

Civil Procedure—An Unsworn Controverting Plea May Be Amended After Expiration of the Ten-Day Filing Period. *Lorenzo Grain Co-op v. Rangel*, 491 S.W.2d 702 (Tex. Civ. App.—Amarillo 1973, no writ).

Plaintiff Domingo Rangel was injured on a farm in Lubbock County where he was employed. Rangel brought suit in Lubbock County and alleged the negligent use of anhydrous ammonia equipment by an employee of defendant Lorenzo Grain Co-op.¹ Defendant filed a plea of privilege to transfer the case to its domicile for venue purposes, Crosby County.² Plaintiff responded by filing a controverting plea which maintained venue was proper in Lubbock County where the accident occurred.³ Plaintiff's pleading, however, was procedurally defective because the accompanying affidavit contained an unexecuted jurat.⁴ When the defect was discovered at the venue hearing, the trial court allowed plaintiff to file an amended plea which was identical to the original except for the inclusion of a properly executed jurat. The action of the trial court was affirmed on appeal.⁵ The Amarillo Court of Civil Appeals held the unsworn controverting plea was not a nullity, and the verification amendment was properly permitted.⁶

The court in *Lorenzo Grain Co-op v. Rangel*⁷ recognized the conflict among the Texas courts of civil appeals on the question of whether an unsworn controverting plea is an amendable defect.⁸ The court concluded, without explanation, that the cases allowing verification amendments were the "better reasoned cases."⁹ The court appeared to be influenced by the defendant's stipulation that the verification amendment offered no surprise because he had previously received a sworn

1. *Lorenzo Grain Co-op v. Rangel*, 491 S.W.2d 702, 703 (Tex. Civ. App.—Amarillo 1973, no writ).

2. See TEX. REV. CIV. STAT. ANN. art. 1995 (1964).

3. A negligence action "may be brought in the county where the act or omission of negligence occurred" TEX. REV. CIV. STAT. ANN. art. 1995(9a) (1964).

4. TEX. R. CIV. P. 86 requires a sworn controverting plea:

If such adverse party desires to controvert the plea of privilege, he shall *within ten days* after he or his attorney of record received a copy of the plea of privilege file a controverting plea *under oath* . . . (emphasis added).

5. *Lorenzo Grain Co-op v. Rangel*, 491 S.W.2d 702 (Tex. Civ. App.—Amarillo 1973, no writ).

6. *Id.* at 704. The court also held the record evidence was sufficient to support the trial court's implied finding that proximate cause existed to establish venue in Lubbock County. Compare TEX. REV. CIV. STAT. ANN. art. 1995(9a) (3) (1964) with *Gulfcraft, Inc. v. Henderson*, 300 S.W.2d 768, 770 (Tex. Civ. App.—Galveston 1957, no writ). See also TEX. R. CIV. P. 385.

7. 491 S.W.2d 702, 704 (Tex. Civ. App.—Amarillo 1973, no writ).

8. See text accompanying notes 13 & 14 *infra*.

9. 491 S.W.2d at 704.

copy of the original plea from the plaintiff.¹⁰

The Texas Supreme Court has not ruled on whether an unsworn controverting plea is an amendable defect. In *Leonard v. Maxwell*,¹¹ the supreme court observed that an unsworn controverting plea failed to comply with the requirements of rule 86. The court, however, reversed on other grounds, and expressly reserved determination of this issue for a future case.¹² This absence of a supreme court decision has allowed the disagreement among the courts of civil appeals to continue. The majority of these courts has favored a liberal construction of rule 86 and allowed verification amendments.¹³ The minority has strictly construed rule 86 to mean an unsworn controverting plea is a nullity and may not be amended after expiration of the ten-day filing period.¹⁴

The strict constructionists argue that rule 86 "means exactly what it says, and that absent a timely sworn plea as required, the court has no jurisdiction except to transfer the cause."¹⁵ The reasoning in support

10. *Id.* at 703-04.

11. 365 S.W.2d 340 (Tex. 1963).

12. *Id.* at 345-46.

13. *Cactus Drilling Corp. v. Hager*, 487 S.W.2d 758 (Tex. Civ. App.—El Paso 1972, no writ); *M.C. Winters, Inc. v. Lawless*, 407 S.W.2d 275 (Tex. Civ. App.—Dallas 1966, writ *dism'd*); *Leonard v. Maxwell*, 356 S.W.2d 335 (Tex. Civ. App.—Austin 1962), *rev'd on other grounds*, 365 S.W.2d 340 (Tex. 1963); *Farmer v. Cassity*, 262 S.W.2d 788 (Tex. Civ. App.—Beaumont 1952, no writ); *Continental Fire & Cas. Ins. Corp. v. Whitlock*, 215 S.W.2d 657 (Tex. Civ. App.—Amarillo 1948, no writ); *Fitzgerald v. Browning-Ferris Mach. Co.*, 49 S.W.2d 489 (Tex. Civ. App.—Waco 1932, writ *dism'd*) (decided prior to adoption of TEX. R. Civ. P. 86).

14. *Globe Fin. & Thrift Co. v. Thompson*, 412 S.W.2d 955 (Tex. Civ. App.—Fort Worth 1967, no writ); *H.E. Butt Co. v. Vaught*, 413 S.W.2d 940 (Tex. Civ. App.—San Antonio 1967, writ *dism'd*) (dictum); *Eastland v. Whitman*, 318 S.W.2d 447 (Tex. Civ. App.—Houston 1958, no writ); *Brashears v. Strawn Nat'l Bank*, 57 S.W.2d 177 (Tex. Civ. App.—Eastland 1932, no writ) (decided prior to adoption of TEX. R. Civ. P. 86).

Attempting to classify the Fort Worth Court of Civil Appeals as accepting either a liberal or strict construction of rule 86 is difficult. Although *Globe Finance, supra*, unequivocally states an unsworn controverting plea is a nullity, the fluctuation of the court in other cases renders the *Globe Finance* holding tenuous at best. In *Duncan v. Denton County*, 133 S.W.2d 197 (Tex. Civ. App.—Fort Worth 1939, writ *dism'd*), the court held that unverified pleas were subject to amendment. In *Fester v. Locke*, 285 S.W.2d 239 (Tex. Civ. App.—Fort Worth 1955, no writ), the court ruled a controverting plea could be amended like any other pleading. *Globe Finance* ostensibly overruled these decisions. A subsequent decision, however, demonstrates the fluctuation of the Fort Worth court. In *Globe Finance*, the court held the waiver provisions of TEX. R. Civ. P. 90 were inapplicable since an unsworn affidavit was a fatal defect. Contrast this position to a recent pronouncement of the same court: "[E]ven where an original Plea of Privilege may be fatally defective it is amendable if it is sufficient to evidence an effort to raise the venue question." *Burns v. McKoy*, 460 S.W.2d 930, 931 (Tex. Civ. App.—Fort Worth 1970, no writ). Understandably, the court failed to distinguish why the "fatally defective" plea of privilege in *Burns, supra*, was amendable while the "fatally defective" controverting plea in *Globe Finance* was a nullity.

15. Brief for Defendant at 19, *Lorenzo Grain Co-op v. Rangel*, 491 S.W.2d 702 (Tex. Civ.

of this argument begins with the premises that all uncontroverted pleas of privilege should be sustained as a matter of right,¹⁶ and that an unsworn controverting plea is the equivalent of a failure to controvert.¹⁷ The strict constructionists advance two reasons why an unsworn controverting plea has the same effect as a failure to file a controverting plea. First, the language in rule 86 expressly requires a sworn oath to controvert a plea of privilege.¹⁸ Hence, the omission of a sworn oath results in a failure to controvert. Second, an affidavit with an unexecuted jurat is no evidence of a sworn plea,¹⁹ and fails to raise the issue of venue.²⁰ Since the venue issue has not been controverted within the prescribed time limit,²¹ the defendant's plea of privilege should be sustained as a matter of right. The court lacks jurisdiction to allow amendment and must transfer the case.²² Therefore, a controverting plea is fatally defective if not verified within ten days after receipt of the plea of privilege.²³

The strict constructionists also argue that rigid compliance with rule 86 best achieves the desired policy of judicial efficiency. The holding that an unsworn controverting plea is not subject to amendment provides a uniform standard which both lawyers and the judiciary can easily apply in future cases. This uniformity is preferable to the uncertainty inherent in the ad hoc approach of those who liberally construe rule 86. If the question of whether amendment is to be allowed depends upon the facts of each particular case, "there is no way to know whether the failure to strictly comply will be forgiven until the case is appealed."²⁴ The strict construction analysis, however, would remove the necessity for constant appellate determination of error and would affect a reduc-

App.—Amarillo 1973, no writ); *see, e.g.*, *Globe Fin. & Thrift Co. v. Thompson*, 412 S.W.2d 955 (Tex. Civ. App.—Fort Worth 1967, no writ).

16. TEX. R. CIV. P. 86; *see, e.g.*, *Eastland v. Whitman*, 318 S.W.2d 477 (Tex. Civ. App.—Houston 1958, no writ).

17. *See, e.g.*, *Globe Fin. & Thrift Co. v. Thompson*, 412 S.W.2d 955 (Tex. Civ. App.—Fort Worth 1967, no writ).

18. TEX. R. CIV. P. 86.

19. *Eastland v. Whitman*, 318 S.W.2d 447, 448 (Tex. Civ. App.—Houston 1958, no writ).

20. *Brashears v. Strawn Nat'l Bank*, 57 S.W.2d 177 (Tex. Civ. App.—Eastland 1932, no writ).

21. TEX. R. CIV. P. 86.

22. *Eastland v. Whitman*, 318 S.W.2d 447 (Tex. Civ. App.—Houston 1958, no writ). *See generally* *Leonard v. Maxwell*, 365 S.W.2d 340, 347 (Tex. 1963) (Norvell, J., dissenting).

23. TEX. R. CIV. P. 86; *e.g.*, *Globe Fin. & Thrift Co. v. Thompson*, 412 S.W.2d 955, 956 (Tex. Civ. App.—Fort Worth 1967, no writ).

24. Brief for Defendant at 21, *Lorenzo Grain Co-op. v. Rangel*, 491 S.W.2d 702 (Tex. Civ. App.—Amarillo 1973, no writ).

tion in appellate caseloads.²⁵

The majority of the Texas courts of civil appeals rejects the strict construction analysis,²⁶ and liberally construes rule 86 to allow amendment. These courts place greater emphasis on the substance of the plea than on the requirement of a formal oath.²⁷ This approach is consistent with the policy of the Texas Rules of Civil Procedure to reach the merits of a case rather than to penalize for deficiencies of form.²⁸ When possible, "no mere rule of procedural form or courtesy should be allowed to . . . [interfere with] the disposition of the litigation upon its merits."²⁹ The absence of a sworn affidavit prevents those courts which strictly construe rule 86 from reaching the merits of the controverting plea. Therefore, to hold that an unsworn controverting plea cannot be amended after the filing deadline is to violate the policy by giving preference to form over substance.³⁰

The courts which liberally construe rule 86 believe that a strict construction is inconsistent with the provisions of other Texas rules.³¹ To deny amendment by strictly construing rule 86 prevents disposition according to the merits of the controverting plea, and thus violates rule 1's requirement of a liberal construction of all rules when necessary to achieve a "just, fair, equitable and impartial adjudication of the rights of litigants under established principles of law."³² The liberal constructionists recognize that a sworn oath is a requirement of a controverting plea, but argue that it is not essential to the substantive allegations necessary to controvert a plea of privilege.³³ Judge Norvell believed the requirement for a sworn oath was incongruous,³⁴ and would have

25. *Id.* at 21-22. Available data indicates approximately one of every thirteen cases on appeal involves a plea of privilege. Norvell, Chadick, & Donovan, *The Work of the Texas Courts of Civil Appeals 1951 to 1958, Inclusive*, 38 TEXAS L. REV. 725, 738 (1960). Even though these figures are outdated, they are useful to indicate the general magnitude of the problem.

26. Cases cited note 13 *supra*.

27. *Cf.* *Cactus Drilling Corp. v. Hager*, 487 S.W.2d 758, 760 (Tex. Civ. App.—El Paso 1972, no writ).

28. *See generally* McDonald, *The Background of the Texas Procedural Rules*, 19 TEXAS L. REV. 229 (1941).

29. *Id.* at 252.

30. *See, e.g.*, *M.C. Winters, Inc. v. Lawless*, 407 S.W.2d 275, 277 (Tex. Civ. App.—Dallas 1966, writ *dism'd*).

31. *See* TEX. R. CIV. P. 1, 5(b), 63.

32. TEX. R. CIV. P. 1.

33. *Farmer v. Cassity*, 252 S.W.2d 788, 791 (Tex. Civ. App.—Beaumont 1952, no writ).

34. The swearing required by our rules relating to pleas of privilege is somewhat incongruous. A lawyer may and usually does swear to the plea of privilege and the opposing lawyer swears to the controverting plea. They both swear to the truth of legal propositions and conclusions and to the existence of facts about which they have no

refused to "regard a defective oath or even the absence of an oath as some special type of defect which is beyond the scope of an amendment."³⁵ Therefore, to allow amendment by a liberal construction of rule 86 insures compliance with the formal oath requirement and simultaneously conforms to the mandate of rule 1 by reaching the merits of the plea.³⁶

A strict construction of rule 86 is also inconsistent with the provisions of rule 5(b).³⁷ Rule 5(b) empowers the court to expand the time allowed for filing most pleas or amendments when "good cause is shown for the failure to act."³⁸ A court may expand the ten-day limit specified in rule 86, assuming good cause is shown.³⁹ Hence, the liberal constructionists believe rule 5(b) negates the strict construction view that the court lacks jurisdiction once the filing deadline has passed.⁴⁰

Finally, a strict construction of rule 86 is contradictory to rule 63.⁴¹ Rule 63 allows amendment of all pleadings⁴² as a matter of right after the expiration of a filing time "unless there is a showing that such amendment will operate as a surprise to the opposite party."⁴³ As demonstrated by the facts in *Lorenzo*, surprise is difficult to establish in cases where the only defect is the absence of a sworn oath.⁴⁴ If the plaintiff forwards a copy of an unsworn plea to the defendant and subsequently seeks only a verification amendment, the defendant cannot truthfully claim surprise. The defendant has knowledge of the plea's contents; the verification amendment affects only the form and not the

personal knowledge.

Leonard v. Maxwell, 365 S.W.2d 340, 347 (Tex. 1963) (dissenting opinion) (rev'd on other grounds).

35. *Id.*

36. See *M.C. Winters, Inc. v. Lawless*, 407 S.W.2d 275, 277 (Tex. Civ. App.—Dallas 1966, writ dismissed).

37. TEX. R. CIV. P. 5(b).

38. *Id.*

39. One may question whether the negligent failure to execute a jurat is sufficient to constitute good cause under TEX. R. CIV. P. 5(b). See *Leonard v. Maxwell*, 356 S.W.2d 335 (Tex. Civ. App.—Austin 1962) (Richards, J., dissenting), *rev'd on other grounds*, 365 S.W.2d 340 (Tex. 1963). Nonetheless, courts have previously found sufficient justification to apply the good cause standard to cases involving unsworn controverting pleas. Compare *Texas-Louisiana Power Co. v. Wells*, 121 Tex. 396, 404, 48 S.W.2d 978, 981 (1932) with *Continental Fire & Cas. Ins. Corp. v. Whitlock*, 215 S.W.2d 657, 658 (Tex. Civ. App.—Amarillo 1948, no writ). A strict construction of TEX. R. CIV. P. 86 would preclude this alternative in the future.

40. See text accompanying note 22 *supra*.

41. TEX. R. CIV. P. 63.

42. TEX. R. CIV. P. 63 authorizes amendment of all pleadings without leave of court when filed seven days or more before the date of trial.

43. *Id.*

44. 491 S.W.2d at 703.

substance of the plea.⁴⁵ Therefore, a strict construction of rule 86 is inconsistent with the court's authority to allow verification amendments under rule 63.⁴⁶

The incompatibility between the liberal⁴⁷ and strict⁴⁸ construction viewpoints indicates this issue might eventually be resolved by the Texas Supreme Court. One indication of how the supreme court might rule is found in *Leonard v. Maxwell*.⁴⁹ In *Leonard* the supreme court stated in dictum that an unsworn controverting plea appeared to violate rule 86.⁵⁰ The majority refused, however, to decide whether such a plea was subject to amendment because resolution of this issue would not affect the outcome of the case.⁵¹ Three judges dissented to the majority's refusal to decide the issue. Speaking for the dissent, Judge Norvell said the supreme court was "seemingly in accord with the liberal view . . . that an unsworn plea is not a nullity but subject to amendment."⁵² Therefore, assuming Judge Norvell's opinion is correct, *Leonard* provides some indication of how the supreme court might eventually decide the issue.

An analysis of rule 86's history supports Judge Norvell's evaluation. The requirements for pleas of privilege and controverting pleas were contained in Art. 2007⁵³ before the adoption of the Texas Rules of Civil Procedure. Rule 86 retained the same element of a timely sworn oath as originally set forth in Art. 2007.⁵⁴ The only significant difference between Art. 2007 and rule 86 was an extension of the filing deadline.⁵⁵

The supreme court considered the validity of a controverting plea filed after expiration of the time limit required by Art. 2007 in *Texas-Louisiana Power Co. v. Wells*.⁵⁶ The court said the statutory time provi-

45. A different issue arises when the plaintiff attempts to substantively change the plea in addition to correcting a defective jurat. In this instance, the court need not consider the defect, but may refuse the motion under TEX. R. CIV. P. 63 on the basis of surprise to defendant.

46. *E.g.*, *Cactus Drilling Corp. v. Hager*, 487 S.W.2d 758 (Tex. Civ. App.—El Paso 1972, no writ).

47. See text accompanying note 13 *supra*.

48. See text accompanying note 14 *supra*.

49. 365 S.W.2d 340 (Tex. 1963) (rev'd on other grounds).

50. *Id.* at 341.

51. *Id.* at 345-46.

52. *Id.* at 347.

53. "If . . . the plaintiff desires to controvert the plea of privilege, he shall file a controverting plea under oath . . ." Tex. Laws 1917, ch. 176, § 1, at 388.

54. *Id.*

55. Originally, a sworn controverting plea had to be filed within five days after appearance day. *Texas-Louisiana Power Co. v. Wells*, 121 Tex. 396, 404, 48 S.W.2d 978, 981-82 (1932) *citing* Tex. Rev. Civ. Stat. art. 2007 (1925). At present, the plaintiff must have filed a sworn controverting plea "within ten days after he or his attorney of record received a copy of the plea of privilege." TEX. R. CIV. P. 86.

56. 121 Tex. 396, 48 S.W.2d 978 (1932).

sion was subject to judicial expansion⁵⁷ and held that the failure to conform to the time limit was an amendable defect.⁵⁸ The history of rule 86 supports the conclusion that verification amendments should be permitted. Hence, the strict construction premise that rule 86 “means exactly what it says” was not the law under Art. 2007.

The history of rule 86 and Judge Norvell’s evaluation⁵⁹ justify the prediction that the Texas Supreme Court would, upon consideration of the issue, liberally construe rule 86. On that basis, the court in *Lorenzo*⁶⁰ correctly concluded that rule 86 was not intended to deprive the court of the power to allow amendment. The conflicting holdings of the courts of civil appeals,⁶¹ however, necessitate a final determination by the supreme court.

The Texas Supreme Court should hold that an unsworn controverting plea is an amendable defect. This holding would incorporate the advantages of the liberal construction analysis: the substantive aspects of the plea would be independent of the formal oath requirements; and rule 86 would supplement, rather than supplant, rules 1, 5(b), and 63. A supreme court holding would also require a uniform application and hence provide a consistent standard for both lawyers and judges. This holding would achieve the policy of judicial efficiency urged by the strict constructionists: a removal of the necessity for ad hoc determination of error, and a reduction of appellate caseloads.

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57. The statutory time limit was not “intended to affect the power of the court to authorized [sic] [a controverting] plea to be filed after the expiration of the prescribed period, when good cause is shown.” *Id.* at 404, 48 S.W.2d at 981.

58. *Id.*

59. See text accompanying note 52 *supra*.

60. 491 S.W.2d at 704.

61. See text accompanying notes 13 & 14 *supra*.