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Ernest E. Figari Jr.

Graves A. Graves

A. Erin Dwyer

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TEXAS CIVIL PROCEDURE

by

*Ernest E. Figari, Jr.,**
*Thomas A. Graves,** and A. Erin Dwyer****

THE major developments in the field of civil procedure during the Survey period occurred through judicial decisions.

I. JURISDICTION OVER THE SUBJECT MATTER

With the failure of several federally insured savings and loan associations in Texas[1] 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 continue to engage in a jurisdictional tug-of-war.[2] The FSLIC argues relying on federal enactments,[3] that its appointment as a receiver ousts the Texas state courts of jurisdiction to hear claims involving the failed association. The FSLIC instead claims that it has the exclusive power to adjudicate those claims.[4] The FSLIC's opponents perceive it as less than impartial in deciding claims involving such an association. Furthermore, FSLIC jurisdiction would deprive those opponents of a jury trial. Thus, the FSLIC's opponents usually challenge the FSLIC's jurisdiction.

In *FSLIC v. Glen Ridge I Condominiums, Ltd.*[5] the Federal Home Loan

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* B.S., Texas A & M University; LL.B., University of Texas; LL.M., Southern Methodist University. Attorney at Law, Dallas, Texas.

** B.B.A., New Mexico State University; J.D., Southern Methodist University. Attorney at Law, Dallas, Texas.

*** B.A., University of Notre Dame; J.D., University of Texas. Attorney at Law, Dallas, Texas.

1. *See, e.g.*, Glidden, *Portrait of an Industry in Crisis*, D MAGAZINE, 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.

2. *See, e.g.*, Summertree Venture III v. FSLIC, 742 S.W.2d 446 (Tex. App.—Houston [14th Dist.] 1987, no writ); Glen Ridge I Condominiums, Ltd. v. FSLIC, 734 S.W.2d 374 (Tex. App.—Dallas 1986), *writ ref'd per curiam*, 750 S.W.2d 757 (Tex. 1988); FSLIC v. Kennedy, 732 S.W.2d 1 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *see generally* Figari, Graves & Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 42 SW. L.J. 1, 523-25 (1988) [hereinafter *1988 Annual Survey*] (discussing FSLIC jurisdiction).

3. *See* 12 U.S.C. § 1464(d)(6)(C) (1982) (provides that "no court may . . . retain or affect the exercise of powers or functions of a receiver [*i.e.*, FSLIC]); *Id.* § 1729(d) (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.").

4. *See* Felt, *FSLIC Receivership Claims Procedures*, 1987 ALI-ABA COURSE OF STUDY: FAILING FINANCIAL INSTITUTIONS 529 (setting forth Federal Home Loan Bank Board procedures when FSLIC is receiver).

5. 750 S.W.2d 757 (Tex. 1988) (per curiam).

Bank Board (FHLBB) appointed the FSLIC receiver of a failed association while claims against the association were still pending. Enjoying success with its federal statutory argument, the FSLIC persuaded the state trial court to dismiss the suit for lack of subject matter jurisdiction. On appeal, the court of appeals disagreed and held the federal enactments unconstitutional. The court concluded that the enactments violated article III of the United States Constitution.[6] The FSLIC sought review of the matter by the Texas Supreme Court. The agency argued that the state courts lack subject matter jurisdiction and that it had exclusive initial jurisdiction to adjudicate claims administratively.[7] Avoiding the constitutional question[8] and joining with an earlier federal decision,[9] the Texas Supreme Court concluded that under the federal statutory scheme the courts retain power to adjudicate claims, not the FSLIC as receiver.[10] Since the United States Supreme Court currently has the question under advisement in another case,[11] an authoritative decision is likely to issue in the near future.

Texas courts have also considered recent amendments to state statutes conferring subject matter jurisdiction. A recent case, *Pearson v. K-Mart Corporation*,[12] interprets the 1985 amendment to section 5A(b) of the Texas Probate Code, which adds the language "[i]n actions by or against a personal representative, . . . the statutory probate courts have concurrent jurisdiction with the district courts."[13] The personal representative of a ward and his estate asserted a tort claim in the statutory probate court to recover for personal injuries to the ward. The probate court granted the defendant's motion to dismiss for lack of subject matter jurisdiction. Reversing the dismissal on appeal, the court of appeals construed amended section 5A(b) "to allow the personal representative bringing a cause of action on behalf of the estate to elect between the probate court or the district court for *any* cause of action, liquidated or unliquidated, contract or tort."[14] According to the court, the amendment overrules the decision of the Texas Supreme Court in *Seay v. Hall*,[15] which had earlier held that the probate court lacked jurisdiction over wrongful death or survival actions that sought to recover

6. *See* Glen Ridge I Condominiums, Ltd. v. FSLIC, 734 S.W.2d at 390.

7. 750 S.W.2d at 758.

8. *Id.* at 759.

9. Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209, 1219-20 (9th Cir. 1987), *cert. pending sub nom.* FSLIC v. Stevenson Ass'n, 811 F.2d 1209, 55 U.S.L.W. 2481 (9th Cir. 1987). *Contra* Coit Independence Joint Venture v. FirstSouth, F.A., 829 F.2d 563, 564-65 (5th Cir. 1987) (per curiam), *cert. granted*, 108 S. Ct. 1105, 99 L. Ed. 2d 267 (1988); FSLIC v. Bonfanti, 826 F.2d 1391, 1394 (5th Cir. 1987), *cert. pending sub nom.* Zohdi v. FSLIC, No. 87-255 (U.S. filed Aug. 5, 1987); Chupik Corp. v. FSLIC, 790 F.2d 1269, 1269-70 (5th Cir. 1986) (per curiam); North Miss. Sav. & Loan Ass'n v. Hudspeth, 756 F.2d 1096, 1101-03 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986).

10. 750 S.W.2d at 759-60.

11. *See* Coit Independence Joint Venture v. FirstSouth, F.A., 829 F.2d 563, 564-65 (5th Cir. 1987) (per curiam), *cert. granted*, 108 S. Ct. 1105, 99 L. Ed.2d 267 (1988).

12. 755 S.W.2d 217 (Tex. App.—Houston [1st Dist.] 1988, no writ).

13. TEX. PROB. CODE ANN. § 5A(b) (Vernon Supp. 1989).

14. 755 S.W.2d at 220 (emphasis added).

15. 677 S.W.2d 19 (Tex. 1984).

unliquidated damages.[16]

A recent decision of the Dallas Court of Appeals, *Qwest Microwave, Inc. v. Bedard*,[17] addressed the jurisdiction of a statutory probate court to entertain a shareholder derivative suit brought by representatives of a pending estate. After administrators of an estate holding shares in two corporations asserted shareholder derivative claims in the statutory probate court, opponents of the claims sought dismissal for lack of subject matter jurisdiction. After their effort proved unsuccessful before the probate court, the opponents sought appellate review of the matter by way of a mandamus proceeding. Section 5(d) of the Texas Probate Code[18] authorizes a statutory probate court to hear all matters incident to estates. Further, according to section 5A(b), all claims by estates fall within this grant,[19] provided settlement, participation, or distribution of an estate is the controlling issue.[20] The appellate court observed that amended section 5A(b), empowering the statutory probate court to act in all "actions by or against a personal representative,"[21] clarified the jurisdiction of the probate courts to decide unliquidated claims.[22] The appellate court emphasized that the claimant must assert such claims in his representative capacity.[23] Explaining that the representative asserted the shareholder derivative claims on behalf of the corporations to which the claims belonged,[24] the court concluded that the administrators were acting in their capacity as shareholders and, as such, were merely nominal plaintiffs.[25] The court therefore concluded that the probate court had exceeded the limits of its jurisdiction and granted the request for a writ of mandamus.[26]

The trial practitioner should note one final case in the area of subject matter jurisdiction. *Greenstein, Logan & Co. v. Burgess Marketing, Inc.*,[27] following the lead of an earlier Texas case,[28] held that state courts do not have

16. 755 S.W.2d at 219 ("it is readily apparent that the purpose of the bill was to overrule Seay v. Hall"); *but see* Yowell v. Piper Aircraft Corp., 703 S.W.2d 630, 634 n.1 (Tex. 1986) (opinion later withdrawn by agreement of parties district court still a proper forum for survival actions under this amendment).

17. 756 S.W.2d 426 (Tex. App.—Dallas 1988, no writ).

18. TEX. PROB. CODE ANN. § 5(d) (Vernon Supp. 1989).

19. *Id.* § 5A(b).

20. *See* Seay v. Hall, 677 S.W.2d 19, 23 (Tex. 1984). *See generally* Figari, Graves & Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 40 SW. L.J. 1, 491-92 (1986) [hereinafter *1986 Annual Survey*].

21. TEX. PROB. CODE ANN. § 5A(b) (Vernon Supp. 1989).

22. 756 S.W.2d at 436.

23. *Id.* at 437.

24. *Id.*

25. *Id.*

26. *Id.*

27. 744 S.W.2d 170 (Tex. App.—Waco 1987, *writ denied*).

28. Main Rusk Ass'n v. Interior Space Constr., 699 S.W.2d 305, 306 (Tex. App.—Houston [1st Dist.] 1985, no writ); *accord* Cacioppe v. Superior Holsteins III, Ltd., 650 F. Supp. 607, 608 nn.1-2 (S.D. Tex. 1986); Spence v. Flynt, 647 F. Supp. 1266, 1270 (D. Wyo. 1986); Broadway Shoes v. San Antonio Shoe, Inc., 643 F. Supp. 584, 586 (S.D. Tex. 1986); Massey v. City of Oklahoma City, 643 F. Supp. 81, 84 (W.D. Okla. 1986); Kinsey v. Nestor Explor. Ltd., 604 F. Supp. 1365, 1370-71 (D.C. Wash. 1985); Greenview Trading Co. v. Hershman & Leicher, P.C., 108 A.D.2d 468, 489 N.Y.S.2d 502, 504-6 (1985). *Contra* County of Cook v. Midcon Corp., 773 F.2d 892, 898 (7th Cir. 1985); Contemporary Servs. v. Universal City

subject matter jurisdiction over claims brought under the federal Racketeer Influenced and Corrupt Organization Act,[29] generally known as "RICO."[30] The court noted that other jurisdictions have found concurrent state and federal RICO jurisdiction.[31] The opinion, however, simply found the Texas cases more persuasive without further explanation.[32]

II. JURISDICTION OVER THE PERSON

The judiciary continues to measure the reach of the Texas long-arm statute.[33] A recent decision of the United States Court of Appeals for the Fifth Circuit, *Southmark Corp. v. Life Investors, Inc.*,[34] reiterated that when effecting service under such statute, due process requirements may be satisfied either "generally"[35] or "specifically."[36] A jilted prospective purchaser of stock filed suit in Texas against the seller of the stock and the ultimate purchaser, claiming breach of contract and tortious interference with contract. The plaintiff effected service on the defendant purchaser, a Virginia company that had virtually no direct contacts with Texas, under the long-arm statute. The plaintiff, a Georgia corporation having its principal office in Texas, negotiated the alleged contract for the sale of stock with the defendant seller, a nonresident of Texas, in either Georgia or New York. Furthermore, no evidence demonstrated that the parties were to perform the contract in Texas or that Texas law governed the contract. Likewise, the company whose stock the plaintiff wished to purchase was not a Texas corporation and the stock certificates were not located in Texas. Rejecting the plaintiff's specific jurisdiction argument, the court observed that no evidence showed that the defendant purchaser "aimed its allegedly tortious activities at Texas, or that Texas is even the focal point of [the defendant purchaser's] tortious conduct."[37]

Given the virtual absence of any contact between the defendant purchaser

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Studios, 655 F. Supp. 885, 893 (C.D. Cal. 1987); Carman v. First Nat'l Bank, 642 F. Supp. 862, 864 (W.D. Ky. 1986); HMK Corp. v. Walsey, 637 F. Supp. 710, 717 (E.D. Va. 1986); Chas. Kurz Co. v. Lombardi, 595 F. Supp. 373, 381 n.11 (E.D. Pa. 1984); Luebke v. Marine Nat'l Bank, 567 F. Supp. 1460, 1462 (E.D. Wis. 1983); Cianci v. Superior Court, 40 Cal. 3d 903, 907-97, 710 P.2d 376, 376-82, 221 Cal. Rptr. 575, 575-82 (1985).

29. 18 U.S.C. §§ 1961-68 (1982).

30. *See* 744 S.W.2d at 180.

31. *Greenstein*, 744 S.W.2d at 180 (citing Contemporary Servs. v. Universal City Studios, 655 F. Supp. 885, 893 (C.D. Cal. 1987); H.M.K. Corp. v. Nalsey, 637 F. Supp. 710, 717 (E.D. Va. 1986); Luebke v. Marine Nat'l Bank, 567 F. Supp. 1460, 1462 (E.D. Wisc. 1983)).

32. *See supra* note 31.

33. TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-.045 (Vernon 1986 & Supp. 1989) (formerly TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964) (repealed 1985)).

34. 851 F.2d 763 (5th Cir. 1988).

35. " 'General jurisdiction' is personal jurisdiction based on a defendant's contacts with the forum that are unrelated to the controversy. To exercise general jurisdiction, the court must determine whether 'the contacts are sufficiently systematic and continuous as to support a reasonable exercise of jurisdiction.' " *Id.* at 772 (citation omitted).

36. " 'Specific jurisdiction' . . . is personal jurisdiction based on contacts with the forum that are related to the particular controversy. [Citation omitted.] Even a single purposeful contact may in a proper case be sufficient to meet the requirement of minimum contacts when the cause of action arises from the contact." *Id.* (citation omitted).

37. *Id.* at 773.

and the forum, the plaintiff argued that the court should sustain general jurisdiction by imputing to defendant the Texas activities of its subsidiaries. The record showed that the subsidiaries kept separate books and accounts; filed tax returns separate from the one filed by the defendant; separate boards with overlapping, but not identical memberships managed the subsidiaries; persons other than the officers of the defendant ran the subsidiaries; and the defendant did not direct the subsidiaries' day-to-day business. Observing that "where, as here, a wholly owned subsidiary is operated as a distinct corporation, its contacts with the forum cannot be imputed to the parent,"[38] the court concluded that general jurisdiction did not exist.[39]

A relatively obscure provision of the long-arm statute drew the attention of two courts during the Survey period.[40] The construed portion of the statute stipulated that when the secretary of state receives process for forwarding to a nonresident defendant, "the secretary of state shall require a statement of the [1] name and [2] address of the home or home office of the nonresident" to facilitate such forwarding.[41] The Eleventh Circuit Court of Appeals considered the name requirement in *American Steel Building Co. v. Davidson & Richardson Construction Co.*[42] The plaintiff had previously sued a nonresident defendant for breach of contract in Texas, effected service under the long-arm statute, and secured a default judgment there that it sought to enforce in Georgia. The appeal, which arose out of the enforcement proceeding, focused on the forwarding of process by the secretary of state to "Zed Davidson," rather than to "Fred Davidson," the named defendant.[43] Finding a lack of strict compliance with the name requirement, the court found the error fatal to the Texas court's exercise of personal jurisdiction and set aside the default judgment.[44]

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38. *Id.* at 773-74; *see* Smith v. Dainicki Kinzoku Kogyo Co., 680 F. Supp. 847, 854-55 (W.D. Tex. 1988).

39. 851 F.2d at 774.

40. At the time of the decisions discussed hereinafter, TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964), *amended by* Act of May 17, 1979, ch. 245, § 1, 1979 Tex. Gen. Laws 522, 522-23, *repealed and recodified as* TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.043-.045 (Vernon 1986) was in effect.

41. TEX. REV. CIV. STAT. ANN. art. 2031b, § 5 (Vernon 1964), *repealed and recodified as* TEX. CIV. PRAC. & REM. CODE ANN. § 17.045 (Vernon 1986). The relevant portion of section 5 is recodified in section 17.045(a). In all respects material to the referenced cases, the statutes are indistinguishable. *See* Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind, 841 F.2d 646, 647 n.1 (5th Cir. 1988). It should be noted that service under the Texas long-arm statute is not completed until process is forwarded by the secretary of state to the nonresident defendant and, in order to establish jurisdiction of the trial court over the defendant's person, the record must affirmatively show that the process was forwarded. Whitney v. L&L Realty Corp., 500 S.W.2d 94, 96 (Tex. 1973). *See also* Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 28 SW. L.J. 1, 248 (1974).

42. 847 F.2d 1519 (11th Cir. 1988) (2-1 decision).

43. *Id.* at 1522.

44. *American Steel* is noteworthy in the area of personal jurisdiction for a further reason. As an alternative ground of attack on the default judgment, the defendant asserted that he never received process from the secretary of state and that one "Thomas Burrise," who signed the receipt as his purported "agent," was not in fact his representative. *See* 847 F.2d at 1522. Finding that this "latter objection has no basis under Texas law," the court emphasized that "Texas does not require that a defendant actually receive the material, but only that it is served

In *Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind*[45] the Fifth Circuit focused on the current address requirement. In this instance, the plaintiff supplied two inadequate addresses. The first address resulted in process being returned to the secretary of state with the notation "Unclaimed"; the second process, with a forwarding address, was again returned, this time with the notation "Moved, Left No Address."[46] The undisputed record before the court established that the addresses were out of date and that the defendant did not receive actual notice of the suit until after the trial court had entered a default judgment based on such service. The defendant sought to have the default judgment set aside, arguing a lack of compliance with the address requirement. Concluding that the defendant's "last known" address did not fulfill the statutory intent that the address be "current," the court set aside the default judgment.[47]

Paramount Pipe & Supply Co. v. Muhr,[48] a recent decision of the Texas Supreme Court, endorses the rule 108[49] procedure for effectuating service in Texas on a nonresident defendant.[50] This holding fulfills an earlier prediction,[51] and rejects a contrary holding of the Fifth Circuit.[52] Overruling the appellant's contention that rule 108 "impermissibly abridges substantive rights," the court held that "Rule 108 is a valid procedural alternative to service under the long-arm statute."[53]

Imaginative plaintiffs might allege a conspiracy between a nonresident and

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and mailed according to the statutory requirements." *Id. See* BLS Limousine Serv., Inc. v. Buslease, Inc., 680 S.W.2d 543, 546 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

45. 841 F.2d 646 (5th Cir. 1988).

46. *Id.* at 648.

47. *Id.* at 650; *see* Southern Distrib. Co. v. Technical Support Ass'n, Inc., 105 F.R.D. 1, 2 (S.D. Tex. 1984); Verges v. Lomas & Nettleton Fin. Corp., 642 S.W.2d 820, 823 (Tex. App.—Dallas 1982, no writ).

48. 749 S.W.2d 491 (Tex. 1988).

49. TEX. R. CIV. P. 108. Rule 108 authorizes service on a nonresident or absent defendant "to the fullest extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam."

50. 749 S.W.2d at 495-96.

51. *See* Figari, Graves & Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 37 SW. L.J. 1, 291-92 (1983).

52. Placid Inv., Ltd. v. Girard Trust Bank, 662 F.2d 1176, 1179 (5th Cir. 1981), *vacated on rehearing on other grounds*, 689 F.2d 1218 (1982); *see* Wyatt v. Kaplan, 686 F.2d 276, 285 n.18 (5th Cir. 1982). *But see* U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 n.1 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978) (the purpose of the amendment to rule 108 is to secure in personam jurisdiction to constitutional limits); Fox v. Fox, 559 S.W.2d 407, 409 (Tex. Civ. App.—Austin 1977, no writ) (rule 108 can be viewed as a long-arm statute to obtain personal jurisdiction); Grantham v. Aetna Life & Cas., 455 F. Supp. 440, 441 n.1 (N.D. Tex. 1978) (amended rule 108 allows for obtaining personal jurisdiction); *see also* 1A W. DORSANEO, TEXAS LITIGATION GUIDE § 32.50[2], at 32-18 (1981) (use of rule 108 when it cannot be shown that statutory method provided actual notice of suit to nonresident); Figari, Graves & Gordon, *Texas Civil Procedure, Annual Survey of Texas Law*, 36 SW. L.J. 1, 436 (1982) (rule 108 offers full constitutional reach in effecting service upon nonresident); Sampson, *Long-Arm Jurisdiction Marries the Texas Family Code*, 38 TEX. B.J. 1023, 1033 n.20 (1975) (rule 108 can be construed as procedural enabling provision ratifying existing long-arm statutes); Weintraub, *Hall v. Helicopteros: The Texas Long-Arm's Grasp Exceeds Its Reach*, 2 TEX. B. LITIGATION SEC. REP. 1, 4-5 (1983). For additional discussion of rule 108, see Letter from Hans W. Baade to the Texas Bar Journal (Dec. 1975), *reprinted in* 38 TEX. B.J. 988 (1975) (rule 108 as an impermissible extension of the Texas long-arm statute).

53. 749 S.W.2d at 495.

resident to extend the reach of the long-arm statute by imputing the Texas activities of the resident to the nonresident. The first appellate decision in Texas to face the conspiracy theory of personal jurisdiction, *McFee v. Chevron International Oil Co.*,[54] arose during the Survey period. The court of appeals, relying on federal authority,[55] articulated several standards. The *McFee* court emphasized that mere allegations of a conspiracy and the presence of one alleged co-conspirator within the forum will not sustain personal jurisdiction over all the alleged co-conspirators.[56] The court insisted that the plaintiff carry a heavy burden of showing foreseeability by the nonresident co-conspirator.[57] The plaintiff would "meet due process requirements by showing a conspiracy and connecting the acts of the resident conspirator. Due process requires that the nonresident defendant either must have known, or should have known of the effects of his act.[58] In *McFee* the plaintiffs failed to make the necessary showing and the appellate court affirmed the dismissal of the nonresident defendant.[59]

III. SERVICE OF PROCESS

The decisions of *Allied Bank v. Pleasant Homes, Inc.*[60] and *Bronze & Beautiful, Inc. v. Mahone*[61] stand as a warning to plaintiff's attorneys that in order to support a default judgment, the pleadings must adequately allege the service agent's authority. In *Allied Bank* the plaintiff alleged in its petition that the defendant was a "banking association" and service could be obtained on "any vice-president or the cashier."[62] Subsequently, the plaintiff filed a return, which recited that service was executed by delivering process to the defendant's "agent of service, Beverly Walters, V.P."[63] The defendant failed to appear or answer, and the plaintiff secured a default judgment for $795,000. After the default judgment became final the defendant attacked it by writ of error. Noting that the petition did not affirmatively allege the capacity or authority of Beverly Walters, the court of appeals concluded that nothing in the record supported her agency for service and set

54. 753 S.W.2d 469 (Tex. App.—Houston [1st Dist.] 1988, no writ).

55. Leasco Data Processing Equip. Corp. v. Maxwell, 319 F. Supp. 1256, 1260-61 (S.D.N.Y. 1970), *modified on other grounds*, 468 F.2d 1326 (2d Cir. 1972).

56. *See* 753 S.W.2d at 473. *See, e.g.*, Glaros v. Perse, 628 F.2d 679, 682 (1st Cir. 1980); Bamford v. Hobbs, 569 F. Supp. 160, 169 (S.D. Tex. 1983); Bennett Waites Corp. v. Piedmont Aviation, Inc., 563 F. Supp. 810, 812 (D. Colo. 1983); Leasco Data Processing Equip. Corp. v. Maxwell, 319 F. Supp. 1256, 1261 (S.D.N.Y. 1970), *modified on other grounds*, 468 F.2d 1376 (2d Cir. 1972).

57. 753 S.W.2d at 473.

58. *Id.*

59. *Id.*

60. 757 S.W.2d 460 (Tex. App.—Dallas 1988, no writ).

61. 750 S.W.2d 28 (Tex. App.—Texarkana 1988, no writ).

62. *Allied Bank*, 757 S.W.2d at 462. TEX. REV. CIV. STAT. ANN. art. 342-915 (Vernon Supp. 1989), which specifies the manner in which a state bank may be served, states that: "The president, a vice-president, or a cashier of a state or private bank is an agent of the bank on whom process, notice, or demand required or permitted by law to be served on the bank may be served."

63. 757 S.W.2d at 463.

aside the default judgment.[64]

Similarly, in *Mahone* the plaintiff requested service by certified mail on "Bronze & Beautiful, Inc., Carol Jeannine Duty, Its Registered Agent" at a specified address. Eunice Harvey signed the return receipt as "Signature-Addressee" and the initials "M.W." appeared above the line for "Signature-Agent." On the basis of this service the plaintiff obtained a default judgment. At a hearing for the defendant's motion for new trial, the plaintiff apparently realized the inadequacy of the record and attempted to develop testimony in the record that showed Eunice Harvey was authorized to accept service.[65] Setting aside the default judgment, the court held that when serving an agent for a corporation the record must show that the individual served is in fact the agent for service and that testimony at a new trial hearing is ineffective to revive the invalid judgment.[66]

General Life and Accident Insurance Co. v. Higginbotham[67] indicates that the time of service may be important. Former article 3.64 of the Texas Insurance Code,[68] which applied at the time in question, authorized service on a domestic insurance company "by leaving a copy of same at the home office of such company during business hours."[69] The plaintiff effected service on the two defendants, both of whom were domestic insurance companies, by leaving process at their home offices on a specified date "at 12:01 o'clock P.M." On the basis of this service, the court entered a default judgment against the defendants. The defendants subsequently sought to set the default aside by writ of error. Concluding that nothing in the record indicated that the specified time of service was during defendants' "business hours," the court found a lack of compliance with the applicable statute and set aside the default judgment.[70]

The rule has long obtained that when a return of citation is regular on its face and recites that the defendant has been served in person, a presumption of proper service arises and can only be rebutted by corroborated proof.[71] *Huffeldt v. Competition Drywall, Inc.*[72] is instructive as to the evidentiary showing that must be made in order to satisfy this rule. After suffering a default judgment on the basis of a return that recited personal service on a

64. *Id.* at 463; *see* American Univ. Ins. Co. v. D.B. & B., Inc., 725 S.W.2d 764, 765 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.); Encore Builders v. Wells, 636 S.W.2d 722, 722-23 (Tex. App.—Corpus Christi 1982, no writ); Pharmakinetics Laboratories, Inc. v. Katz, 717 S.W.2d 704, 706 (Tex. App.—San Antonio 1986, no writ). *See generally* Keltner & Burke, *Protecting the Record for Appeal: A Reference Guide in Texas Civil Cases*, 17 ST. MARY'S L.J. 273, 302-03 (1983) (discussing record requirements for default judgment).

65. *Mahone*, 750 S.W.2d at 29.

66. *Id. See generally* Keltner & Burke, *supra* note 60, at 302-03 (discussing record requirements for default judgment).

67. 750 S.W.2d 19 (Tex. App.—Fort Worth 1988, no writ).

68. TEX. INS. CODE ANN. art. 3.64 (Vernon 1981), *repealed by* Act of April 30, 1987, ch. 46, § 12, 1987 Tex. Gen. Laws 159, 179.

69. *Id.*

70. 750 S.W.2d at 21.

71. *See* Ward v. Nava, 488 S.W.2d 736, 738 (Tex. 1972); Sanders v. Harder, 148 Tex. 593, 227 S.W.2d 206, 209 (1950).

72. 750 S.W.2d 272 (Tex. App.—Houston [14th Dist.] 1988, no writ).

specified data, the defendant filed a motion for new trial supported by affidavits. The affidavits, one by the defendant and one by his secretary, attested to the defendant's absence from the city on the recited date of personal service. The defendant attached a copy of his airline tickets and motel bill, further supporting his absence from the city on the date in question. Although the trial court overruled the motion for new trial, the defendant perfected an appeal and the appellate court found that defendant had satisfied the rule with direct and objective proof.[73]

IV. PLEADINGS

Rule 94 of the Texas Rules of Civil Procedure imposes an obligation on litigants to specifically plead affirmative defenses and identifies a number of defenses that are within its scope.[74] *Davis v. City of San Antonio*,[75] a case of interest to municipal trial counsel, emphasizes that the list of defenses in rule 94 is not exclusive. The plaintiff filed suit against the defendant municipality, but the municipality never plead the defense of governmental immunity. After an adverse jury verdict, the municipality attempted to raise the defense by way of a motion for judgment notwithstanding the verdict and, though successful in the lower courts, the supreme court reversed.[76] Finding that rule 94 includes governmental immunity, the supreme court concluded that the defendant waived the defense by not asserting it prior to trial.[77]

Rule 63 of the Texas Rules of Civil Procedure provides that parties "may amend their pleadings" by filing them with the clerk; provided that "any amendment offered for filing within seven days of the date of trial or thereafter . . . shall be filed only after leave . . . is obtained."[78] Divergent views as to the intended scope of "amendment" under rule 63 appear to be taking shape. Does rule 63 apply to all pleadings after the first in a series? Does it also apply to original pleadings provided they are tendered for filing after a time limit authorized by the rule? *Brown Lex Real Estate Development Corp. v. American National Bank-South*,[79] taking a liberal approach to interpretation, concluded that an original counterclaim by a defendant was "supplemental" to the record.[80] Defendant must file the counterclaim within the

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73. *Id.* at 273.

74. TEX. R. CIV. P. Rule 94 provides, in part, that:

> [A] party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of fraud, statute of limitations, waiver, and *any other matter constituting an avoidance or affirmative defense*.

Id. (emphasis added).

75. 752 S.W.2d 518 (Tex. 1988).

76. *Id.* at 520.

77. *Id.* at 519-20.

78. TEX. R. CIV. P. 63.

79. 736 S.W.2d 205 (Tex. App.—Corpus Christi 1987, no writ).

80. *Id.* at 206; *accord* Hawkins v. Anderson, 672 S.W.2d 293, 295 (Tex. App.—Dallas 1984, no writ); Claude Regis Vargo Enter. v. Bacarisse, 578 S.W.2d 524, 528 (Tex. App.—

time allowed by the rule.[81] To the contrary, *Lee v. Key West Towers, Inc.*,[82] a decision of the supreme court, suggested a more restrictive view. In construing rule 63 the court held that the rule did not to apply to "original or supplemental pleadings."[83] A pleading that was the first answer to a cross-claim, which did not supersede or displace any prior pleading, was not an amended pleading under the rule.[84] Since the supreme court has granted rehearing in the case,[85] such action may suggest a reconsideration of its position.

The harried trial practitioner, rushing to file a petition may take some comfort from *Baker v. Charles*.[86] The plaintiff filed suit against "Holly Baker" and, after service of process, obtained a default judgment against the defendant under that name. On appeal, the intended defendant, "Holley Farlane Baker II," sought to overturn the judgment, claiming that he was an indispensable party and that the trial court never obtained personal jurisdiction over him.[87] Noting that the defendant failed to raise any issues of mistake in identity or lack of service, the court of appeals upheld the judgment, stating that "[w]hen an intended defendant is sued under an incorrect name, jurisdiction is proper after service on the defendant under the misnomer, if it is clear no one was misled."[88]

In *Bethel v. Norman Furniture Co.*[89] the defendant contended that the pleadings and the evidence did not support an award of attorneys' fees.[90] The court of appeals held that a petition that seeks recovery of attorneys' fees in at least a specified sum authorizes the recovery of attorney's fees on appeal in the absence of a special exception.[91] The court, therefore, rejected defendant's claim since pursuant to rules 90 and 91, defendant failed to file special exceptions to the pleading.[92]

V. VENUE

A defendant clearly waives his objection to improper venue unless he files a written motion to transfer venue prior to or concurrently with any other plea, pleading or motion except a special appearance.[93] The court in *Grozier*

Houston [14th Dist.] 1979, writ ref'd n.r.e.); Box v. Ass'n Inv. Co., 389 S.W.2d 687, 689 (Tex. Civ. App.—Dallas 1965, no writ).

81. 736 S.W.2d at 206.

82. 31 Tex. Sup. Ct. J. 127 (Dec. 9, 1987) (per curiam), *rehearing granted*, 31 Tex. Sup. Ct. J. 238 (Feb. 24, 1988).

83. 31 Tex. Sup. Ct. J. at 127.

84. *Id.*

85. *See* 31 Tex. Sup. Ct. J. 238 (Feb. 24, 1988).

86. 746 S.W.2d 854 (Tex. App.—Corpus Christi 1988, no writ).

87. *Id.*

88. *Id.* at 855; *accord* Orange Grove Indep. School Dist. v. Rivera, 679 S.W.2d 482, 483 (Tex. 1984); Cockrell v. Estevez, 737 S.W.2d 138, 140 (Tex. App.—San Antonio 1987, no writ).

89. 756 S.W.2d 6, 8-9 (Tex. App.—Houston [1st Dist.] 1988, no writ).

90. *Id.* at 8.

91. *Id.* at 8-9.

92. *Id.* at 8.

93. TEX. R. CIV. P. 86(1).

v. L-B Sprinkler & Plumbing Repair[94] illustrates another manner by which a party may waive venue. A defendant also waives his venue rights, even if he timely files the required motion and requests a hearing, unless he thereafter pursues the hearing and obtains a ruling on his motion.

Rule 87 of the Texas Rules of Civil Procedure mandates the prompt determination of a motion to transfer venue and imposes a duty on the movant to request a hearing on the motion.[95] Although the defendant in *Grozier* complied with the rule's requirements by promptly scheduling a hearing on his motion to transfer venue, he failed to press his motion at the time of the hearing. On that date, instead, the court considered only a later filed motion by defendant's counsel to withdraw. Once the court granted that motion, defendant failed to urge his venue motion or reschedule it for hearing. Several months later the court granted a summary judgment in favor of plaintiff, whereupon the defendant filed a motion for new trial complaining of the court's failure to grant his motion to transfer venue.

The court of appeals held that the defendant's failure to reset his motion after the original hearing where the court had failed to consider the motion constituted a waiver of his venue rights.[96] The court also found evidence of an implied waiver in the defendant's affirmative actions seeking the withdrawal of his attorney and the filing a motion for new trial.[97] In an attempt to excuse these actions, the defendant argued that no venue hearing was required because the plaintiff failed to answer or otherwise controvert the motion to transfer venue. While the court of appeals acknowledged that a court should grant an uncontested motion to change venue if sufficient evidence supports the motion,[98] the court of appeals nevertheless concluded that the trial court had jurisdiction to proceed on the merits because the defendant failed to obtain a ruling on his motion.[99] In so holding, the court distinguished those cases decided before the 1983 venue amendments, which had held that the filing of a plea of privilege divested the trial court of jurisdiction, pending disposal of the plea, to enter judgment on the merits against the defendant.[100]

Tenneco, Inc. v. Salyer[101] warns plaintiffs who do not wisely exercise their venue choice that the court may not allow second chances. Plaintiff brought suit in Matagorda County against Tenneco, which promptly moved to trans-

94. 744 S.W.2d 306 (Tex. App.—Fort Worth 1988, writ denied).

95. TEX. R. CIV. P. 87(1).

96. 744 S.W.2d at 311.

97. *Id.* While the court's ultimate decision in the case cannot be seriously questioned, these latter two bases for its holding seem dubious. In his motion for new trial, the defendant complained only about the trial court's failure to grant his venue motion. While that motion was probably ill-advised, since TEX. R. CIV. P. 87(5) permits only one venue determination, which is to be made at the outset of the suit, it hardly constitutes an intentional relinquishment of a known right—the standard typically associated with acts of waiver.

98. *Id.* at 308-09.

99. *Id.* at 312.

100. *Id.* at 309 (discussing Texas-Louisiana Power Co. v. Wells, 121 Tex. 397, 48 S.W.2d 978, 981 (1932); Rosenthal v. Short, 582 S.W.2d 214, 215 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ dism'd).

101. 739 S.W.2d 448 (Tex. App.—Corpus Christi 1987, no writ).

fer venue to Harris County. Apparently unsure of his original venue choice, the plaintiff then filed a motion asking the court to transfer venue to Wharton County. The trial court granted plaintiff's motion and ordered the case transferred to Wharton County. Tenneco sought a writ of mandamus directing the Wharton county clerk to return the original suit papers to Matagorda and ordering the trial court to transfer venue to Harris County.

The court of appeals agreed with Tenneco that the trial court acted improperly since neither the venue statute nor the amended rules permit a plaintiff to file a motion to transfer venue if he has improvidently brought suit in an improper county.[102] According to the court, only a defendant can plead under rule 86,[103] which discusses the requisites of a motion to transfer venue.[104] Consequently, the applicable portion of the venue statute[105] that allows the trial court to transfer an action to another county of proper venue does not permit a plaintiff to correct an improper choice of suit by motion to transfer.[106]

In spite of its agreement with the defendant's position regarding venue, the court in *Tenneco* denied the requested mandamus.[107] The court observed that section 15.064(b)[108] of the Civil Practice & Remedies Code (venue statute) preserves defendant's right to appeal the trial court's improper venue ruling. Reversal in this situation is automatic. Based on this statutory interpretation the court concluded that an adequate remedy other than mandamus was available to the defendants.[109] The court dispelled defendant's fear that its appellate remedy would be inadequate if Wharton County also turned out to be a proper county for venue purposes by observing that the venue statute[110] required the court, on appeal, to look at the entire record in reviewing the venue determination, including how the case was transferred to Wharton County.[111] Thus, even if venue were proper in Wharton County, the court intimated that reversible error would exist since transfer of the suit should not have occurred under the circumstances.

The latter result was not quite as obvious to the court in *Cox Engineering, Inc. v. Funston Machine & Supply Co.*[112] Indeed, the court expressly noted that a court had yet to decide whether transfer of a case from one county where venue properly lies to another county where venue is also proper amounted to reversible error.[113] In *Cox*, however, the court never reached

102. *Id.* at 449.
103. TEX. R. CIV. P. 86.
104. 739 S.W.2d at 449.
105. TEX. CIV. PRAC. & REM. CODE ANN. § 15.063 (Vernon 1986).
106. 739 S.W.2d at 449.
107. *Id.* at 450.
108. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986).
109. 739 S.W.2d at 450. *But see* Dorchester Master Ltd. v. Anthony, 734 S.W.2d 151, 152 (Tex. App.—Houston [1st Dist.] 1987, no writ) (permitting mandamus remedy where venue order is void). *See also 1988 Annual Survey, supra* note 2, at 534-35 (discussing *Dorchester Master Ltd.*).
110. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986).
111. 739 S.W.2d at 450.
112. 749 S.W.2d 508 (Tex. App.—Fort Worth 1988, no writ).
113. *Id.* at 511.

that question. Instead, the court held that transfer was proper since plaintiff had failed to make prima facie proof of the venue facts on which it relied by filing an affidavit setting forth those venue facts.[114] Appellant sought to overcome this defect in the record by pointing to depositions and other discovery on file at the time of the venue determination. Appellant contended that the appellate court should reverse the trial court's judgement if this discovery proved the venue facts it originally alleged. Appellant based his argument on the venue statute, which mandates consideration of the entire record on appeal from a venue determination.[115] The court of appeals disagreed, holding that the standard of review set forth in section 15.064(b) of the venue statute only applied in evaluating the propriety of venue in the transferee forum.[116] In deciding whether proper venue existed in the original forum, on the other hand, the court held that its review was confined to the record as it existed in the trial court when the trial court determined venue.[117] According to the court, the trial judge could properly consider only the pleadings and affidavits in making its venue determination.[118] Since plaintiff failed to file any affidavit incorporating or attaching the depositions or other discovery on file in support of its venue position, the court refused to consider that evidence.[119]

VI. LIMITATIONS

The discovery rule, which courts have extended over the past decade to cover a variety of types of actions,[120] 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 disconcerned the facts that establish the cause of action.[121] Since its judicial

114. *Id.*

115. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986).

116. 749 S.W.2d at 511.

117. *Id.* at 512. According to the court, it was not required to apply the same "harsh standard" of appeal in determining whether it was error to transfer the case from a county where venue may also have been proper. *Id.* Unfortunately, the court failed to cite any authority or rationale for this questionable conclusion involving one of the most troubling provisions of the amended venue statue.

118. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a) (Vernon 1986); TEX. R. CIV. P. 87).

119. *Id.* (citing TEX. R. CIV. P. 88).

120. *See, e.g.,* Thrift v. Tenneco Chems, Inc., 381 F. Supp. 543 (N.D. Tex. 1974) (breach of warranty by drug manufacturer); Kelley v. Rinkle, 532 S.W.2d 947 (Tex. 1976); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967) (foreign object left in body by surgeon); Atkins v. Crossland, 417 S.W.2d 150 (Tex. 1967) (negligent preparation of tax return by accountant); Jim Walter Homes, Inc. v. Castillo, 616 S.W.2d 630 (Tex. Civ. App.—Corpus Christi 1981, no writ) (deceptive trade practices claim); *see also* Note, Kelley v. Rinkle: Texas Embraces the Discovery Rule in Credit Libel, 30 SW. L.J. 950 (1976) (submission of false credit report by creditor); Note, *Limitations of Actions*, 46 TEX. L. REV. 199 (1967).

121. *See, e.g.,* Hayes 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 it 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). *See generally* Figari, Graves & Gordon, *supra* note 52, at 450.

inception in 1967,[122] the rule has operated most frequently in suits against doctors for medical malpractice arising from negligently administrated treatment.[123] Until this past year, however, the supreme court had never decided whether the rule applies in actions for legal malpractice.[124] Lower courts addressing the question had reached divergent results, with the majority refusing to extend the rule's application to such suits.[125]

The supreme court's decision in *Willis v. Maverick*[126] finally resolves the issue. The supreme court brought Texas in line with the ever increasing number of states that have adopted the discovery rule in instances of legal malpractice.[127] In *Willis* the court held that the statute of limitations for legal malpractice actions does not begin to run until the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing his cause of action.[128] In reaching this conclusion, the court observed that the policy reasons justifying imposition of the rule in other contexts were no less compelling in circumstances of legal malpractice.[129] The court found further justification for its holding in the special relationship that exists between an attorney and client.[130]

The decision in *Willis* also ends any lingering debate about which statute of limitations is applicable to claims of legal malpractice. Declaring that a cause of action for legal malpractice is in the nature of a tort, the court held that the two-year limitations statute[131] applies.[132] A court of appeals reached the same decision in *Sledge v. Alsup*.[133] There the court refused to permit a plaintiff to fracture his cause of action for malpractice into claims for negligence, fraud, or breach of contract in an effort to avoid the two-year limitations bar.[134]

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122. The supreme court first pronounced the rule in Texas in Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967).

123. *See, e.g.*, Hayes v. Hall, 488 S.W.2d 412 (Tex. 1972) (failure of vasectomy operation); Newberry v. Tarvin, 594 S.W.2d 204 (Tex. Civ. App.—Corpus Christi 1980, no writ) (negligent insertion of an I.U.D.); Fitzpatrick v. Marlow, 553 S.W.2d 190 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.) (negligent nose surgery). *But cf.* Robinson v. Weaver, 550 S.W.2d 18 (Tex. 1977) (5-4 decision) (discovery rule is inapplicable to action for negligent diagnosis).

124. *See* Smith v. Knight, 608 S.W.2d 165 (Tex. 1980).

125. *Compare* McClung v. Johnson, 620 S.W.2d 644 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.) (discovery rule does not apply, but when duty arising out of attorney-client relationship to disclose facts material to representation is breached, statute is tolled for so long as attorney-client relationship exists) *and* Pack v. Taylor, 584 S.W.2d 484 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.) (discovery rule does not apply) *with* Smith v. Knight, 598 S.W.2d 720 (Tex. Civ. App.—Fort Worth), *writ ref'd n.r.e. per curiam*, 608 S.W.2d 165 (Tex. 1980) (discovery rule applies).

126. 31 Tex. Sup. Ct. J. 569 (July 9, 1988).

127. The court noted in its opinion that twenty-four other states have judicially adopted the discovery rule in legal malpractice cases, and several other states have imposed the rule by legislative enactment or adopted variations of the discovery rule. *Id.* at 572.

128. *Id.* at 571-72.

129. *Id.* at 571.

130. *Id.*

131. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986).

132. 31 Tex. Sup. Ct. J. at 572.

133. 759 S.W.2d 1 (Tex. App.—El Paso 1988, no writ).

134. *Id.* at 2.

VII. PARTIES

Citizens State Bank v. Caney Investments[135] concerned a bizarre set of procedural events that culminated in an intervention of parties one year after entry of a final judgment. In a proceeding ancillary to a divorce judgment, the trial court appointed a receiver to take possession of certain assets and sell them. A company wholly owned by the husband and the wife held one of the assets, a tract of realty, in the company's name. The company, however, served as the general partner of a limited partnership that actually owned the realty. Approximately one year after the divorce judgment had become final, a bank, which had received an allegedly unauthorized deed of trust on the realty from the company to secure the husband's personal debts, attempted to foreclose under the instrument. Fearing a loss of their interests in the realty, the limited partners of the partnership intervened in the ancillary proceeding and obtained a permanent injunction against the bank's efforts. On review the supreme court found that the trial court lacked jurisdiction to allow the intervention and vacated the injunction.[136]

A case of first impression in Texas concerning shareholder derivative actions and proper parties is *Eye Site, Inc. v. Blackburn*.[137] *Eye Site* involved an action by a minority shareholder who sought to bring a shareholder derivative suit. The court of appeals held that when the remaining shareholders have denied that the plaintiff, the minority shareholder, represents their interests or that the remaining shareholders are named defendants, a single shareholder cannot maintain a derivative action.[138]

VIII. DISCOVERY

A. Discovery Procedures

Two cases during the Survey period addressed issues related to the time and place for depositions. In *Wal-Mart Stores, Inc. v. Street*[139] the plaintiff sought to take the deposition of Sam Walton, chairman of the board of defendant Wal-Mart Stores, Inc., in Fort Worth, Texas where the case was pending. In this regard, the plaintiff directed the notice of deposition to Walton as an employee or agent of the company. Relying on the provisions of rule 201,[140] the supreme court held that the trial judge abused his discretion by ordering the deposition to be taken in Fort Worth.[141] The high court noted[142] that, under rule 201, if a party directs a deposition notice to the corporation and the corporation designates an agent to give the deposition, the deposition may be taken in the country of suit, subject to the protective

135. 746 S.W.2d 477 (Tex. 1988).
136. *Id.* at 478.
137. 750 S.W.2d 274 (Tex. App.—Houston [14th Dist.] 1988, writ denied).
138. *Id.* at 276; *accord* Rathborne v. Rathborne, 508 F. Supp. 515, 518-19 (E.D. La. 1980), *aff'd on other grounds*, 683 F.2d 914 (5th Cir. 1982); Kuzmickey v. Dunmore Corp., 420 F. Supp. 226, 231 (E.D. Pa. 1976).
139. 31 Tex. Sup. Ct. J. 630 (July 13, 1988).
140. TEX. R. CIV. P. 201.
141. 31 Tex. Sup. Ct. J. at 631.
142. *Id.*

provisions of rule 166b(4).[143] In this case, however, Walmart did not designate Walton to testify on its behalf at the deposition. Accordingly, the provision of rule 201(5),[144] which generally specifies that a party must take a deposition of a nonparty in the county of the witness' residence, his place of business or employment, or such other convenient place, applied to Walton, as a non-party. Since the record did not indicate that it was convenient for Walton, a resident of Arkansas, to travel to Fort Worth, the supreme court found that the trial court's order conflicted with the provisions of rule 201.

Several weeks prior to trial, the defendant in *Bohmfalk v. Linwood*[145] took the deposition of a witness on only four days notice. Although recognizing that the notice was "somewhat scant," the appellate court determined that it was not unreasonable per se.[146] Further, the court ruled that the plaintiff waived any objection to the use of the deposition at trial by failing to apply for a protective order prior to the taking of the deposition and by failing to show it was not feasible to do so.[147]

For the practitioner who drafts preliminary statements in introductions to written discovery responses, *Morehead v. Morehead*[148] serves as a warning that such statements may not be usable at trial. In *Morehead*, one of the parties sought to read at trial a preliminary statement made by another party in responding to requests for admissions. Noting that the trial court dismissed the responding party that had made the statement, the supreme court held that the preliminary statement was hearsay.[149] The statement, therefore, was inadmissible even if the responses to the requests were admitted.[150]

B. Privileges and Exemptions

In *Mutter v. Wood*,[151] a medical malpractice action, the trial judge ordered the plaintiff to sign an authorization permitting the defendant-hospital's attorney to discuss the medical care and treatment of their deceased son with all treating physicians and health care providers. The supreme court construed the authorization as a complete waiver of plaintiffs' physician-patient privilege under rule 509[152] of the Texas Rules of Evidence,[153] and held that such authorization was overly broad.[154] The trial judge should have drawn the authorization more restrictively in order to preserve the privilege for communications and records that "might exist after suit was filed."[155]

143. TEX. R. CIV. P. 166b(4).
144. *Id.* 201(5).
145. 742 S.W.2d 518 (Tex. App.—Dallas 1987, no writ).
146. *Id.* at 520.
147. *Id.*
148. 741 S.W.2d 381 (Tex. 1987).
149. *Id.* at 382.
150. *Id.*
151. 744 S.W.2d 600 (Tex. 1988).
152. TEX. R. EVID. 509.
153. 744 S.W.2d at 601.
154. *Id.*
155. *Id.*

Under rule 166b[156] of the Texas Rules of Civil Procedure, a consulting expert's identity, mental impressions and opinions are generally protected from discovery, subject to certain limited exceptions. In *Tom L. Scott, Inc. v. McIlhany*,[157] a party designated a group of persons as testifying experts, resulting in the scheduling of their depositions. On the morning of the proposed depositions, the party redesignated the experts as consulting experts and did not allow the depositions to proceed. In a mandamus proceeding to overturn the trial court's denial of an order requiring the depositions to go forward, the court of appeals held that the original designation of the experts as witnesses did not waive the consulting expert privilege.[158] Further, the appellate court ruled that a party is "under no duty to produce evidence by an expert witness which may be adverse to his position."[159] Accordingly, the trial court did not abuse its discretion in refusing to order the depositions.[160]

C. *Procedure for Claiming Privilege or Exemption*

In the past few years, an overwhelming number of cases have discussed the procedures for claiming privilege in the discovery context, which the landmark decision of *Peeples v. Honorable Fourth Supreme Judicial District*[161] first outlined. Rule 166b[162] later incorporated these procedures. The year 1988 proved to be no exception to this trend. In *Hoffman v. Fifth Court of Appeals*[163] a party objected to production of its income tax returns on grounds of relevancy and as an invasion of privacy. After a hearing on the matter, but without an *in camera* inspection, the trial judge held that the returns were discoverable. In a subsequent mandamus action, the supreme court held that an *in camera* inspection was not required and thus held that the trial judge had not committed error.[164] The supreme court noted that under rule 166b(4),[165] a trial court need not conduct an *in camera* inspection prior to ruling on a discovery objection if the basis for the objection is something other than a specific immunity, exemption, or privilege.[166] The rule specifically states that an *in camera* examination is not required if the basis of the objection is invasion of personal, constitutional, or property rights, such as the objection made in *Hoffman*.[167]

Pursuant to the *Peeples* holding, a party claiming privilege bears the bur-

156. TEX. R. CIV. P. 166b(3)(e).
157. 753 S.W.2d 214 (Tex. App.—Amarillo 1988, no writ); *accord* Axelson, Inc. v. McIlhan, 755 S.W.2d 170 (Tex. App.—Amarillo 1988, no writ).
158. 753 S.W.2d at 219.
159. *Id.* at 218.
160. *Id.*
161. 701 S.W.2d 635 (Tex. 1985).
162. TEX. R. CIV. P. 166b(4).
163. 756 S.W.2d 723 (Tex. 1988).
164. *Id.*
165. TEX. R. CIV. P. 166b(4).
166. *Hoffman*, 756 S.W.2d at 723.
167. TEX. R. CIV. P. 166b(4).

den of producing evidence to support his claim.[168] In *Barnes v. Whittington*[169] the defendant hospital sought to prevent discovery of its records on grounds of privilege.[170] At a hearing on a motion to compel production, the hospital delivered the documents in sealed envelopes to the trial court for *in camera* inspection. In addition to the documents, the hospital included two affidavits in sealed envelopes that it had not served on opposing counsel. The supreme court ruled that this method of submitting the affidavits was improper, and that the trial court should have refused to consider them.[171] Thus, in order to comply with the *Peeples* procedures, a party must make all evidence, such as affidavits, available to opposing counsel.

The court in *Shell Western E & P, Inc. v. Oliver*[172] considered the sufficiency of an affidavit in support of a claim of attorney-client privilege. One of the party's attorneys submitted the affidavit in question in which he stated, among other things, that first, certain documents were written by a lawyer to a client; and second that the documents consisted of communications from a client to its attorney concerning ongoing discussions with another party about the construction or operation of a plant, which was involved in the suit.[173] Notwithstanding an objection that the affidavit was conclusory in nature, the appellate court found that the affidavit established a *prima facie* case for the applicability of the attorney-client privilege.[174]

Finally, in *Biernat v. Powell*[175] the court addressed the procedures applicable to claims of confidentiality for bank records under article 342-705.[176] Generally, a party seeking production of the records of a bank's customer must give notice of the request to the customer at least 10 days prior to the date that compliance with the request is required, and certify to the bank that the customer has been served with the notice.[177] The customer then may file a motion to quash or for a protective order.[178] In this case the relator gave the required notice, but the customer did not file a motion to quash or for a protective order. Instead, the customer sent a letter to the parties, requesting that his bank records remain private and stating that the letter " 'serve[d] as proper notice that no records should be released without [his] personal authorization.' "[179] The court of appeals determined that the letter did not comply with the statute and, hence, the customer had waived any objection to the bank's production of his records. Further, the court reached that result even though the bank, upon receipt of the letter, had filed

168. Peeples v. Honorable Fourth Supreme Judicial District, 701 S.W.2d 635, 637 (Tex. 1985).
169. 751 S.W.2d 493 (Tex. 1988)..
170. TEX. REV. CIV. STAT. ANN. art. 4447d, § 3 (Vernon Supp. 1988).
171. 751 S.W.2d at 495.
172. 751 S.W.2d 195 (Tex. App.—Dallas 1988, no writ).
173. *Id.* at 196.
174. *Id.*
175. 757 S.W.2d 115 (Tex. App.—Houston [1st Dist.] 1988, no writ).
176. TEX. REV. CIV. STAT. ANN. art. 342-705 (Vernon Supp. 1988).
177. *Id.* § 2.
178. *Id.* § 3.
179. *Biernat*, 757 S.W.2d at 116.

a motion to determine its responsibility to produce the documents.[180]

D. Duty to Supplement Discovery

As noted in a prior Survey,[181] the courts have strictly enforced the duty of a party under rules 166b[182] and 215[183] to supplement responses to discovery. In general, a party must supplement discovery as soon as practicable, but in no event less than 30 days prior to trial.[184] A party who fails to comply with that duty is subject to sanctions, including the exclusion of evidence belatedly designated unless good cause is shown.[185] A number of cases discussed the showing necessary to establish good cause.

In *Hall Construction Co. v. Texas Industries, Inc.*[186] the plaintiff failed to timely identify two witnesses in response to interrogatories inquiring about the identity of persons with knowledge of facts relevant to the case. On appeal, plaintiff contended that it had shown good cause because defendants had notice of the identity of the two persons, as one of them had actually certified the plaintiff's company's answers to the interrogatories and the other had signed an affidavit filed in the case. The court of appeals held, however, that those grounds were not sufficient to constitute good cause.[187] Similarly, in *Braniff, Inc. v. Lentz*[188] plaintiffs failed to identify the address of a fact witness in response to an interrogatory. As grounds for good cause, plaintiff argued that defendants were not surprised by the witness' testimony because he testified that he had given daily reports to the defendant company while working for one of its contractors and his name, if not address, was timely disclosed in the answers to interrogatories. The appeals court ruled that such matters did not demonstrate good cause.[189] In an attempt to show good cause, the plaintiff in *Lohie Investment Co. v. C.G.P., Inc.*[190] argued that he had provided the substance of an undisclosed expert's testimony in answers to interrogatories, if not his identity. The court of appeals rejected that argument as a basis for good cause.[191] The court further noted that the failure of the opposing party to accept an offer to depose the expert 10 days prior to trial was also not a sufficient ground to allow the expert's testimony.[192] In *Smith v. Christley*[193] one of the defendants had propounded interrogatories to plaintiff regarding the identity of experts. That defendant eventually entered into a settlement with plaintiff. At trial, the remaining defendant, who had not served interrogatories, objected to the testimony of

180. *Id.* at 117.
181. *See 1988 Annual Survey, supra* note 2, at 545-46.
182. TEX. R. CIV. P. 166b.
183. *Id.* 215.
184. *Id.* 166b(6).
185. *Id.* 215(5).
186. 748 S.W.2d 533 (Tex. App.—Dallas 1988, no writ).
187. *Id.* at 536.
188. 748 S.W.2d 297 (Tex. App.—Fort Worth 1988, writ denied).
189. *Id.* at 300; *accord* Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986).
190. 751 S.W.2d 313 (Tex. App.—Houston [1st Dist.] 1988, writ dism'd w.o.j.).
191. *Id.* at 315.
192. *Id.* at 316.
193. 755 S.W.2d 525 (Tex. App.—Houston [14th Dist.] 1988, no writ).

an unidentified expert offered by plaintiff. The court of appeals held that the remaining defendant was entitled to rely on the interrogatories and answers of the other defendant and, therefore, the objection was proper.[194]

City of San Antonio v. Fulcher[195] demonstrates that the sanctions for failing to supplement are not limited to exclusion of evidence. In this workers' compensation case, plaintiff sought to introduce evidence of his income from moonlighting employment in addition to his regular employment. At trial, plaintiff produced for the first time his income tax returns to defendant who had requested them during discovery. The returns reflected a lower amount of income than plaintiff had testified that he had earned in his moonlighting endeavors. The court of appeals decided that the sanctions for failing to supplement discovery should apply equally to a party who fails to disclose information that is unfavorable to his case as to one who fails to disclose information useful to his opponent.[196] Accordingly, the court held that plaintiff should have been prohibited from testifying at all about any moonlighting income in excess of that reported in his non-disclosed returns.[197] Finally, the court in *Gandara v. Novasad*[198] held that the duty to supplement answers to interrogatories is inapplicable to a summary judgment proceeding. Accordingly, the court ruled that it could consider the affidavits of undisclosed experts in connection with a motion for summary judgment.[199]

E. Sanctions

Two cases discussed procedures that parties must follow before a court will impose discovery sanctions. In *Palmer v. Cantrell*[200] the court held that a hearing must be held before sanctions are imposed. In this regard, the court found that a trial court's hearing on a motion for reconsideration of a dismissal of a case, as sanctions, was insufficient.[201] In *Zep Manufacturing Co. v. Anthony*[202] the court of appeals ruled that the trial court may not *sua sponte* impose sanctions without a motion requesting sanctions. Further, the court reached that conclusion in this case, even though the trial court had imposed the sanctions at a hearing on motion to compel discovery.[203]

IX. SUMMARY JUDGMENT

A number of cases during the Survey period discussed the sufficiency and form of evidence that will support or defeat a motion for summary judgment. In a personal injury action, the defendant in *Randall v. Dallas Power*

194. *Id.* at 530.
195. 749 S.W.2d 217 (Tex. App.—San Antonio 1988, writ denied).
196. *Id.* at 220.
197. *Id.*
198. 752 S.W.2d 740 (Tex. App.—Corpus Christi 1988, no writ).
199. *Id.* at 742-43.
200. 747 S.W.2d 39 (Tex. App.—Houston [1st Dist.] 1988, no writ).
201. *Id.*
202. 752 S.W.2d 687, 689, 690 (Tex. App.—Houston [1st Dist.] 1988, no writ).
203. *Id.* at 690.

& Light Co.[204] moved for summary judgment on the basis of a release signed by the plaintiff. In response, plaintiff submitted an affidavit in which he claimed that defendant's agent had made fraudulent representations in obtaining the release. After the trial court denied the initial summary judgment motion on the basis of the affidavit, defendant deposed plaintiff who, in his deposition, stated that he did not remember the representations made by defendant's agent. Thereafter, the trial court granted defendant's second motion for summary judgment. On appeal, the supreme court concluded that the trial court had ignored the well-established rule that a "deposition does not have controlling effect over an affidavit"[205] with respect to a summary judgment motion. Accordingly, the supreme court held that the trial court should not have granted the motion in light of the conflict between the affidavit and the deposition testimony.[206]

Rule 166a[207] of the Texas Rules of Civil Procedure provides that an affidavit submitted in connection with a summary judgment motion "shall be made on personal knowledge" and "shall show affirmatively that the affiant is competent to testify to the matters stated therein." In *Radio Station KSCS v. Jenning*[208] plaintiff brought an action against a radio station seeking to collect $25,000 that the station promised to pay if it failed to play "three songs in a row without commercial interruption." After the radio station moved for summary judgment, plaintiff filed an affidavit stating that: (i) the station received the records it played without charge from record companies; (ii) in return, the station announced the name of the songs and singers when it played the records; and (iii) thus, the announcement of the names constituted a commercial interruption. The supreme court held, however, the affidavit was deficient because it failed to demonstrate the basis for plaintiff's personal knowledge of those matters.[209] In this regard, the court rejected plaintiff's argument that he had shown such a basis by stating he had done "promotional work for [a] musician."[210]

During the past few years, the trend of supreme court decisions in defamation cases has been to reject attempts by defendants to obtain summary judgment on the basis of affidavits that purport to negate the required intent element of proof.[211] The supreme court in *Channel 4 KGBT v. Briggs*[212] distinguished its prior holdings and upheld a summary judgment in favor of a defendant television station. In this libel action, defendant had published a television report about the Ku Klux Klan in which an image of plaintiff, a

204. 752 S.W.2d 4 (Tex. 1988).
205. *Id.* at 5; *accord* Gaines v. Hammon, 163 Tex. 618, 626, 358 S.W.2d 557, 562 (1962).
206. *Randall*, 752 S.W.2d at 5.
207. TEX. R. CIV. P. 166a(e).
208. 750 S.W.2d 760 (Tex. 1988).
209. *Id.* at 762.
210. *Id.*
211. *See, e.g.*, Bessent v. Times-Herald Printing Co., 709 S.W.2d 635 (Tex. 1986) (affidavit not readily controverted); Beaumont Enter. & Journal v. Smith, 687 S.W.2d 729 (Tex. 1985) (defendant's affidavit as to own state of mind not readily controverted as requested for summary judgment).
212. 759 S.W.2d 939 (Tex. 1988).

political candidate, appeared for a brief period while the audio portion of the report continued. The defendant station claimed that the broadcast of plaintiff's image was a technical mistake. In support of that claim, the affidavits of defendant's news manager and reporter stated, among other things, that they had no ill feelings toward plaintiff nor reason to injure him, they did not know plaintiff's likeness would appear during the newscast, and the appearance of plaintiff's likeness during the newscast was a "fluke" or accident.[213] Upholding a summary judgment in favor of defendant, the supreme court distinguished the present case from other decisions reversing summary judgments where defendants had submitted "self-serving statements about their state of mind."[214] According to the court, the affidavits in this case established "an objective explanation" for the mistaken broadcast and, thus, summary judgment was proper.[215]

As noted in the last Survey,[216] rule 206,[217] as amended, provides that depositions are no longer filed with the court or clerk. Correspondingly, rule 166a,[218] which governs summary judgment practice, now allows a trial court to consider deposition transcripts set forth or referenced in a motion for summary judgment and in responses to such motion. The court of appeals in *Deerland Joint Venture v. Southern Union Realty Co.*[219] had the opportunity to discuss the effect of those amendments. In this case, the parties had taken depositions and tendered them to the clerk of the court for filing. Relying on rule 206, the clerk refused to allow the filing of the depositions and instead filed only the court reporter's certificate. On appeal from a summary judgment ruling, the court of appeals ruled that the deposition testimony was not properly offered or authenticated and, hence, could not be considered.

In this regard, the court opined as to the proper methods of offering depositions in the summary judgment context under the amended rules. One method, according to the court, is for the attorney, who is in possession of the original deposition, to attach the deposition as an exhibit to the motion, along with the original court reporter's certificate.[220] Another method is for an attorney, who has only a copy or wishes to rely on excerpts, to attach copies of the deposition pages to the motion or response, along with the court reporter's certificate and his or her affidavit certifying the truthfulness and correctness of the copied material. Importantly, the court held that simply quoting portions of the deposition in a motion or response is not sufficient.[221]

Two cases considered certain procedural questions related to summary

213. *Id.* at 940.
214. *Id.* at 942.
215. *Id.*
216. *See 1988 Annual Survey, supra* note 2.
217. TEX. R. CIV. P. 206.
218. *Id.* 166a(c).
219. 758 S.W.2d 608 (Tex. App.—Dallas 1988, no writ).
220. *Id.* at 610.
221. *Id.* at 609.

judgment motions. *Goswami v. Metropolitan Savings & Loan Association*[222] concerned the propriety of an amendment to the pleadings during a summary judgment contest. Rule 63,[223] which governs the filing of amendments, provides that the parties to an action may amend their pleadings as a matter of right until "within seven days of the date of trial." Holding that a hearing on a motion for summary judgment is a trial within the meaning of rule 63,[224] the supreme court concluded that an amended petition submitted four days before a summary judgment hearing required leave of court to be filed.[225] Nevertheless, the court stated that since the amended petition was before the trial court at the time of the hearing and the summary judgment recited "that all pleadings on file were considered," leave of court would be presumed.[226]

Lynch v. Bank of Dallas[227] considered a question related to the sufficiency of notice of a summary judgment motion hearing. Rule 166[228] provides that a party must file a motion at least twenty-one days before the time specified for hearing. Rule 21a[229] specifies that service by mail is complete upon deposit of the pleading with the post office or its official depository. The same rule also provides that when a party is required to take some action within a prescribed period and is served with a pleading by mail, three days shall be added to the prescribed period.[230] In *Lynch* the appellant, against whom summary judgment had been granted, argued that the foregoing provisions require twenty-four days notice of a summary judgment hearing when service of the motion was made by mail. Disagreeing with that contention, the appellate court held that notice was sufficient when the motion and notice of the date of hearing were deposited in the mail twenty-one days prior to the hearing date, excluding, however, in the computation the date of service and the date of the hearing.[231]

Finally, in *City of Beaumont v. Guillory*[232] the supreme court discussed issues related to appeal from an order granting a motion for partial summary judgment. In this case, the trial court entered an order granting a motion for partial summary judgment in favor of a defendant, but the order did not expressly resolve all issues in this case not decide all matters between all parties. In particular, the order did not dispose of a claim between defend-

222. 751 S.W.2d 487 (Tex. 1988).

223. TEX. R. CIV. P. 63.

224. 751 S.W.2d at 490; *accord* Claude Regis Vargo Enter., Inc. v. Bacarisse, 578 S.W.2d 524, 529 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.); Mainland Sav. Ass'n v. Wilson, 545 S.W.2d 491, 493 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); Bruce v. McAdoo, 531 S.W.2d 354, 356 (Tex. Civ. App.—El Paso 1975, no writ); Jones v. Houston Materials Co., 477 S.W.2d 694, 695 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ); Leche v. Stautz, 386 S.W.2d 872 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.).

225. *Goswami*, 751 S.W.2d at 490.

226. *Id.*

227. 746 S.W.2d 24 (Tex. App.—Dallas 1988, writ denied).

228. TEX. R. CIV. P. 116a(c).

229. *Id.* 21a.

230. *Id.*

231. *Lynch*, 746 S.W.2d at 25.

232. 751 S.W.2d 491 (Tex. 1988).

ant and a third party defendant. Apparently, however, the order related to a critical issue that was effectively dispositive of the claim between plaintiff and defendant. Nonetheless, the supreme court held that the order was not final and, therefore, not appealable.[233] In this regard, the court noted that a summary judgment, unlike a judgment signed after a trial on the merits, is presumed to dispose of only those issues expressly presented, not all issues in the case.[234]

X. SPECIAL ISSUES

As discussed elsewhere in this article,[235] the supreme court in *Willis v. Maverick*[236] applied the discovery rule in determining when the statute of limitations begins to run in a legal malpractice action. The court in that case also discussed the form of jury issues under the discovery rule.[237] In this connection, the trial court submitted an issue inquiring as to when plaintiff discovered that an agreement incident to a divorce contained a provision allowing the sale of the marital home, which was the basis of her action against her former attorney.[238] The supreme court held that the issue was improperly worded and should have been phrased so to inquire as to when plaintiff discovered "or should have discovered . . . the facts establishing the elements" of her claim.[239]

The supreme court in *Ludt v. McCullum*[240] discussed the form of a damage issue in a suit against a home builder for foundation problems. The court recognized that in that type of suit, a successful plaintiff could recover damages both for the cost of repairs and for permanent reduction of market value that occurs notwithstanding the repairs. In this action, the jury issue asked about the amount of cost of repairs and permanent reduction in value.[241] The issue was defective, according to the supreme court, because it requested the jury to find the permanent reduction in value "at the present time," rather than at the point in time after the repairs were made.[242]

Numerous courts of appeals have also considered the form of special issues. In a fraud case, the trial court in *Voskamp v. Arnoldy*[243] submitted an issue inquiring as to whether defendant had misrepresented "or" concealed certain material facts. Rejecting defendant's contention that the issue was multifarious, the appellate court noted that an issue is not multifarious because it groups several facts together so long as it involves one ultimate issue.[244] Since concealment and misrepresentation are two different ways of

233. *Id.* at 492.
234. *Id.*
235. *See supra* text accompanying notes 126-30.
236. 760 S.W.2d 642 (Tex. 1988).
237. *Id.* at 647.
238. *Id.*
239. *Id.*
240. 762 S.W.2d 575 (Tex. 1988).
241. *Id.* at 576.
242. *Id.*
243. 749 S.W.2d 113 (Tex. App.—Houston [1st Dist.] 1987, no writ).
244. *Id.* at 118-19.

accomplishing fraud, the court found that the special issue was proper as it inquired into the single ultimate question of fraud.[245]

In *Rio Grande Land & Cattle Co. v. Light*[246] a group of cattle producers brought an action against the owners and operators of a feed lot, alleging wrongful conduct in the housing and feeding of their cattle. At the conclusion of the evidence at trial, the court presented an issue to the jurors regarding several acts of alleged misconduct by defendants, but the damage issue simply asked for the amount of money that would compensate each plaintiff for his damage, which the jury had found resulted from defendant's actions.[247] Appealing from an adverse judgment, defendants contended that the form of the damage issue was improper because it was impossible to determine what acts the jury's award was based upon or if the required number of jurors had agreed on the acts that caused plaintiffs' losses. Disagreeing with those contentions, the court of appeals reasoned that, first, the language of the issues instructed the jurors to award damages that resulted from wrongful acts found by them to be the proximate cause of plaintiffs' losses and, second, whether defendant committed more than one type of misconduct was of no consequence as it would not affect the amount of damages.[248]

Finally, in *Pogue v. First State Bank Monahans*,[249] a case involving a defense of estoppel, the jury found that appellee had not made a false representation. Inadvertently ignoring an instruction that informed them not to answer remaining issues after that finding, the jurors also found that appellant did not rely on the representation. In a subsequent appeal, the appellant attacked the sufficiency of the evidence supporting the answer to the issue about the falsity of the appellee's representation. Based on the jury's finding of a lack of reliance, and even though the jury should not have made that finding under the trial court's instruction, the court of appeals held that any lack of evidence regarding the falsity of the representation was harmless.[250]

XI. JURY PRACTICE

Three decisions during the Survey period considered issues related to the selection of a jury. *Babcock v. Northwest Memorial Hospital*[251] concerned the propriety of a trial court's refusal to allow a plaintiff's attorney, during voir dire, to question the panel about the lawsuit crisis. In this medical malpractice case, plaintiff's counsel was precluded from asking the panel during voir dire about the liability crisis, apparently referring to the proposition that the increasing number of personal injury lawsuits and excessive jury awards had caused a crisis. In presenting his request to the trial court, plaintiff's

245. *Id.* at 119.
246. 749 S.W.2d 206 (Tex. App.—San Antonio), *aff'd in part and rev'd in part on other grounds*, 758 S.W.2d 747 (Tex. 1988).
247. *Id.* at 210.
248. *Id.* at 211.
249. 750 S.W.2d 826 (Tex. App.—El Paso 1988, no writ).
250. *Id.* at 827.
251. 32 Tex. Sup. Ct. J. 146 (Dec. 14, 1988).

counsel specifically stated that he did not want to question the jury about insurance. On appeal, the supreme court held that the trial court had abused its discretion by refusing to allow plaintiff's counsel to question jurors about the alleged " 'lawsuit crisis.' "[252]

In reaching that result, the supreme court noted that the trial court should allow broad latitude to a litigant during the voir dire examination.[253] According to the court, a trial judge abuses his discretion, as here, when his refusal to allow a question during voir dire prevents a litigant from determining whether grounds exist to challenge a prospective juror for cause or denies his intelligent use of peremptory challenges.[254] It remains unclear, however, to what extent a litigant may raise the subject of insurance, such as increasing premiums, in the context of discussing a liability crisis.

During voir dire in *S & A Beverage Co. v. Derouen*[255] a prospective juror asked the trial judge whether there was dram shop insurance in this state, which defendant, a tavern owner, contended was prejudicial. The court of appeals disagreed, however, holding that the mention of insurance during voir dire does not always require a reversal and the complainant must show that it probably did cause the rendition of an improper judgment.[256] Other than reciting the mention of insurance, the appellants did not attempt to show the juror's question lead to an improper judgment and, accordingly, the court overruled the point.[257]

Mendoza v. Ranger Insurance Co.[258] presented a unique question regarding procedures for selection of a jury panel. In this case, the evidence at a hearing on a motion for new trial revealed that, in Tarrant County, persons who postpone their jury service are placed on a transfer list. Not surprisingly, teachers are often granted transfers during the months of March through May. In turn, the names of persons placed on the transfer list are not mixed or shuffled prior to the first assignment to a court.[259]

The trial in this case was in early June 1987 and, as might be expected from the foregoing, the venire panel contained a large number of teachers. Ten of the twenty-one prospective jurors were teachers. At the conclusion of voir dire and prior to the impaneling of the jury, appellant moved for a mistrial and requested that a new panel of prospective jurors be drawn because a disproportionate number of jurors had the same occupation. Agreeing with appellant's position, the court of appeals determined that appellant was denied the right to a trial before an impartial jury fairly representative of the community.[260]

Pursuant to rule 606(b)[261] of the Texas Rules of Civil Evidence and Proce-

252. *Id.* at 149.
253. *Id.*
254. *Id.*
255. 753 S.W.2d 507 (Tex. App.—Beaumont 1988, no writ).
256. *Id.* at 512, 513.
257. *Id.* at 512.
258. 753 S.W.2d 779 (Tex. App.—Fort Worth 1988, no writ).
259. *Id.* at 780.
260. *Id.* at 781.
261. TEX. R. EVID. 606(b).

dural rule 327,[262] evidence of jury misconduct, as a ground for a new trial, may not consist of matters or statements that occur during the jury's deliberation, nor of testimony as to the effect of anything that might influence a juror's thought process in reaching a decision. One exception to the foregoing rule is that a juror may testify as to whether any outside influence was improperly brought to bear upon any juror.[263] Two cases considered the scope of the outside influence exception.

In *Baley v. W/W Interests*[264] the court of appeals took a very restrictive view of the exception. In this wrongful death case, appellant claimed, among things, that: (1) two jurors had visited the scene of the victim's death and related their experience to other jurors; (2) the jurors discussed a newspaper article that was not in evidence; (3) the jurors discussed the case among themselves prior to the conclusion of the evidence; (4) two jurors stated that they did not believe in awarding money damages; and (5) one of the jurors allowed others to vote for her. Although recognizing that such conduct was unquestionably improper, the court of appeals held that the jurors' testimony about the foregoing was inadmissible.[265] In this regard, the court rejected the appellant's argument that such conduct did not occur during the juror's deliberations because it occurred before the charge was read and during lunch or coffee breaks. According to the court, any conversation regarding the case among jurors is part of jury deliberations.[266] The court also held that, to constitute outside influence, a non-juror must supply the information.[267] Information gathered by a juror and introduced to other jurors is not an outside influence.[268] Finally, in *H.E. Butt Grocery Co. v. Paez*[269] the court held that a trial court's response to a jury's question during deliberation, which allegedly caused a change in votes, did not constitute an outside influence.

XII. JUDGMENT, DISMISSAL AND MOTIONS FOR NEW TRIAL

In *Peralta v. Heights Medical Center, Inc.*[270] the United States Supreme Court held that prior Texas law,[271] which required a showing of a meritorious defense in order to set aside a default judgment, contravened the due process rights of a defendant who challenged the sufficiency of service of process upon him. Two Texas cases considered the application of *Peralta* to other situations. In *Lopez v. Lopez*[272] a defendant was not notified of a trial setting and, thus, did not appear for trial. After judgment was entered, the

262. TEX. R. CIV. P. 327.
263. TEX. R. CIV. P. 327(b).
264. 754 S.W.2d 313 (Tex. App.—Houston [14th Dist.] 1988, no writ).
265. *Id.* at 315.
266. *Id.* at 316.
267. *Id.*
268. *Id.*
269. 742 S.W.2d 824, 826 (Tex. App.—Corpus Christi 1987, writ denied).
270. 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988).
271. *E.g.*, Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 393, 133 S.W.2d, 124, 126 (Tex. Comm'n App. 1939, opinion adopted).
272. 757 S.W.2d 721 (Tex. 1988).

defendant sought a new trial, but did not allege or prove a meritorious defense in connection with his motion for new trial. Relying on *Peralta*, the supreme court held that a meritorious defense was not required to be shown in order for the defendant to obtain a new trial.[273] On the other hand, in *Richmond Manufacturing Co. v. Fluitt*[274] the defendant who sought to set aside a default judgment was properly served with process. Under those circumstances, the court of appeals held that requiring the defendant to allege facts supporting a meritorious defense was not unconstitutional nor contrary to the *Peralta* holding.[275]

A number of cases addressed the right of a trial court to dismiss an action for want of prosecution when the parties had not received notice of intent to dismiss under rule 165a.[276] In *Collier Manufacturing & Supply v. InterFirst Bank Austin*,[277] a garnishment action, the garnishor and garnishee had agreed to pass a trial setting, but had failed to notify the court of their agreement. After they failed to appear for the trial setting at which the judgment debtor was present, the trial court dismissed the action without further notice. Although recognizing that a trial court may dismiss a case for want of prosecution based on rule 165a or on its inherent equitable power to control its docket, the court of appeals decided that the dismissal was erroneous without prior notice of intent to take that action.[278] In analogous situations, the courts in *Vautrain v. Dutch Garrett, Inc.*[279] and *Knight v. Trent*[280] held that the lack of notice was not fatal because the trial courts in those cases conducted a hearing on a motion to reinstate the action after dismissal.

Finally, in *Ryals v. Canales*[281] the trial court signed a judgment dismissing an action against some of the defendants based on a settlement and severed plaintiff's claims against those defendants from the remainder of the action. Subsequently, the district clerk gave the severed action a new cause number, but the court rendered no new judgment under the new number. The trial court thereafter set aside the judgment, an action which was only timely and proper under rule 329b[282] if the original judgment was not final at the time of its signing. Reviewing under a petition for writ of mandamus, the court of appeals held that for appellate purposes the primary concern is whether the judgment resolves all issues and rights of all the parties.[283] The court held that because the judgment disposed of all the issues between the parties, it was final when signed and that the clerical function of assigning a second cause number was a purely ministerial act.[284] As such, the court held that

273. *Id.* at 723.
274. 754 S.W.2d 359 (Tex. App.—San Antonio 1988, no writ).
275. *Id.* at 360.
276. TEX. R. CIV. P. 165a.
277. 749 S.W.2d 560 (Tex. App.—Austin 1988, no writ).
278. *Id.* at 564.
279. 755 S.W.2d 486, 489 (Tex. App.—Fort Worth 1988, writ denied).
280. 739 S.W.2d 116, 119 (Tex. App.—San Antonio 1987, no writ).
281. 748 S.W.2d 601 (Tex. App.—Dallas 1988, no writ).
282. TEX. R. CIV. P. 329b.
283. *Ryals*, 748 S.W.2d at 604.
284. *Id.*

the judgment was final for appellate purposes and that the trial judge had erred in setting it aside after his plenary jurisdiction had expired.[285]

XIII. APPELLATE PROCEDURE

A. The Record on Appeal

Prior to its amendment, appellate rule 54[286] required the appellant in any case in which either party made a timely motion for new trial or modification of the judgment to file the transcript and statement of facts in the appellate court within one hundred days after the trial judge signed the judgment. The appellant in those circumstances, however, could wait until ninety days after judgment before even requesting preparation of the statement of facts.[287] As a result, appellants frequently asked appellate courts to grant extensions of time to file the record although they had waited to file a request for preparation of the statement of facts until 10 days before the record filing date.[288]

Although the court in *Sumner & Greener v. Carlson*[289] described the question as troubling, it nevertheless felt compelled under those circumstances to grant a motion for an extension.[290] According to the court, a request for statement of facts made within the time prescribed by the rule is timely as a matter of law.[291] Therefore, if the appellant cannot file the statement of facts within the deadline established by rule 54(a) due to the reporter's workload, an extension is mandatory.[292] The court cautioned, however, that a late request to the court reporter may prevent the court of appeals from allowing any extension.[293] The subsequent decision in *Sifuentes v. Texas Employers' Insurance Association*[294] proved that the *Carlson* warning was anything but idle.

In *Sifuentes* appellant filed a motion for extension six days before the statement of facts was due in the court of appeals. Two weeks later, the court denied the motion on the basis it was defective because appellant's written request to the reporter for the statement of facts was late, and the motion did not reasonably explain the untimeliness of that request.[295]

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285. *Id.* at 604, 606.

286. TEX. R. APP. P. 54(a).

287. *See* TEX. R. APP. P. 41(a)(1) (time for perfecting appeal is ninety days after judgment if timely motion for new trial is filed); TEX. R. APP. P. 53(a) (appellant need not request preparation of statement of facts until at or before time prescribed for perfecting appeal).

288. Due to the recurring nature of this problem, rule 54 was amended, effective January 4, 1988, to allow the statement of facts to be filed 120 days after the judgment is signed if a timely filed motion for new trial has been filed by any party. TEX. R. APP. P. 54.

289. 739 S.W.2d 127 (Tex. App.—Fort Worth 1987, no writ).

290. *Id.* at 129.

291. *Id.*

292. *Id.* The court concluded that a reporter's workload is a reasonable explanation within the meaning of TEX. R. APP. P. 54(c). 739 S.W.2d at 129.

293. *Id.*

294. 754 S.W.2d 784 (Tex. App.—Dallas 1988, no writ).

295. *Id.* at 787. TEX. R. APP. P. 54(c) provides that a motion for extension to file the statement of facts shall reasonably explain any delay in making the request to the reporter for preparation of the statement of facts required under TEX. R. APP. P. 53(a).

Although the court denied the motion without prejudice, appellant waited two additional weeks before filing a second, "amended" motion for extension that ostensibly cured the defects existing in his original motion. By that time, the jurisdictional period for seeking an extension had expired.[296] Appellant argued, however, that the court's first order, denying his original motion for extension without prejudice, meant that he had fifteen days from the date of that order to file a corrected motion.

The court disagreed, holding that the denial of the first motion because of a formal but waivable defect in the motion did not operate in any way to extend the time to file a second, corrected motion.[297] According to the court, it could not by order extend its jurisdiction beyond the limit established by law.[298] Because the court had denied appellant's first motion, it was no longer a "live" pleading subject to amendment.[299] Thus, appellant's corrected motion constituted a second motion for extension, governed by the jurisdictional time limits imposed by rule 54(c).[300]

Darley v. Texas Utavan, Inc.[301] involved a suit tried under the pilot program established by the supreme court[302] that allows certain Dallas district courts to tape record proceedings in lieu of using a traditional court stenographer. In accordance with the supreme court's order, the statement of facts on appeal from a suit in the pilot program consists of the cassette recordings, a copy of the typewritten and original logs filed in the case by the court reporter, and all of the exhibits together with a list of such exhibits in numerical order and a brief identifying description of each.[303] Although appellant Darley filed all of these items in the appellate court, Utavan moved to dismiss the appeal on the basis that Darley had failed to timely request and file the statement of facts pursuant to rules 53(a) and 54.[304]

At the center of the dispute was Darley's motion for an extension of time to file his brief. Section 5 of the supreme court's order[305] requires each party to file with his brief an appendix containing a written transcription of all portions of the recorded statement of facts relevant to the appeal. Accordingly, Darley requested the court reporter to transcribe the entire proceeding for his appendix. When the backlogged court reporter could not complete the transcription by the deadline for appellant's brief, Darley filed a timely motion for extension of time to file his brief. In response, however, Utavan moved to dismiss the entire appeal arguing that the appendix was an integral

296. TEX. R. APP. P. 54(c) permits a party to file a motion for extension up to fifteen days after the date specified for filing the record.

297. *Sifuentes*, 754 S.W.2d at 788.

298. *Id. See* Anderson v. Casebolt, 493 S.W.2d 509, 510 (Tex. 1973) (per curiam) (trial court may not by order enlarge jurisdictional period for perfecting appeal); TEX. R. APP. P. 2(a).

299. *Sifuentes*, 754 S.W.2d at 787.

300. *Id.* at 788.

301. 741 S.W.2d 200 (Tex. App.—Dallas 1987, no writ).

302. Order of the Supreme Court of Texas, 741 S.W.2d 204 (January 8, 1986).

303. *Id.* § 3, at 205.

304. TEX. R. APP. P. 53(a); TEX. R. APP. P. 54.

305. Order of the Supreme Court of Texas § 5, 741 S.W.2d 204 (January 8, 1986).

part of the statement of facts and, therefore, Darley was required to file a motion for extension of time to file the appendix in accordance with the time periods established by rule 54(c).[306] Utavan argued that under rule 54(c), Darley's motion for an extension of time to file the statement of facts had to be filed by March 12, but was not filed until April 24. In effect, Utavan argued that Darley was seeking an extension of time to file his brief when in fact he should have been seeking an extension of time to file the statement of facts.

The court easily dispensed with Utavan's motion, holding that the appendix required by the supreme court's order was not a part of the statement of facts since, pursuant to that order, the statement of facts consists only of the audio tape, the reporter's certification, and the log.[307] Since the audio tape, reporters' certification, and log had been filed on March 10, no extension of time to file the statement of facts was necessary.[308] The court had greater difficulty with Darley's request for an extension of time in which to file his brief.[309] Although the court acknowledged that an extension is the correct remedy when more time is needed to prepare the appendix,[310] the court noted that Darley had failed to prove the need for more time since he did not establish that someone other than the presiding court reporter could not prepare the transcription.[311] The court further held that Darley had failed to make the required showing that a transcription of the entire recorded proceeding was necessary for his appeal.[312] Nevertheless, the court excused the absence of these showings, and granted Darley's requested extension on the basis that both parties were confused about the requirements imposed by the supreme court's order.[313]

In a subsequent opinion in the same case, the Dallas court of appeals wrestled with additional issues involving the record on appeal in lawsuits from the pilot program.[314] The trial court's log showed that the trial of the suit lasted two days, but the tapes delivered to the court of appeals included only the proceedings had on the first day of the trial. Darley therefore asserted that he was entitled to a new trial because the statement of facts from the second day of trial had been lost.[315]

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306. TEX. R. APP. P. 54(c) requires a party to file a motion for extension to file the statement of facts within 15 days after the deadline for such statement of facts. According to Utavan, the rule applied because the supreme court's order does not change any of the other filing deadlines set forth in the Texas Rules of Appellate Procedure. *See* Order of the Supreme Court of Texas § 4, 741 S.W.2d 204 (January 8, 1986).

307. *Darley*, 741 S.W.2d at 202.

308. *Id.*

309. *Id.* at 203.

310. *Id.*

311. *Id.* at 203-204. The court observed that the supreme court's order does not mandate that the presiding reporter prepare the transcription. *Id.* at 203. Thus, *that* reporter's backlog is insufficient justification for an extension absent a showing why someone else could not timely prepare a transcription. *Id.*

312. *Id.* at 204.

313. *Id.*

314. Darley v. Texas Utavan, Inc., 754 S.W.2d 304 (Tex. App.—Dallas 1988, no writ).

315. TEX. R. APP. P. 50(e) provides that unless the parties agree on a statement of facts the appellant is entitled to a new trial when he has made a timely request for a statement of facts,

The court disagreed, holding that Darley had failed to meet his burden under rule 50[316] of providing a record on appeal which supported his claim that a portion of the statement of facts had been lost or destroyed.[317] In this connection, Darley had filed with the appellate court an affidavit showing only his frustrated telephone attempts to obtain tapes of the proceedings from an audio librarian who was not shown to be the official court reporter. The court was unable to conclude, therefore, whether any part of the statement of facts had actually been lost or destroyed.[318] Moreover, the court noted that a party seeking a new trial on the basis of a lost or destroyed record must first have made a timely request for the statement of facts.[319] That request must be in writing, directed to the official reporter, and specifically designate the portion of the evidence and other proceedings to be included in the statement of facts.[320] According to the court, because Darley's telephone conversations with the audio librarian failed all three parts of the test, he had not demonstrated that it was impossible to obtain some portion of the statement of facts that he properly requested.[321]

Finally, in *Deerfield Land Joint Venture v. Southern Union Realty Co.*,[322] the court held that the parties could not supplement the record on appeal with seven deposition transcripts that had not been on file with the trial court at the time it ruled on a motion for summary judgment. All seven of the depositions were taken prior to the hearing on the motion for summary judgment, and the court reporter's certificates were on file with the district clerk at the time of the hearing. In addition, some of the summary judgment motions and responses contained excerpts from the depositions attached as exhibits. The court could find no indication, however, that the entire depositions themselves had ever been filed with the clerk's office.[323] Further, the court declined to treat as filed the excerpts of the depositions attached to the motions or responses because the parties had failed to properly authenticate those excerpts by affidavit.[324] Consequently, the court denied the motions for leave to supplement the record even though all parties on appeal had

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and the court reporter's notes and records have been lost or destroyed without appellant's fault.

316. TEX. R. APP. P. 50(d).

317. *Darley*, 754 S.W.2d at 306.

318. *Id.*

319. *Id.*; TEX. R. APP. P. 50(e).

320. *Darley*, 754 S.W.2d at 306; TEX. R. APP. P. 53(a).

321. *Darley*, 754 S.W.2d at 306 (citing Castillo v. State, 733 S.W.2d 560, 561-62 (Tex. App.—San Antonio 1987, no pet.)).

322. 758 S.W.2d 608 (Tex. App.—Dallas 1988, no writ).

323. Indeed, the record indicated that the clerk, relying on amended TEX. R. CIV. P. 206(1), had declined to file the entire transcripts and accepted only the court reporter's certificates for filing.

324. *Deerfield*, 758 S.W.2d at 610. The court spelled out the procedure for properly placing depositions before the court as summary judgment evidence. According to the court, a party relying on the entire deposition can attach the original transcript to his motion as an exhibit together with the original court reporter's certificate for authentication. *Id.* If a copy, or only a portion of the deposition, is to be used, the party should attach the copy or excerpts to the motion along with a copy of the court reporter's certificate and an affidavit certifying the truthfulness and correctness of the copied material. *Id.*

agreed that the depositions should be included in the record.[325]

B. Briefs

An appellant is required in his brief (1) to state each point upon which an appeal is predicated,[326] (2) to refer parenthetically after each such point to the page of the record where the matter complained about is located,[327] and (3) to include in his argument a statement of the pertinent facts and a discussion of the authorities relied upon to maintain the point at issue.[328] Rule 74 permits the court to require rebriefing of the case for flagrant violations of these briefing requirements.[329] In *Tatum v. Liner*[330] the court enforced these rules with a vengeance, holding that an appellant had waived several of his points of error by failing to abide by the briefing rules.

In his brief, appellant simply listed two of his seventeen points of error without any argument. Determining that this flagrantly violated rule 74, the court concluded that it was not bound to consider the points at all.[331] Since the points were unbriefed and did not refer to any alleged error in the record, the court held they were not actual points of error.[332] The court also observed that, notwithstanding the admonitory language of rule 74(p), it would serve no useful purpose to permit a rebriefing of points not previously brief.[333]

C. Mandamus

Mandamus procedures remained the subject of judicial scrutiny during the survey period. Most notable was the decision in *Smith v. Caldwell*,[334] in which the court focused upon the certification requirements for exhibits to a petition for mandamus. In *Smith* relator sought a writ of mandamus directing the trial court to vacate his order denying a plea in abatement and to grant a motion to dismiss the suit. A certified copy of the order denying the plea in abatement and uncertified copies of various pleadings filed in two competing actions accompanied relator's petition. Relator's attorney verified the petition and his affidavit stated that all of the exhibits were true and correct copies of documents filed or served in the respective lawsuits. The court concluded that the exhibits did not need to be certified in order to meet the requirements of rule 121[335] since they were properly verified by relator's attorney.[336] In reaching this conclusion, the court analogized to a decision

325. *Id.*
326. TEX. R. APP. P. 74(d).
327. *Id.*
328. *Id.* 74(f).
329. *Id.* 74(p).
330. 749 S.W.2d 251, 259 (Tex. App.—San Antonio 1988, no writ).
331. *Id.* at 260.
332. *Id.*
333. *Id.*
334. 754 S.W.2d 692 (Tex. App.—Houston [1st Dist.] 1987, no writ).
335. TEX. R. APP. P. 121(a)(2)(C) requires that a certified or sworn copy of the order complained of and any other relevant exhibits accompany a petition for mandamus.
336. *Caldwell*, 754 S.W.2d at 694.

under the summary judgment rule[337] in which the supreme court had held that copies of documents attached to a properly prepared affidavit were sworn copies.[338] The court also noted that relator's attorney was empowered to sign the required affidavit pursuant to rule 14.[339]

XIV. MISCELLANEOUS

A. Disqualification of Judges

Rule 18a,[340] which governs the disqualification of judges, provides that upon the filing of a motion to disqualify, the judge to whom the motion is directed is required to either recuse himself or refer the motion to the presiding judge of the district for hearing prior to any further proceedings in the case.[341] Although the appellant in *Feist v. Sekaly*[342] had filed a motion to disqualify the trial judge, the trial court simply ignored the motion and continued to conduct proceedings in the case, ultimately entering a summary judgment against the appellant. On appeal, Sekaly argued that the court's failure to follow rule 18a was harmless since the summary judgment was well taken as a matter of law. Following a long and unbroken line of earlier decisions,[343] the court held that the requirements of rule 18a are mandatory.[344] Consequently, the trial judge's failure to comply with the rule required reversal.[345]

State v. Preslar[346] involved a motion to disqualify of a different sort. Apparently due to his overcrowded docket, the trial judge in *Preslar* requested the presiding judge of the district to appoint a visiting judge to try the case. The presiding judge, in turn, asked Chief Justice Hill of the supreme court to assign Judge Preslar, a retired appellate judge, to the case. Upon learning of Judge Preslar's assignment, one of the parties filed a written objection seeking to disqualify him pursuant to section 74.053 of the Government Code.[347] After this motion was ignored, the same party brought an original mandamus proceeding challenging Judge Preslar's assignment on two bases. First, relator argued that Chief Justice Hill exceeded his authority in appointing Preslar, who resided in the trial court's district, since the chief justice of the supreme court may only assign a visiting judge to district courts outside the

337. TEX. R. CIV. P. 166-A.

338. *Caldwell*, 754 S.W.2d at 693. *See* Republic Nat'l Leasing Corp. v. Schindler, 717 S.W.2d 606, 607 (Tex. 1986).

339. *Caldwell*, 754 S.W.2d at 693. TEX. R. CIV. P. 14 provides: "Whenever it may be necessary or proper for any party . . . to make an affidavit, it may be made by . . . his attorney."

340. TEX. R. CIV. P. 18a.

341. TEX. R. CIV. P. 18a(c).

342. 739 S.W.2d 491 (Tex. App.—Beaumont 1987, no writ).

343. *See, e.g.*, McLeod v. Harris, 582 S.W.2d 772 (Tex. 1979); Petitt v. Lawrence, 715 S.W.2d 688 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); Gonzalez v. Gonzalez, 659 S.W.2d 900 (Tex. App.—El Paso 1983, no writ).

344. *Feist*, 739 S.W.2d at 492.

345. *Id.*

346. 751 S.W.2d 477 (Tex. 1988).

347. TEX. GOV'T CODE ANN. § 74.053(b) (Vernon 1988) provides that a judge assigned to hear a case pursuant to subsection (a) of the statute is disqualified if any party files a timely objection to the assignment.

administrative region in which the retired judge resides. Second, relator argued that his timely objection to the assignment disqualified Judge Preslar from hearing the case.

The Texas Supreme Court agreed on both counts.[348] According to the court, section 74 authorizes the chief justice to assign judges from one administrative region to service in a different region.[349] The court contrasted the Chief Justice's authority with that of the presiding judge of an administrative region, who has the authority to assign judges residing within that region.[350] Although the court acknowledged that the chief justice can, under certain limited circumstances, make assignments within an administrative region as if he were the presiding judge of that region,[351] the court found that none of those exceptional circumstances existed in the case.[352] The court also held that relator was entitled to object to the visiting judge under section 74.053, thereby rejecting the respondents' argument that the statute's objection provision had been repealed.[353] Following a lengthy analysis and discussion of recent statutory amendments,[354] the court held the 70th Legislature had not repealed, but only amended section 74.053 to permit each party to the case only one objection to a visiting judge assigned under chapter 74 of the Government Code.[355]

B. Disqualification of Counsel

One case decided during the survey period is of profound significance to large law firms attempting to avoid ethical conflicts occasioned by the routine practice of lateral hiring. In *Petroleum Wholesale, Inc. v. Marshall*,[356] a case of first impression in Texas, the court held that when an attorney in private practice has actual knowledge of the confidences of a former client in a particular case, and he thereafter undertakes employment with a law firm representing an adverse party in the same case, the entire new firm must be disqualified from the litigation.[357] The case arose when Cowles & Thompson, representing the defendant in the suit, hired an attorney associated with the Law Offices of Frank L. Branson, the firm representing plaintiff. Mindful of the potential ethical ramifications of its hiring decision, Cowles & Thompson constructed an elaborate "Chinese Wall"[358] designed to exclude

348. *Preslar*, 751 S.W.2d at 479.
349. *Id.* *See* TEX. GOV'T CODE ANN. §§ 74.002, 74.057 (Vernon 1988).
350. 751 S.W.2d at 479; TEX. GOV'T CODE ANN. § 74.056 (Vernon 1988).
351. TEX. GOV'T CODE ANN. § 74.049 (Vernon 1988) empowers the chief justice to act for the presiding judge, and make assignments within an administrative region, if the presiding judge is incapacitated, dies, resigns, or disqualifies himself.
352. *Preslar*, 751 S.W.2d at 479.
353. *Id.* at 482.
354. *See* Act of May 21, 1987, ch. 148, § 2.93(b)(4), Tex. Gen. Laws 1064, 1178; Act of June 17, 1987, ch. 505, § 1, 1987 Tex. Gen. Laws 4223; Act of June 18, 1987, ch. 674, § 2.14, Tex. Gen. Laws 5017, 5036.
355. *Preslar*, 751 S.W.2d at 482.
356. 751 S.W.2d 295 (Tex. App.—Dallas 1988, no writ).
357. *Id.* at 301.
358. A "Chinese wall" is a device used by a law firm to quarantine a new member with confidential information received from an adversary of one of the firm's clients. In *Petroleum*

the newly-hired attorney from any participation in the lawsuit and to prevent any exchange of the client's shared confidences between the new attorney and existing Cowles & Thompson attorneys involved in the litigation. Notwithstanding these precautions, the court held that erection of the Chinese wall could not rebut the presumption of shared confidences since the newly-hired attorney was in private practice and had actual knowledge of his former client's confidences in relation to the suit.[359] More importantly, the court held that even an effective Chinese wall would be insufficient to refute the appearance of professional impropriety arising from the possible disclosure of the former client's confidences.[360] Accordingly, the court concluded that Cowles & Thompson's continued role in the case constituted a violation of canon 9[361] of the Code of Professional Responsibility and, therefore, the trial court did not abuse its discretion in disqualifying the firm.[362]

Commercial Credit and Control Data Corp. v. Wheeler[363] is a warning to litigants who employ out-of-state practitioners to represent them in Texas lawsuits. Section 81.102 of the Government Code[364] provides that attorneys licensed in other jurisdictions may practice law in the State of Texas only if they comply with certain rules promulgated by the supreme court. Those rules permit non-resident attorneys to practice in Texas if they (1) file a written sworn motion requesting admission to practice in a particular court and (2) associate a resident practicing attorney licensed in Texas who personally participates in the trial or hearing.[365] Counsel for the appellees in *Wheeler* was a non-resident attorney who had failed to file the required motion and never associated a resident attorney as co-counsel. The court therefore struck appellees' briefs on the basis that their counsel was unlawfully practicing law in the State of Texas.[366]

C. *Attorney Fees*

In a case of first impression, the court in *Gill Savings Association v. Inter-*

Wholesale Cowles & Thompson erected such a "Chinese wall" by, among other things, removing litigation files to a storage room where they were maintained under lock and key, instructing the newly-hired attorney not to discuss the lawsuit with anyone, and ordering all of its existing attorneys and staff not to mention the suit in the presence of the new attorney. *Id.* at 296.

359. *Id.* at 300. The court was careful to limit its holding to the specific facts presented in the case, and intimated that a different result might obtain if the newly-hired attorney was formerly employed in the public sector or simply had imputed, rather that actual, knowledge of the former client's confidences as a result of his employment by the former firm. *Id.* at 300-301.

360. *Id.* at 301.

361. SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, § 9 (Code of Professional Responsibility) Canon 9 (Vernon 1973 & Vernon Supp. 1988).

362. *Petroleum Wholesale*, 751 S.W.2d at 301-302.

363. 756 S.W.2d 769 (Tex. App.—Corpus Christi 1988, writ denied).

364. TEX. GOV'T CODE ANN. § 81.102(a)(b) (Vernon 1987).

365. SUPREME COURT OF TEXAS, RULES GOVERNING ADMISSION TO THE STATE BAR OF TEXAS, rule XV(a) (1985).

366. *Wheeler*, 756 S.W.2d at 771. Nevertheless, the court declined to render judgment on that basis alone in favor of appellant, who still carried the burden of demonstrating errors committed by the trial court. *Id.*

national Supply Co.[367] held that compensation for a legal assistant's work may be separately assessed and included in the award of attorney's fees if the legal assistant performs work that has traditionally been done by attorneys. According to the court, requiring attorneys to perform tasks more suitably performed by paralegals just to allow for the compensation of that time in the event attorney's fees are ultimately awarded in the case would not serve justice.[368] In order to recover paralegal's fees, however, the evidence must establish: (1) that the legal assistant is qualified to perform the substantive work; (2) the work was directed or supervised by an attorney; (3) the nature of the work performed; (4) the hourly rate charged for the legal assistant; and (5) the number of hours the legal assistant worked on the matter.[369]

D. Res Judicata

In *Allied Bank v. Pleasant Homes, Inc.*[370] the trial court reversed a default judgment after determining that the plaintiff's claims were barred by res judicata or the compulsory counterclaim rule.[371] The court rejected plaintiff's argument that res judicata was an affirmative defense of which the defendant could not avail itself by reason of its default.[372] According to the court, the error was "apparent from the face of the record," and thus subject to challenge by writ of error, since plaintiff's pleadings themselves conclusively showed that his claims were barred.[373]

367. 759 S.W.2d 697, 702 (Tex. App.—Dallas, 1988, no writ).
368. *Id.* at 704.
369. *Id.* at 702.
370. 757 S.W.2d 460, 461 (Tex. App.—Dallas 1988, no writ).
371. TEX. R. CIV. P. 97(a).
372. *Allied Bank*, 757 S.W.2d at 462.
373. *Id.*