

January 1984

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Recommended Citation

Ernest E. Figari et al., *Texas Civil Procedure*, 38 Sw L.J. 421 (1984)
<https://scholar.smu.edu/smulr/vol38/iss1/17>

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TEXAS CIVIL PROCEDURE

by

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THE major developments in the field of civil procedure during the survey period occurred through judicial decisions, statutory enactments,¹ and amendments to the Texas Rules of Civil Procedure.² This Article examines these developments and considers their impact on existing Texas procedure.

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1. The enactments that have procedural implications principally concern the award of interest in judgments, Act of May 17, 1983, ch. 107, 1983 Tex. Gen. Laws 518 (codified at TEX. REV. CIV. STAT. ANN. art. 5069—1.05 (Vernon Pam. Supp. 1971-1983)); electronic filing of instruments, Act of May 26, 1983, ch. 732, 1983 Tex. Gen. Laws 4505 (codified at TEX. REV. CIV. STAT. ANN. art. 29f, §§ 1-3 (Vernon Supp. 1984)); excuse from jury service, Act of May 17, 1983, ch. 134, 1983 Tex. Gen. Laws 617, 620 (codified at TEX. REV. CIV. STAT. ANN. art. 2133 (Vernon Supp. 1984)); jurisdiction of the justice court, Act of May 17, 1983, ch. 133, 1983 Tex. Gen. Laws 616 (codified at TEX. REV. CIV. STAT. ANN. art. 2385 (Vernon Supp. 1984)), and Act of June 19, 1983, ch. 733, 1983 Tex. Gen. Laws 4508 (codified at TEX. REV. CIV. STAT. ANN. art. 2460a, §§ 2, 5, 5a, 11 (Vernon Supp. 1984)); limitations, Act of June 19, 1983, ch. 744, 1983 Tex. Gen. Laws 4530 (codified at TEX. FAM. CODE ANN. § 13.01 (Vernon Pam. Supp. 1975-1983)); mandamus jurisdiction of courts of appeals, Act of June 19, 1983, ch. 839, 1983 Tex. Gen. Laws 4767, 4768 (codified at TEX. REV. CIV. STAT. ANN. art. 1824 (Vernon Supp. 1984)); referral of suits by agreement for disposition by a retired judge, Act of June 19, 1983, ch. 917, 1983 Tex. Gen. Laws 5060 (codified at TEX. REV. CIV. STAT. ANN. art. 200d, §§ 1-13 (Vernon Supp. 1984)); subpoena of bank records, Act of June 19, 1983, ch. 525, 1983 Tex. Gen. Laws 3056, 3057 (codified at TEX. REV. CIV. STAT. ANN. arts. 342—701, —705 (Vernon Supp. 1984)); transfer of actions among district, county, and statutory probate courts, Act of June 19, 1983, ch. 958, 1983 Tex. Gen. Laws 5228 (codified at TEX. PROB. CODE ANN. § 5B (Vernon Supp. 1984)); and venue, June 17, 1983, ch. 385, 1983 Tex. Gen. Laws 2119 (codified at TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon Supp. 1984)).

2. The amendments modified twelve rules. These changes became effective Sept. 1, 1983. See *Civil Procedure: Court Promulgates New Rules*, 46 TEX. B.J. 858, as corrected, 46 TEX. B.J. 969 (1983) (special pull-out section). Following the period covered by this Article the Texas Rules of Civil Procedure were amended in further respects. See *Rules of Civil Procedure*, 47 TEX. B.J. (Feb. 1984) (special pull-out section listing newly adopted rules). These changes, which are numerous, became effective Apr. 1, 1984, and will be discussed in the 1985 Survey.

I. JURISDICTION OVER THE SUBJECT MATTER

Seay v. Hall,³ a case of first impression, addressed the jurisdiction of a statutory probate court to adjudicate the claims of a wife-administratrix for wrongful death and for personal injury arising from her husband's death. Generally, section 5(d) of the Texas Probate Code⁴ authorizes a statutory probate court to hear all matters incident to estates and, according to section 5A(b),⁵ all claims by estates fall within this grant. A decedent's estate consists of real and personal property,⁶ and personal property includes choses in action.⁷ The *Seay* court reasoned that because a claim for personal injury under the survival statute⁸ is one that survives the decedent and may be asserted by the representative of the estate,⁹ it is an asset of the estate and, therefore, within the jurisdiction of a statutory probate court.¹⁰ Regarding the wife's claim for wrongful death the court held that the statute creating it¹¹ made the claim personal to her and, accordingly, it was not an asset of the estate.¹² For that reason, the court concluded, the claim for wrongful death was not within the jurisdiction of a statutory probate court.¹³

The practical effect of the holding in *Seay* was to require separate trials of almost identical claims arising from the same transaction. Section 5B of the Texas Probate Code¹⁴ was recently enacted to restore judicial economy in this area. It permits a judge of a statutory probate court, on the motion of an interested party, to transfer to his court, from a district, county, or statutory court, any cause of action appertaining or incident to an estate pending before him. After the transfer, section 5B empowers the judge to consolidate the transferred cause of action with the proceeding pending before him.¹⁵

Article 2385,¹⁶ which delineates the subject matter jurisdiction of a justice court, was recently amended to authorize a justice court to hear civil matters in which the amount in controversy, exclusive of interest, is one thousand dollars or less.¹⁷ Hence, in cases in which the matter in controversy exceeds two hundred dollars but does not exceed one thousand dol-

3. No. 05-82-00574-CV (Tex. App.—Dallas 1983, no writ).

4. TEX. PROB. CODE ANN. § 5(d) (Vernon 1980).

5. *Id.* § 5A(b).

6. *Id.* § 3(l).

7. *Id.* § 3(z).

8. TEX. REV. CIV. STAT. ANN. art. 5525 (Vernon 1958).

9. See *Castleberry v. Goolsby Bldg. Corp.*, 617 S.W.2d 665, 666 (Tex. 1981); *Mitchell v. Akers*, 401 S.W.2d 907 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.).

10. No. 05-82-00574-CV (Tex. App.—Dallas 1983, no writ).

11. TEX. REV. CIV. STAT. ANN. arts. 4671 (Vernon Pam. Supp. 1941-1983), 4675 (Vernon 1940).

12. No. 05-82-00574-CV (Tex. App.—Dallas 1983, no writ).

13. *Id.*

14. Act of June 19, 1983, ch. 958, Tex. Gen. Laws 5228 (codified at TEX. PROB. CODE ANN. § 58 (Vernon Supp. 1984)).

15. *Id.*

16. TEX. REV. CIV. STAT. ANN. art. 2385 (Vernon Supp. 1984).

17. Act of May 17, 1983, ch. 133, 1983 Tex. Gen. Laws 616 (codified at TEX. REV. CIV. STAT. ANN. art. 2385 (Vernon Supp. 1984)); see also Act of June 19, 1983, ch. 733, § 2, 1983

lars, the county court shares concurrent jurisdiction with the justice court.¹⁸

II. JURISDICTION OVER THE PERSON

The propriety of out-of-state service under article 2031b,¹⁹ the Texas long-arm statute, continues to be the subject of judicial attention. Section 3 of article 2031b authorizes the exercise of jurisdiction over a nonresident when he is "doing business" in Texas.²⁰ Doing business, as defined by section 4, includes "entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State."²¹ Despite the broad language of section 4, the opinion of the United States Court of Appeals for the Fifth Circuit in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*²² indicates that a choice-of-law provision in a contract may be a limiting factor in a jurisdictional determination in a suit on the contract. The plaintiff, a manufacturing concern located in Texas, sued the defendant, an Alaskan contractor that worked exclusively on projects within Alaska, on a contract that was negotiated in both states. The contract was closed in Texas, but it stipulated that it was to be governed by the law of Alaska. The contract concerned certain equipment that the plaintiff was to manufacture at its facilities in Texas and deliver to the defendant in Washington; however, the contract required that payment for the equipment be made to the plaintiff in Texas. When the defendant rejected the equipment and refused to make payment, the plaintiff filed suit in Texas and effected service under article 2031b. Apart from the transaction sued on, the defendant had had no contacts with Texas. Acknowledging that the transaction had several connections with the forum, the Fifth Circuit nevertheless concluded that the significance of these contacts was diminished by the provision in the contract requiring it to be construed under the laws of Alaska and affirmed the trial court's dismissal of the claim against the defendant.²³

Relaxing the "long arm" of article 2031b, a federal district court concluded during an earlier survey period that the activities in Texas of a subsidiary corporation should not be imputed to its foreign parent for jurisdictional purposes, thereby compelling the court to overrule nonresident service on the parent.²⁴ *Samuels v. BMW of North America, Inc.*²⁵ focused on a variation of the same situation and is instructive on the economics

Tex. Gen. Laws 4508 (codified at TEX. REV. CIV. STAT. ANN. art. 2460a, §§ 2, 5, 5a, 11 (Vernon Supp. 1984)) (amending justice court small claims procedure to new \$1000 limit).

18. See TEX. REV. CIV. STAT. ANN. art. 1949 (Vernon Supp. 1984).

19. *Id.* art. 2031b (Vernon 1964 & Pam. Supp. 1964-1983).

20. *Id.* § 3.

21. *Id.* § 4.

22. 700 F.2d 1026 (5th Cir. 1983).

23. *Id.* at 1029.

24. *Murdock v. Volvo of America Corp.*, 403 F. Supp. 55, 57-58 (N.D. Tex. 1975); *Frito-Lay, Inc. v. Procter & Gamble Co.*, 364 F. Supp. 243, 244-48 (N.D. Tex. 1973); *cf.* *Bland v. Kentucky Fried Chicken Corp.*, 338 F. Supp. 871 (S.D. Tex. 1971) (minimum contacts established jurisdiction, but jurisdiction not solely based on parent-subsidary relation-

underlying such a decision. The plaintiff brought suit in a federal district court in Texas against two corporate defendants, one a subsidiary of the other, seeking recovery on a products liability theory for personal injuries arising from a Texas automobile accident involving a BMW automobile. The automobile was manufactured by the parent company in Germany, distributed through and marketed by the subsidiary in the United States, and apparently purchased by the plaintiff in Texas. Although the subsidiary did not contest the court's jurisdiction over its person, the foreign parent, which was neither incorporated nor licensed to do business in Texas, challenged the service on itself in a motion to dismiss. In response, the plaintiff claimed that the foreign parent delivered a defective product into Texas through its wholly owned subsidiary, that the product injured the plaintiff in Texas, and that, since this occurrence amounted to the commission of a tort in Texas, the foreign parent was subject to the jurisdiction of the court.

Reducing the inquiry to whether it was reasonable to require the parent to defend the suit in Texas,²⁶ the court focused on the economics of the situation. Emphasizing that the subsidiary, a profitable and solvent firm, had not challenged jurisdiction, the court reasoned that the plaintiff could obtain effective relief, should he prevail at trial, from the logical defendant, the subsidiary. According to the court, "[t]o force the parent to defend itself for the alleged acts of its autonomous, solvent subsidiary has the unfortunate and unnecessary effect of increasing the costs of exporting to the U.S."²⁷ As a result, the court held that requiring the parent to defend alongside the subsidiary under such circumstances served neither a legal nor an economic purpose and dismissed the parent from the action.²⁸

In *Bamford v. Hobbs*²⁹ a federal district court recently followed the "fiduciary shield" principle³⁰ and applied it to determine the amenability of the nonresident officer of a foreign corporation to service under article 2031b for acts he performed in the forum state on behalf of the corporation.³¹ The plaintiffs sued the foreign corporation and its officer on several causes of action, effecting service under article 2031b. Regarding the of-

ship). See generally *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 491-99 (5th Cir. 1974) (discussing constitutionality of art. 2031b).

25. 554 F. Supp. 1191 (E.D. Tex. 1983).

26. *Id.* at 1193.

27. *Id.* at 1195.

28. *Id.* at 1194-95.

29. 569 F. Supp. 160 (S.D. Tex. 1983).

30. The "fiduciary shield" principle provides: "[I]f an individual has contact with a particular state only by virtue of his acts as a fiduciary of the corporation, he may be shielded from the exercise, by that state, of jurisdiction over him personally on the basis of that conduct." *Marine Midland Bank v. Miller*, 664 F.2d 899, 902 (2d Cir. 1981); accord *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 929 (5th Cir. 1974) (jurisdiction over corporation's individual officers cannot be based solely upon jurisdiction over corporation); *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277, 1281 n.8 (10th Cir. 1969) (even if foreign corporation is subject to service because it transacts business through agents operating in forum state, such agents are not engaged in business so as to allow application of long-arm statute to them as individuals unless agents transact business on their own behalf apart from corporation).

31. 569 F. Supp. at 168.

ficer, the plaintiffs argued that the court had jurisdiction over him personally because of his actions in Texas as a representative of the corporation. Declining to sustain service over the officer, the court observed that a corporate officer whose only contact with the forum is through performance of his official duties is not subject to personal jurisdiction in the forum by virtue of such contact.³² Rather, concluded the court, "[a]n individual may have his corporation's contacts with the forum attributed to him only if there is an alter ego relationship between the two that justifies a court in disregarding the separate corporate entity."³³

The Supreme Court of Texas concluded during a previous survey period that service under article 2031b is not complete until the secretary of state forwards process to the nonresident defendant.³⁴ To establish the jurisdiction of the trial court over the defendant's person, the record must affirmatively show that the process was forwarded.³⁵ *Vanguard Investments v. Fireplaceman, Inc.*,³⁶ a recent decision by a Houston court of appeals, held that this showing may be made by filing a certificate of mailing issued by the secretary of state.³⁷

*Verges v. Lomas & Nettleton Financial Corp.*³⁸ concerned a relatively obscure provision of article 2031b. Section 5 of that article stipulates that when process is delivered to the secretary of state under article 2031b for forwarding to a nonresident defendant, the secretary of state "shall require a statement of the name and address of the home or home office of the non-resident" to facilitate such forwarding.³⁹ The record in *Verges* revealed that the secretary of state received only the last known address of the defendant and that the process he forwarded to that location was returned bearing the notation "unclaimed." The plaintiff obtained a default judgment based on the service, and the defendant sought to have it set aside, arguing noncompliance with section 5. Finding that the last known address was not the equivalent of the "home or home office" address required by the statute, the appellate court ruled that the plaintiff had not fulfilled the requirements of section 5 and invalidated the judgment.⁴⁰

One final case bearing on personal jurisdiction should be of interest to the trial attorney. *Fidelity Union Life Insurance Co. v. Orr*⁴¹ involved a

32. *Id.*; see *Forsythe v. Overmyer*, 576 F.2d 779, 783 (9th Cir.), *cert. denied*, 439 U.S. 864 (1978); *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc.*, 519 F.2d 634, 637 (8th Cir. 1975); *Siskind v. Villa Found. for Educ., Inc.*, 642 S.W.2d 434, 437 (Tex. 1982). See generally Figari, Graves & Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 37 Sw. L.J. 289, 292 (1983) (discussing corporate officers' amenability to service).

33. 569 F. Supp. at 168-69.

34. *Whitney v. L & L Realty Corp.*, 500 S.W.2d 94, 96 (Tex. 1973).

35. *Id.*

36. 641 S.W.2d 655 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

37. *Id.* at 656; see Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 28 Sw. L.J. 248, 248 n.7 (1974).

38. 642 S.W.2d 820 (Tex. App.—Dallas 1983, no writ).

39. TEX. REV. CIV. STAT. ANN. art. 2031b, § 5 (Vernon 1964).

40. 642 S.W.2d at 823.

41. 648 S.W.2d 36 (Tex. App.—Dallas 1983, no writ).

suit by an insurance company against a soliciting agent on a contract that required all payments under it to be made to the company in Dallas, Texas. Upholding service on the agent, the court, following earlier decisions,⁴² found the obligation requiring payment in Texas to be of critical importance and concluded that the agent's contacts comported with due process.⁴³

III. SPECIAL APPEARANCE

*Haskell v. Border City Bank*⁴⁴ is a judicial warning that rule 120a, which authorizes a defendant to appear specially for the purpose of questioning whether he is amenable to process,⁴⁵ cannot be used to raise the issue of defective service. A plaintiff must generally allege facts in his petition showing that he is entitled to effect substituted service under a particular statute.⁴⁶ The *Haskell* court emphasized, however, that since the sole issue at a special appearance is one of personal jurisdiction, a defendant may not attack a deficiency in service allegation through such procedure.⁴⁷

Rule 120a also has been a source of uncertainty for a party attempting to establish his position on personal jurisdiction at a special appearance hearing. In particular, due to the rule's failure to specify the type of proof the court may receive at such a hearing, the propriety of using affidavits for this purpose has been in doubt. Adhering to a strict approach, the court in *Haskell* condemned the use of affidavits for this purpose and ruled them inadmissible as evidence at special appearance hearings.⁴⁸

IV. SERVICE OF PROCESS

A number of decisions during the survey period invalidated service of process on the basis of inadvertent errors occurring during the execution of service. In *Plains Chevrolet, Inc. v. Thorne*⁴⁹ the citation was officially addressed by the clerk to "General Motors Corporation"; however, after the serving officer received it, he wrote the name "Plains Chevrolet" immedi-

42. *Marathon Metallic Bldg. Co. v. Mountain Empire Constr. Co.*, 653 F.2d 921, 922-23 (5th Cir. 1981); *La Quinta Motor Inns, Inc. v. Schmelig Constr. Co.*, 617 S.W.2d 827, 828 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *Gubifosi v. Buddy Schoellkopf Prods., Inc.*, 545 S.W.2d 528, 536 (Tex. Civ. App.—Tyler 1976, no writ); *National Truckers Serv., Inc. v. Aero Syss., Inc.*, 480 S.W.2d 455, 459 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

43. 648 S.W.2d at 38.

44. 649 S.W.2d 133 (Tex. App.—El Paso 1983, no writ).

45. TEX. R. CIV. P. 120a.

46. *See McKanna v. Edgar*, 388 S.W.2d 927, 929-30 (Tex. 1965); *Flynt v. City of King-ville*, 125 Tex. 510, 511, 82 S.W.2d 934 (1935).

47. 649 S.W.2d at 134.

48. *Id.* at 135; *accord Main Bank & Trust v. Nye*, 571 S.W.2d 222, 223 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.). In contrast, when an objection to personal jurisdiction is asserted in federal court, affidavits represent a proper method of proof. *See, e.g., Edwards v. Associated Press*, 512 F.2d 258, 262 n.8 (5th Cir. 1975) (appropriate to consider affidavits when resolving jurisdictional disputes); *O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173, 1176 (7th Cir. 1971) (courts may receive and weigh affidavits when considering jurisdictional challenge).

49. 656 S.W.2d 631 (Tex. App.—Waco 1983, no writ).

ately above the typed name and served it, noting that he had delivered it to "Plains Chevrolet Company." Finding that the handwritten addition amount to an impermissible amendment of the citation, the court held that once the clerk had issued the citation, it could only be amended by authority of the trial court.⁵⁰ For this reason, the court held the service to be invalid and reversed a default judgment based on it.⁵¹

A similar error occurred in *Stephenson v. Corporate Services, Inc.*,⁵² in which the citation named "Franklin National Corp., Ltd." as a defendant, but the serving officer recited in his return that he had delivered process to "Franklin National Corp." On appeal from a default judgment against the company, the appellate court concluded that, while strict compliance with service requirements is required in such a situation, the failure of the serving officer to write the word "Ltd." after the word "Corp." was not fatal.⁵³ Observing that the petition the officer had served sufficiently indicated to its recipient that it was directed to Franklin National Corp., Ltd., thus providing the defendant with an opportunity to appear and defend the action, the court approved the service and upheld the default judgment based thereon.⁵⁴

Finally, in *Travieso v. Travieso*⁵⁵ a curious omission by a serving officer in completing his return led to an invalidation of service and a reversal of the resulting default judgment. When the serving officer completed his return, he certified that process had been delivered to the defendant but omitted to state the name of the sheriff or constable on whose behalf he was acting. Rule 107, which governs the requirements for proper return of citation, specifies that the return should "be signed by the officer officially."⁵⁶ Finding that the service did not satisfy the requirements of rule 107, the court emphasized that when citation is served by a deputy, compliance occurs only when he identifies the official for whom he is acting as deputy.⁵⁷

V. VENUE

In response to consistent criticism of the Texas venue scheme over the years,⁵⁸ the 68th Legislature enacted Senate Bill 898 during the survey period, completely overhauling article 1995, the Texas venue statute.⁵⁹ Less

50. *Id.* at 633.

51. *Id.*

52. 650 S.W.2d 181, 183 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

53. *Id.* at 184.

54. *Id.*

55. 649 S.W.2d 818 (Tex. App.—San Antonio 1983, no writ).

56. TEX. R. CIV. P. 107.

57. 649 S.W.2d at 820.

58. See Guittard & Tyler, *Revision of the Texas Venue Statute: A Reform Long Overdue*, 32 BAYLOR L. REV. 563 (1980); Langley, *A Suggested Revision of the Texas Venue Statute*, 30 TEX. L. REV. 547 (1952); Spradley, *Texas Venue: The Pathology of the Law*, 36 SW. L.J. 645 (1982).

59. Act of June 17, 1983, ch. 385, § 1, 1983 Tex. Gen. Laws. 2119-24 (codified at TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon Pam. Supp. 1964-1983) [hereinafter cited as Article

than a month after passage of the senate bill, the Texas Supreme Court complemented the lawmakers' measure by promulgating new rules of procedure governing venue hearings.⁶⁰ The amended statute and rules became effective September 1, 1983, substantially altering Texas venue practice.

Like its predecessor,⁶¹ amended article 1995 provides a general rule of venue for all causes of action; it also lists various exceptions to the general rule that are either mandatory⁶² or permissive,⁶³ depending on the substantive nature of the cause of action or the particular status or capacity of the defendant.⁶⁴ In contrast to the old statute, however, amended article 1995 provides the plaintiff with two venue options under the general rule. Suits can now be brought in the county of defendant's residence, if the defendant is a natural person, or in the county where the cause of action, or a part thereof, accrued.⁶⁵ The addition of the county where the cause of action accrued as a proper venue under the general rule carries forward the substance of several former exceptions and, therefore, these exceptions no longer appear in the statute.⁶⁶

The new statute includes seventeen exceptions to the general rule that are either mandatory or permissive.⁶⁷ Mandatory exceptions specifically

1995] (amending TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964 & Supp. 1982-1983) [hereinafter cited as Article 1995 (repealed)]).

60. Order of June 15, 1983, *reprinted at* 46 TEX. B.J. 858-59 (1983).

61. Article 1995 formerly provided, as a general rule, that a defendant shall be sued in his county of domicile. As of January 1983, 34 exceptions to this general rule existed under the old statute. *See* Article 1995 (repealed).

62. The seven mandatory exceptions are codified in § 2 of the amended statute. Article 1995, § 2. The mandatory exceptions clearly control over both the general rule and the permissive exceptions, but the new statute creates no priority among the mandatory exceptions themselves. *See* Article 1995, §§ 1, 2. Under the old statute, courts looked to the intent of the legislature in determining which of the mandatory exceptions controlled. *See* 1 R. McDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 4.05 (F. Elliott rev. ed. 1981).

63. The 10 permissive exceptions are in § 3 of the amended statute. Article 1995, § 3. *Id.* § 3(h) specifically incorporates all other statutory prescriptions of permissive venue.

64. For example, exceptions to the general rule exist under amended art. 1995 for certain causes of action relating to contracts, Article 1995, § 3(c), (e); torts, *id.* §§ 2(g), 3(d); land, *id.* § 2(a); specific types of injunctive relief, *id.* § 2(b), (c); and mandamus actions against certain types of persons or entities, *id.* § 2(d). Other exceptions exist if the defendant is a county, *id.* § 2(e); a certain type of insurance company, *id.* § 3(b); a corporation or partnership, *id.* § 3(f), (g); a transient, *id.* § 3(i); or a nonresident of the state, *id.* § 3(j).

65. Article 1995, § 1. The new general rule substitutes the county of the defendant's residence for the county of his domicile as a location of proper venue. This change in the wording of the statute, however, is of little significance since courts had previously treated the terms "domicile" and "residence" as synonymous for venue purposes. *See Snyder v. Pitts*, 150 Tex. 407, 409, 241 S.W.2d 136, 139 (1951).

66. Most notably, the statute eliminated as unnecessary the former exceptions for certain tort actions such as fraud, negligence, and crime or trespass. *See* Article 1995(7), (9), (9a) (repealed).

67. The former exceptions that have been deleted in whole from the new statute related to fraud, negligence, crime or trespass, attachment and sequestration, personal property, inheritances, partition, breach of warranty of title, divorce, labor disputes, revision of probate, forfeiture of corporate charters, forfeiture of railway lands, carriers, railroad wages, and fraternal benefit societies. *See* Article 1995(7), (8), (9), (9a), (10), (11), (13), (15), (16), (17a), (18), (21), (22), (24), (26), (28a) (repealed).

apply to certain actions involving lands,⁶⁸ injunctive actions to stay other lawsuits⁶⁹ or to restrain execution of judgments,⁷⁰ mandamus actions against the head of a state department,⁷¹ actions against a county,⁷² and suits for libel, slander, or invasion of privacy.⁷³ The statutory section addressing mandatory venue also includes an exception incorporating the mandatory venue provisions of any other statute.⁷⁴ Permissive exceptions exist for, among other things, suits for breach of warranty by a consumer goods manufacturer,⁷⁵ suits on written contracts requiring performance in a particular county,⁷⁶ and suits against insurance companies,⁷⁷ corporations, associations, and partnerships,⁷⁸ foreign corporations,⁷⁹ nonresidents,⁸⁰ and, in certain instances, executors.⁸¹

Although many of these exceptions, both mandatory and permissive, are identical to their counterparts under the old statute, amended article 1995 changes the venue treatment of certain types of actions or entities covered by the exceptions. For example, the amended statute has deleted suits for damages to land or to prevent waste as a basis for invoking the mandatory exception concerning land actions.⁸² Suits to recover real property or an interest therein, for partition, and to remove encumbrances or quiet title to real property, however, continue to be maintainable, and indeed must be brought, in the county where the land is situated.⁸³ Likewise, although the mandatory exception for libel and slander actions continues to list the same venue options as the old statute, the new exception differs to the extent it also covers suits for invasion of privacy.⁸⁴ Of perhaps greatest significance to practitioners, however, is the change the new statute effects

63. Article 1995, § 2(a) (venue in county where property or part thereof is located).

69. *Id.* § 2(b) (venue in county where suit is pending).

70. *Id.* § 2(c) (venue in county where judgment was rendered).

71. *Id.* § 2(d) (venue in Travis County).

72. *Id.* § 2(e) (venue in county sued).

73. *Id.* § 2(g) (venue in county of plaintiff's residence at time cause of action accrued, county of defendant's residence at time suit filed, county of defendant's residence at time action accrued, or county of corporate defendant's domicile).

74. *Id.* § 2(f).

75. *Id.* § 3(c).

76. *Id.* § 3(e)(1) (venue in county where defendant's performance required).

77. *Id.* § 3(b) (venue in county where policyholder or beneficiary resides, among other permissible venues).

78. *Id.* § 3(f).

79. *Id.* § 3(g).

80. *Id.* § 3(j) (venue in county of plaintiff's residence).

81. *Id.* § 3(a) (in suits to establish money demands venue in county where estate administered). This exception also provides that suits against executors, administrators, or guardians for negligence of the person whose estate is represented may be brought in the county where the negligent act or omission occurred. *Id.*

82. Compare Article 1995, § 2(a) with Article 1995(14) (repealed).

83. Article 1995, § 2(a). The inclusion of partition suits in the exception is new; it came from subdivision (13) of the former statute, which the legislature otherwise completely eliminated. See Article 1995(13) (repealed). Unlike the former exception, however, the exception for venue in partition suits in the amended statute is mandatory, and the action can only be brought in the county where the land or a part thereof is situated. Compare Article 1995, § 2(a) with Article 1995(13) (repealed).

84. Compare Article 1995, § 2(g) with Article 1995(29) (repealed).

with respect to the venue treatment of actions against corporations. Sections 3(f) and 3(g) of amended article 1955 provide the plaintiff suing a corporation with the same venue options he had before;⁸⁵ however, these exceptions have now taken on added importance due to the alteration of the general venue rule. As a general rule, actions are now maintainable in the county of defendant's residence only if the defendant is a natural person.⁸⁶ Accordingly, proof that a defendant corporation "resides" in a particular county because its registered office or agent is there⁸⁷ is apparently no longer sufficient to establish venue.⁸⁸

Further, amended article 1995 completely displaces court-developed principles of ancillary venue. Section 4 of the new statute⁸⁹ essentially codifies the long-standing *Middlebrook* doctrine,⁹⁰ which provided that a court with venue of a single claim against a defendant also had venue as to all properly joined claims against that defendant.⁹¹ Article 1995 expands the principle to include multiple parties as well. Thus, a plaintiff can now sue two or more defendants in a single county as long as venue is proper as to one of the defendants and all of the remaining defendants are proper parties.⁹² Finally, the new statute ends the preexisting confusion about venue of cross-actions.⁹³ Section 4(b) provides that venue of the main action shall establish venue of a counterclaim, cross-claim, or third-party claim properly joined under the Texas Rules of Civil Procedure.⁹⁴

85. Compare Article 1995, § 3(f), (g) with Article 1995(23), (27) (repealed).

86. Article 1995, § 1.

87. See *Ward v. Fairway Operating Co.*, 364 S.W.2d 194, 195 (Tex. 1963) (holding that a corporation could always be sued at its registered office since such office constituted a statutory place of residence).

88. Under the amended statute, venue still appears to be proper in the county where a corporation has its registered office or agent if the defendant is a foreign corporation, or if the defendant is a domestic corporation and the plaintiff also resides in that county, because the registered office or agent should qualify as an agency or representative. See Article 1995, § 3(f), (g). Unless the registered office is also the principle office, however, a plaintiff who sues a domestic corporation and who does not live in the same county as the corporation's registered office may be forced to file his suit elsewhere. See *id.*

89. *Id.* § 4(a).

90. See *Middlebrook v. David Bradley Mfg. Co.*, 86 Tex. 706, 706, 26 S.W. 935, 935 (1894).

91. Like the *Middlebrook* doctrine, however, § 4 does not permit the additional claims to be joined if they are subject to an exception that mandates venue in a different county. Article 1995, § 4(a).

92. *Id.* The propriety of venue in multiple party situations was formerly the subject of subdivisions 4 and 29a of the statute. See Article 1995(4), (29a) (repealed). The new statute is more lenient, however, dispensing with the requirement that the additional defendants be necessary parties. Compare Article 1995, § 4(a); with Article 1995 (29a) (repealed).

93. The problem was particularly acute in third-party actions. According to *Union Bus Lines v. Byrd*, 142 Tex. 257, 259, 177 S.W.2d 774, 776 (1944), third-party actions for contribution and indemnity were treated as independent suits for venue purposes. The subsequent enactment of TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1984), the Texas comparative negligence statute, appeared to overrule the holding in *Union Bus Lines*, but the courts of appeals disagreed about the statute's interpretation. The matter was not finally resolved until the recent decision in *Arthur Bros., Inc. v. U.M.C., Inc.*, 26 Tex. Sup. Ct. J. 143, 143-44 (Dec. 15, 1982) (per curiam), discussed in Figari, Graves & Dwyer, *supra* note 32, at 296. The decision in *Arthur Bros.*, however, established the rule of ancillary venue only as to negligence cases.

94. Article 1995, § 4(b).

The new venue statutes and rules have also combined to drastically alter the procedures for establishing, challenging, and proving venue in the trial court, as well as contesting venue decisions in the appellate courts. To begin with, defendants no longer have a privilege to be sued in the county of their residence;⁹⁵ instead, the issue is simply whether the county of suit is a proper venue and, if not, whether the county to which the defendant seeks transfer is a proper venue.⁹⁶ Accordingly, the supreme court has amended the rules to delete references to the former plea of privilege, and the rules now speak in terms of a motion to transfer.⁹⁷ More importantly, the defendant is no longer limited to seeking transfer to the county of his residence or a county of mandatory venue;⁹⁸ the venue choices open to the plaintiff under the permissive exceptions are now equally available to the defendant.⁹⁹

A motion to transfer venue is the procedural vehicle by which the defendant challenges venue.¹⁰⁰ With two exceptions, a motion to transfer is waived if it is not made in writing and filed prior to or concurrently¹⁰¹ with the movant's first responsive pleading, other than a special appearance.¹⁰² The motion must (1) allege either that the county where the suit is pending is improper or that a mandatory provision applies and (2) request a transfer of the case to a specific county of mandatory or proper venue.¹⁰³ Further, the motion must plead the venue facts supporting transfer and state the legal basis for the transfer.¹⁰⁴ If the movant relies on a mandatory venue exception, he must clearly designate the applicable statutory provision.¹⁰⁵ Finally, verification of the motion is not required, although the movant may support his motion with affidavits in order to prove the al-

95. This conclusion is obvious in light of the change to the general rule and the supreme court's amendments to the Texas Rules of Civil Procedure, which eliminated all references to the plea of privilege. *See* TEX. R. CIV. P. 84-89, 93, 120a, 385, 527; *compare* Article 1995, § 1; *with* Article 1995 (repealed).

96. *See* Article 1995, § 4(c).

97. *See, e.g.*, TEX. R. CIV. P. 86, 87.

98. *See* O.F. Mossberg & Sons, Inc. v. Sullivan, 591 S.W.2d 952, 957 (Tex. Civ. App.—Amarillo 1980, no writ).

99. *See* TEX. R. CIV. P. 86; Article 1995, § 4(c).

100. TEX. R. CIV. P. 86(2).

101. Although the statute and the rules retain the due order pleading requirement with respect to venue challenges, the allowance for concurrent filings of separate instruments should eliminate highly technical questions about which instrument was entered on the docket first when a motion to transfer and an original answer are filed at the same time. *Id.*; *see* Industrial State Bank v. Eng'g. Serv. & Equip., Inc., 612 S.W.2d 661, 663 (Tex. Civ. App.—Dallas 1981, no writ), *discussed in* Figari, Graves & Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 36 Sw. L.J. 435, 447 (1982).

102. Article 1995, § 4(c); TEX. R. CIV. P. 86(1), 120a. Although the issue is not free from doubt, motions to transfer by consent or due to inability to obtain an impartial trial can apparently be filed after a responsive pleading has already been filed. *See* Article 1995, § 4(c)(3); TEX. R. CIV. P. 86(1), 87(5), 257. *But see* Article 1995, § 4(c)(2).

103. TEX. R. CIV. P. 86(3).

104. *Id.* In the event the defendant seeks transfer to a county where the cause of action accrued, the rules allow him to plead hypothetically, without admitting the existence of a cause of action, that "if a cause of action exists, then the cause of action or part thereof accrued" in the specific county to which transfer is sought. *Id.* 87(2)(b).

105. *Id.* 86(3).

leged venue facts.¹⁰⁶

The plaintiff is not required to file any response to the motion to transfer. Rule 87(3)(a) provides, however, that all venue facts, when properly pleaded, are taken as true unless specifically denied by the adverse party.¹⁰⁷ Consequently, if the plaintiff desires to challenge the propriety of venue in the county to which defendant seeks transfer, he must file a response specifically denying the venue facts pleaded in the motion to transfer. Likewise, unless the defendant specifically denies venue facts alleged by the plaintiff in his original petition, those facts will also be deemed established.

The party filing a motion to transfer has the duty to request a hearing on the motion, and each party is entitled to forty-five days notice of the hearing.¹⁰⁸ The plaintiff must file any response or opposing affidavits at least thirty days before the hearing, and a reply or additional affidavits supporting the motion are due not later than seven days before the date of hearing.¹⁰⁹

The venue hearing itself completely differs from the former practice under article 1995. Plaintiffs who previously relied on a statutory exception that permitted suit in the county where the cause of action accrued were required to prove the existence of their cause of action by a preponderance of the evidence.¹¹⁰ In contrast, the new rules eliminate the need to conduct a mini-trial on the merits of the venue hearing. Venue determinations are now based solely on the pleadings, affidavits, and any stipulations between the parties;¹¹¹ factual proof concerning the merits of the case is not required in order to establish venue.¹¹² Most importantly, in order to maintain venue in the county of suit, the plaintiff need only make prima facie proof that either the general rule or an exception applies.¹¹³ More-

106. *Id.* 86(3), 87(2), (3). If the plaintiff chooses to file a response, it also need not be verified. *Id.* 86(4).

107. If a venue fact is specifically denied, the party pleading that fact must make prima facie proof by filing affidavits fully and specifically setting forth facts supporting the pleading. *Id.* 87(3)(a).

108. *Id.* 87(1). Unfortunately, neither the statute nor the rules provide for sanctioning the defendant who fails to promptly present his motion for hearing. Consequently, since nothing in the rule prohibits the party opposing transfer from setting the hearing, the plaintiff is well-advised to set the hearing himself if the defendant is using the motion to transfer venue as a means of delaying the lawsuit.

109. *Id.* The time periods for filing responses, replies, and affidavits, or providing notice of the hearing, may be modified upon leave of court. *Id.*

110. *See* *Employer's Casualty Co. v. Clark*, 491 S.W.2d 661, 662 (Tex. 1973).

111. TEX. R. CIV. P. 87(3)(b). The court may also consider depositions, answers to interrogatories, and other discovery products in making its venue determination as long as they are attached to, or incorporated by reference into, an affidavit of a party, witness or attorney who has knowledge of the discovery. *Id.* 88.

112. Article 1995, § 4(d)(1); TEX. R. CIV. P. 87(2)(b).

113. TEX. R. CIV. P. 87(3)(c). Prima facie proof is made if the venue facts are properly pleaded and fully supported by duly filed affidavits. *Id.* 87(3)(a). Thus, it appears that a plaintiff must now plead appropriate venue facts in his original petition in order to prevail at the motion to transfer hearing. *See id.* 87(3)(c). Not clear, however, is whether the plaintiff's response to the motion to transfer can supply the requisite pleading allegations if the allegations are not in the petition.

over, if the plaintiff fails to establish that venue is proper, the case is not automatically transferred pursuant to the defendant's privilege; instead, the burden shifts to the defendant to prove that venue is proper in the county to which transfer is sought.¹¹⁴ If neither party initially makes the required showing, the court may direct that further proof be made.¹¹⁵ Finally, the parties no longer have a right to a jury determination of the venue question.¹¹⁶

Generally, once the court has ruled on a motion to transfer it will consider no further motions to transfer in the case, even if the movant is a party that was added after the venue proceedings.¹¹⁷ A joined party whom this rule precludes from moving to transfer may still file a motion to transfer, but only for the purpose of preserving the venue issue on appeal.¹¹⁸ The new venue provisions, however, prohibit interlocutory appeals of venue rulings.¹¹⁹ Instead, the venue question is now appealed together with any appeal from the trial on the merits.¹²⁰ Section 4(d)(2) of the venue statute provides that, in examining the venue issue on appeal, the court "shall consider the entire record, including the trial on the merits,"¹²¹ and an improper venue determination at the trial court level is automatically reversible error.¹²²

Amended article 1995 also provides for the transfer of a case to another county of proper venue in two additional situations. First, it allows transfer if an impartial trial cannot be had in the county where the action is pending.¹²³ In this connection, the statute merely continues the former practice under rules 257-259, although adjustments were necessary to the procedures those rules prescribe.¹²⁴ For example, it now appears that in cases of alleged inability to obtain an impartial trial, the court is to make its determination solely on the basis of the affidavits, rather than relying on

114. *Id.* 87(a). The rules impose the same pleading and proof requirements on the defendant with respect to the propriety of venue in the county designated in the motion to transfer. *See id.* 86, 87.

115. *Id.* 87(3)(d).

116. *Id.* 87(4).

117. *Id.* 87(5). Exceptions to this rule exist for motions to transfer based on inability to obtain a fair trial, *see id.* 257-59, and motions by subsequently added parties alleging the application of a mandatory venue provision as to them, provided that the claim of mandatory venue was not available to the previous movant. *Id.* 87(5).

118. *Id.* 257-258. Indeed, the appellate point will be lost unless a motion to transfer is filed.

119. Article 1995, § 4(d)(1); TEX. R. CIV. P. 87(6). Section 2 of the bill amending art. 1995 repealed TEX. REV. CIV. STAT. ANN. 2008 (Vernon 1964), which authorized interlocutory appeals of venue judgments. Act of June 17, 1983, ch. 385, § 2, 1983 Tex. Gen. Laws 2119, 2124.

120. Article 1995, § 4(d)(2).

121. *Id.* The proper application of this provision is not entirely clear and must await judicial interpretation. Moreover, the section seems fraught with opportunities for abuse, which may lead the courts to interpret "shall" as merely directory rather than mandatory, thereby providing the courts with some leeway on appeal.

122. *Id.*

123. *Id.* § 4(c)(2).

124. *See* TEX. R. CIV. P. 257-259.

live testimony.¹²⁵ Moreover, if the trial court grants the motion, it must transfer the case to a county of proper venue, if one is available. Accordingly, the case is now transferred to a county in the same or adjoining district only if venue is proper in that county or if no county of proper venue exists anywhere other than the county of suit.¹²⁶ Finally, the new statute expressly permits transfer of a case to another county of proper venue upon the written consent of the parties at any time.¹²⁷

VI. PLEADINGS

Rule 94 imposes an obligation on litigants to specifically plead affirmative defenses and identifies a number of defenses that are within its scope.¹²⁸ Two cases during the survey period illustrate that the list of defenses in rule 94 is not exclusive. In *France v. American Indemnity Co.*¹²⁹ the supreme court held that the defenses of abandonment and election of remedies are affirmative in nature and are not raised by a general denial.¹³⁰ Similarly, in *Matrix v. Provident American Insurance Co.*¹³¹ the court of appeals ruled that the defense of offset is a defense within the contemplation of rule 94 and must be affirmatively alleged.¹³²

For the practitioner whose client faces a default judgment under the Texas Deceptive Trade Practices Act (DTPA),¹³³ *Village Square, Ltd. v. Barton*¹³⁴ may provide basis for relief. Appealing from a default judgment, the defendant in *Barton* claimed that the plaintiff's DTPA allegations were inadequate to support the judgment. Relying on the general rule that a petition must "state an ascertainable cause of action and the

125. Compare *id.* 258 (challenge of change of venue motion determined by affidavit) with *id.* 258 (1976) (if change of venue motion challenged by affidavit, judge can determine issues formed by trial).

126. See TEX. R. CIV. P. 259.

127. Article 1995, § 4(c)(3); see TEX. R. CIV. P. 86(1) (discussing timing of motion to transfer). The interrelationship between the consent and motion to transfer procedures in the statute is unclear. Under the statute, a transfer of venue apparently is available only upon the timely filing of a proper motion before any other responsive pleading; yet the same provision states that a written consent to transfer may be filed at any time. See Article 1995, § 4(c).

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

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

Id. (emphasis added).

129. 648 S.W.2d 283 (Tex. 1983).

130. *Id.* at 285; accord *Bocanegra v. Aetna Life Ins. Co.*, 605 S.W.2d 848, 850 (Tex. 1980); *Mid-Tex Constr. Corp. v. Passero*, 430 S.W.2d 515, 517 (Tex. Civ. App.—El Paso 1968, writ ref'd n.r.e.); *Vratis v. Baxter*, 315 S.W.2d 331, 340 (Tex. Civ. App.—Beaumont 1958, writ ref'd n.r.e.).

131. 658 S.W.2d 665 (Tex. App.—Dallas 1983, no writ).

132. *Id.* at 667; accord *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 936 (Tex. 1980).

133. TEX. BUS. & COMM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1984).

134. 660 S.W.2d 556 (Tex. App.—San Antonio 1983, no writ).

relief sought" in order to support a default judgment,¹³⁵ the court of appeals held that general and conclusory allegations that simply tracked the DTPA's statutory language were insufficient.¹³⁶ Specifically, the appellate court found that the plaintiff's allegations did not designate with particularity which acts or events the plaintiff relied upon as a basis for liability under the DTPA and did not specify the acts that were the producing cause of injury to the plaintiff.¹³⁷

VII. LIMITATIONS

During the survey period Texas courts examined a host of statutes providing specific limitations periods for professional malpractice actions. Plaintiffs suing doctors or hospitals received a disproportionate share of the courts' largesse, prevailing in each of the four limitations cases that attracted the attention of the Texas Supreme Court. Two of these cases involved former article 5.82 of the Texas Insurance Code, which provided a two-year limitation period for filing malpractice suits against physicians or hospitals carrying liability insurance.¹³⁸ In *Sax v. Votteler*¹³⁹ the supreme court held that application of article 5.82 to minors over the age of six was unconstitutional as a violation of the open courts provision of the Texas Constitution.¹⁴⁰ The plaintiffs in *Sax*, the parents of an eleven-year-old who was allegedly the victim of a doctor's negligence, argued that the statute, which barred their claim filed three years after the date of the child's operation, violated the equal protection and due process guarantees of the United States and Texas Constitutions. The plaintiffs premised their argument on the fact that article 5.82 treated medical malpractice minor claimants differently from minor claimants in other tort actions. They argued also that the limitations period was manifestly so short that it deprived an injured plaintiff of a reasonable opportunity to enforce his or her claim. Observing that the statute had survived past challenges to its constitutionality,¹⁴¹ the court of appeals rejected the parents' arguments and af-

135. *Id.* at 559; accord *Stoner v. Thompson*, 578 S.W.2d 679, 683 (Tex. 1979); *C & H Transp. Co. v. Wright*, 396 S.W.2d 443, 446 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.).

136. The plaintiff made the following DTPA allegations:

[P]laintiff is a consumer and in the course of this transaction, defendants engaged in false, misleading, and deceptive acts or practices in trade or commerce; further . . . the course of conduct is further in violation of sections 17.46 and 17.50 of the Texas Business and Commerce Code, in that defendants have failed to comply with express and/or implied warranties, and have been guilty of unconscionable actions or courses of action and plaintiff is thereby entitled to relief, in addition to their actual damages, treble damages and reasonable attorneys' fees

660 S.W.2d at 558.

137. *Id.* at 560.

138. Act of June 3, 1975, ch. 330, § 4, 1975 Tex. Gen. Laws 864, 865, *repealed by* Act of June 16, 1977 ch. 817, § 41.03, 1977 Tex. Gen. Laws 2039, 2064. Article 5.82 imposed a two-year statute of limitations on all persons regardless of minority except that minors under six years of age had until their eighth birthday to file.

139. 648 S.W.2d 661 (Tex. 1983).

140. TEX. CONST. art. I, § 13.

141. *See, e.g.*, *Littlefield v. Hayes*, 609 S.W.2d 627, 630 (Tex. Civ. App.—Amarillo 1980,

firmed a summary judgment in favor of the doctor.¹⁴²

The supreme court, however, chose to bypass considerations of equal protection, as well as due process under the United States Constitution, and focused instead on the open courts provision. The court labeled this provision a "due process guarantee" that accords Texas citizens rights additional to those guaranteed by the United States Constitution.¹⁴³ According to the court, a statute or ordinance that "unreasonably abridges a justiciable right to obtain redress for injuries caused by the wrongful acts of another amounts to a denial of due process under article I, section 13, and is, therefore, void."¹⁴⁴ After first determining that a child does in fact have a well-defined justiciable right to sue for injuries negligently inflicted by others,¹⁴⁵ the court concluded that the statute abrogated that right altogether, without providing a reasonable alternative. The court reached this conclusion because the statute barred assertion of the minor's cause of action once he reached the age of majority, if more than two years had expired since the date of injury, even though the minor had no right to bring his action beforehand.¹⁴⁶ Consequently, although the court acknowledged the salutary purpose of article 5.82 to secure an insurance rate structure that would enable health care providers to obtain liability insurance, it concluded that the means the legislature chose for achieving that purpose was illegitimate.¹⁴⁷ As a result, the court remanded the case to the district court for trial of the claims belonging to the minor.¹⁴⁸

no writ); *Wallace v. Homan & Crimen, Inc.*, 584 S.W.2d 322, 323-24 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

142. 636 S.W.2d 461, 463-65 (Tex. App.—Texarkana 1982).

143. 648 S.W.2d at 664. Although the court of appeals concluded that art. I, § 13 of the Texas Constitution "was not raised as a ground of defense to the motion for summary judgment and cannot be considered," it nevertheless noted in a dictum that art. 5.82 did not violate the open courts provision. 636 S.W.2d at 465. The supreme court disagreed, holding that the petitioner's response to the motion for summary judgment, which included an allegation that the statute denied due process, was sufficient to preserve the matter for review. 648 S.W.2d at 664.

144. *Id.* at 665 (citing *Hanks v. City of Port Arthur*, 121 Tex. 202, 206, 48 S.W.2d 944, 945 (1932)).

145. According to the court, the minor has a cause of action to recover for pain and suffering and loss of earning capacity after the age of majority, which cause of action is distinctly separate from the parents' right to recover for medical costs the parents have incurred on behalf of the minor and diminution of the child's earning capacity during the remaining period of his minority. 648 S.W.2d at 666.

146. *Id.* at 667. In other words, a minor could not bring an action in his own right until he attained the age of majority, but if he sustained the injury before his sixteenth birthday art. 5.82 would bar the action.

147. *Id.* The careful practitioner should note that the basis upon which the supreme court declared art. 5.82 unconstitutional applies equally to its successor statute, TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1984), which likewise provides for a two-year statute of limitations, but which is tolled during the first twelve years of a minor's life. Not being in the habit of rendering advisory opinions, however, the supreme court failed to mention this fact in its opinion.

148. The court affirmed the summary judgment, however, with respect to the causes of action in favor of the minor's parents, since the statute of limitations had run with respect to their claims and the statute, as applied to them, did not run afoul of the open courts provision of the Texas Constitution. 648 S.W.2d at 667.

The question in *Delgado v. Burns*¹⁴⁹ was whether the discovery rule¹⁵⁰ applied to medical malpractice actions formerly governed by article 5.82 and its two-year statute of limitations. The plaintiff filed suit against a surgeon, seeking recovery for injuries resulting from the doctor's failure to remove surgical staples during an operation on October 9, 1975. Post-operative treatment continued until December of that year, but the plaintiff did not subsequently see her doctor until February 1978, when one of the staples was removed. Approximately two months later the plaintiff filed her action. The trial court entered a summary judgment in favor of the doctor based on his plea of limitations. On appeal, the court of appeals dispensed with the plaintiff's constitutional attack on article 5.82, concluding that the plaintiff's response to the motion for summary judgment had not preserved the issue of the statute's constitutionality.¹⁵¹ Addressing the plaintiff's argument that the discovery rule applied and tolled commencement of the limitations period until February 3, 1978, when the plaintiff first learned of the existence of the surgical staples, the court of appeals held that the discovery rule did not apply, under former article 5.82, to actions against physicians carrying medical liability insurance.¹⁵² According to the court, the judiciary engrafted the discovery rule onto article 5526,¹⁵³ which governed medical malpractice actions prior to June 3, 1975, to determine when certain causes of action accrued within the meaning of the statute.¹⁵⁴ In passing article 5.82, however, the legislature abrogated this judicial gloss by deleting reference in the new statutory language to when the cause of action accrues.¹⁵⁵ Accordingly, the court held that the discovery rule was inapplicable and affirmed the judgment of the trial court.¹⁵⁶

149. 650 S.W.2d 505 (Tex. App.—Houston [14th Dist.], *rev'd*, 656 S.W.2d 428 (Tex. 1983).

150. The discovery rule provides that the statute of limitations does not start to run until the plaintiff discovers the true facts giving rise to his claimed damage or until the date discovery should reasonably have been made. *See Hayes v. Hall*, 488 S.W.2d 412, 414 (Tex. 1972); *Gaddis v. Smith*, 417 S.W.2d 577, 578 (Tex. 1967). *See generally* Figari, Graves & Dwyer, *supra* note 32, at 300-01 (discussing discovery rule).

151. 650 S.W.2d at 506-07.

152. *Id.* at 507; *see also* *Littlefield v. Hays*, 609 S.W.2d 627, 630 (Tex. Civ. App.—Amarillo 1980, no writ) (fact that discovery rule was abolished by statute as to insured, but not uninsured, doctors does not render it invalid). By its own terms, art. 5.82 applied only to "claim[s] against a person or hospital covered by a policy of professional liability insurance covering a person licensed to practice medicine or podiatry or certified to administer anesthesia" Act of June 3, 1975, ch. 330, § 4, 1975 Tex. Gen. Laws 864, 865 (repealed 1977).

153. TEX. REV. CIV. STAT. ANN. art. 5526, § 6 (Vernon Supp. 1984) provides that all actions for injury to the person of another shall be commenced and prosecuted within two years after the cause of action accrues.

154. 650 S.W.2d at 506-07; *see Gaddis v. Smith*, 417 S.W.2d 577, 580-81 (Tex. 1967) (quoting *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277, 285-86 (1961) (discussing when cause of action accrues)).

155. 650 S.W.2d at 507.

156. The supreme court, however, reversed the judgment of the court of appeals in *Delgado* on other grounds and remanded the case to the district court for trial. Ignoring the issue of the discovery rule, the court simply held that the summary judgment record failed to establish the plaintiff's last treatment date, which was the commencement date for the limi-

*Bordelon v. Peck*¹⁵⁷ involved the limitations provision of article 4590i, the successor to former article 5.82 of the Insurance Code.¹⁵⁸ After first acknowledging that one court had already held the discovery rule inapplicable under the new health care statute,¹⁵⁹ the court of appeals in *Bordelon* concluded that the legislature had also eliminated the court-developed doctrine of fraudulent concealment¹⁶⁰ as an exception to the statute of limitations governing malpractice actions.¹⁶¹ According to the court, section 10.01 of article 4590i establishes an absolute time in which suits must be filed; the legislature adopted the termination rule so that all suits would be filed within two years of the date the medical or health care treatment was completed.¹⁶² A sharply divided supreme court disagreed and reversed the judgment of the court of appeals.¹⁶³ The supreme court observed that a fiduciary relationship exists between physician and patient and, therefore, a physician has a duty to disclose a negligent act or the fact that an injury has occurred.¹⁶⁴ Failure to disclose in such instances amounts to fraudulent concealment, which operates to "prevent the wrongdoer from perpetrating further fraud by using limitations as a shield."¹⁶⁵ Thus, without even addressing the court of appeals' statutory analysis, the supreme court held that article 4590i, section 10.01, does not abolish fraudulent concealment as an equitable estoppel to the defense of limitations under the statute.¹⁶⁶

tations period under former art. 5.82 of the Insurance Code. *Delgado v. Burns*, 656 S.W.2d 428, 429 (Tex. 1983); see Act of June 3, 1975, ch. 330, § 4, 1975 Tex. Gen. Laws 864, 865 (repealed 1977) (no claim may be commenced unless action filed within two years from date medical treatment completed).

157. 643 S.W.2d 233 (Tex. App.—El Paso 1982), *rev'd*, 26 Tex. Sup. Ct. J. 494 (July 6, 1983).

158. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1984) essentially recodifies art. 5.82. See *supra* note 147.

159. See *Littlefield v. Hays*, 609 S.W.2d 627, 630 (Tex. Civ. App.—Amarillo 1980, no writ).

160. Under the fraudulent concealment doctrine, where a defendant is under a duty to make disclosure but fraudulently conceals the existence of a cause of action from a party to whom it belongs, the defendant is estopped from relying on the defense of limitations until the party learns of the right of action or should have learned thereof through the exercise of reasonable diligence. *Estate of Stonecipher v. Estate of Butts*, 591 S.W.2d 806, 809 (Tex. 1979); *Nicholas v. Smith*, 507 S.W.2d 518, 519 (Tex. 1974).

161. 643 S.W.2d at 235.

162. *Id.* In reaching its conclusion the court of appeals relied on the legislative history of art. 4590i as described by one of the commentators. See Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH. L. REV. 419, 425 (1979), cited in *Bordelon*, 643 S.W.2d at 235.

163. 26 Tex. Sup. Ct. J. 494 (July 6, 1983) (5-4 decision).

164. *Id.* at 495 (citing *Nichols v. Smith*, 507 S.W.2d 518, 519 (Tex. 1974); *Fitzpatrick v. Marlowe*, 553 S.W.2d 190, 194 (Tex. Civ. App.—Tyler 1977, writ *ref'd n.r.e.*)).

165. 26 Tex. Sup. Ct. J. at 495.

166. *Id.* The dissenters engaged in a statutory analysis akin to that of the lower court and concluded by accusing the majority of circumventing the legislature's intent. *Id.* at 496 (Barrow, J., dissenting). Further, the dissent observed that the fraudulent concealment exception would not warrant reversal at any rate since the fiduciary relationship between the plaintiff and defendant and, hence, the duty to disclose, ended more than two years before the plaintiff filed suit. *Id.* (citing *McClung v. Johnson*, 620 S.W.2d 644, 647 (Tex. Civ. App.—Dallas 1981, writ *ref'd n.r.e.*), discussed in *Figari, Graves & Dwyer, supra* note 100, at 450). Moreover, the estoppel effect of fraudulent concealment ends when a party learns the

Article 4590i was also the subject of discussion in *Schepps v. Presbyterian Hospital*.¹⁶⁷ In *Schepps* the supreme court agreed with both of the lower courts and held that the sixty-day notice provision of the statute was mandatory.¹⁶⁸ The courts had differing opinions, however, about the defendants' remedy for the plaintiff's noncompliance with the notice requirement. In *Schepps* the plaintiff filed suit against a hospital and doctor without first providing the requisite notice. After the two-year statute of limitations had expired, the defendants moved for summary judgment and the trial court granted a take-nothing judgment against the plaintiff. Agreeing with the trial court that the notice provision was mandatory, the court of appeals reversed the judgment and remanded it to the trial court with instructions to dismiss the plaintiff's case.¹⁶⁹ The supreme court adopted a more sympathetic view of the plaintiff's plight, however, determining that the appropriate remedy when a plaintiff fails to give notice is for the trial court to abate the action for sixty days.¹⁷⁰ According to the court, barring prosecution of the plaintiff's claim would unduly restrict his rights, contrary to the statutory intent.¹⁷¹

In addition to cases involving medical malpractice, the courts handed down several decisions concerning limitations in other professional malpractice areas. In *Skeen v. Monsanto Co.*,¹⁷² for example, a federal court construed article 5536a,¹⁷³ the statute of limitations governing malpractice claims against engineers and architects. The plaintiffs contended that the statute was inapplicable to persons who merely designed improvements, as opposed to those who actually performed construction or repairs. The court rejected this argument and held that the statute barred the plaintiff's action against a defendant designer that was brought more than twenty years after the project was substantially completed.¹⁷⁴ Moreover, since the

true facts, and it was undisputed that the plaintiff was put on notice of the negligent act more than two years prior to filing suit. 26 Tex. Sup. Ct. J. at 497.

167. 652 S.W.2d 934 (Tex. 1983).

168. *Id.* at 938. TEX. REV. CIV. STAT. ANN. art. 4590i, § 4.01(a) (Vernon Supp. 1984) provides: "Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim . . . to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit"

169. 638 S.W.2d 156, 158 (Tex. App.—Dallas 1982), *rev'd*, 652 S.W.2d 934 (Tex. 1983).

170. 652 S.W.2d at 938. The court disapproved of the contrary holding in *Wilborn v. University Hosp.*, 642 S.W.2d 50, 52-53 (Tex. App.—Amarillo 1982, no writ).

171. 652 S.W.2d at 938; *see* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02(b), (b)(3) (Vernon Supp. 1984). In his dissent Chief Justice Pope disagreed, stating that the remedy of abatement frustrates the statute's purpose of clearing court dockets for meritorious cases. 625 S.W.2d at 939.

172. 569 F. Supp. 232 (S.D. Tex. 1983).

173. TEX. REV. CIV. STAT. ANN. art. 5536a(1) (Vernon Supp. 1984) provides, in part, that all causes of action for personal injury, death, and property damage, arising out of a defective or unsafe condition of any improvement to real property, against any registered or licensed architect performing or furnishing the design, planning, or inspection of construction must be commenced and prosecuted within 10 years after the substantial completion of the improvement.

174. 569 F. Supp. at 234. The court noted that persons who design improvements to real property are clearly within the statute's purview, even though the title of the statute fails to mention them specifically. *Id.* at 233.

defendant was merely a designer and did not actually furnish construction or repairs to the improvement, fraudulent concealment was unavailable as a defense to the limitations statute.¹⁷⁵ Finally, the court upheld the statute's validity in the face of the plaintiff's attack on its constitutionality.¹⁷⁶

*Jimenez v. Maloney*¹⁷⁷ reaffirmed the view, espoused two years earlier in *McClung v. Johnson*,¹⁷⁸ that the discovery rule does not apply in actions for legal malpractice. The court of appeals in *Jimenez* also considered the effect of article 5535,¹⁷⁹ which tolls the statute of limitations for persons imprisoned, on a prisoner who is on parole. Noting that a determination of whether a party is imprisoned within the meaning of the statute depends on the nature and degree of the restraint imposed,¹⁸⁰ the court concluded that the prisoner's parole conditions did not inhibit his access to the courts and, therefore, parole was not imprisonment under article 5535.¹⁸¹ The court also held, in line with the prevailing authorities, that the applicable limitations period commences to run once a prisoner's disability is removed, and it is not subsequently tolled by reimprisonment.¹⁸²

Finally, the legislature amended section 13.01 of the Texas Family Code, the statute of limitations governing paternity suits.¹⁸³ Section 13.01

175. *Id.* at 234. Section 1 of the statute concerns designers. Unlike § 2, which involves persons actually furnishing construction or repairs, § 1 offers no exception to the 10-year limitation period for fraudulent concealment. Compare TEX. REV. CIV. STAT. ANN. art. 5536a(1) (Vernon Supp. 1984); with *id.* art. 5536a(2).

176. 569 F. Supp. at 234; see *Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870, 873 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (upholding constitutionality of art. 5536a), *appeal dismissed*, 103 S. Ct. 24, 74 L. Ed. 2d 39 (1982), discussed in Figari, Graves & Dwyer, *supra* note 100, at 452.

177. 646 S.W.2d 673, 674 (Tex. App.—San Antonio 1983, writ dismissed).

178. 620 S.W.2d 644 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.), discussed in Figari, Graves & Dwyer, *supra* note 100, at 450. *McClung* held that the applicable statute of limitations in legal malpractice actions commenced to run once the attorney-client relationship ended. 620 S.W.2d at 647.

179. TEX. REV. CIV. STAT. ANN. art. 5535 (Vernon Supp. 1984) provides:

If a person entitled to bring any action mentioned in this subdivision of this title be at the time the cause of action accrues . . . a person imprisoned . . . the time of such disability shall not be deemed a portion of the time limited for the commencement of the action and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this title.

180. See *Adler v. Beverly Hills Hosp.*, 594 S.W.2d 153, 158 (Tex. Civ. App.—Dallas 1980, no writ) (disability includes practical as well as legal disability to sue); *Carter v. Associated Transfer & Storage Co.*, 410 S.W.2d 830, 832-33 (Tex. Civ. App.—Waco 1966, no writ) (imprisonment is determined by the nature and degree of restraint imposed).

181. 646 S.W.2d at 674-75.

182. *Id.* at 675; see *Stephens v. Curtis*, 450 F. Supp. 141, 144 (S.D. Tex. 1978); *Blum v. Elkins*, 369 S.W.2d 810, 812-13 (Tex. Civ. App.—Waco 1963, no writ).

183. Act of June 19, 1983, ch. 744, § 1, 1983 Tex. Gen. Laws 4530 (codified at TEX. FAM. CODE ANN. § 13.01 (Vernon Pam. Supp. 1975-1983)). The legislature's action was no doubt prompted by decisions of the United States and Texas Supreme Courts in 1982 that declared unconstitutional the former one-year statute of limitations for paternity suits in Texas. See *Mills v. Habluetzel*, 456 U.S. 91, 101 (1982), and *In re J.A.M.*, 631 S.W.2d 730, 731-32 (Tex. 1982), discussed in Figari, Graves & Dwyer, *supra* note 32, at 303-04. Although the legislature had already amended § 13.01 of the Texas Family Code prior to those decisions, the amended version provided only a four-year limitations period and, thus, probably incorporated the same constitutional flaws that inhered in its predecessor. See TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1982-1983) (repealed).

now provides that a paternity suit may be brought on or before the second anniversary of the day the child becomes an adult.¹⁸⁴ Significantly, the new statute is retroactive in its application, restoring causes of action that had already become barred under the old statute.¹⁸⁵

VIII. PARTIES

Rule 42(c)(1) requires the proponent of a class action to plead the elements of a class action stated in subdivisions (a) and (b) of the rule and to prove those elements at a hearing set as soon as practicable after the petition is filed.¹⁸⁶ *Mahoney v. Cupp*¹⁸⁷ emphasized the importance of providing the opposing party with due notice of that class certification hearing.¹⁸⁸ The plaintiffs filed suit under the Deceptive Trade Practices—Consumer Protection Act,¹⁸⁹ pleading for appropriate orders and rulings under rule 42 to maintain the suit as a class action. The plaintiffs also sought temporary injunctive relief, which the court granted following a hearing that the defendant did not attend. The court entered no order, however, regarding certification of the class, and the plaintiffs, therefore, subsequently moved for such an order. The court entered the certification order following a second hearing, at which the defendant was present. No evidence was adduced at the second hearing, however, apart from a transcript of the testimony from the first hearing, which the plaintiff introduced without objection by the defendant.

On appeal, the defendant complained that the order granting class certification was erroneous because it was based upon a hearing held without notice to him.¹⁹⁰ Rejecting this contention, the court of appeals held that the defendant had received proper notice of the second hearing and had had an opportunity to be heard.¹⁹¹ Nevertheless, the court reversed the order of certification because it was unsupported by the evidence. In this connection, the court concluded that the order could not be based on the testimony adduced at the first hearing, since the defendant did not receive proper notice that the first hearing would address the question of class

184. TEX. FAM. CODE ANN. § 13.01 (Vernon Pam. Supp. 1975-1983).

185. Act of June 19, 1983, ch. 744, § 2, 1983 Tex. Gen. Laws 4530, 4531.

186. TEX. R. CIV. P. 42(c)(1); see *Duncan v. Dripping Springs Indep. School Dist.*, 612 S.W.2d 644, 647 (Tex. Civ. App.—Austin 1981, no writ).

187. 638 S.W.2d 257 (Tex. App.—Waco 1982, no writ).

188. The court noted that fundamental due process under both the Texas and the United States Constitutions required that the defendant have notice and an opportunity to be heard on the question of class certification since certification would broadly affect his property rights. *Id.* at 260.

189. TEX. BUS. & COM. CODE ANN., §§ 17.41-.60 (Vernon Supp. 1984) [hereinafter cited as DTPA].

190. 638 S.W.2d at 260. The defendant apparently contended on appeal that the class certification order actually stemmed from the first hearing since no new evidence was adduced at the second hearing. Moreover, the record at the first hearing did not show any notice to or knowledge by the defendant that the class certification question would be addressed at that hearing. *Id.* at 259-60.

191. *Id.* at 261.

certification.¹⁹² Moreover, the transcript of that testimony was hearsay at the second hearing, since the plaintiff had established no predicate showing that the witness at the first hearing was unavailable at the second hearing, and the defendant had not been afforded the opportunity to cross-examine.¹⁹³ Accordingly, the hearsay evidence could not support the order entered after the second hearing,¹⁹⁴ and the case was remanded for a new trial on the issue of class certification.¹⁹⁵

The court in *Mahoney* also held that the DTPA does not preclude class actions as a matter of law.¹⁹⁶ According to the court, the Texas Legislature repealed the DTPA provisions that formerly authorized class actions¹⁹⁷ in order to avoid their possible interference with the application of rule 42; however, the legislature did not intend to exclude class actions as a procedural device under the act.¹⁹⁸ Moreover, the court envisioned no problem in administering a class composed of members who would be subject to different versions of the DTPA as a result of amendments to the statute. Under rule 42(d), the trial court could simply divide the class into appropriate subclasses and treat each subclass separately.¹⁹⁹

Although rule 39²⁰⁰ now contemplates that indispensable parties are rather rare,²⁰¹ *Neely v. Schooler*²⁰² is a warning that the doctrine of indispensable parties is not dead. The plaintiffs in *Neely* sued for specific per-

192. *Id.* at 260. According to the court, the only exception to this notice requirement arises when the defendant has defaulted on the question of class certification by failing to file a timely answer to the suit. No evidence existed in this case, however, showing any default by the defendant. *Id.*

193. *Id.* at 261 (citing *Houston Fire & Casualty Ins. Co. v. Brittan*, 402 S.W.2d 509, 510 (Tex. 1966); *Lone Star Gas Co. v. State*, 137 Tex. 279, 308, 153 S.W.2d 681, 697 (1941)).

194. The court adhered to the long-standing Texas doctrine that inadmissible hearsay, admitted because of a failure to object, was of no probative value and could not in any way support a judgment. 638 S.W.2d at 261; see *Cooper Petroleum Co. v. LaGloria Oil & Gas Co.*, 436 S.W.2d 889, 891 (Tex. 1969); *Texas Co. v. Lee*, 138 Tex. 167, 171, 157 S.W.2d 628, 631 (1941). Of course, that doctrine is no longer the rule in Texas. See TEX. R. EVID. 802.

195. 638 S.W.2d at 261. The court chose to remand the case in the interest of justice, rather than render judgment for the defendant, since the plaintiffs' failure to produce new evidence at the second hearing apparently resulted from their mistaken belief that the evidence from the first hearing was admissible. *Id.* at 261. This approach is expressly authorized for the Texas Supreme Court and, by analogy, should similarly apply to the courts of appeal. See TEX. R. CIV. P. 505; *Aetna Ins. Co. v. Klein*, 160 Tex. 61, 67, 325 S.W.2d 376, 379-80 (1959).

196. 638 S.W.2d at 261.

197. TEX. BUS. & COM. CODE ANN. §§ 17.51-.54 (Vernon Supp. 1982-1983), repealed by Act of May 23, 1977, ch. 216, §§ 10-13, 1977 Tex. Gen. Laws 605.

198. 638 S.W.2d at 261. The supreme court approved the present version of rule 42 on May 9, 1977. According to the court, the adoption of this rule rendered unnecessary the former class action provisions of the DTPA. *Id.*; see generally Dorsaneo, *Creditor's Rights*, 32 SW. L.J. 245, 268 (1978) (discussion of rule 42); Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 15 (1978) (discussion of rule 42).

199. 638 S.W.2d at 261-62; see TEX. R. CIV. P. 42(d). Moreover, under rule 42(c) the court can alter, amend, or withdraw a class at any time before judgment. TEX. R. CIV. P. 42(c).

200. *Id.* 39.

201. See *Pirtle v. Gregory*, 629 S.W.2d 919 (Tex. 1982) (per curiam), discussed in Figari, Graves & Dwyer, *supra* note 32, at 306; *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 204 (Tex. 1974).

202. 643 S.W.2d 229 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).

formance of a contract relating to real property. They failed, however, to join as a party defendant a third party to whom the named defendant had deeded the property. Affirming an instructed verdict in favor of the defendant, the court of appeals concluded that the absent party, who was the record owner of the land, was indispensable.²⁰³ Pointing out that the plaintiffs knew the names of the persons who had not been joined,²⁰⁴ the court cited what it termed as the longstanding rule in Texas that "the parties to [a] contract will be the parties to an action for its specific enforcement, and all who have an interest in the contract . . . or whose interests may be affected are indispensable parties."²⁰⁵

*Jones v. Springs Ranch Co.*²⁰⁶ involved the procedure for determining the validity of an intervention under rule 60.²⁰⁷ Although the plaintiff filed a motion to strike the petition of two intervening defendants, she never obtained a ruling from the trial court on her motion. Accordingly, the court of appeals held that an issue regarding the validity of the intervention was not preserved for appeal and refused to reach the merits of the point.²⁰⁸ Citing a procedurally similar case in support,²⁰⁹ the court observed that an intervenor under rule 60 is not required to obtain the trial court's approval in order to intervene; the burden is on the opposing party to secure an order striking the petition in intervention.²¹⁰ Since the plaintiff did not pursue the matter in the trial court, she was precluded from litigating the issue for the first time on appeal.

Finally, in *Threeway Constructors, Inc. v. Aten*,²¹¹ the court found no abuse of discretion in the trial court's denial of a defendant's motion for leave to join a third party. By requiring that a defendant ask leave of court to file a third-party petition, rule 38 reposes discretion in the trial court to grant or deny the request.²¹² According to the court of appeals, the trial court did not abuse this discretion since the motion was filed more than a year after the suit was filed and less than three months before trial.²¹³

203. *Id.* at 231.

204. *Id.* TEX. R. CIV. P. 39(c) provides that a plaintiff knowing the names of necessary parties must plead the reasons for their nonjoinder. Apparently, the court deemed it of some significance, in reaching its determination that the absent parties were indispensable, that the plaintiffs had failed to comply with the provisions of rule 39(c).

205. 643 S.W.2d at 231 (quoting 1 R. McDONALD, *supra* note 62, § 3.28.4).

206. 642 S.W.2d 551 (Tex. App.—Amarillo 1982, no writ).

207. TEX. R. CIV. P. 60.

208. 642 S.W.2d at 554.

209. *Bell v. Craig*, 555 S.W.2d 210, 212 (Tex. Civ. App.—Dallas 1977, no writ).

210. 642 S.W.2d at 554; *see also* *McWilliams v. Snap-Pac Corp.*, 476 S.W.2d 941, 949-50 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.) (allowed intervention according to rule 60 because no motion to strike offered).

211. No. 08-82-00335-CV (Tex. App.—El Paso, Aug. 17, 1983, no writ).

212. *Id.*; TEX. R. CIV. P. 38.

213. No. 08-82-00335-CV (Tex. App.—El Paso, Aug. 17, 1983, no writ); *see* TEX. R. CIV. P. 37 (prohibits the addition of new parties at a time when it will unreasonably delay the trial).

IX. DISCOVERY

On November 23, 1982, the Texas Supreme Court officially promulgated the Texas Rules of Evidence, which became effective on September 1, 1983, and now govern all civil proceedings.²¹⁴ Article V of those rules recognizes certain evidentiary privileges with respect to reports privileged by statute;²¹⁵ attorney-client communications;²¹⁶ husband-wife communications;²¹⁷ communications to clergymen;²¹⁸ political votes;²¹⁹ trade secrets;²²⁰ identify of informers;²²¹ physician-patient communications;²²² and mental health information.²²³ The new rules of evidence also repealed the accountant-client privilege, which was formerly authorized by statute.²²⁴ Although each of these privileges obviously impacts on discovery,²²⁵ a full discussion of the privileges, as well as other aspects of the new rules of evidence, is beyond the scope of this Article and is treated elsewhere in this Survey.²²⁶

During the survey period the Texas Legislature also created a limited privilege of significance to bank practitioners. Amended article 342—705 of the Texas Banking Code,²²⁷ effective September 1, 1983, restricts access to a bank's records in several respects. The statute provides that no bank shall be required to disclose or produce to third parties, or permit third parties to examine, any records of accounts or other bank records except in circumstances falling within one of four exceptions enumerated in the statute.²²⁸ The statute also authorizes the affected bank customer to petition

214. Order Adopting the Texas Rules of Evidence (Tex. Sup. Ct., Nov. 23, 1982) (unpublished interim order).

215. TEX. R. EVID. 502.

216. *Id.* 503.

217. *Id.* 504.

218. *Id.* 505.

219. *Id.* 506.

220. *Id.* 507.

221. *Id.* 508.

222. *Id.* 509.

223. *Id.* 510.

224. See TEX. REV. CIV. STAT. ANN. art. 41a—1, § 26 (Vernon Supp. 1982-1983) (deemed repealed as to civil actions as of Sept. 1, 1983). Rule 503, however, which codifies the attorney-client privilege, includes in the definition of "representative of the lawyer" an accountant "who is reasonably necessary for the lawyer's rendition of professional legal services." TEX. R. EVID. 503(a)(4). Of course, this provision is much more limited than the former statutory privilege for communications to accountants.

225. Article V of the Rules of Evidence, however, does not necessarily expand the number or scope of privileges formerly recognized under Texas law. Indeed, the consensus among commentators is that the rules have created no new privileges, nor have any previously existing privileges been expanded. See Goode & Sharlot, *Article V: Privileges*, 20 HOUS. L. REV. 273 (1983) (Tex. R. Evid. Handbook).

226. See Addison, *Evidence*, *supra* p. 371, at 385-87.

227. Act of June 19, 1983, ch. 525, § 2, 1983 Tex. Gen. Laws 3056, 3057-59 (codified at TEX. REV. CIV. STAT. ANN. art. 342—705 (Vernon Supp. 1984)).

228. TEX. REV. CIV. STAT. ANN. art. 342—705, § 1 (Vernon Supp. 1984). The four exceptions are:

- (i) where the depositor or owner of such deposit or other bank customer as to whom records of accounts or other bank records are to be disclosed is a proper or necessary party to a proceeding in a court of competent jurisdiction . . . or
- (ii) where the bank itself is a proper or necessary party . . . or (iii) in response

the appropriate court to prohibit discovery of bank records even if the order, subpoena, or request for discovery falls within one of the four specified exceptions.²²⁹ Moreover, the bank is not required to make any disclosure unless the party requesting discovery has properly provided notice of the subpoena, order, or request to the bank customer, and certified to the bank that the requisite notice has been delivered.²³⁰

Questions of privilege were also addressed by a Texas court of appeals in a pair of cases that arose from a double murder committed in Hawaii. In *Warford v. Childers*²³¹ the Amarillo court of appeals upheld the trial court's refusal to order a deponent police officer to divulge the identity of a confidential informant who had given him information about the murder.²³² The court noted that the existence of a privilege protecting the names of confidential informants is a well-settled principle in criminal cases²³³ and concluded that the same principle should apply in civil cases.²³⁴ Having determined that none of the commonly recognized exceptions to invocation of the privilege existed in the case, it affirmed the decision of the trial court.²³⁵ In *Warford v. Beard*²³⁶ discovery in Texas by the plaintiffs in the same Hawaii litigation was thwarted by the assertion of a different privilege. The deponents in *Beard*, claiming a fifth amendment privilege against self-incrimination,²³⁷ refused to answer most of the questions asked of them or to produce subpoenaed documents. Once again the trial court denied the plaintiffs' rule 215a²³⁸ motion to require the deponents to respond to the discovery requests. The court of appeals reversed

to a subpoena issued by a legislative investigating committee of the Legislature of Texas, or (iv) in response to a request for examination of its records by the Attorney General of Texas pursuant to Article 1302—5.01 et seq. of the Texas Miscellaneous Corporation Laws Act.

Id. The statute provides additional limited exceptions for disclosures made in substantial compliance with federal law or in the regular course of business. *Id.*

229. *Id.* § 3. The bank customer's petition must be verified and served on both the bank and the party seeking discovery prior to the date specified for the bank's disclosure. *Id.*

230. *Id.* § 2. The requesting party must give notice to the depositor or customer by personal service or certified mail, return receipt requested, at least 10 days before he seeks compliance with the discovery request. *Id.*

231. 642 S.W.2d 63 (Tex. App.—Amarillo 1982, no writ).

232. *Id.* at 68. Since the primary litigation was pending in Hawaii, and the deposition was taken pursuant to a commission in accordance with TEX. REV. CIV. STAT. ANN. art. 3769a (Vernon Supp. 1984), the discovering party sought only rule 215a relief in the Texas court. Accordingly, the court of appeals concluded it had jurisdiction of the appeal although rulings on pre-trial discovery motions usually cannot be challenged until a final judgment has been entered in the case. The court reasoned that since this was a final judgment of all issues in controversy in Texas, the appeal was not interlocutory in nature. 642 S.W.2d at 66. Of course, in the more traditional situation where the court in which the primary litigation is pending denies discovery, the aggrieved party may seek mandamus relief. See *Pope v. Ferguson*, 445 S.W.2d 950 (Tex. 1969), cert. denied, 397 U.S. 997 (1970).

233. See, e.g., *Rodriguez v. State*, 614 S.W.2d 448, 449 (Tex. Crim. App. 1981); *Etchieson v. State*, 574 S.W.2d 753, 757 (Tex. Crim. App. 1978); *Carmouche v. State*, 540 S.W.2d 701, 703 (Tex. Crim. App. 1976).

234. 642 S.W.2d at 66-67.

235. *Id.* at 67. The privilege and its exceptions now appear in TEX. R. EVID. 508.

236. 653 S.W.2d 908 (Tex. App.—Amarillo 1983, no writ).

237. U.S. CONST. amend. V.

238. TEX. R. CIV. P. 215a.

that decision, however, observing that "the civil witness, unlike the defendant in a criminal case, is not the exclusive arbiter of his right to exercise the privilege."²³⁹ According to the court, the trial judge must determine the validity of the claim of privilege.²⁴⁰ Because many of the unanswered questions did not, on their face, call for incriminating answers and the record in the trial court failed to illustrate the hazard to the deponents in responding to the questions, the court of appeals held that the deponents had failed to justify their claim of privilege.²⁴¹

The *Beard* court found the privileged document issue more complex because documents, even if incriminating, may not be testimonial in nature, and "the fifth amendment does not protect against compulsion of nontestimonial acts"²⁴² Consequently, the court reasoned that the documents must have a strong personal connection to the witness in order to be privileged.²⁴³ Judging by this standard the court found certain categories of requested documents clearly nonprivileged.²⁴⁴ The court left determination of the validity of the privilege with respect to the remaining unproduced documents, as well as the unanswered deposition questions, to the trial court to determine upon remand. Finally, the court of appeals held that the trial court could conduct its hearing to determine the validity of each claim of privilege either in open court or in camera at its discretion.²⁴⁵

*Katin v. City of Lubbock*²⁴⁶ also involved an asserted fifth amendment privilege. Here, however, the defendant claimed the privilege as a basis for refusing either to admit or deny certain facts requested to be admitted pursuant to rule 169.²⁴⁷ The defendant argued that the assertion of the privilege applied since the suit sought to enjoin his alleged zoning violations, and violations of a zoning ordinance were punishable by criminal sanctions. The court of appeals disagreed, noting that the suit involved only civil remedies and that rule 169 precludes the use of requested admissions in any other proceeding.²⁴⁸ Because the admissions could not be used against the defendant in a subsequent criminal proceeding, the court held the fifth amendment privilege against self-incrimination was unavailable as a justification for refusing to respond to the plaintiff's request.²⁴⁹

239. 653 S.W.2d at 911 (citing *Ex parte Butler*, 522 S.W.2d 196 (Tex. 1975)).

240. 653 S.W.2d at 911.

241. *Id.* at 912.

242. *Id.* (quoting *United States v. Davis*, 636 F.2d 1028, 1042 (5th Cir. 1981)).

243. 653 S.W.2d at 912. Indeed, the court stated that the witness must have written the documents himself or they must have been written under his immediate supervision. *Id.*; see *Fisher v. United States*, 425 U.S. 391, 396 (1976); 1 R. RAY, TEXAS PRACTICE, LAW OF EVIDENCE § 471, at 454 (3d ed. 1980).

244. 653 S.W.2d at 912.

245. *Id.* at 913.

246. 655 S.W.2d 360 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

247. TEX. R. CIV. P. 169.

248. 655 S.W.2d at 363. TEX. R. CIV. P. 169 provides that "[a]ny admission made by a party under this rule is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding."

249. 655 S.W.2d at 363.

Discovery sanctions were also a topic of judicial commentary during the survey period. In *Nutting v. National Homes Manufacturing Co.*²⁵⁰ the court considered the propriety of entering a default judgment against two defendants as a sanction for their failure to answer interrogatories after the trial court had ordered them to do so. Stating that the record reflected a conscious indifference on defendants' part regarding the requirements of the discovery rules and the trial court's order, the court of appeals held that imposition of the default sanction was not an abuse of discretion.²⁵¹ Nevertheless, because the plaintiff's claims were unliquidated and the amount of the award was unsupported by any evidence, the court of appeals reversed the judgment of the trial court and remanded the case for further proceedings.²⁵²

The Texas Supreme Court discussed a different type of discovery sanction in *Smithson v. Cessna Aircraft Co.*²⁵³ The problem arose when in mid-trial the plaintiff tendered the testimony of an expert witness whom the plaintiff had not previously identified in response to the defendant's pretrial interrogatories. The trial court postponed the expert's testimony over the weekend to allow the defendant to depose him. When the trial resumed, the court allowed the plaintiff to read portions of the expert's deposition into evidence over the defendant's objection. The court of appeals, however, held that the district court's admission of the expert's testimony constituted an abuse of discretion.²⁵⁴ Observing that the amended version of rule 168 required exclusion of the expert's testimony,²⁵⁵ the court elected to follow recent Texas decisions²⁵⁶ that recognized exclusion

250. 639 S.W.2d 721 (Tex. App.—Austin 1982, no writ).

251. *Id.* at 723. TEX. R. CIV. P. 170(c) and 215a permit the court to render a default judgment against a party refusing to obey certain orders of discovery. Rule 168 expressly permits the court to invoke the sanctions of rules 170 and 215a for a party resisting discovery by interrogatories. *Id.* 168; see *Bass v. Duffey*, 620 S.W.2d 847, 849 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). See generally *Figari, Graves & Dwyer, supra* note 32, at 307-09 (discussing discovery sanctions).

252. 639 S.W.2d at 724. Whether the court considered the judgment defective only with respect to the damage award is not entirely clear. In its comparison of post-answer defaults with other types of default judgments, the court inferred that entry of a post-answer default judgment as in this case does not relieve the plaintiff of his obligation to offer evidence and prove his case, even with respect to liability. The requirement of proof, however, tends to minimize the effectiveness of the sanction. Other courts have adopted a better approach and have reversed only the portion of the judgment specifying the amount of damages. See, e.g., *Pearson Corp. v. Wichita Falls Boys Club Alumni Ass'n*, 633 S.W.2d 684, 687 (Tex. App.—Fort Worth 1982, no writ); *Bass v. Duffey*, 620 S.W.2d 847, 849-50 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

253. 27 Tex. Sup. Ct. J. 213 (Feb. 15, 1984).

254. *Duncan v. Cessna Aircraft Co.*, 632 S.W.2d 375, 386 (Tex. App.—Austin 1982), *rev'd sub nom. Smithson v. Cessna Aircraft Co.*, 27 Tex. Sup. Ct. J. 213 (Feb. 15, 1984).

255. 632 S.W.2d at 385 n.8. TEX. R. CIV. P. 168(7)(a)(3) provides that the testimony of an expert witness whose name has not been disclosed either in the initial response to an appropriate interrogatory or in an amended response at least 14 days before trial shall not be admitted unless good cause is shown sufficient to require its admission.

256. See *Texas Employers' Ins. Ass'n v. Meyer*, 620 S.W.2d 179 (Tex. Civ. App.—Waco 1981, no writ), *discussed in* *Figari, Graves & Dwyer, supra* note 100, at 456; *Trubell v. Pat-ten*, 582 S.W.2d 606, 611 (Tex. Civ. App.—Tyler 1979, no writ), *discussed in* *Figari, Texas Civil Procedure, Annual Survey of Texas Law*, 34 Sw. L.J. 415, 431-32 (1980).

of the witness's testimony as an appropriate sanction under the former version of rule 168.²⁵⁷ The Texas Supreme Court, reversing the judgment of the court of appeals, seemed to agree that the amended version of rule 168 would mandate exclusion of the expert's testimony.²⁵⁸ Nevertheless, the court held that the old rule did not require exclusion of the testimony and the trial court had broad discretion to choose the appropriate sanction for plaintiff's failure to supplement the designation of experts in her interrogatory answers. Thus, the issue was simply whether allowance of the expert's testimony at trial constituted a clear abuse of that discretion. The supreme court found no such abuse, since the defendant had failed to request a postponement or continuance of the trial and, therefore, had not provided the judge with any reasonable alternative to admitting the testimony.²⁵⁹

In *General Motors Corp. v. Lawrence*,²⁶⁰ a products liability and wrongful death suit arising from a truck collision, the Texas Supreme Court reluctantly acknowledged²⁶¹ that mandamus is available to correct a clear abuse of discretion in a discovery matter.²⁶² The court then held that the respondent trial judge had abused his discretion in ordering the petitioner to respond to overly broad discovery requests, which potentially required General Motors to produce information on all automobiles it had manufactured since 1908, as well as data on locomotives and tanks.²⁶³

Two cases decided during the survey period involved rules relating to the introduction of deposition testimony at trial. In *Deforest v. Dear*²⁶⁴ the court of appeals held that the trial judge erred in refusing to admit deposition testimony as evidence because the deposition had not been filed one day before the trial commenced. Rejecting appellee's contention that rule 212²⁶⁵ required the exclusion of the deposition, the court held that rule 212 deals only with the proper method of objecting to the form or manner of taking depositions and does not concern their admissibility in general.²⁶⁶ In *Szmalec v. Madro*²⁶⁷ the court held that an unresponsive answer in deposition testimony was properly excluded from evidence since a proper objection to the answer was registered at the time the deposition was

257. Although the amendments to rule 168 became effective on January 1, 1981, the trial of the case occurred earlier, and the old version of the rule governed. 27 Tex. Sup. Ct. J. at 214.

258. *Id.* at 519 n.3.

259. *Id.* at 520.

260. 651 S.W.2d 732 (Tex. 1983).

261. The court bemoaned the fact that it has been flooded with mandamus actions, and the sanctions provided in the Texas Rules of Civil Procedure have been ineffective in curbing discovery abuse.

262. 651 S.W.2d at 734; accord *Commercial Travelers Life Ins. Co. v. Spears*, 484 S.W.2d 577, 578 (Tex. 1972); *Crane v. Tunks*, 160 Tex. 182, 189, 328 S.W.2d 434, 438 (1959).

263. 651 S.W.2d at 734.

264. No. A14-82-439-CV (Tex. App.—Houston [14th Dist.] 1983, no writ).

265. TEX. R. CIV. P. 212.

266. Surprisingly, this holding is in conflict with the decision of a companion court of appeals. See *Zamora v. Romero*, 581 S.W.2d 742 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

267. 650 S.W.2d 514 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

taken.²⁶⁸

In *Jackson T. Fulgham Co. v. Stewart Title Guaranty Co.*²⁶⁹ the plaintiff served a request asking the defendant to admit it had wholly defaulted on a note. Although the defendant made a response, the court stated that the request was an unauthorized inquiry about a matter of law. The court therefore held that the response was not binding as an admission under rule 169.²⁷⁰

Finally, and most importantly, the practitioner should be aware that the Texas Rules of Civil Procedure were amended, effective April 1, 1984, by an order of the supreme court.²⁷¹ These amendments make substantial changes in discovery practice, because they (1) consolidate and clarify rules relating to depositions, (2) alter the time periods for noticing depositions and responding to requests for admissions, (3) conform Texas discovery practice to federal practice in some respects, and (4) in an effort to curb discovery abuse, completely revise the rules relating to the scope of discovery and the sanctions for resisting discovery or burdening the opposition with unnecessary discovery. Unfortunately, the new rules had not yet been circulated or published at the time this Article was prepared, and they will be discussed in detail in next year's Survey.

X. SUMMARY JUDGMENT

A number of decisions during the survey period discussed the procedural requirements for a summary judgment motion and the adequacy of the proof supporting the motion. Rule 166-A(c) stipulates that a motion for summary judgment is to be served twenty-one days before the date of the hearing on the motion.²⁷² Appealing from a summary judgment, the plaintiff in *Hudenburg v. Neff*²⁷³ claimed that the lower court had not complied with the twenty-one-day requirement. The court of appeals, however, determined that the plaintiff had waived the twenty-one-day notice requirement by appearing at the summary judgment hearing and by not filing an affidavit stating the reasons why facts could not be presented in opposition to the motion.²⁷⁴ Further, the court held that the plaintiff could not raise the objection to the lack of notice for the first time on appeal.²⁷⁵

The appellant in *Hudenburg* also contended that the summary judgment was improper because the lower court had considered a deposition that was not on file at the time of the hearing. Rejecting this contention, the

268. *Id.* at 518.

269. 649 S.W.2d 128 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

270. *Id.* at 131 (applying TEX. R. CIV. P. 169).

271. *See Rules of Civil Procedure*, 47 TEX. B.J. (Feb. 1984) (containing special pull-out section listing newly-adopted rules).

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

273. 643 S.W.2d 517 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.), *cert. denied*, 104 S. Ct. 348, 78 L. Ed. 2d 313 (1984).

274. 643 S.W.2d at 518; *see* Chandler v. Escobar, 604 S.W.2d 524, 526 (Tex. Civ. App.—El Paso 1980, no writ) (illustrating TEX. R. CIV. P. 166-A(f) waiver of notice defect).

275. 643 S.W.2d at 518; *accord* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979).

appellate court noted that the deposition was on file almost five months before the judgment was entered and that the appellant again had waived any right to complain on appeal by not objecting to its use by the trial court.²⁷⁶ In comparison, the court in *Barrow v. Jack's Catfish Inn*²⁷⁷ held that a deposition filed after a summary judgment had been granted could not be considered as summary judgment proof and would not support the judgment on appeal.²⁷⁸

*Jackson T. Fulgham Co. v. Stewart Title Guaranty Co.*²⁷⁹ examined the adequacy of an affidavit supporting a summary judgment. In this promissory note collection case the corporate plaintiff filed an affidavit wherein the affiant stated that he was vice-president and agent of the plaintiff and had "personal knowledge of the facts contained in the motion for summary judgment."²⁸⁰ The affidavit also stated facts as to the manner in which the plaintiff obtained the promissory note and the corporation's status as holder of the note. Although the court of appeals agreed with the defendant's contention that an affidavit must affirmatively show how the affiant became personally familiar with the facts and that a self-serving recitation is insufficient,²⁸¹ it nonetheless concluded that this requirement had been satisfied by the averment that the affiant was the plaintiff's vice-president and agent, which demonstrated how he learned or knew of the facts in the affidavit.²⁸²

Finally, in *Teer v. Duddleston*,²⁸³ a zoning case, the plaintiff contended that certain city zoning ordinances submitted in connection with defendant's summary judgment motion were not properly certified because the city clerk had stated in an affidavit accompanying each ordinance that the "foregoing" was a true and correct copy when in fact each ordinance followed rather than preceded the statement. Overruling this technical contention, the supreme court decided that the order in which the ordinances were placed in relation to the statement of certification was immaterial where "the certification clearly refer[red] to the ordinance and no confusion could result."²⁸⁴ The court also ruled that the ordinances need not be attached to the summary judgment motion in light of the fact that certified copies were already on file with the trial court.²⁸⁵

276. 643 S.W.2d at 519.

277. 641 S.W.2d 624 (Tex. App.—Corpus Christi 1982, no writ).

278. *Id.* at 625.

279. 649 S.W.2d 128 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

280. *Id.* at 130.

281. *Id.*; accord *Murfee v. Oquin*, 423 S.W.2d 172 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.); see also *TEX. R. CIV. P.* 166-A (delineating affidavit requirements).

282. 649 S.W.2d at 130; accord *Barham v. Sugar Creek Nat'l Bank*, 612 S.W.2d 78, 80 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

283. 26 Tex. Sup. Ct. J. 544 (July 20, 1983).

284. *Id.* at 546.

285. *Id.* Compare *State v. Easley*, 404 S.W.2d 296, 297 (Tex. 1966) (unattached evidence should not be considered on summary judgment) with *Willoughby v. Jones*, 151 Tex. 435, 445, 251 S.W.2d 508, 514 (1952) (allowing uncertified extrinsic documents to be considered part of trial court record).

XI. SPECIAL ISSUE SUBMISSION

Rule 272, which sets forth the procedure for making objections to the charge of the trial court, states that "objections shall in every instance be presented to the court [and] [t]he judge shall announce his rulings thereon before reading the charge to the jury" ²⁸⁶ In *Hernandez v. Montgomery Ward & Co.* ²⁸⁷ the Texas Supreme Court served a warning that the requirements of rule 272 will be interpreted strictly. ²⁸⁸ In *Hernandez* trial counsel had made a meritorious objection to the charge, but had failed to secure a ruling on it. The supreme court concluded that any error in the submission had therefore been waived and, accordingly, no basis existed for appellate review of the matter. ²⁸⁹

A number of appellate decisions during the survey period focused on the scope of special issues under revised rule 277, ²⁹⁰ which formerly required that special issues be submitted distinctly and separately. ²⁹¹ Rule 277 now provides: "It shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly. It shall not be objectionable that a question is general or includes a combination of elements or issues." ²⁹² Giving this language full effect, the court in *Johnson v. Whitehurst* ²⁹³ approved the submission of a single issue in a medical malpractice action inquiring whether the defendant doctor "was negligent in performing the surgical procedure in question." ²⁹⁴ In contrast, the court in *Lucas v. Nesbitt* ²⁹⁵ condemned the submission of a single issue damage inquiry where the plaintiff had alleged two separate claims, one for negligence and one under the Texas Deceptive Trade Practices—Consumer Protection Act. ²⁹⁶ The issue inquired as to the sum of money that would reasonably compensate the plaintiff for any loss resulting from the acts of the defendant, but it failed to identify the acts inquired about. ²⁹⁷ Concluding that the wording of the issue prevented any differentiation of damages between the two claims, the court held that the submission had the potential for allowing an excessive recovery. ²⁹⁸

Walker v. Eason ²⁹⁹ is an indication that the improper placement of the burden of proof within an issue may not always constitute reversible error,

286. TEX. R. CIV. P. 272.

287. 652 S.W.2d 923 (Tex. 1983).

288. *Id.* at 924; accord *Cogburn v. Harbour*, 657 S.W.2d 432, 432-33 (Tex. 1983).

289. 652 S.W.2d at 924-25.

290. TEX. R. CIV. P. 277.

291. See TEX. R. CIV. P. 277 (Vernon 1967). See generally *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 475, 240 S.W. 517, 521 (1922).

292. TEX. R. CIV. P. 277; see Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 Sw. L.J. 577 (1973); Pope & Lowerre, *The State of the Special Verdict—1979*, 11 ST. MARY'S L.J. 1 (1979).

293. 652 S.W.2d 441 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

294. *Id.* at 448.

295. 653 S.W.2d 883 (Tex. App.—Corpus Christi 1983, no writ).

296. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1984).

297. 653 S.W.2d at 887.

298. *Id.*

299. 643 S.W.2d 390 (Tex. 1982).

even if the subject of a proper objection. In a suit to set aside a deed due to lack of mental capacity on the part of the grantor, the general instructions of the trial court advised the jury that the burden to show a lack of mental capacity was on the persons seeking to set aside the deed; however, the issue that followed improperly placed the burden on the proponents of the deed. Acknowledging the error, the supreme court nevertheless concluded that "[a]lthough special issue number one incorrectly placed the burden of proof, the instruction in the court's charge correctly placed the burden of proof."³⁰⁰ Since the jury's answer definitively stated that the grantor "did not have sufficient mental capacity," any error incident to the submission was harmless.³⁰¹

XII. JURY PRACTICE

Rule 281 provides that jurors during deliberations may take with them the charge and "any written evidence, except the depositions of witnesses."³⁰² Notwithstanding this permissive language, the supreme court in *First Employees Insurance Co. v. Skinner*³⁰³ concluded that "Rule 281 is mandatory and that the trial court is required to send all exhibits admitted into evidence to the jury room during the deliberations of the jury."³⁰⁴ Further, the court held, this requirement is self-operative and is not conditioned upon a request by the jurors or counsel.³⁰⁵ The supreme court determined, however, that the trial court's error in not sending the exhibits to the jury room was harmless because the defendant had been extensively cross-examined about the exhibits in this case and that the jurors had reviewed them at the time they were introduced into evidence.³⁰⁶

Jury misconduct was the subject of *Golden v. Ballard Co.*,³⁰⁷ a negligence case involving the operation of an automobile. The jurors in *Golden* had referred to various books and other materials that were not in evidence in order to calculate braking distances, and one of the jurors also visited the scene of the accident.³⁰⁸ Significantly, some of the jurors admitted that they changed their votes in reaching a verdict as a result of these activities. The appellate court found that material jury misconduct had occurred which probably resulted in harm to the appellant.³⁰⁹ Accord-

300. *Id.* at 391.

301. *Id.*

302. TEX. R. CIV. P. 281.

303. 646 S.W.2d 170 (Tex. 1983).

304. *Id.* at 172; *accord* Dallas Ry. & Terminal Co. v. Orr, 147 Tex. 383, 391, 215 S.W.2d 862, 866 (1948); United Employers Casualty Co. v. Smith, 145 S.W.2d 249, 250 (Tex. Civ. App.—San Antonio 1940, writ ref'd); 3 R. McDONALD, *supra* note 62, § 14.08.1 (F. Elliot rev. ed. 1983); 2 R. RAY, *supra* note 243, § 1468.

305. 646 S.W.2d at 172.

306. *Id.*

307. 654 S.W.2d 823 (Tex. App.—Houston [14th Dist.] 1983, no writ).

308. The jurors made conclusory statements concerning appellant's negligence which were based upon their reading a Texas Driver's Manual and a college math textbook.

309. 654 S.W.2d at 825. The supreme court has recognized three requirements for establishing grounds for a new trial based on jury misconduct. The appellant must establish (1) that the misconduct occurred, (2) that the misconduct was material, and (3) based on the

ingly, the case was reversed and remanded for a new trial.

A court of appeals examined the propriety of making a "Golden Rule" closing argument in *World Wide Tire Co. v. Brown*.³¹⁰ In this personal injury case, the plaintiff's counsel reminded the jury that "[w]e are instructed that we should do unto others as we would have them do unto us" and, in essence, asked the jurors to consider what amount of damages they would regard as sufficient if they had suffered similar injuries.³¹¹ Recognizing that a "Golden Rule" jury argument is not per se improper,³¹² the court of appeals nevertheless concluded that the argument at issue went beyond permitted boundaries because the jurors were asked "to give the plaintiff what *they* would *want* if they were injured, rather than what the evidence showed *plaintiff* was *entitled* to receive as compensation."³¹³

With respect to juror qualifications, the legislature enacted article 2120a, which provides that district courts may excuse from jury service persons with a physical or mental impairment or with an inability to comprehend or communicate the English language.³¹⁴ The person seeking to be excused under this statute must file an affidavit with the district court. The affidavit must comply with certain stated requirements.³¹⁵

XIII. JUDGMENT AND DISMISSAL

A number of issues concerning non-suits were addressed by the appellate courts during the survey period. In *Greenberg v. Brookshire*³¹⁶ the plaintiff filed a motion for non-suit and, two days later, the defendant filed a counterclaim. The trial court refused to dismiss the case, but the supreme court held on appeal that the plaintiff was entitled to a non-suit or dismissal immediately upon the filing of his motion.³¹⁷ In this connection, the supreme court noted that a plaintiff is entitled to a non-suit from the moment he files a written motion or makes an oral motion in open court, unless the defendant has previously filed pleadings seeking affirmative relief.³¹⁸ Further, the court expressly disapproved a number of decisions that had imposed requirements for non-suits other than a written or oral motion.³¹⁹

record as a whole, that the misconduct probably resulted in harm to the complaining party. *Flores v. Doshier*, 622 S.W.2d 573, 574 (Tex. 1981); *Strange v. Treasure City*, 608 S.W.2d 604, 606 (Tex. 1980); *Fountain v. Ferguson*, 441 S.W.2d 506, 507 (Tex. 1969).

310. 644 S.W.2d 144 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

311. *Id.* at 145.

312. *Id.* at 145-46; *accord* *Fambrough v. Wagley*, 140 Tex. 577, 582-85, 169 S.W.2d 478, 480-82 (1943).

313. 644 S.W.2d at 146 (emphasis in original).

314. Act of May 17, 1983, ch. 132, § 3, 1983 Tex. Gen. Laws 620 (codified at TEX. REV. CIV. STAT. ANN. art. 2120a (Vernon Supp. 1984)).

315. *Id.*

316. 640 S.W.2d 870 (Tex. 1982).

317. *Id.* at 871.

318. *Id.* at 872; *see* TEX. R. CIV. P. 164.

319. 640 S.W.2d at 872 (disapproving *United States Agencies v. Continental Casualty Co.*, 555 S.W.2d 192 (Tex. Civ. App.—Dallas 1977, no writ); *Cape Oil Co. v. Williams*, 427 S.W.2d 122 (Tex. Civ. App.—Tyler 1968, no writ); *Lovelace v. Shawhart*, 283 S.W.2d 24

The liberal nature of the right to non-suit was also demonstrated by *Lifestyle Mobile Homes v. Ricks*.³²⁰ After allowing the plaintiff to reopen her case pursuant to rule 270³²¹ and present additional evidence at trial, the trial court sustained the plaintiff's motion for non-suit. Affirming the trial court's order of dismissal, the court of appeals held that a non-suit could have been taken under rule 164 at any time before plaintiff had rested her case.³²² Once the plaintiff had reopened her case, therefore, she was entitled to move for a non-suit.³²³

*Essex International Ltd. v. Wood*³²⁴ illustrates the requirements for reinstatement of a case that has been dismissed for want of prosecution due to a plaintiff's failure to appear for trial. Appealing from such a dismissal, the plaintiff in *Essex* contended that the trial court had not given notice of its intent to dismiss and, thus, the lower court should have allowed a reinstatement of the case. Rejecting this contention, the court of appeals held that notice of intent to dismiss is not required when the basis for dismissal is a plaintiff's failure to appear for trial.³²⁵ In *Paul Stanley Leasing Corp. v. Hoffman*³²⁶ the trial court entered a take-nothing judgment because the corporate plaintiff was not represented by a licensed attorney and, as a corporation, could not appear on its own behalf.³²⁷ The appellate court agreed with the trial court's rationale, but determined that a take-nothing judgment, which constituted a ruling on the merits, was inappropriate under those circumstances.³²⁸ Instead, the lower court should have either dismissed the case without prejudice or abated the proceedings for a sufficient period of time to allow the plaintiff the opportunity to obtain licensed counsel.³²⁹

The court in *Jones v. Jones*³³⁰ considered the effect of findings of fact and conclusions of law contained in a judgment. Recognizing that prior decisions conflicted on this point,³³¹ the court in *Jones* decided that the

(Tex. Civ. App.—Amarillo 1955, writ dismissed); *Kelly v. W.C. Turnbow Petroleum Corp.*, 137 S.W.2d 216 (Tex. Civ. App.—Texarkana 1940, no writ); *Towell v. Towell*, 164 S.W. 23 (Tex. Civ. App.—Dallas 1914, no writ).

320. 653 S.W.2d 602 (Tex. App.—Beaumont 1983, writ refused n.r.e.).

321. TEX. R. CIV. P. 270.

322. 653 S.W.2d at 604; see TEX. R. CIV. P. 164. Rule 164 provides: "Upon the trial of any case at any time before plaintiff has rested his case . . . the plaintiff may take a non-suit" TEX. R. CIV. P. 164.

323. 653 S.W.2d at 604.

324. 646 S.W.2d 322 (Tex. App.—Dallas 1983, no writ).

325. *Id.* at 325; TEX. R. CIV. P. 165a (rule governing dismissal for want of prosecution).

326. 651 S.W.2d 440 (Tex. App.—Dallas 1983, no writ).

327. *Id.* at 441; see TEX. R. CIV. P. 7 (allowing pro se representation).

328. 651 S.W.2d at 442.

329. *Id.*

330. 641 S.W.2d 342 (Tex. App.—Corpus Christi 1982, no writ).

331. Compare *Texas Hauling Contractors Co. v. Rose Sales Co.*, 565 S.W.2d 240, 244-45 (Tex. Civ. App.—Corpus Christi 1978, no writ) (recitations in judgment cannot be substituted for separately filed findings of fact); *Morin v. Morin*, 561 S.W.2d 263, 264-65 (Tex. Civ. App.—Corpus Christi 1978, no writ) (trial court must comply with rule 296 authorizing findings of fact); *Fenlon v. Jaffee*, 553 S.W.2d 422, 428 (Tex. Civ. App.—Tyler 1977, writ refused n.r.e.) (where no findings of fact filed, any evidence of probative force will sustain judgment); *Roberson Farm Equip. Co. v. Hill*, 514 S.W.2d 796, 802 (Tex. Civ. App.—Texar-

better reasoned approach is that "[r]ecitations in the judgment itself of findings of fact and conclusions of law are not proper"³³² Thus, the appellate courts should not consider these recitations in reviewing the merits of an appeal.

Finally, two statutory enactments concerning judgments went into effect during the survey period. Article 5069—1.05 was amended to provide that judgments based on a contract shall earn interest at a rate equal to the lesser of the rate specified in the contract or eighteen percent.³³³ The statute further specifies that in noncontract actions interest on judgments shall be determined by the Texas Consumer Credit Commissioner, who shall compute such rate in accordance with the federal treasury bill rate of interest.³³⁴ Post-judgment interest in noncontract actions may not exceed twenty percent or be less than ten percent.³³⁵ Article 4413a.1 was added by the legislature to deal with the taking of default judgments against the State of Texas or one of its agencies.³³⁶ It delineates certain notice procedures for obtaining a valid default judgment against one of those parties.³³⁷

XIV. APPELLATE PROCEDURE

With respect to appellate procedure, the most significant decisions during the survey period dealt with the types of judgments or orders that are subject to appeal. In an appeal from a temporary restraining order that in effect prohibited certain shareholders from voting at an annual meeting, the court in *Global Natural Resources v. Bear, Stearns & Co.*³³⁸ held that the order was appealable.³³⁹ Specifically, the temporary restraining order was granted without notice or hearing, and an adversary hearing on the

kana 1973, writ ref'd n.r.e.) (in absence of findings of fact appellate court will presume evidence supports verdict); *with* *Hemphill v. S & Q Clothiers*, 579 S.W.2d 564, 567 (Tex. Civ. App.—Fort Worth 1978, no writ) (findings contained in judgment of trial court valid); *Cottle v. Knapper*, 571 S.W.2d 59, 64 (Tex. Civ. App.—Tyler 1978, no writ) (if findings contained in judgment and decree based solely on those findings, they are valid); *Davis v. Davis*, 507 S.W.2d 841, 843 (Tex. Civ. App.—Houston [14th Dist.] 1974) (fact that findings and conclusions are filed together does not affect their validity), *rev'd on other grounds*, 521 S.W.2d 603 (Tex. 1975).

332. 641 S.W.2d at 344.

333. TEX. REV. CIV. STAT. ANN. art. 1.05, § 1 (Vernon Supp. 1984).

334. *Id.* § 2.

335. *Id.*

336. Act of Aug. 29, 1983, ch. 659, §§ 1-3, 1983 Tex. Gen. Laws 4176, 4176-77 (codified at TEX. REV. CIV. STAT. ANN. art. 4413a.1 (Vernon Supp. 1984)).

337. TEX. REV. CIV. STAT. ANN. art. 4413a.1 (Vernon Supp. 1984).

338. 642 S.W.2d 852 (Tex. App.—Dallas 1982, no writ). See Carroll, *Review of Temporary Restraining Orders in Texas—An Appealing Prospect*, 46 TEX. B.J. 1406 (1983).

339. 642 S.W.2d at 854. Under Texas law certain interlocutory appeals are available, including appeals of orders granting or refusing a temporary injunction, or granting or overruling a motion to dissolve a temporary injunction. TEX. REV. CIV. STAT. ANN. arts. 2251 (Vernon 1971), 4662 (Vernon Pam. Supp. 1941-1983). Formerly, interlocutory appeals could also be taken from a district court's venue decision. Act of April 18, 1907, ch. 133, §§ 1-2, 1907 Tex. Gen. Laws 248, 248-49 (repealed 1983). Pursuant to the comprehensive revisions to the venue statute, this type of appeal is no longer available. Act of June 17, 1983, ch. 385, 1983 Tex. Gen. Laws 2119.

matter was not set until four days after the shareholder's annual meeting. Under those circumstances, the court of appeals concluded that the trial court's order was "tantamount to a temporary injunction because the effect of it on the parties went beyond protecting the *status quo* for a ten-day period."³⁴⁰ In *Schliff v. Exxon Corp.*³⁴¹ the supreme court discussed the requirements of finality for the purpose of appellate review. One of the parties claimed that the trial court's judgment was not final because it did not dispose of a claim for prejudgment interest, and moved to dismiss the appeal for want of jurisdiction. Recognizing that a final judgment is one disposing of all issues and parties in the case,³⁴² the supreme court nevertheless ruled that the judgment was final and subject to appeal, because it contained a provision that "all claims and/or causes of action herein asserted by all parties herein and not herein granted are hereby in all things denied and concluded."³⁴³ Accordingly, the prejudgment interest claim was disposed of pursuant to that catch-all provision. Finally, *Aubin v. Territorial Mortgage Company of America*³⁴⁴ held that an order disqualifying counsel is interlocutory and hence is not appealable.³⁴⁵

*Saenz Motors v. Big H. Auto Auctions, Inc.*³⁴⁶ demonstrates that an appellee may need to prosecute his own separate appeal in order to have certain points considered by the appellate court. In *Saenz Motors* the plaintiff appealed only from the portion of trial court's judgment that failed to treble its damages under the Deceptive Trade Practices Act and to award attorney's fees to the plaintiff. The defendant contended that the lower court had erred in not awarding it attorney's fees on an indemnification claim against a third party. The court of appeals held the appellee's points of error could not be considered because it had not filed a separate appeal and the appellant had limited the scope of its appeal.³⁴⁷ The court noted that a separate appeal by the appellee "is necessary for the presentment of points of error . . . when the judgment is definitely severable and the appellant strictly limits the scope of its appeal to a severable portion thereof."³⁴⁸

One significant development should be noted in connection with the

340. 642 S.W.2d at 854; *see also* *Plant Process Equip. Inc. v. Harris*, 579 S.W.2d 53, 54-55 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ) (injunction dissolved); *Ellis v. Vander-slice*, 486 S.W.2d 155, 158-59 (Tex. Civ. App.—Dallas 1972, no writ) (county clerk immune from temporary restraining order). For purposes of appellate review, the court in *Global Natural Resources* also held that it was proper to consider the original pleadings, orders, and other papers from the trial court rather than merely a partial transcript prepared by the district clerk, particularly in light of the parties' stipulation that such original papers could be used in lieu of a transcript. 642 S.W.2d at 854.

341. 644 S.W.2d 453 (Tex. 1982).

342. *Id.* at 454; *accord* *North E. Indep. School Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966).

343. 644 S.W.2d at 455.

344. 640 S.W.2d 737 (Tex. App.—Houston [14th Dist.] 1982, no writ).

345. *Id.* at 742-43.

346. 653 S.W.2d 521 (Tex. App.—Corpus Christi 1983, writ granted).

347. *Id.* at 526.

348. *Id.*; *accord* *Cameron & Willacy Counties Community Projects, Inc. v. Gonzalez*, 614 S.W.2d 585, 588 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

codification of the new Texas Rules of Evidence. Previously, Texas courts have held that hearsay will not support a verdict, irrespective of whether an objection is made in the trial court, and a party may raise the question for the first time on appeal under a "no evidence" or "insufficiency" point.³⁴⁹ Effective September 1, 1983, rule 802 of the new Texas Rules of Evidence changes this practice. Rule 802 provides: "Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay."³⁵⁰

Finally, the scope of appellate court jurisdiction was altered by two statutory changes. Article 1821 was amended to provide that, as a general rule, writs of error to the supreme court shall not be allowed (1) in cases of child custody, support, or reciprocal support; or (2) in appeals from orders or judgments in suits in which a temporary injunction has been granted or refused or where a motion to dissolve has been granted or overruled.³⁵¹ The practitioner should bear in mind that a writ of error to the supreme court in such cases may still be available under article 1728.³⁵² A more significant amendment is the expansion of the mandamus jurisdiction of the court of appeals. Under revised article 1824, the court of appeals may now issue "all writs of Mandamus agreeable to the principles of law regulating such writs."³⁵³ For example, if a party seeks a writ of mandamus related to a district court discovery order, then the petition for the writ should be filed with the court of appeals rather than with the supreme court, as under prior practice.

XV. RES JUDICATA

As noted in prior surveys,³⁵⁴ a number of Texas courts of appeals have held that mutuality of parties is no longer necessary in Texas for application of the doctrine of collateral estoppel.³⁵⁵ Indeed, in *Bonniwell v. Beech*

349. *Aetna Ins. Co. v. Klein*, 160 Tex. 61, 66-67, 325 S.W.2d 376, 380 (1959); *Ex parte Ramirez*, 577 S.W.2d 261, 263 (Tex. Crim. App. 1979); H. WENDORF & D. SCHLEUTER, TEXAS RULES OF EVIDENCE MANUAL 170 (1983).

350. TEX. R. EVID. 802.

351. Act of June 19, 1983, ch. 839, §§ 1.3, .6, 1983 Tex. Gen. Laws 4767, 4767-68 (codified at TEX. REV. CIV. STAT. ANN. art. 1821 (Vernon Supp. 1984)). Article 1821 also provides that a writ of error to the supreme court is not permissible in a number of other types of cases. *Id.*

352. TEX. REV. CIV. STAT. ANN. art. 1728 (Vernon Supp. 1984).

353. Act of June 19, 1983, ch. 839, 1983 Tex. Gen. Laws 4767, 4768-69 (codified at TEX. REV. CIV. STAT. ANN. art. 1824 (Vernon Supp. 1984)); see *A American Stamp & Novelty Mfg. Co. v. Wettman*, 658 S.W.2d 241 (Tex. App.—Houston [1st Dist.] 1983, no writ) (mandamus denied).

354. See Figari, Graves & Dwyer, *supra* note 32, at 321; Figari, Graves & Dwyer, *supra* note 100, at 667.

355. See, e.g., *Tobbon v. State Farm Mut. Auto Ins. Co.*, 616 S.W.2d 243, 246 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.) (doctrine of mutuality has been modified); *Baker v. Story*, 564 S.W.2d 166, 167 (Tex. Civ. App.—San Antonio 1978, no writ) (no requirement of mutuality on part of defendants); *Hardy v. Fleming*, 553 S.W.2d 790, 792-93 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.) (finding no compelling need to insist upon mutuality).

Aircraft Co.,³⁵⁶ the most recent pronouncement by a Texas court on the subject, the court of appeals held that a defendant airplane manufacturer could use the doctrine of collateral estoppel offensively to obtain judgment on its cross-claim against a co-defendant because all necessary issues of fact had been adjudicated in a previous action involving a different plaintiff.³⁵⁷ The anxious practitioner awaiting guidance on the subject from the Texas Supreme Court, however, will have to wait until another day. The supreme court reviewed the *Bonniwell* decision during the survey period and initially affirmed the lower court's opinion, thereby adopting its reasoning with respect to mutuality of parties and offensive use of collateral estoppel.³⁵⁸ On rehearing, however, a sharply divided court withdrew its original opinion and reversed the judgment of the court of appeals.³⁵⁹

Bonniwell was one of five lawsuits resulting from a fatal airplane crash. The plaintiff joined both the airplane manufacturer and the air carrier that operated the plane as defendants in the suit, and each of those defendants filed a cross-claim for indemnity and contribution against the other. One of the other lawsuits stemming from the accident, however, proceeded to trial first. The judgment in that earlier suit, which involved the same defendants as *Bonniwell* and identical causes of action, denied the manufacturer's claim for indemnity from the air carrier, but only because the jury's fact findings absolved the manufacturer altogether of liability for the crash.³⁶⁰

On appeal, the supreme court initially held that since the relative liabilities between the manufacturer and the air carrier were ascertained in the first suit, the defendants were precluded from relitigating those fixed liabilities between themselves in the *Bonniwell* suit.³⁶¹ Further, the court concluded that an offensive application of collateral estoppel was appropriate in the case because "the derivative claims of identical parties [were] based upon issues identical to those litigated in [the] prior suit."³⁶² On rehearing, however, the supreme court focused more on the effect that the manufacturer's judgment of indemnity would have on the plaintiffs. Because the plaintiffs had previously settled with the carrier and agreed to indemnify it from further liability, the award of indemnity by the trial court to the manufacturer would operate directly against the plaintiffs and eliminate their

356. 633 S.W.2d 553 (Tex. App.—Houston [14th Dist.] 1982), *aff'd in part, rev'd in part*, 27 Tex. Sup. Ct. J. 140 (Jan. 4, 1984).

357. 633 S.W.2d at 561.

358. 26 Tex. Sup. Ct. J. 259, 263 (Mar. 9, 1983) (opinion withdrawn).

359. 27 Tex. Sup. Ct. J. 140 (Jan. 4, 1984) (6-3 opinion).

360. The jury failed to find the manufacturer negligent or responsible for a design defect in the airplane's control mechanism. In a separate finding the jury apportioned liability 75% to the carrier and 25% to another defendant in the action.

361. 26 Tex. Sup. Ct. J. at 261. According to the court, mutuality was required only as to the party against whom the plea of collateral estoppel was asserted. *Id.* at 260. Thus, collateral estoppel applied in the second suit even though it was brought by a different plaintiff than in the first suit.

362. *Id.* at 261 (citing *Southern Pac. Transp. Co. v. Smith Material Corp.*, 616 F.2d 111, 114-15 (5th Cir. 1980)).

cause of action against the manufacturer.³⁶³ The court held that an application of collateral estoppel in this fashion, against a person who has not had his day in court either as a party to the prior suit or as one in privity to a party, amounts to a denial of due process.³⁶⁴ Further, the court found that principles of collateral estoppel did not support the manufacturer's claim for indemnity, irrespective of the plaintiff's dilemma, because the fact issue in the first suit, comparing the respective liabilities of the defendants, was not essential to the judgment.³⁶⁵ In this connection the court observed that the findings in the first suit exonerating the manufacturer of all fault for the crash eliminated the manufacturer as a joint tortfeasor. A finding of no fault obviated the need to include the manufacturer in the separate issue on comparative negligence.³⁶⁶ Since the comparative negligence issue alone related to the cross-actions for indemnity, and the manufacturer was not properly includable in that issue, the court could find no essential issue of fact resolved in the first suit that would support the manufacturer's claim to indemnity in the second suit.³⁶⁷

XVI. MISCELLANEOUS

Attorney's Fees. Article 2226, the general attorney's fees statute governing actions based on contracts, provides that it shall not apply to insurance contracts issued by insurers subject to articles 3.62, 3.62—1, 21.21 and 21.21—2 of the Texas Insurance Code.³⁶⁸ Claiming that all insurance contracts are subject to the Insurance Code, the defendant insurance company in *Texas Farmers Insurance Co. v. Hernandez*³⁶⁹ argued that article 2226 was not applicable in a suit to recover the proceeds of a fire insurance policy. The court of appeals, however, concluded that the effect of article 2226 is that attorney's fees are recoverable in all suits on insurance contracts.³⁷⁰ According to the court, if the plaintiff sues under one of the Insurance Code provisions that article 2226 specifically mentions, the attorney's fees statute applicable to that specific provision will control the

363. 27 Tex. Sup. Ct. J. at 142. The award of indemnity to the manufacturer would operate this way because any judgment the plaintiffs obtained against the manufacturer would be collected from the carrier, who in turn was to receive reimbursement from the plaintiff under the settlement agreement.

364. *Id.* (citing *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971)). As the dissent observes, however, the plaintiff's dilemma in *Bonniwell*, unlike the situation in *Benson*, resulted from their voluntary agreement to settle with the air carrier. 27 Tex. Sup. Ct. J. at 145 (McGee, J., dissenting).

365. 27 Tex. Sup. Ct. J. at 142.

366. *Id.*

367. *Id.* The court's reasoning on this point appears somewhat tenuous. Clearly the manufacturer need not have been included in the comparative negligence issue, but only because the jury had already determined that the manufacturer was not at fault. Certainly this latter finding was essential to the judgment and, as the dissent pointed out, the finding seems conclusive on the issue of derivative liability as well. *Id.* at 145 (McGee, J., dissenting).

368. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1984).

369. 649 S.W.2d 121 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

370. *Id.* at 124; accord *Prudential Ins. Co. of America v. Burke*, 614 S.W.2d 847, 850 (Tex. Civ. App.—Texarkana 1981, writ ref'd n.r.e.).

award; otherwise, recovery is permitted under article 2226.³⁷¹

In *Hernandez* the court also discussed what constitutes reasonable attorney's fees within the purview of article 2226. The evidence offered was in the form of an attorney's testimony that a one-third contingent fee was a normal, standard, and reasonable fee. The appellate court addressed the adequacy of this evidence and held that "contingent fee evidence will support an award of attorney's fees under article 2226 if the evidence satisfies the tests stated in the statute, is otherwise admissible and is sufficiently detailed to permit the fact finder to calculate the award."³⁷² The cautious practitioner should note, however, that this holding appears in conflict with a number of Texas decisions that conclude testimony as to the amount of a contingent fee does not constitute any evidence of a reasonable attorney's fee.³⁷³

The plaintiff in *City Towing Associates, Inc. v. Labatt Co.*³⁷⁴ claimed on appeal that, having prevailed on a quantum meruit claim, it was entitled to recover attorney's fees under article 2226. The court of appeals affirmed the lower court's denial of such fees and ruled that article 2226 was inapplicable because the plaintiff's services had not been provided directly to the defendant.³⁷⁵ Finally, article 5453 now provides that a party filing a mechanic's lien for labor and materials may recover attorney's fees in a collection suit if the lien has been fixed and secured for 180 days without payment.³⁷⁶ If the lien is not valid or enforceable, however, the owner, original contractor, subcontractor, or any surety under any bond may recover attorney's fees from the lien claimant incurred in the defense against the lien claim.³⁷⁷

Disqualification of Trial Judge. Rule 18a, which controls the procedures for disqualification of a trial judge, specifies that any party may file a motion for recusal at least ten days before the date set for trial or other hearing in trial court.³⁷⁸ In *Autry v. Autry*³⁷⁹ the motion for recusal was filed only one day before a scheduled hearing. The court of appeals held that under those circumstances the failure of the appellant to comply with the ten-day notice provision barred any complaint on appeal with respect to

371. 649 S.W.2d at 124.

372. *Id.* at 125; *accord* *Wenk v. City Nat'l Bank*, 613 S.W.2d 345, 352 (Tex. Civ. App.—Tyler 1981, no writ).

373. *See, e.g.*, *Group Life & Health Ins. Co. v. Turner*, 620 S.W.2d 670, 675 (Tex. Civ. App.—Dallas 1981, no writ) (reversed and remanded for court's determination of reasonable fees); *Prudential Ins. Co. v. Uribe*, 595 S.W.2d 554, 570 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.) (reasonable fee is amount a litigant would pay for prosecuting case).

374. 644 S.W.2d 856 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.).

375. *Id.* at 857.

376. TEX. REV. CIV. STAT. ANN. art. 5453, § 4 (Vernon Supp. 1984).

377. *Id.* § 5.

378. TEX. R. CIV. P. 18a. Rule 18a(e) apparently provides an exception to the normal time limit: "If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing." *Id.* 18a(e).

379. 646 S.W.2d 586 (Tex. App.—Tyler 1983, no writ).

the motion.³⁸⁰ Similarly, in *Ex parte Fernandez*³⁸¹ the court held that the failure to comply with the ten-day time limit foreclosed any objection on appeal about recusal.³⁸²

Claim Referral by Agreement to Retired Judge. The legislature enacted a new statute providing for the use of "special" judges.³⁸³ Pursuant to an agreement of the parties, the district court may order the referral of a case to a retired district judge.³⁸⁴ The agreement of the parties, as reflected in a motion filed by both parties, must include (1) a request for referral, (2) a waiver of the right to a jury trial, (3) a statement as to the issues to be referred, (4) a specification of the time and place of the trial, and (5) a statement as to the name of the judge, his agreement to hear the case, and the fee he is to receive.³⁸⁵ Generally, the same rules and statutes relating to procedure and evidence in the district court apply to a trial before the special judge.³⁸⁶ The special judge also has the same powers as an active district judge, except he may not award attorney's fees to a party or hold a person in contempt unless the person is a witness before him.³⁸⁷ The trial before a special judge may not be held in a public courtroom, and public employees may not be involved in the trial during regular working hours.³⁸⁸ The special judge's verdict stands as a verdict of the district court, and the right to appeal is preserved.³⁸⁹

Electronic Filing of Documents. Apparently anticipating the future growth in the use of computers and related equipment, the legislature enacted article 29f, which provides that litigants may now file documents by electronic transmission to court clerks.³⁹⁰ This new form of filing is conditioned upon the particular court in question having established a system for receiving the electronically transmitted information from an electronic copying device and the approval of the system by the Texas Supreme Court.³⁹¹

380. *Id.* at 588; see *Limon v. State*, 632 S.W.2d 812, 815 (Tex. App.—Houston [14th Dist.] 1982, no writ) (voluntary manslaughter case). The court in *Autry* noted that a reversal would have been required if a timely motion had been filed because the record did not affirmatively reflect that the trial judge had complied with rule 18a. 646 S.W.2d at 588. Under rule 18a the trial judge must forward the motion to the presiding judge of the district so that another judge can be assigned to hear the motion. TEX. R. CIV. P. 18a(d).

381. 645 S.W.2d 636 (Tex. App.—El Paso 1983, no writ).

382. *Id.* at 638.

383. Act of June 19, 1983, ch. 917, 1983 Tex. Gen. Laws 5060 (codified at TEX. REV. CIV. STAT. ANN. art. 200d, §§ 1-13 (Vernon Supp. 1984)).

384. *Id.* §§ 1, 3.

385. *Id.* § 2.

386. *Id.* § 5.

387. *Id.* § 6.

388. *Id.* § 10.

389. *Id.* §§ 11, 13.

390. Act of June 19, 1983, ch. 732, 1983 Tex. Gen. Laws 4505 (codified at TEX. REV. CIV. STAT. ANN. art. 29f (Vernon Supp. 1984)).

391. TEX. REV. CIV. STAT. ANN. art. 29f, § 1(a) (Vernon Supp. 1984).

