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The major developments in the field of civil procedure during the survey period are found in judicial decisions and statutory enactments. This Article examines these developments and considers their impact on existing Texas procedure.

I. JURISDICTION OVER THE SUBJECT MATTER

The impact on subject matter jurisdiction of an increase in the alleged amount in controversy was considered in Cantu v. J. Weingarten’s, Inc. As originally filed, plaintiff’s petition alleged an amount of damages that was within the county court at law’s jurisdictional limit. By subsequent amendment plaintiff petitioned for additional damages accruing through the passage of time, thereby raising the claimed recovery to an amount in excess of the court’s jurisdictional limit. Upon a plea to the jurisdiction, the trial court dismissed the suit as exceeding its statutory jurisdictional limit of $5000. Following the lead of an earlier case, the court of civil appeals reversed, reiterating that “[a] trial court may enter judgment in excess of its jurisdictional limit where the original amount of damages sought is within the jurisdictional limit of the court and the plaintiff, by subsequent amendment, seeks only additional damages that are accruing because of the passage of time.” Furthermore, according to the court, “[i]n the absence of pleading and proof that the allegations in a plaintiff’s original petition have been made fraudulently or in bad faith, the fact that the plaintiff’s amended petition alleges damages in excess of the court’s jurisdictional limit does not necessarily deprive the court of its jurisdiction over the case.”

1. 616 S.W.2d 290 (Tex. Civ. App.-Houston [1st Dist.] 1981, writ ref’d n.r.e.).
3. Flynt v. Garcia, 587 S.W.2d 109 (Tex. 1979) (per curiam); see Haginas v. Malbis Memorial Foundation, 163 Tex. 274, 354 S.W.2d 368 (1962); Isbell v. Kenyon-Warner Dredging Co., 113 Tex. 528, 261 S.W. 762 (1924).
4. 616 S.W.2d at 291.
5. Id.

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II. JURISDICTION OVER THE PERSON

The propriety of out-of-state service under article 2031b, the Texas long-arm statute, continues to be the subject of considerable attention. Section 3 of article 2031b provides that when a nonresident "engages in business in this State," service on the nonresident is authorized under the statute "in any action, suit or proceedings arising out of such business." The case of Prejean v. Sonatrach, Inc. is significant because it indicates that the United States Court of Appeals for the Fifth Circuit follows a stricter construction of the statute than do the Texas state courts. The question presented was whether the plaintiffs could rely upon activities of the defendants in Texas that were not related to the cause of action asserted to establish personal jurisdiction under article 2031b. Undaunted by several state court decisions directly on point, and apparently oblivious to Erie, the Fifth Circuit held that article 2031b does not reach as far as the federal constitution will permit and that it expressly limits its application to causes of action arising out of activities done within the state. The holding in Prejean could prove to have only modest procedural impact because a plaintiff has the option of relying upon rule 108 of the Texas Rules of Civil Procedure for a full constitutional reach in effecting service upon a nonresident, regardless of whether suit is brought in state jurisdiction.
or federal court.\textsuperscript{14}

\textit{Helicopteros Nacionales de Colombia, S.A. v. Hall}\textsuperscript{15} could lead to a determination by the Texas Supreme Court of the outer reach of the Texas long-arm statute. The plaintiffs, survivors of four individuals who were killed in the crash of a helicopter in Peru, sued a South American corporation in a wrongful death action and effected service under article 2031b. Neither the individuals killed in the crash nor their representatives were residents of or had any contacts with Texas. A joint venture that had employed the persons killed was engaged in the construction of a pipeline in Peru and, in connection with the project, had contracted with the defendant to furnish helicopter transportation service in that country. The evidence was disputed as to whether the contract was negotiated in Texas, Oklahoma or Peru; however, it was apparently uncontroversed that the defendant accepted and executed the contract in Peru. Further, the contract provided that the parties to it "were to be subject to the forum and laws of Peru."\textsuperscript{16} While monies due the defendant under the contract originated from a Texas bank, they were sent to the defendant in either New York or Panama. Apart from these events, the defendant had no contacts with Texas. The defendant responded to the suit by filing a special appearance and, after a hearing on the matter, the trial court dismissed the action for lack of personal jurisdiction. In an appeal by the plaintiffs, the court of civil appeals, relying upon a federal case\textsuperscript{17} that considered a similar situation, held that the contacts of the defendant were insufficient to satisfy the requirements of article 2031b.\textsuperscript{18}

\textit{Familia de Boom v. Arosa Mercantil, S.A.},\textsuperscript{19} a case of first impression in Texas, may provide some encouragement to recalcitrant defendants involved in jurisdictional contests in a federal forum. The plaintiffs brought suit against two nonresident corporations, seeking recovery for damages arising from the sinking of a foreign vessel. Service was effected under article 2031b, and the defendants responded with a motion to dismiss for lack of personal jurisdiction. Subsequently, in an attempt to establish the


\textsuperscript{15} See FED. R. CIV. P. 4(e) (authorizing service in federal court on nonresidents in same manner prescribed in statute or rule of court of the state in which the federal court is held). See generally 4 C. Wright \& A. Miller, \textit{Federal Practice and Procedure} \S\S\ 1112-1113 (1969).

\textsuperscript{16} Id. at 252.

\textsuperscript{17} \textit{See Reich v. Signal Oil \& Gas Co.}, 409 F. Supp. 846 (S.D. Tex. 1974), \\textit{aff'd without opinion}, 530 F.2d 974 (5th Cir. 1976) (suit for wrongful death arising from a helicopter crash off the coast of Ghana where service was attempted under article 2031b).

\textsuperscript{18} 616 S.W.2d at 252. In the course of the printing of this article, the Texas Supreme Court affirmed the decision of the court of civil appeals and, in doing so, provided significant guidelines to the interpretation of art. 2031b. \textit{Hall v. Helicopteros nacionales de Colombia, S.A.}, 25 Tex. Sup. Ct. J. 190 (Feb. 27, 1982). This development will be reviewed in the 1983 Survey.

\textsuperscript{19} 629 F.2d 1134 (5th Cir. 1980), \textit{cert. denied}, 101 S. Ct. 2345 (1981).
defendants' contacts with the forum, the plaintiffs propounded interrogatories on the defendants. The defendants evaded the discovery and, after a hearing on the matter, the court ordered them to respond fully within a specified period. After the defendants failed to comply with the order, the trial court entered a default judgment against them for their contumacious conduct. On an appeal from the default judgment, the Fifth Circuit reiterated that in the federal courts "[t]he burden is on the plaintiff to establish jurisdiction when challenged by the defendant," but noted that "[i]n this case, the plaintiffs were foreclosed from presenting jurisdictional evidence in the exclusive possession of the defendants because the defendants refused to disclose the information in response to discovery procedures." Nevertheless, in finding that due process required the necessary facts to be of record, the court held that the plaintiffs were not exempt from the burden of proof even though they had been unable to obtain information from the defendants. Although it set aside the default judgment, the court remanded the case back to the trial court and directed that the plaintiffs be given further opportunity to develop the necessary facts from other sources.

Two final cases in the area of personal jurisdiction should be of interest to the trial attorney. Marathon Metallic Building Co. v. Mountain Empire Construction Co. involved a suit against a nonresident on his written guaranty. The guaranty covered extensions of credit under a contract between the plaintiff and a nonresident corporation that provided for the purchase of merchandise to be manufactured in Texas. Although the guaranty was silent as to its place of performance, the document had been sent to the plaintiff in Houston, Texas, and stipulated that it was to be governed by the laws of Texas. With the exception of the foregoing, the defendant had no other contacts with Texas. Nevertheless, the court found the guaranty to be a "purposeful and affirmative action, resulting in, at the least, a minimum contact with Texas," and held that due process was satisfied, and therefore sustained service on the defendant under article 2031b. The decision in La Quinta Motor Inns, Inc. v. Schmelig Construc-

21. 629 F.2d at 1138.
23. 629 F.2d at 1140.
24. 653 F.2d 921 (5th Cir. 1981).
25. Id. at 923.
26. Id.; accord, Gubitosi v. Buddy Schoellkopf Prods., Inc., 545 S.W.2d 528 (Tex. Civ. App.—Tyler 1976, no writ); National Truckers Serv., Inc. v. Aero Syss., Inc., 480 S.W.2d 455
also turned upon the focus of a written guaranty executed by a nonresident defendant. The only contact the nonresident defendant had with Texas was its transmission through the mails of a guaranty under which it guaranteed the obligations of a subsidiary to build motels in a number of states, including Texas. Upholding service on the defendant under article 2031b, the court concluded that the defendant's contacts, though minimal, satisfied the statute and comported with due process.

III. Service of Process

A number of decisions during the survey period invalidated service on the basis of inadvertent errors made by officials involved in the service of process. In Texas Inspection Services, Inc. v. Melville the plaintiff sought to effect service under article 2.11 of the Texas Business Corporation Act. Article 2.11 provides that if a corporation's registered agent cannot be located for service of process then the secretary of state may be served instead, and he shall cause a copy of the process to be forwarded by registered mail, "addressed to the corporation at its registered office." In Melville, however, the secretary of state sent a copy of the process to the defendant at 2525 Marilee Lane rather than 2526 Marilee Lane, which was the defendant's registered office. Finding this attempt at service to be insufficient, the court held that since the copy was inadvertently sent to an address that was not that of the defendant's registered office, the secretary of state had not performed the duty imposed on him by the statute.

A similar error occurred with respect to the return of the sheriff in Zaragoza v. De La Paz Morales. Although the named defendant was Andrew J. Zaragoza, the sheriff's return stated that service had been effected on Andrew L. Zaragoza. Pointing to the discrepancy in the middle initial, the defendant sought to set aside the default judgment. The appellate court concluded that the service of citation on the defendant was inadequate to support a default judgment and therefore reversed the trial court. The final example of harm caused by an official's inadvertent error is Pete Singh Produce, Inc. v. Macias. Macias is a warning that the requirements of rule 101, which states that the citation "shall be directed to the defendant," must be strictly followed. The clerk's citation had been addressed to the individual serving as the registered agent for the defendant corporation, rather than the corporation itself. On appeal from a default judg-

28. Id. at 828.
30. TEX. BUS. CORP. ACT ANN. art. 2.11 (Vernon 1980).
31. Id.
32. 616 S.W.2d at 254.
33. 616 S.W.2d 295 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.).
34. Id. at 296; see Hendon v. Pugh, 46 Tex. 211 (1876).
36. TEX. R. CIV. P. 101.)
ment, the court held that the citation was violative of the statutory citation requirements, and insufficient to support a default judgment.37

IV. Venue

In the area of venue the provisions of section 17.56 of the Deceptive Trade Practices—Consumer Protection Act (DTPA)38 were once again a major source of judicial decisions during the survey period. Under the 1977 version of the DTPA, suit against a defendant was permissible in a county where he had "done business."39 Although the legislature has since deleted that provision,40 a number of courts during the survey period were required to construe the "doing business" provision in suits governed by the former venue section.41 In keeping with prior broad readings of the provision,42 the court in T. P. Walsh Co. v. Manning held that a defendant had done business in Henderson County within the meaning of the statute by making trips to Henderson County during the negotiation and performance of the contract sued upon in order to examine records, work out problems, and deliver the final product.43

In Big Rock Properties Texas, Inc. v. King44 the court carried the broad construction of the doing business provision even further in a suit involving the lease of space in a shopping mall. The court found the telephone directory listing of the shopping mall in the county of suit to be sufficient proof that the defendant solicited business in that county.45 In contrast, the court in Jim Walter Homes, Inc. v. Altreche held that an advertisement placed in a telephone directory did not constitute the necessary venue proof when the directory was printed after the date of suit.46 Reading section 17.56 carefully, the court held that the statutory requirement that the defendant "has done business" is not satisfied by proof that he is currently doing business.47

The doing business element of proof was also lacking in Herfort v. Hargrove.48 In that case the court held that mailing receipts to purchasers of

37. 608 S.W.2d at 823.
38. TEX. BUS. & COM. CODE ANN. § 17.56 (Vernon Supp. 1982).
41. The DTPA specifically provides that its provisions are prospective only and do not apply to causes arising prior to its effective date. TEX. BUS. & COM. CODE ANN. § 17.6 (Vernon Supp. 1982).
43. 609 S.W.2d 636, 638 (Tex. Civ. App.—Tyler 1980, no writ).
44. 613 S.W.2d 804 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).
45. Id. at 805; accord, Dairyland County Mut. Ins. Co. v. Harrison, 578 S.W.2d 186, 191 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ) (listing of insurance agencies as agent for defendant in Houston yellow pages telephone directory constituted "doing business" under section 17.56).
47. Id. at 734.
48. 606 S.W.2d 359 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).
goods in the county of suit was not doing business, but merely confirmatory evidence of business concluded elsewhere.\textsuperscript{49} Similarly, in \textit{Ferrara v. Corinth Joint Venture} the mere fact that the goods in question were located in the county of suit was held not to be sufficient evidence that the defendant had done business in that county.\textsuperscript{50}

The decision in \textit{Munoz v. Farmland Industries, Inc.}\textsuperscript{51} made clear that the requirement of rule 86,\textsuperscript{52} that the grounds relied upon to confer venue be set out specifically in the controverting plea, is applicable when section 17.56 of the DTPA is involved.\textsuperscript{53} Compliance with pleading requirements was also considered in \textit{Portland Savings & Loan Association v. Bevill, Bresler & Schulman Government Securities, Inc.}\textsuperscript{54} The court held that a plaintiff seeking to rely on section 17.56 to maintain venue was required to allege facts showing that it was a “consumer” of “goods” or “services.”\textsuperscript{55} \textit{Portland Savings} also recognized that section 17.56 is expressed in permissive rather than mandatory terms, and therefore may not be used by a nonresident defendant to transfer venue.\textsuperscript{56}

Two courts during the survey period considered the appropriate venue of a cross-action for indemnity brought by a defendant in a DTPA suit against a third party.\textsuperscript{57} Opposite results were reached by the two courts when they determined whether venue was properly maintainable in the county of the plaintiff’s original suit. In \textit{Diamond Shamrock Corp. v. Chem-Tex Farm Supply} the court concluded that the character of the cross-action for indemnity was distinct from the main suit and did not incorporate the elements of the primary DTPA suit so as to make section 17.56 applicable.\textsuperscript{58} The court in \textit{Williamson v. J.V. Frank Construction, Inc.},\textsuperscript{59} in contrast, found that by enacting the provision permitting indemnity suits, the legislature intended to change former holdings\textsuperscript{60} so as to

\begin{itemize}
\item \textsuperscript{49} Id. at 360. The court concluded that a slogan on the receipt stating “Factory Prices on Diamonds” was simply a “reminder” that the defendant was still doing business elsewhere. \textit{Id.}
\item \textsuperscript{50} 611 S.W.2d 669, 670 (Tex. Civ. App.—Eastland 1980, no writ).
\item \textsuperscript{51} 603 S.W.2d 225 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ dism’d).
\item \textsuperscript{52} TEX. R. CIV. P. 86.
\item \textsuperscript{53} 603 S.W.2d at 229.
\item \textsuperscript{54} 619 S.W.2d 241 (Tex. Civ. App.—Corpus Christi 1981, no writ).
\item \textsuperscript{55} \textit{Id.} at 245. The terms “consumer,” “goods,” and “services” are expressly defined in \textsection{} 17.45 of the Act. \textit{TEX. BUS. & COM. CODE ANN.} \textsection{} 17.45 (Vernon 1968 & Supp. 1982). The necessary venue fact to be proved in \textit{Portland Savings} was that the solicitation upon which the action was based took place in the county of suit. 619 S.W.2d at 245.
\item \textsuperscript{56} 619 S.W.2d at 246.
\item \textsuperscript{57} Prior to 1977 courts had held that no cause of action for indemnity in a deceptive trade practice suit existed. \textit{See, e.g.,} Jones v. Tucker, 611 S.W.2d 456 (Tex. Civ. App.—Corpus Christi 1980, no writ); Volkswagen of Am., Inc. v. Licht, 544 S.W.2d 442 (Tex. Civ. App.—El Paso 1976, no writ). Section 17.55A was added to the act during the 1977 amendments to provide for such a cause of action. \textit{TEX. BUS. & COM. CODE ANN.} \textsection{} 17.55A (Vernon Supp. 1982).
\item \textsuperscript{58} 618 S.W.2d 898, 901 (Tex. Civ. App.—Amarillo 1981, no writ).
\item \textsuperscript{59} 616 S.W.2d 437 (Tex. Civ. App.—Fort Worth 1981, no writ).
\item \textsuperscript{60} \textit{See, e.g.,} Jones v. Tucker, 611 S.W.2d 456 (Tex. Civ. App.—Corpus Christi 1980, no writ); Volkswagen of Am., Inc. v. Licht, 544 S.W.2d 442 (Tex. Civ. App.—El Paso 1976, no writ).
\end{itemize}
permit venue in the county of the original action.\textsuperscript{61}

Subdivision 5(a) of article 1995\textsuperscript{62} was also the subject of considerable judicial scrutiny during the survey period. In \textit{Garcia v. Discrobis Oil Co.}\textsuperscript{63} the court examined a lease term requiring the lessee to pay "at the county of [lessor's] residence"\textsuperscript{64} for damage to the property. Holding that this provision permitted the "possibility" of payment in more than one county, the court concluded that, within the meaning of subdivision 5(a), the contract was not performable in "a particular county."\textsuperscript{65} On the other hand, the court in \textit{Associates Development Corp. v. W.F. & J.F. Barnes, Inc.}\textsuperscript{66} found subdivision 5(a) to have been satisfied by invoices that stated that they would be payable in the county of suit at the seller's option, despite the optional nature of the place of performance.\textsuperscript{66}

In \textit{Williams v. Goodpasture, Inc.}\textsuperscript{67} suit was brought against a corporation and its president to recover on a promissory note executed by the president. The president sought to avoid the application of subdivision 5(a) by arguing that the plaintiff was required to show a binding obligation against him on the note as a venue prerequisite.\textsuperscript{68} Rejecting this argument, the court emphasized that the venue fact to be proved was whether the person "alleged to be liable" contracted in writing to perform the obligation.\textsuperscript{69} Thus, the defendant's affirmative defense of lack of individual capacity could only be raised at the trial on the merits.\textsuperscript{70}

\textit{Dave Summers Realtors, Inc. v. Astro Leasing, Inc.}\textsuperscript{71} raised the question of whether a subsequent oral waiver of a written place of payment term could render subdivision 5(a) inapplicable. Because the written contract required all waivers to be in writing,\textsuperscript{72} the court held that the plaintiff's oral direction to send payments to a county other than that named in the contract would not alter the venue rights conferred by subdivision 5(a).\textsuperscript{73}

\begin{itemize}
\item \endnote{61} 616 S.W.2d at 439.
\item \endnote{62} TEXT revive. Civ. Stat. Ann. art. 1995(5)(a) (Vernon Supp. 1982) allows venue in an action based on a contract to be maintained in a county if that particular county is named as a place of performance in a written contract.
\item \endnote{63} 612 S.W.2d 264 (Tex. Civ. App.—San Antonio 1981, no writ).
\item \endnote{64} \textit{Id.} at 265.
\item \endnote{65} \textit{Id.} at 266. \textit{See also} Sabine Prod. Co. v. Frost Nat'l Bank, 596 S.W.2d 271 (Tex. Civ. App.—Corpus Christi 1980, no writ).
\item \endnote{66} 614 S.W.2d 876, 881 (Tex. Civ. App.—Waco 1981, writ dism'd).
\item \endnote{67} 614 S.W.2d 876, 881 (Tex. Civ. App.—Waco 1981, writ dism'd).
\item \endnote{68} 607 S.W.2d 52 (Tex. Civ. App.—Amarillo 1980, no writ).
\item \endnote{69} 607 S.W.2d 52 (Tex. Civ. App.—Amarillo 1980, no writ).
\item \endnote{70} Since the defendant contended that he had contracted only in his capacity as an officer of a corporation, and was therefore not personally bound by the contract, he argued that subdivision 5(a) was inapplicable. \textit{Id.} at 53.
\item \endnote{71} The court noted that the signature of the defendant did not affirmatively show representative capacity. \textit{Id.} at 54.
\item \endnote{72} \textit{Id.}
\item \endnote{73} \textit{Id.} In making this determination, the court relied on the provision of the Texas Uniform Commercial Code stating that "[a] signed agreement which excludes modification except by a signed writing cannot be otherwise modified." \textit{Tex. Bus. & Com. Code Ann. § 2.209(b) (Tex. UCC) (Vernon 1968).} The court then concluded that a waiver of the place of payment term was a modification. 603 S.W.2d at 302. \textit{But see Tex. Bus. & Com. Code Ann. § 2.209(c) (Tex. UCC) (Vernon 1968).}
The pleading allegations necessary to raise the applicability of subdivision 5(b),\textsuperscript{74} the "consumer contract" venue provision, were addressed in\textit{Hudman v. John Deere Co.}\textsuperscript{75} Relying on the recent decision in\textit{Goudy v. Lewis},\textsuperscript{76} the plaintiff argued that since the defendant had the burden of proving the facts necessary to invoke subdivision 5(b), he must also specifically raise the issue in his plea of privilege.\textsuperscript{77} The court of civil appeals, however, declined to read \textit{Goudy} as requiring the raising of specific allegations of facts under subdivision 5(b) in a plea of privilege.\textsuperscript{78} Although the court recognized that subdivision 5(b) facts were an avoidance of applicability of subdivision 5(a), it concluded that the requirement of rule 94\textsuperscript{79} that matters of avoidance be affirmatively pleaded did not govern venue pleadings. Instead, the court held that rule 86\textsuperscript{80} applied, and that general averments were sufficient to permit the defendant to rely on subdivision 5(b).\textsuperscript{81} The court further held that the defendant could rebut the plaintiff's proof under subdivision 5(a) by offering evidence of subdivision 5(b) facts.\textsuperscript{82} The plaintiff argued that the defendant had purchased equipment for his business of farming, and therefore no consumer transaction was involved. The court held, however, that a "consumer transaction" did not exclude products bought for commercial purposes when the intended use was agricultural.\textsuperscript{83}

In\textit{McCullough v. Key}\textsuperscript{84} the court considered the type of fraud sufficient to sustain venue under subdivision 7 of article 1995.\textsuperscript{85} Although the court found that the plaintiff's own testimony negated the element of false representation,\textsuperscript{86} the court concluded that a showing of breach of fiduciary duty

\textsuperscript{74.} \text{TEX. REV. CIV. STAT. ANN. art. 1995(5)(b) (Vernon Supp. 1982) fixes venue in a suit brought upon an obligation to pay money arising out of a "consumer transactions" for goods "intended primarily for personal, family, household or agricultural use."}

\textsuperscript{75.} 620 S.W.2d 752 (Tex. Civ. App.—Dallas 1981, no writ).

\textsuperscript{76.} 599 S.W.2d 677, 679 (Tex. Civ. App.—Austin 1980, writ dism'd) (defendant has burden to prove facts bringing case with subdivision 5(b)).

\textsuperscript{77.} The court noted contrary authority holding that a plaintiff generally has the burden to prove facts bringing the case within a statutory exception to the defendant's venue right to be sued at his residence. 620 S.W.2d at 753 (citing Collins v. F.M. Equip. Co., 162 Tex. 423, 424, 347 S.W.2d 575, 577 (1961)).

\textsuperscript{78.} 620 S.W.2d at 753.

\textsuperscript{79.} Id. P. 94.

\textsuperscript{80.} Id. 86.

\textsuperscript{81.} 620 S.W.2d at 753.

\textsuperscript{82.} In so holding, the court declined to determine what level of proof a plaintiff seeking to bring the case within the provisions of subdivision 5(a) must offer. Id.

\textsuperscript{83.} Id. at 754. In so holding, the court found support by analogy in cases decided under subdivision 31 of \text{TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon Supp. 1982)} which have held a product purchased by a commercial enterprise to be a consumer good. \textit{See, e.g., Truckers Equip., Inc. v. Sandoval, 569 S.W.2d 518 (Tex. Civ. App.—Corpus Christi 1978, no writ), discussed in Figari, Texas Civil Procedure, Annual Survey of Texas Law, 33 Sw. L.J. 455, 462 (1979).}

\textsuperscript{84.} 608 S.W.2d 351 (Tex. Civ. App.—Fort Worth 1980, no writ).

\textsuperscript{85.} \text{TEX. REV. CIV. STAT. ANN. art. 1995(7) (Vernon 1964). That subdivision fixes venue in suits brought to recover for fraud.}

\textsuperscript{86.} As the court noted, a plaintiff relying on subdivision 7 must prove, not merely allege, fraud. 608 S.W.2d at 352. \textit{See Safeway Stores, Inc. v. Amburn, 380 S.W.2d 727, 729 (Tex. Civ. App.—Fort Worth 1964, writ dism'd); Texas Employers' Ins. Ass'n v. McDaniel, 286 S.W.2d 465, 468 (Tex. Civ. App.—Amarillo 1956, no writ).}
by a defendant satisfied the fraud requirement of subdivision 7. The court also found that the corporate defendant was incapable of raising a plea of privilege in a shareholder derivative action since the corporation in such an action is considered a plaintiff.

The scope of the term "consumer goods" within the meaning of subdivision 31 of article 1995 continued to be the subject of judicial construction during this survey period. Rejecting several earlier decisions, the court in Schwertner v. Nalco Chemical Co. concluded that products intended for agricultural use were not "consumer goods" under subdivision 31. The court thereby confirmed an earlier holding that relied on a narrow definition of "consumer goods" as set out in the Texas Uniform Commercial Code.

The court in John Deere Industrial Equipment Co. v. McMahon Construction Co. was also called upon to construe the meaning of the term "plaintiffs" in that portion of subdivision 31 permitting suit "in the county where the . . . plaintiffs reside" was in question. The defendant-seller in McMahon Construction had brought a third-party indemnity action against the manufacturer after being sued by the plaintiff-consumer in the county of plaintiff's residence. Rejecting the defendant-seller's contention that the reference to "plaintiffs" in subdivision 31 referred to the plaintiff in the primary suit, the court held that the defendant-seller was to be treated as a plaintiff insofar as the third-party defendant was concerned. Thus, the defendant-seller was required to allege and prove its own residence to maintain venue under subdivision 31.

Subdivision 29a of article 1995 permits the venue of suits to be maintained against "all necessary parties" to an action if the suit is lawfully maintainable in that county against any party. Two cases during the survey period considered the term "necessary parties" and found that at least one of the multiple defendants against whom the plaintiffs sought to main-

87. Id.
88. Id.
91. 615 S.W.2d 263, 266 (Tex. Civ. App.—Tyler 1981, writ dism'd). The court refused to reason by analogy from subdivision 5(b) of art. 1995, which expressly includes goods intended for agricultural use, that subdivision 31 should also include such goods. See id. at 265-66.
95. Id. at 320.
96. Id.
tain the actions were not such parties. In Friday v. Grant Plaza Huntsville Associates the Texas Supreme Court resolved a conflict among the courts of civil appeals and held that a guarantor was not a necessary party in a suit against the principal obligor. Similarly, in Portland Savings & Loan Association v. Bevill, Bresler & Schulman Government Securities, Inc. the court found that agents were not necessary parties in a suit against the principal. In both cases the test was held to be whether the plaintiff could obtain complete relief from one defendant, without the joinder of the others.

The provisions of article 2212a, permitting claims for contribution between named defendants to be determined in the primary suit, were considered by two courts during the survey period. In Chadwick v. Mallard & Mallard, Inc. three defendants, each of whom had cross-claimed for indemnity and contribution against the others, filed pleas of privilege, and one plea was sustained. Reversing the action of the trial court, the court of civil appeals held that the provisions of section 2(g) of article 2212a were mandatory and thus required venue of all the claims to be lodged in the county of plaintiff's primary action.

In State Department of Highways & Public Transportation v. Hardy the court considered a more complicated situation involving article 2212a. The plaintiff had brought a wrongful death action against a state agency and two private defendants, and the agency had asserted cross-claims for contribution against each of its co-defendants. Subsequently, however, the two co-defendants filed pleas of privilege with respect to plaintiff's wrongful death action and with respect to the agency's contribution claim. Originally the plaintiff and agency both controverted each of the pleas; the plaintiff, however, subsequently withdrew its controverting affidavit. Thereafter the trial court sustained each of the pleas of privilege of the two co-defendants.

Noting that the Texas Tort Claims Act contains a jurisdictional provision requiring suit against a state agency to be brought in the county where the case arose, the court concluded that the agency's claims for contribution against the co-defendants were required by article 2212a to be lodged in the same county. As analyzed by the court, the primary suit to which

99. 610 S.W.2d 747, 750 (Tex. 1980).
101. 610 S.W.2d at 750; 619 S.W.2d at 247.
104. Id. at 313. The court relied on Goodyear Tire & Rubber Co. v. Edwards, 512 S.W.2d 748, 753 (Tex. Civ. App.—Tyler 1979, no writ).
the claims for contribution related was that brought against the state agency. The court pointed out, however, that article 2212a governed only the venue of claims for contribution and not the venue of the other claims against the parties. Accordingly, the court sustained the transfer of the plaintiff's claims against the co-defendants. In so doing, the court rejected the agency's contentions that it had filed a controverting affidavit on behalf of the plaintiff that should have been considered by the trial court. As the court noted, rule 86 does not give a co-defendant the right to controvert the plea of privilege filed by another defendant.

The National Bank Act contains a mandatory provision requiring actions against national banks to be brought in the county of the bank's domicile. A notable exception to the requirement exists, however, when the suit is local rather than transitory. The court in Citizens National Bank v. Cattleman's Production Credit Association interpreted this exception in a declaratory judgment action instituted to determine the rights and liabilities of the parties to a deed of trust lien on certain land. After carefully examining the character of the action brought by the plaintiff and finding that it was in the nature of a suit to foreclose a mortgage, the court concluded that the suit was one in rem and hence local in character. Thus, the action did not come within the mandatory venue provisions governing proceedings against a national bank.

Statutory venue provisions were also the subject of interpretation by the Texas Supreme Court in Morgan v. Williams. The provision at issue in that case was article 4656 which requires injunctions against inhabitants of Texas to be tried and issued by the court of the defendant's domi-

108. 607 S.W.2d at 614.
109. Id.
110. Id. at 615. the agency had filed a controverting affidavit on plaintiff's behalf after hearing of the plaintiff's intention to withdraw its own controverting affidavit. Id.
111. TEX. R. Civ. P. 86 provides:
A copy of such plea of privilege shall be served on the adverse party or his attorney of record by actual delivery in person to him or by mailing a copy of such pleading to him by registered mail return receipt requested. If such adverse party desires to controvert the plea of privilege, he shall within ten days after he or his attorney of record receive the copy of the plea of privilege file a controverting plea under oath, setting out specifically the grounds relied upon to confer venue of such cause.
112. 607 S.W.2d at 615.
115. See Casey v. Adams, 102 U.S. 66, 67 (1880) (established exception for local actions against national banks).
117. Id. at 736. Thus, the provisions of subdivision 12 of art. 1995 governing suits for foreclosure of liens was applicable if not overridden by the National Bank Act. Under subdivision 12 suit may be brought in the county where the property or any part thereof subject to such lien is situated.
118. Id. at 737.
119. Id. at 736-37.
120. 610 S.W.2d 467 (Tex. 1980).
121. TEX. REV. CIV. STAT. ANN. art. 4656 (Vernon 1952).
ciliary county. The trial court in Morgan issued a temporary injunction against a nonresident defendant over his objections that the court lacked jurisdiction of the case under the provisions of article 4656. On appeal, the court of civil appeals affirmed on the narrow ground that article 4656 controlled venue only and not jurisdiction. The supreme court reversed, holding that while the injunction so issued was not void, it was erroneous.

In Industrial State Bank v. Engineering Service & Equipment, Inc. the court considered a number of issues related to the proper presentation of a plea of privilege. The due order of pleading, the first issue addressed, was raised by the defendant because the plea of privilege and answer were filed simultaneously, and the answer did not recite that it was subject to the plea. The court determined that the due order of pleading was satisfied so long as the plea was the first of any instrument, in this case the first page, filed; when one instrument contained both plea and answer in the proper order, the answer did not have to recite that it was subject to the plea.

A second issue was raised in Engineering Service because the verification of the plea merely stated that it was true "to the best of [the defendant's] knowledge, information and belief." While agreeing that such a verification was defective under rule 86, the court held that the defect in the plea did not make the plea void; rather, the defect could be amended and cured if pointed out by motion or exception under rule 90. Moreover, once amended, the properly verified plea would relate back to the original filing date.

Finally, the court rejected the third contention that the plea was waived because the defendant sought a protective order against the plaintiff's deposition prior to the hearing on the plea. Recognizing that discovery is consistent with a plea of privilege, the court reasoned that the supervision of such process was likewise consistent with the plea. Thus, the defendant did not waive its plea of privilege by seeking the trial court's protection.

Waiver was also the subject of consideration in Donie State Bank v.
The trial court had scheduled a hearing on the various parties' motions and, at that hearing, had first considered and ruled upon a motion for severance before considering the venue question. Pointing out that the defendants had objected to this order of hearing, had requested that the plea of privilege be heard first, and had repeatedly stated that the pleas were not waived, the court held that no intent to waive was present.\textsuperscript{3}

The applicability of rule 21a\textsuperscript{136} to the filing of the controverting affidavit was addressed by the court in \textit{Bentley v. Rio Grande Development Group}.\textsuperscript{137} The controverting affidavit in \textit{Bentley} was filed on the thirteenth day after the plea of privilege was filed.\textsuperscript{138} Because service of the plea was effected by mail, however, the plaintiff argued that the affidavit was timely under the provisions of rule 21a permitting three additional days for reply when an instrument was served by mail. Refusing to follow a line of cases supporting the plaintiff's argument,\textsuperscript{139} the \textit{Bentley} court adhered to authority\textsuperscript{140} stressing the literal language of rule 86.\textsuperscript{141} Under that approach the court found that rule 21a was inapplicable since it specified when service was to be considered effected, while rule 86 concerned itself not with service of a plea of privilege, but receipt of such a plea.\textsuperscript{142} Accordingly, the ten days for filing the controverting affidavit ran, the court held, from receipt of the plea and not from its service.\textsuperscript{143} Furthermore, the fact that the copy of the plea received by the plaintiff was not marked to indicate that the plea had actually been filed, was held to be irrelevant.\textsuperscript{144}

Finally, the supreme court in \textit{Corpening v. Corpening}\textsuperscript{145} emphasized the unqualified right of a defendant to appeal from an order overruling a plea of privilege. The supreme court reversed the determination by the court of civil appeals that such an appeal could be summarily dismissed without oral argument when the record made clear that the plea had been waived.\textsuperscript{146} Thus the waiver of the plea was held by the supreme court not to amount to such a waiver of the change of venue issue as to preclude

\textsuperscript{134} 620 S.W.2d 698 (Tex. Civ. App.—Dallas 1981, no writ).
\textsuperscript{135} \textit{Id.} at 699.
\textsuperscript{136} TEX. R. CIV. P. 21a.
\textsuperscript{137} 607 S.W.2d 319 (Tex. Civ. App.—Fort Worth 1980, no writ).
\textsuperscript{138} The plea was received by the law librarian of the defendant's attorney, then forwarded to the attorney, who did not receive it until three days later. \textit{Id.} at 320.
\textsuperscript{141} 607 S.W.2d at 321; see TEX. R. CIV. P. 86.
\textsuperscript{142} 607 S.W.2d at 321. The court stressed that the rule required the controverting affidavit to be filed within ten days after the plea of privilege was received. \textit{Id.}
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.} at 322.
\textsuperscript{145} 615 S.W.2d 186 (Tex. 1981).
\textsuperscript{146} \textit{Id.} at 187.
V. Pleadings

The procedure surrounding sworn account practice was the subject of some appellate court attention during the survey period in Federal Parts Corp. v. Robert Bosch Corp. Rule 185 provides that a suit on a sworn account "shall be taken as prima facie evidence thereof, unless the party resisting such claim shall . . . file a written denial, under oath, stating [1] that each and every item is not just or true, or [2] that some specified item or items are not just and true." Although the defendant in Robert Bosch failed to file a verified denial to an action on a sworn account, the court concluded that such failure merely had the effect of establishing the account and that the defendant was not foreclosed from defeating the claim on the basis of an affirmative defense alleged in its answer.

Bluebonnet Farms, Inc. v. Gibraltar Savings Association illustrates the risk in deferring the assertion of a dilatory plea. After the case had been on file longer than the applicable limitations period, the defendant submitted an amended answer alleging that the plaintiff corporation lacked the capacity to sue due to the forfeiture of its charter, and asserting the statute of limitations as a defense. The defendant also filed a motion for summary judgment predicated on the limitations defense and, after a hearing on the matter, the trial court granted the motion and dismissed the suit. The plaintiff appealed the ruling. Emphasizing that the defendant had previously answered on the merits, had participated in discovery, had allowed the case to proceed for four years, and had offered no explanation for the delay in asserting the plea, the court of civil appeals reinstated the suit, concluding that the trial court had abused its discretion in allowing the filing of the plea at such a late date.

Several other cases involving question on pleadings were decided during the survey period. The court in Vanderford v. Hudson, in considering the filing of an amended petition that omitted a previously named defendant, ruled that the filing of such an amendment had the effect of dismissing the party omitted, just as if an order to that effect had been entered by the trial court. In addition, two cases concluded that when the recovery of pre-judgment interest was authorized by statute, a petition containing a general prayer for relief was sufficient to support an award of such interest.

147. Id.; cf. TEX. REV. CIV. STAT. ANN. art. 2008 (Vernon 1964) (either party may appeal judgment sustaining or overruling plea of privilege).
148. 604 S.W.2d 367 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).
149. TEX. R. CIV. P. 185.
150. 604 S.W.2d at 369-70; see Rizk v. Financial Guardian Ins. Agency, Inc., 584 S.W.2d 860, 863 (Tex. 1979) (verified denial not nullified by alternative pleading of affirmative defenses).
152. Id. at 83.
153. Id. at 84.
154. 619 S.W.2d 432, 435 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).
VI. LIMITATIONS

The "discovery rule" is a legal principle providing that the applicable period of limitations runs from the date an injury was or should have been discovered by a plaintiff, rather than the actual date of the wrongful act. The applicability of this rule to various causes of action was addressed by a number of courts during the survey period. In Smith v. Knight, however, the supreme court expressly reserved the question of the discovery rule's applicability to legal malpractice cases. The court in McClung v. Johnson displayed no such hesitancy, and rejected application of the discovery rule in legal malpractice suits. The court, however, refused to apply a strict date of wrongful act test, holding that the confidential relationship of attorney and client required a different rule. Since a fiduciary duty of disclosure existed, the court concluded that a failure to disclose was a concealment that tolled the limitations period. The court further held that the cessation of the relationship ended any duty to disclose, and thus suit filed more than two years after the termination of the relationship was barred. The McClung decision is also notable for its affirmation of the rule that a statute extending a limitations period cannot be applied retroactively to revive a cause of action after the original limitations period has run.

In Anderson v. Sneed the court did not reach the issue of the applicability of the discovery rule to legal malpractice. Instead, the court followed the rule that fraudulent concealment tolls the limitations period. The court held that an attorney's incorrect representations to his client concerning the legal status of a case could constitute such fraudulent concealment. The Anderson court also held that the limitations period for a malpractice suit for failure to sue wrongdoers began on the last day such wrongdoers could have been sued. Further, the court held that the re-


157. 608 S.W.2d 165, 166 (Tex. 1980).


159. 620 S.W.2d at 647.

160. Id.

161. Id.

162. Id. at 647-48.


164. The representations noted by the court included, among other things, statements that the cause of action that the attorney had been engaged to prosecute had no limitations period. 615 S.W.2d at 902.

165. Id. at 903.

166. Id. at 900.
cent amendment of article 5526\textsuperscript{167} required the application of a four-year rather than a two-year limitations period to legal malpractice suits.\textsuperscript{168}

In contrast, the court in \textit{Jim Walter Homes, Inc. v. Castillo}\textsuperscript{169} approved the application of the discovery rule to a cause of action asserted under the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA).\textsuperscript{170}

In this case involving a claim for false representations concerning the construction of a home, the limitations period was held to run from the time the defects in the completed home first became evident.\textsuperscript{171} In a similar case under the DTPA, \textit{Jim Walter Homes, Inc. v. Chapa},\textsuperscript{172} a four-year, rather than a two-year, limitations period was applied. The court rejected the defendant's claim that the two-year statute\textsuperscript{173} applied to the action because it was brought under the DTPA. Analyzing the nature of the claim, the court applied the four-year statute because the suit arose out of written representations in a contract.\textsuperscript{174} The four-year statute was also held to apply in \textit{Conann Constructors, Inc. v. Muller}, involving a suit for breach of implied warranties.\textsuperscript{175} In reaching this determination, the court relied upon a court holding that an implied warranty is as much a part of a written contract as its express terms.\textsuperscript{176} Thus, the claim was based on a writing, and the four-year period was applicable.\textsuperscript{177}

In addition to cases involving legal malpractice, several decisions were handed down concerning limitations in other professional malpractice areas. In \textit{Doran v. Compton},\textsuperscript{178} for example, the Fifth Circuit was called upon to determine the application of article 5.82,\textsuperscript{179} the statute of limitations formerly applicable to medical malpractice claims, to a cause of action accruing prior to its enactment. The court recognized that the test to ascertain the retroactivity of such a statute was (1) whether the legislature intended that result, and (2) whether that result violated the Texas Constitution.\textsuperscript{180} Noting that two state courts of civil appeals had reached opposite results concerning the retroactivity of article 5.82,\textsuperscript{181} the court held that

\textsuperscript{167} TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1982). That amendment extended from two to four years the limitations period for actions on a debt not evidenced by a writing. \textit{See generally} Figari, supra note 39, at 425.

\textsuperscript{168} The court was careful to note, however, that medical malpractice actions are governed by a specific two-year statute. 615 S.W.2d at 904 (citing TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1982)).

\textsuperscript{169} 616 S.W.2d 630 (Tex. Civ. App.—Corpus Christi 1981, no writ).

\textsuperscript{170} TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1982).

\textsuperscript{171} 616 S.W.2d at 634.

\textsuperscript{172} 614 S.W.2d 838 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

\textsuperscript{173} \textit{Id}. at 841. The defendant argued that the action should be governed by the former version of art. 5526, which provided for a two-year limitations period for actions upon debts not evidenced by a writing. \textit{See note} 167 \textit{supra}.

\textsuperscript{174} 614 S.W.2d at 840-41.

\textsuperscript{175} 618 S.W.2d 564 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.).

\textsuperscript{176} \textit{Id}. at 566 (citing Certain-Teed Prods. Corp. v. Bell, 422 S.W.2d 719 (Tex. 1968)).

\textsuperscript{177} 618 S.W.2d at 556-67.

\textsuperscript{178} 645 F.2d 440 (5th Cir. 1981).


\textsuperscript{180} 645 F.2d at 446.

\textsuperscript{181} \textit{Compare} Harvey v. Denton, 601 S.W.2d 121, 126 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.) (holding statute not to be retroactive) \textit{with} Wallace v. Homan & Crimen,
the legislative intent was that the statute apply prospectively only.182

Article 5536a183 prescribes the statute of limitations for wrongful death suits arising out of defective conditions on real property against persons who performed construction or repair on improvements on the property. In Ellerbe v. Otis Elevator Co. the court held that the statute applied to a suit against the manufacturer of the elevator, even though the manufacturer did not install it.184 The court also rejected a contention that the statute was unconstitutional as violative of due process and equal protection, finding that the classifications employed were based on valid distinctions.185

VII. PARTIES

In Vondy v. Commissioners Court186 the Texas Supreme Court construed the provisions of rule 39187 governing the joinder of parties. The plaintiff had brought a mandamus action against a county commissioners' court and four of the five commissioners; the fifth commissioner was not named as a party, and no objection to his absence was registered. The court of civil appeals, however, raised the commissioner's absence on its own motion and held his omission from the action to be fundamental error because he was an indispensable party.188 On appeal to the supreme court, that determination was reversed.189 Noting that a party is very rarely so indispensable as to deprive a court of jurisdiction by his absence,190 the court determined that complete relief could be given in this case without the fifth commissioner since the commissioners' court itself was a party, as well as a majority of the individual commissioners.191 The fifth commissioner therefore could not be considered indispensable.192

A number of courts during the survey period dealt with class action certification.193 Calaway v. Foxhall194 emphasized the importance of filing a timely motion for class certification.195 The failure of the attorney to make

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182. 645 F.2d at 452-53.
183. TEX. REV. CIV. STAT. ANN. art. 5536a, § 2 (Vernon Supp. 1982).
184. 618 S.W.2d 870, 872 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).
185. Id. at 873-75.
186. 620 S.W.2d 104 (Tex. 1981).
188. 601 S.W.2d 808, 809 (Tex. Civ. App.—Eastland 1980).
189. 620 S.W.2d at 107.
190. Id. at 106 (quoting Cooper v. Texas Gulf Indus., Inc., 513 S.W.2d 200 (Tex. 1974)).
191. 620 S.W.2d at 107.
192. Id. The case was thus distinguishable from Gaal v. Townsend, 77 Tex. 464, 14 S.W. 365 (1890) in which the absence of a county official was held fatal because only a majority of the officials could perform the act requested and the plaintiff had failed to name the official as defendants.
193. See TEX. R. CIV. P. 42(c)(1), which directs the court to determine whether the action is to be maintained as a class action as soon as practicable after commencement of the suit.
such a motion until after the original plaintiff's case became moot was held fatal to attempts to keep the suit alive as a class action.196 Stagner v. Friendswood Development Co.\textsuperscript{197} made clear that a judgment entered in the form of a class action was improper when no certification of a class had ever taken place. The fact that the plaintiffs had alleged that suit was brought on behalf of a class was therefore insufficient to permit judgment to be entered in favor of such a class.\textsuperscript{198}

In Jones v. City of Dallas\textsuperscript{199} the taxpayer-plaintiffs sought to maintain a class action to restrain the city from certifying, adopting, or enforcing ad valorem tax assessments on residential property. The named plaintiffs, however, failed to offer any evidence in support of their certification motion. The trial court held that as a matter of law the action was not one appropriate for class treatment. On appeal the court of civil appeals affirmed, noting that under substantive law each taxpayer was required to prove substantial individual injury.\textsuperscript{200} In addition, the court concluded that having offered no evidence in support of certification, the plaintiffs failed to show abuse of discretion by the trial court in refusing to certify.\textsuperscript{201}

VIII. Discovery

During the survey period the Texas Legislature created a limited physician-patient privilege.\textsuperscript{202} The Act precludes disclosure of communications from a person licensed to practice medicine in connection with any professional services as a physician to a patient.\textsuperscript{203} Records of the "identity, diagnosis, evaluation, or treatment of a patient . . . created or maintained by a physician" are also designated as privileged.\textsuperscript{204}

Several types of exceptions to the privilege, however, are created expressly. No privilege may be claimed in a court proceeding: (1) When the proceeding is brought by the patient against the physician;\textsuperscript{205} (2) when the

\begin{footnotesize}
196. 578 S.W.2d at 172.
197. 613 S.W.2d 793 (Tex. Civ. App.—Beaumont), \textit{writ ref'd n.r.e per curiam}, 620 S.W.2d 103 (Tex. 1981).
198. Accordingly, the judgment was reformed to delete class references. 613 S.W.2d at 795.
200. \textit{Id.} at 544. Presumably this would prevent common questions of law or fact from predominating over individual ones, thus making class certification improper under TEX. R. CIV. P. 42(b)(3).
201. 604 S.W.2d at 544. Although not explicitly relied upon, the court noted that the alleged class would contain some 200,000 members, thus suggesting that serious difficulties would be raised with regard to manageability of the class. See TEX. R. CIV. P. 42.
202. TEX. REV. CIV. STAT. ANN. art. 4495b, \textsection 5.08 (Vernon Supp. 1982) provides that "[c]ommunications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient, is [sic] confidential and privileged and may not be disclosed except as provided in this section." See \textit{id.} art. 5561h, \textsection 1-6 (confidentiality of mental health information). See generally Figari, \textit{supra} note 39, at 428-29.
203. TEX. REV. CIV. STAT. ANN. art. 4495b, \textsection 5.08(a) (Vernon Supp. 1982). A "patient" is defined as "any person who consults or is seen by a person licensed to practice medicine to receive medical care." \textit{Id.} \textsection 5.08(m).
204. \textit{Id.} \textsection 508(b).
205. \textit{Id.} \textsection 508(g)(1).
\end{footnotesize}
proceeding is a criminal or license revocation action in which the patient is a complaining witness; \(^{206}\) (3) when the patient or his representative waives his privilege in writing; \(^{207}\) (4) when the proceeding is to collect on a claim for medical services rendered to the patient; \(^{208}\) (5) when the proceeding is brought by the patient or his representative to recover monetary damages for any physical or mental condition of the patient; \(^{209}\) (6) when the proceeding is before a court or administrative body having jurisdiction over the subject matter, and the governing rules of procedure authorize discovery of the information; \(^{210}\) (7) involving a disciplinary investigation of a physician conducted under the Act; \(^{211}\) (8) involving a criminal investigation of a physician; \(^{212}\) and (9) when the disclosure is relevant to any one of several involuntary civil commitment or hospitalization proceedings. \(^{213}\)

The physician is also expressly authorized to disclose information protected under the Act: (1) to governmental agencies required or authorized by law to receive it; \(^{214}\) (2) to medical or law enforcement personnel if a probability exists that the patient may physically harm himself or others or suffer immediate mental or emotional injury; \(^{215}\) (3) to qualified personnel performing management audits, financial audits, program evaluations, or research; \(^{216}\) (4) to the extent necessary in the collection of fees for medical services; \(^{217}\) (5) to persons having a written consent of the patient or those having legal authority to act for the patient; \(^{218}\) (6) to persons or entities involved in the payment or collection of fees for medical services; \(^{219}\) or (7) to other physicians or medical personnel participating in the diagnosis, evaluation, or treatment of the patient. \(^{220}\)

The Act provides that the patient, or physician acting on his behalf, may claim the privilege. \(^{221}\) Further, the Act appears to be retroactive in its application. \(^{222}\) Finally, the Act provides that a person aggrieved by a violation of the Act may seek an injunction or bring a civil action for

\(^{206}\) Id.

\(^{207}\) Id. § 5.08(g)(2). The Act provides that the consent "must be in writing and signed by the patient" and specify the information covered, the reasons for the release, and the person to whom the information is to be released. Id. § 5.08(h)(1). Moreover, the patient has the right to withdraw his consent to the release at any time; such withdrawal does not, however, affect any information disclosed prior to written notice of the withdrawal. Id. § 5.08(j)(2).

\(^{208}\) Id. § 5.08(g)(3).

\(^{209}\) Id. § 5.08(g)(4).

\(^{210}\) Id.

\(^{211}\) Id. § 5.08(g)(5).

\(^{212}\) Id. § 5.08(g)(6).

\(^{213}\) Id. § 5.08(g)(7).

\(^{214}\) Id. § 5.08(h)(1).

\(^{215}\) Id. § 5.08(h)(2).

\(^{216}\) Id. § 5.08(h)(3).

\(^{217}\) Id. § 5.08(h)(4).

\(^{218}\) Id. § 5.08(h)(5).

\(^{219}\) Id. § 5.08(h)(6).

\(^{220}\) Id. § 5.08(h)(7).

\(^{221}\) Id. §§ 5.08(e); (f).

\(^{222}\) Id. § 5.08(d). See generally Ex parte Abell, 613 S.W.2d 255, 262 (Tex. 1981) (upholding retroactive application of a similar statute).
damages.\textsuperscript{223}

Under prior law, no type of physician-patient privilege existed in Texas.\textsuperscript{224} By enacting the privilege set forth in article 4495b, Texas joins a growing number of states that have recognized a privilege for communications made in connection with professional services to a patient.\textsuperscript{225}

The legislative action affecting discovery was not the only attention the area received during the survey period; the rules of procedure governing discovery were the subject of several noteworthy opinions. In \textit{Elkins v. Jones}\textsuperscript{226} the rule at issue was rule 169,\textsuperscript{227} governing requests for admissions of fact. The appellant had neither served responses to requests within the time allowed, nor sought any additional time within which to serve the responses. After the trial court had issued an order deeming the requests admitted, summary judgment was entered against the appellant on the basis of such admissions. On appeal, the court of civil appeals rejected the appellant's argument that the order deeming the requests admitted was invalid because it was issued without notice or hearing.\textsuperscript{228} The court observed that rule 169 was automatic in its operation, and unanswered requests deemed admitted, regardless of whether the trial court entered an order to that effect.\textsuperscript{229} Indeed, the court held that in such a situation the burden was on the appellant to file a motion and seek a hearing to avoid having the requests deemed admitted.\textsuperscript{230} In contrast, the appellant in \textit{Eskew v. Johnston Printing Co.} was held not to be bound by his failure to answer requests for admission in a timely fashion.\textsuperscript{231} The court based its decision on the fact that the proponent of the admissions, by asking for a legal conclusion rather than an admission of a fact, had failed to comply with rule 169, and therefore the request was not binding.\textsuperscript{232}

The use of a deposition against a party who was not joined in the suit until after the deposition was taken was considered by the court in \textit{Safeco Insurance Co. v. Gipson}.\textsuperscript{233} The deposition in question had been taken from one defendant prior to the time that Safeco had been made a party to the action; Safeco argued that the deposition was hearsay and should not have been admitted into evidence against it. The appellate court con-

\begin{itemize}
\item \textsuperscript{223} TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.08(2) (Vernon Supp. 1982).
\item \textsuperscript{224} See, e.g., Caddo Grocery & Ice v. Carpenter, 285 S.W.2d 470 (Tex. Civ. App.—Austin 1955, no writ). The majority of states, however, have recognized such a privilege. See 8 J. WIGMORE, A TREATISE ON THE LAW OF EVIDENCE § 2380, at 819 n.5 (McNaughton rev. ed. 1961).
\item \textsuperscript{225} See 8 J. WIGMORE, supra note 224, § 2286, at 75 nn.22b, 23 (Supp. 1979).
\item \textsuperscript{226} 613 S.W.2d 533 (Tex. Civ. App.—Austin 1981, no writ).
\item \textsuperscript{228} 613 S.W.2d at 534.
\item \textsuperscript{229} Id.; accord, Packer v. First Tex. Sav. Ass'n, 567 S.W.2d 574 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).
\item \textsuperscript{230} 613 S.W.2d at 534.
\item \textsuperscript{231} 615 S.W.2d 287, 289 (Tex. Civ. App.—Dallas 1981, no writ).
\item \textsuperscript{232} Id. The request in question sought an admission that the first paragraph of a specified letter "states that Defendant promised to pay to Plaintiff $19,000." Id.
\item \textsuperscript{233} 619 S.W.2d 275 (Tex. Civ. App.—Texarkana 1981, writ dism'd w.o.j.).
\end{itemize}
cluded, however, that because counsel for Safeco had been present at the
deposition, and because Safeco was the insurer of a named party at the
time of the discovery, it was not such a stranger to the suit as to justify
exclusion of the deposition.234

The failure of a party to disclose the identity of a witness in response to
interrogatories resulted in the exclusion of the witness’s testimony in Texas
Employers’ Insurance Association v. Meyer.235 The problem arose when
plaintiff, in an interrogatory, requested a list of witnesses defendant
expected to call. Defendant agreed to provide the information when it be-
came available. Prior to trial the defendant informed plaintiff that he did
not anticipate having any witnesses, even though he had knowledge of a
particular witness’s identity, testimony, and willingness to testify. On the
basis of these facts the trial court refused to admit the testimony of the
witness in question. The appellate court affirmed the exclusion of the testi-
ymony by the trial court, concluding it was within the discretion of the trial
court to impose sanctions for failure to comply with discovery.236

Disbarment proceedings generated two significant decisions in the area
of discovery during the survey period. In Greenspan v. State237 the appel-
lant assigned as error the trial court’s overruling of his motion to produce
the transcript of the testimony presented to the grievance committee.
Based on its analysis of rule 167, authorizing production of documents and
tangible items, the court held that the rules of civil procedure govern such
proceedings.238 Noting that the rule239 excepted from discovery written
statements of witnesses that were made subsequent to the transaction that
was the basis of suit and that were made in connection with the investiga-
tion of the claim, the court concluded that the requested transcript fell into
that category and hence was not discoverable.240

In McInnis v. State,241 another disbarment proceeding, the defendant
attempted to exclude certain evidence on the grounds that it had been im-
properly discovered by the state.242 The court, however, approved the ad-
mission of the evidence because such proceedings were civil and not
criminal in nature.243 Despite its suggestion that the exclusionary rule was

234. Id. at 278. The court was careful to distinguish cases in which a plaintiff sought to
use his own deposition against a defendant who was a stranger to the action at the time of
the deposition. See, e.g., Academy Welding v. Carnes, 535 S.W.2d 917 (Tex. Civ. App.—
Corpus Christi 1976, no writ); Heldt Bros. Trucks v. Silva, 464 S.W.2d 931 (Tex. Civ. App.—
Corpus Christi 1971, no writ).
236. Id. at 180.
237. 618 S.W.2d 939 (Tex. Civ. App.—Fort Worth 1981, writ ref’d n.r.e.).
238. Id. at 940. (citing STATE BAR OF TEXAS, RULES & CODE OF PROFESSIONAL RE-
SPONSIBILITY, art. 12, § 21 (1973)).
239. See TEX. R. CIV. P. 167(2).
240. 618 S.W.2d at 941.
241. 618 S.W.2d 389 (Tex. Civ. App.—Beaumont 1981, writ ref’d n.r.e.).
242. Among other acts, the discovery complained of included surreptitious tape record-
ings of conversations between the defendant and others. Id. at 393.
243. Id.
TEXAS CIVIL PROCEDURE

inapplicable to civil proceedings, the court also held that the actions of the state were not so improper as to require exclusion.

In Ex parte Abell a sharply divided Texas Supreme Court issued a detailed decision regarding the mental health information privilege enacted by the Texas Legislature in 1979. The issue before the court was whether a psychologist-defendant sued by two former patients for engaging in sexual intercourse with them during treatment could be required to reveal whether he had engaged in similar acts with other patients and, if so, the names of such patients. The defendant had refused to disclose such matters even after the trial court had ordered him to disclose. While contempt proceedings were in progress, however, the Texas Legislature passed article 5561h protecting communications between mental health professionals and patients as well as records of the identity and treatment of such patients. The supreme court first determined that article 5561h could be applied retroactively because it created a privilege relating to the admissibility of evidence, and thus was procedural in nature. Since retroactive application of procedural law did not violate the Texas Constitution, the court reasoned that article 5561h could be applied. The majority then concluded that the statute forbade disclosure of patients' identities through the attempted discovery. Expanding the statute even further, the majority held that the general inquiry into whether the defendant had conducted sexual activities with other patients was likewise barred. In reaching these conclusions the majority ignored the literal language of the statute, which, as the dissent pointed out, protects only “communications” and “records.”

IX. SUMMARY JUDGMENT

The supreme court discussed the probative effect of an affidavit of an interested party in the context of a summary judgment contest in Ameri-

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245. 618 S.W.2d at 393.


247. The trial court had attempted to minimize the intrusiveness of its order by subjecting the discovery to protections such as sealing the information discovered. 613 S.W.2d at 257.


249. 613 S.W.2d at 262. The court also noted, however, that the statute related to protection of a privacy right of the patient.

250. *See* TEX. CONST. art. I, § 16.

251. 613 S.W.2d at 263. The justices rejected the attempted “protections” imposed by the trial court as insufficient to protect the privacy of patients since, once identified, they could be subpoenaed to testify. *Id.*

252. *Id.*

253. *Id.* at 263-64.
cana Motel, Inc. v. Johnson,254 a suit to recover for supplies allegedly sold by the plaintiff. The corporate defendant moved for a summary judgment, and filed an accompanying affidavit by its manager that contained a denial of "any dealings" with defendant.255 The trial court granted a summary judgment on the basis of the affidavit; but on review the court of civil appeals discounted the probative effect to be given the affidavit, and reversed.256 The supreme court, finding that the manager's affidavit was clear, direct, positive, and without contradiction in the record, held that it was sufficiently probative, and summary judgment was properly granted.257

Two decisions rendered during the survey period illustrate the range of discretion that may be exercised by a trial court in deciding whether to consider posthearing summary judgment proof. In Central Texas Decorating Center v. Mutual Savings Institution258 the plaintiff failed to file any response or affidavits in opposition to the defendant's motion for summary judgment until two weeks after the hearing on the motion.259 In view of the tardiness of the filing of the affidavits, the appellate court found that the trial court had not abused its discretion in refusing to consider them, and concluded that a summary judgment in favor of the defendant was correctly entered.260 By comparison, in Carney's Lumber Co. v. Lincoln Mortgage Investors261 the trial court considered summary judgment evidence that was submitted nearly eleven months after a hearing on cross-motions for summary judgment. The proof considered was a corrected order entered by a bankruptcy court concerning the same realty that was involved in the state court action. Noting that the opposing party had notice of the bankruptcy proceeding and had an opportunity to respond to the additional evidence, the court of civil appeals concluded that the trial court had not abused its discretion in considering the corrected order.262

Finally, the timeliness of the notice for a summary judgment hearing was considered in Gulf Refining Co. v. A.F.G. Management, 34 Ltd.263 Appealing from a summary judgment entered in favor of the defendant, the plaintiff contended that the notice received by it of the hearing was insufficient. Although the motion had been served, in accordance with rule 166-

254. 610 S.W.2d 143 (Tex. 1980) (per curiam).
255. Id. at 143; see TEX. R. CIV. P. 166-A(c), governing summary judgment practice, which provides that "[a] summary judgment may be based on uncontroverted testimonial evidence of an interested witness . . . if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted."
257. 610 S.W.2d at 143-44; accord, Barham v. Sugar Creek Nat'l Bank, 612 S.W.2d 78 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).
259. Id. at 315.
260. Id. at 316.
262. Id. at 841-42.
263. 605 S.W.2d 346 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).
more than twenty-one days prior to the hearing, no date for the hearing was specified in the motion, and the plaintiff did not receive notice of the hearing until fifteen days before it was held. The defendant argued that the twenty-one day requirement of rule 166-A related only to the filing of the motion in advance of the hearing, and that the notice of the hearing was governed by the three-day requirement of rule 21a. Rejecting the defendant’s argument, the court of civil appeals concluded that the twenty-one day requirement of rule 166-A was applicable to both the filing of the motion and the advance notice of the hearing. A contrary construction, observed the court, would allow the movant to “delay giving notice of the hearing until three days prior thereto and thereby deprive the opposing party of a reasonable opportunity to serve affidavits or other written response.”

X. Special Issue Submission

During the survey period some notable decisions were handed down concerning special issues in Texas. The former requirement that special issues be submitted distinctly and separately was abolished, and rule 277 now provides that “[i]t shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly,” and that “[i]t shall not be objectionable that a question is general or includes a combination of elements or issues.” Giving this language full effect, the supreme court in Burk Royalty Co. v. Walls approved a broad submission of negligent omissions in a form that inquired whether, on the occasion in question, the defendant “failed to follow approved safety practices for pulling wet tubing.” Similarly, in Gray v. West a court of civil appeals found acceptable the submission of a single issue inquiring whether one party “became a partner or joint adventurer” in a particular business with any one of several other parties, followed by a definition of “partnership” and “joint adventure.”

Under former practice the trial judge was required to frame his charge

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264. Tex. R. Civ. P. 166-A provides that “[e]xcept on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing.”

265. Tex. R. Civ. P. 21a provides that “[i]f the time of service is not elsewhere prescribed, the adverse party is entitled to three days notice of a motion.”

266. 605 S.W.2d at 349.


269. 616 S.W.2d 911, 924 (Tex. 1981). Additionally, the court endorsed the definition of gross negligence suggested in 1 State Bar of Texas, Texas Pattern Jury Charges § 3.11, at 70 (1969) to the effect that: “‘Heedless and reckless disregard’ means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare, or safety of the persons affected by it.”

270. 608 S.W.2d 771, 775-76 (Tex. Civ. App.—Amarillo 1980, writ ref’d n.r.e.).
so that he did "not therein comment on the weight of the evidence."\textsuperscript{271} This phrase was deleted by the 1973 amendments to the Texas Rules of Civil Procedure,\textsuperscript{272} and the trial judge is now prohibited only from commenting directly on the weight of the evidence.\textsuperscript{273} While this amendment relaxed the applicable standard, the court in \textit{Capital Title Co. v. Mahone} reiterated that a submission to the jury that assumed a disputed material fact was never a permissible comment on the weight of the evidence, and therefore constituted reversible error.\textsuperscript{274}

While a portion of rule 277 requires that "the court shall submit such explanatory instructions . . . as shall be proper to enable the jury to render a verdict,"\textsuperscript{275} the directive does not apply in every instance. In \textit{Daniels v. Southwestern Transportation},\textsuperscript{276} the court concluded, on the basis of an earlier case,\textsuperscript{277} that the trial court had correctly refused to instruct the jury on circumstantial evidence.\textsuperscript{278}

No area of special issue practice is more difficult than the determination of irreconcilable conflict between jury findings. In \textit{Shop Rite Foods, Inc. v. Upjohn Co.},\textsuperscript{279} the court was confronted with two findings that were apparently inconsistent. The court stated that the situation did not present "the traditional irreconcilable conflict which exists when the answer to one issue would establish a cause of action or defense while the other would destroy it."\textsuperscript{280} Furthermore, the court found applicable the exception that "when a party relies on one of several alternative theories of recovery or defenses and the jury's answers to such theories are seemingly inconsistent or illogical, there is no fatal conflict in the verdict."\textsuperscript{281} Accordingly, the court refused to reverse the judgment on grounds of irreconcilable conflict.\textsuperscript{282} The court in \textit{Ryan v. Huber},\textsuperscript{283} on the other hand, invoked the doctrine of judicial notice to determine that an irreconcilable conflict existed between two findings of the jury. In \textit{Ryan}, a suit to recover for personal injuries, the jury found that the plaintiff had been injured, and that as a result she was incapacitated. The jury, however, refused to find that the plaintiff experienced any pain and suffering. Taking judicial notice of the fact that if there was an injury to a person it was accompanied by pain,

\textsuperscript{271} TEX. R. CIV. P. 272 (1967).
\textsuperscript{272} TEX. R. CIV. P. 272; see \textit{Civil Procedure Rules Amended}, 36 TEX. B.J. 495 (1973).
\textsuperscript{273} TEX. R. CIV. P. 277.
\textsuperscript{274} 619 S.W.2d 204, 206 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ); \textit{accord}, Otto Vehle & Reserve Law Officers Ass'n v. Brenner, 590 S.W.2d 147, 150 (Tex. Civ. App.—San Antonio 1979, no writ); City of Beaumont v. Fuentez, 582 S.W.2d 221, 224 (Tex. Civ. App.—Beaumont 1979, no writ); Cactus Drilling Co. v. Williams, 525 S.W.2d 902, 906-07 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).
\textsuperscript{275} TEX. R. CIV. P. 277.
\textsuperscript{276} 621 S.W.2d 188 (Tex. Civ. App.—Texarkana 1981, no writ).
\textsuperscript{278} 621 S.W.2d at 191.
\textsuperscript{279} 619 S.W.2d 574 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.).
\textsuperscript{280} \textit{Id.} at 583.
\textsuperscript{281} \textit{Id.}
\textsuperscript{282} \textit{Id.}
\textsuperscript{283} 618 S.W.2d 887 (Tex. Civ. App.—Fort Worth 1981, no writ).
the court found "irreconcilable conflict to have resulted by the finding of injury occasioning incapacity of plaintiff, with damages assessed therefor, while at the same time there was a refusal to make a finding in award of any amount for the plaintiff's pain and suffering." The case was therefore reversed and remanded.

XI. JURY PRACTICE

Rule 216 requires that a jury demand be made, and the jury fee be paid "on or before appearance day or, if thereafter, a reasonable time before the date set for trial of the cause on the nonjury docket, but not less than ten days in advance." In Martinez v. Department of Human Resources the jury demand was made ten days prior to the date set for trial. Finding that a jury was unavailable and that obtaining one would have caused an unreasonable delay, the trial court held the demand to be untimely. Affirming the ruling on the circumstances of the case, the court of civil appeals cautioned "that a demand made ten days in advance is not necessarily timely as a matter of law." Similarly, in Coleman v. Sadler a jury demand was made by the defendant thirteen days prior to a trial setting, and the trial court found it to be untimely. Concluding that the trial court had abused its discretion in refusing to allow a jury trial, the appellate court reversed, observing that "[w]hen a jury demand is made more than ten days in advance of the date set for trial, such demand is presumed to be made within a reasonable time." Further, the court found that the presumption had not been rebutted because the record failed to show that a jury trial would have operated to injure the plaintiff, disrupt the trial court's docket, or seriously interfere with the ordinary handling of the lower court's business. Coleman is also significant because the appellate court held that the defendant had not waived his right to a jury trial by announcing "ready" at the call of the trial docket.

Although rule 233 provides that "[e]ach party to a civil suit shall be entitled to six peremptory challenges in a case tried in the district court," the fact that a person is named as a party to a suit does not in itself entitle him to six strikes. In order for two defendants to be entitled

284. Id. at 890.
285. Id.
286. TEX. R. CIV. P. 216.
291. 608 S.W.2d at 346.
292. Id.
293. TEX. R. CIV. P. 223.
294. See, e.g., Retail Credit Co. v. Hyman, 316 S.W.2d 769, 771 (Tex. Civ. App.—Hous-
to more than six peremptory challenges between them, the interests of those defendants must be antagnostic on an issue with which the jury is concerned. Article 2151a, which interacts with rule 233, states that "after proper alignment of parties, it shall be the duty of the court to equalize the number of peremptory challenges provided under Rule 233 . . . in accordance with the ends of justice so that no party is given an unequal advantage." In Williams v. Texas City Refining, Inc. the plaintiff claimed that the trial court had erred in apportioning seven strikes to the defendant and one strike to the third-party defendant, while only allowing six strikes to the plaintiff. Noting that in most cases a two-to-one ratio of strikes is the maximum disparity allowable between sides, the court found that the trial court had not abused its discretion in its manner of apportioning the strikes, primarily because the disparity was less than the usual ratio. In Employers Casualty Co. v. Peterson the court of civil appeals found no error on the part of the trial court in allowing the plaintiff eight strikes and the defendant and third-party defendant four strikes each. Since there was no antagonism on a jury issue between the defendant and the third-party defendant, the court concluded that each side must receive the same number of peremptory challenges.

The court in Peterson also discussed the propriety of the jury argument of counsel for the plaintiff that referred to the refusal of the third-party defendant to testify based on his fifth amendment right. Holding that criminal and civil cases must be treated differently for purposes of this issue since a party's guilt is not at issue in a civil case, the court implied that the comment was not prohibited. The court concluded that even if the comment was improper, the trial court had cured the error by admonishing the jury not to consider the statement.

Rule 223 governs the method for obtaining a general jury panel list in counties that have interchangeable juries. This rule provides that, after a general panel has been selected,

the trial judge upon the demand of any party [to a jury case] . . . shall cause the names of all the members of the general panel . . . to be placed in a receptacle and well shaken, and . . . shall then draw therefrom the names of a sufficient number of jurors from which a
jury may be selected to try [the case] . . .

Davis v. Huey\textsuperscript{305} held that a party had a right to "reshuffle" the jury list after the list was sent to a particular court, regardless of whether the clerk had previously reshuffled the list, and even if the party has examined the jury list prior to making the demand.\textsuperscript{306} Davis also addressed the practice by some jurors of taking notes during trial.\textsuperscript{307} The court recognized that "the chief objection to such practice is the possibility that the notes might be regarded by jurors as evidence and not merely a device to refresh the recollection of the evidence."\textsuperscript{308} Because the record contained no indication that the jurors had considered the notes as evidence, however, no error was found.\textsuperscript{309}

Finally, two decisions during the survey period considered issues related to the removal of jurors on grounds of disability. Prior to the presentation of evidence, a juror in Daniels v. Southwestern Transportation\textsuperscript{310} was removed from the panel due to a heart ailment. The court quoted section 13 of article V of the Texas Constitution,\textsuperscript{311} the basis of rule 292,\textsuperscript{312} which provides that "when, \textit{pending the trial of any case}, one or more jurors not exceeding three may . . . be disabled . . ., the remainder of the jury" may render a verdict.\textsuperscript{313} The court held that a cause was considered pending under rule 292 "when the parties have announced ready and the jury has been selected and sworn."\textsuperscript{314} Accordingly, the court of civil appeals concluded that the trial court had not abused its discretion in dismissing the juror, and affirmed the case on this issue.\textsuperscript{315} In Remuda Oil & Gas Co. v. Nobles\textsuperscript{316} a juror was removed due to his unavailability caused by weather conditions. Rejecting the contention that a juror may only be removed when he is physically or mentally disabled, the court stated that "\textquote{[i]llness, mental disability, misconduct, drunkeness or other facts are subject to the discretionary consideration of the trial court in determining disability.}"\textsuperscript{317}

\textsuperscript{304} Id.
\textsuperscript{305} 608 S.W.2d 944 (Tex. Civ. App.—Austin 1980), \textit{rev'd on other grounds}, 620 S.W.2d 561 (Tex. 1981).
\textsuperscript{306} 608 S.W.2d at 953-54.
\textsuperscript{308} 608 S.W.2d at 955.
\textsuperscript{309} Id.
\textsuperscript{310} 621 S.W.2d 188 (Tex. Civ. App.—Texarkana 1981, no writ).
\textsuperscript{311} TEX. CONST. art. V, § 13.
\textsuperscript{312} TEX. R. CIV. P. 292.
\textsuperscript{313} 621 S.W.2d at 19 (emphasis added).
\textsuperscript{314} 621 S.W.2d at 191; accord Thomas v. Billingsley, 173 S.W.2d 199 (Tex. Civ. App.—Dallas 1943, writ ref'd).
\textsuperscript{316} 613 S.W.2d 312 (Tex. Civ. App.—Fort Worth 1981, no writ).
\textsuperscript{317} Id. at 314 (emphasis in original). \textit{See generally} Dickson v. J. Weingarten, Inc., 498
Several cases decided during the survey period considered the propriety of prejudgment interest awards. In *First City National Bank v. Haynes*\(^3\)\(^{18}\) the court was required to decide the proper rate for an award of equitable prejudgment interest.\(^3\)\(^{19}\) The court first noted the lack of uniformity among the various courts that had been confronted with this issue,\(^3\)\(^{20}\) as well as the recent refusal of the Texas Supreme Court to address it.\(^3\)\(^{21}\) Then, recognizing a recent trend to hold the award of such interest within the trial court's discretion, the court reasoned by analogy that the rate of that award could also be discretionary.\(^3\)\(^{22}\) Implicit in the court's decision, however, was the requirement that any rate so selected be lawful.\(^3\)\(^{23}\)

In *City of Austin v. Foster*\(^3\)\(^{24}\) the court addressed the propriety of awarding compound prejudgment interest in connection with a condemnation award.\(^3\)\(^{25}\) Over a dissent arguing that equity jurisdiction would allow the compounding of statutory interest when market rates were higher than the simple legal rate,\(^3\)\(^{26}\) the majority of the court declined to permit the award for several reasons.\(^3\)\(^{27}\) First, the court noted the difficulties involved in calculating such interest when no contract or agreement between the parties set the "rests" or settlements between principal and interest.\(^3\)\(^{28}\) Secondly, the court held that even if compound interest would be appropriate in certain cases, the failure of the plaintiffs to move forward to trial promptly, thus increasing the damages, rendered it improper in the instant case.\(^3\)\(^{29}\) Further, the court condemned the award of such interest by the trial court without notice and hearing.\(^3\)\(^{30}\)

Lack of hearing was also held fatal to the judgment rendered by the trial

\(^{18}\) 614 S.W.2d 605 (Tex. Civ. App.—Texarkana 1981, no writ).
\(^{19}\) The test applied by the court in determining the propriety of prejudgment interest was whether a specific sum of money was due on a date certain prior to judgment. The court held that the date of filing suit could be used where all breaches giving rise to damages had occurred by then. *Id.* at 610.
\(^{20}\) Id.
\(^{21}\) See Maxey v. Texas Commerce Bank, 580 S.W.2d 340 (Tex. 1979).
\(^{22}\) 614 S.W.2d at 610 (citing Phillips Petroleum Co. v. Stahl Petroleum Co., 569 S.W.2d 480 (Tex. 1978)).
\(^{23}\) The court explicitly noted that "[t]he rate selected in this case is a lawful rate." 614 S.W.2d at 610.
\(^{26}\) No. 13-341 at 5.
\(^{27}\) The significance of compounding is well illustrated by this case, in which the application of compounded interest would have increased the prejudgment interest awarded by more than $10,000.
\(^{28}\) No. 13-341 at 2. As the court viewed it, no logical method existed for determining when interest became past due so as itself to become an interest bearing debt. *Id.* at 2-3.
\(^{29}\) *Id.* at 4. The court was careful to point out that the defendant had not been dilatory. *Id.*
\(^{30}\) *Id.* at 4-5. The court nevertheless stated that such interest might be allowable if alleged and adjudicated at trial. *Id.* at 4.
court in *Reitmeyer v. Charm Craft Publisher*.\(^{331}\) The defendant had filed an answer with the clerk, but the trial court had nevertheless entered a default judgment because the answer was missing from the case file. Condemning this procedure, the court of civil appeals also held that the fact that the answer to the suit on sworn account was unverified did not warrant a default judgment.\(^{332}\)

### XII. Appellate Procedure

In two cases decided during the survey period the Texas Supreme Court addressed the proper procedure for a party seeking to complain of the refusal of a court of civil appeals to grant an extension of time pursuant to rule 21c.\(^{333}\) In *Banales v. Jackson*\(^{334}\) the court of civil appeals had denied an appellant's motion for an extension of time in which to file for rehearing. The appellant then filed an interlocutory appeal from the order denying his motion.\(^{335}\) The supreme court first emphasized that the interlocutory appeal was the appropriate vehicle for challenge of the action by the court of civil appeals; in this instance an application for writ of error would have been improper since the motion for rehearing was itself a prerequisite to such an application.\(^{336}\) The court then catalogued the matters that should be included in the record of such an appeal, listing (1) the petition for review detailing the facts, (2) a copy of the rule 21c motion, (3) the supporting affidavits, (4) the certificate of the clerk, and (5) a brief.\(^{337}\) Finally, the court stated that the motion seeking review of the lower court's denial must be filed within thirty days of such action.\(^{338}\)

In *Sears v. State*\(^{339}\) the appellant also sought an interlocutory review of the denial of a motion to extend under rule 21c. Distinguishing the facts of *Banales*, the court held that such review was available only when the extension sought was related to a motion for rehearing.\(^{340}\) When the extension was sought in order to extend the time in which to file the transcript,\(^{341}\) the court concluded that the proper procedure was for the

\(^{331}\) 619 S.W.2d 441 (Tex. Civ. App.—Waco 1981, no writ).

\(^{332}\) *Id.* at 442.

\(^{333}\) Tex. R. Civ. P. 21c specifies the procedure for requesting and obtaining a determination of motions to extend the time for filing transcript, statement of facts, and motion for rehearing in the court of civil appeals, and application for writ of error in the supreme court.

\(^{334}\) 610 S.W.2d 732 (Tex. 1980).

\(^{335}\) The appellant filed an application in the supreme court to review the decision of the court of civil appeals. *Id.* at 733.

\(^{336}\) See Tex. R. Civ. P. 458, 468-469.

\(^{337}\) 610 S.W.2d at 733.

\(^{338}\) *Id.*

\(^{339}\) 610 S.W.2d 734 (Tex. 1980).

\(^{340}\) *Id.* at 734-35.

\(^{341}\) The appellant had failed to timely file the transcript because he had relied upon the district clerk to do so after affirmatively answering the clerk's inquiry as to whether he wished it filed. The court of civil appeals held that this was not a reasonable explanation within the meaning of Tex. R. Civ. P. 21c since the clerk was under no official duty to forward the transcript to the court. *Sears v. State*, 605 S.W.2d 375, 376-77 (Tex. Civ. App.—Austin 1980).
The appellant could then seek rehearing, and perfect an appeal by writ of error.\textsuperscript{343}

A motion to extend was also the subject of \textit{Smith v. King},\textsuperscript{344} in which appellants sought an extension of time under rule 356(b)\textsuperscript{345} in order to file their cost bond. Construing the recently amended provisions of that rule, the court held that filing the motion to extend one month after the bond was originally due did not satisfy the rule.\textsuperscript{346} According to the court, the motion to extend and the bond itself must be filed within fifteen days of the original due date, and compliance with that time limit was jurisdictional.\textsuperscript{347}

The essential content of the cost bond was addressed by the court in \textit{Conann Constructors, Inc. v. Muller}.\textsuperscript{348} A plaintiff had obtained judgment against certain defendants who had in turn obtained an indemnity award against a third-party defendant. The bond filed by the third-party defendant referred only to the judgment awarded against him, and failed to mention the judgment awarded to the plaintiff. As a result, the plaintiff argued, the third-party defendant had failed to perfect an appeal as to him. Rejecting this contention, the court held that the scope of appeal may be limited only by notice in compliance with rule 353.\textsuperscript{349} As the court saw it, an appeal could not be limited to a particular portion of the judgment by inadvertent omission in the cost bond.\textsuperscript{350}

In \textit{Cameron & Willacy Counties Community Projects, Inc. v. Gonzalez},\textsuperscript{351} however, the appellant complied with the requirements of rule 353\textsuperscript{352} by filing and serving a motion expressly limiting the scope of appeal to a single aspect of the judgment. When the appellee attempted to appeal from another portion of the judgment, the court held that she could not do so.

\textsuperscript{342} 610 S.W.2d at 735.
\textsuperscript{343} Id.
\textsuperscript{345} Tex. R. Civ. P. 356(b) provides:
An extension of time may be granted by the appellate court for late filing of a cost bond or making the deposit required by subdivision (a) or for filing the affidavit, if such bond is filed, deposit is made, or affidavit is filed within fifteen days after the last day allowed and, within the same period, a motion is filed in the appellate court reasonably explaining the need for such extension. If a contest to an affidavit in lieu of bond is sustained, the time for filing the bond is extended until ten days after the contest is sustained unless the trial court finds and recites that the affidavit was not filed in good faith.
\textsuperscript{346} No. M11843 at 1; see Figari, \textit{supra} note 114, at 395-96.
\textsuperscript{347} No. M11843 at 1.
\textsuperscript{348} 618 S.W.2d 564 (Tex. Civ. App.—Austin 1981, writ ref’d n.r.e.).
\textsuperscript{349} Id. at 569; see Tex. R. Civ. P. 353 which provides:
No attempt to limit the scope of an appeal shall be effective as to a party adverse to the appellant unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on the adverse party within fifteen days after the judgment is signed, or, if a motion for new trial is filed by any party, within seventy-five days after the judgment is signed.
\textsuperscript{350} See generally Figari, \textit{supra} note 114, at 397 n.458.
\textsuperscript{351} 614 S.W.2d 585 (Tex. Civ. App.—Corpus Christi 1981, writ ref’d n.r.e.).
\textsuperscript{352} Tex. R. Civ. P. 353.
without perfecting an independent appeal by filing a cost bond and record. 353 Basic to this holding was the court's determination that the two portions of the judgment were conceptually severable. 354

In contrast, the appellants in Gilbert v. Singleton 355 complied with all appropriate steps to obtain a statement of facts, but were unable to do so. The official court reporter had resigned, and failed to comply with a writ of mandamus to deliver the statement. Although the notes were then given to a second reporter, the statement was demonstrably incomplete and of doubtful accuracy. Granting the appellant's prayer for new trial, the court held that an appellant who observes the proper procedure was entitled not only to a statement of facts, but a complete statement. 356 Thus, a new trial was necessary to preserve that right.

XIV. Res Judicata

As noted in a prior Survey, 357 a number of cases have held that mutuality of parties is no longer required in Texas for application of the collateral estoppel doctrine. 358 Following these decisions, the court in Tobbon v. State Farm Mutual Automobile Insurance Co. held that an automobile accident victim was collaterally estopped from attacking the validity of a release in an action against the driver because the same issue had been raised and decided adversely to her in a previous action involving her insurance company. 359 The court observed that "Texas Courts have apparently abandoned the requirement of mutuality and have retained the requirement of privity only to the party against whom the plea of collateral estoppel is made in the second case." 360 A contrary result, however, appears to have been reached in McPherson v. Stovall when the court refused to apply the doctrine of collateral estoppel because the former suit was not between the same parties who were involved in the pending action. 361

Dolenz v. Continental National Bank, 362 a recent decision of the supreme court, concerned an unusual set of procedural events. The plaintiff, a guarantor of a motel's indebtedness, brought a conversion action against a creditor-bank that had sold certain personalty of the motel to satisfy a deficiency resulting from a foreclosure sale. In an earlier action, the plaintiff-guarantor had also sued the lessee of the motel for conversion of the same property. The jury in the earlier action had found that the guarantor had

353. 614 S.W.2d at 588.
354. Id.
356. Id. at 165.
357. See Figari, supra note 83, at 480.
359. 616 S.W.2d 243, 246 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.).
360. Id.
not purchased any of the personalty of his own personal account, and that he had authorized the motel's personalty to be pledged to the creditor-bank. No judgment in that earlier action, however, was entered at the time of the trial of the action against the creditor-bank. The creditor-bank filed a plea of abatement seeking to have the later action against it abated in view of the jury verdict rendered in the earlier action against the lessee; the plea was subsequently denied, and a jury verdict in favor of the plaintiff-guarantor was rendered. On appeal the supreme court held that the trial court had not abused its discretion in refusing to abate the later action because judgment had not been entered in the earlier one, although over a year had transpired from the date of the verdict, and a judgment in the earlier action would not have foreclosed all issues between the creditor-bank and the guarantor in the later suit. 363

XV. MISCELLANEOUS

Attorney's Fees. A number of decisions during the survey period addressed issues related to the recovery of attorney's fees under article 2226. 364 In Findlay v. Cave 365 the defendant contended that the plaintiff was not entitled to a recovery of attorney's fees under the statute because an excessive demand for the amounts due had been made. The court noted that "[a] creditor who makes an excessive demand upon a debtor is not entitled to attorney's fees for subsequent litigation required to recover the debt." 366 The supreme court distinguished the situation before it on the grounds that the plaintiff had not brought suit for more than the liquidated sum due, and the defendant had not tendered any sum that was refused by the plaintiff. 367 Accordingly, the court held that the record did not reflect a sufficient level of unreasonableness or bad faith to warrant a finding of excessive demand. 368 In Tuthill v. Southwestern Public Service Co. the court of civil appeals emphasized that "a demand is not excessive unless (1) the creditor wrongfully demands an amount in excess of that which he is due; and (2) the creditor either refuses, or clearly indicates that he will refuse, tender of the amount actually due." 369 Holding that the defendant had not obtained findings on these elements, the court overruled the claim of excessive demand as barring recovery of attorney's fees. 370 Finally, Westdale Well Service, Inc. v. Walker, 371 a decision as yet unpublished, holds that a plaintiff may recover attorney's fees even though the defendant recovers a greater amount on a counterclaim. The court reasoned that a 1979 amendment to article 2226 authorized recovery of attor-

363. Id. at 575.
365. 611 S.W.2d 57 (Tex. 1981).
366. Id. at 58; accord Collingsworth v. King, 155 Tex. 93, 283 S.W.2d 30 (1955); Ingham v. Harrison, 148 Tex. 380, 224 S.W.2d 1019 (1949).
367. 611 S.W.2d at 58.
368. Id.
369. 614 S.W.2d 205, 212 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.).
370. Id.
ney's fees for a "just claim" and, as a result, prior cases recognizing a "net-recovery" approach were not longer authoritative. A "just claim," according to the court, did not become "unjust" merely because a counter-claim was filed.

**Attorney Disqualification.** At least three opinions were rendered during the survey period on the disqualification of an attorney because the attorney had previously represented the party moving for disqualification. All of these cases recognized the general rule that a prior representation is not grounds for disqualification unless a substantial relationship exists between the subject matter of the prior representation and the pending suit. In each instance, the courts found that the substantial relationship test was not satisfied and declined to order a disqualification.

**Special Appearance.** The special appearance of a third-party defendant to a claim for indemnity by the trial court was sustained in *Cessna Aircraft Co. v. Hotton Aviation Co.* The third-party claimant appealed the ruling. The court, relying upon an earlier case, held that the order was not appealable because the ruling did not dispose of all parties and claims, and, therefore, dismissed the appeal.

**Stipulation.** Finally, in *Kinner Transportation & Enterprises, Inc. v. State* the court considered the use in a summary judgment proceeding of a stipulation that recited that it was to "be considered by the Court upon a trial on the merits of this case." Recognizing that a stipulation may be limited to a part of a proceeding and concluding that a summary judgment hearing was not a "trial on the merits," the court held that the stipula-

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373. No. 20355 at 4.


375. In Ayres the prior representation was in an action by a wife and husband for personal injuries against a corporation, while the later representation of the wife was in a divorce against the husband, who moved for disqualification. 611 S.W.2d at 474. *Braun* involved a previous representation of the movant-husband in a matter related to a divorce decree and a subsequent representation of his employer in a suit against him for breach of an employment contract. 611 S.W.2d at 471-72. Finally, the situation presented in *Lott* was the representation of a wife in a divorce action against the movant-husband after a prior representation of the wife and husband in a personal injury action against a third party. 605 S.W.2d at 668.

376. 620 S.W.2d 231, 233 (Tex. Civ. App.—Eastland 1981, writ ref’d n.r.e.).


378. 620 S.W.2d at 233.


380. *Id.* But see Claude Regis Vargo Enterprises, Inc. v. Bacarisse, 578 S.W.2d 524, 529
tion would not support a summary judgment.381

381. 614 S.W.2d at 189-90.