. TEX. CIV. PRAC. & REM. CODE ANN. § 15.011 (Vernon 1986) provides that certain actions involving real property, including an action for recovery of an interest in real property, shall be brought in the county in which all or part of the property is located.

119. 773 S.W.2d at 798.

120. *Id.* (citing *Scarth v. First Bank & Trust Co.*, 711 S.W.2d 140, 142 (Tex. App.—Amarillo 1986, no writ)).

121. *Id.* at 798.

122. 756 S.W.2d 835 (Tex. App.—Corpus Christi 1988, no writ).

123. *Id.* at 840.

124. *Id.* at 839.

125. *Id.*

126. TEX. CIV. PRAC. & REM. CODE ANN. § 15.001 (Vernon 1986) provides generally that a lawsuit may be brought in the county in which all or part of the cause of action accrued or in the county of defendant's residence if defendant is a natural person.

127. 756 S.W.2d at 837.

On its face, *Krechnak v. Fulton*¹²⁸ appears to expand the venue rules for suits on contracts. As previously noted, § 15.035(a) of the venue statute permits suits on written contracts to be filed in any county expressly named in the contract as the site for performance of the obligations due under the contract.¹²⁹ In *Krechnak* the plaintiff was unable to take advantage of this provision because, apparently, no written contract existed between the parties. Nevertheless, in opposing defendant's motion to transfer venue to the county of defendant's residence, plaintiff contended by affidavit that the defendant had orally agreed to make payment in the county of suit. The court observed that payment in the county of suit was an essential part of the cause of action for breach of contract.¹³⁰ Since defendant failed to make the required payment, therefore, a portion of the cause of action accrued in the county of suit and venue was proper there in accordance with § 15.001.¹³¹

VIII. LIMITATIONS

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 the plaintiff should have reasonably discerned the facts that establish the cause of action.¹³² In *Woods v. William M. Mercer, Inc.*¹³³ the supreme court acknowledged that some of its prior decisions about the rule have been inconsistent, thereby creating confusion about the rule's application.¹³⁴ Attempting to end at least part of this confusion, the court in *Woods* held that the discovery rule is a plea in confession and avoidance.¹³⁵ A party seeking to avail itself of the discovery rule, therefore, waives the plea if it fails to plead the required facts affirmatively.¹³⁶ Since that same party generally has greater access to the facts necessary to establish the rule's application, the court further held that the party asserting the discovery rule bears the burden at trial of proving the plea and securing

128. 759 S.W.2d 524 (Tex. App.—Amarillo 1988, writ denied).

129. See *supra* note 3.

130. 759 S.W.2d at 526, (citing *Phillio v. Blythe*, 12 Tex. 124, 127-28 (1854)).

131. 759 S.W.2d at 526. The court distinguished an earlier venue statute which provided that suit was maintainable in the county in which the cause of action *arose*, and thereby implied, without elaboration, that there is a difference between that standard and the standard for determining the county in which a cause of action *accrued*. *Id.*

132. See, e.g., *Hays v. Hall*, 488 S.W.2d 412, 414 (Tex. 1972) (statute of limitations begins to run from time of discovery of true facts or from date they should, using ordinary care and diligence, have been discovered); *Anderson v. Sneed*, 615 S.W.2d 898, 901 (Tex. Civ. App.—El Paso 1981, no writ) (utilizing discovery rule to determine when cause of action accrued). See generally *Figari, Graves & Gordon, Texas Civil Procedure, Annual Survey of Texas Law*, 36 Sw. L.J. 435, 450 (1982) (discussing discovery rule generally).

133. 769 S.W.2d 515 (Tex. 1988)

134. *Id.* at 517. Compare *Weaver v. Witt*, 561 S.W.2d 792, 794 (Tex. 1977) (discovery rule "is not a plea in confession and avoidance. . .") with *Smith v. Knight*, 608 S.W.2d 165, 166 (Tex. 1980) (discovery rule is "an affirmative defense to the statute of limitations.").

135. 769 S.W.2d at 517. A plea in confession and avoidance is one which avows and confesses the truth of the averments of fact in the petition, but then proceeds to allege a new matter which tends to deprive those facts of their ordinary legal effect, or to obviate, neutralize, or avoid them. BLACK'S LAW DICTIONARY 269 (5th ed. 1979).

136. 769 S.W.2d at 518.

favorable findings thereon.¹³⁷ For purposes of rule 279,¹³⁸ moreover, the discovery rule is an independent ground of defense with but a single element.¹³⁹ Consequently, the plaintiff's failure to request an appropriate jury issue relating to the discovery rule in *Woods* was not excused by his opposition's failure to point out that omission to the trial court by objection.¹⁴⁰

The plaintiff's attempt to rely on a variation of the discovery rule in *Lathem v. Richey*¹⁴¹ met with a similar lack of success. More than four years after deeding certain property to the defendant, plaintiff filed suit to reform the deed on the basis of mutual mistake. In response to the defendant's argument that the four-year statute of limitations applicable to suits for reformation of a deed barred the claim,¹⁴² the plaintiff alleged that he did not discover the mistake until less than four years before he filed the suit. In rejecting plaintiff's contention,¹⁴³ the court of appeals acknowledged that the statute of limitations generally does not begin to run in a suit for reformation on the basis of mutual mistake until the mistake has been discovered or until it reasonably should have been discovered by a person of ordinary care through the exercise of due diligence.¹⁴⁴ The court observed, however, that an exception to this general rule exists if the person seeking reformation is the grantor of the deed.¹⁴⁵ In such cases, absent fraud, the statute of limitations begins to run from the date of the deed's execution because a grantor is charged as a matter of law with the contents of his deed from the date it is executed.¹⁴⁶ The court also held that the statute of limitations barred plaintiff's alternative claim for reformation on the basis of fraud, which plaintiff had added by amendment ten years after commencement of the suit.¹⁴⁷ According to the court, the amended pleading did not relate back¹⁴⁸ to the original pleading for the purpose of tolling the statute of limitations since the cause of action initially asserted by plaintiff was itself barred by limitations when the original pleading was filed.¹⁴⁹

During the survey period, courts again focused their scrutiny on the limi-

137. *Id.* In the summary judgment context, on the other hand, the burden rests on the movant-defendant to negate the discovery rule. *Id.* at 518 n. 2, citing, *Weaver v. Witt*, 561 S.W.2d 792, 794 (Tex. 1977).

138. TEX. R. CIV. P. 279.

139. 769 S.W.2d at 518.

140. *Id.*

141. 772 S.W.2d 249 (Tex. App.—Dallas 1989, writ denied).

142. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1986); *Miles v. Martin*, 159 Tex. 336, 321 S.W.2d 62, 69-70 (1959).

143. 772 S.W.2d at 253.

144. 772 S.W.2d at 253 (citing *Sullivan v. Barnett*, 471 S.W.2d 39, 46 (Tex. 1971)).

145. 772 S.W.2d at 253.

146. The court noted that under various circumstances the presumption that a grantor has immediate knowledge of a mistake in a deed is rebuttable. *Id.*

147. 772 S.W.2d at 255.

148. *Id.* at 255. Under the "relation back" doctrine, TEX. CIV. PRAC. & REM. CODE ANN. § 16.068 (Vernon 1986), if a filed pleading relates to a claim that is not barred by limitations when the pleading is filed, an amendment to that pleading which changes the facts or grounds of liability is not subject to a plea of limitation unless the amendment is wholly based upon a new, distinct, or different transaction or occurrence.

149. 772 S.W.2d at 255.

tations provision contained in the Texas health care statute.¹⁵⁰ The supreme court, for example, in what is becoming an annual tradition, addressed a constitutional issue raised by the statute.¹⁵¹ In *Hellman v. Mateo*¹⁵² the court held that a plaintiff preserved her right to challenge the constitutionality of article 4590i, as applied to her, by alleging that application of the two-year limitation statute cut off her cause of action before she knew or should have known that a cause of action existed.¹⁵³

A more extensive treatment of the statute appeared in the Amarillo court of appeals' opinion in *Rhodes v. McCarron*.¹⁵⁴ The plaintiff in *Rhodes* underwent surgery in late July, 1984, for leg injuries he suffered in an automobile accident. Approximately one year later he learned about additional injuries resulting from the accident that had not been diagnosed or treated while he was originally hospitalized. After making this discovery, the plaintiff duly sent the prescribed notice¹⁵⁵ of a health care liability claim to the physicians who treated him. Subsequently, plaintiff filed a suit against those physicians. As a result of discovery proceedings in the suit, the plaintiff learned in late August, 1986, that yet another physician, McCarron, had participated in his original treatment. Accordingly, in early September the plaintiff sent a notice of claim letter to McCarron, and two months later he joined McCarron as a defendant in the suit. Ultimately, the trial court granted summary judgment in favor of McCarron on the basis that plaintiff's claim against McCarron was barred by limitations.¹⁵⁶

On appeal, plaintiff argued that his notice to the original defendants tolled the statute of limitations for 75 days, which enlarged the limitations period to mid-October, 1986. Since the plaintiff discovered McCarron's involvement during this period of time, the plaintiff contended that his second notice sent to McCarron was timely and tolled the statute for an additional seventy-five days for purposes of joining McCarron as a defendant. Section 4.01(c) of the statute, however, provides that delivery of the required sixty-day notice will toll the statute of limitations for a period of seventy-five days as to all potential, as well as actual, parties to the suit.¹⁵⁷ Thus, while the court agreed that plaintiff's original notice enlarged by seventy-five days the limitations period within which McCarron could be joined as a defendant,¹⁵⁸ plaintiff could not, by sending a second notice directly to McCarron, further expand the period in which McCarron could be joined.¹⁵⁹ The plaintiff's

150. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1990) (two-year statute of limitations on health care claims).

151. *Hellman v. Mateo*, 772 S.W.2d 64 (Tex. 1989).

152. 772 S.W.2d 64 (Tex. 1989)

153. *Id.* at 66.

154. 763 S.W.2d 518 (Tex. App.—Amarillo 1988, writ denied).

155. See TEX. REV. CIV. STAT. ANN. art. 4590i, § 4.01 (Vernon Supp. 1990), which provides that any person asserting a health care liability claim shall give written notice of his claim to each health care provider that he is asserting a claim against at least 60 days before he files a suit based on the claim.

156. 763 S.W.2d at 521.

157. TEX. REV. CIV. STAT. ANN. art 4590i § 4.01(c) (Vernon Supp. 1990).

158. 763 S.W.2d at 522-23.

159. *Id.*

reasoning, observed the court, would permit a clever plaintiff to carefully space his notice letters and thereby extend the two-year limitations period for as many additional seventy-five-day periods as there were defendants.¹⁶⁰

The court likewise rejected plaintiff's constitutional challenge to the statute.¹⁶¹ According to the plaintiff, the summary judgment was improper under the supreme court's holding in *Morrison v. Chan*¹⁶² because a material issue of fact existed as to whether he had a reasonable opportunity to discover McCarron's alleged negligence within the two-year period of limitations. The court of appeals concluded, however, that *Morrison* declared the statute unconstitutional only to the extent it was applied to cut off a litigant's cause of action before he had a reasonable opportunity to discover the wrong and bring suit.¹⁶³ The statute was not unconstitutional as applied to the plaintiff then, because he discovered his injury more than a year before limitations ran on his action against McCarron.¹⁶⁴ The court held that plaintiff's reliance on fraudulent concealment was equally misplaced.¹⁶⁵ According to the court, any duty McCarron had under the statute to disclose the injury ceased once the physician-patient relationship terminated.¹⁶⁶ Because there was no evidence that this relationship continued beyond August 4, 1984, nor was there any evidence McCarron had actual knowledge of the injury and had a fixed purpose to conceal it, plaintiff could not rely on fraudulent concealment as a basis for extending the limitation's cut-off.¹⁶⁷

IX. DISCOVERY

A. Discovery Procedures

Any trial practitioner who drafts Rule 167¹⁶⁸ document requests should review the supreme court's opinion in *Loftin v. Martin*.¹⁶⁹ In that mandamus proceeding, the defendant had served a request for production of documents that sought, among other things, all documents that the plaintiff contended supported its cause of action. The plaintiff objected to this request on the basis that it was so vague, broad, and unclear that the plaintiff

160. *Id.*

161. *Id.* at 523.

162. 699 S.W.2d 205 (Tex. 1985).

163. 763 S.W.2d at 523.

164. *Id.* In so holding, the court observed that § 10.01 withstood the constitutional attack launched in *Morrison* because the plaintiff there discovered her injury approximately eighteen months before the limitations period expired. *Id.* See *Morrison*, 699 S.W.2d at 207.

165. 763 S.W.2d at 523-24. Fraudulent concealment estops a defendant, with an undischarged duty of disclosure, from relying on limitations until the plaintiff learns or, through the exercise of reasonable diligence, should have learned of his right of action. See *Borderlon v. Peck*, 661 S.W.2d 907, 908 (Tex. 1983).

166. 763 S.W.2d at 524 (citing *Borderlon*, 661 S.W.2d at 910 (Barrow, J., dissenting)).

167. 763 S.W.2d at 524. The court also rejected plaintiff's contention that McCarron's absence from the state tolled the limitations statute, holding that TEX. CIV. PRAC. & REM. CODE ANN. § 16.063 was expressly inapplicable to medical malpractice claims. *Id.*; see *Hill v. Milani*, 686 S.W.2d 610, 611 (Tex. 1985), discussed in 1986 *Annual Survey*, *supra* note 119, at 502.

168. TEX. R. CIV. P. 167.

169. 776 S.W.2d 145 (Tex. 1989).

could not determine with reasonable certainty the documents it was being called on to produce. The supreme court agreed with this characterization.¹⁷⁰ According to the court, Rule 167 permits a party to request particular classes or types of documents in a request for production, but, unlike interrogatories and depositions, may not be used simply to explore.¹⁷¹

Two other cases of interest involving written discovery requests that were decided during the Survey period were *County of Dallas v. Harrison*,¹⁷² and *Benger Builders, Inc. v. Business Credit Leasing, Inc.*¹⁷³ In *Harrison*, the court held that a Rule 167 request for production of all photographs to be used at trial did not include a request for production of videotape recordings.¹⁷⁴ The court based its conclusion on the fact that Rule 166b(2)(6),¹⁷⁵ which defines the scope of discovery for documents and tangible things,¹⁷⁶ differentiates between photographs and videotapes.¹⁷⁷ In *Benger Builders*, the court provided guidance on the interplay of the various procedural rules for computing time in connection with responses to requests for admissions.¹⁷⁸ Specifically, the court concluded that Rule 21a,¹⁷⁹ providing an additional three days to any time period where service is made by mail, and Rule 4,¹⁸⁰ extending the period for timely filing of a pleading to the next day that is not a Saturday, Sunday, or legal holiday, are both applicable to requests for admissions.¹⁸¹ Thus, under the circumstances presented in *Benger Builders*, the answering party actually had thirty-five days in which to respond to the requests for admissions.¹⁸²

Finally, two cases decided during the survey period addressed the issue of where a party may take depositions. The first, *Wal-Mart Stores, Inc. v. Street*,¹⁸³ added the latest chapter in the continuing saga of a plaintiff's efforts to depose Sam Walton, the Chairman of the Board of Directors of Wal-Mart Stores, Inc.. As readers of the 1989 Annual Survey will recall, the supreme court previously held that the trial judge's order requiring Walton, a resident of Arkansas, to give his deposition in Fort Worth constituted an abuse of discretion.¹⁸⁴ Following that ruling, the trial court ordered, with the parties' agreement, that the deposition take place at the defendant's

170. *Id.* at 148.

171. *Id.*, (quoting Steely & Gayle, *Operation of the Discovery Rules*, 2 HOUSTON L. REV. 222, 223 (1964)). See also *Lunsmann v. Spector*, 761 S.W.2d 112, 113-14 (Tex. App.—San Antonio 1988, no writ) (interrogatory asking for any information associated with "this cause of action" was overly broad).

172. 759 S.W.2d 530 (Tex. App.—Dallas 1988, no writ).

173. 764 S.W.2d 336 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

174. 759 S.W.2d at 531.

175. TEX. R. CIV. P. 166b(2)(6).

176. *Id.*

177. *Harrison*, 759 S.W.2d at 531.

178. *Benger Builders*, 764 S.W.2d at 337-38.

179. TEX. R. CIV. P. 21a.

180. TEX. R. CIV. P. 4.

181. 764 S.W.2d at 338.

182. *Id.* at 337-38.

183. 761 S.W.2d 587 (Tex. App.—Fort Worth 1988, mand. overr.).

184. *Wal-Mart Stores, Inc. v. Street*, 754 S.W.2d 153, 155 (Tex. 1988).

headquarters in Bentonville, Arkansas.¹⁸⁵ Prior to the deposition, however, Walton sought and obtained a protective order from an Arkansas court, moving the situs of the deposition to the courthouse in Bentonville, which was approximately one mile from the defendant's headquarters.¹⁸⁶ The plaintiff's attorney refused to travel to the courthouse and moved instead for sanctions. The trial court granted this motion, entered a default judgment as to liability, and ordered the defendant to produce Walton in the courthouse in Fort Worth for his deposition.¹⁸⁷ In the event the defendant failed to produce Walton, the trial court ordered that additional sanctions would be imposed each day, with the sanctions eventually reaching the level of \$1,000,000 per day.¹⁸⁸

On petition for writ of mandamus filed by the defendant, the court of appeals held that the trial court did not abuse its discretion in ordering Walton to give his deposition in Fort Worth.¹⁸⁹ The court stated that neither the Texas procedural rules nor the supreme court's prior decision in this controversy granted Walton an absolute right to be deposed in the county of his residence or business.¹⁹⁰ Instead, the court noted that Rule 201(5)¹⁹¹ provides that, apart from those customary locales, a deposition may also be held at such other convenient place as may be directed by the court.¹⁹² Unlike the trial court's prior order, the court of appeals concluded that the record now supported a finding that Fort Worth was a reasonable and convenient place to take the deposition.¹⁹³ The court based this conclusion on facts that the trial court judicially noticed regarding Walton's contacts with Texas,¹⁹⁴ as well as Walton's interference with the previously agreed-upon deposition.¹⁹⁵

In contrast to *Wal-Mart Stores*, the court of appeals in *Borden, Inc. v. Valdez*,¹⁹⁶ found no reasonable basis for ordering that the deposition of a third-party witness, an attorney, be held in a county other than that in which he resided and conducted his business.¹⁹⁷ In *Borden* no agreement existed between the parties to take the deposition elsewhere, and no other evidence presented showed that it was reasonable for the deponent to travel to the county selected by the court. Based upon these facts the court held that the deposition should have been conducted in the county where the witness

185. 761 S.W.2d at 589.

186. *Id.*

187. *Id.* at 589.

188. *Id.*

189. *Id.* at 590-91. Because an adequate remedy on appeal was available to the defendant, with respect to the sanctions imposed by the trial court, the court of appeals held that mandamus was not available to challenge that aspect of the order. *Id.* at 589.

190. *Id.* at 591.

191. TEX. R. CIV. P. 201(5).

192. 761 S.W.2d at 591.

193. *Id.* at 590.

194. *Id.*

195. *Id.*

196. 773 S.W.2d 718 (Tex. App.—Corpus Christi 1989, no writ).

197. *Id.* at 721.

resided.¹⁹⁸

B. Privileges and Exemptions

Rule 166(3)(d) of the Texas Rules of Civil Procedure exempts from discovery communications between agents or representatives of a party that are made subsequent to the events upon which suit is based and in anticipation of the prosecution or defense of the claims made a part of the pending litigation.¹⁹⁹ The Texas Supreme Court has construed this exemption to apply only in those cases in which the communication is made after suit is filed or after good cause exists to believe suit will be filed.²⁰⁰ In *Flores v. Fourth Court of Appeals*,²⁰¹ the court tried to provide guidance in the interpretation of this test.²⁰²

Flores arose from a worker's compensation suit against the City of San Antonio. The City objected to producing a report prepared by a claims supervisor employed by an independent adjusting firm hired by the City. The supervisor prepared the report after the plaintiff filed his claim for compensation with the Industrial Accident Board, but before the Board held a hearing on such claim. The trial court ordered the report produced,²⁰³ but the court of appeals conditionally granted the City's writ of mandamus and directed the trial judge to vacate his order.²⁰⁴ The supreme court, with three justices dissenting, held that the court of appeals abused its discretion²⁰⁵ and that the trial court's order requiring production of the report should be reinstated.²⁰⁶

The court first rejected the City's contention that the plaintiff's filing of a claim with the Industrial Accident Board constituted the commencement of litigation for purposes of Rule 166b(3)(d).²⁰⁷ The court then enunciated a two-prong analysis for determining whether there is good cause to believe a suit will be filed.²⁰⁸ The first prong is an objective one, wherein the court gives consideration to outward manifestations that indicated litigation was imminent.²⁰⁹ The second prong is subjective: did the party opposing discovery have a good faith belief that a lawsuit was forthcoming.²¹⁰ A proponent must meet both prongs of this test to establish the existence of good cause to believe a suit will be filed.²¹¹ Using this analysis, the court concluded that the report in question was prepared in the usual and customary course of the

198. *Id.*

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

200. See, e.g., *Stringer v. Eleventh Court of Appeals*, 720 S.W.2d 801, 802 (Tex. 1986); *Allen v. Humphreys*, 559 S.W.2d 798, 803 (Tex. 1977).

201. 777 S.W.2d 38 (Tex. 1989).

202. *Id.* at 39-42.

203. *Id.* at 39.

204. *Id.*

205. *Id.* at 42.

206. *Id.*

207. 777 S.W.2d at 39-40.

208. *Id.* at 40-41.

209. *Id.*

210. *Id.* at 41.

211. *Id.*

City's business.²¹²

As a postscript to its opinion, the majority in *Flores* encouraged the Texas Bar to utilize the recently amended Rule 166b(3)(e)²¹³ as a mechanism to alleviate disputes over whether an investigation was undertaken in anticipation of litigation.²¹⁴ That section provides that a party may obtain discovery of otherwise exempt party communications upon a showing of substantial need for the material and inability, without undue hardship, to obtain the substantial equivalent by other means.²¹⁵ Apparently, the majority did not believe that this will be a difficult standard to meet.

Notwithstanding the supreme court's efforts, the lower courts have continued to struggle, both before and after *Flores*, with the question of whether a party communication was made in anticipation of litigation. For example, in *Toyota Motor Sales, U.S.A., Inc. v. Heard*,²¹⁶ the trial court ruled that the defendant had not demonstrated good cause to believe a lawsuit would be filed, despite the fact that the defendant had been advised that the survivor of a car crash had hired an attorney and bought photographs of the accident.²¹⁷ On petition for writ of mandamus, the court of appeals did not express its view on whether the hiring of an attorney constituted a sufficient outward manifestation of the likelihood of litigation, but instead stated that the trial court's conclusion was not arbitrary or unreasonable and would not, therefore, be disturbed.²¹⁸ The Austin court of appeals reached a similar result in *Texas Department of Mental Health & Mental Retardation v. Davis*.²¹⁹ There, the court applied the *Flores* two-part test²²⁰ and concluded that the trial court's order requiring the disclosure of materials compiled by the defendant's in-house counsel, in an investigation of the drowning death of a resident of the Travis State School, was not an abuse of discretion.²²¹ The court found that the mere subjective expectation that the accident would give rise to litigation was not sufficient to prove good cause, even though that expectation was subsequently borne out by the commencement of an action.²²²

The attorney work product exemption from discovery was discussed in *Southern Pacific Transportation Co. v. Banales*,²²³ a case involving a videotaped practice deposition. The trial court ordered the videotape produced

212. *Id.*

213. TEX. R. CIV. P. 166b(3)(e).

214. 777 S.W.2d at 42.

215. TEX. R. CIV. P. 166b(3)(e).

216. 774 S.W.2d 316 (Tex. App.—Houston [14th Dist.] 1989, mand. overr.).

217. *Id.* at 317.

218. *Id.* at 319.

219. 775 S.W.2d 467 (Tex. App.—Austin 1989, no writ).

220. *Id.* at 471-72.

221. *Id.* at 472.

222. *Id.* *But see* *Smith v. Thornton*, 765 S.W.2d 473, 477 (Tex. App.—Houston [14th Dist.] 1988, writ requested) (upholding finding that materials compiled in investigation of accident were party communications exempt from discovery due to unusual nature of emergency response and defendant's belief that there was potential for litigation).

223. 773 S.W.2d 693 (Tex. App.—Corpus Christi 1989, no writ).

without having reviewed it *in camera*.²²⁴ The court of appeals held that this was an abuse of discretion.²²⁵ Because the objecting party specifically pleaded the exemption relied upon, made a prima facie showing of its application to the videotape, and tendered the tape for *in camera* inspection, the court held that the trial judge should not have ordered the tape produced without first reviewing it to see if it contained the type of information that could be classified as work product.²²⁶

In *Euresti v. Valdez*,²²⁷ the court denied a petition for writ of mandamus filed by the Cameron County Attorney that sought relief from an order compelling him to produce, in a civil suit, the transcripts of testimony and materials provided to a grand jury in a malicious prosecution action.²²⁸ The plaintiff in *Euresti* alleged a particularized need for the material, and the trial court concluded it should be produced.²²⁹ The court of appeals applied the well-established rule that a party claiming a privilege from discovery bears the burden of proof on that issue²³⁰ to the County Attorney's claim that grand jury materials were not discoverable.²³¹ Thus, by failing to adduce evidence that an investigation was ongoing, or that there would be some damage to law enforcement efforts by the disclosure of the materials, the County Attorney failed to discharge his burden of proof.²³²

Finally, the court in *Public Utility Commission of Texas v. Houston Lighting & Power Co.*²³³ refused to find a waiver of the plaintiff utility company's attorney-client privilege based on the company's filing of a rate case with the Public Utility Commission.²³⁴ The court distinguished those cases holding that an offensive use of a claimed privilege results in a waiver of the privilege,²³⁵ on the ground that the governing regulations required the company to file a rate case any time it sought a rate increase.²³⁶ Thus, the factual justification for a finding an offensive waiver was lacking.²³⁷

C. Procedure for Claiming Privilege or Exemption

Continuing the trend of recent years, a number of decisions during the survey period discussed the proper procedure for claiming privilege in the discovery context, which was first outlined in *Peeples v. Honorable Fourth*

224. *Id.* at 693.

225. *Id.* at 694.

226. *Id.*

227. 769 S.W.2d 575 (Tex. App.—Corpus Christi 1989, no writ).

228. *Id.* at 579.

229. *Id.* at 577.

230. See *Peeples v. Honorable Fourth Supreme Judicial Dist.*, 701 S.W.2d 635, 637 (Tex. 1985) (noting that burden of proof is on party asserting privilege).

231. 769 S.W.2d at 577.

232. *Id.* at 579.

233. 778 S.W.2d 195 (Tex. App.—Austin 1989, no writ).

234. *Id.* at 198-99.

235. See *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107 (Tex. 1985); *DeWitt & Rearick, Inc. v. Ferguson*, 699 S.W.2d 692, 694 (Tex. App.—El Paso 1985, no writ) (cases holding that offensive use of privilege outside intended scope of privilege).

236. 778 S.W.2d at 198.

237. *Id.* at 199.

*Supreme Judicial District*²³⁸ and subsequently codified in Rule 166b(4).²³⁹ The supreme court's opinion on rehearing in *McKinney v. National Union Fire Insurance Co. of Pittsburg, Pa.*²⁴⁰ was the most significant of these cases. In *McKinney*, the court, within the space of two months, announced diametrically opposed rulings on the issue of which party has the burden of obtaining a hearing on objections to discovery.²⁴¹ In its original opinion, the court held that this burden fell on the objecting party.²⁴² On rehearing, however, the Court reversed itself and placed the burden on the party seeking discovery,²⁴³ where it will now apparently stay.

The facts giving rise to this confusion in *McKinney* were as follows. The plaintiff served on the defendant an interrogatory that requested the identity and location of all persons with knowledge of relevant facts. Defendant objected to this inquiry on the grounds that it was overly broad and burdensome. Neither party requested a hearing or obtained a ruling on this objection.²⁴⁴ At trial, however, the plaintiff objected to the defendant offering a witness who had not been designated in response to the discovery requests. The trial court overruled this objection and allowed the witness to testify.²⁴⁵

In its opinion on rehearing, the supreme court discussed the evolution from *Peeples*, which required the objecting party to request a hearing on his or her objections or risk waiving them,²⁴⁶ to Rule 166b(4),²⁴⁷ which permits either party to request such a hearing.²⁴⁸ The court then determined that the better practice under the current procedural rules would be to place the responsibility for obtaining a hearing on discovery matters on the party requesting discovery.²⁴⁹ The court reasoned that the requesting party is in a better position to determine the need for the information requested and, in some instances, may recognize the validity of the resisting party's objection.²⁵⁰ Further, the court expressed its hope that the adoption of this procedure would encourage parties to work through discovery disputes without judicial intervention whenever possible.²⁵¹ Of course, if a hearing is requested, the burden of establishing the privilege or immunity claimed will still be on the objecting party.²⁵²

The significance of this distinction between the burden of requesting a

238. 701 S.W.2d 635 (Tex. 1985).

239. TEX. R. CIV. P. 166b(4).

240. 772 S.W.2d 72 (Tex. 1989).

241. See *McKinney*, 32 Tex. Sup. Ct. J. 306, 309 (April 5, 1989); *McKinney*, 772 S.W.2d at 75.

242. 32 Tex. Sup. Ct. J. 306 (April 5, 1989).

243. 772 S.W.2d at 75.

244. *Id.* at 74.

245. *Id.*

246. *Id.* at 74-75.

247. TEX. R. CIV. P. 166b(4).

248. 772 S.W.2d at 74-75 (citing *Peeples*, 701 S.W.2d at 637 and TEX. R. CIV. P. 166b(4)).

249. 772 S.W.2d at 75.

250. *Id.*

251. *Id.*

252. *Id.*

hearing and the ultimate burden of proof was illustrated in *Loftin v. Martin*,²⁵³ a case discussed in a previous section of this article.²⁵⁴ In *Loftin*, the plaintiff objected to one of the defendant's document requests on the ground that the materials requested were protected by the investigative privilege.²⁵⁵ The defendant requested a hearing on this objection, which he then failed to attend.²⁵⁶ The supreme court held that, notwithstanding this failure, the trial judge abused his discretion by sustaining the plaintiff's objection because there was no evidence of the applicability of the investigative privilege offered by plaintiff and no *in camera* review of the documents undertaken by the court.²⁵⁷

While the supreme court has announced the fundamental changes that have taken place over the past several years with respect to the procedures for claiming privilege, it has been left largely to the intermediate appellate courts to refine how those procedures are actually carried out by the trial bench and bar.²⁵⁸ Three cases decided during the survey period address some of the issues raised by these changing discovery rules. In *State Farm Insurance v. Salinas*²⁵⁹ a party objecting to discovery faced a trial judge who refused to allow the party to present evidence in support of its claim of privilege and who would not review the tendered documents *in camera*.²⁶⁰ The court of appeals held that mandamus was available to correct this abuse of discretion.²⁶¹ On the other hand, the objecting party in *Insurance Company of North America v. Downey*,²⁶² learned that the mere willingness to submit documents for an *in camera* inspection was not the same as actually tendering the documents to the court.²⁶³ Since the objecting party neither produced evidence supporting its claimed privilege nor actually tendered the documents, its statement in a memorandum submitted to the court that it was "prepared to tender" the requested documents was insufficient.²⁶⁴

Finally, the court in *Ryals v. Canales*²⁶⁵ discussed the sufficiency of the evidence relied upon to support a claim of attorney-client privilege. The court found the affidavit relied upon insufficient. Specifically, the court held that an affidavit that merely tracks the language of the Texas evidentiary rule on attorney-client privilege,²⁶⁶ without providing information sufficient

253. 776 S.W.2d 145 (Tex. 1989).

254. See *supra*, notes 151, 152 and accompanying text.

255. 776 S.W.2d at 147. It should be noted that the four dissenting Justices in *Loftin* strongly disagreed with the majority's characterization of both the nature of the plaintiff's objection and the trial court's ruling. *Id.* at 149-50. The dissenters believed that the trial court had sustained an overbreadth objection, which they argued did not trigger the procedures for claiming an exemption from discovery set out in rule 166b(4). *Id.*

256. 776 S.W.2d at 146.

257. *Id.* at 148.

258. *Id.*

259. 767 S.W.2d 212 (Tex. App.—Corpus Christi 1989, no writ).

260. *Id.* at 214.

261. *Id.*

262. 765 S.W.2d 555 (Tex. App.—Houston [14th Dist.] 1989, mand. overr.).

263. *Id.* at 558.

264. *Id.*

265. 767 S.W.2d 226 (Tex. App.—Dallas 1989, mand. overr.).

266. See TEX. R. CIV. EVID. 503(b)(3).

to demonstrate its application to the facts of the particular case, constituted no evidence in support of the claimed privilege.²⁶⁷

D. Duty to Supplement Discovery

As it has been for the last several years, the duty to supplement discovery responses proved to be a fertile source of appellate decisions during the survey period. Rules 166b(6)²⁶⁸ and 215(5)²⁶⁹ require a party to supplement his or her discovery responses to disclose the identity of expert witnesses and persons with knowledge of relevant facts as soon as is practical, and in no event less than thirty days prior to trial. As every trial practitioner is by now aware, the sanction for failing to provide this supplementation is the exclusion of the unidentified witness' testimony.²⁷⁰ The supreme court has repeatedly held that this sanction is automatic unless good cause for allowing the witness to testify is shown.²⁷¹

In three cases decided during the survey period, the supreme court continued to urge the trial courts to apply this exclusionary rule strictly. First, in *Boothe v. Hausler*,²⁷² the court rejected without discussion the offending party's argument that denial of the testimony of a proffered witness would cause him great harm, stating that harm to a party is not sufficient to establish good cause.²⁷³ Significantly, in *Boothe*, the interrogatory answers identified the witness in question, but failed to provide her address, which was also requested.²⁷⁴

Similarly, the court held that no good cause existed to permit the testimony of an unidentified fact witness in *Clark v. Trailways, Inc.*²⁷⁵ The witness in question was a Mexican police officer who originally investigated the accident that gave rise to the action. The trial court allowed the witness to testify on the basis that, as the original investigating officer, he possessed peculiar knowledge of the underlying facts.²⁷⁶ The supreme court held that this rationale for allowing the testimony did not constitute a showing of good cause.²⁷⁷ Indeed, the court noted that the trial court's ruling would provide a party with an incentive to withhold the name of a key witness and then emphasize that witness' peculiar knowledge as a justification for allowing him or her to testify.²⁷⁸

The decision in *Clark* was also significant for its discussion of what a party must do to preserve a complaint that an undisclosed witness was permitted

267. 767 S.W.2d at 230.

268. TEX. R. CIV. P. 166b(6).

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

270. *Id.*

271. See *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297, 297-98 (Tex. 1986).

272. 766 S.W.2d 788 (Tex. 1989).

273. *Id.* at 789.

274. *Id.*

275. 774 S.W.2d 644, 646-47 (Tex. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1122, ___ L.Ed.2d ___ (1990).

276. *Id.* at 646.

277. *Id.*

278. *Id.*

to testify.²⁷⁹ In this connection, the court held, with Justice Gonzales dissenting, that a pretrial motion to prohibit the testimony of undisclosed witnesses was not sufficient to preserve any error for appellate review.²⁸⁰ If a party fails to object at trial when the undisclosed witness is offered, that party waives any complaint as to the admission of the witness' testimony.²⁸¹

Finally, in *Rainbo Baking Co. v. Stafford*,²⁸² a witness who the plaintiff failed to identify by her proper name or provide an address for was allowed to testify over the defendant's objection.²⁸³ Plaintiff's showing of good cause in the trial court consisted principally of her statement that she expected the case to settle and that she first contacted the witness on the day of trial.²⁸⁴ The supreme court held that this explanation was insufficient to allow the testimony.²⁸⁵ According to the court, the Texas Rules of Civil Procedure cannot be read as supporting the proposition that supplementation is only required when a party reasonably expects the case to go to trial.²⁸⁶

Several noteworthy cases from the courts of appeals have also addressed the issue of supplementing discovery responses. In *Clayton v. First State Bank of Gainesville*²⁸⁷ the court held that the rules governing supplementation apply to all witnesses whose identity is discoverable.²⁸⁸ Thus, no distinction exists between character witnesses and other fact witnesses in the context of responding to an interrogatory seeking the identity of persons with knowledge of relevant facts.²⁸⁹ Conversely, in *Tinkle v. Henderson*,²⁹⁰ the court stated in dicta that it doubted that a record custodian subpoenaed at trial was a person with knowledge of relevant facts whose identity would have to be disclosed in interrogatory answers.²⁹¹ The *Tinkle* court did, however, hold that the two defendant doctors should not have been allowed to give expert testimony because they had not been properly identified during discovery as expert witnesses.²⁹²

Finally, *Tri-State Motor Transit Co. v. Nicar*,²⁹³ involved two thorny sub-issues connected with the duty to supplement. In *Nicar*, one of the plaintiffs named a Dr. Hayden as a testifying expert in response to another plaintiff's interrogatories, but not in response to the defendant's interrogatories. When

279. *Id.* at 647.

280. *Id.* at 647 (citing TEX. R. APP. P. 52(a)).

281. 774 S.W.2d at 647 (citations omitted).

282. 33 Tex. Sup. Ct. J. 32 (Oct. 11, 1989).

283. *Id.* at 381.

284. *Id.*

285. *Id.*

286. *Id.* See also *Valley Indus., Inc. v. Cook*, 767 S.W.2d 458, 461-62 (Tex. App.—Dallas 1988, writ denied)(no good cause shown for allowing undisclosed witness to testify where, despite fact that offering party believed there was an agreement between the parties that issue of causation would not be contested, any such agreement was unenforceable under TEX. R. CIV. P. 11).

287. 777 S.W.2d 577 (Tex. App.—Fort Worth 1989, no writ).

288. *Id.* at 579.

289. *Id.* at 579-80.

290. 777 S.W.2d 537 (Tex. App.—Tyler 1989, writ requested).

291. *Id.* at 540.

292. *Id.* at 539.

293. 765 S.W.2d 486 (Tex. App.—Houston [14th Dist.] 1989, no writ).

the commencement of the trial was delayed due to a scheduling conflict on the part of the defendant's attorney, Dr. Hayden became unavailable to testify due to another longstanding commitment. The plaintiff then sought to have Dr. Hayden's associate, Dr. Hart, testify in her place, which the trial court allowed.²⁹⁴

Turning first to the adequacy of the identification of Dr. Hayden, the court of appeals noted that, in the converse situation in another case, it had allowed a party who had not propounded any interrogatories to object to the failure of the opposing party to disclose the identity of a witness in response to interrogatories propounded by a third party.²⁹⁵ The court's belief that a party must be entitled to rely on the interrogatories and answers of other parties in the same suit formed the basis for this earlier decision.²⁹⁶ Thus, the court in *Nicar* concluded that this same reasoning should apply to the case before it, where the plaintiff identified Dr. Hayden in one set of interrogatory answers but not the other.²⁹⁷ With respect to the substitution of Dr. Hart for Dr. Hayden, the court found that the plaintiff had shown good cause for allowing Dr. Hart's testimony.²⁹⁸ Moreover, the court held that an express finding by the trial court of good cause was not necessary where the record reflected that such a finding was implicit in the court's decision to allow the testimony.²⁹⁹

X. SUMMARY JUDGMENT

As in prior years, summary judgment practice was the subject of a number of important decisions during the Survey period. Foremost among these was the supreme court's decision in *Casso v. Brand*,³⁰⁰ which rejected the federal view on the role of summary judgment motions³⁰¹ and overruled two of the court's own recent decisions on the subject.³⁰² *Casso* was a defamation case brought by the incumbent mayor of the City of McAllen against one of his challengers for that office. The trial court granted the defendant a summary judgment based upon his affidavit testimony that he made the statements in question without actual malice (i.e., without either knowledge that they were false or reckless disregard for their truth or falsity).³⁰³ The court of appeals

294. *Id.* at 489.

295. 765 S.W.2d at 489 (citing *Smith v. Christley*, 755 S.W.2d 525, 530 (Tex. App.—Houston [14th Dist.] 1988, writ denied)).

296. *Christley*, 755 S.W.2d at 530.

297. 765 S.W.2d at 489-90.

298. *Id.* at 490-91

299. *Id.* at 491; *accord* *Mercy Hosp. of Laredo v. Rios*, 776 S.W.2d 626, 632 (Tex. App.—San Antonio 1989, writ requested).

300. 776 S.W.2d 551 (Tex. 1989).

301. *Id.* at 559. *See* *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L.Ed.2d 265, 276 (1986), *cert. denied* 484 U.S. 1066, 108 S. Ct. 1028, L.Ed.2d 992 (1988); ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'").

302. 776 S.W.2d at 559, *overruling* *Beaumont Enter. & Journal v. Smith*, 687 S.W.2d 729 (Tex. 1985) and *Bessent v. Times-Herald Printing Co.*, 709 S.W.2d 635 (Tex. 1986).

303. 776 S.W.2d at 559.

reversed and remanded, holding that the defendant had failed to negate one or more elements of the plaintiff's claim as a matter of law.³⁰⁴ In an intriguing decision, which includes Chief Justice Phillips dissenting from the majority opinion he authored, a divided supreme court affirmed in part and reversed in part.³⁰⁵

The majority's opinion on the issue of actual malice begins by declining to follow the summary judgment standard for defamation cases enunciated by the United States Supreme Court in *Anderson v. Liberty Lobby, Inc.*,³⁰⁶ which asks whether the evidence in the record could support a reasonable jury finding that the plaintiff has proven actual malice.³⁰⁷ The court in *Casso* held that, despite the similarities between Federal Rule 56³⁰⁸ and Texas Rule 166a,³⁰⁹ the burden of proof in Texas summary judgment procedure never shifts to the non-movant unless and until the movant conclusively demonstrates that he or she is entitled to judgment.³¹⁰ Moreover, the majority saw no overriding policy reason for shifting to the federal approach to summary judgments, either in all cases generally or in cases involving constitutional rights in particular.³¹¹

Notwithstanding its refusal to follow the analysis employed by the federal courts, however, the supreme court went on to affirm a portion of the summary judgment in favor of the defendant by overruling its own recent decisions in two defamation cases,³¹² *Beaumont Enterprise & Journal v. Smith*³¹³ and *Bessent v. Times-Herald Printing Co.*³¹⁴ In both *Smith* and *Bessent* the court held that the defendant's affidavit testimony, stating that he believed the alleged defamatory statements were true, was evidence of the state of mind of an interested party that could not readily be controverted and, therefore, would not support a summary judgment.³¹⁵ In *Casso*, however, the court held that these previous decisions read the requirement that an interested party's testimony be controvertible too literally,³¹⁶ especially in the light of the First Amendment considerations attendant to a defamation case.³¹⁷ Significantly, however, the court's holding does not appear to be limited to defamation cases; indeed, the majority opinion contains the statement, unsupported by citations, that in all other types of cases, the Texas courts do not "deny otherwise appropriate summary judgment motions be-

304. *Brand v. Casso*, 742 S.W.2d 726 (Tex. App.—Corpus Christi 1987), *rev'd in part and aff'd in part*, 776 S.W.2d 551 (Tex. 1989).

305. 776 S.W.2d at 559.

306. 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

307. *Anderson*, 477 U.S. at 255-56, 106 S.Ct. at 2514, 91 L.Ed.2d at 216.

308. FED. R. CIV. P. 56.

309. TEX. R. CIV. P. 166a.

310. *Casso*, 776 S.W.2d at 556.

311. *Id.* at 556-57.

312. *Id.* at 558.

313. 687 S.W.2d 729 (Tex. 1985).

314. 709 S.W.2d 635 (Tex. 1986).

315. *Bessent*, 709 S.W.2d at 636; *Smith*, 687 S.W.2d at 730; *see generally* TEX. R. CIV. P. 166a(c) (requirement that interested party's testimony be controvertible).

316. 776 S.W.2d at 558.

317. *Id.*

cause of a subjective determination that the movant's proof cannot be readily controverted."³¹⁸

The burden of proof on summary judgment was the subject of the Texas Supreme Court's decision in *Eshleman v. Shield*.³¹⁹ The plaintiffs in *Eshleman* sued under the Deceptive Trade Practices-Consumer Protection Act ("DTPA"),³²⁰ alleging misrepresentations and fraudulent alteration of a home purchase contract. More than two years after the contract was executed, the plaintiffs added the listing agent as a defendant, following his deposition in the case. The agent filed a motion for summary judgment on his affirmative defense of limitations, which was granted by the trial court³²¹ and affirmed by the court of appeals.³²² The supreme court reversed.³²³ In a per curiam opinion, the court noted that the two year statute of limitations set out in the DTPA³²⁴ begins to run when the plaintiff discovers or, in the exercise of reasonable diligence, should have discovered the false or deceptive act.³²⁵ Thus, the agent had the burden on summary judgment to prove, as a matter of law, that the plaintiffs discovered or reasonably should have discovered the falsity of the alleged representations more than two years before suit was filed against him.³²⁶

Several cases decided during the survey period addressed the proper method of presenting and objecting to summary judgment evidence. For example, in *Rogers v. Ricane Enterprises, Inc.*,³²⁷ the supreme court held that a general reference in a summary judgment motion to voluminous materials on file does not direct the court or the other parties to the evidence on which the movant relies and is, therefore, insufficient.³²⁸ In *Mendez v. International Playtex, Inc.*³²⁹ the Corpus Christi court of appeals followed the decision in *Deerfield Land Joint Venture v. Southern Union Realty Co.*,³³⁰ in requiring that deposition excerpts that a party intends to rely upon as summary judgment evidence be authenticated and attached to the summary judgment motion or response.³³¹ The same court, in *Executive Condominiums, Inc. v. State of Texas*,³³² also recognized that a statement of facts from a prior trial may properly be considered as summary judgment evidence.³³³ Presumably, the use of a statement of facts would be subject to the same authentication requirements as a deposition transcript under *Mendez*

318. *Id.* at 559.

319. 764 S.W.2d 776 (Tex. 1989).

320. See TEX. BUS. & COMM. CODE ANN. § 17.41 *et seq.* (Vernon 1987).

321. 764 S.W.2d at 776.

322. 764 S.W.2d at 777.

323. *Id.*

324. See TEX. BUS. & COMM. CODE § 17.56 (Vernon 1987).

325. 764 S.W.2d at 777.

326. *Id.*

327. 772 S.W.2d 76 (Tex. 1989).

328. *Id.* at 81.

329. 776 S.W.2d 732 (Tex. App.—Corpus Christi 1989, writ requested).

330. 758 S.W.2d 608, 610-11 (Tex. App.—Dallas 1988, writ requested).

331. 776 S.W.2d at 733.

332. 764 S.W.2d 899 (Tex. App.—Corpus Christi 1989, writ denied).

333. *Id.* at 901.

and *Deerfield*. Finally, in *Utilities Pipeline Co. v. American Petrofina Marketing*,³³⁴ the court held that, in order to be effective, a ruling by a trial court sustaining an objection to summary judgment evidence must be reduced to writing, signed by the trial judge, and entered of record.³³⁵ The court further held that a docket sheet entry does not meet these requirements.³³⁶

The sufficiency of a party's summary judgment proof was also an issue in several cases decided during the survey period. *Taylor v. Shelton*³³⁷ involved an action for specific performance of a contract for the purchase of oil and casinghead property. The defendants appealed from a summary judgment entered against them, arguing, among other things, that the plaintiff had offered no evidence in support of certain facts found as a matter of law in connection with the entry of the summary judgment. In response, the plaintiffs argued that they had pleaded the performance of all conditions precedent under the contract, and, therefore, the defendants had waived any complaint by failing to specifically deny performance of any conditions.³³⁸ The court of appeals rejected this argument, holding that, in a summary judgment proceeding, neither the pleadings nor the non-movant's failure to respond can establish the moving party's right to judgment.³³⁹ Moreover, the court noted that only two of the facts that were allegedly established as a matter of law could properly be considered conditions under the contract; the others were clearly matters requiring summary judgment proof.³⁴⁰

In *Fair Woman, Inc. v. Transland Management Corp.*,³⁴¹ the court held that the mere statement that an affiant has personal knowledge of the facts stated, without more, is insufficient to establish that fundamental requirement of summary judgment affidavits.³⁴² Thus, even though the affidavit was uncontroverted, the summary judgment based thereon could not stand.³⁴³ Similarly, in *Shindler v. Mid-Continent Life Insurance Co.*,³⁴⁴ the court held that the phrase "as far as I know" in response to a deposition question was analogous to an affidavit stating facts "to the best of my knowledge."³⁴⁵ Neither is sufficient to raise a fact issue that will defeat summary judgment.³⁴⁶

Finally, in an unusual case dealing with the notice provisions under Rule

334. 760 S.W.2d 719 (Tex. App.—Dallas 1988, no writ).

335. *Id.* at 723.

336. *Id.* See also *Vasquez v. Carmel Shopping Center Co.*, 777 S.W.2d 532, 535 (Tex. App.—Corpus Christi 1989, writ denied) (in reviewing summary judgment, court of appeals would consider affidavits filed two days before hearing on summary judgment motion where, even though no signed order of court granted leave to file such affidavits, docket sheet reflected leave had been granted).

337. 772 S.W.2d 281 (Tex. App.—Amarillo 1989, writ denied).

338. See TEX. R. CIV. P. 54.

339. 772 S.W.2d at 286-87.

340. *Id.* at 287.

341. 766 S.W.2d 323 (Tex. App.—Dallas 1989, no writ).

342. *Id.* at 334.

343. *Id.* at 324.

344. 768 S.W.2d 331 (Tex. App.—Houston [14th Dist.] 1989, no writ).

345. *Id.* at 334.

346. *Id.*

166a,³⁴⁷ the Amarillo court of appeals upheld a summary judgment entered in favor of the plaintiff,³⁴⁸ but reversed the trial court's refusal to grant the defendant a new trial.³⁴⁹ *Krchnak v. Fulton*³⁵⁰ was a suit brought against a mare owner to recover amounts due for boarding care, stud fees, and veterinary services. The plaintiff filed a motion for summary judgment, which was served, together with notice of the hearing date, on the defendant himself without a copy being sent to his attorney. Less than ten days before the hearing date, defendant's counsel received a copy of the motion. Under the local rules of Lubbock County, since neither party specifically requested oral argument, the motion for summary judgment was granted without an actual hearing being held before the court.³⁵¹ Later that same day, the court received and denied the defendant's motion for an extension of time within which to respond to the summary judgment motion.³⁵²

The court of appeals, after reviewing this chronology of events, held that the summary judgment was proper.³⁵³ While the court emphasized that the practice of sending pleadings and notices directly to a party without a copy to his or her attorney is not be encouraged, it is permitted under Rule 21a of the Texas Rules of Civil Procedure.³⁵⁴ The court redressed this seemingly inequitable result, however, by holding that the defendant's motion for new trial should have been granted and remanding the case to the trial court.³⁵⁵

XI. JURY QUESTIONS³⁵⁶

Rule 277 of the Texas Rules of Civil Procedure, as amended effective January 1, 1988, requires in jury cases that the trial court, whenever feasible, submit the cause upon broad-form questions.³⁵⁷ Three decisions during the survey period are instructive on how this mandate is to be carried out. In *Bennett Coulson & Cae, Inc. v. Lake LBJ Municipal Utility District*,³⁵⁸ the supreme court rejected a challenge to the propriety of the conjunctive submission of two issues of fact in a single question to the jury.³⁵⁹ The court disagreed with the defendant's contention that the question inquired about a disputed and an undisputed fact and, therefore, constituted an improper comment on the weight of the evidence.³⁶⁰ While one issue had been more

347. TEX. R. CIV. P. 166a(c) (motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing).

348. *Krchnak v. Fulton*, 759 S.W.2d 524, 530 (Tex. App.—Amarillo 1988, writ denied).

349. *Id.* at 530.

350. 759 S.W.2d 524 (Tex. App.—Amarillo 1988, writ denied).

351. *Id.* at 527.

352. *Id.*

353. *Id.* at 528.

354. *Id.*

355. *Id.* at 529.

356. Pursuant to the 1988 amendments to the Texas Rules of Civil Procedure, the form of submissions to the jury, long known to the Texas practitioner as special issues, are now referred to as jury questions. See TEX. R. CIV. P. 271-279.

357. TEX. R. CIV. P. 277.

358. 33 Tex. Sup. Ct. J. 123 (Dec. 13, 1989).

359. *Id.* at 125.

360. *Id.* at 124.

hotly contested by the parties than the other, that fact alone did not require submission of the issues separately.³⁶¹

While *Coulson* sanctioned the use of compound jury questions, a practitioner must still take care when phrasing such questions. For example, in *Mooney Aircraft Corp. v. Altman*,³⁶² a products liability action, the trial court's charge contained two questions that asked the jury to resolve one disputed issue if they found a particular way on another disputed issue.³⁶³ The jury answered both questions in the affirmative, and the court entered judgment in favor of the plaintiff.³⁶⁴ The court of appeals reversed, however, holding that the use of the introductory "if" clause constituted a direct comment on the weight of the evidence.³⁶⁵ The court noted that the word "if", when used as a conjunction, may mean supposing, allowing, or conceding.³⁶⁶ Accordingly, there was a reasonable probability that the jury believed it was required to assume or suppose the existence of the disputed fact contained in the introductory "if" clause.³⁶⁷ Moreover, the plaintiff's effort to distinguish the case law relied upon by the defendant on the ground that it predated the 1988 amendment to Rule 277 was unavailing.³⁶⁸ The defect in this case, said the court, was not that the questions were submitted broadly, but that they assumed disputed facts.³⁶⁹

Similarly, the decision in *E. B. v. Texas Department of Human Services*³⁷⁰ cautions against a mechanical approach to formulating broad form submissions. In that case, a mother appealed from a judgment of the trial court terminating the parent-child relationship between her and her two minor daughters.³⁷¹ Under the applicable statute, the parent-child relationship could be terminated only if the State established one or more specified grounds by clear and convincing evidence.³⁷² The trial court's charge, after instructing the jury on two of the possible grounds, simply asked whether the parent-child relationship should be terminated.³⁷³ The court of appeals held that this charge was defective because it asked the jury to determine the ultimate legal question of whether the parent-child relationship should be

361. *Id.* at 125.

362. 772 S.W.2d 540 (Tex. App.—Dallas 1989, writ denied).

363. *Id.* at 541. The two questions were: (1) "If you find the vacuum pump on the aircraft was defective at the time it left the possession of [the defendant], was such defect a producing cause of the occurrence in question?" and (2) "If you find that the [defendant] made false representations to the public that the aircraft was airworthy, did the representation about the airworthiness of the aircraft involve a material fact concerning the character or quality of the aircraft in question which was relied on by [plaintiff]?" *Id.*

364. *Id.* at 541.

365. *Id.* at 543.

366. *Id.* at 542.

367. *Id.*

368. *Id.* at 542-43.

369. *Id.* Indeed, the court went so far as to suggest how the first question quoted *supra* at note 363 could have been properly submitted in broad form: "'At the time that the aircraft left the possession of [defendant], was there a defect in the vacuum pump that was a producing cause of the occurrence in question?'" *Id.* at 543.

370. 766 S.W.2d 387 (Tex. App.—Austin 1989, no writ).

371. 776 S.W.2d at 388.

372. TEX. FAM. CODE ANN. § 15.02 (Vernon 1986).

373. 766 S.W.2d at 388.

terminated, rather than the factual question of whether the State had proven the specific grounds for termination pleaded.³⁷⁴ In addition, under the particular statute in question, the failure to submit each pleaded ground for termination separately made it impossible to determine if the State had discharged its burden of convincing at least ten jurors that one or more particular grounds for termination existed.³⁷⁵

The court addressed the question of whether an issue that was not properly pleaded may nevertheless be submitted to the jury under the theory that the issue was tried by consent in *Hirsch v. Hirsch*,³⁷⁶ a divorce action in which the petitioner alleged adultery as the sole ground for the divorce. During trial, the court admitted evidence of cruelty without objection,³⁷⁷ although the respondent objected to the submission of a question to the jury on cruelty because it was not supported by the pleadings. The court held that, because the respondent had objected to submitting the issue to the jury, there was no trial by consent.³⁷⁸ Instead, the proper course would have been for the petitioner, the party requesting submission of an issue raised by the evidence but not the pleadings, to offer a trial amendment.³⁷⁹ Finally, the decision in *Elbar, Inc. v. Claussen*³⁸⁰ addressed the issue of what a trial court may do when an erroneous or improper instruction to the jury causes the court to render an incomplete verdict. In *Elbar*, the jury's verdict, as originally returned failed to answer a necessary question because of an error in its conditioning instruction.³⁸¹ Because no objection to the charge had been made, the court of appeals held that the trial judge was authorized to send the jury back for further deliberations with a direction to answer the omitted question.³⁸²

XII. JURY PRACTICE

Two decisions during the survey period considered the qualifications of jurors. *Palmer Well Services, Inc. v. Mack Trucks, Inc.*³⁸³ involved a juror whom the plaintiff discovered, after the jury returned a ten to two verdict in favor of the defendant, was the subject of a pending felony indictment. The statute setting out juror qualification disqualifies any person from serving as a petit juror if he or she is under indictment for a felony.³⁸⁴ Since the juror in question was a member of the majority, the plaintiff argued that it was entitled to a new trial on the ground that the verdict was not rendered by the

374. *Id.* at 390.

375. *Id.*; see TEX. R. CIV. P. 292 (requiring concurrence of minimum of ten jurors as to each of answers made).

376. 770 S.W.2d 924 (Tex. App.—El Paso 1989, no writ).

377. *Id.* at 926.

378. *Id.*

379. *Id.* (citing TEX. R. CIV. P. 66 and 67).

380. 774 S.W.2d 45 (Tex. App.—Dallas 1989, writ requested).

381. *Id.* at 54.

382. *Id.* at 54-55.

383. 776 S.W.2d 575 (Tex. 1989).

384. TEX. GOV'T CODE ANN. § 62.102 (Vernon 1988)

requisite number of qualified jurors.³⁸⁵ The supreme court agreed.³⁸⁶ Significantly, the court held that, in order to give effect to the rules governing juror qualifications, it would presume that the plaintiff suffered a material injury.³⁸⁷ Thus, the court distinguished cases involving the minimum juror qualifications prescribed by statute from other instances in which a new trial is sought on the ground that a juror gave an erroneous or incorrect answer on voir dire.³⁸⁸ In the latter situation, a new trial will only be granted if it reasonably appears from the record that the error prejudiced or injured the complaining party.³⁸⁹

In contrast to *Palmer Well Services*, the court of appeals in *Mercy Hospital of Laredo v. Rios*³⁹⁰ rejected a claim that the alleged failure of one of the majority jurors in another ten to two verdict to meet the literacy qualification under Texas law³⁹¹ constituted reversible error.³⁹² While that part of the decision upholding the trial court's implied finding of literacy would have been a sufficient ground for affirmance,³⁹³ the appellate court stated two alternative holdings,³⁹⁴ both of which are suspect in light of the supreme court's decision in *Palmer Well Services*. First, the court held that any error was waived because the only inquiry regarding qualifications was made by the trial judge of the entire venire panel,³⁹⁵ and the complaining party had not individually interrogated the particular juror on that issue.³⁹⁶ It appears, however, that this same situation existed in *Palmer Well Services*, although the supreme court did not expressly address a waiver argument in that case.³⁹⁷ Second, the *Rios* court concluded that the failure to meet the statutorily-mandated literacy qualification was not reversible error, especially when the juror possessed an understanding of the English language.³⁹⁸ This too appears to fly in the face of the supreme court's holding that the acceptance of a juror who lacks the minimum qualifications constitutes a material injury as a matter of law.³⁹⁹

During the survey period, the supreme court also addressed the issue of the proper scope of voir dire in its opinion on rehearing in *Babcock v. Northwest Memorial Hospital*.⁴⁰⁰ As reported in the 1989 Annual Survey, in its original opinion in *Babcock*, the court held that it was reversible error for a

385. 776 S.W.2d at 576.

386. *Id.* at 577.

387. *Id.*

388. *Id.* at 576-77.

389. TEX. R. CIV. P. 327(a); *see also* TEX. R. APP. P. 81(b)(1) (providing that courts shall not reverse judgments on appeal unless court determines that error complained of was reasonably calculated to cause, and probably did cause, rendition of improper judgment).

390. 776 S.W.2d 626 (Tex. App.—San Antonio 1989, writ requested).

391. *See* TEX. GOV'T CODE ANN. § 62.102 (Vernon 1988).

392. 776 S.W.2d at 629.

393. *Id.*

394. *Id.* at 628.

395. *Id.*

396. *Id.* at 628.

397. *See Palmer Well Services*, 776 S.W.2d at 576.

398. *Rios*, 776 S.W.2d at 628.

399. *Palmer Well Services*, 776 S.W.2d at 577.

400. 767 S.W.2d 705 (Tex. 1989).

trial court to prohibit the plaintiffs' attorney in a medical malpractice case from questioning prospective jurors about their attitudes regarding the publicity about the so-called lawsuit or liability crisis.⁴⁰¹ The court reaffirmed this conclusion on rehearing in an opinion that was substantially the same as its original opinion.⁴⁰² Indeed, the only difference between the two was the way the court treated the defendant's argument that any error in prohibiting the requested voir dire was harmless.⁴⁰³ In the original opinion, the court held that, because the questions were not asked of the veniremen, the court could only speculate as to how they might have responded and, therefore, could not say that the trial court's action did not prejudice the plaintiffs.⁴⁰⁴ On rehearing, however, the court countered the harmless error argument with the statement that the trial court's action resulted in a denial of the plaintiffs' constitutional right to a trial before a fair and impartial jury and was, therefore, harmful.⁴⁰⁵ Although the court apparently intended to address the absence of any evidence in the record that the error was harmful by shifting the analysis of this issue to the context of the fundamental right to trial by jury, it is difficult to see a distinction between *Babcock* and any other case in which a party can demonstrate that the trial court improperly limited voir dire. Thus, the court may have unwittingly opened the door to many more claims of this nature.

An unsuccessful litigant's effort to gain a new trial on the ground of jury misconduct will routinely be met with the obstacle imposed by the procedural and evidentiary rules that bar the admission of testimony or other evidence obtained from jurors, except to the extent the evidence demonstrates an outside influence on the jury's deliberations.⁴⁰⁶ Several decisions during the survey period demonstrate how strictly the Texas courts construe this exception. In *Kendall v. Whataburger, Inc.*⁴⁰⁷ the court held that erroneous information given to the jury by the presiding juror, a paralegal, regarding the effect of their answers was not an outside influence.⁴⁰⁸ Similarly, in *King v. Bauer*,⁴⁰⁹ the court did not consider evidence of the jurors' discussions of insurance and their own personal experiences and knowledge as evidence of jury misconduct.⁴¹⁰ In both *King* and *Mercy Hospital of Laredo v. Rios*,⁴¹¹ moreover, the court held that discussion of a newspaper account of the trial read by one or more jurors did not constitute an outside influence.⁴¹² Finally, in *Eppoletto v. Bournias*,⁴¹³ the court held that a trial court's error in

401. 32 Tex. Sup. Ct. J. 146, 149 (Dec. 14, 1988).

402. 767 S.W.2d at 705-09.

403. *Id.*

404. 32 Tex. Sup. Ct. J. at 149.

405. 767 S.W.2d at 709.

406. TEX. R. CIV. P. 327(b); TEX. R. CIV. EVID. 606(b).

407. 759 S.W.2d 751 (Tex. App.—Houston [1st Dist.] 1988, no writ).

408. *Id.* at 755.

409. 767 S.W.2d 197 (Tex. App.—Corpus Christi 1989, writ denied).

410. *Id.* at 198.

411. 776 S.W.2d 626 (Tex. App.—San Antonio 1989, writ requested).

412. *Id.* at 630; *King v. Bauer*, 767 S.W.2d at 198.

413. 764 S.W.2d 284 (Tex. App.—Waco 1989, no writ).

removing a case from its jury docket could be corrected by mandamus.⁴¹⁴ The court reasoned that requiring the plaintiffs to go through a full trial without a jury, and then appeal, was not a remedy that was equally convenient, effective, or beneficial as mandamus.⁴¹⁵

XIII. JUDGMENT, DISMISSAL, AND MOTIONS FOR NEW TRIAL

In *LBL Oil Co. v. International Power Services, Inc.*,⁴¹⁶ the supreme court once again considered the effect on Texas procedure of the United States Supreme Court's decision in *Peralta v. Heights Medical Center, Inc.*⁴¹⁷ In *LBL* the plaintiff sued LBL Oil Company, alleging that LBL was a Texas corporation, and the return of citation reflected service on a registered agent. R. H. Lindley, a citizen of Oklahoma, filed a pro se motion to dismiss, alleging that he was the sole owner of LBL Oil Company, an unincorporated business, and that the court did not have jurisdiction over him since there had been no valid service of process. The trial court overruled this motion.⁴¹⁸ The plaintiff then filed a motion for default judgment on the ground that the defendant, by its defective motion to dismiss, had entered a general appearance. Notwithstanding the fact that the motion for default judgment had not been served on the defendant, and no notice of the hearing on the motion, had been given to it, the trial court entered a default judgment, which the court of appeals affirmed.⁴¹⁹ The supreme court, in a per curiam opinion, reversed and remanded the case to the trial court.⁴²⁰ Relying on *Peralta*, the court held that, once a defendant makes an appearance in a suit, he is entitled to receive notice of any trial setting as a matter of due process under the Fourteenth Amendment to the U.S. Constitution.⁴²¹ Thus, the same defective motion that conferred jurisdiction over the defendant required that it receive notice of the hearing on the motion for default judgment since it was dispositive of the case.⁴²²

XIV. APPELLATE PROCEDURE

Several cases decided during the survey period involved questions regarding jurisdiction. In *Ferguson v. DRG/Colony North, Ltd.*⁴²³ for example, the court addressed two separate jurisdictional issues presented by the appeal.⁴²⁴ A purchaser of apartment buildings sued the vendor, seeking rescission of the sales contract or, alternatively, damages for the vendor's breach of the

414. *Id.* at 286.

415. *Id.* (citing *Jampole v. Touchy*, 673 S.W.2d 569, 576 (Tex. 1984)).

416. 777 S.W.2d 390 (Tex. 1989).

417. 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988). The court previously had occasion to apply *Peralta* in *Lopez v. Lopez*, 757 S.W.2d 721 (Tex. 1988), a case discussed in the 1989 ANNUAL SURVEY.

418. 777 S.W.2d at 390.

419. *Id.*

420. *Id.* at 390-91.

421. *Id.*

422. *Id.* at 391.

423. 764 S.W.2d 874 (Tex. App.—Austin 1989, writ denied).

424. *Id.* at 879-80.

contract. After the jury returned a verdict favorable to the purchaser, the trial court entered a judgment ordering rescission, together with an alternative award of damages to take effect only if the rescission order was later reversed by an appellate court.⁴²⁵ On appeal, the vendor argued that the trial court's judgment was not final or appealable because the judgment was a conditional award which did not require the purchaser to make an election of remedies.⁴²⁶ The court of appeals disagreed, concluding that the judgment was not truly in the alternative, nor any more indefinite than a judgment that awards additional attorney's fees in the event of an appeal.⁴²⁷ Because the relief granted was clear and definite, and there was nothing left for the trial court to decide, the appellate court held that the judgment was final and appealable.⁴²⁸

That determination, however, did not end the jurisdictional inquiry. Whenever an appellate court reverses a trial court's judgment, the appellate court has the further duty to render whatever judgment the trial court should have entered, except when a remand is necessary.⁴²⁹ Since the Texas Constitution reserves that power to appellate courts,⁴³⁰ the *Ferguson* court concluded that a trial court cannot constitutionally perform the same function.⁴³¹ According to the court, therefore, the trial court lacked authority to include an alternative award in the event of a reversal on appeal, and that portion of the trial court's judgment was erroneous.⁴³²

*Bethurum v. Holland*⁴³³ also dealt with the finality of trial court judgments for purposes of appellate review. The defendants in *Bethurum* obtained a summary judgment dismissing all of the claims asserted against them by the plaintiffs.⁴³⁴ The judgment did not dispose of defendants' counterclaim, however, which was not a subject of the summary judgment motion.⁴³⁵ Nevertheless, the judgment signed by the trial court mistakenly included "Mother Hubbard" language that denied all relief not expressly

425. *Id.* at 877.

426. *See* *Hinde v. Hinde*, 701 S.W.2d 637, 639 (Tex. 1985) (appellate courts can review only final and definite judgments); *Hill v. Hill*, 404 S.W.2d 641, 643 (Tex. Civ. App.—Houston 1966, no writ)(as general rule judgments must not be conditional).

427. 764 S.W.2d at 879; *see* *International Sec. Life Ins. Co. v. Spray*, 468 S.W.2d 347, 349-50 (Tex. 1971) (award of additional attorney's fees in event of appeal affirmed, because clerk could determine from file alone whether appeal was taken, thus achieved certainty as judgment).

428. 764 S.W.2d at 879.

429. *Id.* at 880; *see* TEX. R. APP. P. 81(c).

430. *SEE* TEX. CONST. art. V, § 8.

431. 764 S.W.2d at 880. Pursuant to TEX. CONST. art V, § 8, the jurisdiction of district courts consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies except in cases where exclusive, appellate, or original jurisdiction may be conferred by the constitution or other law on some other court, tribunal, or administrative body.

432. 764 S.W.2d at 880. The court's holding did not require a reversal, however, since the rescission award was in no way dependent on the contingent damage award. *Id.*, *citing* *Blair v. State*, 640 S.W.2d 867, 867 (Tex. 1982) (judgment may be void in part and valid in part as long as valid portion is not dependent on void portion).

433. 771 S.W.2d 719 (Tex. App.—Amarillo 1989, no writ).

434. *Id.* at 720.

435. *Id.* at 720-21.

granted in the judgment.⁴³⁶ After plaintiffs appealed the judgment, defendants moved to dismiss the appeal for want of jurisdiction on the basis that the judgment was an interlocutory, unappealable order because it failed to dispose of defendants' counterclaims which had yet to be presented to the trial court. Defendants' motion to dismiss was not filed until more than thirty days after the filing of the transcript in the court of appeals, however, and plaintiffs urged the court to deny the motion on the basis of untimeliness.⁴³⁷

In granting defendants' motion to dismiss the appeal, the court held that a party does not waive his jurisdictional challenge by failing to timely file a motion to dismiss.⁴³⁸ The court also concluded that the question of jurisdiction was fundamental, so that the court could not blindly ignore the issue even if the parties failed to raise the matter themselves.⁴³⁹ Finally, the court held that its inquiry into the true nature of the summary judgment was appropriate, notwithstanding the "Mother Hubbard" clause, because a summary judgment is interlocutory and unappealable if in reality it is only a partial summary judgment.⁴⁴⁰

Rule 296 requires the presiding judge in a bench trial to make written findings of fact and conclusions of law if either party files a request within ten days after the final judgment is signed.⁴⁴¹ If the trial judge fails to prepare and file his findings within thirty days after the judgment, the party who made the initial request has five days in which to call this omission to the court's attention; otherwise, the party cannot complain about the trial judge's failure on appeal.⁴⁴² In *Cherne Industries, Inc. v. Magallanes*⁴⁴³ the supreme court reversed a decision of the Corpus Christi court of appeals that had held that the initial request for findings and conclusions must be both filed and presented to the trial judge within ten days.⁴⁴⁴ Such a requirement, concluded the supreme court, was not justified by the plain language of Rule 296,⁴⁴⁵ which requires only that the initial request be filed within ten days after the judgment is signed.⁴⁴⁶ Although unnecessary to the decision in *Cherne*, the court went further and held that a party need never present the

436. *Id.* at 722.

437. *Id.* at 722. TEX. R. APP. P. 72 provides that motions to dismiss an appeal for want of jurisdiction shall be made, filed and docketed within thirty days after the filing of the transcript in the court of appeals.

438. 771 S.W.2d at 722 (citing *Walker v. Cleere*, 141 Tex. 550, 174 S.W.2d 956, 958 (1943)).

439. 771 S.W.2d at 722; see *McCauley v. Consolidated Underwriters*, 157 Tex. 475, 304 S.W.2d 265, 266 (1957); *Marshall v. Brown*, 635 S.W.2d 578, 580 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.). The court also observed that TEX. R. CIV. P. 72, which specifies the time period for filing a motion to dismiss the appeal for want of jurisdiction, permits the court to entertain any late-filed motion upon such terms as the court deems just and proper. 771 S.W.2d at 722.

440. 771 S.W.2d at 722-23 (citing *Teer v. Duddleston*, 664 S.W.2d 702, 704 (Tex. 1984)).

441. TEX. R. CIV. P. 296.

442. TEX. R. CIV. P. 297.

443. 763 S.W.2d 768 (Tex. 1989).

444. *Id.* at 770, *overruling Lassiter v. Bliss*, 559 S.W.2d 353 (Tex. 1977).

445. TEX. R. CIV. P. 296.

446. 763 S.W.2d at 770; TEX. R. CIV. P. 296.

initial request to the trial court in order to comply with the rule.⁴⁴⁷ According to the court, presentment of an initial request for findings and conclusions is unnecessary.⁴⁴⁸ If a trial judge fails to comply with the initial request, the more rigorous procedure of Rule 297 ensures that the trial court is apprised in a timely fashion of the requesting party's continued interest in obtaining the court's findings and conclusions.⁴⁴⁹ Finally, because the trial court's duty to file findings and conclusions is mandatory, the supreme court held that the trial judge's failure in *Cherne* to respond to the plaintiff's request was presumed harmful and constituted reversible error.⁴⁵⁰

Rule 329b provides a trial court with plenary power to vacate, modify, correct, or reform its judgment within thirty days after the court signs the judgment or thirty days after all timely motions for new trial are overruled. If a court modifies, corrects or reforms a judgment in any respect, the time for appeal runs from the date the court signs such altered judgment.⁴⁵¹ Applying this rule literally, the court in *Check v. Mitchell*⁴⁵² held that any change made to a judgment during the plenary period, whether or not it is material or substantial, operates to delay the commencement of the appellate timetable.⁴⁵³

Another case decided by the supreme court during the survey period involved an issue about the time period for prosecuting an appeal. In *Garcia v. Kastner Farms, Inc.*⁴⁵⁴ the trial court rendered a take nothing judgment against the plaintiff.⁴⁵⁵ Because the plaintiff did not file a motion for new trial, his appellate cost bond was due within thirty days after the judgment was signed.⁴⁵⁶ Although the plaintiff did not file his cost bond within the required period, the plaintiff did timely move for an extension of time on the basis that he could not adequately determine the propriety or necessity of an appeal until receipt of the trial court's findings of fact and conclusions of law, which the court did not complete until more than thirty days after the court signed the judgment.⁴⁵⁷ The court of appeals denied the plaintiff's motion and dismissed the appeal for want of jurisdiction.⁴⁵⁸ The court re-

447. 763 S.W.2d at 770. In so holding, the court overruled a long line of cases which held that a party must present to the trial judge both the initial request under rule 296 and the second request under rule 297. See, e.g., *Lassiter v. Bliss*, 559 S.W.2d 353, 358 (Tex. 1977) (requiring separate presentment of request for findings and conclusions).

448. 763 S.W.2d at 772.

449. *Id.*; TEX. R. CIV. P. 297.

450. 763 S.W.2d at 772; see *Wagner v. Riske*, 142 Tex. 337, 343, 178 S.W.2d 117, 120 (1944) (trial court's failure to respond when all requests have been properly made is presumed harmful unless record affirmatively shows no injury to complaining party).

451. TEX. R. CIV. P. 329b(h).

452. 758 S.W.2d 755 (Tex. 1988).

453. *Id.* at 756.

454. 774 S.W.2d 668 (Tex. 1989).

455. *Id.* at 669.

456. See TEX. R. APP. P. 41(a)(1).

457. TEX. R. APP. P. 41(a)(2) provides that the appellate court may grant an extension of time for filing the cost bond, if the party files the bond within 15 days of the deadline, together with a motion reasonably explaining the need for the extension.

458. *Garcia v. Kastner Farms, Inc.*, 761 S.W.2d 444, 446 (Tex. App.—Corpus Christi 1988), *rev'd*, 774 S.W.2d 668 (Tex. 1989).

marked that the decision by plaintiff's counsel to postpone his decision on whether or not to appeal until he reviewed the trial court's findings and conclusions had a certain amount of commendable professionalism.⁴⁵⁹ Nevertheless, the court concluded that the untimeliness of the appeal resulted from a conscious and deliberate decision by plaintiff's counsel not to file the bond within the required time period.⁴⁶⁰

The supreme court reached the opposite conclusion and held that the late filing was due to the attorney's misunderstanding of the law, which was a reasonable explanation for an extension within the ambit of Rule 41(a)(2).⁴⁶¹ Pointing to its prior holding in *Meshwert v. Meshwert*,⁴⁶² the court noted that the reasonable explanation standard set forth in Rule 41(a)(2) was a relaxed requirement from the old standard of good cause.⁴⁶³ This liberal standard of review, said the court, even encompasses the negligence of counsel as a reasonable explanation for needing an extension.⁴⁶⁴ The decision in *Garcia* that any conduct short of deliberate or intentional noncompliance qualifies as inadvertence, mistake or mischance—even if that conduct can also be characterized as professional negligence—should resolve prior inconsistencies in the application of Rule 41(a)(2) by the various courts of appeal.⁴⁶⁵

Finally, in *Donwerth v. Preston II Chrysler-Dodge*,⁴⁶⁶ the supreme court reaffirmed its prior holding⁴⁶⁷ that, unless an appellant limits an appeal pursuant to Rule 40(a)(4),⁴⁶⁸ an appellee may complain by cross-point in his brief to the court of appeals of any error in the trial court between the appellant and the appellee without perfecting an independent appeal.⁴⁶⁹ The court noted, however, that this rule for appeals to the court of appeals differs from the rule for appeals to the supreme court.⁴⁷⁰ To obtain a different and more favorable judgment in the supreme court than that rendered by the court of appeals, a party must file a timely motion for rehearing and an application for writ of error in the court of appeals.⁴⁷¹

459. 761 S.W.2d at 446.

460. *Id.*

461. 774 S.W.2d at 670.

462. 549 S.W.2d 383, 384 (Tex. 1977).

463. 774 S.W.2d at 670.

464. *Id.*

465. *Id. Compare* Heritage Life Ins. Co. v. Heritage Group Holding Corp., 751 S.W.2d 229, 231-32 (Tex. App.—Dallas 1988, writ denied) (professional negligence that is not deliberate or intentional noncompliance qualifies as inadvertence) *with* Home Ins. Co. v. Espinoza, 644 S.W.2d 44, 45 (Tex. Civ. App.—Corpus Christ 1982, writ ref'd n.r.e.) (failure to adequately familiarize oneself with basic rules of appellate procedure is not reasonable explanation).

466. 775 S.W.2d 634 (Tex. 1989).

467. *Id.* at 639; *see* Hernandez v. City of Ft. Worth, 617 S.W.2d 923, 924 (Tex. 1981).

468. TEX. R. APP. P. 40(a)(4).

469. 775 S.W.2d at 639.

470. *Id.* at 639, n.5.

471. *Id.* (citing Archuleta v. International Ins. Co., 667 S.W.2d 120, 123 (Tex. 1984)).

XV. MISCELLANEOUS

A. *Witnesses at Trial*

"The rule," derived from Texas Rule of Civil Procedure 267⁴⁷² and Texas Rule of Civil Evidence,⁴⁷³ provides for the exclusion of witnesses from the courtroom so that they cannot hear and be influenced by the testimony of other witnesses.⁴⁷⁴ Prior to the adoption of the Rules of Evidence, the exclusion of witnesses was discretionary with the trial court; however, under the wording of the new rule, the court must exclude witnesses upon the request of a party.⁴⁷⁵ The rule exempts three classes of witnesses from its operation, however, including any person whose presence is essential to the presentation of a party's case.⁴⁷⁶ *Elbar, Inc. v. Claussen*⁴⁷⁷ holds that this latter exemption covers a party's expert witnesses.⁴⁷⁸ According to the court, therefore, the trial judge did not err in refusing to exclude plaintiff's accident reconstruction expert from the courtroom following defendants' invocation of the rule.⁴⁷⁹

B. *Motions for Judgment in Bench Trials*

In *Qantel Business Systems, Inc. v. Custom Controls Co.*⁴⁸⁰ a case of some significance to the practitioner, the supreme court changed the appellate standard for review of a trial court's entry of judgment in a bench trial following the plaintiff's case-in-chief.⁴⁸¹ When faced with a motion for directed verdict at the close of the plaintiff's case in a jury trial, a trial judge must view the evidence in the light most favorable to the plaintiff and direct a verdict only when the plaintiff presents no evidence to support his cause of action.⁴⁸² In *Lorino v. Crawford Packing Co.*⁴⁸³ the court of appeals held that this standard for a directed verdict in a jury trial applies equally to the granting of a motion for judgment in a trial to the court.⁴⁸⁴ Since the *Lorino* decision in 1943, courts have routinely and mechanically followed this

472. TEX. R. CIV. P. 267.

473. TEX. R. CIV. EVID. 614.

474. TEX. R. CIV. P. 267; TEX. R. CIV. EVID. 614.

475. *Id.* Compare *Triton Oil & Gas Corp. v. E.W. Moran Drilling Co.*, 509 S.W.2d 678, 684 (Tex. Civ. App.—Ft. Worth 1974, writ ref'd n.r.e.) (rule is discretionary, not mandatory) with TEX. R. CIV. EVID. 614 (court shall order witnesses excluded) and Tex. R. Civ. P. 267(a) (witnesses shall be sworn and removed from courtroom).

476. TEX. R. CIV. P. 267(b); TEX. R. CIV. EVID. 614.

477. 774 S.W.2d 45 (Tex. App.—Dallas 1989, writ requested). The decision in *Elbar* accords with earlier cases decided prior to the adoption of the Texas Rules of Evidence. See, e.g., *Triton*, 509 S.W.2d at 685.

478. *Elbar*, 774 S.W.2d at 51-52.

479. 774 S.W.2d at 52. Although the court of appeals observed that defendant failed to invoke the rule until after testimony had begun, the court did not address whether defendant waived the rule's protections by the timing of his request. *Id.* at 51.

480. 761 S.W.2d 302 (Tex. 1988).

481. *Id.* at 303-05.

482. *Id.* at 303-04; see *White v. Southwestern Bell Tel. Co.*, 651 S.W.2d 260, 262 (Tex. 1983); *Collora v. Navarro*, 574 S.W.2d 65, 68 (Tex. 1978).

483. 169 S.W.2d 235, 240 (Tex. Civ. App.—Galveston), *aff'd*, 142 Tex. 51, 175 S.W.2d 410 (1943).

484. *Id.*

rule.⁴⁸⁵ Nevertheless, Commentators have severely criticized the *Lorino* rule as fostering judicial inefficiency.⁴⁸⁶ The court in *Qantel* finally concluded that this criticism was meritorious.⁴⁸⁷ According to the court, a plaintiff who rests indicates that he has fully developed his case, and no useful purpose is served by requiring the trial judge to hear the defendant's evidence when, as the trier of fact, the judge is unpersuaded by the plaintiff's case.⁴⁸⁸ Instead, a trial judge should be allowed in those cases to rule on both the factual and legal issues at the close of the plaintiff's case and make factual findings at that time if requested by a party.⁴⁸⁹ For that reason, the *Qantel* court overruled the *Lorino* rule and held that a trial judge granting a motion for judgment at the conclusion of plaintiffs' case is presumed to have ruled on the factual sufficiency of the evidence.⁴⁹⁰

C. Sanctions

In *Mackie v. Koslow's*⁴⁹¹ the court of appeals questioned a trial court's power to impose sanctions on a party who refused to comply with the court's order requiring the parties to confer about the status of the case. The trial court in *Mackie* sent a letter to the parties requesting them to confer about various pretrial matters and to provide the court with a status report.⁴⁹² The letter also advised the parties that failure to comply with the request could result in a show cause hearing in which the court would consider imposing sanctions on the recalcitrant party. After the defendants, who were appearing in the case pro se, failed to confer with their opponents or to appear at the subsequently scheduled show cause hearing, the court entered a default judgment in favor of the plaintiff.⁴⁹³

Although the court of appeals refused to condone defendants' conduct, it nevertheless reversed the default judgment, holding that the trial court was not empowered to sanction the defendants for a failure to confer with their opponent.⁴⁹⁴ The court reached this conclusion only after considering all three possible sources alleged by plaintiff as bases for the trial court's power to enter a default judgment in the case.⁴⁹⁵ To begin with, the court found no authority for the trial judge's action under Rule 166⁴⁹⁶ that, while it permits a judge to order the parties to appear before the court for a conference, does

485. See *Stegman v. Chavers*, 704 S.W.2d 793, 794 (Tex. App.—Dallas 1985, no writ); see also 4 McDonald, TEXAS CIVIL PRACTICE, § 16.04 (1984) (discussing *Lorino* rule).

486. See *R.W.M. v. J.C.M.*, 684 S.W.2d 746, 751-53 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (Gonzalez, J., dissenting); *Guthrie v. Ray*, 556 S.W.2d 589, 591 (Tex. Civ. App.—Dallas 1977, no writ).

487. 761 S.W.2d at 304.

488. *Id.*

489. *Id.*

490. *Id.* at 305. By so holding, the supreme court changed the appellate standard of review in such cases from a standard of legal insufficiency to a standard of factual insufficiency.

491. 774 S.W.2d 741 (Tex. App.—El Paso 1989, writ requested).

492. *Id.* at 741-42.

493. *Id.* at 742.

494. *Id.* at 743.

495. *Id.* at 742-43.

496. TEX. R. CIV. P. 166.

not authorize an order that the parties confer with each other outside the court.⁴⁹⁷ Similarly, the local court rule⁴⁹⁸ relied on by plaintiff failed to provide for a sanction of dismissal or default.⁴⁹⁹ Finally, the court declared Rule 215⁵⁰⁰ inapplicable since it pertains to discovery disputes and not pre-trial matters before the court.⁵⁰¹ Finally, in *Goad v. Goad*⁵⁰² the court held that a trial court has inherent power under Rule 13⁵⁰³ to deal with sanctions even after entry of the judgment.⁵⁰⁴ Thus, according to the court, a trial judge may include an award of sanctions in the final judgment or a judge can enter a separate order concerning sanctions before or after signing the judgment.⁵⁰⁵

D. Attorney Fees

Section 38.001⁵⁰⁶ of the Texas Civil Practice and Remedies Code generally authorizes the recovery of attorney's fees for certain types of claims.⁵⁰⁷ Several years ago, in *Gates v. City of Dallas*,⁵⁰⁸ the supreme court held that the statutory predecessor of § 38.001 applied to municipal corporations when they were engaged in propriety, as opposed to governmental, functions.⁵⁰⁹ Noting that a recent statute⁵¹⁰ enacted in response to *Gates* effectively amended § 38.001, the court in *City of Terrell v. McFarland*⁵¹¹ held that § 38.001 no longer authorizes an award of attorney's fees against a city regardless of whether the city is acting in a governmental or a propriety capacity.⁵¹²

497. 774 S.W.2d at 742.

498. See DALLAS, TEX. CIV. DIST. CT. R. 1.11 (preparation for pre-trial).

499. 774 S.W.2d at 743. The court also observed that, like TEX. R. CIV. P. 166, the Dallas local rule related to pretrial conferences with the court, and not conferences between the parties outside the court.

500. TEX. R. CIV. P. 215(2)(b) provides a laundry list of sanctions available to the court in the event that a party fails to comply with a discovery request or a court order relating to discovery.

501. 774 S.W.2d at 743.

502. 768 S.W.2d 356 (Tex. App.—Texarkana 1989, writ denied, cert. denied — U.S. —, 110 S.Ct. 722, — L.Ed.2d — (1990)).

503. TEX. R. CIV. P. 13.

504. *Id.*

505. 768 S.W.2d at 358. The court also held that the notice procedures contained in the summary judgment rule do not apply to rule 13 sanctions, and a court may impose sanctions sua sponte without any prior notice. *Id.* Compare TEX. R. CIV. P. 13 with TEX. R. CIV. P. 166a.

506. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1986).

507. *Id.*

508. 704 S.W.2d 737 (Tex. 1986).

509. *Id.* at 740.

510. See TEX. REV. CIV. STAT. ANN. art. 1269j-13 (Vernon Supp. 1988).

511. 766 S.W.2d 809 (Tex. App.—Dallas 1988, writ denied).

512. *Id.* at 813.

