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Ernest E. Figari Jr.

Graves A. Graves

A. Erin Dwyer

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

I. JURISDICTION OVER THE SUBJECT MATTER

With the failure of several federally insured savings and loan associations in Texas and the appointment of the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for those associations, the FSLIC and the courts of this state are engaged in a jurisdictional tug-of-war. The FSLIC has argued, relying on federal enactments, that when its appointment as a receiver occurs, the Texas state courts are ousted of jurisdiction too hear claims involving the failed association and, instead, the FSLIC has the exclu-
sive power to adjudicate those claims. The FSLIC’s opponents perceive it as less than impartial in deciding claims involving such an association. Furthermore, the adjudicatory power in the FSLIC would deprive those opponents of a jury trial. Thus, the FSLIC’s opponents usually challenge the FSLIC’s jurisdiction.

During the survey period the Texas appellate courts thrice considered the FSLIC’s jurisdiction argument. In FSLIC v. Kennedy a Houston court of appeals was confronted with a jurisdictional challenge by the FSLIC to a judgment that a state court had entered against an insured association prior to its failure. After the state trial court entered judgment and while the court had plenary control over the suit, the institution failed and the FSLIC took over its affairs as receiver. Subsequently, the FSLIC intervened in the suit and, making its federal statutory argument, asserted that the state trial court should set aside the judgment as the FSLIC now possessed the exclusive power to review or adjudicate the dispute. Apparently unimpressed with the attempted ouster of its jurisdiction, the state trial court refused to set aside the judgment, holding that it was final for purposes of issue preclusion and that the FSLIC did not have the power to review or relitigate the matter. On appeal the FSLIC contended that it, not the state trial or appellate court, had the exclusive power to adjudicate the issues determined by the judgment. Acknowledging the existence of federal authority supporting the FSLIC’s argument, the court of appeals found the federal enactments inapplicable because the trial court had already adjudicated the claims in the case before the institution failed.

More significantly, in Glen Ridge I Condominiums, Ltd. v. FSLIC the Federal Home Loan Bank Board (FHLBB) appointed the FSLIC receiver of a failed association while claims against the association were still pending. Enjoying more success with its federal statutory argument, the FSLIC persuaded the state trial court to dismiss the suit for lack of subject matter jurisdiction. On appeal, the Dallas court of appeals disagreed and held the federal enactments unconstitutional, stating that:

7. 732 S.W.2d 1 (Tex. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.).
8. Undaunted by the state trial court’s adverse determination, the FSLIC apparently sought a more sympathetic forum by removing the suit to federal district court. This attempt failed, however, and the federal district court remanded the suit back to the state trial court. Kennedy, 732 S.W.2d at 3.
9. See, e.g., FSLIC v. Bonfanti, 826 F.2d 1391, 1394 (5th Cir. 1987) (FSLIC has exclusive power to evaluate claims against institution) petition for cert. filed sub nom., Zohdi v. FSLIC, No. 87-255 (filed Aug. 5, 1987); Chupik Corp. v. FSLIC, 790 F.2d 1269, 1269-70 (5th Cir. 1986) (FSLIC may resolve facial merits of claims outside reorganization); North Miss. Sav. & Loan Ass’n v. Hudspeth, 756 F.2d 1096, 1101-03 (5th Cir. 1985) (FSLIC as receiver has power to administer all claims), cert. denied, 474 U.S. 1054 (1986). But see Morrison-Knudsen Co., Inc. v. CHG Int’l, Inc., 811 F.2d 1209, 1219-20 (9th Cir. 1987) (courts retain power to adjudicate claims, not FSLIC as receiver), petition for cert. filed, No. 87-451 (Sept. 17, 1987).
10. Kennedy, 732 S.W.2d at 3.
11. 734 S.W.2d 374 (Tex. App.—Dallas 1986, writ pending).
Since FSLIC claims the authority to adjudicate those matters which reside at the core of judicial power, and claims to have power to compel parties to accept FSLIC adjudication, and claims to be able to oust any court from any jurisdiction over FSLIC, our searching examination of this statutory scheme compels us to hold that the jurisdiction claimed by FSLIC . . . violates article III of the Constitution of the United States. 12

Finally, in Summertree Venture III v. FSLIC 13 the Houston court of appeals addressed and rejected the FSLIC's statutory argument. Framing the question presented as "whether the Federal Savings & Loan Insurance Corporation (FSLIC), in its capacity as a receiver for an insolvent, insured state-chartered savings and loan association, is susceptible to the subject matter jurisdiction of the courts of the State of Texas," 14 the court concluded "that Congress has not given the FSLIC the exclusive power to adjudicate . . . claims" 15 involving such an association and, for that reason, "[t]he trial court does have subject matter jurisdiction." 16

Lamar Savings Association v. White 17 addressed the power of a trial court in one Texas county to enjoin the prosecution of a competing action previously filed in another Texas county. The lender filed suit against the borrower in Travis County seeking recovery on a promissory note. Within two weeks, while the lender was still attempting to effect service on the borrower, the borrower filed a competing action against the lender in Harris County. All of the borrower's claims arose out of the parties' lending relationship. The lender appeared in the later action and asserted a plea in abatement based on its prior pending action. The trial court, however, overruled the plea and allowed the suit before it to proceed forward. The same trial court subsequently entered a temporary injunction against the lender prohibiting it from, inter alia, maintaining a suit against the borrower in any other court on the promissory note. The court of appeals directed that the temporary injunction be dissolved and that the plea in abatement be granted, concluding that: "The court in which suit is first filed acquires dominant jurisdiction over the subject matter and parties of the suit, to the exclusion of other coordinate courts, (citations omitted) and no other court in which a subsequent suit is filed has the power to interfere." 18

12. Id. at 390.
13. No. C14-86-924-CV (Tex. App.—Houston [14th Dist.] Nov. 5, 1987, no writ) (not yet reported); accord Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209, 1219-20 (9th Cir. 1987) (FSLIC, as receiver, has no more power than as supervisor, a role that has no general adjudicatory power), petition for cert. filed sub nom. FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).
15. Id.
16. Id.
17. 731 S.W.2d 715 (Tex. App.—Houston [1st Dist.] 1987, no writ).
18. 731 S.W.2d at 716. See generally Curtis v. Gibbs, 511 S.W.2d 263, 267 (Tex. 1974) (general common law rule gives court in which suit first filed exclusive jurisdiction); Johnson v. Avery, 414 S.W.2d 441 (Tex. 1966) (no other court in which a suit is subsequently filed may interfere with the prior court). While the lender had not served the borrower in the earlier suit at the time it filed the subsequent action, the court of appeals concluded that the lender had
Finally, the Texas legislature recently increased the maximum amount in controversy for county and justice courts. The jurisdictional limit for both courts is now $2,500. The small claims court, in counties with a population in excess of 400,000, has concurrent jurisdiction with the justice court for amounts up to $2,500.

II. JURISDICTION OVER THE PERSON

The reach of the Texas long-arm statute remains the subject of judicial measurement. A recent decision of the United States Court of Appeals for the Fifth Circuit, *Bearry v. Beech Aircraft Corp.*, indicates that a manufacturer may distribute a large quantity of its products into Texas without subjecting itself to the personal jurisdiction of that state, provided each sale is completed outside of Texas. Two individuals, both Louisiana residents, purchased a Beech aircraft in Louisiana and, subsequently, were killed when the plane crashed in Mississippi. Their survivors filed suit in Texas against the manufacturer of the aircraft, a Delaware corporation having its principal place of business in Kansas, and obtained service under the long-arm statute. The aircraft manufacturer, which had neither registered to do business in Texas nor had any facilities, bank accounts, real estate, or permanent employees there, moved to dismiss the suit for lack of personal jurisdiction.

The record showed that during the preceding five years Beech distributed approximately $250 million of its products to seventeen Texas dealers by way of sales negotiated and completed in Kansas; that Beech sold some $72 million of its products to a Texas buyer, delivery F.O.B. Wichita, Kansas; and that Beech purchased over $195 million of goods and services from over 500 Texas vendors pursuant to sales agreements negotiated in Kansas, with delivery of all goods accepted there. While the suit clearly did not arise out of the manufacturer's contacts with Texas, the trial court sustained personal jurisdiction over Beech based on the volume and continuous stream of its products flowing into the state. On appeal from this ruling, the Fifth Circuit disagreed. Noting that "Beech exercised its right to structure its affairs in a manner calculated to shield it from the general jurisdiction of . . . Texas, carefully requiring the negotiation, completion, and performance of all contracts in Kansas", the court concluded that "Beech has not afforded itself the benefits and protections of the laws of Texas, but instead has calculatedly avoided them." 

"[T]hat Beech products flow into Texas does not create a general presence in that State", concluded the court, as "[e]ach transaction exercised utmost diligence in prosecuting the earlier suit, as the record showed that the lender had attempted service on the borrower on four occasions. 731 S.W.2d at 717.

20. Id. §§ 26.042(a), 27.031(a).
21. Id. § 28.003(b).
23. 818 F.2d 370 (5th Cir. 1987).
24. Id.
25. 818 F.2d at 376.
26. Id.
was completed outside of Texas."\textsuperscript{27}

A nonresident may not avoid specific personal jurisdiction as easily as general jurisdiction by remaining outside Texas. The Texas long-arm statute authorizes the exercise of jurisdiction over a nonresident when the nonresident is doing business in Texas.\textsuperscript{28} Doing business includes "commit[ting] a tort in whole or in part in this state."\textsuperscript{29} Focusing on this aspect of the statute, a federal district court in \textit{Ramm v. Rowland}\textsuperscript{30} reiterated that the defendant may not avoid jurisdiction merely by remaining physically outside the forum state.\textsuperscript{31} The plaintiff, a Texas resident, filed suit against the defendant, a New Jersey resident, for alienating the affections of his wife. After the plaintiff's wife met the defendant on business in New York, the defendant made several telephone calls to her in Texas and encouraged her to meet him on various occasions outside the state, presumably to engage in adulterous conduct. Observing that "[t]he Defendant's alleged acts of intentionally contacting the Plaintiff's wife by phone to encourage her to leave her husband is the very essence of the tort",\textsuperscript{32} the court held that "[t]he consequences of his acts created impact on the Plaintiff in Texas"\textsuperscript{33} and "the totality of the circumstances . . . satisfy the purposeful availment of the Texas jurisdiction."\textsuperscript{34}

The Supreme Court of Texas concluded during an earlier survey period that service under the Texas long-arm statute is not complete until the secretary of state forwards process to the nonresident defendant.\textsuperscript{35} In order to establish the jurisdiction of the trial court over the nonresident's person, the record must therefore affirmatively show that the process was forwarded.\textsuperscript{36} The plaintiff may make this showing by filing a certificate of mailing issued by the secretary of state.\textsuperscript{37}

The nonresident defendant's time to appear after service might run from (1) the date of service on the secretary of state, (2) the date the secretary of state performs his statutory duty and mails process to the defendant, or

\textsuperscript{27} Id.
\textsuperscript{28} TEX. CIV. PRAC. & REM. CODE ANN. § 17.044 (Vernon 1986).
\textsuperscript{29} Id. at 17.042(2).
\textsuperscript{32} Ramm, 658 F. Supp. at 708.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 709.
\textsuperscript{36} Whitney, 500 S.W.2d at 96.
\textsuperscript{37} See Vanguard Invs. v. Fireplaceman, Inc., 641 S.W.2d 655, 656 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).
the date such process is received in the mail by the defendant. The court of appeals in *Bonewitz v. Bonewitz* found that the earliest date controls. Using principles of agency, the court held “that service of process on the Secretary of State constitutes constructive service on the nonresident defendant, thereby triggering the nonresident defendant’s answer date.”

### III. SPECIAL APPEARANCE

The trial practitioner representing a nonresident defendant at a special appearance hearing in state court should be aware of the implications of *Zac Smith & Co. v. Otis Elevator Co.*, a recent decision of the Texas Supreme Court. Reiterating that a nonresident defendant has the burden of proof at a special appearance hearing, the court emphasized that this burden forces the nonresident to adduce evidence negating all bases of personal jurisdiction. Thus, in order to prevail at a special appearance hearing, the nonresident defendant must present evidence negating both a “specific” basis and a “general” basis for personal jurisdiction. This burden assumes additional significance in light of the prohibition against the use of affidavits at a special appearance hearing.

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38. 726 S.W.2d 227 (Tex. App.—Austin 1987, writ ref’d n.r.e.).
39. *Id.* at 230.
40. *Id.*
42. *Id.* at 664; see, e.g., Siskind v. Villa Found. for Educ., Inc., 642 S.W.2d 434, 438 (Tex. 1982) (defendant must negate all bases of personal jurisdiction); Hoppenfield v. Crook, 498 S.W.2d 52, 55 (Tex. Civ. App.—Austin 1973, writ ref’d n.r.e.) (burden of proof and persuasion on nonresident defendant); Taylor v. American Emery Wheel Works, 480 S.W.2d 26, 31 (Tex. Civ. App.—Corpus Christi 1972, no writ) (nonresident defendant bears burden of pleading and proving lack of jurisdiction). *But see* Familia de Boom v. Arosa Mercantil, S.A., 629 F.2d 1134, 1138 (5th Cir. 1980) (if defendant challenges jurisdiction, plaintiff has burden of proof), cert. denied, 451 U.S. 1008 (1981); Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 490 (5th Cir. 1974) (party invoking personal jurisdiction has burden of proof); Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1232 (5th Cir. 1973) (plaintiff must establish *prima facie* showing that long-arm statute satisfied).
43. *Zac Smith & Co.*, 734 S.W.2d at 664.
44. “Specific” personal jurisdiction exists when the cause of action relates to the defendant's contacts with the forum and those contacts were occasioned by the defendant's purposeful conduct. *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (defendant must have clear notice that its acts may support personal jurisdiction); Bearry v. Beech Aircraft Corp., 818 F.2d 370, 374 (5th Cir. 1987) (defendant subject to person jurisdiction if it invokes benefits and protection of forum state’s laws). Plaintiff cannot, by his conduct alone, establish the requisite minimum contacts. *World-Wide Volkswagen*, 444 U.S. at 298.
45. “General” personal jurisdiction exists when the cause of action does not relate to the defendant’s purposeful conduct within the forum, but the defendant’s contacts with the forum are continuous and systematic. *See, e.g.,* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-17 (1984) (general personal jurisdiction requires contacts of continuous and systematic nature); Bearry v. Beech Aircraft Corp., 818 F.2d 370, 374 (5th Cir. 1987) (due process demands continuous and systematic contacts for general jurisdiction).
46. *Zac Smith & Co.*, 734 S.W.2d at 664.
its burden through the testimony of live witnesses and other admissible evidence.

IV. SERVICE OF PROCESS

The recent amendments to the Texas Rules of Civil Procedure have relaxed a number of the former service requirements. Rule 103 now allows the trial court to authorize by order any person who is at least eighteen years of age to serve process. Moreover, the court may enter such an order without a written motion and may not charge any fee for the issuance of such an order. Additionally, sheriffs and constables are no longer limited to serving process in their county of office. Finally, when service is made by certified or registered mail, amended rule 106 has deleted the requirement that delivery of the mailing be restricted to the addressee.

The trial practitioner must now use a new form of citation. Amended rule now details more specifically the contents of a citation, including a mandatory admonition to the defendant being served that he has been sued and must answer on the first Monday following twenty-one days after service.

A number of decisions during the Survey period considered challenges to service of process on the basis of inadvertent errors occurring in the course of service. American Universal Insurance Co. v. D.B.&B, Inc. and Pharmakinetics Laboratories, Inc. v. Katz considered situations where the clerk executed service by mail and a material variance existed between the name of the defendant's agent as alleged in the petition and the name of the person signing for and receiving process. In American Universal Insurance Co. the petition stated that service could be effected by serving "Mr. Jack Keith," the registered agent of the corporate defendant. Service was made by certified mail. The return receipt, however showed that "J. Williams" received and signed the receipt in the space labeled "agent". Observing that nothing in the record showed "J. Williams" to be the agent of either the

49. Id.
50. Id. see Tex. R. Civ. P. 106. Plaintiff need only mail process. Id.
51. Id. 99.
52. Id. The mandatory wording is:
You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you.
54. 725 S.W.2d 764 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.).
55. 717 S.W.2d 704 (Tex. App.—San Antonio 1986, no writ).
56. TEX. R. Civ. P. 103 (Vernon Supp. 1986), prior to its recent amendment, provided that "[s]ervice by registered or certified mail may be made by the clerk of the court in which the case is pending."
registered agent or the corporate defendant, the court of appeals invalidated the service and set aside the default judgment founded on such service.

Similarly, in Pharmakinetics Laboratories, Inc. the petition requested service on “Mr. Steve Woodman” as president of the corporate defendant. When process was mailed to the defendant, however, “Charlotte Young” signed the return receipt in the capacity of addressee. On the basis of such service the plaintiff obtained a default judgment against the defendant.

Reiterating that when serving an agent for a corporation the record must show that the individual served is in fact the agent for service, the court found the variance to be fatally defective and set aside the default judgment.

Leach v. City National Bank addressed the propriety of serving process on an attorney who had been representing a defendant prior to suit. The plaintiff filed suit against the defendant, a Georgia resident, seeking recovery on a promissory note. After two unsuccessful attempts at personal service, the plaintiff obtained an order from the trial court under rule 106 allowing substituted service on an attorney who had been representing the defendant in negotiations before suit. Subsequently, on the basis of this service, the plaintiff obtained a default judgment against the defendant. Although he did not contend that this method of service failed to provide him with actual notice of the suit, the defendant appeared through counsel, questioned the propriety of such service, and sought to set aside the default judgment. The court of appeals, however, approved the method of service used finding that it was reasonably calculated to give the defendant notice of suit.

The return receipt need not identify exactly what documents constituted service. In Nelson v. Remmert the defendant claimed that the return was deficient. The plaintiff sought to obtain service over the defendant by certified mail. Rule 107, however, requires that the officer's return must also contain the return receipt with the addressee's signature. Focusing on this requirement, the defendant sought to set aside a default judgment rendered against him, arguing that the return was deficient because the receipt did not reveal what instrument was mailed with it. The appellate court held that

57. American Universal, 725 S.W.2d at 765.
58. Id. at 767.
59. Pharmakinetics Labs., 717 S.W.2d at 706.
60. Id. at 706. See generally Keltner & Burke, Protecting the Record for Appeal: A Reference Guide in Texas Civil Cases, 17 St. Mary's L.J. 273, 302-03 (1986) (discussing record requirements for default judgment).
61. 733 S.W.2d 578 (Tex. App.—San Antonio 1987, no writ).
62. TEX. R. Civ. P. 106(b). In addition to specifying certain methods of service upon a defendant, the residual section of rule 106 provides that “the court may authorize service ... in any ... manner ... [which] will be reasonably effective to give the defendant notice of the suit.” Id. 106(b)(2).
64. 726 S.W.2d 171 (Tex. App.—Houston [14th Dist.] 1987, writ ref’d n.r.e.).
65. TEX. R. CIV. P. 107.
66. Id.
rule 107 did not require the return receipt to identify what document, if any, had been served. According to the court, to do so, might sometimes be a practical impossibility.

V. PLEADINGS

The amendment of Texas Rule of Civil Procedure 13 provided the most significant development in the area of pleadings. Aimed at deterring the filing of frivolous pleadings, rule 13 now provides that the signatures of attorneys or parties on a court filing certify that they have read it and that, to the best of their knowledge and belief reached after reasonable inquiry the filing "is not groundless and brought in bad faith or groundless and brought for the purpose of harassment." "Groundless," for purposes of the rule, "[means] no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law." Pursuant to the rule, the trial court must presume that all filings are made in "good faith." If a party or attorney signs a filing in violation of the rule, "the court, upon motion or upon its own initiative, shall impose sanctions . . . upon the person who signed it, a represented party, or both." Notably, a trial court may not impose sanctions except for "good cause" and, if imposed, the court must set forth the particulars of the good cause its sanctions order. The rule loses some effectiveness since it further provides that a trial court may not impose sanctions if, before the earliest of either the 90th day after the court determines a violation or prior to the expiration of the trial court's plenary power, the offending party withdraws or amends the filing to the satisfaction of the court.

Two additional amendments to the rules of civil procedure in this area

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67. Nelson, 726 S.W.2d at 173.
68. Id.
72. TEX. R. CIV. P. 13. Two filings are, however, exempt from the scope of the amended rule 13. Specifically, the rule provides that neither a "general denial" nor "[t]he amount requested for damages" in a pleading constitute a violation. Id.
73. Id.
74. Id. The trial court may impose sanctions against the offending party which include disallowance of further discovery, assessment of discovery expenses or taxable costs, establishment of designated facts, refusing to allow the disobedient party to support or oppose claims or defenses, striking pleadings, dismissal of claims, rendition of a default judgment, and contempt. See id. 215(2)(b) (miscellaneous sanctions), 13 (contempt).
75. Id. 13.
76. Id.
bear note. Amended rule 45,77 apparently directed at reducing the bulkiness of legal filings, now requires that all pleadings shall be on paper measuring approximately 8½ by 11 inches. Further, the legislature returned rule 7278 to its earlier wording79 and, as a result, now requires that a party serve a court filing only on an “adverse party.”80 Of course, court interpretations of the term adverse party, as it appeared in the earlier version of the rule, should provide guidance in determining who should be notified of or furnished filings.81

During a prior Survey period, the supreme court, in a landmark decision, ruled that prejudgment interest is recoverable in a personal injury case on accrued actual damages.82 Benavides v. Isles Construction Co.,83 a recent decision by the same court, emphasizes that its earlier decision did not dispense with the pleading requirement for common law prejudgment interest.84 Hence, if a personal injury plaintiff seeks prejudgment interest, he must include a request for such a recovery in his pleadings.

Finally, Barrera v. M Bank Brenham, N.A.85 illustrates one manner in which a litigant’s inaccurate pleading may haunt him. The plaintiff bank brought suit to recover on the defendant’s installment note. The bank incorporated an exhibit in its original petition stating that it had accelerated payment of the note on June 16, 1983. The defendant counterclaimed for wrongful dishonor of a check, asserting that defendant had presented the check to the bank for payment on June 7, 1983, when defendant still had sufficient funds in his account to honor the check. The bank took the position that by the time defendant presented the check, the bank had already applied the account balance to the accelerated note. Accordingly, the bank amended its original petition to correct the earlier error. In the amended


83. 726 S.W.2d 23 (Tex. 1987).

84. Id. at 25; accord Vidor Walgreen Pharmacy v. Fisher, 728 S.W.2d 353 (Tex. 1987). The Benavides court recognized the general rule that a party need only plead for general relief to recover statutory or contractual interest. 726 S.W.2d at 25.

85. 718 S.W.2d 763 (Tex. App.—Houston [14th Dist.]), rev’d, 721 S.W.2d 840 (Tex. 1986).
pleading, the bank changed the date of acceleration, alleging that it had accelerated the note on June 7, 1983 and that therefore the insufficiency of funds in the defendant's account occurred on that date. Subsequently, the bank secured a partial summary judgment on the counterclaim, and the defendant appealed. Observing that the counterclaim for wrongful dishonor depended upon whether the note was due in full at the time of the offset, the court of appeals focused on the timing of the acceleration. The court noted that superseded pleadings may contain ordinary admissions. The court then held that defendant's response to the bank's motion for summary judgment raised a material issue of fact since the motion raised the issue of the discrepancy in acceleration dates. Thus, the bank's inconsistent pleading provided evidence to the defendant sufficient to avoid a motion for summary judgment. On appeal, the Texas supreme court reversed because the defendant failed to file the bank's inconsistent pleadings as summary judgment proof.

VI. Venue

The recent and substantial amendments to the Texas Rules of Civil Procedure left the venue rules virtually unchanged. Apart from adopting minor terminology changes to comport with the recently enacted Texas Civil Practice and Remedies Code, the rule makers only amended the first sentence of rule 88 to make clear that the pendency of a motion to transfer venue will not abate or otherwise affect discovery. This section goes on to discuss judicial refinements to the existing venue rules.

It is well-established that a defendant waives his objection to improper venue unless he files a written motion to transfer venue prior to or concurrently with any other plea, pleading or motion except a special appearance. According to the court in *Whitworth v. Kuhn*, a defendant also waives his venue rights, even if he timely files the required motion, unless he promptly requests a hearing on the motion to transfer.

Rule 87 of the Texas Rules of Civil Procedure mandates the prompt determination of a motion to transfer venue and imposes a duty on the movant to request a hearing on the motion. Although the defendant in *Whitworth* timely filed his motion to transfer venue, he waited more than a year after filing the motion before requesting a hearing. Concluding that the defendant's complete lack of diligence was inconsistent with the purpose of rule 87(1), the court, in dicta, opined that the trial court could have refused to

86. *Id.* at 764.
87. *Id.* at 765. The court distinguished ordinary admissions from judicial admissions. *Id.*
88. *Id.*
92. See *Tex. R. Civ. P.* 86(1).
93. 734 S.W.2d 108 (Tex. App.—Austin 1987, no writ).
94. *Id.* at 111.
consider the motion altogether. Nevertheless, the court proceeded to analyze the merits of defendant’s motion because the trial court had itself considered the motion notwithstanding defendant’s failure to schedule a hearing on the motion promptly. Since the plaintiff had alleged facts sufficient to bring the case within one of the permissive exceptions to venue, and the defendant never specifically denied those facts, the court of appeals affirmed the trial court’s denial of defendant’s motion to transfer venue. The defendant also complained that the trial court never signed a written order denying his motion. The appellate court held that the statement of facts reflecting the trial court’s oral ruling from the bench was sufficient.

The current venue rules permit only one venue determination. Accordingly, the court in Dorchester Master Limited Partnership v. Anthony conditionally granted a writ of mandamus directing the trial court to vacate its order purporting to transfer venue of a case because it was the court’s second venue order in the lawsuit. Shortly after the suit was commenced, the defendants in Dorchester timely filed a motion to transfer venue that the trial court denied by written order. More than two years later, the same defendants filed another motion to transfer venue. Judge Anthony sua sponte vacated the first venue order and entered a second order transferring the case. In holding that Judge Anthony’s second order was void, the court of appeals distinguished the decision in U.S. Resources v. Placke. There the court held that a trial judge could reconsider his order transferring venue because the court had not yet actually transferred the case. In contrast, the trial court in Dorchester had sustained venue in the county of suit more than two years earlier, so the trial court’s change of heart violated the express mandate of rule 87(5). Finally, although Texas courts have held in the past that the remedy of mandamus is rarely available to correct erroneous venue
decisions,\textsuperscript{106} the Dorchester court held that remedy was appropriate here because Judge Anthony's order was void.\textsuperscript{107}

VII. LIMITATIONS

Courts continued to wrestle with the constitutionality of the limitations provisions in the Texas health care statutes during the Survey period. Five years ago in \textit{Sax v. Votteler}\textsuperscript{108} the Texas Supreme Court declared former article 5.82 of the Texas Insurance Code\textsuperscript{109} unconstitutional as applied to a minor's claim for medical malpractice. The court held that the statute violated the open courts provision of the Texas Constitution\textsuperscript{110} because it abrogated a minor's cause of action once he reached the age of majority, if more than two years had expired since the date of injury, even though the minor had no right to bring his suit earlier due to his legal disability.\textsuperscript{111} Extending the Sax analysis to another class of disabled litigants, the court in \textit{Tinkle v. Henderson}\textsuperscript{112} held that article 5.82 was unconstitutional to the extent it barred an action brought by a plaintiff who had remained continuously mentally incompetent from the time of injury until suit was filed.\textsuperscript{113} Unable to distinguish between the situation of the child plaintiff in Sax and the arguably incompetent plaintiff in Tinkle,\textsuperscript{114} the court found that article 5.82 deprived the plaintiff of his cause of action before he had a reasonable opportunity to discover the wrong and bring suit.\textsuperscript{115}

\textsuperscript{106} See Hendrick Medical Center v. Howell, 690 S.W.2d 42, 45 (Tex. App.—Dallas 1985, no writ) (mandamus improper after denial of motion to transfer venue), \textit{discussed in 1986 Annual Survey, supra note 103, at 502}. The court in Hendrick held that issuing a writ of mandamus would be tantamount to permitting an interlocutory appeal of the venue determination, which \textit{Tex. Civ. Prac. & Rem. Code Ann.} § 15.064(a) (Vernon 1986) proscribes, and that an adequate remedy at law was available to correct venue errors since a defendant could appeal an erroneous venue ruling following judgment and reversal is automatic in such circumstances. 690 S.W.2d at 45-46. \textit{But see Ramcon Corp. v. American Steel Bldg. Co.}, 668 S.W.2d 459, 461 (Tex. App.—El Paso 1984, no writ) (permitting mandamus remedy).

\textsuperscript{107} 734 S.W.2d at 152.


\textsuperscript{110} \textit{Tex. Const. art. I, § 13.}

\textsuperscript{111} 648 S.W.2d at 667.

\textsuperscript{112} 730 S.W.2d 163 (Tex. App.—Tyler 1987, writ ref’d).

\textsuperscript{113} \textit{Id. at 167.}

\textsuperscript{114} While noting that the law accords children and incompetents comparable treatment, the court observed that mental incompetents present a more compelling case for legal protection in many respects since “[t]hey are frequently less communicative, more vulnerable and dependent than children.” 730 S.W.2d at 166. \textit{See generally Tex. Civ. Prac. & Rem. Code Ann. §§ 16.001, .022} (Vernon 1986) (personal and property limitations provisions defining and setting forth effect of disability, which includes unsound mind).

\textsuperscript{115} \textit{Tinkle}, 730 S.W.2d at 166-67. The court also excused plaintiff’s admitted failure to comply with the notice requirements of article 5.82 due to his mental disability. \textit{Id. at 167.}
On broader grounds, the court in *Tsai v. Wells* held that the limitations provision contained in article 4590i, the successor to former article 5.82 of the insurance code, did not apply to bar plaintiff’s cause of action that a patient brought more than two years after a doctor’s allegedly negligent act. Although the plaintiff in *Tsai* was not legally disabled during the limitations period, the court concluded sufficient evidence existed to support the jury’s finding in the case that the plaintiff did not have a reasonable opportunity to discover the wrong until the date suit was commenced.

The court concluded that as a result, application of the absolute two-year limitation to defeat plaintiff’s action would violate the open courts provision of the Texas Constitution. Referring to recent Texas Supreme Court decisions concerning article 4590i, the court opined that the open courts provision creates a “modified discovery rule.” If, however, a claimant has a reasonable opportunity to discover the wrong within the two-year limitation period, then the limitation period is absolute and will not be tolled despite the date the plaintiff discovers his injury.

Two cases during the Survey period discussed the ten-year statute of limitations governing claims for injuries resulting from the defective design, planning, construction, repair or inspection of improvements to real property. One of the issues in *Dubin v. Carrier Corp.* was whether a wall heater installed in an apartment was an “improvement” within the contemplation of the statute. The summary judgment evidence showed that the heater was actually built into the apartment wall; that a flue extended through the roof of the apartment; and that, if permanently removed, the apartment would require some construction to cover the holes in the wall space and the flue opening. Plaintiff, on the other hand, introduced evidence

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116. 725 S.W.2d 271 (Tex. App.—Corpus Christi 1986, writ ref’d n.r.e.).
117. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1988).
118. 725 S.W.2d at 273.
119. Id.
120. Id.; see also TEX. CONST. art. I, § 13 (provision that creates modified discovery rule).
122. 725 S.W.2d at 273. The discovery rule provides that the statute of limitations will not start running until the plaintiff discovers the true facts giving rise to his claimed damage or until the date plaintiff should reasonably have discovered the facts. See Hays v. Hall, 488 S.W.2d 412, 414 (Tex. 1972) (discovery rule prevents absurd and unjust results); Gaddis v. Smith, 417 S.W.2d 577, 579-80 (Tex. 1967) (discussing history of discovery rule). See generally, Figari, Graves & Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law, 37 Sw. L.J. 284, 300-01 (1983) [hereinafter 1983 Annual Survey] (discussing discovery rule for limitations).
123. 725 S.W.2d at 273.
124. TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.008-.009 (Vernon 1986) repealed and recodified former article 5536a of the revised civil statutes, Act of June 2, 1969, ch. 418, § 1, 1969 Tex. Gen. Laws 1379, 1379. Section 16.008 governs claims against licensed architects and engineers for defective design, planning, and inspection of improvements to real property, whereas section 16.009 applies to any person who constructs or repairs improvements to real property. Id. Both statutes provide for a ten-year period of limitations, which commences to run after the substantial completion of the improvements. Id.
125. 731 S.W.2d 651 (Tex. App.—Houston [1st Dist.] 1987, no writ).
demonstrating that the heater could operate in a freestanding mode. Observing that the term improvement has been defined more broadly than "fixture," and includes everything that permanently enhances the value of the premises, the court held that the heater was an improvement because it was annexed to the soil.

Of perhaps greater significance was the court's holding that the statute covered Carrier, one of the defendants, to begin with. Plaintiff argued that Carrier was merely a supplier of the allegedly defective unit and, therefore, not entitled to the statute's protection, which is confined to persons who construct or repair improvements to real property. Although the court acknowledged that Carrier, at most, merely distributed a product that was manufactured by another entity, it nevertheless held that Carrier enjoyed the statute's benefits because it "functioned" as a manufacturer of the improvement in the subject transaction. Notwithstanding both of these rulings in favor of the defendants, the court of appeals reversed the defendants' summary judgment since they did not prove that the heater had been installed more than ten years before the suits' commencement.

The second case discussing the ten-year limitations period established the elements of a prima facie defense. Suburban Homes v. Austin—Northwest Development Co. holds that a party moving for summary judgment predicated on section 16.009 need not establish the absence of fraudulent concealment that would otherwise toll commencement of the ten-year limitations period. Instead, the burden falls on the plaintiff to adduce proof supporting its allegation of fraudulent concealment once the defendant has established prima facie the elements of the limitations defense. In addition, the court held in Suburban Homes that a defendant engineer need not support his motion for summary judgment with evidence that he is registered or li-

127. Id. at 653.
128. Id. at 655.
129. TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a) (Vernon 1987) provides: "A claimant must bring suit for damages . . . against a person who constructs or repairs an improvement to real property . . . ." Id.
130. Dubin, 731 S.W.2d at 655. In reaching this conclusion, the court relied on McCulloch v. Fox & Jacobs, Inc., 696 S.W.2d 918 (Tex. App.—Dallas 1985, writ ref'd n.r.e.), discussed in 1986 Annual Survey, supra note 103, at 506, which it discussed at some length in its opinion. In McCulloch the defendant contracted with someone else for the construction of a swimming pool, which the defendant later conveyed to a country club. The court there held that the defendant functioned as a builder of the improvements, rather than an owner, because it supervised construction of the pool, inspected the improvement upon completion, and never intended to maintain possession or control of the facility. 696 S.W.2d at 922. Unfortunately, the court in Dubin fails to delineate any of the facts surrounding Carrier's involvement in construction of the wall heater, so the parallels to McCulloch are not obvious from the opinion. Dubin, 731 S.W.2d at 654-55.
131. 731 S.W.2d at 654.
132. 734 S.W.2d 89 (Tex. App.—Houston [1st Dist.] 1987, no writ).
133. Id. at 91. Section 16.009 does not bar an action "based on willful misconduct or fraudulent concealment in connection with the performance of the construction or repair." TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(e)(3) (Vernon 1986).
134. 734 S.W.2d at 91. The court held that plaintiff's conclusory allegations of fraudulent concealment, which were unsupported by affidavit, did not create an issue of material fact. Id.
licensed in Texas when the plaintiff’s pleading specifically alleges that the defendant was an engineering firm. According to the court, only “registered” and “licensed” engineers may call themselves engineers or practice engineering in Texas. The court noted that it would be bizarre to require defendants who are sued as engineers to produce proof that they are in fact engineers before they could rely on the limitations defense available to engineers.

VIII. Parties

Two decisions during the Survey period addressed procedural issues involving class actions. In Grant v. Austin Bridge Construction Co., 128 named plaintiffs filed suit individually and as representatives of a class of approximately 2,000 persons owning property around a lake in Walker County, Texas. The property owners claimed damages resulting from pollution to the lake allegedly caused by defendants’ nearby construction. More than five years after the suit was commenced, the trial court certified the class pursuant to rule 42 of the Texas Rules of Civil Procedure. Shortly thereafter, defendants served each of the 128 named representatives with a set of interrogatories and request for admissions. After only eight of the class representatives filed timely responses to the requested discovery, the trial court decertified the class and struck the pleadings of the 120 non-responding plaintiffs named in the suit.

The first issue presented on appeal was whether the trial court’s order of decertification constituted a non-appealable interlocutory order. After analyzing the specific language of rule 42(c), the court of appeals concluded that a withdrawal of certification at any point in the suit is tantamount to a refusal to certify the class in the first place. Consequently, the court held that the appeal was authorized by a statutory exception permitting appeals from interlocutory orders refusing to certify a class. With respect to the merits of the decertification order, the court held that the trial judge had not abused his discretion since over 90% of the named plaintiffs failed to respond to interrogatories thereby demonstrating that the class was

135. 734 S.W.2d at 91. The applicable limitations period set forth in section 16.008 applies only to “a registered or licensed architect or engineer in this state.” TEX. CIV. PRAC. & REM. CODE ANN. § 16.008(a) (Vernon 1986).
136. Id.; see TEX. REV. CIV. STAT. ANN. art. 3271a, §§ 1.1, 2, 3, 2 (Vernon 1968) (Texas Engineering Practice Act, setting forth definition and qualifications for engineers).
137. 734 S.W.2d at 92.
138. 725 S.W.2d 366 (Tex. App.—Houston [14th Dist.] 1987, no writ).
139. TEX. R. CIV. P. 42.
140. 725 S.W.2d at 368. Except as authorized by statute, no appeal lies from an interlocutory order. See Cherokee Water Co. v. Ross, 698 S.W.2d 363, 365 (Tex. 1985).
141. TEX. R. CIV. P. 42(c)(1) provides first for determination of class status by the trial court. In the next sentence the rule states that the trial court may alter, amend or withdraw certification at any time before final judgment. Id.
142. 725 S.W.2d at 368.
143. 725 S.W.2d at 368. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon 1986) provides: “A person may appeal from an interlocutory order . . . that . . . (3) certifies or refuses to certify a class in a suit brought under Rule 42 . . . .”
not represented by parties who could or would fairly and adequately protect the class interests.144 Since most of the named plaintiffs had also admitted comparative negligence by virtue of failing to respond to defendants' request for admissions, the court concluded further that the plaintiffs had failed to meet the typicality requirement of rule 42(a)(3) because none of the unnamed class members had made any such admission of negligence.145

Finally, addressing an issue of first impression, the court held that the statute of limitations would not bar individual causes of action thereafter brought by unnamed property owners.146 In reaching this conclusion, the court relied upon decisions in the federal courts holding that the filing of the original class action suspends the applicable statute of limitations as to all asserted members of the class.147 Thus, the limitations period remaining on the unnamed plaintiffs' individual causes of action tolled from the date suit was filed to the date the court decertified class.148

According to the court in Life Insurance Co. v. Brister,149 the mere existence of questions of law or fact common to the members of a class is insufficient to support class certification under rule 42(b)150 unless such questions predominate over the issues requiring individual adjudication for each class member. The test for evaluating the predominance issue is not whether the common questions outnumber the individual issues, but whether common or individual issues will be the object of most of the litigants' and courts' efforts.151 Although plaintiffs shoulder the burden of proving predominance of common issues at the certification stage,152 the class proponents need not prove a prima facie case to obtain certification.153 Indeed, the court may determine maintainability of a class action based on the pleadings alone.154 Finally, the court noted that trial judges should err in favor of certification when making the determination at an early stage of the proceeding because the parties may not have fully developed the supporting facts and the court may always modify or withdraw the certification later.155 The court did not find any abuse of discretion by the trial court in certifying the class.156

144. 725 S.W.2d at 369; see Tex. R. Civ. P. 42(a)(4) (class action maintainable only if the representative parties will fairly and adequately protect the interests of the class).
145. 725 S.W.2d at 370; see Tex. R. Civ. P. 42(a)(3) (class action maintainable only if claims or defenses of representative parties are typical of the class).
146. 725 S.W.2d at 370.
148. 725 S.W.2d at 370.
149. 722 S.W.2d 764 (Tex. App.—Fort Worth 1986, no writ).
150. Tex. R. Civ. P. 42(b)(4) provides that an action may be maintained as a class action if, in addition to satisfying the prerequisites of rule 42(a), the action presents questions of law or fact common to the members of the class that predominate over any questions affecting only individual class members.
151. 722 S.W.2d at 772.
152. Id. at 770.
153. Id. at 772-73. The court may decertify the class under Tex. R. Civ. P. 42(c)(1) if common questions do not predominate at trial. 722 S.W.2d at 775.
154. Id. at 772-73.
155. Id. at 774-75.
156. Id. at 771.
IX. DISCOVERY

A. Depositions

Apparently in an effort to conserve file space and to reduce costs, the supreme court eliminated filing requirements for depositions and certain other discovery documents. Pursuant to amended rule 206, the deposition officer (or court reporter) no longer files depositions with the court. Instead, the officer delivers the original deposition to the attorney who asked the first question appearing in the transcript. This attorney, known as the "custodial attorney," must make the original deposition available, upon reasonable request, for inspection or copying by the other parties to the suit.

With respect to exhibits, rule 206 now contains a procedure whereby the deposition officer must return all original documents marked as exhibits to the party or witness producing them. The party or witness who originally produced the documents must maintain the originals and produce them for hearing or trial upon seven days notice. The deposition officer must annex copies of the originals to the original deposition and those copies may be used for all purposes. As an alternative procedure, a party or witness may produce copies at a deposition, provided the other parties have a fair opportunity to verify the copies by comparison with the originals.

The supreme court also amended the rules to conform to agreements customarily reached by counsel regarding depositions. Rule 205, as amended, provides that the witness may sign the deposition transcript before any officer authorized to administer an oath, e.g., a notary public. New rule 166c provides that the parties may, by written agreement, modify deposition procedures, such as the time, place, and manner of the deposition. The "written agreement" may simply be an agreement recorded in the deposition transcript. Rule 204 also authorizes the parties to vary the objection procedure, such as an agreement that all objections, including those as to form and responsiveness of answers, may be made at trial without waiver.

In addition, rule 205 now prohibits a witness from erasing or obliterating

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158. TEX. R. Civ. P. 206.
159. Id.
160. Id. 206(2).
161. Id.
162. Id. 206(3).
163. Id.
164. Id.
165. Id.
166. Id. 205.
167. Id.
168. Id. 166c.
169. See also id. 206(4) (parties may agree contrary to rule 205).
170. Id.
171. Id. 204.
172. Id. The rule sets forth standard objection waivers. Id. 204(4).
the deposition transcript when making changes. Rather, the witness must submit a written statement of the changes and the reasons supporting them to the deposition officer. Finally, the supreme court amended rule 207, which governs the use of a deposition at trial, primarily in two respects. A party may use a deposition against another party joined after the deposition was taken if (i) the newly joined party has interest similar to any party who was present or had notice of the deposition; and (ii) after joinder, the new party had a reasonable opportunity to redepose the deponent and failed to do so. The rule was also amended to specify that a party may use depositions taken in a different proceeding in another case subject to the provisions and requirements of the rules of evidence.

B. Written Discovery

For the benefit of plaintiffs’ counsel, rules 167 and 168 now provide that a plaintiff may serve interrogatories and requests for production of documents without leave of court, upon a defendant at the same time as the service of the petition. In that circumstance, the defendant may serve written responses, answers and objections within fifty (50) days after service of the petition and citation. With respect to objections, rule 168 now contains a provision in conformity with prior case law to the effect that objections served after the time for answer are waived unless good cause is shown for such failure.

Rule 169 governing requests for admissions as amended specifies that, upon a showing of good cause by the party responding, the trial court may allow a party to withdraw or amend a response. The court must find that the parties relying on the response “will not be unduly prejudiced” and the presentation of the merits of the case will be served. Previously, the burden was on the party who obtained the admission to show that withdrawal of the amendment would prejudice him.

As in the case of depositions, new rule 166c authorizes the parties, by written agreement, to modify the procedures as to other methods of discovery, including written discovery. In addition, interrogatories, requests for production of documents, and applicable responses and answers, like depositions...
tions, are no longer filed with the court. No change, however, was made to the filing procedures for requests for admissions and responses, which the party making the request or objection must still file.

C. Privileges and Exemptions

The Rule Amendments

The supreme court made a number of relatively minor changes to the provision of rule 166b, which delineates the privileges and exemptions from discovery. With respect to work product of an attorney, the rule now makes that exemption subject to exceptions for attorney-client privilege contained in evidence rule 503(d).

A written statement of a witness remains exempt from discovery if the witness made the statement (i) subsequent to the occurrence or transaction upon which the suit is based and (ii) in connection with the prosecution or defense of the suit or in anticipation of prosecution or defense of claims made in pending litigation.

The supreme court changed the language of the rule concerning the investigative privilege or confidential party communications, apparently to conform to recent supreme court decisions. Amended rule 166b-3 provides that communications between a party and his agents, representatives and employees are protected when (i) made subsequent to the occurrence or transaction upon which the suit is based; and (ii) in anticipation of the prosecution or defense of the claims made a part of the pending litigation. Also consistent with a prior supreme court decision, the rule states that a photograph is not a communication.

The supreme court made one significant modification in regard to the discovery exemptions. Rule 166b now provides that a party may obtain witness statements and party communications, which are otherwise protected. The party seeking discovery must show that he (i) has substantial need of the materials; and (ii) is unable without undue hardship to obtain the substantial equivalent of them by other means.

Case Law

In Channel Two Television Co. v. Dickerson the court addressed the privilege applicable to a reporter's investigative materials. After a television broadcast regarding a pending lawsuit, one of the parties sought to compel

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188. Id. 167, 168.
189. Id. 169(1).
190. Id. 166b.
191. Id. 166b(3)(a); see also TEX. R. EVID. 503(d) (setting forth exceptions to general rule of attorney-client privilege).
192. TEX. R. Civ. P. 166(3)(c).
193. Id. 166(3)(d).
194. Terry v. Lawrence, 700 S.W.2d 912, 913 (Tex. 1985).
196. Id. 166b(3). The exemption applies to witness statements and party communications only. Id...
197. 725 S.W.2d 470 (Tex. App.—Houston [1st Dist.] 1987, no writ).
production of the reporter's notes and other documents relating to the broadcast. Relying on a United States Supreme Court decision and provision of the state constitution regarding freedom of the press, the court of appeals held that once the reporter asserted the privilege, the party seeking discovery must make a "clear and specific" showing that the information was (1) highly material and relevant; (2) necessary or critical to the maintenance of the claim; and (3) not obtainable from other sources. Finding that the party seeking production had not made such a showing in this case, the court denied the requested discovery.

The "AIDS" controversy did not escape the attention of the Texas courts. In a wrongful death action, the plaintiff in Tarrant County Hospital District v. Hughes claimed that the defendant hospital gave the deceased a blood transfusion that resulted in her contracting Acquired Immune Deficiency Syndrome (AIDS). By a request for production of documents, plaintiff sought to discover the names and addresses of blood donors. Over an objection based on the physician-patient privilege and the donors' right of privacy, the district court allowed the discovery, but ordered plaintiff not to contact the donors or to seek further discovery regarding them without court permission.

The Fort Worth court of appeals, sitting en banc, decided that the district judge had acted correctly. The appellate court held the physician-patient privilege inapplicable because the blood donors had not seen a physician or received medical care when they donated blood. With respect to the donors' right of privacy, the court ruled that plaintiff's need for the information outweighed the privacy interest, especially in light of the provision in the trial court order prohibiting further discovery without leave of court.

The scope of the privilege for party communications made in connection with prosecution or defense of the action continued to generate substantial court attention. In Estate of Gilbert v. Black the court held that an insurer's internal communication generated prior to the denial of issuance coverage were not within the scope of the privilege. In Phelps Dodge Refining Corp. v. Marsh the defendant-employer sought advice from his counsel after an accident resulted in the death of an employee. On advice of counsel that a lawsuit was likely, the employer conducted a post-accident investigation prior to the time plaintiff made a claim. Notwithstanding the

198. See Branzburg v. Hayes, 408 U.S. 665, 689-90 (1972) (first amendment does not protect a reporter from testifying before grand jury).
200. 725 S.W.2d at 472.
201. Id.
202. 734 S.W.2d 675 (Tex. App.—Fort Worth 1987, no writ) (en banc).
203. Id. at 676.
204. 734 S.W.2d at 677; see also Tex. R. Evid. 509(a) (defining "patient" as one who seeks medical care).
205. 734 S.W.2d at 679.
207. 722 S.W.2d 548 (Tex. App.—Austin 1987, no writ).
208. Id. at 550.
209. 733 S.W.2d 359 (Tex. App.—El Paso 1987, no writ).
attorney's accurate prediction, the court of appeals held that the investiga-
tive materials were discoverable.\footnote{210} Finally, in \textit{Brown & Root U.S.A., Inc. v. Moore}\footnote{211} the court held that witness statements taken by a claims examiner at the time of an accident were not covered by the privilege when no one had made any claim at that point.\footnote{212}

\subsection*{D. Procedure For Claiming Privilege or Exemption}

As noted in a prior Survey,\footnote{213} the supreme court in \textit{Peeples v. Honorable Fourth Supreme Judicial District}\footnote{214} outlined the procedures for making and preserving objections to exclude items from discovery on grounds of privilege.\footnote{215} The amended rule 166b\footnote{216} now incorporates the procedure outlined in \textit{Peeples}. In order to exclude any matter from discovery on the basis of an exemption or immunity, a party must specifically plead the particular exemption or immunity.\footnote{217} The party must also support the claimed privilege by either producing affidavits or presenting live testimony at a hearing requested by either the requesting party or the objecting party.\footnote{218} If the party objects to discovery based on a specific immunity or exemption, such as attorney-client privilege or work product, and the trial court determines that an \textit{in camera} inspection is necessary, the objecting party must segregate and produce the documents for that inspection.\footnote{219} If the party objects to discovery based on undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional or property rights, the trial court may rule on the objection without conducting an \textit{in camera} inspection first.\footnote{220}

Several Texas courts considered the application of the procedure prescribed in the \textit{Peeples} opinion before the codification of that procedure in rule 116b. In two cases the appellate court denied a claimed privilege when the objecting party failed to follow the \textit{Peeples} guidelines. In \textit{Medical Protective Co. v. Glanz}\footnote{221} the objecting party presented its objections to discovery in a letter to the trial court that accompanied the documents produced for an \textit{in camera} inspection. The letter pointed out that the discovery requests were too general and that the documents produced were privileged. The appellate court held that the objecting party had not met the guidelines prescribed in \textit{Peeples} since the letter did not specifically point out which privilege was claimed for the documents.\footnote{222}

\begin{thebibliography}{99}
\footnotetext[210]{\textit{Id.} at 361. The court held that a party has good cause to anticipate a lawsuit only upon some outward manifestations of future litigation by someone having a potential claim.\textit{Id.}}
\footnotetext[211]{731 S.W.2d 137 (Tex. App.—Houston [14th Dist.] 1987, no writ).}
\footnotetext[212]{\textit{Id.} at 140.}
\footnotetext[213]{See Figari, Graves & Dwyer, 1986 Annual Survey, supra note 103, at 508-09.}
\footnotetext[214]{701 S.W.2d 635 (Tex. 1985).}
\footnotetext[215]{\textit{Id.} at 637.}
\footnotetext[216]{TEX. R. Civ. P. 166b.}
\footnotetext[217]{\textit{Id.} 166b(4).}
\footnotetext[218]{\textit{Id.}}
\footnotetext[219]{\textit{Id.}}
\footnotetext[220]{\textit{Id.}}
\footnotetext[221]{721 S.W.2d 382 (Tex. App.—Corpus Christi 1986, writ ref’d).}
\footnotetext[222]{\textit{Id.} at 385.}
\end{thebibliography}
Speaus an insurance company contended that its investigative files were privileged from discovery in an action for recovery on a policy and damages for the insurance company's bad faith in its handling of the insurance claim. The company claimed that the investigative materials were not discoverable with respect to the bad faith claim until the underlying claim on the policy had been determined. The court of appeals denied the objection because the insurance company had failed to satisfy the Peeples requirements when it did not produce evidence concerning the claimed privilege in the trial court.

In several cases courts expanded the Peeples guidelines outside the area of privilege. In two decisions, Valley Forge Insurance Co. v. Jones and Brad Caraway & Associates v. Moye, the court of appeals held that the guidelines in Peeples are also applicable to objections to discovery based on lack of relevancy to the subject matter of the action. Apparently foreseeing the change to rule 166b(4), the court of appeals, in Independent Insulating Glass/Southwest, Inc. v. Street, extended the Peeples requirements to include a case involving an objection to discovery on grounds of unduly burdensome, costly, or harassing discovery.

Finally, in Garcia v. Peeples the defendant car manufacturer sought a protective order regarding the disclosure of trade secret information about its fuel-system design. The defendant supported its request with affidavits. Although the district court did not conduct an in camera inspection before it issued a protective order, the supreme court held that such inspection was not mandatory. Since the instant case involved a restriction on the dissemination of information by the party seeking discovery and not a restriction on the flow of information to the requesting party, the court did not apply the Peeples procedures. The supreme court, however, decided that the protective order granted by the lower court was too restrictive because it prevented disclosure of information to litigants with similar suits against automakers. In its opinion the high court strongly endorsed the policy of allowing shared discovery among parties in similar actions.

E. Sanctions

Since 1984, rule 215 has provided that a party who fails to supplement a response to a discovery request is subject to sanctions. The court shall

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223. 730 S.W.2d 821 (Tex. App.—San Antonio 1987, no writ).
224. Id. at 823 (insurance company required to show that the documents were needed to prove only the bad faith claim).
225. 733 S.W.2d 319 (Tex. App.—Texarkana 1987, no writ).
226. 724 S.W.2d 892 (Tex. App.—Texarkana 1987, no writ).
227. Valley Forge, 733 S.W.2d at 321; Brad Caraway, 724 S.W.2d at 893.
228. 722 S.W.2d 798 (Tex. App.—Fort Worth 1987, no writ).
229. Id. at 802.
230. 734 S.W.2d 343 (Tex. 1987).
231. Id. at 345.
232. Id. at 345-46.
233. Id. at 346-47.
234. Id. at 347-48.
236. Id.
not allow the party to present the evidence that it was obligated to provide in
the supplement, unless the court finds "good cause" for admission.237 An
amendment to the rule now places the burden on the party offering the evi-
dence to demonstrate the good cause for its introduction.238 The amend-
ment also expands the sanction to include a party's failure to respond to a
discovery request.239

A number of cases addressed the situation in which a party failed to list a
witness in its response to a discovery request and then sought to introduce
testimony from that surprise witness. In each of these cases the court barred
the witness from testifying. In Guitterrez v. Dallas Independent School Dis-

240    trict the plaintiff served an interrogatory inquiring as to names and ad-
dresses of all witnesses the defendant planned to call at trial. In response,
the defendant did not object and provided information about certain per-
sons. At trial, the court allowed the defendant to present the testimony of an
undisclosed expert over the objection of the plaintiff. Despite reversing the
district court's decision, the supreme court noted that the form of the inter-
rogatory was objectionable as it asked for all witnesses and was not limited
to inquiry about expert witnesses only.241 The court determined, however,
that the defendant had waived any objection to the form of the interrogatory
by answering in a misleading fashion and that the sanction of disallowing the
testimony of the undisclosed expert was automatic.242 The court noted that
since the sanction was automatic, the plaintiff could not be forced to accept a
continuance of the trial in lieu of barring the testimony of the witness.243

In E. F. Hutton & Co. v. Youngblood the Texas Supreme Court applied
rule 215 to the nondisclosure of an expert witness on the issue of reasonable
attorneys fees. The court found that the plaintiffs had not shown good cause
for introduction of the expert testimony even though the opposing party had
special knowledge to cross-examine the undisclosed expert and the plaintiffs
had not decided to call the expert until the time of trial.244 Similarly, in
Williams v. Union Carbide Corp. the court of appeals held that the party
offering an undisclosed expert did not show good cause for allowing the ex-
pert to testify even when the attorney for that party did not know about the
proposed witness until two days before trial.245 The court's holding was
based on the fact that the attorney's client knew of the witness' existence and
expertise two years prior to the trial.246

238. TEX. R. CIV. P. 215(5).
239. Id.
240. 729 S.W.2d 691 (Tex. 1987).
241. Id. at 693; see Employers Mut. Liab. Ins. Co. v. Butler, 511 S.W.2d 323, 324-25 (Tex.
Civ. App.—Texarkana 1974, writ ref'd n.r.e.) (court distinguished those knowing relevant
facts and other witnesses, who are not subject to discovery).
242. 729 S.W.2d at 694.
243. Id.
244. 31 Tex. S. Ct. J. 65 (Nov. 10, 1987).
245. Id.
246. 734 S.W.2d 699 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).
247. Id. at 701.
248. Id.
Finally, in *American Cyanamid Co. v. Frankson* a defendant, Lederle, relied on a statement in his designation of experts that purported to reserve the right to call all experts designated to testify by other parties. The other defendants in the case designated two experts as witnesses but subsequently redesignated the experts as consultants. The court of appeals held that the catch-all reservation by Lederle was insufficient and that the trial court properly disallowed the testimony of the experts when Lederle called them as witnesses.

X. DISQUALIFICATION OF JUDGES

Rule 18a, which governs the disqualification of judges, provides that any party may file a motion for disqualification at least ten days before the date set for trial. Before the case proceedings can continue, the judge to whom the motion is directed must either recuse himself or refer the motion to the presiding judge of the district for determination. In *Houston North Properties v. White* the appellants complained that the trial judge failed to exercise either of two permitted options when the appellants filed a motion to disqualify two days after the trial commenced. The court of appeals rejected the appellants' argument, however, finding nothing in the record that justified the tardiness of the motion. According to the court, a motion to recuse must be timely filed in order to trigger the mandatory provisions of rule 18a.

Although two different judges presided over the landmark jury trial in *Texaco, Inc. v. Pennzoil, Co.*, Texaco considered neither judge satisfactory and unsuccessfully attempted to disqualify each. Three months into the trial, retired district judge Solomon Casseb replaced Judge Farris, who had to step down because of ill health. Following entry of the judgment, Texaco moved to disqualify Judge Casseb based on a newspaper article that alleged that Casseb had not completed the years of service required for retirement status before he replaced Farris. Although Judge Casseb forwarded Texaco's motion to the district's presiding judge for a hearing, in accordance with rule 18a, the presiding judge did not conduct a separate hearing on the recusal motion.

After observing that Judge Casseb's retirement status had been certified by

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249. 732 S.W.2d 648 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.).
250. Id. at 655.
251. TEX. R. CIV. P. 18a.
252. Id. 18a(a).
253. Id. 18a(c), (d).
254. 731 S.W.2d 719 (Tex. App.—Houston [1st Dist.] 1987, writ dism'd w.o.j.).
255. Id. at 722.
256. Id.
257. 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).
258. Since Judge Casseb was not holding judicial office when he replaced Farris, under Texas law he could only qualify as a retired judge subject to assignment if he had accrued 12 years of service. See TEX. GOV'T CODE ANN. § 74.054 (Vernon Pam. Supp. 19878); TEX. REV. CIV. STAT. ANN. tit. 110B, § 44.101(a)(2) (Vernon Pam. Supp. 1988).
259. TEX. R. CIV. P. 18a(d).
the chief justice of the Texas Supreme Court before commencement of the trial, the court of appeals held that the proper method for attacking the qualifications of a retired judge is through a quo warranto proceeding directly against the judge, not through a collateral attack under the guise of rule 18a, which Texaco had attempted. The court also found no error in the presiding judge's refusal to conduct a hearing on Texaco's motion, holding that rule 18a does not mandate a hearing unless the recusal motion states valid grounds for disqualification.

The court of appeals was equally unimpressed with Texaco's efforts to disqualify Judge Farris, who originally presided over the trial court proceedings. Citing canon 3C of the Code of Judicial Conduct, Texaco moved to disqualify Judge Farris before trial on the basis of an appearance of impropriety created by a $10,000 campaign contribution and service on Judge Farris's campaign steering committee by Pennzoil's lead counsel. The court of appeals held, however, that article V, section 11 of the Texas Constitution contains the sole bases under Texas law for the disqualification of a judge. Since Texaco failed to allege any constitutional grounds for disqualification, the judge assigned to hear the motion simply had no basis to disqualify Judge Farris, notwithstanding the provisions of canon 3C. The court likewise dismissed Texaco's claim that the Texas Constitution's limitation on the bases for disqualification of a judge deprived Texaco of due process because the court found no evidence in the record that Judge Farris was either biased or prejudiced in any manner or that he enjoyed any pecuniary interest in the outcome of the case.

Although it came much too late to benefit Texaco, the recent enactment of amendments to the Texas Rules of Civil Procedure expands the grounds for disqualification and recusal of judges in Texas. New rule 18b, which partially tracks the language of canon 3C, provides that judges shall recuse

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260. 729 S.W.2d at 855.
261. Id. at 856.
263. Tex. Const. art. V, § 11 prohibits a judge from sitting in any case in which he may be interested, or when he is related to a party by affinity or consanguinity in a degree prescribed by law, or when he was counsel in the case.
264. 729 S.W.2d at 842-43. The Texaco court distinguished that case from the case of Manges v. Garcia, 616 S.W.2d 380 (Tex. Civ. App.—San Antonio 1981, no writ). 729 S.W.2d at 843. In Manges the court of appeals held that canon 3C contemplates that a judge's refusal to sit in a case may be based on a reason not included in the Texas Constitution. 616 S.W.2d at 382. The Texaco court distinguished between the two cases on the basis that the trial judge in Manges voluntarily recused himself. 729 S.W.2d at 843.
265. 729 S.W.2d at 844. A similar effect resulted from the decision in the case of A.H. Belo Corp. v. Southern Methodist Univ., 734 S.W.2d 720 (Tex. App.—Dallas 1987, no writ), in which the court did not find any basis under the Texas Constitution to disqualify the trial judge, even though the trial judge's financial support of the defendant university's booster group, the Mustang Club, qualified him as a representative of the university under article 3 of the NCAA Constitution. Id. at 722.
266. 729 S.W.2d at 845. The court also observed that most judicial disqualification matters do not rise to a constitutional level and that only in extreme cases would the constitution require disqualification of a judge on the basis of bias and prejudice. Id. at 844 (citing Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986)).
themselves in proceedings in which their impartiality might reasonably be questioned due to, among other things, personal bias or prejudice concerning the subject matter or parties involved.\textsuperscript{267} The rule also lists three grounds for mandatory disqualification of judges, essentially repeating the bases for judicial disqualification set forth in the Texas Constitution.\textsuperscript{268} The amended rule 18a, which governs the procedure for recusal or disqualification, requires the moving party to now verify its motion and state with particularity the grounds for disqualification or recusal.\textsuperscript{269} In addition, if the presiding judge or the judge designated by him determines that the moving party brought a motion to recuse solely for the purpose of delay and without sufficient cause, the judge hearing the motion may, upon motion of the opposing party, impose any sanction authorized by rule 215(2)(b).\textsuperscript{270} No doubt, with this amendment to rule 18a the rulemakers intended to eliminate the practice of using motions to disqualify as a delaying tactic.

XI. SUMMARY JUDGMENT

A number of cases during the Survey period involved the form of evidence that either supports or defeats a motion for summary judgment. In a suit for breach of an aircraft leasing agreement, the plaintiff in \textit{Republic National Leasing Corp. v. Schindler}\textsuperscript{271} submitted the only summary judgment evidence, an affidavit of its credit manager. The affidavit stated that the defendant failed to make certain lease payments and gave the amount of claimed damages. Disagreeing with the court of appeals' conclusion that the matters in the affidavit could not be readily controverted as no discovery had been performed,\textsuperscript{272} the supreme court ruled that the affidavit properly supported a summary judgment.\textsuperscript{273} The supreme court also held that the trial court properly authenticated under rule 166a copies of documents attached to the affidavit, which the affidavit swore were true and correct.\textsuperscript{274} In \textit{MBank Brenham, N.A. v. Barrera}\textsuperscript{275} the defendant claimed that a fact issue existed based on an admission contained in the plaintiff's original petition, even though the plaintiff's amended petition did not contain the same admission. The supreme court disagreed, however, because the defendant failed to authenticate the abandoned pleading by attaching it to an affidavit or by other means.\textsuperscript{276}

\begin{itemize}
  \item \textsuperscript{267} TEX. R. CIV. P. 18b(2).
  \item \textsuperscript{268} See id. 18b(1); TEX. CONST. art. V, § 11.
  \item \textsuperscript{269} TEX. R. CIV. P. 18a(a). The moving party must also make the motion based on personal knowledge and the motion must set forth facts that would be admissible in evidence. \textit{Id}. The motion may state facts based upon information and belief if the motion specifically states the grounds for such belief. \textit{Id}.
  \item \textsuperscript{270} Id. 18a(h); see id. 215(2)(b).
  \item \textsuperscript{271} 717 S.W.2d 606 (Tex. 1986).
  \item \textsuperscript{272} See TEX. R. CIV. P. 166a(c).
  \item \textsuperscript{273} 717 S.W.2d at 607.
  \item \textsuperscript{274} \textit{Id}.
  \item \textsuperscript{275} 721 S.W.2d 840 (Tex. 1986).
  \item \textsuperscript{276} \textit{Id}. at 842.
\end{itemize}
In *Cheatham v. Allstate of Texas, Inc.*, a suit for the brokerage commission rising out of the sale of a business, the defendant filed an affidavit claiming that he had not purchased the particular business in question but had only purchased certain personal assets. The court of appeals decided that such statements did not constitute summary judgment evidence since they were merely contentions as to the proper interpretation of a written contract related to the transaction. Accordingly, the court affirmed the summary judgment granted by the trial court. The court of appeals in *Woods v. Applemark Enterprises, Inc.* held that an affidavit was not defective merely because the affiant did not state that the statements contained in the affidavit were true and correct. The court noted that the affidavit recited that the affiant had personal knowledge of the facts set forth and that it contained a proper verification by a notary public.

Two cases considered issues related to the timing of materials submitted in connection with a summary judgment motion. In *Energo International Corp. v. Modern Industrial Heating, Inc.* the defendant filed an amended answer on the day of the summary judgment hearing. Observing that courts consider a summary judgment hearing to be a trial for purposes of rule 63, which governs the filing of amended pleadings without leave of court, the appellate court ruled that the answer was untimely and would not defeat the motion for summary judgment. In reaching that result, the court disregarded an entry on the trial court's docket sheet that indicated the trial court had granted leave for the defendant to file the amended pleadings. According to the court of appeals, a clerk makes a docket entry only for the convenience of the clerk and the trial court and not as part of the record. In *City of Dallas v. Continental Airlines, Inc.* the movant filed a reply brief with additional evidence only three days before a summary judgment hearing. Based on the provision in rule 16a requiring a movant to file all supporting evidence at least twenty-one days prior to hearing, the nonmovant filed a motion to strike, which the trial court denied. The court of appeals presumed that the trial court had impliedly granted leave for the filing of the reply materials by denying the motion to strike and, thus, that evidence was properly part of the evidence. Rule 166a(c) requires the party seeking summary judgment to file and

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277. 730 S.W.2d 426 (Tex. App.—Dallas 1987, no writ).
278. Id. at 427.
279. Id.
280. 729 S.W.2d 328 (Tex. App.—Houston [14th Dist.] 1987, no writ).
281. Id. at 330.
282. Id.
283. 722 S.W.2d 149 (Tex. App.—Dallas 1986, no writ).
284. TEX. R. CIV. P. 63.
285. 722 S.W.2d at 152.
286. Id. at 151.
287. Id.
288. 735 S.W.2d 496 (Tex. App.—Dallas 1987, no writ).
289. TEX. R. CIV. P. 166a(c).
290. 735 S.W.2d at 500-01.
291. TEX. R. CIV. P. 166a(c).
serve its motion for summary judgment at least twenty-one days before the
time specified for hearing. In Williams v. City of Angleton292 the court of
appeals concluded that the calculation of the twenty-one day period must
exclude the day of the notice and the day of the hearing.293 Employing that
method of computation, the court found in this case that the nonmovant
received only twenty days notice of the hearing.294 Even though the trial
court recessed the hearing for one day, the appellate court decided that sum-
mary judgment was improperly granted in light of the lack of timely no-
tice.295 In Davis v. Davis296 the nonmovant plaintiff did not receive twenty-
one days notice of the motions for summary judgment filed by two of the
three defendants in the case. The court of appeals, however, held that the
nonmovant waived any error due to lack of notice because the nonmovant
participated in the hearing and did not object, seek a continuance, or file a
motion for new trial to preserve error.297

As noted earlier in this article,298 parties no longer file depositions, inter-
rogatory answers, and responses to requests for documents with the court or
the clerk. In an effort to make rule 166a consistent with that change, the
rule now provides that the trial court may consider deposition transcripts,
interrogatory answers, and other discovery responses that the parties refer-
ence or set forth in the motion or response.299 The trial court, however, can
only consider admissions contained in responses to requests for admissions if
the parties have filed them at the time of the hearing.300

XII. SPECIAL ISSUE SUBMISSION

Rule Changes. Since 1973, the rules have allowed the trial courts to sub-
mit special issues in "broad-form" rather than by separate questions with
respect to each element of the case.301 In recent years the supreme court has
strongly indicated its preference for the broad submission form.302 Now,
rule 277303 specifically indicates a strong preference for the broad-form as
well.304 The rulesmakers also amended the same rule to provide that the
court may require affirmative findings of liability before it submits a damage
question to the jury.305

The rulesmakers made other changes to the rules governing special issues,
but most were changes of form rather than substance. In conformity with

292. 724 S.W.2d 414 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).
293. Id. at 417.
294. Id.
295. Id.
296. 734 S.W.2d 707 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).
297. Id. at 712.
298. No copy.
299. See supra notes 157-189 and accompanying text.
300. Tex. R. Civ. P. 166a(c).
301. Id.
303. E.g., Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 19984).
305. Rule 277 provides that "[i]n all jury cases the court shall, whenever feasible, submit
the cause upon broad-form questions [rather than 'issues'].” Id. (emphasis added).
existing practice a provision was added to rule 272\textsuperscript{306} that requires parties to object to the charge outside the presence of the jury.\textsuperscript{307} The rules have long provided that the court must support issues with the pleadings and evidence.\textsuperscript{308} The provision in the rules now requires the court to also submit to the jury instructions and definitions raised by the pleadings and evidence.\textsuperscript{309} Finally, in cases in which the jury’s answers are in conflict, the rules now direct the trial court to instruct the jury, in writing, of the nature of the conflict, unresponsiveness or incompleteness of the answers and to provide the jury with additional instructions, if proper.\textsuperscript{310}

\textit{Case Law.} The trend of supreme court decisions on special issues continued to favor plaintiffs. In \textit{Birchfield v. Texarkana Memorial Hospital},\textsuperscript{311} a negligence action against a number of doctors and a hospital, the trial court submitted a broad-form negligence issue that the defendants claimed as worded, indicated to the jury that in the trial court’s opinion the plaintiff had shown proximate cause.\textsuperscript{312} The supreme court disagreed with the defendant’s contention and held that any comment by the trial court was incidental.\textsuperscript{313} The court also approved the trial court’s definition of ordinary care that referenced the degree of care that a hospital would have exercised “under the same or similar circumstances” rather than referring to a hospital “in this or similar communities.”\textsuperscript{314}

In \textit{Placencio v. Allied Industrial International, Inc.},\textsuperscript{315} a products liability case, the defendant submitted certain misuse issues but did not condition the issue regarding the percentage of causation attributable to the misuse of the product on an affirmative finding of proximate cause by such misuse. The supreme court held that the trial court had not erred in refusing to submit the misuse issues.\textsuperscript{316} The court found that the defendant’s misuse issues assumed the truth of certain material controverted facts and therefore, according to the court, the requested issues were not substantially correct in form.\textsuperscript{317} Rule 278 requires a party to submit a substantially correctly worded issue in order to preserve error.\textsuperscript{318}

Finally, in \textit{Wilgus v. Bond}\textsuperscript{319} the plaintiff brought an action for breach of fiduciary duty, fraud, and conversion. Although issues were submitted to

\begin{itemize}
\item \textsuperscript{306} Id.
\item \textsuperscript{307} Id. 272.
\item \textsuperscript{308} See id; Tex. R. Civ. P. 272 (Vernon 1976).
\item \textsuperscript{309} See Tex. R. Civ. P. 279 (Vernon 1977).
\item \textsuperscript{310} TEX. R. Civ. P. 278.
\item \textsuperscript{311} Id. 295.
\item \textsuperscript{312} 31 Tex. S. Ct. J. 36 (Oct. 28, 1987).
\item \textsuperscript{313} The issue asked whether the the jury found that the defendant was “negligent in the care and treatment of [the plaintiff] with respect to any [treatment] which was a proximate cause of her [injury.]” Id. at 39.
\item \textsuperscript{314} Id.
\item \textsuperscript{315} Id. at 38.
\item \textsuperscript{316} 724 S.W.2d 20 (Tex. 1987).
\item \textsuperscript{317} Id. at 21.
\item \textsuperscript{318} Id.
\item \textsuperscript{319} TEX. R. Civ. P. 278.
\end{itemize}
the jury on all three theories, the damage issue inquired as to what sum of money would reasonably compensate the plaintiff for its damages rather than tying the issue to any particular theory. The high court agreed that a jury must measure damages with a legal standard, but held that the defendant waived any error by failing to object on that ground in the trial court.\textsuperscript{320}

Two court of appeals decisions addressed some interesting points about special issues. In \textit{Liberty Mutual Fire Insurance Co. v. McDonough},\textsuperscript{321} a worker's compensation case, the trial court's damage issue did not indicate that the jury could answer "none" in response. Although the defendant made a valid objection to the issue in the lower court on that basis, the court of appeals found that the trial court committed no reversible error.\textsuperscript{322} The appellate court noted that the jury answered "0" to another damage issue and, thus, the court presumed the jury knew that it could answer similarly to other damage issues.\textsuperscript{323} In \textit{Sours v. Robinson}\textsuperscript{324} the trial court instructed a jury to try to make its decision that day. The jury came back the same day with a verdict. The court of appeals held that the instruction was not coercive, especially since the evidence in the record indicated that the jurors did not feel coerced.\textsuperscript{325}

XIII. JURY PRACTICE

The amendments to the rules changed the time limit for making a request for a jury trial. Under amended rule 216,\textsuperscript{326} a party must file a written request for jury trial within a reasonable time before the trial date on the non-jury docket, but no less than 30 days before that date.\textsuperscript{327} In addition, the jury fee is now ten dollars for the district court and five dollars for the county court.\textsuperscript{328}

The amendments have also modified the time limit for demanding a jury trial in the justice courts. Except for forcible entry and detainer suits, the rules require a party desiring a jury in the justice courts to make such a demand not less than one day in advance of the trial date and to deposit a jury fee of five dollars.\textsuperscript{329} In forcible entry and detainer cases a party must make a jury request within five days from the date of service on the defendant and, in addition, the requesting party must pay a jury fee of five dollars.\textsuperscript{330}

The supreme court considered the procedures for demanding a jury trial in \textit{Citizens State Bank v. Caney Investments}.\textsuperscript{331} In \textit{Caney Investments} the
court held that a trial court must honor a timely demand for a jury trial with respect to an application for a permanent injunction, even if the court had previously set the matter on the nonjury docket.\textsuperscript{332} In this case, the trial court set the case during a week when the court had not called any jury panels. The plaintiff subsequently made a timely jury demand under rule 216 and paid the appropriate fee. The trial court refused to allow a jury trial because the court had given the matter priority and had set it during a nonjury week.\textsuperscript{333} The supreme court, however, ruled that the trial court's action was an egregious error and that the plaintiff was entitled to a jury trial.\textsuperscript{334}

As noted in a prior survey,\textsuperscript{335} a juror may no longer testify as to any matter or statement that occurred during the course of a jury's deliberations under rule 327\textsuperscript{336} and evidence rule 606(b).\textsuperscript{337} Under those rules, however, a juror may testify whether anyone improperly brought any outside influence to bear upon any juror.\textsuperscript{338} In \textit{Weaver v. Westchester Fire Insurance Co.}\textsuperscript{339} the supreme court gave a restrictive interpretation to application of rule.\textsuperscript{340} In this worker's compensation suit the plaintiff-employee filed an affidavit of one of the jurors in support of a motion for new trial, which was denied by the trial court. The affidavit alleged that the jurors discussed that no one from the employee's company had appeared to testify on behalf of the employee, that the persons who had observed the accident causing the employee's injury had not appeared to testify, and that the employee should have had hospitalization insurance. The supreme court held that the juror's affidavit did not show any evidence of outside influence; therefore, the trial court properly overruled the employee's motion for new trial.\textsuperscript{341}

**XIV. DISMISSAL AND MOTIONS FOR NEW TRIAL**

The rule amendments also modified the rules related to voluntary dismissal, nonsuit, and dismissal for want of prosecution. The rulesmakers amended rule 162 in order to fix a definite time after which a party may not voluntarily dismiss or nonsuit a cause of action. Under the amended rule, a plaintiff may take a dismissal or nonsuit at any time before he has introduced all of his evidence other than rebuttal evidence.\textsuperscript{342} In addition, the rule authorizes the clerk to tax costs against the dismissing party unless otherwise

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\textsuperscript{332} 31 Tex. S. Ct. J. 24 (Oct. 21, 1987).

\textsuperscript{333} \textit{Id.} at 24-25.


\textsuperscript{335} 31 Tex. S. Ct. J. at 24; see Ex. Parte Allison, 99 Tex. 455, 456, 90 S.W. 870, 871 (1906) (party has right to jury in hearing for a permanent injunction).

\textsuperscript{336} See Figari, Graves & Dwyer, 1985 Annual Survey, \textit{supra} note 121, at 453.

\textsuperscript{337} \textit{Tex. R. Civ. P.} 327(b).

\textsuperscript{338} \textit{Tex. R. Evid.} 606(b).

\textsuperscript{339} \textit{Tex. R. Civ. P.} 327(b); \textit{Tex. R. Evid.} 606(b).

\textsuperscript{340} 30 Tex. S. Ct. J. 617 (Sept. 16, 1987).

\textsuperscript{341} \textit{Id.} at 617.

\textsuperscript{342} \textit{Tex. R. Civ. P.} 162. The supreme court repealed rule 164, which had governed nonsuits, when the rulesmakers consolidated the provisions concerning nonsuit and dismissal into rule 162.
ordered by the court.\textsuperscript{343}

Rule 165a,\textsuperscript{344} which governs dismissal for want of prosecution, now provides that the trial court may set a case for a dismissal hearing or place the case on the dismissal docket when a party seeking affirmative relief fails to appear for any hearing or trial of which he had notice\textsuperscript{345} or when the trial court fails to dispose of the case within the time standards declared by the supreme court under its administrative rules.\textsuperscript{346} An important provision of rule 165a requires the trial court to dismiss for want of prosecution any matter the court sets for dismissal unless the plaintiff shows good cause for maintaining the case on the docket.\textsuperscript{347} If the trial court keeps the case on the docket, the rule obligates the court to enter a pretrial order that assigns the case a trial date and sets deadlines for various pretrial matters.\textsuperscript{348} After the court enters the pretrial order it may only grant a continuance if the court specifically determines, by court order, that the reasons are valid and compelling.\textsuperscript{349}

Amended rule 567,\textsuperscript{350} which covers motions for new trial in the justice courts, requires the parties to support by affidavit any new trial motion, unless the grounds for new trial are that the verdict or the judgment is contrary to the law or the evidence or that the justice erred in some matter of law.\textsuperscript{351} Rule 749\textsuperscript{352} prohibits all motions for new trial in forcible entry and detainer cases in the justice courts.\textsuperscript{353} In \textit{Garza v. Gonzales},\textsuperscript{354} a forcible entry and detainer case, the county court judge originally signed a judgment in favor of the plaintiff and then granted a new trial. One hundred days after the judge signed the original judgment the county court judge changed his ruling concerning the new trial and reinstated the original judgment. The court of appeals, without mentioning rule 749, relied on the provision in rule 329b\textsuperscript{355} that limits the trial court's power to act seventy-five days after the court signs the judgment\textsuperscript{356} and held that the trial court, in this case, did not have authority to vacate its order granting a new trial.\textsuperscript{357}

Finally, in \textit{Luna v. Southern Pacific Transportation Co.},\textsuperscript{358} a personal injury suit, one of the defendants complained on appeal that the trial court had improperly apportioned damages in its judgment. The supreme court held

\begin{itemize}
  \item \textsuperscript{343} \textit{Id.}
  \item \textsuperscript{344} \textit{Id.}
  \item \textsuperscript{345} \textit{Id. 165a.}
  \item \textsuperscript{346} \textit{Id. 165a(1).}
  \item \textsuperscript{347} \textit{Id. 165a(2).} The time standards are currently eighteen months for a civil jury case or twelve months for a civil nonjury case.
  \item \textsuperscript{348} \textit{Id. 165a(1).}
  \item \textsuperscript{349} \textit{Id.}
  \item \textsuperscript{350} \textit{Id.}
  \item \textsuperscript{351} \textit{Id. 567.}
  \item \textsuperscript{352} \textit{Id. 749.}
  \item \textsuperscript{353} \textit{Id. 749.}
  \item \textsuperscript{354} \textit{Id.}
  \item \textsuperscript{355} 737 S.W.2d 588 (Tex. App.—San Antonio 1987, no writ).
  \item \textsuperscript{356} TEX. R. CIV. P. 329b.
  \item \textsuperscript{357} \textit{Id. 329b(c).}
  \item \textsuperscript{358} 737 S.W.2d at 588.
\end{itemize}
that the defendant waived this point of error by failing to incorporate the apportionment complaint in its motion for new trial.359

XV. Appellate Procedure

The most significant development in appellate procedure during the Survey period was the enactment of numerous amendments to the Texas Rules of Appellate Procedure, effective January 1, 1988.

Suspension of Enforcement of Judgment Pending Appeal in Civil Cases. Rules 47 and 49 of the Texas Rules of Appellate Procedure360 govern the procedure for suspending enforcement of judgments through the filing of a supersedeas bond or other permitted security.361 The recent amendments to these rules effected substantial changes in their terminology. For example, the amendments replaced the terms “appellant” and “appellee” with “judgment debtor” and “judgment creditor,” respectively.362 Likewise, the amended rules refer to “bonds” or “deposits” for the most part as “security,”363 and the court now “suspending enforcement” of a judgment rather than the old terminology of “superseding” or “suspending execution” on that judgment.364

More importantly, the upheaval surrounding Texaco’s efforts to supersede the record judgment against it caused the rulesmakers to amend rule 47 so that the rule no longer automatically requires the appellate to post the bond for a money judgment in at least the amount of the judgment, interest and costs.365 The trial court can now order a reduced bond, after notice to the parties and a hearing, if the court finds that posting a bond in the amount formerly required would irreparably harm the judgment debtor and a reduced amount would not substantially harm the judgment creditor.366 The new rule permits the trial court to stay enforcement of a money judgment based on any order that adequately protects the judgment creditor from any loss or damage caused by the appeal.367 In light of this change granting the trial court discretionary authority to fix the amount of security, the rulesmakers inserted a new provision into rule 47 that provides the trial court with continuing jurisdiction to determine the adequacy of security in the event of a change in circumstances.368

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359. 724 S.W.2d 383 (Tex. 1987).
360. Id. at 384.
361. TEX. R. CIV. P. 47, 49.
362. See id. 47(a), (c)-(f), (h), (i), 49(c).
363. See id. 47(d)-(h), (j), 49(c).
364. See id. 47(a), (d)-(f), 49(b), (c); see also id. 43(b) (language amended to conform to amended rules 47 and 49).
365. Rule 47(b), prior to its recent amendment, provided that the bond or deposit required to supersede a money judgment must at least equal the amount of the judgment, interest, and costs. Tex. R. App. P. 47(b) (West 1987).
366. TEX. R. CIV. P. 47(b).
367. Id. The rulesmakers made similar amendments allowing the court to suspend enforcement of money judgments with or without bond, to sections (d) and (e) of rule 47, which concern judgments of foreclosure on real estate and personal property. Id. 47(d), (e).
368. Id. 47(k). If the trial court makes any order regarding the security or sureties after the
The court of appeals may review any order entered by the trial court pursuant to amended rule 47. The rule requires the court of appeals to hear a motion for review at the earliest practical time but it allows the court to remand the matter to the trial court for findings of fact or for the taking of evidence. Since the amendments to rules 47 and 49 contemplate that the trial court will base the amount of security on the circumstances of the parties, the rulesmakers also amended the post-judgment discovery rule to permit discovery of information relevant to the security issue.

**Briefs.** Apart from a semantic change made to rule 74 and the elimination of an existing ambiguity in rule 136, the only amendment to the rules concerning appellate briefs imposes a page limitation on all briefs filed in the courts of appeal or the Supreme Court of Texas. Under the new rules appellate briefs in civil cases cannot exceed fifty pages, excluding the table of contents, index of authorities, points of error, and any addenda, unless the court permits a longer brief upon motion of the party. Applications for writ of error to the supreme court, briefs in response to an application, and amicus briefs filed with the court also may not exceed fifty pages without an order of the supreme court.

**Disqualification of Judges.** Rule 15a is a new rule that states the grounds for recusal or disqualification of an appellate judge or justice. The rule is identical to the companion rule governing disqualification of trial judges and provides that appellate judges shall disqualify themselves in all proceedings in which they, or another lawyer with whom they previously practiced served as a lawyer in the matter in controversy, they know that they have an interest in the subject matter in controversy, either individually or as a fiduciary, or they are related to either of the parties by affinity or consanguinity within the third degree. The rule also provides that appellate judges

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369. *Id.* 49(b).
370. *Id.*
371. TEX. R. CIV. P. 621a now provides:
Also, at any time after rendition of judgment, either party may, for the purposes of obtaining information relevant to motions allowed by Texas Rules of Appellate Procedure 47 and 49 initiate and maintain in the trial court in the same suit in which said judgment was rendered any discovery proceeding authorized by these rules for pre-trial matters.
372. TEX. R. CIV. P. 74(f) now provides that the brief of the argument "may," rather than "shall," present separately or grouped the points relied upon for reversal.
373. *Id.* 136(a) now makes it clear that the fifteen-day period for responding to an application for writ of error to the supreme court commences upon the filing of the application in the supreme court. Although this was the existing practice even before enactment of the amendment, the rule was ambiguous since the applying party files the applications initially with the court of appeals.
374. *Id.* 74(h). The rule operates only in the absence of local rules for individual courts of appeal that specify some contrary rule. *Id.*
375. *Id.* 131(i), 136(e).
376. *Id.* 15a.
377. See TEX. R. CIV. P. 18a, discussed supra notes 251-70 and accompanying text.
378. TEX. R. CIV. P. 15a(1).
should recuse themselves in any proceeding in which someone might question their impartiality because of, among other things, personal bias or prejudice concerning the subject matter or a party in the proceeding.\textsuperscript{379}

\textit{The Record on Appeal.} Prior to its amendment, rule 54\textsuperscript{380} required the appellant in any case in which either party made a timely motion for new trial or modification of the judgment to file the transcript and the statement of facts in the appellate court within one hundred days after the trial judge signed the judgment.\textsuperscript{381} Since either party could perfect its appeal up to ninety days after the trial judge signed the judgment under those circumstances, the rule proved unwieldy. The rulesmakers accordingly amended the rule to extend the period for filing the appellate record to 120 days after the date the trial judge signs the judgment.\textsuperscript{382} The rule continues to require the appellant to file the record within sixty days of judgment when neither party files a timely motion for new trial or modification of the judgment.\textsuperscript{383} As the result of an amendment of no apparent consequence, rule 54(a) now also provides that the appellate court has the authority to consider all timely filed transcripts and statements of fact.\textsuperscript{384}

\textit{Supreme Court Jurisdiction and Procedure.} On June 20, 1987, several wide-ranging amendments to section 22.001 of the Texas Government Code,\textsuperscript{385} which sets forth the jurisdiction of the Supreme Court of Texas, became effective.\textsuperscript{386} The legislature also expanded the jurisdiction of the supreme court to now allow writs of error in cases involving divorce, child custody, or support.\textsuperscript{387} In those civil cases in which the statutes neither prohibit writs of error by the supreme court,\textsuperscript{388} nor oblige the court to assume jurisdiction,\textsuperscript{389} the court now has jurisdiction when it appears that the court of appeals has committed an error of law that is so important to state jurisprudence that it requires correction.\textsuperscript{390} The supreme court no longer automatically assumes jurisdiction over cases in which the court of appeals commits reversible error. Instead, the court must first determine whether the error is significant

\begin{itemize}
\item \textsuperscript{379} Id. 15a(2).
\item \textsuperscript{380} Id. Tex. R. App. P. 54(a) (Vernon Special Pam. 1987).
\item \textsuperscript{381} Id. 54(a).
\item \textsuperscript{382} TEX. R. CIV. P. 54(a).
\item \textsuperscript{383} Id.
\item \textsuperscript{384} Id. The rule continues to provide, as it did before, that the court has no authority to consider any portion of the record that is filed late. Id.
\item \textsuperscript{385} TEX. GOV’T CODE ANN. § 22.001 (Vernon Pam. Supp. 1988).
\item \textsuperscript{386} Act of June 20, 1987, ch. 1106, 1987 Tex. Sess. Law Serv. 7649 (Vernon).
\item \textsuperscript{387} Id. § 2, at 7650 (deleting former subsection (b)(3) of TEX. GOV’T CODE ANN. § 22.225.
\item \textsuperscript{388} See TEX. GOV’T CODE ANN. § 22.225(b)(1)-(6) (Vernon Pam. Supp. 1988) (listing cases, such as those involving slander or temporary injunction, in which the judgment of the court of appeals is conclusive as to the law and facts).
\item \textsuperscript{389} Id. § 22.001(a)(1)-(5) provides for appellate jurisdiction in the supreme court of cases in which a justice dissented in the court of appeals, cases in which the decision conflicts with another appellate decision regarding a material issue of law, cases involving the construction or the validity of a statute necessary to determine the case, and cases involving state revenue or in which the railroad commission is a party.
\item \textsuperscript{390} Id. § 22.001(a)(6).
\end{itemize}
to the overall fabric of Texas law. The rulesmakers amended rule 133 of the Texas Rules of Appellate Procedure to reflect the jurisdictional amendment, deleting the writ notation "refused, no reversible error." In its place the rulesmakers substituted the new notation "writ denied," which denotes that the court was not satisfied that the court of appeals correctly declared the law in all respects but found no error of law that required reversal or was of sufficient importance to the development of Texas law as to warrant consideration by the court.

The rulesmakers slightly changed procedures involving original proceedings for writs of mandamus, prohibition, and injunction during the survey period. Although rule 121 continues to require the petitioner to file three copies of his motion, petition, and brief with the clerk when he initiates the proceeding in the court of appeals, the amended rule clarifies that the petitioner must file twelve copies if he files with the supreme court. In addition, the petitioner's original filing must now include a certified or sworn copy of the order complained of and other relevant exhibits. For those who may have overlooked rule 13, amended rule 121 also reminds the petitioner to include a deposit for costs with his filing.

Finally, the rulesmakers amended rule 122, adding habeas corpus to the causes that the supreme court may rule upon without hearing oral argument.

Miscellaneous. Rule 52 of the Texas Rules of Appellate Procedure previously required no offer of proof to preserve error when the trial court excluded evidence if no party requested an offer and the context of the questions asked revealed the substance of the excluded evidence. The amended rule, however, requires an offer of proof in all cases before a party can predicate error upon the trial court's exclusion of evidence.

The scope of rule 84, which permits an appellate court to assess damages against an appellant who prosecutes an appeal either without sufficient cause or for delay, is now limited to courts of appeal. The rulesmakers, however, did not intend by this amendment to deprive the supreme court of its


392. Tex. R. Civ. P. 133(a). The rulesmakers also rewrote rule 140, which governs direct appeals to the supreme court. The amendments to that rule, however, appear wholly semantic and intended for the purpose of clarification, and do not effect any substantive changes. See id. 140.

393. Id. 121(3).

394. Id. 121(a)(4).

395. Id. 13(c) (requiring a deposit of costs in original proceedings initiated in the appellate courts).

396. Id. 121a(5).

397. Id. 122.


399. Tex. R. Civ. P. 52(b). The rulesmakers also amended evidence rule 103, which concerns offers of proof, to conform to this new requirement set forth in amended rule 52. See Tex. R. Evid. 103(a)(2).

400. Tex. R. Civ. P. 84.
authority to assess damages for delay. The rulesmakers inserted a new provision, identical to rule 84 but applying to the supreme court, into rule 182 to preserve this authority.401

Rule 85,402 involving remittiturs in civil cases, also has a new provision. The second section of the amended rule now allows a remitting party to contest the remittitur on appeal by cross-point, unless that party is the appellant.403 Another amendment to the rule appears to have changed the appellate standard of review of a trial court's refusal to suggest a remittitur. Rule 85 formerly authorized the court of appeals to suggest a remittitur only if it found that the trial court had abused its discretion.404 The amended rule, however, gives that authority to the appellate court whenever it finds that the trial court simply erred.405

The rulesmakers also amended rule 90(a),406 which concerns decisions and opinions of the courts of appeals, during the survey period but the effect of that amendment is unclear. Before its amendment, the rule required the court to "decide every substantial issue raised and necessary to disposition of the appeal."407 The amended rule, on the other hand, only requires the court's opinion to "address every issue raised and necessary to final disposition of the appeal."408 Although these differences between the two versions of the rule appear slight, judicial clarification of the amendment may be necessary before practitioners can safely assume that the amendment effected no substantive change in the courts' widespread practice of ignoring those points that they determine are unnecessary to the decision, even though the parties properly raise the points on appeal.

Two cases decided during the Survey period serve as a warning to appellees who choose to rely on cross-points as the means of preserving their complaints about the judgment rendered by the trial court. In Chapman Air Conditioning, Inc. v. Franks409 one of the appellees, by cross-points, attacked the trial court's failure to award him attorney's fees in the judgment. In its opinion the court of appeals acknowledged that an appellee may use cross-points to bring forward complaints about the actions of the trial court, but the cross-points must defend the judgment against the appellant.410 Otherwise, the cross-points cast the appellee in the role of an appellant seeking reversal or some modification in the judgment.411 Since the appellee in Franks prayed for reversal of the judgment, at least insofar as it failed to award him the attorney's fees he claimed, and he failed to comply with the procedural requirements for perfecting an appeal, the court dismissed his

401. Id. 182(b).
402. Id. 85.
403. Id. 85(b).
405. TEX. R. CIV. P. 85(c).
406. Id. 90(a).
408. TEX. R. CIV. P. 90(a).
409. 732 S.W.2d 737 (Tex. App.—Dallas 1987, no writ).
410. Id. at 742.
411. Id.
attempted appeal.\textsuperscript{412} For similar reasons, the court in \textit{City of Dallas v. Moreau}\textsuperscript{413} overruled an appellee's cross-points that complained about the trial court's granting of a summary judgment in favor of two persons who were not parties to the appeal. According to the court, an appellee who has not perfected a separate appeal can only present cross-points regarding matters affecting the interest of the appellant.\textsuperscript{414}

XVI. Res Judicata

For almost a hundred years, since the supreme court's decision in \textit{Texas Trunk Ry. v. Jackson Bros.},\textsuperscript{415} Texas has steadfastly adhered to the rule that a judgment is not final for preclusion purposes while an appeal is pending. During the years following the \textit{Texas Trunk} decision most jurisdictions adopted the contrary federal rule.\textsuperscript{416} Likewise, the Restatement of Judgments adopted the prevailing federal interpretation of finality for res judicata purposes in the event of an appeal.\textsuperscript{417} At long last, the decision in \textit{Scurlock Oil Co. v. Smithwick}\textsuperscript{418} changed Texas law to embrace this majority view.

Overruling \textit{Texas Trunk} and its progeny, the supreme court declared in \textit{Scurlock} that a judgment is final for the purposes of issue and claim preclusion despite the taking of an appeal, unless the appeal amounts to a trial de novo.\textsuperscript{419} Addressing another thorny res judicata issue, the court acknowledged that Mary Carter agreements are so unfair that they may preclude the application of collateral estoppel in later lawsuits.\textsuperscript{420} The court, however, elected to leave that decision, at least initially, to the discretion of the trial courts.\textsuperscript{421} The supreme court warned trial judges to be mindful of the fairness factors enumerated by the Supreme Court in the \textit{Parklane Hosiery} decision when exercising their discretion in these situations.\textsuperscript{422}

In \textit{Byrom v. Pendley}\textsuperscript{423} the Supreme Court of Texas refused to apply res judicata or collateral estoppel to bar a plaintiff's recovery of oil drilling production costs from his co-tenant. The defendant, who had previously prevailed in a separate title suit he brought against the plaintiff relating to the oil lease, claimed that res judicata barred the second suit since the plaintiff

\begin{itemize}
\item \textsuperscript{412} \textit{Id.} at 742-43.
\item \textsuperscript{413} 718 S.W.2d 776 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).
\item \textsuperscript{414} \textit{Id.} at 782.
\item \textsuperscript{415} 85 Tex. 605, 22 S.W. 1030 (1893).
\item \textsuperscript{416} See 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4433, at 313 (1981) (observing that most courts follow the rule established by federal decisions). The established rule in federal court is that a final judgment retains all of its res judicata consequences pending decision on appeal, except in the unusual situation in which the appeal actually involves a full trial de novo. Prager v. El Paso Nat'l Bank, 417 F.2d 1111, 1112 (5th Cir. 1969).
\item \textsuperscript{417} See \textit{RESTATEMENT (SECOND) OF JUDGMENTS} § 13, comment (f) (1982).
\item \textsuperscript{418} 724 S.W.2d 1 (Tex. 1986).
\item \textsuperscript{419} \textit{Id.} at 6.
\item \textsuperscript{420} \textit{Id.} at 7.
\item \textsuperscript{421} \textit{Id.}
\item \textsuperscript{422} \textit{Id.; see Parklane Hosiery Co. v. Shore}, 439 U.S. 322, 331 (1979) (outlining factors determining whether application of collateral estoppel doctrine in particular situation is fair).
\item \textsuperscript{423} 717 S.W.2d 602 (Tex. 1986).
\end{itemize}
could have sought recovery of the production costs in the prior litigation. The defendant further claimed that the first suit collaterally estopped the plaintiff from relitigating the issue of the plaintiff's good faith, which the trial court decided in the first suit. According to the supreme court, the production cost issues were unrelated to those tried in the title suit and did not even accrue until after the judgment in the first suit established that the defendant owned an interest in the mineral lease. The court observed that the court in the first suit decided that the plaintiff was not a bona fide purchaser of the lease because he had been aware of the defendant's claim. That issue, however, which was relevant to the title question, was different than the issue of the plaintiff's good faith in conducting drilling operations, which the defendant presented in the second suit. Accordingly, the court applied neither collateral estoppel nor res judicata to bar the second suit.

XVII. MISCELLANEOUS

New rule 264 of the Texas Rules of Civil Procedure permits the parties to agree to present at trial all testimony and other appropriate evidence by videotape. The expenses of the videotape recordings are taxable as costs and if either party withdraws agreement, the court will charge that party the costs that have accrued up to that point. This new procedure is apparently discretionary with the trial court, however, letting the court ignore the parties' agreement.

An amendment to rule 267 eliminated the trial court's discretion in placing witnesses under the rule. If any party now invokes the rule, exclusion of the affected witnesses from the courtroom is mandatory. The rulesmakers also slightly modified the description of the persons subject to rule 267. If a party is a natural person, his or her spouse is likewise now exempt from the rule's effect. The amended rule also appears to limit the persons a corporation or partnership can designate as its trial representatives to officers and employees. Finally, the rule permits the parties to exempt from the ambit of the rule any other person whose presence is essential to the presentation of their case.

For the weary practitioners struggling to complete their preparations for a temporary injunction hearing in only ten days, the rulesmakers granted

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424. Id. at 606.
425. Id.
426. Id.
427. Id.
428. TEX. R. CIV. P. 264.
429. Id.
430. Id. Unfortunately, the rule is silent on the question of how late in the trial a party can retract agreement to the videotape trial.
431. Id.
432. Id. 267.
433. Id. 267(a).
434. Id. 267(b)(1).
435. Id. 267(b)(2).
436. Id. 267(b)(3).
some relief, albeit limited. Amended rule 680 now authorizes trial courts to enter temporary restraining orders up to fourteen days in length.437