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THE major developments in the field of civil procedure during the Survey period occurred through judicial decisions and promulgation of the Texas Rules of Appellate Procedure.1

I. JURISDICTION OF THE SUBJECT MATTER

During the Survey period many appellate decisions scrutinized the power of a trial court to enjoin the prosecution of a competing action filed in another jurisdiction. In Gannon v. Payne2 the Texas Supreme Court faced an international tug-of-war in which the plaintiff, a Texas resident, had filed suit seeking damages for alleged fraud from a Canadian resident. After entering a general appearance, the defendant initiated a competing action in Canada against the plaintiff. The plaintiff countered with a request in the Texas court to temporarily enjoin the defendant from prosecution of the Canadian action. After a hearing on the matter, the trial court granted the request. On appeal the defendant challenged the power of the trial court to halt the Canadian action. Noting that the question was one of first impression in Texas, the court dissolved the injunction, emphasizing that “[r]espect for the principle of comity compels led [the conclusion] . . . that the trial court abused its discretion in granting the temporary injunction.”3 Although the trial court had the power to restrain the prosecution of the competing action, the supreme court reasoned that, “[o]nly in exceptional situations should a trial court issue an injunction prohibiting a foreign citi-

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3. 706 S.W.2d at 308.
zen from prosecuting an action in his home country."4

The Texas Supreme Court confronted an analogous question in Christensen v. Integrity Insurance Co.5 In Christensen the trial court temporarily enjoined the prosecution of a competing action filed in a sister state. The court acknowledged that the trial court had the power to issue the injunction, but cautioned that "[t]he principle of comity . . . requires that courts exercise this equitable power sparingly, and only in very special circumstances."6 After holding that "[a] party seeking to enjoin an out-of-state lawsuit must show that a clear equity demands the Texas court's intervention,"7 the court dissolved the injunction because the required showing had not been made.8

II. JURISDICTION OVER THE PERSON

The propriety of out-of-state service under now recodified article 2031b,9 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 the nonresident is doing business in Texas.10 Doing business includes "entering into contract by mail or otherwise" with a Texas resident when either party is to perform the contract in whole or part in Texas.11 Micromedia v. Automated Broadcast Controls,12 a recent decision of the Fifth Circuit sustaining nonresident service under article 2031b, reiterates that "[e]ven a single purposeful contact may be sufficient to meet the requirements of minimum contacts when the cause of action arises from the contact."13

The plaintiff, a partnership of Texas citizens formed for the purpose of establishing and operating a radio station in Texas, sued a Maryland corporation headquartered in that state, to recover damages for breach of contract. The plaintiff dealt through a third party representative and purchased from the defendant radio broadcast equipment that was in the design stage. After several telephone conversations between the buyer and seller the plaintiff agreed to use certain interim equipment to be supplied by the defendant until the final equipment could be completed and shipped. The interim equipment was subsequently shipped to the plaintiff in Texas. Problems arose with the operation of the equipment, and the plaintiff refused to pay for it. In response the defendant refused to ship the final equipment when it became ready. The plaintiff then filed suit in Texas. Service was effected

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4. Id.
5. 719 S.W.2d 161 (Tex. 1986).
6. Id. at 163.
7. Id.
8. Id. at 164.
10. Id. § 3, recodified as TEX. CIV. PRAC. & REM. CODE ANN. § 17.044 (Vernon 1986).
11. Id. § 4, recodified as TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1986).
12. 799 F.2d 230 (5th Cir. 1986).
13. Id. at 234.
under article 2031b, and the defendant responded with a motion to dismiss for lack of personal jurisdiction. The trial court sustained service and, following a trial, entered judgment against the defendant. On appeal the Fifth Circuit affirmed, holding that the defendant’s contacts were sufficient for the assertion of personal jurisdiction with respect to the contract claim.\(^\text{14}\)

A recent decision of the Texas Supreme Court, *Capitol Brick, Inc. v. Fleming Manufacturing Co.*,\(^\text{15}\) considered whether article 2031b requires that process be personally served on the secretary of state himself, rather than on a subordinate. The plaintiff sued a nonresident corporation for breach of warranty and sought to effect service under article 2031b by having a constable deliver process to an employee in the office of the secretary of state. Thereafter, the plaintiff filed a certificate prepared by the secretary of state showing that the secretary had received process and had forwarded it to the defendant. The trial court granted a default judgment on the basis of the service after the defendant failed to appear. The defendant challenged the service by writ of error, and the court of appeals held that article 2031b requires personal service on the secretary of state.\(^\text{16}\) The Texas Supreme Court reversed.\(^\text{17}\) The court concluded that, in the absence of fraud or mistake, the certificate was “conclusive evidence” that service of process was received by the secretary of state for the defendant.\(^\text{18}\) Thus, the court reinstated the default judgment, holding that the trial court properly asserted personal jurisdiction.\(^\text{19}\) Although *Capitol Brick* does not state that article 2031b permits service to be made on a subordinate of the secretary of state, the case suggests that filing the appropriate certificate will in most circumstances render such service effective.

The opinion in *Colwell Realty Investments, Inc. v. Triple T Inns of Arizona, Inc.*\(^\text{20}\) is a virtual procedural guidebook to the problems facing a plaintiff seeking to invoke article 2031b in federal court. The court concluded that, contrary to the rule under state law,\(^\text{21}\) the plaintiff in a federal court bears the burden of proving that the nonresident defendant is amenable to process under the long-arm statute.\(^\text{22}\) A plaintiff is not required, however, to prove a defendant’s amenability to process under the forum’s jurisdictional statute by a preponderance of the evidence. Rather, a plaintiff meets the burden in federal court by merely making a prima facie showing of the mini-

\(^\text{14}\) Id.
\(^\text{15}\) 722 S.W.2d 399 (Tex. 1986).
\(^\text{16}\) 703 S.W.2d 365, 366-67 (Tex. App.—Austin), rev’d, 722 S.W.2d 399 (Tex. 1986).
\(^\text{17}\) 722 S.W.2d at 402.
\(^\text{18}\) Id. at 401.
\(^\text{19}\) Id. at 401-02.
\(^\text{20}\) 785 F.2d 1330 (5th Cir. 1986).
\(^\text{22}\) 785 F.2d at 1332; accord Jetco Elec. Indus. v. Gardiner, 473 F.2d 1228, 1232 (5th Cir. 1973); Tetco Metal Prods., Inc. v. Langham, 387 F.2d 721, 723 (5th Cir. 1968).
mum contacts necessary to support jurisdiction. 23

Colwell is also informative as to the circumstances under which a plaintiff may rely solely on pleadings, rather than supporting affidavits, depositions, or other recognized methods of discovery, to satisfy the jurisdictional burden. According to the court, allegations in the complaint will be taken as true, except to the extent they are controverted by opposing affidavits. 24 Thus, unless the nonresident defendant concludes that the plaintiff’s pleadings are lacking in necessary respects, the defendant is well advised to submit proof supportive of his jurisdictional position.

III. SPECIAL APPEARANCE

Texas Rule of Civil Procedure 120a governs special appearances to challenge personal jurisdiction in state court. Rule 120a requires a party making a special appearance to have the appearance heard prior to any other plea or motion. 25 A dilemma arises when counsel is asked to represent a nonresident defendant against whom a default judgment has been taken and the defendant does not appear to be subject to the personal jurisdiction of the forum. The court may rule that counsel’s action amounts to a general appearance if counsel files a special appearance followed by a motion for new trial. 26 The defendant is then obliged to defend the suit in Texas if the motion for new trial is acted upon and the default judgment set aside. 27 During the Survey period one resourceful counsel appears to have found a way to avoid this problem.

In Myers v. Emery 28 the trial court entered a default judgment because the time within which the defendants had to file an answer expired after nonresident service was effected. Two weeks later the defendants filed a special appearance challenging jurisdiction over their persons. Instead of filing a motion for new trial, however, counsel for the defendants orally requested a conference concerning the default judgment with opposing counsel and the trial judge. At the conference defendants’ counsel made an oral request that the default judgment be set aside, and the trial judge granted the request. Later, a hearing was held with respect to the special appearance and, after hearing evidence on the matter, the trial court dismissed the suit for lack of personal jurisdiction. In a divided decision the court of appeals sustained the dismissal. 29 Attributing the setting aside of the default judgment to the trial judge, rather than defendants’ counsel, the court concluded that rule 120a “does not preclude a special appearance being made after judgment nor

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23. 785 F.2d at 1333; accord Jetco Elec. Indus. v. Gardiner, 473 F.2d 1228, 1232 (5th Cir. 1973); O’Hare Int’l Bank v. Hampton, 437 F.2d 1173, 1176 (7th Cir. 1971).
24. 785 F.2d at 1333; accord Black v. Acme Markets, Inc., 564 F.2d 681, 683 n.3 (5th Cir. 1977).
25. Tex. R. Civ. P. 120a(1).
27. Id.
28. 697 S.W.2d 26 (Tex. App.—Dallas 1985, no writ) (2-1 decision).
29. Id. at 32.
30. Id. at 29.
does the rule preclude the trial judge from setting aside the default judgment on his own motion." 31

Barrett v. Barrett 32 follows the lead of earlier decisions 33 and serves as a warning that the due order of hearing under rule 120a must be strictly observed in order to avoid a waiver of a defendant's jurisdictional challenge. According to the court in Barrett, rule 120a must be strictly followed. 34

"[I]f a defendant raises any other issue at the [special appearance] hearing, such as defective service, venue, defects in plaintiff's petition, or other such matters, before the court has ruled on the Rule 120a motion, the appearance will be rendered general and will constitute consent to jurisdiction." 35

Wilson v. Chemco Chemical Co. 36 indicates that a ruling must be obtained on a special appearance in order for the point to be preserved for appeal. Although the defendant in Wilson had filed a special appearance, he neither set the special appearance for hearing nor obtained a ruling on the special appearance from the trial court. The defendant later attempted to raise lack of personal jurisdiction as a ground for reversal on appeal. Pointing to the inaction of the defendant, the appellate court held that "[a] special appearance not ruled upon by the trial court presents nothing for review." 37

IV. SERVICE OF PROCESS

A number of decisions during the Survey period invalidated service of process on the basis of inadvertent errors occurring in the course of service. In City of Mesquite v. Bellingar 38 the defendant was a municipality, and the plaintiff attempted to effect service by delivering process to the city attorney. When the defendant city failed to appear, the plaintiff obtained a default judgment; the city subsequently sought to challenge the service by writ of error. Relying on article 2028, 39 which states that service may be made on a municipality by delivering process to the "mayor, clerk, secretary or treasurer," the city contended that there was clear noncompliance with the statute. Acknowledging the obvious deficiency in their service, the plaintiffs countered that article 2028 did not foreclose service on a municipality by delivering process to one of the unnamed city officials. The court, rejecting this argument and concluding that the list of persons in the statute was exclusive, set aside the default judgment. 40

31. Id.
32. 715 S.W.2d 110 (Tex. App.—Texarkana 1986, no writ).
33. See, e.g., Liberty Enters. v. Moore Transp. Co., 690 S.W.2d 570, 571-72 (Tex. 1985);
34. 715 S.W.2d 113.
35. Id.
36. 711 S.W.2d 265 (Tex. App.—Dallas 1986, no writ).
37. Id. at 266.
38. 701 S.W.2d 335 (Tex. App.—Dallas 1985, no writ).
39. TEX. REV. CIV. STAT. ANN. art. 2028 (Vernon 1964), recodified as TEX. CIV. PRAC.
& REM. CODE ANN. § 17.024 (Vernon 1986).
40. 701 S.W.2d at 336.
A combined oversight by the serving officer and the postal authorities apparently caused the service error at issue in *Metcalf v. Taylor*. The plaintiff sought to obtain service over one defendant by utilizing registered mail as authorized by Texas Rule of Civil Procedure 106; however, in such an instance, rule 107 requires that the officer's return bear the officer's signature, state the manner of service, and, when service is by mail, contain the return receipt with the addressee's signature. In *Metcalf* the officer had not filled out or signed his return, and moreover, the return receipt showed neither the date of signature nor the purpose for the signature. The court found this service to be incomplete and thus set aside the default judgment based on it.

Article 2029, authorizing a procedure for serving a corporation, provides that service may be made "by leaving a copy of the [citation] at the principal office of the company during office hours." In *Maritime Services, Inc. v. Moller Steamship Co.* two citations of service had been made on the sole defendant, a Texas corporation. A default judgment was entered on the basis of such service. The first return recited service on a named individual as defendant with no mention of the corporation or its offices. The second return recited that service had been made on the corporation by delivering citation to the same individual as registered agent of the corporation; however, a preprinted line under this recitation, which had not been struck out, indicated that service was effected on the corporation "by leaving [the citation] in the principal office during office hours." The court of appeals found a lack of compliance with article 2029, noting that the first return did not mention the corporation or specify its offices. With respect to the second return, the court held that the service officer's handwritten notation of service prevailed over the preprinted portion and that the return thus indicated personal service, rather than substituted service, that is, delivery of process to the corporation's principal office. The court therefore invalidated such service and set aside the default judgment.

Article 2.11 of the Texas Business Corporation Act sets forth the procedure for effecting service on a corporation. The statute allows for service of process on the secretary of state if a corporation's registered agent cannot be located. The secretary of state must then send a copy of the process by

\[\text{\textsuperscript{41}}\text{ 708 S.W.}2\text{d 57 (Tex. App.-Fort Worth 1986, no writ).}\]
\[\text{\textsuperscript{42}}\text{TEX. R. CIV. P. 106(a).}\]
\[\text{\textsuperscript{43}Id. 107.}\]
\[\text{\textsuperscript{44}Id. 108.}\]
\[\text{\textsuperscript{45}\text{TEX. REV. CIV. STAT. ANN. art. 2029 (Vernon 1964), recodified as TEX. CIV. PRAC. & REM. CODE ANN. §17.023 (Vernon 1986).}\]
\[\text{\textsuperscript{46}702 S.W.}2\text{d 277 (Tex. App.-Houston [1st Dist.] 1985, no writ).}\]
\[\text{\textsuperscript{47}Id. at 279.}\]
\[\text{\textsuperscript{48}Id. at 278.}\]
\[\text{\textsuperscript{49}Id. at 278-79; accord Houston Pipe Coating Co. v. Houston Freightways, Inc., 679 S.W.}2\text{d 42, 44-45 (Tex. App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.).}\]
\[\text{\textsuperscript{50}702 S.W.}2\text{d at 279.}\]
\[\text{\textsuperscript{51}\text{TEX. BUS. CORP. ACT ANN. art. 2.11 (Vernon 1980).}\}
\[\text{\textsuperscript{52}Id.}\]
registered mail to the corporation’s registered office.\textsuperscript{53} The decision in \textit{Humphrey Co. v. Lowry Water Wells} \textsuperscript{54} stands as a warning to plaintiffs’ attorneys that in order to support a default judgment under article 2.11, the pleadings must adequately allege the registered office. In \textit{Humphrey Co.} the petition merely alleged that service could be made on an individual identified as the corporation’s registered agent and specified an address where the agent could be found; however, the pleadings made no allegation with respect to the address being the registered office. When service could not be made on the registered agent the plaintiff served the secretary of state. The plaintiff then filed with the court a certificate from the secretary of state acknowledging that process was forwarded by the secretary’s office to a specified address. The trial court entered a default judgment that the defendant later challenged by writ of error. The court of appeals found that the record was devoid of any allegation that the location to which process was forwarded was the registered office of the defendant.\textsuperscript{55} The court, therefore, set aside the default judgment, concluding that strict compliance with article 2.11 was lacking.\textsuperscript{56}

V. Pleadings

Texas Rule of Civil Procedure 63 authorizes amendments to pleadings and provides that “any amendment offered for filing within seven days of the date of trial . . . shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such amendment will operate as a surprise to the opposite party.”\textsuperscript{57} \textit{Merit Drilling Co. v. Honish},\textsuperscript{58} a case in which a sizeable judgment for the plaintiffs was reversed on the basis of a late pleading amendment, indicates that the limits of rule 63 cannot be ignored. Over the objection of the defendant the trial court, two working days before trial, permitted the plaintiffs to file an amended pleading that alleged a new cause of action. Observing that the new matter had been known to the plaintiffs for some time and that the defendant was apparently surprised by the new theory, the court of appeals found that the trial court had abused its discretion.\textsuperscript{59}

\textit{Dodson v. Citizens State Bank},\textsuperscript{60} which dealt with the failure to file an answer, should be of comfort to the harried trial practitioner. Rule 92 states that “[w]hen a counterclaim . . . is served upon a party who has made an appearance in the action, the party so served, in the absence of a responsive pleading, shall be deemed to have pleaded a general denial of the counter-

\textsuperscript{53} \textit{Id.}
\textsuperscript{54} 709 S.W.2d 310 (Tex. App.—Houston [14th Dist.] 1986, no writ).
\textsuperscript{55} \textit{Id.} at 311.
\textsuperscript{56} \textit{Id.; accord Global Truck & Equip., Inc. v. Plaschinski}, 683 S.W.2d 766, 769 (Tex. App.—Houston [14th Dist.] 1984, no writ); \textit{Travis Builders, Inc. v. Graves}, 583 S.W.2d 865, 867 (Tex. Civ. App.—Tyler 1979, no writ).
\textsuperscript{57} \textit{Tex. R. Civ. P.} 63.
\textsuperscript{58} 715 S.W.2d 87 (Tex. App.—Corpus Christi 1986, no writ).
\textsuperscript{59} \textit{Id.} at 91.
\textsuperscript{60} 701 S.W.2d 89 (Tex. App.—Amarillo 1986, writ ref’d n.r.e.).
In Dodson the defendant counterclaimed against the plaintiff, but counsel for the plaintiff failed to file an answer in response. Addressing the defendant’s contention that a default judgment should have been entered on the counterclaim, the court of appeals emphasized that rule 92 deemed that the plaintiff had made a general denial under such circumstances and thus the entry of a default judgment was inappropriate.

Finally, Villa Nova Resort, Inc. v. State is a warning that a plaintiff’s anticipatory pleadings may ultimately redound to the defendant’s benefit. The rule is well established that the party relying on an affirmative defense must plead the defense. Finding an exception to this settled rule, however, the court in Villa Nova Resort concluded that “[w]hen a plaintiff anticipates defensive matters in his pleadings, and pleads them, a defendant may rely upon the defenses even though his only pleading is a general denial.”

VI. Venue

A. Railroad Personal Injury Actions

In an interesting case of first impression, Burlington Northern Railroad Co. v. Harvey, the court held that the 1983 amendments to article 1995, the Texas venue statute, changed the venue rule for personal injury suits against railroads from a mandatory provision to a permissive one. Prior to 1983 all actions for personal injury brought against railroads had to be filed either in the county in which the plaintiff resided or in the county where the accident occurred. Arguing that the 1983 amendments to article 1995 did not change the mandatory nature of this rule, Burlington Northern contended that the case should have been transferred to the county where the accident occurred.

Burlington Northern noted that the 1983 amendments to the venue statute re-enacted verbatim the pre-1983 mandatory provision governing suits against railroads for personal injury. According to the railroad, the Texas

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61. TEX. R. CIV. P. 92.
62. 701 S.W.2d at 94.
63. 711 S.W.2d 120 (Tex. App.—Corpus Christi 1986, no writ).
64. See TEX. R. CIV. P. 94.
65. 711 S.W.2d at 125 (citing American Communications Telecommunications, Inc. v. Commerce N. Bank, 691 S.W.2d 44 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.), and Browning v. Holloway, 620 S.W.2d 611, 615 (Tex. Civ. App.—Dallas), writ ref’d n.r.e. per curiam, 626 S.W.2d 485 (Tex. 1981)).
66. 717 S.W.2d 371 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.).
68. TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964), recodified as TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.001-.064 (Vernon 1986).
69. 717 S.W.2d at 372.
71. Compare TEX. CIV. PRAC. & REM. CODE ANN. § 15.034 (Vernon 1986) with TEX.
legislature thus intended the venue rule to remain mandatory, although it
inadvertently placed the rule in the permissive section of the new statute.72
Burlington Northern also argued that the mandatory language of the provi-
sion itself should prevail over the permissive characterization that appeared
only in the nonsubstantive chapter heading.73

Acknowledging that the seemingly mandatory language in the text of the
recodified venue provision, section 15.034 of the Texas Civil Practice and
Remedies Code,74 was inconsistent with the pertinent subchapter heading,
the court nevertheless concluded that the new venue provision was merely
permissive.75 According to the court, the subchapter headings are signifi-
cant in the legislature's statutory design.76 Thus, construing the statute as a
whole, the court held that the location of section 15.034 with other permis-
sive venue exceptions reflected the legislature's intent to alter the previously
existing venue scheme.77 The court also disputed Burlington Northern's as-
sertion that recent commentary interpreted section 15.034 as mandatory.78

B. Actions Concerning Land

The court in Scarth v. First Bank & Trust Co.79 held that an action seeking
to establish a deed of trust lien's priority over alleged homestead rights was
not governed by the mandatory provisions of the new Texas venue statute.
In reaching this finding the court analogized to similar cases decided under
former article 1995(14).80 According to the court, section 2(a) of the new
statute,81 like its predecessor, is inapplicable when issues involving title to
property are merely incidental or secondary to the main purpose of the
suit.82 Since the dominant purpose of the suit in Scarth was to obtain only a

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72. Section 15.034 of the statute appears in subch. C, which is entitled "Permissive
Venue." TEX. CIV. PRAC. & REM. CODE §§ 15.03-.036 (Vernon 1986).
73. Burlington Northern made several additional arguments based on the Code Construc-
tion Act, TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 3.06 (Vernon Supp. 1983), and other
rules of statutory construction, all of which were rejected by the court. 717 S.W.2d at 375-77.
74. TEX. CIV. PRAC. & REM. CODE ANN. § 15.034 (Vernon 1986).
75. 717 S.W.2d at 375.
76. Ibid. at 377.
77. Ibid. at 375. In passing, the court noted that the traditional legislative history accompa-
nying legislation was absent since there were no floor debates on or amendments to Senate Bill
898 before passage. Ibid. at 376 (for background information on legislative history the court
(1984)).
78. 717 S.W.2d at 375 (citing 1 R. MCDONALD, TEXAS CIVIL PRACTICE § 4.31 (Cum.
Supp. 1985), and 3 W. DORSEANO, TEXAS LITIGATION GUIDE §§ 61.01, 61.02 (1985)).
79. 711 S.W.2d 140, 143-44 (Tex. App.—Amarillo 1986, no writ).
80. Ibid. at 143 (citing Republic Nat'l Bank v. Estes, 422 S.W.2d 834, 836 (Tex. Civ.
App.—Dallas 1967, no writ) and Holcomb v. Williams, 194 S.W. 631, 632 (Tex. Civ. App.—
Fort Worth 1917, no writ)).
(Vernon 1986). Section 15.011 is a mandatory venue provision for recovery or partition of real
property, removal of encumbrances on real property, or quieting title to real property. Ibid.
82. 711 S.W.2d at 143-44.
declaration regarding the validity of the plaintiff’s lien, the court followed the supreme court’s teaching in *Bennett v. Langdeau* and refused to apply the mandatory venue provision.

### C. Appeal of Probate Court Venue Rulings

Section 15.064 of the Texas Civil Practice and Remedies Code provides that no interlocutory appeal lies from a trial court’s venue determination. Certain orders of a probate court, however, are appealable without disposing of the entire probate proceeding. Finding no conflict between these rules, the court in *Grounds v. Lett* held that a probate court’s order overruling a motion to transfer venue was not a final appealable order. The distinguishing factor is whether an order adjudicates a substantial right. The court reasoned that a venue ruling did not affect the substantial rights of any party and stressed that further hearings would be necessary before the subject of dispute in the case was actually adjudicated.

### D. Change of Venue

A change of venue application, if duly made, will be granted unless attacked by affidavit of a credible person disputing either the credibility of the party making the application or the facts set out in the application. Under Texas Rule of Civil Procedure 258 such an attack will constitute an issue to be tried by the judge. According to *Thompson v. Mayes*, an affidavit stating simply that the party applying for a change in venue can obtain a fair and impartial trial in the county of suit and that the applicant’s affidavits are inaccurate is sufficient to raise and frame a triable issue under rule 258.

### VII. Parties

Texas Rule of Civil Procedure 42(a) provides that one or more members of a class may sue on behalf of the entire class if, among other things, questions of law or fact are common to the class. According to the court in

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83. 362 S.W.2d 952 (Tex. 1962).
84. 711 S.W.2d at 142.
85. TEX. CIV. PRAC. & REM. CODE § 15.064 (Vernon 1986); see also TEX. R. CIV. P. 87(b).
86. See Estate of Wright, 676 S.W.2d 161, 164 (Tex. App.—Corpus Christi 1984, writ ref’d n.r.e.) (citing TEX. PROB. CODE ANN. § 55(a) (Vernon 1980) (declaration of heirship is a final judgment)); Mossler v. Johnson, 565 S.W.2d 952, 954 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref’d n.r.e.) (denial of application to probate a will is final and appealable without disposing of entire probate proceeding).
87. 718 S.W.2d 38 (Tex. App.—Dallas 1986, no writ).
88. Id. at 39.
89. Id.
90. Id.
91. TEX. R. CIV. P. 258.
92. Id.
93. 707 S.W.2d 951 (Tex. App.—Eastland 1986, no writ).
94. Id. at 958.
95. TEX. R. CIV. P. 42(a).
Wente v. Georgia-Pacific Corp., 96 an action for usury, rule 42(a) is satisfied if at least some common questions of law or fact exist.97 The court did not require that all or even a substantial portion of the questions of law or fact be common to the class.98 Disputing a Louisiana court that held that common questions of both law and fact must exist,99 the Wente court remarked that the common issue may be one either of law or fact.100 Nevertheless, the Wente appellate court affirmed the trial court's refusal to certify the class. Observing that the Texas usury statute101 is structured in a way that emphasizes the category into which a debtor's account falls, the court concluded that the initial questions in the suit would be individual rather than common.102 The court also found that the trial court did not abuse its discretion in deciding the class certification question while discovery remained uncompleted, because the discovery remaining to be conducted could not have assisted the court's determination of whether common questions of fact or law existed.103

Shebay v. Davis104 focused on another facet of the class action rule. Under subsection (c)(2) of rule 42 a class action notice must advise class members that they have the right to be excluded from the class if they so request by a specified date.105 After appellant Shebay received notice pursuant to this rule, he filed a petition in intervention for himself and on behalf of a subclass. The trial court refused to certify the subclass and, over Shebay's objection, approved a settlement agreement struck between the plaintiff-representative and the defendant. On appeal, Shebay attacked the validity of the settlement and also claimed that, if the settlement was valid, he was not bound by the settlement terms since he had elected to exclude himself from the class. The court rejected this latter argument after finding no evidence in the record that Shebay had excluded himself from the class in accordance with the rule's requirements.106 Since the notice rule expressly permitted a member of the class to enter an appearance in the case, Shebay's mere filing of a petition in intervention did not fulfill the formal requirements for exclusion.107

Two cases decided by the Texas Supreme Court during the Survey period

96. 712 S.W.2d 253 ( Tex. App.—Austin 1986, no writ).
97. Id. at 255.
98. Id. Indeed, the court noted that it is conceivable that a single common question would satisfy rule 42(a) and provide adequate grounds for a class action. Id.
100. 712 S.W.2d at 255.
102. 712 S.W.2d at 256-57. Although the court rested its holding on the single ground that no questions of law or fact common to the class existed, the court also noted that under rule 42(b) the plaintiff would not have been able to establish the typicality of his claims or that the common questions predominated over individual questions. Id. at 257-58 n.6; see TEX. R. CIV. P. 42(b) (Vernon Supp. 1987).
103. 712 S.W.2d at 258-59.
105. TEX. R. CIV. P. 42(c)(2)(B).
106. 717 S.W.2d at 681.
107. Id.; see TEX. R. CIV. P. 42(c)(2)(D) (any member of class who does not request exclusion may enter an appearance through counsel).
concerned the standard of review when an alleged indispensable party has not been joined in the action. *Browning v. Placke*\(^\text{108}\) presented the question of whether one district court could declare the judgment of another district court void due to the nonjoinder of an alleged indispensable party. The supreme court conditionally granted a writ of mandamus in *Browning* directing the respondent trial court judge to vacate his order that declared a Dallas district court judgment void.\(^\text{109}\) In doing so, the supreme court observed that a judgment of a court of general jurisdiction is not subject to collateral attack by another court of equal jurisdiction unless the judgment is void.\(^\text{110}\) Since a judgment is void only when it is shown that the court lacked jurisdiction,\(^\text{111}\) the supreme court held that the alleged failure to join an indispensable party did not render the judgment void.\(^\text{112}\) In so ruling, the court reconfirmed its long-standing view that rarely could a party exist who is so indispensable that his absence would deprive the court of jurisdiction to adjudicate the controversy between the parties before the court.\(^\text{113}\)

In *Allison v. National Union Fire Insurance Co.*\(^\text{114}\) the respondent asserted, through an unverified special exception, the nonjoinder of an alleged necessary party. Under Texas Rule of Civil Procedure 39,\(^\text{115}\) however, a verified plea is required in order to challenge a defect of parties. Because of the respondent's failure to comply with this requirement the court limited its inquiry to whether the trial court's failure to join the allegedly necessary party constituted fundamental error.\(^\text{116}\) The nonjoinder was not fundamental error.\(^\text{117}\)

*Trails East v. Mustafa*\(^\text{118}\) discussed whether a plaintiff is required to replead upon discovering the true name of a defendant who has been using an assumed name. According to the court, a plaintiff is not required to replead once he discovers the true name of a partnership, unincorporated association, private corporation, or individual doing business under an assumed name.\(^\text{119}\) The court noted that Texas Rule of Civil Procedure 28,\(^\text{120}\) which permits the court to substitute a party's true name on motion of the court or any party, is permissive, not mandatory.\(^\text{121}\)

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108. 698 S.W.2d 362 (Tex. 1985).
109. Id. at 363.
110. Id. (citing Austin Independent School District v. Sierra Club, 495 S.W.2d 878, 881 (Tex. 1973)).
111. Id.
112. Id.
114. 703 S.W.2d 637 (Tex. 1986) (per curiam).
116. 703 S.W.2d at 638.
117. Id.; see also Clear Lake City Water Auth. v. Clear Lake Utils. Co., 549 S.W.2d 385, 390 (Tex. 1977) (trial court's decision to proceed in absence of a party is not fundamental error in all cases).
118. 713 S.W.2d 422 (Tex. App.—Fort Worth 1986, no writ).
119. Id. at 424.
121. 713 S.W.2d at 424.
VIII. Discovery

A. Duty to Supplement Discovery

A number of decisions during the survey period analyzed the duty imposed by Texas Rule of Civil Procedure 166b(5) to supplement discovery and the appropriate sanctions resulting from failure to comply with that duty. In Morrow v. H.E.B., Inc., a slip and fall case, the defendant H.E.B. had been asked for the names and addresses of employees who had first come to the plaintiff's aid after her fall. The defendant answered and gave the address of one of the employees as simply "Missouri." Approximately three weeks before trial the defendant discovered that the employee whose address was listed as Missouri was living in San Antonio, Texas. H.E.B., however, did not supplement its answers to interrogatories to include this information. As a result of H.E.B.'s failure to supplement the trial court excluded the employee's testimony at trial. The Texas Supreme Court determined that the trial court had not abused its discretion in excluding the testimony because rule 166b(5) placed a duty on the defendant to supplement its answer and, under rule 215(5), the failure to supplement results in the automatic sanction of exclusion, unless the defendant demonstrates good cause as to why the testimony should be allowed. The supreme court held that the defendant did not show good cause even though the defendant had offered to allow the plaintiff to take the employee's deposition prior to his testimony and even if there was no surprise to the plaintiff by the testimony.

In Gannett Outdoor Co. v. Kubeczka the court of appeals upheld a trial judge's decision to allow an unidentified rebuttal witness to testify despite the defendant's assertion that the witness was an expert witness. In this action brought against the owners of a billboard that had collapsed on the plaintiff's home, the defendant's employees denied the existence of any written report reflecting the dangerous condition of the billboard. The plaintiff, however, called to testify a design engineer who had been employed by the defendant to examine the billboard and to render a report reflecting problems with the billboard. The plaintiff had not identified the engineer prior to trial, as required by the discovery rules. The court of appeals held, however, that the witness was a rebuttal witness called to refute sur-

122. TEX. R. CIV. P. 166b(5).
123. 714 S.W.2d 297 (Tex. 1986).
125. 714 S.W.2d at 297.
126. Id. at 298; see also Yeldell v. Holiday Hills Retirement & Nursing Center, 701 S.W.2d 243, 247 (Tex. 1985) (not necessary to plead surprise when objecting to testimony because of other party's failure to supplement discovery).
127. 710 S.W.2d 79, 85 (Tex. App.—Houston [14th Dist.] 1986, no writ).
128. TEX. R. CIV. P. 166(b)(2)(c).
prise testimony, not an expert witness.\textsuperscript{129} Further, the court noted that the engineer was obviously known to the defendant, who had formerly employed him, and that, in absence of the untruthful testimony by the defendant's witnesses, the engineer's testimony would not have been necessary.\textsuperscript{130} The trial court did not abuse its discretion in allowing the testimony because, in light of the circumstances, the plaintiff had shown that good cause compelled the admission of the engineer's testimony.\textsuperscript{131}

\textit{First City Bank v. Global Auctioneers, Inc.}\textsuperscript{132} applied the duty to supplement discovery and the related sanction of exclusion to discovery of documents. \textit{Global} involved an action on a promissory note in which the defendant customer claimed that the plaintiff bank had improperly allowed unauthorized transfers from Global's accounts. During discovery the defendant specifically requested that the bank identify all written agreements by which funds could be transferred out of the accounts in question. In its answers the bank only mentioned signature cards and corporate resolutions. At trial the bank sought to offer into evidence a letter from a third-party defendant to the bank setting out the persons who were authorized to make transactions concerning the accounts in question. Although the bank apparently learned about the letter only after the trial had started, the court of appeals held that the bank had failed to reasonably supplement its response.\textsuperscript{133} Thus, the court found that the trial court had not abused its discretion in excluding the evidence.\textsuperscript{134}

\textbf{B. Privilege in the Discovery Context}

During the Survey period Texas courts addressed a number of issues related to assertions of privilege in the discovery context. In \textit{Jordan v. Court of Appeals}\textsuperscript{135} the supreme court construed article 4447d that provides for a privilege related to records and proceedings of hospital committees, medical organizations, and extended care facilities.\textsuperscript{136} In particular, the court was asked to determine what documents fall within the scope of the statutory term "records and proceedings" of such committees. The court decided that the privilege covers documents that have been prepared by or under the direction of the committee for the committee's own purposes.\textsuperscript{137} The court pointed to minutes of committee meetings, correspondence between committee members that is related to the deliberation process, and any final committee product, such as recommendations, as examples of documents covered by the privilege.\textsuperscript{138} The court held, however, that documents gratuitously submitted to the committee or created without committee imputus

\begin{itemize}
\item \textsuperscript{129} 710 S.W.2d at 84.
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.} at 85.
\item \textsuperscript{132} 708 S.W.2d 12 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.).
\item \textsuperscript{133} \textit{Id.} at 15.
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} 701 S.W.2d 644 (Tex. 1985).
\item \textsuperscript{137} 701 S.W.2d at 648.
\item \textsuperscript{138} \textit{Id.}
\end{itemize}
are not protected by the privilege.\textsuperscript{139} In this particular case, the court determined that several documents in question were privileged, but held that the trial court had not erred in ordering production of the documents because the privilege had been waived.\textsuperscript{140} The documents had been disclosed to a grand jury investigating the operations of a unit at the hospital, but the record was completely silent as to the circumstances surrounding the disclosure. Holding that the hospital and doctors had failed to carry their burden of proving that no waiver of the privilege had occurred as a result of the grand jury's possession of the materials, the court upheld the trial court's discovery order requiring production.\textsuperscript{141}

The court in \textit{Dewitt & Rearick, Inc. v. Ferguson}\textsuperscript{142} examined the ability of a plaintiff to assert a privilege with respect to information materially relevant to the action. In this case, the defendants had entered into contracts with two separate groups of purchasers for the sale of the same parcel of real estate. The plaintiffs in this action, representatives of one group of purchasers, sued for unpaid real estate commissions. The representative of the other group had previously sued for specific performance of their contract and settled with the defendants. The plaintiffs sought, by discovery, to determine the settlement basis of the suit between the defendants and the other group of purchasers. The defendant vendors counterclaimed apparently to recover the sums that had been paid in settlement of the first suit. In response to the plaintiff's discovery request the defendants asserted the attorney-client privilege, reasoning that the privilege applied because they had settled the first suit on advice of counsel. The court of appeals held that the vendors could not, on the one hand, continue the prosecution of the counterclaim against the second group of purchasers and, at the same time, assert offensively the attorney-client privilege so as to prevent discovery of information materially relevant to the suit.\textsuperscript{143}

Several cases during the Survey period considered issues related to the investigative privilege, specified in rule 166b(3)(d), that generally protects information prepared in connection with the prosecution or defense of a lawsuit. In one such case, \textit{Turbodyne Corp. v. Heard},\textsuperscript{145} after a fire explosion occurred at a refinery the plaintiff insurance company conducted an investigation into the causes of the accident. After the investigation and after a settlement had been reached concerning coverage of the policy between the insurance company and its insured, the insurance company commenced a subrogation action against the manufacturer of the catalytic cracking unit involved in the fire. The defendant manufacturer filed a motion to compel production of the documents prepared by the insurance company's employees or experts. The insurance company asserted in response that such docu-

\begin{itemize}
\item \textsuperscript{139} \textit{Id.}
\item \textsuperscript{140} \textit{Id.} at 649.
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} 699 S.W.2d 692 (Tex. App.—El Paso 1985, no writ).
\item \textsuperscript{143} \textit{Id.} at 694; \textit{accord} Ginsberg v. Fifth Ct. of Appeals, 686 S.W.2d 105, 107 (Tex. 1985).
\item \textsuperscript{144} \textbf{TEX. R. CIV. P.} 166b(3)(d).
\item \textsuperscript{145} 720 S.W.2d 802 (Tex. 1986) (per curiam).
\end{itemize}
ments were privileged. The supreme court noted that postaccident investigations are not automatically privileged merely because an accident occurred.\(^{146}\) The court held that documents prepared by an insurance company in connection with the settlement of a claim with its insured are not protected from discovery in a later subrogation suit.\(^{147}\) The affidavit submitted by the insurance company in the trial court did not affirmatively state that the documents were prepared in connection with or in anticipation of a subrogation suit;\(^{148}\) thus, the court left open the possibility of a different result in a future case if such affidavits are submitted.

In *Robinson v. Harkins & Co.*\(^{149}\) the supreme court held that an insurance company's investigation report made in connection with a potential workmen's compensation claim was discoverable in a personal injury action by the wife of the injured worker against the worker's employer when the action arose from the same incident as the workmen's compensation claim.\(^{150}\) The privilege against discovery of the report would have applied with respect to the worker's claim.\(^{151}\)

In *Tucker v. Gayle*\(^{152}\) an employee who was injured on the defendant's property sought all reports and evaluations made by the defendant after the accident but prior to the filing of the suit. The court recognized that in many industrial accidents the plaintiff does not have access to the site of the accident;\(^{153}\) thus, the court held that the reports were discoverable.\(^{154}\) As a primary basis for its ruling, the court noted that the reports were routinely prepared under the normal course and scope of the defendant's operations, and their purpose was to discover the cause of accidents in order to prevent future occurrences rather than prepare for a lawsuit.\(^{155}\)

During the Survey period several courts denied discovery on the basis of the investigative privilege. In an action arising out of a railroad collision, the defendant in *Atchison, Topeka & Santa Fe Railway v. Kirk*\(^{156}\) asserted that a notebook compiled by one of its employees during the investigation of the collision was privileged. Agreeing with this contention, the court of appeals held that the employee was involved in an investigation of the occurrence out of which the claim had arisen; that the employee may have also been investigating the occurrence for possible criminal activity was irrelevant.\(^{157}\) In *Monroe v. Fuller*\(^{158}\) the plaintiffs, who were lessors and royalty interest owners in certain oil and gas leases, sought to discover accounting studies

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\(^{146}\) Id. at 804.

\(^{147}\) Id.

\(^{148}\) Id.

\(^{149}\) 711 S.W.2d 619 (Tex. 1986) (per curiam).

\(^{150}\) Id. at 621; accord *Allen v. Humphreys*, 559 S.W.2d 798, 803 (Tex. 1977).

\(^{151}\) See 711 S.W.2d at 621.

\(^{152}\) 709 S.W.2d 247 (Tex. App.—Houston [14th Dist.] 1986, no writ).

\(^{153}\) Id. at 250.

\(^{154}\) Id.

\(^{155}\) Id.

\(^{156}\) 705 S.W.2d 829 (Tex. App.—Eastland 1986, no writ).

\(^{157}\) Id. at 832.

\(^{158}\) 701 S.W.2d 73 (Tex. App.—El Paso 1985, no writ).
prepared by the defendant lessee relating to the royalty payments. Noting that at the time the accounting documents were prepared the defendant believed that litigation with the plaintiffs was imminent, and that one royalty owner had already filed suit, the court of appeals held that the documents were privileged under rule 166b(3)(d).

As noted in the last Survey, the supreme court in *Peeples v. Honorable Fourth Supreme Judicial District* outlined the procedures for excluding documents from discovery on the grounds of privilege. In general, the party who asserts privilege must specifically plead the particular privilege and produce evidence supporting the claim. The recent decisions analyze the application of the procedures set forth in *Peeples*. In the first case, *Wei sel Enterprises v. Curry*, the defendant submitted to the trial court a summary of documents allegedly protected by the attorney-client and attorney work product privilege. The summary contained the heading "Attorney-Client/Attorney Work Product." The supreme court held that the summary was no evidence that any particular document was protected by a specific privilege. It was merely an unverified, global allegation that the list of documents was protected by one or both privileges. Accordingly, the court held that the trial court abused its discretion in denying discovery of the documents, especially without conducting an *in camera* review. The supreme court noted that when a party seeks to protect documents from discovery on the basis of relevancy or harassment, affidavits or live testimony may be sufficient proof, but when a party asserts a claim of privilege, the court may require that the party submit the documents themselves in order to substantiate the claim. Consistent with the foregoing decision, the court in *Group Hospital Service, Inc. v. Dellana* held that the party resisting discovery had complied with the procedures set forth in *Peeples* by claiming privilege and actually submitting the documents in question to the trial court for an *in camera* inspection.

*City of Denison v. Grisham* illustrates that a privilege regarding a document may be waived when the document is used to refresh the recollection of a witness. In *Denison* the plaintiff had refreshed his memory while testifying at his deposition by examining certain notes prepared by himself and his attorney. Relying on Texas Rule of Evidence 611 the appellate court ruled that plaintiff had waived any privilege with respect to the notes.

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159. *Id.* at 75.
160. 701 S.W.2d 635 (Tex. 1985).
162. 701 S.W.2d at 637.
163. 718 S.W.2d 56 (Tex. 1986) (per curiam).
164. *Id.* at 58.
165. *Id.*
166. *Id.*
167. *Id.*
168. 701 S.W.2d 75 (Tex. App.—Austin 1985, no writ).
169. *Id.* at 77.
170. 716 S.W.2d 121 (Tex. App.—Dallas 1986, no writ).
171. TEX. R. EVID. 611.
172. 716 S.W.2d at 123.
C. Discovery from Nonparties

Two cases discuss issues related to discovery from nonparties, actual or imaginary. In a mandamus proceeding arising from the discovery phase of the litigation over the no-pass, no-play rule the supreme court in Texas Education Agency v. Anthony held that the trial court improperly required over 1000 nonparty public school districts to provide detailed statistical information concerning the racial backgrounds of students declared ineligible for extracurricular activity. The basis for the ruling was the failure of the trial court to provide the nonparty school districts with notice and a hearing before entering an order requiring production.

In Kidd Pipeline & Specialties, Inc. v. Campagna the defendant sought on a number of occasions to take the deposition of the president of the plaintiff corporation, but the deponent refused to appear for her deposition. Subsequently, she did appear for her deposition but claimed that she no longer worked for plaintiff corporation, although she still had an office there. Notwithstanding these claims, the court of appeals held that the trial court properly granted sanctions against the plaintiff for the failure of the deponent to testify fully at her deposition. The court noted that the deponent was being furnished with an office by the plaintiff and was the plaintiff's largest shareholder. In addition, the court pointed out that the deponent had been president of the plaintiff corporation at the time the deposition was originally requested.

D. Medical Examinations

Texas Rule of Civil Procedure 167a provides, in general, that when the mental or physical condition of a party is in controversy, the trial court may order the party to submit to a physical or mental examination by a physician. The rule does not, however, state who is to choose the examining physician. In Employers Mutual Casualty Co. v. Street the court held that when a motion is made under rule 167a the trial court may choose an independent and neutral physician to conduct the medical examination; the movant does not have an absolute right to choose the examining physician.

E. Mandamus Relief in Discovery

As most practitioners are aware, the supreme court has demonstrated a
willingness to issue writs of mandamus in discovery proceedings.\textsuperscript{183} The holding in \textit{Street v. Second Court of Appeals},\textsuperscript{184} however, indicates that mandamus relief is not available for all aspects of discovery proceedings. In \textit{Street} a party against whom attorney's fees were awarded as discovery sanctions sought mandamus relief. The supreme court concluded that mandamus relief was not available because the party had an adequate remedy by appeal.\textsuperscript{185} The court distinguished \textit{Street} from situations in which the trial court has sought to compel disclosure of privileged material and the appellate remedy is not adequate.\textsuperscript{186} That a party may or may not recover the money it pays in sanctions did not, according to the court, demonstrate the inadequacy of the appellate remedy.\textsuperscript{187}

\section*{IX. SUMMARY JUDGMENT}

\subsection*{A. Sufficiency of Evidence}

A number of decisions during the Survey period discuss the types of proof that support or defeat a motion for summary judgment. In \textit{Vaughn v. Burroughs Corp.},\textsuperscript{188} the movant filed three separate motions for summary judgment, but on the third motion the movant neither attached its summary judgment proof to the motion nor incorporated by reference the evidence attached to the previous motions. Nonetheless, the court of appeals held that the trial court's consideration of the evidence attached to the prior motions was not erroneous.\textsuperscript{189} Further, the court decided that any defects in the movant's proof were waived by the failure of the other party to object to the lack of incorporation of the previous evidence.\textsuperscript{190} \textit{Campbell v. Fort Worth Bank & Trust}\textsuperscript{191} held that statements in an affidavit that are based upon "the best of affiant's knowledge" do not qualify as summary judgment evidence at all and should not be considered by the trial court.\textsuperscript{192} The opponent to a summary judgment motion in \textit{Feldman v. Manufacturers Hanover Mortgage Corp.}\textsuperscript{193} relied only on his verified pleadings to oppose the motion for summary judgment. Recognizing the well-settled proposition that pleadings, even if sworn, do not constitute proper summary judgment proof, the court of appeals held that verified pleadings

\begin{thebibliography}{99}
\bibitem{183} E.g., Jampole v. Touchy, 673 S.W.2d 569, 576 (Tex. 1984); Allen v. Humphreys, 559 S.W.2d 798, 804 (Tex. 1977); Barker v. Dunham, 551 S.W.2d 41, 42 (Tex. 1977).
\bibitem{184} 715 S.W.2d 638 (Tex. 1986) (per curiam).
\bibitem{185} Id. at 639-40.
\bibitem{186} Id.
\bibitem{187} Id.
\bibitem{188} 705 S.W.2d 246 (Tex. App.—Houston [14th Dist.] 1986, no writ).
\bibitem{189} Id. at 248; accord Cousson v. Disch, 629 S.W.2d 111, 112 (Tex. App.—Dallas 1981, writ dism'd) (trial court can rely on evidence filed but not attached to motion when deciding a summary judgment motion). \textit{But see} Corpus Christi Municipal Gas Corp. v. Tuloso-Midway Indep. School Dist., 595, S.W.2d 203, 204-05 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.) (supporting proof must be attached to summary judgment motion).
\bibitem{190} 705 S.W.2d at 248.
\bibitem{191} 705 S.W.2d 400 (Tex. App.—Fort Worth 1986, no writ).
\bibitem{192} Id. at 402.
\bibitem{193} 704 S.W.2d 422 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).
\end{thebibliography}
are not sufficient summary judgment proof. According to the court, reliance on verified pleadings is more than a defect in form, and an objection is not necessary to preserve the error.

Finally, in River Oaks Shopping Center v. Pagan both parties moved for summary judgment. The defendant's motion incorporated by reference the pleadings on file in the cause, including the plaintiff's pleadings. Although the proof submitted in support of the defendant's motion for summary judgment was insufficient, the court of appeals concluded that the defendant was entitled to judgment based on the summary judgment proof that was attached to the plaintiff's motion. Recognizing that this case presented a novel situation, the appellate court stated that because of logic and judicial economy it should not matter which party presents the evidence for summary judgment as long as the evidence before the trial court provides the court with a sufficient basis to rule on the cross-motions for summary judgment.

B. Summary Judgment Procedure

During the Survey period the courts also considered procedural questions related to summary judgment motions. In Edwards v. State Bank the nonmovant claimed that he had not received notice of a summary judgment hearing more than twenty-one days prior to the hearing. The nonmovant supported his claim by the deposition testimony of his attorney who denied receiving a notice letter about the hearing. Although the movant submitted an affidavit demonstrating the preparation and mailing of the notice letter, the court of appeals concluded that a material issue of fact existed as to whether the notice letter was mailed. Nonetheless, the court concluded that the issue of notice was not a factual issue that necessarily vitiated the summary judgment rendered by the district court, but was a procedural anomaly to be corrected by the trial court in response to a motion for new trial. Since the trial court had failed to correct the procedural problem in response to the motion for new trial, the court of appeals remanded the case to the district court for a hearing and determination of whether the notice was mailed to the nonmovant's attorney.

A response to a summary judgment motion was at issue in Fillion v. David Silvers Co. The nonmovant in Fillion timely filed a response to a motion for summary judgment. Less than seven days prior to the summary judg-

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194. Id. at 425.
195. Id.
196. 712 S.W.2d 190 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.).
197. Id. at 193.
198. Id.
199. 705 S.W.2d 839 (Tex. App.—Amarillo 1986, no writ).
200. See TEX. R. CIV. P. 166-A(c) (motion for summary judgment and supporting affidavits must be filed and served at least 21 days before summary judgment hearing).
201. 705 S.W.2d at 843.
202. Id.
203. Id.
204. 709 S.W.2d 240 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.).
ment hearing, however, the nonmovant filed a supplemental response and a second supplemental response to the summary judgment motion. Contrary to the requirements of rule 166-A(c), the nonmovant did not obtain leave of court before filing the supplemental responses. The court of appeals concluded that the supplemental responses were not timely filed and, because the nonmovant had not obtained leave of the district court for filing the supplemental responses, the supplemental responses could not be considered by the trial court or the court of appeals.

In a case regarding a breach of a lease agreement, Great-Ness Professional Services, Inc. v. First National Bank, the movant mischaracterized the suit by alleging in the motion for summary judgment that the suit was on a sworn account and that the defendants had defaulted in making payments on the “account.” The trial court granted the summary judgment motion. The court of appeals reversed the trial court’s judgment and ruled that misclassification of the specific ground for summary judgment was sufficient to defeat the motion even though no genuine material issue of fact was in controversy.

C. Attorney’s Fees

Two cases considered issues related to proof of attorney’s fees with respect to a summary judgment motion. In Giao v. Smith & Lamm a law firm filed an action seeking to recover attorney’s fees from its former client. In response to a motion for summary judgment filed by the law firm the client’s new attorney filed an affidavit challenging the amount of attorney’s fees that were being sought. Rejecting the contention that the Code of Professional Responsibility prohibited the new attorney from testifying as to fees, the court held that an affidavit by an attorney representing a party litigating over attorney’s fees, whether the affidavit supported or contradicted the reasonableness of the fees, was admissible expert testimony. Accordingly, the appellate court held that the attorney’s affidavit raised a fact issue that precluded a summary judgment. Similarly, in Engel v. Pettit the court held that a controverting affidavit filed in response to a motion for summary judgment, stating that an attorney’s fee requested was excessive and unreasonable, was sufficient to create a material issue of fact and defeat the summary judgment motion.

205. TEX. R. CIV. P. 166-A(c) (party adverse to summary judgment motion may file and serve response to motion not later than 7 days before hearing, unless leave of court is granted).
206. 709 S.W.2d at 244.
207. 704 S.W.2d 916 (Tex. App.—Houston [14th Dist.] 1986, no writ).
208. Id. at 918. TEX. R. CIV. P. 166-A(c) provides that “[t]he motion for summary judgment shall state the specific grounds therefor.”
209. 714 S.W.2d 144 (Tex. App.—Houston [1st Dist.] 1986, no writ).
211. 714 S.W.2d at 149.
212. 713 S.W.2d 770 (Tex. App.—Houston [14th Dist.] 1986, no writ).
213. Id. at 773.
D. Preservation of Error

Two supreme court cases addressed questions regarding preservation of error in summary judgment proceedings. In State Board of Insurance v. Westland Film Industries\(^{214}\) the court of appeals had reversed a summary judgment on a ground that the nonmovant neither raised in the trial court nor presented as a point of error to the court of appeals. The supreme court held that the court of appeals was not authorized to reverse the trial court's judgment in the absence of a properly assigned error, and that issues not expressly presented to the trial court could not be considered on appeal as grounds for reversal of the summary judgment.\(^{215}\) A similar holding was also made in Prudential Insurance Co. v. J.R. Franclen, Inc.\(^{216}\)

X. SPECIAL ISSUE SUBMISSION

A. Submission Form

Although Texas Rule of Civil Procedure 277\(^{217}\) was amended in 1973 to authorize the submission of special issues in a broad form, courts have continued to discuss the form of submission. In a case involving a breach of a loan commitment, Allen Recreational Development Corp. v. Republic of Texas Savings Association,\(^{218}\) the trial court submitted an issue on whether the plaintiffs, the borrowers, performed their obligations under the commitment letter in question. The jury answered affirmatively. On appeal, the defendant lender contended that the jury, in responding to the issue, considered evidence of a waiver by the defendant of the obligations under the commitment letter. Thus, according to the defendant, an instruction on waiver should have been submitted to the jury. Disagreeing with this contention, the supreme court held that the broadly worded issue submitted by the trial court was proper.\(^{219}\) Although the court recognized that the trial court should have submitted appropriate accompanying instructions with the broad issue, the court declined to say that failure to submit accompanying instructions was a reversible error per se. The court noted that the absence of an instruction on waiver would have been detrimental only to the borrower, the party who received the favorable jury verdict. Accordingly, the court concluded that the lender had failed to demonstrate harm from the failure to include a waiver instruction.\(^{220}\)

Two decisions during the Survey period discussed the broad submission form in fraud cases. In Coronado Transmission Co. v. O'Shea\(^{221}\) the trial court submitted an issue asking the jury to determine if the defendant had

\(^{214}\) 705 S.W.2d 695 (Tex. 1986).
\(^{215}\) Id. at 696; accord City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 675 (Tex. 1979).
\(^{216}\) 710 S.W.2d 568, 569 (Tex. 1986).
\(^{217}\) TEX. R. Civ. P. 277.
\(^{218}\) 710 S.W.2d 551 (Tex. 1986).
\(^{219}\) Id. at 555.
\(^{220}\) Id.
\(^{221}\) 703 S.W.2d 731 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.).
made a fraudulent misrepresentation to the plaintiff concerning the plaintiff's entitlement to a net revenue interest in a pipeline project. In conjunction with the issue the trial court instructed the jury on the elements of fraudulent misrepresentation, including the elements of materiality, intent, and reliance. The court of appeals concluded that the trial court's submission of the fraud claim was proper and affirmed the trial court's judgment. On the other hand, in *Gulf Oil Corp. v. Crow* the court ruled that an issue on causation was also necessary. The trial court apparently submitted an issue inquiring as to whether the defendant had made fraudulent representations to the plaintiff. The special issue was accompanied by an instruction that set forth the elements for fraud, including the elements of reliance and injury. Concluding that this submission was error, the appellate court noted that instructions are a means to aid the jury in answering special issues; instructions cannot supply a missing element in a cause of action. The court ruled that an issue on causation was necessary in the fraud action; merely giving the jury a definition of fraudulent conduct did not supply a finding of causation.

The proper form of special issues for damages in a wrongful death and survival action was the subject of *Ford Motor Co. v. Durrill*. The district court submitted an issue asking the jury to find the sum of money that should have been assessed as exemplary damages against the defendant "for the death of" of the plaintiffs' child. The defendant argued that the issue, as worded, allowed the plaintiffs improperly to recover damages under the wrongful death statute rather than under the survival statute. Rejecting this contention, the court of appeals ruled that although the question might have been worded differently, it was not so improper as to warrant a reversal. The defendant also argued that the issue that fixed compensatory damages was improper because it asked the jury to consider both physical pain and suffering and mental anguish. The appellate court found that the two elements of damages, physical pain and suffering, and mental anguish, were distinguishable, not duplicitous; therefore, the court decided that the special issue did not authorize a double recovery. Further, the court noted that the issue was accompanied by limiting instructions that told the jury to consider each element of damage separately and not to include damages for one element in any other element.

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222. Id. at 734-35.
223. 704 S.W.2d 849 (Tex. App.—Corpus Christi 1985, no writ).
224. Id. at 854.
225. Id.
226. Id.
227. 714 S.W.2d 329 (Tex. App.—Corpus Christi 1986, no writ).
228. Id. at 334.
229. Apparently the problem with the special issue was the reference to exemplary damages in connection with the child's death.
230. 714 S.W.2d at 334.
231. Id. at 343.
232. Id.
B. Preservation of Error

There were significant developments during the Survey period regarding preservation of error to objectionable special issues and instructions. In *Morris v. Holt* the defendant claimed that the special issue submitted by the trial court had improperly placed the burden of proof upon him. Although the defendant had submitted his own special issue in a substantially correct form, the issue was refused by the trial court, and the defendant did not object to the trial court's failure to submit the issue. Construing rule 279, the supreme court held that the defendant's written request for submission of an issue was sufficient to preserve his complaint on appeal that the trial court inadvertently failed to submit the issue. The supreme court held that, with respect to issues relied upon by an opponent, a party may preserve error to the trial court's failure to submit an issue by making a timely, specific objection or by requesting submission of the issue in substantially correct form.

In *Aero Energy, Inc. v. Circle C Drilling Co.* the trial court submitted an issue to the jury inquiring as to the existence of a joint venture between two parties. The appellant claimed on appeal that there was no evidence to support the submission of that issue. In the trial court, however, the appellant had objected to the issue on the grounds that one of the parties to the alleged venture was not a party to the contract in dispute and the contract specifically disclaimed any partnership relationship between the two parties. Noting that a party objecting to a charge must point out distinctly the matter to which he objects and the grounds for the objections, the supreme court held that the objection to the issue was not sufficient to preserve a no evidence point.

C. Negative Answers to Issues

*Grenwelge v. Shamrock Reconstructors, Inc.* set forth a proposition that the trial practitioner often overlooks. In this case the jury answered “no” to a defendant's issue inquiring whether the plaintiff contractor breached a construction contract. Based on that answer, the trial judge entered a judgment in favor of the plaintiff. The supreme court recognized that the jury's negative answer was not equivalent to an affirmative finding of substantial performance of the contract by the plaintiff. The court noted that a negative answer to a special issue is nothing more than a finding that a party has failed to carry its burden of proving a particular fact.

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233. 714 S.W.2d 311 (Tex. 1986).
234. TEX. R. CIV. P. 279.
235. 714 S.W.2d at 312.
236. *Id.*
237. 699 S.W.2d 821 (Tex. 1985).
238. See TEX. R. CIV. P. 274.
239. *Id.* at 822.
240. 705 S.W.2d 693 (Tex. 1986).
241. *Id.* at 694.
XI. JURY PRACTICE

A. Peremptory Challenges

A number of courts during the Survey period addressed questions related to peremptory challenges. In Garcia v. Central Power & Light Co., a wrongful death suit involving multiple defendants, the plaintiff contended that the trial court improperly allowed the defendants an extra number of peremptory challenges. On the other hand, the defendants argued that they were entitled to extra peremptory challenges because there was potential antagonism among them, as evidenced by their pleadings wherein some of the defendants claimed that the other defendants were the sole cause of the accident. Also, the defendants pointed out that they had filed cross-actions against each other affirmatively seeking indemnity and contribution. The supreme court disagreed with the defendants' arguments and observed that the defendants, during the voir dire examination, had made statements to the effect that the plaintiff's suit did not "have any merit against any of the people that were sued in the case." Further, the supreme court held that while the pleadings alone supported a finding of antagonism, they were not the only factors in determining whether antagonism existed. According to the court the trial judge must consider the pleadings, information disclosed by pretrial discovery, representations made during voir dire of the jury panel, and any other information brought to the attention of the trial court before the exercise of the peremptory strikes. Accordingly, the court held that the trial court committed reversible error in awarding additional peremptory challenges to the defendants.

In Houston Lighting & Power Co. v. Reynolds the plaintiff and one of the defendants collaborated with one another in making their peremptory challenges to the jury. Shortly thereafter the plaintiff dismissed the action against that particular defendant. On appeal one of the other defendants claimed that it should have been awarded extra peremptory challenges by the trial court because the collaboration had occurred with an unspoken understanding that cooperation by the collaborating defendant would be reciprocated by the plaintiff. The court of appeals disagreed with that contention and pointed out that nothing in the record indicated that the collaborating defendant wanted the jury to answer special issues in a way that would detrimentally affect the other defendant. In reaching its decision the court also relied on the trial court's finding, after a hearing, that the plaintiff did not receive an unfair advantage by the award of additional peremptory challenges to the collaborating defendant.

243. 704 S.W.2d 734 (Tex. 1986).
244. Id. at 736.
245. Id. at 737.
246. Id.; Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1979).
247. 704 S.W.2d at 737.
248. 712 S.W.2d 761 (Tex App.—Houston [1st Dist.] 1986, no writ).
249. Id. at 772.
250. Id.
In *Lopez v. Foremost Paving, Inc.*\(^{251}\) the supreme court again addressed the question of apportioning peremptory challenges. The court discussed the test used to determine whether a trial court’s improper award of additional peremptory strikes results in reversible error. The court noted that the traditional “harmless error” rule had been realized with respect to a trial court committing error in awarding strikes. The court reaffirmed the test, set forth in a prior holding,\(^{252}\) that a party complaining about peremptory challenges must show only that the trial was materially unfair.\(^{253}\) Further, the supreme court stated that the entire trial record must be examined in order to decide whether an error in awarding strikes resulted in a materially unfair trial.\(^{254}\) In particular, such an examination is necessary to determine if the trial was hotly contested and the evidence was sharply conflicting.\(^{255}\) In *Lopez* the court found that the parties hotly contested the trial and that the evidence conflicted sharply.\(^{256}\) In addition the court noted that two defendants who had been awarded extra peremptory challenges had repeatedly used their ostensibly antagonistic positions unfairly by one defendant calling a witness to establish a few routine facts and then quickly turning the witness over to the co-defendant for “cross-examination” by leading questions.\(^{257}\) The court also noted that the defendants had collaborated on the exercise of their strikes, and did not have any double strikes when the jury was selected.\(^{258}\) Not surprisingly, the court concluded that reversible error was present.\(^{259}\)

Finally, in *Scurlock Oil Co. v. Smithwick*\(^{260}\) the supreme court noted the distinction between the rule for preservation of error on a challenge for cause as opposed to the rule for a peremptory challenge. Generally, when a challenge for cause is overruled, the challenging party, in order to preserve error, is required to identify an unacceptable juror that he was forced to accept because of the ruling.\(^{261}\) In *Scurlock* the supreme court reiterated that that rule was not applicable when the trial court improperly apportioned peremptory challenges.\(^{262}\)

### B. Jury Argument

*Ford Motor Co. v. Durrill*\(^{263}\) examined the propriety of the use of a videotape during closing argument. *Durrill* involved a wrongful death action brought against an automobile manufacturer by the parents of a victim who

\(^{251}\) 709 S.W.2d 643 (Tex. 1986).
\(^{252}\) Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 921 (Tex. 1979).
\(^{253}\) *Lopez*, 709 S.W.2d at 644.
\(^{254}\) Id.
\(^{255}\) Id.
\(^{256}\) Id. at 645.
\(^{257}\) Id.
\(^{258}\) Id.
\(^{259}\) Id.
\(^{260}\) 724 S.W.2d 1 (Tex. 1986).
\(^{261}\) Id. at 5.
\(^{262}\) Id.
\(^{263}\) 714 S.W.2d 329 (Tex. App.—Corpus Christi 1986, no writ).
sustained fatal burn injuries from a fuel tank explosion in her car. During the trial the plaintiff sought to introduce a videotape showing rear-end collisions and fires that immediately followed. In footage of one collision and fire the tape showed lifelike dummies being enveloped in flames. Although the tape was not admitted for general purposes during the trial, the district court did allow the film to be introduced to show the size and magnitude of fuel-fed fires. During closing argument, the videotape was shown to the jury, and the plaintiff's attorney prefaced the showing by remarking that the defendant automobile manufacturer knew as early as 1967 what would happen when cars leaked fuel, as evidenced by the videotape. Although the appellate court found that the use of the videotape and the remarks made during closing arguments were improper, the court concluded that the error was not so grave as to constitute reversible error, particularly in light of the failure of the defendant's counsel to object to the use of the tape during argument.264

C. Jury Misconduct

As noted in a prior survey,265 the enactment of Texas Rule of Evidence 606(b)266 may have a significant impact on claims of jury misconduct. In general, the rule provides that a juror may not testify as to any matter or statement occurring during the course of a jury's deliberations, except that a juror may testify as to whether any outside influence was improperly brought to bear upon a juror.267 In Daniels v. Melton Truck Lines, Inc.268 the plaintiffs claimed that a take-nothing judgment entered against them was the result of one of the jurors using her position as a police officer to influence and intimidate other members of the jury. The plaintiffs offered affidavits to that effect from other jurors. The court of appeals held that evidence regarding statements made by the police officer-juror was not an outside influence and, accordingly, was not admissible under rule 606(b).269 Thus, the court concluded that there were no grounds for reversal based on juror misconduct.270

Similar holdings were made in Robinson Electric Supply Co. v. Cadillac Cable Corp.271 and Baker Marine Corp. v. Weatherby Engineering Co.272 In the Robinson Electric case the appellant claimed that an additional sum was added to the plaintiff's award as interest because of a suggestion by one juror. The court held that such a claim was insufficient to establish the existence of an outside influence as required under rule 606(b), and thus, did not

264. Id. at 341-42.
266. Tex. R. Evid. 606(b).
267. Id.
268. 704 S.W.2d 142 (Tex. App.—Eastland 1986, writ ref’d n.r.e.).
269. Id. at 145.
270. Id.
271. 706 S.W.2d 130 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.).
272. 710 S.W.2d 690 (Tex. App.—Corpus Christi 1986, no writ).
constitute grounds for reversal.\textsuperscript{273} Similarly, in the \textit{Baker Marine} case the court held that a juror's testimony was inadmissible on an issue of jury misconduct.\textsuperscript{274} The excluded testimony was to the effect that another juror seemed to be prejudiced against the defendant throughout the deliberations and seemed to have already made up her mind about the case before jury discussions.\textsuperscript{275} The court ruled that only evidence of outside influence is admissible on the issue of jury misconduct.\textsuperscript{276}

\textbf{D. Right to a Jury Trial}

During the Survey period two notable cases discussed the right to a jury trial. The court of appeals in \textit{Gordon v. Gordon}\textsuperscript{277} held that even if a party waives a jury at one trial, that waiver does not affect either party's right to demand a jury for a second trial resulting from a reversal and remand on appeal of the first trial.\textsuperscript{278}

In \textit{Fleet v. Fleet}\textsuperscript{279} the supreme court discussed the legal principles applicable to the ability of a trial judge to render a judgment based on an incomplete verdict. In \textit{Fleet} the plaintiff claimed that the defendant had committed various breaches of fiduciary duties as an independent executor. The trial court presented the acts claimed to be breaches in one jury issue. The questions in the jury issue were lettered “A” through “K” with each lettered question referring to a different act. The jury found in the affirmative with respect to some questions, in the negative with respect to other questions, and left the remaining questions unanswered. In an additional issue related to a statute of limitations defense, the jury answered some of the questions and found that the plaintiff had discovered the existence of some of the acts outside the limitations period. The jury, however, did not answer the questions concerning when the plaintiff discovered the existence of the other acts. The trial court entered a judgment in favor of the defendant on the basis of the incomplete verdict.\textsuperscript{280} Apparently, the court reasoned that all of the acts found to be breaches of fiduciary duties were also found to have been discovered by the plaintiff at a point in time sufficient to support the limitations defense. On appeal, the supreme court observed that a judgment cannot be based on a verdict containing unanswered issues that are supported by some evidence unless the unanswered issues are immaterial.\textsuperscript{281} A court should consider an issue to be immaterial only if the answer to the issue can be found elsewhere in the charge or if the answer to the issue can-

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\item\textsuperscript{273} 706 S.W.2d at 132; see also Tex. R. Civ. P. 327(b) (juror may testify concerning only outside influences).
\item\textsuperscript{274} 710 S.W.2d at 693.
\item\textsuperscript{275} Id. at 692.
\item\textsuperscript{276} Id. at 693.
\item\textsuperscript{277} 704 S.W.2d 490 (Tex. App.—Corpus Christi 1986, writ dism'd).
\item\textsuperscript{278} Id. at 492.
\item\textsuperscript{279} 711 S.W.2d 1 (Tex. 1986) (per curiam).
\item\textsuperscript{280} Id. at 2.
\item\textsuperscript{281} Id. at 2-3 (citing Powers v. Standard Accident Ins. Co., 144 Tex. 415, 418, 191 S.W.2d 7, 9 (1945)).
\end{itemize}
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not change the effect of the verdict. In *Fleet* the supreme court concluded that the issues the jury left unanswered were material. Each issue inquired about a different act of the independent executor, and therefore, while the jury found in the answered issues that the plaintiff discovered acts at a time outside of the statute of limitations, the jury may have found that the plaintiff discovered the acts about which the jury did not answer within the applicable time period under the statute of limitations. Accordingly, the court held that the issues left unanswered were material, and the case was remanded for a new trial.

**XII. DISMISSALS AND MOTIONS FOR NEW TRIAL**

In *Shamrock Roofing Supply, Inc. v. Mercantile National Bank* the court discussed the duty of a movant to present for hearing a motion for new trial. After the entry of a default judgment the losing party filed a motion for new trial but failed to request a hearing, and the motion was later overruled by operation of law. On the day after the motion had been overruled by operation of law, the movant brought the motion for new trial to the trial judge's attention by filing a motion for a hearing on the motion for new trial. Although recognizing that "presentment" of a motion for new trial is no longer required by the rules and that, ordinarily, a point in a motion for new trial may be considered on an appeal when the motion has been overruled by operation of law, the court of appeals nonetheless held that the motion in this case should have been brought to the trial court's attention before it was overruled by operation of law. According to the court, when a motion for new trial requires the exercise of discretion, the trial judge must have an opportunity to exercise that discretion before the court of appeals will hold that the discretion has been abused.

The general rule with respect to nonsuits is that a defendant will be barred from prosecuting a counterclaim if it is not filed before a plaintiff’s motion for nonsuit is filed, even if the counterclaim is filed before the nonsuit is actually granted. In *Associated Indemnity Corp. v. Kyles* the court recognized that an exception to this general rule exists in workers' compensation cases. The court referred to article 8307d, which provides that a plaintiff may take a nonsuit after notice to the other parties to the suit and a

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282. 711 S.W.2d at 2.
283. Id.
284. Id.
285. Id. at 2-3.
286. 703 S.W.2d 356 (Tex. App.—Dallas 1985, no writ).
287. *See* Tex. R. Civ. P. 329b(c). Rule 329b(c) provides that a motion for new trial will be considered overruled by operation of law if not determined by written order within seventy-five days after the court signs the judgment. *Id.*
288. 703 S.W.2d at 358.
289. *Id.*
290. Greenberg v. Brookshire, 640 S.W.2d 870 (Tex. 1982); *see* 4 R. McDonald, *Texas Civil Practice* § 17.16.3 (rev. 1984).
291. 704 S.W.2d 474 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.).
hearing. In Kyles no evidence existed to show that the trial court held a hearing, as required by article 8307d, prior to granting a nonsuit in favor of the plaintiff. Accordingly, the court held that the defendant was entitled to proceed on a counterclaim that had been filed before the nonsuit was granted.

In Guaranty County Mutual Insurance Co. v. Reyna the plaintiff brought a claim under the Deceptive Trade Practices Act against two defendants. When one of the defendants failed to appear the plaintiff nonsuited the remaining defendant and took a default judgment against the defendant who did not appear. The trial court thereafter denied a motion for new trial to set aside the default judgment. On appeal, the supreme court held that because the defaulting defendant had failed to prove sufficient grounds to set aside the default, the trial court did not commit reversible error in refusing to set aside the default judgment. The supreme court, however, expressly disapproved of the court of appeals' holding that the granting of the defendant's motion for new trial would prejudice the plaintiff because of the nonsuit taken against the other defendant. The supreme court noted that the plaintiff's injury was caused by the plaintiff's own action in nonsuiting the other defendant and that the self-imposed nonsuit alone was not a sufficient ground for setting aside the default judgment.

293. Id.
294. 704 S.W.2d at 477.
295. 709 S.W.2d 647 (Tex. 1986) (per curiam).
297. 709 S.W.2d at 648.
298. Id.
299. Id.