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Evidence

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EVIDENCE

by

Linda Leuchter Addison*

DURING this survey period, the appellate courts of Texas delivered numerous decisions construing various rules of evidence. The holdings of greatest significance lie in the following substantive areas: (1) the hearsay rule and its exceptions; (2) expert opinion evidence; (3) parol evidence; (4) judicial notice; (5) impeachment; (6) privileges; (7) admissibility; (8) lack of probative evidence and insufficient evidence; and (9) presumptions and inferences.

The most significant development in the field of evidence during this survey period was the promulgation of the Texas Rules of Evidence by the Texas Supreme Court.¹ The Texas Rules of Evidence became effective in all civil cases on September 1, 1983. The Texas Rules of Evidence both codify and change prior Texas case and statutory law, and additionally adopt and tailor provisions of the Federal Rules of Evidence for Texas practice. Thus, while their numbering system basically follows that of the Federal Rules of Evidence, the Texas Rules of Evidence are a hybrid of both Texas and federal practice. No Texas appellate court during this survey period, or even as of the date of this writing, has yet applied or interpreted any of the new rules of evidence. Accordingly, this survey neither attempts nor purports to be an exhaustive analysis of the Texas Rules of Evidence.²

I. THE HEARSAY RULE AND ITS EXCEPTIONS

A. Identifying Hearsay

Whether a particular record or statement offered to prove its truth con-

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1. Order Adopting the Texas Rules of Evidence (Tex. Sup. Ct. Nov. 23, 1982). The Texas Rules of Evidence were promulgated by the Texas Supreme Court pursuant to its general rulemaking power, TEX. REV. CIV. STAT. ANN. art. 1731a (Vernon 1962), so that they can be updated or modified as necessary rather than requiring legislative amendment every two years. Under this statute the supreme court is also authorized to repeal conflicting statutes, subject to possible reenactment by the legislature, by filing a letter with the secretary of state and sending a copy to all members of the legislature. *Id.* §§ 1-3; Caperton & McGee, *Background, Scope and Applicability of the Texas Rules of Evidence*, 20 HOUS. L. REV. 49, 56 (1983) (Tex. R. Evid. Handbook). The court's order included a list of 37 repealed statutes. Order Adopting the Texas Rules of Evidence (Tex. Sup. Ct. Nov. 23, 1982); see Caperton & McGee, *supra*, at 84-85 (list of repealed statutes).

2. For a general overview and introduction to the Texas Rules of Evidence, see Addison, *A Practical Guide to the Texas Rules of Evidence*, 46 TEX. B.J. 1024 (1983).

stitutes hearsay is often difficult to determine. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."³ Each year numerous appellate courts hold that certain out-of-court statements are inadmissible hearsay. These holdings occur with frequency for reasons explored by the Houston court of appeals in *Estate of Diggs v. Enterprise Life Insurance Co.*⁴ In *Estate of Diggs* the court reversed a summary judgment based on an affidavit.⁵ The court accepted the appellant's contention that although the affiant stated that he had personal knowledge of the facts testified to in the affidavit, nothing in the affidavit demonstrated actual personal knowledge of the matters he averred. To be sufficient an affidavit must in some way show that the affiant is personally familiar with the facts so that he would be qualified to testify as a witness.⁶ In ruling that a recitation by an affiant that he has personal knowledge is not in itself sufficient to show affirmatively that the affiant is competent to testify as required by Texas Rule of Civil Procedure 166-A(c),⁷ the court of appeals explained that a fact considered by a layman to be personally known to him may in fact be hearsay in law.⁸

Evidence that would be hearsay if offered to prove the truth of the matters stated therein may be admitted for other limited purposes.⁹ During the survey period, the Texas Supreme Court held certain hearsay evidence admissible for a limited purpose in *Turner, Collie & Braden v. Brookhollow, Inc.*¹⁰ *Brookhollow* arose out of the allegedly defective construction of a sewer system. Brookhollow, a developer, sought to introduce a report that evaluated several alternatives for extending sewer service into a certain subdivision. The court of appeals held the report inadmissible.¹¹ In reversing the judgment of the court of appeals, the supreme court held that

3. TEX. R. EVID. 801(d). The hearsay rule and its exceptions are comprehensively defined in *id.* 801-806. Additionally, *id.* 602 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."

4. 646 S.W.2d 573 (Tex. App.—Houston [1st Dist.] 1982, no writ).

5. *Id.* at 575-76.

6. *Weaver v. Brandin*, 394 S.W.2d 709, 711-12 (Tex. Civ. App.—Houston 1965, writ *dism'd*).

7. *See* TEX. R. CIV. P. 166-A(c).

8. 646 S.W.2d at 575. Another example of hearsay held inadmissible during this survey period occurred in *Thermo Products Co. v. Chilton Indep. School Dist.*, 647 S.W.2d 726, 731 (Tex. App.—Waco 1983, writ *ref'd n.r.e.*) (testimony of witness that defendant's alleged agent had told witness what agent reported to agent's alleged principal).

9. TEX. R. EVID. 105 codifies the rule of limited admissibility. The rule provides that when evidence admissible as to one party or for one purpose is not admissible as to another party or for another purpose, the court, upon request, shall restrict the evidence to its proper scope and so instruct the jury. Rule 105 also limits the grounds for appeal when a limiting instruction as provided in rule 105(a) is not requested. Rule 105 should be read in conjunction with *id.* 403, which permits exclusion of relevant evidence on special grounds such as unfair prejudice, confusion of the issues, or undue delay. Rule 105(b) provides that when evidence that would be admissible for a limited purpose is excluded, the exclusion will not be grounds for appeal unless the evidence was offered expressly for its limited admissible purpose. *Id.* 105(b).

10. 642 S.W.2d 160 (Tex. 1982).

11. 624 S.W.2d 203 (Tex. Civ. App.—Houston [1st Dist.] 1981).

the report was admissible for the limited purpose of showing that the developer acted reasonably in abandoning a sewer line and thus met its duty to mitigate damages.¹² The supreme court explained that the report, when admitted for such a limited purpose, would not have been hearsay, because it would have been admitted not to prove the truth of the matters stated therein but as evidence of whether the developer acted prudently.¹³

Another example of when a limited offer takes a document out of the parameters of hearsay appeared in *Ashford Development, Inc. v. USLife Real Estate Services Corp.*¹⁴ *Ashford* involved a suit by a borrower against a lender and mortgage broker to recover a fee the borrowers had paid in connection with a mortgage loan application. The Dallas court of appeals affirmed the admission into evidence of certain documents that the lender offered for a limited purpose. The court held that the documents were offered solely with respect to the issue of the reasonableness of USLife's conduct and not to prove the truth of the matters contained therein.¹⁵ By reversing the case on other grounds, the supreme court rendered this evidence question moot.¹⁶

B. Business Records

The previous statutory exception to the hearsay rule allowing the admission of business and other records¹⁷ has been replaced by Texas Rule of Evidence 803(6), which governs the introduction of records of regularly conducted activities.¹⁸ The Texas Rules of Evidence do not, however, contain a specific provision regarding the admission of summaries of records of regularly conducted activities. Practitioners therefore should assume that the method of introducing summaries of business records probably will not change from prior Texas practice. The practice for admitting such summaries was recently described in *Hovas v. O'Brien*.¹⁹ In affirming the trial court's admission into evidence of certain business record summaries, the court of appeals found that the appellee had met her burden of proof for the admission of summaries by proving that the records were voluminous, that they were made available for inspection by the opponent or were present in the courtroom, and that the business records themselves were admissible into evidence.²⁰

12. 642 S.W.2d at 167.

13. *Id.*

14. 649 S.W.2d 96 (Tex. App.—Dallas), *rev'd on other grounds*, 661 S.W.2d 933 (Tex. 1983).

15. 649 S.W.2d at 100-101.

16. 661 S.W.2d 933, 934 (Tex. 1983).

17. TEX. REV. CIV. STAT. ANN. art. 3737e (Vernon Supp. 1982-1983). Article 3737e was repealed in 1983 in conjunction with the adoption of the Texas Rules of Evidence.

18. TEX. R. EVID. 805(6). The new practice to qualify business records remains substantially the same as the procedure under former TEX. REV. CIV. STAT. ANN. art. 3737e.

19. 654 S.W.2d 801 (Tex. App.—Houston [14th Dist.] 1983, writ *ref'd n.r.e.*).

20. *Id.* at 803.

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

A well-recognized exception to the hearsay rule allows the admission into evidence of statements tending to show either the state of mind or the physical condition of the declarant.²¹ The long line of cases carving out this common law exception to the hearsay rule is now codified in Texas Rule of Evidence 803(3), which governs the admission of statements relating to then existing mental, emotional, or physical conditions.²² During this survey period the Texas Supreme Court in *Walters v. American States Insurance Co.*²³ construed this exception. *Walters* involved a claim for workers' compensation death benefits. The issue was whether the decedent died in the course of his employment. On the date of his death, employee Justice accompanied his employer, Lampport, to meet a potential client at the Dallas Airport Marina Hotel. Both Justice and Lampport were found shot to death later that day in a field near the Dallas-Fort Worth Airport. At the time of trial, the assassin was still unknown. The trial court admitted testimony of Lampport's employees that an unknown customer first called Lampport's office on the Thursday prior to the Saturday murders and said that he wanted to see Lampport about a restaurant project. On Friday Lampport's office again received a call from a customer who wanted to talk to Lampport about an interior design job for a restaurant. On Friday night Lampport himself received such a call. The customer called a total of three times to speak with Lampport, not Justice. The evidence further established that Justice had accompanied Lampport on the trip in question to meet a client to discuss the design of a restaurant. In ruling that the testimony of Lampport's employees regarding the telephone calls was admissible, the supreme court held that statements tending to show the state of mind and immediate purpose of a declarant are exceptions to the hearsay rule.²⁴ The supreme court explained that Lampport's statement to his employees regarding the call he received was admissible to show his then existing state of mind, namely, Lampport's belief that he and Justice were going to the airport to meet a client.²⁵

D. *Dying Declarations and Excited Utterances*

Texas Rule of Evidence 804(b) (2) excepts from the hearsay definition in civil cases "[a] statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death."²⁶ This civil dying declarations exception is more liberal than the hearsay exception in criminal cases, because the death of the declarant is not a prerequisite to admission. Under

21. See generally 1A R. RAY, TEXAS PRACTICE, LAW OF EVIDENCE §§ 831-877 (3d ed. 1980) (basis and details of exception).

22. TEX. R. EVID. 803(3).

23. 654 S.W.2d 423 (Tex. 1983).

24. *Id.* at 427.

25. *Id.* at 427-28.

26. TEX. R. EVID. 804(b)(2).

rule 804(b) (2) the declarant must only have believed his death was imminent when he made the statement for the statement to be admissible.²⁷

During this survey period the Tyler court of appeals found the dying declarations exception inapplicable in a criminal case. In *Trahan v. State*²⁸ the court found that the statement of the soon to be deceased Mr. Justice, identifying his assailant as the defendant, was not a dying declaration because Justice, who died forty-three days later, refused to go to the hospital in the ambulance that had been summoned for him after his assault. Approximately one hour after the ambulance left, another party took Justice to the hospital. The court of appeals ruled that Justice's original refusal to go to the hospital indicated that he was not conscious of approaching death without hope of recovery.²⁹ The court held, however, that Justice's statements were admissible as spontaneous exclamations, frequently referred to as *res gestae* or excited utterances.³⁰

E. Vicarious Admissions

Several cases during the survey period followed *Big Mac Trucking Co. v. Dickerson*,³¹ which limited the category of agent or servant admissions that are admissible against a principal. In *Big Mac* the Texas Supreme Court held that the hearsay statements of an agent or employee should be admitted against a principal as vicarious admissions only when the trial judge finds, as a preliminary fact, that the statements were authorized.³² Had the cases that followed *Big Mac*³³ been tried after September 1, 1983, the evidentiary holdings would have been different because Texas Rule of Evidence 801(e)(2)(d) reversed the much criticized *Big Mac* rule.³⁴ Under the new rule, admissions of agents or employees are admissible if they are made during the existence of an employment relationship and concern matters within the scope of the employment relationship, even though the agent or servant has no authority to speak.³⁵

27. Note that the dying declarations exception to the hearsay rule is contained in rule 804(b), which articulates those exceptions for which the declarant must be unavailable as a witness. *Id.* 804(b).

28. 654 S.W.2d 478 (Tex. App.—Tyler 1983, writ ref'd).

29. *Id.* at 481.

30. *Id.* The excited utterance exception to the hearsay rule is codified at TEX. R. EVID. 803(2). Note that while the dying declaration exception requires that the declarant be unavailable at time of trial, the excited utterance exception to the hearsay rule is contained in rule 803, which provides that the availability of the declarant is immaterial to the admissibility of the excited utterance. *Id.* 803.

31. 497 S.W.2d 283 (Tex. 1973).

32. *Id.* at 287.

33. *See, e.g.*, *Green v. Texas Elec. Wholesalers, Inc.*, 651 S.W.2d 4, 7 (Tex. App.—Houston [1st Dist.] 1982, no writ) (unauthorized statement of truck driver not admissible to show employer's negligence); *LaRoque v. Sanchez*, 641 S.W.2d 298, 302 (Tex. App.—El Paso 1982, writ ref'd n.r.e.) (unauthorized statements of employee that were not part of *res gestae* of tort were inadmissible).

34. TEX. R. EVID. 801(e)(2)(d).

35. *Id.*

F. Admissions of Party-Opponents

A distinction exists between two frequently confused exceptions to the hearsay rule, the declarations against interest exception and the admissions of parties exception.³⁶ Admissions of party-opponents are admissible into evidence without satisfying any of the requirements for declarations against interest.³⁷ Broadly stated, statements of a person that are inconsistent with proprietary or pecuniary interests are considered to be declarations against interest.³⁸ Admissions do not need to be against the interest of the party when made, and the party making the admission need not be unavailable.³⁹ The Texas Rules of Evidence, while treating statements against interest as exceptions to the hearsay rule, treat admissions by a party-opponent as statements that are not hearsay.⁴⁰ During this survey period, the Tyler court of appeals considered the hearsay exception for admissions of party-opponents in *Laviage v. Laviage*.⁴¹ In refusing the appellant's argument that two written memoranda of previous offers to compromise were admissions of a party-opponent, the court determined that offers of compromise are not admissible in evidence unless the compromise is completed.⁴²

G. Judicial Admissions

A fact judicially admitted does not require evidence and establishes as a matter of law the fact admitted, precluding a trial court from finding any contrary facts.⁴³ The Texas Rules of Evidence, while not specifically distinguishing judicial admissions from other admissions, treat admissions not as exceptions to the hearsay rule but as statements that simply are not hearsay.⁴⁴ Judicial admissions can be made by either a party himself or by someone authorized to make statements on his behalf,⁴⁵ such as his attorney.

An example of a judicial admission made by a party himself arose in *Cunningham v. Parkdale Bank*.⁴⁶ In *Cunningham* an independent administrator submitted an application to resign. In support of his application

36. TEX. R. EVID. 801(e)(2) defines admissions of party-opponents and *id.* 803(24) defines statements against interest.

37. See generally 1A R. RAY, *supra* note 21, § 1122, at 270-73 (distinction between admissions and declarations against interest).

38. *Id.* § 1001, at 248.

39. *Id.* Note that TEX. R. EVID. 803(24), governing statements against interest, makes the availability of the declarant immaterial to the admission of the statement against interest.

40. *Id.* 801(e).

41. 647 S.W.2d 758 (Tex. App.—Tyler 1983, no writ).

42. *Id.* at 760.

43. 1A R. RAY, *supra* note 21, § 1147, at 299-300. The Texas Supreme Court established five requirements for judicial admissions in *Griffin v. Superior Ins. Co.*, 161 Tex. 195, 201, 338 S.W.2d 415, 419 (1960). This opinion, as well as the strong dissent by four justices, contains a comprehensive discussion of the nuances involved in judicial admissions.

44. See TEX. R. EVID. 801(e)(2).

45. *Id.*

46. 650 S.W.2d 484 (Tex. App.—Houston [14th Dist.] 1983, no writ).

the administrator filed a sworn final accounting in which he admitted wrongful conversion of estate funds and prayed that the court audit, settle, and approve the account. The Houston court of appeals held that the statement in the accounting was a judicial admission and constituted sufficient evidence for the court to enter judgment that the converted amounts be returned to the estate.⁴⁷

Four cases decided during this survey period held the pleading of certain facts to be judicial admissions. The Texas Supreme Court in *Houston First American Savings v. Musick*⁴⁸ held that assertions of fact contained in live pleadings and not pled in the alternative are regarded as formal judicial admissions.⁴⁹ The San Antonio court of appeals in *Valdez v. Barrera*⁵⁰ held that admissions made by a party in abandoned pleadings may also be introduced into evidence as admissions.⁵¹

Similarly, admissions in the pleadings in a separate lawsuit were held properly received into evidence as admissions in *Whataburger, Inc. v. Rutherford*.⁵² *Whataburger* involved a suit by the prizewinner in a promotional contest against the firm running the promotion arising from defects in a vehicle that the plaintiff received as the prize. The defendant, in a separate suit against the supplier of the vehicle, alleged that the vehicle was unacceptable and unfit for use as an automobile. The Dallas court of appeals held that the trial court properly received these allegations into evidence as admissions, because in the separate suit against the supplier the defendant in the instant suit had affirmatively claimed damages for defects rather than merely demanding indemnity for the damages sought by the present plaintiff.⁵³ The distinction between affirmative relief and indemnity also arose in *Forest Lane Porsche-Audi, Inc. v. Staten*,⁵⁴ where the court held that pleadings alleging defective paintwork in a third-party indemnity complaint by an automobile dealership against the party who painted the plaintiff's automobile did not constitute admissions of that fact in plaintiff's suit against the dealership arising from the purchase of an automobile.⁵⁵

47. *Id.* at 487.

48. 650 S.W.2d 764 (Tex. 1983).

49. *Id.* at 769.

50. 647 S.W.2d 377 (Tex. App.—San Antonio 1983, no writ).

51. *Id.* at 383. The court of appeals in *Valdez* wrote that admissions in abandoned pleadings are admissible but not conclusive against the pleader. *Id.* (citing *Long v. Knox*, 155 Tex. 581, 585, 291 S.W.2d 292, 293-94 (1956)). The court explained that admissions in abandoned pleadings are evidence that the jury is entitled to consider, and the probative value of the admission against interest is a question of fact for the jury. Although any admission in an abandoned pleading ceases to bind the pleader, such pleading still remains a statement seriously made and can be introduced into evidence as an admission. 647 S.W.2d at 382.

52. 642 S.W.2d 30, 32 (Tex. App.—Dallas 1982, no writ).

53. *Id.*

54. 638 S.W.2d 62 (Tex. App.—Dallas 1982, no writ).

55. *Id.* at 63.

II. EXPERT OPINION EVIDENCE

A. *Texas Rules of Evidence*

Some of the most significant changes wrought by the Texas Rules of Evidence are contained in article VII, governing opinions and expert testimony. Article VII allows far more liberal admissions of experts' and lay witnesses' opinions based on personal perceptions than did prior case law. Lay witnesses may now state their opinions and no longer must state the specific facts on which their opinions are based, as long as their opinions are "helpful" and "rationally based" on perceptions.⁵⁶ Further, Texas Rule of Evidence 704 provides that opinion testimony is not objectionable because it embraces an ultimate issue to be decided by the jury.⁵⁷ In addition, the facts that form the bases for an expert's opinion may now be outside the record if they are the type of hearsay reasonably relied upon by experts in the same field.⁵⁸ This rule may nullify the limitation of *Moore v. Grantham*⁵⁹ that the testimony of an expert may not be based solely on hearsay. Virtually all expert testimony is necessarily based at least in part on hearsay, and Texas Rule of Evidence 703 seems to abolish the limitation on how much hearsay an expert may consider in formulating his opinions.

While rule 703 defines the substance of an expert's opinion, rule 705 defines the method for offering it. In this regard, rule 705 contains a very important change from prior Texas practice. It is no longer necessary for an expert witness to present his opinions through answers to hypothetical questions. Rather, an expert may now state an opinion without stating its foundation, leaving the other side to inquire as to the bases of the opinion.⁶⁰ The court, however, can still require the expert to state the data underlying his opinion prior to admitting the opinion.⁶¹

B. *Admissibility*

If the trier of fact would be assisted in understanding evidence or determining a fact in issue by specialized knowledge, then "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."⁶² An expert witness may also draw inferences that a jury is not competent to draw from facts in

56. TEX. R. EVID. 701.

57. *Id.* 704.

58. *Id.* 703.

59. 599 S.W.2d 287, 289 (Tex. 1980).

60. TEX. R. EVID. 705.

61. *Id.* Another important change in examination of experts is contained in *id.* 803(18), the hearsay exception governing learned treatises. Learned treatises may now be proved by one's own expert on direct examination, by other expert testimony, or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. Prior Texas law allowed learned treatises to be used only to cross-examine an expert regarding his opinion, not as substantive evidence. Prior case law also had required that the expert being examined recognize the treatise as authoritative as a prerequisite to its use in cross-examination. See *Bowles v. Bourdon*, 148 Tex. 1, 4, 219 S.W.2d 779, 783 (Tex. 1949).

62. TEX. R. EVID. 702.

evidence.⁶³ To justify the use of expert opinion testimony, however, the subject of the inference or conclusion must be beyond the knowledge of the typical layman.⁶⁴ The witness must also have sufficient skill, knowledge, or experience within the particular field to demonstrate that he is qualified to express an opinion.⁶⁵

The trial court has tremendous discretion in determining the admissibility of expert opinion testimony, and an appeals court will not disturb a trial court's decision to admit or exclude expert testimony absent an abuse of discretion.⁶⁶ During this survey period, the San Antonio court of appeals held in *Storm Associates, Inc. v. Texaco, Inc.*,⁶⁷ a suit seeking a determination of the parties' rights and interests in uranium, that a trial court did not err in qualifying as an expert in the area of mining engineering a full professor of mineral engineering at Columbia University.⁶⁸ The court so held notwithstanding that the professor had no formal education in geology, hydrology, or mining engineering and was not a registered engineer in Texas or any other state. Similarly, the Houston court of appeals held that a trial court did not abuse its discretion by excluding the testimony of the appellant's executive vice president as to the value of certain equipment in a suit on a sworn account, where the witness had little or no expertise in the area of the equipment and had depended upon other parties to evaluate the equipment.⁶⁹

C. Effect of Opinion Testimony

Several appellate courts have recently considered the effect of expert opinion testimony and whether either a court or jury is bound by the opinion of an expert. In *Missouri Pacific Railroad Co. v. Midland Independent School District*⁷⁰ the court held that a trial court was not required to accept the value placed on a railroad's operating properties by the railroad's expert witness for purposes of assessment of taxes.⁷¹ Another appellate court held in *Tenngasco Gas Gathering Co. v. Bates*⁷² that a jury may choose among experts' opinion testimony on the question of value and set the

63. See 2 R. RAY, *supra* note 21, § 1400, at 23-27.

64. *Id.*

65. *Id.*

66. See *Wilson v. Scott*, 412 S.W.2d 299, 303-04 (Tex. 1967) (testimony of retired doctor with no special knowledge of stapedectomy excluded).

67. 645 S.W.2d 579 (Tex. App.—San Antonio 1982, no writ).

68. *Id.* at 586.

69. *Alpine Geophysical Assoc., Inc. v. Quantum Elec. Corp.*, 651 S.W.2d 57, 60 (Tex. App.—Houston [14th Dist.] 1983, no writ).

70. 647 S.W.2d 62 (Tex. App.—El Paso 1983, writ ref'd n.r.e.).

71. *Id.* at 65. The El Paso court concluded, in reversing and remanding the decision, that a failure by the taxing authorities to use the cost approach and the income approach to value, as approved by the Texas Supreme Court in *Polk County v. Tenneco, Inc.*, 554 S.W.2d 918, 922-23 (Tex. 1977), and reiterated in *Missouri-Kan.-Tex. R.R. v. City of Dallas*, 623 S.W.2d 296, 299-300 (Tex. 1981), and the use instead of only a market approach, which has been held to be of little use when there are no real comparable sales, resulted in an arbitrary and erroneous method of appraising the land in question. 647 S.W.2d at 65.

72. 645 S.W.2d 496 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (condemnation case).

value at any amount between the highest and the lowest values expressed by the experts.⁷³ Yet another appellate court held that where conflict is present in expert testimony, a jury is not required to believe any expert opinion.⁷⁴

D. Testimony of Medical Experts

The trier of fact usually determines the issue of causation even when expert testimony demonstrates probable cause.⁷⁵ Testimony that an event is a possible cause of the condition is not evidence of reasonable medical probability unless no other causal evidence is produced and the condition more likely than not resulted from the event.⁷⁶ In reversing and remanding instructed verdicts for the defendants in a medical malpractice case, the Corpus Christi court of appeals held in *Valdez v. Lyman-Roberts Hospital, Inc.*⁷⁷ that the plaintiffs had met their burden of proving that proper diagnosis and treatment could have been made at the time in question under the same or similar circumstances, even in the absence of expert testimony so stating.⁷⁸ Lay testimony that no doctor was called to care for the decedent, coupled with an expert's testimony that the decedent could have been alive at the time of trial had she received proper care and treatment, was sufficient evidence to overcome the defendant's motions for instructed verdict.⁷⁹ Continuing this trend toward judging medical testimony by its content rather than its form, the Texarkana court of appeals in *Home Insurance Co. v. Davis*⁸⁰ reversed and remanded a judgment in an occupational disease case against a workers' compensation carrier.⁸¹ The carrier's medical expert had testified that the "most likely etiology" of the plaintiff's chronic bronchitis was smoking. The court held that medical testimony is not to be judged by semantics or by use of magic words, but by its substance.⁸²

Testimony by a medical expert in a medical malpractice case should define the applicable standard of care for a specific condition and then state what conduct of the defendant violated that standard of care.⁸³ In reversing and remanding a summary judgment granted in favor of the de-

73. *Id.* at 498.

74. *Thompson v. Mercantile Thrift Stores, Inc.*, 650 S.W.2d 120, 122 (Tex. App.—Houston [14th Dist.] 1983, no writ). The court explained that testimony of expert witnesses must be taken as true insofar as it establishes facts, but opinions as to deductions from those facts are not binding on the trier of fact. *Id.*

75. *Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703, 706 (Tex. 1970) (doctor testified as to possible causes for separation of sutures of mesentery).

76. *Id.* at 707.

77. 638 S.W.2d 111 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.). This case is more fully discussed in Addison, *Evidence, Annual Survey of Texas Law*, 37 Sw. L.J. 265, 278-79 (1983).

78. 638 S.W.2d at 114-15.

79. *Id.*

80. 642 S.W.2d 268 (Tex. App.—Texarkana 1982, no writ).

81. *Id.* at 269.

82. *Id.*

83. *Snow v. Bond*, 438 S.W.2d 549, 551 (Tex. 1969); *Burks v. Meredith*, 546 S.W.2d 366, 370 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

fendant doctor, the Fort Worth court of appeals held in *Coan v. Winters*,⁸⁴ a medical malpractice case, that the testimony of a medical expert, who stated in effect whether the defendant doctor was negligent in his care and treatment of the plaintiff, was inadmissible and could not serve as the basis for granting a summary judgment.⁸⁵ *Coan* is a surprising case because the court found the defendant's expert testimony inadequate to support the summary judgment even though the plaintiff did not controvert it. The court wrote that the expert testimony was not "clear, positive direct, otherwise credible and free from contradictions and inconsistencies" as required by Texas Rule of Civil Procedure 166-A(c).⁸⁶ Further, because the plaintiff's hospital records were introduced into evidence, the evidence contained certain contradictions and inconsistencies, as well as direct evidence as to the probability of negligence on the part of the defendant.⁸⁷

E. Underlying Data

*Rogers v. Gonzales*⁸⁸ is an interesting case because the reasoning of the Corpus Christi court of appeals seems to follow the Texas Rules of Evidence prior to their effective date and without reference to them. *Rogers* involved the admission into evidence of the testimony of a highway patrolman who had investigated the traffic accident that was the basis of the suit. The patrolman was allowed to testify as an expert witness after describing his training and experience in accident investigation. The court of appeals held that the patrolman's failure to detail what physical evidence he relied upon in reaching his opinions did not negate the probative value of his statement but instead merely affected the weight to be given his opinion.⁸⁹ This approach parallels the practice now permitted by Texas Rule of Evidence 705, but is a deviation from prior Texas practice.⁹⁰

F. Lay Opinions

As noted above, the Texas Rules of Evidence greatly liberalize the admission of opinion testimony by lay witnesses.⁹¹ Texas case law has always been liberal, however, in allowing an owner of property to testify as to his opinion of its value. The owner can give such testimony even though he would not be qualified to testify as an expert to the value of the same property if another person owned it.⁹² One appellate court during the survey period allowed testimony by the owner of a vehicle that his car was

84. 646 S.W.2d 655 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

85. *Id.* at 657-58.

86. *Id.*; see TEX. R. CIV. P. 166-A(c).

87. 646 S.W.2d at 659.

88. 654 S.W.2d 509 (Tex. App.—Corpus Christi 1983, no writ).

89. *Id.* at 513-14.

90. See *Reserve Life Ins. Co. v. Everett*, 275 S.W.2d 713, 716 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.) (hypothetical presentation required when doctor could not supply facts upon which he based his expert inference).

91. TEX. R. EVID. 701; see *supra* text accompanying note 56.

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

worth "around \$3,000.00."⁹³ The court explained that the rules pertaining to establishing value should be liberally construed when the owner of the property is the witness testifying as to its value.⁹⁴

Guidance in interpreting the new liberal admission of lay testimony under Texas Rule of Evidence 701 is available in a recent federal case. In *Soden v. Freightliner Corp.*⁹⁵ the testimony at issue was that of a truck service manager in charge of daily maintenance of sixty trucks primarily belonging to the defendant manufacturer. The suit involved a products liability claim based upon the post-collision fuel ignition fire of a truck. The plaintiff did not offer the truck service manager as an expert witness, but the service manager testified that in the normal course of performing his duties, he had observed holes or cuts in the truck's fuel tanks near the location of the pointed step brackets. This observation was the basis for his opinion that the brackets were the cause of the holes and that the situation was dangerous and would have been apparent to a normal person in his position. In affirming the admissibility of this lay testimony, the Fifth Circuit Court of Appeals articulated the three elements that must be present before lay opinion evidence is admissible under Federal Rule of Evidence 701, of which Texas Rule of Evidence 701 is a verbatim copy. The Fifth Circuit explained that, first, the witness must have personal knowledge of the facts from which his opinion is derived; second, a rational connection must exist between the opinion of the lay witness and the facts on which it is based; and third, the opinion must be helpful in understanding the testimony or in determining a fact issue.⁹⁶ The court further stated that under certain circumstances a layman may express an opinion even on matters appropriate for expert testimony if these enumerated requirements are satisfied.⁹⁷ An opinion is not necessarily inadmissible when it goes to an ultimate fact under Federal Rule of Evidence 701⁹⁸ and, as noted earlier, Texas Rule of Evidence 704 provides that opinion or inference testimony is not objectionable because it embraces an ultimate issue of fact.⁹⁹

The Houston court of appeals considered whether the testimony of a lay witness embraced a legal conclusion in *Shell Oil Co. v. Waxler*.¹⁰⁰ *Waxler* involved a suit by an independent contractor's employee against an oil company to recover for personal injuries sustained while working on the oil company's premises. The trial court rendered judgment on a jury verdict for the employee, and the oil company appealed. Appellant Shell complained of the trial court's admission into evidence of the testimony of

to car's value); *Barstow v. Jackson*, 429 S.W.2d 536, 538 (Tex. Civ. App.—San Antonio 1968, no writ) (owner of car damaged in collision could testify to reduced market value).

93. *First Nat'l Bank v. Brown*, 644 S.W.2d 808, 811 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).

94. *Id.*

95. 714 F.2d 498 (5th Cir. 1983).

96. *Id.* at 511.

97. *Id.*

98. FED. R. EVID. 701.

99. See *supra* text accompanying note 57.

100. 652 S.W.2d 454 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

certain lay witnesses regarding the legal duties and obligations of Shell and its independent contractor, Brown & Root, the plaintiff's employer. Shell contended in particular that its safety representative contractor, Mr. Hruska, was questioned extensively regarding his duties and was asked whether Shell had an obligation to provide the plaintiff with a safe place to work. Shell also argued that a Brown & Root engineer, Mr. Harris, was improperly asked what Shell could have required Brown & Root to do about rectifying a dangerous condition maintained by the independent contractor on Shell's property. Shell argued on appeal that a witness may not testify to a legal conclusion¹⁰¹ and that the existence of a legal duty is a matter of law.¹⁰² The *Waxler* court reasoned that although some of the questions to Hruska tended to call for legal conclusions, the answers he gave did not pertain so much to Shell's contractual relationship with Brown & Root as to the witness' perception of his own job responsibilities as safety representative contractor.¹⁰³ The court further found that Harris's testimony did not constitute a legal conclusion because he testified only with respect to the action Shell would have taken in the event it had discovered a safety violation by one of its independent contractors.¹⁰⁴

III. PAROL EVIDENCE

The parol evidence rule proscribes the use of extrinsic evidence to interpret a writing. The court may allow extrinsic evidence only if it finds a contract to be ambiguous.¹⁰⁵ The rule also prohibits parol evidence if a writing is integrated.¹⁰⁶

During this survey period, several appellate courts rejected attempts to introduce parol evidence on varied and ingenious grounds. One court held parol evidence inadmissible to vary the unambiguous terms of a written contract signed by a party acting as an agent, where the contract gave no indication that an agency existed or that the party who signed it acted other than as a principal.¹⁰⁷ The court so held even though the other contracting party knew the identity of the principal and the parties to the contract intended that the agent not be personally bound.¹⁰⁸ Parol evidence was also held inadmissible to show an oral condition precedent to a written contract.¹⁰⁹ Such evidence must be excluded because of the well-estab-

101. Appellant relied on *Carr v. Radkey*, 393 S.W.2d 806, 810 (Tex. 1965), and *Lindley v. Lindley*, 384 S.W.2d 676, 682 (Tex. 1964) (both holding testimony regarding legal capacity of testator to execute will was inadmissible).

102. See *Abalos v. Oil Dev. Co.*, 544 S.W.2d 627, 631 (Tex. 1976).

103. 652 S.W.2d at 459.

104. *Id.*

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

106. Integration is the practice of embodying a transaction in a final written agreement that is intended to incorporate in its terms the entire transaction. See 2 R. RAY, *supra* note 21, § 1602, at 312-14.

107. *Martin v. Xarin Real Estate, Inc.*, 703 F.2d 883, 891 (5th Cir. 1983).

108. *Id.*

109. *Pan Am. Bank v. Nowland*, 650 S.W.2d 879, 884 (Tex. App.—San Antonio 1983, no writ) (parol evidence relating to collateral pledge agreement inadmissible).

lished rule that a contemporaneous oral agreement is not admissible where it contravenes the terms of an unambiguous written instrument.¹¹⁰

A third court held parol evidence inadmissible to explain an agreement between two defendants and the plaintiff to the effect that defendants would pay plaintiff \$50,000 if the plaintiff failed to recover at least that much from third-party defendants.¹¹¹ The court found the agreement to be complete and unambiguous on its face, so that parol evidence could not be used to explain its terms.¹¹² Nor was parol evidence from an insurance company's employee in another case allowed to contradict what the court found to be the clearly stated intentions of the parties as shown in an insurance contract.¹¹³ One court observed that when the trial court erroneously admits parol evidence into evidence, that evidence may not be considered on appeal because the parol evidence rule is a rule of substantive law.¹¹⁴ By contrast, the court in *Scholz v. Heath*¹¹⁵ held parol evidence admissible to explain an ambiguity in a deed.¹¹⁶ The court in *Stanley v. Conner Construction Co.*¹¹⁷ held parol evidence admissible to show that a corporation was the true borrower in a loan contract and that its president intended merely to guarantee corporate indebtedness.¹¹⁸

IV. JUDICIAL NOTICE

Judicial notice is now governed by article II of the Texas Rules of Evidence. Texas Rule of Evidence 201, governing judicial notice of adjudicative facts, is a verbatim adoption of Federal Rule of Evidence 201 and basically does not alter existing Texas practice. Texas Rule of Evidence 201 defines the facts of which judicial notice properly may be taken.¹¹⁹

110. *Id.* (citing *Lewis v. East Tex. Fin. Co.*, 136 Tex. 149, 150, 146 S.W.2d 977, 980 (1941); *McPherson v. Johnson*, 436 S.W.2d 930, 932 (Tex. Civ. App.—Amarillo 1968, writ ref'd n.r.e.)).

111. *General Motors Corp. v. Grizzle*, 642 S.W.2d 837, 842 (Tex. App.—Waco 1982, writ dism'd).

112. *Id.*

113. *Entzminger v. Provident Life & Acc. Ins. Co.*, 652 S.W.2d 533, 536 (Tex. App.—Houston [1st Dist.] 1983, no writ).

114. *Incorporated Carriers, Ltd. v. Crocker*, 639 S.W.2d 338, 341 (Tex. App.—Texarkana 1982, no writ).

115. 642 S.W.2d 554 (Tex. App.—Waco 1982, no writ). This case involved an attempt to convey half of an entire mineral estate, but the deed excepted a prior one-half royalty interest while simultaneously reserving a one-half mineral estate. The court found that ambiguity arose as to whether the grantor or the grantee received the one-half royalty interest. *Id.* at 557.

116. *Id.*

117. 651 S.W.2d 34 (Tex. App.—El Paso 1983, no writ). The appellant contended that the letter agreement and real estate lien note in question were unambiguous, that parol evidence was inadmissible to vary their effect, and that plaintiff Stanley had signed the note in his individual capacity as a borrower. The El Paso court of appeals, in affirming the admission of the parol evidence, relied on TEX. BUS. & COM. CODE ANN. § 3.415(c) (Tex. UCC) (Vernon 1968), which provides: "As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such. In other cases the accommodation character may be shown by oral proof." 651 S.W.2d at 37.

118. 651 S.W.2d at 38-39.

119. TEX. R. EVID. 201.

The rule also prescribes when the taking of judicial notice is discretionary or mandatory, the time of taking notice, and the instructions to the jury.¹²⁰ Other rules in article II govern the determination of the laws of other states¹²¹ and of foreign countries.¹²²

During this survey period, the appellate courts of Texas affirmed the taking of judicial notice of such varied subjects as that four ounces of marijuana is a usable amount¹²³ and, in a proceeding contesting an appellant's affidavit of inability to pay costs on appeal, the testimony of two doctors that the claimant was able to work at several types of jobs.¹²⁴ The Tyler court of appeals took judicial notice on appeal of certain mechanics' and materialmen's lien statutes for purposes of establishing that the act of one partner in signing a general indemnity agreement was in fact an act for carrying on the business of the partnership within the meaning of the Texas Uniform Partnership Act.¹²⁵

V. IMPEACHMENT

Several of the Texas Rules of Evidence specifically govern impeachment of witnesses.¹²⁶ During this survey period the Corpus Christi court of appeals in *Houston Lighting & Power Co. v. Sue*¹²⁷ reaffirmed the rule that impeachment evidence on collateral matters that affects the credibility of a witness or party is clearly admissible.¹²⁸ Reasoning that the rule of admissibility of impeachment evidence should be liberal and that the trial court should have the discretion to receive any evidence that promises to expose falsehood,¹²⁹ the court affirmed the admission into evidence of a settlement agreement that tended to impeach the testimony of the defendant's representative, who had testified that he had no authority to settle any problem with the plaintiff lessee in this suit involving trespass on grazing lands.¹³⁰

VI. PRIVILEGES

Article V of the Texas Rules of Evidence governs privileges. The article creates no new privileges and recognizes privileges only as created under

120. *Id.*

121. *Id.* 202.

122. *Id.* 203.

123. *Siroky v. State*, 653 S.W.2d 476, 480 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

124. *Keller v. Walker*, 652 S.W.2d 542, 544 (Tex. App.—Dallas 1983, no writ).

125. *Durkin v. American Gen. Fire & Casualty Co.*, 651 S.W.2d 41, 45 (Tex. App.—Tyler 1983, writ ref'd n.r.e.), (citing TEX. REV. CIV. STAT. ANN. arts. 5452, 6132(b), § 9(1) (Vernon 1958 & Supp. 1984)).

126. See TEX. R. EVID. 607 (who may impeach); *id.* 608 (evidence of character and conduct of witness); *id.* 609 (impeach by evidence of conviction of crime).

127. 644 S.W.2d 835 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).

128. *Id.* at 842; see also *Royal v. Cameron*, 382 S.W.2d 335, 342 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.) (insurance policy provisions used to impeach appellant's testimony that she could not afford to see doctor at earlier date).

129. 644 S.W.2d at 842; see also 1 R. RAY, *supra* note 21, § 685, at 622 (list of types of evidence that should be admissible).

130. 644 S.W.2d at 842.

the rules. The rules provide for a lawyer-client privilege,¹³¹ a husband-wife communications privilege,¹³² a privilege for communications to clergymen,¹³³ a privilege for political votes,¹³⁴ a privilege for trade secrets,¹³⁵ a privilege for the identity of informers,¹³⁶ a physician-patient privilege,¹³⁷ and confidentiality for mental health information.¹³⁸ The rules also provide that privileges are waived by voluntary disclosure¹³⁹ and that disclosure of privileged matters under compulsion or without opportunity to claim a privilege does not defeat the claim of privilege.¹⁴⁰ The Texas Rules of Evidence have eliminated the statutory accountant-client privilege.¹⁴¹ Contrary to prior Texas practice, the rules abolish the eavesdropper exception to the lawyer-client privilege and the husband-wife communication privilege.¹⁴²

During this survey period two Texas courts considered the parameters of the attorney-client privilege. *Mortgage American Corp. v. American National Bank*¹⁴³ indicates that mere delivery of a pre-existing document to an attorney does not invoke the attorney-client privilege for the document. *Mortgage American* involved a memorandum that had been drafted by a mortgage company president regarding the disputed sale of government national mortgage association certificates. The memorandum had been drafted before the company retained counsel and not for purposes of obtaining counsel or legal advice. The court properly held that the memorandum was not subject to the attorney-client privilege and was thus admissible in the bank's breach of contract action against the mortgage company.¹⁴⁴

In response to an interesting but unsuccessful attempt to invoke the attorney-client privilege, the San Antonio court of appeals in *Lopez v. State*¹⁴⁵ held that the privilege did not preclude an attorney who had rep-

131. TEX. R. EVID. 503.

132. *Id.* 504.

133. *Id.* 505.

134. *Id.* 506.

135. *Id.* 507.

136. *Id.* 508.

137. *Id.* 509.

138. *Id.* 510.

139. *Id.* 511.

140. *Id.* 512.

141. TEX. REV. CIV. STAT. ANN. art. 41a—1, § 26 (Vernon Supp. 1982-1983) was repealed in conjunction with the enactment of the Texas Rules of Evidence, and the rules do not provide for an accountant-client privilege to replace it. Such privilege still exists, however, in the context of the attorney-client privilege or as work-product. TEX. R. EVID. 503(a)(4) has expanded the attorney-client privilege by including in the definition of "representative of the lawyer" "an accountant who is reasonably necessary for the lawyer's rendition of the professional legal services."

142. TEX. R. EVID. 504, the husband-wife communication privilege, codifies practice previously governed by TEX. REV. CIV. STAT. ANN. art. 3715 (Vernon 1926), which has been repealed. Both this rule and rule 503, governing the lawyer-client privilege, omit the eavesdropper from the list of exclusive exceptions to these privileges. See TEX. R. EVID. 503, 504.

143. 651 S.W.2d 851 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

144. *Id.* at 858.

145. 651 S.W.2d 830 (Tex. App.—San Antonio 1983, pet. ref'd).

resented the defendant in a previous, unrelated matter from testifying that the defendant was present at the scene of the crime.¹⁴⁶ The attorney testified as to the defendant's presence at the scene without disclosing the prior attorney-client relationship. Appellant contended that the witness could identify him only because of the attorney-client relationship. The court correctly reasoned that a client's mere identity is not protected by the attorney-client privilege.¹⁴⁷

VII. ADMISSIBILITY

A. Rule of Optional Completeness

When a party introduces only a portion of a writing or recorded statement, Texas Rule of Evidence 106 allows the adverse party to introduce any other part of it contemporaneously with the introduction of the incomplete portion.¹⁴⁸ Rule 106 allows admission of other portions of the document "which ought in fairness to be considered" with the incomplete portions introduced.¹⁴⁹ At times, however, a complete document will not be admissible even under rule 106. A pre-Texas Rules of Evidence case decided during this survey period, *Brown v. Gonzales*,¹⁵⁰ exemplifies such a situation without reference to rule 106. The plaintiff in *Brown* was struck by a boat owned by his stepfather and driven by the defendant. The court of appeals held that the trial court did not err in excluding from evidence the settlement agreement between the plaintiff and the parties responsible for the boat's manufacture and sale, even though the defendant had been permitted to edit the agreements and offer those portions that were favorable to him.¹⁵¹ The court reasoned that the portions that the trial court excluded were hearsay, were prejudicial, and purported to resolve issues of liability and damages that were clearly within the province of the jury.¹⁵²

B. Exclusion of Relevant Evidence on Special Grounds

Texas Rule of Evidence 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."¹⁵³ Rule 403 is a verbatim adoption of Federal Rule of Evidence 403, and a recent decision by the United States Court of Ap-

146. *Id.* at 838.

147. *Id.*

148. TEX. R. EVID. 106. One who for strategic reasons prefers to wait until cross-examination to introduce other parts of the document may still do so, however, as this rule is not intended to circumscribe the right of cross-examination. See TEX. R. EVID. 106 comment.

149. *Id.* 106.

150. 653 S.W.2d 854 (Tex. App.—San Antonio 1983, no writ).

151. *Id.* at 863-64.

152. *Id.*

153. TEX. R. EVID. 403. This list omits an important ground for exclusion of relevant

peals for the Fifth Circuit, *Jon-T Chemicals, Inc. v. Freeport Chemical Co.*,¹⁵⁴ demonstrates the rule's operation. In this action for a seller's alleged breach of a sales agreement, the buyer complained on appeal that the district court erred when it failed to admit a transcript of a taped telephone conversation between officials of the plaintiff and the defendant. The appellant buyer argued that the transcript would have demonstrated that the defendant agreed to deliver the product in question despite adverse weather conditions. In excluding the transcript, the district court observed that portions of the transcript related to issues upon which it had previously granted summary judgment, that deposition testimony already in evidence adequately covered the material in the transcript, that the defendant would be unduly prejudiced by its admission, and that under the court's managerial duty to achieve a just result the transcript should not be admitted.¹⁵⁵ The Fifth Circuit, reasoning that the probative value of the transcript was thus outweighed by the danger of unfair prejudice and confusion of the issues, affirmed the exclusion of the transcript.¹⁵⁶

VIII. LACK OF PROBATIVE EVIDENCE AND INSUFFICIENT EVIDENCE

Many appellate cases each year address the issue of whether any evidence or sufficient evidence in the record supports the determinations of the trier of fact.¹⁵⁷ The Texas Supreme Court recently confronted this issue in *Kindred v. Con/Chem, Inc.*¹⁵⁸ *Kindred* was a suit against a paint primer manufacturer by individuals injured when the primer ignited. The plaintiffs claimed they had sustained personal injuries from the use of the product and alleged that the product was defective. The plaintiffs also asserted that the defendant had failed to warn adequately of the dangers in using the product and that the product's design was unreasonably dangerous. The trial court refused to submit an issue on design defect and submitted only the issue of marketing defect. The trial court entered a take-nothing judgment based on the jury verdict, and the court of appeals affirmed.¹⁵⁹ The supreme court, in reversing and remanding, held that the evidence, which included the testimony of an environmental chemist relating to feasibility of a safer alternative to ingredients in defendant's primer, was sufficient to submit the issue of design defect to the jury.¹⁶⁰ The court explained that the no-evidence rule provides that, if reasonable minds cannot differ from the conclusion that the evidence offered to support the existence of a vital fact lacks probative force, the evidence offered is the

evidence previously recognized in Texas, unfair surprise to an opponent. Presumably, a court will have to rectify unfair surprise by either recess or continuance.

154. 704 F.2d 1412 (5th Cir. 1983).

155. *Id.* at 1417-18.

156. *Id.*

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

158. 650 S.W.2d 61 (Tex. 1983).

159. 644 S.W.2d 828 (Tex. App.—Corpus Christi 1982).

160. 650 S.W.2d at 63.

legal equivalent of no evidence.¹⁶¹ In the instant case, however, the supreme court held that some evidence, which was more than a scintilla, supported the allegations of defective design because it furnished a reasonable basis for differing conclusions concerning the existence of a design defect in the primer.¹⁶² Accordingly, the trial court should have submitted special issues on the design defect.¹⁶³

In deciding a no-evidence point, an appellate court must consider only the evidence and inferences tending to support the trial court's findings and disregard all contrary evidence and inferences.¹⁶⁴ The Corpus Christi court of appeals' reversal on a no-evidence point in *H.E. Butt Grocery Co. v. Snodgrass*¹⁶⁵ demonstrates the operation of this standard of review. *Snodgrass* involved the appeal of a business owner from a trial court order overruling his plea of privilege in a personal injury case. The court of appeals held that the patron of the business wholly failed to establish by probative evidence any of the specific acts of negligence alleged in her petition, and thus it was error to overrule the business owner's plea of privilege.¹⁶⁶ The court, giving the appellee's testimony the weight to which it was entitled and indulging every reasonable inference in favor of its sufficiency, held that the appellee succeeded only in establishing that she picked up a carton of soft drinks in appellant's place of business and that a bottle fell through the wet bottom of the carton, causing her injury.¹⁶⁷ The court wrote that a thorough search of the record revealed no evidence that tended to prove who placed the wet carton in the store, how long it had been there, how the carton became wet, or any knowledge of appellant or its agents that the carton was wet.¹⁶⁸ Because the mere happening of an accident does not in itself ordinarily evidence negligence,¹⁶⁹ the court held that the plaintiff had failed to establish any specific act of negligence and, accordingly, reversed the decision of the trial court and granted defendant's plea of privilege.¹⁷⁰

If a party to a lawsuit introduces written evidence without limiting its purpose,¹⁷¹ he is bound by the facts recited in that evidence.¹⁷² The appellant in *Western Construction Co. v. Valero Transmission Co.*¹⁷³ confronted precisely this problem. In *Western* a pipeline owner sued a construction company to recover for damages sustained when a bulldozer driven by the

161. *Id.*

162. *Id.*

163. *Id.*

164. *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

165. 655 S.W.2d 241 (Tex. App.—Corpus Christi 1983, no writ).

166. *Id.* at 243.

167. *Id.*

168. *Id.*

169. *Thoreson v. Thompson*, 431 S.W.2d 341, 344 (Tex. 1968) (any activity involves some risk of harm).

170. 655 S.W.2d at 243.

171. See TEX. R. EVID. 105; *supra* note 9.

172. *Green v. State*, 589 S.W.2d 160, 162 (Tex. Civ. App.—Tyler 1979, no writ); *Hidalgo County v. Pate*, 443 S.W.2d 80, 88 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.).

173. 655 S.W.2d 251 (Tex. App.—Corpus Christi 1983, no writ).

construction company's employee struck and ruptured the pipeline. The trial court entered judgment in favor of the pipeline owner and both parties appealed. The court of appeals held that the admitted evidence permitted a finding that the value of the gas loss to the pipeline owner as a result of the rupture was \$2.08 per thousand cubic feet. The defendant construction company had introduced at trial an invoice showing the price of the gas as \$2.08 per thousand cubic feet. Although the defendant had not introduced the invoice on the question of the gas price, it failed to limit the purposes for which it did introduce the invoice. Accordingly, the construction company was bound by the facts recited therein, which the court found sufficient to support the damages assessed by the trier of fact.¹⁷⁴

Two courts during the survey period reaffirmed the proposition that evidence is not required to support a negative answer to a jury issue.¹⁷⁵ One court explained that it is improper to treat negative fact findings as more than the failure of the trier of fact to find such issues.¹⁷⁶ Negative findings mean, in law, that a plaintiff simply failed to meet its burden of proof.

The San Antonio court of appeals reversed two cases presenting interesting questions of sufficiency of the evidence. In *Garcia v. Universal Gas Corp.*¹⁷⁷ the plaintiff sued for property damages arising out of a gas explosion and fire that destroyed her house. The trial court entered judgment for the defendant gas company based on the jury verdict. On appeal, the court held that evidence that the gas company was notified of a gas odor at the house but did not inform its repairman of the odor, that the company sent its repairman to open the valve and light the pilot lights, and that an explosion occurred thereafter was clearly insufficient to support the jury's findings that the gas company was not notified of the gas leak.¹⁷⁸ The same evidence was also insufficient to support the jury's finding that turning on the gas and lighting the pilot lights was not negligent.¹⁷⁹

In *In re E.G.M.*¹⁸⁰ the San Antonio court of appeals reversed and remanded a trial court's finding of nonpaternity as being so against the great weight and preponderance of the evidence as to be manifestly unjust or clearly wrong.¹⁸¹ In *E.G.M.* the alleged father of a minor child denied paternity, arguing on appeal that the child's mother was not worthy of belief. The court noted that the defendant's exclusive access to the mother during the relevant period and medical testimony indicating a 98.9% likelihood of paternity were virtually undisputed.¹⁸² The appellate court held

174. *Id.* at 253-54.

175. *Offer v. TransAmerica Title Ins. Co.*, 653 S.W.2d 373, 374 (Tex. App.—San Antonio 1983, no writ); *Ryan Mortgage Investors v. Flemming-Wood*, 650 S.W.2d 928, 934 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

176. *Offer v. TransAmerica Title Ins. Co.*, 653 S.W.2d 373, 375 (Tex. App.—San Antonio 1983, no writ).

177. 653 S.W.2d 362 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

178. *Id.* at 364.

179. *Id.*

180. 647 S.W.2d 74 (Tex. App.—San Antonio 1983, no writ).

181. *Id.* at 79.

182. *Id.* at 78.

that the trial court's finding of nonpaternity was therefore against the great weight and preponderance of the evidence.¹⁸³ The court wrote that although the fact finder has the role of judge of the credibility of witnesses, evidence of such a high probability of paternity can amount to strong corroboration of a witness's story on the material issues and, when considered together with proper undisputed facts, can preponderate in favor of a finding of paternity.¹⁸⁴

IX. PRESUMPTIONS AND INFERENCES

Article III of the Federal Rules of Evidence governs presumptions. Because the Texas Rules of Evidence contain no article III, presumptions continue to be governed by established Texas common law.

Presumptions and inferences, though frequently confused, are sometimes merely assumptions of facts that have not been rebutted.¹⁸⁵ During the survey period the Texas Supreme Court considered presumptions and inferences in *Walters v. American States Insurance Co.*,¹⁸⁶ a case involving a workers' compensation claim for death benefits. The plaintiff alleged that the decedent had been killed in the course and scope of his employment. The evidence showed that the deceased employee, Mr. Justice, was his employer Mr. Lampport's righthand man. It was usual practice for Justice to accompany Lampport for discussion of interior design plans with prospective customers. The day before their deaths, Lampport told Justice to meet with him to discuss the next day's business meeting at an airport hotel. They left town together the following day to meet with a customer and later were found shot to death in the vicinity of the airport. But for Lampport's directions to Justice to accompany him, Justice would not have left town with Lampport. The supreme court, reversing and remanding the decision of the court of appeals,¹⁸⁷ held that sufficient evidence supported a jury finding that the plaintiff's decedent received his fatal injuries in the course of his employment.¹⁸⁸ The supreme court, citing *Farley v. M M Cattle Co.*,¹⁸⁹ stated that the court first looks to the rules regarding inferences, and when the court can draw reasonable inferences from the evidence presumptions are unnecessary.¹⁹⁰ Relying on *Farley*, the supreme court stated that a number of inferences may be drawn from a single fact situation. The court explained that the simple question before it and the jury in *Walters* was "a question of logic—whether the jury, upon the basis of the facts proved, made a reasonable inferential leap or whether their

183. *Id.*

184. *Id.* at 78-79.

185. See generally 1 R. RAY, *supra* note 21, §§ 51-56 (classification of presumptions).

186. 654 S.W.2d 423 (Tex. 1983); see *supra* notes 23-25 and accompanying text (more complete discussion of case).

187. 636 S.W.2d 794 (Tex. App.—Tyler 1982). The Tyler court of appeals had reversed the trial court's entry of judgment favorable to the claimant.

188. 654 S.W.2d at 426-27.

189. 529 S.W.2d 751, 757 (Tex. 1975).

190. 654 S.W.2d at 426.

logical leap was too far."¹⁹¹ The court concluded that the facts, as reasonably and logically proven, supported the jury finding.¹⁹²

The Texas Supreme Court considered the effect of presumptions, as distinguished from inferences, during this survey period in *Houston First American Savings v. Musick*.¹⁹³ At the trial of this trespass to try title suit, the savings and loan association that claimed title superior to that of the individual defendant introduced a deed by which the substitute trustee had conveyed the property to a third party. The deed recited compliance with all conditions of the deed of trust. The savings and loan association argued that the recital in the substitute trustee's deed established that the foreclosure sale, at which a third party acquired the property and upon which the association's claim of title depended, conformed to the conditions set out in the deed of trust. The supreme court, while agreeing that the recital in the deed was prima facie evidence that the terms of the trust were fulfilled, noted that recitals in a trustee's deed give rise only to a presumption of validity and relate only to matters in evidence.¹⁹⁴ The court pointed to precedent that established that the presumption of the validity of the sale is not conclusive and may be rebutted.¹⁹⁵ The court held evidence presented at trial showed that although the individual defendant admitted that the third party purchased the note and deed of trust at the foreclosure sale and thereby conceded the third party's authority to appoint a substitute trustee, the individual defendant nevertheless rebutted the presumption that the substitute trustee complied with the conditions contained in the deed of trust.¹⁹⁶

In a recent case the supreme court also discussed and defined when evidence is established conclusively. In *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*¹⁹⁷ the defendant filed a counterclaim for usury. The trial court overruled the defendant's motion to include usury penalties in its judgment against the plaintiff. The Corpus Christi court of appeals reversed that part of the judgment overruling the defendant's motion and rendered judgment in favor of the defendant for twice the amount of the usurious interest. The supreme court held that the defendant had made out a prima facie case of usury against the plaintiff and that the evidence was insufficient to overcome that prima facie case.¹⁹⁸ The evidence showed that Triton had unilaterally charged interest on Marine's invoices and deducted those charges from Marine's share of the proceeds. The

191. *Id.*

192. *Id.*

193. 650 S.W.2d 764 (Tex. 1983). This case is also notable for its extensive discussion of judicial admissions by assertions of fact in live pleadings. See *supra* notes 43-55 and accompanying text.

194. *Id.* at 767 (citing *Slaughter v. Qualls*, 139 Tex. 340, 347, 162 S.W.2d 671, 676 (1942)).

195. 650 S.W.2d at 767 (citing *Hart v. Eason*, 159 Tex. 375, 376, 321 S.W.2d 574, 575 (1959)).

196. 650 S.W.2d at 767-68.

197. 644 S.W.2d 443 (Tex. 1982).

198. *Id.* at 445-46.

supreme court wrote that this evidence did not establish an agreement between the parties to interest charges of ten percent.¹⁹⁹ Further, no evidence disclosed any conduct by Marine indicating its acceptance of the ten percent interest charges. Although Marine never complained of the interest charges, it also never paid them. The supreme court held that Triton's act of deducting the charges from Marine's share of the proceeds did not constitute payment of the charges, particularly because Marine never received any of the proceeds.²⁰⁰ Since an issue is conclusively established when the evidence is such that no room exists for ordinary minds to differ as to the conclusion to be drawn from it,²⁰¹ the supreme court held that this evidence did not overcome Marine's prima facie case or raise a fact question as to the existence or non-existence of an agreement.²⁰² The court held that because the evidence conclusively established the absence of an agreement, no question of waiver under rule 279 was presented.²⁰³

Another case during this survey period considered when testimony establishes facts as a matter of law. *Sandoval v. Hartford Casualty Insurance Co.*²⁰⁴ involved an insured's action to recover from a casualty insurer for damages sustained in the upset of his truck. The trial court rendered a take-nothing judgment and the insured appealed. In reversing and rendering, the Amarillo court of appeals held that the positive, uncontradicted testimony of a witness may not be arbitrarily disregarded, particularly when the testimony is so clear that it is unnecessary to speculate on the witness's veracity.²⁰⁵ "[W]here the testimony of a witness, even an interested one, is clear, direct, positive, and uncontradicted by any other witness or attendant circumstances, it is taken as true as a matter of law."²⁰⁶ The insurance company had defended the suit on the ground that damage to plaintiff's truck was due solely to mechanical breakdown or failure, which was excluded from coverage. The *Sandoval* court found that the testimony of two witnesses, including the plaintiff, that the load shifted met the criteria for being accepted as true as a matter of law. Accordingly, by such evidence plaintiff met his burden to negate the pleaded exclusion.²⁰⁷

199. *Id.* at 446.

200. *Id.*

201. *Id.* (citing *Joske v. Irvine*, 91 Tex. 574, 581, 44 S.W.2d 1059, 1063 (1898); 3 R. McDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 12.08, at 294 (F. Elliot rev. ed. 1970)).

202. 644 S.W.2d at 446.

203. *Id.* (citing TEX. R. CIV. P. 279).

204. 653 S.W.2d 604 (Tex. App.—Amarillo 1983, no writ).

205. *Id.* at 607.

206. *Id.*

207. *Id.*

