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CIVIL EVIDENCE

by

Linda L. Addison*

DURING the Survey period, the Texas appellate courts handed down numerous decisions construing various rules of civil evidence. Significant cases arose under every article of the Texas Rules of Civil Evidence and in the areas of burden of proof, presumptions, inferences, and parol evidence. Those cases and this article are organized into the following substantive topics: (1) Article I — General Provisions; (2) Article II — Judicial Notice; (3) Burden of Proof, Presumptions, and Inferences; (4) Article IV — Relevancy and Its Limits; (5) Article V — Privileges; (6) Article VI — Witnesses; (7) Article VII — Opinions and Expert Testimony; (8) Article VIII — Hearsay; (9) Article IX — Authentication and Identification; (10) Article X — Contents of Writings, Recordings, and Photographs; and (11) Parol Evidence.

I. ARTICLE I — GENERAL PROVISIONS

Texas Rule of Civil Evidence 103(a)(1) provides that a ruling admitting evidence cannot be a predicate for a finding of error unless “a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.”¹ During the Survey period, one court held that a general objection to deposition excerpts, taken in another court, that was attached to a motion for summary judgment was insufficient because it did not point out specifically the portion objected to nor the reasons for the objection.² Another court held that a party, who complained on appeal of evidence contained within a psychological assessment that had been admitted earlier without objection, had waived any error regarding a later offer of the same evidence, and had failed to preserve error by not making a timely objection to the earlier offer under Texas Rule of Civil Evidence 103(a)(1).³

Texas Rule of Civil Evidence 103(a)(2) provides that a ruling excluding evidence cannot be the basis of reversible error unless an offer of proof is

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1. TEX. R. CIV. EVID. 103(a)(1).

2. *Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc.*, 779 S.W.2d 474, 477 (Tex. App.—El Paso 1989, writ denied).

3. *Posner v. Dallas County Child Welfare Unit*, 784 S.W.2d 585, 587 (Tex. App.—Eastland 1990, writ denied).

made.⁴ Accordingly, the parties in one suit failed to preserve error for appellate review when they did not make an offer of proof after the trial court excluded their expert's testimony.⁵ Similarly, the court of appeals refused to consider whether a court-ordered social study, in a divorce proceeding, was inadmissible hearsay where the study was not part of the appellate record.⁶

II. ARTICLE II — JUDICIAL NOTICE

Article II of the Federal Rules of Evidence and the Texas Rules of Civil Evidence governs judicial notice. Judicially noticed facts must be free of reasonable dispute⁷ and either generally known within the trial court's territorial jurisdiction⁸ or readily determinable by reference to sources the accuracy of which could not reasonably be questioned.⁹ During the Survey period, the Fifth Circuit took judicial notice that a party had sought transfer of its bankruptcy proceedings in compliance with a district court's order.¹⁰

Texas Rule of Civil Evidence 201(e) is identical to Federal Rule of Evidence 201(e).¹¹ Both rules provide that a party is entitled to be heard on the appropriateness of taking judicial notice, and that a request to be heard can be made after the court has taken judicial notice when there is no prior notification.¹² In *Chen v. Metropolitan Insurance & Annuity Co.*¹³ the Fifth Circuit explained that a party must file a motion requesting an opportunity to be heard after learning that the court has taken judicial notice in order to contest the propriety of the court's taking judicial notice.¹⁴

Texas Rule of Civil Evidence 201(g) requires the court to instruct the jury to accept conclusively any fact that has been judicially noticed.¹⁵ In *First National Bank of Amarillo v. Jarnigan*¹⁶ the trial court instructed the jury to accept thirteen judicially noticed facts as conclusive.¹⁷ In reversing and remanding the case, the Amarillo court of appeals explained that the trial court erred in judicially noticing that certain legal documents in question were part of a single transaction because that factual determination should have been made by the jury.¹⁸ The trial court also erred by charging the jury as to the twelve other judicially noticed facts because the charge amounted to an impermissible comment on the weight of the evidence by the court.¹⁹

4. TEX. R. CIV. EVID. 103(a)(2).

5. 784 S.W.2d at 587.

6. *Rossen v. Rossen*, 792 S.W.2d 277, 278 (Tex. App.—Houston [1st Dist.] 1990, no writ) (citing Tex. R. App. P. 50(d), 74(d) and TEX. R. CIV. EVID. 103(a)(2)).

7. FED. R. EVID. 201(b); TEX. R. CIV. EVID. 201(b).

8. FED. R. EVID. 201(b)(1); TEX. R. CIV. EVID. 201(b)(1).

9. FED. R. EVID. 201(b)(2); TEX. R. CIV. EVID. 201(b)(2).

10. *Seattle-First Nat'l Bank v. Manges*, 900 F.2d 795, 798 (5th Cir. 1990).

11. FED. R. EVID. 201(e); TEX. R. CIV. EVID. 201(e).

12. FED. R. EVID. 201(e); TEX. R. CIV. EVID. 201(e).

13. 907 F.2d 566 (5th Cir. 1990).

14. *Id.* at 569-70.

15. TEX. R. CIV. EVID. 201(g).

16. 794 S.W.2d 54 (Tex. App.—Amarillo 1990, writ denied).

17. *Id.* at 59-60.

18. *Id.* at 62.

19. *Id.* The court reached this decision by construing Texas Rule of Civil Evidence 201(g)

The court of appeals explained that the judicially noticed facts did not constitute definitions or instructions and hence, were not designed to assist the jury in answering the questions in the charge.²⁰

Section 38.004 of the Texas Civil Practice and Remedies Code permits a court to take judicial notice of an amount representative of typical attorneys fees in a matter before the court.²¹ In *Gill Savings Association v. Chair King, Inc.*²² the Houston court of appeals erred by modifying a judgment to delete \$7,800 in attorneys fees for the handling of a bankruptcy matter relating to a breach of contract claim and \$25,000 in attorneys fees for the possible appeal of the case at issue.²³ The court of appeals explained that there was no evidence to support the award and that attorneys fees for bankruptcy proceedings were not recoverable under Section 38.001 of the Civil Practice and Remedies Code.²⁴ In finding that the court of appeals erred, the Texas Supreme Court held that attorneys fees for related bankruptcy proceedings could be awarded in breach of contract actions.²⁵ The supreme court disagreed with the court of appeals' holding that there was no evidence supporting the award of attorneys fees.²⁶ The supreme court held that the trial court record demonstrated the complexity of the case, and that complexity, coupled with the trial court's power to take judicial notice of fees, presented at least some evidence in support of the award of attorneys fees for the appeal.²⁷ Because the court of appeals did not reach the factual sufficiency of the evidence supporting attorneys fees, and because the trial court was going to be required to relitigate actual and punitive damages, the supreme court remanded the issue of attorneys fees to the trial court for redetermination.²⁸

Texas Rule of Civil Evidence 203 governs the determination of laws of foreign countries. In *Ramirez v. Lagunes*²⁹ the Corpus Christi court of appeals affirmed the trial court's denial of a bill of discovery for release of a Mexican ex-husband's financial records from certain Texas financial institutions because the Mexican ex-wife did not prove that the Mexican courts

in conjunction with Texas Rule of Civil Procedure 277. *Id.* at 61-62. Rule 277 provides, in part, that:

The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict. . . .

The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers when it is properly a part of an instruction or definition.

TEX. R. CIV. P. 277.

20. 794 S.W.2d at 62.

21. TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (Vernon 1986).

22. 783 S.W.2d 674 (Tex. App.—Houston [14th Dist.] 1989), *aff'd in part, modified in part*, 797 S.W.2d 31 (Tex. 1990).

23. *Id.* at 681.

24. *Id.*

25. *Gill Savs. Ass'n v. Chair King, Inc.*, 797 S.W.2d 31, 32 (Tex. 1990).

26. *Id.* at 31-32.

27. *Id.* at 32.

28. *Id.*

29. 794 S.W.2d 501 (Tex. App.—Corpus Christi 1990, no writ).

were unable to grant comparable discovery relief.³⁰

III. BURDEN OF PROOF, PRESUMPTIONS, AND INFERENCES

Article III of the Federal Rules of Evidence addresses presumptions. Because the Texas Rules of Civil Evidence lack a corresponding article III, Texas common law continues to govern the law of presumptions. During the Survey period, the Texas Supreme Court further developed the law of presumptions, burden of proof, and inferences in Texas.

In *Chase Manhattan Bank v. Lindsay*³¹ the Texas Supreme Court held there is no presumption that a default judgment or summary judgment disposes of all parties and issues before a trial court. *Lindsay* was a mandamus proceeding arising out of a deficiency action following a foreclosure and sale of mortgaged property.³² A prior judge had granted the defendant's motion for summary judgment on the deficiency claim.³³ Judge Lindsay then held that the order disposed of all parties and issues and that the trial court no longer had plenary jurisdiction.³⁴ On motion for rehearing, the supreme court held the trial court's order granting the defendant's motion for summary judgment, which did not mention the defendant's counterclaims, was interlocutory, and did not deprive the trial court of jurisdiction as to the pending counterclaims, even if the counterclaims were not severable.³⁵

In *Christiansen v. Prezelski*³⁶ the Texas Supreme Court reiterated the well established principle that the burden is on the appellant to present a sufficient record on appeal to show reversible error.³⁷ The appellant, Prezelski, requested that only a portion of the record from the trial court be sent to the court of appeals. Additionally, the appellant failed to comply with the requirements of Texas Rule of Appellate Procedure 53(d), resulting in a loss of the rule's presumption that omitted portions of the record were irrelevant to the appeal. Without a complete trial record, and without the Rule 53(d) presumption, the supreme court held that the court of appeals could not determine whether the alleged trial court error was harmful.³⁸ In *Acker v. Texas Water Commission*³⁹ the Texas Supreme Court also reiterated the principle that on motion for summary judgment, evidence supportive of the non-movant will be presumed as true, with all reasonable inferences indulged in the non-movant's favor and any doubts resolved to its advantage.⁴⁰

30. *Id.* at 506.

31. 787 S.W.2d 51 (Tex. 1990) (original proceeding).

32. *Id.* at 52.

33. *Id.*; *id.* at 52 n. 1.

34. *Id.*

35. *Id.* at 53.

36. 782 S.W.2d 842 (Tex. 1990).

37. *Id.* at 843 (citing Tex. R. App. P. 50(d), 53(d)).

38. *Id.*

39. 790 S.W.2d 299 (Tex. 1990).

40. *Id.* at 301-02.

IV. RELEVANCY AND ITS LIMITS

Article IV of the Texas Rules of Civil Evidence governs relevancy and its limits.⁴¹ All relevant evidence may be admitted unless some constitutional provision, statute, or other rule provides otherwise.⁴² Evidence that is not relevant is not admissible.⁴³

In a products liability suit against Volkswagen, the Corpus Christi court of appeals held that the trial court properly admitted evidence of a barroom brawl.⁴⁴ The evidence in question showed that one of the drivers involved in a fatal two car collision had been in an altercation at a tavern just before the accident, and had been warned the police had been called.⁴⁵ The court of appeals reasoned that the evidence was relevant and admissible, and supportive of Volkswagen's defense that the vehicles collided at a very high closing speed since it tended to show a motive and state of mind on the part of the one driver for traveling at a high rate of speed.⁴⁶

In a suit by a customer against a pest exterminator, the customer alleged that she had suffered mental anguish as a result of a chlordane application to her home.⁴⁷ The Austin court of appeals held that the district court properly admitted psychiatric evidence concerning the customer's teenage son's anger, discouragement, and emotional distress following the pesticide treatment.⁴⁸ The evidence of the son's emotional problems supported the customer's claim for damages because evidence presented showed the son's problems had in turn caused the customer mental anguish.⁴⁹

In *Montelongo v. Goodall*⁵⁰ the Austin court of appeals upheld the trial court's exclusion of certain evidence as irrelevant. The suit involved a tenant's claim against the landlord for injuries suffered by the tenant allegedly due to defective trailer house steps.⁵¹ The tenant sought to admit testimony that the steps did not comply with municipal building code standards.⁵² The court of appeals held that the proffered testimony was irrelevant and properly excluded because the tenant did not introduce evidence to show that the building code standards applied to the steps in question.⁵³

In *Roberts v. Harnischfeger Corp.*^{54a} a products liability action, the Fifth Circuit held that evidence of subsequent safety improvements was irrelevant to the determination of whether the crane in question was unreasonably dan-

41. TEX. R. CIV. EVID. art. IV.

42. TEX. R. CIV. EVID. 402. For the definition of relevance, see *id.* 401.

43. *Id.* 402.

44. *Ramirez v. Volkswagen of Am., Inc.*, 788 S.W.2d 700, 704-05 (Tex. App.—Corpus Christi 1990, writ denied).

45. *Id.*

46. *Id.*

47. *Orkin Exterminating Co. v. Williamson*, 785 S.W.2d 905, 909 (Tex. App.—Austin 1990, writ denied).

48. *Id.*

49. *Id.*

50. 788 S.W.2d 717 (Tex. App.—Austin 1990, no writ).

51. *Id.* at 720.

52. *Id.*

53. *Id.*

54. 901 F.2d 42 (5th Cir. 1989).

gerous when manufactured. The plaintiff had shown that the manufacturer offered a shut-off type safety device that may have prevented plaintiff's injury as optional equipment on the 1978 model of crane in question.⁵⁵ The plaintiff unsuccessfully sought to introduce evidence, deemed irrelevant, that the manufacturer included a warning-type safety device, developed after 1978, as standard equipment on its 1984 cranes to show that the 1978 crane was unreasonably dangerous when sold because it did not include the shut-off safety device as standard equipment.⁵⁶

Texas Rule of Civil Evidence 403 allows the exclusion of relevant evidence on special grounds such as unfair prejudice, confusion of the issues, or if the evidence is merely cumulative.⁵⁷ The exclusion under Rule 403 is discretionary.⁵⁸ In a suit for breach of an option contract, the trial court properly excluded, under Rule 403, a letter from an option grantors' attorney to the option holder's attorney that dealt primarily with the grantor's legal opinion of the validity of the contract.⁵⁹ In another suit, the Federal Savings and Loan Insurance Corporation, as receiver for a savings institution, was granted a new trial on breach of contract claims against it when the trial court had improperly admitted fraud claims that were barred under the *D'Oench, Duhme* doctrine because the admission of evidence on the fraud claims may have resulted in unfair prejudice on the contract claims.⁶⁰

The mere fact that testimony is adverse to a party does not warrant its exclusion under Rule 403 as demonstrated by *Davidson Oil Country Supply Co. v. Klockner, Inc.*⁶¹ In *Klockner*, a breach of warranty of merchantability action against the distributor of well tubing, the trial court improperly excluded evidence of other similar failures of the Italian manufactured tubing because it would have shown a latent defect.⁶² Similarly, a district court correctly admitted evidence that the driver of a vehicle involved in a fatal accident had been in a barroom fight shortly before the accident and that he had been warned that the police had been called.⁶³ The evidence, although adverse to a party, was relevant to show the driver's motive and state of mind for allegedly maintaining a high rate of speed.⁶⁴

Texas Rule of Civil Evidence 408 excludes evidence of compromise and offers to compromise when offered to prove liability, or the invalidity of a claim or its amount.⁶⁵ During the Survey period, the Beaumont court of appeals held that Rule 408 is inapplicable to completed agreements for com-

55. *Id.* at 44.

56. *Id.*

57. TEX. R. CIV. EVID. 403.

58. "Although relevant, evidence may be excluded if . . ." *Id.* (emphasis added).

59. *Olson v. Bayland Publishing, Inc.*, 781 S.W.2d 659, 665 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

60. *Federal Savs. & Loan Ins. Corp. v. T. F. Stone-Liberty Land Assocs.*, 787 S.W.2d 475, 493-94 (Tex. App.—Dallas 1990, writ granted).

61. 908 F.2d 1238, *aff'd on rehearing*, 917 F.2d 185 (5th Cir. 1990).

62. *Id.* at 1244-46.

63. *Ramirez v. Volkswagen of Am., Inc.*, 788 S.W.2d 700, 704-05 (Tex. App.—Corpus Christi 1990, writ denied).

64. *Id.*

65. TEX. R. CIV. EVID. 408.

promise.⁶⁶ Explaining that the settlement agreement at issue resulted in an accord and satisfaction that would have been enforceable by the appellant, the Beaumont court rejected appellant's argument that the agreement was not competent summary judgment evidence because it was not admissible under Rule 408.⁶⁷ In *Kansas City Southern Railway Co. v. Carter*⁶⁸ a worker's suit against a railroad, the Texarkana court of appeals held that a trial court should have excluded an affidavit regarding the railroad's settlement of an unrelated lawsuit as evidence in a hearing on the railroad's motion to transfer venue. The worker argued that the settlement was offered not to show the railroad's liability in the prior suit, but only that the railroad owned and operated the train involved in the prior suit.⁶⁹ In rejecting this argument, the Texarkana court reasoned that ownership and operation of the train were essential to determination of the railroad's liability in the prior suit; therefore, the settlement agreement could not be used to show ownership and operation.⁷⁰

Rule 408, however, does not require exclusion of settlement evidence when offered for some other purpose, such as showing the bias or prejudice of a witness or party.⁷¹ In *Ochs v. Martinez*⁷² the San Antonio court of appeals approved the trial court's exclusion of statements allegedly made by a father during settlement negotiations in a custody dispute that he would consent to his ex-wife's custody of one daughter if he was allowed custody of the other.⁷³ The court rejected the appellant's argument that the statements were admissible to show bias or prejudice under the Rule 408 exception.⁷⁴

Texas Rule of Civil Evidence 410 excludes evidence of pleas, plea discussions, and related statements.⁷⁵ In *Cedillo v. Payloff*⁷⁶ the appellant's attorney had objected on relevancy grounds to the admission of appellant's nolo contendere plea. Since the objection had not been directed to the prohibitions of Rule 410, the Fort Worth court of appeals held that the error in admitting the plea had not been preserved for appeal.⁷⁷

V. PRIVILEGES

Article V of the Texas Rules of Civil Evidence governs privileges. No person has a privilege to refuse disclosure of any matter,⁷⁸ unless rules of

66. *Tag Resources, Inc. v. Petroleum Well Servs., Inc.*, 791 S.W.2d 600, 606 (Tex. App.—Beaumont 1990, no writ).

67. *Id.*

68. 778 S.W.2d 911, 913 (Tex. App.—Texarkana 1989, writ denied).

69. *Id.*

70. *Id.*

71. TEX. R. CIV. EVID. 408.

72. 789 S.W.2d 949 (Tex. App.—San Antonio 1990, writ denied).

73. *Id.* at 959-60.

74. *Id.*

75. TEX. R. CIV. EVID. 410.

76. 792 S.W.2d 830 (Tex. App.—Fort Worth 1990, writ denied).

77. *Id.* at 833.

78. TEX. R. CIV. EVID. 501(2).

evidence recognize the privilege,⁷⁹ or a statute⁸⁰ or constitution⁸¹ grants the privilege. Some of the specific privileges provided for in the Texas Rules of Civil Evidence include: (1) lawyer-client privilege;⁸² (2) husband-wife communication privilege;⁸³ (3) communications to clergymen;⁸⁴ (4) trade secrets;⁸⁵ and (5) physician-patient privilege.⁸⁶

Texas Rule of Civil Evidence 502 makes privileged reports that are required by law.⁸⁷ During the Survey period, the Fort Worth court of appeals rejected a newspaper's argument that handwritten notes prepared by an attorney working for the corporate parent of the newspaper were privileged from discovery in a sexual harassment lawsuit in *Star-Telegram, Inc. v. Schattman*.⁸⁸ In denying the writ of mandamus, the Fort Worth court of appeals explained that although Title VII required the newspaper to investigate sexual harassment claims, neither Title VII nor the EEOC sexual harassment guidelines⁸⁹ required reports; therefore the Rule 502 privilege for reports required by law did not apply.⁹⁰

Texas Rule of Civil Evidence 503 codifies the common law lawyer-client privilege.⁹¹ Additionally, Texas Rule of Civil Procedure 166(b)(3) provides a post-accident investigative privilege when a suit has already been initiated, or when there is good cause to believe suit will be filed.⁹² In *Boring & Tunneling Co. of America v. Salazar*⁹³ the Houston court of appeals considered both the lawyer-client and post-accident investigative privileges. The court rejected the asserted privileges on three documents because the evidence did not demonstrate that the post-accident investigative privileges were applicable or that the attorney-client relationship had been created when the insured's employee gave a statement to the insured's attorney.⁹⁴ The court, however, held that the attorney-client privilege did apply to an attorney's letter to an insurance adjuster who had hired him.⁹⁵

79. See *id.* 502-10.

80. See TEX. REV. CIV. STAT. ANN. art. 5561h (Vernon Supp. 1990), repealed by TEX. R. CIV. EVID. 510 (effective Sept. 1, 1983, as to civil cases) and TEX. R. CRIM. EVID. 510 (effective Sept. 1, 1986, as to criminal cases) (confidential communications between physician and patient relating to professional services rendered by physician for mental health purposes are privileged).

81. See U.S. CONST. amend. V; TEX. CONST. art. I, § 10.

82. TEX. R. CIV. EVID. 503.

83. *Id.* 504.

84. *Id.* 505.

85. *Id.* 507.

86. *Id.* 509.

87. *Id.* 502.

88. 784 S.W.2d 109, 111 (Tex. App.—Fort Worth 1990) (original proceeding; leave denied).

89. 29 C.F.R. § 1604.11 (1989).

90. 784 S.W.2d at 111.

91. TEX. R. CIV. EVID. 503.

92. *Loftin v. Martin*, 776 S.W.2d 145, 147-48 (Tex. 1989) (original proceeding); *Stringer v. Eleventh Court of Appeals*, 720 S.W.2d 801, 802 (Tex. 1986) (original proceeding); *Turbodine Corp. v. Heard*, 720 S.W.2d 802, 804 (Tex. 1986) (original proceeding).

93. 782 S.W.2d 284 (Tex. App.—Houston [1st Dist.] 1989) (original proceeding).

94. *Id.* at 286-89.

95. *Id.* at 289-90.

A client may waive protection of a privilege by allegations and legal proceedings.⁹⁶ For example, *Parten v. Brigham*⁹⁷ involved a wife's petition for writ of mandamus from a bill of review proceeding to set aside a divorce decree because of alleged concealment of community assets by the husband. The wife sought to compel the trial court to vacate its order requiring production of her divorce attorney's entire case file.⁹⁸ The court of appeals conditionally granted the writ but limited it to the parts of the court's order allowing discovery in the matters not dealing with the wife's and her lawyer's knowledge of the community estate.⁹⁹ For the remainder, the court found the wife's assertion of the attorney-client privilege to be a prohibited offensive use of the privilege, where the information sought by the husband regarding her knowledge of the assets in question was crucial in determining whether the divorce decree was entered without the wife's fault or negligence.¹⁰⁰

By contrast, the Waco court of appeals conditionally granted a writ of mandamus to vacate a trial court's order compelling a party to produce certain documents he claimed were protected from the attorney-client privilege in *Cantrell v. Johnson*.¹⁰¹ The Waco court of appeals held that the attorney-client privilege was not waived regarding attorney-client communications during negotiation of a stock option agreement by the client's subsequent filing of a fraud action against other parties to the agreement even though a contested issue in that action was the client's knowledge and state of mind when he entered into the agreement.¹⁰² The Waco court of appeals explained that the trial court had not expressly found that the documents in question were relevant to the issues in the case, and additionally, the trial court had specifically found the attorney-client privilege had not been waived.¹⁰³

Texas Rule of Civil Evidence 509 contains the physician-patient privilege.¹⁰⁴ Exceptions to nondisclosure under the physician-patient privilege exist where any party relies upon a physical, mental, or emotional condition as part of his claim or defense.¹⁰⁵ In *Scheffey v. Chambers*¹⁰⁶ the Houston court of appeals held that hospital medical records of a physician, who following his arrest for cocaine possession admitted himself to the hospital, were privileged in a medical malpractice lawsuit against the physician for

96. *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107-08 (Tex. 1985) (original proceeding); *Dewitt & Rearick, Inc. v. Ferguson*, 699 S.W.2d 692, 694 (Tex. App.—El Paso 1985) (original proceeding).

97. 785 S.W.2d 165 (Tex. App.—Fort Worth 1989) (original proceeding).

98. *Id.* at 166.

99. *Id.* at 169.

100. *Id.* at 167-68.

101. 785 S.W.2d 185 (Tex. App.—Waco 1990) (original proceeding).

102. *Id.* at 189.

103. 785 S.W.2d at 189.

104. TEX. R. CIV. EVID. 509.

105. *Id.* 509(d)(4), 510(d)(5).

106. *Scheffey v. Chambers*, 790 S.W.2d 879 (Tex. App.—Houston [14th Dist.] 1990) (original proceeding).

surgeries he had performed prior to his arrest.¹⁰⁷ The court explained that the exceptions in Rules 509(d)(4) and 510(d)(5) only prohibit offensive use of the privilege in situations such as when a party attempts to conceal evidence of his physical or mental condition after he has placed his condition in issue.¹⁰⁸ In *Midkiff v. Shaver*¹⁰⁹ the Amarillo court of appeals held that an insured did not place her mental condition in issue when she sought damages for ordinary mental anguish, for which she had received medical attention, as part of a lawsuit against her insurer for the mishandling of her insurance claim allegedly in violation of state law and the insurer's duty of good faith and fair dealing.¹¹⁰ The Amarillo court, however, further held that the insured could not use her evidentiary privileges to prevent discovery of the medical and mental health records concerning her alleged emotional condition and neither could she refuse to answer deposition questions concerning the medical attention she received that pertained to her mental anguish claim.¹¹¹

Under the Texas Medical Practice Act¹¹² records and reports received, maintained, or developed by the Board of Medical Examiners are not subject to discovery in a medical malpractice suit.¹¹³ In *Brochner v. Thomas*¹¹⁴ the Eastland court of appeals held that a doctor's statement to the Board of Medical Examiners, another doctor's report to the Board (a copy of which was also sent to an insurance company), reports by Board investigators, and a memo discussing phone calls between the Board and the doctor's partner were privileged and not discoverable. In response to an argument that the sending of the report to the insurance company had waived the privilege, the Eastland court explained that the privilege accorded records maintained by the Board of Medical Examiners belonged to the Board and could not be waived by other parties.¹¹⁵

Texas Rule of Civil Evidence 510 provides for the confidentiality of mental health information. In *Kentucky Fried Chicken National Management v. Tennant*¹¹⁶ the Houston court of appeals conditionally granted a writ of mandamus giving relief from a trial court's discovery order denying access to plaintiff's psychiatric records.¹¹⁷ The court explained that the psychiatric records were discoverable, as opposed to admissible, unless the plaintiffs could show the records would not be materially probative on the

107. *Id.* at 881.

108. *Id.*; see *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107-08 (Tex. 1985) (original proceeding); *Dewitt & Rearick, Inc. v. Ferguson*, 699 S.W.2d 692, 694 (Tex. App.—El Paso 1985) (original proceeding).

109. 788 S.W.2d 399 (Tex. App.—Amarillo 1990) (original proceeding).

110. *Id.* at 402.

111. *Id.* at 402-03.

112. TEX. REV. CIV. STAT. ANN. art. 4495b (Vernon 1990).

113. TEX. REV. CIV. STAT. ANN. art. 4495b § 5.06(s)(3) (Vernon 1990).

114. 795 S.W.2d 215, 217-18 (Tex. App.—Eastland 1990) (original proceeding; leave denied).

115. *Id.*

116. 782 S.W.2d 318 (Tex. App.—Houston [1st Dist.] 1989) (original proceeding).

117. *Id.* at 319.

issue of the validity of KFC's asserted defense.¹¹⁸ By alleging a connection between the psychiatric histories of the plaintiffs and their claims for damages, KFC had made the records relevant for its defense.¹¹⁹ "The burden [then] shifted to the plaintiffs to plead and prove [that] the records were not relevant."¹²⁰ The Houston court of appeals distinguished this case from *Coates v. Whittington*,¹²¹ in which the Texas Supreme Court held that routine allegations of mental anguish in personal injury actions do not put the plaintiff's mental condition in controversy, and that the defendant, in order to obtain discovery of the plaintiff's psychiatric history, needed to show a nexus between that history and plaintiff's claims of damages.¹²² The Houston court of appeals suggested that the *Tennant* plaintiffs might have demonstrated the records neither proved nor disproved the validity of KFC's defenses, and were therefore irrelevant, by producing the records *in camera*.¹²³

VI. ARTICLE VI — WITNESSES

Texas courts consider the dead man's statute¹²⁴ repealed as to civil actions by Texas Rule of Civil Evidence 601(b). Rule 601(b) applies only to uncorroborated oral statements by a decedent or a ward "[i]n actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such"¹²⁵ Rule 601(b) extends to actions by or against the decedent's heirs or legal representatives that are based in some measure on such uncorroborated oral statements.¹²⁶ Rule 601(b) is much more liberal than its predecessor which prohibited testimony regarding transactions with, or statements by, a decedent or ward.¹²⁷ Rule 601(b) does not exclude evidence of transactions; it only excludes testimony as to any oral statement by a testator, intestate, or ward if the testimony to the oral statement is not corroborated.¹²⁸

The San Antonio court of appeals interpreted the corroboration requirement of Rule 601(b) in *Powers v. McDaniel*.¹²⁹ *Powers* was a mother's action against the executor of her son's estate seeking to recover a one-half interest

118. *Id.* at 321.

119. *Id.*

120. *Id.*

121. 758 S.W.2d 749 (Tex. 1988) (original proceeding).

122. *Id.* at 752.

123. 782 S.W.2d at 321.

124. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon 1926), *repealed by* TEX. R. CIV. EVID. 601(b) (effective Sept. 1, 1983).

125. TEX. R. CIV. EVID. 601(b).

126. *Id.*

127. *Id.*

128. TEX. R. CIV. EVID. 601(b). Like its predecessor, article 3716, this rule can be waived if the "witness is called *at the trial* to testify thereto by the opposite party." *Id.* (emphasis added). "At the trial" was added in the amendment to the rule effective November 1, 1984. Unlike its predecessor, the rule will not be waived by question to the opposite party during discovery.

129. 785 S.W.2d 915 (Tex. App.—San Antonio 1990, writ denied).

in a house located in Boerne, Texas.¹³⁰ Powers testified that she and her son had entered into an oral agreement whereby he agreed to will his half interest in the house back to her.¹³¹ She produced copies of personal checks drawn on her account for the purchase of the property.¹³² Additionally, the mother introduced a copy of her son's original will, executed one month after the oral statement, which would have devised his one-half interest in the house to her as agreed.¹³³ The San Antonio court found the actions of the son in carrying out the promises of the prior oral agreement to be adequate corroboration for Rule 601(b).¹³⁴

Texas Rule of Civil Evidence 606(b) governs jury misconduct.¹³⁵ Upon inquiry into a verdict's validity, a juror may testify regarding only whether an influence outside the courtroom was improperly brought against a juror.¹³⁶ In *Soliz v. Saenz*¹³⁷ the Corpus Christi court of appeals held that comments by jurors during deliberations regarding their personal experiences did not constitute an "outside influence" upon the jury.¹³⁸ The court explained that for information not in evidence to be an "outside influence," the information must come from someone outside the jury who introduces the information to the jury to affect its verdict.¹³⁹

VII. ARTICLE VII — OPINIONS AND EXPERT TESTIMONY

A. *Opinion Testimony by Lay Witnesses*

Texas Rule of Civil Evidence 701 permits lay witnesses to offer rationally based opinions that help the trier of fact to either understand the witness's testimony better or to determine a fact in issue.¹⁴⁰ Rule 701 has greatly liberalized the admission of lay witnesses' opinion testimony.¹⁴¹ Texas evidence law has always been liberal in allowing an owner of property to offer his opinion of the property's value.¹⁴² A property owner can give opinion testimony even though he would not be qualified as an expert regarding the value of the same property if owned by another person.¹⁴³ During the Survey period, one court admitted the testimony of an automobile owner regarding the value of the automobile in her conversion action against a bank after the automobile, which had been pledged as collateral for a loan, was

130. *Id.* at 916-17.

131. *Id.* at 920.

132. *Id.*

133. *Id.*

134. *Id.*

135. TEX. R. CIV. EVID. 606(b).

136. *Id.*

137. 779 S.W.2d 929 (Tex. App.—Corpus Christi 1989, writ denied).

138. *Id.* at 932.

139. *Id.*

140. TEX. R. CIV. EVID. 701.

141. *Id.*

142. *See Classified Parking Sys. v. Kirby*, 507 S.W.2d 586, 588 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (owner of car stolen from parking garage competent to testify as to car's value).

143. *Id.*

taken by the bank and sold without her permission.¹⁴⁴ In a divorce action, another court permitted a wife to testify concerning the value of her husband's trucking business because she had participated in running the business for five years, she was familiar with the purchase price for each of the trucks, and she was knowledgeable of the value of similar businesses that were for sale.¹⁴⁵

B. Testimony by Experts

1. Competency of Expert

Texas Rule of Civil Evidence 702 permits expert opinion testimony from a witness who qualifies as an expert by reason of specialized training, education, or so forth.¹⁴⁶ In *Trailways, Inc. v. Clark*¹⁴⁷ a supervisor for the Mexican federal police who was trained in accident reconstruction was permitted to testify in a wrongful death action as an expert regarding the speed of a bus and its contribution to the cause of the accident.¹⁴⁸ The Corpus Christi court of appeals explained that the determination of whether a witness is qualified to testify as an expert is within the discretion of the trial court, and that a witness may testify as an accident analyst and reconstruction expert if it is shown that he is trained in the particular science on which his testimony is based.¹⁴⁹

2. Bases of Opinion Testimony

Texas Rule of Civil Evidence 703 outlines the proper bases of expert opinion testimony.¹⁵⁰ An expert may base her opinion on any facts or data, whether admissible or not, that other experts in the relevant field would reasonably rely on in forming opinions.¹⁵¹ In *Welder v. Welder*¹⁵² the Corpus Christi court of appeals approved testimony from the husband's accountant in a divorce proceeding as to the separate or community nature of various assets.¹⁵³ The accountant based his testimony on summary schedules that traced community and separate interests and expenditures through a joint account.¹⁵⁴ Although holding that the summaries were admissible, the court in dicta noted that even if the summaries were inadmissible hearsay, the accountant's testimony would still be permitted under Rule 703, because the trial court could have reasonably found the summary accounting records to be the type of information on which accounting experts reasonably

144. *First Nat'l Bank v. Gittelman*, 788 S.W.2d 165, 169 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

145. *Laprade v. Laprade*, 784 S.W.2d 490, 492 (Tex. App.—Fort Worth 1990, writ denied).

146. TEX. R. CIV. EVID. 702

147. 794 S.W.2d 479 (Tex. App.—Corpus Christi 1990, writ denied).

148. *Id.* at 482-83.

149. *Id.* at 483.

150. TEX. R. CIV. EVID. 703.

151. *Id.*

152. 794 S.W.2d 420 (Tex. App.—Corpus Christi 1990, no writ).

153. *Id.* at 430.

154. *Id.*

rely.¹⁵⁵

Texas Rule of Civil Evidence 703 closely parallels Federal Rule of Evidence 703.¹⁵⁶ In *Christophersen v. Allied-Signal Corp.*¹⁵⁷ the Fifth Circuit held that challenges to the bases and sources of an expert's opinion generally go to the weight to be given to the opinion, not to its admissibility.¹⁵⁸ The court explained that expert opinions should be excluded, based on their bases and sources, only if they are "fundamentally unsupported" such that they would not assist the trier of fact in reaching a proper, intelligent verdict.¹⁵⁹

C. *Opinion on Ultimate Issue*

Texas Rule of Civil Evidence 704 provides that an expert may testify on ultimate issues that are to be determined by the trier of fact.¹⁶⁰ In *Metot v. Danielson*¹⁶¹ the Tyler court of appeals reversed the judgment of a trial court that erred by excluding testimony from one of plaintiffs' experts regarding the ultimate issues of negligence and proximate cause.¹⁶² At trial, plaintiffs attempted to read deposition testimony into evidence wherein they asked their medical expert to assume definitions of negligence and proximate cause, and then asked for his opinion as to whether defendant's conduct was negligent and a proximate cause of the injuries to plaintiff.¹⁶³ In reversing and remanding the case for a new trial, the court of appeals explained that under *Birchfield v. Texarkana Memorial Hospital*¹⁶⁴ expert opinion on ultimate issues must be limited to relevant issues and correct legal concepts.¹⁶⁵ The Tyler court found that the excluded testimony was relevant, and because the medical expert was asked to use correct legal definitions of negligence and proximate cause, the court found the testimony to have been based on proper legal concepts.¹⁶⁶

VIII. ARTICLE VIII — HEARSAY

A. *Identifying Hearsay*

Whether a statement is hearsay is often difficult to determine.¹⁶⁷ Two

155. *Id.*

156. The Texas rule and federal rules were identical prior to a minor amendment to the Texas rule that became effective September 1, 1990.

157. 902 F.2d 362 (5th Cir. 1990), *reh'g granted en banc*, 914 F.2d 66 (5th Cir. 1990).

158. *Id.* at 364-65.

159. *Id.* (quoting *Viterba v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)).

160. TEX. R. CIV. EVID. 704.

161. 780 S.W.2d 283 (Tex. App.—Tyler 1989, writ denied).

162. *Id.* at 288.

163. *Id.*

164. 747 S.W.2d 361 (Tex. 1987).

165. 780 S.W.2d at 288.

166. *Id.*

167. Texas Rules of Civil Evidence 801 to 806 comprehensively define the hearsay rule and its exceptions. Additionally, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." TEX. R. CIV. EVID. 602.

appellate courts during the Survey period considered whether proffered evidence was hearsay. In the medical malpractice action of *Krueger v. Gol*¹⁶⁸ the Houston court of appeals held that a statement from a physician to the plaintiff, which was contained in plaintiff's affidavit opposing summary judgment based on a limitations defense, was not hearsay because it was not offered to prove the diagnosis asserted in the statement but rather, to show the date plaintiff was notified of her potential malpractice claim.¹⁶⁹ In *Howell Hydrocarbons, Inc. v. Adams*¹⁷⁰ the Fifth Circuit held a series of notations that documented an alleged telephone conversation were inadmissible hearsay since they were offered for proof of the matter asserted in them — the content of the telephone conversation.¹⁷¹ The Fifth Circuit acknowledged, however, that the notes could be admitted for another purpose, such as to show that the conversation occurred.¹⁷²

B. Statements That Are Not Hearsay

Texas Rule of Civil Evidence 801(e) excludes from the definition of hearsay prior statements by a witness,¹⁷³ admissions by a party opponent,¹⁷⁴ and depositions.¹⁷⁵

I. Prior Statements by a Witness

"A statement is not hearsay if — (i) the declarant testifies and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath . . . , or (B) consistent with his testimony and is offered to rebut [a charge] of recent fabrication"¹⁷⁶ In *Ochs v. Martinez*¹⁷⁷ the San Antonio court of appeals rejected an argument that testimony was not hearsay where the testimony dealt with statements by a daughter to her father and others alleging sexual abuse by her stepfather.¹⁷⁸ In reversing and remanding the case, the San Antonio court explained that Rule 801(e)(1)(B), which admits prior consistent statements to rebut a charge of recent fabrication, is applicable only when the declarant testifies at trial and can be cross-examined concerning the statement.¹⁷⁹ Because the declarant did not testify and was not subject to cross-examination, the San Antonio court of appeals held that Rule 801(e)(1)(B) did not apply.¹⁸⁰

168. 787 S.W.2d 138 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

169. *Id.* at 141.

170. 897 F.2d 183 (5th Cir. 1990).

171. *Id.* at 192.

172. *Id.*

173. TEX. R. CIV. EVID. 801(e)(1).

174. *Id.* 801(e)(2).

175. *Id.* 801(e)(3).

176. *Id.* 801(e)(1).

177. 789 S.W.2d 949 (Tex. App.—San Antonio 1990, writ denied).

178. *Id.* at 959.

179. *Id.*

180. *Id.*

C. *The Hearsay Rule*

Texas Rule of Civil Evidence 802 is the general rule of exclusion for hearsay.¹⁸¹ Rule 802 also provides, however, that when hearsay is admitted without objection, the hearsay cannot be denied probative value merely because of its status as hearsay.¹⁸² During the Survey period, three Texas courts followed the Rule and held that when hearsay evidence was admitted without objection, it would not be denied probative value.¹⁸³

D. *Hearsay Exceptions: Availability of Declarant Immaterial*

1. *Then Existing Mental, Emotional, or Physical Condition*

Texas Rule of Civil Evidence 803(3) admits statements of the declarant's then existing state of mind, or emotional or physical condition as an exception to the hearsay rule.¹⁸⁴ Two courts during the Survey period reached opposite conclusions about whether similar evidence was an excited utterance under Rule 803(3). In *Ochs v. Martinez*¹⁸⁵ the San Antonio court of appeals held that testimony regarding statements by a daughter to her father and others alleging past acts of sexual abuse by her stepfather was not admissible under Rule 803(3). The court explained that the hearsay exception normally only admitted spontaneous remarks about some sensation made while the declarant was experiencing the sensation, and could not be used to admit statements of past external facts or conditions.¹⁸⁶ In *Posner v. Dallas County Child Welfare Unit*,¹⁸⁷ a suit to terminate parental rights, the Eastland court of appeals held that the daughter's statement "[g]ive me your doll, and I will show you with mine how daddies sex their little girls," was within the Rule 803(3) hearsay exception as evidence of the daughter's then existing mental and emotional condition.¹⁸⁸

2. *Business Records*

Texas Rule of Civil Evidence 803(6) governs the introduction of records of regularly conducted activities, commonly known as business records.¹⁸⁹ Rule 803(6) requires that the records, to qualify for the exception, be kept in conjunction with a regularly conducted business activity by a person with

181. TEX. R. CIV. EVID. 802.

182. *Id.*

183. *City of Bridge City v. State ex rel. City of Port Arthur*, 792 S.W.2d 217, 234 (Tex. App.—Beaumont 1990, writ denied) (exhibits admitted without objection); *El Paso Assocs. v. J. R. Thurman & Co.*, 786 S.W.2d 17, 19 (Tex. App.—El Paso 1990, no writ) (affidavit, ultimately based on hearsay became admissible, competent summary judgment evidence absent written objection); *Director, State Employees Workers' Compensation Div. v. Dominguez*, 786 S.W.2d 68 (Tex. App.—El Paso 1990, no writ) (medical bill was properly admitted even though possible hearsay when testimony about the bill had already been admitted without objection).

184. TEX. R. CIV. EVID. 803(3).

185. 789 S.W.2d 949 (Tex. App.—San Antonio 1990, writ denied).

186. *Id.* at 959.

187. 784 S.W.2d 585 (Tex. App.—Eastland 1990, writ denied).

188. *Id.* at 587.

189. TEX. R. CIV. EVID. 803(6).

knowledge of the recorded information and as a regular practice of the business.¹⁹⁰ Live witness testimony is not required to demonstrate the document is a business record, and records may be authenticated by an affidavit that complies with Texas Rule of Civil Evidence 902(10).¹⁹¹ During the Survey period, the El Paso court of appeals held that portions of a report, prepared by a physician who had examined a personal injury plaintiff, were not admissible under Rule 803(6) where the portions excluded contained summaries of notes and reports prepared by other physicians.¹⁹²

Federal Rule of Evidence 803(6) is substantially similar to Texas Rule of Civil Evidence 803(6). During the Survey period, the Fifth Circuit held that the business records exception could not be used to admit the statement of a witness to plaintiff's accident on an offshore platform that was taken by a barge captain on his own initiative.¹⁹³ The circuit found the proponent failed to show that the document was prepared or kept in the regular practice of the business.¹⁹⁴

3. *Public Records and Reports and Hearsay Within Hearsay*

Certain reports of public offices or agencies are admissible as exceptions to the hearsay rule under Texas Rule of Civil Evidence 803(8).¹⁹⁵ Moreover, hearsay within hearsay is not excluded under the hearsay rule if all parts of the proffered statement fit into some exception to the hearsay rule.¹⁹⁶ In *All Saints Hospital v. M.S.*¹⁹⁷ the Fort Worth court of appeals held that the trial court had committed prejudicial error by allowing into evidence portions of a social worker's investigation of a claim that an employee of a day-care center had sexually abused one of the children.¹⁹⁸ The portions in question recounted conversations between the social worker, other parents, and other children, and were, therefore, multiple hearsay.¹⁹⁹ The multiple hearsay portions did not fit within any exception to the hearsay rule, and thus were inadmissible, even though the report itself was admissible under Rule 803(8) as a public record.²⁰⁰

4. *Statement Against Interest*

A statement that at the time of its making is so contrary to the declarant's interests that a reasonable person would not have made the statement unless he believed it to be true is admissible as an exception to the hearsay rule

190. *Id.*

191. *Id.* Rule 902(10) permits the introduction of business records accompanied by an affidavit that conforms to the requirements set forth in that Rule. *Id.* 902(10).

192. *Hooper v. Torres*, 790 S.W.2d 757, 760 (Tex. App.—El Paso 1990, writ denied).

193. *Wilander v. McDermott Int'l, Inc.*, 887 F.2d 88, 92 (5th Cir. 1989), *cert. granted*, 110 S. Ct. 3212 (1990).

194. *Id.*

195. TEX. R. CIV. EVID. 803(8).

196. TEX. R. CIV. EVID. 805.

197. 791 S.W.2d 321 (Tex. App.—Fort Worth 1990, writ denied).

198. *Id.* at 323.

199. *Id.* at 322-23.

200. *Id.* at 323.

under Texas Rule of Civil Evidence 803(24).²⁰¹ In *State v. Arnold*,²⁰² an automobile forfeiture action under the Controlled Substances Act, the Texas Supreme Court held that hearsay testimony that the respondent's brother-in-law stated the automobile at issue was registered in the respondent's name merely to avoid forfeiture, and that the brother-in-law was the true owner of the automobile, was admissible as a statement against interest.²⁰³ The court explained that these statements, made in the context of potential forfeiture, were not overly self-serving, and were sufficiently trustworthy to be probative on the issue of ownership.²⁰⁴

E. Hearsay Exceptions: Declarant Unavailable

Federal Rule of Evidence 804(b)(5) is a residual hearsay exception for unavailable declarants.²⁰⁵ The Texas Rules of Civil Evidence contain no similar provision. Federal Rule of Evidence 804(b)(5) provides for the admission of statements of an unavailable declarant not covered by the other exceptions contained in Rule 804, but having equivalent circumstantial guarantees of trustworthiness if the court makes certain threshold determinations required for admissibility.²⁰⁶ In *King v. Armstrong World Industries, Inc.*²⁰⁷ the Fifth Circuit approved the admission of deposition testimony from a prior unrelated action of a scientist, who at the time of the deposition was employed by a company that mined raw asbestos.²⁰⁸ The deposition was admissible under the residual hearsay exception in the subsequent action against a manufacturer of asbestos-containing products after the death of the scientist.²⁰⁹ The Fifth Circuit explained that the deposition was probative of a material fact at issue in the case, namely, the state of scientific knowledge before plaintiff's exposure, which the defendant as a manufacturer should have been aware of, concerning the risks and dangers of asbestos.²¹⁰

IX. ARTICLE IX — AUTHENTICATION AND IDENTIFICATION

Texas Rule of Civil of Civil Evidence 901 requires authentication or identification of evidence as a condition precedent to admitting the offered evidence.²¹¹ The authentication requirement is satisfied by evidence that is sufficient to show that the matter in question is what its proponent alleges.²¹² During the Survey period, the Corpus Christi court of appeals reversed a summary judgment because unauthenticated copies of deposition excerpts

201. TEX. R. CIV. EVID. 803(24).

202. 778 S.W.2d 68 (Tex. 1989).

203. *Id.* at 69-70.

204. *Id.* at 70.

205. FED. R. EVID. 804(b)(5).

206. *Id.*

207. 906 F.2d 1022 (5th Cir. 1990).

208. *Id.* at 1025-26.

209. *Id.* at 1026.

210. *Id.*

211. TEX. R. CIV. EVID. 901(a).

212. *Id.*

could not be used to support an entry of judgment.²¹³

X. ARTICLE X — CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Article X of the Texas Rules of Civil Evidence governs the admission of the contents of writings, recordings, and photographs.²¹⁴ Texas Rule of Civil Evidence 1006 provides that the otherwise admissible contents of voluminous writings that would be inconvenient to examine in court may be offered in summary form.²¹⁵ In *Welder v. Welder*²¹⁶ the Corpus Christi court of appeals held admissible a summary schedule, prepared by the husband's accountants in a divorce proceeding, tracing community and separate income and expenditures through a joint account to the ultimate purchase of various assets in dispute.²¹⁷ The court explained that the summary was admissible under Rule 1006 because testimony had shown that the underlying business records were voluminous, that they were admissible themselves as business records, and that they had been made available to the wife.²¹⁸

XI. PAROL EVIDENCE

The parol evidence rule proscribes the use of extrinsic evidence to interpret a writing in some circumstances.²¹⁹ A court may allow extrinsic evidence if it finds a contract to be ambiguous.²²⁰ The rule prohibits parol evidence concerning the terms in a contract if the contract is integrated.²²¹ Several courts during the Survey period excluded parol evidence to interpret unambiguous written contracts.²²² Although fraud in the inducement is an exception to the parol evidence rule, one court excluded evidence of fraud where the proponent of extrinsic evidence did not make the required showing of trickery, or deceptive scheme.²²³

The Texas Supreme Court held parol evidence admissible for purposes of showing mutual mistake of fact in a release, despite the scope of the language in a release.²²⁴ In an insured's case against an insurer, the San Antonio court of appeals held parol evidence admissible to explain an ambi-

213. *Kotzur v. Kelly*, 791 S.W.2d 254, 255-56 (Tex. App.—Corpus Christi 1990, no writ).

214. TEX. R. CIV. EVID. art. X.

215. TEX. R. CIV. EVID. 1006.

216. 794 S.W.2d 420 (Tex. App.—Corpus Christi 1990, no writ).

217. *Id.* at 428-30.

218. *Id.* at 429.

219. 2 R. RAY, TEXAS PRACTICE § 1601 (3d ed. 1980).

220. *See Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 732 (Tex. 1981) (construction of unambiguous oil and gas lease).

221. Integration is the practice of embodying a transaction into a final written agreement "intended to incorporate in its terms the entire transaction." R. RAY, *supra* note 219, at § 1602.

222. *See Boy Scouts of Am. v. Responsive Terminal Sys., Inc.*, 790 S.W.2d 738, 745 (Tex. App.—Dallas 1990, writ granted); *C & C Partners v. Sun Expl. & Prod. Co.*, 783 S.W.2d 707, 714 (Tex. App.—Dallas 1989, writ denied).

223. *Cocke v. Meridian Savs. Ass'n*, 778 S.W.2d 516, 518 (Tex. App.—Corpus Christi 1989, no writ).

224. *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990).

guity as to why an insurance premium was divided into two amounts.²²⁵ The Corpus Christi court of appeals held that parol evidence was admissible to show the amount of an initial advance that was to have been used to discharge tax liens on property where the written agreement between the parties was incomplete regarding the amount.²²⁶

225. *Balderama v. Western Casualty Life Ins. Co.*, 794 S.W.2d 84, 88 (Tex. App.—San Antonio 1990, writ granted).

226. *First Victoria Nat'l Bank v. Briones*, 788 S.W.2d 632, 635 (Tex. App.—Corpus Christi 1990, writ denied).