SMU | Dedman School of Law

SMU Law Review

Volume 36
Issue 1 *Annual Survey of Texas Law*

Article 13

January 1982

Evidence

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EVIDENCE

by

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During the survey period Texas courts handed down numerous decisions involving various rules of evidence. The cases of greatest interest were in the following substantive areas: (1) the hearsay rule and its exceptions; (2) the dead man's statute; (3) privilege; (4) impeachment; (5) expert opinion evidence; (6) probative value; and (7) evidence of gross negligence.

I. THE HEARSAY RULE AND ITS EXCEPTIONS

A. Personal Knowledge

To be admissible, the testimony of a lay witness must ordinarily be based on personal knowledge.[1] The failure to honor so fundamental a concept was illustrated recently in *Elizarraras v. Bank of El Paso*.[2] In *Elizarraras* the drawer of a check brought suit to recover damages for the failure of the bank to honor his check. The plaintiff, a citizen of Mexico, wrote a check for $64,000 payable to a Mexican bank. Upon notification of a $756.68 shortage in his account, the plaintiff immediately deposited that sum. He also explained to the vice president of the defendant bank the importance of not having the $64,000 check returned for insufficient funds, since in Mexico a return would involve both a penalty and a loss of credit. According to the plaintiff, he was assured by the officer that there would be no problem. Thereafter, and without giving notice to the plaintiff, the bank returned the $64,000 check for insufficient funds. After a jury trial, the plaintiff was awarded $75,000 for loss of credit and damage to his reputation, $12,800 for the penalty the Mexican bank had charged him, and $2,000 for the interest on the $64,000 still owed to the Mexican bank. The bank appealed the judgment.

The bank contended on appeal that the evidence necessary to support the award of damages was improperly admitted, and therefore, the evi-

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1. Loper v. Andrews, 404 S.W.2d 300, 305 (Tex. 1965); Hughes v. State, 508 S.W.2d 167, 169 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.). Rule 602 of the Federal Rules of Evidence codified this well-established principle. Rule 602 expressly provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." FED. R. EVID. 602. *See also* Park, *McCormick on Evidence and the Concept of Hearsay: A Critical Analysis Followed by Suggestions to Law Teachers*, 65 MINN. L. REV. 423 (1981).

2. 631 F.2d 366 (5th Cir. 1980).

dence was insufficient to support the judgment. At trial the plaintiff testified: "I paid the $64,000; then $12,800 and twenty-three and something else."[3] Rule 602 of the Federal Rules of Evidence provides that a witness may not testify to a matter unless the evidence is sufficient to support the finding that he has personal knowledge of that particular matter.[4] Concerning the penalty and interest about which he testified in *Elizarraras*, the plaintiff was not testifying to any act of payment he actually made; rather, he testified that his account had been charged $12,800 and $2,000. The court of appeals held that this was "not an instance where one can infer personal knowledge from the testimony itself."[5] The court reasoned that the only basis the plaintiff had for his testimony concerning the payment of the penalty and the interest was the Mexican bank officer's oral statements; those statements, however, had been excluded as hearsay.[6] The admission of this testimony was deemed harmful to the defendant, and, therefore, the judgment was reversed and remanded for a new trial.[7]

B. Business Records

Article 3737e provides a statutory exception to the hearsay rule for business records.[8] With the continued development of information management techniques, questions relating to the admissibility of computer data and the application of article 3737e will undoubtedly increase. Illustrative of this problem is *Voss v. Southwestern Bell Telephone Co.*,[9] a suit on a sworn account. The trial court admitted into evidence a computer printout establishing the amount and the services for which defendant was billed, and granted judgment for the plaintiff phone company.

Some Texas courts have indicated that in order to satisfy the requisites of article 3737e, a party seeking to introduce computer documents must prove, in addition to the statutory element, that the particular computer

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3. *Id.* at 373.

4. FED. R. EVID. 602. "Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself." *Id.* The rule is subject to evidentiary rules concerning expert opinion testimony. *See id.* 703.

5. 631 F.2d at 374. The court stated that an example of inference of personal knowledge could be drawn from a statement such as "I saw X in the room." *Id.* at 374 n.21.

6. *Id.* at 374.

7. The $75,000 award for loss of credit and reputation damage was also reversed and remanded. *Id.* at 377.

8. TEX. REV. CIV. STAT. ANN. art. 3737e, § 1 (Vernon Supp. 1982) provides:

> A memorandum or record of an act, event or condition shall, insofar as relevant, be competent evidence of the occurrence of the act of event or the existence of the condition if the judge finds that:
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> (a) It was made in the regular course of business;
>
> (b) It was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event or condition to make such memorandum or record or to transmit information thereof to be included in such memorandum or record;
>
> (c) It was made at or near the time of the act, event or condition or reasonably soon thereafter.

For a discussion of the type of business that may qualify under this statutory exception, see Note, *The Hearsay Rule and the Business Entries Exception*, 26 BAYLOR L. REV. 700 (1974).

9. 610 S.W.2d 537 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

equipment used is recognized as standard equipment, that the records are prepared by persons who understand the operation of the equipment, and that the operators of the equipment are engaged in their regular duties of employ.[10] In *Voss* the defendant contended that there was insufficient evidence to support the judgment because the plaintiff had failed to prove the elements noted above. The defendant's witness at trial testified that he was the supervisor of the billing department, that the bills in question were prepared in the regular course of business by employees with personal knowledge of the entries, and that they were prepared at or near the time of the events reflected therein.[11] The court of civil appeals held that the witness's testimony satisfied the requirements of article 3737e, and therefore, the computer printout exhibits were admissible. The court reasoned that the witness's lack of knowledge "as to the type of computer used, its acceptability in the community and the expertise of the operator of the equipment are all matters that go to the weight of the evidence, not the admissibility."[12]

C. Res Gestae

Although a res gestae statement in the form of an opinion or conclusion generally is inadmissible,[13] factual statements usually are admissible in the event that the requisites of the res gestae rule are satisfied. As a general rule, the res gestae exception to the hearsay rule permits the admissibility of factual declarations or exclamations uttered by the parties to a transaction (1) that are contemporaneous with the transaction and calculated to throw light upon the motives and intentions of the party, and (2) that are made under circumstances giving rise to a reasonable presumption that they are the spontaneous utterances of thoughts created by the transaction itself and so soon thereafter as to exclude the presumption that they are the

10. O'Shea v. International Business Machs. Corp., 578 S.W.2d 844 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.), Railroad Comm'n v. Southern Pac. Co., 468 S.W.2d 125, 129 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.). In Railroad Comm'n v. Southern Pac. Co., the Texas Supreme Court refused a writ of error with the notation "no reversible error," expressly stating that it was not passing upon the holding of the court of civil appeals as to the admissibility of the computer printout. *See generally* Comment, *The Admissibility of Computer Printouts under the Business Record Exception in Texas*, 12 So. Tex. L.J. 291 (1971).

11. 610 S.W.2d at 538.

12. *Id.* at 539. Emphasizing that the requirements of admissibility in this area are clearly defined by statute, the court refused to supplement the standard with additional admissibility prerequisites. Consequently, the precedential effects of those cases cited in note 10 *supra* have been seriously undercut.

13. *See, e.g.*, Isaacs v. Plains Transp. Co., 367 S.W.2d 152, 153 (Tex. 1963) (per curiam) (employee's statements that collision was his fault "pure conclusion and opinion" and therefore inadmissible). Some case law, however, indicates a trend away from this rule. In Gonzalez v. Layton, 429 S.W.2d 215, 219 (Tex. Civ. App.—Corpus Christi 1968, no writ), the court held that the witness's statement as to "fault" was properly excluded because it failed to meet the requirements of the res gestae rule. The court stated: "[i]t seems clear that the modern text writers and courts are leaning toward the admission of such opinion statements where they are spontaneous, a part of the res gestae, and encouched in language setting forth a shorthand rendition of the facts, or are used for an impeachment purpose." *Id.*

result of premeditation or design.[14]

The applicability of the res gestae exception to the hearsay rule was involved in *Employers Casualty Co. v. Peterson*[15] when the plaintiffs brought suit to recover under a homeowner's policy for the loss of certain jewelry. The evidence demonstrated that one of the plaintiffs asked a jeweler to sell a diamond ring and diamond earrings for him. The jeweler picked up the jewelry and gave the plaintiff a receipt listing the items and stating the plaintiff's opinion as to the value of each item.[16] When the jeweler was unable to return the jewelry or pay the plaintiffs the price for which he supposedly sold it, the plaintiffs brought suit against Employers Casualty, the insurer, claiming a "loss" under their homeowner's policy. Employers Casualty subsequently impleaded the jeweler as a third-party defendant. The jeweler was called as a witness at trial, but he refused to testify, claiming his privilege against self-incrimination. The defendant then offered into evidence the testimony of both an investigating police officer and a representative of the defendant insurance company concerning various conversations with the jeweler in which the jeweler had told each of the witnesses that he had sold the plaintiffs' jewelry for a total of $10,600 and that the plaintiffs had refused to take $9,800 for the ring. The trial court excluded this testimony, and after a jury trial, the court rendered a verdict in the plaintiffs' favor for $19,400, and awarded Employers Casualty indemnity against the jeweler.[17]

On appeal the defendant insurance company argued that the trial court had erred in refusing to admit the excluded testimony. In affirming the decision of the trial court, the court of civil appeals rejected the defendant's evidentiary assertion that the witnesses' testimony was admissible under the res gestae exception to the hearsay rule. The court concluded that the first condition for application of the res gestae exception was not satisfied because the statements were not made in connection with an act pertinent to the issues, and the statements were made after the transaction involved, and thus failed to raise a presumption of spontaneity.[18]

D. Judicial Admissions

A "judicial admission" has long been defined in Texas as a statement

14. *See, e.g.*, Pacific Mut. Life Ins. Co. v. Schlakzug, 143 Tex. 264, 183 S.W.2d 709 (1945); City of Houston v. Quinones, 142 Tex. 282, 177 S.W.2d 259 (1944); Texas Interurban Ry. v. Hughes, 53 S.W.2d 448 (Tex. Comm'n App. 1932, judgmt adopted); Knapik v. Edison Bros., 313 S.W.2d 335 (Tex. Civ. App.—Waco 1958, writ ref'd).

15. 609 S.W.2d 579 (Tex. Civ. App.—Dallas 1980, no writ).

16. The receipt listed the value of the ring at $9,800 and the earrings at $850. At the bottom of the receipt was the printed phrase "to be sold at the agreed prices above." *Id.* at 583.

17. *Id.* at 584.

18. The defendant claimed that the statements were admissible as res gestae to explain a business transaction. The court distinguished Olvey v. Jones, 137 Tex. 639, 648, 156 S.W.2d 977, 982 (1941), which held that conversations between the parties while a business transaction was being arranged were admissible as part of the res gestae, on the basis that the statements involved did not bear on the agreement entered into, but only on what occurred thereafter.

that: (1) is made during the course of a judicial proceeding; (2) is contrary to an essential fact embraced in the theory of recovery or defense asserted by the party against whom it is admitted; (3) is deliberate, clear, and unequivocal and *not* merely contradictory of other statements or testimony by the party;[19] and (4) relates to a fact upon which a judgment in favor of the opposing party may be based.[20] A judicial admission is a "waiver of proof" as to the fact admitted, is conclusive proof of that fact, and may not be controverted.[21] While affidavits, agreed statements of facts, and stipulations all constitute judicial admissions,[22] currently unsettled is whether deposition testimony[23] or interrogatory answers[24] constitute judicial admissions.

A judicial admission constitutes a waiver of proof of the admitted fact only in the proceeding in which it is made, or perhaps in a subsequent proceeding involving the same parties.[25] A conclusion or opinion of an

19. Robinson v. Ashner, 364 S.W.2d 223 (Tex. 1963) (statement equivocal); Dallas Ry. & Terminal Co. v. Gossett, 156 Tex. 252, 294 S.W.2d 377 (1956) (statement not clear or in positive terms); Western Union Tel. Co. v. Coker, 146 Tex. 190, 195, 204 S.W.2d 977, 980 (1947) (testimony not clear, definite, and unequivocal); Starks v. City of Houston, 448 S.W.2d 698, 700 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.) (testimony merely contradictory of other testimony).

20. *See, e.g.*, Tex-Wis Co. v. Johnson, 534 S.W.2d 895 (Tex. 1976); Griffin v. Superior Ins. Co., 161 Tex. 195, 338 S.W.2d 415 (1960); Commercial Standard Fire & Marine Co. v. Murphy, 537 S.W.2d 497 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.); and United States Fidelity & Guar. Co. v. Carr, 242 S.W.2d 224 (Tex. Civ. App.—San Antonio 1951, writ ref'd).

21. *See, e.g.*, Gevinson v. Manhattan Constr. Co., 449 S.W.2d 458 (Tex. 1969); Griffin v. Superior Ins. Co., 161 Tex. 195, 338 S.W.2d 415 (1960); Putnam v. Sanders, 537 S.W.2d 308 (Tex. Civ. App.—Amarillo 1976, no writ). *See generally* 1A R. RAY, TEXAS LAW OF EVIDENCE § 1127 (Texas Practice 3d ed. 1980). An "extra-judicial admission" is one which, although admitted into evidence, is not conclusive. *Id.* Testimonial declaration of a party normally will not be given the effect of a "judicial admission" if it merely contradicts other portions of his testimony. Stafford v. Wilkinson, 157 Tex. 483, 487, 304 S.W.2d 364, 366 (1957) (extra-judicial admission not conclusive).

22. *See, e.g.*, Hill Farm, Inc. v. Hill County, 425 S.W.2d 414 (Tex. Civ. App.—Waco 1968), *aff'd*, 436 S.W.2d 320 (Tex. 1969) (affidavit); W.T. Burton Co. v. Keown Contracting Co., 353 S.W.2d 909 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.) (agreed statement of facts and stipulations); Thompson v. Graham, 318 S.W.2d 102 (Tex. Civ. App.—Eastland 1958, writ ref'd n.r.e.) (stipulations). *But see* Wilkins v. Cook, 454 S.W.2d 769 (Tex. Civ. App.—Eastland 1970, writ ref'd n.r.e.) (court held defendant's stipulation of liability, withdrawn after plaintiff's amended his complaint, not a judicial admission).

23. Parrott v. Garcia, 428 S.W.2d 476, 477-78 (Tex. Civ. App.—Beaumont), *aff'd*, 436 S.W.2d 896 (Tex. 1969) (deposition testimony constitutes judicial admission); Kulms v. Jenkins, 557 S.W.2d 149 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.) (extra-judicial statements not conclusive); Panola County Comm'r's Court v. Bagley, 380 S.W.2d 878, 885 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.) (contradictions prevented summary judgment); Southern Lloyds v. Jones, 345 S.W.2d 435, 438 (Tex. Civ. App.—Austin 1961, no writ) (inconsistencies prevented summary judgment); Kirby Lumber Corp. v. Freeman, 336 S.W.2d 838, 840 (Tex. Civ. App.—Eastland 1960, writ ref'd n.r.e.) (statements constitute only out of court admissions that may be explained, modified, or contradicted at trial.)

24. Richards v. Boettcher, 518 S.W.2d 286, 288 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.) (do not constitute admissions); Twin City Fire Ins. Co. v. King, 510 S.W.2d 370, 378 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (do not constitute admissions).

25. Aetna Life Ins. Co. v. Wells, 557 S.W.2d 144 (Tex. Civ. App.—San Antonio 1977), *writ ref'd n.r.e. per curiam*, 566 S.W.2d 900 (Tex. 1978) (basis for judicial admission or judicial estoppel not established).

attorney, however, will not constitute a judicial admission.[26] Since judicial admissions are conclusive against the admitting party, and may not be disputed by evidence or otherwise, judgment may be granted against that party on the basis of the judicial admissions alone.[27]

The issue of whether the statement of a party's counsel constituted a judicial admission arose in *Charter Medical Corp. v. Miller*.[28] The plaintiffs brought suit alleging that the three defendants conspired to interfere with their practice of podiatry and with their contractual relations with their patients. Judgment was entered in the plaintiffs' favor and the defendants appealed. One of the defendants' complaints on appeal was the admission into evidence of statements from a previous unrelated case made by their counsel in the instant suit. Two of the plaintiffs had been defendants in a prior medical malpractice suit. At trial the plaintiffs had been allowed to testify that in the prior suit the defendants' counsel had referred to the plaintiffs as "butchers" and threatened to do all in his power to drive them from practice. The defendants objected to the admission of this testimony on the ground that the statements had been made in a judicial proceeding, and therefore, were absolutely privileged. The defendants also argued that the statements constituted hearsay as opposed to a judicial admission. Conversely, the plaintiffs argued the statements were justifiably admitted in an attempt to display malice and ill will. The court of civil appeals did not agree that the prior statements were absolutely privileged because the applicable privilege extended only to statements that would form the foundation for a subsequent suit for libel or slander. The court agreed, however, that the prior statements of defendants' counsel constituted hearsay, stating that it was "not aware of any legal theory upon which any litigant could be held to ratify prior, unsworn statements of his counsel in an unrelated case merely by employing him a subsequent trial."[29] Consequently, the court reversed the trial court's decision and remanded the case because the admission of the testimony had been prejudicial to the defendants, and prevented them from receiving a fair trial.[30]

In *Drake Insurance Co. v. King*[31] the ownership of a trust was in dispute, and one of the issues was whether a statement made in a prior pleading constituted a judicial admission. One of the intervenors, Finley, argued that another party's original petition in intervention contained a judicial admission that the party that sold the truck in question to Finley was the

26. Hochmetal Africa (PTY), Ltd. v. Metals, Inc., 566 S.W.2d 715 (Tex. Civ. App.—Corpus Christi 1978, no writ).

27. *See, e.g.*, Gevinson v. Manhattan Constr. Co., 449 S.W.2d 458 (Tex. 1969); Griffin v. Superior Ins. Co., 161 Tex. 195, 338 S.W.2d 415 (1960); Stanolind Oil & Gas Co. v. State, 136 Tex. 5, 145 S.W.2d 569 (1940), *modifying*, 136 Tex. 5, 133 S.W.2d 767 (1939); Mobil Oil Co. v. Dodd, 515 S.W.2d 351 (Tex. Civ. App.—Corpus Christi 1974, no writ); United States Fidelity & Guar. Co. v. Carr, 242 S.W.2d 224 (Tex. Civ. App.—San Antonio 1951, writ ref'd).

28. 605 S.W.2d 943 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

29. *Id.* at 953.

30. *Id.*

31. 606 S.W.2d 812 (Tex. 1980).

owner of the vehicle. This statement, which corroborated Finley's chain of title, was admitted into evidence. The trial court concluded that Finley had good title to the truck, and that he sold the truck to another person in the good faith belief that he was the owner. The trial court nevertheless entered judgment for the defendant in his cross-action against Finley in the amount of $2,000. The court of civil appeals affirmed the judgment as to the party that purchased the truck from Finley, but reversed the defendant's cross-action judgment for $2,000 against Finley.[32]

The Texas Supreme Court reversed the court of civil appeals holding that the intervenor's original petition was superseded by an amended petition, and therefore no longer constituted a pleading in the case.[33] The court stated that the evidence demonstrated that the intervenor had filed two amended petitions in intervention, alleging that it had received its title to the truck by transfer not from Finley but yet another party. The original petition, having been superseded, "was no longer a judicial admission, but must be introduced into evidence as any other admission before . . . considered as evidence."[34] Accordingly, the court found that since the sale of the truck to Finley was void, Finley had no title to transfer to the other party.[35]

In *Thomas v. St. Joseph Hospital*,[36] a wrongful death case, the trial court directed a verdict in favor of Whitehouse, a hospital gown manufacturer, and third-party defendants, two other hospital gown suppliers, because the plaintiffs failed to establish precisely who had manufactured the gown involved in the death.[37] On appeal the plaintiff complained that the trial court erred in granting a directed verdict in favor of Whitehouse, claiming there was sufficient evidence to raise the issue of whether that company had manufactured the gown in question.[38] The plaintiff contended that Whitehouse had judicially admitted that it was the manufacturer. In pretrial discovery, the defendant hospital had stated in answers to interrogatories that only the Whitehouse Company had supplied gowns during the relevant time period. Subsequently, Whitehouse filed a third-party action against its supplier. When the supplier filed its special appearance and answer, Whitehouse responded, admitting that it had manufactured the gown. The statement was based, however, on the information previously provided by the hospital, information that was peculiarly within the knowledge of the hospital. The plaintiff claimed the statement was a judicial admission by Whitehouse. The hospital later amended its interrogatory answers to state that another company had also supplied gowns to it during the relevant period, thus refuting its earlier unequivocal knowledge

32. *Id.* at 814.
33. *Id.* at 817.
34. *Id.*
35. *Id.* at 817-18.
36. 618 S.W.2d 791 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).
37. *Id.* The decedent's hospital gown had ignited when he dropped a lighted match. *Id.*
38. Neither the nurses who testified nor the treating physician were able to determine who actually manufactured the gown. *Id.* at 794.

of the specific gown manufacturer. Whitehouse then filed a supplemental third-party action against its other supplier and specifically abandoned its earlier admission. The court of civil appeals held that the initial pleading by Whitehouse was based upon erroneous information furnished by the hospital, was thereafter amended and modified to reflect the correct facts, and therefore, did not constitute a judicial admission.[39]

E. Survey Evidence

The leading Texas case considering the admissibility of public opinion polls or surveys is *Texas Aeronautics Commission v. Braniff Airways, Inc.*[40] The supreme court in *Braniff* held that it was error to exclude a poll or survey of air travelers' attitudes toward a proposed new air service.[41] The court noted that the evidence demonstrated that (1) the survey director was experienced, (2) other interviewers were available for examination at trial, and (3) the other party knew of the proposed use of the poll at trial and had an opportunity before trial to conduct investigations as to the survey's methodology and execution; therefore the court held the poll or survey was admissible as either "nonhearsay or within the state of mind exception of the hearsay rule."[42]

The admissibility of a public opinion survey was raised during the last year in *Lubbock Radio Paging Service, Inc. v. Southwestern Bell Telephone Co.*[43] The trial court sustained the orders of the Public Utility Commission that granted certificates of public convenience and necessity to the telephone company.[44] The appellants complained on appeal of the admission of testimony by a professional researcher with twelve years' experience, who testified in support of Bell's applications to furnish different areas of the state with radio paging services. The witness had been commissioned by Bell to conduct studies designed to support the application by demonstrating the need for such service in those areas. The appellants objected to the survey conducted and described by the witness because it relied on the opinion of another expert as to the size of the sample of individuals to be contacted in each survey.[45] The survey was also attacked as being too remote since it was conducted two years prior to the hearing.

The court of civil appeals disposed of the appellants' first objection, that the witness's opinion was based on the opinion of another expert, by holding that the basic data relied upon by the witness in her testimony was the information obtained by her in the survey conducted under her direction.[46]

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39. *Id.*
40. 454 S.W.2d 199 (Tex. 1970), *cert. denied*, 400 U.S. 943 (1971).
41. *Id.* at 203.
42. *Id.*
43. 607 S.W.2d 29 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).
44. *Id.* at 31.
45. The witness testified that her employer desired a 95% reliability factor in each survey, and she therefore sought the advice of the other expert to confirm her own determination of size. *Id.* at 31.
46. *Id.* at 32.

The information provided to her by the other expert had no bearing upon that evidence, the court stated, since it only went to the size of the sample and not its results. To dispose of the appellants' second objection, the court found that the factors considered important in *Braniff* were present, and that the appellants' objections therefore went to the weight of the evidence and not its admissibility.[47] In addition, as in *Braniff*, the expert had testified in person, thus providing a full opportunity for cross-examination of such testimony.

F. Declarations by Agent

A hearsay statement by an agent or employee is admissible as an admission against his principal or employer if it was related to and made contemporaneously with an act within the agent's or employee's authority.[48] A hearsay statement of an agent or an employee is also admissible against his principal if he has express authority to make the statement.[49]

In *Union Carbide Corp. v. Burton*[50] the plaintiff was awarded damages as a result of injuries sustained when a RH-5 degree wheel on a truck owned by Union Carbide explosively separated as the plaintiff was attempting to place a tire gauge on the stem of a tire. Union Carbide complained on appeal that the trial court erred in refusing to admit into evidence a letter by the assistant counsel for the third-party defendant Firestone. The defendant contended that the letter reflected the official position of Firestone, that regular and periodic maintenance of the RH-5 degree rim was necessary, and was inconsistent with the position taken by Firestone and its expert witness at trial. Union Carbide argued that the letter was an admission against Firestone's interest made by an agent of Firestone within the scope of his express or implied authority. In rejecting this contention, the court of civil appeals stated that the hearsay statement of an agent may be received against his principal as an admission against interest only if the trial court first determines that the statement was authorized by the principal. Firestone had denied the authority of the witness to speak for the company regarding the RH-5 degree wheel, and, in

47. The court also relied on Slaughter v. Abilene State School, 561 S.W.2d 789, 791 (Tex. 1977), which held that a witness's testimony is admissible even though it is partially predicated upon hearsay.

48. *See, e.g.*, Big Mack Trucking Co. v. Dickerson, 497 S.W.2d 283 (Tex. 1973) (statement inadmissible because made *after* authorized act); Le Sage v. Pryor, 137 Tex. 445, 154 S.W.2d 446 (1941) (statement inadmissible since it did not relate to acts within agent's authority); Waggoner v. Snody, 98 Tex. 512, 85 S.W. 1134 (1905) (statement inadmissible since made *prior to* authorized act to which it related); Garcia v. Sky Climber, Inc., 470 S.W.2d 261 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.) (statement inadmissible since it did not relate to matter within agent's authority).

49. *See, e.g.*, West Tex. Produce v. Wilson, 120 Tex. 35, 34 S.W.2d 827 (1931) (statements made to police after accident admissible since principal specifically referred officers to agent for answers); Earthman's, Inc. v. Earthman, 526 S.W.2d 192 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) (absent support of authority, testimony of witness that some of defendants had made admissions was inadmissible); Presidential Life Ins. Co. v. Calhoun, 325 S.W.2d 732 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.) (statements made by corporate officer concerning matters under his charge admissible against the corporation).

50. 618 S.W.2d 410 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

the absence of any other evidence showing the existence of such authority, the court of civil appeals held that the trial court did not abuse its discretion in refusing to admit the letter into evidence.[51]

Similarly, in *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*[52] the defendant appealed a judgment in favor of several feed lot operators for the unpaid price of cattle purchased by a buyer, who was found to be the defendant's agent. The jury found that the relationship between Heller, the purchaser of cattle, and the defendant meat packer was one of agent-principal and not one of dealer-purchaser. A witness, Randa Shade, was permitted to testify as to Heller's conversations with an official of the defendant dealing with Heller's purchases of cattle for the defendant. The defendant argued that the testimony of Randa Shade was inadmissible because it was an out-of-court declaration of an alleged agent offered to prove the existence of an agency relationship. The trial court found, however, that the testimony was admissible as impeachment evidence to contradict Heller's previous testimony concerning those same conversations. Moreover, the court had expressly instructed the jury to limit its consideration to the impeachment purpose.[53]

Texas law is well-settled that out-of-court declarations of an alleged agent are not competent proof of the existence of the agency relationship.[54] An out-of-court utterance must have two characteristics before it is rendered inadmissible as hearsay, however. First, the utterance must be a "statement," and secondly, it must be offered to prove the truth of the matter it asserts.[55] The court of appeals in *Lubbock Feed Lots* noted that verbal or nonverbal "conduct when . . . offered as a basis for inferring something *other* than the matter asserted"[56] was to be excluded from the hearsay rule. Verbal conduct, as opposed to verbal assertions, therefore, could be admitted into evidence because it was not assertive and because it was not intended to prove the truth of the matter asserted. The court of civil appeals affirmed the trial court's judgment and held that it need not determine whether the verbal conduct in question amounted to a prohibited out-of-court declaration by the agent because it concluded that the testimony was admissible for the limited purpose of impeachment by contradiction expressed by the trial court.[57]

G. Visual Aids

Visual aids used at trial normally are not considered as evidence because they do not constitute proof of any facts; they are merely tools used

51. *Id.* at 415.
52. 630 F.2d 250 (5th Cir. 1980).
53. *Id.* at 261.
54. *See, e.g.*, Porter v. Thalman, 516 S.W.2d 755 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (attorney's statement regarding construction of deed inadmissible).
55. *E.g.*, 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(c)[01] (1981).
56. 630 F.2d at 262.
57. *Id.* at 263.

by trial counsel.[58] Nevertheless, in *Speier v. Webster College*[59] the issue presented was whether the admission into evidence of a chart summarizing testimony constituted reversible error. The chart reflected the oral testimony of the plaintiff policemen as to damages. The plaintiffs' attorney prepared the chart and placed it within the jury's view. The chart listed the eleven policemen-plaintiffs with six blank spaces beside each name. After each policeman testified as to his damages, the attorney would fill in the figure reflecting the individual policeman's testimony in the appropriate blank space on the chart. At the end of the trial, the trial court admitted the chart into evidence and allowed the jury to take the chart with them into the jury room during deliberation.[60] The trial court entered judgment for the plaintiffs on the jury verdict, but the court of civil appeals reversed and remanded on the basis that the admission of the chart into evidence was reversible error.[61]

Relying on its decision in *Champlin Oil & Refining Co. v. Chastain*,[62] which held that the admissibility of charts and diagrams designed to summarize the testimony of witnesses was within the discretion of the trial court, the Texas Supreme Court reversed the court of civil appeals. The court's rationale was that in order to expedite trials and to aid juries in recalling the testimony of witnesses, such summaries are "useful and oftentimes essential."[63] The court held that to find error in this case, it would have been necessary to conclude that the trial court abused its discretion in admitting the chart into evidence, and the court refused to reach such a conclusion.[64]

In an attempt to exclude the chart, the defendant had relied on *Harvey v. State*, in which the admission of a chart into evidence was held to be error.[65] The supreme court sought to reconcile *Harvey* first by stating that it agreed with the judgment of the court of civil appeals in *Harvey* that, although error had been committed, the appellant had failed to carry the burden of demonstrating that the error probably caused the rendition of an improper judgment. The court then explained that "[t]he fact that a chart happens to summarize testimony on damages does not remove its admissibility from the discretion of the trial court."[66] Nevertheless, the court was forced to recognize that certain language in the *Harvey* opinion conflicted

58. *See* 2 R. RAY, *supra* note 21, § 1465.
59. 616 S.W.2d 617 (Tex. 1981).
60. The supreme court stated that the issue of whether the trial court erred in permitting the jury to take the chart with them into the jury room "is not before this Court. There was no objection in the trial court and no point of error in the briefs challenging its presence in the jury room." 616 S.W.2d at 618 n.2. The court intimated, however, that allowing the chart into the jury room would not have constituted error even if the point had been raised. *Id.*
61. *Id.* at 618.
62. 403 S.W.2d 376 (Tex. 1965).
63. 616 S.W.2d at 618. This approach assumes that the summarized testimony is admissible and already before the jury. *Id.*
64. *Id.* at 619.
65. 389 S.W.2d 692 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).
66. 616 S.W.2d at 619.

with its holding in *Champlin Oil*. The court, therefore, expressly disapproved the language in *Harvey* to the extent of any conflict.[67]

II. DEAD MAN'S STATUTE

The dead man's statute[68] is a statutory exception to the general rule that parties to a lawsuit are competent to testify about the matters in dispute.[69] Its purpose is to exclude the testimony of a living party pertaining to a transaction with or a statement by a decedent whose death prevents rebuttal.[70] The rule does not, however, prohibit a party from testifying from personal knowledge arising other than from a transaction with or statement by the decedent.[71] Furthermore, since the dead man's statute serves to exclude otherwise competent testimony of a party merely because it pertains to a transaction with or statement by the decedent, the courts have strictly construed the statute.[72] Consequently, there are numerous decisions in which parties have been able to circumvent the restrictive effect of the statute by demonstrating that the objecting party waived its applicability.[73]

In *Lewis v. Foster*[74] a breach of contract suit, the trial court permitted the plaintiff to testify as to his transactions with the decedent-defendant. The plaintiff, who was in the cattle business, had entered into an oral agreement with Mrs. Foster, the owner of a large ranch, under which she was to furnish water free of charge for the plaintiff's cattle because he had no water supply for the pasture he had leased. Subsequently, the plaintiff was advised that Mrs. Foster would require all of the water her land could produce for her own ranching purposes and that she could no longer provide free water to the plaintiff. The plaintiff then sold his cattle and did not use the leased pasture for the remainder of his lease. He later filed suit seeking to recover damages. Mrs. Foster died after the suit was filed and

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67. *Id.*

68. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon 1926) provides:

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

69. Adams v. Barry, 560 S.W.2d 935, 937 (Tex. 1978).

70. *See* Walker, *The Dead Man's Statute*, 27 TEX. B.J. 315 (1964).

71. *See, e.g.*, Roberts v. Roberts, 405 S.W.2d 211, 214 (Tex. Civ. App.—Waco), *writ ref'd n.r.e. per curiam*, 407 S.W.2d 772 (Tex. 1966) (beneficiaries under a lost will permitted to testify concerning contents of the instrument).

72. Adams v. Barry, 560 S.W.2d 935, 937 (Tex. 1978); Harper v. Johnson, 162 Tex. 117, 124, 345 S.W.2d 277, 280 (1961); Pugh v. Turner, 145 Tex. 292, 298, 197 S.W.2d 822, 825 (1947); Ragsdale v. Ragsdale, 142 Tex. 476, 481, 179 S.W.2d 291, 294 (1944).

73. *See, e.g.*, Green v. Hale, 433 F.2d 324 (5th Cir. 1970); Mueller v. Banks, 273 S.W.2d 88 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.); Smith v. Smith, 257 S.W.2d 335 (Tex. Civ. App.—Waco 1953, writ ref'd n.r.e.); Merriman v. Lary, 205 S.W.2d 100 (Tex. Civ. App.—Waco 1947, writ ref'd n.r.e.).

74. 621 S.W.2d 400 (Tex. 1981).

her executor was substituted as a party. At trial, objection was made to the introduction of any testimony from the plaintiff concerning his agreement with Mrs. Foster on the basis of the dead man's statute. The objection was overruled. Deposition testimony of Mrs. Foster, which had been obtained prior to her death, was read into evidence by the plaintiff. Her testimony admitted the existence of an oral agreement, but explained that she was to have continued to furnish water only so long as she did not need it herself. The plaintiff testified, however, that he had an agreement with Mrs. Foster to furnish him water for a period of three years, the same period as his pasture lease. The jury concluded that the decedent had an agreement to furnish the plaintiff water for three years, and the trial court entered judgment for the plaintiff.[75]

The court of civil appeals reversed the decision of the trial court, ruling the introduction of such oral evidence violated the dead man's statute.[76] The court's analysis began with the conclusion that the statute was violated in this particular case "unless there was a waiver."[77] Further, the court stated there were two common methods of establishing waiver under the dead man's statute: (1) when the party to a transaction with the deceased was called to testify by the opposite party, such as by a deposition inquiring into a transaction with the deceased;[78] and (2) when the testimony of the decedent was offered by the one entitled to the protection of the statute.[79] The court reasoned that neither of the exceptions existed in *Lewis* because it was the plaintiff, not the defendant, the party entitled to the protection of the statute, that offered the testimony of the decedent. The court of civil appeals also held that Mrs. Foster's service of requests for admissions and interrogatories on the plaintiff prior to her death did not constitute a waiver. Relying on the per curiam opinion of the Texas Supreme Court in *Fleming v. Baylor University Medical Center*,[80] the court concluded that at the time of pre-trial discovery, Mrs. Foster was still alive; accordingly, the executor was not a party to the lawsuit, and the dead man's statute therefore had no application.[81]

The supreme court reversed the judgment of the court of civil appeals

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75. *Id.* at 401.

76. Foster v. Lewis, 607 S.W.2d 608, 611 (Tex. Civ. App.—El Paso 1980), *rev'd*, 621 S.W.2d 400 (Tex. 1981).

77. 607 S.W.2d at 609.

78. *Id., see, e.g.*, Chandler v. Welborn, 156 Tex. 312, 294 S.W.2d 801 (1956); 1 R. RAY, *supra* note 21, § 334.

79. 607 S.W.2d at 609-10; *see, e.g.*, O'Neill v. Brown, 61 Tex. 34 (1884); 1 R. RAY, *supra* note 21 § 335.

80. 554 S.W.2d 263 (Tex. Civ. App.—Waco), *writ ref'd n.r.e. per curiam*, 561 S.W.2d 797 (Tex. 1977). For a discussion of this decision, see Beck, *Evidence, Annual Survey of Texas Law*, 33 Sw. L.J. 397, 411 (1979).

81. The court of civil appeals posed the following questions in denying application of the waiver principles:

> [H]ow can there be a waiver of a right that does not exist? If a court is to say that an executor waived a valuable right, should it not first be required that the executor be a party to the suit and participate in the conduct which resulted in the waiver?

607 S.W.2d at 611.

and affirmed the judgment of the trial court for two reasons.[82] First, the decedent previously had testified fully as to the transaction in question; therefore, one of the main purposes of the statute, to prevent one party from taking advantage of the fact that the lips of the deceased have been sealed, was satisfied. The supreme court reasoned that "the legislature did not intend for the statute to disqualify the survivor from testifying about that transaction so long as the deceased's testimony is available to both parties and both sides to the suit had an opportunity to examine the deceased as to the transaction when the testimony was given."[83] Secondly, when the plaintiff's attorney originally offered the deceased's testimony, the executor did not object; thus, even if the dead man's statute was considered applicable, the executor had waived his objection by failing to object properly.[84]

The meaning of the phrase "opposite party" contained in the dead man's statute was raised in *Womack v. First National Bank*.[85] In *Womack* a bank brought suit against two brothers to recover on five promissory notes. The bank alleged that the brothers were individually liable or, alternatively, that the notes were partnership obligations executed by one brother on behalf of the two brothers' partnership. One of the brothers, Charles McClanahan, admitted liability in a pleading and acknowledged that the notes were partnership obligations. Prior to trial, the other brother, H. Lane McClanahan, died. On appeal the decedent's administrator argued that the trial court erred in allowing Charles McClanahan, the brother of the decedent, to testify about conversations or transactions with the decedent. The basis for the objection was that, by admitting liability and aligning himself with the plaintiff in his pleadings, the witness made his testimony inadmissible. The court of civil appeals held that the dead man's statute rendered Charles McClanahan, as a party to the action, initially incompetent to testify about any transaction with his deceased brother.[86] The court also indicated that when one party calls the "opposite party" to the stand and asks him about a transaction with the decedent, the statute is waived. Since the bank called Charles McClanahan as an adverse party, the bank waived applicability of the statute. The decedent's administrator argued that the bank could not waive the decedent's rights under the statute by calling Charles McClanahan because the witness was not adverse to the bank. The court of civil appeals recognized that "some controversy has arisen over the meaning of 'opposite party' where one de-

82. 621 S.W.2d at 404.

83. *Id.*

84. Additionally, the parties previously had stipulated that Mrs. Foster's testimony "can and will be used in future proceedings in lieu of her deposition." *Id.* This stipulation was without qualification or reservation of any objections. The supreme court considered the stipulation binding on the executor. Smith v. Burroughs, 34 S.W.2d 364 (Tex. Civ. App.—Austin 1931, writ dism'd), held otherwise, and therefore the supreme court disapproved that holding because it "is not consistent with other cases on waiver." 621 S.W.2d at 404.

85. 613 S.W.2d 548 (Tex. Civ. App.—Tyler 1981, no writ).

86. *Id.* at 556.

fendant has an interest adverse to that of his co-defendant."[87] The court concluded, however, that the prevailing view seemed to be that "opposite party" meant the opposite party of record and that when the other party called the opposite party to testify, he became competent.[88]

III. PRIVILEGE

Confidential communications between attorney and client ordinarily are privileged and inadmissible.[89] Many other communications that are confidential, either because of the relationship of the parties or a pledge of secrecy, are not privileged, and thus are admissible. For example, in *Granviel v. Estelle*,[90] a habeas corpus case, the evidence demonstrated that prior to his criminal conviction the appellant's counsel contacted Dr. Holbrook, a psychiatrist, and requested that he examine the appellant. Present at the examinations were the psychiatrist, the appellant, and the appellant's legal counsel. After these examinations, the appellant filed a motion with the trial court to have Dr. Holbrook appointed to examine the appellant again. The trial court granted this motion. At the guilt phase of his trial, the prosecution subpoenaed Dr. Holbrook, who testified that the appellant was sane.

The appellant claimed that Dr. Holbrook's examination was necessary for his defense of insanity, and that failure to request an examination would have been ineffective assistance of counsel. The appellant further contended that by employing Dr. Holbrook he created an involuntary state's witness who gave testimony adverse to him. The court of appeals rejected the appellant's agency-based contention, concluding that by filing a motion to have the trial court appoint Dr. Holbrook as an expert, the doctor became the court's disinterested expert, who was subject to being called as a witness by either party.[91] The court stated that no attorney-

87. *Id.*

88. The court of civil appeals also stated that even if the bank could waive the statute by calling Charles McClanahan as an adverse witness, his testimony could not have been admissible against his brother's estate. The right of McClanahan's administrator to object could not be waived by another party to the suit. Since appellant failed to raise the point sufficiently on appeal, the court declined to decide the question. *Id.*

89. TEX. CODE CRIM. PROC. art. 38.10 (Vernon 1979) states that: "an attorney at law shall not disclose a communication made to him by his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship." The court in Williams v. Williams, 108 S.W.2d 297, 299 (Tex. Civ. App.—Amarillo 1937, no writ), stated: "This provision is a statutory declaration of the commonlaw rule of evidence and it applies to both criminal and civil cases." The privilege can, however, be waived. West v. Solito, 563 S.W.2d 240 (Tex. 1978) (when attorney's professional conduct challenged by client, privilege waived as necessary to defend attorney's character). *See, e.g.*, Suddarth v. Poor, 546 S.W.2d 138, 141 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.) (communication concerning will preparation privileged); Ledisco Fin. Servs., Inc. v. Viracola, 533 S.W.2d 951 (Tex. Civ. App.—Texarkana 1976, no writ) (attorney-client privilege does not exist if statement made in presence of third person); Miller v. Pierce, 361 S.W.2d 623, 625 (Tex. Civ. App.—Eastland 1962, no writ) (privilege continues to exist even after death of either attorney or client; heirs may claim privilege).

90. 655 F.2d 673 (5th Cir. 1981).

91. *Id.* at 682. TEX. CODE CRIM. PROC. art. 46.02, § 3(a) (Vernon 1979) provides that

client privilege existed to prevent Dr. Holbrook from testifying because under Texas law the attorney-client privilege did not attach in such a situation.[92] Although the court recognized that other courts had adopted the rule advocated by the appellant,[93] it held that its sole responsibility was to determine whether such privilege was constitutionally required.[94] The court of appeals relied on *Edney v. Smith*,[95] another habeas corpus case, which applied the test of whether the balance drawn by the state rule "is so detrimental to the attorney's effective representation of his client as to be prohibited by the Sixth Amendment."[96] The court held that the Texas rule on balance did not violate the sixth amendment.[97]

The applicability of the patient-physician privilege was at issue in *Jones v. State*[98] when a patient in a state hospital appealed from the trial court's judgment temporarily commiting her to the state hospital. The commitment order was attacked on the basis that the trial court erred in admitting the testimony of the patient's physician because the physician's testimony was based upon privileged communications. The patient contended that Texas statutory law[99] provided that communications between a mental patient and a professional were confidential. The statute, however, also provides that disclosure of such communications is permissible if the patient is informed in advance that the communications will not be privileged, and the patient thereafter makes communications to a professional in the course of a court-ordered examination.[100] In *Jones* the evidence was undisputed that the physician did not inform the appellant that her communications with him would not be privileged. Other evidence, however, indicated that the patient had been informed by an employee in the admissions office of the state hospital that her communications with mental health professionals during her period of treatment would not be privileged for the purpose of future proceedings. Nevertheless, the patient contended that the statute required the *physician* to advise her of that fact. The court of civil appeals overruled the patient's contention and stated that the statute required only that patients be informed that communications with mental health professionals were not privileged; it did not re-

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the court may appoint disinterested qualified experts to examine the defendant as to his competence to stand trial and to testify at trial on that issue.

92. 655 F.2d at 682.

93. *See, e.g.*, San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951); Lindsay v. Lipson, 367 Mich. 1, 116 N.W.2d 60 (1962).

94. 655 F.2d at 682.

95. 425 F. Supp. 1038 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 556 (2d Cir. 1977).

96. 655 F.2d at 683 (citing Edney v. Smith, 425 F. Supp. 1038, 1053 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 556 (2d Cir. 1977)).

97. The court stated that it was especially driven to this outcome because the appellant refused to cooperate with the experts who were appointed at the prosecutor's request. 655 F.2d at 683.

98. 613 S.W.2d 570 (Tex. Civ. App.—Austin 1981, no writ).

99. TEX. REV. CIV. STAT. ANN. art. 5561(h) (Vernon Supp. 1982) provides a limited privilege for confidential communications from patient to psychotherapist.

100. *Id.* § 4(a)(4).

quire that the physician himself provide such advice.[101]

IV. IMPEACHMENT

There are many ways to impeach a witness or refute a party's contention of fact.[102] In criminal cases a common method of refuting the defendant's contention that he was incorrectly identified as a party to a crime is to bolster the trial testimony of the prosecution's identification witness. A second witness is called to testify that the prosecution's identification witness previously identified the defendant as the perpetrator of the crime while the defendant was in police custody. The prevailing rule is that a witness who has identified a defendant at trial may also testify that he identified the defendant on another occasion while the defendant was in police custody.[103] It has also been held that this type of testimony, if unimpeached, may not be bolstered by the testimony of others.[104] When the defendant impeaches or attempts to impeach the testimony of the identifying witness, however, the testimony of a third party as to the witness's extra judicial identification is admissible.[105]

The prosecution used this technique in a case reported during the survey period. In *Franklin v. State*[106] the defendant appealed from a criminal conviction contending that (1) the trial court erroneously permitted the prosecution to bolster the allegedly unimpeached testimony of identification witnesses, and (2) his own post-arrest silence was unlawfully used against him. Both prosecution witnesses originally testified that the defendant was the man they saw at the scene of the crime, but neither witness testified at the time as to any other extrajudicial identification they had made of the defendant while he was in police custody. After the defense rested its case, however, the prosecution called as a rebuttal witness a police officer, who testified that both witnesses had also picked defendant out of a police line-up. The state then recalled the two witnesses who confirmed this testimony.

The defendant had sought to impeach the two witnesses with regard to

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101. 613 S.W.2d at 571-72. The court's statements were directed specifically to the requirements of TEX. REV. CIV. STAT. ANN. art. 5561(h), § 4(a)(4) (Vernon Supp. 1982).

102. *See* Irvin, *Admissibility of Defective Confessions for Impeachment: Article 38.22 and Harris v. New York*, 11 HOUSTON L. REV. 193 (1973); Peeples, *Prior Inconsistent Statements and the Rule Against Impeachment of One's Own Witness: The Proposed Federal Rules*, 52 TEXAS L. REV. 1383 (1974); Note, 10 ST. MARY'S L.J. 632 (1979); Note, 3 ST. MARY'S L.J. 361 (1971).

103. Williams v. State, 565 S.W.2d 937 (Tex. Crim. App. 1978); Ward v. State, 427 S.W.2d 876 (Tex. Crim. App. 1968); Lyons v. State, 388 S.W.2d 950 (Tex. Crim. App. 1965).

104. *See, e.g.*, Lyons v. State, 388 S.W.2d 950 (Tex. Crim. App. 1965).

105. Turner v. State, 486 S.W.2d 797 (Tex. Crim. App. 1972) (police officer testifying regarding witness' description of defendant); Frison v. State, 473 S.W.2d 479 (Tex. Crim. App. 1971) (testimony of police officer regarding unimpeached witness's description of defendant was admitted erroneously, but was rendered harmless by defendant's subsequent attempt to impeach the witness); Beasley v. State, 428 S.W.2d 317 Tex. Crim. App. 1968) (police officer permitted to testify regarding witness's identification of defendant in police lineup).

106. 606 S.W.2d 818 (Tex. Crim. App. 1978).

the opportunity each had to view him in the parking lot where he had been identified. The statements by the witnesses at a pre-trial proceeding were used in an attempt to prove inconsistencies in their testimony; consequently, the court held that the defendant's efforts to impeach the testimony warranted the admission of the officer's testimony as to extrajudicial identifications.[107]

The law is well settled that the prior silence of a witness as to a fact to which he has already testified, when such silence occurred under circumstances in which he would be expected to speak out, may be used to impeach the witness during cross-examination.[108] On the other hand, a defendant in a criminal trial who testifies as to certain allegations may not be impeached by his silence at the time of his arrest after receiving *Miranda* warnings.[109] In *Franklin* the defendant also challenged the trial court's holding because the prosecution questioned him about his failure to tell his exculpatory story at the preliminary hearings. The court of criminal appeals overruled this contention and stated that unless prosecutors were allowed some leeway in the scope of impeachment cross-examination, some defendants would be able to distort the factual picture.[110] The court held that when a criminal defendant takes the stand during pre-trial proceedings and denies making a statement testified to by a prosecution witness, he may be cross-examined as to why he did not deny making the statement after the same testimony was given at earlier hearings.[111] The court reasoned that the right of a defendant to present limited testimony at a pre-trial hearing without waiving his fifth amendment rights[112] did not prohibit using knowingly false exculpatory statements made by the defendant at such a hearing against him. Moreover, prior inconsistent statements by the defendant to the police also might be used to impeach his testimony, even though the statements were obtained in violation of the defendant's *Miranda* rights and could not have been used by the state as direct evidence of guilt.[113] The defendant was free to testify to, and had the opportunity to testify to, the same exculpatory version of the facts at the pre-trial hearing as he did later before the jury. The appellate court therefore determined that the trial court did not err in permitting the state to cross-examine the defendant before the jury as to why he had not related his exculpatory version of the facts in the pre-trial hearing.

On rehearing, the court concluded that its original opinion was incorrect

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107. *Id.* at 824.

108. 3A J. WIGMORE, EVIDENCE, § 1042 (Chadbourn rev. 1970).

109. Doyle v. Ohio, 426 U.S. 610 (1976) (prosecutor violated defendant's due process rights by cross-examining as to why he had not divulged exculpatory story to arresting officer).

110. 606 S.W.2d at 825.

111. *Id.*

112. *See* Simmons v. United States, 390 U.S. 377 (1968).

113. *See* Oregon v. Hass, 420 U.S. 714 (1975) (inculpatory statement made by defendant to police before he had consulated with his attorney was admissable for impeachment purposes); Harris v. New York, 401 U.S. 222 (1971) (statement by defendant made before Miranda warnings admissable for impeachment purposes).

both on "state evidentiary grounds and on constitutional grounds."[114] The court reasoned that the defendant had taken the stand at the pre-trial hearings for a limited purpose and on issues to which his trial testimony was not relevant. Consequently, the defendant's silence on a subject relevant to his subsequent trial was not a proper subject for impeachment. The impeachment of the defendant was also improper (1) because it was error to allow impeachment on a post-arrest silence if his silence was based on an exercise of the privilege against self-incrimination, and (2) because it violated article 38.08 of the Texas Code of Criminal Procedure.[115]

Another common form of impeachment is typified by the cross examination of the defendant in *Bell v. State*[116] in which the defendant appealed his criminal conviction of aggravated robbery. After the state rested its case in chief, the defendant adduced testimony from two defense witnesses and then took the stand to testify on his own behalf. During his direct examination, he was asked whether anything in his past was of a criminal nature, and he replied in the affirmative.[117] He admitted that he had been convicted of the felony offense of embezzlement and had been assessed a sentence of two years. He further testified that he spent seven months in the Department of Corrections and was then paroled. He stated that because he had no further problems, his sentence was discharged, and that the embezzlement conviction was his only felony conviction. The remainder of his testimony dealt with his denial of the crime in question. On cross-examination the prosecutor asked questions concerning a conviction for the criminal offense of fleeing from police officers and about arrests for charges of embezzlement and possession of marijuana. In replying to the defendant's objection to exclude such testimony, the prosecutor contended that the defendant had "opened the door for anything regarding criminal activity."[118]

The court of appeals initially held that, although the privilege against self-incrimination may be waived by the defendant taking the witness stand, the state's use of prior specific acts of misconduct committed by a witness to reflect on his credibility was limited to the introduction of the witness's final conviction of a felony or misdemeanor involving moral tur-

114. 606 S.W.2d at 848.

115. TEX. CODE CRIM. PRO. ANN. art. 38.08 (Vernon 1979) provides that "[a]ny defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause."

116. 620 S.W.2d 116 (Tex. Crim. App. 1980).

117. The testimony was as follows:

> Q: [By Defense Counsel]: Did I advise you that should you take the stand *that the . . . District Attorney would go into your past*, if there was anything criminal in your past they would bring it out in front of the jury?
> A: Yes, sir.
> Q: *Have you anything in your past that is of a criminal nature*?
> A: Yes, sir.
> Q: Have you been down to what we call the joint, Texas Department of Corrections?

Id. at 119 (emphasis in original; footnote omitted).

118. *Id.* at 120.

pitude.[119] The court therefore reversed the trial court, holding it error to admit before the jury proof of the appellant's misdemeanor conviction for possession of marijuana, an offense that is not a crime involving moral turpitude. On motion for rehearing, however, the court noted that its original opinion erroneously construed the defendant's testimony as "going no further than the general rule would have permitted the State to go."[120] The court concluded that the defendant actually went further than he should have if he desired to avoid impeachment, and therefore, the state had a right to inquire about his arrest and conviction for the possession of marijuana since the appellant had " 'opened the door' on direct examination."[121] The court reasoned that the question asked and answered on direct examination "could not have left any other impression with the jury except that he had nothing in his criminal past except the embezzlement conviction."[122] The state's motion for rehearing was therefore granted, and the judgment affirmed.[123]

V. OPINION EVIDENCE

A. Competency

Whether the person offered by a party as an expert possesses the requisite qualifications is a preliminary question to be determined by the trial court.[124] In *Gold Kist, Inc. v. Massey*,[125] a deceptive trade case in which a farmer brought suit against a seed dealer and a seed manufacturer to recover his lost profits, the trial court permitted certain farmers to testify as experts concerning the quality of the seed in dispute. The court thereafter entered judgment for the farmer and awarded the dealer indemnity from the corporate manufacturer.[126] One of the issues on appeal was whether the trial court erred in allowing the peanut farmers, including the plaintiff, to testify, as experts, that the peanut seed failed to germinate and was bad seed. The defendant contended that the witnesses were not qualified as experts. The court of civil appeals held that "[p]ractical experience is an acceptable way of gaining expertise"[127] sufficient to testify as an expert, and concluded that the trial court did not abuse its discretion in permitting the testimony of these witnesses as experts.[128]

That an attorney may not inject his personal opinion into the trial of a case is well established.[129] In *Menefee v. State*[130] the defendant on appeal

119. *Id.*
120. *Id.* at 125.
121. *Id.* at 126.
122. *Id.*
123. *Id.* at 127.
124. *See* 2 R. RAY, *supra* note 21, § 1401.
125. 609 S.W.2d 645 (Tex. Civ. App.—Fort Worth 1980, no writ).
126. *Id.* at 646.
127. *Id.* at 647.
128. *Id.*
129. The Texas Supreme Court announced the permissible limits for an attorney in stating his opinion as to the truth of a witness's testimony in Southwestern Greyhound Lines v. Dickson, 149 Tex. 587, 236 S.W.2d 115 (1951):

contended that it was error for the prosecutor to tell the jury in his jury argument: "I don't believe I have ever seen anybody that I thought was anymore honest than she is."[131] The witness about whom the statement was made was the only witness who could identify the defendant as the person who committed the offense. On cross-examination, her credibility had been subject to strong attack by defendant's counsel. The court held that since the "jury argument injected the prosecutor's personal opinion of her credibility,"[132] reversible error occurred. The court reasoned that the prosecutor's opinion of the witness's credibility would carry "undue weight with the jury in light of the prosecutor's experience"[133] and that the statements of the prosecutor were merely "an effort to bolster [the witness's] credibility by unsworn testimony."[134]

In *Clark v. DeLaval Separator Corp.*,[135] a products liability case, the trial court entered judgment for the plaintiff. On appeal the defendant attacked the sufficiency of the plaintiff's evidence, and argued that there was no evidence of any defect in the cow milking system. The plaintiff had offered no evidence specifically identifying a defect either of design or manufacture, and had offered no evidence of the product's condition when it left the defendant's hands. The plaintiff's evidence basically showed only that his cows developed mastitis after he purchased two additional milking units from the defendant. Only one witness was called by the plaintiff to discuss the presence of a defect in the milking equipment. The witness testified that "milking machines *in general* cause mastitis, primarily by what is commonly known as 'slippage,' which is the introduction of air between the cow's teat and the milking machine inflation,"[136] but he also admitted that mastitis could be caused by many factors other than milking machines. The expert witness had not conducted any tests on the milking machines or on the cattle, nor did he or anyone else investigate to determine whether "slippage" was the cause of the mastitis in the defend-

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> Undoubtedly there is no absolute rule against expressing even a highly unfavorable opinion of an opposing party or witness . . . . But the salutory right of counsel thus to speak his mind is subject to obvious limits, which excessive language may exceed—either by connoting an idea or fact without support in the record or by its very character as inflammatory. . . . While argument otherwise excessive or improper under the above rules has been held justified by similar argument or other type of invitation previously emanating from the opposing side, obviously this is so only when the *relation between the argument under attack and the alleged provocation is one of reason and fairness.*

Id. at 119 (emphasis added; citation deleted). While *Southwestern Greyhound* reflected the court's intolerance for prejudicial or inflammatory attorney comments about witnesses, the later decision of Morgan v. Luna, 337 S.W.2d 139 (Tex. Civ. App.—El Paso 1960, no writ), prescribes the boundaries of attorney commentary when inflammatory language is not in issue. In *Morgan* the court upheld the propriety of an attorney's attack upon a witness and upon that witness's testimony. *Id.* at 143.

130. 614 S.W.2d 167 (Tex. Crim. App. 1981).
131. *Id.* at 168.
132. *Id.*
133. *Id.*
134. *Id.*
135. 639 F.2d 1320 (5th Cir. 1981).
136. *Id.* at 1326.

ant's cows. He also expressly admitted that he did not have the expertise to express an opinion as to the inadequacy of the design or mechanics of the milking machine.[137] The court thereupon reversed and remanded, holding that there was insufficient evidence in the record to support the jury's finding of a defect.[138]

VI. PROBATIVE VALUE

Rule 403 of the Federal Rules of Evidence provides that a district court may exclude evidence, even if relevant, "if its probative value is substantially outweighed by the danger of unfair prejudice."[139] In *Ballou v. Henri Studios, Inc.*,[140] the application of this rule was called directly into issue. After judgment was entered in favor of the plaintiffs as survivors of the decedent, the defendant argued that the exclusion of blood test results indicating that the deceased automobile driver Ballou was intoxicated at the time of the collision and thereby contributorily negligent, constituted reversible error. The trial court had considered the issue on motion in limine, and excluded such evidence because it believed that the prejudicial potential substantially outweighed the probative value.[141] The results of the blood alcohol test were viewed as unreliable by the court because one witness testified that Ballou was not intoxicated a few minutes before the collision while another witness testified that it would probably take at least one hour of alcohol consumption to reach a blood alcohol level of 0.24 percent.[142]

The court of appeals held that as a matter of law the potential for unfair prejudice of the blood alcohol test did not substantially outweigh its probative value, and therefore excluding the results of the test was an abuse of discretion requiring a reversal of the trial court's judgment and a new trial.[143] The court reasoned that the district court made an "impermissible credibility choice"[144] by deciding to believe another witness's testimony rather than the results of a blood alcohol test. The appellate court concluded that in conducting the balancing test required by rule 403, the trial court was not authorized to exclude evidence because the judge did not find it credible; on the contrary, the district court should have determined the probative value of the test results if true, and weighed that probative

137. The court of appeals also noted that the plaintiff failed to rebut any of the defendant's evidence that the milking machine purchased by the plaintiff was designed in such a manner that, if properly used, it would decrease rather than increase the incidence of mastitis. *Id.*

138. For an excellent discussion of this general area of the law, see Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEXAS L. REV. 361 (1960).

139. FED. R. EVID. 403.

140. 656 F.2d 1147 (5th Cir. 1981).

141. The court determined that the evidence of Ballou's intoxication would be too harmful and overly prejudicial to the plaintiff because "it is never possible to judge the attitude of a Jury and how they are affected by the subject of alcohol." *Id.* at 1152.

142. *Id.* at 1154.

143. *Id.* at 1155.

144. *Id.* at 1154.

value against the danger of unfair prejudice. The court of appeals, therefore, held that the trial court should have left to the jury the difficult choice of whether to credit the evidence, and the failure to do so constituted reversible error.[145]

VII. Evidence of Gross Negligence

The most significant evidence case decided during the survey period was *Burk Royalty Co. v. Walls*.[146] *Burk Royalty* was an action brought against the employer of the plaintiff's deceased husband, in which gross negligence in the death of the plaintiff's husband was alleged. The trial court entered judgment for the plaintiff based on the jury's verdict. The court of civil appeals reformed the amount of the judgment and remanded to the trial court to allocate the award between the plaintiff and her son.[147]

The principal issue on appeal was whether there was evidence to support the jury's finding that the defendant's district superintendent, Swetnam, was grossly negligent. The evidence demonstrated that the fatal fire occurred while the decedent was working as a member of a four-man crew that was pulling wet tubing from an oil well so that the pump at the bottom could be replaced and production restored. On the date of the accident, the defendant's operator in charge of the well had intended to locate the toolpusher in charge of the crew to find out precisely how the crew should remove the fluid trapped in the tubing. Swetnam had driven out to deliver the crew's paychecks and the operator asked him instead. The operator suggested that an explosive charge be dropped in the well to blow a hole in the tubing to allow the fluid to drain out at the bottom. Swetnam told the operator not to use that method, but instead suggested that the tubing be pulled until they reached the fluid, and then that they "swab" the remainder of the tubing in the hole. During the conversation, Swetnam said nothing about safety. He remained in his car, and did not check for fire extinguishers or any other safety equipment. The crew began pulling the tubing as suggested by Swetnam. The decedent's job was to take the sections of pipe as they were pulled up and place them in a rack. He was working approximately twenty-five feet up in the derrick above the floor of the well and had a safety belt strapped around his shoulders and waist that was attached to the derrick to prevent him from falling.

After pulling approximately twenty dry pieces of pipe, the crew reached tubing that was full of fluid. Before the next joint of pipe could be pulled, pressurized gas escaped, causing oil to spew out of the tubing up into the derrick. As a result, the decedent was covered with oil. The leaked gas ignited and flames shot to the top of the derrick, igniting the oil on the

145. This is not to imply that the court is attempting to restrict a trial judge's discretion in the realm of probative value. A key distinction must be made, however, between probative value and credibility. The judge in *Ballou* simply crossed the boundary from the former to the latter, thereby usurping the jury's right to believe or disbelieve such relevant evidence. *Id.*

146. 616 S.W.2d 911 (Tex. 1981).

147. *Id.* at 914.

decedent, who struggled to get out of his safety belt, but was unable to do so. Because there were no fire extinguishers on the rig, the crew was unable to extinguish the fire on the decedent, and he burned to death. On the basis of this evidence, the jury determined that Swetnam " 'failed to follow approved safety practices for pulling wet tubing,' "[148] and that this failure constituted gross negligence.

The court of civil appeals held that there was "some evidence" to support the jury's finding of gross negligence. The court further held that there was "some evidence" that the defendant's negligence was a proximate cause of the decedent's death, because Swetnam failed " 'to have available at prescribed positions the two (2) fire extinguishers prescribed by paragraph No. 14 of the company safety rules.' "[149] The defendants contended that there was no evidence of such an "entire want of care" on the part of Swetnam as would amount to "conscious indifference" to support an award of exemplary damages.[150] In addition, the defendants argued that although Swetnam was in charge of safety, it was not his responsibility to perform the task of positioning the fire extinguishers. They also contended that there was no evidence that Swetnam knew or should have known that there were no fire extinguishers properly positioned at the well.[151]

After stating that the development of the concept of gross negligence in Texas has been "somewhat confusing,"[152] the Texas Supreme Court discussed the historical development of that concept. The court determined that the "no evidence" test applied in testing jury findings of fact issues should also be applied in reviewing gross negligence findings. In such situations, the plaintiff must prove that the defendant was grossly negligent; if the jury should find gross negligence then the defendant must bear the burden of establishing that there was "no evidence" to support the finding.[153] The supreme court concluded that the long-accepted "some care" test improperly reversed that burden. Under the "some care" test, the defendant, instead of proving that there was "no evidence" to support the verdict, only needed to show that there was "some evidence" that did not support the jury finding of gross negligence. The burden was thus shifted to the plaintiff to negate the existence of "some care."[154] Stating that since no justification existed for having a different standard for reviewing gross

148. *Id.*

149. *Id.* at 915.

150. *Id.* The instruction on gross negligence and the definition of "heedless and reckless disregard" were not attacked by the defendants. *Id.*

151. The defendants relied on a number of cases that held that if "some care" was exercised there could not be "an entire want of care"; thus, exemplary damages were improper. Sheffield Div., Armco Steel Corp. v. Jones, 376 S.W.2d 825 (Tex. 1964); Bennett v. Howard, 141 Tex. 101, 170 S.W.2d 709 (1943); Delgadillo v. Tex-Con Util. Contractors, Inc., 526 S.W.2d 208 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); Loyd Elec. Co. v. DeHoyos, 409 S.W.2d 893 (Tex. Civ. App.—San Antonio 1966, writ ref'd).

152. 616 S.W.2d at 915.

153. *Id.* at 920-21.

154. *Id.* at 921. The court stated that the burden was "almost an impossible task since anything may amount to some care." *Id.*

negligence findings in employer cases, the supreme court disapproved the use of the "some care" test, and overruled those cases that had applied it.[155] After reviewing the evidence favorable to the jury's finding of gross negligence, the court held that there was evidence upon which the jury could have based its finding of gross negligence and affirmed the appellate court decision.

Although the majority concluded that the definition of gross negligence as reaffirmed by the supreme court in *Sheffield Division, Armco Steel Corp. v. Jones*[156] was correct, that definition has been significantly altered under the new test. Appellate review will now require the reviewing court to (1) consider only the evidence viewed in the most favorable light tending to support the jury finding of gross negligence and (2) disregard all evidence of care. In fact, the court's decision in *Burk Royalty* constitutes an abandonment of the long-settled definition of "gross negligence," i.e. an entire want of care, and effectively results in the disappearance of the distinction between ordinary negligence and gross negligence.

155. Justice McGee wrote an opinion dissenting from this decision and Justices Denton and Barrow joined in that opinion. *Id.* at 927. Advocating the "some care" standard of proof, the dissent traced the historical development of the confused state of the law. Undaunted by such criticism, the majority emphasized that "[w]hen there is *some* evidence of defendant's want of care and also *some* evidence of 'some care' by the defendant, the jury's finding of gross negligence through entire want of care resolves the issue, and the appellate court is bound by the finding in testing for legal insufficiency." *Id.* at 921.

156. 376 S.W.2d 825 (Tex. 1964).