

CHAPTER 12. SETTINGS & TRIAL

A. Pretrial Conference

Read Rule 166.

KOSLOW'S
v.
MACKIE
796 S.W.2d 700
(Tex. 1990)

RAY, JUSTICE.

This is a suit on a sworn account. The trial court rendered judgment by default against defendants for their failure to participate in the preparation of a joint status report as ordered by the court and their failure to appear and show cause at the subsequent disposition hearing for their non-participation. The court of appeals reversed and rendered, holding the trial court had no authority to strike defendants' pleadings and render judgment by default and abused its discretion by its order. 774 S.W.2d 741. We hold that the trial court had authority under the rules of civil procedure to make its pretrial orders and to sanction disobedience by striking pleadings and rendering default judgment. Since defendants failed to show lack of notice or other circumstances making the ruling unjust, we further hold the trial court's order was not an abuse of discretion. We reverse the judgment of the court of appeals and affirm the judgment of the trial court.

Uncontested verified business records and admissions in defendants' pleadings establish the basic facts. Thomas S. Mackie and wife Patsy B. Mackie contracted to purchase a Russian lynx coat from Koslow's. The purchase was first structured as a "layaway" transaction, with the Mackies having put \$5,000 down. When the Mackies failed to pay the balance of the purchase price, Koslow's wrote the Mackies demanding payment because the "layaway" period had expired. The Mackies then made another payment and the transaction was changed to a credit purchase. Koslow's delivered the fur coat to the Mackies, but they did not make the additional payments, despite repeated requests.

Koslow's filed suit against the Mackies, primarily alleging a suit on a sworn account, for the unpaid portion (over \$47,000) of the purchase price. The Mackies filed a pro se answer setting forth certain defenses, including principally that Koslow's had agreed the sale included a matching fur hat with personal monograms at no additional charge and that consideration had failed in whole or in part because of Koslow's breach.

By letter dated March 4, 1988, addressed to counsel for Koslow's and the Mackies, the trial judge informed the parties of certain procedures he required in his court. The form letter contained the salutation "Dear Counsel" and stated: "Prior to this case being set for trial . . . , I am requesting you to meet to discuss the status of this case and submit to me a joint status report on or before April 15, 1988." The letter stated what should be included in the status report, including the nature of the claim and the defenses; the discovery contemplated; whether a jury would be requested; and whether settlement negotiations had occurred. The letter then stated: "Refusal to participate in the status conference or failure to file timely the joint status report will cause this case to be set for disposition hearing, at which time cause will have to be shown why dismissal, default, or other sanctions should not be imposed."

Counsel for Koslow's filed his proposed status report with the judge with a cover letter dated April 13, 1988, stating that he had attempted to contact the Mackies by telephone and by letter concerning the joint status report, but had received no response. He sent a copy of the letter certified mail to the Mackies. The letter further reminded the judge of the March 4 letter stating that failure to submit the status report would result in a disposition hearing.

The Mackies did not file a status report and did not respond in any way to either the trial court's letter or the letter copy from Koslow's counsel. On April 18, 1988, the trial judge sent the parties a letter stating that a disposition hearing as described in the prior letter would be held on April 27, 1988. At the disposition hearing on April 27, 1988, neither the Mackies nor anyone on their behalf appeared. At that hearing the judge signed an order striking the pleadings of the defendants. The same day the judge signed a default judgment against the Mackies granting the relief requested in Koslow's sworn pleadings.

* * *

[The court recounts the evidence from the Mackies and opposing counsel about the Mackies' attempts to comply or refusal to comply with the court's pretrial order.]

The court of appeals concluded that the trial court did not have authority under rule 166 to order the parties to confer and submit a joint pretrial status report since that rule states "the court may in its discretion direct the attorneys for the parties and the parties or their duly authorized agents *to appear before it* for a conference." TEX. R. CIV. P. 166 (emphasis added). The court further reasoned that since rule 166 did not apply, the sanctions of rule 215 did not apply. The court of appeals further examined the local rules applying to pretrial conferences, Dallas Civil District Court Rules 1.11 and 1.12. The court concluded that since striking pleadings and rendering default judgment were not among the enumerated sanctions, the local rules did not authorize the trial court's actions.

The court of appeals erred in so narrowly confining the meaning of an appearance under rule 166. Rule 166 must be read in conjunction with rule 7 of the Rules of Judicial Administration for the construction of the terms "appear before it" or "appearance." Rule 7 of our administrative rules in relevant part provides:

A district or statutory county court judge shall:

(6) to the extent consistent with safeguarding the rights of litigants to the just processing of their causes, utilize methods to expedite the disposition of cases on the docket of the court, including

(b) the use of telephone *or mail in lieu of personal appearances* by attorneys for motion hearings, *pretrial conferences*, scheduling and the setting of trial dates; . . .

TEX. R. JUDICIAL ADMIN. 7 subd. a(6)(b) (emphasis added).

This rule of judicial administration expressly approves the use of a mail appearance instead of a personal appearance for pretrial conferences. We find nothing in rule 166 that is repugnant to or inconsistent with the administrative rule. We hold that the power to require the parties to "appear before it" in rule 166 includes the express power to order appearance by written report filed by mail.

This express power obviously includes the power to order the parties through their attorneys (or through themselves if appearing pro se) to confer to narrow the issues for the written pretrial conference report. Rule 166(g) further provides that the court's pretrial directive may require the parties to address "Such other matters as may aid in the disposition of the action." Without the power to require appropriate action, the pretrial conference rule would be meaningless. Specifying the sanc-

tions that may be imposed is appropriate to “aid in the disposition of the action” to compel the parties to obey the pretrial directive. We hold, therefore, that the trial court had power implicit under rule 166 to provide in his pretrial order that the refusal to participate in the status conference or the failure to file a timely joint status report would result in the cause’s being “set for disposition hearing, at which time cause will have to be shown why *dismissal, default, or other sanctions* should not be imposed.” (Emphasis added.)

* * *

Notes & Questions

1. *Practical difficulty.* In practice, the standing order that counsel meet and agree and submit joint reports or proposed pretrial orders can become a nightmare. What if your opponent will not return your calls? Will not agree to a meeting date? A desperate but sometimes effective solution is for counsel to document and outline failed attempts to set a meeting and file a unilaterally prepared proposed order.
2. *Notice.* In *Koslow’s*, the defendants had notice that their failure to appear at the pretrial hearing might subject them to sanctions. In cases after *Koslow’s*, dismissals or default judgments rendered for failure to appear have been reversed because the party had no notice that the case could be disposed of in the pretrial hearing.¹ Thus, a default judgment or dismissal rendered for failure to appear at the hearing will be valid only if the order setting the hearing states that parties may be subject to sanctions for failure to appear, or if the motions set to be heard at the hearing include a motion for dismissal or default or motion for sanctions. Also, today the death penalty sanction of dismissal or default will be judged under the standards of *TransAmerican v. Powell*.²
3. *Pretrial orders and discovery.* Rule 166(c) allows trial courts to order a discovery schedule as part of a pretrial order. However, it is important to remember that Rule 190 also imposes a discovery schedule in all cases, and Rule 190.4 allows the court to impose a discovery control plan by order that includes many items that are normally part of a pretrial order (e.g. trial date, deadlines for joining parties and amending pleadings). Together, Rules 166 and 190 give the trial judges substantial discretion in controlling discovery schedules and limiting discovery in civil cases.
4. *Amendment surprise.* Rule 63, unlike the Federal Rules, makes amendment to pleadings a matter of right within seven days of the trial date, if filed at a time not to operate as a surprise. The court’s response to surprise is often the offer of a delayed trial, usually an unsatisfactory alternative for plaintiffs. Does Rule 166 offer help in this respect? Note that rule 166(d) allows the court to determine what amendments to pleadings will be allowed and the deadlines for filing them.
5. *Texas use of pretrial conference.* Compared to their federal counterparts, Texas courts traditionally have made little use of the pretrial conference.

¹ See *Murphree v. Ziegelmaier*, 937 S.W.2d 493 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Masterson v. Cox*, 886 S.W.2d 436, 439 (Tex. App.—Houston [1st Dist.] 1994, no writ).

² 811 S.W.2d 913 (Tex. 1991).

B. The Jury Demand

Read Rules 216-220, Gov't Code § 51.604.

HALSELL
v.
DEHOYOS
810 S.W.2d 371
(Tex. 1991)

PER CURIAM.

In this cause, we consider whether the continuance of a trial setting affects the timeliness of a jury request. The court of appeals held that it does not, and therefore upheld the trial court's denial of Petitioner's jury request. We disagree, and therefore reverse.

Esther and George Dehoyos brought this suit against Jim B. Halsell for wrongful eviction and conversion. On the Dehoyoses' motion, the trial court set the case on the non-jury docket for final trial on the merits on September 8, 1989. Halsell filed a jury request, and paid the proper fee, on August 15, 1989.

The trial court called the case as scheduled on September 8, 1989. Thereafter, by order of September 14, 1989, the court struck Halsell's request for a jury trial on the ground that it was not timely filed. By the same order, however, the court also reset the case on the non-jury docket for final trial on the merits on October 13, 1989.

Under our rules, a request for a jury trial must be filed "a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance." TEX. R. CIV. P. 216. A request in advance of the thirty-day deadline is presumed to have been made a reasonable time before trial. The adverse party may rebut that presumption by showing that the granting of a jury trial would operate to injure the adverse party, disrupt the court's docket, or impede the ordinary handling of the court's business.

At the time the trial court struck Halsell's request for a jury trial, the request was timely as to the October 13, 1989, trial setting. The record contains no indication that the granting of the jury trial would have injured the Dehoyoses or caused undue disruption to the trial court. Thus, the untimely jury demand became timely when the trial court reset the case for October 13. The trial court therefore erred in denying Halsell's request for a jury trial.

A refusal to grant a jury trial is harmless error only if the record shows that no material issues of fact exist and an instructed verdict would have been justified. Here, the record reflects the existence of several material fact issues: chiefly, whether the Dehoyoses abandoned their apartment, and the extent of the Dehoyoses' damages.

We conclude that the trial court's refusal to grant a jury trial amounted to harmful error. We therefore grant Petitioner's application for writ of error and pursuant to Texas Rule of Appellate Procedure 170, without hearing oral argument, a majority of the court reverses the judgment of the court of appeals and remands this cause to the trial court for a jury trial.

CORNYN, JUSTICE, not sitting.

Notes & Questions

1. *Broad right to jury trial.* For a historical analysis of the constitutional basis for the right to a jury trial, read *Texas v. Credit Bureau of Laredo, Inc.*¹ The Texas Constitution contains two provisions regarding the right to a jury trial: the first in the Bill of Rights (Article I, Section 15) and the second in the Judiciary Article (Article V, Section 10). The Judiciary Article provision extends the right to a jury to “trial of all causes.” Thus, the right to a jury in Texas is extremely broad, covering suits in equity as well as law. Only certain proceedings, where there is “some special reason that a jury has been held unsuitable,” do not carry the right to a jury trial. These include civil contempt proceedings, election contests, habeas corpus proceedings for the custody of minor children, suit for removal of a sheriff, and appeals in administrative proceedings.²
2. *Advisory juries.* When a jury is advisory only, as in certain family law cases, the trial court’s refusal to empanel a jury is not reversible error.³
3. *Jury fee and jury demand.* Rule 216 requires a jury demand within 30 days of trial, and payment of the fee at the same time “unless otherwise provided by law.” Section 51.604 of the Government Code has a different and higher fee than the rule, and specifically says that this amount includes the amount set out in Rule 216. Thus, the statutory fee applies. The statute also says that the fee needs to be paid 10 days before trial.
4. *Waiver.* The failure to timely pay the fee and make the demand waives the right to jury trial.⁴ The failure to appear at trial also waives the right to a jury even though the fee has been paid and the demand made.⁵ A party’s waiver of a jury in the first trial does not prevent it from timely demanding a jury if the case is remanded for a second trial.⁶
5. *Jury fee benefits.* Rule 220 provides that a party who has paid the jury fee (and thus placed the case on the jury docket) cannot take the case off the jury docket over the objection of other parties (“parties adversely interested”). Thus, Plaintiff’s jury demand and fee protects the right of all parties to a jury trial.
6. *Practical note.* Most local rules and practices allow the jury fee to be paid at the time plaintiff’s first pleading (usually Plaintiff’s Original Petition) is filed. A common practice is to make the jury demand the last paragraph in the first pleading filed and to pay all required fees—including the jury fee—at the time of filing, forestalling the possibility that these actions will be overlooked later.
7. *Contractual jury waivers.* With increasing frequency, businesses seem not to trust the fairness of the judicial system. Some of them insist that those they do business with agree in advance that any disputes will be decided by arbitration. Others insist on contractual provisions that give up the right to a jury trial and provide that any disputes that go to court will be tried without a

¹ 530 S.W.2d 288 (Tex. 1975).

² *Id.*

³ *Lenz v. Lenz*, 79 S.W.3d 10 (Tex. 2002); *Martin v. Martin*, 776 S.W.2d 572, 575 (Tex. 1989). See Family Code § 105.002(c) and (d).

⁴ See *Halsell*, 810 S.W.2d 371, above.

⁵ See *Chandler v. Chandler*, 536 S.W.2d 260, 262 (Tex. Civ. App.—Corpus Christi 1976, writ dismissed).

⁶ See *Harding v. Harding*, 485 S.W.2d 297, 299 (Tex. Civ. App.—San Antonio 1972, no writ).

jury. The Texas Supreme Court has upheld such agreements, rejecting the argument that the agreement violated constitutional guarantees.⁷ The court added:

[I]f parties are willing to agree to a non-jury trial we think it preferable to enforce that agreement rather than leave them with arbitration as their only enforceable option. By agreeing to arbitration, parties waive not only their right to trial by jury, but their right to appeal, whereas by agreeing to waive only the former right, they take advantage of the reduced expense and delay of a bench trial, avoid the expense of arbitration, and retain their rights to appeal. The parties obtain dispute resolution of their own choosing in a manner already afforded to litigants in their courts. Their rights, and the orderly development of the law, are further protected by appeal. And even if the option appeals only to a few, some of the tide away from the civil justice system to alternate dispute resolution is stemmed.⁸

GENERAL MOTORS CORP.

v.

GAYLE

951 S.W.2d 469

(Tex. 1997)

PHILLIPS, CHIEF JUSTICE.

In this original mandamus proceeding, we must first decide whether the trial court abused its discretion by compelling relator to designate in advance whether its crash testing was to be used for evidentiary purposes or solely for consulting purposes, and by ordering that the opposing party be allowed to attend those tests designated as evidentiary. Because we conclude that the trial court's order invades the consulting-expert privilege, and that relator lacks an adequate remedy by appeal, we conditionally grant mandamus relief compelling the trial court to vacate its crash-test order. We must also determine whether the trial court abused its discretion by denying a continuance which would have rendered relator's jury fee timely. Because we conclude that the trial court also abused its discretion in this regard, we conditionally grant mandamus relief compelling the trial court to place this case on its jury docket.

I.

Manuel Delarosa was severely injured in 1988 when his General Motors pickup truck struck another car driven by Christopher Broussard. Delarosa's wife, a passenger in the pickup, suffered relatively minor injuries.

The Delarosas sued Broussard and General Motors in September 1990 alleging, among other things, that General Motors defectively designed the seat belts in Delarosa's pickup truck. In September 1995, after several continued trial settings, the trial court set the case for trial on Janu-

⁷ *In re Prudential Ins. Co.*, 148 S.W.3d 124 (Tex. 2004). *See also In re General Electric Capital Corp.*, 203 S.W.3d 314 (Tex. 2006)(finding that GE did not waive contractual right to non-jury trial by not objecting to first two jury trial settings).

⁸ *Id.*

ary 3, 1996, on the court's "try or dismiss" docket. The notice sent to the parties did not specify whether the January 3 trial was to be to a jury or to the court.

When General Motors appeared on January 3, 1996, it discovered for the first time that no party had ever paid a jury fee, so that the case was on the nonjury docket. At the docket call, the court informed the parties that it intended to try the case without a jury beginning two days later. General Motors immediately paid the jury fee and then filed an "Objection to Placement of Case on Non-Jury Docket." Although General Motors had not paid the jury fee thirty days in advance of trial as required by Texas Rule of Civil Procedure 216(a), it argued that it had been led to believe that either the Delarosas or Broussard had paid a jury fee and that the case was on the jury docket. General Motors relied on the following circumstances: 1) the parties and the court had earlier discussed the logistics of trying the case to a jury; 2) Broussard, in his original answer, asked that all matters "be properly decided by this Honorable Court and Jury;" 3) the case had been preferentially set for July 12, 1993, which according to the trial court's schedule was a civil jury week; and 4) an October 1992 letter from the Delarosas' attorney to the trial court referred to the "issues to be presented to the Court and jury." Even the trial judge, in considering General Motors' arguments, stated that he "didn't realize this was a nonjury case until right before the nonjury docket."

General Motors also moved to continue the January 5 trial, arguing that the case was not ready because of pending discovery issues. At that time, both the Delarosas and General Motors had discovery matters pending before the court. In particular, General Motors argued that it had not conducted critical "crash tests" because the trial court had not yet ruled on the Delarosas' motion to attend those tests. Finally, General Motors argued that a continuance was necessary to allow its jury fee to become timely, thereby preserving its right to a jury trial. Despite their own outstanding document discovery requests, the Delarosas opposed the continuance, announcing that they were ready to proceed to trial before the court.

The trial court overruled General Motors' objection to nonjury trial and its motion for continuance at a January 5 pretrial conference. Recognizing that "this case still has some discovery that needs to be done . . .," however, the trial court decided only to hear opening statements that day weeks before hearing testimony. The court scheduled hearings during the interim period on both sides' outstanding discovery matters, recognizing that the crash tests would have to be performed at some future date after trial recommenced. Finally, the court informed the parties that they could expect a piecemeal trial, interlaced with the completion of discovery:

I will tell all sides also that I don't intend necessarily to commit to try this case on a continuous day-by-day basis. I may recess it for two or three weeks, hear a couple of days of testimony, and come back in a week or so. It may be that certain experts, if I allow late designations, may need to be deposed. You will have this trial finished before the spring is over and we will wrap this thing up one way or another as far as trial goes.

After hearing opening statements, the court recessed the trial in accordance with its announced plan.

The parties resolved their dispute over the Delarosas' document requests at a court hearing on January 9. After another discovery hearing the next day, the trial court granted the Delarosas' motion to attend General Motors' crash tests, subject to certain conditions.

* * *

General Motors sought mandamus relief in the court of appeals on January 23, 1996, challenging the crash-test order and the trial court's denial of a jury trial. After initially staying the trial court proceedings, the court of appeals denied relief in June 1996, with one justice dissenting.

* * *

III

We next consider whether the trial court abused its discretion in denying General Motors' request for a jury trial. Rule 216 provides:

No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.

TEX. R. CIV. P. 216(a). General Motors filed a written request for a jury trial and tendered the \$30.00 fee on January 3, 1996, the date the case was set for trial. General Motors also moved to continue the trial to allow its jury request to become timely. As noted, the trial court denied the motion for continuance, calling the case for nonjury trial on January 5.

"The granting or denial of a motion for continuance is within the trial court's sound discretion." General Motors argues that the trial court abused its discretion by not granting a continuance for at least thirty days, which would have rendered General Motors' jury request and payment timely. Under the unique facts of this case, we agree.

The right to jury trial is one of our most precious rights, holding "a sacred place in English and American history." Even where a party does not timely pay the jury fee, courts have held that a trial court should accord the right to jury trial if it can be done without interfering with the court's docket, delaying the trial, or injuring the opposing party.

Even as the trial court was denying General Motors' motion for continuance, it conceded that the case was not ready for trial. Because of the outstanding discovery issues, including resolution of plaintiffs' motion to attend the crash tests, the trial court decided to hear no evidence until January 29, twenty-six days after General Motors paid its jury fee. Even then, the court acknowledged that outstanding discovery issues would probably cause further multiple interruptions to the proceedings. At a discovery hearing on January 10, the court again confirmed that trial would be delayed by ongoing discovery:

I'm going to start this case on the 29th. I'm probably going to hear from two or three or four witnesses, primarily your lay witnesses. I may even hear from your experts. I don't know, but at some point I'm going to shut this thing down for a while to let you guys finish whatever the discovery is that's still outstanding. That may be the crash tests. I don't have a problem with that.

We recognize that occasionally the exigencies of a crowded docket will require a judge to interrupt a bench trial, or even conduct it in segments. But here the trial judge commenced the nonjury trial in the teeth of a demand for a jury trial, timing the proceedings to avoid the requirements of Rule 216(a), with no expectation of reaching the heart of the case for some weeks or months. In light of such preordained delays, the Delarosas could not show that a thirty-day continuance to perfect General Motors' jury trial demand would cause them any injury or delay. In fact, the trial court's seriatim trial schedule seems only a sham to hold General Motors to its mistake in not paying the jury fee without penalizing the other side. Under these particular and unusual circumstances, we hold that the trial court abused its discretion by not granting a continuance to allow General Motors' jury request and fee to become timely.

Because the denial of a jury trial can be reviewed by ordinary appeal, mandamus is generally not available to review such a ruling. Similarly, the denial of a motion for continuance is an incidental trial ruling ordinarily not reviewable by mandamus. In the absence of any other error, we would not grant extraordinary relief merely to revise a trial judge's scheduling order, however perverse. This case, however, presents special circumstances, in that we must remedy the crash-test order by interlocutory mandamus review. Under these special circumstances, the interests of judicial economy dictate that we should also remedy the trial court's denial of the right of jury trial by mandamus.

* * *

For the foregoing reasons, we conditionally grant writ of mandamus compelling the trial court to vacate its January 22, 1996, crash-test order. We further direct the trial court to abort or mistry the nonjury trial commenced in January 1996, and to place the case on its jury docket in accordance with General Motors' written request and payment of jury fee, which are now timely. We are confident that Judge Gayle will act in accordance with this opinion, and the writ of mandamus will issue only if he fails to do so.

Judge Chides Chief Justice for Comment in Case*

Two years after the above opinion was issued, and the case had settled, Judge Gayle wrote a letter to Chief Justice Phillips responding to the Court's criticism of how he handled the case. Seldom does one see the trial judge's perspective on matters such as these. Here are some excerpts from the letter:

This case was over five years old, and I got tired of all the excuses for not going to trial, so I set it (and not for the first time) on my try-or-dismiss docket in January 1996. This is not a sham docket, and every lawyer in this area that comes into my court knows it. Both sides received notice of the January trial setting at least four months in advance. In addition, when this case was given a preferential setting in August 1993 (which was later canceled because the lawyers were not ready), both the plaintiff's and defendant's attorneys were told in my chambers that a jury fee had not been paid.

At the time of trial two-and-one-half years later, General Motors had still not paid the required jury fee under the provisions of Rule 216b, a rule which was promulgated by your court. It was not just untimely paid, it was not paid period when the case was called for trial on Wednesday morning. The trial court did not mislead them, nor did the clerk. The General Motors trial counsel, who had appeared before me numerous times, did not appear for trial, but sent word through a local attorney that the case was not ready, and he had to be "elsewhere." No one knew what "elsewhere" meant.

The plaintiffs were there, as was their attorney who announced ready for trial. I could have started the trial on that day, but instead recessed the case until the following Friday (two days later) to allow General Motors' attorney time to prepare for trial. I advised the plaintiff's attorney and General Motors' local counsel that I would only hear opening

* TEXAS LAWYER, August 16, 1999. Reprinted by permission of TEXAS LAWYER. © 1999, TEXAS LAWYER. All rights reserved.

statements on Friday, and would not start evidence until sometime thereafter. On Friday, General Motors' lawyer (who had by now finally paid the required jury fee) requested a continuance, which I denied. However, I recessed the commencement of evidence until Jan. 29, 1996, to allow General Motors some leeway to prepare its case, designate late certain experts and to set up their crash-tests, since General Motors (at least according to their lawyer) was unprepared for trial—in short, to give General Motors a break to complete their discovery with a subsequent staggered trial schedule to allow the case to be fully developed and tried.

I did not write Rule 216. You did. I did not put the 30-day jury fee requirement in it. You did (and if you will check your history, you changed it from 10 days to 30 days several years ago). Had I granted a jury trial, it would have been a clear violation of Rule 216 and subject to mandamus by the plaintiffs. Had I granted General Motors a 30-day continuance, I would have been justifying their actions in not following Rule 216b. In short, there were no “special circumstances” as you stated on page 16 of the opinion to justify General Motors' failure to follow the law.

C. Settings

Read Rules 245-249 and 3(a).

Rule 245 gives the court power to set a case for trial upon the request of a party or on its own. Rule 245 requires all courts to give parties at least 45 days notice of the first trial setting, but only “reasonable” notice thereafter. Settings can differ greatly from one county to another—in one county a setting may mean that the case can be called anytime during the week, while in another county it may mean that it can be called anytime during the month. And when a case is set for trial, the setting does not mean that the case will be tried. Courts typically set many cases for trial for a particular setting because many of the cases on the docket will be taken off due to settlement or continuance. The practice relating to trial settings varies greatly from county to county, and it is imperative that counsel become familiar with the local rules.

LOPEZ

v.

LOPEZ

757 S.W.2d 721

(Tex. 1988)

PER CURIAM.

The issue of concern in this appeal is whether a defendant, who is not notified of a trial setting and consequently does not appear, must nevertheless set up a meritorious defense in order to obtain a new trial. * * * Because Guadalupe Lopez, the defendant in the present case, did not do this, the court of appeals held that the trial court did not err in overruling his motion for new trial and affirmed the judgment of the trial court. * * *

The judgment in this case arises out of the final distribution of assets of an estate among certain remaining heirs. Some of these heirs, as plaintiffs, claimed that two other heirs, Jesus Lopez, Jr., and Guadalupe Lopez, had profited at the expense of the estate. These plaintiffs prayed that the remaining cash assets of the estate, held in the registry of the court, be distributed with due regard to the benefits previously enjoyed by Jesus and Guadalupe.

Jesus and Guadalupe were initially represented by the same attorney, who filed answers on their behalf. Approximately eighteen months prior to trial, this attorney was permitted to withdraw as Guadalupe's counsel, although he continued in the case as attorney for Jesus. Following the withdrawal of his attorney, Guadalupe was not served with documents generated by the attorneys representing the plaintiff heirs or Jesus. Further, there is nothing in the record to suggest that any attempt was made to notify Guadalupe of the trial setting. Guadalupe apparently did not obtain the services of a new attorney until after the trial.

Although conceding that Guadalupe had no notice of the trial setting, the court of appeals nevertheless held him to the standard set forth in *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939):

A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; provided the motion for new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.

Although in *Craddock* the default judgment was taken because the defendant failed to answer, the same requirements apply to a post-answer default judgment.

Applying the *Craddock* standards to the facts here, the court of appeals found that Guadalupe's failure to appear was not intentional or the result of conscious indifference, because he did not have notice of the trial setting. The court of appeals, however, concluded that Guadalupe's motion for new trial was properly overruled because he did not factually set up a meritorious defense in his motion or produce evidence of a defense at the hearing on the motion.

Because the record here establishes that Guadalupe had no actual or constructive notice of the trial setting, the lower courts erred in requiring him to show that he had a meritorious defense as a condition to granting his motion for new trial. The Supreme Court has recently held that such a requirement, in the absence of notice, violates due process rights under the Fourteenth Amendment to the federal constitution. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988).

The decision of the court of appeals, as it pertains to Guadalupe Lopez, is in conflict with *Peralta v. Heights Medical Center, Inc.* Pursuant to TEX. R. APP. P. 133(b), we grant Guadalupe's application for writ of error and, without hearing oral argument, a majority of the court reverses the judgment of the court of appeals and remands the cause to the trial court for new trial.

* * *

***LBL Oil Company v. International Power Services, Inc.*, 777 S.W.3d 390 (Tex. 1989) (per curiam):**

[The defendant alleges] among other matters that he had been denied due process by the failure to serve notice of the default motion and hearing on him. Once a defendant has made an appearance in a cause, he is entitled to notice of the trial setting as a matter of due process under the Fourteenth Amendment to the federal constitution, as set forth in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988). See *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988). The record here establishes that Lindley had no actual or constructive notice of the hearing on the motion for default judgment, which effectively was his trial setting since it was dispositive of the case. The decision of the court of appeals affirming the judgment is in conflict with *Peralta* and *Lopez*.

Notes & Questions

1. *Form of notice.* In *Mansfield State Bank v. Cohn*,¹ a letter by an adversary *requesting* a trial setting was held to be sufficient notice of the setting itself.
2. *Notice of trial.* Rule 245 requires a minimum of 45 days first notice of trial setting and a reasonable notice thereafter. Rule 246 requires the clerk to give notice of trial settings upon written request of a non-resident attorney who encloses a return envelope properly addressed and stamped. The failure of such notice is ground for continuance. At one time, various local rules required that parties certify to the completion of all discovery before requesting a trial setting. Note that Rule 245 makes such local rules inoperative. All that a party is required to do in order to obtain a setting is to represent that it reasonably and in good faith expects to be ready for trial by the requested date. It violates rule 245 and the Texas Constitution for the trial court to call a case for trial without notice and dispose of it before the time a party was notified to appear.²
3. *Special settings.* Government Code Sections 23.101 and 23.102 mandate priority settings for temporary injunctions, criminal cases, election contests and actions under the Texas Election Code, appeals from Industrial Accident Board decision (workers' compensation) and claims under the Federal Employees Liability Act and Jones Act. Other priorities are (1) matters in which delay will cause physical or economic harm to the parties or to the public; (2) matters involving constitutional rights; (3) issues of public concern or affecting public welfare. Local rules often provide for "special" or preferential settings of cases on various grounds—including complexity, a great number of expert or out-of-town witnesses, statutory priority, or the fact that the case is being re-tried on remand.
4. *Local rules.* In order to avoid unfairness resulting from idiosyncratic or unpublished local rules, the Texas Supreme Court adopted Rule 3(a), making the Texas Rules of Civil Procedure govern in case of conflicts with local rules and providing for Supreme Court approval of local rules. In instances of unfairness resulting from the operation of local rules or local docket management rules, it

¹ 573 S.W.2d 181 (Tex. 1978).

² See *Rogers v. Texas Commerce Bank-Reagan*, 755 S.W.2d 83 (Tex. 1988)(after giving the parties an 11:00 nonjury trial setting, on the day of trial the court called the case and heard it at 9:30)

is well to remember the dominance of Rule 3(a). Of course, such rules must comport with the due process requirements of the Texas and United States Constitutions.

5. *Docket calls and settings.* Local rules often provide for the “call of the docket,” in which the cases set for trial are called out and the attorneys are asked to announce “ready” or “not ready.” The “not ready” announcement is often followed by a motion for continuance. Sometimes an attorney, having announced “ready,” finds that circumstances require that the announcement be withdrawn. While courts routinely accept such withdrawals, it is within their discretion to refuse to do so.³ Similarly, when a trial court dismisses an action for want of prosecution because the attorney fails to appear for a setting, the attorney’s motion to reinstate (usually containing excuses for the failure) is within the trial court’s discretion to grant or deny.⁴

6. *Post-answer and no-answer default judgments.* Notice that the trial courts in *Lopez* and *LBL Oil* had granted default judgments against parties who had filed answers. The Supreme Court made clear that parties who have answered and entered an appearance are entitled to notice of any trial settings. That is, a court may grant a *post-answer* default judgment against a defendant who fails to appear for trial only if the defendant has notice of the trial setting. But different rules apply to defendants who have been served and have not filed an answer. Courts may grant *no-answer* default judgments at any time after appearance day without giving a new notice to the defendant.

D. Continuance

Read Rules 251-254.

1. Continuances Generally

FORMAN

v.

FINA OIL AND CHEMICAL CO.

858 S.W.2d 498

(Tex. App.—Eastland),

rev’d on other grounds, 858 S.W.2d 373 (Tex. 1993)

MCCLLOUD, CHIEF JUSTICE.

Clarence Forman sued Fina Oil and Chemical Company alleging that, while working for a third-party salvage company at Fina’s refinery, he received an electrical shock while he was working on a breaker box and that the shock was a result of Fina’s negligence. The jury found that plaintiff did not receive an electrical shock while working at the refinery. Plaintiff appeals a take-nothing judgment. We affirm.

³ See *South Texas Lumber Stores, Inc. v. Cain*, 416 S.W.2d 530, 532 (Tex. Civ. App.—Austin 1967, no writ).

⁴ See *Melton v. Ryander*, 727 S.W.2d 299 (Tex. App.—Dallas, 1987, writ ref’d n.r.e.)

Plaintiff contends in his first point of error that the trial court erred in denying his first motion for continuance so that plaintiff could take the deposition of Dr. Charles R. Baxter.

Plaintiff filed this suit on April 24, 1990. On December 16, 1991, the trial court notified both parties that the case was set for trial for February 3, 1992. The court advised the parties to appear for docket call on January 13, 1992. On January 3, 1992, Fina supplemented its answers to interrogatories by designating Dr. Baxter as an additional expert. On January 6, 1992, Fina filed a motion for continuance to postpone the February 3, 1992, trial setting. In its motion, Fina urged that additional discovery was needed and that Fina's counsel had a prior conflicting setting in another court. Plaintiff opposed Fina's motion for continuance. On January 13, 1992, the trial court overruled Fina's motion for continuance, and plaintiff announced ready for trial.

By agreement of the parties, Dr. Baxter examined plaintiff on January 14, 1992. Counsel for both parties agreed that a report of Dr. Baxter's findings would be delivered to plaintiff on January 23, 1992. Fina, however, "undesignated" Dr. Baxter as an expert in a letter sent to plaintiff's counsel on January 21, 1992. Plaintiff obtained a report directly from Dr. Baxter on January 24, 1992.

Some of the information contained in Dr. Baxter's report was beneficial to plaintiff. Plaintiff filed a motion for continuance on January 28, 1992, in order to depose Dr. Baxter. The trial court overruled this motion on February 3, 1992, and the parties went to trial.

The granting or denial of a motion for continuance is within the trial court's sound discretion. The exercise of such discretion will not be disturbed on appeal unless the record discloses a clear abuse of discretion. A trial court may be reversed for abusing its discretion only when the court of appeals finds the court acted in an unreasonable or arbitrary manner. The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles. The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred.

Plaintiff's motion for continuance was made on the ground of want of testimony. TEX. R. CIV. P. 252 states the requirements for requesting a continuance on the ground of want of testimony. Plaintiff's motion for continuance was in substantial compliance with Rule 252. However, mere compliance with Rule 252 does not guarantee that a continuance will be granted. The court in *Fritsch v. J.M. English Truck Line*, 151 Tex. 168, 246 S.W.2d 856, 858 (1952), stated: "There is nothing in the rules on continuance requiring the granting of a first motion [for continuance] merely because it is in statutory form."

TEX. R. CIV. P. 251 mandates that a continuance shall not be granted except for sufficient cause. The trial court has the duty of deciding whether or not sufficient cause exists when a motion for continuance is filed. The trial court denied plaintiff's motion for continuance on the grounds that the case was filed almost two years prior to the filing of the motion and that plaintiff's counsel announced "ready" in response to Fina's prior motion for continuance.

The absence of a material witness is "sufficient cause" but only if proper diligence has been used to procure the testimony of the witness. Plaintiff knew that he would need sufficient evidence to prove his cause of action when the case was filed. Plaintiff had almost two years to find experts to testify that he had received an electrical shock. The length of time that this case had been pending

supports the argument that plaintiff did not use proper diligence in securing sufficient expert testimony to prove his case.¹

Plaintiff's announcement of ready in response to Fina's motion for continuance is also significant in reviewing the trial court's ruling. Generally, an announcement of ready waives the right to subsequently seek a delay based upon any facts which were known or with proper diligence should have been known at the time. This general rule is subject to the exception of an unforeseeable event arising through no fault of the movant. The announcement of ready by plaintiff was made after Fina designated Dr. Baxter as an expert. Plaintiff's announcement was an indication that he was prepared to try the case without the benefit, if any, of Dr. Baxter's testimony. Dr. Baxter's opinion supporting plaintiff's cause of action is not a sufficient unforeseeable event to invoke the exception to the general rule regarding an announcement of ready.

We hold that the trial court did not abuse its discretion by overruling plaintiff's motion for continuance. The trial court noted that plaintiff "strenuously" objected to Fina's motion for continuance and announced "ready . . . not having any idea at that moment what Dr. Baxter might or might not say about the facts of this case." We cannot say that the trial court acted without reference to any guiding rules or principles. Plaintiff's first point of error is overruled.

* * *

The judgment of the trial court is affirmed.

***Brown v. Gage*, 519 S.W.2d 190 (Tex. Civ. App.—Ft. Worth 1975, no writ):**

It is clear that the defendants did not comply with Rule 252, Texas Rules of Civil Procedure sometimes referred to as statutory grounds for continuance. That rule and the interpretation thereof provides that before a third motion for continuance should be granted, as a matter of right, the affidavit supporting such motion must show: (1) that such testimony is material; (2) showing the materiality thereof; (3) that such movant has used due diligence to procure such testimony; (4) stating such diligence; (5) and the cause of failure, if known; (6) that such testimony cannot be procured from any other source; (7) and if it be for the absence of a witness, movant shall state the name of the witness; (8) the residence of the witness; (9) what he expects to prove by him.

It is only on the first application that it is not necessary to show that the absent testimony cannot be procured from any other source. On all subsequent applications, this must be shown.

Each of the above requirements of Rule 252 must be complied with by the defendants before they can complain of the order of the court in overruling their motion for continuance.

The facts must be alleged and the allegations cannot be made in general terms or by stating conclusions.

¹ Rule 252 sets out the requirements for the contents of a motion for continuance for want of testimony. The rule provides that, on a first application for continuance for want of testimony, it is not necessary to show that the absent testimony cannot be procured from any other source. This portion of the rule does not relieve the movant's burden of showing sufficient cause for the continuance. See Rule 251. A party seeking a continuance in order to obtain expert testimony cannot show due diligence in procuring the expert's testimony if he cannot show that this expert testimony cannot be obtained from another source.

A general statement of the law applicable is found in 13 TEX. JUR. 2D 23, Sec. 108, ‘Continuance,’ which is as follows:

The object of the statute is to prevent frivolous grounds of continuance to delay the trial. If the use of due diligence is not alleged, the application is not statutory, even though the facts stated may show diligence. It is not sufficient merely to aver that diligence has been used; the diligence that has been used must be set out. The diligence ought to be shown specifically; mere conclusions that it was used are insufficient. The application should set out the diligence with sufficient particularity and certainty to enable the court, from the application alone, to judge whether sufficient diligence has been used.

Notes & Questions

1. *First motion for continuance.* *Forman* makes it clear that compliance with Rule 252 does not assure a continuance. Plaintiff’s motion for continuance seems to have been his first one. Should that require special consideration? Attorneys sometimes mistakenly rely on a mythical “custom” requiring courts to grant first motions for continuance. While it is true that courts are generally disinclined to allow repeated continuances, the first motion has no special status except that granted by the rule—that the missing testimony need not be unique. As the Supreme Court has noted,¹ “From the very language of the rule it will be noted that the only difference between a first and a subsequent motion is that the first motion is not required ‘to show that the absent testimony cannot be procured from any other source.’ ”
2. *Uniqueness of testimony.* If the rules do not require that a first motion based on an absent witness show that the testimony cannot be procured elsewhere, how do you explain the holding cited in footnote 1 of *Forman*? Might it rest, in part, on the idea that because expert testimony is not based on first-hand observation it is never unique? That it can always be replaced?
3. *The ready announcement.* Parties are asked for ready announcements at docket calls and again at the commencement of trial. Because of the waiver problem illustrated by *Forman*, docket call responses are sometimes equivocal: “Expect to be ready” or “Ready subject to completing the deposition of Dr. Jones.”²
4. *Charging continuances.* Part of the *Brown* opinion not reproduced above contains this paragraph:

“[D]efendants’ attorney requested by telephone that the case be continued. By agreement of the parties, the defendants were charged with a first continuance and the case was reset . . .”

What does it matter who is “charged with” a continuance? Suppose your opponent needs a continuance. You are ready to go to trial. Will you ever agree to the continuance in this situation? What condition will you impose if you do agree? It makes sense to agree to some continuances, depending on whether the case has been delayed before and how urgently your client needs to get to trial. Why? Because it may be fair play to do so; because you may need such an agreement later, and/or because it is clear under the circumstances that the court will likely grant the continuance anyway.

¹ See *Fritsch v. English Truck Line, Inc.*, 246 S.W.2d 856 (Tex. 1952).

² See *Reyna v. Reyna*, 738 S.W.2d 772 (Tex. App.—Austin 1987, no writ).

Because courts tend to ration the continuances allowed a given side, you want to be sure the agreed continuance is charged to your opponent. One way to do this is to require your opponent to file the motion, which you agree not to oppose.

5. *Agreed continuances.* Historically, Texas courts almost always grant agreed continuances. See Rule 330(d): “[T]he court shall respect written agreements of counsel for postponement and continuance if filed in the case when or before it is called for trial, unless to do so will unreasonably delay or interfere with other business of the court.” This custom may be a convenience to the attorneys, but some courts are now less willing to automatically accept an agreed continuance because it allows dilatory counsel to delay a case indefinitely. Federal judges are not, as a general rule, so accommodating.

6. *Diligence and the practical consequences of procrastination.* Note *Forman’s* emphasis on diligence. The failure to take necessary depositions promptly or to issue subpoenas early may hazard the right to a continuance.³ As the Supreme Court noted, “The fact that Wood did not have an opportunity to review the depositions of his own witnesses or depose the State’s witness is a predicament of his own making. That is a risk Wood took by not diligently pursuing discovery. To reward such conduct with a new trial is manifestly improper. Since Wood did not show a clear abuse of discretion [by the trial court in denying a continuance], it was error for the court of appeals to reverse the trial court.”

What if Witness X, who lives within the trial court’s subpoena range, is critical to your case? You have a subpoena served on him well before the trial date, but you do not take his deposition. He fails to show at trial, and you move for continuance. Your opponent resists, citing your lack of diligence in not taking the witness’s deposition. Can the court deny your continuance on this basis alone? No. See Rule 252 (second paragraph).

7. *Legal conclusions.* Legal conclusions (such as, “we have been diligent”) will not do in the affidavit supporting continuance. The affidavit must set out facts and detail is recommended.

8. *Factual content of affidavits and missing testimony.* Affidavits cannot contain hearsay. What if you need a continuance and must show what you expect to prove by the witness as required by Rule 252, summarized in *Brown*? Doesn’t your affidavit contain hearsay? No. It is not offered for the truth of the testimony; only to show that it exists. See TRCE 801(d).

9. *Religious holy days.* A statute mandates continuances when court proceedings would interfere with the observance of a religious holy day by a party, a juror or an attorney. See § 30.005 and Chapter 23 of the Civil Practice and Remedies Code.

³ See *State v. Wood Oil Distributing, Inc.*, 751 S.W.2d 863 (Tex. 1988).

2. *Absence of Counsel*

Read Rule 253.

VILLEGAS
v.
CARTER
711 S.W.2d 624
(Tex. 1986)

SPEARS, JUSTICE.

This case involves the trial court's discretion to deny a motion for continuance after allowing the attorney to withdraw two days before trial. As a result of the denial, the petitioner Villegas appeared pro se and prosecuted his case unsuccessfully. In an unpublished opinion, the court of appeals affirmed the judgment. We reverse the court of appeals judgment and remand to the trial court for a new trial.

In June, 1982, Jaime Lara Villegas bought a home in El Paso from Wilmot and Alicia Carter. Villegas assumed a first lien and executed a second lien for approximately \$38,000. He defaulted in July 1983, and the Carters accelerated the note. Villegas and the Carters then worked out an agreement, with Villegas executing a new note for \$47,000 that included accrued interest, expenses, and a higher interest rate. In January 1984, the Carters' trustee informed Villegas that he owed \$1,350 in delinquent payments. Villegas paid the Carters \$5,000 on March 2nd to cure the default, pay the attorney's fees, and provide a credit on future payments. On April 9th the Carters' trustee posted the property for foreclosure. On June 5th, the trustee sold the property at public auction back to the Carters.

Villegas filed suit in county court on June 25, 1984, alleging that: (1) the second promissory note was void for usury; (2) the sale was for an inordinately low amount; (3) he had not received notice of the foreclosure sale; and (4) there were other irregularities in the public sale of the property. He was represented by Paula Thomas and Miguel Cervantes. The court set the cause for trial on October 25, 1984. On October 3rd, Thomas moved to withdraw as counsel, and the motion was granted that day. Cervantes moved to withdraw as counsel on October 5th, alleging irreconcilable differences. The court granted his motion to withdraw on October 23rd.

Two days later, Villegas appeared for trial without an attorney and told the court that he wanted time to get an attorney; that he first learned about Cervantes' attempt to withdraw only six days before at his deposition; that Cervantes would not turn over his file and important evidence to him although Cervantes had not presented him with a bill; that he wanted to hire a new attorney, Jose Montez, Jr., but that Montez would not take the case until he could see the file, look over the facts, and determine the fee; and that Montez had called Cervantes to obtain the file but that Cervantes would not return his call.

The court refused Villegas' request for a continuance to obtain an attorney and his papers. The case was then tried to the court. The court denied Villegas' claim and awarded the Carters restitution of their property and a deficiency judgment of \$19,700.

TEX. R. CIV. P. Rule 253 provides:

[A]bsence of counsel will not be good cause for a continuance or postponement of the cause when called for trial, except it be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of judge to be stated on the record.

The granting or denial of a motion for continuance is within the trial court’s sound discretion. . . . The trial court’s action will not be disturbed unless the record discloses a clear abuse of discretion. When the ground for the continuance is the withdrawal of counsel, movants must show that the failure to be represented at trial was not due to their own fault or negligence. . . . Generally, when movants fail to comply with TEX. R. CIV. P. 251’s requirement that the motion for continuance be “supported by affidavit,” we presume that the trial court did not abuse its discretion in denying the motion. . . . It would be unrealistic, however, to apply this presumption to lay movants who without fault have their attorney withdrawn. . . .

The right to counsel is a valuable right; its unwarranted denial is reversible error. . . . Therefore, when a trial court allows an attorney to voluntarily withdraw, it must give the party time to secure new counsel and time for the new counsel to investigate the case and prepare for trial. . . . Before a trial court allows an attorney to withdraw, it should see that the attorney has complied with the Code of Professional Responsibility:

[A] lawyer should not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules.

Supreme Court of Texas, Rules Governing the State Bar of Texas art. XII, § 8 (Code of Professional Responsibility) DR 2-110(A)(2); . . .

In this case, the trial court abused its discretion because the evidence shows that Villegas was not negligent or at fault in causing his attorney’s withdrawal. The court granted Villegas’ attorney’s motion to voluntarily withdraw two days before trial—too short a time for Villegas to find a new attorney and for that new attorney to investigate the case and prepare for trial. In addition, Villegas could not obtain a new attorney or present his case because the former attorney refused to turn over Villegas’ files with his papers and evidence. The attorney did not give Villegas time to employ new counsel or deliver to Villegas the papers and property to which Villegas was entitled. In short, Villegas’ attorney did not take reasonable steps to avoid foreseeable prejudice to the client.

The trial court should either have denied the attorney’s motion to withdraw or granted the party’s motion for continuance; it did neither. Therefore, we reverse the court of appeals judgment and remand for a new trial.

Notes & Questions

1. *Attorney’s conduct.* What would be the vulnerability of Villegas’ attorney if the Supreme Court had upheld the trial court’s refusal of continuance and thus the judgment against Villegas? Note that there are ethical prohibitions against leaving a client in the lurch on the eve of trial.

2. *Support by affidavit.* Note that a party's failure to comply with the provisions of Rule 251 respecting supporting affidavit(s) does not mean that the motion will be denied; only that, if the trial court does deny the motion, the appellate court will presume that the trial court was operating within its zone of discretion.

3. *Absence of counsel.* In *Dancy v. Daggett*,¹ a trial court, acting in violation of local rules, denied a continuance and ignored a federal judge's telephone call advising him that the attorney was required to be in federal court in a case already in progress. Held: abuse of discretion. Note that *Villegas* and *Daggett* are exceptions to the general rule: absence of counsel does not mandate a continuance. See Rule 253 and *Dover Corp. v. Perez*,² holding that there was no abuse in denying continuance when another attorney ably represented the movant at trial.

4. *Due process.* Keep in mind that it is possible for the denial of a continuance to involve due process right to counsel under state law or under the U.S. Constitution. See *State v. Crank*,³ in which the Texas Supreme Court recognizes the constitutional implications with respect to an administrative hearing. It holds against the client-complainant, Dr. Crank, however, who had obtained earlier continuances and delays, and who fired his attorney over "philosophical differences" on the day of the hearing. The court quotes with approval from the U.S. Supreme Court's opinion in *Ungar v. Sarafite*⁴:

"The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party . . . is compelled to defend without counsel Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

5. *Ethics rules on withdrawal.* Rule 1.15(d) of the Texas Rules of Professional Responsibility provides: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation." Rule 10 specifies the procedures that a withdrawing *attorney* should follow. Notice the last paragraph in the *Villegas* opinion, which states what the *court* should have done.

¹ 815 S.W.2d 548 (Tex. 1991).

² 587 S.W.2d 761 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

³ 666 S.W.2d 91 (Tex. 1984).

⁴ 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964).

3. *Legislative Continuances*

Read Rule 254.

***Waites v. Sandock*, 561 S.W.2d 772 (Tex. 1977):**

[A divorced mother filed a motion for contempt to force the child’s father to pay court-ordered child support. The father’s lawyer, a member of the Texas House of Representatives, filed a motion for legislative continuance, seeking postponement of the hearing from January until after May 31, when the Legislature would recess. The trial court granted the continuance without hearing the mother’s evidence of her dire financial straits. The supreme court held that mandatory legislative continuances in such circumstances deny litigants due process of law.]

“Article I, section 13 of the Texas Constitution 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.

This provision prohibits ‘legislative bodies from arbitrarily withdrawing all legal remedies from one having a cause of action well established and well defined in the common law.’ *Lebohm v. City of Galveston*, 154 Tex. 192, 197, 275 S.W.2d 951, 954 (1955). In *Lebohm*, this court went on to say:

(L)egislative action withdrawing common-law remedies for well established common-law causes of action for injuries to one’s ‘lands, goods, person or reputation’ is sustained only when it is reasonable in substituting other remedies, or when it is a reasonable exercise of the police power in the interest of the general welfare. Legislative action of this type is not sustained when it is arbitrary or unreasonable.

154 Tex. at 199, 275 S.W.2d at 955.

“Article 2168a effectively withdraws the common law remedy of litigants who, in emergency situations, seek to enforce court decrees and obtain other relief other than by a temporary restraining order. Although article 2168a [the predecessor to Rule 254] appears on its face merely to postpone pending suits and matters ancillary thereto, in the present case the delay in enforcement caused by the legislative continuance allegedly inflicts harm that is not susceptible to remedy at a later date. The mother here claims that the support payments are critical to her ability to feed and support her children. The trial court, after the expiration of the continuance, may force the father to pay any overdue sums, but these payments will not compensate the child for any injury resulting from the mother’s present inability to care for the child. The legislative basis for withdrawing the mother’s remedy—the presumption that the policy behind article 2168a outweighs a litigant’s right of redress—is arbitrary and unreasonable when, in situations such as this, a party allegedly faces irreparable injury from inaction.”

“The courts of other states also have rejected arguments that legislative continuance statutes are mandatory in situations of emergency or irreparable harm.”

“We agree with the conclusions of these courts insofar as their decisions deal with the constitutionality of mandatory legislative continuances when the non-moving party faces irreparable harm. At the same time we reiterate the limited nature of our holding: a legislative continuance is mandatory except in those cases in which the party opposing the continuance alleges that a substantial existing right will be defeated or abridged by delay. In cases of this type the trial court has a duty to

conduct a hearing on the allegations. If the allegations are shown to be meritorious the court should deny the continuance.

“Accordingly, relator’s petition for writ of mandamus is conditionally granted. We assume that Judge Sondock or her successor⁵ will set aside her order and proceed to trial, including any pretrial hearings or proceedings, to determine the validity of the mother’s allegations. A writ will issue only if the judge of the court of domestic relations fails to do so.

In *In re Ford Motor Company*, 165 S.W.3d 315 (Tex. 2005), the court reaffirmed *Waites v. Sondock*, but held that under the facts of this personal-injury case the trial court did not have the discretion to overrule a legislative continuance. Plaintiff Robin Fuentes sustained serious injuries, which left her a quadriplegic, when a Goodyear tire blew out on her Ford vehicle and it rolled over. The trial court scheduled the case for trial on May 16, 2005. On April 1, Ford filed a motion for legislative continuance, properly supported by an affidavit from a legislator on its litigation team. The trial court overruled the motion. The supreme court issued a conditional writ of mandamus ordering the trial court to grant the continuance.

The court noted that the legislator had sworn to the required facts, and therefore the *statute* gave the court no discretion to deny the motion. Concerning the *due process* exception engrafted onto the statute for litigants who face “irreparable harm from the delay in enforcing existing rights,” the court stressed that in *Waites* the mother had a pre-existing court-ordered right to child support, and a continuance would delay enforcement and make it difficult for her to feed her children. Fuentes argued that if her case were delayed she would exhaust her right to temporary state funding for rehabilitation services; her doctor stated that without the rehabilitation her condition might worsen. But *Waites*, said the court, involved an *existing right* to court-ordered child support, while Fuentes had only a *claim* to have Ford pay her money which she could use to purchase medical benefits. The court pointed out that the legislature has made the judgment that the public interest is served by having legislators in Austin during legislative sessions, and that legislator-lawyers should not have to choose between their duties to their clients and their duties to their constituents. The *Waites* due process exception, said the court, requires a higher showing than Fuentes had made.

⁵ Judge Sondock was appointed to the district court bench after the continuance in question was granted.

E. Motions to Bifurcate

Read Rule 174(b), 320, T.R.A.P. 44.1(b) and 61.2.

ILEY
v.
HUGHES
311 S.W.2d 648
(Tex. 1958)

[Hancock sued Iley for injuries resulting from an assault—Iley shot Hancock with a rifle. Iley defended on grounds of defense of property, specifically to protect his pecans. The jury answered general liability questions favoring the defendant, but was unable to come to a verdict on some of the general damage questions, the malice question, and exemplary damages. Hancock offered to waive exemplary damages if the judge would render an interlocutory judgment on the general liability questions, and empanel a jury to determine damages only. The trial judge (Sarah T. Hughes, who as a federal judge in 1963 administered the presidential oath to LBJ in Dallas) granted the motion and was about to begin the damages trial when Iley sought mandamus.

CALVERT, JUSTICE.

In this proceeding Iley seeks a writ of mandamus directing the respondent District Judge to set aside her order for a separate trial of the damage issue and to declare a mistrial of the case of *Hancock v. Iley*. The respondent, Hancock, appears here by counsel in defense of the action of the District Judge. He asserts that the action of the District Judge is authorized by Rule 174(b), T.R.C.P. All parties agree that the precise question is one of first impression in this state. In deciding it we attach no controlling significance to the fact that the order for a separate trial of the damage issue was entered after a verdict was had on the liability issues. Our conclusion would be the same if the separate trial had been ordered before trial of any issue had been undertaken.

Rule 174(b) reads as follows:

(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues.

There are strong arguments supporting respondents' position, some of which may be noticed.

On its face and by its literal wording the Rule would seem to authorize a separate trial of the damage and liability issues in a personal injury suit. It authorizes a trial court 'in furtherance of convenience or to avoid prejudice' to order a separate trial 'of any separate issue or of any number of . . . issues,' and we have said that the discretion to require severances and separate trials conferred on trial courts by this and other Rules is 'about as broad as language could make it.'

The Rule has been interpreted as conferring authority on trial courts to try separately certain other types of 'issues.' In a suit for damages for wrongful death, the issue of whether the plaintiff was married to the deceased and therefore entitled to maintain the suit was tried separately, apparently

ently without question. In a suit for damages for personal injuries, the Court stated that the trial court had properly tried in limine the question of whether the plaintiff was an independent contractor and thus entitled to a recovery of damages or an employee of the defendant whose only right of recovery was under the Workmen's Compensation Law. In a suit for damages for alienation of affection, the Court specifically approved the action of the trial court in requiring a separate trial in limine of an issue of limitations. In a suit to establish a right to a share of the net profits of a business and for an accounting, the trial court, apparently without challenge, tried separately the issue of the plaintiff's right to share in the profits of the business. In [other cases] the trial court tried the issue of divorce in advance of a trial of the property rights of the parties, but separate trial of like issues was held unauthorized in [another].

* * *

Giving full weight to the foregoing arguments in support of respondents' position, we nevertheless feel that they are overborne by stronger considerations of long standing policy and practice in this state.

Our courts have always frowned upon piecemeal trials, deeming the public interest, the interests of litigants and the administration of justice to be better served by rules of trial which avoid a multiplicity of suits.

By refusing to interpret Rule 174(b) to permit separate trials of liability and damage issues in this type of case that Rule and its interpretation is kept harmonious with our interpretation of Rules 434 and 503 [now T.R.A.P. 44 and 66]. We have held that the broad language of those Rules directing reversal of only that part of a judgment affected by error, 'where the issues are severable,' does not permit of a disassociation on subsequent trial of liability and damage issues through severance and reversal as to only one or the other. . . .

If Rule 174(b) were now interpreted to permit separate trial of liability and damage issues, on what basis could we later deny to a trial court the right to try only the primary negligence issues? Or the contributory negligence issues? Or, more appropriately perhaps, the issue of unavoidable accident, since a finding that an accident was unavoidable would ordinarily relieve the defendant of liability?

Prior to adoption of the Rules of Civil Procedure in 1941 a separate trial of issues as here attempted would not have been countenanced. . . . It could hardly have been contemplated that Rule 174(b) would be interpreted to work such a radical departure from long settled practice.

* * *

Our conclusion is that although the discretion lodged in trial judges by Rule 174(b) in ordering separate trials of 'issues' is indeed broad and realistic, it does not authorize separate trials of liability and damage issues in personal injury litigation.

In spite of the conclusion reached and announced on the question presented by this proceeding, we, nevertheless, decline to grant the writ of mandamus [because there is an adequate remedy by appeal.]

TRANSPORTATION INS. CO.

v.

MORIEL

879 S.W.2d 10

(Tex. 1994)

CORNYN, JUSTICE.

This case requires us to clarify the standards governing the imposition of punitive damages in the context of bad faith insurance litigation. . . . We hold that Juan Moriel did not present legally sufficient evidence of gross negligence. Therefore, Moriel is not entitled to punitive damages. It necessarily follows that the constitutional issues-whether the size of the punitive damages award or the procedures the trial court followed violated Transportation's due process rights-are questions that must await another day. Because the court has not previously addressed punitive damages in the bad faith context, and because this opinion represents a substantial clarification of the gross negligence standard that will apply in all cases, we remand this case for a new trial in the interest of justice.

* * *

We held in *Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988), that evidence of a defendant's net worth is relevant in determining the proper amount of punitive damages, and therefore may be subject to pretrial discovery. This decision aligned Texas with the overwhelming majority of other jurisdictions on this issue. As we noted in *Lunsford*, the amount of punitive damages necessary to punish and deter wrongful conduct depends on the financial strength of the defendant. "That which could be an enormous penalty to one may be but a mere annoyance to another."

However, evidence of a defendant's net worth, which is generally relevant only to the amount of punitive damages, by 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. We therefore conclude that a trial court, if presented with a timely motion, should bifurcate the determination of the amount of punitive damages from the remaining issues. Under this approach, the jury first hears evidence relevant to liability for actual damages, the amount of actual damages, and liability for punitive damages (e.g., gross negligence), and then returns findings on these issues. If the jury answers the punitive damage liability question in the plaintiff's favor, the same jury is then presented evidence relevant only to the amount of punitive damages, and determines the proper amount of punitive damages, considering the totality of the evidence presented at both phases of the trial.

At least thirteen states now require bifurcation of trials in which punitive damages are sought. Ten of these, California, Georgia, Kansas, Missouri, Montana, Nevada, Ohio, Tennessee, Utah, and Wyoming, generally follow the procedure outlined above, in which the amount of punitive damages is bifurcated from the remaining issues. The other states require bifurcation of the entire punitive damage claim, including liability and amount. We believe the former approach is preferable, as some of the evidence relevant to punitive damage liability, such as evidence of gross negligence, will also be relevant to liability for actual damages. Bifurcating only the amount of punitive dam-

ages therefore eliminates the most serious risk of prejudice, while minimizing the confusion and inefficiency that can result from a bifurcated trial.²⁸

The issue in this Court is not whether bifurcation of punitive damage claims is constitutionally required, but whether our system of imposing punitive damages, on the whole, provides adequate procedural safeguards to protect against awards that are grossly excessive. Concluding that the current procedures are not adequate, we hereby adopt the requirement of bifurcated trials in punitive damage cases.

* * *

Notes & Questions

1. *Rationale.* In *Iley*, Judge Calvert uses a slippery-slope justification for the court's resistance to bifurcation. Is there a counterargument? Are damages issues intertwined with liability issues in the same way that primary negligence, comparative negligence and unavoidable accident (a finding that nobody was negligent) are intertwined? A customary argument against bifurcation is that when liability and causation are intertwined—as in, for example, a negligence case—a second jury would have to re-try liability in order to find on causation. How can a jury determine whether the injury was within the foreseeable risk created by D if it does not know what that risk was? In many cases, the second jury must know *why* the first jury found D negligent or it cannot assess causation. Note that this kind of objection to bifurcation does not apply when the same jury hears all segments.
2. *New trials and remands.* Note that *Iley* announces its rule against bifurcation in personal injury cases. The Rules incorporate *Iley* into the procedures for new trials and remands for other cases as well. Rule 320 permits the trial court to grant partial new trials on “clearly separable issues” when that can be done with fairness, but it cannot grant a separate trial on unliquidated damages alone if liability is contested. Rules 44.1, 61.1 and 61.2 of the Texas Rules of Appellate Procedure, contain similar restrictions regarding remands by appeals courts. Note that neither *Iley* nor the rules apply to cases involving liquidated damages. (Note: Liquidated damages is an amount the parties have agreed to in writing. Unliquidated damages must be proven up with evidence.) The Supreme Court reversed the court of appeals remand for trial of damages only in a breach of warranty case (unliquidated damages).¹
3. *Mass torts.* A common approach to mass tort or toxic tort cases (in which thousands of plaintiffs claim injury from the same product or event) is to combine plaintiffs in one trial to determine liability of various defendants, and then hold separate mini-trials of six to eight plaintiffs each in which causation and damages are determined. This approach has been suggested for Texas state courts, but has often been rejected by trial courts. Why? *Iley v. Hughes*.

²⁸ Despite the authority of trial courts to order separate trials under TEX. R. CIV. P. 174(b), we have previously held that liability and damages may not be bifurcated in a personal injury action. *Iley v. Hughes*, 158 Tex. 362, 311 S.W.2d 648, 651 (1958). . . . Although we remain resolute that piecemeal trials as a general rule should be avoided, given the importance of the considerations we have discussed, we conclude that punitive damage cases should be the exception to the rule.

¹ *Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664 (Tex. 1996) (Court of Appeals found that evidence supported jury findings on liability but that evidence of damages was insufficient and remanded only the damages issue).

4. *Motion required.* Note that bifurcation for punitive damages is not automatic. The party seeking it must timely file an appropriate motion.
5. *Statute.* The *Moriel* holding set new standards for punitive damages, and much of the substance of the *Moriel* holding was incorporated into Chapter 41 of the Texas Civil Practices and Remedies Code, effective September, 1995. The right to a bifurcated trial of the punitive damages phase is elaborated in TEX. CIV. PRAC. & REM. CODE § 41.009. The motion to bifurcate must be made before voir dire, and any defendant may request it. One significant departure from *Moriel* is the statute's provision that only a defendant may move for bifurcation.
6. *Not always harmful error.* If the trial court erroneously refuses to bifurcate the punitive damage phase, the error may be harmless. In *Uniroyal Goodrich Tire Co. v. Martinez*,² the Supreme Court held that the error was harmless because the jury was not presented with any evidence of net worth or other prejudicial evidence that would have been admissible only in the second hearing.
7. *Same jury.* *Moriel* and the bifurcation statute both require the punitive damage phase be heard by the same jury that decided liability. The Austin Court of Appeals has held that convening a second jury violates "fundamental constitutional rights to trial by jury and to due process."³ In that case, the plaintiff failed to object to the trial court's dismissal of the jury after the first phase. The Court of Appeals instructed the trial court to vacate its order for the second phase to be tried by a second jury. Where does that leave the plaintiff? Since the amount of punitive damages cannot be tried by a second jury in isolation from the issues of liability and actual damages, must plaintiff choose between accepting the actual damages awarded in the first trial and trying the entire case again to a second jury?
8. *No bifurcation in condemnation cases.* In *Tarrant Regional Water District v. Gragg*,⁴ a landowner sought compensation for the reduction in value that a water project had caused to his property by changing the water-flow patterns. The Supreme Court upheld the trial court's refusal to bifurcate. What if the trial court had ordered bifurcation? Would the trial court's order have been upheld?

The District argues that the trial court abused its discretion by declining to bifurcate the proceedings. According to the District, the trial court should have first conducted a bench trial on the takings issue, and then held a separate trial, if necessary, to allow a jury to assess reasonable compensation.

Texas Rule of Civil Procedure 174(b) allows a trial court to order a separate trial on any issue in the interest of convenience or to avoid prejudice. We review a trial court's ruling on a motion for separate trial for an abuse of discretion. The District complains that it was prejudiced in a number of respects by the trial court's refusal to order separate trials. First, the District asserts that the failure to bifurcate left it confused about several issues, including "whether the court would find the District responsible at all," whether the court would find a temporary or permanent taking which would in turn call for different damage measures, whether a fee or an easement was taken, and how much of the Ranch was affected. The District argues that the trial court's failure to order separate trials was inher-

² 977 S.W.2d 328 (Tex. 1998).

³ *In re Bradle*, 83 S.W. 3d 923, 928 (Tex. App.—Austin 2002, pet. denied).

⁴ 151 S.W.3d 546, 556-57 (Tex. 2004).

ently unfair because it forced the District to present proof of damages while simultaneously contesting liability. We disagree.

In nearly every case a defendant must proceed with some amount of uncertainty of the type the District describes. Defendants typically proceed generally without knowing whether they will be found liable or on what, if any, theory. And it is not at all unusual for a plaintiff to present more than one damage measure during trial. For example, a plaintiff may allege breach of contract and quantum meruit, causes of action with different elements of proof and different damage measures. The District has articulated no reason why admitting damage evidence before liability is determined is any more prejudicial in the condemnation context than in any other.

On the other hand, the record supports the trial court's findings that separate trials would have resulted in considerable and unnecessary evidentiary repetition. For example, the damage questions that were submitted instructed jurors "to consider only the differences in value caused by the construction and operation of Richland-Chamber Reservoir." Whether and to what extent the Ranch was damaged by the reservoir's construction and operation were also issues central to the trial court's taking determination. Accordingly, it is likely that many, if not most, of the same witnesses would have been called to testify in both the liability and compensation trials had the trial court bifurcated the proceedings. As the trial court found, "there were several weeks of common questions of law and of fact involved in the matters that would have been considered in the first phase and the second phase of a bifurcated trial." And, as the court of appeals noted, this case had been pending in the trial court for almost seven years and had been through extensive discovery and numerous pre-trial proceedings by the time it was tried. Under these circumstances, we cannot say that the trial court abused its discretion in refusing to bifurcate the proceedings.

F. The Trial Begins

Read Rules 7-10, 265-266.

1. Order of Proceedings

Rule 265 sets out the order of proceedings. It is a common practice for the trial court to allow a party to call a witness "out of order"—that is, during the opponent's case-in-chief, when the witness's schedule or expert witness' fees make such a concession reasonable. Note also that the defendant may defer his opening statement until after plaintiff has rested. What if co-defendants decide that one will open at the beginning of trial and another will open after plaintiff has rested (thus presenting the defense view of the case at both opportunities)? It did not fly in *Fibreboard Corp. v. Pool*.¹ The trial court ruled that all defendants had to choose the same option and "open" at the same time, and the ruling was held on appeal to be within the trial court's discretion.

In the typical two-party case, the order of proceedings in a jury trial is something like the following:

¹ 813 S.W.2d 658 (Tex. App.—Texarkana 1991, writ denied).

(1) *Announcements.* The case is called for trial, and both parties announce ready. (If either party is not ready, the court considers and rules on that party's motion for continuance.)

(2) *Pretrial motions.* The court considers the motions in limine and makes rulings. Some courts consider at this time any pretrial *Daubert* objections to expert witnesses. Many courts also discuss with the attorneys how long they expect the case to take, how many witnesses they will call, and what issues they will want submitted to the jury.

(3) *Voir Dire.* The bailiff brings a jury panel² into the courtroom. The judge welcomes them and gives them some general instructions. P begins the voir dire process, followed by D. Both parties exercise their peremptory challenges, and the names of the jurors are announced. The jury is sworn and seated, and the judge gives them further instructions.

(4) *Opening statements.* P and D make opening statements, outlining their case for the jury. D has the option, seldom exercised, to wait and make its opening statement after P has rested.

(5) *Plaintiff's case in chief.* P presents witnesses and documentary evidence. D cross-examines each P witness in turn. Eventually P rests. D will sometimes make a motion for directed verdict on all or part of P's case.

(6) *Defendant's case in chief.* D presents witnesses and documentary evidence. P cross-examines each witness.

(7) *Rebuttal.* P may call witnesses to respond to matters brought out in D's case and which could not have been anticipated during P's case in chief. When P concludes her rebuttal, D may introduce evidence in response to matters brought out by P's rebuttal evidence. At some point, both sides rest and close, which means that the evidence phase of the case has concluded.

(8) *Preparation of the charge.* The court will prepare the charge, usually relying substantially on the requests for jury questions and instructions that the parties have previously presented. The parties are given a reasonable time to review the court's charge, and then they may object to any questions or instructions or definitions in the charge, and may officially request their own additions.

(9) *Jury Argument.* P sums up and argues the case to the jury. D follows. P gives rebuttal argument in reply to D's argument.

(10) *Jury deliberations.* The bailiff escorts the jury to the jury room. The jury chooses a presiding juror, discusses the evidence and the charge, and reaches a verdict. Eventually the presiding juror notifies the bailiff that the jury has reached a verdict, the lawyers are notified, and the jury is escorted into the courtroom.

(11) *Receipt of verdict.* The court reads the verdict silently and makes sure that all questions have been answered and that ten or more jurors have signed. The court then reads the answers aloud, accepts the verdict, and thanks and discharges the jury.

(12) *Judgment.* The winning party prepares a judgment based on the jury's answers, which states which party has won and specifies the relief granted (or states that relief is denied).

² The jurors will have been "qualified" earlier by the trial judge (or in multi-judge counties, perhaps by another judge in the same jurisdiction). In other words, the jurors that are brought to the courtroom have already been screened to make sure they meet the statutory qualifications for jury service (e.g. age, residency, literacy), and they have been given an opportunity to claim statutory exemptions from jury service (e.g. students, those responsible for small children, age over 70), and to ask to be rescheduled if they have a serious conflict.

(13) *Post-trial motions*. The losing party may move for judgment n.o.v. or for a new trial.

As you study these chronological steps in a jury trial, ask yourself which of them would be omitted or modified in a nonjury trial.

2. Invoking “The Rule”

Read Rule 267 and TRCE 614.

DRILEX SYSTEMS, INC.

v.

FLORES

1 S.W.3d 112

(Tex. 1999)

ABBOTT, JUSTICE.

* * *

This case concerns the exclusion of an expert witness’s testimony for violating “the Rule”¹ by discussing the case with a corporate representative. * * * Based on our resolution of these issues, we affirm the court of appeals’ judgment, as reformed, and remand this cause to the trial court to render judgment in accordance with this opinion.

I

Jorge Flores was employed as a roughneck/floorhand for Helmerick and Payne, a drilling contractor. Jorge’s hand was severely injured during a well-drilling operation for Amoco Production Company. Jorge, his wife Maria, and their three children Gina, Jose, and Georgette, sued Amoco, Drilex Systems, Inc., MASX Energy Services Group, and MASCO Industries, Inc. for Jorge’s injury.

Before trial, Amoco settled with all of the plaintiffs for a total of \$774,675. The case proceeded to trial against Drilex, MASX, and MASCO (“Drilex”). On the first day of trial, Drilex invoked the Rule and asked that any witnesses present in the courtroom be sworn. The trial court swore in Jorge and Maria Flores and Tom Bailey, Drilex’s corporate representative. The court noted that these individuals were parties, and instructed that “anybody else” who stayed in the courtroom for a considerable time would not be allowed to testify. Although Texas Rule of Civil Procedure 267(d) requires the trial court to instruct witnesses placed under the Rule “that they are not to converse with each other or with any other person about the case other than the attorneys” and that “they are not to read any report of or comment upon the testimony in the case,” TEX. R. CIV. P. 267(d), the trial court did not give such an admonishment at that time. Drilex did not attempt to have the trial court exempt its expert witnesses from the Rule.

¹ See TEX. R. CIV. P. 267(a) (defining “placing witnesses under the rule” as the process of swearing in the witnesses and removing them from the courtroom to some place where they cannot hear the testimony of any other witness); see also TEX. R. EVID. 614.

Plaintiffs then called their first witness, Tom Bailey. During Bailey's testimony, one of Drilex's testifying expert witnesses, Randy Acock, remained present. On the second day of trial, counsel for the Flores family moved to strike Acock as a witness, arguing that Acock had violated the Rule by being present during part of Bailey's testimony. Drilex's counsel argued that Acock was exempt from the Rule because he was an expert. The trial court made no ruling at the time, and Acock left the courtroom.

When Drilex later called Acock to testify, counsel for the Flores family again objected to Acock's testimony on the basis that Acock was present for a portion of Bailey's testimony. After listening to counsel's arguments and discussing the substance of Acock's testimony, the court stated that it would allow Acock to testify. However, the court was then informed that Acock had also discussed the case with Bailey after Bailey had testified. Acock also admitted talking to another expert after hearing Bailey's testimony, but stated that they did not discuss Bailey's testimony. Based on this additional information, the trial court excluded Acock's testimony.

At the conclusion of the trial, the jury returned a verdict finding that Drilex was sixty percent responsible, Amoco was thirty percent responsible, and Jorge Flores was ten percent responsible for causing Jorge's injuries, and awarded a total of \$2,145,000 in damages. After applying a credit for the Flores family's settlement with Amoco, the trial court awarded Jorge \$1,929,048, and ordered that all other plaintiffs take nothing.

Drilex appealed, arguing, among other things, that the trial court improperly excluded Acock's testimony and failed to properly apply the settlement credit. * * *

II

Drilex argues that the trial court abused its discretion by excluding Acock's testimony for violating the Rule, and that this error was harmful because Acock's testimony was necessary to the presentation of its defense. We agree with the court of appeals that the trial court did not abuse its discretion, and in any event, the excluded testimony would have been cumulative.

A

Sequestration minimizes witnesses' tailoring their testimony in response to that of other witnesses and prevents collusion among witnesses testifying for the same side. The expediency of sequestration as a mechanism for preventing and detecting fabrication has been recognized for centuries. English courts incorporated sequestration long ago, and the practice came to the United States as part of our inheritance of the common law. Today, most jurisdictions have expressly provided for witness sequestration by statute or rule.

In Texas, sequestration in civil litigation is governed by Texas Rule of Evidence 614 and Texas Rule of Civil Procedure 267. These rules provide that, at the request of any party,² the witnesses on both sides shall be removed from the courtroom to some place where they cannot hear the testimony delivered by any other witness in the cause. TEX. R. CIV. P. 267(a); TEX. R. EVID. 614. Certain classes of prospective witnesses, however, are exempt from exclusion from the courtroom, including: (1) a party who is a natural person or his or her spouse; (2) an officer or employee of a party that is not a natural person and who is designated as its representative by its attorney; or (3) a person whose presence is shown by a party to be essential to the presentation of the cause. TEX. R. CIV. P. 267(b); TEX. R. EVID. 614.

² The court may also sequester the witnesses on its own motion. TEX. R. EVID. 614.

When the Rule is invoked, all parties should request the court to exempt any prospective witnesses whose presence is essential to the presentation of the cause. The burden rests with the party seeking to exempt an expert witness from the Rule's exclusion requirement to establish that the witness's presence is essential. Witnesses found to be exempt by the trial court are not "placed under the Rule."

Once the Rule is invoked, all nonexempt witnesses must be placed under the Rule and excluded from the courtroom. Before being excluded, these witnesses must be sworn and admonished "that they are not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under the rule." TEX. R. CIV. P. 267(a), (d). Thus, witnesses under the Rule generally may not discuss the case with anyone other than the attorneys in the case.

Witnesses exempt from exclusion under Rule 614 (and Rule 267) need not be sworn or admonished. Texas Rule of Civil Procedure 267(d) states that "[w]itnesses, when placed under Rule 614 of the Texas Rules of Civil Evidence, shall be instructed by the court that they are not to converse with each other or with any other person about the case other than the attorneys." TEX. R. CIV. P. 267(d) (emphasis added). The instruction requirement does not apply to exempt witnesses because they are not "placed under Rule 614."

A violation of the Rule occurs when a nonexempt prospective witness remains in the courtroom during the testimony of another witness, or when a nonexempt prospective witness learns about another's trial testimony through discussions with persons other than the attorneys in the case or by reading reports or comments about the testimony. When the Rule is violated, the trial court may, taking into consideration all of the circumstances, allow the testimony of the potential witness, exclude the testimony, or hold the violator in contempt. *See* TEX. R. CIV. P. 267(e). We review the trial court's action for abuse of discretion.

* * *

B

Drilex asserts that there was no Rule violation because Acock was exempt from the Rule, he spoke only to another exempt witness, and neither witness was admonished not to discuss the case with others. Thus, contends Drilex, the trial court abused its discretion by excluding Acock's testimony.

Drilex contends that the trial court "exempted" Acock from the Rule's requirement that witnesses be excluded when it ruled that Acock could testify despite the fact that he had remained in the courtroom during Bailey's testimony. Because witnesses exempt from exclusion are also exempt from Rule 267(d)'s admonishment not to discuss the case with others, Drilex argues that the trial court abused its discretion when it exempted Acock from the exclusion requirement but nevertheless excluded his testimony for discussing the case with Tom Bailey. The flaw in this argument is that Drilex never established—and the trial court never found—that Acock was in fact exempt. After being told that Acock had been present during Bailey's testimony, the trial court concluded that he would allow Acock to testify. As noted, a court may, subject to review for abuse of discretion, allow a witness to testify even though the witness has violated the Rule by remaining in the courtroom during another witness's testimony. But a decision to allow a witness to testify despite his presence in the courtroom is not the same as a finding that the witness is exempt from the Rule. Thus, although Drilex is correct that a witness who is exempt from exclusion

is also exempt from Rule 267(d)'s requirement not to discuss the case with others, the trial court did not actually exempt Acock from the exclusion requirement.

Drilex also argues that all expert witnesses are exempt from the Rule under the essential presence exception in Rules 614 and 267, and therefore Acock was exempt. Drilex is correct that this exception is often relied on to allow expert witnesses to be exempt from the Rule. But nothing in Rules 614 or 267 suggests that all expert witnesses qualify for exemption. Although an expert witness may typically be found exempt under the essential presence exception,⁴ experts are not automatically exempt. Instead, Rules 614 and 267 vest in trial judges broad discretion to determine whether a witness is essential. . . .

* * *

Drilex presented no evidence to the trial court to establish that Acock should have been exempt, other than its argument that experts are per se exempt. Drilex could have presented evidence that Acock needed to be present to form his opinions based on more accurate factual assumptions, *see* TEX. R. EVID. 703, but it did not do so. Moreover, Acock admitted in the bill of exceptions that he did not need to be present in the courtroom. Thus, the trial court did not abuse its discretion by failing to exempt Acock from the Rule.

* * *

Drilex further contends that Rule 614 “did not apply to Tom Bailey and it could not serve as a predicate for preventing him from discussing the case with Mr. Acock.” Tom Bailey, Drilex’s designated corporate representative, was exempt from exclusion, and the trial court recognized that Bailey was exempt. *See* TEX. R. CIV. P. 267(b)(2) (exempting “an officer or employee of a party that is not a natural person and who is designated as its representative by its attorney”). But the record indicates that the trial court based its decision to disqualify Acock partly on its belief that Bailey violated the Rule. The trial court stated that, although Bailey was exempt from the Rule for the purpose of exclusion from the courtroom, he was under the Rule for the purpose of discussing the case with other witnesses, and thus he violated the Rule by discussing the case with Acock. As stated previously, a witness such as Bailey who is exempt from exclusion is also exempt from the Rule for purposes of discussing the case with others. Bailey was not under the Rule for any purpose—only Acock was. Accordingly, this basis for the trial court’s decision to exclude Acock was erroneous. We will nevertheless uphold the trial court’s ruling if there is any legitimate basis for it in the record.

The trial court also stated that it would not allow Acock to testify because he discussed the case with another witness although he was under the Rule. The proper focus in determining whether Acock’s testimony should have been excluded is whether Acock, not Bailey, was exempt from Rule 614. If Acock was not exempt, he was not free to discuss the case with Bailey, regardless of whether Bailey was exempt from the Rule. Because Acock was never exempted from Rule 614, he was not free to discuss the case with another witness, and his doing so violated the Rule. Accordingly, we conclude that the trial court’s decision was not an abuse of discretion.

⁴ The Notes of the Advisory Committee to the Proposed Federal Rule, upon which the Texas rule is based, suggest that the essential presence exception contemplates an expert needed to advise counsel in the management of litigation. FED. R. EVID. 615 advisory committee’s note. In addition, courts have held that expert witnesses expected to testify in an expert capacity only, and not to the facts of the case, should typically be exempt so that they can form opinions based on more accurate factual assumptions. *See, e.g., Opus 3 Ltd. V. Heritage Park, Inc.*, 91 F.3d 625, 629 (4th Cir.1996); *see also* TEX. R. EVID. 703. However, expert witnesses who are also fact witnesses provide a closer case.

We acknowledge that the court never expressly placed Acock under the Rule and never instructed him not to discuss the case with others. However, a court may, in its discretion, exclude the testimony of a prospective witness who technically violates the Rule even though the witness was never actually placed under the Rule. . . .

Drilex invoked the Rule and was obligated to ensure that its witnesses either complied with the Rule or were exempted from it. Drilex did neither. Thus, the trial court acted within its discretion in disqualifying Acock even though the court never actually placed Acock under the Rule and failed to appropriately instruct him.

Additionally, we note that it may be an abuse of discretion in some circumstances to disqualify a witness even when the witness has violated the Rule. However, Drilex has not argued that excluding Acock's testimony was an abuse of discretion even if Acock was not exempt from the Rule, and therefore we do not decide that question.

Last, we agree with the court of appeals that the excluded testimony was largely cumulative, and thus Drilex was not harmed by Acock's disqualification.

* * *

Notes & Questions

1. *Trial court discretion.* The trial court has wide discretion in the matter of the exclusion of witnesses. It can exclude or allow a witness' testimony if the witness who has been "placed under the Rule" then hears trial testimony. Thus, when the Rule had been invoked and an investigator remained in the courtroom and heard testimony, the trial court did not abuse its discretion in refusing to allow him to testify, even though his only role would have been to authenticate a tape recording impeaching plaintiff's testimony.¹
2. *Compliance.* Note also that a witness violating the rule may be punished by contempt, but only after the witness has been "placed under the rule," that is, sworn and instructed. In *Drilex*, the witness had not been placed under the rule, so the party, not the witness had the duty to ensure compliance.
3. *Daily copy.* You are in a trial in which you are receiving "daily copy"—transcripts of each day's testimony provided by privately paid reporters, working in relays. Your senior counsel directs that a copy of these transcripts be delivered each evening to each of three key witnesses so that they can know what the effect of the other testimony is on their own. Your senior counsel asks your opinion of this procedure. What is it? Will Rule 267d affect your opinion?
4. *"The Rule" and depositions.* What about invoking the Rule for a deposition? Rule 267 refers to "the courtroom" and Rule 614 seems to relate to testimony at trial. In *Kennedy v. Eden*,² the Texas Supreme Court had before it an order grounded in TRCE 614 excluding a witness from a deposition. The Court issued mandamus, holding the order to be an abuse of discretion because its duration was perpetual, expressly refusing to rule on whether a trial court can exclude witnesses from depositions

¹ See *Southwestern Bell Telephone Co. v. Johnson*, 389 S.W.2d 645 (Tex. 1965). It is also within the court's discretion to allow testimony from the offending witness. See *Pierson v. Noon*, 814 S.W.2d 506 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

² 837 S.W.2d 98 (Tex. 1992).

at all under TRCE 614 (or presumably Rule 247): “If the trial court was authorized to issue such an instruction [excluding a witness from a deposition], *an issue on which we express no opinion here*, there is nothing before us to suggest that it was justified in these circumstances.” (Emphasis added.) What *should* be the policy regarding invocation of “The Rule” at depositions? If witnesses are allowed to hear each other’s testimony the first time they are under oath, what good is “The Rule” at trial?

3. *The Right to Open and Close the Evidence*

Read Rule 265, 266, 269.

4M LINEN & UNIFORM SUPPLY CO., INC.

v.

W.P. BALLARD & CO., INC.

793 S.W.2d 320

(Tex. App.—Houston [1st Dist.] 1990, writ denied)

[Ballard sued 4M on a sworn account for the underlying debt and for attorneys’ fees. By counterclaim, 4M sought damages for misrepresentation and breach of warranty. After an instructed verdict for Ballard on its account cause of action, the only remaining issues were Ballard’s claim for attorneys’ fees and 4M’s misrepresentation and warranty claims. Over 4M’s objection, the trial court allowed Ballard to open and close.]

* * *

3. Right to open and close.

In its third point of error, 4M Linen argues the trial court erred in denying it the opportunity to open and close on final argument, in violation of TEX. R. CIV. P. 266 and 269. Before trial, the court granted a motion for directed verdict on 4M Linen’s stipulation of liability on the sworn account. Ballard & Co.’s only remaining issue to go to the jury was attorney’s fees. 4M Linen contends the trial court should have permitted it to open and close the argument because the central issue was its DTPA claim.

There are two rules that control the order of final argument: TEX. R. CIV. P. 266, which governs both the order of presenting evidence and final argument; and TEX. R. CIV. P. 269, which governs the argument.

Rule 266, which is subject to rule 269, provides that the plaintiff has the right to open and close argument. There are two exceptions in rule 266. First, a defendant has the right to open and close if the burden of proof for the entire case under the pleadings is on defendant. TEX. R. CIV. P. 266. Second, a defendant has the right to open and close if, before trial begins, defendant admits that plaintiff is entitled to recover, subject to proof of defensive allegations in the answer.

Rule 269 provides that the party who has the burden of proof on the whole case, or the party who has the burden on all matters in the charge, has the right to open and close the argu-

ment. TEX. R. CIV. P. 269(a). There is an exception in rule 269: When there are several parties who have separate claims or defenses, the court ‘shall’ determine the order of argument.

4M Linen claims that it had the right to open and close the argument because it had the burden of proof on the whole case. . . . We agree with the holding in *Andrews*: when a defendant has the burden on all issues submitted to the jury, and the trial court permits defendant to open and close, we will affirm the ruling on appeal. Those are not the facts in this case.

* * *

In this case, the trial court submitted six issues to the jury, one of which was Ballard & Co.’s issue on attorney’s fees. 4M Linen had the burden of proof on the remainder of the issues submitted. After looking to the pleadings of the case, we determine that Ballard & Co. carried the burden of proof on the whole case. The trial court properly denied 4M Linen’s request to open and close final arguments.

We overrule 4M Linen’s third point of error.

Notes & Questions

1. *Rules 265(a) and 266 v. Rule 269.* Suppose that, when the case begins, D has admitted P’s entire *prima facie* case for breach of contract and damages. D disputes only the *amount* of P’s claim for attorneys’ fees (not P’s right to reasonable attorneys’ fees). D’s affirmative defense to P’s *prima facie* claim is limitations.

a. Who is entitled to make the first opening statement to the jury? P is under Rule 265(a). So long as D contests any part of P’s case for recovery, including damages or attorneys’ fees, D does not have the “burden of proof on the whole case.”¹

b. Suppose that, during the trial, D stipulates with P on a reasonable amount as P’s attorneys’ fees. Before closing arguments, D asks the court for leave to make the first and last final arguments under Rule 269(a), as D now has the burden of proof on all matters which are submitted by the charge. P resists, urging that Rule 265(a) controls and governs throughout the trial (based on the pleadings in force when the trial began). Who wins? D does. When the burdens on issues change during the trial so that D has the burden on each jury question at the time of final arguments, Rule 269(a) controls and D is entitled to make the first and last closing arguments.²

2. *Declaratory judgments.* Who gets to open and close the arguments and evidence in a declaratory judgment suit? After all, each party may have the same interest in establishing its preferred declaration of rights. In *Pace Corp. v. Jackson*,³ the Texas Supreme Court held that one of the parties to a declaratory judgment suit (involving rights under a contract) still had the burden of proving his

¹ See *Montoya v. Nueces Vacuum Service, Inc.*, 471 S.W.2d 110 (Tex. Civ. App.—Corpus Christi 1971, writ ref’d n.r.e.) (D’s admission of liability not enough where P still has burden of proof on amount of damages); and *Horton v. Dental Capital Leasing Corp.*, 649 S.W.2d 655 (Tex. App.—Texarkana 1983, no writ).

² See *Community Public Service Co. v. Andrews*, 590 S.W.2d 563 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref’d n.r.e.). Note that D must be sure it has properly pled an affirmative defense. Otherwise the admission of P’s *prima facie* case could result in rendition of judgment for P.

³ 284 S.W.2d 340 (Tex. 1955).

right to relief on a separate claim for damages. It held that “if one party is asserting a right to damages or some other active relief in his own behalf, the burden of proving his right to that relief still rests upon him. The time sequence in the filing of pleadings can neither relieve him of his responsibilities nor deprive him of his advantages.” Thus, the party who retains the burden gets the right to open and close. But suppose all parties to the case simply ask for a declaration of rights, such as the proper location of a property boundary? The problem then becomes more difficult and is not resolved by *Pace*.

4. *Opening Statement*

RANGER INSURANCE CO.

v.

ROGERS

530 S.W.2d 162

(Tex. Civ. App.—Austin 1975, writ ref’d n.r.e.)

SHANNON, JUSTICE.

Appellees, Sara Rogers, the administratrix of the estate of John D. Rogers, deceased, and Billie L. Arnold, individually and as next friend for William Allen Arnold, a minor, sued appellant, Ranger Insurance Company in the district court of Travis County. After a trial to a jury and upon appellees’ motion, the district court entered judgment *Non obstante veredicto* for Billie L. Arnold and the minor child for a total of \$450,000.00.

The event made the basis for this appeal was the crash of a Piper aircraft in West Texas on April 13, 1972. At the time of the crash John D. Rogers was the pilot of the aircraft and Billy J. Arnold was a passenger. Rogers was president of and a major stockholder in United Housing Corporation. Rogers had used the airplane for trips about the area in the furtherance of his business interests. On the occasion of the crash he and Arnold had flown to Lubbock in connection with the commencement of a new business venture for United Housing Corporation. Both Rogers and Arnold were killed in the crash.

* * *

By its point of error number twelve appellant claims error by the district court in permitting counsel for appellees to make an opening statement to the jury wherein he outlined in detail the names and the substance of the testimony of many witnesses he intended to call. Appellant’s counsel objected repeatedly during the appellees’ opening statement and moved for a mistrial. After the district court had overruled appellant’s objections and motion for mistrial, appellant’s counsel, in turn, gave his opening statement in terms almost as detailed as that of appellees.

TEX. R. CIV. P. 265(a) provides in part: ‘The party upon whom rests the burden of proof on the whole case shall be permitted at his option to read his pleading or *to state to the jury briefly the nature of his claim or defense.*’ (Emphasis added)

Rule 265(a) does not afford counsel the right to detail to the jury the evidence which he intends to offer, nor to read or describe in detail the documents he proposes to offer. The practice of detailing the expected testimony in the opening statement places matters before the jury without the trial

court having had an opportunity to determine the admissibility of such matters. We are of the further opinion that such a practice sometimes has the effect of misleading or confusing the jurors as between the expectations of counsel and evidence actually admitted. The proper limitation of the opening statement is a matter necessarily resting in the discretion of the trial court subject to review for abuse of discretion.

The opening statements of counsel for appellees and appellant were in violation of Rule 265(a). The district court should not have tolerated counsel for either party to have detailed the evidence which he expected to introduce, and the court's failure to limit counsel was erroneous. Under the circumstances of this case, however, particularly in view of the fact that counsel for both parties violated Rule 265(a), we are not convinced that the court's failure to sustain the objections and the failure to grant the motion for mistrial was such error as was calculated to cause the rendition of an improper judgment.

* * *

The judgment is affirmed.

5. Judge's General Authority to Manage the Trial

Read Rule 265.

DOW CHEMICAL COMPANY

v.

FRANCIS

46 S.W.3d 237

(Tex. 2001)

PER CURIAM.

Renee Francis, a former employee of The Dow Chemical Company, sued Dow and its employee, Joseph Hegyesi, alleging discrimination, fraud, constructive discharge, and retaliation. The trial court granted summary judgment for Dow and Hegyesi on Francis' fraud claims and dismissed Hegyesi from the case. The remaining claims against Dow were tried to a jury. After a two-week trial, the jury rejected Francis' discrimination and constructive-discharge claims. The jury found for Francis on her retaliation claim but awarded zero damages. Based on these findings, the trial court rendered a take-nothing judgment against Francis. Francis appealed. The court of appeals reversed both the take-nothing judgment for Dow and the summary judgment for Dow and Hegyesi. In doing so, the court of appeals concluded, among other things, that the cumulative effect of the trial court's abuse of discretion with regard to its evidentiary rulings and its bias against Francis resulted in the rendition of an improper judgment. We conclude that the court of appeals erred, reverse its judgment, and remand this cause to that court for further proceedings consistent with this opinion.

In their petition for review, Dow and Hegyesi argue that the court of appeals erred in: (1) holding that the trial judge's bias resulted in an improper judgment; (2) sustaining Francis'

evidentiary complaints; (3) applying incorrect legal and factual-sufficiency standards in reviewing the jury's zero damages verdict on Francis' retaliation claim; and (4) reversing the summary judgment on Francis' fraud claim. We begin with the court of appeals' bias holding.

Without citing any particular examples, the court of appeals concluded that:

Here, the record reveals that some of the trial court's comments were not so much directed toward Francis, her attorney, or the merits of her case, as they were to the trial court's desire to expedite the proceedings. However, there are many instances of conduct by the trial court that we do not condone and which cause us concern over whether there was prejudice towards Francis.

The cumulative effect of the trial court's abuse of its discretion with regard to its evidentiary rulings and its bias against the appellant resulted in the rendition of an improper judgment and constitutes reversible error.

Dow first complains that as a matter of law, the trial judge's comments were insufficient to support a finding of judicial bias or misconduct, and that the court of appeals erred in not describing the conduct it determined to be improper. Second, Dow maintains that the trial court's objectionable conduct was presumptively curable by instruction, and therefore, Francis failed to preserve her bias complaint by not objecting or requesting a jury instruction at trial. Third, Dow argues that the court of appeals failed to analyze how the alleged judicial misconduct probably caused the rendition of an improper judgment.

Francis responds with seven examples of alleged judicial bias. First, Francis claims that the trial judge assisted Dow's counsel during voir dire by commenting, "Ms. Johnson [Dow's counsel], there were a couple of other hands on your question about labor union [sic]." Second, Francis cites the following exchange as an example of the judge encouraging Dow's counsel to object:

Counsel: "Objection, Your Honor. Remote as to time. Vague."

Judge: "Go ahead."

Counsel: "Not relevant."

Judge: "Sustained."

Third, Francis contends that the judge frequently added additional bases to Dow's objections. Fourth, Francis asserts that the judge twice instructed Francis' counsel to "move on" "so that we can get this case to the jury." Fifth, Francis claims that the judge frequently reprimanded Francis' counsel in a condescending manner; as an example, Francis cites this response by the judge to an objection: "You can just say compound, and I can listen to the question." Sixth, Francis complains that the judge did not allow Francis' counsel to read from documents already admitted into evidence. For example, at one point, the judge said, "I instructed you not to read from the document. Would you please just direct questions to the witness? As I said, the document is in evidence and can be reviewed by the jury; and continuing to read the document at this late hour only prolongs the time we are here." And at another point in the trial, the judge again reminded Francis' counsel: "But I once again caution you that these documents are in evidence. So, rather than reviewing the documents with the jury, ask the question of the witness; and let's focus specifically on information you need to get from this witness and not information from the document that the jury has seen several times already." Francis argues that these comments were intended to prevent the impeachment of defense witnesses.

As a seventh example of alleged judicial bias, Francis describes an exchange that took place near the end of the trial, out of the jury's presence. The judge criticized Francis' counsel for calling a Dow executive to testify when counsel had not indicated his intention to do so the day before. Francis' attorney explained that he had developed his strategy just the evening before and had not made any misrepresentations to the court. The judge then apologized for her comment: "Okay. Well, I apologize. That was out of line. I shouldn't have said that. But honestly, I'm about to my limit with the conduct of how this trial has proceeded and—you know, I'm a patient person. That was out of line, and I do apologize." Francis argues the judge's improper comments spanned the two-week trial, grew increasingly caustic in nature, and were incurable by instruction. We disagree with Francis.

First, we consider whether the trial judge's comments constituted bias as a matter of law. The United States Supreme Court, when presented with similar allegations of judicial bias, has determined that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion," and opinions the judge forms during a trial do not necessitate recusal "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." Further, "[n]ot establishing bias or partiality . . . are expressions of impatience, dissatisfaction, annoyance, and even anger A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune." In short, a trial court has the inherent power to control the disposition of cases "with economy of time and effort for itself, for counsel, and for litigants."

Similarly, Texas courts have held that "the discretion vested in the trial court over the conduct of a trial is great." A trial court has the authority to express itself in exercising this broad discretion. Further, a trial court may properly intervene to maintain control in the courtroom, to expedite the trial, and to prevent what it considers to be a waste of time.

We apply these principles to this case, and after carefully examining the judge's allegedly improper comments in the context of the entire record, we conclude there is no evidence of judicial bias. The record indicates that the judge exercised her broad discretion to "maintain control and promote expedition." Thus, the court of appeals erred in concluding that the trial judge's conduct exhibited bias.

The court of appeals also erred in excusing Francis' failure to preserve her complaint. This Court [has] held that objection to a trial court's alleged improper conduct or comment must be made when it occurs if a party is to preserve error for appellate review, unless the conduct or comment cannot be rendered harmless by proper instruction. Neither Francis nor the court of appeals explain how any comments made by the trial judge were incurable or would excuse Francis' failure to preserve error. For this additional reason, the court of appeals erred in sustaining Francis' allegations of judicial bias.

* * *

Accordingly, without hearing oral argument, we grant Dow and Hegyesi's petition for review, reverse the court of appeals' judgment, and remand the case to the court of appeals for further proceedings consistent with this opinion.

6. *Who Can Question a Witness*

Read Rule 265.

***Pitt v. Bradford Farms*, 843 S.W.2d 705 (Tex. App.—Corpus Christi 1992, no writ.):**

Finally, appellant complains that the trial judge acted improperly by examining a witness in front of the jury. The record shows that the trial judge examined one witness, that appellant did not object during the examination, that the court immediately recessed, and that appellant requested a bench conference when the court reconvened. At that conference, the trial judge stated:

Well, if the Court doesn't understand what the witness is doing and I don't feel that the question has been properly put to the witness so that the Court and the Jury can understand it, then I'm going to take it upon myself to ask the Jury [sic] the questions so that it can be clarified, and I do this as a matter of expediency so we can get on with the trial. I don't feel that that's embellishing the witness's testimony, I feel it's an amplification of what his answer is, and that's all, and that's the only reason it's made [T]he Court, I feel, has the right to amplify what the witness said so that everybody understands. For example—I'll give you a perfect example. When Mrs. Bradford was testifying right now there was some confusion, and I could tell from the looks on the Jury's face that there was some confusion as to what call she had reference to, and that's the reason I asked her.

We have previously held that a trial judge may examine a witness during a bench trial. . . . The Third Court of Appeals, however, [has] stated, 'If this were a jury trial, we would have to view the matter in an entirely different light.'

We agree that the examination of witnesses by a trial judge during a jury trial must be viewed in an entirely different light. A trial judge should not examine witnesses who are testifying before a jury. We disapprove of cases which suggest that trial judges may generally examine witnesses whenever they feel that the jury does not understand the evidence being presented. . . . Under our State's system of justice, the duty to present coherent evidence to the jury belongs to the advocates, not to the bench. We hold that the trial judge acted improperly by examining the witness in front of the jury.

To reverse a judgment on the ground of judicial misconduct, however, a complaining party must show either trial court bias or that he suffered probable prejudice. The record does not reflect trial court bias, and appellant has neither demonstrated nor does the record show she suffered probable prejudice from the trial court's examination of the witness. We find that the trial judge acted in a fair and impartial manner throughout the trial and that appellant did not suffer probable prejudice from the impropriety committed by the trial judge. We overrule appellant's fourth point of error.

We AFFIRM the trial court's judgment.

***Born v. Virginia City Dance Hall and Saloon*, 857 S.W.2d 951 (Tex. App.—Houston [14th Dist.] 1993, writ denied):**

[William Born, Jr. died in a car wreck after he and Nicar (the driver) had been drinking one evening at the defendant dance hall. Born's wife, children, and parents brought a dram shop suit against the dance hall, alleging that it served Born and Nicar after they were visibly intoxicated. The jury failed to find the defendant negligent, and plaintiffs appealed. One of their complaints on appeal concerned the trial judge's questioning of a witness.]

In point of error five, appellants claim the trial court erred by instructing a witness how to answer a question on direct examination. Appellants complain about the following statements by the trial judge:

Q. [Plaintiffs' counsel] Well, now, being his best friend, what would have prevented you from simply turning around and saying, 'Willie, stop it'?

A. I tried.

Q. What would have prevented you from turning around and saying, 'Willie, have you had too much to drink to drive the truck?'

A. I know what his answer would have been.

Q. What would have prevented you from turning around and really looking at this person who you say is your best friend, who you say has a drinking problem, and determining for yourself—

A. I said he had a drinking problem.

Q. —determining for yourself whether or not he was intoxicated?

A. Like I said, you'd have to know Willie. You know, he's persistent.

Q. I'm not talking about Willie. I'm talking about you.

MR. COOPER: Judge, I object to him arguing with the witness. He asked him what would have prevented him, and the man answered, and he starts arguing with him.

THE COURT: Overruled. The question is simply: 'Would anything have prevented you.' I take it your answer is nothing other than his personality?

THE WITNESS: Yes, sir.

THE COURT: Let's move along then.

Appellants did not object to the trial court's action.

Although the trial judge should not act as an advocate, his role is more than that of an umpire. *Henderson-Bridges, Inc. v. White*, 647 S.W.2d 375, 377 (Tex. App.—Corpus Christi 1983, no writ). For the purpose of eliciting evidence that has not otherwise been brought out, the judge may put competent and material questions to a witness, and where anything material has been omitted, it is sometimes his duty to examine a witness. *Id.* We find that the trial judge's action in this instance was to paraphrase the previous question and to clarify the witness' response. The judge did not instruct the witness to answer the question differently in any material respect than he had already answered.

Appellants also complain about the trial court's answer to a question regarding the reason for the witness' termination of employment. Appellants assert that the witness previously testified he was put on leave of absence from employment due to a criminal conviction arising out of the incident upon which this suit is based. The written transcription presented by appellants contains no testimony by this witness about this subject. Rather, the page cited by appellants contains a statement by appellants' counsel to the trial court about the witness' prior deposition testimony. Appellants' counsel was arguing that defense counsel was misleading the jury by telling them the witness was on leave of absence because of the allegations in this case. The judge addressed this issue later and the following transpired out of the jury's presence:

THE COURT: I think I'm going to rule that—Mr. Nicar, you'll need to listen to this—that you may ask him the question: 'Were you suspended because we sued you in this suit?' Your answer to that is going to be? Were you suspended because of this lawsuit?

THE WITNESS: No, sir.

We find no impropriety by the trial judge in attempting to clarify this point. Furthermore, appellants have shown no harm and we cannot perceive any harm that this action could have caused appellants. We overrule point of error five.

FAZZINO

v.

GUIDO

836 S.W.2d 271

(Tex. App.—Houston [1st Dist.] 1992, writ denied)

WILSON, JUSTICE.

Appellant, John Fazzino, appeals from a judgment entered below following a jury verdict in which a roadway bordering and/or on appellant's property was found to be dedicated for the benefit of the general public. The trial court also ordered that appellant remove any impediment placed in the roadway within his property lines. We affirm.

* * *

Appellant alleges in his sixth point of error that the trial court committed fundamental error by encouraging the questioning of witnesses by jurors during the trial. The procedure that appellant complains of is as follows:

1. After both lawyers had concluded their respective direct and cross-examination, the trial court asked the jurors for written questions.
2. The jury and witness left the courtroom while the admissibility of the question was determined.
3. The trial court read the question to both lawyers and they were given the opportunity to object to the questions.
4. The jury and witness were brought back into the courtroom and the admissible questions were read to the witness verbatim.

5. After the witness answered, both lawyers were allowed to ask follow-up questions limited to the subject matter of the juror's question.

This appears to be a case of first impression in a civil cause of action in Texas. However, two criminal cases recently decided by the Fourteenth Court of Appeals involved this same issue. . . . [T]he court in these two cases did determine that the trial court's allowing the jurors to propound questions to the witnesses was not improper.

The Fifth Circuit has stated: "There is nothing improper about the practice of allowing occasional questions from jurors to be asked of witnesses. If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it. If nothing else, the question should alert trial counsel that a particular factual issue may need more extensive development. Trials exist to develop the truth."

In the present case, both parties were afforded great procedural protection by the manner in which the questions were asked, as is outlined in the five steps describing the procedure above. Additionally, the record reveals that neither of the lawyers at trial objected to this procedure, and that neither side was injured by any of the questions from the jurors. With these procedural safeguards, there was no harm to appellant, and no fundamental error. Appellant's sixth point of error is overruled.

* * *

Appellant's final point of error is overruled, and the judgment is in all things affirmed.

Notes & Questions

1. *Current thinking.* There are many lawyers and judges who believe that jurors should be able to ask questions, provided that appropriate procedural safeguards are followed, in particular excusing the jurors when the lawyers and the judge are discussing whether the question is admissible or not. The Supreme Court Rules Advisory Committee is considering an amendment allowing juror questions to a witness.
2. *Criminal case reversals.* Since the decision in *Fazzino*, the Court of Criminal Appeals has condemned the practice of allowing jurors to propose questions in criminal cases.¹
3. *Attorney's objections.* Note that nothing in *Fazzino* requires an attorney to object to a juror's question in front of the jury, a procedure that would be clearly prejudicial.

¹ See *Morrison v. State*, 845 S.W.2d 882 (Tex. Crim. App. 1992); *State v. Buchanan*, 846 S.W.2d 853 (Tex. Crim. App. 1993) and *Allen v. State*, 845 S.W.2d 907 (Tex. Crim. App. 1993).

7. *The Judge's Comments Before the Jury*

***Pacesetter Corp. v. Barrickman*, 885 S.W.2d 256 (Tex. App.—Tyler 1994, no writ):**

Barrickman sued his employer (Pacesetter) for wrongful discharge, claiming Pacesetter fired him for filing a worker's compensation claim. The Texas statutes make such firings actionable. A jury awarded Barrickman actual and punitive damages. One of Pacesetter's complaints on appeal concerned the trial judge's conduct in front of the jury. The appellate court described the situation as follows and then affirmed the judgment.

Pacesetter in its fourth point maintains that the trial court erred (1) in questioning witnesses during Pacesetter's examination of the witnesses, (2) in suggesting in the presence of the jury that Pacesetter's questions were irrelevant, and (3) in commenting in the presence of the jury that Pacesetter worked "hand in glove" with its workers' compensation insurance carrier. It argues that the judge's remarks were comments on the weight of the evidence and calculated to lead the jury to infer collaboration between Pacesetter and its workers' compensation carrier in discharging plaintiff.

Pacesetter cites five incidents of alleged judicial misconduct. However, Pacesetter never raised a timely objection complaining of the judge's comments or conduct, nor did it request a curative instruction or mistrial. If objectionable remarks by the judge are of the type which could have been rendered harmless by a proper instruction from the judge, failure to object to such remarks and to request a curative instruction waives error. The same rule applies in the case of a comment on the weight of the evidence. An objection must be promptly made or an instruction requested or the error is waived.

The trial court has a right to inquire concerning the purpose of a line of questioning during both direct and cross-examination, since he must be granted considerable discretion in controlling the orderly progress of the trial. Even if the statements complained of constitute comments on the weight of the evidence, they must be examined in the light of the entire record to determine whether they amounted to reversible error. Even conceding for the sake of argument that the judge's comments constituted error, none were so egregious that they could not have been cured by instruction. Error, if any, was waived. Point number four is overruled.

***Brazos River Authority v. Berry*, 457 S.W.2d 79 (Tex. Civ. App.—Tyler 1970):**

The river authority condemned a tract of certain land for a reservoir project. The parties could not agree on the value of compensation owed to the landowner, and at trial a jury awarded the landowner \$75,800 as compensation. On appeal, the condemnor complained that the trial judge had influenced the verdict by commenting on the weight of the evidence while a witness for the landowner was testifying. The witness had given his opinion as to the value of sand and gravel deposits underneath the surface of the condemned land. When the condemnor objected, the judge made these remarks:

THE COURT: Well, there is no doubt in my mind that, eventually, some day, it (the sand and gravel) would have been removed.

MR. HOOPER (attorney for landowner): Yes.

MR. KULTGEN (attorney for condemnor): Of course, I object to the Court's making that statement because we have had testimony—

THE COURT: I'm sorry. I will retract that.

MR. KULTGEN: All right, sir.

The condemnor did not ask the judge to instruct the jury to disregard his remarks, but did move for a mistrial the next day. The appellate court held that error was not preserved (no ruling on the objection, no request for instruction to disregard the remark) and that any error was harmless.

Notes & Questions

1. *Objection and instruction?* Cases on prejudicial judicial comments make it clear that the judge's comments—like those of opposing counsel—must be objected to at the time they are made or the error is waived *unless* the comment could not have been cured by an instruction from the judge. Though the judicial comment cases do not expressly require counsel to follow the objection with a request for an instruction to the jury to disregard the comment, or a request for a statement to the jury by the court that the comment is withdrawn, that is the curative action contemplated by the cases¹ and is the recommended practice.²

2. *What objection?* The predecessor to Rule 277 forbade the judge to comment on the weight of the evidence in his charge. That prohibition was, by case law, expanded to apply to the judge's comments *during* the trial.³ Judges cannot expressly indicate which evidence they consider credible or not credible. Nor can they indicate their views on the weight of the evidence indirectly or with subtlety in any phase of the trial. Generalizations are difficult, but almost any unfair or prejudicial comment the judge makes—whether or not it addresses any testimony or exhibit—is likely objectionable as a comment on the weight of the evidence. The objection applies to any reflection on the character of a party, reflection on a witness's honesty or ability or deportment (unless the witness deserves the judge's rebuke) and any highlighting of evidence or testimony or witnesses as more or less credible or important than other evidence. The closer the comment comes to directly evaluating or commenting on evidence, the more likely it is to be held harmful.⁴ A good rule of thumb is that, if the judge goes further than a simple ruling on a motion or objection and volunteers something that is prejudicial, the correct objection is probably “comment on the weight of the evidence” and should be followed by a motion requesting that the judge withdraw the comment and instruct the jury not to consider it.

¹ See also *Gillum v. Temple*, 546 S.W.2d 361 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.); and *Pirung v. T. & N.O. Railroad Co.*, 350 S.W.2d 50 (Tex. Civ. App.—Houston 1961, no writ). But it *is* required in the case of improper comments by counsel. See Chapter 9 on Argument, following.

² See, 4 MCDONALD, TEXAS CIVIL PRACTICE, Section 21:39, at p. 117.

³ See 4 MCDONALD, TEXAS CIVIL PRACTICE, Section 21:30, p. 111 and 20 TEX. L. REV. 83 (1941).

⁴ See, generally, MCDONALD, TEXAS CIVIL PRACTICE, Section 21:40, at p. 117.

8. *Making a Record—Bills of Exception*

When you object to evidence and the trial court *admits* it over your objection, the record will contain the evidence and the appellate court will be able to assess it and decide whether the trial court’s ruling was erroneous and whether it was harmful. But if you are offering evidence and the court *excludes* it, you must get the evidence that you offered into the trial court’s record so if you decide to appeal the appellate court will be able to assess it. This making of a record is called your “offer of proof” or your “bill of exceptions.”

In the Interest of N.R.C.

94 S.W.3d 799

(Tex. App.—Houston [14th Dist.] 2002, pet. denied)

GUZMAN, Justice.

Rachel appeals from a judgment terminating her parental rights. She challenges . . . the trial court’s sanctions order [which] precluded Rachel from presenting any witnesses other than herself at trial. We find the trial court abused its discretion in imposing sanctions Accordingly, we reverse and remand for a new trial.

I. FACTUAL BACKGROUND

Rachel and David divorced in 1991. At that time, the trial court named them joint managing conservators of their two children, N.R.C. and L.A.C. The children lived with David during the school year and with Rachel during the summer. [In August 2000, David brought this suit to terminate Rachel’s parental rights. The trial court appointed an attorney ad litem for the children and ordered both parties to pay the ad litem’s fees. Rachel did not pay, and the ad litem sought sanctions. The court granted sanctions and ordered that Rachel was “prohibited from presenting any witnesses on her behalf, save and except herself, at the trial on the merits.”]

At trial, David presented evidence that Rachel had verbally and physically abused the children and that the children did not want to visit Rachel. [David introduced expert testimony that it would be in the best interest of the children to terminate Rachel’s parental rights.] Rachel testified that she recognized the need to control her anger and that with appropriate psychological help, she could repair the relationship with her children. [Under the sanctions order,] Rachel was not allowed to present any other witnesses. The jury unanimously found that Rachel’s parental rights should be terminated.

* * *

B. SUFFICIENCY OF THE OFFER OF PROOF

[David contended that the record does not show error because] Rachel’s offer of proof was incomplete, and thus, the exclusion of her witnesses presents nothing for review. We disagree. Defense counsel began his offer of proof noting that Rachel would have called Paula Hudson, the executive director of the Jameson Center. In summarizing Hudson’s proposed testimony, counsel introduced into evidence a letter in which Hudson detailed her observations of Rachel and remarked upon her progress and suitability as a parent. Hudson concluded that supervised visitation

with “appropriate structuring” would provide opportunities within a safe environment to enhance both the development of positive relationships between Rachel and her children and to practice skills learned in therapy.

Defense counsel summarized the proposed testimony of Rachel’s boyfriend and mother as follows:

As further proof, had [Rachel] been allowed to call witnesses to testify in her own behalf she would have called Mr. Gregory Wassinger, who, as testimony has revealed, has been her significant other for the past four years, to testify to her actions and to the best interests of the children. Had she also been allowed to put on testimony she would have called Sameline [surname omitted] who has also been referred to in reference to this case as Grandma Sammie, also to testify to the best interests of the children.

Rule 103(a)(2) of the Texas Rules of Evidence provides that error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected, and the substance of the objection was made known to the trial court by offer of proof. To adequately and effectively preserve error, an offer of proof must show the nature of the evidence specifically enough so that the reviewing court can determine its admissibility. Rather than mandating formal proof, however, the Rules require only a “short, factual recitation of what the testimony would show is sufficient ‘evidence’ to preserve an issue for appeal.” Courts prefer a concise statement over a lengthy or arduous presentation. The offer of proof may be made by counsel, who should reasonably and specifically summarize the evidence offered and state its relevance unless already apparent. If counsel does make such an offer, he must describe the actual content of the testimony and not merely comment on the reasons for it.

Counsel referenced the “best interests of the children” standard in his offer of proof. This term immediately invokes the relevant factors promulgated by the supreme court. Here, as indicated above, Rachel’s attorney adequately described the substance of the proposed testimony, introduced Hudson’s letter and referenced the best interest of the children. We find this showing sufficient under the circumstances.

C. CUMULATIVE NATURE OF THE TESTIMONY ON OFFER OF PROOF

In a final attempt to avoid an inquiry into the trial court’s sanction, David contends the sanction was harmless, as the testimony sought to be elicited was “clearly cumulative” of that offered by Rachel. Texas courts have long recognized cumulateness as grounds for the exclusion of probative evidence. However, the Texas Rules of Evidence discourage “*needless* presentation of cumulative evidence,” not cumulateness in and of itself. TEX. R. EVID. 403 (emphasis added). The mere fact that another witness may have given the same or substantially the same testimony is not the decisive factor. Rather, we consider whether the excluded testimony would have added substantial weight to the complainant’s case.

As a litigant, Rachel retains the right to prove her case in the most persuasive manner possible. To defend herself, she may require several witnesses addressing the same material issue, as the testimony may come from disinterested sources or witnesses with differing vantage points. Indeed, litigants may, and often do, offer evidence from several different witnesses to prove one specific material fact. Often, the cumulative effect of the evidence heightens, rather than reduces, its probative force. Where, as here, different witnesses were to offer varying perspectives of the best interest of the children, the probative effect may likely have been heightened by the testimony of the stricken witnesses.

Based upon her own analysis and observations, Hudson's testimony was unique and not cumulative of any testimony given by Rachel. Though David insists that Rachel's mother and boyfriend are interested witnesses, that possibility does not automatically transform their observations into needlessly cumulative testimony unworthy of consideration. Rare indeed is the family courtroom in which multiple interested witnesses do not testify as to the best interests of the children in a termination proceeding. To say that testimony from non-party witnesses would be needlessly cumulative of the testimony of a single party witness would endorse an overly broad rule which we decline to adopt. We do not find that the testimony of the stricken witnesses would have been needlessly cumulative of that offered by Rachel.

[The court concluded that the trial court erred in striking Rachel's witnesses as a sanction for her failure to pay the ad litem's attorneys fees. It then reversed and remanded.]

LASCURAIN

v.

CROWLEY

917 S.W.2d 341

(Tex. App.—El Paso 1996, no writ)

BARAJAS, Chief Justice.

This is an appeal from a judgment rendered in a personal injury case arising out of an automobile accident. The jury returned a verdict of \$110,000 for Appellant, which was reduced by credits to Appellee of \$190,000. Because the amount of damages awarded to Appellant was less than the sum of the settlements reached with others prior to trial, the trial court rendered judgment that Appellant take nothing. We affirm the judgment of the trial court.

* * *

In her third point of error, Appellant alleges that because she has been unable to obtain a complete statement of facts for review, she is entitled to a new trial. During the trial, Appellant played portions of the videotape depositions of Diana Oliva, Susan Gravatt, and Chad Gillespie. Appellee showed the entire videotape depositions of these three witnesses to the jury and read portions of the Brock Perkins' deposition. None of this testimony was recorded by the court reporter. Similarly, during the direct examination of Dr. Watson, Appellant showed Dr. Watson part of the videotape deposition testimony of Dr. Misenhimer and Dr. Barron, which also was not recorded.

At our direction, the trial court held a hearing to correct the inaccuracies in the statement of facts. The trial court found that, with the consent of the parties, the official court reporter was excused during a portion of the defense presentation. Additionally, the court was unable to determine which portions of the testimony of three witnesses were utilized as evidence.

Texas Rule of Appellate Procedure 50(e) states that an Appellant is entitled to a new trial if (1) the Appellant has made a timely request for a statement of facts, (2) the court reporter's notes and records "have been lost or destroyed," and (3) the parties do not agree on a statement of facts. Appellant cannot meet the second part of this test because the court reporter's notes are not lost or destroyed. This requirement contemplates that notes were actually made, then either lost or destroyed after coming into existence.

In the instant case, the court reporter did not make any notes when the videotapes were played to the jury; thus, there were no notes to lose or destroy. Although an Appellant is entitled to a complete statement of facts, where a witness testifies in the absence of the court reporter and the Appellant fails to object, the Appellant is not entitled to a new trial.

Moreover, Texas Rule of Appellate Procedure 11(a)(1) states that an official court reporter shall “mak[e] a full record of the evidence when requested by the judge or any party to the case” (Emphasis added). No such request was made, as Appellant and Appellee excused the court reporter during part of the defense presentation. Counsel cannot keep silent when the court reporter openly leaves the courtroom and thereby guarantee his client a new trial. Accordingly, we overrule Appellant’s Point of Error No. Three.

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Notes & Questions

The TRAP rules were rewritten in 1997. TRAP 11 was replaced by TRAP 13, which now commands: “The official court reporter or court recorder must: (a) unless excused by agreement of the parties, attend court sessions and make a full record of the proceedings. . . .” What difference does it make to replace old TRAP 11’s language (“the reporter must report court proceedings *when requested*”) with TRAP 13’s new language (the reporter “must . . . unless excused by agreement of the parties” report court proceedings).

4M Linen & Uniform Supply Co. v. Ballard & Co., 793 S.W.2d 320 (Tex. App.—Houston [1st Dist.] 1990, writ denied):

ON MOTION FOR REHEARING

* * *

There are two kinds of bills of exception: the informal bill and the formal bill. *Compare* TEX. R. APP. P. 52(b) [now see TEX. R. EVID. 103] *to* 52(c) [now see T.R.A.P. 33.2]. 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) [now see TEX. R. EVID. 103].

Rule 52(b) [now see TEX. R. EVID. 103] permits a party to make an informal bill of exception before the court reads the charge to the jury. 4M Linen made its informal bill of exception after the charge was read to the jury.

Rule 52(b) [now see TEX. R. EVID. 103] 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. 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 [now see TEX. R. EVID. 103 and T.R.A.P. 33], 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.

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. 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."

* * *

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 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) [now see TEX. R. EVID. 103]. 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 & Questions

1. *Offers of testimonial proof.* How does one show by a bill that evidence was offered and excluded? First, the line of questioning draws an objection which is sustained. The proponent advises the judge (then or at the next convenient time, usually a recess) that he would like to “make a bill” on the excluded testimony. In order to avoid inconvenience to the jurors, bills are often made at recesses, during an extended lunch hour, or after the jury is retired for the day. (Counsel must remember to make the bill, preferably before the witness involved leaves the area.) When the time arrives, the attorney usually states for the record that this is testimony of X for a bill of exceptions, the witness is sworn (or more often reminded that he or she is still under oath), and the attorney questions the witness (in open court with no jury present) to elicit the essence of the excluded testimony, following which he “tenders” or “offers” the testimony. The opponent again objects, and the judge again sustains the objection (unless, as is sometimes the case, the judge has a change of heart and decides to allow the testimony, in which case it will be repeated before the jury).
2. *Documentary evidence.* With documentary evidence, the proper predicate should have been laid through a witness’s testimony and the exhibit offered and excluded on the record. This is usually done in the presence of the jury. Thereafter, no other action is required except to state that the exhibit will be made a part of the bill of exceptions. If the predicate cannot be laid without violating a motion in limine, then it will have to be handled as with an offer of testimonial proof, that is, when the jury is absent.
3. *Formal and informal bills.* Note that error can be preserved in the “reporter’s record” of the proceedings (formerly called the “statement of facts”). This is an informal bill.¹ Most appeals rely on informal bills. In unusual situations when there is no court reporter’s record—or there is disagreement about the reporter’s accuracy—a formal bill of exceptions may be required. Note that TRAP 33.2 is aimed at reaching a consensus on what actually took place. The judge has the final say in case of disagreement. The judge’s version becomes the official bill. Then a contesting party’s only recourse is to a bystander’s bill under TRAP 33.2. The appellate court must choose between the competing versions based on affidavits, an unsatisfactory approach to a “fact-finding” chore. A formal bill controls over the reporter’s record if the two are in conflict. *See* TRAP 33.2. Fortunately, court reporters usually record the critical events with a high degree of accuracy, so that resort to the formal bill is seldom required. TRAP 13.1 requires the court reporter to be present at all proceedings and make a record, unless excused by the agreement of the parties.

¹ The “reporter’s record” is a written (typed) record of every utterance in the courtroom while the court is in session and includes testimony and the comments of the court and counsel.