November 2016

Evidence

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Recommended Citation
https://scholar.smu.edu/smulr/vol35/iss1/11

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DURING the survey period Texas courts handed down numerous decisions involving various rules of evidence. The cases of greatest interest lie in the following substantive areas: (1) expert opinion evidence; (2) evidence of settlement; (3) the hearsay rule and its exceptions; (4) corroboration of accomplice testimony; (5) tape recordings; (6) damages; (7) jury misconduct; and (8) parol evidence.

I. EXPERT OPINION EVIDENCE

A. Competency

Whether the person offered as an expert possesses the required qualifications is a preliminary question to be determined by the trial court. The party offering the testimony of an alleged expert has the burden of establishing the expert's qualifications. *Trick v. Trick* presented the question of whether a party had met this burden. In *Trick*, a divorce case that involved the value of stock in a medical professional association, the appellant complained of the trial court's refusal to permit her proposed expert to testify concerning the value of the parties' stock in the medical association. The proposed expert was a high school graduate and had attended the Southwestern Graduate School of Banking at Southern Methodist University, but he did not have a college degree. He had served as a vice president of two separate banks, had been president of a bank for approximately six months, and had been in the banking business for approximately twenty years. At the time of trial, however, he was an official of a chemical company. During questioning on voir dire examination, the proposed expert admitted that he did not belong to any professional organizations or societies, that he was not an accountant, and that he did not subscribe to any trade publications. He also admitted that he had never previously evaluated the stock of a professional association. The court of civil appeals held that the trial court did not abuse its discretion in excluding the testimony of the witness. Reasoning that the witness had never evaluated stock of a professional corporation in twenty years of banking

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2. Id.
4. Id. at 773.
business and had no expertise for making such an evaluation, the appellate court held that the trial court properly concluded that the witness did not possess the requisite qualifications.  

B. Underlying Data

*Moore v. Grantham* 6 addressed the perennial inquiry concerning the extent to which an expert's opinion may be based on hearsay. *Moore* involved an action for damages resulting from personal injuries sustained in an automobile accident. Prior to the accident, the plaintiff had been trained and had worked as an interior designer. She testified that she had attempted to return to interior design work after the accident, but that her injuries had precluded her from doing so. To meet her burden of proof with respect to loss of future earning capacity, the plaintiff called as an expert witness the Director of the Rehabilitation Counselor Education Program, who was a professor at the University of Texas. The expert admitted that he had no personal knowledge of the interior design profession. Rather, in preparation for his testimony, the witness had referred to Department of Labor and Manpower publications as well as correspondence from the plaintiff's former employers and clients. The witness also had interviewed a university home economics professor specializing in interior design and had conducted a survey of local interior design businesses. At trial, however, the plaintiff did not introduce into evidence any of these external sources relied upon by the expert. The trial court allowed the plaintiff's expert to testify that in his opinion the plaintiff's loss of future earning capacity was the difference between the plaintiff's future career expectancy as an interior decorator and her current employment as assistant manager of a retail store. On appeal, the defendant attacked the jury's award of damages for the plaintiff's loss of future earning capacity, contending that the testimony of the plaintiff's expert on damages was based wholly on hearsay and therefore was inadmissible. The court of civil appeals affirmed the trial court, holding that once an expert is qualified the issue of admissibility becomes whether the sources of information relied upon by the expert are of the type reasonably and customarily relied upon by experts in that particular field. 7 The court also stated that the recent trend of judicial decisions was to treat objections such as that made by the defendant as merely going to the weight rather than to the admissibility of the evidence. 8

The Texas Supreme Court reversed the judgment of the court of civil appeals and held that "an expert's opinion may not be based solely on the

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5. *Id.*


8. *Id.*
The court stated that "[w]hile the courts have adopted a more liberal approach in allowing an expert's opinion testimony to be based partially on hearsay, . . . this Court has yet to adopt a rule permitting an expert's opinion testimony to be based solely on hearsay." The court observed that it had rejected such a broad rule of admissibility in two recent decisions, *Slaughter v. Abilene State School* and *Lewis v. Southmore Savings Association*. In *Slaughter* the testifying doctor had not based his expert opinion solely on the patient's history as told by the patient; rather, the expert gained personal knowledge of the patient's condition by making a physical examination and by taking and examining x-rays. Similarly, in *Lewis* there was substantial evidence, based on the personal knowledge of the expert witness, to support the commissioner's order not to exclude the expert's testimony. The supreme court in *Moore* observed that the court of civil appeals had misread these decisions. The expert witness in *Moore* admitted that he had no personal knowledge of the wage scale in the interior design field. Consequently, instead of partially relying on outside sources, the expert in *Moore* relied totally on such sources for his testimony.

In *Texas Employers' Insurance Association v. Carnine* the plaintiff presented the testimony of a medical doctor, who, in testifying concerning his diagnosis, relied in part upon a radiologist's report. The x-rays upon which the radiologist's report was based were not offered into evidence. The court of civil appeals followed the rationale of *Slaughter v. Abilene State School* and held that such evidence was admissible because the doctor's testimony was predicated both on personal knowledge and hearsay. The doctor testified that he had examined the plaintiff on two occasions prior to the date the x-rays were taken. He described numerous tests that he performed on the plaintiff on those occasions, testifying that after his initial examination, but prior to the taking of the x-rays, he believed the plaintiff had sustained a serious injury. Consequently, the doctor's opinion was correctly admitted into evidence. Unlike the situation

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9. 599 S.W.2d at 289.
10. *Id.* (emphasis in original) (citations omitted).
11. *Id.*
12. 561 S.W.2d 789 (Tex. 1977).
13. 480 S.W.2d 180 (Tex. 1972).
14. The Texas Supreme Court in *Moore* also indicated that the opinion in *Lewis* was not an opinion of the Texas Supreme Court. Although all nine justices agreed to the judgment, six justices concurred only in the result reached. 599 S.W.2d at 289 n.2.
15. *Id.* at 289-90.
17. 601 S.W.2d 391 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).
18. 561 S.W.2d 789 (Tex. 1977).
19. 601 S.W.2d at 392.
presented in Moore v. Grantham, the expert’s opinion was not predicated solely on hearsay.

C. Standard of Care

In Texas a patient ordinarily has no cause of action against his doctor for malpractice unless he proves by a doctor of the same school of practice as the defendant that the diagnosis or treatment complained of was such as to constitute negligence and that it was the proximate cause of the patient’s injuries. The testifying expert cannot establish the requisite standard by stating what he would have done under the same or similar circumstances; rather, he must testify as to what the standard itself is.

In Bearce v. Bowers the trial court rendered judgment for the defendant doctor at the close of the plaintiff’s case because the plaintiff had failed to establish the requisite standard of care. The medical doctor called as an expert witness by the plaintiff was not questioned concerning the standard of care. Instead, the questions concerned what that doctor would have done under the circumstances. Affirming the trial court, the court of civil appeals concluded that “what Dr. Whitehouse personally would or would not have done under the same circumstances confronting [the defendant] is insufficient to establish the requisite standard.”

20. 599 S.W.2d 287 (Tex. 1980).
22. For example, a medical expert is not competent to express an opinion as to what constitutes malpractice or negligence, or what a reasonable and prudent doctor would have done under the same or similar circumstances. Snow v. Bond, 438 S.W.2d 549, 550-51 (Tex. 1969). The rationale for these restrictions is that these opinions constitute conclusions that only the trier of facts may draw, and therefore they invade the province of the jury. Conversely, Texas courts have allowed medical experts to testify that medical practices are correct in certain circumstances, Prestegord v. Glenn, 441 S.W.2d 185, 187 (Tex. 1969), that certain hypothetical acts are against standard medical practice, Cleveland v. Edwards, 494 S.W.2d 578, 580 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ), and that certain acts fall below the standard of conduct of other doctors practicing in the area, Martisek v. Ainsworth, 459 S.W.2d 679, 680 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref’d n.r.e.).
24. For example, the expert was asked: “Doctor, . . . what . . . would you have done . . . ?” Id. at 219 (emphasis in original).
25. Id. The identical issue arose in Stanton v. Westbrook, 598 S.W.2d 331 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.), a medical malpractice case in which the trial court granted the doctor’s motion for a directed verdict. The plaintiff appealed, urging the appellate court to adopt an expanded view as to when the requisite standard of care is established. The appellate court refused to expand the existing law, concluding that the evidence established only what the plaintiff’s expert witness “would have done and what he thought was a proper use of the diagnostic tools available to [the defendant] in examining the plaintiff.” Id. at 333 (emphasis in original). The court followed the line of Texas cases that holds that the standard of care may not be established by the expert’s opinion testimony that the defendant-doctor’s treatment constituted negligence. Id. Accordingly, because the expert failed to establish a standard of diagnostic procedure considered acceptable by medical doctors, no fact issue of negligence was raised by the plaintiff, and the trial court’s decision was affirmed. Id. at 333-34.
D. Causation

In *Schaeffer v. Texas Employers' Insurance Association*, a workers' compensation case, the plaintiff failed to establish the requisite causal connection between the disease and his employment because the testimony of his expert witness failed to rise to the level of reasonable medical probability. In *Schaeffer* the jury found that the atypical tuberculosis suffered by the plaintiff was an occupational disease that resulted in total and permanent disability. Two medical experts testified at the trial, the plaintiff's treating physician and the defendant's expert witness. The issue raised by the defendant on appeal was whether the testimony of the plaintiff's expert constituted some evidence of probative force to support the jury finding that the plaintiff was exposed to his medical condition while in the course and scope of his employment. Reversing the judgment of the trial court, the appellate court held that there was no evidence of probative force to support the jury's finding.

After reviewing the testimony of the plaintiff's doctor, the Texas Supreme Court held that the expert's opinion was not based upon reasonable medical probability, but instead relied on "mere possibility, speculation, and surmise." The court reasoned that even though proof of causation of the particular disease involved was difficult, such difficulty did not excuse the plaintiff from introducing some evidence of causation. Furthermore, the court stated that "[t]o ignore the substance of [the expert's] testimony and accept his opinion as 'some' evidence simply because he used the magic words 'reasonable probability' effectively removes this Court's jurisdiction over any case requiring expert opinion testimony."

II. EVIDENCE OF SETTLEMENT

Texas adheres to the rule that information concerning settlement agreements should be excluded from jury consideration because the settlement may be misconstrued as an admission of liability. That rule, however, is

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28. The plaintiff's expert witness testified that in his opinion, based on reasonable medical probability, the plaintiff's disease resulted from his employment:

Q. [A]ssume the term occupational disease means a disease which arises out of and in course of employment which causes damage or harm to the physical structure of the body and I'll ask you whether or not you have an opinion based on reasonable medical probability as to whether the atypical tuberculosis from which Mr. Schaeffer is suffering, as it applies to his case, whether it is an occupational disease within the definition?

A. Yes, sir. I think it is.

not without exception. For example, in *General Motors Corp. v. Simmons* the Texas Supreme Court held that evidence of a Mary Carter settlement agreement was admissible to enable a party to discredit witnesses for the settling defendant who, as a result of the settlement, actually retained a financial interest in the success of the plaintiff's recovery.

In *City of Houston v. Sam P. Wallace & Co.* the question arose whether a settlement agreement resulted in the parties being misaligned at the argument stage of the trial. One of the plaintiffs, the city of Houston, argued that its motion for a mistrial should have been granted because a settling co-plaintiff, Little, was allowed to argue to the jury after he had settled his action against Wallace. Little had no action against any party other than Wallace. Counsel for the other plaintiff advised the jury panel on voir dire examination that the evidence would show that the defendant Wallace was in control of the premises and that Wallace was the negligent party. The record revealed that while the jury was deliberating, and at a time when counsel for the city of Houston was out of the courtroom, counsel for Little orally asked the court to grant a nonsuit of his action against Wallace. The city of Houston was not informed of the dismissal. During jury argument, Little's counsel did not argue that his client and the city of Houston should win as he suggested to the jury panel on voir dire; instead, he argued that defendant Wallace should win. The jury, apparently believing that Little became convinced of the error of his contentions, returned a verdict that defeated the city of Houston's cause of action. On the basis of that verdict, the trial court entered a judgment for the defendant. The court of civil appeals affirmed, and the city petitioned for review.

The Texas Supreme Court concluded that “Little's posture in the case during jury argument was a subterfuge. His real mission was not to win as a plaintiff, but to defeat his co-plaintiff's action which he did.” Although the defendant contended that its settlement agreement with Little was not a Mary Carter agreement, the court found that Mary Carter agreements and the misalignment of the parties that resulted from the present agreement “possess a more basic vice. Both of them are false and misleading portrayals to the jury of the real interest of the parties and witnesses.” Because the trial was not a fair adversary proceeding, the court reversed.

33. 558 S.W.2d 855 (Tex. 1977).
34. The Mary Carter settlement agreement originated in *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). In this type of settlement one of the tortfeasors contractually agrees to aid the plaintiff in his suit against the remaining tortfeasor in consideration for recovering a portion of the plaintiff's judgment. Although the Texas Supreme Court subsequently has discussed the effect of this form of settlement agreement, see *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801 (Tex. 1978), the validity of Mary Carter settlement agreements has not yet been squarely decided by the court. See *Lubbock Mfg. Co. v. Perez*, 591 S.W.2d 907 (Tex. Civ. App.—Waco 1979, no writ).
35. 558 S.W.2d at 857.
36. 585 S.W.2d 669 (Tex. 1979).
37. *Id.* at 670.
39. 585 S.W.2d at 673.
40. *Id.* at 674.
and remanded the case for a new trial.41

III. THE HEARSAY RULE AND ITS EXCEPTIONS

A. Declaration Against Interest

One of the oldest exceptions to the hearsay rule involves a declaration against interest, which is a statement contrary to the pecuniary or proprietary interest of the declarant.42 A declaration against interest is ordinarily admissible if (1) the declarant is unavailable as a witness at the time of trial; 43 (2) the declaration was against the declarant's pecuniary or proprietary interest; (3) the statement is a fact of which the declarant was personally cognizant; and (4) the declarant had no possible motive to falsify the act declared.44 Because the declaration against interest must be against the pecuniary or proprietary interest of the declarant, it is insufficient if the statement merely subjects the declarant to criminal liability.45 The rationale for the distinction is that the admission of a declaration against penal interests could lead to the presentation of perjured testimony because confessions of criminal activity often are motivated by extraneous considerations and therefore are not as inherently reliable as declarations against pecuniary interest.46

In Hill v. Robinson47 the plaintiffs sued for damages under the wrongful death statute for the murder of a doctor, alleging that the doctor was killed as a result of a murder-for-hire conspiracy perpetrated by the defendants. The trial court entered judgment in favor of the defendants,48 and the plaintiffs appealed. In order to establish their allegations of conspiracy, the plaintiffs sought to introduce the out-of-court confession of a then-deceased ex-convict implicating the defendant Robinson and two others.49 The court of civil appeals sustained the defendants' objection to the introduction of the confession.50 Although the court acknowledged that no civil case in this state definitively holds that a declaration against penal interest is inadmissible, the court nonetheless held that the confession was properly excluded as it could find no compelling reason to depart from the majority practice of excluding declarations against penal interest.51 The court further stated that in order to be admissible, the declaration, whether it be against the pecuniary, proprietary, or penal interest of the declarant,

41. Id.
42. 1A R. RAY, supra note 1, §§ 1001-1011.
44. See, e.g., Duncan v. Smith, 393 S.W.2d 798 (Tex. 1965).
45. See 1A R. RAY, supra note 1, § 1005; 5 J. WIGMORE, EVIDENCE § 1476 (J. Chadbourn rev. ed. 1974).
47. 592 S.W.2d 376 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).
48. Id. at 379.
49. These other two alleged co-conspirators previously were convicted for the murder of the doctor. Id.
50. Id. at 382.
51. Id.
must possess some degree of reliability. At the time the declarant gave his confession, he was in police custody facing a habitual criminal indictment that could have resulted in an automatic life sentence. He also was offered a lesser term if he cooperated. The court concluded that under the circumstances some doubt existed as to whether the confession possessed the requisite indicia of reliability to warrant its admission into evidence. Accordingly, the court held that the question of whether the confession was admissible was a matter resting within the sound discretion of the trial court.

In Car, Ltd. v. Smith, an automobile accident case, the trial court entered judgment in favor of the plaintiff, and the defendants appealed. The defendants attacked the trial court's exclusion of certain testimony by two witnesses concerning conversations they had had with Beasley, a driver of one of the two vehicles involved in the accident. Beasley was a porter employed by the defendant and was driving a customer's car; he purportedly told the two witnesses that he did not have permission to take the car. The defendants argued that Beasley's statements were admissible as declarations against his interest. The court of civil appeals held that the statements attributed to Beasley were not against his pecuniary or proprietary interest when made. The court stated that whether Beasley was driving the vehicle with his employer's permission and whether he was on an errand for his employer would in no way affect Beasley's own liability for his negligent act. Accordingly, the court reasoned that Beasley's ultimate liability would not have been affected by his out-of-court statement.

B. Admissions

In Mendoza v. Fidelity & Guaranty Insurance Underwriters, Inc., a workers' compensation case, the plaintiff claimed that a change in his physical condition entitled him to an increase in his workers' compensation benefits. The trial court entered judgment on the jury verdict in the plaintiff's favor. The court of civil appeals reversed and rendered a take-nothing judgment, holding that the plaintiff's testimony that he was totally unable to work prior to the Insurance Accident Board award in dispute was a judicial admission that conclusively established that he was totally

52. Id.
53. Id.
54. Id.
55. 590 S.W.2d 738 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).
56. Id. at 742.
57. Id. at 741-42.
58. Id. Furthermore, the court concluded that the record did not demonstrate conclusively that Beasley was unavailable as a witness, and that, therefore, one of the prerequisites for introducing a declaration against interest was not established. The court held that in order for the witness to be unavailable he must be shown to be dead, insane, physically unable to testify, beyond the jurisdiction of the court, or a showing must be made that his whereabouts are unknown and a diligent search has been made to locate him. Id.; see Hall v. White, 525 S.W.2d 860, 862 (Tex. 1975).
59. 606 S.W.2d 692 (Tex. 1980).
60. Id. at 693.
disabled at the time so that there could not have been a subsequent change in his work capacity on which to base an increased award.\textsuperscript{61}

Reversing the court of civil appeals, the Texas Supreme Court stated that the testimonial declarations of a party that are contrary to his position are quasi-admissions that are not conclusive.\textsuperscript{62} According to the court, a testimonial declaration of the type presented in \textit{Mendoza} will be treated as a judicial admission only if the statement is "deliberate, clear, and unequivocal. The hypothesis of mere mistake or slip of the tongue must be eliminated."\textsuperscript{63} Although the court stated that the appellate court had correctly set out the requirements for a quasi-admission to be treated as a conclusive judicial admission, the court found that Mendoza's testimony did not meet those requirements.\textsuperscript{64} The court categorized Mendoza's testimony as merely an opinion concerning his disability and concluded that Mendoza's opinion testimony as a lay person was not so clear and unequivocal as to preclude his recovery as a judicial admission.\textsuperscript{65}

\textit{Fuselier v. Dow Chemical Co.}\textsuperscript{66} presented the question whether an admission of an attorney is admissible against his client. In \textit{Fuselier} the plaintiff argued on appeal that a statement made by defendant's counsel in a brief filed in an appeal of the venue issue constituted an admission, a judicial admission, or a prior inconsistent statement. The brief stated that the evidence at the hearing on the defendant's plea of privilege indicated negligence on the part of the defendant. In affirming the decision of the

\begin{itemize}
\item \textsuperscript{61} 588 S.W.2d 612, 616 (Tex. Civ. App.—Austin 1979). The testimony considered by the court of civil appeals to be a judicial admission of facts conclusively establishing the plaintiff's total inability to work prior to the original award was as follows:
\begin{itemize}
\item Q. But on September—in September of 1976, you were totally unable to do any work?
\item A. Yes, sir.
\item Q. In October of 1976, you were totally unable to do any kind of work?
\item A. In October of 1976?
\item Q. That is still before you were put in the hospital.
\item A. Yes, sir.
\item Q. Up to November 30, 1976 [the date of the original award], you were totally unable to do any kind of work.
\item A. Yes, sir.
\item Q. In December of 1976, you were totally unable to do any kind of work?
\item A. Yes, sir.
\item Q. Right up to the present time?
\item A. Yes, sir.
\end{itemize}
\textit{Id.} at 615.
\item \textsuperscript{62} 606 S.W.2d at 694; see, e.g., Harris County v. Hall, 141 Tex. 388, 172 S.W.2d 691 (1943). Quasi-admissions differ from judicial admissions because the latter constitute a formal waiver of proof and are normally found in pleadings or in the stipulations of the parties. Unlike a quasi-admission, a judicial admission is binding upon the party making it. See IA \textsc{R. Ray}, supra note 1, § 1127.
\item \textsuperscript{63} 606 S.W.2d at 694. The court listed the requirements as set forth in United States Fidelity & Guar. Co. v. Carr, 242 S.W.2d 224, 229 (Tex. Civ. App.—San Antonio 1951, writ ref'd).
\item \textsuperscript{64} 606 S.W.2d at 694-95.
\item \textit{Id.} at 695. The court stated that such an opinion would require medical knowledge beyond that of the average lay person and because Mendoza was a lay person, his opinion could have been wrong. \textit{Id.}
\item \textsuperscript{65} 590 S.W.2d 624 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).
\end{itemize}
trial court, the court of civil appeals held that the prior statement made by
the defendant's attorney concerned the quantity and quality of the evi-
dence introduced at the venue hearing and was not an admission that the
defendant was negligent. Consequently, the court stated that "[w]hether
appellant sought to introduce the prior statement as an admission to be
used as probative evidence or as a prior inconsistent statement for im-
peachment," the statement was inadmissible.

At least one case during the survey period highlights the potential risk of
introducing evidence of an opponent's pleading without any limitation on
the offer. In Hackney v. Johnson the plaintiff sued her landlord for dam-
ages arising out of an alleged wrongful eviction. At trial the plaintiff of-
fered into evidence without limitation the defendant's first amended
original answer, which consisted of a general denial and various allega-
tions that the plaintiff had breached the lease. On the basis of the jury's
verdict, the trial court entered judgment for the plaintiff. On appeal the
defendant contended that the introduction of the pleading without limita-
tion bound the plaintiff to all of the allegations contained therein and enti-
tled the defendant to an instructed verdict. Texas case law indicates that
when a party offers into evidence a pleading of his opponent without limi-
tation, the allegations contained in such pleading are conclusively estab-
lished. After acknowledging the harshness of the stated rule, the court
held that the plaintiff was not conclusively bound by her introduction of
the defendant's pleadings. Rather, the court affirmed the trial court be-
because the plaintiff had introduced other evidence that established that the
plaintiff was not in default under her lease.

Nu-Way Oil Co. v. Trac-Work, Inc. involved the frequently raised is-
issue of whether the admissions of an employee are admissible against his
employer. In Nu-Way the plaintiff sued a truck driver and his employer
for damages allegedly sustained when the truck struck the plaintiff's gaso-
line pump and sign located at the plaintiff's service station. The employee
did not testify at trial. After the plaintiff rested its case, the employer
moved for and received an instructed verdict. The take-nothing judgment
recited that the evidence was legally insufficient to raise fact issues for the

67. Id. at 626.
68. Id.
69. 601 S.W.2d 523 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).
70. Id. at 525.
71. See, e.g., Seddon v. Harrison, 367 S.W.2d 888 (Tex. Civ. App.—Houston 1963, writ
ref'd n.r.e.); Lincoln v. Pohly, 325 S.W.2d 170 (Tex. Civ. App.—Texarkana 1959, writ ref'd
n.r.e.); McClung Constr. Co. v. Langford Motor Co., 33 S.W.2d 749 (Tex. Civ. App.—Fort
Worth 1930, no writ). The court, however, did not find the case law to be dispositive of the
issue, and indicated that the statements contained in these cases supporting the proposition
have generally been used by those courts as an alternative reason for their decision. 601
S.W.2d at 526.
72. 601 S.W.2d at 526.
73. Id. at 527.
74. Id.
76. For a discussion of the area of vicarious admissions, see 52 Texas L. Rev. 593 (1974).
jury on the issues of the employer's negligent entrustment of the vehicle to its employee, the employee's negligence, and the course and scope of his employment. On appeal the plaintiff contended that the admissions attributed to the employee by the investigating police officer to the effect that the employee did not have a driver's license and that the brakes on the truck had failed, together with the officer's testimony that the truck had hit a car from the rear and the presumption that Johnson was driving the truck in the course of his employment, were sufficient to raise the issue of negligent entrustment by the employer.

The Waco court of civil appeals, however, held that the evidence was legally insufficient to raise the issue of negligent entrustment. Although there was evidence that the vehicle involved in the accident was owned by the defendant and that the employee was driving the truck when it struck the plaintiff's gasoline pump, the court found that the presumption of scope of employment that normally arises under such evidence "vanishes when there is other evidence showing that the driver was not acting within the scope of his employment." Even though the court indicated that there was no such other evidence in the record, it held that there was no admissible evidence introduced against the employer establishing his negligence. Discussing the employee's admissions to the police officer, the court stated that the employee's statements were admissible against him, but that they were hearsay as to the employer and therefore without probative value toward establishing any essential element of the plaintiff's case against the employer. The judgment in favor of the employer therefore was affirmed, and the judgment in favor of the employee was reversed.

C. Business Records

Notwithstanding the express language of the statutory business records exception to the hearsay rule, several decisions during each survey pe-

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77. 601 S.W.2d at 211.
78. Id. (citing Robertson Tanklines, Inc. v. Van Cleave, 468 S.W.2d 354, 357 (Tex. 1971)). Robertson discusses the presumption of scope of employment that can arise and the evidence necessary to rebut such a presumption.
79. 601 S.W.2d at 211.
80. Id. at 212. The court also held that the evidence that the brakes were overhauled 13 days after the accident, standing alone, did not raise an issue that the brakes were defective at the time of the accident. Id.
81. Id.
82. TEX. REV. CIV. STAT. ANN. art. 3737e (Vernon Supp. 1980-1981) provides:

**Competence of record as evidence**

Section 1. A memorandum or record of an act, event or condition shall, insofar as relevant, be competent evidence of the occurrence of the act or event or the existence of the condition if the judge finds that:

(a) It was made in the regular course of business;
(b) It was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event or condition to make such memorandum or record or to transmit information thereof to be included in such memorandum of record;
(c) It was made at or near the time of the act, event or condition or reasonably soon thereafter.
period illustrate the repeated failure of counsel to comply with the prerequisites of this exception. For example, in Missouri-Kansas-Texas Railroad v. May, the plaintiff brought suit against the railroad company for damages arising from a railroad crossing accident. The trial court entered a take-nothing judgment for the defendant, but the appellate court reversed and remanded for a new trial. In its per curiam decision refusing the defendant's application for writ of error, the Texas Supreme Court held that the court of appeals was correct in holding that it was reversible error for the trial court to exclude evidence of earlier accidents that occurred under reasonably similar but not necessarily identical circumstances. The court cautioned, however, that its disposition of the case should not be construed as approving the additional holding of the court of civil appeals that the trial court had erred in admitting the blood-alcohol report as a business record of the hospital. Reasoning that the objections articulated by the lower court affected only the report's weight and credibility but not its admissibility, the supreme court held that the hospital lab report of the blood-alcohol test was admissible as a business record of the hospital in that the requirements of article 3737e were met.

For a report to be admissible under the business records exception to the hearsay rule, article 3737e requires that an employee or representative who has personal knowledge of the transaction either prepare the record or transmit the information to another who prepares the record. The competency of a person to testify as to satisfaction of the requirements contained in article 3737e was presented in Knollenberg v. Steel Tank Construction Co. In Knollenberg, a sworn account suit, the issue on appeal was whether the document evidencing the account, which was admitted into evidence, was properly proven under article 3737e. The plaintiff

Proof of identity and mode of preparation; lack of personal knowledge
Sec. 2. The identity and mode of preparation of the memorandum or record in accordance with the provisions of paragraph one (1) may be proved by the testimony of the entrant, custodian or other qualified witness even though he may not have personal knowledge as to the various items or contents of such memorandum or record. Such lack of personal knowledge may be shown to affect the weight and credibility of the memorandum or record but shall not affect its admissibility.

Sec. 4. “Business” as used in this Act includes any and every kind of regular organized activity whether conducted for profit or not.

For a discussion of the type of business that may qualify under this statutory exception, see Note, The Hearsay Rule and the Business Entities Exception, 26 Baylor L. Rev. 700 (1974).

83. 600 S.W.2d 755 (Tex. 1980).
84. Id. at 756.
86. 600 S.W.2d at 756.
87. Id. The court of civil appeals held that because the report did not identify the person taking the blood from the plaintiff and because security measures used for the blood sample were absent, a chain of custody was not shown establishing that the blood analyzed actually came from the plaintiff. 583 S.W.2d 694, 700-01 (Tex. Civ. App.—Waco 1979).
89. 600 S.W.2d at 756.
presented only one witness, an employee of the plaintiff, who testified that the company with whom the defendant transacted business assigned its accounts to the plaintiff. The witness admitted that he did not have personal knowledge of how the first company handled its business, but he stated that he had instructed a Mr. Tinsley, who had been a bookkeeper for the first company, to bring all of that company's accounts up to date. Tinsley prepared a summary of the defendant's account, and it was this document that the appellee offered into evidence to prove the account. The witness testified that Tinsley had personal knowledge of each of the transactions set forth in the document.

The court of civil appeals reversed the decision of the trial court and held that the witness was not competent to testify that the requirements of article 3737e were met by employees of the first company because he was not familiar with that company's operation.92 The court relied on Matrix Computing, Inc. v. Davis93 and rejected the plaintiff's contention that section 2 of article 3737e permits one who has no personal knowledge of the transaction in question to prove up the document by merely reciting the language of the three requirements set out in section 1 of the statute.94 The court acknowledged, however, that if the witness had been able to testify from personal knowledge as to the record keeping procedure of the first company and the preparation of the document by that company in accordance with the requirements of article 3737e, then the document would have been admissible.95 In such instance, the court stated that the testimony would have satisfied section 2 of article 3737e even though the witness had no personal knowledge of the particular transactions set out in the documents.96

Similarly, in Brans v. Office Building Managers, Inc.,97 a suit to collect rents and service charges alleged to be due and owing under an oral lease agreement, the plaintiff attempted to prove the defendant's indebtedness by offering copies of a tenant ledger that its witness testified were reproduced from the company's books. As the evidence showed that the witness did not begin work for the defendant until April 1978, the court initially stated that he could not possess the personal knowledge required by article 3737e because the transactions involved dealt with rents accrued during 1975 and 1976.98 The court reasoned that the question then was whether there was proof that the witness was a custodian or other qualified witness.99 The only evidence relevant to this inquiry was the witness's statement that he was the company's treasurer. Because the duties of a

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92. Id. at 348-49.
93. 554 S.W.2d 288 (Tex. Civ. App.—Amarillo 1977, no writ) (mere recitation of the statutory predicate by a person who has no personal knowledge of the entries is insufficient to satisfy the requisites of art. 3737e).
94. 600 S.W.2d at 349.
95. Id.
96. Id.
98. Id. at 416.
99. Id.
subordinate corporate officer cannot be inferred merely from an official title, but rather are defined in the corporation's bylaws, the court reversed the trial court and held that this evidence alone was insufficient to prove that the witness was a custodian of the company's books or was otherwise qualified.  

D. Matters Not in Evidence

Visual aids used at trial normally are not considered as evidence because they do not constitute proof of any fact; they are merely tools used by trial counsel. In *Webster College v. Speier* various police officers instituted suit under the Texas Deceptive Trade Practices—Consumer Protection Act for the alleged failure of the defendant to abide by its representations concerning a course of study in criminal justice. After a jury trial, judgment was rendered for the police officers. The court of civil appeals reversed, however, and remanded the case for a new trial because of the particular use by the plaintiffs' attorney of a chart during trial. The chart apparently listed the police officers with a column beside each name with a space to indicate the various damage items attributable to each. During the course of the trial the plaintiffs' counsel filled in the blanks. The court of civil appeals held that the chart was not evidence and that it was error to admit the chart. The court also held that the error was compounded by the jury's taking the chart to the jury room and responding to the closing argument of the plaintiff's attorney by reference to the chart. The Texas Supreme Court has granted a writ of error on these evidentiary points.

In *Green v. Remling* the paternal grandparents and paternal aunt of three children appealed the trial court's decision allowing the children's adoption by the Greens, their maternal aunt and uncle. The trial court had appointed a local agency of the Texas State Department of Human Resources to prepare a social study concerning the children and the suitability of the Greens' home. The report was filed with the trial court on the day of the adoption hearing, but it was never formally introduced into evidence. All parties knew about the appointment of the social worker, the preparation of the social study, and the contents of the report prior to the hearing; no objection was made to the appointment, however, and no ob-

100. *Id.* at 415.
104. 605 S.W.2d at 713.
105. *Id.* at 715.
106. *Id.* at 714.
107. *Id.* The jury awarded damages in the amount set forth on the chart with only one exception. *Id.*
108. [Editor's Note: After this Article went to print, the Texas Supreme Court reversed the lower court on the evidentiary issues and rendered judgment for the policemen. 24 Tex. Sup. Ct. J. 309, 311 (Mar. 25, 1981). This decision will be discussed in next year's Survey.]
109. 608 S.W.2d 905 (Tex. 1980).
jection was made to the contents of the report until after the hearing. The trial court allowed the Greens to adopt the children. Similarly, no effort was made to call the social worker as a witness or to subpoena her. The trial court allowed the Greens to adopt the children. The court of civil appeals reversed the judgment of the trial court and remanded the case for a new trial on the ground that the trial judge committed reversible error by considering a social study report not in evidence because it deprived the appellants of their right to cross-examine the author of the study.

The Texas Supreme Court reversed, holding that it was not error for the trial court to consider the social study even though it was not in evidence. The court acknowledged that the issue of whether a study that has not been admitted formally into evidence can be considered by the trial court was one of first impression. The court also stated that although either party has a right to examine the author of the social study, the respondents in this case did not avail themselves of their adequate opportunity to cross-examine the author. More importantly, the court seemed impressed with the fact that trial courts need an impartial source of information to guide them in suits involving the parent-child relationship and that, in recognition of this burden, the legislature had provided for the compilation of an independent social study to aid the court in its determination. As only one statement in the social study was not cumulative of other evidence adduced at trial, the court held that it would defeat the purpose of the statute to deprive the court of potentially valuable information submitted by an independent investigator by holding that the trial court may not consider the report until it is formally introduced into evidence by one of the parties. Furthermore, the court concluded that the social study was a part of the trial court’s record because it was on file with the trial court.

110. The report indicated that the Greens had adequate housing and were financially and emotionally stable. It further stated that allegations of medical neglect and physical abuse were not substantiated. The trial court made various findings of fact, none of which specifically referred to the information contained in the social study. Two of the findings, however, indicated that a social study was made, filed, and considered by the court without objection. Id. at 907.
111. Id. at 906.
113. 608 S.W.2d at 906.
114. Id. at 909. The court cited three courts of civil appeals decisions that suggest that a trial court must consider the social study in adoption cases even though it contains hearsay information: Alexander v. Clower, 486 S.W.2d 189, 191 (Tex. Civ. App.—Tyler 1972, no writ); In re Jones, 475 S.W.2d 817, 819 (Tex. Civ. App.—Eastland 1972, writ ref’d n.r.e.); Hickman v. Smith, 238 S.W.2d 838, 840 (Tex. Civ. App.—Austin 1956, writ ref’d). 608 S.W.2d at 909.
115. 608 S.W.2d at 908.
116. Id. at 907. The court quoted at length from § 11.12 of the Texas Family Code, which allows a court to order the preparation of a social study whenever the parent-child relationship may be affected. Id.
117. Id. at 909.
118. Id.
portions of the study which are admissible under the rules of evidence may be disclosed to the jury.”

E. Reputation Evidence

A seemingly unsolicited response to a question can serve to allow the introduction of harmful reputation evidence. In Minchen v. Rogers the plaintiff brought suit to recover damages for breach of a construction contract and for violation of the Deceptive Trade Practices Act. The trial court rendered judgment for the plaintiff and the defendant appealed. On appeal the defendant claimed that the admission of testimony regarding his reputation for truth and veracity in the community was improper. At trial the defendant, in response to a question regarding the business relationship between himself and the plaintiff, testified that as a business man and as a human being, “the only thing I ever worried about was maintaining an honest reputation.” The court of civil appeals held that this testimony placed the defendant's reputation in issue and the plaintiff was therefore entitled to offer harmful reputation testimony rebutting that statement.

IV. Uncontradicted Testimony of Interested Witnesses

The credibility of a witness is often a significant factor in determining whether a fact has been conclusively proven or whether such evidence merely raises an issue to be determined by the trier of fact. For example, in Commercial Insurance Co. v. Smith, a workers' compensation case, the defendant claimed that the plaintiff failed to comply with the notice and claim filing provisions of the Workers' Compensation Act. Although the evidence that the plaintiff's employer was aware of her occupational disease was uncontradicted, the question was whether the employer had received notice within thirty days of the first distinct manifestation of such disease. No jury issue was submitted on this question. The plaintiff claimed that no issue was necessary because her supervisor admitted that he had notice on the same day that she began to notice the problem and reported it to her supervisor.

The Fort Worth court of civil appeals acknowledged that its obligation was to review the evidence in the record to determine if the plaintiff's testimony, combined with other evidence, was sufficient to establish conclusively the fact that her employer had timely notice. After reviewing the

119. Id.
120. 596 S.W.2d 179 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).
121. Id. at 180.
122. Id. at 182.
123. Id.
125. TEX. REV. CIV. STAT. ANN. art. 8307, § 4(a) (Vernon 1967).
126. 596 S.W.2d at 664.
record, the court followed the exception to the interested witness rule set forth in Collora v. Navarro and concluded that the plaintiff's testimony "on the question of notice to her employer was clear, direct, positive and uncontradicted" and that "we can find nothing in the record to cause any reasonable suspicion as to its truth." Accordingly, it was unnecessary to submit an issue to the jury and the trial court's judgment was considered proper.

The dissenting opinion by Chief Judge Massey disagreed with the majority's conclusion that the plaintiff conclusively established timely notice and claim. The dissent concluded that the plaintiff's credibility was put into question and therefore there was a necessity for a jury issue to be submitted "because the question of when her first distinct manifestation occurred was of such a subjective nature that Commercial could not readily contradict or disprove her testimony." Chief Judge Massey reasoned that the basis for the exception to the interested witness rule relied on by the majority was weakened when the testimony of the plaintiff could not be readily contradicted even if untrue.

V. Corroboration of Accomplice Testimony

The sufficiency of the corroboration necessary for accomplice testimony normally is determined by eliminating the testimony from consideration and examining the remaining evidence to ascertain whether there is evidence of an incriminating nature that tends to connect the accused with the commission of the crime. If there is such evidence, the corroboration is sufficient; if there is not, it is insufficient. The presence of the accused in the company of an accomplice shortly before or shortly after the commission of a crime is not, standing alone, sufficient corroboration. The issue in In re A. D. L. C. was whether the accomplice testimony of a child participating in a felony offense was sufficiently corroborated. The trial court found the child delinquent for engaging in delinquent conduct with two other children who were allegedly his accomplices. Reversing and

127. 574 S.W.2d 65 (Tex. 1978). Collora posits the following questions, the affirmative answers to which can form the basis for accepting the testimony of an interested witness as conclusively establishing a fact:

Is the testimony clear, direct, and positive? Is it internally consistent? Is it contradicted or corroborated by other circumstances in the case? Is it contradicted or corroborated by other witnesses? Does the opposing party possess the means to verify or dispute the testimony? Does he have a way to test the witness' credibility? Did he make use of those means?

128. 596 S.W.2d at 665.
129. Id. at 666.
130. Id.
131. Id.
135. Id. at 384.
remanding the decision of the trial court, the court of civil appeals held that the testimony of the accomplice witnesses was not corroborated sufficiently by other evidence tending to connect the child with the alleged delinquent conduct.\textsuperscript{136} The court determined that when the accomplice testimony of the two children was eliminated, the only remaining evidence was the defendant's presence in the same city with the accomplices approximately an hour and a half before the burglary; the evidence did not establish the proximity of the scene of the alleged conduct to the location in the city where the children were seen together.\textsuperscript{137}

VI. TAPE RECORDINGS

Tape recordings are generally admissible upon establishing (1) that the recording device was capable of taking testimony; (2) that the operator of the device was competent; (3) the authenticity of the correctness of the recording; (4) that changes, additions, or deletions have not been made; (5) the manner of the preservation of the recording; (6) the identification of the speakers; and (7) that the testimony elicited was made voluntarily without any kind of inducement.\textsuperscript{138} \textit{Seymour v. Gillespie}\textsuperscript{139} presented the issue of whether the trial court committed reversible error in excluding a tape recording of the conversation and sounds that occurred during an alleged assault and battery. The trial judge refused to admit the tape in evidence because the tape was self-serving, the persons being recorded did not identify themselves during the recording, one of the parties did not know he was being recorded, and part of the tape was not understandable.\textsuperscript{140} The court of civil appeals affirmed, concluding that the trial court did not abuse its discretion in refusing to admit the tape recording.\textsuperscript{141}

The Texas Supreme Court reversed, holding that the trial court did err in excluding the evidence.\textsuperscript{142} First, the court held that the plaintiff's objections to the predicate laid for the introduction of the tape recording were too general and therefore were waived.\textsuperscript{143} The court then held that the recording of conversations by one party to the conversation constitutes neither an invasion of privacy nor illegally obtained evidence.\textsuperscript{144} The

\textsuperscript{136} \textit{Id.} at 385.
\textsuperscript{137} \textit{Id.} There was also evidence in the case that the father of one of the accomplices was told that his son and the defendant were asleep in the same house approximately three hours after the burglary.
\textsuperscript{139} 608 S.W.2d 897, 897 (Tex. 1980).
\textsuperscript{140} \textit{Id.} at 898.
\textsuperscript{141} 584 S.W.2d 528, 529 (Tex. Civ. App.—Beaumont 1979).
\textsuperscript{142} 608 S.W.2d at 899.
\textsuperscript{143} \textit{Id.} at 898. The defendant filed a motion in limine complaining that the tape invaded the defendant's right of privacy, was made without his consent and permission, was hearsay, and was illegally obtained evidence. The defendant subsequently complained that the evidence in support of the introduction of the tape did not satisfy the requisites of \textit{Cummings}. \textit{See} note 138 \textit{supra} and accompanying text.
\textsuperscript{144} \textit{Id.}
court distinguished the leading case of Cummings v. Jess Edwards, Inc., stating that in the present case the testimony from each side was sharply controverted and the tape recording was the only unbiased evidence available. Moreover, the court observed that in Cummings there was evidence in addition to the testimony of the witness who was impeached by the tape recording to support the contributory negligence findings against the plaintiff; only under those circumstances did the Cummings court hold that the exclusion of the tape was "at least discretionary."

VII. DAMAGES

In Texas the lost profits of a business may be recovered as damages only if the business is shown to be established and profitable at the time of the act complained of; lost profits in the future may not be recovered if the business is new and unestablished. The rationale for this distinction is that preexisting profits supply the requisite legal certainty as to both fact and amount of damages, whereas anticipated profits of a new and unestablished business leave too much to conjecture and speculation. In Bell Helicopter Co. v. Bradshaw, two helicopter passengers brought a products liability action. About four months before the accident, the plaintiffs had opened an office devoted exclusively to the sale of farms and ranches. To support one of the damage claims, one of the plaintiffs testified as to the lost profits of the new business. The trial court entered judgment against the manufacturer on the basis of the jury's findings, and the manufacturer appealed. One of the contentions on appeal was that the trial court erred in admitting the opinion testimony of the one plaintiff concerning the projected income from the passengers' business of selling farms and ranches. The basis of the objection was that the business had not been in existence for a sufficient time to support such an opinion. The court of civil appeals rejected the manufacturer's contention and held that the evidence showed that the passenger had an interest in the selling of farms and ranches at least three years prior to the formal establishment of an office devoted exclusively to such sales. The court therefore ruled that the rationale of the new and unestablished business cases was inapplicable.

In Bedgood v. Madalin, the Texas Supreme Court held that testimony concerning the plaintiffs' pecuniary loss by reason of the death of their son was "too remote and speculative to have probative force." The court

145. 445 S.W.2d 767 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.).
146. 608 S.W.2d at 899.
147. Id.
148. See, e.g., Southwest Battery Corp. v. Owen, 131 Tex. 423, 427, 115 S.W.2d 1097, 1098-99 (1938); Atomic Fuel Extraction Corp. v. Estate of Slick, 386 S.W.2d 180, 188-89 (Tex. Civ. App.—San Antonio 1965), writ ref'd n.r.e. per curiam, 403 S.W.2d 784 (Tex. 1966).
149. 594 S.W.2d 519 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).
150. Id. at 524-25.
151. Id. at 536.
152. Id.
153. 600 S.W.2d 773 (Tex. 1980).
154. Id. at 776.
decided that the testimony necessarily assumed that an eleven-year-old boy "would maintain his interest in studying to be a doctor, successfully pursue his education and be licensed as such, decide to practice medicine in Corpus Christi, and have the type of practice that he could make referrals of heart patients to his father's clinic which would still be in operation." Even though the court recognized that a trial court has broad discretion in this area, the court held that the testimony was beyond all reasonable boundaries.

VIII. JURY MISCONDUCT

Jury misconduct requires a finding of fact that the misconduct occurred and a legal conclusion that the misconduct was material and that, based on the record as a whole, the misconduct probably resulted in harm to the complaining party. Although the finding of fact is tested by the sufficiency of the evidence standard, the legal conclusion of probable harm may be determined by the appellate court. In reviewing a claim of jury misconduct, the appellate court will presume that the jury obeyed the instructions of the trial court and disregarded the existence of such improper subjects as insurance. Moreover, many improper statements are capable of being corrected by means of additional instructions.

Several cases during the survey period dealt with the evidence necessary to establish jury misconduct. In Strange v. Treasure City, a false imprisonment case, the trial court overruled the defendant's amended motion for a new trial after four jurors testified regarding the jury's deliberations. On appeal the defendant argued that the trial court erred in overruling its amended motion for a new trial because jury misconduct was the only conclusion that could be supported by the record. The court of civil appeals examined the record and determined that the foreman and one juror testified that during deliberations the jurors discussed numerous matters that were improper. Another juror summoned by the plaintiff stated that he recalled a discussion about attorneys' fees and wages but testified

155. Id.
156. Id.
157. For a general discussion of this subject, see Keltner, Jury Misconduct in Texas: Trying the Trier of Fact, 34 Sw. L.J. 1131 (1981).
158. See, e.g., Crawford v. Detering Co., 150 Tex. 140, 237 S.W.2d 615 (1951).
159. See City of Houston v. Quinones, 142 Tex. 282, 177 S.W.2d 259 (1944).
160. See Duncan v. Smith, 393 S.W.2d 798 (Tex. 1965).
161. See Younger Bros. v. Myers, 159 Tex. 585, 324 S.W.2d 546 (1959).
162. 608 S.W.2d 604 (Tex. 1980).
163. Id. at 605.
164. 590 S.W.2d 816, 817 (Tex. Civ. App.—Dallas 1979). These matters included: (1) whether the defendant or an insurance company would pay the money judgment; (2) whether the plaintiff's attorney had a contingent fee contract and would receive one-third of any money awarded; (3) whether any money awarded would be tax free; (4) whether the plaintiff, a black man, had "gotten a fair shake"; (5) whether two days' lost wages to try this case and wages for another day lost for deposition purposes, trebled, was a better way to assess damages than to follow the court's charge; and (6) a juror's statement during deliberations that "she had personal reasons to give as much money as possible" to the plaintiff. Id.
that the jury foreman cut off extended discussion. The court concluded that "the fact of misconduct is established in that the testimony of two jurors is full and explicit and the misconduct is not denied by the remaining jurors, just unrecalled." Thus, the court held that the record compelled the legal conclusion that the misconduct of the jury was of such a nature and degree that a fair trial had been denied.

The supreme court reversed the appellate court's decision. First, the court stated that because the trial court did not make any specific findings of fact as to whether the misconduct occurred, it must be "presumed that the trial court found that such misconduct did not occur, provided there is evidence to support such a finding." The court then discussed the evidence to determine if there was evidentiary support for such a presumed finding. The court separated the alleged misconduct into the categories of lost wages, statements of personal bias, taxes, attorneys' fees, and insurance, all of which were subjects supposedly discussed during the jury's deliberations. Although the statement of personal bias by one of the jurors was determined to constitute material misconduct, the court concluded that it did not result in probable injury because "[the statement was not repeated, it was not discussed by other jurors, and no further explanation was offered by [the juror who had made the statement]."

With respect to the jurors' lost wages discussion, the court followed the "trial court's implied finding that this specific act of misconduct did not occur" because the jurors' testimony was conflicting and inconsistent. The court ruled that the remaining items of alleged misconduct either did not constitute misconduct, were not material, or did not result in probable harm. Finally, the court concluded that the defendant failed to establish that the cumulative effect of all of these acts resulted in probable injury.

IX. Parol Evidence

The parol evidence rule states that in the absence of fraud, accident, or mistake, extrinsic evidence is inadmissible to contradict or vary the terms

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165. Id.
166. Id. at 817-18. In another jury misconduct case, Bailey v. Tuck, 591 S.W.2d 605 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.), three jurors remembered certain occurrences that were improper, while two jurors stated that such occurrences did not take place. Because the evidence in Bailey was conflicting, the court ruled that the factual determination by the trial court as to whether misconduct occurred was binding on appeal. Id. at 608. See also White Cabs v. Moore, 146 Tex. 101, 203 S.W.2d 200 (1947), and Pryor v. New St. Anthony Hotel Co., 146 S.W.2d 428 (Tex. Civ. App.—San Antonio 1940, writ ref'd), in which the fact of misconduct was conclusively shown.
167. 608 S.W.2d at 606.
168. Id. at 606-09.
169. Id. at 607-08.
170. Id. at 607.
171. Id.
172. Id. at 608-09.
173. Id. at 609.
of a written instrument. In *Cove Investments, Inc. v. Manges*, however, the plaintiff, seeking to recover a mineral interest in land, introduced parol evidence to establish that mineral deeds were given for purposes other than that stated in the instruments. Notwithstanding such extrinsic evidence, the trial court granted the defendants' motion for summary judgment, and the court of civil appeals affirmed. In order to be entitled to summary judgment, the defendants had to establish that the deeds were nullities and were ineffectual as a matter of law to convey any right, title, or interest to the plaintiff. Reversing and remanding the decisions below, the Texas Supreme Court held that a material fact issue existed as to whether two mineral deeds given by one of the defendants to the plaintiff were intended to be effective as security interests for that defendant's performance of an oral promise to convey minerals to the plaintiff. The supreme court stated that when parol evidence is admitted to establish a prior or simultaneous oral agreement showing a different purpose for a deed, the courts will determine and give effect to that oral agreement. The court then held that the admission by the defendant that the deeds were given as security for performance was sufficient to negate the assertion in his action for summary judgment that no right, title, or interest was conveyed by the deeds.

An alleged contractual ambiguity was used as the basis for the introduction of parol evidence in *Crozier v. Horne Children Maintenance & Educational Trust*, in which the plaintiff brought suit seeking recission of a contract for the purchase of real property. The question of ambiguity did not arise until one of the plaintiff's witnesses completed his testimony. Subsequently, the trial court began to allow the introduction of testimony to explain the written contract by evidence of prior negotiations, unexecuted previous contractual drafts, and circumstances surrounding the negotiations. The trial court allowed this testimony apparently under the theory that in order to pass properly on the question of ambiguity, the court needed to hear extrinsic evidence. Even though neither party alleged that the contract in dispute was in any way ambiguous, the trial court, over the defendant's objections, allowed the introduction of parol evidence and rescinded the contract. The disputed issue on appeal was whether the plaintiff tendered at the time of the closing full performance of the contract of sale or whether, as the defendant contended, the plaintiff's tender was materially defective. The court of civil appeals reversed and rendered judgment for the defendant on his cross claim, holding that the contract of

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175. 602 S.W.2d 512 (Tex. 1980).
177. 602 S.W.2d at 517.
178. *Id.*; see, e.g., Meadows v. Bierschwale, 516 S.W.2d 125 (Tex. 1974); Jackson v. Hernandez, 155 Tex. 249, 285 S.W.2d 184 (1955); Humble Oil & Ref. Co. v. Atwood, 150 Tex. 617, 244 S.W.2d 637 (1951).
179. 602 S.W.2d at 517.
180. 597 S.W.2d 418 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.).
181. *Id.* at 418-19.
sale was not ambiguous on its face, that there were no pleadings to support a judgment on the basis of ambiguity, and that, therefore, the trial court erred in permitting parol evidence to vary or contradict the terms of the contract involved.\textsuperscript{182}

An ambiguity in a lease was the basis for the admissibility of parol evidence in \textit{Fort Worth Neuropsychiatric Hospital, Inc. v. Bee Jay Corp.}\textsuperscript{183} In that case the plaintiff corporation brought suit against a hospital corporation to recover for breach of an oral agreement allegedly occurring when the hospital evicted a doctor-tenant from his offices. The doctor-tenant initially owned all of the stock in both the plaintiff-corporation and the hospital. In 1969 the doctor entered into a written lease with the plaintiff. Subsequently, the plaintiff and the doctor conveyed their respective interests to the hospital. The alleged oral agreement between the plaintiff and the hospital was that the 1969 lease was to continue, that the doctor was to remain in possession of the premises, and that the plaintiff was to receive the rents. The trial court entered judgment in favor of the plaintiff, and the court of civil appeals affirmed.\textsuperscript{184} The supreme court, however, reversed and rendered a take-nothing judgment against the plaintiff, holding that the evidence conclusively established that the hospital did not breach its oral agreement with the plaintiff by evicting the doctor from his hospital offices.\textsuperscript{185} As part of its proof, the plaintiff introduced into evidence its 1969 lease with the doctor. Because the lease mistakenly described the lot and block numbers of the demised premises, the plaintiff also introduced the testimony of the doctor to explain the parties’ intentions concerning the demised premises. The court, citing \textit{Smith v. Liddell},\textsuperscript{186} stated the general rule that in interpreting a lease, parol evidence is not admissible to determine the premises that were rented.\textsuperscript{187} The court further stated, however, that when a lease contains a description of the demised premises that is so general that it describes more than one location, the lease contains a latent

\textsuperscript{182} \textit{Id.} at 425. Similarly, in \textit{Warren Bros. v. A.A.A. Pipe Cleaning Co.}, 601 S.W.2d 436 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.), the plaintiff brought suit to recover for certain pipecleaning services furnished the defendant. After judgment was entered on the verdict for the plaintiff, the defendant contested on appeal that the trial court erred in admitting testimony that the second purchase order was intended only to cover cleaning small lines. The defendant objected that such testimony violated the parol evidence rule inasmuch as the purchase order by its terms did not confine the plaintiff’s work merely to the small lines running across the highway. The witness testified that it was the intent of the purchase order that the plaintiff clean only the small sewer lines. The court of civil appeals held that the testimony of the witness was properly admitted. \textit{Id.} at 439. The court stated that on its face the purchase order did not appear to be a complete embodiment of the terms relating to the agreement between the parties, but rather an “incomplete memorial or memorandum.” \textit{Id.} The court further noted that the purchase order was “so general as to logically encompass either of the two interpretations offered by the parties.” \textit{Id.} The court therefore held that because the application of pertinent rules of interpretation allowed two or more meanings, parol evidence was admissible to explain the interest of the parties. \textit{Id.}

\textsuperscript{183} 600 S.W.2d 763 (Tex. 1980).
\textsuperscript{184} 587 S.W.2d 746, 756 (Tex. Civ. App.—Fort Worth 1979).
\textsuperscript{185} 600 S.W.2d at 767.
\textsuperscript{186} 367 S.W.2d 662 (Tex. 1963).
\textsuperscript{187} 600 S.W.2d at 766.
ambiguity;\textsuperscript{188} in such an instance, the language of the lease, though clear on its face, cannot be enforced without raising doubts concerning the location of the premises. The court found such an ambiguity in this case,\textsuperscript{189} and held that when such a latent ambiguity arises in the course of interpreting and enforcing a lease, parol evidence is admissible to resolve the doubts and identify the premises that were leased.\textsuperscript{190} Accordingly, the court stated that the doctor was "uniquely situated to answer the inquiry concerning the parties' intentions" because he executed the lease on his own behalf and on behalf of the plaintiff.\textsuperscript{191} Because only he testified as to the parties' intent and because his testimony was unequivocal, the intent of the parties, which was favorable to the plaintiff, was undisputed.

The primary inquiry in interpreting a will is to determine the intent of the testator,\textsuperscript{192} and review is normally limited to the words of the will itself.\textsuperscript{193} Extrinsic evidence generally is admissible only to demonstrate the situation of the testator, the circumstances existing when the will was executed, and other material facts that may enable the court to place itself in the testator's position at the time of the execution of the will.\textsuperscript{194} In Gee v. Read\textsuperscript{195} the plaintiff sought to go beyond the four corners of the will to explain the testator's intent. The district court granted summary judgment for the defendant because the will unambiguously left all of the decedent's property to her surviving sister.\textsuperscript{196} The court of civil appeals, however, reversed and remanded, ruling that the will was ambiguous and, therefore, extrinsic evidence was admissible to aid in interpreting the will.\textsuperscript{197} The supreme court affirmed the decision of the court of civil appeals and held that the decedent's will did not on its face unambiguously leave all her property to the surviving sister; parol evidence therefore was admissible.\textsuperscript{198}

Similarly, in Rutherford v. Randall,\textsuperscript{199} which involved the interpretation of a mineral deed, the plaintiffs claimed that the mineral deed contained conflicting provisions regarding the interest conveyed. The trial court rejected this contention and granted the defendant's motion for summary judgment, holding that only a 1/240th interest in the minerals had been conveyed as opposed to the 1/24th interest urged by the plaintiffs.\textsuperscript{200} The court of civil appeals reversed and remanded the case for a new trial.\textsuperscript{201}

\textsuperscript{188} Id.
\textsuperscript{189} At the time the lease was executed, there were three buildings that were known as 1066 West Magnolia Avenue: the two clinics owned by the plaintiff and the hospital building owned by the doctor in his individual capacity.
\textsuperscript{190} 600 S.W.2d at 766.
\textsuperscript{191} Id.
\textsuperscript{192} Powers v. First Nat'l Bank, 138 Tex. 604, 616, 161 S.W.2d 273, 281 (1942).
\textsuperscript{193} Huffman v. Huffman, 161 Tex. 267, 270, 339 S.W.2d 885, 888 (1960).
\textsuperscript{194} Stewart v. Selder, 473 S.W.2d 3, 7 (Tex. 1971).
\textsuperscript{195} 606 S.W.2d 677 (Tex. 1980).
\textsuperscript{196} Id. at 679.
\textsuperscript{197} 580 S.W.2d 431, 434-35 (Tex. Civ. App.—Fort Worth 1979).
\textsuperscript{198} 606 S.W.2d at 681.
\textsuperscript{199} 593 S.W.2d 949 (Tex. 1980).
\textsuperscript{200} Id. at 951.
\textsuperscript{201} 577 S.W.2d 368, 372 (Tex. Civ. App.—Fort Worth 1979).
Because there was a fact issue concerning the extent of the mineral interest that the grantor intended to convey, the court held that extrinsic evidence could properly be considered to determine the intent of the grantor.\textsuperscript{202}

The Texas Supreme Court reversed the decision of the court of civil appeals and affirmed the decision of the trial court.\textsuperscript{203} The court held that the deed unambiguously conveyed only a 1/240th mineral interest as opposed to the interest claimed by the plaintiffs.\textsuperscript{204} Thus, the absence of any ambiguity in the deed precluded any consideration of extrinsic evidence concerning the original intent of the grantor.

Parol evidence is also admissible to prove the nonexistence of a contract. For example, in \textit{Merbitz v. Great National Life Insurance Co.}\textsuperscript{205} the insurer brought suit for a declaratory judgment that it was not liable for benefits under the life insurance policy of an insured who committed suicide. The trial court entered judgment on the verdict in favor of the insurer,\textsuperscript{206} and the defendant appealed. The court of civil appeals held that parol evidence was admissible to show the nonexistence of the policy, rather than for the purpose of varying the terms of an existing contract.\textsuperscript{207}

\begin{footnotes}
\textsuperscript{202} \textit{Id.}.
\textsuperscript{203} 593 S.W.2d at 953.
\textsuperscript{204} \textit{Id.}
\textsuperscript{205} 599 S.W.2d 655 (Tex. Civ. App.—Texarkana 1980, writ ref’d n.r.e.).
\textsuperscript{206} \textit{Id.} at 657.
\textsuperscript{207} \textit{Id.} at 658. \textit{See also} Baker v. Baker, 143 Tex. 191, 183 S.W.2d 724 (1944).
\end{footnotes}