TEXAS CIVIL PROCEDURE PRETRIAL

CASES AND MATERIALS

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EDITION

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CHAPTER 1.
PRESERVATION OF ERROR AND THE HARMFUL ERROR RULE

1. *Introduction*

Before launching into a detailed presentation of the procedural intricacies of Texas Civil Procedure, one of its more fundamental aspects needs to be addressed. In the following pages of this book the student will be reading real decisions by real courts in Texas concerning Texas Civil Procedure. The majority of decisions in this book are from appellate courts in Texas. By in large the cases contained in this book discuss various alleged errors which occurred during the pretrial and trial process of the particular case. As a general rule a lawyer needs to bring the alleged error to the attention of the trial court for its consideration and decision in order for an appellate court to have the ability to consider the alleged error on appeal. The concept of preservation of error refers to those procedures which must be taken by a lawyer in a lower court to ensure that any alleged errors made by a lower court are available for review by an appellate court. *See* Rule 33 of the Texas Rules of Appellate Procedure.

Another fundamental aspect of Texas Civil Procedure that will be presented in this chapter concerns the manner in which an appellate court determines whether the error preserved and presented to it on appeal is of such a nature as to lead to a reversal of the case. As a general rule, even if error of law is determined to have occurred in the trial court level, appellate courts will not reverse the trial court unless the error which was committed "probably caused the rendition of a improper judgment or probably prevented the appellant from properly presenting the case" to the appellate court. This concept of reversible error has been given the popular name of the "harmful error rule". *See* Rules 44.1 and 61.1 of the Texas Rules of Appellate Procedure.

In the following pages the concepts of preservation of error and the "harmful error rule" will be briefly introduced. Throughout the remainder of the book the student needs to be very mindful of these basic concepts and of the various exceptions which can arise depending on the nature of the error or the type of proceeding which is presented to the court.

2. *Why Require That Error Be Preserved*

Most procedural rules are written to guide the parties and the courts in the conduct of litigation. When the rule is violated, an error occurs. The party aggrieved by that error has the alternative of insisting that the error be corrected, or of waiving the error. Parties regularly waive rules, and allow the rules to be ignored. When the party wishes to insist upon the observation of the rule, that party must preserve error at any time the other party or the court violate the rule. By complaining of the violation (preserving error),

a) the opposing party is given an opportunity to cure any error that may occur;
b) the trial court is given an opportunity to cure any error that may occur;
c) trial by ambush is prevented; and
d) appeal by ambush is prevented.

Following the trial of a case, a party seeking to alter a trial court's appealable order must perfect his appeal by filing a notice of appeal with the information required and in the manner dictated by Rule 25 of the Texas Rules of Appellate Procedure and within the time specified in Rule 26 of the Texas Rules of Appellate Procedure. Once the appeal has been perfected, and the record brought forward to the appellate court, the party seeking to alter the trial court's appealable order may through his brief request the court of appeals to review the alleged errors that had been properly preserved.

In addition, certain procedural errors committed by the trial court may be reviewed by an appellate court in an original mandamus proceeding pursuant to Rule 52 of the Texas Rules of Appellate Procedure. As will be shown in the following case, the basic requirements for an appellate court to exercise its original mandamus jurisdiction are an abuse of discretion by the trial court and no adequate remedy by appeal.

In re The PRUDENTIAL INSURANCE CO. OF AMERICA
148 S.W.3d 124
(Tex. 2004)

Gino John Rossini, John A. Mackintosh Jr., G. Luke Ashley and Camille Knight, Thompson & Knight, L.L.P., Dallas, for Relators.

Luke Madole, Russell F. Nelms, Dena Jean Denooyer, Carrington Coleman Sloman & Blumenthal, Dallas, for Respondents.

JUSTICE HECTH delivered the opinion of the Court, in which JUSTICE OWEN, JUSTICE SMITH, JUSTICE WAINWRIGHT, and JUSTICE BRISTER joined.

The parties to a commercial lease agreed to waive trial by jury in any future lawsuit involving the lease, but when the tenant and its guarantors later sued for rescission and damages, they nevertheless demanded a jury trial. The trial court denied the landlord's motion to quash the demand. In this original proceeding, the landlord petitions for mandamus relief directing the trial court to enforce the parties' contractual jury waiver. We conditionally grant relief.

I

Francesco Secchi, a native of Italy, and his wife Jane, a native of England, moved to Dallas in 1981, where they have lived ever since and have become naturalized citizens. The Secchis have been in the restaurant business since 1983, and they (or entities controlled by them) own and operate two Dallas restaurants, Ferrari's and Il Grano. In October 2000, a limited partnership the Secchis controlled, Italian Cowboy Partners, Ltd., leased space in a Dallas shopping center for another restaurant. The lease agreement was the product of six months' active negotiations with the landlord, The Prudential Insurance Co. of America, and its agent, Four Partners L.L.C. doing business as Prizm Partners (collectively, "Prudential"). The Secchis had negotiated at least two other leases over the years, and they and their lawyer successfully insisted on a number of changes in Prudential's proposals. Offers went back and forth, and the agreement went through seven drafts. Francesco, whose formal education extended only to about the eighth grade, did not read the lease but left that to Jane, whose educational background was similar but whose English was better. Jane went over the agreement with their attorney but focused on the economic terms. When the Secchis and Prudential finally reached an understanding, Francesco signed the lease as manager of the partnership's general partner, Secchi, L.L.C. Prudential insisted that the Secchis personally guarantee the lease, and that agreement was also negotiated and changed by the Secchis before they signed it.

The lease contains the following paragraph:

> Counterclaim and Jury Trial. In the event that the Landlord commences any summary proceeding or action for nonpayment of rent or other charges provided for in this Lease, Tenant shall not interpose any counterclaim of any nature or description in any such proceeding or action. Tenant and Landlord both waive a trial by jury of any or all issues arising in any action or proceeding between the parties hereto or their successors, under or connected with this Lease, or any of its provisions.

Prudential did not specifically point out this provision to the Secchis, and Jane testified that she never noticed it. She also testified that notwithstanding the clear meaning of the second sentence, she never intended to waive a jury trial in any future litigation. The guaranty agreement does not contain a similar waiver but does state that the Secchis agree to guarantee the tenant's "full and timely performance and observance of all the covenants, terms, conditions, provisions, and agreements" in the lease, and in the event of the tenant's default, to "faithfully perform and fulfill all of such terms, covenants, conditions, provisions, and agreements".

Some nine months after the lease was executed, the Secchis and their limited partnership (collectively, "ICP") sued Prudential in statutory county court, claiming in part that it was impossible to do business on the premises because of a persistent odor of sewage. Prudential counterclaimed for amounts allegedly due under the lease and guaranty. When the trial court notified the parties that a date for non-jury trial had been set, ICP filed a jury demand and paid the jury fee, as required by Rule 216 of the Texas Rules of Civil Procedure. The court then notified the parties that a date for jury trial had been set. Prudential moved to quash the jury demand, based on the waiver in the lease. ICP responded that contractual jury waivers in general, and the waiver in the lease in particular, are unenforceable. * * *

After a hearing, the court denied the motion in a brief order without explanation.

Prudential petitioned the court of appeals for mandamus relief, which that court denied with a short memorandum opinion, 2002 WL 1608233, explaining only that "the relators have not shown themselves entitled to the relief requested." Prudential then petitioned for relief from this Court, and we agreed to hear argument. * * *

* * *

Having concluded that the parties' contractual jury waiver is enforceable, we turn to whether Prudential is entitled to relief by mandamus. Prudential must meet two requirements. One is to show that the trial court clearly abused its discretion. We have concluded as a matter of law that Prudential was entitled to enforcement of the jury waiver. Since "[a] trial court has no 'discretion' in determining what the law is or applying the law to the facts", even when the law is unsettled, the trial court's refusal to enforce the jury waiver was a clear abuse of discretion. Thus, Prudential has met the first requirement.

The other requirement Prudential must meet is to show that it has no adequate remedy by appeal. The operative word, "adequate", has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate both public and private interests. Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is "adequate" when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.

This determination is not an abstract or formulaic one; it is practical and prudential. It resists categorization, as our own decisions demonstrate. Although this Court has tried to give more concrete direction for determining the availability of mandamus review, rigid rules are necessarily inconsistent with the flexibility that is the remedy's principal virtue. Thus, we wrote in *Walker v. Packer* that "an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ." While this is certainly true, the word "merely" carries heavy freight. In *In re E.I. duPont de Nemours & Co*., we concluded that defending the claims of more than 8,000 plaintiffs in litigation that would last for years was not mere expense and delay, and that mandamus review of the denial of duPont's special appearance was justified, even though duPont could eventually appeal and did not appear to be in any danger of succumbing to the burden of the litigation. In *Travelers Indemnity Co. v. Mayfield*, we granted mandamus review of an order requiring a carrier to pay the plaintiff's attorney fees as incurred in a compensation case, even though the carrier could have appealed from the final judgment and won recovery for the amounts paid, because the order not only cost the carrier money but "radically skew[ed] the procedural dynamics of the case" by requiring the defendant to fund the plaintiff's prosecution of her claims. In *In re Masonite Corp*., the trial court on its own motion and without any authority whatever, split two cases into sixteen and transferred venue of fourteen of them to other counties. We held that the defendants were not required to wait until appeal to complain:

> Walker does not require us to turn a blind eye to blatant injustice nor does it mandate that we be an accomplice to sixteen trials that will amount to little more than a fiction. Appeal may be adequate for a particular party, but it is no remedy at all for the irreversible waste of judicial and public resources that would be required here if mandamus does not issue.

These cases, among a great many others that could be cited, serve to illustrate that whether an appellate remedy is "adequate" so as to preclude mandamus review depends heavily on the circumstances presented and is better guided by general principles than by simple rules.

Nor is the consideration whether to grant mandamus review confined to private concerns. No one suggested in *Masonite* that any individual party would suffer more by waiting to complain on appeal of the venue order than would any other party complaining of any other venue order in any other case. Two factors drove our decision in *Masonite*: the complete lack of authority for the trial court's order, and the impact on the legal system. We simply could not justify putting the civil justice system itself to the trouble of grinding through proceedings that were certain to be "little more than a fiction." The trial court's ruling in Travelers was novel but might easi-

ly have become a repeated error. Either way, the error was clear enough, and correction simple enough, that mandamus review was appropriate.

Prudent mandamus relief is also preferable to legislative enlargement of interlocutory appeals. The unavailability of mandamus relief increases the pressure for expanded interlocutory appeals. For example, when this Court refused to review venue decisions by mandamus, the Legislature responded by authorizing mandamus review of all decisions involving mandatory venue provisions. When we held that the denial of a special appearance would ordinarily not warrant mandamus review, the Legislature responded by creating an interlocutory appeal from the denial of a special appearance. When questions arose concerning the availability of mandamus to review the sufficiency of expert reports required in medical malpractice cases, the Legislature responded by creating an interlocutory appeal from the denial of dismissals of such cases for insufficient expert reports. Interlocutory appeals lie as of right and must be decided on the merits, increasing the burden on the appellate system. "Mandamus," on the other hand, "is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court. Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles." As a selective procedure, mandamus can correct clear errors in exceptional cases and afford appropriate guidance to the law without the disruption and burden of interlocutory appeal. Appellate courts must be mindful, however, that the benefits of mandamus review are easily lost by overuse.

The issue before us in the present case—whether a pre-suit waiver of trial by jury is enforceable—fits well within the types of issues for which mandamus review is not only appropriate but necessary. It is an issue of law, one of first impression for us, but likely to recur (it has already arisen in another case in the court of appeals, also on petition for mandamus. It eludes answer by appeal. In no real sense can the trial court's denial of Prudential's contractual right to have the Secchis waive a jury ever be rectified on appeal. If Prudential were to obtain judgment on a favorable jury verdict, it could not appeal, and its contractual right would be lost forever. If Prudential suffered judgment on an unfavorable verdict, Prudential could not obtain reversal for the incorrect denial of its contractual right "unless the court of appeals concludes that the error complained of . . . probably caused the rendition of an improper judgment". Even if Prudential could somehow obtain reversal based on the denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive.

* * *

Only if a contractual waiver of trial by jury is enforced in the trial court can its propriety effectively be reviewed on appeal. The denial of trial by jury is harmless error only if there are no material fact issues to submit to a jury. But the denial of trial by jury is also reviewable by mandamus. A sentence in our opinion in *General Motors Corp. v. Gayle* suggests that this is not true, but we granted mandamus in that case to correct the trial court's denial of a jury trial, and we cited without disapproval three courts of appeals that we said "ha[d] reviewed jury trial orders by mandamus." To afford relief for the denial of a jury trial both by mandamus and by appeal, and to deny relief by either means for the refusal to enforce a jury waiver, unacceptably contorts review of the issue. Mandamus relief in a situation like this, in Professor Charles Alan Wright's words, "provides a valuable ad hoc relief valve for the pressures that are imperfectly contained by the statutes permitting appeals from final judgments and interlocutory orders."

* * *

The dissent suggests that mandamus relief should not be used to enforce contractual rights, but we used it for precisely that purpose only recently in *In re Allstate County Mutual Insurance Co*. to enforce the parties' agreement to submit to an appraisal process for determining the value of a vehicle claimed to be a total loss. The dissent states that we took "the United States Supreme Court's pronouncement that appellate delays defeated the 'core purpose' of contracts to arbitrate" as a "mandate . . . to provide an extraordinary remedy." Perhaps so, but the Supreme Court's "pronouncement" was also a statement of fact: lawsuits followed by appeals defeat the core purpose of arbitration agreements. For exactly the same reason, trial to a jury followed by appeal, if one were even allowed, defeats the reasons for agreeing to waive a jury in the first place.

The dissent argues that "authorizing mandamus relief to enforce a contractual jury waiver while relegating a party to its appellate remedy when denied its constitutional right to a jury trial" creates a procedural anomaly. If the premise were true, an anomaly would exist; but the premise is not true. We have never held that the denial of a jury trial, which can certainly be reviewed by appeal, cannot also be reviewed by mandamus. As we have already noted, we have faced the issue only once, in *General Motors Corp. v. Gayle*, and while one sentence of

that opinion states that mandamus is "generally not available" to review the denial of a jury trial, we nevertheless directed the trial court to abort or mistry the nonjury trial it had commenced and to set the case on its jury docket. We also cited three court of appeals cases that had "reviewed jury trials by mandamus." *General Motors* does not preclude review of the denial of a jury trial by mandamus.

Finally, the dissent argues that "[e]ven if parties may freely waive their right to trial by jury, there is no public policy reason for encouraging them to do so." Of course, enforcing an agreement is not the same as encouraging parties to make it. By enforcing contractual jury waivers, we no more encourage them than we encourage arbitration by enforcing arbitration agreements. Parties are free to agree to such remedies as they choose, and as we have noted, they may have good reasons for agreeing to waive a jury trial. What the dissent ignores is that there is a compelling public policy reason to enforce legal agreements freely made. The dissent does not find the jury trial waiver in this case illegal or contrary to public policy, yet it would deny all viable means of enforcement.

* * *

For these reasons, we direct respondent, the Honorable Sally Montgomery, to vacate her order of June 6, 2003, and the prior order of June 19, 2002, to grant Prudential's motion to quash the jury demand and payment of jury fee, and to return the case to the nonjury docket. We are confident she will promptly comply. Our writ will issue only if she does not.

CHIEF JUSTICE PHILLIPS, joined by JUSTICE O'NEILL, JUSTICE JEFFERSON, and JUSTICE SCHNEIDER, dissenting [omitted].

3. *Fundamental Error*

Fundamental or unassigned error is an exception to the general rule that error must be preserved during the lower court proceeding in order for an appellate court to consider any complaints about the specific error. The definition of fundamental error was fairly broad for a period of time. The current view of fundamental error, however was set in 1941, and is extremely restrictive.

Note

McCauley v. Consolidated Underwriters, 157 Tex. 475, 304 S.W.2 265 (1957):

Facts: This is an appeal from the order of a district court setting aside a default judgment rendered at a previous term (after the trial court lost jurisdiction). The court of appeals affirmed.

Issues: Is this fundamental error? Yes. Fundamental error is an error which directly and adversely affects the interest of the public generally, as that interest is declared by the statutes or Constitution of Texas. A court's lack of jurisdiction is fundamental error.

Issues: Is there a difference between fundamental error in the Supreme Court and Court of Appeals? No. There used to be, but there is no longer any difference.

PIRTLE
v.
GREGORY
629 S.W.2d 919
(Tex. 1982)

Sudderth, Woodley & Dudley, Keith Woodley, Comanche, for petitioner.
Thompson & Cook, John R. Cook, Breckenridge, for respondents.

PER CURIAM.

Stanley Pirtle brought suit for specific performance and for removal of cloud on 512 acres of land. Pirtle sued Layne Gregory, Grady Gregory, and Kathy Coker because they had contracted in writing but failed to exe-

cute an oil and gas lease to Pirtle, as lessee. Layne and Grady Gregory later executed an oil and gas lease on the property to James P. Flanagan. Plaintiff Pirtle originally sued Flanagan as one of the defendants, but took a non-suit as to him. The trial court rendered judgment for Pirtle commanding the Gregorys and Coker to execute the oil and gas lease, but the court of appeals reversed that judgment, believing that the absence of Flanagan from the suit constituted fundamental error. 623 S.W.2d 955 (Tex. App.).

"Fundamental error" in civil actions arose in Texas under old statutes that stated that cases on appeal could be reviewed "on an error in law either assigned or apparent on the face of the record." 2 GAMMEL, LAWS OF TEXAS 1562 (1898); 3 GAMMEL, LAWS OF TEXAS 393 (1898). The practice of appellate courts in considering unassigned errors was the source of much mischief, and when the Texas Supreme Court promulgated its Rules of Civil Procedure in 1941, old article 1837 was repealed. Since that time, there has been no rule or statute that authorizes appellate consideration of errors for which there was no trial predicate that complained of the error. *McCauley v. Consolidated Underwriters*, 157 Tex. 475, 304 S.W.2d 265, 266 (1957); *Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W.2d 979, 984 (1947) (ALEXANDER, J., concurring). Fundamental error survives today in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas. STATE BAR OF TEXAS, APPELLATE PROCEDURE IN TEXAS § 11.5 (2d ed. 1979).

The reason for the requirement that a litigant preserve a trial predicate for complaint on appeal is that one should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time.

Flanagan is said to be an indispensable party to this cause, because the defendants gave him an oil and gas lease and the validity of that lease has not been adjudicated. The defendants should not be heard to complain for the first time on appeal, however, because they did not complain at the trial level by exception, plea in abatement, motion to join other parties or otherwise.

We reaffirm the views we expressed in *Cooper v. Texas Gulf Industries, Inc*., 513 S.W.2d 200 (Tex. 1974). We there stated: Under the provisions of our present Rule 39 it would be rare indeed if there were a person whose presence was so indispensable in the sense that his absence deprives the court of jurisdiction to adjudicate between the parties already joined. *Id.* at 204.

In a case such as this, parties who participate in the trial without complaint will not be heard to complain at the appellate stage when "there is reason not to throw away a judgment just because it did not theoretically settle the whole controversy." *Continental Insurance Co. of New York v. Cotten*, 427 F.2d 48, 51 (9th Cir. 1970) (*citing Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1967).

Pursuant to Texas Rules of Civil Procedure, Rule 483, we grant the writ of error and, without hearing oral argument, reverse the judgment of the court of appeals and remand this cause to that court for disposition of the other points not reached.

Notes

1. In *Ramsey v. Dunlop*,[1] CHIEF JUSTICE ALEXANDER, in his concurring opinion stated: "[I]n so far as the rights of the litigants are concerned they are not entitled to have the court consider any error not assigned by them. It is my opinion that the Court of Civil Appeals is authorized to reverse a judgment of the trial court upon an unassigned error only when it involves a matter of public interest and when the record affirmatively and conclusively shows that the appellee was not entitled to recover, where the record affirmatively shows that the court rendering the judgment was without jurisdiction over the subject matter."

2. Examples of fundamental error, that do not relate to jurisdictional defects, are difficult to find. *Bradley v. State of Texas ex rel White*,[2] however, is a recent case that reflects non-jurisdictional fundamental error. Under TEX. R. EVID. 605 "[T]he judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve this point." In *Bradley*, city council members sitting as a court to remove the mayor of the city were held to be sitting as judges. The council members were, thus, bound by Rule 605, and

[1] 146 Tex. 196, 205 S.W.2d 979 (1947).

[2] 990 S.W.2d 245 (Tex. 1999).

violated the rule by testifying as witnesses in the removal proceeding. Under that section, a harm analysis is not necessary.

3. In *Waco Independent School District v. Gibson*, 22 S.W.3d 849 (Tex. 2000) the Court held that because subject matter jurisdiction is essential to the authority of a court to decide a case, it cannot be waived and may be raised for the first time on appeal. Thus, ripeness and standing, which are components of subject matter jurisdiction, cannot be waived.

ALLSTATE INDEMNITY COMPANY
v.
FORTH
204 S.W.3d 795
(Tex. 2006)

Roger Higgins, Thompson Coe Cousins and Irons, L.L.P., Dallas, Jeffrey P. Lennard, Sonnenschein Nath & Rosenthal LLP, Chicago, IL, for Petitioner.

G. Laird Morgan, Stephen Gardner, Law Office of Stephen Gardner, PC, John M. Phalen Jr., Daniel Sheehan & Associates, L.L.P., Dallas, for Respondent.

PER CURIAM.

In this breach of contract suit, we consider whether an insured has standing to sue her insurance company for settling her medical bills in what the insured considered to be an arbitrary and unreasonable manner. In reversing the trial court and remanding the case for trial, the court of appeals concluded that the insured had standing even though the insured had no out-of-pocket expenses, and her health care providers had not, and now could not, collect any additional sum from her. 151 S.W.3d 732, 738. Because there are no allegations that the insured suffered damages or that the manner in which the insurance company settled the insured's medical expenses caused her any injury, we conclude that the trial court was correct to dismiss her suit, and accordingly we reverse the court of appeals' judgment.

Pat Forth's daughter required medical treatment in 1997 as the result of an auto accident. The personal-injury-protection (PIP) of Forth's Allstate auto insurance policy, covered "reasonable medical expenses incurred for necessary medical services." Allstate settled Forth's medical bills for less than the actual amount billed. Forth sued Allstate for injunctive and declaratory relief, alleging that it arbitrarily reduced her bills without using an independent and fair evaluation to determine what amount of her medical expenses were reasonable. According to Forth, Allstate routinely discounts medical expenses by comparing those charges to a third-party contractor's computerized database. Allstate then offers about eighty-five percent of the medical expenses reflected in that database for the same treatment or procedure. Forth did not claim that Allstate's conduct had caused her any damage.

In the trial court, Allstate filed a motion to dismiss, arguing that Forth lacked standing because she had no claim for damages, and Allstate had not caused her any actual injury. The trial court granted Allstate's motion, and the court of appeals affirmed in part and reversed in part, holding that Forth lacked standing to seek prospective relief because Allstate no longer insured her, but that she could seek retrospective relief for any injury suffered while she was a policy holder. The court concluded that if a fair and independent evaluation of the medical bills revealed that Allstate paid less than the full amount of Forth's "reasonable expenses," then Forth could claim injury because the terms of the insurance contract required that reasonable expenses be paid.

The court of appeals relied on *Black v. American Bankers Insurance Co*., 478 S.W.2d 434 (Tex. 1972) and *American Indemnity Co. v. Olesijuk*, 353 S.W.2d 71, 72 (Tex. Civ. App.—San Antonio 1961, writ dism'd w.o.j.) to support its view that the insured had standing to sue her insurance company despite its settlement of her medical claims to the apparent satisfaction of the medical providers. Both *Black* and *Olesijuk* held that the insurance companies' obligation to pay under the respective policies was triggered by the insured's incurrence of medical expenses and was not affected by the fact that the insured had not, in fact, had to pay those expenses. In both cases, a third party paid the medical expenses, but the respective courts concluded that such fact did not alter the obligation of the insurance company to pay under its policy. Unlike the insurance companies in Olesijuk and

Black, Allstate did not question whether Forth had incurred medical expenses and did not refuse to pay the medical providers. Instead, Allstate paid the medical bills according to its own evaluation.

Under Texas law, to have standing a party must have suffered a threatened or actual injury. Forth does not claim that she has any unreimbursed, out-of-pocket medical expenses. She does not assert that these providers withheld medical treatment as a result of Allstate reducing their bills, or threatened to sue her for any deficiency, or harassed her in any other manner. Moreover, Forth has no exposure in the future because limitations has now run on the medical claims. From all appearances, her medical providers have accepted the amount Allstate paid them without complaint, thereby satisfying Allstate's obligation under the policy.

Because Forth does not claim that the manner in which Allstate settled her claim caused her any injury, we conclude that she does not have standing in this case. Accordingly, we reverse the court of appeals' judgment and, without hearing oral argument, render judgment dismissing Forth's claims against Allstate.

Note

In *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006), the Court held that there is no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners for pure economic loss, because such claims are necessarily limited to recovery for property damage. In that case the joint, independent executors of an estate sued several attorneys and their law firm, for legal malpractice. The Court noted that even though an estate may suffer significant damages after a client's death, this does not preclude survival of an estate-planning malpractice claim.

MAPCO, INC.
v.
CARTER
817 S.W.2d 686
(Tex. 1991)

Roger Townsend, Lee A. Hunnell, Houston, Royse M. Parr, Tulsa, Okl., for Mapco.
Thomas Lee Bartlett, Tom F. Coleman, Houston, for Carter.

PER CURIAM.

We consider whether a judgment may be entered against a party not before the trial court. We conclude that it may not.

Clarence, James Ross, and Mrs. Clyde Carter (Carters), Mapco Underground Storage of Texas, Inc. (MUST) and Texasgulf, Inc. (Texasgulf) owned, in undivided interests, a 126.378-acre mineral estate (5/8's by the Carters, 2/8's by Texasgulf, and 1/8 by MUST). MUST owned the surface estate in its entirety. MUST created an underground cavern on a portion of the tract from a salt dome formation to store natural gas and other hydrocarbons. The Carters sued MUST for waste and sought a partition of the mineral estate. The waste claim was severed and is not a part of this appeal.

After a bench trial, the trial court found that the mineral estate was susceptible to a partition in kind. In accord with a request by MUST, the trial court awarded a 15.797-acre tract surrounding the cavern to Gordon Speer (Speer) (successor to MUST), a 31.582-acre tract to Landmark Trust (successor to Texasgulf), and a 78.999-acre tract to be divided equally among the Carters. In addition, the trial court entered a $450,000 owelty award against Mapco, Inc. (Mapco, Inc.) and imposed a lien against the property set aside to Speer, to be foreclosed in the event the owelty award was not paid. The court of appeals affirmed, holding, among other things, that a judgment against Mapco, Inc. was permissible. 808 S.W.2d 262. The parties do not contest the partition and we consider only the portion of the judgment pertaining to Mapco, Inc.

Mapco, Inc. argues that the owelty award entered against it was erroneous because it was not a party in the trial court. We agree.

In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon an appearance. TEX. R. CIV. P. 124. *See, e.g., Patrick v. Patrick*, 728 S.W.2d 864, 868 (Tex.

App.—Fort Worth 1987, writ ref'd n.r.e.). The Carters' pleadings identified only MUST as a party and indicated only that service could be made upon MUST's designated agent. Furthermore, each answer filed was only on behalf of MUST and there is no indication in the record that Mapco, Inc. waived service of process. *See* TEX. R. CIV. P. 120. The fact that MUST was generically referred to by the parties and the trial court as "Mapco, Inc." is not sufficient to place Mapco, Inc. before the court. *See also Fuqua v. Taylor*, 683 S.W.2d 735, 738 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) ("Judgment may not be granted in favor of a party not named in the suit as a plaintiff or a defendant.").

The Carters argue that Mapco, Inc. and MUST waived this point because they did not raise it until their motion for rehearing in the court of appeals. Generally, a point not assigned as error in the court of appeals and raised for the first time in a motion for rehearing cannot be considered by this court. *See Watson v. Glens Falls Ins. Co*., 505 S.W.2d 793, 797 (Tex. 1974). However, lack of jurisdiction is fundamental error and may be raised for the first time before this court. *Grounds v. Tolar Indep. School Dist*., 707 S.W.2d 889, 893 (Tex. 1986). *See also Texas Alcoholic Beverage Comm'n v. Sfair*, 786 S.W.2d 26, 27 (Tex. App.—San Antonio 1990, writ denied).

* * *

Pursuant to Rule 170 of the Texas Rules of Appellate Procedure, a majority of the court grants the application for writ of error of Mapco, Inc. and MUST and, without hearing oral argument, reverses that portion of the judgment of the court of appeals concerning entry of judgment against Mapco, Inc., renders judgment that the Carters take nothing against Mapco, Inc. and remands this cause to the trial court solely to determine against whom the owelty award may properly be entered.

TEXAS ASSOCIATION OF BUSINESS
v.
TEXAS AIR CONTROL BOARD, et al
852 S.W.2d 440
(Tex. 1993)

R. Kinnan Golemon, James W. Checkley, Jr., Albert R. Axe, Jr., Scott R. Kidd and Douglas W. Alexander, Austin, for appellant.

Douglas G. Caroom, Mary E. Kelly, Dan Morales, Nancy N. Lynch, William D. Dugat, III and Amy R. Johnson, Austin, for appellees.

CORNYN, JUSTICE.

The Texas Association of Business (TAB), on behalf of its members, brought this declaratory judgment action seeking a ruling that statutes empowering two state administrative agencies to levy civil penalties for violations of their regulations conflict with the open courts and jury trial provisions of the Texas Constitution. The administrative agencies denied TAB's claims, and along with two Intervenors, filed counterclaims seeking a declaration that the same statutes and regulations comport with those constitutional provisions.

* * *

TAB alleges that it is a Texas not-for-profit corporation, that its members do business throughout Texas, and that it is authorized to represent its members on any matter that may have an impact on their businesses.

TAB filed this suit under the Uniform Declaratory Judgments Act, TEX.CIV.PRAC. & REM.CODE §§ 37.001-37.011, alleging that some of its members had been subjected to civil penalties assessed by either the Air Control Board or the Water Commission. TAB further alleged that all of its other members that operate their businesses pursuant to the pertinent provisions of the Texas Clean Air Act, the Texas Water Code, or the Texas Solid Waste Disposal Act or any rules or orders issued pursuant to those provisions were put at "substantial risk (if not certainty)" of being assessed civil penalties by the Air Control Board or the Water Commission. Thus this suit does not challenge specific instances of the Air Control Board's or the Water Commission's exercise, or threatened exercise, of the civil penalty power. Instead, TAB's suit is a facial challenge to the constitutionality of this administrative enforcement scheme under the Texas Constitution.

* * *

Before we reach the merits of this case, we first consider the matter of the trial court's jurisdiction, as well as our own; specifically we determine whether TAB has standing to challenge the statutes and regulations in question. Because TAB's standing to bring this action is not readily apparent, and because our jurisdiction as well as that of the trial court depends on this issue, we requested supplemental briefing on standing at the oral argument of this case. In response, the parties insist that any question of standing has been waived in the trial court and cannot be raised by the court for the first time on appeal. We disagree.

Subject matter jurisdiction is essential to the authority of a court to decide a case. Standing is implicit in the concept of subject matter jurisdiction. The standing requirement stems from two limitations on subject matter jurisdiction: the separation of powers doctrine and, in Texas, the open courts provision. Subject matter jurisdiction is never presumed and cannot be waived.

One limit on courts' jurisdiction under both the state and federal constitutions is the separation of powers doctrine. *See* TEX.CONST. art. II, § 1; * * * Under this doctrine, governmental authority vested in one department of government cannot be exercised by another department unless expressly permitted by the constitution. Thus we have construed our separation of powers article to prohibit courts from issuing advisory opinions because such is the function of the executive rather than the judicial department. *Firemen's Ins. Co. v. Burch,* 442 S.W.2d 331, 333 (Tex. 1969); *Morrow v. Corbin,* 122 Tex. 553, 62 S.W.2d 641, 644 (Tex.1933). Accordingly, we have interpreted the Uniform Declaratory Judgments Act, TEX.CIV.PRAC. & REM.CODE §§ 37.001-.011, to be merely a procedural device for deciding cases already within a court's jurisdiction rather than a legislative enlargement of a court's power, permitting the rendition of advisory opinions. *Firemen's Ins. Co.,* 442 S.W.2d at 333; *United Serv. Life Ins. Co. v. Delaney,* 396 S.W.2d 855, 863 (Tex. 1965); *California Prods., Inc. v. Puretex Lemon Juice, Inc.,* 160 Tex. 586, 334 S.W.2d 780 (1960).

The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties. *Alabama State Fed'n of Labor v. McAdory,* 325 U.S. 450, 461, 65 S.Ct. 1384, 1389, 89 L.Ed. 1725 (1945); *Firemen's Ins. Co.,* 442 S.W.2d at 333; *Puretex Lemon Juice, Inc.,* 160 Tex. at 591, 334 S.W.2d at 783. An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury. *See Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). Texas courts, like federal courts, have no jurisdiction to render such opinions.

The separation of powers doctrine is not the only constitutional basis for standing. Under federal law, standing is also an aspect of the Article III limitation of the judicial power to "cases" and "controversies." *Sierra Club v. Morton,* 405 U.S. 727, 731, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972). To comport with Article III, a federal court may hear a case only when the litigant has been threatened with or has sustained an injury. *Valley Forge Christian College,* 454 U.S. at 471, 102 S.Ct. at 758. Under the Texas Constitution, standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury. Specifically, the open courts provision provides:

> All courts shall be open, and every person for an **injury** done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

TEX. CONST. art. I, § 13 (emphasis added). Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.

Under federal law, a lack of standing deprives a court of subject matter jurisdiction because standing is an element of such jurisdiction. * * * Other states have followed this analysis in construing their own constitutions. * * *

Subject matter jurisdiction is an issue that may be raised for the first time on appeal; it may not be waived by the parties. *Texas Employment Comm'n v. International Union of Elec., Radio and Mach. Workers, Local Union No. 782,* 163 Tex. 135, 352 S.W.2d 252, 253 (1961); RESTATEMENT (SECOND) OF JUDGMENTS § 11, comment c (1982). This court recently reiterated that axiom in *Gorman v. Life Insurance Co.,* 811 S.W.2d 542, 547 (Tex.), *cert. denied,* 502 U.S. 824, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991). Because we conclude that standing is a component of subject matter jurisdiction, it cannot be waived and may be raised for the first time on appeal.

If we were to conclude that standing is unreviewable on appeal at least three undesirable consequences could result. First and foremost, appellate courts would be impotent to prevent lower courts from exceeding their constitutional and statutory limits of authority. Second, appellate courts could not arrest collusive suits.

Third, by operation of the doctrines of res judicata and collateral estoppel, judgments rendered in suits addressing only hypothetical injuries could bar relitigation of issues by a litigant who eventually suffers an actual injury. We therefore hold that standing, as a component of subject matter jurisdiction, cannot be waived in this or any other case and may be raised for the first time on appeal by the parties or by the court.

* * *

Because standing is a component of subject matter jurisdiction, we consider TAB's standing under the same standard by which we review subject matter jurisdiction generally. That standard requires the pleader to allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Richardson v. First Nat'l Life Ins. Co.,* 419 S.W.2d 836, 839 (Tex. 1967). When reviewing a trial court order dismissing a cause for want of jurisdiction, Texas appellate courts "construe the pleadings in favor of the plaintiff and look to the pleader's intent." *Huston v. Federal Deposit Ins. Corp.,* 663 S.W.2d 126, 129 (Tex. App.—Eastland 1983, writ ref'd n.r.e. 1984); *see also* W. Wendell Hall, *Standards of Appellate Review in Civil Appeals,* 21 ST. MARY'S L.J. 865, 870 (1990).

Here, however, we are not reviewing a trial court order of dismissal for want of jurisdiction, we are considering standing for the first time on appeal. A review of only the pleadings to determine subject matter jurisdiction is sufficient in the trial court because a litigant has a right to amend to attempt to cure pleading defects if jurisdictional facts are not alleged. *See* TEX.R.CIV.P. 80. Failing that, the suit is dismissed. When an appellate court questions jurisdiction on appeal for the first time, however, there is no opportunity to cure the defect. Therefore, when a Texas appellate court reviews the standing of a party sua sponte, it must construe the petition in favor of the party, and if necessary, review the entire record to determine if any evidence supports standing.

TAB asserts standing on behalf of its members. The general test for standing in Texas requires that there "(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought." *Board of Water Engineers v. City of San Antonio,* 155 Tex. 111, 114, 283 S.W.2d 722, 724 (1955). Texas, however, has no particular test for determining the standing of an organization, such as TAB. * * * While we agree with the statement of the general test for standing set out in *Board of Water Engineers,* we foresee difficulties in relying on it alone to determine the standing of an organization like TAB. For instance, when members of an organization have individual standing, but the organization was not established for the purpose of protecting the particular interest at issue, it is not necessarily in the members' best interest to allow such a disinterested organization to sue on their behalf. Furthermore, an organization should not be allowed to sue on behalf of its members when the claim asserted requires the participation of the members individually rather than as an association, such as when the members seek to recover money damages and the amount of damages varies with each member.

The United States Supreme Court has articulated a standard for associational standing that lends itself to our use. We adopt that test today. In *Hunt v. Washington State Apple Advertising Commission,* the Court held that an association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); *see also New York State Club Ass'n v. City of New York,* 487 U.S. 1, 9, 108 S.Ct. 2225, 2231, 101 L.Ed.2d 1 (1988); *International Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock,* 477 U.S. 274, 282, 106 S.Ct. 2523, 2528, 91 L.Ed.2d 228 (1986). This standard incorporates the standing analysis we adopted in *Board of Water Engineers,* yet addresses the additional concerns we have noted.

We now apply the *Hunt* standard to the case before us. Reviewing the record in its entirety for evidence supporting subject matter jurisdiction, and resolving any doubt in TAB's favor, we conclude that TAB has standing to pursue the relief it seeks in this case.

The first prong of the *Hunt* test requires that TAB's pleadings and the rest of the record demonstrate that TAB's members have standing to sue in their own behalf. This requirement should not be interpreted to impose unreasonable obstacles to associational representation. In this regard the United States Supreme Court stated that "the purpose of the first part of the *Hunt* test is simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *New York State Club Ass'n,* 487 U.S. at 9, 108 S.Ct. at 2232. We are satisfied that TAB has not manufactured this lawsuit. A comparison of the association's membership roster with the list of businesses subjected to state penalties indicates individual TAB members have been assessed administrative penalties pursuant to the challenged

enactments. Additionally, TAB has alleged that other of its members remain at substantial risk of penalty. A substantial risk of injury is sufficient under *Hunt. See e.g., Pennell v. City of San Jose,* 485 U.S. 1, 7 n. 3, 108 S.Ct. 849, 855 n. 3, 99 L.Ed.2d 1 (1988) (concluding that association of landlords had standing based on pleadings that individual members would likely be harmed by rent ordinance). Thus TAB satisfies the first prong of the *Hunt* test.

The second prong of *Hunt* requires that TAB's pleadings and the rest of the record demonstrate that the interests TAB seeks to protect are germane to the organization's purpose. TAB was chartered to "represent the interests of its members on issues which may impact upon its members' businesses." Considering a very similar question in *New York State Club Association,* the United States Supreme Court held that: "[T]he associational interests that the consortium seeks to protect are germane to its purpose: appellant's certificate of incorporation states that its purpose is 'to promote the common business interests of its [member clubs].' " 487 U.S. at 10 n. 4, 108 S.Ct. at 2232, n. 4 (bracketed language in original). Likewise, the interests TAB desires to protect are germane to the organization's purpose, and thus the second prong is met.

Under the third and final prong of the *Hunt* test, TAB's pleadings and the record must demonstrate that neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit. The Supreme Court has interpreted this prong as follows:

> [W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.

Hunt, 432 U.S. at 343, 97 S.Ct. at 2441 (quoting *Warth,* 422 U.S. at 515, 95 S.Ct. at 2213).

By seeking damages on behalf of its members, necessitating that each individual prove lost profits particular to its operations, the organization in *Warth* lacked standing to sue; rather, each individual member had to be a party to the suit. These facts are distinguishable from *Brock,* in which the union challenged an administrative interpretation of statutory provisions relating to unemployment compensation. 477 U.S. 274, 106 S.Ct. 2523. Recognizing that the suit raised "a pure question of law," and that "the individual circumstances" of any aggrieved member were not in issue, the Court held that the UAW had standing to challenge the government's actions. *Id.* at 287-88, 290, 106 S.Ct. at 2531-32, 2533; *see also Pennell,* 485 U.S. at 7 n. 3, 108 S.Ct. at 855 n. 3 (facial challenge to rent ordinance does not require participation of individual landlords). Here, TAB seeks only prospective relief, raises only issues of law, and need not prove the individual circumstances of its members to obtain that relief, thus meeting the third prong of *Hunt.*

Having found that TAB meets all three prongs of the *Hunt* test, we conclude that TAB has standing to pursue the relief it seeks in this case.

* * *

Concurring and dissenting opinions by DOGGETT, GAMMAGE and SPECTOR, JJ(omitted). HIGHTOWER, J., not sitting.

4. *Methods of Preservation of Error*

Error occurring during a lower court proceeding that is not fundamental requires some sort of affirmative action on the part of a complaining attorney to preserve error. As will be shown throughout this book the types of affirmative action necessary to preserve error for appellate review will vary depending on the nature of the alleged error as well as the time in the lower court proceeding in which the alleged error occurred.

One of the more frequent errors complained of on appeal relates to the admission or exclusion of evidence. Therefore, in the remaining portion of this Chapter the focus will be on steps which must be taken when alleged *improper evidence* is admitted during a trial or when purported proper evidence is excluded. An "objection" made to the introduction of evidence claimed to be inadmissible is the most frequent affirmative action which is taken to preserve the alleged error of admitting inadmissible evidence. An "offer of proof" [prior to September 1, 1997, this was also referred to an "informal bill of exception"; *see* Rule 52(b) of the former Texas Rules of Appellate Procedure] is the typical method to preserve error in the event that the trial court refuses to admit evi-

dence. In the following pages a brief introduction to these two methods of preservation of error will be made. The proper procedures necessary to preserve other types of errors will be presented throughout the remainder of this book.

Texas Rules of Evidence 103. Rulings on Evidence.

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.

(b) Record of Offer and Ruling. The offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may, or at the request of a party shall, direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Fundamental Error in Criminal Cases. In a criminal case, nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

Texas Rules of Appellate Procedure 33.1. Preservation; How Shown.

(a) In General. As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and

(B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or motion, either expressly or implicitly; or

(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

(b) Ruling by Operation of Law. In a civil case, the overruling by operation of law of a motion for new trial or a motion to modify the judgment preserves for appellate review a complaint properly made in the motion, unless taking evidence was necessary to properly present the complaint in the trial court.

(c) Formal Exception and Separate Order Not Required. Neither a formal exception to a trial court ruling or order nor a signed, separate order is required to preserve a complaint for appeal.

Note

In the Interest of ZLT, 124 S.W.3d 163 (Tex. 2003): Under Rule 33.1(a)(2) of the Rules of Appellate Procedure, in order to present a complaint for appellate review, the record must reflect that the trial court (A) ruled on the request, objection, or motion, either expressly or implicitly; or (B) refused to rule and the complaining party objected to the refusal. In this case, the trial court proceeded to trial without ruling expressly on Thompson's

request for a bench warrant. Consistent with Rule 33.1(a)(2)' s language, an implicit ruling may be sufficient to present an issue for appellate review. By proceeding to trial, without issuing the bench warrant, it is clear that the trial court implicitly denied Thompson's request.

BAY AREA HEALTHCARE GROUP, LTD.
v.
MCSHANE
239 S.W.3d 231
(Tex. 2007)

R. Brent Cooper, Diana L. Faust, Stephen J. Rodolf, Leslie C. Weeks, Russell H. McMains, Rick Rogers, A. Scott Johnson, for Petitioners.

Mark R. Mueller, Max E. Freeman II, Vincent L. Marable III, Kathleen P. McCartan, for Respondents.

PER CURIAM.

In this medical malpractice case, Deborah Sue McShane and James Patrick McShane, individually and as next friends of their daughter, Maggie Yvonne McShane, sued Bay Area Healthcare Group, Ltd., Columbia Hospital Corporation of Bay Area, and South Texas Surgicare, Inc. (collectively, "Bay Area") to recover for injuries that Maggie allegedly sustained during her birth at a Bay Area Healthcare Group hospital. After a jury found in the hospital's favor, the trial court signed a take-nothing judgment. The court of appeals reversed, holding that the trial court abused its discretion in admitting evidence that two doctors involved in the incident were originally sued by the plaintiffs, but were nonsuited before trial. 174 S.W.3d 908, 912. Bay Area presents several issues on appeal: (1) whether the court of appeals misapplied the Texas Rules of Evidence regarding the admissibility of information in superseded pleadings; (2) whether the court of appeals incorrectly concluded that the error was harmful; and (3) whether the court of appeals misapplied Texas Rule of Appellate Procedure 44.1 We hold that the trial court did not abuse its discretion in admitting information from the superseded pleadings. Because that issue is dispositive, we do not reach Bay Area's remaining complaints.

* * *

In 1999, Deborah Sue McShane gave birth to Maggie Yvonne McShane. Maggie allegedly sustained injuries during the delivery that left her with brain damage and other physical complications. Deborah and James McShane sued Bay Area and two doctors, Dr. Rothschild and Dr. Eubank, but nonsuited the doctors before trial. The McShanes filed a motion in limine to prevent Bay Area from introducing into evidence the superseded pleadings that listed Rothschild and Eubank as defendants. The trial court denied that motion. At trial, neither party attempted to introduce the superseded pleadings into evidence, but attorneys for both sides discussed Rothschild and Eubank's status during voir dire, and witnesses testified over objection that the McShanes had previously sued Rothschild and Eubank.

After a three-week trial, the jury returned a 10-2 verdict in Bay Area's favor, and the trial court signed a take-nothing judgment. A divided court of appeals reversed and remanded, concluding that the trial court abused its discretion by admitting evidence that the McShanes had, at one point, sued the two physicians. 174 S.W.3d at 912. The dissent would have held that the complained-of evidence was merely cumulative and the McShanes had not shown reversible error. *Id.* at 924 (CASTILLO, J., dissenting).

The first issue is whether statements from the superseded pleadings were admissible at trial. Evidentiary rulings are committed to the trial court's sound discretion. *Interstate Northborough P'ship v. State,* 66 S.W.3d 213, 220 (Tex. 2001); *City of Brownsville v. Alvarado,* 897 S.W.2d 750, 753 (Tex. 1995). Even if a trial court errs by improperly admitting evidence, reversal is warranted only if the error probably caused the rendition of an improper judgment. TEX. R. APP. P. 61.1(A); *Nissan Motor Co. Ltd. v. Armstrong,* 145 S.W.3d 131, 144 (Tex. 2004); *Owens-Corning Fiberglas Corp. v. Malone,* 972 S.W.2d 35, 43 (Tex. 1998). We review the entire record and require the complaining party to demonstrate that the judgment turns on the particular evidence admitted. *Nissan Motor,* 145 S.W.3d at 144.

Statements from pleadings, depending on their content, could potentially be excluded as irrelevant or unfairly prejudicial. *See* TEX.R. EVID. 402, 403. The McShanes, however, cannot make this complaint here because their attorney was the first to allude to the doctors' party status by telling the jury panel that a doctor's conduct

"could have been brought before this Court in this trial" but "both sides have not done that at this trial." *See McInnes v. Yamaha Motor Corp., U.S.A.,* 673 S.W.2d 185, 188 (Tex. 1984) (plaintiff's counsel opened door to plaintiff's alcohol consumption by discussing it during opening statements, thus preventing plaintiffs from complaining on appeal of similar evidence later introduced by the defendant); *see also* W. JEREMY COUNSELLER & CHARLES D. BROWN, HANDBOOK OF TEXAS EVIDENCE § 401.03 (2005) ("A party can make otherwise irrelevant evidence relevant by injecting collateral issues into a lawsuit. This is called 'opening the door.' Once a party opens the door . . . the opposing party may offer rebuttal evidence on the collateral issue." (citations omitted)). Moreover, testimony is not inadmissible on the sole ground that it is "prejudicial" because in our adversarial system, much of a proponent's evidence is legitimately intended to wound the opponent. Here, however, we conclude that the information's probative value is not substantially outweighed by the danger of *unfair* prejudice.

The Rules of Evidence govern admissibility of evidence in court proceedings. TEX. R. EVID. 101(B). Bay Area introduced statements from superseded pleadings indicating that Bay Area sued Rothschild and Eubank. Normally, out-of-court statements are excluded as hearsay. *Id.* 801(d) (hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). But because the McShanes made the statements, they are considered admissions by a party-opponent and are not hearsay. *Id.* 801(e)(2) ("A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement . . . ."). Rule 801(e)(2) is straightforward: subject to other Rules of Evidence that may limit admissibility, *any* statement by a party-opponent is admissible against that party. *Id.*

Thus, the court of appeals erred in concluding that statements from the pleadings would only be admissible if they contained "some statement relevant to a material issue in the case" that is "inconsistent with the position taken by the party against whom it is introduced." 174 S.W.3d at 920. Before the Rules of Evidence were promulgated, our cases required an inconsistency between the superseded pleading and the party's position at trial. *See Hartford Accident and Indem. Co. v. McCardell,* 369 S.W.2d 331, 337-39 (Tex. 1963); *Kirk. v. Head,* 137 Tex. 44, 152 S.W.2d 726, 729 (Tex. 1941). But the Rules of Evidence no longer require inconsistency when it comes to admissibility of superseded pleadings. *See* TEX.R. EVID. 801(E)(2) (statements made by a party and offered against that party are admissible). Cases that hold otherwise are distinguishable because they were decided before the Rules of Evidence became effective in 1983, or they rely on pre-1983 case law without discussing the Rules' effect. *See, e.g., Drake Ins. Co. v. King,* 606 S.W.2d 812, 817 (Tex. 1980); *McCardell,* 369 S.W.2d at 337-39; *Kirk,* 152 S.W.2d at 729; *Loy v. Harter,* 128 S.W.3d 397, 407 (Tex. App.—Texarkana 2004, pet. denied) (relying on *Kirk,* 152 S.W.2d at 729); *Huff v. Harrell,* 941 S.W.2d 230, 239 (Tex. App.—Corpus Christi 1996, writ denied) (same). We hold that there is no requirement that the statement be inconsistent with the party's position at trial, and the court of appeals erred in finding the superseded pleadings inadmissible on that basis.

* * *

For the reasons stated in this opinion, we grant the petition for review and without hearing argument, TEX. R. APP. P. 59. 1, we reverse the court of appeals' judgment and render judgment that the McShanes take nothing. *Id.* 60.2(c).

BUSHELL
v.
DEAN
803 S.W.2d 711
(Tex. 1991)

PER CURIAM.

Syndex's motion for rehearing is granted in part and overruled in part. This court's opinion and judgment of November 21, 1990, are withdrawn, and the following is substituted in their place.

Mary Dean brought this action against Bill Bushell and the Syndex Corporation, her former manager and employer, claiming assault, intentional infliction of emotional distress, and sexual harassment pursuant to TEX. REV. CIV. STAT. ANN. art. 5221k, § 5.01 (1985). Dean obtained a favorable jury determination on each cause and the trial court rendered judgment awarding Dean $195,600 in actual and punitive damages and $123,000 in attorney's fees. The court of appeals reversed that part of the judgment awarding damages and attorney's fees

for the sexual harassment claim and remanded that part of the cause for new trial. 781 S.W.2d 652. Because the court of appeals based this part of its judgment on unpreserved error, we reverse the judgment of the court of appeals and remand the cause to that court for further proceedings.

By three points of error to the court of appeals, Syndex attacked the trial court's admission of testimony by one of Dean's experts, Dr. Lucia Gilbert. Syndex asserted that the testimony was irrelevant, TEX. R. CIV. EVID. 402; that the probative value of the testimony was substantially outweighed by unfair prejudice, TEX. R. CIV. EVID. 403; and that the testimony was inadmissible character evidence. TEX. R. CIV. EVID. 404. The court of appeals sustained all three points of error.

Syndex did not preserve its objection to Dr. Gilbert's testimony at trial. On direct examination, Dr. Gilbert indicated that he was going to give a "working definition" of sexual harassment, including "general things that are true about a person who harasses." Syndex's counsel objected, stating, I am objecting to the testimony of this expert witness as a whole to the extent that it goes to questions of profile of someone who harasses . . . . I think it is likely to create a great deal of prejudice and to confuse the jury and issues that they actually have to decide in this case, and that involves a mixture of law and fact. The trial judge responded, I [have] expressed a concern that at some point I did not think that the questions to the witness had crossed the point yet, but at some point it might cross the line into character evidence prohibitions, at which time if you believe that it does you will need to reurge your—any objection. Some time later, Dr. Gilbert testified about the "profile" of a sexual harasser, but Syndex did not make any further objection.

In order to preserve a complaint for appellate review, a party must present to the trial court a timely request, objection or motion, state the specific grounds therefor, and obtain a ruling. TEX. R. APP. P. 52(a). Therefore, Syndex's points of error relating to this testimony were not before the appellate court for review, and the court of appeals erred in holding that the testimony was inadmissible. *See Lemons v. EMW Mfg. Co*., 747 S.W.2d 372 (Tex. 1988).

The court of appeals did not consider several of Syndex's points of error. These points include arguments which, if sustained, would require a modification of the trial court's judgment or a remand for new trial. Therefore, we remand the cause to the court of appeals for consideration of these points of error. *See McKelvy v. Barber*, 381 S.W.2d 59, 64 (Tex. 1964).

The applications for writ of error brought by Bill Bushell and Syndex Corporation are denied.

Pursuant to TEX. R. APP. P. 170, a majority of the court, without hearing oral argument, reverses the judgment of the court of appeals and remands the cause to that court for further consideration in accordance with this opinion.

Notes

1. In *Campbell v. State of Texas*, 85 S.W.3d 176 (Tex. 2002) the court noted that an objection is sufficient to preserve error for appeal, if it allows the trial judge to make an informed ruling and the other party to remedy the defect, if he can. Campbell's statement, that an unidentified statute prohibited the trial court from compelling Campbell to engage in certain unidentified "things," was inadequate to inform the trial court of the precise objection. Thus, the objection was insufficient to preserve error for appellate review.

2. *Maritime Overseas Corporation v. Ellis.*[1] To preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial, or when the evidence is offered.

Maritime did not object before trial, or when the evidence was offered, that the scientific evidence offered by Ellis's experts was scientifically unreliable. On appeal, Maritime argues that the federal standard articulated in *Daubert*[2] and the state standard articulated in *Robinson*[3] and *Havner*[4] are the proper standards for reviewing the sufficiency of Ellis's damages evidence. Maritime does not complain about the trial court's admissions of

[1] 971 S.W.2d 402 (Tex. 1998).

[2] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

[3] E.I. duPont de Nemours v. Robinson, 923 S.W.2d 549 (Tex. 1995).

[4] Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997).

any of the scientific evidence from any of Ellis's five experts. Rather, Maritime's position is that, if the court of appeals applied a proper scientific methodology test to Ellis's experts' testimony, the testimony would be legally insufficient to show that the long-term conditions, which Ellis claims he suffers, were caused by delayed neurotoxicity. Thus, Maritime concludes, by way of its complaints about the court of appeals" factual sufficiency review, that there is *no evidence* of *some* of Ellis's actual damages.

Held: Affirmed. Maritime's argument is flawed. *To preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial or when the evidence is offered*. In *Daubert,* the U. S. Supreme Court considered "the standard for admitting expert scientific testimony in a federal *trial*." *Daubert's* focus is on the trial court's discretion, when faced with an objection to scientific evidence, to admit or exclude such evidence before or during the trial. When the trial court concludes that the disputed scientific evidence is insufficient to go to the jury, the trial court may grant a summary judgment or a directed verdict. However, *Daubert* does not support the proposition that a reviewing court can in effect exclude expert testimony that was not objected to, based on its scientific reliability before trial, or when it was offered at trial, and then render judgment against the offering party.

Similarly, in *Robinson*, the special nature of scientific expert testimony was recognized. There, it was recognized that the trial court's role is as a "gatekeeper," and that "[t]he trial court is responsible for making the preliminary determination of whether the proffered testimony meets the standards for scientific reliability." Like *Daubert*, *Robinson's* focus is on a trial court's discretion in admitting or excluding scientific evidence after a party lodges an objection to the reliability of its opponent's scientific expert testimony before trial, or when the evidence is offered.

Under *Havner*, a party may complain on appeal that scientific evidence is unreliable, and thus, no evidence to support a judgment. *Havner* recognizes that a no evidence complaint may be sustained when the record shows one of the following: (a) a complete absence of a vital fact; (b) the reviewing court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more that a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact.

Without requiring a timely objection to the reliability of the scientific evidence, the offering party is not given an opportunity to cure any defect that may exist, and will be subject to trial and appeal by ambush. Reviewing courts may not exclude expert scientific evidence after trial to render a judgment against the offering party, because that party relied on the fact that the evidence was admitted. To hold otherwise is unfair. To prevent trial or appeal by ambush, the complaining party must object to the reliability of scientific evidence before trial, or when the evidence is offered. When the reliability of scientific evidence is contested, attempts at persuasion before the jury and reiterated on appeal cannot amount to preservation of error for appeal. To allow otherwise would impermissibly permit a party to strip away the trial court's role as gate keeper in the first instance, when a party wishes to contest the reliability of scientific evidence. It is impossible for a trial court to exercise its gatekeeper function after the evidence has been admitted and the jury discharged. [Emphasis added.]

3. *In the Interest of ZLT*, 124 S.W.3d 163 (Tex. 2003). Under Rule 33.1(a)(2) of the Rules of Appellate Procedure, in order to present a complaint for appellate review, the record must reflect that the trial court (a) ruled on the request, objection, or motion, either expressly or implicitly; or (b) refused to rule and the complaining party objected to the refusal. In this case, the trial court proceeded to trial without ruling expressly on Thompson's request for a bench warrant. Consistent with Rule 33.1(a)(2)' s language, an implicit ruling may be sufficient to present an issue for appellate review. By proceeding to trial without issuing the bench warrant, it is clear that the trial court implicitly denied Thompson's request.

4. In *Low v. Henry*, 221 S.W.3d 609 (Tex. 2007) the court held that a trial court does not abuse its discretion in denying a party's request for a running objection, if the party fails to plainly identify the source of the objectionable testimony, the subject matter of the witness's testimony, and the ways the testimony will be brought before the court.

BRIDGES
v.
RICHARDSON
163 Tex. 292, 354 S.W.2d 366
(1962)

Woodgate, Richards & McElhaney, Dallas, for petitioners.
Strasburger, Price, Kelton, Miller & Martin, Dallas, for respondents.

PER CURIAM.

The opinion of the Court of Civil Appeals is reported in 349 S.W.2d 644.

We approve the judgment entered by the Court of Civil Appeals, but we are not satisfied that the opinion of the court "in all respects has correctly declared the law." Normally that conclusion would call for no other action on our part than the stamping of the application for writ of error, "Refused. No Reversible Error." *See* Rule 483, Texas Rules of Civil Procedure. But some of the general holdings of the Court of Civil Appeals, express and implied, which we regard as erroneous are so far-reaching that we deem it wise to disapprove them specifically lest they be regarded by lawyers, trial judges and judges of the Courts of Civil Appeals as having our tacit approval.

The holdings to which we refer and our views with respect thereto are:

1. That in order to complain successfully on appeal of the erroneous admission of evidence, a party must have filed a proper motion in limine to suppress the evidence or to instruct counsel not to offer it.

The purpose in filing a motion in limine to suppress evidence or to instruct opposing counsel not to offer it is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury with respect to matters which have no proper bearing on the issues in the case or on the rights of the parties to the suit. It is the prejudicial effect of the questions asked or statements made in connection with the offer of the evidence, not the prejudicial effect of the evidence itself, which a motion in limine is intended to reach. A proper objection made at the time evidence is offered is sufficient to preserve right of review of error committed in admitting it, and a motion in limine is not a necessary predicate for complaint on appeal that the admission of the evidence was error and that the error was prejudicial.

2. That in order to complain successfully on appeal of the erroneous admission of evidence, a party must have requested that the jury be retired until the judge had heard and ruled upon the admissibility of the evidence.

A request to retire the jury while evidence is being offered cannot be a necessary predicate to the right to complain on appeal of a trial court's error in admitting evidence over proper objection. The purpose in retiring a jury is to prevent prejudice through development of questionable evidence in the presence of the jury if the evidence is later excluded, or to permit the perfecting of a bill of exceptions after the evidence has been excluded.

3. That an objection that proffered evidence is "immaterial and irrelevant" is not sufficient to preserve right of review of error committed in admitting it.

The rule stated is a correct general rule but there is a limitation on or an exception to the rule: When the evidence is not relevant to any issue in the case and can have no material bearing thereon, a general objection that it is immaterial and irrelevant is sufficient to preserve right of review of error committed in admitting it. 1 MCCORMICK & RAY, TEXAS LAW OF EVIDENCE, 2d ed., § 25, p. 24; 1 WIGMORE, EVIDENCE, 3d ed. § 18, p. 336.

4. That a conclusion that the erroneous admission of evidence was not reasonably calculated to cause and probably did not cause an improper judgment leads to the further conclusion that "no error resulted in (from) the admission of the evidence."

If evidence is erroneously admitted, error exists; if its admission was not reasonably calculated to cause and probably did not cause an improper judgment, it is still error but is not reversible error. The question of whether a particular error is reversible error depends upon whether it was reasonably calculated to cause and probably did cause an improper judgment and presupposes the existence of error. *Aultman v. Dallas Ry. & Term. Co*., 152 Tex. 509, 260 S.W.2d 596.

In pointing out the foregoing errors in the opinion of the Court of Civil Appeals we are not to be understood as approving all other holdings and statements in the opinion.

The application for Writ of Error is "Refused. No Reversible Error." Rule 483, Texas Rules of Civil Procedure.

Notes

1. *Hartford Accident and Indemnity Co. v. McCardell,* 369 S.W.2d 331, 335 (Tex. 1963): "The Court of Civil Appeals held that the trial court erred in not sustaining a portion of respondent's motion in limine which sought to suppress evidence of claims, settlements or payments arising out of three other injuries. We sustain petitioner's point of error complaining of this holding.

We held in *Bridges v. City of Richardson*, Tex., 354 S.W.2d 366 (1962), that a party need not file a motion in limine in order to preserve the right to appellate complaint about erroneous admission of evidence. Proper objection made at the time of the offer of the evidence is sufficient. We stated that the purpose of a motion in limine is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury. It seems that the converse of our holding in the Bridges case is that although the overruling of a motion in limine may be error, it is never reversible error.

If a motion in limine is overruled, a judgment will not be reversed unless the questions or evidence were in fact asked or offered. If they were in fact asked or offered, an objection made at that time is necessary to preserve the right to complain on appeal that such questions asked or such evidence tendered were so prejudicial that the mere asking or tendering should require a reversal. In neither case-(1) questions not asked or evidence not offered, or (2) questions asked or evidence offered-should the error of the trial court in overruling the motion in limine be regarded as harmful or reversible error."

2. *In re Toyoto Motor Sales, U.S.A., Inc.,* 407 S.W. 3d 746, 760 (Tex. 2013): The trial court initially granted the Kings' motion in limine to preclude Officer Coon's deposition testimony regarding King's seat belt usage at the time of the crash. But a protective limine order alone does not preserve error. *See Pool v. Ford Motor Co.,* 715 S.W.2d 629, 637 (Tex. 1986) (noting that "to preserve error as to an improper question asked in contravention of a sustained motion in limine, a timely objection is necessary"). Furthermore, where, as here, the party that requested the limine order *itself* introduces the evidence into the record, and then fails to immediately object, ask for a curative or limiting instruction or, alternatively, move for mistrial, the party waives any subsequent alleged error on the point. *See, e.g., Bay Area Healthcare Grp., Ltd. v. McShane,* 239 S.W.3d 231, 235 (Tex. 2007) ("Error is waived if the complaining party allows the evidence to be introduced without objection."); *State Bar of Tex. v. Evans,* 774 S.W.2d 656, 659 n. 6 (Tex. 1989) ("Failure to request the court to instruct the jury to disregard the inadmissible testimony results in waiver of the alleged error where the instruction would have cured the error."); *see also* TEX.R.APP. P. 33.1(a) (detailing requirements for preservation of appellate complaints); TEX.R. EVID. 103(a) (describing effects of erroneous admission or exclusion of evidentiary rulings); John Henry Wigmore, WIGMORE'S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW § 140 (3d ed. 1942) ("The objector waives an objection when he himself *subsequently introduces* evidence which is directed to prove or disprove the same matter and is liable to the same objection.")".

3. *In the Interest of R.V. Jr. and C.V.*, 977 S.W.2d 777, 780 (Tex. App.—Ft. Worth, 1998, no pet.): "A motion in limine merely precludes reference to certain issues without first obtaining a ruling on the admissibility of those issues outside the presence of the jury. *See Sims v. State*, 816 S.W.2d 502, 504 (Tex. App.—Houston [1st Dist.] 1991, writ denied). A trial court's ruling on a motion in limine does not preserve error. *See Chavis v. Director, State Worker's Compensation Div.*, 924 S.W.2d 439, 446 (Tex. App.—Beaumont 1996, no writ). Thus, on appeal, a party may not predicate his complaint on a motion in limine. *See id; Methodist Hospitals v. Corporate Communicators, Inc.*, 806 S.W.2d 879, 883 (Tex. App.—Dallas 1991, writ denied). In addition, the complaint on appeal must be the same as that presented in the trial court."

4. *Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 91 (Tex. App.—Houston [14th Dist.] 2004, no pet.): "A motion in limine is a procedural device that permits a party to identify, prior to trial, certain evidentiary rulings the trial court may be asked to make. *Weidner v. Sanchez*, 14 S.W.3d 353, 363 (Tex. App.—Houston [14th Dist.] 2000, no pet.). The purpose of the motion in limine is to prevent the other party from asking prejudicial questions or introducing prejudicial evidence in front of the jury without first asking the trial

court's permission. *Hartford Acc. & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963); *Weidner*, 14 S.W.3d at 363. Because a trial court's ruling on a motion in limine preserves nothing for review, a party must object at trial when the testimony is offered to preserve error for appellate review. *Hartford Acc. & Indem. Co*., 369 S.W.2d at 335. However, not all pretrial motions are motions in limine. *See Huckaby v. A.G. Perry & Son, Inc*., 20 S.W.3d 194, 203 (Tex. App.—Texarkana 2000, pet. denied). There is a distinction between a motion in limine and a pretrial ruling on admissibility. *Id*.; *see also Norfolk S. Ry. Co. v. Bailey*, 92 S.W.3d 577, 583 (Tex. App.—Austin 2002, no pet.) (stating that "[a] ruling on a pretrial motion to exclude evidence . . . can be a ruling on the admission of evidence"). The trial court has the authority to make a pretrial ruling on the admissibility of evidence. *Huckaby*, 20 S.W.3d at 203; *Owens-Corning Fiberglas Corp. v. Malone*, 916 S.W.2d 551, 557 (Tex. App.—Houston [1st Dist.] 1996), aff'd, 972 S.W.2d 35 (1998)."

5. The *Bridges* case introduces another important concept of Texas Civil Procedure—the precedential value of orders by the Supreme Court. The refusal of a petition for review by the Texas Supreme Court indicates that the opinion of the court of appeals has the same precedential value as an opinion of the Supreme Court. Since June 24, 1927, such a notation [either writ refused or petition refused] has indicated that the opinion and judgment of the court of appeals are correction. [Prior to 1997, the method of appealing from a court of appeals to the Supreme Court of Texas was by application for writ of error, and hence a writ refused was the designation used to indicate that the opinion and judgment of a court of appeals was correct.] The denial of a petition for review carries no precedential value, and does not indicate approval of the opinion or judgment of the court of appeals. It only means that 4 justices did not agree that the appeal is important to the jurisprudence of the state. TEX. R. APP. P. 56.1.

From February 1, 1946, until December 31, 1987, the Supreme Court's most common notation when refusing to review a case was "writ refused, n.r.e." This designation indicated that the Supreme Court approved of the result (reverse and remand, reverse and render, affirm) of the court of appeals, but did not necessarily approve of the court's reasoning or language. *See* Frank Wilson, "*Hints on Precedent Evaluation*," 24 TEX. BAR J. 1037 (1961).

[Note that the Texas Courts of Civil Appeals became Courts of Appeal on September 1, 1981, and were, at that time, given jurisdiction to review criminal, as well as civil appeals.]

From September 1, 1941 to February 1, 1946, the notation "writ ref'd w.o.m.," was used to indicate approval of the Court of Civil Appeals judgment, but not the opinion.

From March 1, 1939 to September 1, 1941, the designation "Writ Dismissed, Judgment Correct," was used to indicate approval of the Court of Civil Appeals judgment, but not the opinion.

Prior to June 24, 1927, the designation "writ refused" meant only that the decision of a Court of Civil Appeals was correct in the result, even though the Supreme Court might not agree with the reasoning used to reach that result.

From February 1, 1946 until December 31, 1987, the designation "writ dismissed, w.o.j. (want of jurisdiction)" meant that the Supreme Court lacked jurisdiction to review the case or that the application on writ of error failed to properly present the error. The designation, petition dismissed for want of jurisdiction, currently in use, means the same thing.

Prior to February 1, 1946, the designation dismissed, w.o.j. could have one of several meanings. *See Bain Peanut Co. v. Pinson and Guyger*, 119 Tex. 572, 34 S.W.2d 1090, 1091 (1931).

6. In *Hartford Accident & Indem. Co. v. McCardell*,[1] the Court noted that "[i]f a motion in limine is overruled, a judgment will not be reversed unless the questions or evidence were in fact asked or offered. If they were in fact asked or offered, an objection made at that time is necessary to preserve the right to complain on appeal that such questions asked or such evidence tendered were so prejudicial that the mere asking or tendering should require a reversal. In either case—(1) questions not asked or evidence not offered, or (2) questions asked or evidence offered—should the error of the trial court in overruling the motion in limine be regarded as harmful or reversible error."

7. *In the Interest of M. N*., 262 S.W.3d 799 (Tex. 2008): "This Court is obligated to promulgate rules of practice and procedure in civil cases. *See* TEX. CONST. art. V, § 31(b) ("The Supreme Court shall promulgate

[1] 369 S.W.2d 331 (Tex. 1963).

rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts."); TEX. GOV'T CODE § 22.003(d) ("The supreme court from time to time shall promulgate suitable rules, forms, and regulations . . . ."); *id.* § 22.004(a) ("The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant."); *see generally Stillman v. Hirsch,* 128 Tex. 359, 99 S.W.2d 270, 273-74 (1936). Rules promulgated by this Court repeal conflicting laws and parts of laws governing practice and procedure so long as the laws are non-substantive. *See* TEX. CONST. art. V, § 31(c); TEX. GOV'T CODE § 22.004(c) ("So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed."). The rules of civil procedure are intended to promote just, fair, and equitable resolution of issues."

4M LINEN & UNIFORM SUPPLY CO.
v.
W.P. BALLARD & CO.
793 S.W.2d 320
(Tex. App.—Houston [1st Dist.] 1990, writ denied)

Andrew J. Mytelka, John A. Buckley, Jr., Galveston, for appellant.
Robert E. Lapin, Galveston, for appellee.

O'CONNOR, JUSTICE.

This is an appeal from a suit on a sworn account. We grant appellant's motion for rehearing, withdraw our original opinion issued November 16, 1989, and substitute the following opinion.

W.P. Ballard & Co., Inc. (Ballard & Co.) filed suit on a sworn account against 4M Linen & Uniform Supply Co., Inc. (4M Linen). In response, 4M Linen filed a counterclaim alleging breach of implied warranty, breach of contract, and violation of the Deceptive Trade Practices Act (DTPA). Before trial, on stipulated facts, the court entered an instructed verdict for Ballard & Co. for $51,996.11 on its sworn account claim and on 4M Linen's counterclaim. After the evidence, the trial court submitted Ballard & Co.'s issue on attorney's fees, and 4M Linen's defensive issues on misrepresentations and breach of warranties. The jury answered all the issues in favor of Ballard & Co. The trial court disregarded the finding on attorney's fees, and signed a judgment awarding Ballard & Co. $51,996.11, plus interest. Both parties appealed. We modify and affirm the judgment.

This suit arises out of a contract between Ballard & Co. and 4M Linen, under which Ballard & Co. supplied laundry products, produced and recommended by Diamond Shamrock, to 4M Linen. A sales representative for Ballard & Co. visited the 4M Linen plant each week to inventory 4M Linen's supplies. Based on that inventory, Ballard & Co. delivered chemicals. 4M Linen paid Ballard & Co. for the chemicals until July 1985. Beginning in June, 4M Linen started having problems with mildew. 4M Linen refused to pay Ballard & Co. for the supplies that it delivered from July 1985 through October 1985. The main issue at trial was whether Ballard & Co. had a duty to tell 4M Linen that Tex-Stat, one of the chemicals recommended by Diamond Shamrock and supplied by Ballard & Co., was not a mildewcide.

* * *

In its second point of error, 4M Linen contends the trial court erred in excluding part of the testimony of its expert witness, Chad Keith, which it preserved in an informal bill of exceptions. In our earlier opinion, we overruled the point because 4M Linen did not make an informal bill before the court submitted the charge to the jury. On rehearing, 4M Linen contends the trial court erred when it refused to permit it to make an informal bill of exceptions before the jury retired to consider the charge. We agree and reconsider our holding on appellant's second point of error.

When 4M Linen tried to question Keith about a statement in a letter Diamond Shamrock sent to 4M Linen, Ballard & Co. objected. After the court sustained the objection, 4M Linen deferred further questions of that witness on that subject until a later bill of exceptions. 4M Linen did not outline what it planned to prove through Keith's testimony.

At the charge conference, 4M Linen reminded the court that it wanted to make its bill of exceptions before the court submitted the charge to the jury. The court refused, but said it would permit 4M Linen to make a bill during the jury's deliberations. The court noted that if it decided it was error to exclude the evidence, it could grant 4M Linen a new trial.

After the jury retired to consider the charge, 4M Linen made its bill of exceptions by eliciting testimony from Keith before the court and opposing counsel, for the court reporter to include in the statement of facts. To begin the bill, 4M Linen asked that the two questions 4M Linen asked Keith during the trial be read to him from the court reporter's notes. In response to those questions, Keith testified that a product identified as a mildewcide should kill and prevent mildew, and that the letter did not supply a lot of information about the product. In response to questions that were not asked during the trial, Keith testified that a linen supply dealer in the Gulf Coast area would have reason to know that a linen company required a mildewcide, and that a linen supply company in this area would have run across the mildew problem many times.

There are two kinds of bills of exception: the informal bill and the formal bill. Compare TEX. R. APP. P. 52(b) to 52(c). An informal bill of exception preserves error if: (1) an offer of proof is made before the court, the court reporter, and the opposing counsel, outside the presence of the jury; (2) it is preserved as part of the statement of facts; (3) and it is made before the charge is read to the jury. TEX. R. APP. P. 52(b).

Rule 52(b) permits a party to make an informal bill of exception before the court reads the charge to the jury. *McKinney v. National Union Fire Ins. Co*., 747 S.W.2d 907, 910 (Tex. App.—Fort Worth 1988), aff'd, 772 S.W.2d 72 (Tex. 1989). 4M Linen made its informal bill of exception after the charge was read to the jury.

Rule 52(b) states: When the court excludes evidence, the party offering same shall as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, an offer of proof in the form of a concise statement. (Emphasis added.)

The rule is mandatory. The trial court must permit a party to make an informal bill before the jury is charged. *Dorn v. Cartwright*, 392 S.W.2d 181, 185-86 (Tex. Civ. App.—Dallas 1965, writ ref'd). Here, 4M Linen specifically reminded the court that it wanted to make an informal bill before the court read the charge to the jury. The court refused, and granted 4M Linen permission to make the bill after the charge was read.

Under rule 52, it was error to refuse 4M Linen permission to make an informal bill. Our task now is to determine whether the error was reasonably calculated to cause and probably did cause harm. TEX. R. APP. P. 81(b)(1); *see also Houston Lighting & Power Co. v. Russo Properties, Inc*., 710 S.W.2d 711, 717 (Tex. App.—Houston [1st Dist.] 1986, no writ).

To appeal the trial court's exclusion of evidence, the complaining party must present the evidence that was excluded to the appellate court in a bill of exception. *Huckaby v. Henderson*, 635 S.W.2d 129, 131 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.). Because the appellate courts cannot evaluate excluded evidence unless it is preserved in a bill, it is reversible error for the trial court to refuse to permit a party to make a bill of exceptions. Here, however, although the trial court incorrectly prevented 4M Linen from making an informal bill before the charge was read to the jury, 4M Linen made a late informal bill, preserving that testimony.

On the late informal bill, Keith testified that a linen supply dealer in the Gulf Coast area would have reason to know that a linen company required a mildewcide, and that a linen supply company in this area would have run across the mildew problem many times. We hold this testimony was not relevant. There was no evidence in this case that Ballard & Co. had a duty to 4M Linen to do anything but supply the chemicals 4M Linen ordered. The laundry products were recommended to 4M Linen by Diamond Shamrock, not by Ballard & Co.

We overrule 4M Linen's second point of error.

* * *

We modify the judgment to reinstate the jury's award of attorney's fees for Ballard & Co., and, as modified, affirm the judgment.

ON SECOND MOTION FOR REHEARING

On appellant's first motion for rehearing, we held the trial court erred in refusing to allow 4M Linen to make an informal bill of exception, but we found the error was harmless. On second motion for rehearing, appellant claims the error was harmful. 4M Linen refers us to *In re Marriage of Goodwin*, 562 S.W.2d 532 (Tex. Civ. App.—Texarkana 1978, no writ); *Ledisco Fin. Serv., Inc. v. Viracola*, 533 S.W.2d 951 (Tex. Civ. App.—

Texarkana 1976, no writ); and *Dorn v. Cartwright*, 392 S.W.2d 181 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

In all three cases cited by 4M Linen, the party who attempted to make a bill to preserve excluded testimony was prevented from preserving a record of the excluded testimony. *Dorn* directly supports our holding. In *Dorn*, the Dallas Court of Appeals held it was not reversible error to refuse a bill of exception when the information appellant attempted to offer was immaterial to the outcome of the suit. 392 S.W.2d at 186. We said the same thing in this case: the evidence offered in the late bill was not relevant to the issue of defendant's liability.

We do not think Ledisco assists 4M Linen's cause either. In *Ledisco*, the trial court refused to permit appellant to make a bill of exception to preserve cross-examination testimony of a witness. 533 S.W.2d at 958. On appeal, the court held the objections, the questions, and the statements of counsel were sufficient to apprise both courts of the nature of the evidence appellant expected to produce. 533 S.W.2d at 959. Here, as in *Ledisco*, we can look at the record and find the testimony the trial court excluded.

Neither should Goodwin offer 4M Linen any comfort. In *Goodwin*, the trial court announced it would render judgment without taking any evidence. 562 S.W.2d at 533. Before the judgment was signed, appellant filed a motion to make a bill of exception to preserve evidence. *Id.* Without ruling on the bill, the court rendered a judgment reciting that it heard evidence and the parties waived a record. *Id.* On appeal, the Texarkana Court of Appeals reversed because appellant did not have the opportunity to present evidence. That is not the case here. The record before us contains the testimony 4M Linen attempted to offer at trial.

4M Linen complains about the timing of the bill: it was not permitted to make a bill before the trial court charged the jury, as required in TEX. R. APP. P. 52(b). 4M Linen, however, was permitted to present the excluded evidence to the trial court after the charge was read to the jury. That evidence was brought forward for our consideration in the statement of facts.

After finding the trial court erred, we reviewed the evidence in the late bill and held the evidence was not relevant. 4M Linen now insists it has a right to a reversal and retrial because the trial court did not permit it to make a timely bill of exception.

If the purpose of the procedure for a bill of exception is to afford a party the opportunity to preserve excluded testimony for appellate review, the late informal bill did so. We find the late informal bill was the equivalent of a formal bill of exception, which can be filed as late as 60 days after the judgment is signed or, if a motion for new trial was filed, as here, 90 days after the judgment was signed.

We overrule 4M Linen's second motion for rehearing.

Notes

1. Rule 52(b) of the former Texas Rules of Appellate Procedure provided the procedural requirements for preservation of error by an informal bill of exception. The new Rules of Appellate Procedure eliminated mention of the informal bill of exception on grounds that it was unnecessary, as it was already provided for in Rule 103(a)(2) ["Offer of Proof"] of the Texas Rules of Civil Evidence. It is clear, therefore, that all of the procedures for the preservation of error by means of an informal bill of exception as outlined in the former case law have survived the enactment of the new appellate rules.

2. In *Raw Hide Oil & Gas v. Maxus Exploration*,[1] the Court stated succinctly: "To preserve error concerning the exclusion of evidence by offer of proof, the appellate record must show that (1) the substance of the evidence sought to be admitted was made known to the court, and (2) the court either ruled adversely to its admission or, after timely request, affirmatively refused to rule.[2] An objection to the trial court's refusal to rule is suf-

[1] 766 S.W.2d 264, 274 (Tex. App—Amarillo 1988, writ denied).

[2] *See* Disposal Supply Co. v. Perryman Bros. Trash Service, Inc., 664 S.W.2d 756, 762 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.); O'Shea v. Coronado Transmission Co., 656 S.W.2d 557, 564 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); TEX. R. CIV. EVID. 103(a)(2) & (b); TEX. R. APP. P. 52(a).

ficient to preserve error for appellate complaint.[3] An offer of proof or objection to the refusal to rule on the offer must be made prior to the court's charge being read to the jury."[4]

3. a. *Presenting a formal bill of exception*. TEX. R. APP. P. 33.2 requires:

"The objection to the court's ruling or action, and the ruling complained of, must be stated with sufficient specificity to make the trial court aware of the complaint." TEX. R. APP. P. 33.2(a).

"If the evidence needed to explain the bill is in the record, the complainant may refer to it and attach a transcription of the record certified by the court reporter." TEX. R. APP. P. 33.2(b).

b. *The procedure for preserving error by use of a bill of exception.* The requirements are:

The bill be presented first to the trial court. TEX. R. APP. P. 33.2(c)(1).

If the parties agree to the bill, the judge must sign it. TEX. R. APP. P. 33.2(2).

If the parties do not agree to the bill, the judge must:

Sign the bill if the judge finds it to be correct. TEX. R. APP. P. 33.2(a).

Suggest correction to the complaining party if the judge believes they are necessary to make it accurately reflect the proceedings in the trial court. If the party agrees to the correction, then the judge signs and files the bill. TEX. R. APP. P. 33.2(b).

If the party will not make corrections suggested by the judge, then the judge returns the bill with the judge's refusal noted on it. The judge then prepares and files a bill that accurately reflects the proceedings in the court. TEX. R. APP. P. 33.2(c).

If the party is dissatisfied with the judge's bill, the party may file the bill rejected by the judge, supported by the affidavits of three people who observed the matter to which the bill of exceptions is addressed, who attest to the correctness of the bill. The opposing party may contest this 'by-standers' bill, and the appellate court will determine the truth of the exception. TEX. R. APP. P. 33.2(c)(3).

c. *Conflict with the record.* "If a formal bill *of* exceptions conflicts with the reporter's record, the bill controls." TEX. R. APP. P. 33.2(d).

d. *Time.* A formal bill of exceptions must be filed no later than 30 days after the filing party's notice of appeal is filed. TEX. R. APP. P. 33.2(e). Unlike the prior practice, the deadline does not vary depending on timely filing of a post verdict motion. The time for filing the formal bill may be extended if, "within 15 days after the deadline for filing the bill, the party files in the appellate court a motion complying with Rule 10.5(b)." TEX. R. APP. P. 33.2(e)(3).

e. *Inclusion in the record:* "When filed, a formal bill of exceptions should be included in the appellate record."

4. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006): The purpose of a bill of exceptions is to allow a party to make a record for appellate review of matters that do not otherwise appear in the record, such as evidence that was excluded.

5. When it is impossible to preserve error by informal bill, and the trial court will not approve a formal bill of exception, the parties only recourse is to what has been called the "bystanders bill of exceptions." While, under the 1997 appellate rule changes, these may no longer be technically "bystanders bills," since the term "bystander" was eliminated from Rule 33.2, it is expected that the "old" terminology will continue to be used to describe this procedure.

6. A bill of exceptions that is not approved by either the trial judge or opposing counsel, and that is not a bystanders' bill, presents nothing for appellate review. *See Goodpasture v. Coastal Industrial Water Authority*.[5]

7. Under *old* TEX. R. APP. P. Rule 52(c), a bystanders bill of exceptions required the affidavits of "three respectable bystanders." The *new* TEX. R. APP. P. Rule 33.2 dispenses with the language "three respectable by-

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[3] TEX. R. APP. P. 52(a).

[4] TEX. R. APP. P. 52(a) & (b).

[5] 90 S.W.2d 883 (Tex. App.—Houston [1st Dist] 1973, no writ).

standers" and merely states "three people." Does this reflect a change in actual practice? Will the affidavits of attorneys still not suffice? Must the affiant still be one who has no concern in the outcome of the case?

8. In *Smith v. United Gas Pipe Line Co*.,[6] the Court held that bystander's bills are defective if supported only by affidavits of the attorneys participating in the case. The court in *Harris County Flood Control Dist. v. Cohen*,[7] held that the term "bystander" "relates to one who has no concern in the outcome of the case on trial."[8] Both *Smith v. United Gas Pipe Line Co*. and *Harris County Flood Control Dist. v. Cohen* dealt with TEX. R. APP. P. 52(c)(8)'s predecessor, TEX. R. CIV. P. 372(j). However, since the language of the two rules is virtually identical on the bystanders bill there is no reason to believe that these two cases are not still the law.

9. Before the 1997 amendments, formal bills of exception had to be filed 60 days after the judgment was signed if there was not post-judgment motion, and 90 days after the judgment was signed, if there was a post-verdict motion. Former TEX. R. APP. P. 52(c)(11). Under the current TEX. R. APP. P. 33.2(1), the formal bill of exception is to be filed 30 days after the filing party perfects appeal. TEX. R. APP. P. 33.2(e)(3) provides for extending that deadline, upon proper motion, filed within 15 days after the deadline. *See* Richard Orsinger, *The New Texas Rules of Appellate Procedure*, STATE BAR OF TEXAS INSTITUTE ON PRACTICING UNDER THE NEW TEXAS RULES OF APPELLATE PROCEDURE, 1997, at page B-9.

5. *Failure to Properly Preserve Error Results in a Waiver*

In order to preserve the right to complain on appeal about the admission of testimony one must have objected at the time the testimony was offered; the objection must have been specific enough to enable the trial court to understand the precise nature of the objection; and the party needed to have obtained a ruling on the objection. Thus, any complaint is waived if the objection is made after the admission of the testimony. Furthermore, the preceding section established that in order to preserve the right to complain on appeal about the exclusion of evidence one must have properly made an offer of proof. The failure to properly preserve error results in a waiver. Absent fundamental error, an appellate court is not authorized to reverse a trial court judgment in the absence of properly assigned error. *See Gulf Consolidated International Inc. v. Murphy*.[9]

6. *The Preserved Error must be Harmful*

Texas Rules of Appellate Procedure 44.1. Reversible Error in Civil Cases.

(a) Standard for Reversible Error. No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of:

(1) probably caused the rendition of an improper judgment; or

(2) probably prevented the appellant from properly presenting the case to the court of appeals.

(b) Error Affecting Only Part of Case. If the error affects part of, but not all, the matter in controversy and that part is separable without unfairness to the parties, the judgment must be reversed and a new trial ordered only as to the part affected by the error. The court may not order a separate trial solely on unliquidated damages if liability is contested.

Texas Rules of Appellate Procedure 61.1. Standard for Reversible Error.

No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the Supreme Court concludes that the error complained of:

(a) probably caused the rendition of an improper judgment; or

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6 149 Tex. 69, 228 S.W.2d 139 (1950).

7 282 S.W.2d 917 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.).

8 *Id*. at 919.

9 568 S.W.2d 565 (Tex. 1983).

(b) probably prevented the petitioner from properly presenting the case to the appellate courts.

The reversible error rules under the former Texas Rules of Appellate procedure included language that error must be one that "was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case" in order to result in the reversal of the case. *See* Rules 81(b)(1) and 184(b) of the former Texas Rules of Appellate Procedure. The Supreme Court did not make any substantive changes in the new Rules of Appellate Procedure by dropping the phrase "reasonable calculated to cause" and leaving only "probably caused the rendition of an improper judgment."

RELIANCE STEEL & ALUMINUM CO.
v.
SEVCIK
267 S.W.3d 867
(Tex. 2008)

Chad Michael Forbes, Thomas C. Wright, Wright Brown & Close, LLP, Houston TX, Russell H. McMains, Law Offices of Russell H. McMains, Corpus Christi, TX, for Reliance Steel & Aluminum Co. and Samuel Alvarado.

David W. Holman, The Holman Law Firm, P.C., Houston TX, Macklin Keith Johnson, Hallettsville, TX, for Michael Sevcik and Cathy Loth.

JUSTICE BRISTER delivered the opinion of the Court.

Neither a plaintiff's poverty nor a defendant's wealth can help a jury decide whose negligence caused an accident. Even though punitive damages were not at issue in this collision case, the plaintiffs tendered evidence that the defendant's annual revenues were $1.9 billion. Because this evidence was inadmissible, and the record reflects that it probably caused an improper verdict, we reverse and remand for a new trial.

I. Background

Michael Sevcik and Cathy Loth were injured in a highway accident west of Houston when they were hit from behind by a tractor trailer owned by Reliance Steel & Aluminum Co. and driven by Sam Alvarado. Sevcik and Loth filed suit in Waller County, and at trial they offered the following testimony from the deposition of Reliance's corporate representative:

Q: How big a company is Reliance?

A: I believe last year's annual sales approximated $1.9 billion.

Q: About how many employees do they have? Do you know?

A: Just guessing, I think we're close to 3,000 I think, nationwide.

Q: And are the headquarters for Reliance in California? Is that what I-

A: Yes, sir. They're in Los Angeles, California.

Outside the presence of the jury, counsel for the defendants objected to the offer:

> Defense counsel: Judge, on this and the next couple pages, [plaintiffs' counsel] is talking to the witness-this is the corporate rep for Reliance Steel & Aluminum. He is talking to him about how big a company it is, how many people do you employ, you're all over the country. And I think that is irrelevant and it is also inflammatory to the jury because that plants a seed in their mind that this is a huge company with huge dollars and they can afford a huge verdict.
>
> The Court: [to plaintiff's counsel] You are not seeking punitives?
>
> Plaintiffs' counsel: No, sir.
>
> The Court: Therefore it becomes less relevant.
>
> Plaintiffs' counsel: Right. The thing is, we are definitely entitled to show they are not a mom and pop operation, and we are going to talk-It says they are a California corporation. Then he says they are a division. I'm entitled to bring all of that in.

> Defense counsel: I don't think it is relevant at all. We have the truck driver here, the man who drove the truck who was involved in the accident. Why do we need all this information about the company? That only plants the seed in their mind-
>
> Plaintiffs' counsel: He is asking Mike Sevcik if he bought a new truck. I think everything
>
> Defense counsel: This, I think, only tends to make the jurors start thinking about how much money is behind Mr. Alvarado, which isn't something they need to reach their verdict
>
> Plaintiffs' counsel: Your Honor, some of what we get into in his deposition and then in the testimony of the driver is-part of it is how much-how many hours they have these people riding on the road, 15- and 16-hour days.
>
> The Court: I'm going to overrule the objection

At the end of the four-day trial, the jury awarded the plaintiffs more than $3 million. The defendants appealed, challenging several of the damage awards and the admission of evidence of its $1.9 billion in revenues. After transfer for docket equalization, the court of appeals reduced one damage item by $6,000, affirmed the rest, and held admission of the gross sales evidence was harmless. The defendants then petitioned this Court for review.

II. Evidence of Wealth

Even when a party's wealth has no logical relevance to a case, the prejudicial effect of such evidence often creates strong temptations to use it. As we have stated before, "highlighting the relative wealth of a defendant has a very real potential for prejudicing the jury's determination of other disputed issues in a tort case." To avoid such situations, Texas courts "historically have been extremely cautious in admitting evidence of a party's wealth." Even when wealth can be used on the issue of punitive damages, we take the unusual step of bifurcating a trial so that it cannot be used for any other purpose.

* * * We hold the trial court abused its discretion in allowing admission of Reliance's gross annual sales.

III. Harmless Error?

Erroneous admission of evidence is harmless unless the error probably (though not necessarily) caused rendition of an improper judgment. We have recognized "the impossibility of prescribing a specific test" for harmless-error review, as the standard "is more a matter of judgment than precise measurement." A reviewing court must evaluate the whole case from voir dire to closing argument, considering the "state of the evidence, the strength and weakness of the case, and the verdict."

A. The Effect

The starting point for harmless-error review is the judgment. Obviously, a party that wins a favorable judgment has usually not suffered harm from any errors during trial. In this case, several parts of the verdict on which the judgment was based show that something beyond the relevant evidence was guiding the jury's deliberations.

During trial, plaintiffs' counsel introduced a chart showing that Loth's past medical expenses totaled $33,985.23, and he asked for precisely that amount in closing argument. Nevertheless the jury awarded $40,000. As the court of appeals held, there was no evidence for this amount as "the record is devoid of any testimony or affidavits" supporting it.

The same is true of the jury's verdict that Loth's future medical expenses were $250,000. Reliance concedes there was some evidence that she would incur $37,000 for future medications, and there was also some evidence she could incur as much as $90,000 for a six-month rehabilitation program in Houston. But there was no evidence she would incur anything more. To the contrary, her expert testified that "when we see a patient like Cathy, who is several years past their brain injury, all of the healing and recovery that is going to take place has taken place." While there was evidence that Loth would suffer permanent brain damage (for which the jury awarded $1.75 million in future impairment and mental anguish), there was no evidence that further medical treatment could do anything about it. The jury's finding on future medical expenses was simply twice as much as the evidence would support.

The jury's finding of $750,000 for future earning capacity was also surprisingly large given the evidence. Loth's tax returns leading up to the accident showed a total income of $7,562 for all five years combined; at that rate, the future award represented almost 500 years. Similarly, the jury's award for her earning capacity lost in

the three years before trial was $15,000; at that rate the future award represented 150 years. It is of course true that Loth was entitled to damages for future earning capacity, not just future earnings. But the jury's findings still must be based on "such facts as are available" and "on something more than mere conjecture." We need not decide whether this particular award was erroneous; we conclude only that in combination with the other awards it shows that the jury's findings probably were the result of something other than the admissible evidence in the case.

The plaintiffs argue that the verdict was not inflated because the jury awarded them only half of what they requested in closing argument. But whether a jury awarded less than the plaintiffs requested is not the same question as whether they awarded the plaintiffs more than the evidence supported. The primary damage requests rejected by the jury related to future pain and mental anguish and future physical impairment, matters as to which the lack of specific proof available makes it very hard to say whether the jury's award was either "too low" or "too high." But in those parts of the verdict where such evidence was available, the jurors' findings generally exceeded it by a substantial amount.

B. The Evidence

In reviewing whether erroneous admission of evidence was harmful, we have also looked to the role the evidence played in the context of the trial. Thus, if erroneously admitted or excluded evidence was crucial to a key issue, the error was likely harmful. By contrast, admission or exclusion is likely harmless if the evidence was cumulative, or if the rest of the evidence was so one-sided that the error likely made no difference.

As already noted, a defendant's wealth has "a very real potential" for prejudice. The Legislature has deemed it so potentially prejudicial that it must be separated from the jury's deliberations regarding liability and actual damages. That concern is especially relevant here because the more impressive the wealth, the more likely it is to make an impression. Had Reliance's gross sales been $190,000 or perhaps even $1.9 million, the plaintiffs might be right that it would have been unlikely to turn jurors' heads. But sales of $1.9 billion are surely enough to catch any juror's attention. If evidence of gross sales is ever likely to be harmful, the evidence offered here surely must qualify.

Further, that evidence must be considered in the context of this case. Liability here was largely uncontested; as plaintiffs' counsel told the jury in his opening statement, "You're going to hear the driver tell you that it was his fault." Instead, he correctly noted that the key issue was damages: "The biggest issue, the biggest issue, in my opinion, that you're going to have at the end of the week or later in the week when you deliberate is going to involve how much should be paid." In that respect, most of the damages here were difficult to gauge, stemming as they did from soft-tissue injuries and impairments whose effects were hard to measure objectively. Given that the trial focused primarily on setting damage amounts as to which jurors have few clear guideposts, it is probable that proof of Reliance's huge revenues played a crucial role on the key issue at trial.

C. The Emphasis

In harmless-error review, we have also looked to efforts by counsel to emphasize the erroneous evidence. In this case, the court of appeals held that evidence of Reliance's wealth was harmless because it was mentioned only once. If that were the only rule, there would be little use for the rules of evidence as everyone could ignore them once with impunity.

Moreover, this argument conflicts with the plaintiffs' additional argument that evidence of Reliance's wealth was "buried in the larger context of testimony that concerned the size of the Reliance Steel operation, the number of employees, the number of divisions, and so forth." While plaintiffs' counsel mentioned the gross revenues figures only once, he mentioned Reliance's large size from voir dire to closing argument. * * *

D. The Effort

In harmless-error review, we have also considered whether admission of improper evidence was calculated or inadvertent. As this Court has stated before, a party's insistence on introducing inadmissible testimony "indicates how important he thought it was to his case." In the related area of improper evidence of insurance, Texas courts often look to whether the injection of insurance was inadvertent or not. When attorneys insist that prejudicial evidence be admitted, that can be some evidence that at least they thought it would have some likely effect.

Here, of course, admission was no accident. Proof of Reliance's income was not offered in the heat of the moment, but as a deposition excerpt prepared in advance and offered outside the presence of the jury, giving the plaintiffs time to overcome the defendants' objection and the trial court's reservations.

Intentionally leading the trial court into error does not always make the error harmful. But when issues like race, religion, gender, and wealth are injected into a case unnecessarily, there is the potential for damage not just to a litigant but to the civil justice system. Courts must provide equal justice to all, regardless of their circumstances, and efforts to suggest that jurors should do otherwise cannot be lightly disregarded.

* * *

We recognize that evidence of a party's wealth is sometimes admissible, and sometimes unavoidable; a large company may be so well known that jurors need no evidence about its ability to pay a judgment. But we also recognize "the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." We reiterate today that gratuitous evidence about either party's financial circumstances is not what trials should be about.

Accordingly, we reverse the judgment of the court of appeals, and remand the case for a new trial.

Notes

1. *Texas Department of Transportation v. Able*, 35 S.W.3d 608 (Tex. 2000): The inclusion and exclusion of evidence is committed to the trial court's sound discretion. Even if the excluded evidence was admissible, and that the trial court erred in not admitting it, the complainant still must show that the error was harmful. To put it another way, a successful challenge to evidentiary rulings usually requires the complaining party to show that the judgment turns on the particular evidence excluded or admitted. In determining if the excluded evidence probably resulted in the rendition of an improper judgment, a court must review the entire record. Courts ordinarily will not reverse a judgment for erroneous rulings on admissibility of evidence when the evidence in question is cumulative and not controlling on a material issue dispositive to the case.

2. *Nissan Motor Company Ltd. v. Armstrong*, 145 S.W.3d 131(Tex. 2004): The erroneously admitted evidence probably made the judgment improper. The evidence of other incidents was far more than cumulative: it was emphasized at every opportunity; it was used to prove a defect when the actual evidence had been destroyed; and it was calculated to show Nissan was malicious rather than mistaken in suggesting the accident was Armstrong's fault. It also violated the long-standing rule in Texas that proof of unintended acceleration is not proof of a defect. Under that rule, proof of many instances of unintended acceleration cannot prove a defect either; a lot of no evidence is still no evidence. For all these reasons, the evidence improperly admitted in this case probably resulted in an improper judgment.

3. In *Service Corp. International v. Guerra*, 348 S.W.3d 221 (Tex. 2011) the court stated: "An error in admitting evidence requires reversal if it probably caused the rendition of an improper judgment. TEX.R.APP. P. 61.1; *Nissan Motor Co. v. Armstrong,* 145 S.W.3d 131, 144 (Tex. 2004). In determining whether the error was harmful we evaluate the entire case from voir dire to closing argument, considering the evidence, strengths and weaknesses of the case, and the verdict. *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867,871 (Tex. 2008). We also consider whether counsel emphasized the erroneous evidence and whether the admission of the evidence was calculated or inadvertent. *Id*. at 874; *Nissan Motor Co.,* 145 S.W.3d at 144 ("[W]hether erroneous admission is harmful is more a matter of judgment than precise measurement.")."

McCRAW
v.
MARIS
828 S.W.2d 756
(Tex. 1992)

Joe D. Gregory, Grapevine, Gary W. Sibley, Dallas, for petitioner.
David S. Stubblefield, Dallas, for respondent.

HIGHTOWER, JUSTICE.

The issue before this court is whether certain evidence was admissible in an action to determine whether the surviving spouse or the surviving children of Donna Ann Maris are entitled to the proceeds of her life insurance policy. After excluding certain evidence, the trial court determined that the surviving spouse was entitled to the life insurance proceeds. The court of appeals affirmed. ___ S.W.2d ___. We reverse the judgment of the court of appeals and remand the cause to the trial court for further proceedings on all issues.

Donna Ann Maris was an employee of the United States Department of Labor and had obtained life insurance under a Federal Employee's Group Life Insurance policy. Under federal statute, the life insurance proceeds are paid to the surviving spouse of the deceased employee unless the employee signed a written beneficiary designation form and filed it with the employing office. At her death in 1987, Donna Ann Maris was survived by her estranged husband, Jimmie L. Maris ("Maris"), and two children from a prior marriage, Tracy L. McCraw and Kristina N. McCraw ("McCraws"). The McCraws, the surviving children, filed suit for declaratory judgment asserting that they were entitled to the life insurance proceeds because Donna Ann Maris signed and filed the appropriate form with the employing office designating them as beneficiaries and the beneficiary designation form was subsequently lost. Maris, the surviving spouse, counterclaimed asserting that he was entitled to the life insurance proceeds. During trial, the court admitted testimony that two co-employees witnessed Donna Ann Maris' signature on some forms and that it was Donna Ann Maris' habit to complete handwritten duplicate forms prior to typing and filing the original form. However, the court excluded, among other things, a "duplicate beneficiary designation form" in the handwriting of Donna Ann Maris. The trial court determined that the surviving spouse was entitled to the life insurance proceeds. The court of appeals held that the trial court did not err in excluding the "duplicate beneficiary designation form."

* * *

Since we have determined that exclusion of the "duplicate beneficiary designation form" was erroneous, we must determine whether the exclusion constituted reversible error. For the exclusion of evidence to constitute reversible error, the complaining party must show (1) that the trial court committed error and (2) that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. *Gee v. Liberty Mut. Ins. Co*., 765 S.W.2d 394, 396 (Tex. 1989); TEX. R. APP. P. 81(b)(1). Since we have determined that the trial court committed error when it excluded the "duplicate beneficiary designation form," we must determine whether the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. This court has recognized "the impossibility of prescribing a specific test for determining whether any error . . . [including] the improper admission or exclusion of evidence . . . 'was reasonably calculated to cause and probably did cause the rendition of an improper judgment.' " *Lorusso v. Members Mut. Ins. Co*., 603 S.W.2d 818, 821 (Tex. 1980). "Such a determination necessarily is a judgment call entrusted to the sound discretion and good senses of the reviewing court." *Id.* However, it is not necessary for the complaining party to prove that "but for" the exclusion of evidence, a different judgment would necessarily have resulted. The complaining party is only required to show that the exclusion of evidence probably resulted in the rendition of an improper judgment. *Howard v. Faberge, Inc*., 679 S.W.2d 644, 648 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). *See King v. Skelly*, 452 S.W.2d 691, 696 (Tex. 1970). In making this determination, the court must review the entire record. *Gee v. Liberty Mut. Ins. Co*., 765 S.W.2d at 396; *Lorusso v. Members Mut. Ins. Co*., 603 S.W.2d at 821.

Under the McCraws' theory of the case, it is necessary that they prove (either directly or by circumstantial evidence) that Donna Ann Maris signed and filed the appropriate form with the employing office designating them as beneficiaries. Evidence of the duplicate beneficiary designation form in the handwriting of Donna Ann Maris combined with admitted evidence that it was Donna Ann Maris' habit to complete handwritten duplicate forms prior to typing and filing the original constitutes crucial circumstantial evidence concerning proof that

Donna Ann Maris signed and filed the appropriate beneficiary designation form. Under these circumstances, the McCraws have demonstrated that exclusion of the "duplicate beneficiary designation form" was reasonably calculated to cause and probably did cause rendition of an improper judgment.

We reverse the judgment of the court of appeals and remand the cause to the trial court for further proceedings on all issues.

GONZALEZ, JUSTICE, dissenting [opinion omitted].

CORNYN, JUSTICE, dissenting.

* * *

Even if the majority is impelled to the conclusion that exclusion of this evidence was error, Petitioners have not met their burden to show any error was reasonably calculated to cause and probably did cause rendition of an improper judgment. TEX. R. APP. P. 81(b)(1). The excluded evidence of the duplicate beneficiary designation form is cumulative of other evidence admitted on this point and, thus, even erroneous exclusion is harmless error. *Rose v. O'Keefe*, 39 S.W.2d 877, 879 (Tex. Comm'n App. 1931, opinion adopted); *Thrailkill v. Montgomery Ward & Co*., 670 S.W.2d 382, 387 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Certainly, the inferences which petitioners seek to have drawn from the excluded evidence are cumulative of the inferences that they sought to have drawn from the evidence admitted and considered by the trial court. Moreover, how the majority can hold that in this non-jury trial—where the trier of fact actually heard all the evidence, both admitted and excluded, albeit on a bill of exception—that admission would have probably resulted in a different judgment is beyond me. I would affirm the judgment of the court of appeals.

Notes

1. As shown above a successful challenge to properly preserved evidentiary rulings usually requires the complaining party to show that the judgment turns on the particular evidence excluded or admitted. That determination is made by the appellate court by reviewing the entire record. *See City of Brownsville v. Alvarado*.[1]

2. Please note as you read the remainder of this book that often times the courts do not address the harmless error rule. Many times that failure is an oversight on the part of the court. However, in a few special instances, it is because a different standard—other than the harmless error rule—is being used to determine whether the error will lead to a reversal of the case being appealed. Please be alert to this possibility.

MENTIS
v.
BARNARD
870 S.W.2d 14
(1994)

Gary W. Sibley and Robert T. Baskett, Dallas, for petitioner.

Charles M. Bradshaw, Dallas, for respondent.

JUSTICE DOGGETT delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE GONZALEZ, JUSTICE HIGHTOWER, JUSTICE HECHT, JUSTICE GAMMAGE, and JUSTICE ENOCH join.

We consider trial court exclusion of the testimony of an expert witness on the grounds that he had not been designated "as soon as practical" under Rule 166b(6)(b) of the Texas Rules of Civil Procedure.

While crossing a street, Thelma Mentis was struck and killed by an automobile driven by John Barnard. Although suit was filed shortly after her death, the attorney who tried the case was not retained until about three months before trial. In response to discovery, that attorney designated an accident reconstruction expert as a testifying witness thirty-two days before trial. After jury selection and opening statements had been completed,

[1] 897 S.W.2d 750 (Tex. 1995).

Barnard's attorney was successful in having barred any testimony from this expert because he had not been identified "as soon as practical." Based upon the remaining evidence it was permitted to consider, the jury found that the negligence of both Mentis and Barnard constituted a proximate cause of the accident, with 85 percent of the negligence attributable to the former, and 15 percent to the latter. The trial court entered a take-nothing judgment. The court of appeals affirmed. 853 S.W.2d 119. We reverse.

* * *

A trial court's exclusion of an expert who has not been properly designated can be overturned only upon a finding of abuse of discretion. *Morrow*, 714 S.W.2d at 298. Barnard's only objection was that "the designation of the [Mentis's] expert one month before trial, after a lawsuit ha [d] been filed almost two years, is not as soon as practical." Though later arguing that he lacked the expert's deposition, Barnard's counsel admitted that he had never sought it. A litigant who seeks to deny an opponent the right to use a witness has the burden of producing evidence to show that the designation was not "as soon as practical." *See Williams*, 734 S.W.2d at 193. Simply advising the court as to how long the case had been pending did not by itself establish that designation at an earlier date would have been practical. The trial court abused its discretion in granting Barnard's motion.

Our analysis is not complete, however, without determining whether the error constituted reversible error. TEX. R. APP. P. 81(b). An error in the exclusion of evidence requires reversal if it is both controlling on a material issue and not cumulative. *See Gee v. Liberty Mut. Fire Ins. Co*., 765 S.W.2d 394, 396 (Tex. 1989). Here the excluded witness was an accident reconstruction expert who planned to address a central issue of the comparative negligence of the pedestrian and driver. The expert's noncumulative calculations and opinions, based on examination and measurement of the scene, that Barnard was driving between 6 and 20 miles above the 40 mile per hour speed limit on a dark, rainy morning were controlling, though not conclusive, as to whether excessive speed caused the death.

Given the harmful effect of the trial court's abuse of discretion in excluding expert testimony, we reverse the court of appeals and remand for a new trial.

CORNYN, JUSTICE, joined by SPECTOR, J., in Part I of this opinion, dissenting.

* * *

The court further errs when it concludes that exclusion of Murray's testimony was harmful error. After the trial court excluded Murray's testimony, Murray testified on bill of exception that Barnard's car was travelling between forty-five and sixty miles per hour at the time of the accident.

Three eyewitnesses testified to the speed of Barnard's vehicle before the accident, the main subject of contention at trial. Barnard testified that he was travelling about thirty-five miles per hour at the time of the collision; one disinterested witness, Carolyn Hubacek, testified that Barnard was travelling at a speed of twenty to twenty-five miles per hour. A second disinterested eyewitness, Joy Soby, testified that Barnard was travelling "approximately forty miles-an-hour" at the time his car hit Mentis.

Given this eyewitness testimony, Murray's testimony was probably cumulative. And the court offers no reason to assume that the testimony of what Learned Hand once referred to as a "hired champion" will carry the day with the jury. *See* Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 53 (1901). Even if exclusion of Murray's testimony was error, however, the court's opinion does not show that such error probably caused the jury to reach an improper verdict when the jury assigned eighty-five percent of the fault for the accident to Mentis, and fifteen percent of the fault to Barnard. I would conclude that the trial court did not err by rendering judgment on the verdict. *See* TEX. R. APP. P. 81(b)(1).

For the foregoing reasons, I respectfully dissent.

Note

GTE Southwest v. Bruce.[1] In this action for intentional infliction of emotional distress, three GTE employees, Bruce, Davis, and Poelstra, sued GTE for intentional infliction of emotional distress premised on the constant humiliating and abusive behavior of their supervisor, Shields. The employees obtained opinion evidence from three different expert witnesses that Shields's conduct was extreme and outrageous. GTE objected to this testimony at trial, and complained of the trial court's admission of the testimony of two of the witnesses on appeal. The court of appeals held that the trial court's admission of expert testimony on the issue of whether Shields's conduct was extreme and outrageous was error. The Supreme Court affirmed, holding that the error was harmless.

> Last, GTE complains about the trial court's admission of expert testimony that Shields's conduct was extreme and outrageous. The employees obtained opinion evidence from three different expert witnesses that Shields's conduct was extreme and outrageous. GTE objected to this testimony at trial, and complained of the trial court's admission of the testimony of two of the witnesses on appeal.
>
> The court of appeals held that the trial court's admission of expert testimony on the issue of whether Shields's conduct was extreme and outrageous was error. 956 S.W.2d at 641. We agree. "[A]n expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts." *Birchfield v. Texarkana Mem'l Hosp*., 747 S.W.2d 361, 365 (Tex. 1987). But to be admissible, expert testimony must generally involve "scientific, technical, or other specialized knowledge" as to which a witness could be qualified as an expert by "knowledge, skill, experience, training, or education," and it must assist the trier of fact. TEX. R. EVID. 702; *Warner v. Hurt*, 834 S.W.2d 404, 406 (Tex. App.—Houston [14th Dist.] 1992, no writ) ("Admissibility of the expert's opinion hinges on whether or not the expert has special knowledge concerning [the] matter on which his opinion is sought."). Except in highly unusual circumstances, expert testimony concerning extreme and outrageous conduct would not meet this standard. Where, as here, the issue involves only general knowledge and experience rather than expertise, it is within the province of the jury to decide, and admission of expert testimony on the issue is error.
>
> Nevertheless, the court of appeals correctly concluded that the error was harmless. The court applied our reasoning in *Louder v. De Leon*, 754 S.W.2d 148, 149 (Tex. 1988), that "[j]urors realize that they are the final triers to decide the issues. They may accept or reject an expert's view. Thus there is little danger in an expert's answer to an all-embracing question on a mixed question of law and fact."
>
> Texas Rule of Appellate Procedure 44.1(a)(1) mandates that no judgment may be reversed on appeal on the ground that the trial court made an error of law unless the error complained of probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(1). GTE argues that "it is inconceivable that expert opinion on the ultimate issue could be harmless." To demonstrate that it was harmed by the expert's testimony, GTE relies solely on the jury's answers to the charge, pointing out that the jury did not find malice, upon which there was no expert opinion, but did find intentional infliction of emotional distress, upon which there was expert testimony. This questionable logic is insufficient to demonstrate that admitting the testimony harmed GTE. *See Templeton v. Dreiss*, 961 S.W.2d 645, 672 (Tex. App.—San Antonio 1998, pet. denied). Absent the expert testimony, there was an abundance of evidence from the employees and other witnesses establishing the continuing assaults and humiliation by Shields. At most, the expert testimony GTE finds objectionable was merely cumulative of evidence demonstrating that Shields's conduct amounts to intentional infliction of emotion distress. *See Southwestern Elec. Power Co. v. Burlington N. R.R*., 966 S.W.2d 467, 474 (Tex. 1998). This non-expert testimony is sufficient to support the jury's verdict.
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> * * *
>
> [JUSTICE OWEN concurred on grounds unrelated to this point.]

[1] 998 S.W.2d 605 (Tex. 1999).

CHAPTER 2.
COURTS AND SUBJECT MATTER JURISDICTION

1. *Jurisdiction and the Judicial Function*

CLAYTON
v.
HURT
88 Tex. 595, 32 S.W. 876
(1895)

L. E. Trezevant, for appellants.
Spencer & Kincaid, for appellees.

DENMAN, J.

[Facts abridged by editor. This was an action commenced in the justice court to expel a tenant from property. The owner gave the tenant only two days notice of the termination of the lease, when he was legally required to have given thirty days notice of termination. The justice court ordered the tenant off, despite the procedural irregularities. The county court affirmed. The tenant sued in district court to enjoin the enforcement of the justice court judgment alleging that such judgment was void, since the plaintiff did not plead that there had been thirty days notice.]

Where a court of general jurisdiction, in the exercise of its ordinary judicial functions, renders a judgment in a cause in which it has jurisdiction over the person of the defendant and the subject-matter of the controversy, such judgment is never void, no matter how erroneous it may appear, from the face of the record or otherwise, to be. An analysis and application of this rule to the facts stated will answer the questions certified. Whether a court is to be classed as one of general or one of special and limited jurisdiction depends, not upon the classification of courts of similar names in other jurisdictions, but upon the duties and powers devolved upon it, and the manner of their exercise, as prescribed by the organic law. The constitution of this state, in distributing the judicial power of the government among the various courts, and defining their relation to each other, after providing for the division of the county into precincts, and the election of a justice of the peace in each precinct, provides that "justices of the peace shall have jurisdiction . . . in civil matters of all cases where the amount in controversy is two hundred dollars or less, exclusive of interest, of which exclusive original jurisdiction is not given to the district or county courts; and such other jurisdiction, criminal and civil, as may be provided by law, under such regulations as may be prescribed by law. * * *" CONST. art. 5, § 19. In pursuance of the power therein conferred, the legislature has by law conferred upon such justices jurisdiction of forcible entry and detainer cases. The language of the constitution, that "the justices of the peace shall have jurisdiction," etc., confers upon them the general judicial powers of the government over the subjects therein specified, subject to the limitations therein prescribed; and such jurisdiction is as general and exclusive as is that of the various other courts mentioned in the constitution over the subjects committed to them. The fact that their judgments are subject to revision in the various forms prescribed by law does not tend to show that they are courts of limited or special jurisdiction; for such judgments can be revised or annulled only in the instances and in the manner prescribed by the constitution in fixing the jurisdiction of the other courts, and, until so revised or amended, are of as much binding force as the judgments of any other court. We therefore hold them to be courts of general jurisdiction, within the meaning of the rule above stated. *Williams v. Ball*, 52 Tex. 603; *Holmes v. Buckner*, 67 Tex. 107, 2 S.W. 452.

It is contended, however, that the justice court, in forcible entry and detainer proceedings, under our statute, is not "in the exercise of its ordinary judicial functions," but exercises only special and summary powers, and that, therefore, each step in the proceeding must appear to have been done in accordance with the statute regulating same, before the judgment can be held valid. In order to determine this question we must look to the statute conferring this jurisdiction upon the court, and regulating the manner of its exercise. The statute provides for the beginning of the proceedings by complaint; for the issuance and service of process upon the defendant, and return thereof by the officer serving same; for the summoning by the executive officer of a jury to try said cause; for the summoning and compelling the attendance of witnesses; for the postponement of the trial upon application of either party for good cause shown; for the impaneling and swearing of the jury "as in other cases;" for the docketing and trial of the cause "as in other cases;" for the rendition of a judgment by the justice upon and in

accordance with the verdict of the jury; and, finally, for appeal by either party from such judgment to the county court. It is clear that during the trial the court is to be governed by the ordinary rules of law applicable in other cases. It is true that the statute expressly provides that "the only issue shall be as to the right of actual possession, and the merits of the title shall not be inquired into;" but this does not authorize the court, in the trial of such issue, to apply any other than the ordinary rules of law governing its proceedings. The question as to what evidence can properly be admitted upon such issue is often of difficult determination, and must be decided by the court trying the cause, governed by the rules of law. The decision of such questions, as well as various questions which may arise from the beginning to the end of the proceedings, including the motion for a new trial, calls into exercise the ordinary judicial functions of the court. We are therefore of the opinion that the contention above stated, that the court is not in the exercise of ordinary judicial functions, cannot be maintained. Therefore, if it be conceded that the ruling of the justice to the effect that the landlord was only required to give the notice for the length of time stated on the face of the complaint was erroneous in point of law, such error did not render the judgment void, under the rule above stated. *Railway Co. v. Dowe*, 70 Tex. 1, 6 S.W. 790.

No question is raised as to the jurisdiction of the justice over the person of the defendant, for he appears not only to have been served with process, but to have entered his appearance, and after the trial of the cause appealed to the county court, but it is contended that it appears from the face of the complaint that the justice had no jurisdiction of the subject-matter of the controversy. The ground upon which this contention is based is that the justice has no jurisdiction to entertain a suit of forcible detainer by a landlord against a tenant until the term has terminated, and that since it appears from the face of the complaint that it was a lease from month-to-month, the notice given on the 5th of December, only two days prior to the ending of the month, on the 7th of December, 1893, did not in law terminate the lease. We are not called upon to determine whether the justice erred, as a matter of law in holding such notice sufficient. The sole question for us to determine is, did the justice have jurisdiction of the suit? For if he had jurisdiction, as stated above, his judgment is not void, though it be conceded that his ruling as to the sufficiency of the notice was erroneous. The statute provides that "if any person shall willfully and without force hold over any lands, tenements or other real property after the termination of the time for which such lands, tenements or other real property were let to him, or to the person under whom he claims, after demand made in writing for the possession thereof by the person or persons entitled to such possession, such person shall be adjudged guilty of forcible detainer." The class of cases of which jurisdiction is conferred by this section of the statute is that where a landlord, or some one entitled to his rights, seeks to recover possession from his tenant or some one claiming under him, urging as cause of action that the lease under which the possession was obtained has been terminated. The jurisdiction of the court attaches when a case belonging to this class is stated on the face of the complaint. After the jurisdiction attaches, it then becomes the duty of the court, on exceptions raised to the complaint; of the jury, upon the evidence adduced in support thereof; and of the court, again, on motion for new trial,—to determine (1) whether the lease had in fact terminated; and (2) whether demand had been made in writing for the possession; and (3) whether the holding over thereafter was willful. The improper determination of either or all of these questions are merely errors occurring on the trial, which, under the rule above indicated, does not render the judgment void, although such errors appear on the face of the record. If one be sued in a justice court upon a contract to which he is not a party, or a married woman be sued upon a note which she had no power to contract, the judgment rendered thereon, though palpably erroneous, is not void. *Railway Co. v. Dowe*, 70 Tex. 1, 6 S.W. 790; *Trimble v. Miller*, 24 Tex. 215. These cases fall within the general rule stated in the beginning of this discussion. We are therefore of the opinion that the judgments of the justice and county courts referred to in the questions certified are not void.

Notes

1. *Dallas County v. Halsey*, 87 S.W.3d 552 (Tex. 2002). "When entitled to the protection of derived judicial immunity, an officer of the court receives the same immunity as a judge acting in his or her official judicial capacity—absolute immunity from liability for judicial acts performed within the scope of jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (stating that "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' " (*quoting Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351, 20 L.Ed. 646 (1871)); *Turner v. Pruitt*, 161 Tex. 532, 342 S.W.2d 422, 423 (Tex.1961) (noting that in judicial proceedings in which the court has jurisdiction, a judge is immune for his or her actions). While protecting the individual judge, this policy likewise serves to protect the

public "whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 349 n. 16, 20 L.Ed. 646 (1871); *see Delcourt v. Silverman*, 919 S.W.2d 777, 781 (Tex. App.—Houston [14th Dist.] 1996, writ denied). The policy reasons for judicial immunity are also implicated when a judge delegates or appoints another person to perform services for the court or when a person otherwise serves as an officer of the court. *See Delcourt*, 919 S.W.2d at 782. In this circumstance, the immunity attaching to the judge follows the delegation, appointment, or court employment. *See Clements v. Barnes*, 834 S.W.2d 45, 46 (Tex.1992); *City of Houston v. West Capital Fin. Servs. Corp*., 961 S.W.2d 687, 689 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd w.o.j.); *Byrd v. Woodruff*, 891 S.W.2d 689, 707 (Tex. App.—Dallas 1994, writ dism'd by agr.). The person acting in such a capacity also enjoys absolute immunity, known as derived judicial immunity. *See Clements*, 834 S.W.2d at 46; *Delcourt*, 919 S.W.2d at 782."

2. *Shepherd v. San Jacinto Junior College Dist*., 363 S.W.2d 742 (Tex. 1962): "A state constitution, unlike the federal constitution, is in no sense a grant of power but operates solely as a limitation of power. 'All power which is not limited by the constitution inheres in the people, and an act of a state legislature is legal when the Constitution contains no prohibition against it.'

DUBAI PETROLEUM COMPANY
v.
KAZI
12 S.W.3d 71
(Tex. 2000)

Larry Funderburk, Michael A. Plotz, Michael K. Bell, Tracy J. Willi, Gregory G. Funderburk, JoAnn Storey, Houston, for Petitioners.
Jeffrey W. Mankoff, Dallas, for Respondents.

CHIEF JUSTICE PHILLIPS delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE OWEN, JUSTICE BAKER, JUSTICE ABBOTT, JUSTICE HANKINSON, JUSTICE O'NEILL and JUSTICE GONZALES joined.

We withdraw our January 6 opinion and substitute the following.

Section 71.031 of the Texas Civil Practice and Remedies Code permits suit for the personal injury or wrongful death of a citizen of a foreign country, if the decedent or injured party's country of citizenship has "equal treaty rights" with the United States. In this wrongful death case, we hold that the "equal treaty rights" requirement is not jurisdictional and that the plaintiffs have satisfied their initial burden to show that the decedent's country of citizenship offers "equal treaty rights" to United States citizens. Accordingly, we affirm the judgment of the court of appeals, which reversed the trial court's order dismissing the case for lack of subject-matter jurisdiction. 961 S.W.2d 313.

I

Alimuddin Sirajuddin Kazi, a citizen of India, was killed while working on an oil rig off the coast of the United Arab Emirates. Kazi's survivors, all citizens of India, brought this wrongful death suit in Harris County district court, basing their claim on Texas Civil Practice and Remedies Code section 71.031. When the Kazis filed this suit in 1993, section 71.031 provided:

(a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:

(1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;

(2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and

(3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

TEX. CIV. PRAC. & REM. CODE § 71.031(a) (1997).

Defendants, Dubai Petroleum Company, Inc., Conoco, Inc., Dresser Industries, Inc. d/b/a Dresser-Rand Co., Aeroquip Corporation, Solar Turbines Incorporated, and Energy Service International, LTD a/k/a ESI., Inc., responded that the trial court lacked subject-matter jurisdiction because India does not have "equal treaty rights" with the United States as section 71.031(a)(3) required. The court agreed and dismissed the case.

Unlike section 71.051(a), which applies only to plaintiffs who are not legal residents of this country, section 71.031's "equal treaty rights" requirement applies to all citizens of foreign countries, including legal residents of this country. *Compare* TEX. CIV. PRAC. & REM. CODE § 71.031(a)(4) (Supp. 2000), *with id*. § 71.051(a). The federal Constitution limits the states' ability to discriminate against foreign citizens who reside in this country. *See, e.g., Bernal v. Fainter*, 467 U.S. 216, 104 S.Ct. 2312, 81 L.Ed.2d 175 (1984); *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). As the decedent in this case was not a United States resident, we need not determine whether the "equal treaty rights" requirement can constitutionally be applied to resident aliens. Because section 71.031 frames the "equal treaty rights" requirement in terms of the injured party's citizenship, this opinion discusses the effect of that requirement on suits by or on behalf of foreign citizens. We caution, however, that one should not view our use of the word "citizen" as resolving the constitutionality of the "equal treaty rights" requirement as applied to resident aliens.

The court of appeals reversed, holding that the International Covenant on Civil and Political Rights, adopted by the U.N. General Assembly Dec. 16, 1966, 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368 ("Covenant"), confers "equal treaty rights" between India and the United States. 961 S.W.2d at 318. The court of appeals sought guidance from a footnote in our opinion in *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, 675 n. 2 (Tex. 1990), which requires the existence of treaty provisions "similar" to those in the Friendship, Commerce, and Navigation ("FCN") Treaty between Costa Rica and the United States to satisfy subsection (a)(3) of section 71.031. Determining that the Covenant's provisions were sufficiently "similar" to the rights extended in the FCN Treaty, which include (1) protection to persons and property, (2) free and open access to the courts, (3) the ability to employ counsel, and (4) the same rights and privileges as native citizens, the court of appeals held that Texas courts have subject-matter jurisdiction over the Kazis' wrongful death action. 961 S.W.2d at 318. For different reasons than the court of appeals gave, we affirm that judgment.

II

It is well-settled that "[a] judgment may properly be rendered against a party only if the court has authority to adjudicate the type of controversy involved in the action." RESTATEMENT (SECOND) OF JUDGMENTS § 11 (1982). For federal district courts or state trial courts of limited jurisdiction, the authority to adjudicate must be established at the outset of each case, as jurisdiction is never presumed. *See* 13 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COPPER, FEDERAL PRACTICE & PROCEDURE § 3522, at 62 (1984). A Texas district court, however, is a court of general jurisdiction. Our Constitution provides that the jurisdiction of a district court "consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body." TEX. CONST. art. V, § 8. By statute, district courts have "the jurisdiction provided by Article V, Section 8, of the Texas Constitution," TEX. GOV'T CODE § 24.007, and "may hear and determine any cause that is cognizable by courts of law or equity and may grant any relief that could be granted by either courts of law or equity." TEX. GOV'T CODE § 24.008.[1] For "courts of general jurisdiction, . . . the presumption is that they have subject matter jurisdiction unless a showing can be made to the contrary."

[1] A third general jurisdictional statute, section 24.009, provides that "[i]f two or more persons originally and properly join in one suit, the suit for jurisdictional purposes is treated as if one party is suing for the aggregate amount of all their claims added together, excluding interests and costs." TEX. GOV'T CODE § 24.009. This section may be irrelevant to district courts, where there may no longer be a jurisdictional minimum, but it does apply to statutory county courts, where suits clearly must allege a certain minimum value for the court to exercise jurisdiction unless by law the jurisdiction of the statutory county court has been made equivalent to the district court in civil cases. TEX. GOV'T CODE § 25.0003(c)(1); *see also Smith v. Clary Corp*., 917 S.W.2d 796, 797 (Tex. 1996) (holding that the statute applies to statutory county courts only "to allow multiple plaintiffs to aggregate their claims to achieve the minimum jurisdictional amount for a court, not to defeat jurisdiction"); *Peek v. Equipment Serv. Co*., 779 S.W.2d 802, 803-04 n. 4 (Tex. 1989) (discussing without deciding whether a jurisdictional minimum still exists for Texas district courts).

13 WRIGHT ET AL., *supra*, at § 3522, at 60; *see also* 16 CASAD ET AL., MOORE'S FEDERAL PRACTICE § 108.04[2], at 108-19 (3d ed.1999); *Dean v. State ex rel. Bailey*, 88 Tex. 290, 30 S.W. 1047, 1048 (1895) ("No other court having jurisdiction over the cause, the district court has the power to determine the right of the case, and to apply the remedy."); *Bowles v. Angelo*, 188 S.W.2d 691, 693 (Tex. Civ. App.—Galveston 1945, no writ) ("[I]f the jurisdiction necessary to relieve against a wrong is not to be found in the specific grants of jurisdiction to the justice or the county court, then it has either been specifically granted to the district court, or conferred upon that court in the grant to it of all residuary jurisdiction."); 2 BRADEN, ET AL., THE CONSTITUTION OF THE STATE OF TEXAS, AN ANNOTATED AND COMPARATIVE ANALYSIS 411 (1977). Thus, all claims are presumed to fall within the jurisdiction of the district court unless the Legislature or Congress has provided that they must be heard elsewhere.

However, this Court has held that this presumption does not apply to actions grounded in statute rather than the common law. For example, this Court held in *Mingus v. Wadley*, 115 Tex. 551, 285 S.W. 1084 (1926):

> The general rule is where the cause of action and remedy for its enforcement are derived not from the common law but from the statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable. *Id*. at 1087.

Further, the Court stated: ". . . there is no presumption of jurisdiction where a court, although it is one of general jurisdiction, exercises special statutory powers in a special statutory manner or otherwise than according to the courts of the common law, since under such circumstances the court stands with reference to the special power exercised on the same footing with courts of limited and inferior jurisdiction." *Id*. at 1089 (*quoting* 15 CORPUS JURIS *Courts*, § 148(c), at 831-32). We have repeatedly reaffirmed this dichotomy between common-law and statutory actions. *See, e.g., Grounds v. Tolar Indep. Sch. Dist.*, 707 S.W.2d 889, 891 (Tex. 1986); *Texas Catastrophe Property Ins. Ass'n v. Council of Co- Owners of Saida II Towers Condominium Ass'n*, 706 S.W.2d 644, 646 (Tex. 1986); *Alpha Petroleum Co. v. Terrell*, 122 Tex. 257, 59 S.W.2d 364, 367-68 (1933); *see also Cunningham v. Robison*, 104 Tex. 227, 136 S.W. 441, 442 (1911). Likewise, the court of appeals below concluded that a claim must satisfy all the requisites of section 71.031 in order for the district court to assert subject-matter jurisdiction. 961 S.W.2d at 314. This approach is consistent with the language of other appellate decisions. *See Owens- Corning Fiberglas Corp. v. Baker*, 838 S.W.2d 838, 841 n. 2 (Tex. App.—Texarkana 1992, no writ); *Alfaro v. Dow Chem*., 751 S.W.2d 208, 208-09 (Tex. App.—Houston [1st Dist.] 1988), *aff'd*, 786 S.W.2d 674 (Tex. 1990).

But while conceptualizing subject-matter jurisdiction in this way has an initial appeal, the resulting practical difficulties suggest underlying logical flaws. Because of the longstanding principle that subject-matter jurisdiction is a power that "exists by operation of law only, and cannot be conferred upon any court by consent or waiver," *Federal Underwriters Exch. v. Pugh*, 141 Tex. 539, 174 S.W.2d 598, 600 (1943), a judgment will never be considered final if the court lacked subject-matter jurisdiction. "The classification of a matter as one of [subject-matter] jurisdiction . . . opens the way to making judgments vulnerable to delayed attack for a variety of irregularities that perhaps better ought to be sealed in a judgment." RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. b, at 118 (1982). When, as here, it is difficult to tell whether or not the parties have satisfied the requisites of a particular statute, it seems perverse to treat a judgment as perpetually void merely because the court or the parties made a good-faith mistake in interpreting the law. Thus, the rationale of *Mingus* has been criticized as "more suited to a eulogy for the common law than to a businesslike administration of justice." Dobbs, *Trial Court Error as an Excess of Jurisdiction*, 43 TEXAS L. REV. 854, 878 (1965). It wrongly assumes that a court exercising its common-law authority would never be "willing to introduce new procedures, new remedies, and new substantive rules," and that "something is functionally different about a non-common law proceeding, and that, therefore, courts are justified in regarding such proceedings in a harsher light." *Id*. at 878-79.

Although *Mingus* represented the dominant approach when it was decided, "the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction." RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e, at 113 (1982). *See generally* Boskey & Braucher, *Jurisdiction and Collateral Attack*, 40 COLUM. L. REV. 1006 (1940); Note, *Filling the Void: Jurisdictional Power and Jurisdictional Attacks on Judgements*, 87 YALE L.J. 164 (1977). We therefore overrule *Mingus* to the extent that it characterized the plaintiff's failure to establish a statutory prerequisite as jurisdictional. The trial court in this case had jurisdiction because a claim for wrongful death was within its constitutional jurisdiction, not because the plaintiffs satisfied all the grounds listed in former section 71.031(a). Thus, while defendants in this Court and the Kazis in the court of appeals framed their argument in terms of whether the district

court did or did not have subject- matter jurisdiction, we consider those arguments in the context of whether the Kazis established their right under the statute to go forward with this suit. "The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, has been said to go in reality to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it." 21 C.J.S. *Courts* § 16, at 23 (1990).

III

Having made the preliminary determination that section 71.031 is not jurisdictional, we now discuss the meaning of "equal treaty rights" in order to determine whether plaintiffs met its requirements. We hold that "equal treaty rights" means that a country grants—based on a treaty—to United States citizens the same rights to sue in its courts for personal injury or death that it grants to its own citizens. This does not mean that the substantive law, remedies, or procedures in Texas and the foreign country have to coincide, or even be remotely similar. But it does require that the decedent's or injured party's country of citizenship allow United States citizens to pursue available remedies for personal injury or death in its courts to the same extent that it allows its own citizens to pursue those remedies.

* * *

Because the language of the Covenant provides for equal access to courts and equal treatment in civil proceedings, it satisfies the Kazis' initial burden of establishing "equal treaty rights." Under the procedure we authorize today, however, the defendants can still put this requirement at issue by producing evidence that, under Indian law, these rights do not exist. Accordingly, we express no opinion regarding whether the Kazis will ultimately meet their burden of proving this statutory condition. Because the plaintiffs have satisfied their initial burden of establishing that India provides "equal treaty rights" to United States citizens, however, we affirm the court of appeals' judgment reversing the trial court's order and remanding this case to that court.

JUSTICE ENOCH did not participate in the decision.

Note

Hubenak v. San Jacinto Gas Transmission Company, 141 S.W.3d 172 (Tex. 2004): Subject matter jurisdiction cannot be waived. If the "unable to agree" requirement, found in TEX. PROP. CODE § 21.012 (one of the requirements of a condemnation petition is to state that the parties were unable to agree on a value of the taking) were necessary to confer subject matter jurisdiction, then judgments in condemnation proceedings would be subject to collateral attack. In construing other mandatory statutory provisions, the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction. Thus, the "unable to agree" requirements of § 21.012 are not jurisdictional, although they are mandatory.

MORROW
v.
CORBIN
122 Tex. 553, 62 S.W.2d 641
(1933)

B. R. Wall, of Grapevine, for plaintiff.
M. Hendricks Brown, of Fort Worth, for defendant.

[Facts abridged by the editor. Under a Texas statute, the district or county courts were authorized to certify any question raised by a party concerning the constitutionality of any law or any order, rule, or regulation of any officer, board, or other State commission directly to the Court of Civil Appeals before the trial on the merits. The statute also provided that the courts of civil appeals could further certify the question to the Supreme Court.]

CURETON, CHIEF JUSTICE.

* * *

It is obvious that the purpose of this act is to obtain before judgment in the trial court the advice of the Court of Civil Appeals and the Supreme Court as to "the constitutionality of any law or any order, rule or regulation of

any officer, board, or other State Commission," which may be involved in any case pending but undetermined in a trial court. In other words, by the terms of this enactment in so far as involved in the case before us we are required to advise the district and county judges how to try their cases as to all constitutional questions, not to revise, reverse, affirm, or otherwise affect their decrees. Ordinarily, we believe the rendition of advisory opinions is to be regarded as the exercise of executive rather than judicial power. This seems to have been the conception of those who framed the Constitution, since by that instrument the Attorney General, a member of the Executive Department, is the only state officer expressly authorized to render such opinions. State Constitution, article 4, §§ 1, 22. At any rate, the rendition of advisory opinions has generally been held not to be the exercise of judicial power. 7 HARVARD LAW REVIEW, p. 153; *Matter of State Industrial Commission*, 224 N. Y. 13, 119 N. E. 1027; *Laughlin v. Portland*, 111 Me. 486, 90 A. 318, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916C, 734; Opinion of Justices, 126 Mass. 567; *Anway v. Grand Rapids R. Co*., 211 Mich. 592, 179 N. W. 350, 12 A. L. R. 26 (overruled in the later case, 68 A. L. R. 105, but not on the above question); 15 Corpus Juris, p. 785, ss 78, 79, and authorities cited in the notes; authorities post. We shall inquire, however, whether or not such power may be exercised by the appellate courts of this state, either as an express grant under the Constitution or as incidental to any granted power.

Section 1, article 5, of the Constitution states in what "magistracy" the judicial power shall be vested. It declares: "The judicial power of this State shall be vested in one Supreme Court, in Courts of Civil Appeals, in a Court of Criminal Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law." The Constitution has thus erected a system of trial and appellate courts quite similar to that of the United States and those of the American states generally, all of which are an outgrowth of the judicial system of England, out of which the common law grew and attained its renown.

"Judicial power" is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for a decision. *Muskrat v. United States*, 219 U. S. 346, 31 S. Ct. 250, 55 L. Ed. 246; *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 47 S. Ct. 282, 71 L. Ed. 541; 11 TEXAS JURISPRUDENCE, pp. 711, 712, § 9, and cases cited in the notes.

"Jurisdiction" of a particular court is that portion of the judicial power which it has been authorized to exercise by the Constitution or by valid statutes.

Since the Constitution has erected a system of both trial and appellate courts, it is obvious that it was never the purpose of the Organic Law to permit one tribunal to interfere with the lawful exercise by another of the judicial power allocated to it. It was the purpose of the framers of the Constitution to make each tribunal independent of all others in the exercise of the authority confided to it, except in so far as powers of revision or direction may be given in the Organic Law or valid statutes thereunder to appellate over trial tribunals. * * *

The Constitution is specific in confiding trial jurisdiction to the district and county courts, and other inferior courts. State Constitution, article 5, §§ 8, 16, 19. These provisions mean that those courts are to exercise that portion of the judicial power allocated to them unimpeded by the supervision of any other tribunal, except in so far as powers of revision may be confided to other tribunals. The jurisdiction of these trial or inferior courts, without any exception, embraces the "power to hear and determine the matter in controversy according to established rules of law, and to carry the sentence or judgment of the court into execution." * * *

One Court of Civil Appeals or district court will not be permitted to interfere with the previously attached jurisdiction of another court of co-ordinate power, nor can an appellate court interfere with the jurisdiction of a district court, except upon appeal in the usual way. *Cleveland v. Ward*, 116 Tex. 1, 285 S. W. 1063. Briefly stated, what we here intend to say is that the jurisdiction of trial courts, under the Constitution, once it attaches, embraces every element of judicial power allocated to those tribunals, and includes: (1) The power to hear the facts, (2) the power to decide the issues of fact made by the pleadings, (3) the power to decide the questions of law involved, (4) the power to enter a judgment on the facts found in accordance with the law as determined by the court, (5) and the power to execute the judgment or sentence. These duties this court will, by mandamus, require them to perform. Authorities *supra*. And further: That with the right of the trial court to exercise the powers thus confided to it, no appellate court can interfere, except in accordance with the authority given in the Constitution or valid statutes thereunder. *Cleveland v. Ward, supra*.

We are equally clear that the power thus confided to our trial courts must be exercised by them as a matter of nondelegable duty, that they can neither with nor without the consent of parties litigant delegate the decision

of any question within their jurisdiction, once that jurisdiction has been lawfully invoked, to another agency or tribunal, and that any legislative act attempting to authorize such a delegation of authority is inconsistent with those provisions of the Constitution which confer jurisdiction on the trial tribunals. * * *

An analysis of the vital portions of this section shows that:

(a) The Supreme Court has "appellate jurisdiction only" (except where authorized to exercise original jurisdiction);

(b) This "appellate jurisdiction only" is limited in two particulars, viz.: (1) "To questions of law," (2) "Arising in cases of which the Courts of Civil Appeals have appellate jurisdiction."

The jurisdictional provisions of the Constitution relating to Courts of Civil Appeals are found in section 6 of article 5 of the Constitution. * * *

These provisions leave no room for doubt as to the types of jurisdiction which may be conferred upon Courts of Civil Appeals. They are (1) "original" and (2) "appellate." The italicized words in the quotations above definitely and conclusively settle this question.

We think the plain reading of the Constitution concludes the question that the Supreme Court and the Courts of Civil Appeals may exercise only these two classes of jurisdiction. *Yett v. Cook*, 115 Tex. 175, 180, 268 S. W. 715, 281 S. W. 843. Neither is given any advisory power by the organic law and since not given, under the rule expressio unius est exclusio alterius it is denied and can not be conferred by the Legislature.

Since advisory jurisdiction generally is not given under the Constitution and cannot be conferred by the Legislature, and since that authorized by the act before us is not original jurisdiction, it is obvious that if the enactment under which the certificate is before us is to stand the jurisdiction provided for must be found to be within the appellate powers of the Supreme Court and the Courts of Civil Appeals, either as an express grant or incidental to the exercise of the authority granted. The power to determine the constitutionality of a statute or order, etc., is certainly within the appellate power of the revisory courts, but this power can only be invoked in a case within their appellate jurisdiction (or in a case within their original jurisdiction), and in the manner and under conditions contemplated by the Constitution. The question then is when may the appellate jurisdiction of the Supreme Court and of the Courts of Civil Appeals be invoked. The rule in Texas, with exceptions to be hereafter noted, has always been that appellate jurisdiction may be invoked only after trial. * * *

Not only must there be a trial in the inferior court, but the trial must result in a final judgment disposing of all issues and parties before appellate jurisdiction may attach. These rules have been stated and adhered to by the courts without any special discussion of the Constitution, but from a consideration of the statutes then existing. However, a proper interpretation of the Constitution leads us to the same conclusion. The Constitution does not in so many words say that appeals lie only from final judgments, but it does erect a system of trial and appellate courts and gives the latter (aside from their original jurisdiction) only appellate power. The Constitution is to be interpreted in the light of the common law, which has been the rule of decision with us since 1840. The common law limits and determines the meaning of words and phrases used in the Constitution when the context or some other provision of the instrument or some previous enactment existing when the Organic Law was framed does not determine them. * * *

The fact that the statute before us authorizes certified questions to be presented to the appellate courts upon agreement of counsel, and that such an agreement was actually entered into in the instant case, cannot have the effect of conferring jurisdiction upon the appellate courts, nor of relieving the act of its constitutional infirmity. Jurisdiction over the subject-matter of litigation cannot be conferred by agreement. This type of jurisdiction exists by reason of the authority vested in the court by the Constitution, or by statutes not in conflict therewith.

* * *

So interpreting the jurisdictional provisions heretofore quoted by us, it is obvious that the appellate jurisdiction of the Courts of Civil Appeals and that of the Supreme Court (subject to exceptions next to be noted) cannot be invoked until after final judgment of the trial courts of the state. This interpretation of the Organic Law as to the appellate power is not only consistent with the construction given similar language of previous Constitutions, but in complete harmony with our view above expressed that the jurisdiction of our trial courts embraces not only the power and duty to hear causes, but the power and duty to pass upon the facts and law and enter final decrees in accordance therewith; and then to execute their judgments, without interference by any other tribunal, except and until the appellate power of a revisory court is invoked.

The exceptions as to the necessity for final judgments before appeal to which we have referred above are those where the statutes permit appeals from certain interlocutory orders of trial courts, namely, those granting or refusing temporary injunctions, appointing receivers, and determining pleas of privilege. Under these statutes appeals are predicated upon judgments, which though interlocutory in form as effectively deprive the litigant of his rights or his property for the time being as do final judgments or decrees.

The validity of these statutes is referable to the practice in common law chancery courts, to "stare decisis" and the amendment and consequent re-adoption of the jurisdictional section of the Constitution as to the Supreme Court as previously interpreted, and is not here involved. In the case before us neither an interlocutory nor final judgment has ever been rendered and the statute in so far as here involved does not require the entry of decrees before certification.

We know of no rule by which the constitutional basis for existing certification statutes may be extended to the act before us, which calls for advisory action only, and requires no judgment or decree upon which the appellate power of the revisory courts may act.

In view of the importance of the questions involved in the certificate of the district judge, we regret that the jurisdiction of the appellate courts has not been invoked in a constitutional way, so that we might have assisted in their solution at this time.

However, we are clear that we have no jurisdiction of the certificate, that the act under which the certified questions are before us is unconstitutional and void, and no other action may lawfully be taken by us than to dismiss the certificate, as provided by the rules of this court. The certificate of the Court of Civil Appeals is accordingly dismissed.

Notes

1. While advisory opinions are generally prohibited, advisory opinions are permitted by the Texas Supreme Court for federal circuit courts on certified questions. TEX. CONST., Art 5, sec 3-C(a), and TEX. R. APP. PROC. 58. While the constitutional amendment and rules give the Texas Supreme Court jurisdiction to answer the certified question, *Humana Hosp. Corp. v. American Med. Sys. Inc.,* 785 S.W.2d 144, 145 (Tex. 1990), the court will not apply the answer to the facts of the case—that is for the federal court. *Amberboy v. Societe de Banque Privee,* 831 S.W.2d 793, 798 (Tex. 1992). "Any response other than that necessary to answer the question authorized by the Constitution or the enabling rules would be dicta." *Rose v. Doctors Hosp.,* 801 S.W.2d 841, 844 (Tex. 1990).

2. *In the Interest of M. N.*, 262 S.W.3d 799 (Tex. 2008): Under Tex. Const. art. V, § 31(b), the Supreme Court is obligated to promulgate rules of practice and procedure in civil cases. Rules promulgated by the Supreme Court repeal conflicting laws, and parts of laws governing practice and procedure, so long as the laws are non-substantive. The rules of civil procedure are intended to promote just, fair, and equitable resolution of issues.

3. *Hagen v. Hagen,* 282 S.W.3d 899 (Tex. 2009): Doris and Raoul Hagens' 1976 divorce decree awarded a percentage of Raoul's military retirement pay to Doris to be paid if, as, and when he received it. After Raoul's subsequent retirement from the Army, he was determined by the Veterans' Administration (VA) to have a service-connected disability. He then elected to be paid VA disability benefit payments, which are not subject to federal income taxes, in place of part of his military retirement payments, which are subject to income taxes. Raoul's election reduced the amount of military retirement pay he received. When Doris began receiving her percentage of the reduced Army retirement pay Raoul received, she sought enforcement and clarification of the divorce decree. The trial court determined that the decree divided only the military retirement pay being received by Raoul, it did not divide his VA disability benefits, and Doris was entitled to only a percentage of the military retirement pay. The court of appeals reversed. The appeals court held that the trial court modified the 1976 decree instead of clarifying it, and the modification was barred by res judicata principles. ***Held:*** The judgment of the court of appeals is reversed and the judgment of the trial court is affirmed. The trial court correctly clarified the unambiguous original decree, and its action was not a modification barred by res judicata principles. The Hagens' 1976 divorce decree is unambiguous. It provides Doris is to receive a percentage of the Army Retirement Pay or Military Retirement Pay Raoul receives. It does not provide she is to receive payments

calculated on any other basis, or that she is to receive part of his VA disability compensation. The trial court's order was a proper clarification of, and not an impermissible modification of, the decree.

4. TEX. R. APP. P. 30: Restricted Appeal to Court of Appeals in Civil Cases

A party who did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of and who did not timely file a postjudgment motion or request for findings of fact and conclusions of law, or a notice of appeal within the time permitted by Rule 26.1(a), may file a notice of appeal within the time permitted by Rule 26.1(c). Restricted appeals replace writ of error appeals to the court of appeals. Statutes pertaining to writ of error appeals to the court of appeals apply equally to restricted appeals.

WALDRON
v.
WALDRON
614 S.W.2d 648
(Tex. Civ. App.—Amarillo 1981, no writ).

Arthur J. Lamb, Amarillo, for appellant.
Miner & Hill, Hal Miner, Amarillo, for appellee.

COUNTISS, JUSTICE.

This default judgment divorce case is before us on petition for writ of error[1] perfected in accordance with TEX. REV. CIV. STAT. ANN. art. 2249, et seq. (Vernon 1971) and TEX. R. CIV. P. 359-363. Petitioner Ronald Gordon Waldron (hereafter "Ronald") alleges and Respondent Donna Lee Waldron (hereafter "Donna") judicially admits reversible error. The questions before us are whether (1) a partial, or total, reversal is required and (2) that which is reversed should be rendered or remanded. We reverse the entire judgment and remand the case.

Donna filed suit for divorce in Potter County. She alleged her residence as Amarillo, Potter County, Texas, and Ronald's as Amarillo, Texas. Service of citation was obtained on Ronald in the state of Florida. The Florida sheriff's return on the citation did not comply with Rule 108 because the person serving the citation did not, among other things, state under oath that he was a disinterested person competent to make oath of that fact. Ronald did not make an appearance in the divorce case prior to entry of judgment. The parties have stipulated that no evidence was introduced at the trial to prove Ronald's residence. Donna obtained judgment granting the divorce and awarding her certain items of property, including "The sum of $13,235.00 to be paid to Petitioner (Donna) by Respondent (Ronald) from community funds and property in his possession." Thereafter, she instituted an action against Ronald to enforce property rights granted her under the decree. Ronald then initiated this writ of error proceeding in the divorce case.

Ronald urges two alternative points of error. Under his first point he requests a take-nothing rendition of the portion of the judgment awarding Donna $13,235.00 and affirmance of the remainder of the judgment. Alternatively, under his second point of error, Ronald requests a reversal and remand of the entire case because he was not served in accordance with Rule 108.

Donna admits reversible error because of the defective service. By motion filed prior to submission, and in her brief on the merits, she urges remand of the entire case for new trial.

The service of citation on Ronald was fatally defective because of the incomplete return. *Scucchi v. Woodruff*, 503 S.W.2d 356, 358-60 (Tex. Civ. App. Ft. Worth 1973, no writ). That much is conceded by the parties. However, in arguing his first point, Ronald does not rely on the defective service. Instead, he contends that Donna's failure to prove his residence combined with the fact of service on him in Florida means Donna did not

[1] Author's note: The procedure formerly known as the Petition for Writ of Error was revised in 1997, and is now referred to as a "restricted appeal." TEX. R. APP. P. 30. Many attorneys were confused because, before this, Texas had a procedure referred to as an "Application for Writ of Error," which was used to appeal from the court of appeals to the Supreme Court. That procedure is now referred to as a Petition for Discretionary Review. TEX. R. APP. P. 53.

prove facts sufficient to invoke Texas' long-arm jurisdiction over him. Absent such evidence, says Ronald, the trial court never acquired in personam jurisdiction of him. Thus, it could not award Donna the sum of $13,235.00 "from community funds and property in his possession" because that award is a money judgment to be paid from personal property in his possession outside Texas. Yet, because the court did have jurisdiction of the cause of action, Ronald argues, the remainder of the judgment should be affirmed.

In order to resolve the issue, an analysis of the nature of the trial court's jurisdictional power is necessary. The district court in which this case originated had the jurisdictional power to try all issues in the case. TEX. CONST. art. 5, § 8; TEX. REV. CIV. STAT. ANN. art. 1906 (Vernon 1964). That jurisdictional power, however, is dormant potential jurisdiction until it is awakened in the proper manner. "Jurisdiction of a court must be legally invoked; and when not legally invoked, the power to act is as absent as if it did not exist." *State v. Olsen*, 360 S.W.2d 398, 400 (Tex. 1962). In order to invoke the court's jurisdiction various procedural steps must be taken. *See* 1 R. MCDONALD, TEXAS CIVIL PRACTICE, § 1.04 (rev. 1965). Pertinent to this case is the requirement that persons or property over which the court has potential jurisdiction be brought before the court by service of process that (1) is consistent with due process and (2) follows, with reasonable strictness, the procedure designed by the state for notification of the pending action. *Colson v. Thunderbird Bldg. Materials*, 589 S.W.2d 836, 839-40 (Tex. Civ. App. Amarillo 1979, writ ref'd n. r. e.); 1 R. MCDONALD, *supra* § 1.04. Until the court's potential jurisdiction is activated, the court is not authorized to exercise its jurisdictional power.

The effect of an unauthorized exercise of jurisdictional power varies, depending on its demonstrability and the manner in which the judgment is attacked. If a court having potential jurisdiction renders a judgment when the potential jurisdiction has not been activated, and the defect is apparent from the face of the judgment, then the judgment is void and subject to either direct or collateral attack. *Fulton v. Finch*, 162 Tex. 351, 346 S.W.2d 823 (1961). If, as in this case, the court having potential jurisdiction renders a judgment regular on its face that contains recitations stating that potential jurisdiction has been activated, i.e., recitations of due service, then the judgment is voidable, not void, and may be set aside only by a direct attack. *Akers v. Simpson* 445 S.W.2d 957 (Tex. 1969). The latter result is because a court of potential jurisdiction has the power to determine whether its jurisdiction has been activated, and the recitations making that determination are immune from attack in a collateral proceeding. *McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706, 710 (1961). In a direct attack recitations of due service are not conclusive; the record must affirmatively show that the potential jurisdiction was properly activated. *See Whitney v. L & L Realty Corporation*, 500 S.W.2d 94, 95 (Tex. 1973).

The appeal before us is a direct attack on the judgment of the trial court. Despite recitations of due service in the judgment, it is apparent from the record that the potential jurisdiction of the trial court to render the default judgment was never activated, because the procedure designed by the state for notification of the pending action was not followed with reasonable strictness. *Scucchi v. Woodruff*, 503 S.W.2d at 358. Therefore, "the power to act is as absent as if it did not exist," *State v. Olsen*, 360 S.W.2d at 400, and we must declare the judgment void in its entirety.

We cannot, as Ronald requests under his first point, reverse and render part of the judgment and affirm the remainder. First, the record will not support his contention that the judgment awarding Donna $13,235.00 is an attempt by the trial court to exercise control over personal property located outside the state of Texas. The record does not reflect the location of the $13,235.00, which the judgment characterizes as community property. The fact that Ronald was served in Florida is no more than a scintilla of evidence that the $13,235.00 "in his possession" is in his possession outside the state of Texas.

Second, and of greater importance, we cannot ignore a patent jurisdictional defect and approve, in part, action taken by the trial court when it had no power to act. To do so would be to permit Ronald to activate the trial court's jurisdictional power in a manner not sanctioned by statute or rule.

It is also the failure to activate the trial court's jurisdictional power that distinguishes this case from, and makes inapplicable, the cases upon which Ronald relies. In *Fox v. Fox*, 559 S.W.2d 407 (Tex. Civ. App. Austin 1977, no writ), and *Risch v. Risch*, 395 S.W.2d 709 (Tex. Civ. App. Houston 1965, writ dism'd), *cert. denied*, 386 U.S. 10, 87 S.Ct. 881, 17 L.Ed.2d 703 (1967), the spouse who was the respondent in the trial court was apparently served in the manner required by the Rules, but proved an absence of minimum contacts with Texas. The courts held that the divorce, being in rem, could be affirmed but in personam relief against the respondent spouse was a nullity and that portion of the judgment in each case was reversed and rendered in the respondent spouse's favor. In those cases, however, the trial court's jurisdictional power was activated by service on the non-resident spouse that apparently was proper. Thereafter, the in personam jurisdiction over the respondent

spouse was carved out because of the absence of minimum contacts. The in rem jurisdiction, however, remained viable. In our case, neither in rem nor in personam jurisdiction having been activated, there is no basis upon which we can affirm any part of the judgment. Notwithstanding a statement to the contrary in *Fox v. Fox*, 559 S.W.2d at 410, even the in rem aspect of a divorce cannot be ex parte.

Ronald's first point of error is overruled. His second point of error is sustained. The judgment of the trial court is reversed and the case is remanded for new trial.

Notes

1. In *Blum v. Savell*, 1994 WL 389039 (Tex. App.—Hous. (1st Dist.) 1994, no writ): Blum argues that Savell's foreclosure and his trustee's deed are invalid because the hearing in the bankruptcy court on the debtor's motion for authorization to incur secured debt was conducted without notice to debtor's creditors. There is conflicting evidence in the record regarding notice. Blum argues that the hearing was void because it violated her due process rights under the United States Constitution. Blum contends the bankruptcy order, which is void, is vulnerable to a collateral attack in any other court of proper jurisdiction. Blum cites *Waldron* to support her argument that the order is void *ab initio*, and may be collaterally attacked. Instead of supporting Blum's claim, the *Waldron* case exposes its weakness. In *Waldron*, the court held that:

> If . . . the court having potential jurisdiction renders a judgment regular on its face that contains recitations stating that potential jurisdiction has been activated, i.e., recitations of due service, then the judgment is voidable, not void, and may be set aside only by a direct attack.

The order authorizing debtor to incur secured debt contains similar recitations of service. The order was not void *ab initio*; it cannot be attacked as void for lack of due process in a collateral proceeding such as this.

2. In *Heth v. Heth*, 661 S.W.2d 303 (Tex App.—Fort Worth 1983, no writ): The primary question on appeal was whether the trial court lacked jurisdiction to enter the divorce decree due to the failure of proper service upon Mrs. Heth. James Heth contends that the trial court's decree was proper because the court had "in rem" jurisdiction over the marital status of the parties based on his domicile within the state. A divorce proceeding has been characterized as quasi in rem. This characterization does not dispense with the due process requirement of adequate notice to a non-resident spouse as noted by the *Waldron* court. Because Nancy Heth was a non-resident of Texas, TEX. R. CIV. P. 108 controlled as to the manner of service of citation upon her. Said rule authorizes service by the same methods as provided by Rule 106, one of which is to leave a copy of the citation and petition with anyone over the age of sixteen at the location specified in the movant's affidavit. *See* TEX. R. CIV. P. 106(b)(2). The rule, however, expressly requires that there be a motion for and order authorizing the use of such substituted service. TEX. R. CIV. P. 106(b). James Heth concedes that there was no such motion nor order authorizing the manner of service used in the instant case, but he argues that Nancy Heth had actual notice of the Texas divorce proceedings. We have been cited to no authority nor have we found any authority for the proposition that actual notice of pending proceedings is sufficient to activate the potential jurisdictional powers of a court. To the contrary, it has been held that where a defendant has not been served in the manner required by law, the court's jurisdiction is not invoked notwithstanding actual notice of the suit on the part of the defendant.

JUD
v.
CITY OF SAN ANTONIO
143 Tex. 303, 184 S.W.2d 821
(1945)

HICKMAN, COMMISSIONER.

This suit was instituted by George F. Jud against the City of San Antonio, the Board of Firemen, Policemen, and Fire Alarm Operator's Pension Fund Trustees of San Antonio, Texas, referred to hereinafter as the Pension Board, and against the Mayor and other individuals alleged to be members of the Pension Board. The plaintiff labeled his pleading a 'petition for declaratory judgment.' To this pleading the defendants filed an answer consisting of a plea to the jurisdiction, exceptions to plaintiff's petition, answer on the alleged facts, and a special answer. The Court set the case for a hearing on the plea to the jurisdiction only and after such hearing entered an

order sustaining the plea and dismissing the case at plaintiff's cost. That order was affirmed by the Court of Civil Appeals, 182 S.W.2d 260. * * *

* * *

It is not presently material whether plaintiff alleged a cause of action against the members of the Board individually. It is sufficient for present purposes to note that he does undertake to connect them in some manner with the original fund collected from the City employees, claiming that it was a trust fund in which he had a vested interest, and that in denying his application the Board acted illegally, arbitrarily and maliciously. While he does seek to have the Court supervise the Pension Board and 'rescind their minutes to place the plaintiff on their pension rolls,' and substitute its discretion for that of the Board on the question of granting him a pension, still, as noted, that is not all the relief sought.

It is familiar law that jurisdiction is the power to hear and determine a controversy, which, of course, includes the power to decide whether or not a pleading filed in the court is sufficient to state a cause of action as against the exceptions filed thereto. *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641; *Texas Employers' Ins. Ass'n v. Ezell, Tex.Com.App*., 14 S.W.2d 1018; 11 TEX. JUR. p. 711 et seq., Sec. 9.

By Texas Rule of Civil Procedure, No. 90, it is provided that a general demurrer shall not be used. To dismiss a plaintiff's case upon sustaining a plea to the jurisdiction on the ground that his petition is insufficient to state a cause of action when he is praying for judgment for an amount within the jurisdiction of the Court, is even a more summary proceeding than to sustain a general demurrer. This is true for the reason that, upon sustaining a demurrer the Court does not dismiss the case until the plaintiff has been afforded an opportunity to amend, whereas, upon sustaining such plea the plaintiff is not afforded that opportunity.

It would seem that the defendants have proceeded upon the theory that they could establish want of jurisdiction in the Court by showing upon a hearing on the plea to the jurisdiction that certain fact allegations were untrue. They did not stand upon the proposition in the trial court that, as a matter of law on the face of the pleadings, the Court had no potential jurisdiction to hear the case. Their plea contemplated a hearing on the facts, and upon being granted that hearing they placed upon the witness stand one of the members of the Pension Board who testified, under the questioning of their attorney, to the facts in connection with the hearing on plaintiff's application for a pension. In substance and effect his testimony was that the Board did not act arbitrarily or maliciously, but that it accorded the plaintiff a fair hearing and based its order denying the application upon its conclusion that, under the facts plaintiff should not be granted a pension. They argue here that 'in view of the allegations of the petition, and the evidence introduced on the hearing on the plea to the jurisdiction' the Court had no jurisdiction to hear the case. The jurisdiction of a court is not to be determined on that basis. In passing on the plea to its jurisdiction the Court was not authorized to base its ruling upon the conclusion drawn from the evidence that the Board exercised a legitimate discretion in denying the pension and did not act arbitrarily and maliciously, as alleged. The question of whether or not the Board or the individual members thereof should be held liable for money paid into the pension fund is not a question to be determined in limine on a hearing of the plea to the jurisdiction.

* * *

It is ordered that the judgments of both courts below be reversed and the case remanded to the trial court with instructions to reinstate same on its docket. Opinion adopted by the Supreme Court.

Notes

1. *Bullock v. Briggs*, 623 S.W.2d 508 (Tex. 1981). "Appellants' proposition ignores the fundamental difference between subject matter and in personam jurisdiction. The former exists when the nature of the case falls within a general category of cases the court is empowered, under applicable statutory and constitutional provisions, to adjudicate. The latter exists when the statutory procedures for bringing a party within the court's control are followed, and those procedures comport with due process of law; or, it exists if a party appears voluntarily in the proceedings. * * * Whereas subject matter jurisdiction is a fundamental stricture on the power of the court, and appellants' argument would be valid in that respect, in personam jurisdiction may be waived, as it was here, by a voluntary participation in the trial of the suit. *Leroy v. Great Western United Corp*., 443 U.S. 173, 99 S.Ct. 2710, 61 L.Ed.2d 464 (1979)."

2. *Texas Department of Parks and Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004): Sovereign immunity from suit defeats a trial court's subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction. The trial court must determine at its earliest opportunity whether it has the constitutional or statutory authority to decide the case before allowing the litigation to proceed.

3. In *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007) the Court discussed whether ecclesiastical matters fell within the jurisdiction of the courts of Texas. Westbrook, the pastor of a church and also a licensed professional counselor, directed his congregation to shun Penley, a former parishioner, for engaging in a "biblically inappropriate" relationship, which the ecclesiastical disciplinary process outlined in the church's constitution required him to do. Claiming Westbrook had learned the disclosed information in a secular counseling session, Penley filed this suit against him for professional negligence. The trial court dismissed the case, because it was an ecclesiastical dispute, concerning church discipline, which the First and Fourteenth Amendments to the U. S. Constitution precluded the trial court from adjudicating. The court of appeals affirmed the trial court's dismissal of all claims against Westbrook except for professional negligence, which it held concerned Westbrook's role as Penley's secular professional counselor and did not invoke First Amendment concerns. 146 S.W.3d 220, 233. ***Held:*** Reversed and dismissed for want of jurisdiction. It is assumed for purposes of review that the counseling at issue was purely secular in nature. Even so, the Court cannot ignore Westbrook's role as Penley's pastor. In his dual capacity, Westbrook owed Penley conflicting duties; as Penley's counselor he owed her a duty of confidentiality, and as her pastor he owed Penley and the church an obligation to disclose her conduct. Parsing those roles for purposes of determining civil liability in this case, where health or safety are not at issue, would unconstitutionally entangle the court in matters of church governance and impinge on the core religious function of church discipline.

2. *The Basic Court System in Texas*

Note

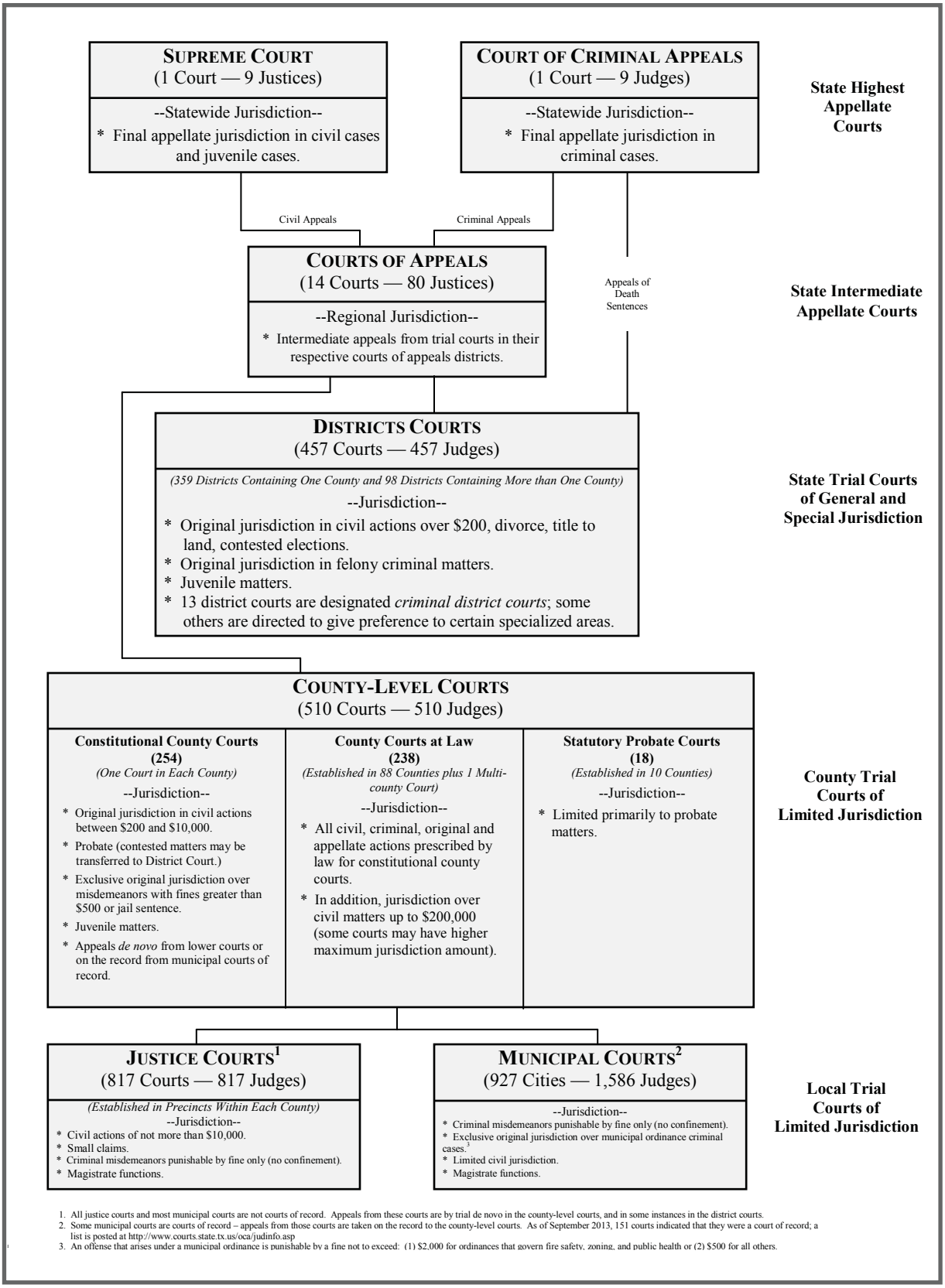
Jurisdiction can be understood as the power of the court to exercise its judicial function as authorized by the Constitution or statute. In order to be able to exercise power a court must have both actual subject matter jurisdiction over the case or controversy and actual personal jurisdiction over the named party defendant. The Texas Constitution establishes three different types of trial courts—the district court, the constitutional county court, and the justice court. The Constitution gives the legislature the power to establish the jurisdiction of these various courts. Furthermore the Constitution gives the legislature the power to create additional courts by legislative enactment. In response to this power the legislature has established legislative county courts (referred to as county courts at law), statutory probate courts, and municipal courts. The subject matter jurisdiction of all of these courts is determined by either the amount in controversy or the nature the of the suit itself. The Texas Government Code must be consulted in order to determine the exact parameters of a particular court's subject matter jurisdiction.

Of the courts established by the Constitution, the Texas Supreme Court, the Courts of Appeal and the Court of Criminal Appeals are primarily courts of appellate jurisdiction. The intermediate appellate courts in Texas—the courts of appeals—have jurisdiction over both criminal and civil matters. Appeal to these courts in civil cases is a matter of right [assuming the amount in controversy is in excess of $100]. The Texas Supreme Court is the highest court for appeals of civil matters; while the Court of Criminal Appeals is the highest court for criminal appeals. It needs to be noted that each of the appellate courts has limited original jurisdiction. The one which is most frequently used in civil cases is mandamus jurisdiction [the original jurisdiction of appellate courts is the subject of the last chapter of this book].

In the following pages the general constitutional provisions and the basic legislative enactments are included to give the student a basic understanding of the general Texas court jurisdictional scheme. The chart on the next page provides a general overview of the court structure in Texas.

Court Structure of Texas

September 1, 2013



3. *Constitutional and Statutory Provisions Relating to Subject Matter Jurisdiction*

TEX. CONST. Art. 5

Sec. 1. The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.

The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.

Sec. 8. District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction.

The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law.

Sec. 16. The County Court has jurisdiction as provided by law. The County Judge is the presiding officer of the County Court and has judicial functions as provided by law. County court judges shall have the power to issue writs necessary to enforce their jurisdiction . . . .

Sec. 19. Justice of the peace courts shall have original jurisdiction in criminal matters of misdemeanor cases punishable by fine only, exclusive jurisdiction in civil matters where the amount in controversy is two hundred dollars or less, and such other jurisdiction as may be provided by law. Justices of the peace shall be ex officio notaries public.

TEX. GOV'T CODE

§ 24.007 District Courts

(a) The district court has the jurisdiction provided by Article V, Section 8, of the Texas Constitution.

(b) A district court has original jurisdiction of a civil matter in which the amount in controversy is more than $500, exclusive of interest.

§ 25.0003 Statutory County Courts

(a) A statutory county court has jurisdiction over all causes and proceedings, civil and criminal, original and appellate, prescribed by law for county courts.

(b) A statutory county court does not have jurisdiction over causes and proceedings concerning roads, bridges, and public highways and the general administration of county business that is within the jurisdiction of the commissioners court of each county.

(c) In addition to other jurisdiction provided by law, a statutory county court exercising civil jurisdiction concurrent with the constitutional jurisdiction of the county court has concurrent jurisdiction with the district court in:

(1) civil cases in which the matter in controversy exceeds $500 but does not exceed $200,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs, as alleged on the face of the petition; and

(2) appeals of final rulings and decisions of the division of workers' compensation of the Texas Department of Insurance regarding workers' compensation claims, regardless of the amount in controversy.

(d) Except as provided by Subsection (e), a statutory county court has, concurrent with the county court, the probate jurisdiction provided by general law for county courts.

(e) In a county that has a statutory probate court, a statutory probate court is the only county court created by statute with probate jurisdiction.

(f) A statutory county court does not have the jurisdiction of a statutory probate court granted statutory probate courts by the Texas Probate Code.

§ 26.041 Constitutional County Courts

A county court has the jurisdiction conferred by this subchapter and other law.

§ 26.042. Constitutional County Courts; Civil Jurisdiction; Juvenile Jurisdiction

(a) A county court has concurrent jurisdiction with the justice courts in civil cases in which the matter in controversy exceeds $200 in value but does not exceed $10,000, exclusive of interest.

(b) A county court has juvenile jurisdiction as provided by Section 23.001.

(c) If under Subchapter E a county court has original concurrent jurisdiction with the justice courts in all civil matters in which the justice courts have jurisdiction, an appeal or writ of error may not be taken to the court of appeals from a final judgment of the county court in a civil case in which:

(1) the county court has appellate or original concurrent jurisdiction with the justice courts; and

(2) the judgment or amount in controversy does not exceed $250, exclusive of interest and costs.

(d) A county court has concurrent jurisdiction with the district court in civil cases in which the matter in controversy exceeds $500 but does not exceed $5,000, exclusive of interest.

(e) A county court has appellate jurisdiction in civil cases over which the justice courts have original jurisdiction in cases in which the judgment appealed from or the amount in controversy exceeds $250, exclusive of costs.

§ 27.031 Justice Courts

(a) In addition to the jurisdiction and powers provided by the constitution and other law, the justice court has original jurisdiction of:

(1) civil matters in which exclusive jurisdiction is not in the district or county court and in which the amount in controversy is not more than $10,000, exclusive of interest;

(2) cases of forcible entry and detainer;

(3) foreclosure of mortgages and enforcement of liens on personal property in cases in which the amount in controversy is otherwise within the justice court's jurisdiction; and

(4) cases arising under Chapter 707, Transportation Code, outside a municipality's territorial limits.

(b) A justice court does not have jurisdiction of:

(1) a suit in behalf of the state to recover a penalty, forfeiture, or escheat;

(2) a suit for divorce;

(3) a suit to recover damages for slander or defamation of character;

(4) a suit for trial of title to land; or

(5) a suit for the enforcement of a lien on land.

(c) A justice court has concurrent jurisdiction with a municipal court in cases that arise in the municipality's extraterritorial jurisdiction and that arise under an ordinance of the municipality applicable to the extraterritorial jurisdiction under Section 216.902, Local Government Code.

(d) A corporation need not be represented by an attorney in justice court.

Given the various constitutional and statutory provisions which confer general jurisdiction on other courts, it can be said that district courts generally have the following jurisdiction in civil cases: cases of divorce, suits for title to land or enforcement of liens on land, contested elections, suits for slander or defamation, suits in behalf of the State for escheat; and all civil cases where the amount in controversy is $200 or more. In those counties having statutory county courts at law, the district courts generally have exclusive jurisdiction in civil cases where the amount in controversy is $100,000 or more and concurrent jurisdiction with the statutory county courts where the amount in controversy exceeds $500 but is less than $100,000.

The legislature as created substantial confusion by creating a multitude of subject matter jurisdictions for the various statutory county courts. As of September 1, 1996, the legislature has created 172 statutory county courts and 19 statutory probate courts. Forty-five of the county courts at law have concurrent jurisdiction with the district court in appeals from decisions of the Texas Workers' Compensation Commission and civil cases when the matter in controversy does not exceed $100,000. One county court has concurrent jurisdiction with the district court in all matters. Four county courts at law have concurrent jurisdiction with district courts in all matters ex-

cept felony official misconduct, contested elections, and family cases. Fifty three county courts at law have concurrent jurisdiction with district courts in specified family law matters, appeals from decisions of Texas Workers' Compensation Commission, and in civil cases when the matter in controversy does not exceed $100,000. Other statutory county courts have jurisdiction over all family law matters; still others have jurisdiction over suits involving title to land, eminent domain suits, and suits involving slander and defamation. One statutory probate court has concurrent jurisdiction with the district court in eminent domain cases and suits involving title to real or personal property. The list could go on. The point is that in order to determine the exact subject matter jurisdiction of the statutory county court at law or statutory probate court one needs to look at a specific section for the particular county in Chapter 25 of the Texas Government Code. The complexity of the system is shown in the case that follows.

Notes

1. *In re United Services Auto. Ass'n***,** 307 S.W.3d 299 (Tex. 2010): The Court noted that Texas has some 3,241 trial courts within its 268,580 square miles. Jurisdiction is limited in many of the courts; it is general in others. Compare TEX. GOV'T CODE § 25.0021 (describing jurisdiction of statutory probate court), with *id*. § 24.007-.008 (outlining district court jurisdiction); *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006) (noting that Texas district courts are courts of general jurisdiction). We have at least nine different types of trial courts, although that number does not even hint at the complexities of the constitutional provisions and statutes that delineate jurisdiction of those courts. *See* Office of Court Administration, 2008 Annual Report, Texas Judicial System, Subject-Matter Jurisdiction of the Courts passim (2008), available at http:// www.courts.state.tx.us/pubs/AR 2008/jud branch/2a-subject-matter-jurisdiction-of-courts.pdf; George D. Braden et al., *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 367 (1977). Statutory county courts (of which county courts at law are one type) usually have jurisdictional limits of $100,000, *see* TEX. GOV'T CODE § 25.0003(c)(1), unless, of course, they do not*, see, e.g.,* TEX. GOV'T CODE §§ 25.0732(a) (El Paso County), 25.0862(a) (Galveston County), 25.0942(a) (Gregg County), 25.1322(a) (Kendall County), 25.1802(a) (Nueces County), 25.2142(a) (Smith County); *see also Sultan v. Mathew*, 178 S.W.3d 747, 756 (Tex. 2005) (HECHT, J., dissenting) (observing that "[m]onetary jurisdictional limits on statutory county courts are generally from $500 to $100,000, but they vary widely from county to county, and many such courts have no monetary limits"). Appellate rights can vary depending on which court a case is filed in, even among trial courts with concurrent jurisdiction, and even when the same judge in the same courtroom presides over two distinct courts. *See, e.g., Sultan*, 178 S.W.3d at 752 (holding that there was no right of appeal to courts of appeals from cases originating in small claims courts, but recognizing that justice court judgment would be appealable*); see also id*. at 754-55 (HECHT, J., dissenting) (noting that the same justice of the peace hears small claims cases and justice court cases).

The Court also noted the five-step process involved in determining the jurisdiction of any particular trial court:

> [R]ecourse must be had first to the Constitution, second to the general statutes establishing jurisdiction for that level of court, third to the specific statute authorizing the establishment of the particular court in question, fourth to statutes creating other courts in the same county (whose jurisdictional provisions may affect the court in question), and fifth to statutes dealing with specific subject matters (such as the Family Code, which requires, for example, that judges who are lawyers hear appeals from actions by non-lawyer judges in juvenile cases).

Office of Court Administration, Subject-Matter Jurisdiction of the Courts at 1.

In conclusion the Court stated that our court system has been described as "one of the most complex in the United States, if not the world." *Braden*, The Constitution of the State of Texas, at 367; *see also Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 449 (Tex. 1996) (voicing "concern over the difficulties created for the bench, the bar, and the public by the patchwork organization of Texas' several trial courts"); *Sultan*, 178 S.W.3d at 753 (HECHT, J., dissenting) (noting that Texas courts' "jurisdictional scheme . . . has gone from elaborate . . . to Byzantine"); *Camacho v. Samaniego*, 831 S.W.2d 804, 807 n. 4, 811 (Tex. 1992) (stating that "confusion and inefficiency are endemic to a judicial structure with different courts of distinct but overlapping jurisdiction" and observing that "there are still more than fifty different jurisdictional schemes for the statutory county courts"); Texas Judicial Council, Assessing Judicial Workload in Texas' District Courts 2 (2001), available at http://www.courts.state.tx.us/tjc/TJC Reports/Final Report.pdf (observing that " 'the Texas trial court system,

complex from its inception, has become ever more confusing as ad hoc responses are devised to meet the needs of an urban, industrialized society' " (quoting Citizens' Commission on the Texas Judicial System, Report and Recommendations-Into the Twenty-First Century 17 (1993).

2. *PR Investments and Specialty Retailers, Inc. v. Texas*, 251 S.W.3d 472 (Tex. 2008): In this condemnation proceeding, the trial court had jurisdiction to try the case de novo and was obliged to exercise that jurisdiction. A court possessed of jurisdiction generally must exercise it. Unless the dismissal was an appropriate sanction for improper conduct, the trial court should have exercised its jurisdiction to decide the case on the merits.

Note

There are additional "courts" in Texas. For example, Title IV-D of the Social Security Act requires states to "provide services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations . . . ." 42 U.S.C. § 654(4). The Family Code designates the Attorney General as Texas' Title IV-D agency and sets forth its rights and responsibilities to collect child support. TEX. FAM. CODE §§ 231.001, .0011, .101. The Family Code allows presiding judges to appoint associate judges to handle Title IV-D matters. TEX. FAM. CODE § 201.101, .104.

AMIGO HELICOPTERS, INC.
v.
JONES
488 S.W. 2d 473
(Tex. 1972)

Facts: P filed suit , in a constitutional county court for $3,019.50, plus $1,207.80 in attorneys fees. At that time, the maximum amount in controversy for the constitutional county court was $1,000.

Issue: Does an action above the dollar jurisdiction of a court deprive that court of jurisdiction?

Held: Yes, the court could not take jurisdiction of this case.

There is a distinction between constitutional county courts and statutory county courts. An action for more than the dollar amount jurisdiction of the constitutional county court (then $1,000—now $5,000) was beyond the jurisdiction of the constitutional county court, and had to be brought in the legislative county court or the district court.

CONTINENTAL COFFEE PRODUCTS CO.
v.
CAZAREZ
937 S.W.2d. 444
(1996)

A. Martin Wickliff, Jr., Barbara L. Johnson, Paul E. Hash, Houston, for Respondent.
Thomas N. Thurlow, Houston, Donna Roth, Spring, Jose Luis Garriga, Janine G. Howard, Richard P. Hogan, Jr., Houston, for Petitioners.

PHILLIPS, CHIEF JUSTICE.

The principal question for our decision is what evidence is required for a court to find malice in order to award punitive damages for a violation of a statute creating an intentional tort. Juanita Cazarez sued her employer, Continental Coffee Products Company, and its employment manager, Alan D. Duff, for allegedly discharging her in retaliation for filing a workers' compensation claim in violation of TEX. REV. CIV. STAT. ANN. art. 8307c (repealed) (codified without substantive changes at TEX. LAB. CODE § 451.001-.003). The trial court, after a bench trial, rendered judgment awarding Cazarez actual damages of $150,000 and punitive damages of $500,000. The court of appeals, with one justice dissenting, affirmed, holding that the trial court properly exercised jurisdiction and that factually and legally sufficient evidence supported the trial court's findings that Conti-

nental violated the statute intentionally and with malice. 903 S.W.2d 70. We agree with the court of appeals that the trial court had jurisdiction. We also agree that there is some evidence that Continental and Duff violated section 451.001 in terminating Cazarez's employment.[2] However, in deciding that the evidence was legally and factually sufficient, the court of appeals relied in part on evidence that we hold is not probative. Moreover, we hold that the evidence is not legally sufficient to support a finding of actual malice, which is required to assess punitive damages for a retaliatory discharge. We therefore affirm in part and reverse in part the judgment of the court of appeals and render judgment that Cazarez take nothing on her claim for punitive damages.

I.

Cazarez was employed from 1976 to 1991 by Continental, a wholly-owned subsidiary of Quaker Oats, as a production assistant performing primarily janitorial and maintenance duties. In April 1991, Cazarez suffered an on-the-job injury to her right ankle. She filed a workers' compensation claim in connection with the injury, missing seven months of work while on workers' compensation leave.

While Cazarez was out, Quaker Oats transferred Duff to Continental to be the new Employee Relations Manager. One of Duff's duties was monitoring the progress of those employees out while receiving workers' compensation benefits. Another of his duties was enforcing Continental's "three day no call/no show rule." Under this rule, an employee who is not absent on workers' compensation leave loses all seniority and other rights if he or she misses three days of work without properly notifying management. According to plant work rules, termination under the three-day rule is considered a "voluntary quit." The three-day rule applies to employees receiving workers' compensation benefits as soon as they are released to return to work by their treating physician.

The exact date that Cazarez was released to come back to work, and Duff's knowledge of that release, are both highly disputed. The record contains three "Specific and Subsequent Medical Reports," each signed by Cazarez's treating physician, Dr. Brian Parsley. The first, dated September 30, 1991, states only that the anticipated date of Cazarez's return to full-time work is October 28, 1991. Duff testified that this was the only document he saw before he fired Cazarez on November 8, 1991. The second document, dated October 30, 1991, states that Cazarez was released to return to work on October 28, 1991, and was anticipated to return to work on that date. The third document, dated December 17, 1991, revises the release date to November 18, 1991.

Between June 1991 and October 28, 1991, Duff had continuing contact by telephone with Cazarez, Dr. Parsley, and the workers' compensation carrier handling Cazarez's claim. On October 28, 1991, Cazarez called Continental and informed Maize Villareal, Duff's assistant, that she was still awaiting "molded shoe" ankle supports she needed to return to work and that she was suffering from the flu. Duff's handwritten notes indicate that when he called Cazarez on Wednesday, October 30, 1991, to "check status," she told him that while her flu was better, she still had not received the ankle supports, so that she "probably" would return to work that Friday or the following Monday. The trial court found that Duff knew on October 30, 1991, that Cazarez could not return to work until she had received her ankle supports, which she did not in fact receive until after Continental fired her.

Duff's notes indicate that on that Monday, November 4, 1991, he "tried calling Juanita Cazarez at 1 p.m. to see why she wasn't at work," but there was no answer. Cazarez did not report to work or call Continental on that day or any day that week. On Tuesday, November 5, however, Duff's assistant, Villareal, visited Cazarez's home and was informed by her son that Cazarez was still sick. Later that week, Duff called and wrote to Cazarez to inform her that she was fired for violating the three-day rule. Although Duff presented evidence that this occurred on Friday, November 8, Cazarez testified that Duff called and fired her on November 7.

Cazarez claims, and the trial court found, that she was actually fired because she in good faith filed a workers' compensation claim. Based on this finding, the trial court concluded that Continental and Duff had violated the so-called Texas Anti-Retaliation Law.

II.

[2] Section 451.001 states: A person may not discharge or in any manner discriminate against an employee because the employee has: (1) filed a workers' compensation claim in good faith; (2) hired a lawyer to represent the employee in a claim; (3) instituted or caused to be instituted in good faith a proceeding under Subtitle A; or (4) testified or is about to testify in a proceeding under Subtitle A. TEX.LAB.CODE § 451.001.

Continental and Duff first argue that the County Civil Court at Law No. 3 of Harris County lacked subject matter jurisdiction over Cazarez's claims. Cazarez brought her suit under article 8307c, which stated that "[t]he district courts of the State of Texas shall have jurisdiction, for cause shown, to restrain violations of this Act." TEX. REV. CIV. STAT. ANN. art. 8307c, § 3 (repealed 1993). As codified, this portion of the statute now states that "[a] district court may restrain, for cause shown, a violation of Section 451.001." TEX. LAB. CODE § 451.003. Continental and Duff argue that the statute confers exclusive jurisdiction upon the district courts to hear retaliatory discharge cases under the statute, relying on *Azar Nut Co. v. Caille*, 734 S.W.2d 667, 669 (Tex. 1987); *Mingus v. Wadley*, 115 Tex. 551, 285 S.W. 1084, 1087 (1926); and *McGregor v. Clawson*, 506 S.W.2d 922, 928 (Tex. Civ. App.—Waco 1974, no writ). We disagree.

The statute before us states that district courts "shall" (old version) or "may" (codified version) "restrain violations of the Act." That language might indicate the Legislature's intent to allow injunctive relief under the statute. However, its plain meaning does not express an intention to grant exclusive jurisdiction to district courts to grant certain relief or, in general, to decide cases under the statute. Stated another way, to the extent that statutory courts share concurrent jurisdiction with district courts, nothing in this statute limits or excludes that concurrent jurisdiction.

In Sandy International, Inc. v. Hansel & Gretel Children's Shop, Inc., 775 S.W.2d 802 (Tex. App.—Dallas 1989, no writ), a similar jurisdictional issue arose under section 16.26(b) of the Texas Business and Commerce Code, which allows a trademark registrant to sue to enjoin a trademark infringement. This statutory provision formerly provided that the "District Court shall grant injunctions," *see* TEX. REV. CIV. STAT. ANN. art. 851-C (Vernon 1964) (repealed 1967), and at the time of the opinion provided that registrants "may sue for damages and to enjoin an infringement . . . in a district court having venue." *See* TEX. BUS. & COM. CODE § 16.26(b). The court refused to construe the statutory language as indicating legislative intent to limit jurisdiction to district courts, concluding instead that the intent of the statute was to provide registrants with the statutory means of enforcing their right to the exclusive use of their trademarks. *See Sandy Int'l*, 775 S.W.2d at 805-06. Finding nothing in the statutory language to indicate an intent to expressly limit jurisdiction to district courts, the court concluded that the county court at law had subject matter jurisdiction. *Id.* at 806. We approve of this reasoning and believe a similar approach is appropriate in this case. To construe the workers' compensation retaliation statute as limiting jurisdiction to district courts in the absence of an express indication of legislative intent would not further the Legislature's overall purpose in enacting article 8307c, "to protect persons who are entitled to benefits under the Worker's Compensation Law and to prevent them from being discharged by reason of taking steps to collect such benefits." *Carnation Co. v. Borner*, 610 S.W.2d 450, 453 (Tex. 1980).

Sections 25.0003 and 25.1032 of the Texas Government Code are, respectively, the general grant of jurisdictional authority to statutory county courts and the specific grant of jurisdictional authority to Harris County civil courts at law. Section 25.0003(c) states: (c) In addition to other jurisdiction provided by law, a statutory county court exercising civil jurisdiction concurrent with the constitutional jurisdiction of the county court has concurrent jurisdiction with the district court in: (1) civil cases in which the matter in controversy exceeds $500 but does not exceed $100,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs, as alleged on the face of the petition; and (2) appeals of final rulings and decisions of the Texas Workers' Compensation Commission, regardless of the amount in controversy. Section 25.1032(a) and (c) state: (a) A county civil court at law in Harris County has jurisdiction over all civil matters and causes, original and appellate, prescribed by law for county courts, but does not have the jurisdiction of a probate court. A county civil court at law has jurisdiction in appeals of civil cases from justice courts in Harris County . . . . (c) A county civil court at law has exclusive jurisdiction in Harris County of eminent domain proceedings, both statutory and inverse, regardless of the amount in controversy. In addition to other jurisdiction provided by law, a county civil court at law has jurisdiction to: (1) decide the issue of title to real or personal property; (2) hear a suit to recover damages for slander or defamation of character; (3) hear a suit for the enforcement of a lien on real property; (4) hear a suit for the forfeiture of a corporate charter; (5) hear a suit for the trial of the right to property valued at $200 or more that has been levied on under a writ of execution, sequestration, or attachment; and (6) hear a suit for the recovery of real property.

Together, these provisions grant Harris County civil courts at law concurrent jurisdiction with district courts in civil cases in which the amount in controversy falls within a certain jurisdictional dollar limit for statutory county courts. We find nothing in these provisions to indicate that the Legislature intended to exclude retaliatory discharge cases from the county courts' concurrent jurisdiction. We reject Continental and Duff's argument that such an intent is evidenced by the fact that statutory county courts are specifically granted concurrent jurisdiction

with district courts in "appeals of final rulings and decisions of the Texas Workers' Compensation Commission, regardless of the amount in controversy," under section 25.0003(c)(2). This specific reference to appeals of Commission rulings is necessary because the Legislature chose to broaden the statutory county courts' jurisdiction of these cases beyond the normal jurisdictional dollar limit on the amount in controversy.

Moreover, the cases cited by Continental and Duff do not support their argument that the statute confers exclusive jurisdiction on district courts to hear retaliatory discharge cases. *Azar Nut* addresses only whether punitive damages are available under the statute, while *Mingus* and *McGregor* construe statutes which contained mandatory venue provisions. *See Azar Nut*, 734 S.W.2d at 669 (considering district courts' power under the statute to "restrain violations" in context of punitive damages issue); *Mingus*, 285 S.W. at 1087 (construing clearly mandatory statute which provides that suit to set aside workers' compensation award shall be brought in the county where the injury occurred); *McGregor*, 506 S.W.2d at 928 (focusing on issue of whether particular venue provisions of State Bar Act for disbarment suits prevail over general provisions of Rule 257 applying to all civil actions). We therefore hold that the trial court had jurisdiction to decide this case, assuming that the amount in controversy is within the court's monetary limit of $100,000.[3]

Jurisdiction is based on the allegations in the petition about the amount in controversy. *See Richardson v. First Nat'l Life Ins. Co*., 419 S.W.2d 836, 839 (Tex. 1967). Cazarez's original petition sought actual damages of $100,000. Thus, the trial court properly acquired jurisdiction over this case based on the original petition. As a general rule, where jurisdiction is once lawfully and properly acquired, no later fact or event can defeat the court's jurisdiction. *See Dallas Indep. Sch. Dist. v. Porter*, 709 S.W.2d 642, 643 (Tex. 1986); *Isbell v. Kenyon-Warner Dredging Co*., 113 Tex. 528, 261 S.W. 762, 763 (1924).

If a plaintiff's original petition is properly brought in a particular court, but an amendment increases the amount in controversy above the court's jurisdictional limits, the court will continue to have jurisdiction if the additional damages accrued because of the passage of time. *See Mr. W. Fireworks, Inc. v. Mitchell*, 622 S.W.2d 576, 577 (Tex. 1981); *Flynt v. Garcia*, 587 S.W.2d 109, 110 (Tex. 1979). Seven months after she filed her original petition, Cazarez amended her claimed actual damages to $250,000. In a second amendment, Cazarez dropped a claim for intentional infliction of emotional distress, but did not decrease the actual damages claim. Continental and Duff filed a plea to the jurisdiction challenging Cazarez's "passage of time allegations" on the sole basis that Cazarez's fraud and bad faith were clear on the face of her various pleadings.

In a hearing on their plea held during the trial, Cazarez was asked whether her state of mind and the way she felt about the defendants remained the same from the time she was fired through the time of the trial. She replied, "[i]t's getting worser [sic], everyday." In denying the plea, the court made the following relevant findings of fact: 2. Defendant was permitted the opportunity to present evidence in an attempt to show that the allegations in Plaintiff's Original Petition were made fraudulently or in bad faith. 3. Defendant called Juanita Cazarez to the witness stand for the foregoing purpose. 4. The evidence did not show that the allegations in Plaintiff's Original Petition were made fraudulently or in bad faith. 5. The evidence presented showed that the increased damages over the jurisdictional limit had accrued due to the passage of time.

We agree with the court of appeals that in the absence of any proof to support Continental and Duff's claims, Cazarez's mere allegation of damages in excess of the court's jurisdictional limits in the amended petition does not deprive the trial court of jurisdiction. *See Cantu v. J. Weingarten's, Inc*., 616 S.W.2d 290, 291 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.). Where the plaintiff's original and amended peti-

[3] Continental and Duff do not complain in this Court, as they did in the court of appeals, that the trial court lacked jurisdiction because Cazarez fraudulently and in bad faith alleged an amount in controversy in her original petition in order to stay within the jurisdictional limits of the court, alleging additional damages in her amended petition that were not due merely to the passage of time. We are mindful, however, that subject matter jurisdiction is never presumed and cannot be waived. *See* Texas Ass'n of Business v. Texas Air Control Bd., 852 S.W.2d 440, 443-44 (Tex. 1993). We therefore revisit this issue to determine whether the trial court properly exercised jurisdiction over the case.

tions do not affirmatively demonstrate an absence of jurisdiction, a liberal construction of the pleadings in favor of jurisdiction is appropriate. *See Peek v. Equipment Serv. Co*., 779 S.W.2d 802, 804 (Tex. 1989). Here, while the additional actual damages alleged by Cazarez in her amended petitions may raise some suspicion, there is neither anything on the face of those petitions suggesting nor any evidence in the record proving that the amount in controversy was fraudulently alleged. In such a case, the averments in the petition control. *See Tidball v.*

Eichoff, 66 Tex. 58, 17 S.W. 263, 263 (1886) (in absence of pleading and proof of fraudulently alleged jurisdictional amount in controversy, jurisdiction is determined by the averments in the petition).

This Court has previously voiced its concerns over the difficulties created for the bench, the bar, and the public by the patchwork organization of Texas' several trial courts. As Thomas Paine observed: "[T]he more simple anything is, the less liable it is to be disordered, and the easier repaired when disordered." PAINE, COMMON SENSE 3 (1776). This case is yet another confirmation that "confusion and inefficiency are endemic to a judicial structure with different courts of distinct but overlapping jurisdiction." *Camacho v. Samaniego*, 831 S.W.2d 804, 811 (Tex. 1992). While we question the propriety of a limited jurisdiction court rendering a judgment awarding damages that are one hundred and fifty percent of its maximum jurisdictional limit, we cannot say, on the record before us, that the trial court lacked jurisdiction.

* * *

[The Court held that actual malice must be shown before punitive damages may be assessed against an employer for violating section 451.001. The Court then concluded that there was no evidence to support the trial court's finding that Continental and Duff acted with malice.]

* * *

Accordingly, we hold that the court of appeals did not err in finding some evidence to support the trial court's award of actual damages. * * * Therefore, we affirm that part of the court of appeals' judgment affirming the trial court's actual damages award. We reverse that part of the court of appeals' judgment affirming the trial court's punitive damages award, however, and render judgment that Cazarez take nothing thereon.

4. *Nature of Suit as Basis for Subject Matter Jurisdiction*

***Ex parte* BRYANT**
155 Tex. 219, 285 S.W.2d 719
(1956)

Issue: Did the Constitutional County Court have jurisdiction to issue an injunction enjoining the operation of a bawdy house (a house of prostitution)?

Held: No. There must be a fixed amount in controversy for a constitutional county court to have jurisdiction to issue an injunction. Thus, the constitutional county court does not have jurisdiction to enjoin the operation of a bawdy house. [The district court has residual jurisdiction, and, thus, has jurisdiction of such a case.]

Note

AIC Management v. Crews, 246 S.W.3d 640 (Tex. 2008): Generally, pursuant to TEX. GOV'T CODE § 25.0003(c)(1), the subject-matter jurisdiction of statutory county courts is limited to "cases in which the matter in controversy exceeds $500 but does not exceed $100,000." Without reference to amounts in controversy, TEX. PROP. CODE § 21.002 requires a county court at law before which an eminent-domain proceeding is pending to transfer the case to the district court upon determining that the controversy involves "an issue of title." Finally, section 25.1032 of the Government Code grants specific jurisdiction over "all civil matters and causes, original and appellate, prescribed by law for county courts" and exclusive jurisdiction "in Harris County of eminent domain proceedings, both statutory and inverse, regardless of the amount in controversy." Section 25.1032 also provides that such courts have jurisdiction to decide the issue of title to real or personal property. In Harris County, the county civil courts' jurisdiction to decide issues of title, arising out of condemnation proceedings, is in addition to their general concurrent jurisdiction described in section 25.0003(c) and is not dependent upon the amount in controversy.

BAILEY
v.
CHEROKEE COUNTY APPRAISAL DIST.
862 S.W.2d 581
(Tex. 1993)

William E. Bailey, Dallas, for petitioners.
F. Duane Force, Peter W. Low, Austin, Rodney B. Dowd, Longview, Tab Beall, Tyler, for respondents.

SPECTOR, JUSTICE.

Respondents' motions for rehearing are granted in part and overruled in part. The court's opinion and judgment of June 3, 1993 are withdrawn, and the following is substituted therefor.

This cause presents the question whether a suit to collect ad valorem taxes accruing on estate property during administration is a claim against the estate, properly filed in probate court, or a claim for which heirs are personally liable. The court of appeals held that the heirs are personally liable for the taxes and that a district court has concurrent jurisdiction with a statutory probate court over this matter. 817 S.W.2d 117 (1991). Because we hold that the present suit constitutes a claim against the estate which should have been filed in the probate court in which the administration was pending, we reverse the judgment of the court of appeals and dismiss the taxing authorities' claims without prejudice.

In 1973, W.E. Bailey died intestate in Cherokee County, Texas, survived by his wife, Petitioner Alibe Carter Bailey, and two adult sons, Petitioners William E. Bailey and Robert E. Bailey. At the time of his death, W.E. and Alibe Carter Bailey owned as community property land located in Cherokee County. Alibe Carter Bailey was appointed administrator of the estate in the intestate dependent administration.

Following commencement of the dependent administration, Respondents, Cherokee County, Cherokee County Appraisal District, and the City of Jacksonville, filed suit in the District Court of Cherokee County against the Baileys jointly and severally, seeking a personal judgment in the amount of $90,608.48 for tax years 1976-1986, and foreclosure of tax liens for delinquent property taxes, interest, and fees which had accrued subsequent to the decedent's death. The district court rendered a judgment ordering foreclosure of the tax liens, but denied the taxing authorities' prayers for personal judgment against the Baileys. The court of appeals reversed and remanded, holding that the taxing authorities were entitled to the personal judgment. 817 S.W.2d at 120. * * * [The Court first determined that ad valorem taxes accruing on estate property during administration were a claim against the estate].

Because the present action constitutes a claim against the estate filed after administration had begun in the county court at law sitting in probate, jurisdiction lies with the county court.

In those counties where there are statutory courts exercising probate jurisdiction, such courts share original jurisdiction over probate proceedings with the constitutional county court, to the exclusion of the district court. TEX. PROB. CODE § 5(c). Accordingly, administration of the Bailey estate was properly initiated in the Cherokee County Court at Law.

The Probate Code further provides that "[a]ll courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate." TEX. PROB. CODE § 5(e). With regard to proceedings in statutory county courts, "matters incident to an estate" are defined to include "all claims by or against an estate" and "all actions for trial of title to land and for the enforcement of liens thereon incident to an estate." TEX. PROB. CODE § 5A(a). The instant suit constitutes a "claim against the estate" rather than a claim for which the putative heirs may be held personally liable. The suit is, moreover, an action "for the enforcement of liens" on land which is "incident to the estate." In sum, this suit pertains to matters incident to the estate and the county court at law is vested with jurisdiction over it. *See Blair v. State*, 640 S.W.2d 867, 869 (Tex. 1982) ("The scheme for administration of estates is that claims should be submitted to the probate court for classification and then paid through orders of the probate court.").

When sitting in probate, the county court at law is empowered to enforce creditors' claims against the estate. A creditor may petition the court to order payment of the claim; if funds on hand are insufficient, the court may order the sale of estate property. TEX. PROB. CODE § 326; *see also Rivera v. Morales*, 733 S.W.2d 677, 678

(Tex. App.—San Antonio 1987, writ ref'd n.r.e.) (an administrator has a duty to pay creditors pursuant to orders of the probate court). If the administrator refuses to make a court-ordered payment, the creditor may have execution issued against the property for the amount owed, plus interest and costs. TEX. PROB. CODE § 328(a). Alternatively, the court may cite the representative and sureties to show cause why they should not be held liable for the debt, as well as interest, costs and damages. TEX. PROB. CODE § 328(b).

Instead of submitting their claim to the county court, the taxing authorities filed suit in the district court. The record reflects that the Baileys filed a "Plea in Abatement and Motion for Dismissal of Cause" in the district court, urging that the taxing authorities' action be dismissed for want of jurisdiction. The district court in its final judgment denied the Baileys' motion to dismiss.

The taxing authorities argue that because the district court is empowered with original probate jurisdiction, it has jurisdiction to hear matters incident to the estate. We disagree. A court empowered with probate jurisdiction may only exercise its probate jurisdiction over matters incident to an estate when a probate proceeding related to such matters is already pending in that court. *See Interfirst Bank-Houston v. Quintana Petroleum*, 699 S.W.2d 864, 873 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). Thus, because the ongoing administration in the county court at law sitting in probate was the only probate proceeding pending, that court alone had jurisdiction over matters incident to the estate.

Furthermore, the court in which suit is first filed acquires dominant jurisdiction to the exclusion of coordinate courts. *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974). Because the administration was already pending in the county court when this suit was filed in the district court, the jurisdiction of the county court is dominant. *See Thomas v. Tollon*, 609 S.W.2d 859, 860 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (where county court originally exercised jurisdiction over the estate of decedent it was the proper court to determine matters incident to the estate).

We hold that the estate bears the liability for ad valorem taxes accruing during administration and that therefore the Bailey heirs may not be held personally liable prior to distribution. The present suit to collect the taxes is a claim against the estate over which the probate court maintained exclusive jurisdiction once the administration commenced in that court. We reverse the judgment of the court of appeals and dismiss the taxing authorities' claims. Our disposition of this cause is without prejudice to any right of the taxing authorities to present claims incident to the estate in the county court at law sitting in probate. * * *

GONZALEZ, J., dissenting, joined by HIGHTOWER and ENOCH, JJ. [opinion omitted].

Note

In 1973 the legislature amended Section 5 of the Probate Code to limit probate court jurisdiction to matters "appertaining to" and "incident to" estates. The legislature was trying to limit probate court jurisdiction to matters in which *the controlling issue* was the settlement, partition, or distribution of an estate. In *Seay v. Hall*, 677 S.W.2d 19 (1984), the Court held that the probate court lacked jurisdiction to try a wrongful death or survival action, because it was not a matter incident to or appertaining to an estate, i.e., *the controlling issue* in the wrongful death action was not the settlement, partition or distribution of the estate. Furthermore, such action was not a claim against the estate because it was not for a specified sum owed. A claim is a debt of a liquidated nature due an estate. In 1985 and again in 1987 Section 5 of the Probate Code was amended to give the statutory probate courts concurrent jurisdiction with district courts in actions by or against a personal representative or in matters involving an inter vivos trust. Hence, the direct result in *Seay v. Hall* was reversed by the legislature, i.e., the statutory probate court has jurisdiction of a survival action or one for wrongful death *where a personal representative is joined.*

PALMER
v.
COBLE WALL TRUST CO.
851 S.W.2d 178
(Tex. 1992)

Thomas C. Hall, San Antonio, for petitioners.
Tony L. Schaffer, Barry A. McClenahan, San Antonio, for respondents.

GONZALEZ, JUSTICE.

This case addresses the scope of a statutory probate court's jurisdiction under § 5A(b) of the Texas Probate Code as it existed in 1985. William Palmer, the independent administrator of an estate, brought this suit in statutory probate court against Coble Wall Trust Company, Inc., the estate's former temporary administrator, and Elwood Cluck, president of Coble Wall. The suit alleged negligence, gross negligence, and violations of the DTPA, which included breach of fiduciary duty and misrepresentations of the estate plan's characteristics. Based on favorable jury findings for the plaintiff, the probate court rendered judgment for Palmer. The court of appeals reversed and rendered for Coble Wall and Cluck on the basis that the probate court lacked subject matter jurisdiction over the suit. 848 S.W.2d 696. Because the probate court did not exceed its subject matter jurisdiction, we reverse the judgment of the court of appeals and remand the cause to that court for consideration of the unaddressed points of error.

I.

In April 1985, the statutory probate court appointed Coble Wall as guardian of the estate of Booney M. Moore, an adjudicated incompetent. In November 1985, Cluck, an attorney and the sole stockholder and president of Coble Wall, applied for an order to authorize the establishment of an administrative plan for Moore's estate. The probate court issued an order approving the estate plan, and Moore's properties were then either sold or conveyed to her beneficiaries, pledged as collateral for bonds, or converted into various types of corporate shares. The probate court subsequently approved an order that Coble Wall be paid the greater of either $75,000 or 10% of the reduction in federal taxes achieved by the plan, plus 5% of the gross value of various property and stocks when sold.

Upon Moore's death in December 1985, Coble Wall was appointed temporary administrator of the estate with the power to complete the previously approved estate plan. Coble Wall continued as temporary administrator until March 1986, when the probate court removed it and appointed Palmer as independent administrator of Moore's estate.

In 1987, Palmer filed suit against Coble Wall and Cluck in the probate court alleging the aforementioned causes of action. Palmer also alleged that the estate plan had been ineffective, exorbitant, and needlessly complex, all of which forced the estate to pay useless and excessive fees. The jury found that Coble Wall and Cluck were guilty of negligence, gross negligence, breach of fiduciary duties, and breach of the DTPA; the jury also found that Coble Wall was the alter ego of Cluck. Based upon these findings, the probate court rendered judgment for Palmer and awarded damages of $1,757,600 against Coble Wall and $1,757,600 against Cluck.

II.

Texas Probate Code § 5A(b) sets forth the subject matter jurisdiction of statutory probate courts.[4] The court of appeals determined that the 1985 version of the Code applied to this cause of action. This version stated that:

[4] Texas probate jurisdiction is, to say the least, somewhat complex. The Probate Code vests general probate jurisdiction in the constitutional county courts. TEX. PROB. CODE § 4 (1980). The Government Code, however, extends probate jurisdiction to the statutory county courts as follows: (d) Except as provided by Subsection (e), a statutory county court has, concurrent with the county court, the probate jurisdiction provided by general law for county courts. (e) In a county that has a statutory probate court, a statutory probate court is the only county court created by statute with probate jurisdiction. TEX. GOV'T CODE § 25.0003 (Supp.1992). Thus, a statutory county court has concurrent probate jurisdiction, unless there is also in that county a "statutory probate court." In the latter case, only the statutory probate court exercises probate jurisdiction concurrent with the constitutional coun-

> In proceedings in the statutory probate courts and district courts, the phrases "appertaining to estates" and "incident to an estate" in this Code include the probate of wills, the issuance of letters testamentary and of administration, and the determination of heirship, and also include, but are not limited to, all claims by or against an estate, all actions for trial of title to land and for the enforcement of liens thereon, all actions for trial of the right of property, all actions to construe wills, the interpretation and administration of testamentary trusts and the applying of constructive trusts, and generally all matters relating to the settlement, partition, and distribution of estates of wards and deceased persons. All statutory probate courts may, in the exercise of their jurisdiction, notwithstanding any other provisions of this Code, hear all suits, actions, and applications filed against or on behalf of any guardianship, heirship proceeding, or decedent's estate, including estates administered by an independent executor . . . . In situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district court. In actions by or against a personal representative, the statutory probate courts have concurrent jurisdiction with the district courts. TEX. PROB. CODE § 5A(b) (1985).[5]

The court of appeals held that the probate court lacked subject matter jurisdiction over the suit, because it was not a suit "appertaining to" or "incident to" the estate. 848 S.W.2d at 701-02. In making this determination, the court relied heavily on our decision in *Seay v. Hall*, 677 S.W.2d 19 (Tex. 1984), in which this Court held that probate courts did not have jurisdiction over wrongful death and survival claims. In *Seay*, we stated that the "appertaining to an estate and incident to an estate" language was designed to limit probate court jurisdiction to matters in which the controlling issue was the settlement, partition, or distribution of an estate. *Id.* at 24. Thus, the court of appeals reasoned that the outcome of Palmer's claims failed to meet this test and was "not necessary to the resolution of the estate." 848 S.W.2d at 703. In 1985, the legislature responded to Seay by amending the Texas Probate Code to broaden statutory probate court jurisdiction. The 1985 amendment added the last sen-

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ty court. *See* TEX. GOV'T CODE § 25.0021 (1988). A "statutory probate court" is defined as: [A]ny statutory court . . . the jurisdiction of which is limited by statute to the general jurisdiction of a probate court, and such courts whose statutorily designated name contains the word "probate." County courts at law exercising probate jurisdiction are not statutory probate courts under this Code unless their statutorily designated name includes the word "probate." TEX. PROB. CODE § 3(ii) (1980). A statutory probate court is not considered to be a statutory county court, except in Brazoria County. TEX. GOV'T CODE § 21.009(2) (Supp.1992). However, there are statutory courts in two other counties designated as "Probate and County" courts which exercise both probate and county court at law jurisdiction. TEX. GOV'T CODE § 25.0171(a) (Supp.1992) (Bexar); § 25.0861(b) (Supp.1992) (Galveston). To further complicate matters, the district courts exercise some probate jurisdiction. The Probate Code provides that "[t]he district court shall have original control and jurisdiction over executors, administrators, guardians and wards under such regulations as may be prescribed by law." TEX. PROB. CODE § 5(a) (Supp.1992). In those counties where there is no statutory court exercising probate jurisdiction, most probate matters must be filed in the constitutional county court, *id.* § 5(b); however, the county judge may transfer contested matters to the district court, which may then hear them "as if originally filed in district court." *Id.* In this situation the county court retains jurisdiction over the uncontested portions of the case. *Id.* The county judge may also request the assignment of a statutory probate judge to hear contested matters. *Id.* In counties where there is a statutory court exercising probate jurisdiction, most probate matters must be filed and heard in the statutory court or the constitutional county court, rather than the district court, "unless otherwise provided by the legislature." *Id.* § 5(c). The county judge may transfer contested probate matters to one of the statutory courts, but not to the district court. *Id.* Examples of where the legislature has altered the general rule of Section 5 are Anderson County, where the statutory county court has concurrent jurisdiction with the district court over all probate matters, and Parker County, where the statutory county court has concurrent jurisdiction with the district court over contested probate matters. *See* TEX. GOV'T CODE §§ 25.0032, 25.1863 (1992). District courts and statutory probate courts have concurrent jurisdiction "in all actions by or against a person in the person's capacity as a personal representative, in all actions involving an inter vivos trust, in all actions involving a charitable trust, and in all actions involving a testamentary trust." TEX. PROB. CODE § 5(d) (1992).

[5] The 1987 amendment to the Texas Probate Code § 5A(b) modified the last sentence of that section to read: "In actions by or against a personal representative, or in matters involving an inter vivos trust, the statutory probate courts have concurrent jurisdiction with the district courts." *See* Act of June 17, 1987, 70th Leg., R.S. ch. 459, § 1, 1987 TEX. GEN. LAWS 2043, 2044.

tence to § 5A which provided that "[i]n actions by or against a personal representative, the statutory probate courts have concurrent jurisdiction with the district court." TEX. PROB. CODE § 5A(b) (1985). We agree with the court of appeals' assessment in *Pearson v. K-Mart*, 755 S.W.2d 217, 219 (Tex. App.—Houston [1st Dist.] 1988 no writ) that "it is readily apparent that the purpose of [House Bill 479] was to overrule *Seay v. Hall*." Nevertheless, many courts of appeals have continued to apply the "controlling issue" test set out in Seay in their determination of whether a claim is "appertaining to" or "incident to" an estate. *See, e.g., Bruflat v. Rodeheaver*, 830 S.W.2d 821, 823 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Carlisle v. Bennett*, 801 S.W.2d 589, 591 (Tex. App.—Corpus Christi 1990, no writ); *Crawford v. Williams*, 797 S.W.2d 184, 185 (Tex. App.—Corpus Christi 1990, no writ); *Qwest Microwave, Inc. v. Bedard*, 756 S.W.2d 426, 436 (Tex. App.—Dallas 1988, no writ). However, continued application of this test in the context of the 1985 amendment is inconsistent with that amendment's purpose. The controlling issue in wrongful death and survival actions is not the settlement, partition, and distribution of the estate. A wrongful death recovery is a means of providing the statutory beneficiaries a remedy for the loss of their loved one because of another's wrongful conduct; the estate does not benefit from this recovery. While a survival recovery may impact the assets of the estate to be distributed, this is obviously not the controlling issue. Therefore, to apply the "controlling issue" test in the context of the 1985 amendment would be to deny probate courts jurisdiction over wrongful death and survival actions, in direct contravention of the purpose of the amendment. The court of appeals, in denying the probate court jurisdiction over Palmer's claims, relied on *Qwest Microwave, Inc. v. Bedard, supra*. We agree with the holding in *Qwest* that the 1985 amendment to § 5A(b) "conferred jurisdiction upon the probate courts to hear claims that might not be fully liquidated but that nonetheless are brought by a personal representative in his capacity of personal representative administering an estate." 756 S.W.2d at 436-37. However, as previously discussed, we disagree with *Qwest* insofar as it states that by amending the statute in 1985, "the legislature did not intend to expand probate jurisdiction to matters other than those in which the controlling issue was the settlement, partition, or distribution of an estate." *Id.* at 436.

When the 1985 amendment is not implicated, the "controlling issue" test has useful application in determining whether a claim is "appertaining to" or "incident to" an estate. In 1989, the legislature again amended § 5A and gave probate courts jurisdiction over claims by or against personal representatives "whether or not the matter is appertaining to or incident to an estate." TEX. PROB. CODE § 5A(e).[6] This amendment dispensed with the need to make this inquiry in suits involving a personal representative. However, the need for an ascertainable meaning of "appertaining to or incident to" an estate still exists in certain circumstances. Therefore, we confirm our reasoning in Seay that a suit is "appertaining to or incident to" an estate when the controlling issue is the settlement, partition, or distribution of an estate insofar as it does not apply to suits by or against a personal representative.[7]

While it is true that the 1985 amendment was enacted in order to give probate courts jurisdiction over wrongful death and survival actions, the wording of this amendment and the legislative history behind its enactment contemplates a broader application. In fact, as noted in the House Research Organization report on the amendment, the original HB 479 stated specifically that statutory probate courts would have jurisdiction over survival and wrongful death actions, but it was changed to the more expansive wording of "in actions by or against a personal representative." It is evident that this suit falls within the plain meaning of the 1985 amendment.

The Texas Probate Code § 3(aa) defines "personal representative" as including "executor, independent executor, administrator, independent administrator, temporary administrator, guardian, and temporary guardian, together with their successors." TEX. PROB. CODE § 3(aa) (1980). As independent administrator of the estate, Palmer was Moore's personal representative. Further, as temporary administrator, Coble Wall acted as Moore's personal representative. Therefore, this suit filed by Palmer, the current independent administrator, against Co-

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[6] The 1989 amendment to § 5A reads as follows: A statutory probate court has concurrent jurisdiction with the district court in all actions: (1) by or against a person in the person's capacity as a personal representative; (2) involving an inter vivos trust; (3) involving a charitable trust; and (4) involving a testamentary trust. (d) A statutory probate court may exercise the pendent and ancillary jurisdiction necessary to promote judicial efficiency and economy. (e) Subsections and (d) apply whether or not the matter is appertaining to or incident to an estate.

[7] Because of the 1989 amendment, which separates the "appertaining to" or "incident to" an estate language from suits involving a personal representative, today's decision only impacts suits brought before September 1, 1989.

ble Wall, the prior temporary administrator, was a suit filed by a personal representative against a personal representative. As such, under the 1985 Probate Code, the probate court had concurrent jurisdiction with the district court.

We reverse the judgment of the court of appeals and remand the cause to that court so that it can resolve the remaining unaddressed points of error.

CORNYN, J., dissenting [opinion omitted].

Notes

1. Before 1987, the Government Code specified that district courts had exclusive jurisdiction over divorces. The revised section, TEX. GOV'T CODE § 24.007, states that "[t]he district court has the jurisdiction provided by Article V, Section 8, of the Texas Constitution." In turn, article V, section 8 bridles the exclusive jurisdiction of district courts, when jurisdiction is conferred on another court. The Probate Code confers jurisdiction on statutory probate courts to hear matters appertaining to or incident to a guardianship estate. Thus, current Texas law does not impede a probate court from providing all necessary relief in a divorce action, when it properly transfers to itself a cause of action appertaining or incident to a guardianship estate.

2. *In Re Graham,* 971 S.W.2d 56 (Tex. 1988): A statutory probate court has authority under Probate Code section 608 to transfer to itself from district court a divorce proceeding when one party to the divorce is a ward of the probate court. Section 608 of the Probate Code authorizes a statutory probate court to transfer to itself a matter appertaining to or incident to a pending estate. A cause of action is appertaining or incident to an estate, if section 607 of the Probate Court explicitly defines it as such, or if the controlling issue in the suit is the settlement, partition, or distribution of an estate. Section 607 defines the term "appertaining to or incident to an estate" to include, among other things, "all actions for trial of the right of property incident to a guardianship estate, and generally all matters relating to the settlement, partition, and distribution of a guardianship estate." The divorce proceeding itself is appertaining to or incident to the guardianship estate.

CARROLL
v.
CARROLL
304 S.W.3d 366
(Tex. 2010)

Johnny Carroll, Whitney, pro se.
William Brent Shellhorse, Whitaker Chalk Swindle & Sawyer, L.L.P., Fort Worth, TX, Patrick Gordon Barkman, Cleburne, TX, for petitioner.
Bennett Brantley Aufill, Hillsboro, TX, S. Clinton Nix, Bradbury & Nix, Abilene, TX, for respondents.

PER CURIAM.

In this case, the 66th District Court of Hill County transferred a suit seeking the removal of a trustee and other relief to the county court at law. When the suit was filed, the Texas Property Code provided that district courts have original and exclusive jurisdiction over all proceedings concerning trusts, including proceedings to appoint or remove a trustee, determine the liability of a trustee, or require an accounting by a trustee. Act of May 26, 1997, 75th Leg., R.S., ch. 1375, § 5, 1997 Tex. Gen. Laws 5162, 5163 (amended 2005 and 2007) (current version at TEX. PROP. CODE § 115.001(a)). Because the Texas Property Code vests exclusive jurisdiction over the claims in this case in the district court, we hold that the county court at law had no jurisdiction to grant the relief sought and the judgment it rendered was void.

Letha and Ray Carroll were the parents of Johnny and Donald. Ray Carroll died in 1987, leaving an irrevocable testamentary trust called the Johnny Carroll Trust. Ray named Johnny as the trustee and Letha as the beneficiary of the trust. In November 2005, Donald and Letha sued Johnny, individually and as trustee, in the 66th District Court of Hill County. They alleged that Johnny failed to provide an accounting, engaged in self-dealing,

wasted trust assets, and failed to file income tax returns. Donald and Letha requested that the court order an accounting, remove Johnny as trustee, and award damages for his alleged misconduct.

In February 2006, the case was transferred to the Hill County Court at Law. By partial summary judgment that court removed Johnny as trustee, ordered him to provide an accounting, and ordered the trust records to be turned over to Donald, the successor trustee. In a final default judgment signed October 3, 2006, the county court awarded Donald and Letha $1 million for breach of fiduciary duty, $2.8 million in exemplary damages, and $15,000 in attorney's fees. Johnny filed a motion for new trial on January 5, 2007, claiming he never received notice of the October 3 trial setting and did not receive notice of the default judgment until December 4. The county court never ruled on the motion and it was overruled by operation of law.

Johnny appealed, and Letha filed a brief in support requesting that the default judgment be set aside and the case remanded for a jury trial. The court of appeals treated the county court's failure to rule on the motion for new trial as an implied finding that Johnny received timely notice of the default judgment. 304 S.W.3d 414, 2008 WL 2404548. Thus, the court of appeals treated Johnny's motion for new trial as untimely and deemed his appeal a restricted appeal. *Id.* at 420. Finding no error apparent on the face of the record, the court denied Johnny's restricted appeal. *Id.* at 420. The court of appeals did, however, strike the $2.8 million exemplary damages award because Donald and Letha's pleadings failed to assert any claim that would support punitive damages. *Id.* at 417. Johnny filed this petition for review, to which only Letha responded, again in favor of Johnny's petition.

Johnny challenges the county court's jurisdiction over the case for the first time in this Court. Jurisdiction over the subject matter of an action may not be conferred or taken away by consent or waiver, and its absence may be raised at any time. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 445 (Tex. 1993). Accordingly, Johnny's failure to assert the jurisdictional defect below does not preclude our review.

When the suit was filed, section 115.001 of the Texas Property Code provided:

> a district court has original and exclusive jurisdiction over all proceedings concerning trusts, including proceedings to . . . appoint or remove a trustee; . . . determine the . . . liability of a trustee; [and] require an accounting by a trustee.

TEX. PROP. CODE § 115.001(a). The only exceptions to the district court's exclusive jurisdiction are limited and do not apply here.

Texas Government Code section 25.0003 governs the jurisdiction of county courts at law, also known as statutory county courts, and vests them with concurrent jurisdiction with the district courts in certain worker's compensation cases and in civil cases in which the matter in controversy exceeds $500, but does not exceed $100,000, as alleged on the face of the petition. TEX. GOV'T CODE § 25.0003(c). However, that section also explicitly states that statutory county courts do not have the jurisdiction granted to statutory probate courts by the Texas Probate Code. *Id.* § 25.0003(f). The jurisdiction of the Hill County Court at Law is specifically governed by Texas Government Code section 25.1112, which grants the court concurrent jurisdiction with the district court in felony cases and family law cases and proceedings. *Id.* § 25.1112(a). The district courts may only assign cases to the county courts at law that are within the county court at law's jurisdiction. *See id.* §§ 25.1112(g), (h). Neither section 25.1112 nor section 25.0003 provide a statutory county court with concurrent jurisdiction when another court is vested with exclusive jurisdiction. *See, e.g., AIC Mgmt. v. Crews,* 246 S.W.3d 640 (Tex. 2008) (holding that subject matter jurisdiction is determined by the more specific statute). *See also* TEX. GOV'T CODE § 25.0001(a). Nothing in the Texas Government Code confers jurisdiction upon the Hill County Court at Law over proceedings listed in Texas Property Code section 115.001. *See id.* §§ 25.0003, 25.1112.

In this case, Johnny and Letha sought removal of a trustee, an accounting by a trustee, and appointment of a successor trustee, together with money damages and attorney's fees. Removal of a trustee, an accounting by a trustee, and appointment of a successor trustee are all "proceedings concerning a trust" expressly governed by the statute and fall under the exclusive jurisdiction of the district court. TEX. PROP. CODE § 115.001(a). As such, transfer to the Hill County Court at Law was improper because it was apparent from the pleadings that the county court lacked jurisdiction over the claims. Because the Hill County Court at Law had no jurisdiction over the claims, its judgment was void. *See State ex rel. Latty v. Owens,* 907 S.W.2d 484, 485 (Tex. 1995). Because the county court's judgment was void, we do not reach Johnny's other arguments challenging the judgment.

Accordingly, without hearing argument, we grant the petition for review, reverse the court of appeals' judgment, vacate the county court's judgment, and remand the case to the county court with instructions to transfer the case back to the 66th District Court of Hill County for further proceedings. *See* TEX. R. APP. P. 59.1.

SCHLICHTING
v.
LEHMAN BROTHERS BANK FSB
346 S.W.3d 196
(Tex. App.—Dallas 2011, pet. filed)

Facts: Purchaser of property at non-judicial foreclosure sale brought forcible entry and detainer action, seeking writ of possession of property after mortgagor failed to vacate premises. The County Court at Law No. 4, Dallas County, Ken Tapscott, J., entered judgment of possession in purchaser's favor, and mortgagor appealed.

Appellant concedes that a justice court or county court at law is not deprived of jurisdiction in a forcible detainer action merely because of the existence of a title dispute. Indeed, in most cases the right to immediate possession can be determined separately from the right to title. The trial court is deprived of jurisdiction only if the determination of the right to immediate possession necessarily requires the resolution of the title dispute. This is not such a case.

Where a foreclosure pursuant to a deed of trust establishes a landlord and tenant-at-sufferance relationship between the parties, the trial court has an independent basis to determine the issue of immediate possession without resolving the issue of title to the property. In this case, as stated above, the foreclosure pursuant to the deed of trust created a landlord and tenant-at-sufferance relationship between appellant and Lehman Brothers. Thus, it was not necessary for the trial court to resolve the title dispute to determine the right of immediate possession.

Notes

1. In *Orange Laundry Co. v. Stark*, 179 S.W.2d 841 (Tex. Civ. App.—Amarillo 1944, no writ) the Bank had leased the property to the Defendants for one year (1937-1938), but the lease was not renewed. The Defendants, however, held over, and stayed in possession, paying rent to the Bank until July 6, 1942. On December 12, 1942, the Bank sold the property to Stark, notifying the Defendants of the sale. Stark, now the landlord, sued the Defendants, (the tenants) for forcible entry and detainer (FED) in justice court, alleging ownership of the land. The Defendants challenged Stark's title because the bank had held title to the land for more than five years in violation of a federal statute. Stark specially excepted to the Defendants' pleadings. The special exception was sustained. Stark, the landlord won, and it was held that the justice court had jurisdiction.

2. In *Rodriquez v. Sullivan*, 484 S.W.2d 592 (Tex. Civ. App.—El Paso 1972, no writ), Sandoval, sued in justice court for possession (FED), seeking to expel Rodriquez from the property. Sandoval sold the property to Rodriguez in 1961 on a contract for sale. Sandoval alleged that Rodriquez had become delinquent and sought to regain possession of the property. The justice court issued a writ of possession to Sandoval. The district court issued a temporary injunction to prevent the sheriff from executing on the writ of possession issued by the justice court. This was affirmed. A forcible entry and detainer proceeding is an action for possession and the question of right of possession is the only issue involved in the justice court. Justice courts have no jurisdiction for suits for title to land, and hence cannot try a forcible detainer action that involves trial of title to land. Here, the Defendant had the right to possession unless he lost equitable title to the property.

3. Are the two decisions consistent? Yes. In *Rodriguez* the issue was title and the district court had jurisdiction; in *Stark* the issue was possession and the justice court had jurisdiction. In *Stark,* the tenant did not claim title (ownership), but rather sought to show that the landlord was not the owner, and thus had no right to possession. In *Rodriguez* one or the other of the parties was entitled to ownership, and the ownership issue determined the possession issue.

4. A claimant may properly join in justice court a detainer action with a suit for unpaid rent, provided the amount requested does not exceed the jurisidictional limits of the justice court in which the suit is brought.

5. Although an appeal from a justice court judgment is tried de novo in the county or district court, TEX. R. CIV. P. 574b, the appellate jurisdiction of the county court is confirmed to the jurisdictional limits of the justice court. The county court has no jurisdiction over the appeal unless the justice court had jurisdiction over the case. *Tile v. Ramsey*, 905 S.W.2d 620, 622 (Tex.App.—Houston [14th Dist.] 1995, no writ); *Wattley v. Turner*, WL (Tex. App.—Dallas, 1998, ordered not published).

6. Texas Civil Practice & Remedies Code § 51.001:

(a) In a case tried in justice court in which the judgment or amount in controversy exceeds $20, exclusive of costs, or in which the appeal is expressly provided by law, a party to a final judgment may appeal to the county court.

(b) In a county in which the civil jurisdiction of the county court has been transferred to the district court, a party to a final judgment in a case covered by this section may appeal to the district court.

7. In *Coinmach Corp. v. Aspenwood Apt. Corp*., 417 S.W.3d 909, 919 (Tex. 2013) the court stated:

"The only issue in a forcible detainer action is the right to actual possession of the premises." *Marshall v. Hous. Auth. of the City of San Antonio,* 198 S.W.3d 782, 785 (Tex.2006). Such an action "is intended to be a speedy, simple, and inexpensive means to obtain immediate possession of property." *Id.* at 787. The judgment in a forcible detainer action is a final determination only "of the right to immediate possession;" it is not "a final determination of whether the eviction is wrongful" or whether the tenant's continued possession was a trespass. *Id.; see also House v. Reavis,* 89 Tex. 626, 35 S.W. 1063, 1067 (1896) (holding that FED action did not affect "merits of the title" and was "no bar to the recovery of the plaintiffs" in subsequent action for title and damages); *Johnson v. Highland Hills Drive Apartments,* 552 S.W.2d 493, 494 (Tex. Civ. App.—Dallas 1977, no writ) (holding that predecessor to section 24.008 "prevents a judgment of possession in a forcible entry and detainer action from barring a subsequent action for damages for wrongful eviction")."

"We hold that chapter 24's procedural protections do not grant to tenants at sufferance any legal interests in or possessory rights to the property at issue; rather, the statute provides procedural protections that apply once the tenant has lost, or allegedly lost, all legal interests and possessory rights. Although the landlord must comply with the statute's procedural requirements to evict the tenant at sufferance, eviction is allowed only if the tenant has no remaining legal or possessory interest, which makes the tenant a tenant at sufferance. The FED action and judgment do not bar a separate action for trespass or for wrongful eviction, and if it is determined in that action that the tenant lacked any legal interest or right of possession, the tenant at sufferance is a trespasser. Nothing in the statute indicates that the procedural protections grant legal or possessory rights to a tenant at sufferance. To the contrary, the statute states that the "person entitled to possession of the property" is not the tenant but the person seeking the eviction, that is, the one who "must comply with the [procedural] requirements." TEX. PROP. CODE § 24.002(b). And, even more directly, the statute expressly provides that a suit for eviction under the FED statute "does not bar a suit for trespass." *Id.* § 24.008. Thus, despite the so-called "grace periods" and chapter 24's other procedural protections, the tenant at sufferance remains a trespasser on the property."

5. *Amount in Controversy as Basis for Jurisdiction*

FLYNT
v.
GARCIA
587 S.W.2d 109
(Tex. 1979)

Fred Riepen, Houston, for petitioner.
Milton Schwartz, Houston, for respondent.

PER CURIAM.

This case involves the jurisdiction of a county court at law to entertain suit and render judgment after a trial amendment raised the amount in controversy over the maximum jurisdictional limit of $5,000.

We will recite only those facts necessary for our disposition of the case and will not repeat the full statement made by the court of civil appeals at 574 S.W.2d 587.

The record before us does not contain pleadings prior to the fourth amended original petition filed April 18, 1977. By that pleading, Sue Ann Flynt sought to recover $1,778.40 plus interest under a fully matured obligation, and $3,100 plus interest in monthly payments accrued through August, 1976, under another obligation not yet fully matured. The total sought at that time was $4,778.40 plus interest. By trial amendment, she increased her demand to $6,242.40 by including accrued payments on the second obligation through the end of trial.

The court of civil appeals has held that the county court at law retained jurisdiction to "entertain the suit," citing this Court's opinions in *Isbell v. Kenyon-Warner Dredging Co*., 113 Tex. 528, 261 S.W. 762 (1924); and *Haginas v. Malbis Memorial Foundation*, 163 Tex. 274, 354 S.W.2d 368 (1962). However, the court further held that the trial court had no "jurisdiction to enter a judgment in excess of the jurisdictional amount."

We think the opinion of the court of civil appeals is in conflict with the general rule announced in *Isbell*, *supra* and *Haginas*, *supra* ; and, therefore pursuant to TEX. R. CIV. P. 483, we grant the application of Sue Ann Flynt, and without hearing oral argument, reverse the judgment of the court of civil appeals.

The general rule stated in the two prior opinions is that "where jurisdiction is once lawfully and properly acquired, no subsequent fact or event in the particular case serves to defeat that jurisdiction." We see no reason why that general rule should not apply to a case where the original suit is within the jurisdictional limits of the court and subsequent amendments seek only additional damages that are accruing because of the passage of time. This is especially so where there is no allegation of bad faith or fraud in invoking the jurisdiction of the court.

The rule applied here will serve the purposes of judicial economy. The opinion of the court of civil appeals would reverse the judgment and remand the cause for another trial in the county court at law while allowing only a partial recovery of the amount due. If another suit is required to recover the balance, three lawsuits will result from this single claim.

The judgment of the court of civil appeals is reversed and the judgment of the trial court is affirmed.

Notes

1. For jurisdictional purposes, the amount in controversy must be determined from the allegations of fact contained in the pleadings of the party seeking to invoke the court's jurisdiction, unless the adverse party alleges and proves that the allegations of his adversary with respect to the amount in controversy were falsely made for the fraudulent purpose of wrongfully conferring jurisdiction. *See, e.g*., *Dwyer v. Bassett*, 63 Tex. 274; *Clonts v. Johnson*, 116 Tex. 489, 294 S.W. 844.

2. It also appears to be well settled that the word 'interest,' as used in the Constitutional and statutes provisions above referred to, means interest *eo nomine* as distinguished from interest as an element of recoverable

damages. *See, e.g., Smelser v. Baker*, 88 Tex. 26, 29 S.W. 377; *Watkins v. Junker*. Interest as interest or interest *eo nomine* is compensation allowed by law or fixed by the parties for the use of detention of money; interest as damages is compensation allowed by law as additional damages for lose use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgement. *See, e.g., Cavnar v. Quality Control Parking*, 696 S.W.2d 549 (1985). Thus, in determining the amount in controversy interest as damages are included in the amount in controversy. In addition, exemplary damages and attorneys' fees are included in the amount in controversy.

3. In *Mr. W. Fireworks v. Mitchell*, 622 S.W.2d 576 (Tex. 1981) the Court applied the same general principles expressed in the *Flynt* case to a case in which additional attorney's fees accrued from the time of filing the suit until judgment.

4. In *Bybee v. Fireman's Fund Ins. Co.*, 331 S.W.2d 910 (Tex. 1960) the Court noted that when jurisdiction is dependent upon the amount in controversy, a mere unfounded claim to a penalty or attorney's fees will not serve to place the case within the exclusive jurisdiction of a particular court.

5. *Richardson v. First National Life Insurance Company*, 419 S.W.2d 836 (Tex. 1967). The residual power of Texas trial courts rests in the district courts. Thus, a suit for an accounting was properly brought in the district court.

PEEK
v.
EQUIPMENT SERV. CO. OF SAN ANTONIO
779 S.W.2d 802
(Tex. 1989)

PHILLIPS, CHIEF JUSTICE.

These cases present the question of whether a plaintiff seeking damages under the wrongful death and survival statutes invokes the jurisdiction of a district court by filing a petition which fails to allege either a specific amount of damages or that the damages sustained exceed the court's minimum jurisdictional limits. The district court held that its jurisdiction was not invoked by such a pleading. Because plaintiffs did not file a pleading properly alleging damages until after the applicable statute of limitations had run, the district court dismissed the suit. The court of appeals, in two unpublished opinions, affirmed. We reverse the judgments of the court of appeals and remand this consolidated cause to the trial court because the original pleading, although defective, was sufficient to invoke the court's jurisdiction and prevent the running of limitations.

This matter arose out of the murder of Clyde Peek on December 18, 1984. The plaintiffs were Clyde's widow, Lucie Allen Peek, acting in her individual capacity and as representative of Clyde's estate, and Clyde's four surviving children. They brought suit on November 18, 1986, under the wrongful death and survival statutes. TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.001-.003, § 71.021 (Vernon 1986). The Peeks sued six defendants: Marvin Wiley DeBerry, Jr., who shot and killed Peek; Equipment Service Company, DeBerry's employer; Victor J. Weiss, M.D. and Burton O. Neeswig, M.D., two doctors who had treated DeBerry for mental illness; Suzanne Cude, DeBerry's estranged wife; and Oshman's Sporting Goods, Inc., the owner of the store in which DeBerry purchased the murder weapon. The Peeks plead for lost care, nurture, guidance, education, wages in the past and future, pain and suffering, mental anguish, grief, loss of companionship, and loss of enjoyment of life (hedonic damages), together with interest and costs. What they did not plead, however, was the amount of damages sought, either by properly alleging that damages exceeded the minimum jurisdictional limits of the court, *see* TEX. R. CIV. P. 47(b), or by alleging a sum certain.

The Peeks amended their petition on December 16, 1986, but made no changes in their defective allegations of damages. In a second amended pleading, filed January 14, 1987, the Peeks sought $3,750,000 actual damages and $5,000,000 exemplary damages against the defendants, jointly and severally. This pleading, however, came more than two years after Clyde's death. All defendants except Oshman's Sporting Goods, Inc. filed motions to dismiss, alleging that the Peeks had failed to invoke the jurisdiction of the district court prior to the running of the two-year statute of limitations. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(b) (Vernon 1986). The trial court granted these motions at various times, and severance orders were signed so that these judgments became final.

The Peeks timely appealed to the court of appeals, which affirmed the judgments of the trial court in two opinions. From both judgments of the court of appeals, the Peeks applied to this court for writ of error. After granting both writs, we consolidated the two causes for oral argument and decision.

The parties here have assumed the minimum monetary jurisdictional limit of the district court to be $500.00. Although recent constitutional and legislative changes call this assumption into question, we will also assume, for purposes of our decision, that the jurisdiction of the district court does not extend to controversies involving sums of less than $500.00.

In this case, all parties agree that the trial court's jurisdiction was invoked not later than the filing of the Peeks' second amended petition. The respondents, however, argue that the Peeks did not invoke jurisdiction by the first two pleadings, and hence did not obtain jurisdiction until after limitations had run. The Peeks, on the other hand, assert that their original petition did invoke the trial court's jurisdiction. Although the petition did not expressly allege that the amount sought was within the court's jurisdiction, neither did anything in the petition suggest that the court lacked jurisdiction. In fact, the Peeks argue that the nature of the loss sustained and the claims asserted made it absolutely apparent that plaintiffs sought damages far in excess of five hundred dollars.

The court of appeals held, however, that the Peeks' claims were time barred because the second amended petition, which alleged sufficient jurisdictional facts, was not filed prior to the expiration of limitations. In so holding, the court of appeals rejected the Peeks' theory that their second amended petition should relate back to the date of original filing. Instead, the court concluded that a petition which does not affirmatively state that the amount in controversy is above the minimum monetary jurisdiction of the district court is, in effect, no pleading.

In reaching this conclusion, the court relied heavily on our decision in *Richardson v. First National Life Insurance Co*., 419 S.W.2d 836 (Tex. 1967). In that case, Richardson sued for breach of contract, alleging in his petition that he believed that "at least the amount of $314.37" was due to him, and also seeking an accounting and general relief. *Id.* at 837. The defendant attacked Richardson's pleading with special exceptions and, after Richardson failed to amend, the trial court dismissed his claim. The court of appeals and this court both affirmed. We held that because Richardson had specifically pleaded an amount under the minimum jurisdiction of the district court, he could not rely on his more general allegations to sustain jurisdiction. *Id.* at 839. Richardson, in effect, pleaded himself out of court.

In the instant case, however, the Peeks' original and first amended petitions did not affirmatively demonstrate an absence of jurisdiction. Under these circumstances, a liberal construction of the pleadings is appropriate. As we wrote in *Pecos & Northern Texas Railway Co. v. Rayzor*, 106 Tex. 544, 548, 172 S.W. 1103, 1105 (1915): "In any doubtful case all intendments of the plaintiff's pleading will be in favor of the jurisdiction." Unless it is clear from the pleadings that the court lacks jurisdiction of the amount in controversy, it should retain the case. *Dwyer v. Bassett & Bassett*, 63 Tex. 274, 276 (1885). As one court recently said: "[W]e must presume in favor of the jurisdiction unless lack of jurisdiction affirmatively appears on the face of the petition." *Smith v. Texas Improvement Co*., 570 S.W.2d 90, 92 (Tex. Civ. App.—Dallas 1978, no writ).

The failure of a plaintiff to state a jurisdictional amount in controversy in its petition, without more, thus will not deprive the trial court of jurisdiction. *See* W. DORSANEO, 1 TEXAS LITIGATION GUIDE § 11.02(4)(a) (1989); Newton, *Conflict of Laws*, 33 Sw.L.J. 425, 431-32 (1979). Even if the jurisdictional amount is never established by pleading, in fact, a plaintiff may recover if jurisdiction is proved at trial. DORSANEO, *supra*, § 2.01(4)(b); 2 R. MCDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 6.09.1 (rev. 1982). This result is consistent with our holdings in cases when a plaintiff has failed to plead facts which state a cause of action. Unless the petition affirmatively demonstrates that no cause of action exists or that plaintiff's recovery is barred, we require the trial court to give the plaintiff an opportunity to amend before granting a motion to dismiss or a motion for summary judgment. *Texas Dept. of Corrections v. Herring*, 513 S.W.2d 6, 10 (Tex. 1974), *Killebrew v. Stockdale*, 51 Tex. 529, 532 (1879); *Southern Sur. Co. v. Sealy I.S.D*., 10 S.W.2d 786, 789 (Tex. Civ. App.—Austin 1928, writ ref'd). And unless defendant objects, the plaintiff may proceed to trial, however defective its allegations. So it is here. In the absence of special exceptions or other motion, defendant waives the right to complain of such a defect if plaintiff establishes the trial court's jurisdiction before resting its case. *See Olivares v. Service Trust Co*., 385 S.W.2d 687 (Tex. Civ. App.—Eastland 1964, no writ).

In summary, we hold that the omission of any allegation regarding the amount in controversy from plaintiff's petition did not deprive the court of jurisdiction, but was instead a defect in pleading subject to special ex-

ception and amendment. Although defective, the original petition filed in this cause was sufficient to invoke the jurisdiction of the district court. The court of appeals therefore erred in affirming the judgments of dismissal, as the Peeks amended their petition and cured the defect prior to the rendition of the judgments which dismissed their claims. Accordingly, the judgments of the court of appeals are reversed and the causes remanded to the trial court for further proceedings.

Note

Rule 47. Texas Rules of Civil Procedure: Claims for Relief

An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain:

(a) a short statement of the cause of action sufficient to give fair notice of the claim involved;

(b) a statement that the damages sought are within the jurisdictional limits of the court;

(c) except in suits governed by the Family Code, a statement that the party seeks:

(1) only monetary relief of $100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees; or

(2) monetary relief of $100,000 or less and non-monetary relief; or

(3) monetary relief over $100,000 but not more than $200,000; or

(4) monetary relief over $200,000 but not more than $1,000,000; or

(5) monetary relief over $1,000,000; and

(d) a demand for judgment for all the other relief to which the party deems himself entitled.

Relief in the alternative or of several different types may be demanded; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed. A party that fails to comply with (c) may not conduct discovery until the party's pleading is amended to comply.

Note

It will be helpful in understanding the following case to know that at the time of Mr. Brite's termination from USAA, his annual salary was almost $74,000, he was 52 years old, and intended to work until he was 65.

UNITED SERVICES AUTO. ASS'N
v.
BRITE
215 S.W.3d 400
(Tex. 2007)

Raquel G. Perez, Kathleen A. Devine, United Services Automobile Association, Judy K. Jetelina, Bracewell & Patterson, San Antonio, W. Carl Jordan, Vinson & Elkins LLP, Houston, J. Joe Harris, Southwest Airlines Co., Dallas, Lacey L. Gourley, Bracewell & Patterson, L.L.P., Pamela Stanton Baron, Austin, for Petitioner.

Jeffrey D. Small, Law Office of Jeff Small, Jeffrey Alan Goldberg, Cynthia A. Cano, San Antonio, Douglas Alexander, Alexander Dubose Jones & Townsend, LLP, Austin, for Respondent.

Kathryn S. Vaughn, Baker Botts LLP, Houston, for Amicus Curiae Texas Employment Law Council.

Jeffrey C. Londa, Ogletree Deakins Nash Smoak & Stewart, P.C., Houston, for Amicus Curiae Texas Association of Business.

JUSTICE MEDINA delivered the opinion of the Court.

County courts at law are courts of limited jurisdiction and many, including the county court at law in this case, lack jurisdiction over a "matter in controversy" that exceeds $100,000. *See* TEX. GOV'T CODE § 25.0003(C)(1); *see also id*. § 25.0172 (Bexar County Court at Law Provisions). The question here is whether the value of this case at filing (commonly referred to as the amount in controversy) exceeded the court's $100,000 jurisdictional limit. To answer that question, we must decide whether the amount in controversy includes the total amount of the damages the plaintiff seeks to recover, or whether it excludes damages that are uncertain in duration or amount. Because we hold that the "matter in controversy" includes all of the damages the plaintiff

seeks to recover at the time suit is filed, we conclude that the case's value here at the time of filing exceeded $100,000 and that the county court at law therefore lacked jurisdiction over this matter. Accordingly, we reverse the judgment of the court of appeals and dismiss the case for want of jurisdiction.

James Steven Brite was employed by United Services Automobile Association (USAA) from 1977 to 2001. In 2001, USAA undertook a reduction in force and terminated Brite's employment. Brite subsequently filed an age-discrimination lawsuit against USAA, alleging that he was selected for a layoff because of his age.

Brite filed his suit in the Bexar County Court at Law No. 7, which has jurisdiction concurrent with that of the district court in "civil cases in which the matter in controversy exceeds $500 but does not exceed $100,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs, as alleged on the face of the petition . . . ." TEX. GOV'T CODE § 25.0003(C)(1). In his original petition, Brite pleaded that his damages exceeded the statutory minimum of $500, but he did not plead that his damages were below the $100,000 maximum limits. Although he did not specify amounts, his pleadings did seek the recovery of back pay, front pay, punitive damages, and attorney's fees. Brite's pleading did not use the terms "back pay" and "front pay" but rather described his damages as "compensation due Plaintiff that accrued at the time of filing this Petition" (back pay) and "the present value of unaccrued wage payments" (front pay).

Subsequently, Brite amended his petition to state that he sought damages of $1.6 million. He did not specify how much of that amount consisted of punitive damages or attorney's fees, but in a later discovery response, Brite admitted that "his lost wages and benefits in the future, until age 65, total approximately $1,000,000.00."

USAA filed a plea to the jurisdiction, asserting that the county court at law lacked jurisdiction because Brite sought damages greater than $100,000. The trial court denied the plea, and, after a jury trial, the court ultimately awarded Brite $188,406 for back pay, $350,000 for front pay, $300,000 in punitive damages, $129,387 in attorney's fees, and prejudgment interest. The court of appeals, with one justice dissenting, affirmed the trial court's judgment. 161 S.W.3d 566.

USAA argues here that the court of appeals erred in affirming the trial court's judgment because the amount in controversy at the time Brite filed suit exceeded $100,000, thus depriving the county court at law of jurisdiction over the matter. We agree.

Texas Rule of Civil Procedure 47(b) requires that an original pleading "contain . . . the statement that damages sought are within the jurisdictional limits of the court." Moreover, we have said that "[t]he general rule is that the allegations of the plaintiff's petition must state facts which affirmatively show the jurisdiction of the court in which the action is brought." *Richardson v. First Nat'l Life Ins. Co*., 419 S.W.2d 836, 839 (Tex. 1967). Brite's petition did not comply with these authorities because it failed to assert that the matter in controversy was within the monetary limitations of the county court at law's jurisdiction. His petition was therefore defective. He could have remedied this defect, however, by proving jurisdiction in the trial court, as his original petition did not "affirmatively demonstrate an absence of jurisdiction." *See Peek v. Equip. Serv. Co.*, 779 S.W.2d 802, 804 (Tex. 1989) ("Even if the jurisdictional amount is never established by pleading, in fact, a plaintiff may recover if jurisdiction is proved at trial.").

Brite asserts that he established jurisdiction by proof at trial that, at the time he filed his petition, his back-pay damages totaled less than $100,000. USAA, on the other hand, argues that Brite's request for front-pay damages must also be included in calculating the amount in controversy. Because Brite's alleged front-pay damages alone exceeded $100,000 at the time he filed suit, including these damages would mean that the county court at law did not have jurisdiction over the case. TEX. GOV'T CODE § 25.0003(C)(1).

We have previously held that the amount in controversy is determined by the amount the plaintiff seeks to recover. *Tune v. Tex. Dep't of Pub. Safety*, 23 S.W.3d 358, 361 (Tex. 2000) ("It has long been the law that the phrase 'amount in controversy,' in the jurisdictional context, means 'the sum of money or the value of the thing originally sued for . . . .' " *quoting Gulf, C. & S.F. Ry. Co. v. Cunnigan*, 95 Tex. 439, 67 S.W. 888, 890 (1902) (emphasis in original)). Brite argues, however, that we should abandon this rule in favor of another that takes into consideration the probability that plaintiff will succeed. Thus, he submits that the amount in controversy should not be calculated by the damages originally sued for, but instead by the amount of damages that, more likely than not, the plaintiff would recover. Under his proposed rule, Brite asserts that front pay should not be included in the amount in controversy because it was unlikely that he would recover those damages at the time he filed suit. Although Brite sued for front pay, asserting that he would "[i]n all reasonable probability" sustain

those damages, he now submits that he was unlikely to prevail on this claim because the front-pay remedy is disfavored by the courts.

The court of appeals accepted this argument, holding that because of the "speculative nature of the front-pay damages," the trial court did not err in excluding those damages from its calculation of the amount in controversy. 161 S.W.3d at 573 n. 1. A dissenting justice disagreed, noting that "[f]or purposes of determining the 'amount in controversy,' the question is not what a plaintiff will recover or is likely to recover; it is what the plaintiff seeks to recover." *Id*. at 586 (DUNCAN, J. dissenting). We agree with the dissenting justice.

The jurisdictional statute for county courts at law values the matter in controversy on the amount of damages "alleged" by the plaintiff, not on the amount the plaintiff is likely to recover. As previously stated, it grants county courts at law jurisdiction over "civil cases in which the matter in controversy exceeds $500 but does not exceed $100,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs, as alleged on the face of the petition . . . ." TEX. GOV'T CODE § 25.0003(C)(1). And although the statute excludes several items when determining the amount in controversy, front pay is not among them. *See Mid-Century Ins. Co. of Tex. v. Kidd*, 997 S.W.2d 265, 273-74 (Tex. 1999) (doctrine of expressio unius est exclusio alterius—the inclusion of a specific limitation excludes all others—a statutory interpretation tool of some use under these circumstances). Moreover, the statute is not ambiguous, and courts are required to interpret unambiguous language according to its plain meaning. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). Because the statute bases jurisdiction on the damages "alleged on the face of the petition" and makes no exclusion based on the plaintiff's likelihood of recovery, it does not allow front-pay damages to be excluded from the amount in controversy. We therefore hold that front-pay damages must be included when determining the amount in controversy.

The amount in controversy in this case exceeded $100,000 at the time Brite filed suit, and thus the county court at law lacked jurisdiction over this matter. Accordingly, we reverse the court of appeals' judgment and, without reference to the merits, dismiss the case for want of jurisdiction.

JUSTICE GREEN did not participate in the decision.

Note

See Texas Rules of Civil Procedure 91A. **Dismissal of Baseless Causes of Action**.

6. *Problems of Multiple Parties and Claims*

Section 24.009 of the Texas Government Code provides in part:

If two or more persons originally and properly joined in one suit, the suit for jurisdictional purposes is treated as if one party is suing for the aggregate amount of all their claims added together, excluding interest and costs.

TEXAS EMPLOYMENT COMMISSION
v.
INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, LOCAL UNION NO. 782
165 Tex. 135, 352 S.W.2d 252
(Tex. 1961)

Will Wilson, Atty. Gen., C. K. Richards, Sam Lane, Asst. Attys. Gen., for Texas Employment Commission.

Ramey, Brelsford, Hull & Flock, Tyler, Wm. J. Barron, New York City, L. Mason Harter, De Witt, N. Y., and Jack W. Flock, Tyler, of counsel, for General Electric Company.

Sam Houston Clinton, Jr., Austin, for respondents.

STEAKLEY, JUSTICE.

This case as it reaches us with the Texas Employment Commission and General Electric Company as petitioners involves the right of eighty-eight respondents to unemployment compensation benefits for the week of August 4, 1957, during which the plant of General Electric Company at Tyler was shut down. The facts common to all of the respondents require a construction of certain provisions of their collective bargaining contract in the light of the applicable provisions of the Texas Unemployment Compensation Act. The claims of the respondents were denied by the Commission in one proceeding and suit was brought by all the respondents in the District Court of Smith County to review the adverse decision. The district court sustained the Commission. The Court of Civil Appeals reversed the district court and entered judgment 'directing the Texas Employment Commission to grant the claims of the eighty-eight claimants. * * *

Preliminarily, petitioners urge two jurisdictional pleas. The first is that the district court was without jurisdiction in the fact that the claim of each respondent was approximately $25.00 although aggregating, of course, more than $500.00. This plea to the jurisdiction was not raised in the trial court but was urged in the Court of Civil Appeals, and is urged here, as fundamental error. Lack of jurisdiction in the district court would be fundamental error and a plea to such effect is subject to review although first presented on appeal. We hold, however, that the plea is without merit.

There was proper joinder of the claimants under Rule 40, Texas Rules of Civil Procedure. *Hindman v. Texas Lime Co.*, 157 Tex. 592, 305 S.W.2d 947, 954. The rights jointly asserted by the several claimants arose out of the same transactions and occurrences within the purview and purposes of the Rule. The determining questions of law and of fact are common to all.

Article 1906a, Vernon's Ann.Civ.St., provides: 'Where two or more persons originally and properly join in one suit, the suit for jurisdictional purposes shall be treated as if one party were suing for the aggregate amount of all their claims added together, exclusive of interest and cost; provided that this statute shall not prevent jurisdiction from attaching on any other ground. Provided further, that the passage of this Act shall not affect any pending litigation.' Acts 1945, 49th Leg., p. 543, ch. 329, § 1.

Article V, Section 8 of the Constitution, Vernon's Ann. St., provides that 'The District Court shall have * * * such other jurisdiction, original and appellate, as may be provided by law.' *See Oilmen's Reciprocal Ass'n v. Franklin*, 116 Tex. 59, 286 S.W. 195, 197.

Respondents were originally and properly joined and the statute makes the aggregate amount controlling for jurisdictional purposes. Article 1906a was enacted for the express purpose of curing what the Legislature described as a 'jurisdictional defect' in *Long v. City of Wichita Falls*, 142 Tex. 202, 176 S.W.2d 936; the 'defect' was the holding in Long that the claims of several plaintiffs cannot be added together to achieve a jurisdictional amount. *Southwestern Drug Co. v. Webster*, Tex. Civ. App., 246 S.W.2d 241 (no writ hist.) and *Kasishke v. Ekern*, Tex. Civ. App., 278 S.W.2d 274 (ref., n.r.e.), cited by petitioners, are not in point because of their reliance on Long and under their facts. In the case before us there is proper joinder of claims aggregating more than $500.00 giving the district court jurisdiction under the express provisions of Article 1906a.

* * *

The judgment of the Court of Civil Appeals awarding recovery to the twelve respondents who are not residents of Smith County is reversed and the judgment of the District Court dismissing them from this suit is af-

firmed. The judgment of the Court of Civil Appeals awarding recovery to the remaining respondents is reversed and the judgment of the District Court is affirmed.

7. *Consequences of a Lack of Jurisdiction over the Subject Matter*

Notes

1. A Texas court which does not have subject matter jurisdiction must dismiss the proceeding before it. Thus, if the trial court proceeds to judgment and the case is appealed the appellate court can make no order other than reversing the judgment of the court below and dismissing the cause. *See City of Garland v. Louton*, 691 S.W.2d 603 (Tex. 1985).

2. Texas Civil Practice & Remedies Code § 16.064 provides:

> (a) The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if:
>
> (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and
>
> (2) not later than the 60th day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.
>
> (b) This section does not apply if the adverse party has shown in abatement that the first filing was made with intentional disregard of proper jurisdiction.

3. *In re United Services Auto. Ass'n*, 307 S.W.3d 299 (Tex. 2010): TEX. CIV. PRAC. & REM. CODE § 16.064 tolls limitations for those cases filed in a trial court that lacks jurisdiction, provided the case is refiled in a proper court within sixty days of dismissal. The tolling provision does not apply, however, to those cases in which the first filing was made with "intentional disregard of proper jurisdiction." When, as here, the plaintiff intentionally disregarded the jurisdictional limits applicable to county courts at law in Bexar County, in a way that cannot be cured by ordinary appellate review, mandamus relief will be granted.

Once an adverse party has moved for relief under the "intentional disregard" provision, the nonmovant must show that he did not intentionally disregard proper jurisdiction when filing the case. As it is the nonmovant who has this information, he should bear the burden of producing it. Section 16.064's intent standard is similar to that required for setting aside a default judgment, and a mistake of law may be a sufficient excuse. Moreover, section 16.064 was drafted precisely because "capable lawyers" often make "good faith" mistakes about the jurisdiction of Texas courts. But while the tolling statute protects plaintiffs who mistakenly file suit in a forum that lacks jurisdiction, it does not apply to a strategic decision to seek relief from such a court—which is what happened here. Because Brite unquestionably sought damages in excess of the county court at law's jurisdiction, it matters not that he subjectively anticipated a verdict within the jurisdictional limits. For that reason, limitations was not tolled. His second suit, filed long after the expiration of the two-year statute, is therefore barred.

4. *Texas Department of Transportation, Petitioner v. Ramirez,* 74 S.W.3d 864 (Tex. 2002): In considering jurisdictional pleas, an appellate court reviews the pleadings and any evidence relevant to the jurisdictional issue, construing the pleadings liberally in the plaintiff's favor. To sue the State for a tort, the pleadings must state a claim under the Tort Claims Act. Mere reference to the Act is not enough. A plaintiff has a right to amend its pleadings to attempt to cure pleading defects, if he has not alleged enough jurisdictional facts. However, if the pleadings show a state of facts under which it is impossible to amend the pleadings to invoke jurisdiction, the trial court should dismiss the plaintiff's suit.

5. *FKM Partnership, Ltd v. Board of Regents of University of Houston System*, 255 S.W.3d 619 (2008): The trial court is allowed to conduct a hearing on a plea to the jurisdiction or motion to dismiss for lack of jurisdiction in a manner similar to how it hears a summary judgment motion, and may consider affidavits and other summary judgment-type evidence. If the evidence presents a fact question on the jurisdictional issue, the motion should be denied.

ATTORNEY GENERAL
v.
SAILER
871 S.W.2d 257
(Tex. App.—Houston [14th Dist.] 1994, writ denied)

Rhonda Amkraut Pressley, Tod L. Adamson, Austin, for appellant.
Bruce A. Baughman, Baytown, for appellee.

SEARS, JUSTICE.

The Attorney General appeals an order dismissing a motion to modify child support with prejudice. The Attorney General claims that the trial court lacked subject matter jurisdiction and could not dismiss the case with prejudice. We agree, reform the order to delete the words "with prejudice," and affirm the order as reformed.

Joyce Barrett and David Sailer were divorced in Iowa on November 4, 1982. Ms. Barrett was awarded custody of the couples' two minor children, and Mr. Sailer was ordered to pay $140.00 a month per child in child support. Subsequently, all the parties moved to Texas.

On January 14, 1991, Ms. Barrett instituted an action in the 308th District Court in Harris County, Texas, to enforce the Iowa decree and obtain past due child support. The Texas court granted judgment to Ms. Barrett for $15,640.00 in past due child support, found Mr. Sailer in contempt for failure to pay his child support, and sentenced him to three years in jail and a $500.00 fine. The court suspended the commitment order, on the condition that Mr. Sailer comply with a schedule to pay off the amount in arrears and stay current with his support obligations.

Ms. Barrett then applied to the Attorney General for child support services. On August 5, 1991, the 308th district court signed an order assigning Ms. Barrett's right to child support to the Attorney General. The Attorney General filed a motion to modify support in the 308th District Court. That motion was dismissed on jurisdictional grounds. On May 13, 1992, the Attorney General filed a second, identical motion in the 308th court to modify support. The motion again erroneously identified the "order to be modified" as an order signed on "November 4, 1982, by order of this Court." The motion identified by date the order signed by an Iowa court, but told the Texas court that it was an order the Texas court had entered. As a result, on August 12, 1992, Appellee again objected to the court's jurisdiction and filed a motion to dismiss the motion to modify support. He argued "there is no support order in the State of Texas to be modified." On September 15, 1992, the trial court dismissed the motion to modify support "with prejudice." In a hearing on a motion for new trial and in their briefs before this court, both parties agree that the trial court lacked subject matter jurisdiction to hear the motion to modify.

If a trial court learns that it lacks jurisdiction to hear a cause, it becomes the duty of the court to dismiss the cause. *General Tel. Co. of the Southwest v. City of Point Comfort*, 553 S.W.2d 808, 811 (Tex. Civ. App.—Corpus Christi 1977, no writ), and *Southwestern Bell Tel. Co. v. City of Kountze*, 543 S.W.2d 871, 873 (Tex. Civ. App.—Beaumont, no writ). In rendering the judgment of dismissal, the trial court must refrain from rendering a judgment on the merits of the suit. *State v. Schless*, 815 S.W.2d 373, 376 (Tex. App.—Austin 1991, original proceeding [leave denied]), and *Berger v. Berger*, 497 S.W.2d 453, 454 (Tex. Civ. App.—El Paso 1973, no writ). "It is well established that a dismissal with prejudice functions as a final determination on the merits." *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991). Therefore, a dismissal for want of jurisdiction with prejudice is error. *Stephanou v. Texas Medical Liab. Ins. Underwriting Ass'n*, 792 S.W.2d 498, 500 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

We recognize that Appellee relies on two cases which indicate that, even if a trial court lacks jurisdiction, a dismissal with prejudice is proper if the appellant has shown that he is not entitled to recovery. This proposition, found in *Zimmerman v. Texaco, Inc*., 409 S.W.2d 607, 614 (Tex. Civ. App.—El Paso 1966), writ ref'd, n.r.e., 413 S.W.2d 387 (Tex. 1967) and *Liland v. Dallas County Appraisal Dist*., 731 S.W.2d 109 (Tex. App.—Dallas 1987, no writ) has never been cited nor followed by any other Texas court. Further, *Zimmerman* and *Liland* are both distinguishable as administrative cases, which turn on the issue of exhaustion of administrative remedies. Finally, this is not a case which "cannot be tried for jurisdictional reasons" and for which the plaintiff "is not entitled to recovery." The Attorney General may simply refile and allege the proper order to be modified, and then the 308th district court may consider the merits of the claim. *See, In re S.A.V*., 837 S.W.2d 80 (Tex. 1992).

We order that the words "with prejudice" be deleted from the trial court's order, and reform the order to be a dismissal without prejudice. The judgment of the trial court is affirmed as reformed.

8. *Jurisdiction over Counterclaims*

Rule 97. Texas Rules of Civil Procedure: Counterclaim and Cross-Claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; provided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the continuation or assertion of the claims of any other party to the transaction or occurrence unless the latter has consented in writing that said judgment shall operate as a bar.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party, so long as the subject matter is within the jurisdiction of the court.

(d) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after filing his pleading may be presented as a counterclaim by amended pleading.

(e) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action again the cross-claimant.

(f) Additional Parties. Persons other than those made parties to the original action may be made parties to a third party action, counterclaim or cross-claim in accordance with the provisions of Rules 38, 39 and 40.

(g) Tort shall not be the subject of set-off or counterclaim against a contractual demand nor a contractual demand against tort unless it arises out of or is incident to or is connected with same.

(h) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule 174, judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

ANDEL
v.
EASTMAN KODAK COMPANY
400 S.W.2d 584
(Tex. Civ. App.—Houston 1966, no writ)

Facts: Ps sued D for negligence (causing the auto accident). D counterclaimed for an amount below the jurisdictional limit of the court. When Ps' motion for continuance was denied, they took a nonsuit.

Issue: Does a trial court retain jurisdiction of a counterclaim, below its jurisdictional amount, when the Ps' claim within its jurisdictional amount is nonsuited?

Held: Yes. Where a court by the plaintiff's pleading obtains jurisdiction over the case, a defendant may assert against the plaintiff a counter-claim in an amount that is below the minimum jurisdiction of the court where the case is filed. Once the court has obtained jurisdiction over the controversy between the parties by the filing of a counter-claim, dismissal of plaintiff's case does not deprive the court of jurisdiction of the counter-claim.

SMITH
v.
CLARY CORPORATION
917 S.W.2d 796
(Tex. 1996)

Anne Gardner and John J. Drake, Fort Worth, for petitioners.

Sloan B. Blair, Fort Worth, Carey Frank Walker and David Lewallen, Arlington, Kevin Norton, Fort Worth, for respondent.

PER CURIAM.

* * *

This issue in this case is whether counterclaims of multiple defendants should be aggregated to determine whether the amount in controversy in a county court at law exceeds that court's maximum statutory jurisdictional limit and divests it of jurisdiction. The court of appeals held that a statute required aggregation. We hold that the legislature enacted TEX. GOV'T CODE section 24.009, the aggregating statute, to allow multiple plaintiffs to aggregate their claims to achieve the minimum jurisdictional amount for a court, not to defeat jurisdiction for multiple defendants each of whose counterclaims is within the jurisdictional limit. Accordingly, the statute does not apply to require that multiple counterclaims be aggregated to determine the amount in controversy for statutory county court jurisdiction. Without hearing argument, the Court reverses the judgment of the court of appeals and remands the cause to that court for further proceedings. *See* TEX. R. APP. P. 170.

Daniel Smith and Michael Smith formed Fairfield Distributors and contracted with Clary Corporation to sell Clary's pallet products. Clary sued the Smiths, individually, and d/b/a Fairfield Distributors in Tarrant County Court at Law Number Three for $19,821.85 balance on an open account. The Smiths and Fairfield counterclaimed against Clary alleging deceptive trade practices, negligent misrepresentation, and tortious interference with business relations.

In their original counterclaims, the Smiths and Fairfield generally alleged damages in excess of the minimum jurisdiction of the Tarrant County Court at Law. Later, the three parties amended their counterclaims to allege damages of $100,000 each, for an aggregate of $300,000. A jury awarded Clary $14,155.57 on its open account claim. However, the jury found for the Smiths and Fairfield on their counterclaims. After deducting the $14,155.57 plus attorney's fees, the court rendered a net judgment for the Smiths and Fairfield for $264,271.61, including pre-judgment interest, statutory penalties, treble damages, attorney's fees and costs. Clary appealed this judgment arguing that the aggregate amount of the counterclaims exceeded the jurisdictional limit of the county court's authority. The court of appeals reversed the judgment and remanded the cause. 886 S.W.2d 570.

County courts at law generally have statutorily prescribed jurisdiction in civil cases where the amount in controversy exceeds $500 but does not exceed $100,000, excluding mandatory damages and penalties, attorney's fees, interest, and costs. TEX. GOV'T CODE ANN. § 25.0003(c) (Vernon Supp. 1995). A counterclaim, whether permissive or compulsory, must be within the court's jurisdiction. 2 ROY W. MCDONALD, TEXAS CIVIL PRACTICE § 9.76 (rev. 1992); *see also Wyatt v. Shaw Plumbing Co*., 760 S.W.2d 245, 247 (Tex. 1988) (counterclaim is compulsory if "it is within the jurisdiction of the court."). A counterclaim is not within the court's jurisdiction when the amount in controversy exceeds the maximum jurisdictional limit of the court. *Kitchen Designs, Inc. v. Wood*, 584 S.W.2d 305, 307 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); 2 ROY W. MCDONALD, TEXAS CIVIL PRACTICE § 9.77 (rev. 1992); 16 TEX. JUR. 3D *Courts* §70 (1981). Daniel Smith, Michael Smith, and Fairfield individually pleaded $100,000 in damages. Each claim is within the jurisdictional purview of Tarrant County Court at Law Number Three. However, the court of appeals held that the counterclaim amounts should be aggregated under section 24.009 of the Government Code which provides, in relevant part:

> If two or more persons originally and properly join in one suit, the suit for jurisdictional purposes is treated as if one party is suing for the aggregate amount of all their claims added together, excluding interest and costs. This section does not prevent jurisdiction

TEX. GOV'T CODE ANN. § 24.009 (Vernon 1988). The court of appeals concluded that this statute applies to county courts at law through section 25.2222(m) of the Government Code. *See* TEX. GOV'T CODE ANN. § 25.2222(m) (Vernon Supp.1996). We initially assume, without deciding, that the aggregating statute applies to county courts at law. However, we disagree with the court of appeals' conclusion that the aggregating statute applies to the counterclaims the multiple defendants presented in this case. The courts have never applied the aggregating statute to counterclaims of multiple defendants who are properly joined. The legislature enacted the aggregating statute in 1945 to statutorily overrule this Court's holding in *Long v. City of Wichita Falls*, 142 Tex. 202, 176 S.W.2d 936, 940 (1944). *Long* involved two plaintiffs' claims against the same defendant, properly subject to joinder under Rule 40, one of which was below the minimum jurisdictional amount of the trial court. We held the trial court lacked jurisdiction over the smaller claim. The legislature sought to overturn what we quoted as the majority rule prevailing in 1944: "Where several claimants have separate and distinct demands against a defendant or defendants, and join in a single suit to enforce them, they cannot be added together to make up the required jurisdictional amount but each separate claim furnishes the jurisdictional test." *Long*, 176 S.W.2d at 940. Thus, Clary Corporation's reliance on *Long* is misplaced because neither *Long* nor any case cited in *Long* considered aggregation of counterclaims of separate defendants to defeat jurisdiction.

* * *

The courts have not and should not apply aggregation to divest a court of jurisdiction on counterclaims asserted by multiple defendants, whose joinder normally is not voluntary, and who have not chose the forum. *See* TEX. R. CIV. P. 38, 39. Moreover, co-defendants have no control over the number of defendants joined or the amounts of their counterclaims. Permitting aggregation of counterclaims to defeat jurisdiction under such circumstances would encourage races to the courthouse and forum shopping by parties to set arbitrary limits on anticipated claims by adversaries. We reverse the judgment of the court of appeals and remand the cause to that court for further proceedings.

Notes

1. A court must not only have jurisdiction over the amount in controversy, but it must also have subject matter jurisdiction over a counterclaim. *See Camacho v. Samaniego*, 831 S.W.2d 804, 806-807 (Tex.1992).

2. *Moritz v. Byerly*, 185 S.W.2d 589 Tex. Civ. App. 589 (Tex. Civ. App.—Austin 1945, writ refused): ". . . [A] court (here the district court) has jurisdiction of a counterclaim which is in amount below its minimum jurisdiction, the counterclaim not arising out of the same transaction as plaintiff's claim, but being of the general character warranting set off; and being pleaded only by way of set-off, without prayer for affirmative relief.

3. A permissive or compulsory counterclaim may be for an amount within or below the court's minimum jurisdiction, but it cannot be for an amount above the court's maximum jurisdiction. *See* TEX. R. CIV. P. 97(a); *Kitchen Designs, Inc. v. Wood*, 584 S.W.2d 305, 307 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.).

4. An order that severs a compulsory counterclaim from the main suit is an abuse of discretion. *Goins v. League Bank & Trust*, 857 S.W.2d 628, 630 (Tex. App.—Houston [1st Dist.] 1993, no writ) (citing *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co*. 793 S.W.2d 652, 658 (Tex. 1990)).

5. When the counterclaim is for an amount in excess of the jurisdictional limits of the court, the trial court should dismiss the counterclaim. *Kitchen Designs, Inc. v. Wood*, 584 S.W.2d 305 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); 2 MCDONALD'S TEXAS CIVIL PRACTICE, § 7.51.2, p. 293 (1970); 15 TEX. JUR. 2D *Courts*, § 81, p. 520 (1960).

9. *Limits on Jurisdictional Power*

UNIVERSITY OF TEXAS
v.
MORRIS
162 Tex. 60, 344 S.W.2d 426
(1961)

A district court having jurisdiction of the parties and the subject matter may enjoin a party from prosecuting a cause of action in another court when such relief is necessary to prevent a multiplicity of suits, avoid vexatious litigation, or prohibit the use of the judicial processes for purposes of harassment. [This is limited on intra-state litigation by the holding in ***Donovan v. City of Dallas,*** *infra.*]

DONOVAN
v.
CITY OF DALLAS
377 U. S. 408, 84 S.Ct. 1579, 12 L. Ed. 2d 409
(1964)

A state court cannot enjoin a person from prosecuting an action in personam in a district or appellate court of the United States which has jurisdiction both of the parties and of the subject matter.

Congress has authorized federal courts to restrain state-court proceedings in some special circumstances.

However, in cases of in rem or quasi in rem proceedings the state or federal court having custody of the property has exclusive jurisdiction to proceed.

HARRIS COUNTY
v.
SYKES
136 S.W.3d 635
(Tex. 2004)

Kevin D. Jewell, Chamberlain Hrdlicka White Williams & Martin, Casey Todd Wallace and Michael A Stafford, Harris County Atty., Michael R. Hull, Harris County Attorney's Office, Houston, for Petitioner.

Okon J. Usoro, Okon J. Usoro, P.C., Houston, for Respondent.

CHIEF JUSTICE PHILLIPS delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE OWEN, JUSTICE JEFFERSON, JUSTICE SMITH, and JUSTICE WAINWRIGHT joined.

This case raises two issues. First, we address whether an order granting a governmental unit's plea to the jurisdiction should be with or without prejudice when the claimant has failed to state a claim that is cognizable under the Texas Tort Claims Act. Regardless of the answer, we must then decide whether such a dismissal is a judgment for the purposes of section 101.106 of the Texas Tort Claims Act, that would bar a plaintiff from proceeding against governmental agents for claims arising from the same subject matter. *See* TEX. CIV. PRAC. & REM.CODE § 101.106. The court of appeals held that a dismissal pursuant to a plea to the jurisdiction is a dismissal without prejudice, and as such, not a judgment under the Texas Tort Claims Act. 89 S.W.3d 661, 670. We hold that such a dismissal is with prejudice because it fully and finally adjudicates whether the claims that were asserted, or that could have been asserted, come within the Texas Tort Claims Act's waiver of sovereign immunity. We further hold that such a dismissal is a judgment under section 101.106 of the Texas Tort Claims Act. Accordingly, we modify the judgment of the court of appeals to render judgment dismissing the plaintiff's claims with prejudice and render judgment that the plaintiff take nothing.

I

George Sykes and his wife, Faye, brought this suit for injuries Mr. Sykes allegedly sustained in the Harris County jail. While incarcerated there, Mr. Sykes was assigned to a bed next to an inmate who was infected with tuberculosis. The Sykeses claimed that the county was negligent in failing to quarantine the infected inmate and in failing to warn Mr. Sykes of the inmate's infection. Several months after filing suit, Faye Sykes filed a suggestion informing the trial court of her husband's death. At the same time, she filed a motion, on which the trial court apparently never ruled, requesting that Trenard Battle, Mr. Sykes's minor son, be added as a plaintiff and that the estate of George Sykes be substituted in the place of her late husband.

Asserting governmental immunity from suit, Harris County filed a plea to the jurisdiction arguing that the Legislature has not waived immunity from suits like the Sykes's. Sykes responded that immunity was waived by the Texas Tort Claims Act because her husband's injuries arose out of the condition or use of property. TEX. CIV. PRAC. & REM.CODE § 101.021. Specifically, Sykes argued that the words "housed," "room," and "sleeping space" in their pleadings all connote use of the tangible personal or real property that caused Mr. Sykes's injury and eventual death.

By amended petition, Sykes added Carl Borchers, the major of the Harris County jail, as a defendant both individually and in his official capacity. The trial court subsequently granted Harris County's plea to the jurisdiction and dismissed Sykes's claims against Harris County with prejudice. Borchers then moved for summary judgment, urging that the trial court's dismissal of Harris County entitled him to derivative immunity under section 101.106 of the Texas Tort Claims Act. *See id*. § 101.106; *Thomas v. Oldham*, 895 S.W.2d 352, 357 (Tex. 1995). The trial court granted Borchers's motion and signed an order that Sykes take nothing.

Sykes appealed, arguing that the trial court erred in granting the plea to the jurisdiction and dismissing her claims against Harris County because the Texas Tort Claims Act waives immunity when a condition or use of tangible personal property causes injury. *See* TEX. CIV. PRAC. & REM.CODE § 101.021. Sykes also argued that the trial court further erred in granting Borchers's motion for summary judgment because Harris County's dismissal was not a judgment for purposes of section 101.106. *See id*. § 101.106. The court of appeals affirmed the trial court's dismissal of Harris County, holding that Sykes's amended petition did not affirmatively plead facts sufficient to confer jurisdiction on the trial court. 89 S.W.3d at 667. But the court decided that, in granting the plea to the jurisdiction, the trial court could only dismiss the suit without prejudice, which did not qualify as a judgment under section 101.106 of the Texas Tort Claims Act. 89 S.W.3d at 668. Accordingly, the court of appeals reversed Carl Borchers's summary judgment and remanded the case to the trial court. We granted Carl Borchers and Harris County's petition for review.

II

Sovereign immunity from suit defeats a trial court's subject matter jurisdiction unless the state expressly consents to suit. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Governmental immunity operates like sovereign immunity to afford similar protection to subdivisions of the State, including counties, cities, and school districts. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n. 3 (Tex. 2003) (recognizing that sovereign immunity and governmental immunity are distinct concepts although courts often use the terms interchangeably). The Texas Tort Claims Act provides a limited waiver of governmental immunity if certain conditions are met. *See* TEX. CIV. PRAC. & REM.CODE §§ 101.021, 101.025.

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Because governmental immunity from suit defeats a trial court's jurisdiction, it may be raised by such a plea. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004); *Jones*, 8 S.W.3d at 639. Whether a court has subject matter jurisdiction is a legal question. *State ex rel. State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). If the trial court denies the governmental entity's claim of no jurisdiction, whether it has been asserted by a plea to the jurisdiction, a motion for summary judgment, or otherwise, the Legislature has provided that an interlocutory appeal may be brought. *See* TEX. CIV. PRAC. & REM.CODE § 51.014; *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 245 n. 3 (Tex. 2004). However, if the court grants the plea to the jurisdiction, as the trial court did in this case, the plaintiff may take an appeal once that judgment becomes final. See *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 15 (Tex. 2000).

A trial court must grant a plea to the jurisdiction, after providing an appropriate opportunity to amend, when the pleadings do not state a cause of action upon which the trial court has jurisdiction. See *Bybee v. Fireman's Fund Ins. Co*., 160 Tex. 429, 331 S.W.2d 910, 917 (1960) (citing *Lone Star Fin. Corp. v. Davis*, 77 S.W.2d 711, 715 (Tex. App.—Eastland 1934, no writ)). This was such a case. After Harris County filed its plea to the jurisdiction, Sykes amended her petition to state with greater particularity the theory that Harris County waived governmental immunity by placing Mr. Sykes in the same room with, and assigning him a bed near, an inmate infected with tuberculosis. The trial court dismissed Sykes's claims, and the court of appeals agreed that "any effect that the room's walls and Sykes's bed had on Sykes's alleged exposure to tuberculosis is too attenuated to constitute a waiver of immunity under the [Texas Tort Claims Act]." 89 S.W.3d at 667 (citing *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998)).

The court of appeals disagreed with the trial court, however, on whether such a dismissal should be with or without prejudice. In general, a dismissal with prejudice is improper when the plaintiff is capable of remedying the jurisdictional defect. See *Dahl v. State*, 92 S.W.3d 856, 862 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *Thomas v. Skinner*, 54 S.W.3d 845, 847 (Tex. App.—Corpus Christi 2001, pet. denied); *Bell v. State Dep't of Highways & Pub. Transp*., 945 S.W.2d 292, 295 (Tex. App.—Houston [14th Dist.] 1997, writ denied). The court of appeals in this case relied on Bell to hold that Sykes's claims should have been dismissed without prejudice. In so doing, the court ruled contrary to a line of decisions stating that dismissal with prejudice is appropriate when a trial court lacks subject matter jurisdiction because of the sovereign immunity bar. . . . We granted Borchers and Harris County's petition to resolve this conflict.

If a plaintiff has been provided a reasonable opportunity to amend after a governmental entity files its plea to the jurisdiction, and the plaintiff's amended pleading still does not allege facts that would constitute a waiver of immunity, then the trial court should dismiss the plaintiff's action. Such a dismissal is with prejudice because a plaintiff should not be permitted to relitigate jurisdiction once that issue has been finally determined. Before dismissing this case, the trial court allowed Sykes to file an amended petition, after which the court made a final adjudication that the Legislature has not waived governmental immunity under the Texas Tort Claims Act with respect to any claim that Sykes brought against Harris County.

Therefore, Sykes is foreclosed from relitigating whether the Texas Tort Claims Act waives immunity in this case. Accordingly, the court below erred in reversing the dismissal with prejudice, and we modify the court of appeals' judgment to dismiss Sykes's claims against Harris County with prejudice.

III

Next, we address the court of appeals' holding reversing the summary judgment granted by the trial court in favor of Carl Borchers. The Texas Tort Claims Act states: "A judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim." TEX. CIV. PRAC. & REM.CODE § 101.106. The purpose of section 101.106 is to protect employees of a governmental unit from liability when a judgment or settlement has been obtained from the government employer pursuant to a claim under Chapter 101 of the Texas Tort Claims Act. *Thomas v. Oldham*, 895 S.W.2d 352, 357 (Tex. 1995). Section 101.106 applies not only when there has been a judgment against a governmental entity prior to the suit against the employee, but also when the settlement or judgment against the governmental entity occurs at any time before or during the pendency of the action against the employee. *Id*. at 355. The bar applies regardless of whether the judgment is favorable or adverse to the governmental unit. *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998).

This Court has never addressed whether a dismissal on a plea to the jurisdiction is a judgment for purposes of section 101.106 of the Texas Tort Claims Act. Several courts of appeals, however, have considered this issue. In *Brown v. Prairie View A & M Univ*., the Fourteenth Court of Appeals held that dismissing Prairie View A & M pursuant to a plea to the jurisdiction was not a judgment that triggered the bar of the Texas Tort Claims Act. 630 S.W.2d 405, 408 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). Since *Brown*, however, that court, as well as two other courts of appeals, have held that a dismissal pursuant to a plea to the jurisdiction is a judgment for purposes of section 101.106 of the Texas Tort Claims Act. . . .

Sykes argues that a granted plea to the jurisdiction does not qualify as a judgment because it does not dispose of the claims' merits. As we have already held, however, a dismissal constitutes a final determination on the merits of the matter actually decided. *See Ritchey v. Vasquez*, 986 S.W.2d 611, 612 (Tex. 1999) (per curi-

am); *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991) (per curiam). In this case, there is a final adjudication that the Legislature has not waived Harris County's immunity on the facts of this case. Since the trial court properly dismissed Sykes's claims against Harris County with prejudice, Carl Borchers is entitled to derivative immunity under section 101.106 of the Texas Tort Claims Act.

The court of appeals erred in holding that the claims against Harris County should be dismissed without prejudice and that such a dismissal is not a judgment under section 101.106 of the Texas Tort Claims Act. Accordingly, we modify the judgment of the court of appeals and render judgment that the plaintiff's suit is dismissed with prejudice. We also reverse the portion of the court of appeals' judgment reversing Carl Borchers's summary judgment and render judgment that the plaintiff take nothing.

JUSTICE BRISTER, joined by JUSTICE O'NEILL, concurring (omitted).

JUSTICE SCHNEIDER did not participate in the decision.