TO: SCAC MEMBERS

RE: PROPOSED AMENDMENTS TO RULES 733-758

June 15, 2001

Chairman Babcock has asked the SCAC Subcommittee for Rules 735-822 to review Tex. R. Civ. P. 742, 749b, 749c, and 751. We have reviewed all the rules pertaining to forcible entry and detainer practice, and propose a number of modifications. Please refer to the following attachments:

Attachments:

Commentary prepared by Professor Elaine Carlson-Forcible Entry and Detainer Practice
Index to Subcommittee Proposed Amendments
Subcommittee Proposed Amendments to Rules 733-758
Subcommittee Proposed Amendment to Rule 4
Subcommittee Proposed Amendment to Rule 143a
Subcommittee Proposed Amendment to Rule 190
Subcommittee Proposed Amendment to Rule 216
Subcommittee Proposed Amendment to Rule 245
Chapter 27, Texas Property Code
Dillingham v Putnam
The State Bar Court Rules Committee Proposed Changes to Forcible Rules

Commentary-Forcible Entry & Detainer Rule Modifications

A forcible entry and detainer action is brought by one claiming a superior right to possession to real property. Typically these actions are brought by a landlord against a tenant seeking possession due to a breach of the lease agreement, most often for failure to pay rent. Historically, the sole issue in a forcible action is the right to possession, although there is a limited ability to join related claims, including an action for back rent if within the jurisdiction of the court. The rationale for limiting the issues that may be tried in a forcible proceeding is to ensure a summary, speedy, simple, and inexpensive remedy for the determination of the right to possession[1]. For that reason, a forcible action is not exclusive, but cumulative, of any other remedy that the parties may have and other remedies may be the subject of an independent action.[2] A forcible judgment awarding possession is not a bar to an action for trespass, damages, waste, rent or mesne profits.[3] Nor does a forcible judgment bar a tenant's subsequent action for wrongful eviction.[4]

Subject matter jurisdiction for forcible entry and detainer actions is in the justice of the peace courts, regardless of the value of the property for which possession is sought. However, the amount in controversy jurisdiction of justice courts is limited to $5000 and justice courts lack jurisdiction to issue injunctive relief. A claim for money damages in excess of $5,000, such as for back rent, would have to be the subject of a separate lawsuit brought in a court that has jurisdiction. Thus, the res judicata maxim that all transactionally related claims must be litigated in the same proceeding does not apply to forcible actions as the plaintiff may choose to litigate separately the issue of possession from that of money damages.

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[1] *McClothlin v. Kliebert*, 672 S.W.2d 231, 232 (Tex. 1984); *Scott v. Hewitt,* 127 Tex. 31, 90 S.W.2d 816 (1936)

[2] *Holcombe v. Loringo*, 79 S.W.2d 307, 309 (Tex. 1935).

[3] Texas Property Code section 24.008.

[4] *Tallwater v. Brodnax*, 156 S.W.2d 142 (Tex. 1941); *Hanks v. Lake Towne Apts,* 812 S.W.2d 625, 627 (Tex. App.-Dallas 1991, writ denied).

The principle authorities governing forcible actions are Texas Rules of Civil Procedure 737-755 and Chapter 24 of the Texas Property Code.[5] These governing rules and statute provide for an expedited trial of forcible cases, with an appeal by trial de novo in the county court. A final judgment of a county court in an eviction suit may not be further appealed on the issue of possession unless the premises are being used for residential purposes only.[6] However, if the premises are used for residential purposes, the issue of possession may be further reviewed on appeal to the court of appeals and the supreme court.

Currently, distinctive provisions apply as to the necessity and method of superseding a forcible judgment depending upon whether the appeal is from justice court to county court or if the appeal is from county court to the court of appeals. In the latter instance, the Legislature has mandated that "A judgment of a county court may not under any circumstances be stayed pending appeal [to the court of appeals] unless, within ten days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court."[7] The amount of the supersedeas bond is to protect the appellee from loss or damage occasioned by the appeal, and consideration should be given in setting the amount of the bond to the value of rents likely to accrue during the appeal. An indigent appellant must post the bond to stay execution. There is no "pauper's affidavit" for a supersedeas bond.[8] A judgment creditor has a statutory right to have execution issued to enforce a judgment pending appeal, unless and until a valid supersedeas bond has been filed.[9] There is no requirement that supersedeas be posted to perfect the appeal to the court of appeals, but only to stay the judgment. Thus, the indigent's right to appeal is preserved.

There is a dearth of case law addressing the effect enforcing a forcible judgment pending appeal to the court of appeals when no supersedeas has been posted has on the appeal. Recently, one intermediate court held that when a tenant perfects an appeal of a county court forcible judgment to the court of appeals but does not post supersedeas, the prevailing party may obtain a writ of possession, thereby mooting the issue of possession in the forcible

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[5] However, potentially three sets of procedural rules govern forcible actions. The Texas Rules of Civil Procedure governing district and county courts also govern justice courts "insofar as they can be applied, except where otherwise specifically provided by law" or when rules 523-591 apply that provide distinctive rules of practice for the justice court. In addition, forcible actions are subject to rules 738-755. Chapter 24 of the Property Code also provides procedures for forcible entry and detainer actions.

[6] Texas Property Code sec 24.007 states "for residential purposes" but rule 755 currently says unless the premises are "used for residential purposes only". The proposed amended rule reads "for residential purposes" thus making rule 755 conform to Prop. Code Sec 24.007.

[7] Texas Property Code section 24.007.

[8] *Texas Employers' Ins. Assoc. v. Engelke,* 790 S.W.2d 93, 95 (Tex.App.--Houston [1st Dist.] 1990, orig. proceeding)

[9] Id. TEX. R. APP. P. 24 addressing suspension of enforcement of judgments pending appeal in civil cases does not include a pauper's affidavit as a method to supersede a judgment.

proceeding.[10] However, if other issues remain in controversy, the appeal is not moot and the court should proceed to adjudicate those issues.[11] Thus, for example, if the appeal involved both issues of the right to possession and a money judgment for back rent, the issuance of the writ of possession would not moot the issues pertaining to the validity of the judgment awarding or denying back rent. Further, even though the issue of possession may be mooted by the appellant tenant's failure to supersede the judgment, the issue of wrongful eviction is not mooted by issuance of a writ of possession and may be the subject of an independent action[12]. As observed above, the permissible issues that may be litigated in a forcible action are extremely limited, and for that reason a forcible judgment is not res judicata to other claims the parties may have arising out of the landlord-tenant relationship. A forcible action is not exclusive, but cumulative, of any other remedy that the parties may have.

The procedures to appeal a forcible judgment from the justice court to the county court and to stay enforcement of that judgment pending appeal are different than those discussed above for an appeal of a forcible judgment of a county court to the court of appeals. Either party may appeal the justice court's forcible judgment to the county court by filing an *appeal* bond set by the justice in an amount that will protect the appellee from damages or delay caused by the appeal and may include additional damages the appellee will suffer for withholding or defending possession of the premised during the pendency of the de novo appeal, including loss rentals, and attorneys fees incurred at the county court level[13]. The appeal bond is to be conditioned that the appellant will prosecute the de novo appeal with effect and pay all costs and damages which may be adjudged against the appellant. There is no separate provision for a supersedeas bond to be filed on the appeal from the justice court to the county court, presumptively because the appeal bond covers the damages that ordinarily would be protected by a supersedeas. However, an important distinction from a supersedeas bond is the fact that an appeal bond must be filed to perfect the appeal[14]. In a nonpayment of rent forcible case, a tenant may perfect the appeal by filing a pauper's affidavit pursuant to rule 749a and is entitled

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[10] *Kemper v. Stonegate Manor Apts., Ltd.*, 29 S.W.3d 362 (Tex. App.-Beaumont 2000, pet. dism'd w.o.j.).

[11] *Shelby Operating Co. v. City of Waskon*, 964 S.W.2d 75, 81 (Tex. App.--Texarkana 1997). The Texarkana court in discussing the doctrine of mootness observed: "A case becomes moot or abstract when it does not rest, or ceases to rest, on any existing right or fact. Several corollaries of this rule are: (1) a case is not moot if some issue is still in controversy; (2) a case becomes moot if it is impossible for the court to grant effectual relief for any reason; (3) a case can become moot by reason of new legislation or acts which supersede existing legislation. *James v. City of Round Rock,* 630 S.W.2d 466, 468 (Tex.App.-Austin 1982, no writ) (citing *Swank v. Sharp,* 358 S.W.2d 950 (Tex.Civ.App.-Dallas 1962, no writ), and *Gordon v. Lake,* 163 Tex. 392, 356 S.W.2d 138 (1962)). When a case becomes moot, the only proper judgment is one dismissing the cause. *Polk v. Davidson,* 145 Tex. 200, 196 S.W.2d 632, 633 (1946). In determining whether a case is moot, the court may consider anything that bears upon the question. *Hunt Oil Co. v. Federal Power Comm'n,* 306 F.2d 359, 361 (5th Cir.1962)."

[12] *Tallwater v. Brodnax*, 156 S.W.2d 142 (Tex. 1941); Hanks v. Lake Towne Apts. 812 S.W.2d 625, 627 (Tex. App.-Dallas 1991, writ denied).

[13] TEX. R. CIV. P. 749, 752.

[14] TEX. R. CIV. P. 749c.

to remain in possession of the premises during the pendency of the appeal to the county court if the tenant complies with rule 749b. That rule requires the indigent tenant to pay into the justice court registry one rental period's rent within five days of filing the pauper's affidavit, and to pay the rent as it becomes due into the county court registry within 5 days of the date rent is due under the rental agreement, throughout the appeal process. If the indigent tenant fails to timely pay the rent, the landlord may seek possession notwithstanding the de novo appeal.

The State Bar Court Rules Committee has suggested a series of modifications to the appeals process when an indigent tenant seeks de novo review of an adverse justice court judgment in a forcible entry and detainer action for nonpayment of rent. In particular, the State Bar Committee expressed concern over reported abuses under the current rules that afford a tenant taking an appeal five days after judgment in which to file the pauper's affidavit and 5 more days to pay one rental period's rent, guaranteeing, in some cases, 10 days free rent when the affidavit is not contested. The State Bar Committee recommends conditioning perfection of the appeal upon the indigent tenant paying one rental period's rent into the registry of the justice court, and that failing to do so would result in a writ of possession being issued in favor of the landlord.

Our sub-committee reviewed those suggestions and proposes alternative rules which, we believe, will meet the concerns expressed by the Court Rules Committee. Of central concern to the sub-committee was the current practice that requires a party appealing a justice court forcible judgment to file an appeal bond that secures the judgment, as well as rent that may accrue on appeal, attorneys fees, and any other damages caused by the appeal. The Texas Supreme Court, in *Dillingham v. Putnam*, held that conditioning an appeal upon a party filing a supersedeas bond (or other appellate security bonding the judgment) violates the Texas Open Courts[15] constitutional guarantee.[16] Art. 1, section 13, 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."[17] Thus, a party has a guarantee of access to the courts[18] and a right to appeal

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[15] Every Texas Constitution has contained an open courts provision. W. Harris, Constitution of the State of Texas Annotated, 114 (1913),

[16] *Dillingham v. Putnam*,14 S.W. 303 (Tex. 1890), stating "[A] party's right to appeal to this court cannot be made to depend on his ability to give a bond which will itself secure to the party successful in the court below full satisfaction of his judgment." The Texas Supreme Court has reaffirmed the holding in Dillingham on numerous occasions most recently in *Texas Ass'n of Business v. Texas Air Control Bd.,* 852 S.W.2d 440, 449 (Tex. 1993). See also *LeCroy v. Hanlon*, 713 S.W.2d 335, 340 (Tex. 1986); *Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984). For an extensive analysis of Texas jurisprudence on this issue, see Elaine A. Carlson**,** Mandatory Supersedeas Bond Requirements--A Denial of Due Process Rights? 39 Baylor L. Rev. 29 (1987).

[17] The Open Courts provision emanates from Chapter 40 of t he Magna Carta ("To no one will we sell, to no one will we refuse or delay, right or justice") and was adopted in response to abuses such as "the denial and delay of justice through external interference with the courts by the King and his ministers" and the requirement that writs be purchased as a precondition to access to the courts. *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986). "Judgeships were purchased and the court had a vested interest in prolonging and multiplying court proceedings because most of their income derived from fees paid by

without having to secure the judgment or post supersedeas.[19] However, should a judgment-loser appeal and fail to post appellate security, the judgment-winner may seek enforcement of the judgment.[20] The enforcement of a money judgment does not moot the appeal. [21] It appears that the issue of possession is mooted when the tenant fails to supersede and the landlord obtains issuance of a writ of possession. Notwithstanding the issuance of a writ of possession, the tenant may proceed with the appeal of an adverse forcible judgment as to "non-possession" issues. In addition, the tenant may proceed with other claims, such as a wrongful eviction action in an independent action.

A law which unreasonably denies access to Texas courts or arbitrarily or unreasonably abolishes common law causes of action is invalid under the open courts provision of the Texas Constitution.[22] The Texas Supreme Court has acknowledged that the open courts guarantee confers independent state constitutional rights[23] and have found impermissible violations under a variety of circumstances, including: requiring a party determined by a Texas agency to be in violation of environmental statutes to tender a cash deposit or post a supersedeas bond in the full amount of the penalties assessed or forfeit the right to judicial review ;[24] requiring payment of a filing fee that goes to the state general revenues was held to be an arbitrary and unreasonable interference with the right of access to the courts;[25] a statute requiring that a

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litigants." Jonathon M. Hoffman, By The Course of The Law: The Origins of the Open Courts Clause of State Constitutions, 74 Or. L. Rev. 1279 (1995). Thirty-nine states, including Texas have adopted an Open Courts provision as a part of the state constitution. The federal constitution does not contain an open courts guarantee. David Schuman, The Right to a Remedy, 65 Temp. L. Rev. 1197, 1198 n. 6, 1199 (1992).

[18] William C. Koch, Reopening Tennessee's Open Courts Clause: A Historical Reconsideration, 27 U. Mem. L. Rev. 333, 361 (1997).

[19] *Dillingham v. Putnam*,14 S.W. 303 (Tex. 1890); *Texas Ass'n of Business v. Texas Air Control Bd.,* 852 S.W.2d 440, 449 (Tex. 1993).

[20] Tex. R. Civ. P. 627. See *Willis v. Keator*, 181 S.W. 556, 557 (Tex. Civ. App.-Amarillo 1915, no writ).

[21] *Cravens v. Wilson*, 48 Tex. (1877); *Employees Fin. Co. v. Lathram*, 369 S.W.2d 927 (Tex. 1963). However, subsequently, if the judgment of the trial court is reversed on appeal, the judgment creditor is liable to the appellant for the fair market value of the property seized through execution. Tex. Civ. Prac. & Rem. Code Ann. § 34.022; *Texas Trunk R. Co. v. Jackson*, 85 Tex. 605, 22 S.W. 1030 (1893), overruled other grounds, *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986).

[22] See *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951 (1955); LeCroy, 713 S.W.2d 335 (Tex. 1986).

[23] *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986) stating "Like the citizens of other states, Texans have adopted state constitutions to restrict governmental power and guarantee individual rights. The powers restricted and the individual rights guaranteed in the present constitution reflect Texas' values, customs, and traditions. Our constitution has independent vitality, and this court has the power and duty to protect the additional state guaranteed rights of all Texans."

[24] *Texas Ass'n of Business v. Texas Air Control Bd*., 852 S.W.2d 440, 449 (Tex. 1993).

[25] *LeCroy v. Hanlon*, 713 S.W.2d 335, 341 (Tex. 1986).

minor's medical malpractice claim be filed within two years of the injury or medical treatment violated the minor's access to courts at the age of majority.[26]

It appears that our current rules requiring a party to post an appeal bond securing a forcible judgment (and damages caused by the delay of a de novo appeal) or an indigent to put up rent in advance as a precondition to appellate review implicates the open courts guarantee. It is against this background, that the subcommittee suggests the following rule amendments.

Overview of Sub-Committee Proposal:

The subcommittee proposes the adoption of parallel provisions for supersedeas in forcible appeals from the justice court to the county court as exist for forcible appeals from the county court to the court of appeals.

Tenant who is not an indigent must post appeal bond to perfect an appeal. The appeal bond is to cover the costs incurred in the justice court.

Indigent tenant is excused from posting appeal bond, by properly proceeding as an indigent, when the same is not successfully contested.

Justice court is to make a finding of fact and include the same in the transcript sent from the justice court to the county court, of any past due rent, as well as the [fair market value] amount of one rental period's rent and the due date of such rent. Tenant (indigent or not), wishing to remain in possession pending the appeal, must post supersedeas that secures past due rent, as well as deposit into the registry of the county court the [fair market value of] rent when due (so if due monthly, rent deposit must be made monthly, so long as the appeal continues). If the tenant fails to do so, the county court judge may issue a writ of possession in favor of the landlord.

Supersedeas practices provided in TEX. R. APP. P. 24 should be adopted, insofar as feasible, in the appellate process of judgments from justice to county court, including the power of the justice court to exercise concurrent jurisdiction in reviewing questions of whether a surety is a good and sufficient surety, etc.

Summary: Make forcible appeal procedures from justice court to county appeal parallel with county to court of appeals. Require an appeal bond to cover costs (when D is appellant) or notice of appeal (when P is appellant), and appeal perfected when filing fee for county ct paid. (Does not violate open courts). Supersedeas bond (or other appellate security) is to cover judgment and interest. Rent is to be paid when due. If supersedeas is not posted or rent not paid when due, appellee may seek writ of possession, and possession issue mooted in forcible action.

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[26] *Sax v. Votteler,* 648 S.W.2d 661, 664-665 (Tex. 1983).