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EVIDENCE

by

Linda Leuchter Addison*

DURING the survey period, the Texas appellate courts handed down numerous decisions construing various common law rules of evidence. Regrettably, very few cases during the survey period interpreted the Texas Rules of Evidence, presumably because the cases were tried prior to the effective date of the rules.¹

The cases of greatest significance arose from the following substantive areas: (1) the hearsay rule and its exceptions; (2) expert and lay opinion evidence; (3) parol evidence; (4) judicial notice; (5) impeachment; (6) privileges; (7) admissibility; (8) presumptions and inferences; (9) the dead man's statute; and (10) lack of probative evidence and insufficient evidence.

I. THE HEARSAY RULE AND ITS EXCEPTIONS

A. Identifying Hearsay

Whether a record or statement offered to prove its truth is hearsay is often difficult to determine.² "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."³ In *Richardson v. Green*⁴ the Texas Supreme Court explained that out-of-court statements offered through a videotaped recording rather than through the testimony of a witness were hearsay when the statements were not made under oath and were not subject to cross-examination.⁵ In *Pope v. Darcey*⁶ the appellant complained of a list of twenty-eight statements that were admitted without objection at trial, contending that twenty-seven of the statements constituted hearsay. Although appellant had failed to timely object to the statements,⁷ the court

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1. Adopted by the Supreme Court of Texas effective September 1, 1983.

2. The hearsay rule and its exceptions are comprehensively defined in TEX. R. EVID. 801-806. Additionally, TEX. R. EVID. 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

3. TEX. R. EVID. 801(d). "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by law." TEX. R. EVID. 802.

4. 677 S.W.2d 497 (Tex. 1984).

5. *Id.* at 502.

6. 667 S.W.2d 270 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

7. "Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay." TEX. R. EVID. 802. This change is a significant one from prior Texas practice, under which inadmissible hearsay would not support a judgment even when

held that because none of the twenty-seven statements were admitted for their truth or falsity, but rather simply to show that the statements were made, the statements were not hearsay.⁸

B. Business Records

Texas Rule of Evidence 803(6)⁹ governs the introduction of records of regularly conducted activities and replaces the previous statutory exception to the hearsay rule allowing the admission of business and other records.¹⁰ No business records case decided during the survey period construed rule 803(6), although several courts, including the Texas Supreme Court, construed its statutory forerunner. These cases may nevertheless be instructive regarding questions of interpretation of rule 803(6) in that the rule does not appear to change prior Texas practice.

In *LaFreniere v. Fitzgerald*¹¹ the Texas Supreme Court held that cancelled checks and invoices representing payments were properly admitted under the business records exception to the hearsay rule.¹² The exhibits consisted of over 550 cancelled checks supported by invoices. LaFreniere signed all but six of the checks, the remaining six having been signed by his bookkeeper pursuant to his instructions. LaFreniere was the sole stockholder and manager of his corporation, and each check was drawn on either his personal account or his corporate account. He testified that each check was issued in the regular course of his business, at or about the time of the rendition of the services paid for by the check, and that the checks were kept in the regular course of his business. In reversing the court of appeals, the supreme court held that the trial court properly admitted the invoices and checks as business records pursuant to article 3737e.¹³ The supreme court wrote that LaFreniere's testimony met the personal knowledge requirement of article 3737e, section 1(b).¹⁴ Texas Rule of Evidence 803(b) preserves the personal knowledge requirement of article 3737e.¹⁵

While providing for the introduction of summaries into evidence,¹⁶ the

admitted without objection. See *Aquamarine Assocs. v. Burton Shipyard*, 659 S.W.2d 820, 822 (Tex. 1983).

8. 667 S.W.2d at 273.

9. TEX. R. EVID. 803(6). The new practice of qualifying business records remains substantially the same as the procedure under former TEX. REV. CIV. STAT. ANN. art. 3737(e) (Vernon Supp. 1985) (repealed 1983).

10. TEX. REV. CIV. STAT. ANN. art. 3737e (Vernon Supp. 1985). Article 3737e was repealed in 1983 in conjunction with the adoption of the Texas Rules of Evidence.

11. 669 S.W.2d 117 (Tex. 1984).

12. *Id.* at 119.

13. *Id.*; TEX. REV. CIV. STAT. ANN. art. 3737e (Vernon Supp. 1985) (repealed 1983).

14. 669 S.W.2d at 119; TEX. REV. CIV. STAT. ANN. art. 3737e, § 1(b) (Vernon Supp. 1985) (repealed 1983).

15. TEX. R. EVID. 803(6) allows admission of the records of regularly conducted activities as an exception to the hearsay rule when certain prerequisites are "shown by the testimony of the custodian or other qualified witness . . ." *Id.* This requirement preserves the requirement of art. 3737e, § 2 that allowed the mode of preparation of the memorandum or record to be proved by "the custodian or other qualified witness." TEX. REV. CIV. STAT. ANN. art. 3737e, § 2 (Vernon Supp. 1985) (repealed 1983).

16. TEX. R. EVID. 1006 provides that the contents of voluminous writings, recordings, or

Texas Rules of Evidence do not contain a specific provision regarding the admission of summaries of records of regularly conducted activities. Practitioners, therefore, should assume that the method of introducing summaries of business records probably will not change from prior Texas practice. During the survey period the Houston court of appeals held that a business document is admissible as a business record even though it represents a compilation of prior information in *Marquis Construction Co. v. Johnson Masonry*.¹⁷ *Marquis* considered whether invoices supporting the plaintiff's claim for labor and materials were business records or summaries of business records. The court wrote that there is a natural hierarchy of records in any business, citing as examples calendar notations or phone message slips that are later incorporated into regular business reports, which in turn subsequently may be incorporated into billing statements to clients.¹⁸ Writing that each level of entry is a summary and a consolidation of prior notations, the court held that each level is nevertheless a business record, made in regular course, by a person with personal knowledge, at or near time of the time of the act, event, or condition or reasonably soon thereafter.¹⁹ The court ruled that an invoice, which is itself a business record, should not be treated as a summary and is admissible if it otherwise meets the tests of article 3737e.²⁰

C. *Excited Utterances*

Another well-recognized exception to the hearsay rule is the exception for statements made while in the grip of violent emotion, excitement, or pain.²¹ The rationale for this exception is that a person in an excited condition loses his capacity for the reflection necessary to fabricate a falsehood.²² The excited utterance exception to the hearsay rule has been codified in Texas Rule of Evidence 803(2).²³ Prior Texas common law required independent proof of the exciting event for the excited utterance to be admissible.²⁴ Common law required that corroborating evidence of the exciting event be sufficient to support a finding that the event did occur, not merely that it could have occurred.²⁵ Rule 803(2) does not preserve the common law requirement of independent proof of the exciting occurrence as a prerequisite to the admis-

photographs, otherwise admissible, which cannot be conveniently examined in court, may be presented in the form of charts or summaries if the originals or duplicates are made available for inspection either at a reasonable time and place, or are produced in court.

17. 665 S.W.2d 514 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

18. *Id.* at 515.

19. *Id.*

20. *Id.* The tests of article 3737e are substantially preserved in TEX. R. EVID. 803(6).

21. See TEX. R. EVID. 803(2).

22. See *Johnson v. State*, 110 Tex. Crim. 250, 251, 8 S.W.2d 127, 128 (1928) (excited utterance in murder prosecution context).

23. TEX. R. EVID. 803(2) allows the admission of statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

24. *Truck Ins. Exch. v. Michling*, 364 S.W.2d 172, 175 (Tex. 1963).

25. *Hartford Accident & Indem. Co. v. Hale*, 400 S.W.2d 310, 311 (Tex. 1966).

sion of the excited utterance.²⁶

An example of the operation of the common law excited utterance exception is contained in the Texas Supreme Court opinion in *Richardson v. Green*.²⁷ *Richardson* considered whether a child's statements to his mother and his mother's husband on the child's return from a visit with his father were admissible under the *res gestae*²⁸ exception to the hearsay rule. The court stated that to be admissible as *res gestae*, a statement must be shown to have been a spontaneous reaction to an exciting event and there must be independent proof of the exciting event to which the statement relates.²⁹ The court explained that the offered statements themselves cannot be used to prove the exciting event.³⁰ In holding that the offered testimony was not admissible as *res gestae*, the court explained that spontaneity had not been established, because the alleged abuse preceded the statements by several days, and that no independent evidence supported the hearsay statement because the physician who examined the boy the following morning found no physical evidence of the sexual abuse alleged.³¹ In comparison, *Atlantic Mutual Insurance Co. v. Middleman*³² held that a deceased worker's statement that he must have hurt his leg on the job was admissible through testimony of his widow and a co-worker when other independent evidence corroborated the injury.³³

26. See TEX. R. EVID. 803(2).

27. 677 S.W.2d 497 (Tex. 1984). This case also discussed the issue of whether an out-of-court statement offered in court through a videotape, rather than by the statement of another witness, is hearsay. *Id.* at 502.

28. Originally the term *res gestae* was used to denote testimony that accompanied the principally litigated fact, such as the murder, accident, or tort that was the subject of the litigation. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 288, at 686 (E. Cleary 2d ed. 1972). Commentators and courts have criticized the use of the phrase *res gestae*, however, because of the vagueness and imprecision that developed as the courts broadened the usage of the term to allow evidence of almost any spontaneous declaration. *Id.* at 687. A Texas commentator has also complained of the "promiscuous use of 'the nonsense phrase *res gestae*,'" and has written that the common law concept of *res gestae* breeds confusion, is improper, and should be avoided. Wellborn, *Article VIII: Hearsay*, 20 HOUS. L. REV. 477, 511 (1983) (Tex. R. Evid. Handbook) (citing E. CLEARY & J. STRONG, EVIDENCE 680 (3d ed. 1981)).

29. 677 S.W.2d at 500 (citing *Hartford Accident & Indem. Co. v. Hale*, 400 S.W.2d 310, 311 (Tex. 1966); *Truck Ins. Exch. v. Michling*, 364 S.W.2d 172, 175 (Tex. 1963)).

30. 677 S.W.2d at 500.

31. *Id.*

32. 661 S.W.2d 182 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

33. *Id.* at 189. The evidence complained of was introduced for the purpose of proving that the worker sustained an injury in the course and scope of his employment. In interpreting the opinion of the Texas Supreme Court in *Hartford Accident & Indem. Co. v. Hale*, 400 S.W.2d 310, 311 (Tex. 1966), the *Middleman* court explained that the supreme court did not specifically state that the independent proof of the incident or occurrence to which the statement relates must be established by direct evidence, and that the finder of fact can make a reasonable inference from direct or circumstantial probative evidence. 661 S.W.2d at 185. The court wrote that in this case there was a close proximity between the time the worker arrived at the employer's premises uninjured and the time his co-worker found him rubbing his leg, and that this timing constituted sufficient direct and circumstantial evidence of probative value to establish where, when, and how the worker was injured. *Id.* The testimony considered by the court in this case would also be admissible under TEX. R. EVID. 803(3), which admits into evidence statements regarding then existing mental, emotional, or physical conditions as exceptions to the hearsay rule. *Id.*

D. Then Existing Mental, Emotional, or Physical Condition

A well-recognized exception to the hearsay rule admits into evidence statements tending to show either the state of mind or the physical condition of the declarant.³⁴ The long line of cases carving out this common law exception to the hearsay rule is now codified in Texas Rule of Evidence 803(3), governing the admission of statements relating to then existing mental, emotional, or physical conditions.³⁵ During this survey period, the Houston court of appeals construed the common law basis for this exception in *Thrillkill v. Montgomery Ward & Co.*³⁶ At issue was the propriety of the exclusion from evidence as hearsay appellant's testimony concerning her conversations with her doctor regarding her need for future surgery. Appellant offered the testimony as an exception to the hearsay rule, claiming that she was not offering the statements for truth of the matters asserted, but, rather, to show her state of mind, which was relevant to her claim of mental anguish.³⁷ The trial court sustained the hearsay objections, but the court of appeals reversed, stating that the evidence was not hearsay because it was not offered to prove the truth of the matter asserted.³⁸

E. Admissions of Party-Opponents

A distinction exists between two frequently confused exceptions to the hearsay rule: the declarations against interest exception and the admissions of party-opponents exception.³⁹ Admissions of party-opponents are admissible into evidence without satisfying any of the requirements for declarations against interest.⁴⁰ Generally stated, statements of a person that are inconsistent with proprietary or pecuniary interests are considered to be declarations against interest.⁴¹ Admissions do not need to be against the interest of the party when made, and the party making the admission need not be unavailable.⁴² The Texas Rules of Evidence, while treating statements against interest as exceptions to the hearsay rule, treat admissions by a party-opponent as statements that are not hearsay.⁴³

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

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

36. 670 S.W.2d 382 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

37. *Id.* at 386.

38. *Id.* In so holding, the court cited TEX. R. EVID. 801(d), which defines hearsay as a statement offered in evidence to prove the truth of the matter asserted. The court reasoned that appellant's testimony was not offered to prove the truth of the statement asserted, but, rather, to show appellant's state of mind. 670 S.W.2d at 386. This testimony also would be admissible as a statement of her then existing mental, emotional, or physical condition under TEX. R. EVID. 803(3).

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

40. See generally 1A R. RAY, *supra* note 34, § 1122, at 270-73 (distinction between admissions and declarations against interest).

41. *Id.* § 1001, at 248.

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

43. TEX. R. EVID. 801(e).

During this survey period, the Houston court of appeals considered the hearsay exception for admissions of party-opponents in *Bangor Punta Acceptance Corp. v. Palm Center R.V. Sales*.⁴⁴ Appellant Bangor complained of the trial court's exclusion of four cancelled checks from evidence. Palm Center drew the four checks and sent them to Bangor as partial payment of the promissory notes. The court of appeals reversed and held that the checks were admissible as admissions by Palm Center of the existence of the indebtedness that formed the basis of plaintiff's cause of action.⁴⁵ The court explained that the statements or conduct of a party inconsistent with the position taken by him at trial are generally admissible and that the weight and probative force of such evidence is a matter for the trier of fact.⁴⁶

F. Judicial Admissions

A fact judicially admitted does not require evidence and establishes the fact admitted as a matter of law, thereby precluding a trial court from finding any contrary facts.⁴⁷ The Texas Rules of Evidence, while not specifically distinguishing judicial admissions from other admissions, treat admissions not as exceptions to the hearsay rule but, rather, as statements that are not hearsay.⁴⁸ Judicial admissions can be made either by a party himself or by someone authorized to make statements on his behalf, such as his attorney.⁴⁹ Two cases decided during the survey period held the pleading of certain facts to be judicial admissions. *Industrial Disposal Supply Co. v. Perryman Brothers Trash Service*⁵⁰ and *Mollinedo v. Texas Employment Commission*⁵¹ held that facts admitted in pleadings can be considered judicial admissions and are substitutes for evidence.

Although judicial admissions preclude a trial court's finding any contrary fact, a judicial admission is waived when evidence to the contrary is heard, as occurred in *Perryman Brothers*.⁵² Matters deemed admitted are proper summary judgment evidence because a party may not introduce evidence that contradicts a judicial admission, as held by the Dallas court of appeals

44. 661 S.W.2d 237 (Tex. App.—Houston [1st Dist.] 1983, no writ).

45. *Id.* at 240.

46. *Id.* The court of appeals rejected appellee's contention that the documents were business records, and specifically ruled that no predicate was necessary under TEX. REV. CIV. STAT. ANN. art. 3737e (Vernon Supp. 1985) (repealed 1983). 661 S.W.2d at 240. The court explained that the items were original documents prepared by Palm Center and were admissible as admissions without regard to the business records statute. *Id.* at 241. The court also rejected Palm Center's argument that the checks were hearsay, explaining that admissions by a party-opponent are not hearsay. *Id.* This treatment is the same as that given admissions of party-opponents by TEX. R. EVID. 801(e).

47. 1A R. RAY, *supra* note 34, § 1147, at 299-300. The Texas Supreme Court established five requirements for judicial admissions in *Griffin v. Superior Ins. Co.*, 161 Tex. 195, 201, 338 S.W.2d 415, 419 (1960). This opinion, as well as the strong dissent by four justices, contains a comprehensive discussion of the nuances involved in judicial admissions.

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

49. *Id.*

50. 664 S.W.2d 756, 763 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

51. 662 S.W.2d 732, 736 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

52. 664 S.W.2d at 764.

in *Overstreet v. Home Indemnity Co.*⁵³ The Texas Supreme Court reversed,⁵⁴ however, because a majority of the court, without questioning the propriety of admissions as summary judgment evidence, believed that the admissions did not establish plaintiff's summary judgment case as a matter of law.⁵⁵

Two courts during the survey period held that admissions made in superseded pleadings lose their binding force as judicial admissions.⁵⁶ Admissions in abandoned pleadings, however, do have value as evidentiary admissions and can be introduced into evidence.⁵⁷ Judicial admissions can be made in pleadings as well as through a party's trial testimony.⁵⁸ For testimony to be considered a judicial admission, however, the statement must be deliberate, clear, and unequivocal.⁵⁹ Statements that are conflicting are not judicial admissions, as demonstrated in *Building Concepts, Inc. v. Duncan*.⁶⁰ To be conclusive against a party, a judicial admission must be made in the same proceeding or in another proceeding involving the same parties.⁶¹ During the survey period *Holloway v. Holloway*⁶² held that a prior sworn statement by a party in a different proceeding not involving the same parties and not made in the same case was not a judicial admission.⁶³

G. Vicarious Admissions

Texas Rule of Evidence 801(e)(2)(d) reversed the much criticized holding of *Big Mac Trucking Co. v. Dickerson*⁶⁴ that limited the category of agent or servant admissions that are admissible against a principal. Under the new

53. 669 S.W.2d 825, 827 (Tex. App.—Dallas 1984), *rev'd*, 28 Tex. Sup. Ct. J. 45 (Oct. 17, 1984).

54. 28 Tex. Sup. Ct. J. 45, 46 (Oct. 17, 1984).

55. *Id.*

56. *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983); *Corsi v. Nolanda Dev. Ass'n*, 674 S.W.2d 874, 878 (Tex. App.—Corpus Christi), *rev'd on other grounds*, 682 S.W.2d 246 (Tex. 1984).

57. *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983); *Corso v. Nolanda Dev. Ass'n*, 674 S.W.2d 874, 878 (Tex. App.—Corpus Christi), *rev'd on other grounds*, 682 S.W.2d 246 (Tex. 1984). Admissions in abandoned pleadings are evidence that a jury is entitled to consider, and the probative value of the admission against interest is a question of fact for the jury. Although any admission in an abandoned pleading ceases to bind the pleader, such pleading remains a statement seriously made and can be introduced into evidence as an admission. See *Valdes v. Barrera*, 647 S.W.2d 377, 382 (Tex. App.—San Antonio 1983, no writ).

58. *Watts v. St. Mary's Hall, Inc.*, 662 S.W.2d 55, 59 (Tex. App.—San Antonio 1983, writ *ref'd n.r.e.*).

59. *Id.*

60. 667 S.W.2d 897 (Tex. App.—Houston [14th Dist.] 1984, writ *ref'd n.r.e.*). The court ruled that the testimony of a homeowner regarding whether changes by a contractor and plans for construction of a residence were authorized was clearly conflicting and, therefore, could not be considered a judicial admission. *Id.* at 906.

61. *Aetna Life Ins. Co. v. Wells*, 557 S.W.2d 144, 147 (Tex. Civ. App.—San Antonio 1977), writ *ref'd n.r.e. per curiam*, 566 S.W.2d 900 (Tex. 1978).

62. 671 S.W.2d 51 (Tex. App.—Dallas 1983, writ *dism'd*).

63. *Id.* at 59.

64. 497 S.W.2d 283 (Tex. 1973). In *Big Mac* the Texas Supreme Court held that the hearsay statements of an agent or employee should be admitted against a principal as vicarious admissions only when the trial judge finds, as a preliminary fact, that the statements were authorized. *Id.* at 287.

rule, admissions of agents or employees are admissible if they are made during the existence of an employment relationship and concern matters within the scope of the employment relationship, even though the agent or servant has no authority to speak.⁶⁵ The first Texas case decided under the new rule was *Yellow Freight System, Inc. v. North American Cabinet Corp.*⁶⁶ *Yellow Freight* held that in a shipper's action against a carrier for damage to property during transit, evidence of an oral agreement between the shipper and the carrier, even if admitted for its truth rather than the fact of its utterance, was admissible under rule 801(e)(2)(d) as an admission by a party's agent or representative.⁶⁷

H. Rebutting Charges of Recent Fabrication

An exception to the hearsay rule has long admitted into evidence prior consistent statements to support a witness charged with recent fabrication of his testimony.⁶⁸ The Texas Rules of Evidence do not include prior consistent statements offered to rebut a charge of recent fabrication within the definition of hearsay and admit them into evidence as statements that are not hearsay if offered to rebut an express or implied charge of recent fabrication or improper influence or motive.⁶⁹ The Texas Supreme Court demonstrated the operation of the common law rule in *McInnes v. Yamaha Motor Corp., U.S.A.*⁷⁰ In *McInnes* the supreme court ruled that the trial court erred in excluding the testimony of a motorcyclist's daughter that the motorcyclist had told her soon after the accident in question that his motorcycle had forced him off the road.⁷¹ The court reasoned that Yamaha clearly charged McInnes with recent fabrication and the excluded testimony would have rebutted the charge.⁷²

I. Best Evidence

No case decided during the survey period interpreted the extent to which the common law best evidence rule has been changed by the Texas Rules of Evidence.⁷³ Because of the liberal admissibility of duplicates provided by Texas Rule of Evidence 1003, it is logical to assume that, except when questions are raised as to the authenticity of a document, a best evidence objec-

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

66. 670 S.W.2d 387 (Tex. App.—Texarkana 1984, no writ).

67. *Id.* at 390. Note that TEX. R. EVID. 801(e)(2)(d) does not create an exception to the hearsay rule for admissions of a party's agents or representatives, but rather, defines them as statements that are not hearsay.

68. *Skillern & Sons, Inc. v. Rosen*, 359 S.W.2d 298, 301-02 (Tex. 1962).

69. TEX. R. EVID. 801(e)(1)(B).

70. 673 S.W.2d 185 (Tex. 1984).

71. *Id.* at 189.

72. *Id.* at 190. The court ruled, however, that because the evidence excluded was cumulative, the error was harmless and did not require a new trial. *Id.*

73. TEX. R. EVID. 1003 permits the introduction into evidence of duplicates to the same extent as originals unless a question is raised as to their authenticity or other unfairness would result from the admission of the duplicate. TEX. R. EVID. 1004 dispenses with the need for originals that are lost or destroyed, not obtainable, outside the state, in the possession of the opponent, or pertain to collateral matters.

tion will be sustained primarily when a witness attempts to introduce oral testimony regarding the contents of a document without introducing the document.

Two cases decided during the survey period demonstrate the operation of the common law best evidence rule without illuminating how Texas Rule of Evidence 1003 has affected it. *Raymond v. Aquarius Condominium Owners Association*⁷⁴ demonstrated two ways a best evidence objection could be overcome under the old common law rule: first, by demonstrating that the terms of the writing not introduced were not at issue; and second, by explaining to the satisfaction of the trial court the failure to obtain the original document.⁷⁵ *Holloway v. Holloway*⁷⁶ allowed the admission of a photocopy of a check over an objection that the original had not been produced or accounted for where the original was not available and there was no bona fide dispute as to its being an accurate reproduction.⁷⁷

J. Summaries

Texas Rule of Evidence 1006 permits the contents of voluminous writings, recordings or photographs, otherwise admissible, to be presented in the form of a chart, summary, or calculation.⁷⁸ This rule is basically a codification of the prior statutory exception that allowed the admission of summaries into evidence as an exception to the hearsay rule under former article 3737e of the Texas Revised Civil Statutes.⁷⁹ During the survey period the Texas Supreme Court considered the admission of summaries into evidence under the common law rule in *Aquamarine Associates v. Burton Shipyard, Inc.*⁸⁰ In *Aquamarine* the Texas Supreme Court affirmed the exclusion from evidence of a summary chart offered to demonstrate plaintiff's cost of cover. The supreme court wrote that because the underlying business records, which were purportedly the basis of the summary chart, were not shown to be admissible, the summary and any testimony regarding it were hearsay.⁸¹

II. LAY AND EXPERT OPINION EVIDENCE

A. Texas Rules of Evidence

Some of the most significant changes wrought by the Texas Rules of Evidence are contained in article VII, governing opinions and expert testimony. Article VII allows far more liberal admission of expert and lay witness opin-

74. 662 S.W.2d 82 (Tex. App.—Corpus Christi 1983, no writ).

75. *Id.* at 92.

76. 671 S.W.2d 51 (Tex. App.—Dallas 1983, writ dismissed). This case is also interesting for its discussion of judicial admissions. See *id.* at 56.

77. *Holloway* was decided under TEX. REV. CIV. STAT. ANN. art. 3731(c) (Vernon Supp. 1982-1983), which was repealed in 1983 in conjunction with the adoption of the Texas Rules of Evidence.

78. TEX. R. EVID. 1006.

79. TEX. REV. CIV. STAT. ANN. art. 3737e was repealed in 1983, insofar as it applied to civil actions, in conjunction with the adoption of the Texas Rules of Evidence.

80. 659 S.W.2d 820 (Tex. 1983).

81. *Id.* at 821-22.

ions based on personal perceptions than did prior case law. Lay witnesses may now state their opinions and no longer must state the specific facts on which their opinions are based, as long as their opinions are helpful and rationally based on perceptions.⁸² Further, Texas Rule of Evidence 704 provides that opinion testimony is not objectionable solely because it embraces an ultimate issue to be decided by the jury.⁸³ The facts that form the bases of an expert's opinion may now be outside the record if they are the type of hearsay reasonably relied upon by experts in the same field.⁸⁴

While rule 703 defines the permissible substance of an expert's opinion, Rule 705 defines the method for offering it. In this regard rule 705 contains a very important change from prior Texas practice. No longer is it necessary for an expert witness to present his opinions in answers to hypothetical questions. Rather, an expert may now state an opinion without stating its foundation, leaving opposing counsel to inquire as to the bases of the opinion.⁸⁵ The court, however, can still require the expert to state the data underlying his opinion prior to admitting the opinion.⁸⁶

B. *Qualifications of Experts and Admissibility of Testimony*

If the trier of fact would be assisted in understanding evidence or determining a fact issue by specialized knowledge, then "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."⁸⁷ An expert witness may also draw inferences from facts in evidence that a jury is not competent to draw.⁸⁸ To justify the use of expert opinion testimony, however, the subject of the inference or conclusion must be beyond the knowledge of the typical layman.⁸⁹ The witness must also have sufficient skill, knowledge, or experience within the particular field to demonstrate that he is qualified to express an opinion.⁹⁰

The trial court has tremendous discretion in determining the admissibility of expert testimony, and an appeals court will not disturb a trial court's

82. TEX. R. EVID. 701.

83. *Id.* 704.

84. *Id.* 703. This rule may nullify the limitation of *Moore v. Grantham*, 599 S.W.2d 287, 289 (Tex. 1980), that the testimony of an expert may not be based solely on hearsay. Virtually all expert testimony is necessarily based at least partially on hearsay, and rule 703 seems to abolish the limitation on how much hearsay an expert may consider in formulating his opinions.

85. TEX. R. EVID. 705.

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

87. TEX. R. EVID. 702.

88. See 2 R. RAY, *supra* note 34, § 1400, at 23-27.

89. *Id.*

90. *Id.*

decision to admit or exclude expert testimony absent an abuse of discretion.⁹¹ During the survey period, the Fort Worth court of appeals held in *Garner v. Garner*⁹² that the court did not abuse its discretion in finding that a case worker in a child custody proceeding was an expert in the field of social work.⁹³ Similarly, the Houston court of appeals held that a trial court did not abuse its discretion by excluding testimony consisting of an officer's opinion as to the cause of an accident in *Monsanto Co. v. Johnson*.⁹⁴ The action arose from an automobile accident in which a pedestrian was killed. The court wrote that where the officer's opinion was based on interviews with witnesses to the accident, the opinion testimony was properly excluded because there was no showing that the officer was specifically qualified to express his opinion because of scientific, technical, or other specialized knowledge not generally possessed by a layman.⁹⁵ The court explained that the jury, which heard the direct testimony of the same witnesses to the accident, was in as good a position as the officer to form an opinion regarding the cause of the accident.⁹⁶

C. Effect of Opinion Testimony

Several appellate courts during the survey period considered the effect of expert opinion testimony and the extent to which either a court or a jury is bound by the opinions of an expert. In *Gonzales v. Lancaster*⁹⁷ the expert opined on the cost of replacing plumbing. The court held that opinion evidence does not establish any material fact as a matter of law and that a jury could form its own opinions from other evidence admitted and by utilizing its own experience and common knowledge.⁹⁸ By contrast, when the subject of expert testimony is one for experts or skilled witnesses alone, and when the jury or the court cannot properly be assumed to have formed or to be able to form correct opinions based upon the evidence and aided by their own experience and knowledge, expert testimony is conclusive.⁹⁹ *Green v. Crawford*¹⁰⁰ held that expert opinions expressed by a witness, who held a bachelor of science degree in forest management and was employed as an independent timber resource consultant, conclusively established the value of timber remaining after the plaintiffs had cut and removed other timber from the subject tract.¹⁰¹ Similarly, in *Mack v. Moore*,¹⁰² a case in which the

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

92. 673 S.W.2d 413 (Tex. App.—Fort Worth 1984, writ dismissed).

93. *Id.* at 417.

94. 675 S.W.2d 305 (Tex. App.—Houston [1st Dist.] 1984, no writ).

95. *Id.* at 310-11.

96. *Id.*

97. 675 S.W.2d 293 (Tex. App.—Dallas 1984, no writ).

98. *Id.* at 296.

99. *Coxson v. Atlantic Life Ins. Co.*, 142 Tex. 544, 549, 179 S.W.2d 943, 945 (1944).

100. 662 S.W.2d 123 (Tex. App.—Tyler 1983, writ refused n.r.e.).

101. *Id.* at 128.

102. 669 S.W.2d 415 (Tex. App.—Houston [1st Dist.] 1984, no writ). The *Mack* court held that when three expert witnesses testified that \$4,865 was a reasonable value of an attorney's accounting services and the client did not impeach expert witnesses on cross-examina-

subject matter required the fact finder to be guided solely by expert opinion and the expert opinion evidence was uncontroverted, the court held that the failure to offer contrary expert evidence constituted an effective corroboration of the expert's testimony and, therefore, the court must accept the opinion as conclusive.¹⁰³ During the survey period another court held that a jury may accept or reject expert opinions or may find its own opinions from other evidence by using its experience in matters of common knowledge.¹⁰⁴ *Precision Homes, Inc. v. Cooper*¹⁰⁵ demonstrated that a jury may accept controverted expert testimony as the basis of its verdict.¹⁰⁶ In this homeowners' action against a builder under the Texas Deceptive Trade Practices Act,¹⁰⁷ the Houston court of appeals found an expert witness's testimony that the foundation was not built in a workmanlike manner, although conflicting with the contractor's testimony, sufficient to support the jury's finding that the foundation was not built in a good, substantial, and workmanlike manner.¹⁰⁸

D. Testimony of Medical Experts

The trier of fact usually determines the issue of causation, even when expert testimony demonstrates probable cause.¹⁰⁹ The burden of proof in a medical malpractice case is on the patient to prove that the physician has undertaken a mode or form of treatment that a reasonable and prudent doctor would not have undertaken under same or similar circumstances.¹¹⁰ Expert testimony is required to meet this burden of proof. The form of offering such expert testimony was considered by the Corpus Christi court of appeals in *Bauer v. King*.¹¹¹ In *Bauer* the court reversed the trial court and held that no evidence supported a finding that the doctor's treatment fell below the standard of care used by radiologists.¹¹² The court wrote that the medical standard of care must be established so that the trier of fact may determine whether the doctor's acts or omissions deviated from the standard.¹¹³ An expert witness in a medical malpractice case should first state what the stan-

tion, the only reasonable conclusion to be drawn from the evidence was that \$4,865 was the reasonable value of services rendered, and that to award less was reversible error. *Id.* at 319. The Houston court of appeals made an identical holding in *City of Houston v. Blackbird*, 658 S.W.2d 269, 271 (Tex. App.—Houston [1st Dist.] 1983, no writ).

103. 669 S.W.2d at 319.

104. *Leiber v. Texas Mun. Power Agency*, 667 S.W.2d 206, 208 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.) (evidence sufficient to support jury's findings of after-taking value of easement and remainder, when findings of after-taking value were above lowest figure testified to by experts and amount of total damages found by jury was within the range of expert testimony produced at trial).

105. 671 S.W.2d 924 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

106. *Id.* at 929.

107. TEX. BUS. & COMM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1985).

108. 671 S.W.2d at 929.

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

110. *Hood v. Phillips*, 554 S.W.2d 160, 165 (Tex. 1977).

111. 674 S.W.2d 377 (Tex. App.—Corpus Christi 1984, writ granted).

112. *Id.* at 381.

113. *Id.* at 380.

dard of care is for a specific treatment, and then state facts that establish the nature of the defendant doctor's treatment.¹¹⁴ Once the standard is stated and the facts described, the jury can then determine whether the defendant doctor met the required standard of care.¹¹⁵ Although admissibility of medical testimony becomes increasingly more liberal and less dependent upon magic words, this holding continues the long standing method for the introduction of expert opinions in medical malpractice cases.¹¹⁶ The Texas Supreme Court granted writ of error in this case to consider whether the court of appeals erred in holding there was no evidence of negligence.¹¹⁷

The Houston court of appeals continued the erosion of the standard of care distinctions between specialties and between physicians in various geographical areas. In *Johnson v. Hermann Hospital*¹¹⁸ the court held that it was error to exclude the expert testimony of a nurse who was qualified by her experience in an intensive care unit to testify as a medical expert, notwithstanding that she was not a registered nurse at the time she testified.¹¹⁹ The court reversed the trial court's exclusion of the nurse's testimony even though no certification or specialization was required for nurses to work as critical care nurses in intensive care units, and notwithstanding that the nurse was familiar only with the standard of care at one other hospital.¹²⁰ In reversing, the court explained that nonphysicians may qualify as medical experts by virtue of their special experience, and that even doctors are not required to be from the same city, state, or school of practice to testify as medical experts so long as they are equally familiar with the subject of the inquiry.¹²¹

In *Oil Country Haulers, Inc. v. Griffin*¹²² the Houston court of appeals affirmed the trial court's admission into evidence of testimony of a physician qualified as an expert. The physician testified as to the reasonableness and necessity of charges to the plaintiff for medical services, even though most of the charges were not his.¹²³ The court held that because the physician was qualified to testify as a medical expert, he was able to testify about the cost of medical services.¹²⁴

E. Opinion on Ultimate Issue

Texas Rule of Evidence 704 provides that testimony otherwise admissible is not objectionable simply because it embraces an ultimate issue to be de-

114. *Id.*

115. *Id.*

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

117. 28 Tex. Sup. Ct. J. 53 (Oct. 24, 1984).

118. 659 S.W.2d 124 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

119. *Id.* at 126.

120. *Id.*

121. *Id.*

122. 668 S.W.2d 903 (Tex. App.—Houston [14th Dist.] 1984, no writ).

123. *Id.* at 904.

124. *Id.*

cided by the trier of fact.¹²⁵ No case decided during the survey period interpreted the extent to which this rule has modified prior Texas practice. Prior to rule 704, objections that opinion testimony embraced an ultimate issue of fact were sustained because such testimony historically was thought to be an invasion of the province of the jury.¹²⁶ Texas courts will have to resolve whether under rule 704 an expert may boldly state his opinion regarding an ultimate fact, or whether expert testimony that simply embraces an ultimate issue is not objectionable. The only case decided during the survey period considering the testimony of an expert regarding an ultimate issue was decided under Texas common law. In *Herrera v. FMC Corp.*¹²⁷ the Houston court of appeals explained that a trial court has broad discretion in deciding whether expert testimony that regards an ultimate fact issue is admissible.¹²⁸ The court affirmed the trial court's exclusion of testimony by the plaintiff's expert that the defendant's failure to provide adequate warning exposed the plaintiff to an unreasonable risk of harm.¹²⁹

F. Lay Opinions

1. Owner's Opinion of Value

As noted above, the Texas Rules of Evidence have greatly liberalized the admission of opinion testimony by lay witnesses.¹³⁰ Texas case law has always been liberal, however, in allowing an owner of property to testify as to his opinion of its value.¹³¹ An owner of property can give such testimony even though he would not be qualified to testify as an expert regarding the value of the same property if it were owned by another person.¹³²

Several Texas courts during the survey period allowed owners to testify as to value. Courts admitted owner testimony as to the value of an automobile before and after the subject collision,¹³³ by the buyer of a truck regarding the value of the truck to him when he purchased it and after the truck collapsed,¹³⁴ and as to the value of gemstones lost in a burglary.¹³⁵ An owner's testimony regarding value is subject to some restrictions, however, as evi-

125. TEX. R. EVID. 704.

126. See *Loper v. Andrews*, 404 S.W.2d 300, 305 (Tex. 1966) (dictum admonishing that a witness "is not permitted to express an opinion since this invades province of the trier of the facts").

127. 672 S.W.2d 5 (Tex. App.—Houston [14th Dist.] 1984, no writ).

128. *Id.* at 7.

129. *Id.*

130. TEX. R. EVID. 701.

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

132. *Id.*

133. *Bower v. Processor & Chem. Serv.*, 672 S.W.2d 30, 32 (Tex. App.—Houston [14th Dist.] 1984, no writ).

134. *Superior Trucks, Inc. v. Allen*, 664 S.W.2d 136, 146 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

135. *Southwest Craft Center v. Heilner*, 670 S.W.2d 651, 654 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

denced in the Texas Supreme Court opinion of *Porras v. Craig*.¹³⁶ *Porras* was a suit for title and damages to land. Upon purchasing a tract of land adjacent to Craig's tract, Porras bulldozed everything that his survey showed to be his property, including an existing fence and two acres on Craig's side of the fence. Porras then built a new fence on the survey line. In so doing, Porras cut down a number of trees, some as much as four feet in diameter. Craig filed suit for title and damages to the land on his side of the old fence.¹³⁷ In holding that there was no evidence to support the award of actual damages to the land, the Texas Supreme Court explained that in order for a property owner to qualify as a witness to the damages to his property, his testimony must refer to market value, rather than intrinsic or some other value of the property.¹³⁸

Another limitation on owner testimony was demonstrated in *Perry v. Texas Municipal Power Agency*.¹³⁹ *Perry* involved an eminent domain proceeding in which a landowner who was not qualified as an expert attempted to testify as to the amount and value of lignite on his property. The Houston court of appeals held that such testimony was properly excluded when the owner admitted that he was not an expert witness and his testimony was offered as such.¹⁴⁰

2. Lay Testimony to Prove Medical Causation

In *Morgan v. Compugraphic Corp.*¹⁴¹ the Texas Supreme Court held that lay testimony is adequate to prove causation in those cases in which general experience and common sense enable a layman to determine, with reasonable probability, the causal relationship between the event and the condition.¹⁴² The supreme court explained that lay testimony establishing a sequence of events providing a "strong, logically traceable connection between the event and the condition is sufficient proof of causation."¹⁴³ The lay testimony found to be sufficient in this case was plaintiff's testimony that she had always been in good health, but that upon the installation of a type-setting machine near her desk, positioned in such a way that its back was only two inches from her face as she worked, she began to develop problems with her breathing, blurred vision, headaches, stomach problems, and swelling of the eyes, lips, and nasal passages.¹⁴⁴ Similarly, in *Popkowski v. Gramza*¹⁴⁵ the Houston court of appeals held that a personal injury plain-

136. 675 S.W.2d 503 (Tex. 1984).

137. The jury found that Craig had title to the land in question by virtue of adverse possession, and this finding was not in dispute before the supreme court. *Id.* at 504.

138. *Id.* at 506. The court was not unanimous in its interpretation of Craig's testimony. A dissent by Justice Wallace, in which Justice Kilgarlin joined, stated that when Craig's testimony was considered in its entirety "one is lead [sic] to the obvious conclusion that the values being discussed are market values." *Id.* at 507.

139. 667 S.W.2d 259 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

140. *Id.* at 265.

141. 675 S.W.2d 729 (Tex. 1984).

142. *Id.* at 733.

143. *Id.*

144. Plaintiff's testimony is more fully described at *id.* at 731.

145. 671 S.W.2d 915 (Tex. App.—Houston [1st Dist.] 1984, no writ).

tiff's testimony concerning his physical condition following an accident was competent evidence of his freedom from injury before the accident.¹⁴⁶

III. PAROL EVIDENCE

The parol evidence rule proscribes the use of extrinsic evidence to interpret a writing. The court may allow extrinsic evidence only if it finds a contract to be ambiguous.¹⁴⁷ The rule also prohibits parol evidence if a contract is integrated.¹⁴⁸ During this survey period, several appellate courts, including the Texas Supreme Court, rejected attempts to introduce parol evidence on varied and ingenious grounds. In *Lehman v. Corpus Christi National Bank*¹⁴⁹ the Texas Supreme Court affirmed the exclusion of the testimony of an attorney who had prepared a will. The attorney would have testified that in his opinion the testator did not intend to include adopted adults within the class of descendants referenced in the will. The supreme court held that the testimony was properly excluded not only because the will was unambiguous, but also because the witness should not be allowed to testify to the state of mind of another person.¹⁵⁰ In *Akin v. Dahl*¹⁵¹ the Texas Supreme Court disallowed extrinsic parol evidence that would have shown a condition that varied the terms of a written note that was unambiguous on its face.¹⁵²

During the survey period, the Texas courts of appeals refused to allow parol evidence of the intent of contracting parties where a contract was unambiguous,¹⁵³ refused to allow parol evidence to supply the essential elements of a contract for the sale of real estate,¹⁵⁴ held that no ambiguity existed in either the term "option to purchase" or the mistaken attachment of the wrong contract for sale when a different contract for sale was to be incorporated by reference into the challenged contract.¹⁵⁵ When neither defendant contended a note was not a complete and accurate integration of the agreement between the parties, the Fifth Circuit Court of Appeals affirmed the exclusion of parol evidence of antecedent understandings or negotiations sought to be admitted for the purposes of varying the terms of an unambigu-

146. *Id.* at 919.

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

148. Integration is the practice of embodying a transaction in a final written agreement that is intended to incorporate in its terms the entire transaction. *See* 2 R. RAY, *supra* note 34, § 1602, at 312-14.

149. 668 S.W.2d 687 (Tex. 1984).

150. *Id.* at 689.

151. 661 S.W.2d 914 (Tex. 1983).

152. *Id.* at 916.

153. Travis Heights Improvement Ass'n v. Small, 662 S.W.2d 406, 411 (Tex. App.—Austin 1983, no writ).

154. Mainland Sav. Ass'n v. Hoffbrau Steakhouse, Inc., 659 S.W.2d 101, 103 (Tex. App.—Houston [14th Dist.] 1983, no writ) (because contracts for the sale of real estate fall within the statute of frauds and must be in writing to be enforceable, it was not proper to admit oral testimony to supply essential terms such as location or description of land).

155. Maxwell v. Lake, 674 S.W.2d 795, 801-02 (Tex. App.—Dallas 1984, no writ) (contract ambiguous if court is genuinely uncertain as to which one of two meanings is correct).

ous note.¹⁵⁶ Several appellate courts during the survey period approved parol evidence under varying circumstances. For example, courts allowed parol evidence to show a want or failure of consideration,¹⁵⁷ to show misrepresentations under the Texas Deceptive Trade Practices Act,¹⁵⁸ to show fraud in the inducement,¹⁵⁹ and to explain the terms of a letter agreement found to be ambiguous.¹⁶⁰

IV. JUDICIAL NOTICE

Judicial notice is now governed by article II of the Texas Rules of Evidence. Texas Rule of Evidence 201, governing judicial notice of adjudicative facts, is a verbatim adoption of Federal Rule of Evidence 201 and basically does not alter existing Texas practice. Texas Rule of Evidence 201 defines the facts of which a court may properly take judicial notice.¹⁶¹ The rule also prescribes when the taking of judicial notice is discretionary or mandatory, the timing of taking of judicial notice, and the accompanying instructions to the jury.¹⁶² Other rules in article II govern the determination of the laws of other states¹⁶³ and of foreign countries.¹⁶⁴ During the survey period, the Texas appellate courts approved the taking of judicial notice of a court's own record in the same case¹⁶⁵ and of the law of another state.¹⁶⁶

Texas Rule of Evidence 201(f) provides that judicial notice may be taken at any stage of the proceeding.¹⁶⁷ Two appellate courts during the survey

156. *U.S. v. Vahlco Corp.*, 720 F.2d 885, 891 n.10 (5th Cir. 1983) (citing *A. CORBIN, CORBIN ON CONTRACTS* § 573 (1960)).

157. *DeLuca v. Munzel*, 673 S.W.2d 373, 376 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (employee should be allowed to explain provision in employment contract on summary judgment).

158. *Tidelands Life Ins. Co. v. Harris*, 675 S.W.2d 224, 226 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (citing *Anthony Indus., Inc. v. Ragsdale*, 643 S.W.2d 167 (Tex. Civ. App.—Fort Worth, 1983, writ ref'd n.r.e.)).

159. *Wheeler v. Box*, 671 S.W.2d 75, 77 (Tex. App.—Dallas 1984, no writ) (purchasers of business brought successful DTPA action against sellers). Another fraud in the inducement case decided during the survey period is *Potts v. Potts*, 672 S.W.2d 28, 30 (Tex. App.—Houston [14th Dist.] 1984, no writ) (oral promise by husband to wife that he would help her with her income tax, when promise was allegedly made to induce wife to complete divorce, was subject to proof by parol evidence notwithstanding that written agreement between husband and wife stated it expressed the entire agreement between the parties).

160. *Stanley v. H.J. Justin & Sons, Inc.*, 672 S.W.2d 327, 329 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (parol evidence was admissible to determine employment agreement was a year-to-year contract).

161. *TEX. R. EVID.* 201.

162. *Id.*

163. *Id.* 202.

164. *Id.* 203.

165. *Mitchell v. Baum*, 668 S.W.2d 757, 761 (Tex. App.—Houston [14th Dist.] 1984, no writ).

166. *Cessna Fin. Corp. v. Morrison*, 667 S.W.2d 580, 585 (Tex. App.—Houston [1st Dist.] 1984, no writ). Note that under *TEX. R. EVID.* 202 the proper way of proving the law of a foreign state is by judicial notice. In the absence of evidence to the contrary, it is presumed that the law of the foreign state is the same as that of Texas. The operation of this presumption was demonstrated in another case decided during the survey period, *Humphrey v. Bullock*, 666 S.W.2d 586, 589 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

167. *TEX. R. EVID.* 201(f).

period took judicial notice on appeal. In *Garza v. Garza*¹⁶⁸ the San Antonio court of appeals took judicial notice that a divorce judgment was affirmed on appeal.¹⁶⁹ In *Haden Company v. Mixers, Inc.*¹⁷⁰ the Dallas court of appeals took judicial notice that a ' mark refers to feet and a '' mark refers to inches for purposes of determining whether a lien affidavit gave a meaningful description of materials furnished.¹⁷¹

Rule 201(b) allows judicial notice of facts not subject to reasonable dispute that are either generally known within the jurisdiction of the trial court or capable of "accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."¹⁷² The prior common law test, which was substantially the same in operation but employed different language, was whether the fact for which judicial notice was requested was verifiably certain.¹⁷³ In a pre-Texas Rules of Evidence case, the Amarillo court of appeals in *Furr's Supermarket, Inc. v. Williams*¹⁷⁴ held that the proposition that a sign purporting to mark the county line was correctly located on the county boundary was not a certain and indisputable fact that could be judicially noticed with verifiable certainty.¹⁷⁵

V. IMPEACHMENT

Several of the Texas Rules of Evidence specifically govern impeachment of witnesses¹⁷⁶ and liberalize substantially the impeachment of witnesses.¹⁷⁷ While Texas common law permitted a witness to be impeached by a prior conviction only if the conviction was not too remote in time to be probative,¹⁷⁸ rule 609(b) defines remoteness by providing that a conviction cannot be used for impeachment if more than ten years have elapsed since the date of the conviction or release of the witness from confinement, whichever is later.¹⁷⁹ In a pre-Texas Rules of Evidence case, the Corpus Christi court of appeals in *Harker v. Coastal Engineering, Inc.*¹⁸⁰ affirmed the trial court's refusal to use a conviction to impeach a witness with a prior criminal conviction that had occurred over ten years before his testimony.¹⁸¹

Rule 608(a) expands prior Texas common law by allowing the character of a witness to be impeached or supported with opinion as well as reputation

168. 666 S.W.2d 205 (Tex. App.—San Antonio 1983, no writ).

169. *Id.* at 208-09.

170. 667 S.W.2d 316 (Tex. App.—Dallas 1984, no writ).

171. *Id.* at 318.

172. TEX. R. EVID. 201(b)(2).

173. *Eagle Trucking Co. v. Texas Bitulithic Co.*, 612 S.W.2d 503, 506 (Tex. 1981).

174. 664 S.W.2d 154 (Tex. App.—Amarillo 1983, no writ).

175. *Id.* at 157-58.

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

177. No impeachment case was decided during the survey period under the new rules.

178. *Landry v. Travelers Ins. Co.*, 458 S.W.2d 649, 650-51 (Tex. 1970) (determination of remoteness is in discretion of the trial judge weighing all the facts and circumstances).

179. TEX. R. EVID. 609(b).

180. 672 S.W.2d 517 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

181. *Id.* at 522.

testimony.¹⁸² In a personal injury action resulting from a traffic accident, the court of appeals affirmed the exclusion of plaintiff's two convictions for driving while intoxicated when no testimony was offered to show that plaintiff had a reputation for insobriety.¹⁸³ In a case that clearly would have been decided differently under rule 608(a), another appellate court affirmed the trial court's exclusion of testimony of witnesses' opinions concerning whether the plaintiff was a good, safe engineer because the witnesses were asked for opinions and not about reputation.¹⁸⁴ Another pre-Texas Rules of Evidence case, demonstrating the extent to which rule 608(b) has codified prior common law, held that inquiry into specific acts of misconduct for impeachment is not admissible for impeachment purposes unless the specific act involved a conviction for a crime.¹⁸⁵

VI. PRIVILEGES

Article V of the Texas Rules of Evidence governs privileges. The article creates no new privileges and recognizes privileges only as created under the rules.¹⁸⁶ Two cases decided during the survey period interpreted rule 510, which provides for the confidentiality of mental health information.¹⁸⁷ *Gaynier v. Johnson*¹⁸⁸ held that a pleading of fraud does not necessarily put mental condition into issue such as would enable an opposing party to depose a psychiatrist concerning privileged communications.¹⁸⁹ The court also held that when the patient did not testify in her deposition as to what she told her psychiatrist and did not demonstrate an intent to relinquish the confidential communications, her testimony that she had been treated by a psychiatrist, had been hospitalized, and had received shock treatment was not sufficient to waive the privilege under rule 510.¹⁹⁰

Another case strictly construing rule 510 was *Ginsberg v. Johnson*.¹⁹¹ *Ginsberg* is significant not only for its ruling that the medical records of plaintiff's deceased psychiatrist were inadmissible under rule 510, but also because the Dallas court of appeals considered the effect of an erroneous order of production of psychiatric records by the trial court. The court held that despite defendants' possession of the psychiatric records as a result of a prior erroneous court order of production, and despite the claim that the records contained evidence favorable to the defendants, the privilege had not

182. TEX. R. EVID. 608(a). *Id.* 405 allows the character of a witness to be proved with opinion or reputation testimony.

183. *Amoco Chem. Corp. v. Stafford*, 663 S.W.2d 147, 148-49 (Tex. App.—Houston [1st Dist.] 1983, no writ) (citing *Compton v. Jay*, 389 S.W.2d 639, 642-43 (Tex. 1965)).

184. *Port Terminal R.R. Ass'n v. Sims*, 671 S.W.2d 575, 579 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (citing *Eichel v. New York Cent. R.R.*, 375 U.S. 253 (1963)).

185. *Bolling v. Baker*, 671 S.W.2d 559, 569 (Tex. App.—San Antonio 1984, writ dismissed).

186. See TEX. R. EVID. art. V.

187. TEX. R. EVID. 510.

188. 673 S.W.2d 899 (Tex. App.—Dallas 1984, no writ).

189. *Id.* at 906.

190. *Id.* at 905-07.

191. 673 S.W.2d 942 (Tex. App.—Dallas 1984, no writ).

been waived.¹⁹² Although the *Ginsberg* court based its holding on rule 510, the holding also casts light on the operation of rule 512, which provides that a claim of privilege is not defeated by a disclosure that was compelled erroneously.¹⁹³

During the survey period the Corpus Christi court of appeals considered the parameters of the attorney-client privilege. *Duke v. Power Electric & Hardware Co.*¹⁹⁴ held that the asking and answering of a deposition question establishing the motive or intent of a party acting on advice of counsel was not the type of question that would result in a waiver of the attorney-client privilege.¹⁹⁵

VII. ADMISSIBILITY

Texas Rule of Evidence 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."¹⁹⁶ In a pre-Texas Rules of Evidence case, the Fort Worth court of appeals in *Farmers Texas County Mutual Insurance Co. v. Jones*¹⁹⁷ held that evidence of other insurance on the subject property at the time of a fire loss was properly excluded in an insured's action on a fire insurance policy where pro rata clauses in both policies provided that each company would only pay a portion of the loss. The court explained the evidence was highly prejudicial to the insured in that it focused the mind of the jury on a potential for double recovery when in fact none existed.¹⁹⁸

Although it is well-settled that an offer to compromise or settle an existing controversy is inadmissible,¹⁹⁹ determining what constitutes an offer of compromise is sometimes difficult. This difficulty was evidenced in *Duval County Ranch Co. v. Alamo Lumber Co.*²⁰⁰ *Duval County Ranch* considered a telegram that did not offer to reduce a claim but rather stated that if payment on Duval's insurance policy was further withheld, Duval would file suit for tortious business interference. Holding that the trial court could have considered the telegram an ultimatum rather than an overture for peaceful settlement, the Amarillo court of appeals held that the trial court did not abuse its discretion in admitting the telegram into evidence.²⁰¹

When a party offers into evidence a document written in a foreign lan-

192. *Id.* at 943.

193. TEX. R. EVID. 512.

194. 674 S.W.2d 400 (Tex. App.—Corpus Christi 1984, no writ).

195. *Id.* at 404.

196. TEX. R. EVID. 403. This list omits an important ground for exclusion of relevant evidence previously recognized in Texas: unfair surprise to an opponent. See 2 R. RAY, *supra* note 34, § 1481, at 168. Presumably, a court will have to rectify unfair surprise by either recess or continuance.

197. 660 S.W.2d 879 (Tex. App.—Fort Worth 1983, no writ).

198. *Id.* at 882.

199. TEX. R. EVID. 408.

200. 663 S.W.2d 627 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

201. *Id.* at 634.

guage, the offering party bears the burden of having the document translated into English.²⁰² In an interesting application of this old and rarely used rule of admissibility, the Houston court of appeals in *Gendebien v. Gendebien*²⁰³ held that the trial court did not commit error by refusing to admit into evidence a prenuptial agreement written in French and offered without an accompanying English translation.²⁰⁴ Appellant's counsel argued that she herself would have translated the document at the hearing on the motion for new trial, but because appellant failed to develop any bill of exception demonstrating what the translation would have been, the court held that appellant waived any right to claim error because of the exclusion.²⁰⁵

In a suit brought by a lessor to recover damages for a leased gas compressor destroyed by fire, the Austin court of appeals affirmed the admissibility of testimony and evidence concerning a prior lease agreement for another gas compressor in *PGP Gas Products, Inc. v. Reserve Equipment, Inc.*²⁰⁶ The court wrote that the prior lease agreement was admissible to show that the lessee agreed to procure insurance for the compressor in question.²⁰⁷ The court further explained that the existence of an oral contract that is the subject of a suit may be proved by circumstantial as well as direct evidence.²⁰⁸

VIII. PRESUMPTIONS AND INFERENCES

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

Presumptions and inferences, though frequently confused, are sometimes merely assumptions of facts that have not been rebutted.²⁰⁹ In *Tanner v. BDK Production Co.*²¹⁰ the Corpus Christi court of appeals reaffirmed the black letter rule that prohibits the stacking of one presumption upon another. After reviewing all testimony favorable to plaintiff, the court concluded that no evidence existed tending to show that loss of circulation in the circulating mud on an oil drilling rig posed a dangerous condition that necessitated a duty to warn the deceased.²¹¹ Assuming *arguendo* that one of the defendants was negligent in his failure to warn the deceased, the court explained that appellants failed to prove that this failure to warn of the presence of substances in the mud was the proximate cause of the fatal accident.²¹² The court explained that the evidence showed at most only a possibility that the system may have been blocked and the possibility that

202. *Sartor v. Bolinger*, 59 Tex. 411, 413 (1883); *Lacoma v. Canto*, 236 S.W. 1013, 1014 (Tex. Civ. App.—El Paso 1922, no writ).

203. 668 S.W.2d 905 (Tex. App.—Houston [14th Dist.] 1984, no writ).

204. *Id.* at 908.

205. *Id.*

206. 667 S.W.2d 604 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

207. *Id.* at 607.

208. *Id.*

209. See generally 1 R. RAY, *supra* note 34, §§ 51-56 (classification of presumptions).

210. 671 S.W.2d 941, 947 (Tex. App.—Corpus Christi 1984, no writ).

211. *Id.*

212. *Id.*

the cause of the blockage was the presence of materials in the mud.²¹³ From these two possibilities, the jury would have had to draw the further inference that there was a blockage caused by the loss of circulation caused by materials in the system, which caused the end of the hose to fly up and hit the deceased in the head. To reach this point, the court wrote that the jury would have had to stack one inference upon another, which is not allowed by law.²¹⁴

A general presumption exists that in the absence of evidence to the contrary, a public official has properly performed his duty.²¹⁵ Texas courts, however, have held that the recording statutes governing judgment liens²¹⁶ require that the proponent of the abstract of judgment produce evidence that it was properly indexed.²¹⁷ In *Alkas v. United Savings Association of Texas, Inc.*²¹⁸ the Corpus Christi court of appeals held that the common law presumption that a public official has properly performed his duty is not applied to the indexing of judgment liens because of the statutory requirement of proof of indexing.²¹⁹

IX. THE DEAD MAN'S STATUTE

Texas Rule of Evidence 601(b) abrogates the dead man's statute,²²⁰ by permitting testimony regarding transactions with the deceased, except for prohibiting uncorroborated oral statements by the testator in actions by or against executors, administrators, or guardians.²²¹ In the only dead man's statute case decided during the survey period, the court in *Jordan v. Shields*²²² noted that the Texas Rules of Evidence were not in effect at the time of trial. The court held that in a wrongful death action arising out of a multiple vehicular collision, the causes of action of the deceased driver's daughter and husband were in the survivors' own right.²²³ Evidence concerning their relationship with the deceased, therefore, did not violate the now-repealed dead man's statute.²²⁴

X. LACK OF PROBATIVE EVIDENCE AND INSUFFICIENT EVIDENCE

Numerous appellate cases each year address the issue of whether any evidence or sufficient evidence in the record supports the determinations of the

213. *Id.*

214. *Id.*

215. *See* *Cooper v. Hall*, 489 S.W.2d 409, 416 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.) (clerk presumed to have mailed notice properly).

216. TEX. PROP. CODE ANN. §§ 52.003, .004, .006 (Vernon 1984).

217. *See* *Houston Inv. Bankers Corp. v. First City Bank*, 640 S.W.2d 660, 662 (Tex. App.—Houston [14th Dist.] 1982, no writ).

218. 672 S.W.2d 852 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

219. *Id.* at 859.

220. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon Supp. 1982-1983) (repealed 1983).

221. TEX. R. EVID. 601(b).

222. 674 S.W.2d 464 (Tex. App.—Beaumont 1984, no writ).

223. *Id.* at 468.

224. *Id.*

trier of fact.²²⁵ In deciding a no evidence point, an appellate court must consider only the evidence and inferences tending to support the trial court's findings and disregard all contrary evidence and inferences.²²⁶ During the survey period, the Texas Supreme Court rendered two examples of the operation of this standard of review. In *Tomlison v. Jones*²²⁷ the Texas Supreme Court applied the no evidence standard of review and held that there was evidence to support a finding that the deceased lacked mental capacity to change the beneficiary of his two insurance policies shortly before his death.²²⁸ The supreme court found some evidence to support the jury's finding of no capacity,²²⁹ and wrote that the deceased's medical records, which were properly admitted into evidence at trial, "paint[ed] a grim picture of a man critically injured and in great pain, at times heavily drugged, at times hallucinating, with little possibility of survival."²³⁰ The court wrote that these entries in the medical records, coupled with the deceased's physician's notation that the patient "continued his downhill course," constituted some evidence of physical problems consistent with mental incapacity.²³¹

In *Lucas v. Texas Industries*²³² the Texas Supreme Court, again employing the no evidence standard of review, reversed and remanded for determination of factual sufficiency a portion of the judgment against plaintiff.²³³ The court addressed the testimony of the president of one of the defendant corporations. The president's testimony indicated that the defendant had knowledge of plans and specifications, and that despite this knowledge, the defendant's representative improperly advised that certain equipment would be needed. The court wrote that the jury was entitled to conclude that the incorrect advice concerning the equipment needed was a breach of the duty owed to inform the plaintiff's employer correctly what equipment would be needed to perform the lifting tasks in question.²³⁴

In *Mitsubishi Aircraft International, Inc. v. Maurer*,²³⁵ in finding no evidence to support a judgment for Maurer, the Dallas court of appeals not only reversed, but rendered judgment for Mitsubishi. The court explained that if a no evidence point is sustained and the proper procedural steps have been taken, the finding under attack may be disregarded entirely and judgment rendered for the appellant, unless the interests of justice require another trial.²³⁶ In *Porras v. Craig*²³⁷ the Texas Supreme Court further

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

226. *Glover v. Texas Gen. Indem. Co.*, 619 S.W.2d 400, 401 (Tex. 1981); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

227. 677 S.W.2d 490 (Tex. 1984).

228. *Id.* at 492.

229. *Id.*

230. *Id.*

231. *Id.* (citing *Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983)).

232. 27 Tex. Sup. Ct. J. 491 (July 11, 1984).

233. *Id.* at 494.

234. *Id.*

235. 675 S.W.2d 286 (Tex. App.—Dallas 1984, no writ).

236. *Id.* at 288 (citing *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965)).

237. 675 S.W.2d 503 (Tex. 1984).

explained when, given a no evidence finding, the interests of justice require another trial. The court held that although there was no evidence of a reduction in market value resulting from defendant's cutting down shade or ornamental trees on plaintiff's property, courts are authorized to award damages for the intrinsic value of the trees.²³⁸ Explaining that the Texas Supreme Court had never addressed the intrinsic value rule, but noting that a number of courts of appeals have adopted it, the supreme court stated that in its opinion the rule is sound.²³⁹ Accordingly, the court remanded the case for retrial so that plaintiff Craig could either show that the market value of his land was reduced or prove damages by the intrinsic value measure.²⁴⁰

When an appellate court confronts a challenge that the evidence is merely insufficient, it must consider and weigh all the evidence in a case, including that which is contrary to the judgment.²⁴¹ The court must decide if the evidence that supports the judgment is so weak, or the evidence to the contrary is so overwhelming, as to warrant setting aside the judgment and remanding for a new trial.²⁴² One court, applying this standard of review, found evidence to be legally sufficient to support a jury finding that an entire sixty-four-acre tract owned by a church and used as a church camp site was an actual place of worship, thereby qualifying for ad valorem tax exemption.²⁴³ The Fort Worth court of appeals also applied this standard of review and found that in a breach of contract suit against a roofer who had agreed to cover a swimming pool during roofing repairs, but failed to do so, evidence was sufficient to support the conclusion that the black substance later found on the swimming pool was tar, and that the roofer was responsible for its being in the pool.²⁴⁴

238. *Id.* at 506.

239. *Id.*

240. *Id.*

241. *Burnett v. Motyka*, 610 S.W.2d 735, 736 (Tex. 1980) (citing *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1952)).

242. *See Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965); *Calvert*, *supra* note 225.

243. *Kerrville Indep. School Dist. v. Southwest Texas Encampment Ass'n*, 673 S.W.2d 256, 260 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

244. *Hollingsworth Roofing Co. v. Morrison*, 668 S.W.2d 872, 874-75 (Tex. App.—Fort Worth 1984, no writ).