1980

Texas Civil Procedure

Ernest E. Figari Jr.

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
Ernest E. Figari Jr., Texas Civil Procedure, 34 Sw L.J. 415 (1980)
https://scholar.smu.edu/smulr/vol34/iss1/14

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
THE major developments in the field of civil procedure during the
survey period are found in judicial decisions, constitutional amend-
ments,\(^1\) and statutory enactments.\(^2\) This survey examines these
developments and considers their impact on existing Texas procedure.

I. JURISDICTION OVER THE SUBJECT MATTER

During the survey period Texas voters approved several constitutional
amendments expanding the jurisdiction of the justice court. Article V of
the Texas Constitution now provides that the justice court may exercise
jurisdiction over cases in which the matter in controversy does not exceed
five hundred dollars, exclusive of interest, so long as exclusive jurisdiction
of such cases is not lodged elsewhere.\(^3\) The exclusive jurisdiction of the
justice courts was, however, not altered.\(^4\) Accordingly, in cases in which
the matter in controversy exceeds two hundred dollars but does not exceed
five hundred dollars, the county courts share concurrent jurisdiction with
the justice courts.\(^5\) The statutory provisions governing jurisdiction of the
justice and county courts were also amended to reflect this constitutional
revision.\(^6\)

A change in the amount in controversy alleged by the plaintiff was the

---

1. B.S., Texas A & M University; LL.B., University of Texas; LL.M., Southern Methodist University. Attorney at Law, Dallas, Texas. The author acknowledges the very considerable assistance of Thomas A. Graves and Storrow Moss Gordon, Attorneys at Law, in the preparation of this Article.

2. The two constitutional amendments that relate to the procedural area concern subject matter jurisdiction. See Tex. Const. art. V, §§ 16, 19.

3. Tex. Const. art. V, § 19. In addition, the amendment grants authority to the legislature to expand the subject matter jurisdiction of the justice courts up to an amount not exceeding one thousand dollars. Id. To date, however, the legislature has not taken advantage of this additional authority. See note 6 infra.

4. Id.

5. Id., §§ 16, 19.

subject of judicial examination in *Flynt v. Garcia.* In a suit brought in a county court at law, the plaintiff filed a trial amendment increasing the amount sought to be recovered from $4,778.40 to $6,242.40 to reflect additional damages accruing through passage of time. Applying the general rule that "where jurisdiction is once lawfully and properly acquired, no subsequent fact or event in the particular case serves to defeat that jurisdiction," the supreme court held that the county court at law could properly render judgment for the full amount sought by the plaintiff.

II. JURISDICTION OVER THE PERSON

The propriety of out-of-state service under article 2031b, the Texas long-arm statute, continues to be the subject of judicial attention. Section 3 of article 2031b authorizes the exercise of jurisdiction over a nonresident when he is "doing business" in Texas. "Doing business," as defined by section 4, includes "entering into a contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State." The opinion of the federal district court in *Docutel Corp. v. S.A. Matra,* a case in which a Texas firm sued two French corporations for alternative tort and breach of contract claims, is a virtual guidebook for a plaintiff seeking to invoke article 2031b. Focusing initially on the contract claim, the court observed that section 4 was met even though the subject contract did not, by its terms, require performance in Texas, provided the contracting defendant could reasonably foresee that the plaintiff would perform its obligations thereunder in Texas. On this basis the court sustained service of process upon the contracting defendant with respect to the contract claim.

Significantly, in a ruling of first impression in Texas, the court in *Docutel* applied an "overlay" analysis, under which overlapping facts justifying the assertion of personal jurisdiction under article 2031b over one claim furnish a basis for jurisdiction over alternative claims involving the same

---

7. 587 S.W.2d 109 (Tex. 1979) (per curiam).
8. *Id.* at 109-10 (following Haginas v. Malbis Memorial Foundation, 163 Tex. 274, 354 S.W.2d 368 (1962); Isbell v. Kenyon-Warner Dredging Co., 113 Tex. 528, 261 S.W. 762 (1924)).
9. The opinion of the court appears to be limited to cases where the amendment adds damages accruing only because of the passage of time. *See* 587 S.W.2d at 110. The supreme court rejected as judicially uneconomical the holding of the court of civil appeals that the county court at law could entertain the suit, but could not award any amount of damages in excess of its jurisdictional limits. *Id.*
11. In a holding that would limit appellate review of a due process inquiry under article 2031b, a federal district court in Western Desert, Inc. v. Chase Resources Corp., 460 F. Supp. 63 (N.D. Tex. 1978), stated that "[t]he question of whether the defendant . . . has created sufficient contacts with Texas such that personal jurisdiction may be obtained under the Texas long-arm statute is a question of fact." *Id.* at 66.
12. TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (Vernon 1964).
15. *Id.* at 1215-16.
The court concluded that since the tort claim arose from substantially the same facts as the contract claim, the assertion of jurisdiction over the contracting defendant on the tort claim comported with due process for the same reasons that personal jurisdiction on the contract claim comported with due process. With respect to the second defendant, the court noted that, while it was not a party to the subject contract, it had dispatched representatives to Texas to investigate business opportunities and ultimately purchased approximately $9,000,000 worth of goods from various third parties located in Texas. Invoking the doctrine of "unrelated contacts," which authorizes reliance upon business contacts that are unrelated to the asserted cause of action for the purpose of supporting personal jurisdiction, the court sustained service over the second defendant, concluding that: "It is not unfair or unreasonable to require a corporation which over the course of the seventies has purchased nearly $9,000,000 worth of goods manufactured and sold in Texas and has sent numerous representatives to the state to defend a suit brought in Texas." Finally, Docutel is also significant for its confirmation that the Texas Supreme Court has a more restrictive view of the federal due process requirements of nonresident service than the federal courts. Since it is well settled that article 2031b reaches as far as the Federal Constitution will permit, any challenge to service under the statute necessarily reduces to an inquiry into whether due process is satisfied. During a previous survey period, the Texas Supreme Court, apparently overlooking federal authority that sustained nonresident service in analogous situations, concluded in U-Anchor Advertising, Inc. v. Burt that a defendant's contacts with Texas did not satisfy federal constitutional requirements and, therefore, affirmed the trial court's dismissal for lack of personal jurisdiction. Ignoring the Texas Supreme Court's interpretation of the four-
eenth amendment and returning the focus of inquiry to federal authority, the Docutel court concluded that "U-Anchor . . . cannot be read to preclude a court from following federal precedent in determining due process for purposes of article 2031b."

Rockwell International Corp. v. KND Corp., a recent decision of a federal district court, is significant for its studious analysis of existing precedent in the area. Distilling the various tests of due process advanced by other courts, the court concluded that the central inquiry under article 2031b is "whether the defendant's contact with the forum rests on something more substantial than mere fortuity, when viewed from the defendant's perspective, that the plaintiff happens to be a resident of the forum." Moreover, "[p]hysical presence within the forum is not determinative," as "[i]t is well established that activities outside the forum that have reasonably foreseeable consequences within may support a court's exercise of personal jurisdiction."

Two statutory enactments in the area of personal jurisdiction should be noted. First, the definition of "doing business" contained in section 4 of article 2031b has been expanded to include "[t]he act of recruiting Texas residents, directly or through an intermediary located in Texas, for employment inside or outside of Texas." Since article 2031b has already been construed to be limited only by the constraints of due process under the federal constitution, the change seems unnecessary.

Oklahoma by the plaintiff and was executed by both parties in that state. With respect to performance, the contract required the plaintiff to erect five advertising displays at specified locations in Oklahoma and obligated the defendant to send payment to the plaintiff's offices in Amarillo. The defendant mailed six checks to Amarillo, but had no other contacts with Texas. On the basis of these facts, the court concluded that the defendant's contacts with Texas did not satisfy federal constitutional requirements, and, therefore, affirmed the trial court's dismissal for lack of personal jurisdiction. See Figari, Texas Civil Procedure, Annual Survey of Texas Law, 32 Sw. L.J. 407, 408-09 (1978).

28. 83 F.R.D. at 564.
30. 83 F.R.D. at 564; accord, Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 496-97 (5th Cir. 1974).
Adding to the existing framework of Texas long-arm statutes,33 section 2a of article 8306, which covers the field of workers' compensation, was recently amended.34 The prior version authorized service upon a nonresident defendant in any suit “growing out of any accident resulting in the injury or death of any employee of said nonresident, occurring in the course of employment of the employee in this State,” by serving the chairman of the Industrial Accident Board, provided the nonresident had employed labor within Texas.35 As amended, section 2a now permits long-arm service on a nonresident in any action against the nonresident arising out of any accident resulting in the injury or death of any employee of the nonresident “occurring in the course of employment of the employee in a foreign jurisdiction when the employee is a Texas resident recruited in this State.”36

III. SPECIAL APPEARANCE

Butler v. Butler37 is a warning that rule 120a,38 which authorizes a defendant to make a special appearance for the purpose of questioning whether his person is “amenable to process” issued by the trial court, cannot be used to raise the issue of defective service. Finding that the sole issue at a special appearance is jurisdiction over the person, the court concluded that “[b]y only raising the issue of defective service, appellant waived his special appearance”39 and “thereby turned the special appearance into a general appearance.”40

In a suit brought against two defendants in which one of them asserted a special appearance, the trial court sustained the appearance, and the plaintiff took an appeal from the ruling. The appellate court in Sullivan v. Tab Sales Co.41 held that the order was not appealable because the ruling did not dispose of all parties and claims.

IV. SERVICE OF PROCESS

The most important decision during the last year dealing with service of process was Butler v. Butler.42 Although arising out of service upon a resident of Louisiana pursuant to rule 108,43 the decision turned upon an in-
terpretation of the method of substituted service authorized by rule 106 as incorporated in rule 108. Following authorization by the trial court, the defendant, who after considerable effort could not be located in his state of residence, was served by sending the citation and petition by certified mail, return receipt requested, to his attorney of record in a competing action in Louisiana. Although he did not contend that this method of service failed to provide him with actual notice of the Texas proceeding, the defendant appeared through counsel and questioned the propriety of such service. The court of civil appeals approved the method of service used, finding that it was reasonably calculated to give the defendant notice of suit.45

V. VENUE

In 1977 the Texas Legislature liberalized section 17.56 of the Texas Deceptive Trade Practices—Consumer Protection Act to provide for venue in specified counties in actions “which allege a claim to relief” under the Act. In the first cases to construe this amendment, three courts of civil appeals have held that a plaintiff must allege, but need not prove, a cause of action under the Act in order to sustain venue in the places specified.46

All three courts, however, also recognized that the plaintiff must prove that the defendant “resides, has his principal place of business, or has done business” in the county where suit is brought before venue under the 1977 amendment to section 17.56 could be sustained there. In Pettit v. England, for example, plaintiff offered no proof at the venue hearing, relying solely upon his petition alleging a cause of action under the Act. The court held that there was no evidence of “any legislative intent to change prior case law on proof of residence or business location” and that the

may be served by any disinterested person competent to make oath of the fact in the same manner as provided in Rule 106 hereof. . . . A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State to the full 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.


44. TEX. R. Civ. P. 106. In addition to specifying certain methods of service upon a defendant, the residual section of rule 106 provides that “the court, upon motion, may authorize service . . . in any . . . manner which will be reasonably effective to give the defendant notice of the suit.”

45. 577 S.W.2d at 507.

46. 1977 Tex. Gen. Laws, ch. 216, § 8, at 604, discussed in Figari, supra note 18, at 462-63. That version of section 17.56 has since been amended. See text accompanying note 58 infra.


48. All three courts recognized that the legislature intended by its 1977 amendments to overrule the holdings in prior cases that a plaintiff under the Act must prove and plead a cause of action. See, e.g., Doyle v. Grady, 543 S.W.2d 893, 895 (Tex. Civ. App.—Texarkana 1976, no writ). See also Figari, supra note 18, at 463.

49. 583 S.W.2d 875 (Tex. Civ. App.—Dallas 1979, no writ).
burden was upon plaintiff to establish these venue facts.\(^{50}\)

Focusing upon the sufficiency of evidence necessary to satisfy the "doing business" provision of section 17.56, the court in *Dairyland County Mutual Insurance Co. v. Harrison*\(^{51}\) imposed a relatively light burden on the plaintiff. The proof found sufficient to sustain venue in Harris County consisted solely of a page from the Houston "yellow pages" telephone directory that listed several insurance agencies with Harris County addresses as "agents" for the defendant.\(^{52}\) Adopting a stricter construction of the "doing business" test, the court in *Compu-Center, Inc. v. Compubill, Inc.*\(^{53}\) looked to the "doing business" provision of the Texas long-arm statute\(^{54}\) for guidance. Although the defendants had other clients in the county of suit, the court found that the parties had not entered into a contract to be performed in whole or in part by any party in that county, and accordingly held that venue would not lie.\(^{55}\)

The decisions construing "doing business" in *Dairyland* and *Compu-Center* are, however, of limited relevance to future actions brought under the Texas Deceptive Trade Practices—Consumer Protection Act.\(^{56}\) Effective August 27, 1979, the Texas Legislature again amended section 17.56, this time deleting the "doing business" provision.\(^{57}\) Actions that allege a claim to relief under the Act may now be commenced:

in the county in which the person against whom the suit is brought resides, has his principal place of business, or has a fixed and established place of business at the time the suit is brought or in the county in which the alleged act or practice occurred or in a county in which the defendant or an authorized agent of the defendant solicited the transaction made the subject of the action at bar.\(^{58}\)

In *Church's Fried Chicken, Inc. v. Jim Dandy Fast Foods, Inc.*\(^{59}\) the court considered the applicability of subdivision 5(a) of article 1995\(^{60}\) to a suit fordeclaratory judgment to interpret a contract. The defendant's grant of a right to use its trademark to a plaintiff residing in the county of suit was held to satisfy the requirement that the obligation be performable in the county of suit.\(^{61}\)

Subdivision 31 of article 1995, which governs venue in "[s]uits for breach of warranty by a manufacturer of consumer goods,"\(^{62}\) was again the subject of judicial interpretation during this survey period. Focusing upon the scope of the term "consumer goods" as used in that subdivision,
the court in *L & M-Surco Manufacturing, Inc. v. Winn Tile Co.* held that mortar and grout compounds purchased by an installer of ceramic tiles and used in the construction of a swimming pool were not "consumer goods" so as to allow the installer to maintain venue in the county of its residence. In reaching this result, the court considered and rejected the broad interpretation of the term given by two courts of civil appeals. Instead, the court accepted an argument that those courts had previously rejected, and relied upon the definition of consumer goods set forth in sections 9.109 and 2.103(c) of the Texas Uniform Commercial Code, as well as those definitions set forth in other state and federal statutes. Noting that all of these definitions limit the term to products used for personal, family, or household purposes, the court held that "a commercial product purchased by a business entity strictly for use by mixing with other materials in commercial construction" is not a consumer good.

*Mutual Savings & Loan Association v. Earnest* raised the question of the trial court's power to transfer a case filed in one county to a county other than that of the defendant's residence when the defendant asserted its right to be sued in the county of its residence. In *Earnest* the plaintiffs filed suit in Bowie County. When the defendant filed its plea to be sued in Hunt County, however, the plaintiffs filed a controverting plea alleging a written contract performable in Rockwall County and requesting that the case be transferred there. Holding that the plaintiff was required to plead and prove that the suit was properly brought where it was originally filed in order to overcome the defendant's plea of privilege, the court stated that "[i]t is not proper to transfer a case to a third county, even if venue would be properly maintainable there had the suit been filed there originally."

*Barnes v. Waters Equipment Co.* dealt with the effect upon a controverting plea of a subsequent amendment to the petition that had been incorporated by reference into the plea. The plaintiff in that case had alleged in its controverting plea only that one of the two defendants had

---

63. 580 S.W.2d 920 (Tex. Civ. App.—Tyler 1979, writ dism'd).
65. 569 S.W.2d at 523; 554 S.W.2d at 32. The court in *Winn* did not, however, disapprove the result reached in those cases, recognizing that TEX. REV. CIV. STAT. ANN. art. 1995(5(b)) (Vernon Supp. 1980) includes goods used for agricultural purposes within its definition of consumer goods. Instead, the court read the two cases as authority for the limited proposition that agricultural goods may be consumer goods. See 580 S.W.2d at 928.
67. Id. § 2.103(e) (Vernon 1968).
69. 580 S.W.2d at 927. The court in *Winn* did not, however, attempt to articulate a comprehensive definition of consumer goods. Id.
70. 582 S.W.2d 534 (Tex. Civ. App.—Texarkana 1979, no writ).
71. Id. at 535.
72. 582 S.W.2d 580 (Tex. Civ. App.—Beaumont 1979, no writ).
entered into a written contract under subdivision 5 of article 1995. When its proof at the venue hearing failed to show venue under that subdivision, however, the plaintiff sought and received leave to file a trial amendment alleging fraud and contended that this was sufficient to sustain venue over both defendants under subdivision 29a. Finding that the facts alleged in an amendment to an original petition are not automatically incorporated into a controverting plea, the court held that before the allegations in such an amended petition may be considered at a venue hearing, the controverting plea itself must be amended to make it clear that the affiant is swearing to the facts in the amended petition.

VI. PLEADINGS

Booker Custom Packing Co. v. Caravan Refrigerated Cargo, Inc. demonstrates how the use of an opponent’s pleading can conclusively establish an allegation contained in such pleading. The plaintiff brought an action to recover unpaid freight charges for delivery of meat, and the defendant sought an offset for the value of meat damaged by the plaintiff in a prior shipment. In rebutting the defendant’s case, the plaintiff read to the jury a portion of the defendant’s pleading alleging, inter alia, that the plaintiff had failed to comply with its promise to deliver a quantity of meat by a certain date and that the resulting delay in delivery caused the meat to deteriorate. Relying on the “long standing rule in Texas” that the allegations of a pleading are conclusively established when a party offers in evidence his opponent’s pleading without limitation, the court of civil appeals held that a jury finding in favor of the defendant’s offset claim for the value of damaged meat was supported by the evidence. The court, however, noted that the rule “is an extraordinarily harsh one . . . since an unsworn pleading, even if offered by the opposing party, logically does not tend to show what the true facts are, but only what the pleader has asserted them to be, unless its allegations are contrary to the position taken by the pleader at the trial.”

Rule 185 provides that a suit on sworn account “shall be taken as prima facie evidence thereof, unless the party resisting such claim shall . . . file a written denial, under oath, stating [1] that each and every item is not just or true, or [2] that some specified item or items are not just and true.” Although the defendant in Sundance Oil Co. v. Aztec Pipe & Supply Co.,

74. Id. art. 1995(29(a)).
75. 582 S.W.2d at 581.
78. 575 S.W.2d at 330-31.
79. TEX. R. CIV. P. 185.
80. 576 S.W.2d 780 (Tex. 1978).
failed to file a sworn denial to an action on a sworn account, the supreme
court held that such a denial was not required because the plaintiff's sworn
invoices contained the names of two different companies and, thus, raised
a fact issue as to which company was actually indebted to the plaintiff.\textsuperscript{81}
In \textit{Rizk v. Financial Guardian Insurance Agency, Inc.}\textsuperscript{82} the defendant's an-
swer stated that each and every item in the plaintiff's sworn account was
not just or true in whole or in part and, in addition, alleged the affirmative
defenses of lack of consideration and limitations. Finding that the affirma-
tive defenses were consistent with the verified denial and that they could
have been raised even in the absence of a verified denial under rule 185,
the supreme court concluded that the defendant's answer complied with
the requirements of the rule.\textsuperscript{83}
A distinction in the manner of pleading for the recovery of prejudgment
interest sought at common law as an element of damages and prejudgment
interest based on statute\textsuperscript{84} was drawn by the supreme court in \textit{Republic
National Bank v. Northwest National Bank}.\textsuperscript{85} The court held that when
the prejudgment interest is to be awarded under a statute, in this case article 5069—1.03,\textsuperscript{86} a general prayer for relief is sufficient.\textsuperscript{87} On the other
hand, if prejudgment interest is sought as damages, a specific prayer for
relief must be pleaded.\textsuperscript{88}
The supreme court in \textit{Standard Fire Insurance Co. v. LaCoke}\textsuperscript{89} was
faced with the question of whether a petition filed one day late should be
deemed to be timely filed when the delay was caused by an act of a deputy
district clerk. In this workers' compensation action, the petition to set
aside the decision of the Industrial Accident Board was not received within
the statutory time period\textsuperscript{90} because the deputy district clerk had instructed
the post office to postpone the second of two daily deliveries of mail until
the following day. Relying on a previous case holding that an instrument
is deemed filed when it is placed in the control or custody of the clerk,\textsuperscript{91}
the court concluded that the petition was in the control of the clerk because

\begin{itemize}
\item \textsuperscript{81} \textit{Id.} at 780-81.
\item \textsuperscript{82} 584 S.W.2d 860 (Tex. 1979).
\item \textsuperscript{83} \textit{Id.} at 863.
\item \textsuperscript{84} Prejudgment interest based on a statute is known as interest eo nomine. \textit{Republic
\item \textsuperscript{85} 578 S.W.2d 109 (Tex. 1978).
\item \textsuperscript{86} TEX. REV. CIV. STAT. ANN. art. 5069—1.03 (Vernon Pam. Supp. 1971-1979).
\item \textsuperscript{87} 578 S.W.2d at 117. The court noted that plaintiff must also allege and prove that the
requirements of the statute have been met. Thus, under art. 5069—1.03, the pleader satisfies
this condition by pleading and proving a written contract that specifies a sum payable on a
date certain. \textit{Id.}
\item \textsuperscript{88} 578 S.W.2d at 117. This pleading requirement is met when a prayer for damages
"with interest" is made and the pleadings disclose that the damages are definitely established
as of a definite date. \textit{See} \textit{Black Lake Pipe Line Co. v. Union Constr. Co.}, 538 S.W.2d 80, 96
(Tex. 1976).
\item \textsuperscript{89} 585 S.W.2d 678 (Tex. 1979).
\item \textsuperscript{90} TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1980) requires that the
petition be filed within 20 days after notice of appeal is given. The 20-day period for filing a
petition is jurisdictional. \textit{Clawson v. Texas Employers Ins. Ass'n}, 475 S.W.2d 735, 737-38
(Tex. 1972).
\item \textsuperscript{91} Glidden Co. v. Aetna Cas. \& Sur. Co., 155 Tex. 591, 291 S.W.2d 315 (1956).
\end{itemize}
it would have been delivered on time but for the deputy district clerk’s conduct.\textsuperscript{92} The petition was, therefore, timely filed.

VII. Limitations

Until this year, Texas statutes governing limitation periods treated actions for debt differently depending upon whether they were founded upon open or stated accounts, or whether they were evidenced by written contracts.\textsuperscript{93} By an amendment effective August 27, 1979, however, the Texas Legislature has provided that all actions for debt are subject to a four-year limitations period.\textsuperscript{94} This change brings Texas statutes into conformity with the four-year limitation period specified in article 2 of the Uniform Commercial Code\textsuperscript{95} and goes beyond the Code to extend the four-year period to contracts for services.\textsuperscript{96}

In another statutory enactment, the Texas Legislature added an explicit two-year statute of limitations to the Texas Deceptive Trade Practices—Consumer Protection Act.\textsuperscript{97} Effective August 27, 1979, actions brought under that subchapter must be commenced “within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false,
misleading, or deceptive act or practice."98 If, however, the consumer proves that his failure to commence the action within the two-year period was caused by conduct of the defendant calculated solely to induce the plaintiff to refrain from or postpone the bringing of an action, an additional 180 days may be added to the two-year period.99

VIII. Parties

Two cases during the survey period dealt with the obligations imposed on a person seeking to act on behalf of unnamed parties under rule 42.100 In Smith v. Lewis101 plaintiffs filed an action on behalf of themselves and other similarly situated. Subsequently, the trial court granted a motion for summary judgment dismissing the suit without determining whether the suit could be maintained as a class action. Recognizing that rule 42, as amended, requires the trial court to make such a determination "as soon as practical" after the suit's commencement,102 the court of civil appeals held that the rule places an obligation on the trial court to consider class action maintainability on its own motion.103 Nevertheless, the court held that the trial court's failure to do so did not violate a substantive right; rather, the plaintiff has the burden to present his motion for class certification in a timely manner104 and to demonstrate that the case qualifies as a class action.105

The importance of fulfilling this latter obligation is well illustrated by Huddleston v. Western National Bank.106 In that case the trial court had dismissed a stockholders' derivative action based on its conclusion that the plaintiff was an inadequate class representative because he had been a corporate officer at the time of the misconduct alleged in the petition and, further, had attempted to remove himself from the class by selling his stock to the defendants. Holding that the trial court had not clearly abused its discretion,107 the court of civil appeals upheld the finding of inadequate class representation on the grounds that the trial court could properly have believed that the plaintiff's interests were antagonistic to those of the class.108 The court also rejected plaintiff's contention that he had been

98. TEX. BUS. & COM. CODE ANN. § 17.56A (Vernon Supp. 1980).
99. Id.
100. TEX. R. CIV. P. 42.
101. 578 S.W.2d 169 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).
102. This provision was added to rule 42 by amendment effective Sept. 1, 1977. TEX. R. CIV. P. 42(c)(1) (Historical Comment). Although the suit in Smith was filed before that date, the court held that the amended provision applied retroactively. 578 S.W.2d at 171-72.
103. 578 S.W.2d at 172. The court relied upon the construction that the federal courts have given the identical portion of rule 23 of the Federal Rules of Civil Procedure in reaching this conclusion. Id.
104. Id. (citing East Tex. Motor Freight Sys. Inc. v. Rodriguez, 434 U.S. 810 (1977)).
105. 578 S.W.2d at 172.
106. 577 S.W.2d 778 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).
107. Id. at 780.
108. Id. at 780-81. The court found federal decisions interpreting FED. R. CIV. P. 23 to be "persuasive" in construing rule 42. Consequently, the court took note of the factors considered by federal courts in their determinations of adequacy of class representation. These factors were stated to be:
deprived of a jury trial on the issue of his adequacy as a class representative, noting that the plaintiff had made no demand for a jury, paid no jury fee, and participated in the hearing without objection.109

IX. Discovery

Two significant statutory developments in the area of privilege occurred during the survey period. In the new Public Accountancy Act of 1979,110 the Texas Legislature created a limited accountant-client privilege. Under section 26 of that Act a certified public accountant, public accountant, or entity licensed thereunder111 "shall not be required to disclose or divulge information which has come into his possession relative to or in connection with any professional services as [an accountant]"112 without the client's permission.113 Further, "[a]ny information derived from or as the result of such professional services shall be deemed confidential and privileged."114

Excluded from the scope of the privilege, however, is "information related to the methods or procedures" used in the preparation of financial statements, in management advisory or consulting services, and in tax returns and supporting schedules.115 In addition, the Act prohibits the assertion of the privilege in certain proceedings, including "(1) an action against a licensee by the client or entity engaging the licensee; (2) any disciplinary investigation or proceeding conducted under or pursuant to this Act; or (3) any criminal investigation or proceeding."116 Moreover, the privilege does not extend to "documentary information, books or records" in examinations sought by the Comptroller of Public Accounts or any state agency seeking examination "pursuant to the authority granted by law."117

Prior to the enactment of section 26, which became effective September

---

109. 577 S.W.2d at 780.
110. TEX. REV. CIV. STAT. ANN. art. 41a-I (Vernon Supp. 1980).
111. This includes professional partnerships and corporations. Id. § 26(a).
112. Id.
113. The Act also allows permission to be given by the "person or entity engaging" the accountant or "the heirs, successors, or personal representatives of such client or person or entity." Id.
114. Id.
115. Id. §§ 26(a)(1)-(3).
116. Id. §§ 26(b)(1)-(3).
117. Id. § 26(c).
1, 1979, Texas law did not recognize an accountant-client privilege. Accordingly, there are as yet no reported Texas decisions construing such privilege. In enacting section 26, however, Texas joins the minority of states which have accorded the accountant-client privilege statutory recognition. While no accountant-client privilege exists under federal law, the federal rules of evidence make state law applicable “in civil actions and proceedings, with respect to an element of claim or defense as to which State law supplies the rule of decision.”

During the survey period, the legislature also added a privilege for communications between a patient and a mental health professional. The Act precludes disclosure of communications between a person authorized to practice medicine or a person certified to diagnose, evaluate, or treat mental or emotional disorder and a person who consults such an individual for diagnosis, treatment, or evaluation of a mental or emotional disorder. Records of the “identity, diagnosis, evaluation, or treatment” of the client “created or maintained” by the health professional are also designated as privileged.

Several types of exceptions to the privilege are, however, expressly created. No privilege may be claimed in court proceedings: (1) by the patient against the professional; (2) when the proceeding is a criminal or license revocation action in which the patient is a complaining witness; (3) when the patient waives the privilege in writing; (4) when the proceeding is to collect on a claim for services rendered by the professional to the client; or (5) when the communications are made in a court-ordered examination and the patient was informed beforehand that no privilege would attach.

---

119. See 8 J. WIGMORE, EVIDENCE § 2286, at 533 n.22 (McNaughton rev. ed. 1961). While decisions construing such statutes may be of some value in interpreting § 26, the various statutes are by no means uniform.
121. FED. R. EVID. 501. For a discussion of the complexities raised by this rule, see 2 WEINSTEIN’S EVIDENCE § 501[02], at 501-17 to -20.5 (1979).
122. TEX. REV. CIV. STAT. ANN. art. 5561h, §§ 1-6 (Vernon Supp. 1980).
123. Id. § 2(a).
124. Id. § 1(a). The person may be authorized by any state or nation to practice medicine and need not be a psychiatrist.
125. The certification must be given by the State of Texas. Moreover, if the patient “reasonably believes” the person to be authorized to practice medicine or certified to deal with mental health problems, the communication remains privileged. Id.
126. Id. § 1(b). Alcoholism and drug addiction are included as mental or emotional disorders.
127. Id. § 2(b).
128. Id. § 4(a)(1). Such proceedings include but are not limited to malpractice proceedings.
129. Id. The information must also be relevant to the claim or defense of the professional in such a proceeding.
130. Id. § 4(a)(2). Such a written waiver may also be submitted by the parent of a minor, the guardian of an adjudged incompetent, or the personal representative of one deceased.
131. Id. § 4(a)(4). The examination must relate to the patient’s mental or emotional con-
The privilege is also expressly vitiated with respect to disclosures by the professional: (1) to governmental agencies required or authorized by law to receive them; 132 (2) to medical or law enforcement personnel if there exists probability that the patient may physically harm himself or others or suffer immediate mental or emotional injury; 133 (3) to qualified personnel performing management audits, financial audits, program evaluations, or research; 134 (4) to persons having written consent of the patient or those having legal authority to act for the patient; 135 (5) to persons or entities "involved in the payment or collection of fees for mental or emotional health services;" 136 or (6) to other professionals participating in the diagnosis, evaluation, or treatment of the patient. 137 Once such disclosures are made, however, the person receiving them may not further disclose them except for the authorized purposes for which such disclosures were first obtained. 138

The Act further provides that the patient, or persons authorized by law to act on his behalf, may claim the privilege. 139 The professional involved may also claim the privilege, but only on behalf of the patient. 140 Moreover, the Act provides that a person aggrieved by a violation of the Act may seek an injunction or bring a civil action for damages. 141

Under prior law, no type of physician-patient privilege existed in Texas. 142 In enacting the privilege set forth in article 5561h, Texas joins a growing number of states that have recognized a privilege for communications between patients and mental health professionals. 143

The question of privilege was also addressed by the Texas Supreme Court in Stewart v. McCain. 144 The issue there presented was whether article 342—210 of the Texas Banking Code 145 creates an absolute privilege

---

132. Id. § 4(b)(1).
133. Id. § 4(b)(2). This determination is left to the professional.
134. Id. § 4(b)(3). In reporting on these activities, the personnel may not disclose "directly or indirectly" the patient's identity.
135. Id. § 4(b)(4). These include the parent of a minor, the guardian of an adjudged incompetent, or the personal representative of one deceased.
136. Id. § 4(b)(5). These include corporations and governmental agencies.
137. Id. § 4(b)(6). Personnel under a professional's direction are also within the scope of this exception.
138. Id. § 2(c). Persons authorized to act on the patient's behalf are not subject to this restriction.
139. Id. § 3(a).
140. Id. § 3(b). The authority to assert the privilege is presumed in the absence of contrary evidence.
141. Id. § 5.
142. See, e.g., Caddo Grocery & Ice v. Carpenter, 285 S.W.2d 470 (Tex. Civ. App.—Austin 1955, no writ). The majority of states have, however, recognized such a privilege.
143. See 8 J. Wigmore, supra note 119, § 2380, at 819 n.5.
144. See 8 J. Wigmore, supra note 119, § 2286, at 75 nn.22b & 23 (Supp. 1979).
for information obtained by the Texas Department of Banking relative to the financial condition of state banks. 146 The attorneys for defendants in a suit between private parties had served a subpoena duces tecum upon an assistant examiner of the Texas Department of Banking who had conducted an examination of a state bank. The subpoena sought all documents relating to that examination, including materials contained in a confidential section of the examination report. After the examiner refused to produce the material, and a notice to show cause in connection with contempt proceedings was issued, the bank examiner sought to have the supreme court set aside the district court order to show cause. 147

Finding that the legislature had expressly prohibited disclosure of the information sought, 148 and had made such disclosure a misdemeanor, 149 the court found no exception in the statute for discovery in civil proceedings. 150 The court also noted that the information sought consisted of "hunches, opinions and impressions" of the examiner which would "seldom, if ever, be competent or admissible evidence." 151

In Werner v. Miller 152 the Texas Supreme Court again considered discovery of information concerning experts under rule 168. 153 The plaintiff had filed interrogatories requesting the names of those experts the defendants had consulted who would be called as witnesses at trial; in addition, plaintiff sought the names of consulting experts who might be called as witnesses as well as those the defendant had not yet decided upon calling. 154 The plaintiff thereafter filed a motion to compel answers to those interrogatories and the defendant sought an order compelling both parties to designate only testifying experts by a date to be set by the trial court. The trial court denied the former motion and granted the latter, 155 where-

146. Article 342—210 of the Texas Banking Code provides in pertinent part:

[A]ll information obtained by the Banking Department relative to the financial condition of state banks, whether obtained through examination or otherwise, except published statements, and all files and records of said Department relative thereto shall be confidential, and shall not be disclosed by the Commissioner or any officer or employee of said Department.


147. The court had previously denied the examiner leave to file a petition for writ of mandamus seeking to vacate the order of the trial court denying the examiner's motion for protective order. 575 S.W.2d at 510.

148. Id. The court recognized the power of the legislature to exempt materials from discovery and held itself obligated to apply the statute as written.

149. TEX. REV. CIV. STAT. ANN. art. 342—211 (Vernon 1973).

150. 575 S.W.2d at 511. See also TEX. ATT’Y GEN. ORD-147 (1976) (information held pursuant to art. 342—210 not subject to Texas Open Records Act).

151. 575 S.W.2d at 511.

152. 579 S.W.2d 455 (Tex. 1979).

153. TEX. R. CIV. P. 168. This rule allows discovery by interrogatory of any information discoverable by deposition under rule 186a. Rule 186a allows discovery of "the identity and location of . . . persons, including experts, having knowledge of relevant facts," but allows discovery of "the reports, factual observations and opinions of an expert" only if he "will be called as a witness." TEX. R. CIV. P. 186a.

154. 579 S.W.2d at 457.

155. Id. at 456. Under the order, the party setting the case trial was required to designate testifying experts 30 days prior to filing the written trial setting. The other party then had two days to designate its testifying experts.
upon the plaintiff sought a writ of mandamus.\textsuperscript{156}

A majority of the supreme court upheld the action of the trial court, finding no abuse of discretion. Characterizing the principal question presented to be "at what stage a party must 'positively aver' that an expert consultant will not be a witness,"\textsuperscript{157} the majority viewed the trial court's order as one that was well within its discretion in supervising the conduct of discovery.\textsuperscript{158} Disposing of the plaintiff's contention that the trial court had abused its discretion by denying discovery of the identity of consulting experts, the majority relied upon \textit{Boyles v. Houston Lighting & Power Co.},\textsuperscript{159} stating that such information is "irrelevant and immaterial."\textsuperscript{160}

In a strong dissent, Justice McGee\textsuperscript{161} pointed out that \textit{Boyles} had addressed only the admissibility of the identity of consulting experts as evidence.\textsuperscript{162} Examining rule 186a,\textsuperscript{163} the dissent found that only the written statements, factual observations, mental impressions, and opinions of consulting experts qualify for the work product exception incorporated into the rule.\textsuperscript{164} Further, the dissent noted that prior opinions of the supreme court\textsuperscript{165} had held that a party was entitled to a "positive averment" as to whether an expert would fulfill only a consulting role.\textsuperscript{166} Thus, in the dissenter's view, an interrogatory may "properly inquire into the identity and location, as well as the testifying or consulting capacity, of any expert possessing knowledge of relevant facts."\textsuperscript{167}

The question of appropriate sanctions for failure to supplement properly a designation of a testifying expert was addressed in \textit{Trubell v. Patten}.\textsuperscript{168} In an action against an attorney for professional malpractice, the defendant, by interrogatories, requested the plaintiff to designate the names of testifying experts; in response, the plaintiff stated that he knew of no such

\textsuperscript{156} For a discussion of the use of mandamus to review discovery orders, see Comment, \textit{The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available}, 32 Sw. L.J. 1283 (1979); Note, \textit{Mandamus-Discovery-Mandamus May Issue to Compel a District Judge to Order Discovery}, 9 Tex. Tech L. Rev. 782 (1978).
\textsuperscript{157} 579 S.W.2d at 456. The majority merely passed over the question of how a party could "positively aver" that a particular consultant would not be used as a testifying witness if his name had never been revealed in the first instance. Apparently the majority viewed a designation limited to the names of testifying experts as the equivalent of such an averment. The opinion appears to run counter to the thrust of such opinions as Barker v. Dunham, 551 S.W.2d 41 (Tex. 1977), in which the burden was placed upon the party resisting discovery to justify the application of the "work product" exception. See Figari, supra note 24, at 416-17.
\textsuperscript{158} The majority expressed its concern "over the great loss of time and judicial resources through 'discovery gamesmanship.'" 579 S.W.2d at 457.
\textsuperscript{159} 464 S.W.2d 359 (Tex. 1971).
\textsuperscript{160} 579 S.W.2d at 456.
\textsuperscript{161} Justices Pope, Johnson, and Campbell also joined in the dissent. 579 S.W.2d at 457.
\textsuperscript{162} As the dissent pointed out, information sought need not be admissible at trial so long as it is reasonably calculated to relate to admissible evidence. 579 S.W.2d at 458 (citing Tex. R. Civ. P. 186a).
\textsuperscript{163} Tex. R. Civ. P. 186a.
\textsuperscript{164} 579 S.W.2d at 459.
\textsuperscript{165} Id. (citing Allen v. Humphreys, 559 S.W.2d 798 (Tex. 1977); Barker v. Dunham, 551 S.W.2d 41 (Tex. 1977)).
\textsuperscript{166} 579 S.W.2d at 459.
\textsuperscript{167} Id.
\textsuperscript{168} 582 S.W.2d 606 (Tex. Civ. App.—Tyler 1979, no writ).
experts, but agreed to supplement his response prior to trial. Although the plaintiff had subsequently designated experts, he had withdrawn the designations on each occasion after a continuance was obtained and the designated persons were deposed. At trial, the plaintiff sought to elicit expert testimony from a fact witness who had never been designated as an expert.\(^{169}\) The trial court excluded the expert testimony and subsequently directed a verdict for defendant.\(^ {170}\)

On appeal, the court of civil appeals noted that while rule 168 expressly requires supplementation of interrogatory answers,\(^ {171}\) it provides specific sanctions only for refusal to answer any or all of such interrogatories.\(^ {172}\) Because Texas practice regarding supplementation of discovery derives from the federal rules,\(^ {173}\) however, the court saw no reason to depart from the federal practice that allows sanctions for failure to supplement.\(^ {174}\) Having filled the gap in the Texas rules by holding that the trial court had the power to impose sanctions in the instant situation,\(^ {175}\) the court considered whether the exclusion of evidence in the case before it constituted an abuse of discretion.\(^ {176}\) Finding that the plaintiff had agreed to supplement his expert designations, had never designated the expert in question, had denied prior to trial that he would call experts, and had never sought a continuance, the court found no abuse in the trial court's ruling.\(^ {177}\)

The propriety of imposing sanctions for failure to answer interrogatories in the absence of a prior order compelling such answers was before the court of civil appeals in *Illinois Employers Insurance Co. v. Lewis*.\(^ {178}\) In that case the plaintiff had filed a motion to impose sanctions under rules

---

169. Although the defendant had deposed the witness, he argued that he had deposed him merely as a fact witness. *Id.* at 609.

170. *Id.* On appeal, the plaintiff admitted that without expert testimony, he had no basis to request the submission of issues regarding professional negligence to the jury. *Id.* at 611.

171. TEX. R. CIV. P. 168 requires supplementation if a party obtains information upon the basis of which "he knows that the answer [to the interrogatory] though correct when made is no longer true and the circumstances are such that a failure to amend the answer is in substance a knowing concealment." In *Trubell* the plaintiff may have been in literal compliance with rule 168 since he did not even inquire into the witness's willingness to give an expert opinion until after trial had begun. Nevertheless, he had agreed to designate any testifying experts prior to trial. Such an agreement itself imposes a duty under rule 168.

172. See TEX. R. CIV. P. 215a. Rule 215a includes among the appropriate sanctions exclusion of evidence offered by the noncomplying party.

173. 582 S.W.2d at 611 (citing *Wright v. Wright*, 154 Tex. 138, 274 S.W.2d 670 (1955)). The federal version of the duty to supplement is incorporated in *FED. R. CIV. P. 26(e).*


175. This holding appears to conflict with that of Texas Employers' Ins. Ass'n v. Thomas, 517 S.W.2d 832 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (trial court did not abuse discretion in refusing to grant mistrial after plaintiff neglected to supplement).

176. The imposition of sanctions by a trial court for failure or refusal of a party to comply with discovery rules can be set aside only when there has been a clear abuse of discretion. 582 S.W.2d at 610.

177. *Id.* at 611.

178. 582 S.W.2d 242 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.).
168 and 215a\textsuperscript{179} for defendant's failure to answer interrogatories.\textsuperscript{180} The defendant filed its answers fifteen minutes prior to trial, but the trial court nevertheless granted the motion for sanctions by ordering the defendant's answers stricken and a default judgment entered. The reviewing court first noted that the purpose of sanctions is to secure compliance with the discovery rule rather than to punish erring parties.\textsuperscript{181} Emphasizing that subjecting a party to a default judgment constitutes an extremely harsh remedy,\textsuperscript{182} the court stated that it had found no cases in which such a sanction had been imposed in the absence of a refusal to comply with an order of the court compelling the filing of interrogatory answers.\textsuperscript{183} Thus, while acknowledging that rule 215a(c) does not "literally require a party to obtain an order compelling answers to interrogatories before moving for sanctions,"\textsuperscript{184} the court found it incumbent upon the party seeking sanctions to obtain such an order and to show a refusal to obey before sanctions could properly be imposed.\textsuperscript{185}

The availability of discovery by depositions after trial was rejected in \textit{Swearingen v. Swearingen}\.\textsuperscript{186} After an adverse jury verdict in a child custody proceeding, the father sought to take notice depositions for use in a motion for new trial on the ground of newly discovered evidence. Although the court found no rule or case prohibiting the taking of post-trial depositions,\textsuperscript{187} it nevertheless concluded that "the authorities assume that if depositions are to be taken, it should be done before or during trial for use during the trial."\textsuperscript{188}

Finally, supplementing rule 167a,\textsuperscript{189} section 13.02(a) of the Family Code\textsuperscript{190} now not only permits blood testing of parties in a paternity suit, but requires it. Under that section, the court "shall order the mother, alleged father, and child to submit to the taking of blood."\textsuperscript{191} The court is

\begin{itemize}
\item \textsuperscript{179} \textit{Tex. R. Civ. P. 168, 215a.}
\item \textsuperscript{180} The defendant had filed responses to requests for admission covering the same subject matter sought by the interrogatories, but as a result of counsel's absence from the country, had simply failed to answer any of the interrogatories. \textit{582 S.W.2d at 244.}
\item \textsuperscript{181} \textit{Id. at 245.}
\item \textsuperscript{182} \textit{Id. Nevertheless, rule 215a explicitly authorizes sanctions striking pleadings, depriving a party of his grounds for defense, or entering judgment by default.}
\item \textsuperscript{183} \textit{See cases cited at 582 S.W.2d at 245.}
\item \textsuperscript{184} \textit{582 S.W.2d at 245. Rule 215a requires an order compelling answers only where a party fails to answer some, but not all, of the interrogatories.}
\item \textsuperscript{185} \textit{Id. For a discussion of the standards governing discovery sanctions see Comment, \textit{Imposition and Selection of Sanctions in Texas Pretrial Discovery Procedure}, 31 \textit{Baylor L. Rev.} 191 (1979).}
\item \textsuperscript{186} \textit{578 S.W.2d 829 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ dism'd). A similar result with respect to interrogatories was reached in Ana-Log, Inc. v. City of Tyler, 520 S.W.2d 819 (Tex. Civ. App.—Tyler 1975, no writ).}
\item \textsuperscript{187} \textit{578 S.W.2d at 833.}
\item \textsuperscript{188} \textit{Id. The court did not, however, identify the authorities relied upon. \textit{Tex. R. Civ. P. 621a specifically authorizes post-trial discovery, but only by the successful party in aid of enforcement of judgment.}}
\item \textsuperscript{189} \textit{Tex. R. Civ. P. 167a.}
\item \textsuperscript{190} \textit{Tex. Fam. Code Ann. § 13.02(a) (Vernon Supp. 1980).}
\item \textsuperscript{191} \textit{Id. No showing of good cause is necessary.}
\end{itemize}
also given power to appoint experts to conduct the tests.\textsuperscript{192}

\section*{X. Dismissal}

The dangers in failing to prosecute a suit diligently are highlighted by the harsh result reached in \textit{Harris County v. Miller}.\textsuperscript{193} In that case, the Texas Supreme Court considered the power of a trial court to reinstate a case under rule 165a\textsuperscript{194} after dismissing it for want of prosecution. Three and one half years after the suit in question had been filed, the trial court placed it on the automatic dismissal docket and notified the plaintiff's attorney. Although the plaintiff's attorney filed a motion to retain the case on the docket and obtained a trial setting, the trial court was not informed of these actions and signed an order dismissing the case for want of prosecution. The plaintiff's attorney was unaware of the dismissal order until he received a copy of the defendant's motion to strike the trial setting one month after the dismissal order was signed. He immediately moved to reinstate the case, and the trial court granted that motion several days later.

Recognizing that rule 165a, which governs the reinstatement jurisdiction of the courts, specifies different periods for reinstatement, depending upon when a party or his attorney receives notice,\textsuperscript{195} the supreme court held that notice of the trial court's \textit{intent} to dismiss bars reinstatement at any time after thirty days from the order of dismissal.\textsuperscript{196} So long as that notice is received prior to the expiration of twenty days after the actual dismissal, the fact that notice of the actual order of dismissal is not received until later is irrelevant. Although the plaintiff in \textit{Miller} had no notice of the actual dismissal until thirty days after entry of the order, the court found that he had notice of the trial court's \textit{intent} to dismiss before the order was even signed. This being the operative date under the rule, the trial court had no jurisdiction to reinstate after thirty days from the order of dismissal. The plaintiff's filing of a motion to reinstate within the thirty-day period was found to be insufficient to satisfy the rule's requirement that actual reinstatement must occur in that period.\textsuperscript{197}

\section*{XI. Summary Judgment}

The effect of the 1978 amendments to rule 166-A,\textsuperscript{198} which governs sum-

\begin{footnotesize}
\begin{itemize}
\item[192.] \textit{Id.} \textsection 13.03(a).
\item[193.] 576 S.W.2d 808 (Tex. 1979).
\item[194.] \textsc{Tex. R. Civ. P.} 165a.
\item[195.] 576 S.W.2d at 810-11 (citing Danforth Memorial Hosp. v. Harris, 573 S.W.2d 762 (Tex. 1978)). Reinstatement must take place either within 30 days from the date of dismissal or within 30 days after the party or his attorney receives notice. In no event, however, may the court reinstate under rule 165a more than six months after the dismissal; the remedy in that situation is a bill of review.
\item[196.] 576 S.W.2d at 810-11.
\item[197.] \textit{Id.} at 811.
\item[198.] \textsc{Tex. R. Civ. P.} 166-A. The amendments to rule 166-A included: (a) expanding the time for filing the motion from 10 days to 21 days before the time specified for the hearing; (b) expanding the time for a response to the motion from prior to the day of the hearing to
\end{itemize}
\end{footnotesize}
mary judgment practice, has been the subject of a number of opinions, including the significant supreme court decision of *City of Houston v. Clear Creek Basin Authority*. In that case the defendant city filed a motion for summary judgment, and at the time of the hearing on the motion, the only issue presented to the trial court was whether the plaintiff had standing to sue for violations of chapter twenty-six of the Texas Water Code that had occurred outside the plaintiff’s jurisdictional boundaries. Ruling on this single issue, the trial court granted the city’s motion. The court of civil appeals reversed, finding that the allegations of violations within the plaintiff’s territorial boundaries gave rise to a fact issue. Relying on the recently added language of rule 166-A that requires the movant to establish that he is entitled to a judgment as a matter of law “on the issues as expressly set out in the motion or in an answer or any other response” and provides that “[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal,” the supreme court held that the court of civil appeals erred in considering an issue that was not presented to the trial court and affirmed the trial court’s judgment.

Under the supreme court’s interpretation of the rule, “both the reasons for the summary judgment and the objections to it must be in writing and before the trial court at the hearing.” Further, in order to ensure appellate review of an issue, the issue must be “expressly presented” in “written motions, written answers or written responses to the motion.” The term “answer,” the court emphasized, means “an answer to the motion, not an answer generally filed in response to a petition.” Finally, the supreme court noted that the nonmovant need not file an answer or response to the motion to argue on appeal that the movant’s summary judgment proof is legally insufficient. If the nonmovant pursues this course, however, he will be precluded from raising “any other issues as grounds for reversal,”

---

seven days prior to the day of hearing; (c) requiring that issues related to the motion be expressly presented to the trial court in the written motion, answer or other reponse, see notes 199-226 infra and accompanying text; (d) allowing expert testimony under certain circumstances in support of the motion, see notes 222-25 infra and accompanying text; (e) allowing testimonial evidence of an interested witness; and (f) providing that defects in affidavits and attachments will not be grounds for reversal unless specifically pointed out by objection. See Figari, supra note 24, at 407, 418-19.


201. 589 S.W.2d at 674.

202. TEX. R. CIV. P. 166-A(c).

203. Id.

204. 589 S.W.2d at 677.

205. Id. The court also noted that the issues could be restricted or expanded by written agreement of the parties or by the parties' agreement on the record in open court pursuant to TEX. R. CIV. P. 11. 589 S.W.2d at 67. The court therefore approved the parties' agreement made on the record in open court that restricted the hearing to the single issue of violations occurring within the plaintiff's boundaries. 589 S.W.2d at 677-78.

206. Id. at 677.

207. Id. at 678.
including issues that relate to reasons for "avoiding" the movant's right to summary judgment. Thus, defenses of an affirmative nature, which are covered by rules 93 and 94 would have to be asserted in a written document by the nonmovant to be considered on appeal.

Although decided before Clear Creek, two decisions by the Dallas court of civil appeals, Combs v. Fantastic Homes, Inc. and Sherman v. Davis, are in accord with the rationale of that opinion. In Combs the trial court granted the defendant's motion for summary judgment in a suit under the Deceptive Trade Practice—Consumer Protection Act because the plaintiff's deposition testimony established as a matter of law that the defendant had not acted with intent to deceive the plaintiff. Although he had failed to file any response or answer to the motion, the plaintiff contended on appeal that the trial court erred because questions of fact existed on the issue of the defendant's intent and on the issue of negligent misrepresentation. The court held that the issue of the defendant's intent could be raised on appeal since that ground had been asserted by the defendant-movant in its motion and, therefore, had been expressly presented to the trial court. The issue of negligent misrepresentation, however, could not be considered because that issue had not been "presented to the trial court by either party." Similarly, in Sherman the nonmovant plaintiff failed to file a response or answer to the defendant's motion for summary judgment that was based on the applicable statute of limitations. The appellate court held that the plaintiff could attack the sufficiency of the proof that the defendant had offered to show that the limitations period had run. The court reiterated that "the party opposing a motion for summary judgment need not file a written answer or other response in order to raise for appellate consideration the insufficiency of the summary-judgment proof to support the specific grounds stated in the motion."

To be compared with the foregoing authorities is the supreme court's

---

208. Id.
209. TEX. R. CIV. P. 93.
210. TEX. R. CIV. P. 94.
211. 589 S.W.2d at 679. As examples of the types of cases in which the nonmovants must expressly raise certain issues in order to preserve appellate consideration, the supreme court cited Torres v. Western Cas. & Sur. Co., 457 S.W.2d 50 (Tex. 1970) (existence of good cause for late filing of worker's compensation claim) and Gardner v. Martin, 162 Tex. 156, 345 S.W.2d 274 (1961) (failure of movant to attach certified copies of prior case to establish res judicata). 589 S.W.2d at 679.

The supreme court also pointed out that under the new version of rule 166-A, the trial court is encouraged to use the summary judgment in appropriate cases. Id. at 676. In the court's view, the pre-1978 summary judgment rule had "a chilling effect on the willingness of trial courts to utilize the intended benefits of the procedure." Id. See generally McDonald, The Effective Use of Summary Judgment, 15 SW. L.J. 365 (1961); Comment, Summary Judgment in Texas: A Selective Survey, 14 HOUS. L. REV. 854 (1977).
212. 584 S.W.2d 340 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).
213. 583 S.W.2d 922 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).
214. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1980).
215. 584 S.W.2d at 343-44.
216. Id. at 344.
217. 583 S.W.2d at 924.
decision in Westchester Fire Insurance Co. v. Alvarez. In that case the defendant filed a motion for summary judgment that failed to set out the grounds for the motion as required by rule 166-A(c). After the motion was granted, the plaintiff raised this defect for the first time in her brief on appeal. Analogizing to the rule that defects in pleadings are waived unless specifically pointed out by written motion or exception before the charge to the jury or rendition of judgment, the supreme court held that the failure of the movant to specify grounds in his motion was "a defect in form" that was "waived unless excepted to prior to rendition of judgment." Pursuant to the 1978 amendments to rule 166-A, "]a] summary judgment may be based on uncontroverted testimonial evidence . . . of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts" provided such "evidence is [1] clear, positive and direct, [2] otherwise credible and free from contradictions and inconsistencies, and [3] could have been readily controverted." Relying on this language, the court in Walkoviak v. Hilton Hotels Corp. held that an expert's opinion can be used to defeat, as well as support, a motion for summary judgment. Accordingly, the appellate court ruled that the trial court had erred in granting a motion for summary judgment, because the nonmovant had filed an affidavit of his expert, which created an issue of fact. Overruling the movant's contention that the expert's affidavit was insufficient because it was based on "the best of his knowledge and belief" rather than personal knowledge, the court found that movant had waived this point by failing to object to the affidavits at the summary judgment hearing. Section (e) of rule 166-A provides in part that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." In Dallas County State Bank v.

218. 576 S.W.2d 771 (Tex. 1978).
219. TEX. R. CIV. P. 166-A(c).
220. TEX. R. CIV. P. 90.
221. 576 S.W.2d at 773. See also Life Ins. Co. v. Gar-Dal, Inc., 570 S.W.2d 378 (Tex. 1978). Assuming the movant files a motion for summary judgment in general terms and the nonmovant files no reponse or answer, the question arises as to what grounds the nonmovant may raise on appeal. The court in Combs v. Fantastic Homes, Inc., 584 S.W.2d 340, 343 n.1 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) suggested that a motion in general terms would allow "the appellate court to consider any issue that would be negated by the general language asserted in the motion."
223. 580 S.W.2d 623 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).
224. Id. at 626.
225. Id. at 626-27. TEX. R. CIV. P. 166-A(e) states that "]d]efects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend." The court found that this provision was applicable to affidavits that either "establish" or "preclude" a movant's right to summary judgment. 580 S.W.2d at 627.
226. TEX. R. CIV. P. 166-A(e).
the plaintiff sought to collect on a delinquent promissory note. Filing a motion for summary judgment together with supporting affidavits, the plaintiff requested the court to enter judgment in its favor for the face amount of the note less the amount offset by the plaintiff because of the defendant’s pledge agreement. Although the plaintiff failed to attach a sworn or certified copy of the pledge agreement to the affidavits, the supreme court held that reversal was not required because the missing pledge agreement did not “pertain to an element of the movant’s suit” but was only a “part of what should have been an affirmative defense.”

Claude Regis Vargo Enterprises, Inc. v. Bacarisse concerned the propriety of an amendment to the pleadings after a summary judgment contest. Rule 63, 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, the court of civil appeals concluded that the trial court committed no error in disregarding an amended petition filed after the date of hearing because leave to amend had not been sought.

Contending that he had received no advance notice of a summary judgment hearing, the plaintiff in Lofthus v. State attempted to set aside a summary judgment entered against him. Finding that plaintiff’s counsel had attended the hearing and had been afforded additional time to file opposing affidavits but had failed to do so, the court of civil appeals concluded that plaintiff was barred from challenging the judgment for lack of advance notice of the hearing date.

XII. SPECIAL ISSUE SUBMISSION

The opinion of the Texas Supreme Court in Turner v. General Motors Corp. is a guidebook to the submission of an automobile crashworthiness case to a jury. Proclaiming that “in the trial of strict liability cases involving design defects the issue and accompanying instruction will not include either the element of the ordinary consumer or of the prudent manufacturer,” the court concluded that henceforth “[t]he jury may be instructed in general terms to consider the utility of the product and the

227. 575 S.W.2d 20 (Tex. 1978).
228. Id. at 21. See also Southwestern Fire & Cas. Co. v. Larue, 367 S.W.2d 162 (Tex. 1963).
229. 578 S.W.2d 524 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref’d n.r.e.).
230. TEX. R. CIV. P. 63.
232. 578 S.W.2d at 529.
233. 572 S.W.2d at 799 (Tex. Civ. App.—Amarillo 1978, writ ref’d n.r.e.).
234. Id. at 800 (citing Chalkley v. Ashley, 392 S.W.2d 752, 753 (Tex. Civ. App.—Dallas 1965, no writ)).
235. 584 S.W.2d 844 (Tex. 1979).
236. Id. at 847.
risks involved in its use.” As formulated by the court, the submission should read as follows:

Do you find from a preponderance of the evidence that at the time the [product] in question was manufactured by [the manufacturer] the [product] was defectively designed?

By the term “defectively designed” as used in this issue is meant a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.

Answer “We do” or “We do not.”

Worthy of note also is the Turner court’s refusal to permit a jury instruction that any award of damages is not subject to federal taxation. Reaffirming its earlier decision on the point, the supreme court held that such a submission would be improper because it would introduce a wholly collateral matter into the damage issue.

Under former practice the trial judge was required to frame his charge so as to “not therein comment on the weight of the evidence.” This phrase was deleted by the 1973 amendments to the Texas Rules of Civil Procedure, and the trial judge is now only prohibited from commenting directly on the weight of the evidence. While this amendment relaxed the standard applicable in this area, the court in City of Beaumont v. Fuentes reiterated that a submission to the jury that assumes a disputed fact is never a permissible comment on the weight of the evidence and constitutes reversible error.

Several decisions of courts of civil appeals during the survey period focused on the scope of submission of special issues under rule 277. Abolishing the former requirement that special issues be submitted distinctly and separately, rule 277 now provides that “[i]t shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly,” and that “[i]t shall not be objectionable that a question is general or includes a combination of elements or issues.” Giving this language full effect, the court in Del Monte Corp. v. Martin approved the submission in a breach of contract action.

237. Id.
238. Id. at 847 n.1.
240. 584 S.W.2d at 853. But see Burlington N., Inc. v. Boxberger, 529 F.2d 284, 295-97 (9th Cir. 1975).
241. Id.
244. Tex. R. Civ. P. 277.
245. 582 S.W.2d 221 (Tex. Civ. App.—Beaumont 1979, no writ).
246. Id. at 224-25; accord, Cactus Drilling Co. v. Williams, 525 S.W.2d 902 (Tex. Civ. App.—Amarillo 1975, writ ref’d n.r.e.).
of a single issue inquiring whether the “plaintiff substantially complied with the terms of the contract” in the place of seven issues concerning the same subject matter.\textsuperscript{250}

In contrast, the court in \textit{Harville v. Siebenlist}\textsuperscript{251} found improper an issue inquiring whether “the manner in which [the defendant] operated his vehicle on the occasion in question” was grossly negligent.\textsuperscript{252} Although the plaintiff had pleaded that the defendant was grossly negligent in three distinct respects, the court observed that the evidence raised the issue only as to speed. Adhering to a recent decision of the supreme court,\textsuperscript{253} the court of civil appeals reversed the trial court because the submitted issues did not restrict the jury’s determination of gross negligence to the single act that was pleaded and supported by the evidence.\textsuperscript{254}

Finally, the court in \textit{American Transfer and Storage Co. v. Brown}\textsuperscript{255} condemned the special issues submitted by the trial court in a suit to recover under the Texas Deceptive Trade Practices—Consumer Protection Act.\textsuperscript{256} Relying on \textit{Spradling v. Williams},\textsuperscript{257} the court held that the special issues in a deceptive trade practices suit must inquire into the occurrence of the specific acts or practices alleged in the petition.\textsuperscript{258} Further, if an act or practice does not fall within any of the twenty subdivisions of section 17.46(b) of the Act, an additional issue must be submitted asking whether the specific act or practice alleged is a deceptive trade practice.\textsuperscript{259} In the case at bar the issues did not inquire about specific facts but merely repeated the language of two subdivisions of section 17.46(b) of the Act.\textsuperscript{260} Thus the jury members were improperly asked a legal question without appropriate instructions. Although conceding that instructions might cure the defect in the submission of a legal question, the court stated that the “better practice is . . . to submit to the jury issues concerning the particular act or practice alleged to have been false, misleading, or deceptive.”\textsuperscript{261}

Rule 273, which concerns requested submissions, stipulates that “[a] request by either party for any instructions, special issues, definitions or explanatory instructions shall be made separate and apart from such party’s objections to the court’s charge.”\textsuperscript{262} \textit{Texas Employers’ Insurance Association v. Eskue}\textsuperscript{263} is a warning to the trial practitioner that the rule should

\textsuperscript{250} Id. at 598.
\textsuperscript{251} 582 S.W.2d 621 (Tex. Civ. App.—Amarillo 1979, writ granted).
\textsuperscript{252} Id. at 624.
\textsuperscript{254} 582 S.W.2d at 624.
\textsuperscript{255} 584 S.W.2d 284 (Tex. Civ. App.—Dallas 1979, writ granted).
\textsuperscript{256} TEX. BUS. & COM. CODE ANN. §§ 17.41-63 (Vernon Supp. 1980).
\textsuperscript{257} 566 S.W.2d 561 (Tex. 1978).
\textsuperscript{258} 584 S.W.2d at 294-95.
\textsuperscript{259} Id. at 295.
\textsuperscript{260} Id. at 295-96. The court questioned whether the defendant had violated TEX. BUS. & COM. CODE ANN. § 17.46(b)(5), (7) (Vernon Supp. 1980).
\textsuperscript{261} 584 S.W.2d at 295-96.
\textsuperscript{262} 574 S.W.2d 814 (Tex. Civ. App.—El Paso 1978, no writ).
not be taken lightly. Following an earlier case, the court concluded that the failure of a party to submit requests separate from his objections to the charge results in a waiver and precludes appellate review of the trial court's failure to give the request.

XIII. Jury Practice

Although rule 233 provides that "[e]ach party to a civil suit shall be entitled to six peremptory challenges in a case tried in the district court," the fact that a person is named as a party to a suit does not in itself entitle him to six peremptory challenges. In order for two defendants to be entitled to more than six peremptory challenges between them, the interests of those defendants must be antagonistic on an issue with which the jury is concerned. Article 2151a, interacting with rule 233, states that "[a]fter proper alignment of parties, it shall be the duty of the court to equalize the number of peremptory challenges provided under Rule 233 . . . in accordance with the ends of justice so that no party is given an unequal advantage." Resolving a conflict in the courts of appeals as to whether each side must be allowed an equal number of peremptory challenges, the supreme court in Patterson Dental Co. v. Dunn concluded that article 2151a does not require numerical equality. The plaintiff brought a products liability and negligence action against four defendants who each claimed that the sole cause of the plaintiff's injuries was the other defendants' acts or omissions. Finding that the necessary antagonism existed among the defendants, the trial court awarded each defendant six peremptory challenges. Rejecting the argument that article 2151a requires numerical equality for the number of challenges allowed each side, the supreme court nevertheless ruled that the trial court had committed error in permitting a four-to-one disparity in the number of peremptory challenges allotted to plaintiff and defendants. Recognizing that the

265. 574 S.W.2d at 818.
266. TEX. R. CIV. P. 233.
267. See, e.g., Retail Credit Co. v. Hyman, 316 S.W.2d 769 (Tex. Civ. App.—Houston 1958, writ ref'd). If a group of litigants have essentially common interests and are not antagonistic on an issue of fact, they are considered to be only one "party" under rule 233. Perkins v. Freeman, 518 S.W.2d 532 (Tex. 1974).
269. TEX. REV. CIV. STAT. ANN. art. 2151a (Vernon Supp. 1980).
272. Id. at 130. The supreme court did refer to a number of court of civil appeals cases which held that a two-to-one ratio was not an improper disparity. Id. See Longoria v. Atlantic Gulf Enterprises, 577 S.W.2d 71 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); King v. Maldonado, 552 S.W.2d 940 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); Dean v. Texas Bitulithic Co., 538 S.W.2d 825 (Tex. Civ. App.—Waco 1976, no writ);
statute requires the trial court to equalize strikes between the "parties" rather than the "sides" of the suit, the supreme court emphasized that the duty of the trial court under article 2151a is to "equalize the positions of the parties to prevent one side, antagonistic among the parties on certain matters of fact with which the jury would be concerned but primarily united in their opposition to the other side, from selecting the jury." According to the court, the proportionalizing of the strikes "may be accomplished by increasing the number alloted a sole party on one side, by decreasing the number alloted the multiple parties on the other side, or by both."

Three opinions during the survey period addressed the propriety of final jury argument. In *Standard Fire Insurance Co. v. Reese* counsel for the defendant argued to the jury that the plaintiff's attorney, to make his client's claim more valuable, had concocted a "sham or plot" that required the plaintiff to drive past "a thousand doctors" on his way to find one who would cooperate by providing unnecessary treatment and inflating the plaintiff's medical bills. Reversing the court of civil appeals decision that had found such argument to be improper and prejudicial, the supreme court held that the argument was not improper because "there was direct evidence, as well as inferences from the evidence, which supported the argument." Further, plaintiff's counsel had failed to make an objection or to request an instruction for the jury to disregard the argument, and the supreme court concluded that the case was not one of the "rare instances" in which incurable harm from an improper argument had occurred. One of those rare instances, however, arose in *Fortenberry v. Fortenberry*, which was a suit to cancel a will and a mineral deed. Counsel for the contestants to the instruments implied in his closing argument that the signatures on the documents were forgeries, and he also stated that the proponents for the will were "vultures" who were "circling in the air" and who had "swooped down" on the testatrix at the time she executed the documents. Moreover, he asked the jury to consider "whose grandmother" and "aunt" were "next."

Notwithstanding the trial court's action in sustaining objections to all the foregoing argument, the court of civil appeals held that the harm from such argument was in-
In *Fulmer v. Thompson* the plaintiff's counsel suggested that a witness had testified favorably for the defendant "because of some green stuff that comes out of your pocket back here." Holding that the defendant's objection to such argument should have been sustained, the court of civil appeals decided that the statement constituted reversible error.

In order to ensure that an action is tried before a jury, a demand must be made and the appropriate fee paid not less than ten days before the date set for trial. In *Childs v. Reunion Bank* demand was made seven days before the trial setting. Recognizing that the trial court had the discretion to deny an untimely jury demand, the court held that the appellant had failed to carry his burden of proving an abuse of that discretion because the record did not reflect "any of the circumstances surrounding the denial except that the request was denied." Similarly, in *Gulf Insurance Co. v. Dunlop Tire & Rubber Corp.* a jury demand was not filed until the date of trial. Notwithstanding the availability of a jury panel, the court of civil appeals found no abuse of discretion in the trial court's denial of a jury trial. The court of appeals based this holding on the trial court's findings that the case had been set for several months on the non-jury docket, a jury trial would disrupt the court's business, and the underlying motivation for the request was to obtain a continuance.

When jury misconduct is asserted in a motion for new trial, the rule has long prevailed in Texas that the movant must establish probable harm as well as the existence of material misconduct. An example of the application of this rule is found in *City of Houston v. Simon*. In that case, a copy of the court's charge belonging to the plaintiff's attorney, which also included his handwritten notations, was mistakenly delivered to the jury during its deliberation. Although finding that such action was in violation

---

283. *Id.*
284. 573 S.W.2d 256 (Tex. Civ. App.—Tyler 1978, writ ref’d n.r.e.).
285. *Id.* at 264 (emphasis removed).
286. *Id.* at 266-67. For cases holding that an argument suggesting that a witness was paid to testify is reversible error when the witness has not been impeached and nothing in the record supports the suggestion, see *Cross v. Houston Belt & Terminal Ry. Co.*, 351 S.W.2d 84 (Tex. Civ. App.—Houston 1961, writ ref’d n.r.e.); *Rogers v. Broughton*, 250 S.W.2d 606 (Tex. Civ. App.—Austin 1952, writ ref’d n.r.e.); *Airline Motor Coaches, Inc. v. Campbell*, 184 S.W.2d 532 (Tex. Civ. App.—Beaumont 1944, writ ref’d w.o.m.).
288. 587 S.W.2d 466 (Tex. Civ. App.—Dallas 1979, writ filed).
289. *Id.* at 471. The court did note, however, that "a party has a right to a trial by jury even though the jury fee is paid late, if a jury panel is available, unless it causes a postponement of the trial and unless it causes an undue interference with the handling of other business of the court." *Id.* See also *Erbach v. Donald*, 170 S.W.2d 289 (Tex. Civ. App.—Fort Worth 1943, writ ref’d w.o.m.).
290. 587 S.W.2d at 471.
291. 584 S.W.2d 886 (Tex. Civ. App.—Dallas 1979, writ ref’d n.r.e.).
of rule 281, the court held that prejudicial harm could not be presumed and that no grounds for reversal had been established.

The final development in the area of jury practice is the amendment of article 2135. In apparent recognition of the discriminatory treatment of male parents and guardians, the legislature amended the statute so that "all persons" who have legal custody of children under the age of ten years may be exempted from jury service if the service would leave the children of such persons without adequate supervision.

XIV. JUDGMENT

Stoner v. Thompson, a case involving a post-answer default judgment, dealt with the sufficiency of the plaintiff's pleadings to support the judgment. The original plaintiff, Stoner, took a nonsuit after two parties, the Malkans and Texas Media, had intervened seeking various forms of relief against him. On the morning of the trial, Stoner's attorney appeared solely for the purpose of urging a special appearance under rule 120a and, after that motion was denied, withdrew. Thereafter, the Malkans obtained leave to file a trial amendment asking for declaratory relief. After trial, judgment was entered against the original plaintiff Stoner in favor of the Malkans and Texas Media.

The appellant, Stoner, attacked the award of money damages to Texas Media as being unsupported by the pleadings, which at the time of his withdrawal contained only claims for injunctive and declaratory relief. Noting that Texas Media had never alleged that it had sustained money damages, nor stated a prayer for such relief, the court held that Stoner did not have "fair notice" that such relief might be awarded. The general prayer "for such other and further relief to which plaintiff...may show himself entitled" was insufficient to enlarge the pleading to embrace an entirely different cause of action of which Stoner had no fair notice. The court further rejected an argument that such deficiencies in the pleadings...
ings were waived or tried by consent under rules 90\textsuperscript{303} or 67,\textsuperscript{304} stating: "Rule 90 does not apply to a post-answer default judgment. . . . Likewise, an absent party will not be considered to have tried an unpled cause of action by implied consent under Rule 67 where fair notice of that cause of action is not in the pleadings."\textsuperscript{305}

The Texas Legislature enacted a significant addition to the arsenal of a party seeking to collect on a judgment during the survey period. Article 3827\textsuperscript{a306} now provides that a judgment creditor whose debtor owns property that cannot readily be reached by ordinary legal process of attachment or levy is entitled to aid from a court of appropriate jurisdiction by injunction or otherwise in reaching the property to satisfy the judgment."\textsuperscript{307} This aid may be obtained "in the same suit in which the judgment is rendered or in a new and independent suit."\textsuperscript{308} Significantly, a judgment creditor proceeding under this section "is entitled to recover reasonable costs, including attorney's fees."\textsuperscript{309}

XV. Appellate Procedure

During this survey period, the Texas Legislature amended article 2250\textsuperscript{310} to add a new type of interlocutory order from which appeal will lie. Effective August 27, 1979, an order "[c]ertifying or refusing to certify a class in a suit brought pursuant to Rule 42 of the Texas Rules of Civil Procedure" may now be appealed immediately.\textsuperscript{311} This change represents a marked departure from the general rule followed in the federal courts prohibiting interlocutory appeals of such orders.\textsuperscript{312}

Texas courts also considered interlocutory appeals during the survey period. In Transamerica Insurance Co. v. Price Construction, Inc.\textsuperscript{313} the court considered the application of rule 21c\textsuperscript{314} to an appeal from an interlocutory order. The appellant in that case filed a motion for an extension of

\textsuperscript{303} TEX. R. Civ. P. 90 provides that pleading defects not brought to the attention of the trial court before judgment are waived.

\textsuperscript{304} TEX. R. Civ. P. 67 provides that issues not raised by the pleadings may be tried by implied consent.

\textsuperscript{305} 578 S.W.2d at 684-85.

\textsuperscript{306} TEX. REV. CIV. STAT. ANN. art. 3827a (Vernon Supp. 1980).

\textsuperscript{307} Id. art. 3827a(a). The property may include present or future rights to property, but must not be exempt from seizure for the satisfaction of liabilities.

\textsuperscript{308} Id. art. 3827a(d).

\textsuperscript{309} Id. art. 3827a(c).

\textsuperscript{310} TEX. REV. CIV. STAT. ANN. art. 2250 (Vernon Supp. 1980).

\textsuperscript{311} TEX. REV. CIV. STAT. ANN. art. 2250, § 3 (Vernon Supp. 1980). This change effectively overrules the result reached in Unnamed Members of Class v. McMahon, 582 S.W.2d 600 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ), which held that certification of a class, refusal to certify, or decertification is not a final order and may not be appealed immediately in the absence of legislative authorization. The amendment is intended to avert the waste of "lawyer effort, client money, and judicial time" involved when a class action determination is found to be erroneous on appeal and a retrial of the case is therefore necessary. See O'Connor, Legislative Program: Amendment to Article 2250, 42 TEX. B.J. 23 (1979).

\textsuperscript{312} See, e.g., Coopers & Lybrand v. Livesay, 98 S. Ct. 2459, 57 L. Ed. 2d 351 (1978).

\textsuperscript{313} 577 S.W.2d 578 (Tex. Civ. App.—Eastland 1979, no writ).

\textsuperscript{314} TEX. R. Civ. P. 21c. The rule allows a motion to extend time to be filed within 15 days of the last date for filing.
time to file the record that fully complied with rule 21c, but the motion was some eight days late under the more abbreviated limitations set forth in rule 385. Following the lead of an earlier decision by the El Paso court of civil appeals, the court held that rule 385, the more specific rule governing interlocutory appeals, controls over the general requirements of rule 21c. Accordingly, the court found itself without jurisdiction and dismissed the appeal.

The opinion of the court in Cooper v. Bowser clearly illustrates that rule 364 means what it literally says. In that case the appellant appealed from a judgment against him in the sum of $240,725.30 plus interest from the date of judgment. The combined supersedeas and cost bond filed by the appellant, however, totaled only the principal sum of the judgment plus the $500 required to perfect an appeal under rule 354(a). Recognizing that it is "impossible for an appellant to determine accurately the amount of post judgment interest which will accrue while he pursues the appellate process," the court nevertheless held that rule 364 is "clear and unambiguous" and that failure to include the interest required by that rule rendered the amount of the bond "patently insufficient." Therefore, in order to continue suspended enforcement of the judgment, the court required an amended supersedeas bond to be filed including interest on the principal amount at the rate prescribed in the judgment. The court held, however, that the original bond filed was sufficient as a cost bond to perfect the appeal.

Two courts of civil appeals during the survey period reached opposite results in considering the situation in which the court reporter lost photographs introduced into evidence during the trial. In Diaz v. Deavers, an assault and battery action, the appellant sought to have the cause reversed and remanded after the court reporter lost eight exhibits consisting of photographic slides depicting the injury received by the appellant in the assault. Although the court recognized the rule that "a reviewing court may reverse a judgment where the appellant, without fault, has been deprived of a statement of facts," the court refused to reverse the trial court be-

315. 577 S.W.2d at 579.
316. Tex. R. Civ. P. 385(b) requires a motion to extend time for filing the record to be filed no later than five days after the date the record is due.
318. 577 S.W.2d at 579-80.
319. Id. at 580.
323. 583 S.W.2d at 806.
324. Id. at 806-07.
325. Id. at 807. Although the combined bond did not mention costs on appeal, it did obligate the appellant and his surety to perform the judgment of the appellate court. Since any such judgment would require costs, the court held the absence of any express statement to that effect was irrelevant. Id.
326. 574 S.W.2d 602 (Tex. Civ. App.—Tyler 1978, writ dism’d).
327. Id. at 608 (citing Victory v. Hamilton, 127 Tex. 203, 91 S.W.2d 697 (1936); Goodin v. Geller, 521 S.W.2d 158 (Tex. Civ. App.—Waco 1975, writ ref’d n.r.e.)).
cause the slides were not material to a proper determination of the case. Finding that ample evidence of the nature and extent of the appellant's injuries had been introduced in other forms, the court held that the slides were merely cumulative and, at best, would serve only to create a conflict with the appellee's testimony. Accordingly, the slides were not material because the only issue preserved on appeal was whether any evidence existed to support the findings of the jury.

In contrast, the court in *Rodriguez v. Standard Fire Insurance Co.* held that the loss of seventeen photographic exhibits by the court reporter, without any fault on the part of the appellant, required reversal and remand for a new trial on the merits. In *Rodriguez*, however, the testimony adduced at the trial of the appellant's workers' compensation case was found by the court to be "without meaning" and "confusing" in the absence of the photographs. Rejecting the appellee's suggestion that new photographs could be substituted or that the trial court could resolve the matter under rule 377(d), the court held that the appellant's "right to have the cause reviewed on appeal can be preserved to her in no other way than by a retrial of the case."

The inability of the appellant to obtain a statement of facts after due diligence and through no fault of his own also led to a reversal and remand in *Fisher v. First Security State Bank*. In that case, not only did the appellant and his counsel fail to appear at trial, but, in addition, no court reporter was present. Although the appellee submitted a narrative statement of evidence adduced at trial that was approved by the trial court, the court of civil appeals held that the appellant was "entitled" to a complete statement of facts in question and answer form. Further, the court held that "[w]e need a question and answer statement of facts as reproduced verbatim from the spoken word of both counsel and the witnesses, unblemished by human interpretation."

The importance of the distinction between a postage meter stamp and a postmark of the United States Postal Service complying with rule 5 is
well illustrated by *Albaugh v. State Bank*. The appeal bond in that case was due on April 30; it was not received by the clerk, however, until May 3. Although the envelope in which the appellant had mailed the bond showed a metered stamp dated April 26, the postmark on the envelope was dated May 1, 1979. Noting that the metered stamp was "of the type used in business offices by persons other than the United States Postal Service," the court held that the stamp "at best" indicated the date the envelope was run through the meter and had "little, if any, probative force as evidence of the date of mailing." Since the postmark "affixed by the United States Postal Service" within the meaning of rule 5 showed that the bond was mailed after the last day for filing, the appeal was dismissed.

**XVI. Res Judicata**

Two cases decided during the survey period discuss the application of the doctrine of res judicata to proceedings for a temporary injunction. In *Brooks v. Jones* the supreme court held that issues decided in a temporary injunction hearing would not be binding on a losing party who did not elect to pursue an appeal from such determination, but instead proceeded to a trial on the merits for a permanent injunction. The court, however, clearly implied that a party would be bound by the matters decided in a temporary injunction hearing if an appeal was taken from the hearing.

As noted in a prior Survey, a judgment is conclusive as to any compulsory counterclaim that is required to be asserted under rule 97. In *Stubbs v. Patterson Dental Laboratories* the court of civil appeals concluded that the foregoing rule was inapplicable to an order of dismissal entered after a hearing on an application for a temporary injunction. The defendant employer had instituted a prior action for temporary and permanent injunctive relief against the plaintiff employee who had allegedly violated the terms of a noncompetitive agreement; a temporary injunction was issued that enjoined the employee from operating a dental laboratory. On the motion of the employer, the trial court entered an order dismissing

339. *Id.* at 137-38.
341. 586 S.W.2d at 138.
342. 578 S.W.2d 669 (Tex. 1979).
345. TEX. R. CIV. P. 97.
the prior action "with prejudice." Thereafter, the employee brought a
suit against the employer, seeking damages for having been temporarily
enjoined from operating the dental laboratory and claiming that he was
coerced by fraud and undue influence into signing the noncompetitive
agreement. Rejecting the employer's argument that the employee's claim
should have been asserted as a counterclaim in the prior action and, there-
fore, was barred by the order of dismissal, the court of civil appeals held
that the prior order was not a final judgment on the merits to which the
doctrine of res judicata applied.

XVII. MISCELLANEOUS

Rule 245 provides in part that "[t]he court may set contested cases on
motion of any party, or on the court's own motion with reasonable notice
of not less than 10 days to the parties, or by agreement of the parties." The
supreme court in *Mansfield State Bank v. Cohn* held that a request
by a party for a trial setting constituted sufficient notice of the trial setting
within the meaning of the rule. The defendant, who was unrepresented by
counsel, received a request for a trial setting from the opposing party
more than ten days prior to the requested trial date. The defendant failed
to appear on the requested date, however, and the trial court entered a
judgment against him. On appeal, the supreme court ruled that the re-
quest was sufficient notice of the trial setting since "[i]t is reasonable to
assume that if a trial setting is requested from the district clerk, a litigant is
put on notice that trial may be on that requested date." The supreme court
in *McLeod v. Harris* held that a district judge has no discretion to hear a motion to recuse
that is directed at him, and that article 200a imposes a mandatory duty on a
district judge to request the presiding judge of the administrative district

347. *Id.* at 276.

348. *Id.* The *Stubbs* decision is consistent with *Brooks* since no appeal was taken after the proceeding on the temporary injunction.

trial setting made at the regular call of the docket. *See Plains Growers, Inc. v. Jordan, 519
S.W.2d 633 (Tex. 1974).* Pursuant to the 1976 amendments to the Texas Rules of Civil
Procedure, *Tex. R. Civ. P.* 245 (1975) was amended and *Tex. R. Civ. P. 330(b) (1975)* was
repealed, so that ten days' notice of a trial setting is now required in all district courts for
contested cases.

350. 573 S.W.2d 181 (Tex. 1978).

351. In rejecting the argument that failure to receive notice of the actual trial date is a
denial of due process for a litigant not represented by counsel, the court concluded that there
is no basis "for differentiating between litigants represented by counsel and litigants not
represented by counsel in determining whether rules of procedure must be followed." *Id.* at
184. *See also Stein v. Lewisville Independent School Dist., 481 S.W.2d 436 (Tex. Civ.
App.—Fort Worth 1972, writ ref'd n.r.e.), cert. denied, 414 U.S. 948 (1973).*

352. 573 S.W.2d at 185.


354. 582 S.W.2d 772 (Tex. 1979).
to assign another district judge to hear a motion for recusal.  

With respect to the timing of a motion for directed verdict, a court of civil appeals recognized the obvious proposition that a directed verdict cannot be instructed for a defendant prior to the completion of the plaintiff's case.

In 1975 the Texas Legislature amended the sequestration statute in an effort to comply with federal due process standards. For the same reason, the Texas Supreme Court amended the rules of civil procedure governing attachment, garnishment, and sequestration. Despite these changes to the statute and to the rules of procedure, the debtor in Monroe v. General Motors Acceptance Corp. contended that the sequestration statute remains unconstitutional because the statute fails to provide for notice and a hearing prior to the deprivation of the debtor's property. After analyzing the three leading Supreme Court decisions in this area, the court of civil appeals concluded that the sequestration statute is not unconstitutional because the initial seizure of property must be based on sworn ex parte documents and an early opportunity is afforded the debtor to put creditor to his proof.

In addition to the foregoing decisions, a number of other miscellaneous developments occurred as a result of legislative enactments or amendments. Article 2226, which authorizes the recovery of a reasonable attor-

---


361. 573 S.W.2d 591 (Tex. Civ. App.—Waco 1978, no writ).


363. The constitutionality of and the amendments to the attachment, garnishment, and sequestration statutes and rules have generated a great deal of discussion. See, e.g., Beard, Due Process and Ancillary Writs, 30 Baylor L. Rev. 23 (1978); Dorsaneo, Creditors' Rights, Annual Survey of Texas Law, 32 Sw. L.J. 245 (1978); Newton, Fuentes "Repossessed" Reconsidered, 28 Baylor L. Rev. 497 (1976); Touchy, Sequestration Made Whole Again, 41 Tex. B.J. 943 (1978); Comment, Constitutional Dimensions of the Amended Texas Sequestration Statute, 29 Sw. L.J. 884 (1975). See also 2 W. Dorsaneo, Texas Litigation Guide §§ 40.01-42.203 (1979).
ney’s fee in connection with the successful prosecution of certain types of claims, was recently amended so that

[i]n a proceeding before the court, or in a jury case where the issue of amount of attorney’s fees is submitted to the court for determination by agreement, the court may in its discretion take judicial knowledge of the usual and customary fees in such matters and of the contents of the case file without receiving further evidence.364

In a further effort to reduce the length of trials and perhaps to ease the burden on certain individuals who would otherwise have to testify, the legislature enacted article 3737h,365 which now allows the parties, by way of affidavit, to prove the amount and reasonableness of charges for services rendered by other persons and institutions. As a condition precedent to the application of article 3737h, the affidavit must be filed with the clerk of the court and a copy served on each other party to the cause at least fourteen days prior to the date set for trial.366 In order to controvert a claim covered by such affidavit, the opposing party must file a controverting affidavit and serve a copy on the other party within ten days after receipt of such party’s copy of the affidavit, or prior to the commencement of trial if leave of court is obtained.367 The counter-affidavit must give reasonable notice of the basis upon which the party filing it intends at trial to controvert all or part of the claim covered by the initial affidavit.368 Article 3737h is inapplicable to an action on a sworn account369 and to claims for attorney’s fees charged in the trial of the cause or preparation thereof.370 Finally, for the practitioner who is faced with the prospect of examining a deaf person or who represents a deaf party, note should be taken of article 3712a,371 which requires the court to appoint an interpreter for such individuals.

365. Id. art. 3737h.
366. Id. § 1(b).
367. Id.
368. Id.
369. Id. § 1(a).
370. Id. § 2.