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).

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).

STATE BAR OF TEXAS

COURT RULE COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact Wording of Existing Rule:

RULE 742. SERVICE OF CITATION

The officer receiving such citation shall execute the same by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at his usual place of abode, at least six days before the return day thereof; and on or before the day assigned for trial he shall return such citation with his action written thereon, to the justice who issued the same.

II. Proposed Rule:

RULE: 742. SERVICE OF CITATION

The officer ~~receiving such citation shall execute the same~~ or other person authorized to serve citation under Rule 103 shall execute the citation by delivering a copy of it to the defendant, or by leaving a copy of the citation with some person over the age of sixteen years, at the defendant's usual place of abode, at least six days before the return day ~~thereof~~ for the citation. ~~and~~ On or before the day assigned for trial, the person serving the citation he shall return ~~such~~ the citation with his action written on it, to the justice who issued the citation.

III. Brief Statements of Reasons for Requested Changes and Advantages to be Served by Them.

The current rule dealing with Forcible, Entry and Detainer cases only provides for service of citation by an "officer." Practitioners have indicated that they would like the rule revised to allow for service by private process servers. This change would expedite service in metropolitan counties where sheriffs' offices face backlogs in serving citations.

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The Michael Group - Real Estate and Management

November 4, 1997

The Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Dear Judge Hecht,

I own a Real Estate Property Management Company. I feel that rule 742 should be changed so that we have the right to choose who files our evictions. Being forced to use the constable requires us to leave our office to file, and we end up waiting for the constable to serve papers, when convenient.

Please feel free to contact me with any questions.

Sincerely,

Mike Levitin

ML/ks

000227

10303 Northwest Freeway, Suite 101 • Houston, Texas 77092
713 - 956-9911 • Fax #: 713 - 956-0336

September 22, 1997

Frank Lynch
P.O. Box 671532
Houston, Texas 77267-1532

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
Austin, Texas 78711

Dear Justice Hecht:

I was a small business owner until I was closed down by the Harris County constables. I was in the business of delivering citation (notices on hearings to defendants) in Forcible Entry Detainer (F.E.D.) actions for approximately two years. The owners all felt that they should make the decision as to who did this for them not the constables, my service was more efficient and much more economical for them. The Harris county constables made threats to the Justices and managers of apartment complexes to no longer allow our services. The constables stated that "constables and only constables are allowed to serve citations under Rule 742". Rule 742 states in part, "The *Officer* receiving such citation shall execute the same" in the opinion of myself and others the word officer does not mean constables only, to us it means anyone appointed by order of the court is an officer to perform that task and only that task, the same as Rule 103. The constables should not be allowed to dictate to the courts, Judges or senators how a rule should be interpreted, so that they can monopolize it. This has caused not only a hardship for me and my employees but also for the owners and apartment manager that had been using my service.

Failure to pay rent is not a felony, misdemeanor, nor a crime against the people, therefore a constable or sheriff would not be needed to serve this notice. All other notices in courts in this state of Texas can be served under Rule 103, also a private person can arrest felons under warrants in this state. Also Rule 613 SERVICE OF WARRANT ON DEFENDANT of the Texas Rules of Court states in part " The defendant shall be served in any manner prescribed for service of citation, or as provided in rule 21 a. Rule 21a METHODS OF SERVICE reads in part, "Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify. All of the other rules allow private service of citation for justice court or any court in this state. We are asking that Rule 742 be changed to read the same as Rule 103.

Thank you for your time and consideration.

Very truly yours,

Frank Lynch

10.30.1997

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Tx 78711

Dear Justice Hecht,

With all due respect I would like to voice my strong opinion in favor of the changing of rule 742.

I am a manager on a small property (128 units) and this is a one-person property. I do not have the time to be away from my job to go and file eviction. I also think it is my constitutional right to choose my course of action. The government is already involved in too much of our lives and businesses. I hardly see what difference it should make to you or any other lawmaker as to who files and serves these papers. I also prefer the private service because it is much more personalized and I am kept abreast of the situation. This does not happen with the constables. In fact most of them have a real attitude! I also have to ask the question, where does this money go? Who is accountable for it and what good does it do me as a private citizen? I have been told by the judge's office that we file in that the money goes into a "Slush Fund" for the constables!!! I really oppose this strongly.

Thank you for your time and I hope you will consider my reasons for wanting this rule changed.

Respectfully Yours,

Shirley Nelson/Property Manager
Candleridge Park Apartment Homes
1601 Wooded Pine
Houston, TX 77073

000230

MORRIS ATLAS
ROBERT L. SCHWARZ
GARY GURWITZ
E.G. HALL
CHARLES C. MURRAY
A. KIRBY CAVIN
MIKE MILLS
MOLLY THORNBERRY
FREDERICK J. BIEL
REX H. LEACH
LISA POWELL
STEPHEN L. CRAIN
O.C. HAMILTON, JR.
VICKI M. SKAGGS
RANDY CRANE
STEPHEN C. HAYNES
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June 29, 1998

The Honorable Nathan Hecht
Justice, Supreme Court of Texas
Supreme Court Building
201 West 14th Street, Room 104
Austin, Texas 78701

RE: Court Rules Committee - Rules 749b, 749c and 751

Dear Justice Hecht:

Enclosed are proposed rule changes to Rules 749b, 749c and 751 which have been approved for submission to the Supreme Court by the Court Rules Committee.

Please have Bob Pemberton call me if there are any questions.

Sincerely,

By: Carl
O. C. Hamilton, Jr.

OCH/jf
Enclosures

000231

STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

Rule 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS

In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:

(1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement.

(2) During the appeal process as rent becomes due under the rental agreement the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.

(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.

(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

II. Proposed Rule:

Rule 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS

In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in

possession of the premises during the pendency of the appeal, by complying with the following procedure:

(1) ~~Within five days of the date that~~ At the time the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement. Failure to pay one rental period's rent into the justice court registry will result in the appeal not being perfected and authorize the justice court to issue a writ of possession upon payment of the appropriate fee.

(2) During the appeal process as rent becomes due under the rental agreement the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.

(3) If the tenant/appellant fails to pay the rent into the ~~court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of possession.~~ registry of the court as required by subparagraph (2) of this rule, the appellee may notify the court in writing of such default and request the court to issue a writ of possession. Upon receipt of the notice of default, the court shall immediately confirm with the clerk of the court that the appellent is in default and upon such confirmation shall issue a writ of possession upon payment of the appropriate fee, and order the clerk to pay all rent in the county court registry to the landlord/appellee.

(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

III. Brief Statements of Reasons for Requested Changes and Advantages to be Served by Them.

See reasons stated under Rule 751.

TARRANT COUNTY
JUDGE JACQUELYN WRIGHT
JUSTICE OF THE PEACE, PCT. 4

April 22, 1999

The Honorable Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Judge Hecht:

I am writing regarding the proposed changes to Rule 749b. I understand that the changes have been drafted, but not adopted.

Please expedite the adoption of these changes. There are unnecessary delays and expense to the litigants and to the courts, which would be eliminated by the changes to 749b. Those of us who work down here in the Justice Courts would like very much to see these changes adopted. Please see what you can do. Thank you.

Respectfully yours,

JACQUELYN WRIGHT

NORTHWEST SUB-COURTHOUSE

STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

Rule 749c. APPEAL PERFECTED

When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.

II. Proposed Rule:

Rule 749c. APPEAL PERFECTED

When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a and one rental period's rent paid into the justice court registry, the appeal shall be perfected.

III. Brief Statements of Reasons for Requested Changes and Advantages to be Served by Them.

See reasons stated under Rule 751.

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STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

Rule 751. TRANSCRIPT

When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

The trial, as well as all hearings and motions, shall be entitled to precedence in the county court.

II. Proposed Rule:

Rule 751. TRANSCRIPT

When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1) <u>together with a statement of the amount of one rental period's rent and the due date of such rent</u>, with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

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The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

The trial, as well as all hearings and motions, shall be entitled to precedence in the county court.

III. Brief Statements of Reasons for Requested Changes and Advantages to be Served by Them.

These changes come at the request of one or more justices of the peace who have, for some time, wanted changes in the rules to correct abuses on the part of tenants in forcible detainer suits. If a tenant files an appeal bond and appeals the matter to county court, the amount of the bond is governed by Rule 752 and includes an amount to cover loss of rentals during the pendency of the appeal, and the landlord is protected.

If however, the tenant files a pauper's affidavit, the pauper's affidavit perfects the appeal when it is approved. The tenant has five days after judgment in which to file a pauper's affidavit and five days after filing the pauper's affidavit, to pay one rental period's rent into the registry of the court. Thus, the tenant gets ten days of free rent. If the pauper's affidavit is not contested, and therefore, becomes approved, the appeal is then perfected and the tenant may never pay a month's rental into the registry of the justice of the peace court. The tenant then remains in possession during the appeal process and may not pay any money into the registry of the county court. No writ of possession gets issued until the landlord hires a lawyer and files a motion with the county court to have the writ of possession issued. This allows the tenant at least ten and sometimes many more days of free rent, before the landlord can recover possession of the premises.

The changes proposed are designed to expedite restoring possession to the landlord, in a pauper's oath situation, if the tenant fails to pay one rental period's rent, both in the justice court and in the county court.

Rule 749c has been changed to provide that the pauper's oath appeal is not perfected until one rental period's rent is paid into the justice court registry.

Rule 749b requires such payment to be made at the time the pauper's affidavit is filed. This prevents the tenant from filing a pauper's affidavit and continuing to occupy the premises rent free, until the pauper's affidavit gets approved or disapproved. Upon failure of the tenant to pay the one rental period's rent into the registry of the court, the justice of the peace is authorized to issue a writ of possession upon payment of the appropriate fee for the issuance of such writ.

If the appeal gets perfected and the tenant fails to pay the rent as it becomes due under the rental agreement into the registry of the county court, then the landlord only has to notify the court in writing of such default. The county judge verifies the default with the county clerk and the court is then authorized to issue a writ of possession upon payment of the appropriate fees. This eliminates the possible need for a hearing before the county court and the cost and expenses the landlord must incur to hire a lawyer to represent the landlord in the county court.

Rule 751 has also been amended to provide that the transcript must contain a statement of the amount of one rental period's rent and the due date of such rent so that the county court can ascertain whether the tenant is in default in paying the rent as it becomes due in the county court.

Rev 3 6/5/01 (6.8)

Index of Rule Changes

Existing Rule	Proposed Rule
738 May Sue For Rent	Re-worded but essentially unchanged except for adding language about contractual late charges, attorney's fees, and court costs being awarded. Contractual late charges are added because late charges are too closely linked to rent as a cause of action to justify requiring a separate action for late charges. The comment makes it clear that whenever the rules use the term forcible entry and detainer they also intend that it include a forcible detainer.
739 Citation	Gender and style changes only
740 Complainant May Have Possession	Option #1 is to repeal the entire section. The plaintiff may request a possession bond, at or after, the filing of a forcible. The tenant may file a counterbond or request a trial to be held within six days after the tenant is served (although as a practical matter this may be difficult if the tenant makes the request on the 4th or 5th day after service, because of the court's schedule). What if the tenant requests a jury trial, which would be very difficult to hold within 6 days after service? When a plaintiff/landlord requests a possession bond, the tenant will then receive two citations. The first citation is in response to the original forcible and will have an appearance date that will generally be the trial date. The next citation will be for the possession bond and will advise the tenant that he can either post a counterbond or

request a trial to be held within 6 days, and if he does neither then he will be evicted, presumably before the trial referred to in the first citation. Also if the tenant does not post a counterbond or request a trial then the sheriff or constable may evict the tenant, apparently without a writ of possession from the justice court and possibly before the actual trial referred to in the original citation. If the tenant is evicted by the sheriff or constable, is the trial moot because the tenant is now evicted and there is no apparent appeal from this procedure, and if it is not moot what is the result if a trial is held and the tenant wins and is granted a judgment for possession?
Option # 2 is to modify the rule so that there is more due process. Service of process must be by rule 742, not 742a, and the plaintiff would have to get a writ of possession from the justice court not just simply have the sheriff or constable evict the tenant without any order from the court. Still unanswered is the effect of the justice court issuing a writ of possession on a possession bond where the tenant did not post a counterbond or request a trial. Is the actual trial moot, and if not what happens if at the trial the court finds for the tenant for possession after having already granted a writ of possession on the possession bond? Option # 2 is a better solution but perhaps the best solution is to simply repeal the rule entirely.

741 Requisites Of Complaint

Deleted specific sections of the Texas Property Code in favor of a more general reference.

742 Service of Citation

Change will allow private process servers to serve citation on evictions, and will require the citation to be returned to the trial court at least one day before the trial day so that the

	citation is not returned after trial but yet still on the same day.
742a Service By Delivery To Premises	Change will allow a 742a service by only attempting service at the rental premises instead of all possible addresses. If the plaintiff lists other addresses then service must be attempted at all addresses listed in the complaint before 742a service is authorized. There is also a new requirement that return of the citation on a 742a service be verified.
743 Docketed	Addresses discovery in this accelerated trial schedule by allowing discovery at discretion of the judge (same language in small claims rules).
744 Demanding Jury	No change except for deleting the five dollar charge for a jury fee and replacing it with general language referring to the fee allowed by law. This is so we do not have to change the rule whenever the legislature changes the fee for a jury trial.
745 Trial Postponed	Allows trials to be continued for longer periods at request of all parties or by the court for good cause shown.
746 Only Issue	Rule was rewritten for style only and the reference to the specific section of the Property Code was deleted in order to refer to the general chapter.
747 Trial	No changes.
747a Representation By Agents	Conforms this rule to Sec. 24.011 of the Texas Property Code.
748 Judgment And Writ	This new rule has significant changes which will require JP's to have separate written judgments with findings of fact as to rent and other aspects of the landlord/tenant relationship. It also makes clear what may be awarded in a forcible judgment. These

changes are necessary to dovetail with the new supersedeas procedure and for the new method of paying rent into the registry of the court as it becomes due during the pendency of the appeal. Current rules allow the judgment to simply be recorded in the docket book without a separate written document. The new rule also clarifies that a counterclaim may not be filed in a forcible entry and detainer.

749 May Appeal

This new rule has significant changes which will set up a dual track appeal. One track will allow either party to appeal the case itself, which is found in this rule, and the other track allows a defendant to suspend the enforcement of the judgment, which is dealt with in Rule 750. A tenant will be able to appeal the judgment, but not suspend the enforcement of the judgment, by posting an appeal bond, security or deposit in the amount of the court costs. A plaintiff may appeal by filing a notice of appeal but there is no requirement to post a bond as the plaintiff will have already paid the justice court filing fees. Any party appealing must also pay the county court filing fee to the justice court.

749a Pauper's Affidavit

The old 749a is repealed and replaced with a new rule which is called Affidavit of Indigence. It replaces the old method of an indigent appealing if they cannot afford the bond, with a modernized method more in keeping with the TRAP rules. It closely follows TRAP rule 20.1 as to the information the party claiming indigency must provide. The procedure for handling affidavit of indigency motions in both justice and county court is the same although it is re-written to make it easier to follow. There is a provision for either the justice court or county court to extend the hearing for a maximum of 5 additional days.

749b Pauper's Affidavit In Non Payment of Rent Appeals	The old rule 749b is repealed with there now being no distinction between an appeal based on a rent versus non-rent breach. Part of old rule 749b is moved to rule 750 and part to rule 754. The new rule 749b is now called Appeal Perfected. All indigent appeals would be governed by rule 749a. 749b will cover perfecting appeals and define exactly what the appellant must do to perfect an appeal and exactly what the court must do when an appeal is perfected. The new rule also makes clear that appealing the case will not suspend the enforcement of the judgment. The comment to the rule further explains that not suspending the enforcement of the judgment will cause the appeal on the issue of possession to be moot and subject the appeal to dismissal at county court.
749c Appeal Perfected	The old rule 749c is now incorporated in rule 749b. The new rule 749c is now called Form Of Appeal Bond. This appeal bond form was formerly found in the old rule 750, which has been modified to fit the new rules.
750 Suspension of Enforcement of Judgment Pending Appeal in Forcible Entry and Detainer Cases	The old rule 750 is now contained in new rule 749c. The new rule 750 is now called Suspension of Enforcement of Judgment Pending Appeal in Forcible Entry and Detainer Cases. This will set up the second track of an appeal, which is to post a supersedeas to stop the enforcement of the judgment. This is similar to TRAP rule 24.1. Sub-section (g) talks about paying rent into the registry of the county court during the pendency of the appeal. It specifies what to do if rent is not paid when due and the action that may be taken by the county court if there is default.

751 Transcript	The old rule 751 is now contained in new rule 749b, 753, and 754. The new rule is called Form of Supersedeas Bond. It sets forth a form for the supersedeas bond.
752 Damages	Changes include a mention that the trial on appeal in county court is de novo and the deletion of the last sentence talking about recovering from the sureties on the bond. The liability of sureties is now in rule 754.
753 Duty Of Clerk To Notify Parties	The new rule 753 is from the old rule 751.
753a Judgment By Default	This is from the old rule 753 except that the reference to trial is now in rule 754 and the eight day limit is now ten days for filing a written answer.
754 Blank	Now called Trial of the Case in County Court. This rule will address the trial of the case on appeal in county court. The rule deals with requesting jury trials, discovery, the sufficiency of sureties on appeal and supersedeas bonds, and setting the case for trial.
755 Writ of Possession	Addresses the conflict between Sec 24.007 Texas Property Code and this rule by changing the language for who can suspend the enforcement of a judgment in an appeal from county court from one who uses the premises as the principal residence to one who uses the premises as a residence. It also adds language from Texas Property Code Section 24.007 reflecting that a judgment of a county court may not be stayed on appeal unless a supersedeas bond is posted within ten days after the judgment is signed.
4 Computation of Time	Rule 4 defines how to calculate five day periods with respect to counting weekends and holidays. The renumbering of some of these rules necessitates this change.

143a Cost on Appeal to County Court	Proposed Rule 749, subsection (d) requires a party appealing a forcible judgment to pay to the justice court the filing fee required by the county court and the same is a condition to perfect the de novo appeal. Rule 749b.
190 Discovery Limitations	Proposed amendments to Rule 743 acknowledge that generally discovery is not appropriate in a forcible entry and detainer action, but provides the justice with discretion to allow reasonable discovery when appropriate. Thus, the prescribed discovery limits set forth in Rule 190 should not apply to forcible actions.
216 Request & Fee for Jury Trial	Rule 744 governs request and fee for jury trials in forcible entry and detainer actions in justice court , and Rule 754 governs request and jury fees for jury trials in forcible appeals in county courts. Thus, forcible entry and detainer actions should be exempted from the application of Rule 216.
245 Assignment of Cases for Trial	Forcible entry and detainer actions are subject to an accelerated time frame for trial as mandated by the legislature. Thus, Rule 245 should not apply to forcible entry and detainer actions.

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KEITH BAKER
JUSTICE OF THE PEACE

June 28, 2001

Logged

The Honorable Nathan Hecht
Supreme Court Justice
291 W. 14th Street, Room 310
P.O. Box 12248
Austin, Texas 78711

RE: SCAC Subcommittee's Proposed Rules 735-822

Dear Justice Hecht,

The Honorable David Peeples gave me a copy of the SCAC Subcommittee's proposed changes to the FE&D (eviction) Rules 735-822. I have ample experience in administering these rules since I hear 2,000 FE&D's a year, and I have been a JP for 18 years. Generally, I agree with the proposed changes, but a few of the modifications will cause real problems for Texas JP Courts. Therefore, I hope the Supreme court will consider my concerns, which are as follows:

RULE 742: Currently, only a sheriff or constable can serve an FE&D citation. The proposed modifications to Rule 742, will permit other persons allowed by law to serve FE&D citations. This one modification will have a very severe, adverse impact on county government. Such a modification will dramatically reduce county revenue received from JP courts because we will lose much of the money we collect in citation service fees (which is set by each county). Furthermore, my court personnel have found that the majority of private process servers are very unreliable. They frequently misplace citations. Their citations often expire prior to service. The court has to constantly reissue citations to process servers, which causes delayed trials. The returns on the citations are often incomplete or inaccurate. Process servers routinely fail to timely file the returns on citations with the court after service or don't return them at all. They cannot be found or fail to appear when summoned to testify at trial concerning service of a citation. There is also a great turnover in private process servers. When one quits, the law firm that employed him frequently requests the court to provide documentation of all citations that were assigned to that private process server, and the court has to reissue all citations that the process server did not return to the court. My clerks and I have extensive experience with private process servers because every year we docket approximately 1,000 small claims cases and 1,000 civil suits (which are mostly collection suits filed by attorneys). Because FE&D citations must be served no more than 10 and no less than 6 days prior to the set trial date, proof of timely and accurate service of citation are very important issues in an eviction case. I foresee a substantial loss of revenue for county governments, a multitude of documentation and citation problems for the JP courts, and an outcry from angry landlords, tenants and attorneys, if this proposed modification is implemented.

RULE 748: The Subcommittee proposes to modify Rule 748, by requiring JP's to include findings of fact in their judgments. This requirement alone would place a very heavy and unwarranted burden on metropolitan JP's. As I pointed out above, I hear 2,000 FE&D cases every year. Very few FE&D plaintiffs are represented by attorneys, and every year I would have to prepare approximately 1,600 specially tailored judgments to comply with this modification. At the present time, my court can only keep current in it's paperwork by issuing standardized fill-in-the-blank judgments, with very few variables, in cases where plaintiffs are not represented by attorneys. Furthermore, I believe lay JP's will have a difficult time following this proposed revised rule. Over the years, I have attended many JP training seminars, and talked to many lay JP's. They have a very limited grasp on their duties even though most are conscientious and hardworking. Their formal education is often very limited. The Subcommittee's proposal simply asks too much from an almost entirely lay judiciary. Only a handful of the approximately 900 Texas JP's are attorneys. In Bexar County, an urban county of one million in population, there are two lay JP's. I know that the Advisory Committee will find this observation difficult to accept, but please believe me that the ordinary lay JP will struggle, often unsuccessfully, in determining the "rent paying period", because the phrase will have little meaning to him. To an attorney, a determination of "the day rent is due" is straight-forward, but lay JP's are often very uncertain when it comes to making a fact finding that includes a legal determination as well. I could expand on these observations at much greater length, but I hope the above illustrations are sufficient. If the Subcommittee's proposal on findings of fact are adopted, I know the lay judiciary will heroically struggle to make the findings, but inevitably our county courts will be saddled with some very imperfect results.

RULE 749: At present, Rule 749, does not provide for a motion for new trial. The proposed modification to Rule 749, provides for a motion for new trial. This proposed modification will also impose a substantial administrative burden on JP courts. Based on my experience on hearing more and more cases with extremely angry tenants, JP courts will get a large influx of motions for new trials. Very few of them will have any merit. Most counties have very tight budgets and Justice Courts are often very underfunded. JP courts rarely have all the staff, equipment, office and storage space needed to maintain an adequate operation. This proposed modification will make it even more difficult for JP staffs to keep current on FE&D paperwork and processing requirements. I suggest that, at a very minimum, any revised rule provide that a motion for new trial will be sufficient only if the tenant specifically recites facts that refute the landlord's allegations as to the defaults in the lease.

RULE 749(a): I agree with the substance of proposed Rule 749(a), but I believe the Supreme Court should instead repeal existing Rule 145, and replace it with the substance contained in proposed Rule 749(a), as to the contents of the affidavit. A revised Rule 145, should be applicable to any situation under the Rules of Civil Procedure, where an indigent is not able to pay court costs or post any type of bond, including an appeal bond or supersedeas bond. Proposed Rule 749(a), should simply require an indigent to file an affidavit that complies with revised Rule 145.

RULE 749(c) & RULE 751: Proposed Rule 749(c) concerns the form of the appeal bond, and proposed Rule 751 concerns the form of the supersedeas bond. This court has found that a large number of appeal bonds have unreadable scrawls on the spaces provided for sureties signatures. There is often no way to determine the name or address of these individuals. I suggest that the proposed forms be modified to include a space for the printed or typewritten name of the principal and each surety, and a space for the printed or typewritten address of the principal and each surety. If these changes are not included in the proposed forms, the bonds will, in many cases, be a waste of time and paper. I also suggest that spaces be included for a printed or typewritten date of birth and Texas drivers license number for the principal and the sureties, because personal identifiers are necessary in bond forfeiture situations, and because, from time to time, we get fictitious names.

Thank you for your consideration of the above observations on the SCAC Subcommittee's proposed changes to the FE&D rules.

Sincerely,

Keith Baker
Justice of the Peace
Pct. 3, Bexar County

KB/jm

cc: The Honorable Tom Phillips
The Honorable David Peeples
Mr. Charles Babcock

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
PROPERTY CODE
TITLE 4. ACTIONS AND REMEDIES
CHAPTER 24. FORCIBLE ENTRY AND DETAINER

Current through End of 1999 Reg. Sess.

§ 24.001. Forcible Entry and Detainer

(a) A person commits a forcible entry and detainer if the person enters the real property of another without legal authority or by force and refuses to surrender possession on demand.

(b) For the purposes of this chapter, a forcible entry is:
(1) an entry without the consent of the person in actual possession of the property;
(2) an entry without the consent of a tenant at will or by sufferance; or
(3) an entry without the consent of a person who acquired possession by forcible entry.

§ 24.002. Forcible Detainer

(a) A person who refuses to surrender possession of real property on demand commits a forcible detainer if the person:
(1) is a tenant or a subtenant wilfully and without force holding over after the termination of the tenant's right of possession;
(2) is a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant's lease; or
(3) is a tenant of a person who acquired possession by forcible entry.

(b) The demand for possession must be made in writing by a person entitled to possession of the property and must comply with the requirements for notice to vacate under Section 24.005.

§ 24.003. Substitution of Parties
If a tenancy for a term expires while the tenant's suit for forcible entry is pending, the landlord may prosecute the suit in the tenant's name for the landlord's benefit and at the landlord's expense. It is immaterial whether the tenant received possession from the landlord or became a tenant after obtaining possession of the property.

§ 24.004. Jurisdiction
A justice court in the precinct in which the real property is located has jurisdiction in eviction suits. Eviction suits include forcible entry and detainer and forcible detainer suits.

§ 24.005. Notice to Vacate Prior to Filing Eviction Suit

(a) If the occupant is a tenant under a written lease or oral rental agreement, the landlord must give a tenant who defaults or holds over beyond the end of the rental term or renewal period at least three days' written notice to vacate the premises before the landlord files a forcible detainer suit, unless the parties have contracted for a shorter or longer notice period in a written lease or agreement. A landlord who files a forcible detainer suit on grounds that the tenant is holding over beyond the end of the rental term or renewal period must also comply with the tenancy termination requirements of Section 91.001.

(b) If the occupant is a tenant at will or by sufferance, the landlord must give the tenant at least three days' written notice to vacate before the landlord files a forcible detainer suit unless the parties have contracted for a shorter or longer notice period in a written lease or agreement. If a building is purchased at a tax foreclosure sale or a trustee's foreclosure sale under a lien superior to the tenant's lease and the tenant timely pays rent and is not otherwise in default under the tenant's lease after foreclosure, the purchaser must

give a residential tenant of the building at least 30 days' written notice to vacate if the purchaser chooses not to continue the lease. The tenant is considered to timely pay the rent under this subsection if, during the month of the foreclosure sale, the tenant pays the rent for that month to the landlord before receiving any notice that a foreclosure sale is scheduled during the month or pays the rent for that month to the foreclosing lienholder or the purchaser at foreclosure not later than the fifth day after the date of receipt of a written notice of the name and address of the purchaser that requests payment. Before a foreclosure sale, a foreclosing lienholder may give written notice to a tenant stating that a foreclosure notice has been given to the landlord or owner of the property and specifying the date of the foreclosure.

(c) If the occupant is a tenant of a person who acquired possession by forcible entry, the landlord must give the person at least three days' written notice to vacate before the landlord files a forcible detainer suit.

(d) In all situations in which the entry by the occupant was a forcible entry under Section 24.001, the person entitled to possession must give the occupant oral or written notice to vacate before the landlord files a forcible entry and detainer suit. The notice to vacate under this subsection may be to vacate immediately or by a specified deadline.

(e) If the lease or applicable law requires the landlord to give a tenant an opportunity to respond to a notice of proposed eviction, a notice to vacate may not be given until the period provided for the tenant to respond to the eviction notice has expired.

(f) The notice to vacate shall be given in person or by mail at the premises in question. Notice in person may be by personal delivery to the tenant or any person residing at the premises who is 16 years of age or older or personal delivery to the premises and affixing the notice to the inside of the main entry door. Notice by mail may be by regular mail, by registered mail, or by certified mail, return receipt requested, to the premises in question. If the dwelling has no mailbox and has a keyless bolting device, alarm system, or dangerous animal that prevents the landlord from entering the premises to leave the notice to vacate on the inside of the main entry door, the landlord may securely affix the notice on the outside of the main entry door.

(g) The notice period is calculated from the day on which the notice is delivered.

(h) A notice to vacate shall be considered a demand for possession for purposes of Subsection (b) of Section 24.002.

(i) If before the notice to vacate is given as required by this section the landlord has given a written notice or reminder to the tenant that rent is due and unpaid, the landlord may include in the notice to vacate required by this section a demand that the tenant pay the delinquent rent or vacate the premises by the date and time stated in the notice.

§ 24.0051. Procedures Applicable in Suit to Evict and Recover Unpaid Rent

(a) In a suit filed in justice court in which the landlord files a sworn statement seeking judgment against a tenant for possession of the premises and unpaid rent, personal service on the tenant or service on the tenant under Rule 742a, Texas Rules of Civil Procedure, is procedurally sufficient to support a default judgment for possession of the premises and unpaid rent.

(b) A landlord may recover unpaid rent under this section regardless of whether the tenant vacated the premises after the date the landlord filed the sworn statement and before the date the court renders judgment.

§ 24.006. Attorney's Fees and Costs of Suit

(a) Except as provided by Subsection (b), to be eligible to recover attorney's fees in an eviction suit, a landlord must give a tenant who is unlawfully retaining possession of the landlord's premises a written demand to vacate the premises. The demand must state that if the tenant does not vacate the premises

before the 11th day after the date of receipt of the notice and if the landlord files suit, the landlord may recover attorney's fees. The demand must be sent by registered mail or by certified mail, return receipt requested, at least 10 days before the date the suit is filed.

(b) If the landlord provides the tenant notice under Subsection (a) or if a written lease entitles the landlord to recover attorney's fees, a prevailing landlord is entitled to recover reasonable attorney's fees from the tenant.

(c) If the landlord provides the tenant notice under Subsection (a) or if a written lease entitles the landlord or the tenant to recover attorney's fees, the prevailing tenant is entitled to recover reasonable attorney's fees from the landlord. A prevailing tenant is not required to give notice in order to recover attorney's fees under this subsection.

(d) The prevailing party is entitled to recover all costs of court.

§ 24.0061. Writ of Possession

(a) A landlord who prevails in an eviction suit is entitled to a judgment for possession of the premises and a writ of possession. In this chapter, "premises" means the unit that is occupied or rented and any outside area or facility that the tenant is entitled to use under a written lease or oral rental agreement, or that is held out for the use of tenants generally.

(b) A writ of possession may not be issued before the sixth day after the date on which the judgment for possession is rendered unless a possession bond has been filed and approved under the Texas Rules of Civil Procedure and judgment for possession is thereafter granted by default.

(c) The court shall notify a tenant in writing of a default judgment for possession by sending a copy of the judgment to the premises by first class mail not later than 48 hours after the entry of the judgment.

(d) The writ of possession shall order the officer executing the writ to:

(1) post a written warning of at least 8 1/2 by 11 inches on the exterior of the front door of the rental unit notifying the tenant that the writ has been issued and that the writ will be executed on or after a specific date and time stated in the warning not sooner than 24 hours after the warning is posted; and

(2) when the writ is executed:

(A) deliver possession of the premises to the landlord;

(B) instruct the tenant and all persons claiming under the tenant to leave the premises immediately, and, if the persons fail to comply, physically remove them;

(C) instruct the tenant to remove or to allow the landlord, the landlord's representatives, or other persons acting under the officer's supervision to remove all personal property from the rental unit other than personal property claimed to be owned by the landlord; and

(D) place, or have an authorized person place, the removed personal property outside the rental unit at a nearby location, but not blocking a public sidewalk, passageway, or street and not while it is raining, sleeting, or snowing.

(e) The writ of possession shall authorize the officer, at the officer's discretion, to engage the services of a bonded or insured warehouseman to remove and store, subject to applicable law, part or all of the property at no cost to the landlord or the officer executing the writ.

(f) The officer may not require the landlord to store the property.

(g) The writ of possession shall contain notice to the officer that under Section 7.003, Civil Practice and Remedies Code, the officer is not liable for damages resulting from the execution of the writ if the officer executes the writ in good faith and with reasonable diligence.

(h) A sheriff or constable may use reasonable force in executing a writ under this section

§ 24.0062. Warehouseman's Lien

(a) If personal property is removed from a tenant's premises as the result of an action brought under this chapter and stored in a bonded or insured public warehouse, the warehouseman has a lien on the property to the extent of any reasonable storage and moving charges incurred by the warehouseman. The lien does not attach to any property until the property has been stored by the warehouseman.

(b) If property is to be removed and stored in a public warehouse under a writ of possession, the officer executing the writ shall, at the time of execution, deliver in person to the tenant, or by first class mail to the tenant's last known address not later than 72 hours after execution of the writ if the tenant is not present, a written notice stating the complete address and telephone number of the location at which the property may be redeemed and stating that:

(1) the tenant's property is to be removed and stored by a public warehouseman under Section 24.0062 of the Property Code;

(2) the tenant may redeem any of the property, without payment of moving or storage charges, on demand during the time the warehouseman is removing the property from the tenant's premises and before the warehouseman permanently leaves the tenant's premises;

(3) within 30 days from the date of storage, the tenant may redeem any of the property described by Section 24.0062(e), Property Code, on demand by the tenant and on payment of the moving and storage charges reasonably attributable to the items being redeemed;

(4) after the 30-day period and before sale, the tenant may redeem the property on demand by the tenant and on payment of all moving and storage charges; and

(5) subject to the previously stated conditions, the warehouseman has a lien on the property to secure payment of moving and storage charges and may sell all the property to satisfy reasonable moving and storage charges after 30 days, subject to the requirements of Section 24.0062(j) of the Property Code.

(c) The statement required by Subsection (b)(2) must be underlined or in boldfaced print.

(d) On demand by the tenant during the time the warehouseman is removing the property from the tenant's premises and before the warehouseman permanently leaves the tenant's premises, the warehouseman shall return to the tenant all property requested by the tenant, without charge.

(e) On demand by the tenant within 30 days after the date the property is stored by the warehouseman and on payment by the tenant of the moving and storage charges reasonably attributable to the items being redeemed, the warehouseman shall return to the tenant at the warehouse the following property:

(1) wearing apparel;
(2) tools, apparatus, and books of a trade or profession;
(3) school books;
(4) a family library;
(5) family portraits and pictures;
(6) one couch, two living room chairs, and a dining table and chairs;
(7) beds and bedding;
(8) kitchen furniture and utensils;
(9) food and foodstuffs;
(10) medicine and medical supplies;

(11) one automobile and one truck;
(12) agricultural implements;
(13) children's toys not commonly used by adults;
(14) goods that the warehouseman or the warehouseman's agent knows are owned by a person other than the tenant or an occupant of the residence;
(15) goods that the warehouseman or the warehouseman's agent knows are subject to a recorded chattel mortgage or financing agreement; and
(16) cash.

(f) During the first 30 days after the date of storage, the warehouseman may not require payment of removal or storage charges for other items as a condition for redeeming the items described by Subsection (e).

(g) On demand by the tenant to the warehouseman after the 30-day period and before sale and on payment by the tenant of all unpaid moving and storage charges on all the property, the warehouseman shall return all the previously unredeemed property to the tenant at the warehouse.

(h) A warehouseman may not recover any moving or storage charges if the court determines under Subsection (i) that the warehouseman's moving or storage charges are not reasonable.

(i) Before the sale of the property by the warehouseman, the tenant may file suit in the justice court in which the eviction judgment was rendered, or in another court of competent jurisdiction in the county in which the rental premises are located, to recover the property described by Subsection (e) on the ground that the landlord failed to return the property after timely demand and payment by the tenant, as provided by this section. Before sale, the tenant may also file suit to recover all property moved or stored by the warehouseman on the ground that the amount of the warehouseman's moving or storage charges is not reasonable. All proceedings under this subsection have precedence over other matters on the court's docket. The justice court that issued the writ of possession has jurisdiction under this section regardless of the amount in controversy.

(j) Any sale of property that is subject to a lien under this section shall be conducted in accordance with Sections 7.210, 9.301-9.318, and 9.501-9.507 of the Business & Commerce Code.

(j) Any sale of property that is subject to a lien under this section shall be conducted in accordance with Section 7.210 and Subchapters D and F, Chapter 9, Business & Commerce Code.

(k) In a proceeding under this section, the prevailing party is entitled to recover actual damages, reasonable attorney's fees, court costs, and, if appropriate, any property withheld in violation of this section or the value of that property if it has been sold.

§ 24.007. Appeal

A final judgment of a county court in an eviction suit may not be appealed on the issue of possession unless the premises in question are being used for residential purposes only. A judgment of a county court may not under any circumstances be stayed pending appeal unless, within 10 days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court. In setting the supersedeas bond the county court shall provide protection for the appellee to the same extent as in any other appeal, taking into consideration the value of rents likely to accrue during appeal, damages which may occur as a result of the stay during appeal, and other damages or amounts as the court may deem

appropriate.

§ 24.008. Effect on Other Actions

An eviction suit does not bar a suit for trespass, damages, waste, rent, or mesne profits.

§ 24.009. Renumbered

§ 24.010. [Blank]

§ 24.011. Nonlawyer Representation

In eviction suits in justice court for nonpayment of rent or holding over beyond a rental term, the parties may represent themselves or be represented by their authorized agents, who need not be attorneys. In any eviction suit in justice court, an authorized agent requesting or obtaining a default judgment need not be an attorney.

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

STATE BAR OF TEXAS

COURT RULE COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact Wording of Existing Rule:

RULE 742. SERVICE OF CITATION

The officer receiving such citation shall execute the same by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at his usual place of abode, at least six days before the return day thereof; and on or before the day assigned for trial he shall return such citation, with his action written thereon, to the justice who issued the same.

II. Proposed Rule:

RULE: 742. SERVICE OF CITATION

The officer ~~receiving such citation shall execute the same~~ or other person authorized to serve citation under Rule 103 shall execute the citation by delivering a copy of it to the defendant, or by leaving a copy of the citation with some person over the age of sixteen years, at the defendant's usual place of abode, at least six days before the return day ~~thereof~~ for the citation. ~~and~~ On or before the day assigned for trial, the person serving the citation. ~~he~~ shall return ~~such~~ the citation with his action written on it, to the justice who issued the citation.

III. Brief Statements of Reasons for Requested Changes and Advantages to be Served by Them.

The current rule dealing with Forcible, Entry and Detainer cases only provides for service of citation by an "officer." Practitioners have indicated that they would like the rule revised to allow for service by private process servers. This change would expedite service in metropolitan counties where sheriffs' offices face backlogs in serving citations.

STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

Rule 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS

In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:

(1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement.

(2) During the appeal process as rent becomes due under the rental agreement the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.

(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.

(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

II. Proposed Rule:

Rule 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS

In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises

during the pendency of the appeal, by complying with the following procedure:

(1) ~~Within five days of the date that~~ At the time the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement. Failure to pay one rental period's rent into the justice court registry will result in the appeal not being perfected and authorize the justice court to issue a writ of possession upon payment of the appropriate fee.

(2) During the appeal process as rent becomes due under the rental agreement the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.

(3) If the tenant/appellant fails to pay the rent into the ~~court registry within the time limits proscribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of possession.~~ registry of the court as required by subparagraph (2) of this rule, the appellee may notify the court in writing of such default and request the court to issue a writ of possession. Upon receipt of the notice of default, the court shall immediately confirm with the clerk of the court that the appellent is in default and upon such confirmation shall issue a writ of possession upon payment of the appropriate fee, and order the clerk to pay all rent in the county court registry to the landlord/appellee.

(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

III. Brief Statements of Reasons for Requested Changes and Advantages to be Served by Them.

See reasons stated under Rule 751.

STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

Rule 749c. APPEAL PERFECTED

When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.

II. Proposed Rule:

Rule 749c. APPEAL PERFECTED

When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a and one rental period's rent paid into the justice court registry, the appeal shall be perfected.

III. Brief Statements of Reasons for Requested Changes and Advantages to be Served by Them.

See reasons stated under Rule 751.

STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

Rule 751. TRANSCRIPT

When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

The trial, as well as all hearings and motions, shall be entitled to precedence in the county court.

II. Proposed Rule:

Rule 751. TRANSCRIPT

When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1) <u>together with a statement of the amount of one rental period's rent and the due date of such rent</u>, with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

The trial, as well as all hearings and motions, shall be entitled to precedence in the county court.

III.Brief Statements of Reasons for Requested Changes and Advantages to be Served by Them.

These changes come at the request of one or more justices of the peace who have, for some time, wanted changes in the rules to correct abuses on the part of tenants in forcible detainer suits. If a tenant files an appeal bond and appeals the matter to county court, the amount of the bond is governed by Rule 752 and includes an amount to cover loss of rentals during the pendency of the appeal, and the landlord is protected.

If however, the tenant files a pauper's affidavit, the pauper's affidavit perfects the appeal when it is approved. The tenant has five days after judgment in which to file a pauper's affidavit and five days after filing the pauper's affidavit, to pay one rental period's rent into the registry of the court. Thus, the tenant gets ten days of free rent. If the pauper's affidavit is not contested, and therefore, becomes approved, the appeal is then perfected and the tenant may never pay a month's rental into the registry of the justice of the peace court. The tenant then remains in possession during the appeal process and may not pay any money into the registry of the county court. No writ of possession gets issued until the landlord hires a lawyer and files a motion with the country court to have the writ of possession issued. This allows the tenant at least ten and sometimes many more days of free rent, before the landlord can recover possession of the premises.

The changes proposed are designed to expedite restoring possession to the landlord, in a pauper's oath situation, if the tenant fails to pay one rental period's rent, both in the justice court and in the county court.

Rule 749c has been changed to proved that the pauper's oath appeal is not perfected until one rental period's rent is paid into the justice court registry.

Rule 749b requires such payment to be made at the time the pauper's affidavit is filed. This prevents the tenant from filing a pauper's affidavit and continuing to occupy the premises rent free, until the pauper's affidavit gets approved or disapproved. Upon failure of the tenant to pay the one rental period's rent into the registry of the court, the justice of the peace is authorized to issue a writ of possession upon payment of the appropriate fee for the issuance of such writ.

If the appeal gets perfected and the tenant fails to pay the rent as it becomes due under the rental

agreement into the registry of the county court, then the landlord only has to notify the court in writing of such default. The county judge verifies the default with the county clerk and the court is then authorized to issue a writ of possession upon payment of the appropriate fees. This eliminates the possible need for a hearing before the county court and the cost and expenses the landlord must incur to hire a lawyer to represent the landlord in the county court.

Rule 751 has also been amended to provide that the transcript must contain a statement of the amount of one rental period's rent and the due date of such rent so that the county court can ascertain whether the tenant is in default in paying the rent as it becomes due in the county court.

SECTION 3. FORCIBLE ENTRY AND DETAINER

RULE 738. MAY SUE FOR RENT

~~A suit for rent, may be joined with an action of forcible entry and detainer, wherever the suit for rent is within the jurisdiction of the justice court. In such case the court in rendering judgment in the action of forcible entry and detainer, may at the same time render judgment for any rent, due the landlord by the renter; provided the amount thereof is within the jurisdiction of the justice court.~~

A suit for rent, contractual late charges, and attorney's fees may be joined with an action of forcible entry and detainer. The court in rendering judgment for possession, may at the same time render judgment for any rent, contractual late charges, and attorney's fees, due the landlord by the renter; provided the amount thereof is within the jurisdiction of the justice court. The justice may also award court costs against the unsuccessful party.

Notes and Comments

Source: Art. 3976, unchanged.

Notes and Comments

Comment: Whenever the term forcible entry and detainer is used in this section it is intended that it also include forcible detainer. Back rent, late charges authorized by lease or contract, and attorney's fees may be sought subject to the jurisdictional limit of the justice court.

[Comment for the committee. Late charges should be included in an eviction suit. Judicial economy dictates that a landlord not have to file for back rent in an eviction and then sue for late charges on that back rent in a separate action. I am also trying to show that late charges, attorney's fees and rent may be requested if they are within the jurisdictional limit of the court, but that costs may be awarded regardless of the amount in controversy because costs are not included within the jurisdictional limit.]

RULE 739. CITATION

When an aggrieved ~~the~~ party ~~aggrieved~~ or ~~his~~ the party's authorized agent shall file ~~his~~ a written sworn complaint, the justice shall immediately issue citation ~~directed to~~ directing the defendant or defendants ~~commanding him~~ to appear before such justice at a time and place named in such citation, such time being not more than ten days nor less than six days from the date of service of the citation.

The citation shall inform the parties that, upon timely request and payment of a jury fee no later than five days after the defendant is served with citation, the case shall be heard by a jury.

(Amended July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3977.

[Comment for the committee. Gender neutral changes]

{ Option # 1 (Repeal the entire section) }

RULE 740. ~~COMPLAINANT MAY HAVE POSSESSION~~

~~The party aggrieved may, at the time of filing his complaint, or thereafter prior to final judgment in the justice court, execute and file a possession bond to be approved by the justice in such amount as the justice may fix as the probable amount of cost of suit and damages which may result to defendant in the event that the suit has been improperly instituted, and conditioned that the plaintiff will pay defendant all such costs and damages as shall be adjudged against plaintiff.~~

~~The defendant shall be notified by the justice court that plaintiff has filed a possession bond. Such notice shall be served in the same manner as service of citation and shall inform the defendant of all of the following rules and procedures:~~

~~(a) Defendant may remain in possession if defendant executes and files a counterbond prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's bond. Said counterbond shall be approved by the justice and shall be in such amount as the justice may fix as the probable amount of costs of suit and damages which may result to plaintiff in the event possession has been improperly withheld by defendant;~~

~~(b) Defendant is entitled to demand and he shall be granted a trial to be held prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond;~~

~~(c) If defendant does not file a counterbond and if defendant does not demand that trial be held prior to the expiration of said six day period, the constable of the precinct or the sheriff of the county where the property is situated, shall place the plaintiff in possession of the property promptly after the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond; and~~

~~(d) If, in lieu of a counterbond, defendant demands trial within said six day period, and if the justice of the peace rules after trial that plaintiff is entitled to possession of the property, the constable or sheriff shall place the plaintiff in possession of the property five days after such determination by the justice of the peace.~~

(Amended June 16, 1943, eff. Dec. 31, 1943; July 22, 1975, eff. Jan 1, 1976; May 9, 1977, eff. Sept. 1, 1977.)

Notes and Comments

Source: Art. 3978, unchanged, except that by amendment effective December 31, 1943, the regulations as to the bond of defendant have been enlarged so as to include a case where an out-of-county officer effects service of citation and so as to make it clear that six days' time will be allowed, before possession is given the aggrieved party, within which defendant may give such bond; and other relevant changes have been made.

Changes by amendment effective January 1, 1976; The rule is rewritten to eliminate the requirement that the defendant execute a counterbond for double the amount of plaintiff's bond.

The rule is rewritten to permit a possession bond and a counterbond in the probable amount of costs and damages. The new rule requires notice to the defendant of the rights and liabilities stated in sections (a) through (d).

Amended by substitution of "five days" for "immediately" to avoid conflict with Rule 748.

[Comment for the committee. Option #1 is to repeal the rule and Option #2 is to amend it to make it somewhat easier to understand.]

{Option # 2 (Modify the section) }

RULE 740. COMPLAINANT MAY HAVE POSSESSION

The ~~party aggrieved~~ plaintiff may, at the time of filing his complaint, or thereafter prior to ~~final judgment~~ trial in the justice court, execute and file a possession bond to be approved by the justice in such amount as the justice may fix as the probable amount of cost of suit and damages which may result to defendant in the event that the suit has been improperly instituted, and conditioned that the plaintiff will pay defendant all such costs and damages as shall be adjudged against plaintiff.

The defendant shall be notified by the justice court that plaintiff has filed a possession bond. Such notice ~~shall~~ must be served on a defendant under Rule 742 in the same manner as service of citation and shall inform the defendant of all of the following rules and procedures:

(a) Defendant may remain in possession if;

(1) defendant executes and files a counterbond prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's bond. Said counterbond shall be approved by the justice and shall be in such amount as the justice may fix as the probable amount of costs of suit and damages which may result to plaintiff in the event possession has been improperly withheld by defendant; or

(2) ~~Defendant~~ defendant ~~is entitled to~~ demands ~~and he shall be granted~~ a trial by judge ~~to~~ which must be held prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond;

(b) If defendant does not file a counterbond and if defendant does not demand that trial be held prior to the expiration of said six-day period, the ~~constable of the precinct or the sheriff of the county where the property is situated, shall place the plaintiff in possession of the property promptly~~ plaintiff may request a writ of possession from the justice court after the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond; and

(c) If, in lieu of a counterbond, defendant demands trial within said six-day period, and if the justice of the peace rules after trial that plaintiff is entitled to possession of the property, the ~~constable or sheriff shall place the plaintiff in possession of the property~~ justice court may issue a writ of possession five days after such determination by the justice of the peace.

(d) Whenever a justice court issues a writ of possession under this rule a defendant may appeal in the same manner as a traditional forcible entry and detainer trial.

Notes and Comments

A defendant must be served with a possession bond under Rule 742 only, not under Rule 742a. The sheriff or constable can no longer place a plaintiff in possession without a writ of possession from the justice court.

RULE 741. REQUISITES OF COMPLAINT

The complaint shall describe the lands, tenements or premises, the possession of which is claimed, with sufficient certainty to identify the same, and it shall also state the facts which entitled the complainant to the possession and authorize the action under Chapter 24 of the ~~Sections 24.001-24.004,~~ Texas Property Code.

(Amended Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3979, unchanged.
Change by amendment effective April 1, 1984; Corrective.

[Comment for the committee. This prevents having to amend the rules if the Property Code is renumbered.]

RULE 742. SERVICE OF CITATION

(a) Person Authorized to Serve Citation in Forcible Entry and Detainer Actions.
Persons authorized to serve citation in Forcible Entry and Detainer actions include (1) any sheriff or constable or other person authorized by law or, (2) any person authorized by law or written order of the court who is not less than 18 years of age. No person who is a party to, or interested in the outcome of a suit shall serve any process.

(b) Method of Service of Citation

The officer ~~receiving such citation shall execute the same~~ or other person authorized to serve citation shall execute the citation by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at ~~his usual place of abode~~ the rental premises at issue, at least six days before the return day ~~thereof~~ for the citation. ~~and on or before the day assigned for trial~~ The person serving the citation ~~he~~ shall return ~~such~~ the citation, noting the action taken thereon, ~~with his action written thereon~~, to the justice who issued the ~~same~~ citation at least one day before the appearance day named in the citation.

(Amended Aug. 18, 1947, eff. Dec 31, 1947.)

Notes and Comments

Source: Art 3980, with minor textual change.

[Comment for the committee. This will conform service of citation in evictions to service for all other civil suits in Texas. The requirement that the citation be returned at least one day prior to trial will prevent the citation being returned after the time set for trial although on the same day.]

RULE 742a. SERVICE BY DELIVERY TO PREMISES

If the sworn complaint lists ~~all home an work addresses~~ the address of the premises at issue as well as any other alternate addresses of the defendant or defendant's as contained in a written lease agreement, ~~of the defendant which are known to the person filing the sworn complaint and if it states that such person knows of no other home or work addresses of the defendant in the county where the premises are located~~, and if service of citation cannot be effected under Rule 742 then service of citation may be by delivery to the rental premises ~~in question~~ at issue as follows:

If the officer or other person authorized to serve citation in forcible entry and detainer actions ~~receiving such citation~~ is unsuccessful in serving ~~such~~ citation under Rule 742, the officer or other authorized person shall no later than five days after receiving such citation execute a sworn statement based on personal knowledge, confirming that ~~the officer has made~~ diligent efforts have been made to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located as may be shown on the sworn complaint, stating the times and places of attempted service. Such sworn statement shall be filed ~~by the officer~~ with the justice ~~who shall promptly consider the sworn statement of the officer~~. After promptly considering the sworn statement ~~of the officer~~ the justice may then authorize service by written order ~~according to the following~~ as follows:

(a) The officer or other authorized person shall place the citation inside the premises ~~by placing it~~ through a door mail chute or by slipping it under the ~~front door~~ main entry door to the

premises; and if neither method is possible or practical, ~~the officer shall~~ to securely affix the citation to the ~~front door or~~ main entry door to the premises; and

(b) The officer or other authorized person shall that same day ~~or the next day~~ deposit in the mail a true copy of such citation with a copy of the sworn complaint attached thereto, addressed to the defendant at the premises in question and sent by first class mail; and

(c) The officer or other authorized person shall note on the return of such citation the date of delivery under (a) above and the date of mailing under (b) above. The return of the citation by an authorized person shall be verified; and

(d) Such delivery and mailing to the premises shall occur at least six days before the return day of the citation; and ~~on or before~~ at least one day before the appearance day named in the citation ~~assigned for trial~~. The officer or other authorized person accomplishing service ~~he~~ shall return such citation noting ~~with his~~ the action taken ~~written~~ thereon, to the justice who issued the same.

It shall not be necessary for the aggrieved party or ~~his~~ the party's authorized agent to make a request for or motion for alternative service pursuant to this rule.

(Added April 15, 1982, eff. Aug. 15, 1982.)

Notes and Comments

This is a new rule.

[Comment for the committee. This will conform service of citation under 742a with service under Rule 742. It will also relieve the landlord of the requirement of putting down all possible addresses of the defendant for the process server to attempt service at before a request for service under Rule 742a can be made. The best address in which to serve a defendant for an eviction is generally at the premises in question. It will also require the process server to get the citation back to the court at least one day prior to trial. If the trial is set for 9am and the process server doesn't get the citation back until 3pm then it doesn't do much good as the trial will have been rescheduled even though the process server will have technically complied with the law. This change will also require that the server file a verified return of citation. Another change is that the server mails the citation on the same day it is attached to or slipped through the door. This solves the problem of how you calculate the earliest trial date under sub-section (d) [i.e. do you calculate from the date of delivery or the date of mailing?] and it gets the mailed citation to the defendant quicker by 1 day.

RULE 743. DOCKETED

The cause shall be docketed and tried as other cases. If the defendant shall fail to enter an appearance upon the docket in the justice court or file answer before the case is called for trial, the allegations of the complaint may be taken as admitted and judgment by default entered

accordingly. The justice shall have authority to issue subpoenas for witnesses to enforce their attendance, and to punish for contempt.

Generally, discovery is not appropriate in forcible entry and detainer actions, however, the justice has the discretion to allow reasonable discovery.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947.)

Notes and Comments

Source: Art. 3981, unchanged.

[Comment for the committee: Some provision must be made for discovery although applying the entire discovery rules for forcible entry and detainer cases is not reasonable. This language is similar to the language in Chapter 28 of the Government Code providing for reasonable discovery in small claims court, therefore the justice courts will be familiar with this terminology.]

RULE 744. DEMANDING JURY

Any party shall have the right of trial by jury, by making a request to the court on or before five days from the date the defendant is served with citation, and by paying a the jury fee ~~of five dollars~~ required by law for requesting a jury trial in justice court. Upon such request, a jury shall be summoned as in other ~~cases in~~ justice court proceedings.

(Amended July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art 3982, unchanged.

[Comment for the committee. See comment at the end regarding Rule 4]

RULE 745. TRIAL POSTPONED

For good cause shown, supported by affidavit of either party, the trial may be postponed for a period not exceeding ~~six~~ seven days. The trial may be postponed for a longer period upon the agreement of all parties provided such agreement is made in writing and filed with the court, or if the agreement is made in open court.

Notes and Comments

Source: Art 3983, unchanged.

[Comment for the committee. Many JP courts hold evictions only one day a week and it is generally on the same day each week, therefore being able to continue a case for only 6 days is

often inconvenient for the court. There are some cases where both parties would like a longer continuance in order to further prepare or for settlement discussions.

RULE 746. ONLY ISSUE

~~In a case of forcible entry or of forcible detainer under Sections 24.001-24008, Texas Property Code, the only issue shall be as to the right to actual possession and the merits of the title shall not be adjudicated.~~

Except as provided in rule 738, the only issue in a forcible entry and detainer action under Chapter 24 of the Texas Property Code is the right to actual possession and the merits of the title shall not be adjudicated.

(Amended Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3984, with minor textual change.

Change by amendment effective April 1, 1984: Corrective.

[Comment for the committee. This is a housekeeping change so we will not have to amend the rules if the property code is renumbered. Also by eliminating the word only perhaps we clear up some confusion about what can be tried in an eviction action. Rule 746 now seems to be in conflict with rules 738 and 748. Striking only makes it more consistent.

RULE 747. TRIAL

If no jury is demanded by either party, the justice shall try the case. If a jury is demanded by either party, the jury shall be impaneled and sworn as in other cases; and after hearing the evidence it shall return its verdict in favor of the plaintiff or the defendant as it shall find. (Amended June 16, 1943, eff. Dec. 31, 1943; June 10, 1980, eff. Jan 1, 1981.)

Notes and Comments

Source: Art. 3985.

Change by amendment effective January 1, 1981: The last sentence of the former rule is deleted because it is the same provision as the second sentence of Rule 743.

RULE 747a. REPRESENTATION BY AGENTS

In forcible entry and detainer cases for non-payment of rent or holding over beyond the rental term, the parties may represent themselves or be represented by their authorized agents, who

need not be attorneys. ~~in justice court~~ In any forcible entry and detainer suit in justice court, an authorized agent requesting or obtaining a default judgment need not be an attorney.

(Added April 15, 1982, eff. Aug. 15, 1982.)

Notes and Comments

This is a new rule.

[Comment for the committee. This will conform Rule 747a to Chapter 24.011 Texas Property Code.

RULE 748. JUDGMENT AND WRIT

If the judgment or verdict is ~~be~~ in favor of the plaintiff, the justice shall give judgment for plaintiff for possession of the premises, and costs. The justice may also give judgment for ~~damages~~ the plaintiff for back rent, contractual late charges and attorney's fees, if sought and established by proof, and provided that such claims are within the jurisdiction of the court. ~~and he shall award his a writ of possession.~~ If the judgment or verdict is ~~be~~ in favor of the defendant, the justice shall give judgment for defendant against the plaintiff for costs and for possession of the premises. The justice may also award a defendant who prevails against the plaintiff in the issue of possession, a judgment for attorney's fees if authorized and established by proof, and provided that such claim is within the jurisdiction of the court. ~~and any damages~~. If the judgment is for the plaintiff for possession, the justice shall issue a writ of possession except that no ~~No~~ writ of possession shall issue until the expiration of five days from the ~~time~~ day the judgment is signed.

(a) A forcible entry and detainer judgment shall be in writing in a separate document and contain the full names of the parties, as stated in the pleadings, and state for and against whom the judgment is rendered. The judgment shall recite who is awarded:
(1) possession of the premises:
(2) back rent, if any, and contractual late charges, if any, and in what amount,
(3) attorney's fees, if any, and in what amount;
(4) court costs and in what amount.

(b) A forcible entry and detainer judgment shall contain findings of fact which must include the following:
(1) whether there is an obligation to pay rent on the part of the defendant;
(2) a determination of the rent paying period;
(3) a determination of the day rent is due;
(4) a determination of the amount of rent due each rent paying period, and if the rental agreement provides that all or part of the tenant's rental obligation is subsidized by the government then a determination as to how much rent is to be paid by the tenant and how much rent is to be paid by the federal government;
(5) a determination of the date through which the judgment for back rent, and contractual late charges is calculated.

(c) If there is no obligation on the part of the tenant to pay rent then the judge shall make a finding as to the fair market rental value of the premises per month as if there was an obligation to pay rent.

Notes and Comments

Comment: The main issue in a forcible entry and detainer action is possession, however a plaintiff may join a claim for rent, contractual late charges, costs, and attorney's fees to the issue of possession. The rules also allow a defendant who prevails to recover any costs and attorney's fees to which they are entitled but a defendant may not file a counterclaim. Recovery under any other grounds is not permitted under this section. This amendment to the rule also sets out a requirement that judgments in a forcible entry and detainer case be in writing in a separate document and that the judgment contains specific information, including findings of fact about the rent. This is necessary in order to determine the amount of the appeal bond and the supersedeas bond, and for the county court to determine when and how much rent the tenant/appellant should pay into the registry of the court when the appeal is pending in county court.. Part (c) requires a finding by the court of the fair market rental value of the premises if there is no contractual obligation for the defendant to pay rent. This is necessary, for example, where a tenant at sufferance who holds over after the termination of an executory contract or after a foreclosure, or someone who has entered the real property of another without legal authority, (see Chapter 24 of the Texas Property Code).

(Amended July 26, 1960, eff. Jan. 1, 1961; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan 1, 1981; July 15, 1987, eff. Jan 1, 1988.)

Notes and Comments

Source: Art. 3986.

Change: Elimination of verdict of "guilty" or "not guilty."

Change by amendment effective January 1, 1961: The time within which writ of restitution to issue changed from two days to five days.

Changes by amendment effective January 1, 1976; The amendments authorize judgments for costs and damages which Rule 740 protects.

Change by amendment effective January 1, 1981; Changed so that time runs from the date judgment is signed.

[Comment for the committee. This will clarify what a prevailing plaintiff or defendant is entitled to if they are successful. We have some defendants who try to file a counterclaim on evictions which I don't think is contemplated under the rules. Since a forcible entry and detainer does not bar a tenant from filing a suit for trespass, damages, waste, mesne profits or any other cause of action the inability to file a counterclaim in a forcible will not harm the tenant. This will also require for the first time a separate written judgment which contains information which will be needed in setting an appeal or supersedeas bond and in calculating how much rent will need to be paid into the registry of the court during the pendency of the appeal)

RULE 749. MAY APPEAL

~~In appeals in forcible entry and detainer cases, no motion for new trial shall be filed.~~

~~Either party may appeal from a final judgment in such case, to the county court of the county in which the judgment is rendered by filing with the justice within five days after the judgment is signed, a bond to be approved by said justice, and payable to the adverse party, conditioned that he prosecute his appeal with effect, or pay all costs and damages which may be adjudged against him.~~

~~Within five days following the filing of such bond, the party appealing shall give notice as provided in Rule 21a of the filing of such bond to the adverse party. No judgment shall be taken by default against the adverse party in the court to which the cause has been appealed without first showing substantial compliance with this rule.~~

~~The justice shall set the amount of the bond to include the items enumerated in Rule 752.~~

(a) All motions to set aside a forcible entry and detainer judgment or for a new trial shall be made within 1 day after the judgment is signed. The filing of a motion to set aside a judgment or for a new trial does not extend the deadline to perfect an appeal under these rules.

(b) A defendant may appeal from a final judgment in a forcible entry and detainer, to the county court of the county in which the judgment is signed by filing with the justice, not more than five days after the judgment is signed, an appeal bond, deposit, or security to be approved by said justice. The appeal from a judgment for court costs, back rent, late charges, attorney's fees and possession may be made by posting an appeal bond, deposit, or security in an amount equal to the court costs incurred in justice court.

(c) A plaintiff may appeal from a final judgment in a forcible entry and detainer, to the county court of the county in which the judgment is signed by filing a written notice of appeal with the justice not more than five days after the day the judgment is signed. The notice of appeal must identify the trial court, plaintiff, defendant and the cause number, and state that the plaintiff desires to appeal. The notice of appeal must be signed by the plaintiff or the plaintiff's authorized agent.

(d) The party appealing the judgment must also pay to the justice court, the filing fee required by that county to appeal a case to county court. The court will forward the filing fee to the county clerk along with all other papers in the case. The filing fee must be made payable to the county clerk of the county in which the case was heard.

(e) If an appeal bond is posted it must meet the following criteria:
(1) It must be in an amount required by this rule,
(2) It must be made payable to the county clerk of the county in which the case was heard,
(3) It must be signed by the judgment debtor or the debtor's authorized agent,

(4) It must be signed by a sufficient surety or sureties as approved by the court. If an appeal bond is signed by a surety or sureties, then the court may, in its discretion, require evidence of the sufficiency of the surety or sureties prior to approving the appeal bond.

(f) Deposit in lieu of appeal bond. Instead of filing a surety appeal bond, a party may deposit with the trial court:
(1) cash;
(2) a cashier's check payable to the county clerk of the county where the case was heard, drawn on any federally insured and federally or state chartered bank or savings and loan association; or
(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(g) Any motions challenging the sufficiency of the appeal bond or deposit in lieu of appeal bond may be filed with the county court.

(h) Within five days following the filing of an appeal bond by a defendant, or the filing of a notice of appeal by a plaintiff, the party appealing shall give notice in accordance with Rule 21a of the filing of an appeal bond or the filing of a notice of appeal to the adverse party. No judgment shall be taken by default against the adverse party in the county court to which the cause has been appealed without first showing substantial compliance with this subsection.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan 1, 1981; July 15, 197, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3987, unchanged.

Changes by amendment effective January 1, 1976: The first sentence has been moved to that place from within the rule as previously written. The amount of the appeal bond is fixed by the justice as prescribed by Rule 752.

Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.

Comment on 1988 Change: The purpose of this amendment is to give notice to the appellee that an appeal of the case from the justice court has been perfected in the county court.

(Note to committee: This rule is rewritten to allow a two-part method of appeal. Rule 749 sets forth what a plaintiff and defendant must do to appeal the judgment, including the notice, amount of the appeal bond or contents of the notice of appeal. Rule 749a talks about the affidavit of indigence which replaces the old pauper's affidavit. The affidavit of indigence may be used to avoid posting the appeal bond but may not be used to suspend the enforcement of the judgment. Rule 749b discusses what must occur for an appeal to be perfected and rule 749c contains the form of the appeal bond, which was formerly found in rule 750.)

~~RULE 749a. PAUPER'S AFFIDAVIT~~

~~If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 749, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the filing of such affidavit and notice thereof to the opposite party or his attorney of record by any officer of the court or party to the suit, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence either than by affidavit above referred to. When a pauper's affidavit is timely contested by the appellee, the justice shall hold and rule on the matter within five days.~~

~~If the justice of the peace disapproves the pauper's affidavit, appellant may, within five days thereafter bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing, not later than five days, and shall hear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case.~~

~~A pauper's affidavit will be considered approved upon one of the following occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit.~~

~~No writ of possession may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 within five days thereafter. If no appeal bond is filed within five days, a writ of possession may issue.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977; amended June 10, 1980, eff. Jan. 1, 1981; April 245, 1990 amendment withdrawn Sept. 4, 1990, and rule amended eff. retroactively to Sept. 1, 1980.)~~

~~This is a new rule. It substantially tracks Rule 572.~~

~~Notes and Comments~~

~~Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.~~

~~Comment to 1990 change: Proceedings on pauper affidavits are revised. The term writ of restitution is corrected to writ of possession.~~

Rule 749a Affidavit of Indigence

(a) Establishing indigence

A party who cannot pay the costs to appeal may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in compliance with this rule within five days after the judgment is signed; and

(2) the claim of indigence is not contested or, if contested, the contest is not sustained by a timely written order.

(b) Contents of affidavit.

The affidavit of indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

(1) the nature and amount of the party's current employment income, government-entitlement income, and other income;

(2) the income of the party's spouse and whether that income is available to the party;

(3) real and personal property the party owns;

(4) cash the party holds and amounts on deposit that the party may withdraw;

(5) the party's other assets;

(6) the number and relationship to the party of any dependents;

(7) the nature and amount of the party's debts;

(8) the nature and amount of the party's monthly expenses;

(9) the party's ability to obtain a loan for court costs;

(10) whether an attorney is providing free legal services to the party;

(11) whether an attorney has agreed to pay or advance court costs.

(c) When and Where Affidavit Filed

An appellant must file the affidavit of indigence in the justice court within five days after the judgment is signed

(d) Duty of Clerk or Justice of the Peace

Upon the filing of an affidavit of indigence the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of indigence within one working day of its filing by written notification accomplished by first class mail.

(e) No contest filed

Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(f) Contest to affidavit

The appellee or county clerk, may contest the claim of indigence by filing a contest to the affidavit. The contest must be filed in the justice court within five days after the date when the notice of the filing of the affidavit was mailed by the clerk or justice of the peace to the opposing party. The contest need not be sworn.

(g) Burden of Proof

If a contest is filed, the party who filed the affidavit of indigence must prove the affidavit's allegations. If the indigent party is incarcerated at the time the hearing on a contest is held, the affidavit must be considered as evidence and is sufficient to meet the indigent party's burden to present evidence without the indigent party's attending the hearing.

(h) Hearing and decision in the trial court

(1) Notice required

If the affidavit of indigence is filed in the justice court and a contest is filed, the justice court must set a hearing and notify the parties of the setting.

(2) Time for hearing.

The justice court must either hold a hearing and rule on the matter or sign an order extending the time to conduct a hearing within five days from the date a contest is filed.

(3) Extension of time for hearing.

The time for conducting a hearing must not be extended for more than five days from the date the order is signed.

(4) Time for written decision; effect.

Unless—within the period set for the hearing---the justice court signs an order sustaining the contest, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(i) Appeal from the justice court order disapproving the affidavit of indigence

(1) No writ of possession may issue pending the hearing by the county court of the appellant's right to appeal on an affidavit of indigence.

(2) If a justice of the peace disapproves the affidavit of indigence, appellant may, within five days thereafter, bring the matter before the county court for a final decision, and , on request, the justice shall certify to the county court appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county court shall hold a hearing de novo and rule on the matter within five days from the date the matter is brought to the county court, or within that five day period, sign an order extending the time to conduct a hearing. The time for conducting a hearing must not be extended for more than five days from the date the order is signed. If the affidavit of indigence is approved by the county court, it shall direct the justice to transmit to the clerk of the county court, the transcript, records, and papers of the case. If the county court disapproves the affidavit of indigence, appellant may perfect an appeal by filing an appeal bond, deposit, or security with the justice court in the amount required by this rule within five days thereafter. If no appeal bond is filed within five days thereafter, the justice court may issue a writ of possession.

(j) Costs defined

As used in this rule, costs means:

(1) a filing fee paid in justice court to initiate the forcible entry and detainer action:

(2) any other costs sustained in the justice court; and

(3) a filing fee paid to appeal the case to the county court.

(Notice to committee: The new affidavit of indigence replaces the pauper's affidavit and generally follows the TRAP rules except for a few modifications necessary for to make the rule fit these cases. It is important to note that the approval of an affidavit of indigence only allows the case to be appealed but does not suspend the enforcement of the judgment. The procedures for filing, contesting and appealing the denial of the affidavit of indigence are essentially the same as under old rule 749a.)

~~RULE 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS~~

~~In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:~~

~~(1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry on rental period's rent under the terms of the rental agreement.~~

~~(2) During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.~~

~~(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.~~

~~(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.~~

~~(5) All hearings and motions under this rule shall be entitled to precedence in the county court.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977.)~~

~~Notes and Comments~~

~~This is a new rule.~~

Rule 749b Appeal Perfected

When an appeal bond, deposit, or security has been timely filed in conformity with Rule 749, and the filing fee required for the appeal of cases to the county court is paid, or an affidavit of indigence approved in conformity with Rule 749a, the appeal shall be perfected. When an appeal has been perfected, the trial court shall make out a transcript of all the entries made on it's docket of the proceedings had in the case and immediately file the same, together with the original papers, any money in the court registry pertaining to that case, and the appeal bond, deposit, or security filed in conformity with Rule 749, or the affidavit of indigence approved in conformity with Rule 749a with the county clerk of the county in which the case was heard.

The county clerk shall docket the case and the trial shall be de novo. The county clerk shall immediately notify both appellant and appellee of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when there is no written answer on file in the justice court.

The perfection of an appeal in a forcible entry and detainer case does not suspend enforcement of the judgment. Enforcement of the judgment may proceed unless the enforcement of the judgment is suspended in accordance with rule 750. If the appeal is based on a judgment for possession and court costs only then the tenant's failure to post a supersedeas bond will allow the appellee to seek a writ of possession. Issuance of a writ of possession will cause the appeal to be moot and allow the county court in which the case is pending to dismiss the appeal.

Notes and Comments

An appeal by a tenant for rent, contractual late charges, attorney's fees, and court costs may be appealed separately from the issue of possession, and the tenant's failure to post a supersedeas bond to suspend the enforcement of judgment, such as with a writ of possession, will not moot the appeal on grounds other than possession. If the appeal is based on a judgment for possession and court costs only, then the tenant's failure to post a supersedeas bond will allow the appellee to seek a writ of possession and cause the appeal to be moot.

(Added May 9, 1977, eff. Sept. 1, 1977; amended April 15, 1982, eff. Aug. 15, 1982; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Change by amendment effective August 15, 1982: This rule is amended so that one month's rent need not be paid when an appeal bond is made.

Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.

(Amended May 9, 1977, eff. Sept. 1, 1977; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

(From old RULE 751)
Notes and Comments

Source: Art. 3989.

Amended to require immediate filing of papers and money with clerk of county court. Provides for precedence of trial, hearings, and motions.

Comment on 1988 Change: This amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in the justice court.

Comment to 1990 change: To provide for transfer of subject funds.

(Note to committee; This rule sets forth what must occur to perfect an appeal. It now includes a requirement that the filing fee for county court be paid to the justice court. As in old rule 749c it also dictates what the justice court must do when an appeal is perfected.)

~~**RULE 749c. APPEAL PERFECTED**~~

~~When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977; amended April 15, 1982, eff. Aug. 15, 1982; April 24, 1990, eff. Sept. 1, 1990.)~~

~~**Notes and Comments**~~

~~Change by amendment effective August 15, 1982: This rule is amended so that one month's rent need not be paid when an appeal bond is made.~~

~~Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.~~

~~**RULE 750.**~~ RULE 749c **FORM OF APPEAL BOND**

The appeal bond authorized in the preceding article may be substantially as follows:

_____ , Plaintiff	"The State of Texas,
vs.	"County of _____
_____ , Defendant	Cause Number _____

"~~Whereas~~ WHEREAS, in the above entitled and numbered ~~upon a writ of~~ forcible entry and detainer in the Justice Court of precinct _____ of _____ County, Texas, judgment was signed on the _____day of _____, _____ in favor of ~~A.B~~ _____ appellee., and against ~~C.D.~~ _____ appellant. ~~tried before _____, a justice of the peace of _____ county, a judgment was rendered in favor of the said A.B. on the _____day of _____, A.D. ___, and against the said C.D~~ From ~~from~~ which judgment the said ~~C.D~~ appellant, ~~has appealed~~ wishes to appeal to the county court; now, therefore, the said ~~C.D~~ appellant, and ~~his/her~~ sureties, covenant that appellant will prosecute ~~his/her~~ said appeal with effect and pay all cost and damages which may be adjudged against the appellant, provided the sureties shall not be liable in an amount greater than $_____, said amount being the amount of the bond herein.

NOW, THEREFORE, WE _____, appellant, as principal, and _____, as surety at _____ (address of surety), and_____ as surety at _____ (address of surety), acknowledge ourselves as bound to pay to _____ appellee, the sum of $ _____, conditioned that appellant shall prosecute the appeal with effect and will perform an adverse judgment final on appeal.

" Given under our hands this _____day of _____, A.D. ____."

_____
Signature of Appellant

_____
Signature of Surety

_____
Signature of Surety

(Amended July 22, 1975, eff. Jan. 1, 1976.)

Notes and Comments

Source: Art. 3988, unchanged.

Change by amendment effective January 1, 1976: The form is amended to state the limits of liability of the sureties.

(Note to committee: This form of the appeal bond has been modified. It was formerly found in rule 750 but was moved so that all rules pertaining to the appeal are found in one place.)

Rule 750 SUSPENDING ENFORCEMENT OF FORCIBLE ENTRY AND DETAINER JUDGMENT PENDING APPEAL TO COUNTY COURT

(a) In a forcible entry and detainer case an appellant who has perfected an appeal under these rules shall be entitled to suspend the enforcement of the judgment and, where applicable, stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:
(1) filing with the justice court a written agreement with the appellee for suspending enforcement of the judgment ;
(2) filing with the justice court a good and sufficient supersedeas bond;
(3) making a deposit with the justice court in lieu of a supersedeas bond; or
(4) providing alternate security as ordered by the justice court.

(b) Supersedeas Bonds
(1) must be in an amount required by this rule;
(2) must be made payable to the county clerk of the county in which the case was heard;
(3) must be signed by the appellant or the appellant's agent;
(4) must be signed by a sufficient surety or sureties as approved by the justice court.
(5) the justice court may, in its discretion require evidence of the sufficiency of the surety or sureties prior to approving the supersedeas bond.

(c) Deposit in lieu of supersedeas bond.
Instead of filing a surety supersedeas bond, a party may deposit with the justice court;
(1) cash;
(2) a cashier's check payable to the county clerk , drawn on any federally insured and federally or state chartered bank or savings and loan association; or
(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(d) Conditions of liability. The surety or sureties on a supersedeas bond, any deposit in lieu of a supersedeas bond, or any alternate security ordered by the court is subject to liability for all damages and costs that may be awarded against the debtor—up to the amount of the supersedeas bond, deposit, or security—if;
(1) the debtor does not perfect an appeal or the debtor's appeal is dismissed, and the debtor does not perform the justice court's judgment; or
(2) the debtor does not perform an adverse judgment final on appeal.

(e) Effect of supersedeas. Enforcement of a judgment must be suspended if the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded. If execution or a writ of possession has been issued, the justice court will promptly issue a writ of supersedeas.

(f) Amount of supersedeas bond, deposit or security. The amount of the supersedeas bond, deposit or security must be at least in an amount to cover;
(1) the amount of the judgment, and interest on the judgment for the estimated duration of the appeal;
(2) the amount of attorney's fees awarded for the appellee;

(3) the amount of rent owed by the appellant for the current rent paying period less any portion of that rent reflected in the judgment, except that if the appellant was the plaintiff in justice court then the supersedeas bond need not include any rent; or
(4) if there is no obligation on the part of the appellant to pay rent then an amount equal to the fair market value of the rent for the current month.
(5) Lesser amount The justice court may order a lesser amount than required by subsections 1-4 above if, after notice to all parties and a hearing, the justice court finds that;

(A) posting a supersedeas bond, deposit, or security in the amount required by subsections 1-4 above will irreparably harm the appellant; and
(B) that posting a supersedeas bond, deposit or security in a lesser amount will not substantially impair the appellee's ability to recover under the judgment after all appellate remedies are exhausted.

(g) Effect of appellant's not paying rent or the amount of fair market value into the registry of the county court.

(1) During the pendency of the appeal the appellant must pay rent, or the amount determined to be a fair market rental value of the premises as set forth in Rule 748, into the registry of the county court as it becomes due. If the appellant fails to make timely payments into the registry of the county court as it becomes due, the appellee may file a notice of default in the county court where the cause is pending. Upon sworn motion by the appellee, and a showing of default by the appellant in making payments into the registry of the county court as they become due, the court may issue a writ of possession. During the appeal, if a governmental agency is responsible for payment of a portion of the rent and does not pay that portion to the landlord or into the registry of the county court, the landlord may file a motion with the county court requesting that the tenant be required to pay the full amount of the rent into the county court registry as a condition for remaining in possession. After notice and hearing, the court may grant the motion only if the landlord:
(A) did not cause the agency to cease making the payments: and
(B) is not able to take an action that will cause the agency to resume making payments or to otherwise pay all or part of the rent.

(2) The county court may allow the appellee to withdraw any or all rent or the amount determined to be a fair market rental value from the county court registry upon;
(A) sworn motion and hearing, prior to final determination of the case, showing the right to receive payment;
(B) dismissal of the appeal, or
(C) order of the court upon final hearing.

(3) All hearings and motions under this rule shall be entitled to precedence in the county court.

(h) When the enforcement of the judgment has been suspended the justice court shall stay all further proceedings on the judgment and shall immediately make out a transcript of all the entries on the court's docket of the proceedings related to the suspension of the judgment; and shall immediately file same, together with the supersedeas bond, deposit, or security with the clerk of the county court. The justice court will immediately issue whatever writs of supersedeas are needed, or take other actions to suspend the enforcement of the judgment.

(i) Once the appeal has been perfected and five days have expired since the day the judgment was signed, any actions to suspend the enforcement of the judgment under this rule, or to modify an existing justice court order suspending the enforcement of the judgment, must be filed in the county court where the appeal is pending.

(j) If the appeal is perfected and the tenant does not take any actions to suspend the enforcement of the judgment within five days after the judgment was signed, or if the tenant does not pay rent into the registry of the county court as it becomes due, the county court, where the appeal is pending, may issue a writ of possession at any time.

Notes and Comments

If the tenant who perfects an appeal from an adverse judgment does not post a supersedeas bond or deposit or other security, or pay rent into the registry of the county court as it becomes due, the appellee may request a writ of possession from the county court where the case is pending at any time.

(Note to committee: This sets up the second part of an appeal, which is suspending the enforcement of the judgment by posting a supersedeas bond. There is no provision to avoid the posting of a supersedeas bond by filing an affidavit of indigence. This provision is very similar to the TRAP rules modified somewhat for these cases.)

~~RULE 751. TRANSCRIPT~~

~~When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers, and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.~~

~~The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.~~

~~The trial, as well as all hearing and motions, shall be entitled to precedence in the county court.~~

~~(Amended May 9, 1977, eff. Sept. 1, 1977; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)~~

~~Notes and Comments~~

~~Source: Art. 3989.~~

~~Amended to require immediate filing of papers and money with clerk of county court. Provides for precedence of trial, hearings, and motions.~~

~~Comment on 1988 Change: This amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in the justice court.~~

~~Comment to 1990 change: To provide for transfer of subject funds.~~

Rule 751 Form of Supersedeas Bond

The supersedeas bond authorized in the preceding article may be substantially as follows:

SUPERSEDEAS BOND

"The State of Texas"
"County of _____"
"Cause No. _____"

WHEREAS, in the above entitled and numbered forcible entry and detainer in the Justice Court of Precinct _____ of _____ County, Texas, judgment was signed on the _____ day of _____, _____ in favor of _____ (plaintiff/defendant), hereinafter referred to as appellee against _____ (plaintiff/defendant), hereinafter referred to as appellant for;

____ Possession,
____ Court costs of $_____,
____ Back rent and contractual late charges of $_____,
____ Attorney's fees of $_____,

together with interest thereon from the date of the judgment, at the rate of ____ percent per annum, from which judgment appellant has appealed to the county court of _____ County, Texas.

WHEREAS, appellant desires to suspend enforcement of the judgment pending determination of said appeal:

NOW, THEREFORE, WE _____ (appellant), as principal, and _____ as surety at _____ (address of surety), and _____ as surety at _____ (address of surety), acknowledge ourselves as bound to pay to _____ (appellee), the sum of $_____, said sum being at least the amount of the judgment, interest, and costs, plus estimated interest from the date of the judgment until final disposition of the appeal, and any rent, or the fair market value of the property, currently owed during this rent paying period and not reflected in the judgment, conditioned that appellant shall prosecute the appeal with effect; and in case the judgment of the county court be against appellant, appellant shall perform its judgment, sentence or decree, and pay all such damages as the court may award against appellant up to the amount of the bond.

"Given under our hands this ____ day of _____, _____."

_____
Signature of Appellant

Signature of Surety

Signature of Surety

Notes and Comments

This is a new rule which provides a suggested form for the supersedeas bond provided by rule 750.

(Note to committee: This is a new supersedeas bond form. Most of the content of old rule 751 is now in rule 749c.)

RULE 752. DAMAGES

On the trial de novo of the cause in the county court the appellant or appellee shall be permitted to plead, prove and recover his damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal.

Damages may include but are not limited to loss of rentals during the pendency of the appeal and reasonable attorney fees in the justice and county courts provided, as to attorney fees, that the requirements of Chapter 24 ~~Section 24.006~~ of the Texas Property Code have been met. Only the party prevailing in the county court shall be entitled to recover damages against the adverse party. ~~That prevailing party shall be entitled to recover against the sureties on the appeal bond in cases where the adverse party has executed such bond.~~

Notes and Comments

Source: Art. 3990, unchanged; except that by amendment effective December 31, 1943, the rule is made to extend, in a proper case, to appellant as well as to appellee; and other relevant changes have been made.

Changes by amendment effective January 1, 1976: Costs and damages are stated by this rule rather than by various enumeration's in other rules.

~~**RULE 753. JUDGMENT BY DEFAULT**~~

RULE 753. DUTY OF CLERK TO NOTIFY PARTIES

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

RULE 753a. JUDGMENT BY DEFAULT

~~Said cause shall be subject to trial at any time after the expiration of eight full days after the date the transcript is filed in the county court.~~ If the defendant has filed a written answer in the justice court, the same shall be taken to constitute ~~his~~ the defendant's appearance and answer in the county court, and such answer may be amended as in other cases. If the defendant made no answer in writing in the justice court, and ~~if he~~ fails to file a written answer within ten ~~eight~~ full days after the transcript is filed in the county court, the allegations of the complaint may be taken as admitted and judgment by default may be entered accordingly.

(Amended June 16, 1943, eff. Dec. 31, 1943; Aug. 18, 1947, eff. Dec. 31, 1947; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art 3991, with minor textual change.

RULE 754. ~~[BLANK]~~ TRIAL OF THE CASE IN COUNTY COURT

(a) The trial of a forcible entry and detainer appeal as well as all hearings and motions shall be entitled to precedence in the county court.

(b) No jury trial shall be had in any appeal of a forcible entry and detainer, 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 five days in advance. The fee required by law for requesting a jury trial in county court must be deposited with the county clerk within the time for making a written request for jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

(c) Generally, discovery is not appropriate in forcible entry and detainer appeals, however, the county court has the discretion to allow reasonable discovery.

(d) The forcible entry and detainer appeal shall be subject to trial de novo at any time after the expiration of ten full days after the date the transcript is filed in the county court. The county court may set appeals of forcible entry and detainer cases for trial on written motion of any party or on the court's own motion, with reasonable notice to the parties of a first setting for trial, or by agreement of the parties.

(e) On written motion by the appellee contesting the sufficiency of the appeal bond or the

supersedeas bond, the county court may hold a hearing on the appellee's motion. If upon review of the appeal bond or the supersedeas bond, the county court should find the bond to be deficient, the court may disapprove the bond and allow the appellant 5 days from the date the bond is disapproved to correct the deficiencies with the bond. If the deficiencies are corrected then the bond may be approved. If the deficiencies on the appeal bond are not corrected then the appeal may be dismissed. If the deficiencies on a supersedeas are not corrected then the appellee may proceed with the enforcement of judgment including a writ of possession

(f) When the appellant fails to prosecute the appeal with effect or the county court renders judgment against the appellant, then the county court must render judgment against the sureties on the appellant's appeal bond or supersedeas bond, for the performance of the judgment up to the amount of the bond.

(Note to committee: This rule will provide guidance to the county court's on how to try appeals of forcible entry and detrainer cases. See 754(e) for a comment on a still unresolved issue.)

RULE 755. WRIT OF POSSESSION

The writ of possession, or execution, or both, shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable, as in other cases; and such writ of possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used ~~as the principal residence of a party~~ for residential purposes only. A judgment of a county court may not under any circumstances be stayed pending appeal unless, within ten days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court.

(Note to committee: There is a conflict between the language in the current rule 755 which says that you cannot supersede a judgment unless the premises was used as a primary residence and the language in Texas Property Code Section 24.007 which says that a judgment cannot be stayed unless the premises was used as a residence. This amendment would conform the rule to the property code. The last sentence in this rule mirrors the mandate of Section 24.007.)

(Amended July 15, 1987, Jan. 1, 1988.)

Notes and Comments

Source: Art 3993, unchanged.

Eviction Rules 4, 143a, 216, 190, 245 Ver. 6.9

RULE 4. COMPUTATION OF TIME

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purposes of the three-day periods in rules 21 and 21a, extending other periods by three days when service is made by registered mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 744, 748, 749, 749a, ~~749b, and 749c~~ 750 and 754.

(Note to committee: This needs to be changed because under the current rules 5 days may be longer than 6 days.
Example: A defendant is served with citation for an eviction on a Wednesday so under Rule 739 the trial can be held as early as the following Tuesday. However, under rule 744 the defendant can request a jury trial within 5 days of service, and under rule 4 you cannot count holidays, Saturdays or Sundays in that 5 day calculation. If the tenant was served on Wednesday you would count Thursday and Friday as day 1 and 2, exclude Saturday and Sunday and then count Monday as day 3, Tuesday as day 4 and Wednesday as day 5. Therefore a defendant could come in on Wednesday to timely request a jury trial under rule 744 one day after the trial could have been set under rule 739. If service occurred the Wednesday before thanksgiving then day five would be Friday of the following week or 3 days after the trial. Adding rule 744 to rule 4 would seem to solve this problem. Other changes to the rules necessitate deleting rules 749b and 749c, and adding rules 750 and 754.)

Rule 143a. COST ON APPEAL TO COUNTY COURT

If the appellant fails to pay the cost on appeal from a judgment of a justice of the peace or small claims court, except for a forcible entry and detainer case, within twenty (20) days after being notified to do so by the county clerk, the appeal shall be deemed not perfected and the county clerk shall return all papers in said cause to the justice of the peace having original jurisdiction and the justice of the peace shall proceed as though no appeal had been attempted.

(Added July 22, 1975, eff. Jan. 1, 1976.)

RULE 190 DISCOVERY LIMITATIONS

190.1 Discovery Control Plan Required. Except in forcible entry and detainer cases, every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule.

RULE 216 REQUEST & FEE FOR JURY TRIAL

a. Request. 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.

b. Jury Fee. Unless otherwise provided by law, a fee of ten dollars if in the district court and five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

c. This Rule does not apply in forcible entry and detainer cases.

Notes and Comments

Comment to 2001 change: Rule 744 governs request & fee for jury trials in forcible entry and detainer cases in justice court, and Rule 754 governs request & fee for jury trials in forcible entry and detainer appeals in county court.

Rule 245. ASSIGNMENT OF CASES FOR TRIAL

The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time. The forty-five day notice required in the preceding sentence will not apply to cases set for trial in justice court, including forcible entry and detainer cases, nor will it apply to the de novo trial of appeals of forcible entry and detainer cases in county court.

A request for trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested, but no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case.

(Amended July 22, 1975, eff. Jan. 1, 1975; Dec. 5, 1983, eff. April 1, 1984; April 24, 1990, eff. Sept. 1, 1990.)

Eviction Rules 748-755 Option 1 Ver. 6.9 (10/6/01)

RULE 748. JUDGMENT AND WRIT

If the judgment or verdict is ~~be~~ in favor of the plaintiff, the justice shall give judgment for plaintiff for possession of the premises, and costs. The justice may also give judgment for ~~damages~~ the plaintiff for back rent, contractual late charges and attorney's fees, if sought and established by proof, and provided that such claims are within the jurisdiction of the court . ~~and he shall award his a writ of possession~~. If the judgment or verdict is ~~be~~ in favor of the defendant, the justice shall give judgment for defendant against the plaintiff for costs and for possession of the premises. The justice may also award a defendant who prevails against the plaintiff in the issue of possession, a judgment for attorney's fees if authorized and established by proof, and provided that such claim is within the jurisdiction of the court. ~~and any damages~~. If the judgment is for the plaintiff for possession, the justice shall issue a writ of possession except that ~~no~~ No writ of possession shall issue until the expiration of five days from the ~~time~~ day the judgment is signed.

(a) A forcible entry and detainer judgment shall be in writing in a separate document and contain the full names of the parties, as stated in the pleadings, and state for and against whom the judgment is rendered. The judgment shall recite who is awarded:
(1) possession of the premises:
(2) back rent, if any, and contractual late charges, if any, and in what amount.
(3) attorney's fees, if any, and in what amount;
(4) court costs and in what amount.

(b) A forcible entry and detainer judgment shall contain findings of fact which must include the following:
(1) whether there is an obligation to pay rent on the part of the defendant;
(2) a determination of the rent paying period;
(3) a determination of the day rent is due;
(4) a determination of the amount of rent due each rent paying period, and if the rental agreement provides that all or part of the tenant's rental obligation is subsidized by the government then a determination as to how much rent is to be paid by the tenant and how much rent is to be paid by the federal government;
(5) a determination of the date through which the judgment for back rent, and contractual late charges is calculated.

(c) If there is no obligation on the part of the tenant to pay rent then the judge shall make a finding as to the fair market rental value of the premises per month as if there was an obligation to pay rent.

(d) If the judgment of the justice court is not appealed then it remains in force and a prevailing party may enforce their rights under the judgment in the justice court. If the appeal of the judgment in the justice court is perfected but the county courts jurisdiction is not invoked, then the judgment of the justice court remains in force and the prevailing party may enforce their rights under the judgment in the justice court. If the appeal from the justice court is perfected and the county courts jurisdiction is invoked then the justice court loses jurisdiction over the case. The county court may rely on the justice court judgment in determining when and in what amount rent is due to be paid by the appellant into the registry of the county court during the pendency of the appeal. The county court may also rely on the judgment of the justice court in determining whether of not to issue a writ of possession in the event rents are not timely paid into the registry of the county court. Nothing in this rule prohibits the county court from making an independent determination as to the amounts and due dates of rents to be paid into the registry of the county court during the pendency of the appeal.

Notes and Comments

Comment: The main issue in a forcible entry and detainer action is possession, however a plaintiff may join a claim for rent, contractual late charges, costs, and attorney's fees to the issue of possession. The rules also allow a defendant who prevails to recover any costs and attorney's fees to which they are entitled but although a defendant may not file a counterclaim, any available defenses may be raised at trial. Recovery under any other grounds is not permitted under this section. This amendment to the rule also sets out a requirement that judgments in a forcible entry and detainer case be in writing in a separate document and that the judgment contains specific information, including findings of fact about the rent. This is necessary in order to determine the amount of the appeal bond and the supersedeas bond, and for the county court to determine when and how much rent the tenant/appellant should pay into the registry of the court when the appeal is pending in county court.. Part (c) requires a finding by the court of the fair market rental value of the premises if there is no contractual obligation for the defendant to pay rent. This is necessary, for example, where a tenant at sufferance who holds over after the termination of an executory contract or after a foreclosure, or someone who has entered the real property of another without legal authority, (see Chapter 24 of the Texas Property Code).

(Amended July 26, 1960, eff. Jan. 1, 1961; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan 1, 1981; July 15, 1987, eff. Jan 1, 1988.)

Notes and Comments

Source: Art. 3986.

Change: Elimination of verdict of "guilty" or "not guilty."

Change by amendment effective January 1, 1961: The time within which writ of restitution to issue changed from two days to five days.

Changes by amendment effective January 1, 1976; The amendments authorize judgments for costs and damages which Rule 740 protects.

Change by amendment effective January 1, 1981; Changed so that time runs from the date judgment is signed.

[Note for the committee. This will clarify what a prevailing plaintiff or defendant is entitled to if they are successful. We have some defendants who try to file a counterclaim on evictions which I don't think is contemplated under the rules. Since a forcible entry and detainer does not bar a tenant from filing a suit for trespass, damages, waste, mesne profits or any other cause of action the inability to file a counterclaim in a forcible will not harm the tenant. This will also require for the first time a separate written judgment which contains information which will be needed in setting an appeal or supersedeas bond and in calculating how much rent will need to be paid into the registry of the court during the pendency of the appeal)

RULE 749. MAY APPEAL

~~In appeals in forcible entry and detainer cases, no motion for new trial shall be filed.~~

~~Either party may appeal from a final judgment in such case, to the county court of the county in which the judgment is rendered by filing with the justice within five days after the judgment is signed, a bond to be approved by said justice, and payable to the adverse party, conditioned that he prosecute his appeal with effect, or pay all costs and damages which may be adjudged against him.~~
~~Within five days following the filing of such bond, the party appealing shall give notice as provided in Rule 21a of the filing of such bond to the adverse party. No judgment shall be taken by default against the adverse party in the court to which the cause has been appealed without first showing substantial compliance with this rule.~~

~~The justice shall set the amount of the bond to include the items enumerated in Rule 752.~~

(a) All motions to set aside a forcible entry and detainer judgment or for a new trial shall be made within 1 day after the judgment is signed. The filing of a motion to set aside a judgment or for a new trial does not extend the deadline to perfect an appeal under these rules.

(b) A defendant may appeal from a final judgment in a forcible entry and detainer, to the county court of the county in which the judgment is signed by filing with the justice, not more than five days after the judgment is signed, an appeal bond, deposit, or security to be approved by said justice. The appeal from a judgment for court costs, back rent, late charges, attorney's fees and possession may be made by posting an appeal bond, deposit, or security in an amount equal to the court costs incurred in justice court.

(c) A plaintiff may appeal from a final judgment in a forcible entry and detainer, to the county court of the county in which the judgment is signed by filing a written notice of appeal with the justice not more than five days after the day the judgment is signed. The notice of appeal must identify the trial court, plaintiff, defendant and the cause number, and state that the

plaintiff desires to appeal. The notice of appeal must be signed by the plaintiff or the plaintiff's authorized agent.

(d) The party appealing the judgment must also pay to the justice court, the filing fee required by that county to appeal a case to county court. The court will forward the filing fee to the county clerk along with all other papers in the case. The filing fee must be made payable to the county clerk of the county in which the case was heard.

(e) If an appeal bond is posted it must meet the following criteria:
(1) It must be in an amount required by this rule,
(2) It must be made payable to the county clerk of the county in which the case was heard,
(3) It must be signed by the judgment debtor or the debtor's authorized agent,
(4) It must be signed by a sufficient surety or sureties as approved by the court. If an appeal bond is signed by a surety or sureties, then the court may, in its discretion, require evidence of the sufficiency of the surety or sureties prior to approving the appeal bond.

(f) Deposit in lieu of appeal bond. Instead of filing a surety appeal bond, a party may deposit with the trial court:
(1) cash;
(2) a cashier's check payable to the county clerk of the county where the case was heard, drawn on any federally insured and federally or state chartered bank or savings and loan association; or
(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(g) Any motions challenging the sufficiency of the appeal bond or deposit in lieu of appeal bond may be filed with the county court.

(h) Within five days following the filing of an appeal bond by a defendant, or the filing of a notice of appeal by a plaintiff, the party appealing shall give notice in accordance with Rule 21a of the filing of an appeal bond or the filing of a notice of appeal to the adverse party. No judgment shall be taken by default against the adverse party in the county court to which the cause has been appealed without first showing substantial compliance with this subsection.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan 1, 1981; July 15, 197, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3987, unchanged.

Changes by amendment effective January 1, 1976: The first sentence has been moved to that place from within the rule as previously written. The amount of the appeal bond is fixed by the justice as prescribed by Rule 752.

Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.

Comment on 1988 Change: The purpose of this amendment is to give notice to the appellee that an appeal of the case from the justice court has been perfected in the county court.

(Note to committee: This rule is rewritten to allow a two-part method of appeal. Rule 749 sets forth what a plaintiff and defendant must do to appeal the judgment, including the notice, amount of the appeal bond or contents of the notice of appeal. Rule 749a talks about the affidavit of indigence which replaces the old pauper's affidavit. The affidavit of indigence may be used to avoid posting the appeal bond, but may not be used to suspend the enforcement of the judgment. Rule 749b discusses what must occur for an appeal to be perfected and rule 749c contains the form of the appeal bond, which was formerly found in rule 750.)

~~RULE 749a. PAUPER'S AFFIDAVIT~~

~~If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 749, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the filing of such affidavit and notice thereof to the opposite party or his attorney of record by any officer of the court or party to the suit, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence either than by affidavit above referred to. When a pauper's affidavit is timely contested by the appellee, the justice shall hold and rule on the matter within five days.~~

~~If the justice of the peace disapproves the pauper's affidavit, appellant may, within five days thereafter bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing, not later than five days, and shall hear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case.~~

~~A pauper's affidavit will be considered approved upon one of the following occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit.~~

~~No writ of possession may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 within five days thereafter. If no appeal bond is filed within five days, a writ of possession may issue.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977; amended June 10, 1980, eff. Jan. 1, 1981; April 245, 1990 amendment withdrawn Sept. 4, 1990, and rule amended eff. retroactively to Sept. 1, 1980.)~~

~~This is a new rule. It substantially tracks Rule 572.~~

~~**Notes and Comments**~~

~~Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.~~

~~Comment to 1990 change: Proceedings on pauper affidavits are revised. The term writ of restitution is corrected to writ of possession.~~

Rule 749a Affidavit of Indigence

(a) Establishing indigence

A party who cannot pay the costs to appeal may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in compliance with this rule within five days after the judgment is signed; and

(2) the claim of indigence is not contested or, if contested, the contest is not sustained by a timely written order.

(b) Contents of affidavit.

The affidavit of indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

(1) the nature and amount of the party's current employment income, government-entitlement income, and other income;

(2) the income of the party's spouse and whether that income is available to the party;

(3) real and personal property the party owns;

(4) cash the party holds and amounts on deposit that the party may withdraw;

(5) the party's other assets;

(6) the number and relationship to the party of any dependents;

(7) the nature and amount of the party's debts;

(8) the nature and amount of the party's monthly expenses;

(9) the party's ability to obtain a loan for court costs;
(10) whether an attorney is providing free legal services to the party;
(11) whether an attorney has agreed to pay or advance court costs.

(c) When and Where Affidavit Filed

An appellant must file the affidavit of indigence in the justice court within five days after the judgment is signed

(d) Duty of Clerk or Justice of the Peace

Upon the filing of an affidavit of indigence the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of indigence within one working day of its filing by written notification accomplished by first class mail.

(e) No contest filed

Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(f) Contest to affidavit

The appellee or county clerk, may contest the claim of indigence by filing a contest to the affidavit. The contest must be filed in the justice court within five days after the date when the notice of the filing of the affidavit was mailed by the clerk or justice of the peace to the opposing party. The contest need not be sworn.

(g) Burden of Proof

If a contest is filed, the party who filed the affidavit of indigence must prove the affidavit's allegations. If the indigent party is incarcerated at the time the hearing on a contest is held, the affidavit must be considered as evidence and is sufficient to meet the indigent party's burden to present evidence without the indigent party's attending the hearing.

(h) Hearing and decision in the trial court

(1) Notice required

If the affidavit of indigence is filed in the justice court and a contest is filed, the justice court must set a hearing and notify the parties of the setting.

(2) Time for hearing.

The justice court must either hold a hearing and rule on the matter or sign an order extending the time to conduct a hearing within five days from the date a contest is filed.

(3) Extension of time for hearing.

The time for conducting a hearing must not be extended for more than five days from the date the order is signed.

(4) Time for written decision; effect.

Unless—within the period set for the hearing---the justice court signs an order sustaining the contest, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(i) Appeal from the justice court order disapproving the affidavit of indigence

(1) No writ of possession may issue pending the hearing by the county court of the

appellant's right to appeal on an affidavit of indigence.

(2) If a justice of the peace disapproves the affidavit of indigence, appellant may, within five days thereafter, bring the matter before the county court for a final decision, and , on request, the justice shall certify to the county court appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county court shall hold a hearing de novo and rule on the matter within five days from the date the matter is brought to the county court, or within that five day period, sign an order extending the time to conduct a hearing, The time for conducting a hearing must not be extended for more than five days from the date the order is signed. If the affidavit of indigence is approved by the county court, it shall direct the justice to transmit to the clerk of the county court, the transcript, records, and papers of the case. If the county court disapproves the affidavit of indigence, appellant may perfect an appeal by filing an appeal bond, deposit, or security with the justice court in the amount required by this rule within five days thereafter. If no appeal bond is filed within five days thereafter, the justice court may issue a writ of possession.

(j) Costs defined

As used in this rule, costs means:

(1) a filing fee paid in justice court to initiate the forcible entry and detainer action:

(2) any other costs sustained in the justice court; and

(3) a filing fee paid to appeal the case to the county court.

(Note to committee: The new affidavit of indigence replaces the pauper's affidavit and generally follows the TRAP rules except for a few modifications necessary for to make the rule fit these cases. It is important to note that the approval of an affidavit of indigence only allows the case to be appealed but does not suspend the enforcement of the judgment. The procedures for filing, contesting and appealing the denial of the affidavit of indigence are essentially the same as under old rule 749a.)

~~RULE 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS~~

~~In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:~~

~~(1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry on rental period's rent under the terms of the rental agreement.~~

~~(2) During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.~~

~~(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.~~

~~(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.~~

~~(5) All hearings and motions under this rule shall be entitled to precedence in the county court.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977.)~~

~~Notes and Comments~~

~~This is a new rule.~~

Rule 749b Appeal Perfected

When the defendant timely files an appeal bond, deposit, or security in conformity with Rule 749, and the filing fee required for the appeal of cases to the county court is paid, or an affidavit of indigence approved in conformity with Rule 749a, the appeal by the defendant shall be perfected When the plaintiff timely files a notice of appeal in conformity with Rule 749 and the filing fee required for the appeal of cases to county court is paid, the appeal by the plaintiff shall be perfected. When an appeal has been perfected, the justice court shall make out a transcript of all the entries made on it's docket of the proceedings had in the case and immediately file the same, together with the original papers, any money in the court registry pertaining to that case, and the appeal bond, deposit, or security filed in conformity with Rule 749, or the affidavit of indigence approved in conformity with Rule 749a with the county clerk of the county in which the case was heard.

The county clerk shall docket the case and the trial shall be de novo. The county clerk shall immediately notify both appellant and appellee of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when there is no written answer on file in the justice court.

The perfection of an appeal in a forcible entry and detainer case does not suspend enforcement of the judgment. Enforcement of the judgment may proceed unless the enforcement of the judgment is suspended in accordance with rule 750. If the appeal is based on a judgment for possession and court costs only then the tenant's failure to post a supersedeas bond will allow the appellee to seek a writ of possession. Issuance of a writ of

possession will cause the appeal to be moot and allow the county court in which the case is pending to dismiss the appeal.

Notes and Comments

An appeal by a tenant for rent, contractual late charges, attorney's fees, and court costs may be appealed separately from the issue of possession, and the tenant's failure to post a supersedeas bond to suspend the enforcement of judgment, such as with a writ of possession, will not moot the appeal on grounds other than possession. If the appeal is based on a judgment for possession and court costs only, then the tenant's failure to post a supersedeas bond will allow the appellee to seek a writ of possession and cause the appeal to be moot.

(Added May 9, 1977, eff. Sept. 1, 1977; amended April 15, 1982, eff. Aug. 15, 1982; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Change by amendment effective August 15, 1982: This rule is amended so that one month's rent need not be paid when an appeal bond is made.

Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.

(Amended May 9, 1977, eff. Sept. 1, 1977; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

(From old RULE 751)

Notes and Comments

Source: Art. 3989.

Amended to require immediate filing of papers and money with clerk of county court. Provides for precedence of trial, hearings, and motions.

Comment on 1988 Change: This amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in the justice court.

Comment to 1990 change: To provide for transfer of subject funds.

(Note to committee; This rule sets forth what must occur to perfect an appeal. It now includes a requirement that the filing fee for county court be paid to the justice court. As in old rule 749c it also dictates what the justice court must do when an appeal is perfected.)

~~RULE 749c. APPEAL PERFECTED~~

~~When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977; amended April 15, 1982, eff. Aug. 15, 1982; April 24, 1990, eff. Sept. 1, 1990.)~~

~~Notes and Comments~~

~~Change by amendment effective August 15, 1982: This rule is amended so that one month's rent need not be paid when an appeal bond is made.~~

~~Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.~~

~~RULE 750.~~ RULE 749c FORM OF APPEAL BOND

The appeal bond authorized in the preceding article may be substantially as follows:

_____ , Plaintiff

vs.

_____ , Defendant

"The State of Texas,

"County of _____

Cause Number _____

"~~Whereas~~ WHEREAS, in the above entitled and numbered ~~upon a writ of~~ forcible entry and detainer in the Justice Court of precinct _____ of _____ County, Texas, judgment was signed on the _____ day of _____, _____ in favor of ~~A.B~~ _____ appellee., and against ~~C.D.~~ _____ appellant. ~~tried before _____, a justice of the peace of _____ county, a judgment was rendered in favor of the said A.B. on the _____ day of _____, A.D. ___, and against the said C.D~~ From ~~from~~ which judgment the said ~~C.D~~ appellant, ~~has appealed~~ wishes to appeal to the county court; now, therefore, the said ~~C.D~~ appellant, and ~~his/her~~ sureties, covenant that appellant will prosecute ~~his/her~~ said appeal with effect and pay all cost and damages which may be adjudged against the appellant, provided the sureties shall not be liable in an amount greater than $_____, said amount being the amount of the bond herein.

NOW, THEREFORE, WE _____, appellant, as principal, and _____, as surety at _____ (address of surety), and_____ as surety at _____ (address of surety), acknowledge ourselves as bound to pay to _____ appellee, the sum of $ _____, conditioned that appellant shall prosecute the appeal with effect and will perform an adverse judgment final on appeal.

" Given under our hands this _____day of _____, A.D. ____."

_____
Signature of Appellant

_____
Signature of Surety

_____
Signature of Surety

(Amended July 22, 1975, eff. Jan. 1, 1976.)

Notes and Comments

Source: Art. 3988, unchanged.

Change by amendment effective January 1, 1976: The form is amended to state the limits of liability of the sureties.

(Note to committee: This form of the appeal bond has been modified. It was formerly found in rule 750 but was moved so that all rules pertaining to the appeal are found in one place.)

Rule 750 SUSPENDING ENFORCEMENT OF FORCIBLE ENTRY AND DETAINER JUDGMENT PENDING APPEAL TO COUNTY COURT

(a) In a forcible entry and detainer case an appellant who has perfected an appeal under these rules shall be entitled to suspend the enforcement of the judgment and, where applicable, stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:
(1) filing with the justice court a written agreement with the appellee for suspending enforcement of the judgment ; or
(2) filing with the justice court a good and sufficient supersedeas bond; or
(3) making a deposit with the justice court in lieu of a supersedeas bond; or
(4) providing alternate security as ordered by the justice court.

(b) Supersedeas Bonds

(1) must be in an amount required by this rule;
(2) must be made payable to the county clerk of the county in which the case was heard;
(3) must be signed by the appellant or the appellant's agent;
(4) must be signed by a sufficient surety or sureties as approved by the justice court.
(5) the justice court may, in its discretion require evidence of the sufficiency of the surety or sureties prior to approving the supersedeas bond.

(c) Deposit in lieu of supersedeas bond.
Instead of filing a surety supersedeas bond, a party may deposit with the justice court;
(1) cash;
(2) a cashier's check payable to the county clerk , drawn on any federally insured **and** federally or state chartered bank or savings and loan association; or
(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(d) Conditions of liability. The surety or sureties on a supersedeas bond, any deposit in lieu of a supersedeas bond, or any alternate security ordered by the court is subject to liability for all damages and costs that may be awarded against the debtor—up to the amount of the supersedeas bond, deposit, or security—if;
(1) the debtor does not perfect an appeal or the debtor's appeal is dismissed, and the debtor does not perform the justice court's judgment; or
(2) the debtor does not perform an adverse judgment final on appeal.

(e) Effect of supersedeas. Enforcement of a judgment must be suspended if the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded. If execution or a writ of possession has been issued, the county court will promptly issue a writ of supersedeas.

(f) Amount of supersedeas bond, deposit or security. The amount of the supersedeas bond, deposit or security must be at least in an amount to cover;
(1) the amount of the judgment, and interest on the judgment for the estimated duration of the appeal;
(2) the amount of attorney's fees awarded for the appellee;
(3) the amount of rent owed by the appellant for the current rent paying period less any portion of that rent reflected in the judgment, except that if the appellant was the plaintiff in justice court then the supersedeas bond need not include any rent; or
(4) if there is no obligation on the part of the appellant to pay rent then an amount equal to the fair market value of the rent for the current month.
(5) Lesser amount The justice court may order a lesser amount than required by subsections 1-4 above if the justice court finds that;
(A) posting a supersedeas bond, deposit, or security in the amount required by subsections 1-4 above will irreparably harm the appellant; and
(B) that posting a supersedeas bond, deposit or security in a lesser amount will not substantially impair the appellee's ability to recover under the judgment after all appellate remedies are exhausted.

(g)Effect of appellant's not paying rent or the amount of fair market value into the registry of the county court.

(1)During the pendency of the appeal the appellant must pay rent, or the amount determined to be a fair market rental value of the premises as set forth in Rule 748, into the registry of the county court as it becomes due. If the appellant fails to make timely payments into the registry of the county court as it becomes due, the appellee may file a notice of default in the county court where the cause is pending. Upon sworn motion by the appellee, and a showing of default by the appellant in making payments into the registry of the county court as they become due, the court may issue a writ of possession. During the appeal, if a governmental agency is responsible for payment of a portion of the rent and does not pay that portion to the landlord or into the registry of the county court, the landlord may file a motion with the county court requesting that the tenant be required to pay the full amount of the rent into the county court registry as a condition for remaining in possession. After notice and hearing, the court may grant the motion only if the landlord:

(A) did not cause the agency to cease making the payments: and

(B) is not able to take an action that will cause the agency to resume making payments or to otherwise pay all or part of the rent.

(2) The county court may allow the appellee to withdraw any or all rent or the amount determined to be a fair market rental value from the county court registry upon;

(A) sworn motion and hearing, prior to final determination of the case, showing the right to receive payment;

(B) dismissal of the appeal, or

(C) order of the court upon final hearing.

(3) All hearings and motions under this rule shall be entitled to precedence in the county court.

(h) When the enforcement of the judgment has been suspended the justice court shall stay all further proceedings on the judgment and shall immediately make out a transcript of all the entries on the court's docket of the proceedings related to the suspension of the judgment; and shall immediately file same, together with the supersedeas bond, deposit, or security with the clerk of the county court. The justice court will immediately issue whatever writs of supersedeas are needed, or take other actions to suspend the enforcement of the judgment.

(i) Once the appeal has been perfected and five days have expired since the day the judgment was signed, any actions to suspend the enforcement of the judgment under this rule, or to modify an existing justice court order suspending the enforcement of the judgment, must be filed in the county court where the appeal is pending.

(j) If the appeal is perfected and the tenant does not take any actions to suspend the enforcement of the judgment within five days after the judgment was signed, or if the tenant does not pay rent into the registry of the county court as it becomes due, the county court, where the appeal is pending, may issue a writ of possession at any time.

(k) If the appeal is perfected by the approval of an affidavit of indigence, the defendant must

post a supersedeas bond, deposit, or security with the justice court. If the affidavit of indigence was approved in the justice court the supersedeas bond, deposit, or security must be posted within one day after the affidavit of indigence is approved. If the affidavit of indigence is approved in the county court the supersedeas bond, deposit, or security must be posted in the county court within five days after the affidavit of indigence is approved.

Notes and Comments

If the tenant who perfects an appeal from an adverse judgment does not post a supersedeas bond or deposit or other security, or pay rent into the registry of the county court as it becomes due, the appellee may request a writ of possession from the county court where the case is pending at any time.

(Note to committee: This sets up the second part of an appeal, which is suspending the enforcement of the judgment by posting a supersedeas bond. There is no provision to avoid the posting of a supersedeas bond by filing an affidavit of indigence. This provision is very similar to the TRAP rules modified somewhat for these cases.)

~~RULE 751. TRANSCRIPT~~

~~When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers, and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.~~

~~The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.~~

~~The trial, as well as all hearing and motions, shall be entitled to precedence in the county court.~~

~~(Amended May 9, 1977, eff. Sept. 1, 1977; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)~~

~~Notes and Comments~~

~~Source: Art. 3989.~~

~~Amended to require immediate filing of papers and money with clerk of county court. Provides for precedence of trial, hearings, and motions.~~

~~Comment on 1988 Change: This amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in the justice court.~~

~~Comment to 1990 change: To provide for transfer of subject funds.~~

Rule 751 Form of Supersedeas Bond

The supersedeas bond authorized in the preceding article may be substantially as follows:

SUPERSEDEAS BOND

"The State of Texas"
"County of "
"Cause No. "

WHEREAS, in the above entitled and numbered forcible entry and detainer in the Justice Court of Precinct of County, Texas, judgment was signed on the day of , in favor of (plaintiff/defendant), hereinafter referred to as appellee against (plaintiff/defendant), hereinafter referred to as appellant for;

Possession,
Court costs of $,
Back rent and contractual late charges of $,
Attorney's fees of $,

together with interest thereon from the date of the judgment, at the rate of percent per annum, from which judgment appellant has appealed to the county court of County, Texas.

WHEREAS, appellant desires to suspend enforcement of the judgment pending determination of said appeal:

NOW, THEREFORE, WE (appellant), as principal, and as surety at (address of surety), and as surety at (address of surety), acknowledge ourselves as bound to pay to (appellee), the sum of $, said sum being at least the amount of the judgment, interest, and costs, plus estimated interest from the date of the judgment until final disposition of the appeal, and any rent, or the fair market value of the property, currently owed during this rent paying period and not reflected in the judgment, conditioned that appellant shall prosecute the appeal with effect; and in case the judgment of the county court be against appellant, appellant shall perform its judgment, sentence or decree, and pay all such damages as the court may award against appellant up to the amount of the bond.

"Given under our hands this day of , ."

Signature of Appellant

Signature of Surety

Signature of Surety

Notes and Comments

This is a new rule which provides a suggested form for the supersedeas bond provided by rule 750.

(Note to committee: This is a new supersedeas bond form. Most of the content of old rule 751 is now in rule 749c.)

RULE 752. DAMAGES

On the trial de novo of the cause in the county court the appellant or appellee shall be permitted to plead, prove and recover his damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal.

Damages may include but are not limited to loss of rentals during the pendency of the appeal and reasonable attorney fees in the justice and county courts provided, as to attorney fees, that the requirements of Chapter 24 ~~Section 24.006~~ of the Texas Property Code have been met. Only the party prevailing in the county court shall be entitled to recover damages against the adverse party. ~~That prevailing party shall be entitled to recover against the sureties on the appeal bond in cases where the adverse party has executed such bond.~~

Notes and Comments

Source: Art. 3990, unchanged; except that by amendment effective December 31, 1943, the rule is made to extend, in a proper case, to appellant as well as to appellee; and other relevant changes have been made.

Changes by amendment effective January 1, 1976: Costs and damages are stated by this rule rather than by various enumerations in other rules.

~~RULE 753. JUDGMENT BY DEFAULT~~

RULE 753. DUTY OF CLERK TO NOTIFY PARTIES

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

RULE 753a. JUDGMENT BY DEFAULT

~~Said cause shall be subject to trial at any time after the expiration of eight full days after the date the transcript is filed in the county court.~~ If the defendant has filed a written answer in the justice court, the same shall be taken to constitute ~~his~~ the defendant's appearance and answer in the county court, and such answer may be amended as in other cases. If the defendant made no answer in writing in the justice court, and ~~if he~~ fails to file a written answer within ten ~~eight~~ full days after the transcript is filed in the county court, the allegations of the complaint may be taken as admitted and judgment by default may be entered accordingly.

(Amended June 16, 1943, eff. Dec. 31, 1943; Aug. 18, 1947, eff. Dec. 31, 1947; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art 3991, with minor textual change.

RULE 754. ~~[BLANK]~~ TRIAL OF THE CASE IN COUNTY COURT

(a) The trial of a forcible entry and detainer appeal as well as all hearings and motions shall be entitled to precedence in the county court.

(b) No jury trial shall be had in any appeal of a forcible entry and detainer, 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 five days in advance. The fee required by law for requesting a jury trial in county court must be deposited with the county clerk within the time for making a written request for jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

(c) Generally, discovery is not appropriate in forcible entry and detainer appeals, however, the county court has the discretion to allow reasonable discovery.

(d) The forcible entry and detainer appeal shall be subject to trial de novo at any time after the expiration of ten full days after the date the transcript is filed in the county court. The county court may set appeals of forcible entry and detainer cases for trial on written motion of any party or on the court's own motion, with reasonable notice to the parties of a first

setting for trial, or by agreement of the parties. If the county court invokes jurisdiction in the case then it must dispose of all parties and issues before the court, including the issue of possession.

(e) On written motion by the appellee contesting the sufficiency of the appeal bond or the supersedeas bond, the county court may hold a hearing on the appellee's motion. If upon review of the appeal bond or the supersedeas bond, the county court should find the bond to be deficient, the court may disapprove the bond and allow the appellant 5 days from the date the bond is disapproved to correct the deficiencies with the bond. If the deficiencies are corrected then the bond may be approved. If the deficiencies on the appeal bond are not corrected then the appeal may be dismissed. If the deficiencies on a supersedeas are not corrected then the appellee may proceed with the enforcement of judgment including a writ of possession

(f) When the appellant fails to prosecute the appeal with effect or the county court renders judgment against the appellant, then the county court must render judgment against the sureties on the appellant's appeal bond or supersedeas bond, for the performance of the judgment up to the amount of the bond.

(Note to committee: This rule will provide guidance to the county court's on how to try appeals of forcible entry and detrainer cases. See 754(e) for a comment on a still unresolved issue.)

RULE 755. WRIT OF POSSESSION

The writ of possession, or execution, or both, shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable, as in other cases; and such writ of possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used ~~as the principal residence of a party~~ for residential purposes only. A judgment of a county court may not under any circumstances be stayed pending appeal unless, within ten days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court.

(Note to committee: There is a conflict between the language in the current rule 755 which says that you cannot supersede a judgment unless the premises was used as a primary residence and the language in Texas Property Code Section 24.007 which says that a judgment cannot be stayed unless the premises was used as a residence. This amendment would conform the rule to the property code. The last sentence in this rule mirrors the mandate of Section 24.007.)

(Amended July 15, 1987, Jan. 1, 1988.)

Notes and Comments

Source: Art 3993, unchanged.

Eviction Rules 748-755 Option 2 Ver. 6.9 (10/6/01)

RULE 748. JUDGMENT AND WRIT

If the judgment or verdict is ~~be~~ in favor of the plaintiff, the justice shall give judgment for plaintiff for possession of the premises, and costs. The justice may also give judgment for ~~damages~~ the plaintiff for back rent, contractual late charges and attorney's fees, if sought and established by proof, and provided that such claims are within the jurisdiction of the court . ~~and he shall award his a writ of possession~~. If the judgment or verdict is ~~be~~ in favor of the defendant, the justice shall give judgment for defendant against the plaintiff for costs and for possession of the premises. The justice may also award a defendant who prevails against the plaintiff in the issue of possession, a judgment for attorney's fees if authorized and established by proof, and provided that such claim is within the jurisdiction of the court. ~~and any damages~~. If the judgment is for the plaintiff for possession, the justice shall issue a writ of possession except that no ~~No~~ writ of possession shall issue until the expiration of five days from the ~~time~~ day the judgment is signed.

(a) A forcible entry and detainer judgment shall be in writing in a separate document and contain the full names of the parties, as stated in the pleadings, and state for and against whom the judgment is rendered. The judgment shall recite who is awarded:
(1) possession of the premises:
(2) back rent, if any, and contractual late charges, if any, and in what amount.
(3) attorney's fees, if any, and in what amount;
(4) court costs and in what amount.

(b) A forcible entry and detainer judgment shall contain findings of fact which must include the following:
(1) whether there is an obligation to pay rent on the part of the defendant;
(2) a determination of the rent paying period;
(3) a determination of the day rent is due;
(4) a determination of the amount of rent due each rent paying period, and if the rental agreement provides that all or part of the tenant's rental obligation is subsidized by the government then a determination as to how much rent is to be paid by the tenant and how much rent is to be paid by the federal government;
(5) a determination of the date through which the judgment for back rent, and contractual late charges is calculated.

(c) If there is no obligation on the part of the tenant to pay rent then the judge shall make a finding as to the fair market rental value of the premises per month as if there was an obligation to pay rent.

(d) If the judgment of the justice court is not appealed then it remains in force and a prevailing party may enforce their rights under the judgment in the justice court. If the appeal of the judgment in the justice court is perfected but the county courts jurisdiction is not invoked, then the judgment of the justice court remains in force and the prevailing party may enforce their rights under the judgment in the justice court. If the appeal from the justice court is perfected and the county courts jurisdiction is invoked then the justice court loses jurisdiction over the case. The county court may rely on the justice court judgment in determining when and in what amount rent is due to be paid by the appellant into the registry of the county court during the pendency of the appeal. The county court may also rely on the judgment of the justice court in determining whether of not to issue a writ of possession in the event rents are not timely paid into the registry of the county court. Nothing in this rule prohibits the county court from making an independent determination as to the amounts and due dates of rents to be paid into the registry of the county court during the pendency of the appeal.

Notes and Comments

Comment: The main issue in a forcible entry and detainer action is possession, however a plaintiff may join a claim for rent, contractual late charges, costs, and attorney's fees to the issue of possession. The rules also allow a defendant who prevails to recover any costs and attorney's fees to which they are entitled but although a defendant may not file a counterclaim, any available defenses may be raised at trial. Recovery under any other grounds is not permitted under this section. This amendment to the rule also sets out a requirement that judgments in a forcible entry and detainer case be in writing in a separate document and that the judgment contains specific information, including findings of fact about the rent. This is necessary in order to determine the amount of the appeal bond and the supersedeas bond, and for the county court to determine when and how much rent the tenant/appellant should pay into the registry of the court when the appeal is pending in county court.. Part (c) requires a finding by the court of the fair market rental value of the premises if there is no contractual obligation for the defendant to pay rent. This is necessary, for example, where a tenant at sufferance who holds over after the termination of an executory contract or after a foreclosure, or someone who has entered the real property of another without legal authority, (see Chapter 24 of the Texas Property Code).

(Amended July 26, 1960, eff. Jan. 1, 1961; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan 1, 1981; July 15, 1987, eff. Jan 1, 1988.)

Notes and Comments

Source: Art. 3986.

Change: Elimination of verdict of "guilty" or "not guilty."

Change by amendment effective January 1, 1961: The time within which writ of restitution to issue changed from two days to five days.

Changes by amendment effective January 1, 1976; The amendments authorize judgments for costs and damages which Rule 740 protects.

Change by amendment effective January 1, 1981; Changed so that time runs from the date judgment is signed.

[Comment for the committee. This will clarify what a prevailing plaintiff or defendant is entitled to if they are successful. We have some defendants who try to file a counterclaim on evictions which I don't think is contemplated under the rules. Since a forcible entry and detainer does not bar a tenant from filing a suit for trespass, damages, waste, mesne profits or any other cause of action the inability to file a counterclaim in a forcible will not harm the tenant. This will also require for the first time a separate written judgment which contains information which will be needed in setting an appeal or supersedeas bond and in calculating how much rent will need to be paid into the registry of the court during the pendency of the appeal)

RULE 749. MAY APPEAL

~~In appeals in forcible entry and detainer cases, no motion for new trial shall be filed.~~

~~Either party may appeal from a final judgment in such case, to the county court of the county in which the judgment is rendered by filing with the justice within five days after the judgment is signed, a bond to be approved by said justice, and payable to the adverse party, conditioned that he prosecute his appeal with effect, or pay all costs and damages which may be adjudged against him.~~

~~Within five days following the filing of such bond, the party appealing shall give notice as provided in Rule 21a of the filing of such bond to the adverse party. No judgment shall be taken by default against the adverse party in the court to which the cause has been appealed without first showing substantial compliance with this rule.~~

~~The justice shall set the amount of the bond to include the items enumerated in Rule 752.~~

(a) All motions to set aside a forcible entry and detainer judgment or for a new trial shall be made within 1 day after the judgment is signed. The filing of a motion to set aside a judgment or for a new trial does not extend the deadline to perfect an appeal under these rules.

(b) A defendant may appeal from a final judgment in a forcible entry and detainer, to the county court of the county in which the judgment is signed by filing with the justice, not more than five days after the judgment is signed, an appeal bond, deposit, or security to be approved by said justice. The appeal from a judgment for court costs, back rent, late charges, attorney's fees and possession may be made by posting an appeal bond, deposit, or security in an amount equal to the court costs incurred in justice court.

(c) A plaintiff may appeal from a final judgment in a forcible entry and detainer, to the county court of the county in which the judgment is signed by filing a written notice of appeal with the justice not more than five days after the day the judgment is signed. The notice of appeal must identify the trial court, plaintiff, defendant and the cause number, and state that the

plaintiff desires to appeal. The notice of appeal must be signed by the plaintiff or the plaintiff's authorized agent.

(d) The party appealing the judgment must also pay to the justice court, the filing fee required by that county to appeal a case to county court. The court will forward the filing fee to the county clerk along with all other papers in the case. The filing fee must be made payable to the county clerk of the county in which the case was heard.

(e) If an appeal bond is posted it must meet the following criteria:
(1) It must be in an amount required by this rule,
(2) It must be made payable to the county clerk of the county in which the case was heard,
(3) It must be signed by the judgment debtor or the debtor's authorized agent,
(4) It must be signed by a sufficient surety or sureties as approved by the court. If an appeal bond is signed by a surety or sureties, then the court may, in its discretion, require evidence of the sufficiency of the surety or sureties prior to approving the appeal bond.

(f) Deposit in lieu of appeal bond. Instead of filing a surety appeal bond, a party may deposit with the trial court:
(1) cash;
(2) a cashier's check payable to the county clerk of the county where the case was heard, drawn on any federally insured and federally or state chartered bank or savings and loan association; or
(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(g) Any motions challenging the sufficiency of the appeal bond or deposit in lieu of appeal bond may be filed with the county court.

(h) Within five days following the filing of an appeal bond by a defendant, or the filing of a notice of appeal by a plaintiff, the party appealing shall give notice in accordance with Rule 21a of the filing of an appeal bond or the filing of a notice of appeal to the adverse party. No judgment shall be taken by default against the adverse party in the county court to which the cause has been appealed without first showing substantial compliance with this subsection.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan 1, 1981; July 15, 197, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3987, unchanged.

Changes by amendment effective January 1, 1976: The first sentence has been moved to that place from within the rule as previously written. The amount of the appeal bond is fixed by the justice as prescribed by Rule 752.

Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.

Comment on 1988 Change: The purpose of this amendment is to give notice to the appellee that an appeal of the case from the justice court has been perfected in the county court.

(Note to committee: This rule is rewritten to allow a two-part method of appeal. Rule 749 sets forth what a plaintiff and defendant must do to appeal the judgment, including the notice, amount of the appeal bond or contents of the notice of appeal. Rule 749a talks about the affidavit of indigence which replaces the old pauper's affidavit. The affidavit of indigence may be used to avoid posting the appeal bond and may be used to suspend the enforcement of the judgment, including the writ of possession. Rule 749b discusses what must occur for an appeal to be perfected and rule 749c contains the form of the appeal bond, which was formerly found in rule 750.)

~~RULE 749a. PAUPER'S AFFIDAVIT~~

~~If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 749, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the filing of such affidavit and notice thereof to the opposite party or his attorney of record by any officer of the court or party to the suit, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence either than by affidavit above referred to. When a pauper's affidavit is timely contested by the appellee, the justice shall hold and rule on the matter within five days.~~

~~If the justice of the peace disapproves the pauper's affidavit, appellant may, within five days thereafter bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing, not later than five days, and shall hear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case.~~

~~A pauper's affidavit will be considered approved upon one of the following occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon hearing the justice determines that the pauper's affidavit is approved; or~~

~~(3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit.~~

~~No writ of possession may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 within five days thereafter. If no appeal bond is filed within five days, a writ of possession may issue.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977; amended June 10, 1980, eff. Jan. 1, 1981; April 245, 1990 amendment withdrawn Sept. 4, 1990, and rule amended eff. retroactively to Sept. 1, 1980.)~~

~~This is a new rule. It substantially tracks Rule 572.~~

~~**Notes and Comments**~~

~~Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.~~

~~Comment to 1990 change: Proceedings on pauper affidavits are revised. The term writ of restitution is corrected to writ of possession.~~

Rule 749a Affidavit of Indigence

(a) Establishing indigence

A party who cannot pay the costs to appeal may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in compliance with this rule within five days after the judgment is signed; and

(2) the claim of indigence is not contested or, if contested, the contest is not sustained by a timely written order.

(b) Contents of affidavit.

The affidavit of indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

(1) the nature and amount of the party's current employment income, government-entitlement income, and other income;

(2) the income of the party's spouse and whether that income is available to the party;

(3) real and personal property the party owns;

(4) cash the party holds and amounts on deposit that the party may withdraw;

(5) the party's other assets;

(6) the number and relationship to the party of any dependents;

(7) the nature and amount of the party's debts;
(8) the nature and amount of the party's monthly expenses;
(9) the party's ability to obtain a loan for court costs;
(10) whether an attorney is providing free legal services to the party;
(11) whether an attorney has agreed to pay or advance court costs.

(c) When and Where Affidavit Filed

An appellant must file the affidavit of indigence in the justice court within five days after the judgment is signed

(d) Duty of Clerk or Justice of the Peace

Upon the filing of an affidavit of indigence the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of indigence within one working day of its filing by written notification accomplished by first class mail.

(e) No contest filed

Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(f) Contest to affidavit

The appellee or county clerk, may contest the claim of indigence by filing a contest to the affidavit. The contest must be filed in the justice court within five days after the date when the notice of the filing of the affidavit was mailed by the clerk or justice of the peace to the opposing party. The contest need not be sworn.

(g) Burden of Proof

If a contest is filed, the party who filed the affidavit of indigence must prove the affidavit's allegations. If the indigent party is incarcerated at the time the hearing on a contest is held, the affidavit must be considered as evidence and is sufficient to meet the indigent party's burden to present evidence without the indigent party's attending the hearing.

(h) Hearing and decision in the trial court

(1) Notice required

If the affidavit of indigence is filed in the justice court and a contest is filed, the justice court must set a hearing and notify the parties of the setting.

(2) Time for hearing.

The justice court must either hold a hearing and rule on the matter or sign an order extending the time to conduct a hearing within five days from the date a contest is filed.

(3) Extension of time for hearing.

The time for conducting a hearing must not be extended for more than five days from the date the order is signed.

(4) Time for written decision; effect.

Unless—within the period set for the hearing---the justice court signs an order sustaining the contest, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(i) Appeal from the justice court order disapproving the affidavit of indigence

(1) No writ of possession may issue pending the hearing by the county court of the appellant's right to appeal on an affidavit of indigence.

(2) If a justice of the peace disapproves the affidavit of indigence, appellant may, within five days thereafter, bring the matter before the county court for a final decision, and , on request, the justice shall certify to the county court appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county court shall hold a hearing de novo and rule on the matter within five days from the date the matter is brought to the county court, or within that five day period, sign an order extending the time to conduct a hearing, The time for conducting a hearing must not be extended for more than five days from the date the order is signed. If the affidavit of indigence is approved by the county court, it shall direct the justice to transmit to the clerk of the county court, the transcript, records, and papers of the case. If the county court disapproves the affidavit of indigence, appellant may perfect an appeal by filing an appeal bond, deposit, or security with the justice court in the amount required by this rule within five days thereafter. If no appeal bond is filed within five days thereafter, the justice court may issue a writ of possession.

(j) Costs defined

As used in this rule, costs means:

(1) a filing fee paid in justice court to initiate the forcible entry and detainer action:

(2) any other costs sustained in the justice court; and

(3) a filing fee paid to appeal the case to the county court.

(Note to committee: The new affidavit of indigence replaces the pauper's affidavit and generally follows the TRAP rules except for a few modifications necessary for to make the rule fit these cases. It is important to note that the approval of an affidavit of indigence only allows the case to be appealed but does not suspend the enforcement of the judgment, except for the writ of possession. The procedures for filing, contesting and appealing the denial of the affidavit of indigence are essentially the same as under old rule 749a.)

~~RULE 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS~~

~~In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:~~

~~(1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry on rental period's rent under the terms of the rental agreement.~~

~~(2) During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.~~

~~(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.~~

~~(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.~~

~~(5) All hearings and motions under this rule shall be entitled to precedence in the county court.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977.)~~

~~**Notes and Comments**~~

~~This is a new rule.~~

Rule 749b Appeal Perfected

When the defendant timely files an appeal bond, deposit, or security in conformity with Rule 749, and the filing fee required for the appeal of cases to the county court is paid, or an affidavit of indigence approved in conformity with Rule 749a, the appeal by the defendant shall be perfected When the plaintiff timely files a notice of appeal in conformity with Rule 749 and the filing fee required for the appeal of cases to county court is paid, the appeal by the plaintiff shall be perfected. When an appeal has been perfected, the justice court shall make out a transcript of all the entries made on it's docket of the proceedings had in the case and immediately file the same, together with the original papers, any money in the court registry pertaining to that case, and the appeal bond, deposit, or security filed in conformity with Rule 749, or the affidavit of indigence approved in conformity with Rule 749a with the county clerk of the county in which the case was heard.

The county clerk shall docket the case and the trial shall be de novo. The county clerk shall immediately notify both appellant and appellee of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when there is no written answer on file in the justice court.

The perfection of an appeal in a forcible entry and detainer case does not suspend enforcement of the judgment. Enforcement of the judgment, may proceed unless the enforcement of the judgment is suspended in accordance with rule 750. If the appeal is based on a judgment for possession and court costs only then the tenant's failure to post a supersedeas bond will allow the appellee to seek a writ of possession. Issuance of a writ of

possession will cause the appeal to be moot and allow the county court in which the case is pending to dismiss the appeal.

Notes and Comments

An appeal by a tenant for rent, contractual late charges, attorney's fees, and court costs may be appealed separately from the issue of possession, and the tenant's failure to post a supersedeas bond to suspend the enforcement of judgment, such as with a writ of possession, will not moot the appeal on grounds other than possession. If the appeal is based on a judgment for possession and court costs only, then the tenant's failure to post a supersedeas bond will allow the appellee to seek a writ of possession and cause the appeal to be moot. If a defendant perfects the appeal by the approval of an affidavit of indigence, it is not necessary for the defendant to post a supersedeas bond, deposit, or security to remain in possession, and to suspend the enforcement of the judgment.

(Added May 9, 1977, eff. Sept. 1, 1977; amended April 15, 1982, eff. Aug. 15, 1982; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Change by amendment effective August 15, 1982: This rule is amended so that one month's rent need not be paid when an appeal bond is made.

Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.

(Amended May 9, 1977, eff. Sept. 1, 1977; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

(From old RULE 751)

Notes and Comments

Source: Art. 3989.

Amended to require immediate filing of papers and money with clerk of county court. Provides for precedence of trial, hearings, and motions.

Comment on 1988 Change: This amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in the justice court.

Comment to 1990 change: To provide for transfer of subject funds.

(Note to committee; This rule sets forth what must occur to perfect an appeal. It now includes a requirement that the filing fee for county court be paid to the justice court. As in old rule 749c it also dictates what the justice court must do when an appeal is perfected.)

~~RULE 749c. APPEAL PERFECTED~~

~~When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977; amended April 15, 1982, eff. Aug. 15, 1982; April 24, 1990, eff. Sept. 1, 1990.)~~

~~**Notes and Comments**~~

~~Change by amendment effective August 15, 1982: This rule is amended so that one month's rent need not be paid when an appeal bond is made.~~

~~Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.~~

~~RULE 750.~~ RULE 749c FORM OF APPEAL BOND

The appeal bond authorized in the preceding article may be substantially as follows:

_____ , Plaintiff

vs.

_____ , Defendant

"The State of Texas,

"County of _____

Cause Number _____

"~~Whereas~~ WHEREAS, in the above entitled and numbered ~~upon a writ of~~ forcible entry and detainer in the Justice Court of precinct _____ of _____ County, Texas, judgment was signed on the _____day of _____, _____ in favor of ~~A.B~~ _____ appellee., and against ~~C.D.~~ _____ appellant. ~~tried before _____, a justice of the peace of _____ county, a judgment was rendered in favor of the said A.B. on the _____day of _____, A.D. ___, and against the said C.D~~ From ~~from~~ which judgment the said ~~C.D~~ appellant, ~~has appealed~~ wishes to appeal to the county court; now, therefore, the said ~~C.D~~ appellant, and ~~his/her~~ sureties, covenant that appellant will prosecute ~~his/her~~ said appeal with effect and pay all cost and damages which may be adjudged against the appellant, provided the sureties shall not be liable in an amount greater than $_____, said amount being the amount of the bond herein.

NOW, THEREFORE, WE _____, appellant, as principal, and _____, as surety at _____ (address of surety), and _____ as surety at _____ (address of surety), acknowledge ourselves as bound to pay to _____ appellee, the sum of $ _____, conditioned that appellant shall prosecute the appeal with effect and will perform an adverse judgment final on appeal.

" Given under our hands this _____day of _____, A.D. ____."

_____

Signature of Appellant

_____

Signature of Surety

_____

Signature of Surety

(Amended July 22, 1975, eff. Jan. 1, 1976.)

Notes and Comments

Source: Art. 3988, unchanged.

Change by amendment effective January 1, 1976: The form is amended to state the limits of liability of the sureties.

(Note to committee: This form of the appeal bond has been modified. It was formerly found in rule 750 but was moved so that all rules pertaining to the appeal are found in one place.)

Rule 750 SUSPENDING ENFORCEMENT OF FORCIBLE ENTRY AND DETAINER JUDGMENT PENDING APPEAL TO COUNTY COURT

(a) In a forcible entry and detainer case an appellant who has perfected an appeal under these rules shall be entitled to suspend the enforcement of the judgment and, where applicable, stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:

(1) filing with the justice court a written agreement with the appellee for suspending enforcement of the judgment ; or

(2) filing with the justice court a good and sufficient supersedeas bond; or

(3) making a deposit with the justice court in lieu of a supersedeas bond; or

(4) providing alternate security as ordered by the justice court.

(b) Supersedeas Bonds

(1) must be in an amount required by this rule;
(2) must be made payable to the county clerk of the county in which the case was heard;
(3) must be signed by the appellant or the appellant's agent;
(4) must be signed by a sufficient surety or sureties as approved by the justice court.
(5) the justice court may, in its discretion require evidence of the sufficiency of the surety or sureties prior to approving the supersedeas bond.

(c) Deposit in lieu of supersedeas bond.
Instead of filing a surety supersedeas bond, a party may deposit with the justice court;
(1) cash;
(2) a cashier's check payable to the county clerk , drawn on any federally insured and federally or state chartered bank or savings and loan association; or
(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(d) Conditions of liability. The surety or sureties on a supersedeas bond, any deposit in lieu of a supersedeas bond, or any alternate security ordered by the court is subject to liability for all damages and costs that may be awarded against the debtor—up to the amount of the supersedeas bond, deposit, or security—if;
(1) the debtor does not perfect an appeal or the debtor's appeal is dismissed, and the debtor does not perform the justice court's judgment; or
(2) the debtor does not perform an adverse judgment final on appeal.

(e) Effect of supersedeas. Enforcement of a judgment must be suspended if the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded. If execution or a writ of possession has been issued, the county court will promptly issue a writ of supersedeas.

(f) Amount of supersedeas bond, deposit or security. The amount of the supersedeas bond, deposit or security must be at least in an amount to cover;
(1) the amount of the judgment, and interest on the judgment for the estimated duration of the appeal;
(2) the amount of attorney's fees awarded for the appellee;
(3) the amount of rent owed by the appellant for the current rent paying period less any portion of that rent reflected in the judgment, except that if the appellant was the plaintiff in justice court then the supersedeas bond need not include any rent; or
(4) if there is no obligation on the part of the appellant to pay rent then an amount equal to the fair market value of the rent for the current month.
(5) Lesser amount The justice court may order a lesser amount than required by subsections 1-4 above if the justice court finds that;
(A) posting a supersedeas bond, deposit, or security in the amount required by subsections 1-4 above will irreparably harm the appellant; and
(B) that posting a supersedeas bond, deposit or security in a lesser amount will not substantially impair the appellee's ability to recover under the judgment after all appellate remedies are exhausted.

(g) Effect of appellant's not paying rent or the amount of fair market value into the registry of the county court.

(1) During the pendency of the appeal the appellant must pay rent, or the amount determined to be a fair market rental value of the premises as set forth in Rule 748, into the registry of the county court as it becomes due. If the appellant fails to make timely payments into the registry of the county court as it becomes due, the appellee may file a notice of default in the county court where the cause is pending. Upon sworn motion by the appellee, and a showing of default by the appellant in making payments into the registry of the county court as they become due, the court may issue a writ of possession. During the appeal, if a governmental agency is responsible for payment of a portion of the rent and does not pay that portion to the landlord or into the registry of the county court, the landlord may file a motion with the county court requesting that the tenant be required to pay the full amount of the rent into the county court registry as a condition for remaining in possession. After notice and hearing, the court may grant the motion only if the landlord:

(A) did not cause the agency to cease making the payments: and

(B) is not able to take an action that will cause the agency to resume making payments or to otherwise pay all or part of the rent.

(2) The county court may allow the appellee to withdraw any or all rent or the amount determined to be a fair market rental value from the county court registry upon;

(A) sworn motion and hearing, prior to final determination of the case, showing the right to receive payment;

(B) dismissal of the appeal, or

(C) order of the court upon final hearing.

(3) All hearings and motions under this rule shall be entitled to precedence in the county court.

(h) When the enforcement of the judgment has been suspended the justice court shall stay all further proceedings on the judgment and shall immediately make out a transcript of all the entries on the court's docket of the proceedings related to the suspension of the judgment; and shall immediately file same, together with the supersedeas bond, deposit, or security with the clerk of the county court. The justice court will immediately issue whatever writs of supersedeas are needed, or take other actions to suspend the enforcement of the judgment.

(i) Once the appeal has been perfected and five days have expired since the day the judgment was signed, any actions to suspend the enforcement of the judgment under this rule, or to modify an existing justice court order suspending the enforcement of the judgment, must be filed in the county court where the appeal is pending.

(j) If the appeal is perfected and the tenant does not pay rent into the registry of the county court as it becomes due, the county court, where the appeal is pending, may issue a writ of possession at any time. The duty of the defendant to pay rent into the registry of the county court as it becomes due exists even if the appeal is perfected by the approval of an affidavit of indigence.

(k) If the appeal is perfected by the approval of an affidavit of indigence, the defendant does

not have to post a supersedeas bond, deposit, or security with the justice court in order to remain in possession, or to suspend the enforcement of the judgment. If the affidavit of indigence was approved in the justice court the supersedeas bond, deposit, or security must be posted within one day after the affidavit of indigence is approved. If the affidavit of indigence is approved in the county court the supersedeas bond, deposit, or security must be posted in the county court within five days after the affidavit of indigence is approved.

Notes and Comments

If the defendant who perfects an appeal from an adverse judgment does not pay rent into the registry of the county court as it becomes due, the appellee may request a writ of possession from the county court where the case is pending at any time. A defendant who perfects an appeal by the approval of an affidavit of indigence may remain in possession and suspend the enforcement of the judgment without posting a supersedeas bond, deposit or security. A defendant who perfects an appeal by approval of an affidavit of indigence must still pay rent into the registry of the county court as it becomes due in order to be allowed to remain in possession.

(Note to committee: This sets up the second part of an appeal, which is suspending the enforcement of the judgment by posting a supersedeas bond. There is no provision to avoid the posting of a supersedeas bond by filing an affidavit of indigence. This provision is very similar to the TRAP rules modified somewhat for these cases.)

~~**RULE 751. TRANSCRIPT**~~

~~When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers, and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.~~

~~The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.~~

~~The trial, as well as all hearing and motions, shall be entitled to precedence in the county court.~~

~~(Amended May 9, 1977, eff. Sept. 1, 1977; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)~~

~~**Notes and Comments**~~

~~Source: Art. 3989.~~

~~Amended to require immediate filing of papers and money with clerk of county court. Provides for precedence of trial, hearings, and motions.~~

~~Comment on 1988 Change: This amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in the justice court.~~

~~Comment to 1990 change: To provide for transfer of subject funds.~~

Rule 751 Form of Supersedeas Bond

The supersedeas bond authorized in the preceding article may be substantially as follows:

SUPERSEDEAS BOND

"The State of Texas"
"County of ____"
"Cause No. ____"

WHEREAS, in the above entitled and numbered forcible entry and detainer in the Justice Court of Precinct ____ of ____ County, Texas, judgment was signed on the ____ day of ____, in favor of ____ (plaintiff/defendant), hereinafter referred to as appellee against ____ (plaintiff/defendant), hereinafter referred to as appellant for;

Possession,
Court costs of $ ____,
Back rent and contractual late charges of $ ____,
Attorney's fees of $ ____,

together with interest thereon from the date of the judgment, at the rate of ____ percent per annum, from which judgment appellant has appealed to the county court of ____ County, Texas.

WHEREAS, appellant desires to suspend enforcement of the judgment pending determination of said appeal:

NOW, THEREFORE, WE ____ (appellant), as principal, and ____ as surety at ____ (address of surety), and ____ as surety at ____ (address of surety), acknowledge ourselves as bound to pay to ____ (appellee), the sum of $ ____, said sum being at least the amount of the judgment, interest, and costs, plus estimated interest from the date of the judgment until final disposition of the appeal, and any rent, or the fair market value of the property, currently owed during this rent paying period and not reflected in the judgment, conditioned that appellant shall prosecute the appeal with effect; and in case the judgment of the county court be against appellant, appellant shall perform its judgment, sentence or decree, and pay all such damages as the court may award against appellant up to the amount of the bond.

"Given under our hands this day of , ."

Signature of Appellant

Signature of Surety

Signature of Surety

Notes and Comments

This is a new rule which provides a suggested form for the supersedeas bond provided by rule 750.

(Note to committee: This is a new supersedeas bond form. Most of the content of old rule 751 is now in rule 749c.)

RULE 752. DAMAGES

On the trial de novo of the cause in the county court the appellant or appellee shall be permitted to plead, prove and recover his damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal.

Damages may include but are not limited to loss of rentals during the pendency of the appeal and reasonable attorney fees in the justice and county courts provided, as to attorney fees, that the requirements of Chapter 24 ~~Section 24.006~~ of the Texas Property Code have been met. Only the party prevailing in the county court shall be entitled to recover damages against the adverse party. ~~That prevailing party shall be entitled to recover against the sureties on the appeal bond in cases where the adverse party has executed such bond.~~

Notes and Comments

Source: Art. 3990, unchanged; except that by amendment effective December 31, 1943, the rule is made to extend, in a proper case, to appellant as well as to appellee; and other relevant changes have been made.

Changes by amendment effective January 1, 1976: Costs and damages are stated by this rule rather than by various enumeration's in other rules.

~~**RULE 753. JUDGMENT BY DEFAULT**~~

RULE 753. DUTY OF CLERK TO NOTIFY PARTIES

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

RULE 753a. JUDGMENT BY DEFAULT

~~Said cause shall be subject to trial at any time after the expiration of eight full days after the date the transcript is filed in the county court.~~ If the defendant has filed a written answer in the justice court, the same shall be taken to constitute ~~his~~ the defendant's appearance and answer in the county court, and such answer may be amended as in other cases. If the defendant made no answer in writing in the justice court, and ~~if he~~ fails to file a written answer within ten ~~eight~~ full days after the transcript is filed in the county court, the allegations of the complaint may be taken as admitted and judgment by default may be entered accordingly.

(Amended June 16, 1943, eff. Dec. 31, 1943; Aug. 18, 1947, eff. Dec. 31, 1947; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art 3991, with minor textual change.

RULE 754. ~~[BLANK]~~ TRIAL OF THE CASE IN COUNTY COURT

(a) The trial of a forcible entry and detainer appeal as well as all hearings and motions shall be entitled to precedence in the county court.

(b) No jury trial shall be had in any appeal of a forcible entry and detainer, 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 five days in advance. The fee required by law for requesting a jury trial in county court must be deposited with the county clerk within the time for making a written request for jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

(c) Generally, discovery is not appropriate in forcible entry and detainer appeals, however, the county court has the discretion to allow reasonable discovery.

(d) The forcible entry and detainer appeal shall be subject to trial de novo at any time after the expiration of ten full days after the date the transcript is filed in the county court. The county court may set appeals of forcible entry and detainer cases for trial on written motion of any party or on the court's own motion, with reasonable notice to the parties of a first setting for trial, or by agreement of the parties. If the county court invokes jurisdiction in the

case then it must dispose of all parties and issues before the court, including the issue of possession.

(e) On written motion by the appellee contesting the sufficiency of the appeal bond or the supersedeas bond, the county court may hold a hearing on the appellee's motion. If upon review of the appeal bond or the supersedeas bond, the county court should find the bond to be deficient, the court may disapprove the bond and allow the appellant 5 days from the date the bond is disapproved to correct the deficiencies with the bond. If the deficiencies are corrected then the bond may be approved. If the deficiencies on the appeal bond are not corrected then the appeal may be dismissed. If the deficiencies on a supersedeas are not corrected then the appellee may proceed with the enforcement of judgment including a writ of possession

(f) When the appellant fails to prosecute the appeal with effect or the county court renders judgment against the appellant, then the county court must render judgment against the sureties on the appellant's appeal bond or supersedeas bond, for the performance of the judgment up to the amount of the bond.

Notes and Comments

This rule provides guidance to the county court in procedures to use in the trial of the case. When the county court invokes jurisdiction of a case it must dispose of all issues and parties before the court. If the case is dismissed, once the county court has invoked jurisdiction, then the dismissal should address the issue of possession

(Note to committee: This rule will provide guidance to the county court's on how to try appeals of forcible entry and detrainer cases. See 754(e) for a comment on a still unresolved issue.)

RULE 755. WRIT OF POSSESSION

The writ of possession, or execution, or both, shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable, as in other cases; and such writ of possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used ~~as the principal residence of a party~~ for residential purposes only. A judgment of a county court may not under any circumstances be stayed pending appeal unless, within ten days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court.

(Note to committee: There is a conflict between the language in the current rule 755 which says that you cannot supersede a judgment unless the premises was used as a primary residence and the language in Texas Property Code Section 24.007 which says that a judgment cannot be stayed unless the premises was used as a residence. This amendment would conform the rule to the property code. The last sentence in this rule mirrors the mandate of Section 24.007.)

(Amended July 15, 1987, Jan. 1, 1988.)

Notes and Comments

Source: Art 3993, unchanged.

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RULE 748. JUDGMENT AND WRIT

If the judgment or verdict is ~~be~~ in favor of the plaintiff, the justice shall give judgment for plaintiff for possession of the premises, and costs. The justice may also give judgment for ~~damages~~ the plaintiff for back rent, contractual late charges and attorney's fees, if sought and established by proof, and provided that such claims are within the jurisdiction of the court . ~~and he shall award his a writ of possession~~. If the judgment or verdict is ~~be~~ in favor of the defendant, the justice shall give judgment for defendant against the plaintiff for costs and for possession of the premises. The justice may also award a defendant who prevails against the plaintiff in the issue of possession, a judgment for attorney's fees if authorized and established by proof, and provided that such claim is within the jurisdiction of the court. ~~and any damages~~. If the judgment is for the plaintiff for possession, the justice shall issue a writ of possession except that ~~no~~ No writ of possession shall issue until the expiration of five days from the ~~time~~ day the judgment is signed.

(a) A forcible entry and detainer judgment shall be in writing in a separate document and contain the full names of the parties, as stated in the pleadings, and state for and against whom the judgment is rendered. The judgment shall recite who is awarded:
(1) possession of the premises:
(2) back rent, if any, and contractual late charges, if any, and in what amount.
(3) attorney's fees, if any, and in what amount;
(4) court costs and in what amount.

(b) A forcible entry and detainer judgment shall contain findings of fact which must include the following:
(1) whether there is an obligation to pay rent on the part of the defendant;
(2) a determination of the rent paying period;
(3) a determination of the day rent is due;
(4) a determination of the amount of rent due each rent paying period, and if the rental agreement provides that all or part of the tenant's rental obligation is subsidized by the government then a determination as to how much rent is to be paid by the tenant and how much rent is to be paid by the federal government;
(5) a determination of the date through which the judgment for back rent, and contractual late charges is calculated.

(c) If there is no obligation on the part of the tenant to pay rent then the judge shall make a finding as to the fair market rental value of the premises per month as if there was an obligation to pay rent.

(d) If the judgment of the justice court is not appealed then it remains in force and a prevailing party may enforce their rights under the judgment in the justice court. If the

appeal of the judgment in the justice court is perfected but the county courts jurisdiction is not invoked, then the judgment of the justice court remains in force and the prevailing party may enforce their rights under the judgment in the justice court. If the appeal from the justice court is perfected and the county courts jurisdiction is invoked then the justice court loses jurisdiction over the case. The county court may rely on the justice court judgment in determining when and in what amount rent is due to be paid by the appellant into the registry of the county court during the pendency of the appeal. The county court may also rely on the judgment of the justice court in determining whether of not to issue a writ of possession in the event rents are not timely paid into the registry of the county court. Nothing in this rule prohibits the county court from making an independent determination as to the amounts and due dates of rents to be paid into the registry of the county court during the pendency of the appeal.

Notes and Comments

Comment: The main issue in a forcible entry and detainer action is possession, however a plaintiff may join a claim for rent, contractual late charges, costs, and attorney's fees to the issue of possession. The rules also allow a defendant who prevails to recover any costs and attorney's fees to which they are entitled but although a defendant may not file a counterclaim, any available defenses may be raised at trial. Recovery under any other grounds is not permitted under this section. This amendment to the rule also sets out a requirement that judgments in a forcible entry and detainer case be in writing in a separate document and that the judgment contains specific information, including findings of fact about the rent. This is necessary in order to determine the amount of the appeal bond and the supersedeas bond, and for the county court to determine when and how much rent the tenant/appellant should pay into the registry of the court when the appeal is pending in county court.. Part (c) requires a finding by the court of the fair market rental value of the premises if there is no contractual obligation for the defendant to pay rent. This is necessary, for example, where a tenant at sufferance who holds over after the termination of an executory contract or after a foreclosure, or someone who has entered the real property of another without legal authority, (see Chapter 24 of the Texas Property Code).

(Amended July 26, 1960, eff. Jan. 1, 1961; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan 1, 1981; July 15, 1987, eff. Jan 1, 1988.)

Notes and Comments

Source: Art. 3986.

Change: Elimination of verdict of "guilty" or "not guilty."

Change by amendment effective January 1, 1961: The time within which writ of restitution to issue changed from two days to five days.

Changes by amendment effective January 1, 1976; The amendments authorize judgments for costs and damages which Rule 740 protects.

Change by amendment effective January 1, 1981; Changed so that time runs from the date judgment is signed.

[Note for the committee. This will clarify what a prevailing plaintiff or defendant is entitled to if they are successful. We have some defendants who try to file a counterclaim on evictions which I don't think is contemplated under the rules. Since a forcible entry and detainer does not bar a tenant from filing a suit for trespass, damages, waste, mesne profits or any other cause of action the inability to file a counterclaim in a forcible will not harm the tenant. This will also require for the first time a separate written judgment which contains information which will be needed in setting an appeal or supersedeas bond and in calculating how much rent will need to be paid into the registry of the court during the pendency of the appeal)

RULE 749. MAY APPEAL

~~In appeals in forcible entry and detainer cases, no motion for new trial shall be filed.~~

~~Either party may appeal from a final judgment in such case, to the county court of the county in which the judgment is rendered by filing with the justice within five days after the judgment is signed, a bond to be approved by said justice, and payable to the adverse party, conditioned that he prosecute his appeal with effect, or pay all costs and damages which may be adjudged against him.~~
~~Within five days following the filing of such bond, the party appealing shall give notice as provided in Rule 21a of the filing of such bond to the adverse party. No judgment shall be taken by default against the adverse party in the court to which the cause has been appealed without first showing substantial compliance with this rule.~~

~~The justice shall set the amount of the bond to include the items enumerated in Rule 752.~~

(a) All motions to set aside a forcible entry and detainer judgment or for a new trial shall be made within 1 day after the judgment is signed. The filing of a motion to set aside a judgment or for a new trial does not extend the deadline to perfect an appeal under these rules.

(b) A defendant may appeal from a final judgment in a forcible entry and detainer, to the county court of the county in which the judgment is signed by filing with the justice, not more than five days after the judgment is signed, an appeal bond, deposit, or security to be approved by said justice. The appeal from a judgment for court costs, back rent, late charges, attorney's fees and possession may be made by posting an appeal bond, deposit, or security in an amount equal to the court costs incurred in justice court.

(c) A plaintiff may appeal from a final judgment in a forcible entry and detainer, to the county court of the county in which the judgment is signed by filing a written notice of appeal with the justice not more than five days after the day the judgment is signed. The notice of appeal must identify the trial court, plaintiff, defendant and the cause number, and state that the plaintiff desires to appeal. The notice of appeal must be signed by the plaintiff or the plaintiff's authorized agent.

(d) The party appealing the judgment must also pay to the justice court, the filing fee required by that county to appeal a case to county court. The court will forward the filing fee to the county clerk along with all other papers in the case. The filing fee must be made payable to the county clerk of the county in which the case was heard.

(e) If an appeal bond is posted it must meet the following criteria:
(1) It must be in an amount required by this rule,
(2) It must be made payable to the county clerk of the county in which the case was heard,
(3) It must be signed by the judgment debtor or the debtor's authorized agent,
(4) It must be signed by a sufficient surety or sureties as approved by the court. If an appeal bond is signed by a surety or sureties, then the court may, in its discretion, require evidence of the sufficiency of the surety or sureties prior to approving the appeal bond.

(f) Deposit in lieu of appeal bond. Instead of filing a surety appeal bond, a party may deposit with the trial court:
(1) cash;
(2) a cashier's check payable to the county clerk of the county where the case was heard, drawn on any federally insured and federally or state chartered bank or savings and loan association; or
(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(g) Any motions challenging the sufficiency of the appeal bond or deposit in lieu of appeal bond may be filed with the county court.

(h) Within five days following the filing of an appeal bond by a defendant, or the filing of a notice of appeal by a plaintiff, the party appealing shall give notice in accordance with Rule 21a of the filing of an appeal bond or the filing of a notice of appeal to the adverse party. No judgment shall be taken by default against the adverse party in the county court to which the cause has been appealed without first showing substantial compliance with this subsection.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan 1, 1981; July 15, 197, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3987, unchanged.

Changes by amendment effective January 1, 1976: The first sentence has been moved to that place from within the rule as previously written. The amount of the appeal bond is fixed by the justice as prescribed by Rule 752.

Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.

Comment on 1988 Change: The purpose of this amendment is to give notice to the appellee that an appeal of the case from the justice court has been perfected in the county court.

(Note to committee: This rule is rewritten to allow a two-part method of appeal. Rule 749 sets forth what a plaintiff and defendant must do to appeal the judgment, including the notice, amount of the appeal bond or contents of the notice of appeal. Rule 749a talks about the affidavit of indigence which replaces the old pauper's affidavit. The affidavit of indigence may be used to avoid posting the appeal bond. Rule 749b discusses what must occur for an appeal to be perfected and rule 749c contains the form of the appeal bond, which was formerly found in rule 750.)

~~RULE 749a. PAUPER'S AFFIDAVIT~~

~~If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 749, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the filing of such affidavit and notice thereof to the opposite party or his attorney of record by any officer of the court or party to the suit, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence either than by affidavit above referred to. When a pauper's affidavit is timely contested by the appellee, the justice shall hold and rule on the matter within five days.~~

~~If the justice of the peace disapproves the pauper's affidavit, appellant may, within five days thereafter bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing, not later than five days, and shall hear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case.~~

~~A pauper's affidavit will be considered approved upon one of the following occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit.~~

~~No writ of possession may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 within five days thereafter. If no appeal bond is filed within five days, a writ of possession may issue.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977; amended June 10, 1980, eff. Jan. 1, 1981; April 245, 1990 amendment withdrawn Sept. 4, 1990, and rule amended eff. retroactively to Sept. 1, 1980.)~~

~~This is a new rule. It substantially tracks Rule 572.~~

~~**Notes and Comments**~~

~~Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.~~

~~Comment to 1990 change: Proceedings on pauper affidavits are revised. The term writ of restitution is corrected to writ of possession.~~

Rule 749a Affidavit of Indigence

(a) Establishing indigence

A party who cannot pay the costs to appeal may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in compliance with this rule within five days after the judgment is signed; and

(2) the claim of indigence is not contested or, if contested, the contest is not sustained by a timely written order.

(b) Contents of affidavit.

The affidavit of indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

(1) the nature and amount of the party's current employment income, government-entitlement income, and other income;

(2) the income of the party's spouse and whether that income is available to the party;

(3) real and personal property the party owns;

(4) cash the party holds and amounts on deposit that the party may withdraw;

(5) the party's other assets;

(6) the number and relationship to the party of any dependents;

(7) the nature and amount of the party's debts;

(8) the nature and amount of the party's monthly expenses;

(9) the party's ability to obtain a loan for court costs;

(10) whether an attorney is providing free legal services to the party;

(11) whether an attorney has agreed to pay or advance court costs.

(c) When and Where Affidavit Filed

An appellant must file the affidavit of indigence in the justice court within five days after the judgment is signed

(d) Duty of Clerk or Justice of the Peace

Upon the filing of an affidavit of indigence the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of indigence within one working day of its filing by written notification accomplished by first class mail.

(e) No contest filed

Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(f) Contest to affidavit

The appellee or county clerk, may contest the claim of indigence by filing a contest to the affidavit. The contest must be filed in the justice court within five days after the date when the notice of the filing of the affidavit was mailed by the clerk or justice of the peace to the opposing party. The contest need not be sworn.

(g) Burden of Proof

If a contest is filed, the party who filed the affidavit of indigence must prove the affidavit's allegations. If the indigent party is incarcerated at the time the hearing on a contest is held, the affidavit must be considered as evidence and is sufficient to meet the indigent party's burden to present evidence without the indigent party's attending the hearing.

(h) Hearing and decision in the trial court

(1) Notice required

If the affidavit of indigence is filed in the justice court and a contest is filed, the justice court must set a hearing and notify the parties of the setting.

(2) Time for hearing.

The justice court must either hold a hearing and rule on the matter or sign an order extending the time to conduct a hearing within five days from the date a contest is filed.

(3) Extension of time for hearing.

The time for conducting a hearing must not be extended for more than five days from the date the order is signed.

(4) Time for written decision; effect.

Unless—within the period set for the hearing---the justice court signs an order sustaining the contest, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(i) Appeal from the justice court order disapproving the affidavit of indigence

(1) No writ of possession may issue pending the hearing by the county court of the appellant's right to appeal on an affidavit of indigence.

(2) If a justice of the peace disapproves the affidavit of indigence, appellant may, within five days thereafter, bring the matter before the county court for a final decision, and , on request, the justice shall certify to the county court appellant's affidavit, the contest

thereof, and all documents, and papers thereto. The county court shall hold a hearing de novo and rule on the matter within five days from the date the matter is brought to the county court, or within that five day period, sign an order extending the time to conduct a hearing, The time for conducting a hearing must not be extended for more than five days from the date the order is signed. If the affidavit of indigence is approved by the county court, it shall direct the justice to transmit to the clerk of the county court, the transcript, records, and papers of the case. If the county court disapproves the affidavit of indigence, appellant may perfect an appeal by filing an appeal bond, deposit, or security with the justice court in the amount required by this rule within five days thereafter. If no appeal bond is filed within five days thereafter, the justice court may issue a writ of possession.

(j) Costs defined

As used in this rule, costs means:

(1) a filing fee paid in justice court to initiate the forcible entry and detainer action:

(2) any other costs sustained in the justice court; and

(3) a filing fee paid to appeal the case to the county court.

(Note to committee: The new affidavit of indigence replaces the pauper's affidavit and generally follows the TRAP rules except for a few modifications necessary for to make the rule fit these cases. The procedures for filing, contesting and appealing the denial of the affidavit of indigence are essentially the same as under old rule 749a.)

~~**RULE 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS**~~

~~In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:~~

~~(1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry on rental period's rent under the terms of the rental agreement.~~

~~(2) During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.~~

~~(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.~~

~~(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.~~

~~(5) All hearings and motions under this rule shall be entitled to precedence in the county court.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977.)~~

~~Notes and Comments~~

~~This is a new rule.~~

Rule 749b Appeal Perfected

When the defendant timely files an appeal bond, deposit, or security in conformity with Rule 749, and the filing fee required for the appeal of cases to the county court is paid, or an affidavit of indigence approved in conformity with Rule 749a, the appeal by the defendant shall be perfected When the plaintiff timely files a notice of appeal in conformity with Rule 749 and the filing fee required for the appeal of cases to county court is paid, the appeal by the plaintiff shall be perfected. When an appeal has been perfected, the justice court shall make out a transcript of all the entries made on it's docket of the proceedings had in the case and immediately file the same, together with the original papers, any money in the court registry pertaining to that case, and the appeal bond, deposit, or security filed in conformity with Rule 749, or the affidavit of indigence approved in conformity with Rule 749a with the county clerk of the county in which the case was heard.

The county clerk shall docket the case and the trial shall be de novo. The county clerk shall immediately notify both appellant and appellee of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when there is no written answer on file in the justice court.

Notes and Comments

An appeal by a tenant for rent, contractual late charges, attorney's fees, and court costs may be appealed separately from the issue of possession.

(Added May 9, 1977, eff. Sept. 1, 1977; amended April 15, 1982, eff. Aug. 15, 1982; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Change by amendment effective August 15, 1982: This rule is amended so that one month's rent need not be paid when an appeal bond is made.

Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.

(Amended May 9, 1977, eff. Sept. 1, 1977; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

(From old RULE 751)

Notes and Comments

Source: Art. 3989.

Amended to require immediate filing of papers and money with clerk of county court. Provides for precedence of trial, hearings, and motions.

Comment on 1988 Change: This amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in the justice court.

Comment to 1990 change: To provide for transfer of subject funds.

(Note to committee; This rule sets forth what must occur to perfect an appeal. It now includes a requirement that the filing fee for county court be paid to the justice court. As in old rule 749c it also dictates what the justice court must do when an appeal is perfected.)

~~RULE 749c. APPEAL PERFECTED~~

~~When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977; amended April 15, 1982, eff. Aug. 15, 1982; April 24, 1990, eff. Sept. 1, 1990.)~~

~~Notes and Comments~~

~~Change by amendment effective August 15, 1982: This rule is amended so that one month's rent need not be paid when an appeal bond is made.~~

~~Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.~~

~~RULE 750.~~ RULE 749c FORM OF APPEAL BOND

The appeal bond authorized in the preceding article may be substantially as follows:

_____ , Plaintiff

vs.

_____ , Defendant

"The State of Texas,

"County of _____

Cause Number _____

"~~Whereas~~ WHEREAS, in the above entitled and numbered ~~upon a writ of~~ forcible entry and detainer in the Justice Court of precinct _____ of _____ County, Texas, judgment was signed on the _____day of _____, _____ in favor of ~~A.B~~ _____ appellee., and against ~~C.D.~~ _____ appellant. ~~tried before _____, a justice of the peace of _____ county, a judgment was rendered in favor of the said A.B. on the _____day of _____, A.D. ___, and against the said C.D~~ From ~~from~~ which judgment the said ~~C.D~~ appellant, ~~has appealed~~ wishes to appeal to the county court; now, therefore, the said ~~C.D~~ appellant, and ~~his/her~~ sureties, covenant that appellant will prosecute ~~his/her~~ said appeal with effect and pay all cost and damages which may be adjudged against the appellant, provided the sureties shall not be liable in an amount greater than $_____, said amount being the amount of the bond herein.

NOW, THEREFORE, WE _____, appellant, as principal, and _____, as surety at _____ (address of surety), and_____ as surety at _____ (address of surety), acknowledge ourselves as bound to pay to _____ appellee, the sum of $ _____, conditioned that appellant shall prosecute the appeal with effect and will perform an adverse judgment final on appeal.

" Given under our hands this _____day of _____, A.D. ____."

_____
Signature of Appellant

_____
Signature of Surety

_____
Signature of Surety

(Amended July 22, 1975, eff. Jan. 1, 1976.)

Notes and Comments

Source: Art. 3988, unchanged.

Change by amendment effective January 1, 1976: The form is amended to state the limits of liability of the sureties.

(Note to committee: This form of the appeal bond has been modified. It was formerly found in rule 750 but was moved so that all rules pertaining to the appeal are found in one place.)

~~RULE 751. TRANSCRIPT~~

~~When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers, and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.~~

~~The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.~~

~~The trial, as well as all hearing and motions, shall be entitled to precedence in the county court.~~

~~(Amended May 9, 1977, eff. Sept. 1, 1977; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)~~

~~Notes and Comments~~

~~Source: Art. 3989.~~

~~Amended to require immediate filing of papers and money with clerk of county court. Provides for precedence of trial, hearings, and motions.~~

~~Comment on 1988 Change: This amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in the justice court.~~

~~Comment to 1990 change: To provide for transfer of subject funds.~~

(Amended June 16, 1943, eff. Dec. 31, 1943; Aug. 18, 1947, eff. Dec. 31, 1947; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art 3991, with minor textual change.

RULE 753. ~~[BLANK]~~ TRIAL OF THE CASE IN COUNTY COURT

(a) The trial of a forcible entry and detainer appeal as well as all hearings and motions shall be entitled to precedence in the county court.

(b) No jury trial shall be had in any appeal of a forcible entry and detainer, 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 five days in advance. The fee required by law for requesting a jury trial in county court must be deposited with the county clerk within the time for making a written request for jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

(c) Generally, discovery is not appropriate in forcible entry and detainer appeals, however, the county court has the discretion to allow reasonable discovery.

(d) The forcible entry and detainer appeal shall be subject to trial de novo at any time after the expiration of ten full days after the date the transcript is filed in the county court. The county court may set appeals of forcible entry and detainer cases for trial on written motion of any party or on the court's own motion, with reasonable notice to the parties of a first setting for trial, or by agreement of the parties. If the county court invokes jurisdiction in the case then it must dispose of all parties and issues before the court, including the issue of possession.

(e) On written motion by the appellee contesting the sufficiency of the appeal bond , the county court may hold a hearing on the appellee's motion. If upon review of the appeal bond , the county court should find the bond to be deficient, the court may disapprove the bond and allow the appellant 5 days from the date the bond is disapproved to correct the deficiencies with the bond. If the deficiencies are corrected then the bond may be approved. If the deficiencies on the appeal bond are not corrected then the appeal may be dismissed.

(f) When the appellant fails to prosecute the appeal with effect or the county court renders judgment against the appellant, then the county court must render judgment against the sureties on the appellant's appeal bond, for the performance of the judgment up to the amount of the bond.

(Note to committee: This rule will provide guidance to the county court's on how to try appeals of forcible entry and detainer cases. See 754(e) for a comment on a still unresolved issue.)

RULE 754 [BLANK]

RULE 755. WRIT OF POSSESSION

The writ of possession, or execution, or both, shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable, as in other cases; and such writ of possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used ~~as the principal residence of a party~~ for residential purposes only. A judgment of a county court may not under any circumstances be stayed pending appeal unless, within ten days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court.

(Note to committee: There is a conflict between the language in the current rule 755 which says that you cannot supersede a judgment unless the premises was used as a primary residence and the language in Texas Property Code Section 24.007 which says that a judgment cannot be stayed unless the premises was used as a residence. This amendment would conform the rule to the property code. The last sentence in this rule mirrors the mandate of Section 24.007.)

(Amended July 15, 1987, Jan. 1, 1988.)

Notes and Comments

Source: Art 3993, unchanged.

Eviction Rules 738-747a Ver. 6.9 (10/6/01)

~~SECTION 3. FORCIBLE ENTRY AND DETAINER~~

RULE 738. JOINDER OF ADDITIONAL CLAIMS

~~A suit for rent, may be joined with an action of forcible entry and detainer, wherever the suit for rent is within the jurisdiction of the justice court. In such case the court in rendering judgment in the action of forcible entry and detainer, may at the same time render judgment for any rent, due the landlord by the renter; provided the amount thereof is within the jurisdiction of the justice court.~~

A suit for rent, contractual late charges, and attorney's fees may be joined with an action of forcible entry and detainer. The court in rendering judgment for possession, may at the same time render judgment for any rent, contractual late charges, and attorney's fees, due the landlord by the renter. The justice may also award court costs against the unsuccessful party.

Notes and Comments

Source: Art. 3976, unchanged.

Notes and Comments

Comment: Whenever the term forcible entry and detainer is used in this section it is intended that it also include forcible detainer. Back rent, late charges authorized by lease or contract, and attorney's fees may be sought subject to the jurisdictional limit of the justice court.

[Comment for the committee. Late charges should be included in an eviction suit. Judicial economy dictates that a landlord not have to file for back rent in an eviction and then sue for late charges on that back rent in a separate action. Late charges, attorney's fees and rent may be requested if they are within the jurisdictional limit of the court, but costs may be awarded regardless of the amount in controversy because costs are not included within the jurisdictional limit.]

RULE 739. CITATION

When an aggrieved ~~the~~ party ~~aggrieved~~ or ~~his~~ the party's authorized agent shall file ~~his~~ a written sworn complaint, the justice shall immediately issue citation ~~directed to~~ directing the defendant or defendants ~~commanding him~~ to appear before such justice at a time and

place named in such citation, such time being not more than ten days nor less than six days from the date of service of the citation.

The citation shall inform the parties that, upon timely request and payment of a jury fee no later than five days after the defendant is served with citation, the case shall be heard by a jury.

(Amended July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3977.

[Comment for the committee. Gender neutral changes]

RULE 740. COMPLAINANT MAY HAVE POSSESSION

The ~~party aggrieved~~ plaintiff may, at the time of filing his complaint, or thereafter prior to ~~final judgment~~ trial in the justice court, execute and file a possession bond to be approved by the justice in such amount as the justice may fix as the probable amount of cost of suit and damages which may result to defendant in the event that the suit has been improperly instituted, and conditioned that the plaintiff will pay defendant all such costs and damages as shall be adjudged against plaintiff.

The justice court shall notify the defendant that plaintiff has filed a possession bond. Such notice ~~shall~~ must be served on a defendant, in the same manner as service of citation in a forcible entry and detainer suit and shall inform the defendant of all of the following rules and procedures, except that the officer or other authorized person serving the notice of possession bond shall return such notice to the justice who issued same within one day after service:

(a) Defendant may remain in possession if;

(1) defendant executes and files a counterbond prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's bond. Said counterbond shall be approved by the justice and shall be in such amount as the justice may fix as the probable amount of costs of suit and damages which may result to plaintiff in the event possession has been improperly withheld by defendant; or

(2) ~~Defendant~~ defendant ~~is entitled to~~ demands ~~and he shall be granted~~ a trial ~~to~~ which must be held prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond. Any trial held under this rule must be a trial by judge. If the defendant requests a trial under this rule it will be the only trial held in this cause and will supercede the trial which would have been held under the original citation;

(b) If defendant does not file a counterbond and if defendant does not demand that trial be held prior to the expiration of said six-day period, the ~~constable of the precinct or the sheriff of the county where the property is situated, shall place the plaintiff in possession of the property promptly~~ plaintiff may request a writ of possession from the justice court after the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond; and

(c) If, in lieu of a counterbond, defendant demands trial within said six-day period, and if the justice of the peace rules after trial that plaintiff is entitled to possession of the property, the ~~constable or sheriff shall place the plaintiff in possession of the property~~ justice court may issue a writ of possession after the expiration of five days after such determination by the justice of the peace.

(d) Whenever a justice court issues a writ of possession under this rule a defendant may appeal in the same manner as after a traditional forcible entry and detainer trial.

Notes and Comments

A defendant must be served with a possession bond in the same manner as citation in a forcible entry and detainer suit. The trial held under this rule must be a trial by judge because of the severe time limits imposed. If a trial is requested by the defendant under this rule then it will take the place of the trial referenced in the original citation..

RULE 741. REQUISITES OF COMPLAINT

The complaint shall describe the lands, tenements or premises, the possession of which is claimed, with sufficient certainty to identify the same, and it shall also state the facts which entitled the complainant to the possession and authorize the action under Chapter 24 of the ~~Sections 24.001-24.004,~~ Texas Property Code.

(Amended Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3979, unchanged.
Change by amendment effective April 1, 1984; Corrective.

[Comment for the committee. This prevents having to amend the rules if the Property Code is renumbered.]

RULE 742. SERVICE OF CITATION

(a) Person Authorized to Serve Citation in Forcible Entry and Detainer Actions.

Persons authorized to serve citation in Forcible Entry and Detainer actions include (1) any sheriff or constable or other person authorized by law or, (2) any person authorized by law or written order of the court who is not less than 18 years of age. No person who is a party to, or interested in the outcome of a suit shall serve any process.

~~(b) Method of Service of Citation~~
The officer ~~receiving such citation shall execute the same~~ or other person authorized to serve citation shall execute the citation by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at ~~his usual place of abode~~ the premises at issue, at least six days before the return day ~~thereof~~ for the citation. ~~and on or before the day assigned for trial~~ The person serving the citation ~~he~~ shall return ~~such~~ the citation, noting the action taken thereon, ~~with his action written thereon~~, to the justice who issued the ~~same~~ citation at least one day before the appearance day named in the citation.

(Amended Aug. 18, 1947, eff. Dec 31, 1947.)

Notes and Comments

Source: Art 3980, with minor textual change.

[Comment for the committee. This will conform service of citation in evictions to service for all other civil suits in Texas. The requirement that the citation be returned at least one day prior to trial will prevent the citation being returned after the time set for trial although on the same day.]

RULE 742a. SERVICE BY DELIVERY TO PREMISES

If the sworn complaint lists ~~all home an work addresses~~ the address of the premises at issue as well as any other alternate addresses of the defendant or defendants as contained in a written lease agreement, ~~of the defendant which are known to the person filing the sworn complaint and if it states that such person knows of no other home or work addresses of the defendant in the county where the premises are located~~, and if service of citation cannot be effected under Rule 742 then service of citation may be by delivery to the premises ~~in question~~ at issue as follows:

If the officer or other person authorized to serve citation in forcible entry and detainer actions ~~receiving such citation~~ is unsuccessful in serving ~~such~~ citation under Rule 742, the officer or other authorized person shall no later than five days after receiving such citation execute a sworn statement based on personal knowledge, confirming that ~~the officer has made~~ diligent efforts have been made to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located as may be shown on the sworn complaint, stating the times and places of attempted

service. Such sworn statement shall be filed ~~by the officer~~ with the justice ~~who shall promptly consider the sworn statement of the officer~~. After promptly considering the sworn statement ~~of the officer~~ the justice may then authorize service by written order ~~according to the following~~ as follows:

(a) The officer or other authorized person shall place the citation inside the premises ~~by placing it~~ through a door mail chute or by slipping it under the ~~front door~~ main entry door to the premises; and if neither method is possible or practical, ~~the officer shall~~ to securely affix the citation to the ~~front door or~~ main entry door to the premises; and

(b) The officer or other authorized person shall that same day ~~or the next day~~ deposit in the mail a true copy of such citation with a copy of the sworn complaint attached thereto, addressed to the defendant at the premises in question and sent by first class mail; and

(c) The officer or other authorized person shall note on the return of such citation the date of delivery under (a) above and the date of mailing under (b) above. The return of the citation by an authorized person shall be verified; and

(d) Such delivery and mailing to the premises shall occur at least six days before the return day of the citation; and ~~on or before~~ at least one day before the appearance day named in the citation ~~assigned for trial~~. the officer or other authorized person accomplishing service ~~he~~ shall return such citation noting ~~with his~~ the action taken ~~written~~ thereon, to the justice who issued the same.

It shall not be necessary for the aggrieved party or ~~his~~ the party's authorized agent to make a request for or motion for alternative service pursuant to this rule.

(Added April 15, 1982, eff. Aug. 15, 1982.)

Notes and Comments

This is a new rule.

[Comment for the committee. This will conform service of citation under 742a with service under Rule 742. It will also relieve the landlord of the requirement of putting down all possible addresses of the defendant for the process server to attempt service at before a request for service under Rule 742a can be made. The best address in which to serve a defendant for an eviction is generally at the premises in question. It will also require the process server to get the citation back to the court at least one day prior to trial. If the trial is set for 9am and the process server doesn't get the citation back until 3pm then it doesn't do much good as the trial will have been rescheduled even though the process server will have technically complied with the law. This change will also require that the server file a verified return of citation. Another change is that the server mails the citation on the same day it is attached to or slipped through the door. This solves the problem of how you calculate the earliest trial date under sub-section (d) [i.e. do you

calculate from the date of delivery or the date of mailing?] and it gets the mailed citation to the defendant quicker by 1 day.

RULE 743. DOCKETED

The cause shall be docketed and tried as other cases. If the defendant shall fail to enter an appearance upon the docket in the justice court or file answer before the case is called for trial, the allegations of the complaint may be taken as admitted and judgment by default entered accordingly. The justice shall have authority to issue subpoenas for witnesses to enforce their attendance, and to punish for contempt.

Generally, discovery is not appropriate in forcible entry and detainer actions, however, the justice has the discretion to allow reasonable discovery.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947.)

Notes and Comments

Source: Art. 3981, unchanged.

[Comment for the committee: Some provision must be made for discovery although applying the entire discovery rules for forcible entry and detainer cases is not reasonable. This language is similar to the language in Chapter 28 of the Government Code providing for reasonable discovery in small claims court, therefore the justice courts will be familiar with this terminology.]

RULE 744. DEMANDING JURY

Any party shall have the right of trial by jury, by making a request to the court on or before five days from the date the defendant is served with citation, and by paying ~~a~~ the jury fee ~~of five dollars~~ required by law for requesting a jury trial in justice court. Upon such request, a jury shall be summoned as in other ~~cases in~~ justice court proceedings.

(Amended July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art 3982, unchanged.

[Comment for the committee. See comment at the end regarding Rule 4]

RULE 745. TRIAL POSTPONED

For good cause shown, supported by affidavit of either party, the trial may be postponed for a period not exceeding ~~six~~ seven days. The trial may be postponed for a longer period upon the agreement of all parties provided such agreement is made in writing and filed with the court, or if the agreement is made in open court.

Notes and Comments

Source: Art 3983, unchanged.

[Comment for the committee. Many JP courts hold evictions only one day a week and it is generally on the same day each week, therefore being able to continue a case for only 6 days is often inconvenient for the court. There are some cases where both parties would like a longer continuance in order to further prepare or for settlement discussions.

RULE 746. ONLY ISSUE

~~In a case of forcible entry or of forcible detainer under Sections 24.001-24008, Texas Property Code, the only issue shall be as to the right to actual possession and the merits of the title shall not be adjudicated.~~

Except as provided in rule 738, the only issue in a forcible entry and detainer action under Chapter 24 of the Texas Property Code is the right to actual possession and the merits of the title shall not be adjudicated.

(Amended Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3984, with minor textual change.

Change by amendment effective April 1, 1984: Corrective.

[Comment for the committee. This is a housekeeping change so we will not have to amend the rules if the property code is renumbered. Also by eliminating the word only perhaps we clear up some confusion about what can be tried in an eviction action. Rule 746 now seems to be in conflict with rules 738 and 748. Striking only makes it more consistent.

RULE 747. TRIAL

If no jury is demanded by either party, the justice shall try the case. If a jury is demanded by either party, the jury shall be impaneled and sworn as in other cases; and after hearing the evidence it shall return its verdict in favor of the plaintiff or the defendant as it shall find.

(Amended June 16, 1943, eff. Dec. 31, 1943; June 10, 1980, eff. Jan 1, 1981.)

Notes and Comments

Source: Art. 3985.

Change by amendment effective January 1, 1981: The last sentence of the former rule is deleted because it is the same provision as the second sentence of Rule 743.

RULE 747a. REPRESENTATION BY AGENTS

In forcible entry and detainer cases for non-payment of rent or holding over beyond the rental term, the parties may represent themselves or be represented by their authorized agents, who need not be attorneys. ~~in justice court~~ In any forcible entry and detainer suit in justice court, an authorized agent requesting or obtaining a default judgment need not be an attorney.

(Added April 15, 1982, eff. Aug. 15, 1982.)

Notes and Comments

This is a new rule.

[Comment for the committee. This will conform Rule 747a to Chapter 24.011 Texas Property Code.

REPORT OF THE SUBCOMMITTEE ON TEXAS RULES OF CIVIL PROCEDURE 300-330[1]

The Subcommittee was asked to consider issues relating to the finality of judgments, motions for new trial, and extensions of plenary power and the appellate timetable. This report discusses these issues and the Subcommittee's recommendations for amendments to the appropriate rules in the Recodification Draft.

[1]Chair: Sarah B. Duncan. Members: John Cayce, Ralph Duggins, Wendell Hall, Mike Hatchell, and Steven Tipps. Frank Gilstrap joined the Subcommittee after its work was concluded; thus, his views may not be reflected in the Subcommittee's recommendations.

1. Final Judgments

a. Issue–Many lawyers are not familiar with the finality rules established by case law, even in the context of a conventional trial on the merits. *See, e.g., North East Independent School District v. Aldridge*, 400 S.W.2d 893 (Tex.1966). But the finality problem is particularly acute in the summary judgment context. *See, e.g., Bandera Elec. Co-op., Inc. v. Gilchrist*, 946 S.W.2d 336 (Tex. 1997); *Inglish v. Union State Bank*, 945 S.W.2d 810 (Tex. 1997); *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508 (Tex. 1995); *Martinez v. Humble Sand & Gravel, Inc.*, 875 S.W.2d 311 (Tex. 1994); *Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993). The issue continues to plague the courts of appeals and the supreme court. *See, e.g., Lehmann, et al. v. Har-Con Corp.*, 988 S.W.2d 415 (Tex. App.–Houston [14th Dist.] 1999, pet. granted); *Harris v. Harbour Title Co.*, No. 14-99-00034-CV, 1999 WL 211859 (Tex. App.–Houston [14th Dist.] April 8, 1999, pet. granted) (not designated for publication).

b. Subcommittee Recommendation–In light of the disarray in the case law, the Subcommittee recommends an amendment to Rule 100(b) of the Recodification Draft to prescribe when a judgment is final and appealable. Although the Subcommittee considered defining when a judgment is final, it rejected this approach because the contexts in which the issue arises are too varied and complex. Ultimately, the Subcommittee decided the best approach to the problem was a "final judgment clause" similar to that proposed by Douglas K. Norman, the chief staff attorney at the Thirteenth Court of Appeals.

Rule 100. Judgments, Decrees and Orders

(b) Final Judgment.

(1) Final Judgment Clause. An order or judgment is final for purposes of appeal if and only if it contains the following language:

> This is a final, appealable order or judgment. Unless expressly granted by signed order, any relief sought in this cause by any party or claimant is denied.

If this final judgment clause is to be included, it should be set apart as a separate paragraph at the end of the judgment or order immediately before the date and signature of the trial judge. However, a final judgment clause placed elsewhere in a judgment or order is nonetheless valid.

(2) Separate Orders, Conflicts. A final judgment may incorporate by reference the provisions of an earlier signed interlocutory order. If any provision of an earlier order incorporated by reference conflicts with the final judgment, the final judgment controls.

2. Reasons for Granting a New Trial

a. Issue–Rule 320 permits a trial court to grant a new trial for good cause. TEX. R. CIV. P. 320. For all practical purposes, such an order is unreviewable. *See In re Bayerische Motoren Werke,* 8 S.W.3d 326 (Tex. 2000) (Hecht, J., joined by Owen, J., dissenting from denial of motion for rehearing of petition for mandamus). The Court Rules Committee has proposed requiring the trial court to state good cause for granting a new trial and subjecting the court's order to review by mandamus. *See* July 8, 1999 Letter From O.C. Hamilton to Chief Justice Phillips. The SCAC has also proposed, in Rule 102 of the Recodification Draft, listing situations in which a trial court may grant a new trial.

b. Recommendation–The Subcommittee recommends implementing the Court Rules Committee's recommendation to require a trial court to give reasons for granting a new trial. Whether to review such an order by mandamus would then be possible but within the courts' discretion. However, the Subcommittee also believes the reasons for granting a new trial are too numerous and varied to be codified.

Rule 102. Motions for New Trial

(a) Grounds. For good cause, a new trial, or partial new trial under paragraph (f), may be granted and a judgment may be set aside on motion of a party or on the judge's own motion~~, in the following instances, among others.~~.

[delete (a)(1)-11)]

(g) Order. If a court grants a new trial, in whole or in part, it must state in the order granting the new trial or otherwise on the record the reasons for its finding that good cause exists.

3. TRCP 306a/Procedure

a. Issue–Rule 306a permits a litigant who has not been given notice or acquired actual knowledge of the signing of a judgment to restart the appellate timetable in certain circumstances. *See* TEX. R. CIV. P. 306a; TEX. R. APP. P. 4.2(d). However, as pointed out by Pam Baron in her amicus letter in *Grondona v. State*, "Rule 306a is functioning as one big 'Gotcha!'" The courts of appeals differ on when a Rule 306a motion must be filed; the effect of an unverified, untimely, or incomplete motion; the date the movant must establish; and the date by which the trial court must rule on the motion.

b. Recommendation–The Subcommittee discussed these issues at length and agreed upon the following:

(1) **Time Limit**–The rule should not require that a Rule 306a motion be filed within a set period of time after learning of the judgment or order. There may be instances in which a party will not know it needs to do so. Consider, for example, the plaintiffs in *Stokes v. Aberdeen Ins. Co.*, 917 S.W.2d 267 (Tex. 1996) (per curiam), who received notice of the June 16 judgment, but the notice erroneously stated the judgment had been signed on June 19. *Id.* at 267. The plaintiffs did not learn of the error until the Austin Court of Appeals notified them their motion for new trial was untimely. *Stokes v. Aberdeen Ins. Co.*, 918 S.W.2d 528, 529 (Tex. App.–Austin 1995), *rev'd, Stokes v. Aberdeen Ins. Co.*, 917 S.W.2d 267 (Tex. 1996) (per curiam).

(2) **Verification**–The seriousness of substituting a new judgment date should dictate that a Rule 306a motion be verified. However, the lack of a verification should require a prompt objection.

(3) **Amendments**–The trial court should have discretion to permit amendments at any time before the motion is determined.

(4) **Date**–The movant should be required to establish the dates required by the current rule.

(5) **Deadline for Ruling**–There should be a deadline for ruling on the motion.

(6) **Procedure in the Appellate Court**–The Subcommittee discussed adding a paragraph regarding the procedure to be followed in the appellate court if it appears an initial or additional Rule 306a proceeding is needed. But, upon reflection, there appear to be too many "ifs" to draft the paragraph. However, the Subcommittee does recommend an addition to TRAP 4.5 (modeled after TRAP 24.3) to clarify the trial court's continuing jurisdiction to entertain Rule 306a proceedings.

Rule 104. Timetables

(e) Effective Dates and Beginning of Periods

(3) Notice of Judgment. When ~~the~~ a final judgment or appealable order is signed, the clerk of the court shall immediately give notice of the date upon which the judgement or order was signed ~~signing~~ to each party or the party's attorney by first-class mail. Failure to comply with this rule shall not affect the periods mentioned in paragraph (e)(1), except under paragraph (e)(4).

(4) No change.

(5) Procedure to Gain Additional Time. ~~To establish the application of paragraph (e)(4), the party adversely affected must file a motion in the trial court stating the date on which the party or the party's attorney first either received a notice of the final judgment or appealable order or acquired actual knowledge of the signing of the final judgment or appealable order and that this date was more than twenty days after the final judgment or appealable order was signed. The trial judge shall promptly set the motion for hearing, and after conducting a hearing on the motion, shall find the date the party or the party's attorney first either received a notice of the final judgment or appealable order or acquired actual knowledge of the signing of the final judgment or appealable order and include this finding in a written order.~~

(a) Requisites of Motion. To establish the application of paragraph (e)(4), the party adversely affected must file a verified motion in the trial court setting forth:

(1) The date the judgment or appealable order was signed;

(2) That neither the party nor its attorney received the notice required by paragraph (e)(3) of this rule nor acquired actual knowledge of the judgment or order within twenty days after the date the judgment or appealable order was signed; and

(3) the date upon which either the party or its attorney first

(a) received the notice required by paragraph (e)(3) of this rule; or

(b) acquired actual knowledge that the judgment or appealable order had been signed.

If an unverified motion is filed and the respondent does not object to the lack of a verification at any time before the hearing on the motion commences, the absence of a verification is waived. If an objection is timely made, the court must afford the movant a reasonable opportunity to cure the defect. In all other respects, a motion

5. Motions That Extend Plenary Power

a. Issue–In 1988, the supreme court held "that 'any change, whether or not material or substantial, made in a judgment while the trial court retains plenary power' restarts the appellate timetable." *Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 10 S.W.3d 308 (Tex. 2000) (quoting *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988)). More recently, however, the court held that "only a motion seeking a substantive change will extend the appellate deadlines and the court's plenary power under Rule 329(g)." *Lane Bank*, 10 S.W.3d at 313. Accordingly, a motion for sanctions will qualify as a Rule 329b(g) motion only "if it seeks a substantive change in an existing judgment." *Id.* at 314. Concurring in the judgment, Justice Hecht would have held "that under Rule 329b(g), a post-judgment motion requesting any relief that could be included in the judgment extends the trial court's plenary power over the judgment and the deadline for perfecting appeal." *Id.* at 314, 316 (Hecht, J., concurring).

b. Recommendation–The Subcommittee shares the concern that the *Lane Bank* construction of Rule 329b(g) may create a trap for the unwary. Accordingly, the Subcommittee recommends the rule be amended to clarify the types of motions that will extend the trial court's plenary power and the appellate timetable. The Subcommittee also recommends a parallel amendment to TRAP 26.1(a)(2).

Rule 105. Plenary Power of the Trial Court

> **(b) Duration.** Regardless of whether an appeal has been perfected, the trial court has plenary power to modify or vacate a judgment or grant a new trial:
>
> (1) within thirty days after the judgment is signed, or
>
> (2) if any party has timely filed a (i) motion for new trial, (ii) motion to modify the judgment or any other motion that requests relief that could be included in the judgment, (iii) motion to reinstate a judgment after dismissal for want of prosecution, or (iv) request for findings of fact and conclusions of law, within on[e] hundred and five days after the judgment is signed.

TRAP 26.1(a)(2)

a motion to modify the judgment or any other motion that requests relief that could be included in the judgment;

ORDER OF APPEALABILITY

It appears to the court that all claims by all parties in this cause have been disposed of by prior written order or judgment. Therefore, pursuant to Texas Rule of Civil Procedure ___, it is ORDERED:

1. All relief not expressly granted by prior written order or judgment is denied;

2. The date this order is signed is deemed to be the date the "final judgment or other appealable order" in this cause was signed for purposes of the accrual of pre- and postjudgment interest, the enforcement of orders and judgments, the time for filing postjudgment motions pursuant to Texas Rule of Civil Procedure 329b, the notice required Texas Rule of Civil Procedure 306a(3), and the time for perfecting an appeal pursuant to Texas Rule of Appellate Procedure 26; and

3. The clerk is directed to send to all parties or their attorneys of record the notice required by Texas Rule of Civil Procedure 306a(3) immediately after the date this order was signed. The notice must state that the court signed an Order of Appealability on the date set forth below and, therefore, the time periods for filing postjudgment motions pursuant to Texas Rule of Civil Procedure 329b and the time period for perfecting an appeal pursuant to Texas Rule of Appellate Procedure 26 began to run on the date set forth below.

SIGNED the ___ day of _____, 2000.

_____
Judge Presiding

TRCP ___. APPEALABLE JUDGMENTS, ORDERS, AND DECREES

1. **Applicability**. This rule applies to all judgments, orders, and decrees signed on and after [effective date].

2. **Appealability**. No order or judgment is appealable unless:

(a) It is made appealable by statute;

(b) It is an order or judgment rendered in a case governed by the Texas Probate Code; it may logically be considered a part of a particular phase of the probate proceeding; and it disposes of all issues raised by the pleadings in that particular phase of the proceeding;[1]

(c) It is a judgment or order that resolves a discrete issue in a receivership proceeding;[2] or

(d) It is an order or judgment rendered in a case in which the trial judge has signed an Order of Appealability (a form promulgated by the Supreme Court of Texas).

3. Objection Required. If a party believes an order of appealability was erroneously signed, the error must be preserved in the manner required by Rule 33.1(a), TEX. R. APP. P. If the error is not preserved in this manner, the error is waived.

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[1] *See Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995).

[2] *See Huston v. Federal Dep. Ins. Corp.*, 800 S.W.2d 845, 847 (Tex. 1990).

E-Mail from Judge Peeples, June 14, 2001:

Chip:

Attached are two documents:

(1) Proposed revisions of rules 306 and 306a and

(2) a memo explaining these revisions and my thoughts.

Briefly: Revised rule 306 restates current law and puts it into one rule.

If we want to do more than this, I offer amended rule 306a. Amended rule 306a does two main things: (1) It says that if the Lehmann language is not used in a judgment all timetables are delayed, and (2) it requires clerks to send a more thorough notice of final judgment and delays timetables if the notice is not received.

I have sent all this to the committee members by copy of this email, but I will bring hard copies of everything to the meeting Friday.

David

PROPOSED CHANGES IN RULES 306 AND 306a
(new language in *italics*)

Rule 306. ***Finality*** **of Judgment** ***or Order***

1. Final judgment. *At the conclusion of the litigation, the court shall render a final judgment or order.*

2. Judgment after conventional trial on merits. *A judgment rendered after a conventional trial on the merits is presumed to dispose of all claims between all parties and is presumed to be final and appealable.*

3. Other judgments and orders. *A judgment or order rendered without a conventional trial on the merits is final only if it:*

(a) expressly disposes of all claims between all parties,

(b) is the latest of two or more orders that, considered together, expressly dispose of all claims between all parties, or

(c) states with unmistakable clarity, in language placed immediately above or adjacent to the judge's signature, that it is final as to all claims between all parties and is appealable.

4. Interlocutory judgments and orders. *Any judgment or order that does not comply with paragraph (2) or (3) remains interlocutory and is not final.*

Rule 306a. Periods to Run From Signing of Judgment or Order

1. Beginning of periods. The date *a* judgment or order is signed as shown of record shall determine the beginning of the periods prescribed by these rules for the court's plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order and for filing in the trial court the various documents that these rules authorize a party to file within such periods including, but not limited to, motions for new trial, motions to modify judgment, motions to reinstate a case dismissed for want of prosecution, motions to vacate judgment and requests for findings of fact and conclusions of law; but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose. *The beginning date of all such periods is extended [90] days for all final judgments or final orders that do not state with unmistakable clarity, in language placed immediately above or adjacent to the judge's signature, that the judgment or order is final as to all claims between all parties and is appealable.*

2. Date to be shown. Judges, attorneys and clerks are directed to use their best efforts to cause all judgments, decisions and orders of any kind to be reduced to writing and signed by the trial judge with the date of signing stated therein. If the date of signing is not recited in the judgment or order, it may be shown in the record by a certificate of the judge or otherwise; provided, however, that the absence of a showing of the date in the record shall not invalidate any judgment or order.

3. Notice of judgment. When the final judgment, *final order,* or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by first-class mail advising that the judgment or order was signed. *The notice*

of final judgment or final order must state that the court has disposed of all claims between all parties and that the judgment or order is final and appealable. Failure to comply with the *notice* provisions of this *paragraph* shall not affect the periods mentioned in paragraph (1) , except as provided in paragraph (4).

4. No notice of judgment. If within twenty days after the *beginning date for all periods, as determined under paragraph (1),* a party adversely affected by the judgment or order or his attorney has *not* received the notice required by paragraph (3) nor acquired actual knowledge of the *signed* order, then with respect to that party all the periods mentioned in paragraph (1) shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the *signed order*, whichever occurred first, but in no event shall such periods begin more than ninety days after the *beginning date as determined under paragraph (1)* .

5. Motion, notice and hearing. In order to establish the application of paragraph (4) , the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received *the* notice *required by paragraph (4)* or acquired actual knowledge of the *signed judgment or order* and that this date was more than twenty days after the *beginning date as determined under paragraph (1).*

6. Nunc pro tunc order. When a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316, the periods mentioned in paragraph (1) shall run from the date of signing the corrected judgment with respect to any complaint that would not be applicable to the original document.

7. **When process served by publication.** With respect to a motion for new trial filed more than thirty days after the judgment was signed pursuant to Rule 329 when process has been served by publication, the periods provided by paragraph (1) shall be computed as if the judgment were signed on the date of filing the motion.

MEMORANDUM

TO: All members of the Supreme Court Advisory Committee

FROM: David Peeples

RE: Finality of Judgments

DATE: June 14, 2001

At our meeting on March 30, I was asked to write up my suggestions for improving the existing finality rules without a comprehensive rewrite. Here they are.

1. **General observations.** First some general thoughts.

   A. Finality is not a problem in the trial courts. Now that *Lehmann* has clarified and improved the law, it is okay with me to leave things alone.

   B. Even if we decide to leave present law as it is, the supreme court has asked us to draft a rule of some kind. My new rule 306 (attached) is offered in that spirit. I think we should do something like this because it would put the case law in one concise rule with one minor improvement (requiring the language to be near the judge's signature).

   C. There are of course occasional appellate problems, but most of our efforts to solve those problems with new rules (e.g., mandatory language or mandatory death certificate) threaten to create fresh problems in the trial courts (i.e. many judgments remaining interlocutory and pending indefinitely). Put to the choice, I would prefer the status quo to the mandatory-language solutions we have been discussing so far.

   D. In the event we decide to go beyond merely restating present law in a concise rule, my revised rule 306a (attached) tries to reduce the inadvertent loss of appeal rights by negligent attorneys—by requiring a more thorough notice of judgment and giving additional time for correction of mistakes.

2. **Existing law.** I submit that the following principles can be distilled from the cases:

   A. Complete relief. When the court has granted or denied all relief sought as to all parties (whether in one instrument or in two or more instruments taken together), there is a final judgment, and all trial-court and appellate timetables begin to run from the date the last order was signed.

B. Severance. By carving one case into two, a severance can make an existing interlocutory order become final. The severance does this by factoring out the unadjudicated claims and/or parties from the others. After the severance, if one case contains only adjudicated claims, the severance has created a final judgment in that case.

C. Language. Under the supreme court's recent decision in *Lehmann*, traditional Mother Hubbard catch-all language is no longer effective to adjudicate claims and thereby create finality. Under *Lehmann*, general language can have Mother Hubbard effect only if it shows with unmistakable clarity that all claims by and against all parties have been adjudicated.

3. Problems with existing law. The committee's discussions have identified three principal problems under the present rules. There may be others, but these are the main ones. (*Lehmann* has ameliorated Problem *A* below, but not entirely.)

A. Inadvertent loss of appeal rights by catch-all clause. This problem seems to occur primarily in summary judgments, but it can happen in other situations too. After a hearing on a motion for partial summary judgment, the court *should* sign an order dealing specifically with the issues presented and nothing else. But until *Lehmann* a Mother Hubbard clause in the order has had the effect of denying all other claims, including claims as to parties that the motion did not even mention. *See Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993). As a result, the trial-court and appellate timetables would start to run, and they sometimes expired before unwary litigants and lawyers realized that the catch-all clause had denied their claims. *Lehmann*'s requirement of neon language will help put everyone on notice that a final judgment has been signed, but I am sure there will still be negligent and inattentive lawyers who do not notice or do not understand.

B. Inadvertent loss of appeal rights by cumulative orders. When the rulings in successive orders add up to a complete adjudication of all claims between all parties, the result is a final judgment, even if the last order does not mention the earlier ones or contain language of finality. Some lawyers do not realize that the timetables begin to run when the last order is signed, and they have a rude awakening when they learn later that the time for perfecting appeal has passed. *Lehmann* does not address this problem.

C. Finality hard to determine. After a series of interlocutory rulings in complicated cases, judges sometimes have difficulty determining whether there has been a complete adjudication. District and County Clerks, who must send notice of final judgment under Rule 306a(3), have the same difficulty.

4. The attached rules vs. other proposals.

A. Other proposals. It has been suggested that we *require* neon language in the judgment, or perhaps require a death certificate signed by the judge. My main objection to these suggestions is that they focus only on the appellate issues (inadvertent loss of appeal rights) at the expense of trial-court finality concerns. Both the appellate and trial-court issues are important. But if the language (or the death certificate) is *mandated*, judgments without the language (or the death certificate) will remain interlocutory until someone learns about it and gets the language included (or the death certificate signed). I consider it unacceptable to have so many cases remain interlocutory and pending indefinitely.

B. The attached proposals. If we decide to do more than restate existing law in proposed rule 306, I propose the modified rule 306a. Amended rule 306a would do these things:

(1) Clarify present law of finality. Judgments become final in the following three ways (or some combination of them):

- By presumption after a conventional trial on the merits,
- By expressly disposing of all parties and issues (including series of orders), or
- By including *Lehmann*-type neon language.

(2) Put final/appealable language in prominent place. Lawyers who want the judgment to become final quickly would be motivated to include the *Lehmann* language because if such language is not used the timetables would be delayed automatically for 90 days. In other words, when the language is not used all timetables are extended, even if the judgment expressly disposes of all issues between all parties. Judges would usually insist on the language when they intended finality and would certainly strike it out when they did not.

(3) Require more meaningful notice from the clerk. The clerk's notice would have to say the court has signed a judgment that disposes of all issues between all parties and is final and appealable.

(4) Extend timetables. If anyone can prove that this notice was not received, the timetables will be extended for potentially 90 more days. Thus, if the judgment lacks the required language *and* the beefed-up notice is not given, the timetables would be extended for two consecutive 90-day periods, for a total of 180 days.

PROPOSED CHANGES TO RULE 306
October 31, 2001 draft

Rule 306. Finality of Judgment or Order

1. Final judgment to be rendered. At the conclusion of the litigation, the court shall render a final judgment or order. The judgment shall contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered.

2. Finality. Divorce decrees, agreed judgments, and judgments rendered after a conventional trial on the merits are presumed to dispose of all claims between all parties and are presumed to be final. Any other judgment and order is final if it:

(a) specifically identifies and disposes of all claims between all parties,

(b) is the latest of two or more orders that, considered together, specifically identify and dispose of all claims between all parties, or

(c) states with unmistakable clarity, in language placed adjacent to the judge's signature, that it is final as to all claims between all parties and is appealable.

3. Interlocutory judgments and orders. Any judgment or order that is not final under paragraph (2) remains interlocutory.

From: Nathan Hecht
To: Charles Babcock, Bill Dorsaneo
Date: 4/26/01 10:34AM
Subject: FW: TRAP rule 41.2(a)'s definition of "en banc court"

Bill: The Committee may have discussed this before, I've forgotten. But if we didn't, we need to. I'm not sure I'm for Tim's change, but I'm willing to listen. Nathan

-----Original Message-----
From: Justice Tim Taft [mailto:Tim.Taft@courts.state.tx.us]
Sent: Wednesday, April 25, 2001 3:17 PM
To: Nathan.Hecht@courts.state.tx.us
Subject: TRAP rule 41.2(a)'s definition of "en banc court"

Justice Hecht,

The latest change in the rule (41.2(a)) defining "en banc court" includes a visiting judge sitting on the original panel. The result of this rule is that a minority of the elected Justices plus a visiting judge from the original panel can defeat a request for en banc review that a majority of the elected Justices want to grant. That is what happened in Willover v. State, 38 S.W.3d 672 (Tex. App.--Houston [1st Dist.] 2000). See my dissenting opinion at pages 687-89. Please consider returning to the former definition of "en banc court" as being the members of the court, i.e., the elected Justices. As stated in my opinion, this would eliminate a conflict with an existing statute, and also advance a sound policy of accountability. Thanks for your consideration.

Respectfully,
Tim Taft

From: Carrie Gagnon
To: cbabcock
Date: Fri, Apr 27, 2001 2:59 PM
Subject: TRAP 41.2(a)

Chip:

Re: TRAP Rule 41.2(a)'s definition of "en banc court". I searched the transcripts on Summation (which included not only the ones since you've been the Chair, but ones from the 80's and 90's that Holly gave me . . . but I couldn't swear they were complete) and I could not find any discussion or reference to "en banc court" or rule 41.2/41.2(a). "en banc court" came up briefly when we discussed TRAP 47.6 on November 17, 2000, morning session, but the discussion was not along the lines of the e-mails from Justices Tim Taft and Hecht. Thus, I don't believe that the definition of en banc court has been discussed in Committee.

MEMORANDUM

Date: September 27, 2001

To: Bill Dorsaneo

From: Frank Gilstrap

Re: Composition of en banc court

Justice Jim Taft, of the First Court of Appeals, has asked the committee to examine Rule 41.2(a) & (b), TEX.R.APP.P., which involves the composition of the en banc court. This matter was referred to the appellate rules subcommittee, and you requested this memo from me.

The en banc rule

Prior to 1997, the en banc rule read as follows:

> Where a case is submitted to an en banc court, whether on motion for rehearing or otherwise, a majority of the membership of the court shall constitute a quorum and the concurrence of a majority of the court sitting en banc shall be necessary to a decision

Former Rule 79(d), TEX.R.APP.P. (superseded effective September 1, 1997)(emphasis added). In 1997 the rule was amended to read as follows:

> An en banc court consists of all members of the court who are not disqualified or recused and—if the case was originally argued before or

decided by a panel—any members of the panel who are not members of the court but remain eligible for assignment to the court.

Rule 41.2(a), TEX.R.APP.P. (emphasis added). Under this provision, a visiting justice who serves on a panel will also serve on the en banc court which reviews the panel decision. Justice Taft has criticized this provision in two recent opinions. His concerns are of two kinds. First, as a matter of policy, he argues that a visiting justice should not be able to join with a minority of the elected justices to prevail over a majority of the elected justices. Second, he questions the validity of the rule on statutory and constitutional grounds.

The policy issue: the majority of elected justices can be outvoted.

In *Polasek v. State*, 16 S.W.3d 82 (Tex.App.—Houston [1st Dist.] 2000, pet ref'd)(en banc), the defendant was convicted of criminal trespass. 16 S.W.3d at 83. On appeal he argued that he had been denied a reporter's record. *Id.* A panel of the First Court, including a visiting justice, affirmed the conviction. *Id.* The defendant requested rehearing en banc. *Id.* Under Rule 41.2(a), quoted above, the visiting justice became a member of the en banc court. *Polasek*, 16 S.W.3d at 83. As a result, the en banc court consisted of ten justices (the nine elected members of the First Court and the one visiting justice). *Id.* The en banc court divided five-to-five on the request for rehearing. *Id.* at 87. A second visiting justice was then appointed, pursuant to the tie-breaker provision of Rule 41.2(b). This raised the total number of justices to eleven (nine elected and two visiting). *Polasek*, 16 S.W.3d at 86-87. A majority of the eleven member court voted to

rehear the case en banc. *Id.* The en banc court affirmed the trial court decision by a vote of seven-to-four. *Id.* at 89 One visiting justice voted with the majority, and one voted with the minority. *Id.* at 86, 89.

In his majority opinion, Justice Taft criticized the policy behind Rule 41.2(a), which makes the visiting justice a part of the en banc court. This procedure

> created the possibility that the two visiting justices could have voted with a minority of four elected justices on this Court to defeat the will of the majority of the elected judges. Such a frustration of the will of the majority of elected justices did not happen in this case, but we point out this potential result of the change of the definition of en banc court for the consideration of the rule making committee.

Polasek, 16 S.W.3d at 87.

In *Ex parte Wilson*, 25 S.W.3d 932 (Tex.App.—Houston [1st Dist.] 2000, pet. ref'd)(per curiam), the First Court modified its en banc practice to eliminate the need for a tie-breaker. In that case, the panel again included a visiting justice. *Id.* at 932. En banc rehearing was requested, and again the visiting justice became a member of the en banc court. *Id.* Once more, "[t]he vote of the en banc court on the motion [for rehearing] resulted in a five to five tie." *Id.* But this time the court decided that no tie-breaker was needed. *Id.* at 932-933. It based its decision on the following rule:

> While the court of appeals has plenary jurisdiction, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision.

Rule 49.7, TEX.R.APP.P. (emphasis added).[1] Because six justices would be required to constitute "a majority" of an eleven member court, the motion failed because it did not receive the required six votes. *Wilson*, 25 S.W.2d at 933. Therefore, no tie-breaker was needed. *Id.* at 932.

In *Willover v. State*, 38 S.W.3d 672 (Tex.App.—Houston [1st Dist.] 2000, pet.granted), the defendant was convicted of sexually assaulting a child and sentenced to life in prison. 38 S.W.3d at 673. A panel of the First Court, including one visiting justice, reversed because the trial court had improperly excluded a videotaped interview with the complainant. *Id.* at 673-678 (panel opinion). The State moved for rehearing en banc. *Id.* at 679. Again, the visiting justice became a member of the en banc court, and again the vote on the motion for rehearing was five-to-five. *Id.* at 687 (Taft, J. dissenting from denial of en banc rehearing). Five elected justices voted for rehearing, and four elected justices and the one visiting justice voted against. *Id.* Under *Ex parte Wilson*, the motion failed because a majority of the ten member court (six members) did not vote for rehearing. *Willover*, 38 S.W.3d at 688. Thus, the motion was denied, even though the elected justices favored en banc rehearing by a five-to-four margin. *Id.*

[1] *Cf.* former Rule 79(d)(". . . a majority of the membership of the court . . .").

Justice Taft's dissented in *Willover* repeated the concerns that he raised in *Polasek*. Before the 1997 rule change, a visiting justice who sat on a panel could not sit with the en banc court. But under the amended rule, the visiting justice was a part of the en banc court. As a result,

> [A] minority of the elected Justices, plus one visiting judge who was a member of the original panel deciding this case, are able to frustrate the will of the majority of the will of the elected Justices. This is a because a five-to-five tie does not obtain the necessary majority of the en banc court to require en banc review.

Willover, 38 S.W.3d. at 687 (Taft, J., dissenting from denial of en banc rehearing).

The validity of the en banc rule.

In his *Willover* dissent, Justice Taft also made three arguments as to why Rule 41.2(a) is invalid. *See Willover,* 38 S.W.3d at 687-688.

In his principal argument, Justice Taft says that the rule conflicts with Section 22.223(b) of the Government Code. In making this argument, he refers to his majority opinion in *Polasek*. There he noted that, prior to 1997, "the practice of [the First] Court had been to include only elected judges of [that] Court in en banc decisions." *Polasek*, 16 S.W.3d at 87 (emphasis added, footnote deleted). This practice was based on both a rule and a statute. The rule reads as follows:

> Where a case is submitted to an en banc court, whether on motion for rehearing or otherwise, a majority of the membership of the court shall constitute a quorum and the concurrence of a majority of the court sitting en banc shall be necessary to make a decision

Former Rule 79(d), TEX.R.APP.P. (superseded effective September 1, 1997)(emphasis added). And the statute says that

> When convened en banc, a majority of the membership of the court constitutes a quorum and the concurrence of the majority of the court sitting en banc is necessary for a decision.

TEX.GOV'T CODE § 22.223(b)(emphasis added). *See Polasek*, 16 S.W.3d at 87. In 1997, the Court of Criminal Appeals repealed former Rule 79 and replaced it with the current Rule 41.2(a). This new rule expressly allows a visiting justice to serve on the en banc court, as we have seen. But the Legislature did not repeal section 22.223(b) of the Government Code. The new rule and the old statute thus appear to conflict.

"[W]hen a rule of procedure conflicts with a statute, the statute prevails unless the rule has been passed subsequent to the statute and repeals the statute as provided by Texas Government Code section 22.004" (for the Supreme Court) or section 22.108 (for the Court of Criminal Appeals.). *Johnstone v. State*, 22 S.W.3d 408, 409 (Tex.2000)(per curiam). The latter provision reads as follows:

> The court of criminal appeals is granted rulemaking power to promulgate rules of posttrial, appellate, and review procedure in criminal cases, except that its rules may not abridge, enlarge or modify the substantive rights of a litigant.

TEX.GOV'T CODE, § 22.108(a)(emphasis added).[2] The validity of current Rule 41.2(a), depends, therefore, on whether the above provision gave the Court of Criminal Appeals the power to repeal section 22.223(b) of the Government Code, which is quoted on page 6 above. *Willover*, 38 S.W.3d at 687-688.

In Justice Taft's view, the Court of Criminal Appeals did not have that power. He concludes that a repeal of section 22.223(b) of the Government Code would "abridge, enlarge or modify the substantive rights of a litigant." *Willover*, 38 S.W.3d at 687 (quoting TEX.GOV'T CODE § 22.108(a)). This is because, as he stated in his *Willover* dissent, "the change [of the en banc] rule will determine which litigant wins." 38 S.W.3d at 687.

In making this argument, Justice Taft refers to his majority opinion in *Polasek*. In that case the criminal defendant had claimed that he was deprived "of a meaningful record on appeal." *Polasek*, 16 S.W.3d at 88. The court had rejected his contention and affirmed his conviction. *Id.* at 87. In the process, the court invalidated the 1997 amendment to Rule 13.1(a), TEX.R.CIV.P., which requires court reporters to

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[2] *See generally State v. Hardy*, 963 S.W.2d 516, 519-523 (Tex.Crim.App. 1997). *Cf.* TEX.GOV'T CODE, § 22.004(a) ("The supreme court has the full rulemaking power and the

make a full record of the proceedings "unless excused by agreement of the parties." *Polasek*, 16 S.W.3d at 88. In so doing, the court ruled that "the new rule is at odds with an existing statute," *Polasek*, 16 S.W.3d at 88, and that it amounted to "an enlargement of a defendant's substantive rights." *Id.* at 89. Accordingly, the court held "that Rule 13.1(a) is void." *Id.* Indeed, it was on this particular point that the en banc court divided.[3]

In his next argument, Justice Taft's says that "the Texas Constitution provides that the justices on the courts of appeals shall be elected by the qualified voters of their respective districts." *Willover*, 38 S.W.2d at 688 (citing TEX.CONST., art. V § 6). But in *Polasek*, the First Court expressly ruled that a visiting justice could sit on a on panel. *Polasek*, 16 S.W.3d at 85-86.[4] If the Texas Constitution allows a visiting justice to serve on a panel, then why doesn't it also allow a visiting justice to sit on an en banc court?

In his third argument, Justice Taft notes that the procedure under the current rule is different from the procedure under Rule 35(a), FED.R.APP.P., which

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practice and procedure in civil actions, except that its rules may not abridge, enlarge or modify the substantive rights of a litigant.").

[3] *Cf. Polasek*, 16 S.W.3d at 89-90 (Robertson, J., concurring); *Id.* at 90-91 (Price, J., dissenting). *Note also Tanguma v. State*, No. 13-99-490-CR, 2001 WL 378388 at **1-2 (Tex.App.—Corpus Christi May 17, 2001, pet.filed)(expressly disagreeing with *Polasek*).

[4] *Cf. Polasek*, 16 S.W.3d at 91 (O'Conner, J., dissenting)("I also agree with the appellant that the appointment of visiting judges violates the Texas Constitution article 5, section 6, which requires the election of judges.").

"provides that the en banc court is composed of the circuit judges who are on regular, active service." *Willover*, 38 S.W.3d at 688. He further notes that "in *O'Conner v. First Court of Appeals*, 837 S.W.2d 94 (Tex.1992), the supreme court supported its decision by pointing out that it was consistent with the federal rule guiding the circuit court of appeals upon which this state's panel system was modeled." *Willover*, 38 S.W.2d at 688.[5]

Recommendation

The Court of Criminal Appeals has granted the petition for discretionary review in *Willover*. Accordingly, the committee should await that court's opinion before considering further action in this area.

[5] (citing *O'Conner*, 837 S.W.2d at 96).

REPORT

REGARDING ADOPTION OF UNIFORM STANDARDS
FOR GRANTING AUTHORITY TO PRIVATE INDIVIDUALS TO
SERVE PROCESS IN CIVIL PROCEEDINGS

November 2, 2001

by

Richard R. Orsinger

This report summarizes a discussion held on October 18, 2001, between Richard Orsinger, Chris Griesel, Rick Keeney, and Colin Coe, on the subject of establishing uniform standards for licensing or authorizing private individuals to serve civil process. Rick Keeney owns a large private process serving organization, and he also appeared as a representative of the North Texas Process Servers Association, which Rick says has 384 members.

At the present time, there is no state-wide licensing system for private process servers. Tex. R. Civ. P. 103, which provides that "citation or other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age." Parties and other persons "interested" in the outcome of the lawsuit cannot serve process in that case. Under Rule 103, the clerk of the court can serve citation by registered or certified mail. The concluding sentence to TRCP 103 provides:

> The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order.

The present practice is for the judge of each court to control by court order who can serve process in a case pending in that court. Many counties with a number of courts sharing a county or district clerk have adopted an uniform order for all courts in that county, setting out requirements that must be met in order to serve process out of those courts. Dallas, Harris and Bexar Counties have done that. Some smaller counties will issue a blanket order for a process serving organization that covers all employees. Some of the larger counties issue orders on a person-by-person basis.

Process servers that work in the county where they live may be able to conveniently comply with the local standards for serving process issued out of the local courts. However, that arrangement will not work where process is issued, say out of a Dallas Court, for service in Travis County. The process will actually be served on the defendant in Travis County by a process server who lives in Travis County, but since the process is issued out of a Dallas court, that person in Travis County will have to meet the Dallas County requirements for process

servers.

A coherent state-wide system of private process serving is very difficult to set up because of the varying requirements from locale to locale. Dallas County requires that you obtain a DPS criminal history check and submit the original to the Dallas County District Clerk, plus you must take a course. Galveston County wants to run its own local criminal history check, and charges $10.00 for it. Harris County requires the person serving process out of those courts to attend a seminar put on by the Houston Young Lawyers' Association. You must pay $115.00 fee to Harris County for the course, but the courses are scheduled irregularly and many months apart. In McAllen, the process service has to "open up a case" in the court system, by paying a filing fee of $175.00, just like a lawsuit was being initiated. For Nueces County, you can serve their process just by filling out an application, but you must pay $2.00 to file the return of service. Bexar County requires process servers of its process to carry $300,000 worth of insurance, while Tarrant County requires the process server to carry $100,000 worth of insurance. To complicate matters worse for a business owner, each process server's authorization order issued out of a county expires on a unique date, and sometimes it is difficult to find out when an order expires.

Also, Rule 103 provides that no motion is necessary in order to obtain an order to serve process. The official Comment to Rule 103 says that this proviso was "added to avoid the necessity of motions and fees." But Harris County judges still require the motion.

According to the private process servers, various associations of private process servers have attempted to establish a uniform system and licensing for a number of years. All the attempts have been met with a varying level of failure, including one bill that passed both houses and was vetoed. Constable organizations have been opposed to the creation of the state-wide standard.

Some organizations have established a unified standard for the use of process servers. The State Attorney General uses private process servers for its cases. Rick Keeney says that his company did $1.2 million of statewide business with the AG last year. According to Keeney, the AG's office got a bill passed to permit private process serving on their cases without a court order, and no classes and no liability insurance is required.

The process server group would like to have a licensing requirement, with uniform standards, so that once you comply then you are licensed to serve process anywhere in Texas. They suggest the following requirements: over age 18, criminal background check and exclude felons and perhaps persons convicted of a crime of moral turpitude, be a citizen of the USA, and have 7 hours of training. If the conviction is for a misdemeanor, or is more than 7 years old, then the judge of the court can waive those disabilities.

Rick Keeney talked with the Texas Department of Licensing about how they would handle this if the problem were given to them. Rick says they told him that they would be considered analogous to air conditioning installers, who go onto private property, etc., and they

PROCESS SERVERS' PROPOSED
AMENDMENT TO TRCP 103
November 2, 2001

RULE 103. WHO MAY SERVE

Citation and other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order , (3) by any person who is not less than eighteen years of age, is a U.S. Citizen, has not been convicted in any jurisdiction of a felony or misdemeanor involving moral turpitude, provides a Texas Department of Public Safety verified finger print criminal history record check, proof of attendance at a seven-hour education course on civil process approved by the Presiding District Judge or his/her designee, proof of Errors & Omissions & General Liability Insurance coverage for such person a face amount not less than $300,000 to the Presiding District Judge or his/her designee. Upon compliance with the foregoing requirements, the person shall be issued no later than 30 days after application, a photo identification card with a unique county registration number on it and shall therefore be authorized under this order to serve citation and other notices as herein provided . The authorized person shall list that unique number on each return of service made by such authorized person that is filed with the clerk of the appropriate court. The identification card shall remain the property of the Presiding District Judge or his/her designee and must be surrendered upon written demand by the Presiding District Judge or his/her designee. The person appointed under this rule shall be considered an officer of the court when in performance of his/her duties. The person will have the authority to serve process issued out of any court in the State of Texas in the same manner as constables and sheriffs, and may serve process anywhere the defendant may be found. A person authorized under this rule shall not serve any writs that require the person to take control of, possession of, or the seizure of any person, property, or thing. The order authorizing a person to serve process may be made without written motion and a fee may be imposed for issuance of such order. No person who is a party to or interested in the outcome of a suit shall serve any process. Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which the case is pending.

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The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

March 28, 2001

Mr. Charles L. Babcock
Jackson Walker
901 Main St. #6000
Dallas TX 75202

Dear Chip:

Please direct this issue to the appropriate subcommittee for study and recommendations:

- Mike Hatchell points out (letter attached) that the U.S. Postal Service has introduced a new service called "Delivery Confirmation" that may be superior to the "Certificate of Mailing" for purposes of Rule 9.2 of the Rules of Appellate Procedure. Should the rule be amended to allow this new service and others that may be offered?

As always, the Court greatly appreciates your work on the rules of procedure.

Cordially,

Nathan L. Hecht
Justice

Hatchell PC
Attorneys

Mike Hatchell
Board Certified, Civil Appellate Law
Texas Board of Legal Specialization

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903.526.6500 FAX 903.526.6600

March 6, 2001

Hon. Nathan L. Hecht
Justice
Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Re: Possible amendment to Rule 9.2(b)(2)(C)

Dear Justice Hecht:

The United States Postal Service has introduced a new service called "Delivery Confirmation". The documentation for this service is attached for your reference. The postal authorities will also be introducing very soon a similar service that actually requires a signature by the receiving party.

This service has some advantages over the "Certificate of Mailing" mentioned in Rule 9.2(b)(2)(C). In fact, the certificate of mailing has some potential for abuse, because there is no real way to determine precisely what was sent under the certificate.

I would suggest that we place on the agenda for the Supreme Court Advisory Committee a proposal to amend Rule 9.2 to permit use of these new services. Presently, I would be very reluctant to use either one of them, despite their advantages, because they are not specifically mentioned in the Rule.

Many thanks for your consideration.

Sincerely yours,

Mike Hatchell

MH:bw

Attachment

LAW OFFICE OF AL STAEHELY
511 Stewart Street
Houston, Texas 77006
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Pam Baron

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June 11, 2001

Chris Griesel
Rules Attorney
Supreme Court of Texas

Mr Griesel:

I am writing to request the Court consider amending Rule 6, Texas Rules of Civil Procedure to explicitly provide that writs of execution may be served on Sunday. The rule currently provides:

> Rule 6. Suits Commenced on Sunday
>
> No civil suit shall be commenced nor process issued or served on Sunday, except in cases of injunction, attachment, garnishment, sequestration, or distress proceedings; provided that citation by publication published on Sunday shall be valid.

This Court clarified years ago that the predecessor statutes to this rule did not apply to writs of execution. *See Houston Oil Co. of Tex. v. Randolph*, 251 S.W. 794, 800 (Tex. Comm'n App. 1923, holding approved) ("[T]he issuance of the writ [of execution] on Sunday would not make it void."); *Crabtree v. Whiteselle*, 65 Tex. 111, 113-14 (1885) (explaining that rule did not apply to executions because its application is limited to "such process as pertains to the commencement of suits").

However, because the rule enumerates specific exceptions that do not include executions, most sheriffs' departments and constables' offices refuse to serve writs of execution on Sunday without a court order explicitly permitting service on Sunday. This process results in unnecessary expense and wastes the courts' time.

We would appreciate your considering this change. Please contact me if I can provide any additional information.

Thank you,

Daniel Sanders
713-528-6946

Attachments

From: Nathan Hecht
To: Charles Babcock, Bill Dorsaneo
Date: 5/26/01 3:33PM
Subject: <No Subject>

Logged

In Fulton v. Finch, 346 S.W.2d 823 (Tex. 1961), we held that a trial court lacked power to un-grant a motion for new trial more than 45 days after the motion was filed, based on TRCP 329b, s. 3, which then read: "All motions and amended motions for new trial must be determined within not exceeding forty-five (45) days after the original or amended motion is filed . . . ." The rule was completely rewritten in 1981 and no longer contains such language. However, in Porter v. Vick, 888 S.W.2d 789 (Tex. 1994) (per curiam), we cited Fulton as authority for the proposition that "any order vacating an order granting a new trial . . . signed outside the court's period of plenary power over the original judgment is void", without reference to the rule. Now the rules argument is that a trial court cannot ungrant a motion for new trial after its plenary jurisdiction would have expired, not because the rule prohibits it, but because the rule does not permit it – is silent on the subject. See, e.g., Ferguson v. Globe-Texas Co., 35 S.W.3d 688 (Tex. App.–Amarillo 2000, pet. denied). The court in Ferguson observed that a federal trial court may ungrant a motion for new trial at any time, subject to review for abuse of discretion. The Court requests that the Advisory Committee consider whether the holding of Porter should be changed by rule. As always, the Court greatly appreciates your service and that of the other members of the Committee.

Nathan L. Hecht

TO: **SCAC R. 300-330 Sub-committee**

FROM: Skip

RE: Justice Hecht's 5-26-01 e-mail to Chip Babcock concerning whether the holding of *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994), should be changed by rule in light of its application in *Ferguson v. Globe Texas, Co.*, 35 S.W.3d 688 (Tex.App. – Amarillo, 2000 pet. denied.).

PROBLEM

Some courts have limited a trial court's power to reinstate a judgment previously set aside by granting a motion for new trial, to 75 days after the judgment was originally signed. As a result, a court must re-try a case if it waits too long to re-enter judgment.

POSSIBLE SOLUTION

Amend Rule 329 b (h) to read:

"If a motion for new trial is granted, the judgment that has been set aside may be re-entered, modified, corrected or reformed, or a new judgment may be signed at any time prior to [the commencement of/close of evidence] in the new trial. The time for appeal shall run from the time the order granting judgment is re-entered, modified, corrected or reformed, or the new judgment is signed."

BACKGROUND

Ferguson v. Globe Texas, Co., 35 S.W.3d 688, 691-92 (Tex.App. – Amarillo, 2000, pet. denied) held that a "trial court may only vacate an order granting a new trial during the period when it continues to have plenary power" and that "the trial court's plenary power only continues for 75 days after the date judgment is signed."

In *Ferguson* the Amarillo court held that the trial court lacked plenary power to grant a motion to reinstate a judgment originally signed 100 days earlier, which had been set aside by a motion for new trial signed on day 71. It held that the plain meaning of Rule 329(e) limits trial courts' plenary power to the "grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after such timely filed motions are overruled." Thus, it reasoned, because no motion for new trial was overruled, the court's plenary power to reinstate judgment ended when the motion for new trial would have been overruled by operation of law. *Id.* at 690.

The court stated that Rule 329(e) was clear and unambiguous in specifying the types of powers it vested in trial courts and those powers did not expressly include the power to ungrant a new trial. It held the rule should not be construed to mean something other than its plain words "unless application of the literal language would produce an absurd result." *Id.* at 691.

The court did not consider whether it was an absurd result to require a district court to retry a case that could have been, and should have been, disposed of by entry of judgment mistakenly set aside by an order granting a new trial. The court did not consider whether the apparent basis for Rule 329(e)'s time limits (the need for a judgment to become final within a finite time after signing) did not apply when the judgment, and the finite plenary period its signing invoked, had been set aside by the granting of a new trial. The problem appears to be supreme court precedent.

The court of appeals relied on the supreme court's opinion in *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994), for its holding that a trial court may only vacate an order granting a new trial during the period when it continues to have plenary power. *Porter v. Vick* was a per curiam mandamus issued by the supreme court to set aside an order vacating an order of new trial. The trial had been non-jury. A new trial had been mistakenly granted by default by a visiting judge when opposing counsel's message to the trial judge that he had been delayed in another court was not relayed to the visiting judge at the new trial hearing. The default order granting new trial was set aside by the original judge who had presided over the trial and entered the judgment. Because the order vacating the new trial order was signed "long past the time for plenary power over the judgment, as measured from the date the judgment was signed," the supreme court held it was void. *Id.*, citing *Fulton v. Finch*, 346 S.W.2d 823, 826 (Tex. 1961).

However, as noted by Justice Hecht's e-mail, the holding in *Fulton v. Finch* was based on a prior version of Rule 329(b) that required that all motions for new trial "must be determined within not exceeding forty-five (45) days after the. . . .motion is filed. . . ." The language was dropped when the rule was rewritten in 1981. In *Porter v. Vick*, the per curiam court apparently relied on the holding of *Fulton v. Finch* without considering the reason for that holding.

The problem was fully briefed for the supreme court on Petition for Review in *Ferguson v. Globe Texas Co.* The Petition was denied after the court requested briefing. It may prefer to address the problem created by *Porter v. Vick* by clarifying the rule.

REPORT OF THE PARENTAL NOTIFICATION RULES SUBCOMMITTEE

A meeting of the Parental Notification Rules Subcommittee was held September 7, 2001 at the 6th floor conference room, Office of Court Administration, in Austin. The Subcommittee was composed of all prior members of the Subcommittee and one new member, Susan Hays.

Attending the meeting were: Justice McClure (Chair), Judge Specia, Justice Hecht, District Clerk Woelbruck, Appeal Court Clerk O'Neal, Dr. Anderson, Ms. Collette, Ms. Hays, and Ms. Woodward. Also attending Mr. Coe (Senate Judiciary) and Mr. Griesel (SCRAC).

At 9:30 a.m., Justice McClure opened the meeting, outlining issues to be discussed at the meeting. Five major issues raised by the referral of the issue from the SCRAC to be discussed at the meeting were:

-problems arising from conflicts;
-examination of the need to tighten confidentiality rules;
-examination of the issue of an intermediate appellate court's ability to remand a parental notification case;
-examining the current rules relating to the disclosure of the verification page; and
-examination of issues related to the filing of amicus briefs and the timing of case specific amicus briefs.

The Subcommittee took the following action:

A. With regard to conflict between appellate timetable and the practicality of requesting the court's clerk and the court reporter to prepare a record, the Subcommittee agreed to recommend to the full committee the adoption of standardized forms for requesting that the court's clerk and the court reporter prepare, instanter, the record of the trial proceeding. The Subcommittee also agreed that the record when completed should be delivered to the party appealing. This would allow the party appealing to have a complete record before filing a notice of appeal which starts the appeallate court's time to decide a case. Additionally, Rule 2.4(d) currently provides that "if the minor appeals . . . the hearing must be transcribed instanter." The rule should be amended to specify that the record shall be transcribed instanter upon the reporter's receipt of the written request for preparation and delivered to the minor's attorney. Similarly, Rule

3.2(b) should be changed to provide that upon receipt of the written request, the clerk shall prepare instanter the clerk's record and deliver to the minor's attorney. These changes should allow the appealing attorney to have the complete record for briefing and then file together the notice of appeal, the record, and the brief.

B. With regard to the examination of the confidentiality rules, the subcommittee made no recommendations for any changes.

C. With regard to the remand issue, the subcommittee, by a vote of 4-3, decided to ask the SCRAC to either have the subcommittee or the SCRAC as a whole to revisit the remand issue. The March 2001 amendments to Rule 3.3(b) deleted the sentence: "If the court of appeals reverses the trial court order, it must also state in its judgment that the application is granted". Several parties have argued that the deletion of this sentence would allow the courts of appeals to take an action other than granting the application when reversing the trial court's denial.

D. With regard to the disclosure of the verification page, the subcommittee made no recommendations for change.

E. With regard to amicus briefing, two changes were suggested. First with regard Rule 1.10(b), the subcommittee agreed that the duty of the clerk of the court to provide public or general briefs to parties in a case, should be a duty that should be done "instanter".

The subcommittee also agreed that with regard to confidential, case-specific briefs (Rule 1.10(a)), that the timing of the filing of a "non-party" brief and the filing of the brief of a party should be coordinated, so that all parties would have uniform time to file and respond. Ms. Collette and Ms. Hays are working on agreed language to the proposed changes.

F. An issue not originally a subject for discussion was also raised. The question of the destruction of the records in the proceeding was discussed. The subcommittee recommended that the rules be amended to allow for the destruction of records in these cases 10 years after the date of filing.

The proposed changes are to be circulated among the subcommittee members and should be presented to the SCRAC at their November meeting. The

only other action item is whether the SCRAC, as a whole, or the subcommittee should undertake the reexamination of the remand issue, if the SCRAC decides that the issue merits further study.