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Evidence

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EVIDENCE

by

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Many significant evidence decisions were handed down during this survey period. The cases of greatest importance fall into these substantive areas: (1) Hearsay Rule and Exceptions; (2) Best Evidence Rule; (3) Expert Opinion Evidence; (4) Impeachment; (5) Marital Privilege; (6) Parol Evidence Rule; (7) Wrongful Death Suit—Ceremonial Remarriage; (8) Cross-Examination; (9) Dead Man's Statute; and (10) Admissibility of Sound Recordings.

I. HEARSAY RULE AND EXCEPTIONS

Business Records Exception. Several decisions within the survey period dealt with the application of the hearsay rule or one of its exceptions. In *Sid Merchant v. Farmers Insurance Group*[1] plaintiff recovered a money judgment for the fraudulent sale of a stolen motor home to the plaintiff. One of the defendants appealed contending that no evidence connected him with the false representation made by the other defendant. The primary evidence relied upon by plaintiff to sustain the jury's finding connecting the appealing defendant to the false representation was a statement by the non-appealing defendant that the former was "in on it with me."[2] Rejecting the plaintiff's contention that this statement had probative value, the court of civil appeals reversed and rendered judgment for defendant. The court reasoned that this statement was "hearsay as to Scott [appealing defendant] and amounts to no evidence."[3]

The plaintiff in *Hallmark Builders, Inc. v. Anthony*[4] sought to overcome an anticipated hearsay objection by reliance on article 3737e,[5] the business records exception to the hearsay rule. Plaintiff, an electrical contractor, brought suit in quantum meruit against a general contractor. In seeking to establish the reasonable value of the work performed on two jobs, the plaintiff identified and introduced five exhibits. These exhibits, which the plaintiff claimed were invoices, were compiled from original records. The exhibits listed items and charges but did not show specific dates as to when each item was furnished, when the work was performed, or when the exhibits were compiled. On appeal the defendant contractor challenged the

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1. 540 S.W.2d 749 (Tex. Civ. App.—Eastland 1976, no writ).
2. *Id.* at 751.
3. *Id.*
4. 547 S.W.2d 681 (Tex. Civ. App.—Amarillo 1977, no writ).
5. TEX. REV. CIV. STAT. ANN. art. 3737e (Vernon Supp. 1978).

evidentiary support for the trial court's findings supporting the plaintiff's claim for damages.

The plaintiff relied on *University Savings & Loan Ass'n v. Security Lumber Co.*[6] to support his alleged compliance with article 3737e. In *Security Lumber Co.* it was held that the testimony of a qualified witness supported the implied finding of the trial judge that the invoices introduced were made in the regular course of business and were made at or near the time of the recorded act or reasonably soon thereafter.[7]

Distinguishing *Security Lumber Co.*, the court of civil appeals reversed the decision of the trial court and remanded the case for trial because the plaintiff failed to introduce sufficient evidence to support his claim for recovery. The court concluded that the five exhibits were not admissible under article 3737e and that any testimony predicated on such exhibits was inadmissible as hearsay under the rule announced in *Lewis v. Southmore Savings Ass'n*.[8] Although the plaintiff testified that notations were made regarding the materials as the job progressed, such memoranda were not contained in the exhibits introduced. The notations were instead kept on note pads that were destroyed after the invoices were prepared. The plaintiff's exhibits were therefore not the records made at or near the time of the act, as required by article 3737e, but instead were summaries of the records prepared at a later time. Since the plaintiff's exhibits were summaries, his failure to make available to the opposing party all of the records from which the summaries were taken precluded him from using article 3737e to circumvent the hearsay rule.[9]

Similar issues arose in another suit for breach of a construction contract. In *Hanson Southwest Corp. v. Dal-Mac Construction Co.*[10] the defendant, appealing from a jury verdict in the plaintiff's favor, contended that the plaintiff's damages were not supported by the evidence. Defendant specifically argued that exhibit 47, the only evidence supporting the damage award, was inadmissible hearsay. The plaintiff, on the other hand, contended that the document was admissible as a business record under article 3737e. Plaintiff argued that its comptroller had testified that the exhibit was made in the regular course of business, that the exhibit was made "reasonably soon" after the invoices were received, and was therefore admissible under the holding in *Security Lumber Co.*[11] The court of civil appeals distinguished *Security Lumber Co.* because the underlying invoices supporting exhibit 47 were not admissible in *Hanson*. The court considered significant the fact

6. 423 S.W.2d 287 (Tex. 1967); *see* note 9 *infra*.

7. 423 S.W.2d at 289.

8. 480 S.W.2d 180 (Tex. 1972). *Lewis* held that a witness may testify from extractions from records if the complete records are made available to the opposing party.

9. In order to introduce a summary of voluminous records, the introducing party must show that the underlying records were (1) voluminous, (2) accessible to the opposing party, and (3) admissible. Black Lake Pipeline Co. v. Union Constr. Co., 538 S.W.2d 80 (Tex. 1976). The court of civil appeals in *Hallmark Builders, Inc.* distinguished *Security Lumber Co.* by stating that the invoices in the latter were not summaries made after the whole project was completed and that the delivery tickets, which were supporting documents, had been introduced in evidence.

10. 554 S.W.2d 712 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

11. *See* text at note 7 *supra*.

that the defendant's comptroller's "personal knowledge" was limited to the receipt of bills from various subcontractors; thus, the comptroller had no independent knowledge that such services or materials were rendered or supplied.[12]

On motion for rehearing in *Hanson* the plaintiff asserted that information showing that the services and materials represented by the invoice were actually furnished had been provided to the comptroller by other employees of the plaintiff through delivery tickets attached to the invoices. The court accepted that assertion as true, but nevertheless held that article 3737e was not satisfied because there was no testimony that an employee of the plaintiff "with personal knowledge that the materials were furnished or the services were rendered made any notation on the delivery tickets or transmitted information to another employee for notation on the delivery ticket nor is there any testimony that delivery tickets are made in the regular course of Dal-Mac's business."[13] The court concluded that plaintiff's evidence at best merely showed that delivery tickets were attached to some invoices.

The qualifications of the witness used to introduce business records were also considered in *Matrix Computing, Inc. v. Davis*.[14] In that case the plaintiff appealed from an instructed verdict granted to the defendant due to plaintiff's failure to introduce any evidence of damages. The plaintiff argued that five exhibits showing damages had been properly authenticated for admission as business records pursuant to article 3737e and that the trial court had erred in excluding them. The plaintiff's only authenticating witness, however, was its current president.

The appellate court disposed of the first exhibit by stating that it was a summary and did not meet the test of admissibility set forth in *Black Lake Pipe Line Co. v. Union Construction Co.*[15] because the admissibility of the underlying records had not been shown. The remaining four exhibits were also held to be inadmissible, but for a different reason. Those exhibits were actually records the witness had obtained from *other companies* and the mere recitation by the plaintiff's president of the statutory prerequisites was held to be insufficient to satisfy any of the requirements of article 3737e.

In *United States Fire Insurance Co. v. Stricklin*[16] plaintiff sued on a fire insurance policy. Defendant argued on appeal that the trial court improperly admitted a summary of certain repair expenses. The underlying records consisted of invoices covering repairs to the entire unit, not just the damaged portion of the property. These records did not disclose whether the expenditures were made for repairs necessitated by the fire damage or were for general repairs unrelated to the fire. The two witnesses who testified about the preparation of the summary indicated that the invoices were

12. The court also held that exhibit 47 did not qualify as a summary under the three-prong test enunciated in Black Lake Pipeline Co. v. Union Constr. Co., 538 S.W.2d 80 (Tex. 1976). For the requirements of that test see note 9 *supra*.

13. 554 S.W.2d at 725.

14. 554 S.W.2d 288 (Tex. Civ. App.—Amarillo 1977, no writ).

15. 538 S.W.2d 80 (Tex. 1976); *see* note 9 *supra*.

16. 556 S.W.2d 575 (Tex. Civ. App.—Dallas 1977, writ filed).

marked with a code which allocated repair costs between the fire damage and other repairs.

The court of civil appeals followed the *Black Lake* test[17] and held that for a summary to be admissible, the underlying records must be admissible. The underlying records were not admissible in *Stricklin* because the evidence did not show that this code was placed on the invoices by an employee with personal knowledge of the facts or that such an employee transmitted the information to another employee who made the notations in the regular course of business, nor did it show that the entry was made at or near the time that the repairs were made.[18]

The hearsay rule was the basis for reversing and remanding a judgment for the defendant in *Avila v. United States Fidelity & Guaranty Co.*,[19] a workmen's compensation case. The plaintiff argued that it was reversible error to admit into evidence the deposition testimony of an orthopedic surgeon as to his observations and conclusions based on X-rays taken on the plaintiff. These X-rays were never produced or admitted into evidence and were not available for inspection by plaintiff or his counsel either at the time of taking the deposition or at the time of the trial. After noting that "Texas cases concerning whether an X-ray may be interpreted without its physical presence in Court are divided," the court of civil appeals reasoned that "fairness requires [the X-rays'] presence in Court during interpretation" and that "[a] contrary rule . . . could lead to much abuse."[20] The court also determined that testimony concerning the X-rays was improperly admitted because the X-rays were not sufficiently proven up in that there was no positive evidence: (a) as to who made the X-rays; (b) that they were taken by a qualified technician or doctor; (c) that they correctly portrayed what they purported to represent; and (d) that such X-rays actually portrayed the portion of the plaintiff's body where the injury was involved.[21]

Refreshing Past Recollection. In *Decker v. Commercial Credit Equipment Corp.*[22] the defendants appealed from a judgment awarding the plaintiff the balance due under a purchase security agreement. To meet its burden that the obligation sought to be enforced was within the general subject matter of the contract, the plaintiff was required to prove that the alleged deficiency, which the defendant Sanders was obligated to assume, was the result of any of the first three repossessions of certain farm equipment. Plaintiff introduced the testimony of its general manager to satisfy its burden. The general manager, however, testified only after consulting the company's repossession log. The defendants contended that his testimony was hearsay and without probative value.

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17. *See* note 9 *supra*.
18. 556 S.W.2d at 581.
19. 551 S.W.2d 453 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.).
20. *Id.* at 456. *See also* 3 J. WIGMORE, EVIDENCE § 795 (J. Chadbourn rev. 3d ed. 1970): "In view of this importance of interpretation, a witness who testifies orally to knowledge obtained by studying an X-ray photograph must be prepared to *produce the photograph-print* . . . for cross-examination to the grounds of his interpretation." (Emphasis added.)
21. 551 S.W.2d at 457.
22. 540 S.W.2d 846 (Tex. Civ. App.—Texarkana 1976, no writ).

The court of civil appeals upheld the decision of the trial court because "such testimony was admissible and competent under the rules of evidence relating to past recollection."[23] Although the court recognized that the "usual method [of guaranteeing the correctness] is for the witness to state that he remembers when he made or saw the memorandum he knew it to be correct,"[24] the plaintiff apparently did not ask the general manager any such questions. The court thereupon noted that other methods of guaranteeing the correctness of the document are permissible, such as verification based on a general course of business or a habit of keeping records. The court then determined that the general manager's testimony was admissible because "he testified it was made in the regular course of business by those under his direction and supervision, and he attested to its accuracy."[25]

II. BEST EVIDENCE RULE

Photographic Copies. Article 3731c,[26] which permits the use of photographic copies of written instruments, was construed in *Clement v. Nacol*.[27] On appeal the defendant contended that it was error to admit into evidence a xerox copy of a warranty deed purporting to convey title to the land involved from plaintiff's immediate predecessor to the plaintiff. The evidence established that if the plaintiff had title to the land involved, it was by virtue of that deed. When the plaintiff offered the copy of the deed into evidence, the defendant objected on the grounds that it was not the best evidence and because a proper predicate had not been laid. The trial court overruled the objection and admitted the exhibit into evidence.

The best evidence rule generally provides that if the original writing is not produced or its non-production accounted for, secondary evidence of a writing's contents is admissible.[28] The plaintiff in *Clement*, however, neither sought to comply with this rule nor to comply with any of the exceptions to the rule. Plaintiff relied solely on article 3731c contending that the copy of the deed was admissible because there was no bona fide dispute as to its being an accurate reproduction of the original. The court of civil appeals held that the trial court committed reversible error in admitting the exhibit. The court determined that since "it was incumbent on [plaintiff] to lay a predicate by showing that there was no bona fide dispute as to the copy being an accurate reproduction of the original," and because he failed to do so, "there was no evidence from which [the trial court] could conclude that there was no bona fide dispute between the parties"[29] on that point. *Clement*

23. *Id.* at 849. The requirements for the use of a memorandum to reflect one's past recollection are: (1) the witness has no present recollection, but when the events were fresh a correct memorandum was made, and (2) the witness must be able to guarantee the correctness of the memorandum. *See* 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE §§ 541-544 (2d ed. 1956).

24. 540 S.W.2d at 849.

25. *Id.*

26. TEX. REV. CIV. STAT. ANN. art. 3731c (Vernon Supp. 1978).

27. 542 S.W.2d 265 (Tex. Civ. App.—Fort Worth 1976, no writ).

28. Hill v. Taylor, 77 Tex. 295, 14 S.W. 366 (1890); Wheat v. Citizens Nat'l Bank, 310 S.W.2d 735 (Tex. Civ. App.—Eastland 1958, writ ref'd n.r.e.).

29. 542 S.W.2d at 267.

clearly establishes that a "bona fide dispute" within the meaning of article 3731c is raised by a best evidence objection.

III. EXPERT OPINION EVIDENCE

The burden of proof which must be met by the plaintiff in medical malpractice actions in Texas was explained in the leading case of *Bowles v. Bourdon*.[30] The Texas Supreme Court announced that expert testimony is generally required to establish that the defendant doctor was negligent and that such negligence was the proximate cause of the plaintiff's injuries. Subsequent decisions have interpreted *Bowles* in such a manner that only certain, precise questions can be asked to satisfy that burden of proof. A medical expert, for example, is not competent to express an opinion as to what constitutes "malpractice" or "negligence" or "what a reasonable and prudent doctor would have done under the same or similar circumstances."[31] The rationale for these restrictions is that these opinions constitute conclusions which only the trier of facts may draw, and therefore they invade the province of the jury.[32] Texas courts, on the other hand, have allowed medical experts to testify as to what medical practices are "correct" in certain circumstances,[33] that certain hypothetical acts are "against good [medical] practice,"[34] and that certain acts fall below the "standard of conduct" of the other doctors.[35]

One decision during the survey period involved these restrictions on expert testimony. In *Lee v. Andrews*[36] the plaintiff's medical expert testified as to possible deviations by the defendant doctor from applicable standards. The witness testified that "[i]f I—the word 'malpractice' was committed, at least timely treatment was not awarded this gentlemen (*sic*) in that errors had been made which went unrecognized, untreated even though they were obvious."[37] After noting that *Snow v. Bond*[38] and its progeny preclude a medical expert witness from passing judgment on the correctness or incorrectness of the defendant's conduct,[39] the court of civil appeals held that the trial court erred in admitting this testimony into evidence. The court further held that such error was harmless in light of other evidence tending to establish the defendant doctor's negligence.

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30. 148 Tex. 1, 219 S.W.2d 779 (1949).

31. Snow v. Bond, 438 S.W.2d 549, 550 (Tex. 1969). During the survey period one decision, following *Snow*, held that an expert witness in a medical malpractice case cannot be asked "what a reasonably prudent doctor or an average doctor or treating doctor or any hypothetical doctor would have done under the same or similar circumstances." Smith v. Guthrie, 557 S.W.2d 163, 166 (Tex. Civ. App.—Fort Worth 1977, writ filed).

32. *See, e.g.*, Aetna Life Ins. Co. v. Scarborough, 556 S.W.2d 109 (Tex. Civ. App.—Beaumont 1977, writ granted), which held that the plaintiff's family physician was not qualified to construe the group medical policy in dispute or give his opinion on the subject. The expert witness could only "give his opinion . . . as [to] medical facts, he may not determine the legal classification or effect of such facts; that is a matter entrusted to the courts." *Id.* at 110.

33. Prestegord v. Glenn, 441 S.W.2d 185 (Tex. 1969).

34. Cleveland v. Edwards, 494 S.W.2d 578, 580 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).

35. Martisek v. Ainsworth, 459 S.W.2d 679, 680 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.).

36. 545 S.W.2d 238 (Tex. Civ. App.—Amarillo 1976, writ granted).

37. *Id.* at 243.

38. 438 S.W.2d 549 (Tex. 1969).

39. *Id.* at 551; *see* note 31 *supra*.

Although it is generally true that expert testimony is not binding on the trier of fact, a recent decision reaffirmed an exception to that rule. In *Exxon Corp. v. West*[40] Exxon appealed from a judgment decreeing the rights of certain royalty owners to gas produced from an underground reservoir. The only evidence introduced at the trial was the testimony of two witnesses, a geologist and a petroleum engineer, both of whom were employed by Exxon. Both witnesses gave their expert opinions that the total amount of gas which could have been in place in the reservoir, as of the date the storage operations were commenced, was 95.3 billion cubic feet. At the conclusion of their testimony, both sides rested, and the trial court entered its judgment in favor of the Wests, declaring that Exxon was required to account to them for royalty on all gas produced from the field regardless of whether the gas was native or stored. The trial court concluded that Exxon failed to establish with reasonable certainty the maximum volume of either the recoverable gas or the total gas that could have remained in the reservoir when gas storage operations commenced. The trial court indicated in its findings that it did not believe the opinions of Exxon's experts and that since Exxon failed to meet its evidentiary burden, the Wests were entitled to be paid royalties on all gas produced from the reservoir.

The court of civil appeals reversed the decision of the trial court and rendered judgment in Exxon's favor. The court acknowledged the general rule that the opinion testimony of an expert, even though not contradicted, is not binding upon the trier of facts, and that "[t]his is particularly true where the experts' testimony is based upon studies made while in the employ of the party who is offering their testimony."[41] The court, nevertheless, held that the opinions of the two experts in this case were conclusive because they were otherwise credible and free from contradiction and inconsistency. The court reasoned that the witnesses' "testimony was clear, direct and positive and there was nothing to cause any reasonable suspicion as to the credibility of their testimony," and that the Wests' failure to introduce contrary evidence "constitutes effective corroboration of the testimony of these witnesses."[42]

One problem that frequently confronts a trial court is the admissibility of an expert's opinion when that opinion is partly based upon hearsay. *United States Fire Insurance Co. v. Stricklin*,[43] which was a suit on a fire insurance policy, is illustrative of this problem. The defendant contended on appeal that the trial court erred in excluding the testimony of its expert and admitting the testimony of plaintiff's expert. Both experts based their respective opinions on the same facts and had similar professional experience. Both experts were engaged at the time of trial as independent adjusters and both had previously been employed by the defendant as staff adjusters. Plaintiff made no objection to the qualifications of the defendant's expert, but objected to his testimony on the ground that it was based upon hearsay. This

40. 543 S.W.2d 667 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.).
41. *Id.* at 672.
42. *Id.* at 673.
43. 556 S.W.2d 575 (Tex. Civ. App.—Dallas 1977, writ filed).

objection was sustained, and the expert's opinion testimony was excluded. Plaintiff contended on appeal that the trial court's ruling was proper and not inconsistent as no objection was made by defendant to the testimony of plaintiff's expert on the basis of hearsay or lack of qualification.

The court of civil appeals rejected plaintiff's contention and held that opinions of most experts are necessarily based in part on hearsay. The court considered significant the fact that defendant's expert's opinion was also based upon facts of which he had personal knowledge and noted that the defendant's expert used cost guides accepted by various area contractors as well as information received in telephone conversations with contractors. The court recognized that this latter information was hearsay, but held that "it is one way that an expert on repair costs can keep current on construction costs" and, therefore, "[t]his method is perfectly permissible."[44] The court determined that since any expert must in part use hearsay as a basis for his opinion, "the better view is to admit the testimony . . . thus leaving to the jury the weight to be given the opinion rather than excluding it."[45] The court concluded that it was an abuse of discretion for the trial court to exclude one expert's opinion and admit the other when both were based on similar information.

The chief controversy between the parties in *Graham v. Oak Park Mobil Homes Inc.*[46] was the cause of a fire in the area of the water heater in plaintiff's mobile home. After a favorable verdict for the plaintiff, the trial court granted defendant's motion for judgment n.o.v. on the the ground that the plaintiff's expert's opinion about the cause of the fire amounted to no evidence "because it was based on hearsay and was no more than a qualified guess."[47] The court of civil appeals determined that the expert witness had a clear opinion as to the cause of the fire, notwithstanding the fact that "he used the words 'apparently' and 'apparent' in his opinion and even though he indicated on cross-examination 'possibilities' of other causes."[48] The appellate court further reasoned that the jury was entitled to consider the expert's opinion because the opinion, even if based on hearsay information, "is not valueless or inadmissible."[49] Judgment was reversed and rendered in the plaintiff's favor.

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44. *Id.* at 580.
45. *Id.*
46. 546 S.W.2d 394 (Tex. Civ. App.—Corpus Christi 1977, no writ).
47. *Id.* at 397.
48. *Id.*
49. *Id.* Although an expert may give his opinion and, in so doing, rely on hearsay information, the expert may not rely on just any hearsay. For example, one expert cannot base his opinion on the hearsay opinions of other experts. Perkins v. Springstun, 557 S.W.2d 343 (Tex. Civ. App.—Austin 1977, writ filed). The hearsay source should be acceptable to the members of the expert's profession, and it should be confirmed insofar as is practical. Lewis v. Southmore Sav. Ass'n, 480 S.W.2d 180 (Tex. 1972). *See also* Loper v. Andrews, 404 S.W.2d 300 (Tex. 1966); 1 C. MCCORMICK & R. RAY, *supra* note 23, §§ 800, 1400, 1404. Thus, a medical expert's recitation of the history of the injury as reported to him by the plaintiff, although admissible to show the basis of the doctor's opinion, is not competent evidence that an injury in fact occurred. *See, e.g.*, Presley v. Royal Indem. Co., 557 S.W.2d 611 (Tex. Civ. App.—Texarkana 1977, no writ). Furthermore, the party against whom the evidence is introduced is entitled, in a jury trial, to an instruction that the "expert's hearsay is not evidence of the fact but only bears on his opinion." Lewis v. Southmore Sav. Ass'n, 480 S.W.2d 180, 187 (Tex. 1972).

IV. IMPEACHMENT

Admissions Against Interest. In *Howland v. Hough*,[50] a trespass to try title action, the plaintiff appealed from a take nothing judgment. One of the plaintiff's assertions on appeal was that the trial court erred in refusing to admit into evidence a deed from the defendants to a third party. The deed executed by the defendants to the third party contained a recitation by which, arguably, defendants recognized the disputed tract as belonging to plaintiff. The plaintiff's theory was that the deed was admissible as an admission against interest because at the time of trial the defendants were claiming title to the disputed tract. Since evidence of conduct by a party which is inconsistent with his present position is generally admissible against the party as an admission against interest,[51] it was held that the trial court committed reversible error in failing to admit the deed.

Similarly, in *Colonial Life & Accident Insurance Co. v. Squyres*[52] an insurance company sought to introduce into evidence a motion in limine, a certified copy of the verdict, and a certified copy of the judgment in a prior suit filed by the plaintiff. The plaintiff, in a suit to recover under a disability insurance policy, alleged that he was disabled because of a back injury. Defendant's theory was that plaintiff's disability was not solely caused by the accident in question, but was caused by a prior accident. The motion in limine from the prior lawsuit contained a statement that "[t]he suit referred to above resulted from an injury to Plaintiff, involving primarily his lumbosacral spine."[53] The trial court refused to permit the documents to be introduced and defendant appealed from an adverse verdict. In rejecting the defendant's contention that the motion in limine was admissible, the court of civil appeals gave three reasons: (1) the burden was on the defendant to delete the inadmissible matter from that which was admissible and, having failed to do so, the trial court did not err in excluding the evidence; (2) the evidence was immaterial as to whether the plaintiff was totally and permanently disabled from the accident in question in view of the plaintiff's uncontested testimony that he recovered from the prior injury and in the absence of any evidence connecting the prior injury with the present case; and (3) even if the trial court did err in excluding the motion in limine, it was not reversible error.[54] The court's rationale for the third basis of its ruling was that the defendant was fully able to develop testimony from the plaintiff and a medical expert regarding the plaintiff's prior injury.[55]

Although the affirmance in *Squyres* was probably a correct one, the first two reasons given by the court for upholding the exclusion of the relevant

50. 553 S.W.2d 162 (Tex. Civ. App.—Eastland 1977, writ granted).
51. Texas Gen. Indem. Co. v. Scott, 152 Tex. 1, 253 S.W.2d 651 (1952); *see* 2 C. MCCORMICK & R. RAY, *supra* note 23, § 1141.
52. 550 S.W.2d 413 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).
53. *Id.* at 417.
54. *Id.* The court of civil appeals also held that since the jury verdict and the judgment in the prior suit, which the defendant also sought to introduce, were not statements made by the plaintiff, and involved a different defendant, a different set of facts, and a different subject matter, they were immaterial to the issues in the present case. *Id.* at 418.
55. *Id.* at 418.

portion of the motion in limine are invalid. The record reflects that the defendant's attorney did in fact offer part of the motion and that his offer focused on the language quoted above.[56] Moreover, the fact that the plaintiff, an interested witness, testified that there was no causal relationship between the prior injury and the one in issue does no more than raise an issue of fact.[57] Prior pleadings of parties which are factually inconsistent with their position in court as a matter of logic and justice are usually admissible. In view, however, of the other evidence introduced, the third reason given by the court—that an error in excluding the document was harmless—was probably valid.

In *United States v. Cook*,[58] a criminal case involving alleged mail fraud, the issue presented was whether reversible error occurred in the admission into evidence of injunctive documents prepared in settlement of a prior action. The defendants had previously consented to the entry of orders of injunction in settlement of a civil action filed by the Securities and Exchange Commission. When the government sought to introduce the documents, defendants objected on the basis of rule 403 of the Federal Rules of Evidence.[59] The government countered by relying on rule 404(b),[60] arguing that proof of the injunction's existence was necessary to show the common scheme of defendants to perpetrate fraud, to prove intent and motive, and to prove the existence of a scheme to defraud. The Fifth Circuit Court of Appeals determined that "[t]o qualify for admission under rule 404(b) . . . the injunction documents here would have to evidence the commission of some crime, wrong or act at least related in nature to the present charge of mail fraud."[61] Consequently, the court concluded that rule 404(b) was not applicable because the document introduced neither admitted nor denied any act of any kind. The court held that reversible error was committed as to one defendant because the procedure called for by rule 403 was "unfair," but such error was not reversible as to the other defendant in view of other evidence contained in the record.

Evidence of Other Accidents. In order to prove defective design, the plaintiff in *Magic Chef, Inc. v. Sibley*[62] sought to introduce evidence of other accidents involving the same or similar model product made by the defendant. These products were located in other apartments in the same apartment

56. *Id.* at 417.
57. *See, e.g.*, Greenville Ave. State Bank v. Lang, 421 S.W.2d 748 (Tex. Civ. App.—Dallas 1967, no writ).
58. 557 F.2d 1149 (5th Cir. 1977).
59. FED. R. EVID. 403, which pertains to the bases of opinion testimony by experts, provides: "Although relevant, evidence may be excluded if its probative value is substantially out-weighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
60. FED. R. EVID. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

61. 557 F.2d at 1152.
62. 546 S.W.2d 851 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.).

complex. Over the defendant's objections several lay witnesses testified that the defendant's product, a kitchen range, accidently ignited when a control knob was merely brushed by clothing or one's body. The plaintiff's theory of liability was that her kitchen range was defectively designed because of its propensity to ignite. The defendant argued on appeal that the admission of evidence of other accidents constituted reversible error.

Evidence of other accidents involving the same product can be admitted to establish the product's dangerous or hazardous nature.[63] The accidents, however, must have occurred under the same or substantially similar conditions as the one involving the plaintiff. The court of civil appeals in *Sibley* agreed with the trial court's decision to admit such evidence because it saw "no difference in evidence of this type to show that the design is defective from the evidence offered by [defendant] that no difficulty had been experienced by any other user of this model range."[64]

Prior Wrongful Acts. At least one decision during the last year involved the question of impeachment under the new Federal Rules of Evidence. In *United States v. Herzberg*[65] both defendants were found guilty of devising a scheme and artifice to defraud using the mails. The government cross-examined one of the defendants on the subject of a prior, unrelated civil fraud judgment taken against both defendants and introduced testimony as to that defendant's reputation for truthfulness in the community. The defendants, on appeal from their convictions, claimed that the trial court erred in permitting the government to introduce such evidence.

Rule 608(b) of the Federal Rules of Evidence[66] provides several avenues for the introduction of evidence of prior wrongful acts of a witness. In *Herzberg* one defendant was directly impeached by extrinsic evidence as to a civil fraud matter on which there had been no criminal conviction. The question thus became whether such prior wrongful act was a collateral matter. If it was, such evidence should have been excluded because a witness may not generally be impeached with extrinsic evidence as to a collateral matter. After recognizing that the subject involved was not a collateral matter "if the witness testified on that subject on direct examination," the court concluded that "the topic, while perhaps cracked open on direct examination of one witness, did not emerge during direct examination

63. *See, e.g.*, Keyser v. Lackey, 523 S.W.2d 295 (Tex. Civ. App.—Corpus Christi 1975, no writ); Davis, *Evidence of Post-Accident Failures, Modifications, and Design Changes in Products Liability Litigation*, 6 ST. MARY'S L.J. 792 (1974).

64. 546 S.W.2d at 855.

65. 558 F.2d 1219 (5th Cir. 1977).

66. FED. R. EVID. 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

of the defendant."[67] Such evidence thus amounted to impeachment by extrinsic evidence on a collateral matter in violation of rule 608(b).

V. MARITAL PRIVILEGE

In a federal criminal action where only one spouse is a defendant and the prosecutor seeks to call the other spouse as a witness the rule is that either the defendant spouse or the witness spouse may claim the marital privilege to prevent the witness spouse from testifying.[68] A spouse, however, is competent to testify on behalf of a defendant spouse if both consent.[69]

One case within the last year dealt with a claim of marital privilege where both spouses were defendants. In *United States v. Hicks*[70] a husband and wife had been indicted for various federal narcotics offenses along with many other defendants, some of whom had already pleaded guilty. The defendants filed a motion for separate trial, asserting that they should be accorded separate trials because a joint trial would limit their claim of marital privilege.

The district court rejected the defendants' initial argument that the marital privilege in federal court is a constitutional right, citing *Hawkins v. United States*.[71] *Hawkins* held that the marital privilege was a common law rule of evidence designed to maintain marital and family harmony.[72] The district court then addressed the issue of who may claim the privilege by stating that although *either* spouse, whether defendant or potential witness, can claim the privilege, "[t]here is, unfortunately, a dearth of caselaw and a conflict of theory in the situation where both spouses are co-defendants."[73]

The district court decision weighed the conflicting policies of protecting marital harmony on the one hand against the desirability, in criminal conspiracy cases, of trying all defendants together. Separate trials for alleged co-conspirators are *not* to be granted as a right, but only when a reasonable prospective evaluation of the evidence indicates that one co-defendant will be prejudiced by the defense of another. The court's deliberations were made more complex by the relatively rare incidence of married co-defendants. Although noting that two commentaries had advocated an automatic severance of trials involving co-defendant spouses,[74] the court held that the better course would be to defer its ruling on the severance motion until the federal prosecutor had presented his evidence. At the conclusion of the government's case if one spouse definitely would take the stand in his own behalf and the other spouse would claim the marital privilege, the court

67. 558 F.2d at 1223.

68. Hawkins v. United States, 358 U.S. 74 (1958); United States v. Doughty, 460 F.2d 1360, 1364 (7th Cir. 1972); United States v. Fields, 458 F.2d 1194, 1198-99 (3d Cir. 1972). *See also* 8 J. WIGMORE, *supra* note 20, §§ 2332-2341 (J. McNaughton rev. 3d ed. 1961); Comment, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 NW. U.L. REV. 208, 231 (1961).

69. Hawkins v. United States, 358 U.S. 74 (1958); Funk v. United States, 290 U.S. 371 (1933).

70. 420 F. Supp. 533 (N.D. Tex. 1976).

71. 358 U.S. 74 (1958).

72. *Id.* at 76. Since the rule is of common law rather than constitutional origin, the Congress or courts could alter the evidentiary rule at will for the federal judicial system.

73. 420 F. Supp. at 536-37.

74. 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 505[04] (1975); Symposium, *Marital Privileges and the Right to Testify*, 34 U. CHI. L. REV. 196, 207-08 nn.48-52 (1966).

could better perceive the prejudical effect the spouse's testimony might create and the non-frivolous nature of the claim of privilege by the other spouse. The court held that if separate trials were granted on a claim of marital privilege, the defendant spouse claiming the privilege would be barred from calling the other spouse as a witness in the separate trial. The defendants' motion for separate trial of the spouses was denied without prejudice, thereby permitting the motion to be renewed after completion of the prosecution's case.

VI. PAROL EVIDENCE RULE

Many decisions involving application of the parol evidence rule arise each year in opinions of Texas appellate courts. Two of these decisions deserve mention in this survey. In *Ross v. Stinnett*[75] a building contractor brought suit against a homeowner to recover the unpaid balance due under an alleged oral contract to build a house. The evidence established that the parties had executed a mechanics' and materialmen's lien contract. At the request of the defendant some changes in the plans and specifications were made during the course of the construction. After the house was completed a conflict arose between the parties over the amount owed by the homeowner. Plaintiff asserted that the defendant had orally agreed, prior to the execution of the contract, to pay the cost plus fifteen percent to have the house built. Defendant, however, contended that the amount specified in the contract was the binding agreement of the parties. The defendant paid the amount provided in the contract but refused to pay the additional sum. Only two special issues were submitted to the jury, one inquiring into whether the defendant agreed to pay plaintiff the cost of construction plus fifteen percent, and one concerning damages. Judgment was entered for the plaintiff on the basis of favorable jury findings. On appeal the defendant asserted that the trial court erred in admitting parol evidence of the alleged oral contract because such evidence contradicted the express terms of the written contract.

The parol evidence rule provides that, in the absence of fraud, accident, or mistake, parol or extrinsic evidence is not admissible to contradict or vary the terms of a written instrument.[76] The plaintiff in *Ross*, however, did not plead fraud, accident, or mistake; instead, he relied on the rule announced in *Bell v. Mulkey*.[77] The plaintiff contended that the written contract was never intended to be binding as an agreement between the parties, but was signed only as a matter of form to enable defendant to secure a loan. The court in *Ross* rejected the plaintiff's position and distinguished *Bell* on the ground that the rule there enunciated only applied when the written contract sought to be avoided by parol proof "is a sham in its entirety, and not merely that

75. 540 S.W.2d 493 (Tex. Civ. App.—Tyler 1976, no writ).

76. *See, e.g.*, Jackson v. Hernandez, 155 Tex. 249, 285 S.W.2d 184 (1955). The parol evidence rule, however, is not a rule of evidence but a rule of substantive law. Hubacek v. Ennis State Bank, 159 Tex. 166, 317 S.W.2d 30 (1958).

77. 7 S.W.2d 115 (Tex. Civ. App.—Amarillo 1928), *aff'd*, 16 S.W.2d 287 (Tex. Comm'n

some of its terms are not in accord with the prior parol agreement . . . ."[78] The court noted that the plaintiff argued that the written contract was a sham only insofar as it concerned consideration for construction of the house, rather than in its entirety.[79] The court thus held that plaintiff's evidence of the prior oral agreement was inadmissible under the parol evidence rule. The court reversed and rendered judgment for the defendant.

The parol evidence rule, however, will not preclude the introduction of extrinsic evidence to establish that a party other than the signatory to the written contract may be liable under the agreement. In *Nelson v. Texas Power & Light Co.*[80] it was held that extrinsic evidence is ordinarily admissible to establish the identity of an undisclosed principal and to hold him liable upon a contract entered into by his agent and for his benefit. The court reasoned that such proof does not vary or alter the terms of the contract, but simply permits a new party to be bound because of his relationship to the party in whose name the contract was executed.

VII. WRONGFUL DEATH SUIT—CEREMONIAL REMARRIAGE

The question concerning the admissibility of evidence of a widow's ceremonial remarriage was presented once again. In *Exxon Corp. v. Brecheen*[81] the Texas Supreme Court held that article 4675a[82] made such evidence admissible; consequently, it was reversible error to exclude evidence of the widow's ceremonial remarriage in a wrongful death case. In *Conway v. Chemical Leamon Tank Lines, Inc.*[83] the decedent's widow answered "yes" on direct examination when she was asked if her marriage to the decedent was her only marriage. This testimony was misleading. The district court, however, prevented the defendant from referring to her remarriage. The Fifth Circuit Court of Appeals observed that "whether or not error is harmless is a matter of federal law,"[84] notwithstanding the decision in *Brecheen* which held that such error is reversible and never harmless. Nevertheless, the court reversed, holding that article 4675a is "one of those rare evidentiary rules which is so bound up with state substantive law that federal courts sitting in Texas should accord it the same treatment as state courts in order to give full effect to Texas' substantive policy."[85] The court further reasoned that to hold otherwise would result in forum shopping in which beneficiaries of the Texas wrongful death statutory scheme could receive more favorable treatment in a federal court than in a state court.

App. 1929, jdgmt adopted) (parol evidence admissible to show writing purporting to be contract was not intended to be such).

78. 540 S.W.2d at 495.
79. *Id.* at 496.
80. 543 S.W.2d 26 (Tex. Civ. App.—Waco 1976, no writ).
81. 526 S.W.2d 519 (Tex. 1975).
82. TEX. REV. CIV. STAT. ANN. art. 4675a (Vernon Supp. 1978) provides: "[E]vidence of the actual ceremonial remarriage of the surviving spouse is admissible, if such is true, but the defense is prohibited from directly or indirectly mentioning or alluding to any common-law marriage, extramarital relationship, or marital prospects of the surviving spouse."
83. 540 F.2d 837 (5th Cir. 1976).
84. *Id.* at 838.
85. *Id.*

VIII. CROSS-EXAMINATION

The extent to which a witness may be cross-examined to show interest, bias, or motive was addressed in *General Motors Corp. v. Simmons*.[86] As a general rule, interest, bias, or motive on the part of a witness may be elicited on cross-examination.[87] This is true even though such examination incidentally discloses that the defendant is protected by insurance.[88] The problem in *Simmons* was that the plaintiff entered into a "Mary Carter" settlement agreement[89] with two defendants. These defendants remained in the case as defendants and aligned themselves with the plaintiff throughout the trial. General Motors attempted to introduce into evidence the terms of the settlement agreement but this evidence was excluded. Plaintiff sought to uphold the trial court's ruling by reliance on the traditional Texas rule that settlement agreements between the plaintiff and a co-defendant should be excluded because a contrary rule would frustrate the policy favoring the settlement of lawsuits.[90] Plaintiff and the two settling defendants also argued that there was no harm in excluding this evidence because "it was made clear to General Motors, the court and the jury that [the settling defendants] were not adverse to Simmons and were adverse to General Motors."[91]

The court of civil appeals reformed the judgment by granting General Motors contribution from the two settling defendants and rendered judgment for the plaintiff for one-half of the original judgment. The Texas Supreme Court reversed the decisions of the lower courts because the nature of the settlement agreement had been excluded. In so holding the court stated:

> It was not an ordinary settlement agreement. By its terms Feld acquired a direct financial interest in Simmons' lawsuit. The financial interest of parties and witnesses in the success of a party is a proper subject of disclosure by direct evidence or cross-examination. While the alignment of the adversaries was disclosed, the jury did not know the extent of Feld's interest or that it was a financial interest which depended upon the amount of the judgment for Simmons . . . . That kind of interest is a proper subject of cross-examination and proof.[92]

A similar problem arose in *Bristol-Myers Co. v. Gonzales*,[93] a products liability case. Before trial the plaintiff settled his claims against the defendant-doctor, but continued his action against the manufacturer of the drug that allegedly caused his deafness. The manufacturer attempted to introduce evidence of the settlement agreement between the plaintiff and the doctor on the ground that this evidence reflected the credibility of Dr. Gonzalez by showing the true alignment of the parties.[94] The trial court excluded this

86. 558 S.W.2d 855 (Tex. 1977).
87. *See* 1 C. MCCORMICK & R. RAY, *supra* note 23, §§ 670-681.
88. *See, e.g.*, Aquilera v. Reynolds Well Serv., Inc., 234 S.W.2d 282 (Tex. Civ. App.—San Antonio 1950, writ ref'd).
89. This type of settlement agreement, which derives its name from Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Dist. Ct. App. 1967), usually provides that a settling defendant will be reminbursed for the amount paid in settlement from funds recovered against the remaining defendants.
90. *See, e.g.*, McGuire v. Commercial Union Ins. Co., 431 S.W.2d 347 (Tex. 1968).
91. 558 S.W.2d at 857.
92. *Id.*
93. 548 S.W.2d 416 (Tex. Civ. App.—Corpus Christi 1976), *rev'd on other grounds*, 21 Tex. Sup. Ct. J. 179 (Feb. 4, 1978).
94. The defendant manufacturer also attempted to introduce the pleadings abandoned by

evidence and the court of civil appeals affirmed. The appellate court also held that, even if such evidence was admissible, the exclusion was harmless error.

Before the supreme court[95] the plaintiff sought to distinguish *Simmons* on two grounds: (1) that Dr. Gonzalez did not personally retain any financial interest in the plaintiff's recovery; and (2) that the doctor did not remain a defendant through any action of his own or the plaintiff's. The supreme court, however, rejected these distinctions and held that it was reversible error to exclude evidence of the settlement agreement. The court concluded that the evidence offered by Bristol-Myers for the purpose of showing the bias or credibility of the doctor was admissible.

IX. DEAD MAN'S STATUTE

The applicability of article 3716,[96] commonly referred to as the dead man's statute, to a medical malpractice action was decided in *Wilkinson v. Clark*.[97] The plaintiff sued the defendant-doctor alleging improper diagnosis, negligent treatment, and negligence in failure to refer him to a specialist for corrective eye surgery. The defendant-doctor died before trial and his independent executrix was added as a party. Prior to trial the defendant filed a motion in limine requesting that the plaintiff be instructed not to testify as to any conversation "plaintiff had with Dr. Clark or as to any tests performed by Dr. Clark during the case and treatment provided . . . , because such conversations and test results are clearly transactions . . . as defined by the Texas Dead Man's Statute . . . ."[98]

The trial court sustained the motion in limine, and the plaintiff perfected his bill of exception. The court, trying the case without a jury, rendered judgment that the plaintiff take nothing. In holding that the trial court properly excluded testimony of the plaintiff's medical treatment, the court of civil appeals determined that the word "transaction" as used in article 3716 includes medical services rendered by a physician.

X. ADMISSIBILITY OF RECORDINGS

Sound recordings are admissible if the proper foundation has been laid. The proper foundation usually consists of proof: (1) that the recording device was capable of taking testimony; (2) that the operator of the device was competent; (3) that the recording is authentic and correct; (4) that no

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the plaintiff after he settled with the defendant-doctor. This evidence was excluded by the trial court. The court of civil appeals held that this was error but harmless under the provisions of TEX. R. CIV. P. 434. 548 S.W.2d at 429.

95. 21 Tex. Sup. Ct. J. 179 (Feb. 4, 1978).

96. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon 1976) provides (emphasis added):

> In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others *as to any transaction* with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent.

97. 558 S.W.2d 490 (Tex. Civ. App.—Waco 1977, writ filed).

98. *Id.* at 491.

changes, additions, or deletions have been made; (5) of the manner of the preservation of the recording; (6) of identification of the speakers; and (7) that the testimony elicited was voluntarily made without any kind of inducement.[99] In *Edwards v. State*[100] the court of criminal appeals affirmed a judgment based in part upon a recording of a conversation with the defendant. Summarizing the cases discussing the proper foundation for the admission of a sound recording, the court held that certain of the enumerated requirements can be inferred from testimony and need not be shown with the same degree of particularity required for admission of other mechanically acquired evidence, such as the results of a breathalyzer test. *Edwards* held, for example, that if a person testifies that he made a tape recording and that it coincided with what he heard the parties say, then that foundation is sufficient to establish that the recording device was capable of taking testimony and that the operator was competent. Likewise, "[t]he voluntary nature of the conversation can be inferred from the facts and circumstances of each case."[101]

A proper foundation for the introduction of a tape recording was also held to have been laid in *In re Bates*.[102] Judge Bates argued that the predicate required by *Cummings v. Jess Edwards, Inc.*[103] had not been satisfied. In *Bates* a witness identified the equipment and gave testimony regarding the circumstances surrounding the making of each tape. The witness also testified that he was familiar with the equipment's use, he identified the voices on each tape, and he testified as to the authenticity of each tape and to his consent. The chain of custody of the tapes was also established. The court of criminal appeals held that a proper predicate for admission of the tapes had therefore been established.

99. *See, e.g.*, Cummings v. Jess Edwards, Inc., 445 S.W.2d 767, 772-73 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.).
100. 551 S.W.2d 731 (Tex. Crim. App. 1977).
101. *Id.* at 733.
102. 555 S.W.2d 420 (Tex. 1977).
103. 445 S.W.2d 767 (Tex. Civ. App.—Corpus Christi 1961, writ ref'd n.r.e.); *see* text accompanying note 101 *supra*.