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SOME PROBLEMS OF SUPREME COURT REVIEW

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Since the basic text of this article was originally published,[1] many of the observations made and the rules discussed have been changed or modified, while many have been affirmed by subsequent decisions of the Supreme Court of Texas. As the caseload of the supreme court continues to increase,[2] so also does the potentiality that an individual practitioner will become involved in an appeal to that court by way of an application for writ of error. For that reason, the text of the original article has been revised, brought up to date, and republished here in order that it might be of continuing benefit both to the appellate practitioner and to those students whose curriculum has traditionally incorporated the contents of the original text.

This article continues to endeavor both to illustrate some of the procedural problems which confront a litigant appealing to the supreme court by application for writ of error and to define the "ground rules" under which the supreme court operates in considering and disposing of an appeal by application for writ of error. Since the present emphasis is upon problems peculiar to supreme court review by applications for writ of error, review by certified questions is not considered,[3]

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1. The earlier version of this article was published in 21 TEX. B.J. 75 ((1958).

2. *See* Sinclair, *The Supreme Court of Texas,* 7 HOUS. L. REV. 20, 55 (1969).

3. *See* TEX. R. CIV. P. 461-66. The 1953 amendment to article 1728, for all practicable purposes, has limited review by certified questions to two instances. The first instance is where the case cannot reach the supreme court by writ of error and the controlling question is one of general importance throughout the state. City of

nor are questions of supreme court jurisdiction,[4] and, except where extraordinary situations are involved, no attention is given to the form of, or the mechanics for filing, an application for writ of error.[5]

JUDGMENTS REVIEWABLE AND QUESTIONS DECIDED

An application for writ of error may be prosecuted only from a final judgment of a court of civil appeals.[6] Generally, little difficulty with "finality" is encountered in a case which proceeds normally from a timely filing of the record to the opinion and judgment of the court of civil appeals, and ends with a simple order overruling a motion for rehearing. Problems with "finality" most commonly arise in the attempted appeal of some preliminary motion or order of the court of civil appeals or when that court takes further action on motion for rehearing. For example, orders overruling or granting a motion to file a transcript, or overruling a motion to affirm on certificate, are not final judgments.[7] A court of civil appeals judgment which fails to dispose of any part of the trial court judgment properly brought forward for review is not final, nor is one which holds the case in

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Stamford v. Ballard, 162 Tex. 22, 23, 344 S.W.2d 861 (1961). The second is where emergency conditions require an early disposition of litigation which can be accomplished by answer to certified questions. Wilson v. Thompson, 162 Tex. 390, 391, 348 S.W.2d 17 (1961); Barrington v. Cokinos, 161 Tex. 136, 143-44, 338 S.W.2d 133, 139 (1960). If certification is appropriate, the questions must be certified by the court of civil appeals, not an individual judge thereof. Gateley v. Humphrey, 151 Tex. 588, 592, 254 S.W.2d 98, 101 (1952). Compelling certification by mandamus was abolished when Rule 475 was repealed. TEX. R. CIV. P. 475 (1955).

4. *See* TEX. REV. CIV. STAT. ANN. arts. 1728, 1821 (1964). Regarding "conflict" as a ground of jurisdiction, attention is directed to Barber v. Intercoast Jobbers & Brokers, 417 S.W.2d 154 (Tex. Sup. 1967) which holds that a "prior decision," within the meaning of section 2 of article 1728 is a prior *final* decision by a court of civil appeals or the supreme court. *Id.* at 156-57. Regarding "dissent" upon a question of law *material* to the decision, as a ground of jurisdiction, see Bishop v. Bishop, 359 S.W.2d 869 (1962). Jurisdiction is accorded under section 1, where the dissenting justice merely noted his dissent, without specifying the grounds therefor, but the context of the case demonstrated he must have disagreed with the majority upon a question of law material to the decision. The case leaves open the question of jurisdiction under section 1 in such a case should the court of civil appeals' decision be based to any extent upon a question of fact. *Id.* at 870-71.

5. The form in which an application for writ of error should be filed is adequately detailed in TEX. R. CIV. P. 469. For aid in interpreting that rule, reference to the articles, cases, and comments annotated under it is suggested. *See also* Calvert, *The Application for Writ of Error*, TEX. R. CIV. P. ANN. 469.

6. TEX. R. CIV. P. 467; Klattenhoff v. Schriever, 131 Tex. 223, 225, 113 S.W.2d 515, 516 (1938).

7. Keck v. Roberson, 133 Tex. 466, 130 S.W.2d 287 (1939); Smith v. Free, 130 Tex. 23, 25, 107 S.W.2d 588, 589 (1937); Prince v. Guyer, 129 Tex. 90, 92, 103 S.W.2d 128 (1937); New Amsterdam Cas. Co. v. Pugh, 124 Tex. 34, 35, 73 S.W.2d 94, 95 (1934); Casey v. Bell, 104 Tex. 338, 339, 137 S.W. 918, 919 (1911).

abeyance pending further action in the trial court per instructions of the court of civil appeals.[8] A judgment vacated by a court of civil appeals on motion for rehearing is not final.[9] However, a judgment which affirms on certificate is final, as is an order which overrules a motion to affirm on certificate but then dismisses the case.[10]

Despite the supreme court's practice of granting an application for writ of error "on" certain points assigned therein, when an application has been granted, the court then has jurisdiction to decide *all* points of error properly presented in the application.[11] In disposing of a cause, the supreme court will resolve all questions of law decided by the court of civil appeals, provided that they are properly presented in the application (or by cross point in the response thereto), that the court has jurisdiction, and that they are determinations necessary to a full disposition of the case.[12] Moreover, depending upon the action it takes in ruling on those points, the court *may* pass upon certain other questions which were *not* decided by the court of civil appeals, and, in some instances, it is *required* to consider such questions.[13]

PRESERVATION OF ERROR

Necessity that error be preserved

Review by the supreme court of an erroneous order or judgment of a court of civil appeals can be obtained only where the party seeking review has preserved the error at every vital step, from its origin or commission through its assignment as a point of error in an application for writ of error or as a cross point in a response to the application.[14]

8. Luling Oil & Gas Co. v. Humble Oil & Refining Co., 143 Tex. 54, 55, 182 S.W.2d 700 (1944); Robertson v. Duncan, 124 Tex. 40, 75 S.W.2d 875 (1934).

9. Oil Field Haulers Ass'n v. Railroad Comm'n, 381 S.W.2d 183, 188 (Tex. Sup. 1964).

10. Klattenhoff v. Schriever, 131 Tex. 223, 225, 113 S.W.2d 515, 516 (1938); Smith v. Free, 130 Tex. 23, 25, 107 S.W.2d 588, 589 (1937).

11. Pittman v. Baladez, 158 Tex. 372, 376, 312 S.W.2d 210, 213 (1958); Duncan v. Willis, 157 Tex. 316, 318, 302 S.W.2d 627, 629 (1957); Aultman v. Dallas Ry. & Terminal Co., 152 Tex. 509, 511, 260 S.W.2d 596, 597 (1953). The court's indication that an application is granted "on" certain points is an indication to the parties of the points of law upon which the court is most desirous of hearing oral argument, and the court's indication should be respected by counsel during the argument.

12. Magnolia Petroleum Co. v. Long, 126 Tex. 195, 200, 86 S.W.2d 450, 452 (1935); Holland v. Nimitz, 111 Tex. 419, 430-31, 239 S.W. 185, 188 (1922); Moore v. Davis, 27 S.W.2d 153, 156 (Tex. Comm'n App. 1930, aff'd as recommended).

13. See the cases cited in notes 52-58 *infra*, and the discussion and examples to which they relate.

14. TEX. R. CIV. P. 469(c); Harris v. Windson, 156 Tex. 324, 326, 294 S.W.2d

This preservation process includes: (1) proper objection in the trial court, if the ruling or objectionable matter occurs there;[15] (2) assignment of the error in a motion for new trial,[16] when such motion is required;[17] (3) inclusion as a point of error[18] or cross point[19] in the respective party's brief in a court of civil appeals; (4) assignment of the error in a motion for rehearing in the court of civil appeals;[20] and (5) complaint by point of error in the application for writ of error[21] or by cross point in the respondent's reply.[22]

798, 799 (1956). The only exception is "fundamental error," a very narrow concept discussed pp. 307-08, *infra*.

15. TEX. R. CIV. P. 372-73. Lewis v. Texas Employers Ins. Ass'n, 151 Tex. 95, 99, 246 S.W.2d 599, 601 (1952).

16. TEX. R. CIV. P. 320-27. St. Louis Southwestern Ry. v. Duke, 424 S.W.2d 896, 898 (Tex. Sup. 1967).

17. Rule 324 dispenses with the necessity of filing a motion for new trial as a prerequisite to appeal in specified instances. TEX. R. CIV. P. 324. However, attention is directed to Rule 325 which requires certain types of error to be preserved by motion for new trial in *every* case, even where such a motion would normally be excused by Rule 324. TEX. R. CIV. P. 325.

18. TEX. R. CIV. P. 324, 377a, 418, 420, 469(c); Bickler v. Bickler, 403 S.W.2d 354, 361 (Tex. Sup. 1966); State v. Bilbo, 392 S.W.2d 121, 126 (Tex. Sup. 1965); State Highway Dept. v. Fillmon, 150 Tex. 460, 464, 242 S.W.2d 172, 174 (1951).

In McKelvy v. Barber, 381 S.W.2d 59 (Tex. Sup. 1964), however, the supreme court treated a point as properly preserved for review "even though not raised by a formal point of error in the appellant's brief," where the parties had joined issue on, and fully briefed and argued, the point in their briefs in that court. *Id.* at 62. Nevertheless, the appropriate procedure is to assign a formal point of error in the brief.

19. TEX. R. CIV. P. 324, 420. LeMaster v. Forth Worth Transit Co., 138 Tex. 512, 518, 160 S.W.2d 224, 227 (1942). Rule 324 was amended in 1957, in response to DeWinne v. Allen, 154 Tex. 317, 277 S.W.2d 95 (1955), to require that "cross points" be filed in the appellee's brief in the court of civil appeals by the holder of a judgment *non obstante veredicto* as a prerequisite to review of most complaints by an appellee. *Id.* at —, 277 S.W.2d at 100; *cf.* Jackson v. Ewton, 411 S.W.2d 715 (Tex. Sup. 1967) which wisely suggests that points in the appellee's brief which reply to the appellant's points of error be designated "Reply Points" and that those by which the appellee independently asserts error and seeks relief be designated "Cross Points." *Id.* at 717.

20. TEX. R. CIV. P. 458. Life Ins. Co. v. First Nat'l Bank, 464 S.W.2d 362, 364 (Tex. Sup. 1971); Forrest v. Hanson, 424 S.W.2d 899, 905 (1968); Wallace v. Scrogum, 372 S.W.2d 941 (Tex. Sup. 1963); East Texas Motor Freight Lines v. Loftis, 148 Tex. 242, 247, 223 S.W.2d 613, 615-16 (1949); Moore v. Dilworth, 142 Tex. 538, 543, 179 S.W.2d 940, 942 (1944).

21. TEX. R. CIV. P. 469(c), 476. State Farm Mut. Auto. Ins. Co. v. Cowley, 468 S.W.2d 353, 354 (Tex. Sup. 1971); Steeger v. Beard Drilling, Inc., 371 S.W.2d 684, 688 (Tex Sup. 1963); Shambry v. Housing Authority, 152 Tex. 122, 255 S.W.2d 184 (1953); Pacific Fire Ins. Co. v. Donald, 148 Tex. 277, 279, 224 S.W.2d 204, 205 (1949); Railroad Comm'n v. Mackhank Petroleum Co., 144 Tex. 393, 396, 190 S.W.2d 802, 803 (1946).

In the event of a direct appeal from the trial court to the supreme court, the intermediate appellate steps are eliminated, but the rules pertinent to appeal to the court of civil appeals are controlling in general. TEX. R. CIV. P. 499a.

22. Rule 480, which concerns the answer to an application for writ of error, says nothing specific about the necessity for assigning cross points therein. TEX. R. CIV.

Despite the clear provisions of Rules 458 and 469(c), the right of review by the supreme court is often lost by a party's failure to preserve error either in a motion for rehearing in the court of civil appeals[23] or by point of error in an application for writ of error.[24] While Rules 481 and 504 are liberal in authorizing amendment both of applications and of answers to include additional complaints or to correct jurisdictional deficiencies, and are so applied by the supreme court, at least up to the entry of its judgment,[25] such an amendment is of no avail where the error alleged is not preserved by assignment in the motion for rehearing in the court below.[26]

Fundamental Error

One who has failed to preserve a question for review at one or more stages of the appellate process frequently seeks appellate review of the

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P. 480. In pp. 320-21, *infra*, this article tentatively suggests that some types of error *must* be assigned as cross points to be reviewed by the supreme court, and also that cross points *should* be assigned as an aid to the court in many instances.

Such cross points should be assigned in the respondent's answer with the same formality and particularity as are points of error in an application, showing that they are germane to an assignment in a motion for rehearing below and to a requisite procedure step in the trial court. Cross points are properly assigned immediately after the statement of the respondent's reply points and may be restated and argued immediately after the argument and authorities in support of the reply points.

23. Rules and cases cited note 20, *supra*.

24. Rules and cases cited note 21, *supra*; City of Deer Park v. State, 154 Tex. 174, —, 275 S.W.2d 77, 84 (1954); Tips v. Security Life & Accident Co., 144 Tex. 461, 466, 191 S.W.2d 470, 472 (1945); London Terrace, Inc. v. McAlister, 142 Tex. 608, 615, 180 S.W.2d 619, 622 (1944).

25. In City of Deer Park v. State, 154 Tex. 174, 275 S.W.2d 77 (1954), the record reflects that, after the case had been decided against the petitioner on motion for rehearing because of failure to include a vital point of error in the application, petitioner filed a motion to amend the application by supplying the point, which was overruled without written opinion. *Id.* at —, 275 S.W.2d at 84. But, in Cochran v. Wool Growers Cen. Storage Co., 140 Tex. 184, 166 S.W.2d 904 (1943), a petition to amend the application by stating grounds for jurisdiction was granted after the writ of error had been dismissed because of that defect. *Id.* at 187-88, 166 S.W.2d at 906. In Great American Ins. Co. v. Langdeau, 379 S.W.2d 62 (Tex. Sup. 1964), the court specifically indicated that the timeliness of an amendment—*i.e.*, before judgment—is a crucial factor in allowing it. *Id.* at 70.

26. Cases cited note 20, *supra*. A word of caution is in order regarding the motion for rehearing in the court of civil appeals. When a court of civil appeals writes, in response to a motion for rehearing, counsel must be vigilant to ascertain whether a second motion for rehearing is *required* in order to preserve error in the supreme court: (1) if, in its opinion on rehearing, a court of civil appeals grants the is *required* to preserve the remaining errors left uncorrected; and this applies even if the court of civil appeals states that it is granting the motion in part and overruling it in part; (2) if the judgment is not changed by the opinion on motion for rehearing, a second motion is not required, although, in some instances, specified in Rule 458, a second motion for rehearing *may* be filed. *See* Oil Field Haulers Ass'n, Inc. v. Railroad Comm'n, 381 S.W.2d 183, 188-89 (Tex. Sup. 1964).

point on the theory that it constitutes "fundamental error." The odds weigh heavily against the success of such a contention for "fundamental error," as defined by the Texas cases, denotes a very narrow, restricted classification and is not the same as plain or obvious error.[27]

Appellate consideration of "fundamental error" has had a long and varied history in this state,[28] and, still, no definitive classification of "fundamental error" has been, or probably can be, formulated. Nevertheless, the following restrictive test, stated by Chief Justice Alexander in his concurring opinion in *Ramsey v. Dunlop*[29] has gained general acceptance over more liberal tests:

> It is my opinion that the Court of Civil Appeals is authorized to reverse a judgment of the trial court upon an unassigned error only when it involves a matter of public interest and when the record affirmatively and conclusively shows that the appellee was not entitled to recover, where the record affirmatively shows that the court rendering the judgment was without jurisdiction over the subject matter.[30]

The supreme court itself applies that test when reviewing error alleged to be fundamental,[31] and, when "fundamental error," according to that test, exists in a record, the supreme court may reverse the lower courts because of the error once its appellate jurisdiction attaches—and regardless of how it attaches—even though the error was not assigned in any court below or in the supreme court.[32] *Ramsey* and subsequent decisions serve to illustrate on a case-by-case basis what has been[33] and what has not been[34] deemed "fundamental error" under

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27. State v. Sunland Supply Co., 404 S.W.2d 316, 319 (Tex. Sup. 1966).

28. Note, 29 TEXAS L. REV. 369 (1951).

29. 146 Tex. 196, 205 S.W.2d 979 (1947).

30. *Id.* at 206, 205 S.W.2d at 985.

31. TEX. R. CIV. P. 467, 469; State v. Sunland Supply Co., 404 S.W.2d 316, 319 (Tex. Sup. 1966); McCauley v. Consolidated Underwriters, 157 Tex. 475, 477, 304 S.W.2d 265, 266 (1957).

McCauley points out that a different rule pertained prior to the adoption of the Rules of Civil Procedure and the repeal of article 1837, which precluded the supreme court from considering *any* unassigned error, whether it was "fundamental" or not, although the courts of civil appeals could do so. *See* Grayce Oil Co. v. Peterson, 128 Tex. 550, 559, 98 S.W.2d 781, 785-86 (1936), and George Scalfi & Co. v. State, 73 S.W. 441 (Tex. Civ. App.—1903, writ ref'd), to the effect that the supreme court may not reverse on errors unassigned; these are no longer controlling.

32. McCauley v. Consolidated Underwriters, 157 Tex. 475, 478, 304 S.W.2d 265, 266 (1957).

33. State v. Santana, 444 S.W.2d 614, 615 (Tex. Sup. 1969); Petroleum Anchor Equip. Co. v. Tyra, 406 S.W.2d 891, 892 (Tex. Sup. 1966); Texas Employment Comm'n v. International Union, 163 Tex. 135, 137, 352 S.W.2d 252, 253 (1961); McCauley v. Consolidated Underwriters, 157 Tex. 475, 477-78, 304 S.W.2d 265, 266 (1957); Ramsey v. Dunlop, 146 Tex. 196, 202, 205 S.W.2d 979, 983 (1947).

the controlling test.

WHO MAY AND MUST FILE AN APPLICATION FOR WRIT OF ERROR

Generally

An application for writ of error may be prosecuted only by a party who is "aggrieved" by the judgment of a court of civil appeals.[35] While the rules of procedure and the statutes do not specifically designate "aggrievement" as a prerequisite to supreme court review, that requirement is implicit in Rule 467 which provides that "the Supreme Court may review final judgments of Courts of Civil Appeals upon writ of error, *when good cause therefor be shown* . . . ."[36] One who has obtained the utmost relief which he seeks from a court of civil appeals cannot show "good cause" for review on application, regardless of how erroneous some of the lower court holdings may be.[37]

EXAMPLE

A has obtained a judgment against B, and B brings to the court of civil appeals points of error which, if sustained, would require a reversal of the trial court's judgment and rendition of judgment for B as well as points of error which, if sustained, would require a reversal of the trial court's judgment and remand for another trial.

If the court of civil appeals sustains one or more of the rendition points, and overrules some or all of the remand points, B may not obtain review of his remand points by application for writ of error, however erroneous the court's ruling thereon may be, because he has obtained the utmost relief to which he was

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Undoubtedly the most frequent "fundamental error" encountered involves jurisdiction, i.e., a court acting where it had no jurisdiction to do so. *See* State v. Sunland Supply Co., 404 S.W.2d 316, 319 (Tex. Sup. 1966).

34. Jackson v. Fontaine's Clinics, Inc., 499 S.W.2d 87, 91 (Tex. Sup. 1973); Newman v. King, 433 S.W.2d 420, 422 (Tex. Sup. 1968); State v. Sunland Supply Co., 404 S.W.2d 316, 319 (1966); Kimbrough v. Walling, 371 S.W.2d 691, 694 (Tex. Sup. 1963); St. Paul Fire & Marine Ins. Co. v. Murphree, 163 Tex. 534, 541, 357 S.W.2d 744, 749 (Tex. Sup. 1962); Wagner v. Foster, 161 Tex. 333, 340, 341 S.W.2d 887, 892 (1960); Texas Co. v. State, 154 Tex. 494, —, 281 S.W.2d 83, 90 (1955); City of Deer Park v. State, 154 Tex. 174, —, 275 S.W.2d 77, 85 (1955).

35. *See* Trad v. General Crude Oil Co., 474 S.W.2d 183, 184 (Tex. Sup. 1971); City of San Antonio v. Munoz, 159 Tex. 436, 437, 321 S.W.2d 573 (1959).

36. TEX. R. CIV. P. 467.

37. Shell Petroleum Corp. v. Grays, 131 Tex. 515, 517-18, 114 S.W.2d 869, 870 (1938); *see* Trad v. General Crude Oil Co., 474 S.W.2d 183, 184 (Tex. Sup. 1971). The court's dismissal of the application for writ of error in *Trad* "w.o.j." indicates that appeal by a non-aggrieved party fails to invoke the supreme court's jurisdiction. *Id.* at 184.

entitled; and, thus, he is not aggrieved by the judgment of the court of civil appeals.

In some fact situations noticed later, he may obtain supreme court review of actual rulings on his remand points by assigning them as cross points in his answer to an application for writ of error by the opposing party, if one is filed.

A party is aggrieved by the judgment of a court of civil appeals if he is denied any part of the ultimate relief he seeks, and he *must* file an application for writ of error to obtain review of any such adverse ruling. Thus, if a party has obtained a severable judgment in the trial court which is affirmed in part and reversed in part by the court of civil appeals, or, if that court reduces the amount of the judgment, *each* party *must* file an application for writ of error if he wishes supreme court review of that part of the court of civil appeals judgment adverse to him; such review *cannot* be obtained by cross point in the respondent's answer.[38]

EXAMPLE

A has recovered judgment against B on a promissory note and in *quantum meruit*. B has before the court of civil appeals points of error which attack both items of recovery. The court overrules the points attacking the first item (the note), and affirms as to it, but it sustains the points which attack the second item (*quantum meruit*) and, as to it, reverses and renders judgment for B, or reverses and remands.

A *must* file an application for writ of error if he wishes review of the holding sustaining the points which attacked the *quantum meruit* recovery, and B *must* file an application if he wishes review of the holding overruling the points which attacked the recovery on the promissory note.

In addition to being "aggrieved" by a particular aspect of a judgment, one or both parties may be "aggrieved" by the *nature* of the judgment or the court of civil appeals' disposition of the case. In that event, they may be required to seek review by application for writ of error. For example, a court of civil appeals may have before it points of error which, if sustained, would require reversal of the trial court judgment and rendition of judgment in favor of the appealing party,

38. Tarver v. Tarver, 394 S.W.2d 780, 782 (Tex. Sup. 1965); Honea v. Lee, 163 Tex. 129, 130, 352 S.W.2d 717, 718 (1961); Wilson v. Wilson, 145 Tex. 607, 610, 201 S.W.2d 226, 227 (1947); Railroad Comm'n v. Mackhank Petroleum Co., 144 Tex. 393, 396, 190 S.W.2d 802, 803 (1945); Milliken v. Coker, 132 Tex. 23, 26, 115 S.W.2d 620, 621 (1938); Barnsdale Oil Co. v. Hubbard, 130 Tex. 476, 483, 109 S.W.2d 960, 963 (1937); West v. Carlisle, 111 Tex. 529, 533, 241 S.W. 471, 472 (1922).

as well as points of error which, if sustained, would require only a reversal and remand for another trial. If the court overrules the rendition points but sustains one or more of the remand points, both parties are *aggrieved* by the court's judgment.

In that situation, if the prevailing party (whose remand points were sustained) still wishes supreme court review of his rendition points, he *must* file an application for writ of error,[39] and, if the other party (against whom the case was reversed) wishes review of the reversal, he, too, must file an application for writ of error. Neither party may obtain review by cross point in their answer to the other's application for writ of error.[40]

EXAMPLE

A has obtained a judgment against B. B has before the court of civil appeals two points of error, one which seeks rendition of judgment on the ground that there is "no evidence" to support the judgment and one that seeks a new trial on the ground of jury misconduct. The court of civil appeals overrules the first point but sustains the second.

If B wishes supreme court review of the ruling on the "no evidence" point, he *must* file an application for writ of error. If A wishes review of the jury misconduct ruling, in an attempt to have the trial court judgment in his favor affirmed, he *must* file an application for writ of error.

A situation which frequently occurs in that context is one where a court of civil appeals, although it sustains the appealing party's points of error which would normally require rendition of judgment, nevertheless, for one reason or another, remands to the trial court. Although the prevailing party has been successful in sustaining a point which would normally entitle him to the utmost relief he sought, he is still aggrieved by the judgment of the court insofar as it disposes of the case. He *must* file an application to have that disposition reviewed,[41]

39. Pruitt v. Republic Bankers Life Ins. Co., 491 S.W.2d 109, 112 (Tex. Sup. 1973); Tennessee-Louisiana Oil Co. v. Cain, 400 S.W.2d 318, 326 (Tex. Sup. 1966); Isenhower v. Bell, 365 S.W.2d 354, 357 (Tex. Sup. 1963).

40. Sims v. Haggard, 162 Tex. 307, 313, 346 S.W.2d 110, 114 (1961); Sears, Roebuck & Co. v. Robinson, 154 Tex. 336, —, 280 S.W.2d 238, 240-41 (1955); Texas Employers' Ins. Ass'n v. Lightfoot, 139 Tex. 304, 308, 162 S.W.2d 929, 931 (1942); Cherry v. Farmers Royalty Holding Co., 138 Tex. 576, 582-83, 160 S.W.2d 908, 911 (1942); Vanover v. Henwood, 136 Tex. 348, 351-52, 150 S.W.2d 785, 787 (1941).

41. Pruitt v. Republic Bankers Life Ins. Co., 491 S.W.2d 109, 112 (Tex. Sup. 1973), *rev'g* 483 S.W.2d 686 (Tex. Civ. App.—Amarillo 1972).

and his opponent *must* file an application to have the reversal reviewed.[42]

EXAMPLE

A has obtained a judgment against B. On appeal, B's brief contains a point of error which asserts that his motion for judgment *non obstante veredicto* should have been granted. The court of civil appeals sustains that point but remands the cause to the trial court in the interest of justice on the theory that the case was not fully developed.

B *must* file an application for writ of error to obtain review of the court's action in remanding instead of rendering judgment. A *must* file an application if he wishes the reversal to be reviewed.

Conditional Applications

A conditional application for writ of error is one which seeks review of the judgment below only in the event an application by the opposing party is filed and granted. In situations where both parties are aggrieved by the judgment of the court of civil appeals,[43] it may be that the adverse feature of the judgment is of minor importance to the party who has otherwise prevailed in the court of civil appeals. Thus, he may not wish to file an application for fear it would cause the *entire* judgment, including the ruling favorable to him, to be overturned by the supreme court if his opponent should also file an application. That is a distinct risk because of the supreme court's policy of granting the applications of both parties where it appears that either of them should be granted. Conversely, he cannot obtain review of the ruling adverse to him without filing an application for writ of error. In that event, he should file a "conditional" application.[44]

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42. Jackson v. Ewton, 411 S.W.2d 715, 717 (Tex. Sup. 1967); Texas Employers' Ins. Ass'n v. Lightfoot, 139 Tex. 304, 308, 162 S.W.2d 929, 930-31 (1942).

43. Where both parties are aggrieved, each is required to file an application to obtain review of the ruling adverse to him.

44. A suggested statement which may be incorporated as a "Preliminary Statement" immediately before the "Statement of the Case" is:

PRELIMINARY STATEMENT

Petitioner would respectfully show the court that, although he is not satisfied with the entire judgment of the court of civil appeals, he is willing to accept it conditionally. Thus, petitioner requests that this application for writ of error be granted only in the event that an application for writ of error on behalf of [the opposing party] is filed herein and granted.

An appropriate prayer incorporating the same allegations may be added at the conclusion of the application. *See* TEX. R. CIV. P. 469(a).

While a "conditional" application conceivably could be utilized in any of the situations where both parties are aggrieved by some aspect of a court of civil appeals judgment, its use is most naturally suggested where a severable judgment has been affirmed in part and reversed in part by a court of civil appeals.

EXAMPLE

A has obtained a judgment against B for debt and attorneys' fees. The court of civil appeals affirms the recovery on the debt but reverses and renders as to the award of attorneys' fees.

Both A and B *must* file an application to obtain review of the ruling adverse to each. If A is willing to abide by the court of civil appeals judgment as a whole and wishes review of the ruling disallowing attorneys' fees *only* if the balance of the judgment favorable to him is reviewed, he *should* file a "conditional" application if B files an application.[45]

Judgments Supportable on Multiple, Independent Grounds

A court of civil appeals often sustains two or more points of error, or cross points of error, either of which would independently support its judgment. Therefore, a party appealing from a court of civil appeals judgment which is supportable on multiple, independent grounds *must* assign a point of error in his application which attacks each independent ruling by the court of civil appeals upon which its judgment may rest. If he does not do so, the application for writ of error must be denied, or the judgment below affirmed, regardless of how meritorious the points of error brought forward in the application may be. This is so because, even if the point or points in the application be sustained, there would still exist an independent, unchallenged basis for the judgment appealed from and the appealing party could not demonstrate "good cause" for favorable action on his application, nor could it be said that the erroneous ruling or rulings attacked in the application caused "the rendition of an improper judgment in the case."[46]

45. If A does not wish to prepare and file an application until he is sure that B is going to file one also, but B waits until the last day to do so, A may utilize the provisions of Rule 468 which states: "If any party files an application within the time specified, any other party who was entitled to file such an application within such time but failed to do so shall have ten days additional time within which to file it." TEX. R. CIV. P. 468.

46. TEX. R. CIV. P. 503; State Farm Ins. Co. v. Cowley, 468 S.W.2d 353, 354 (Tex. Sup. 1971); Life Ins. Co. v. First Nat'l Bank, 464 S.W.2d 362, 364 (Tex. Sup. 1971); Gillett v. Achterberg, 159 Tex. 591, 592, 325 S.W.2d 384, 385 (1959); City of Deer Park v. State, 154 Tex. 174, —, 275 S.W.2d 77, 85-86 (1954). *See also* Mid-

EXAMPLE

A obtains a judgment against B in a personal injury suit on the finding of negligence against B's servant. In the court of civil appeals, B attacks the judgment by points of error which assert that A had released the claim against him and that there is no evidence that his servant was in the course and scope of employment at the time of the accident with A. The court of civil appeals rules on, and sustains, *both* points, reverses the judgment of the trial court and renders judgment for B.

In his application for writ of error, A *must* attack by point of error the holding on *each* point sustained by the court of civil appeals, otherwise the supreme court is precluded from granting him any relief.

EXAMPLE

A obtains a judgment against B in a products liability case. B appeals to the court of civil appeals on two points, one which complains of the admissibility of certain testimony on the ground of hearsay and the other complaining of improper jury argument. The court of civil appeals rules on, and sustains, *both* points of error, holding that each probably caused the rendition of an improper judgment, reverses the trial court judgment, and remands for a new trial.

In his application for writ of error, A *must* attack *both* holdings by point of error, otherwise the supreme court cannot grant him any relief.

Where a court of civil appeals affirms, normally, a party may prevail in the supreme court by attacking any one of several points overruled below which would entitle him to a reversal, but the rule just stated may also apply to an affirmance if the trial court judgment rests upon independent grounds and the court of civil appeals affirms as to each.[47]

EXAMPLE

In A's suit against B to collect on a policy of insurance, B's motion for judgment *non obstante veredicto* is sustained on the dual grounds of a policy exclusion and the statute of limitations, and the judgment so states. The court of civil appeals affirms on both grounds.

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way Nat'l Bank v. West Texas Wholesale Supply Co., 453 S.W.2d 460, 461 (Tex. Sup. 1970); TEX. R. CIV. P. 467.

47. *See* Life Ins. Co. v. First Nat'l Bank, 464 S.W.2d 362, 364 (Tex. Sup. 1971); Midway Nat'l Bank v. West Texas Wholesale Supply Co., 453 S.W.2d 460, 461 (Tex. Sup. 1970).

Caution should be exercised in this situation, because one of two or more independent rulings which would support a court of civil appeals judgment (and thus *must* be attacked by application) may occur through such innocuous language as " 'we have severally considered every point of error presented to us and overrule all of them.' " Life Ins. Co. v. First Nat'l Bank, 464 S.W.2d 362, 364 (Tex. Sup. 1971). *But see* Shelton v. Standard Ins. Co., 389 S.W.2d 290, 291 (Tex. Sup. 1965).

In his application for writ of error, A *must* attack *both* grounds for affirmance or his appeal will be fruitless.

A variation of the foregoing rule, however, pertains to the type of fact situation first noticed in *McKelvy v. Barber*.[48] There, the trial court judgment rested upon two independent grounds, both of which were attacked by the appellant in the court of civil appeals. That court based its judgment on only *one* of the grounds, leaving the other undecided.[49] The supreme court held that in the application for writ of error it was necessary to attack only the single, independent ground upon which the court of civil appeals based its judgment.[50] The court noted, however, that the better practice is for the appealing party to attack both grounds in the application—*i.e.*, the court's affirmative ruling on the one ground and its failure to rule a particular way on the other.[51]

CONSIDERATION OF POINTS OF ERROR OVERRULED OR NOT DECIDED BY THE COURT OF CIVIL APPEALS

Formerly, when the supreme court reversed the judgment of a court of civil appeals, complex and confusing questions could arise concerning the supreme court's power and duty to consider and dispose of points of law overruled or not decided by an opinion of a court of civil appeals. Recent changes in the court's treatment of such points have, however, greatly simplified this problem. An analysis of this area can conveniently be divided into (1) situations where a court of civil appeals has reversed the trial court judgment and (2) those where it has affirmed.

Where the Court of Civil Appeals Has Reversed

When the supreme court rules that a court of civil appeals erred in reversing a trial court judgment, there are instances in which it *must* act and those where it *may* act in regard to points of law presented to, but not considered or overruled by, a court of civil appeals. When the supreme court overturns a court of civil appeals' reversal of a trial

48. 381 S.W.2d 59 (Tex. Sup. 1964).

49. If the court of civil appeals *reverses* and bases its judgment on one of several independent grounds urged by the appellant—either overruling or not deciding the others—the supreme court will automatically review the remaining grounds if it decides the court of civil appeals erred in its ruling, but the prevailing party should bring such grounds to the attention of the supreme court by cross points in the answer to the application for writ of error. *See* pp. 315-16, *infra*.

50. McKelvy v. Barber, 381 S.W.2d 59, 64-65 (Tex. Sup. 1964). *See also* Angelo v. Biscamp, 441 S.W.2d 524, 527 (Tex. Sup. 1969); Porter v. Wilson, 389 S.W.2d 650, 653 (Tex. Sup. 1965).

51. McKelvy v. Barber, 381 S.W.2d 59, 65 (Tex. Sup. 1964).

court judgment, the prevailing party in the court below (the appellant) is "entitled"[52] to have considered, and the supreme court is "required"[53] to examine the appellant's brief for, any points before the lower court in that brief which would require that the court of civil appeals' judgment be affirmed. If the supreme court finds such points, it *may* consider and rule on them itself, or if the points were not considered by the lower court, it *may* remand to the court of civil appeals for consideration and disposition of such points.[54] Generally, the court itself will dispose of the points,[55] although it reserves, and frequently exercises, the right to remand to the court of civil appeals for consideration of *all undecided* points which would require affirmance where one or more of them are within the court of civil appeals' exclusive jurisdiction.[56]

EXAMPLE

A obtains a judgment against B for negligent collision. B appeals to the court of civil appeals on points of error raising improper jury argument and jury misconduct. The court of civil appeals sustains the argument point, does not consider the misconduct point, and remands.

If the supreme court concludes that the court of civil appeals erred in sustaining the argument point, it is *required* to consider the misconduct point in the appellant's brief, and, if it finds the point meritorious, it will deny the application, or, if the application was granted, it will affirm the judgment below or, which is

52. Texas Employers' Ins. Ass'n v. Jones, 393 S.W.2d 305, 308 (Tex. Sup. 1965); Sims v. Haggard, 162 Tex. 307, 313, 346 S.W.2d 110, 114 (1961); Vanover v. Henwood, 136 Tex. 348, 351, 150 S.W.2d 785, 787 (1941).

53. King v. Skelly, 452 S.W.2d 691, 694 (Tex. Sup. 1970); Moulton v. Alamo Ambulance Serv., Inc., 414 S.W.2d 444, 449 (Tex. Sup. 1967); Isaacs v. Plains Transport Co., 367 S.W.2d 152 (Tex. Sup. 1963); Walker v. Texas Employers' Ins. Ass'n, 155 Tex. 617, 623, 291 S.W.2d 298, 302 (1956); Dallas Ry. & Terminal Co. v. Bailey, 151 Tex. 359, 366, 250 S.W.2d 379, 383 (1952).

54. McConnel Constr. Co. v. Insurance Co., 428 S.W.2d 659, 661 (Tex. Sup. 1968).

55. *See, e.g.*, Johnson v. American General Ins. Co., 464 S.W.2d 83 (Tex. Sup. 1971); King v. Skelly, 452 S.W.2d 691 (Tex. Sup. 1970); Leonard v. Texaco, Inc., 422 S.W.2d 160 (Tex. Sup. 1967); Bildon Farms, Inc. v. Ward County Water Improvement Dist. No. 2, 415 S.W.2d 890 (Tex. Sup. 1967); Moulton v. Alamo Ambulance Serv., Inc., 414 S.W.2d 444 (Tex. Sup. 1967); Isaacs v. Plains Transport Co., 367 S.W.2d 152 (Tex. Sup. 1963).

56. Custom Leasing, Inc. v. Texas Bank & Trust Co., 491 S.W.2d 869, 872 (Tex. Sup. 1973); Pruitt v. Republic Bankers Life Ins. Co., 491 S.W.2d 109, 112 (Tex. Sup. 1973); Penny v. Powell, 162 Tex. 497, 502, 347 S.W.2d 601, 604 (1961); Fritsch v. J.M. English Truck Line, Inc., 151 Tex. 168, 174, 246 S.W.2d 856, 860 (1952); Wood v. Kane Boiler Works, Inc., 150 Tex. 191, 201, 238 S.W.2d 172, 178 (1951); Ritchie v. American Sur. Co., 145 Tex. 422, 432, 198 S.W.2d 85, 91 (1946). *But see* King v. Skelly, 452 S.W.2d 691, 699 (Tex. Sup. 1970).

less likely, it will remand to the lower court for disposition of the point.

EXAMPLE

A obtains a judgment against B for breach of contract. B appeals to the court of civil appeals on points of error contending that the contract was unenforceable as a matter of law under the Statute of Frauds and for failure of consideration. The court of civil appeals sustains the Statute of Frauds point, and renders judgment for B without passing on the consideration point.

If the supreme court concludes that the court of civil appeals erred in its Statute of Frauds holding, it is *required* to examine the consideration point in the appellant's brief and will act accordingly as in the preceding example if it finds that point to be good.

In addition to the "affirmance" points which the supreme court *must* consider when it disagrees with a lower court's reversal, it may also rule on, or remand to the court of civil appeals to rule on any other point of error placed before but not considered by the lower court[57]—except in one critical instance: points of error before the court of civil appeals which would require that a judgment be entered, more favorable to the appellant than the one initially rendered by that court, cannot be considered by the supreme court. Such points must be brought to the supreme court by application for writ of error since the prevailing party in the court of civil appeals, appellant, is "aggrieved" by such points not sustained.[58]

EXAMPLE

A obtains a judgment against B. B's appeal to the court of civil appeals includes one point of error contending that his motion for directed verdict should have been sustained, one point

57. Johnson v. Pacific Employers Indem. Co., 439 S.W.2d 824, 829-30 (Tex. Sup. 1969); McKelvy v. Barber, 381 S.W.2d 59, 64-65 (Tex. Sup. 1964).

58. Pruitt v. Republic Bankers Life Ins. Co., 491 S.W.2d 109, 112 (Tex. Sup. 1973); Jackson v. Ewton, 411 S.W.2d 715, 718 (Tex. Sup. 1967); Tennessee-Louisiana Oil Co. v. Cain, 400 S.W.2d 318, 326 (Tex. Sup. 1966); Isenhower v. Bell, 365 S.W.2d 354, 357 (Tex. Sup. 1963); Pan American Fire & Cas. Co. v. Trammell, 159 Tex. 627, 628, 325 S.W.2d 383, 384 (1959); Texas Employers' Ins. Ass'n v. Lightfoot, 139 Tex. 304, 308, 162 S.W.2d 929, 931 (1942); Cherry v. Farmers Royalty Holding Co., 138 Tex. 576, 582-83, 160 S.W.2d 908, 911 (1942); Vanover v. Henwood, 136 Tex. 348, 352, 150 S.W.2d 785, 787 (1941).

In Pon Lip Chew v. Gilliland, 398 S.W.2d 98, 103 (Tex. Sup. 1966) and Reed v. Buck, 370 S.W.2d 867, 874 (Tex. Sup. 1963), the supreme court ruled on points of the prevailing party, in his brief in the court of civil appeals, which would have required the entry of judgment more favorable to that party. Under the rules discussed herein, it would seem that such points should have been brought forward in an application for writ of error, and the propriety of the court's consideration of them is doubtful.

complaining of the admission of evidence, and one point complaining of overruling his objections and exceptions to the charge. The court of civil appeals overrules the point on the motion for instructed verdict, sustains the point regarding the admission of evidence, does not consider (or overrrules) the remaining point, and reverses and remands.

If the supreme court disagrees with the court of civil appeals' holding, it will *not* look to the appellant's brief and consider the point relating to the motion for instructed verdict since that point, if sustained, would result in a judgment more favorable to the appellant. That point *must* be brought forward in an application for writ of error. The court will, however, consider the point in the appellant's brief concerning the charge of the court to see if that point could form the basis for an affirmance of the court of civil appeals judgment.

Prior to *McKelvy v. Barber*[59] the rule required that the prevailing party in the court of civil appeals bring forward by application for writ of error or cross point in the answer *any* point of error overruled or not considered by the court of civil appeals which would lead to a modification or reversal of the court of civil appeals judgment, without regard to whether the point would result in a judgment more favorable or less favorable to the prevailing party. If that were not done, the point was deemed to have been waived, not only for review by the supreme court but also for any further review by the court of civil appeals in the event of a remand to that court.[60] *McKelvy* amended that rule to the extent of eliminating the necessity of preserving by cross point any *unconsidered* point of error which would result in a judgment *less favorable* to the prevailing party in the court of civil appeals,[61] while leaving intact the requirement that overruled or unconsidered points of error, which would require a *more favorable* judgment, must be brought forward by application for writ of error.[62]

59. 381 S.W.2d 59 (Tex. Sup. 1964).

60. *See, e.g.*, Jecker v. Western Alliance Ins. Co., 369 S.W.2d 776, 782 (Tex. Sup. 1963); Maddox v. Maxwell, 369 S.W.2d 343, 348 (Tex. Sup. 1963); Rogers v. Winters, 161 Tex. 451, 455, 341 S.W.2d 417, 420 (1960).

61. In Great American Ins. Co. v. Sharpstown State Bank, 460 S.W.2d 117 (Tex. Sup. 1970), the court applied the pre-*McKelvy* rule which required the preservation by cross points of unconsidered points of error that would give a less favorable judgment to the prevailing party below. On its face, it appears to be contrary to *McKelvy*. *Id.* at 122-23.

62. Note, however, that in Pruitt v. Republic Bankers Life Ins. Co., 491 S.W.2d 109 (Tex. Sup. 1973), the failure to bring forward by application for writ of error an *unconsidered* point, that would have required the entry of a more favorable judgment for the prevailing party below, while it precluded the supreme court from considering the point, was not deemed by the court as a waiver of it. Therefore, the court of civil appeals could not consider the point upon remand of the cause to it. *Id.* at 112.

Where the court of civil appeals has affirmed

If the supreme court disagrees with a ruling of a court of civil appeals, it will look to the reply points in the appellee's brief to determine if there are any points presented which would require that the court of civil appeals judgment be affirmed. If such points exist, the court will dispose of them in the same manner as it does where the court of civil appeals has reversed the trial court.[63]

Similarly the court may consider any other points in the appellee's brief (generally the appellee's "cross points")[64] which would result in a judgment less favorable to the appellee than that entered by the court of civil appeals.[65] The court's disposition of such points, if there are any, is the same as in the situation where the court of civil appeals has reversed the trial court.[66]

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63. *See* Sobel v. Jenkins, 477 S.W.2d 863, 867 (Tex. Sup. 1972); Texas Gas Util. Co. v. Barrett, 460 S.W.2d 409, 413 (Tex. Sup. 1970); Ford v. Culbertson, 158 Tex. 124, 139, 308 S.W.2d 855, 865 (1958); Driver v. Worth Constr. Co., 154 Tex. 66, —, 273 S.W.2d 603, 606-607 (1954).

The assignment of reply points in an appellee's brief is not jurisdictional in the sense that such points are absolutely necessary, and it frequently happens that no brief at all is filed on behalf of an appellee. Is the supreme court limited to considering an appellee's reply points in this situation? It was so suggested in Ford v. Culbertson, 158 Tex. 124, 139, 308 S.W.2d 855, 865 (1958). But the requirement of Rule 501 that the court render that judgment which the court of civil appeals should have rendered would seem to give the supreme court broad license to consider any theory apparent on the face of the record by which the judgment below could be affirmed, and in at least one recent case, Texas Gas Util. Co. v. Barrett, 460 S.W.2d 409, 417 (Tex. Sup. 1970), the court did consider a point of affirmance, suggested by respondent, which was not in its appellee's brief. It is doubtful, however, whether the court is disposed to search the record for points of affirmance in this instance, which underscores the wisdom of a judicious usage of cross points by the respondent as suggested in pp. 321-22, *infra*.

64. In Dennis v. Royal Indem. Co., 410 S.W.2d 185 (Tex. Sup. 1966), Dennis recovered a workmen's compensation judgment for less than he would have liked; but, so far as the record shows, he did not file a motion for new trial or otherwise appeal from the judgment. Instead, he attempted by cross point, in his appellee's brief, to have the judgment set aside because of an alleged irreconcilable conflict in the verdict which he raised in the trial court by motion for mistrial. The court of civil appeals affirmed without ruling on Dennis' cross point, and Dennis brought the same complaint forward by two cross points in his answer to Royal Indemnity's application for writ of error. The supreme court held that error embodied in those cross points should have been brought forward in an application for writ of error because it "would lead to a modification of the judgment of the Court of Civil Appeals." *Id.* at 187.

65. Sobel v. Jenkins, 477 S.W.2d 863, 867 (Tex. Sup. 1972).

66. *See* Johnson v. Pacific Employers Indem. Co., 439 S.W.2d 824, 829-30 (Tex. Sup. 1969); McKelvy v. Barber, 381 S.W.2d 59, 64-65 (Tex. Sup. 1964).

CROSS POINTS

The Necessity for Cross Points

A natural question arises in the wake of *McKelvy v. Barber*: is there now any type of point which, on the penalty of waiver, *must* be preserved for supreme court review by assignment in a cross point in a respondent's answer to an application for writ of error?

An abundantly cautious answer to that question is *yes*. In *McKelvy*, the court was concerned principally with questions of law which were not considered by the court of civil appeals. In modifying the previous requirement that a respondent *must* preserve by cross point any question of law which would result in an alteration of the court of civil appeals' judgment to one less favorable to the respondent, it appears that the supreme court meant to dispense with such requirement where a court of civil appeals actually overrules such a point.[67] In *Jecker v. Western Alliance Insurance Co.*,[68] one of the cases overruled by *McKelvy*, the supreme court did just that. One of the points held to have been waived for failure to bring it forward as a cross point was one that had been specifically overrruled by the court of civil appeals; the other point was not considered.

A critical distinction is necessary between an actual ruling by a court of civil appeals and its failure to rule. There is much more justification for requiring a litigant to act affirmatively to preserve error in regard to an actual ruling by a court of civil appeals than there is where the court has failed to rule, and that distinction is implicit in the philosophy which underlies *McKelvy*.

Until a clear affirmation of the supreme court's position appears, it is suggested that the cautious appellate practitioner deem preservation of error by cross point in the supreme court to be absolutely necessary (1) where a court of civil appeals has sustained an appellant's rendition points but has also specifically overruled one or more of his remand points, and (2) where a court of civil appeals has affirmed but has specifically overruled an appellee's cross point.[69]

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67. McKelvy v. Barber, 381 S.W.2d 59, 64-65 (Tex. Sup. 1964).

68. 369 S.W.2d 776, 782 (Tex. Sup. 1963).

69. Although it is beyond the scope of this article to discuss the various types of permissible cross points in a court of civil appeals, cross points can serve various functions in an appellee's brief. Where one does have cross points before a court of civil appeals and they are either overruled or not considered, he must come to terms with the holding in Dennis v. Royal Indem. Co., 410 S.W.2d 185, 187 (Tex. Sup. 1966), which—although questioned herein—did hold that the type of cross points involved

EXAMPLE

A obtains a judgment from B. B has before the court of civil appeals a point of error which contends that his motion for instructed verdict should have been sustained and a point which complains of the admission of testimony. The court of civil appeals sustains the point relative to the instructed verdict but, also, specifically overrules the point concerning the admissibility of testimony.

As respondent in the supreme court, A should assign as a cross point the court of civil appeals' adverse ruling on the evidence question.

There is one relatively common situation in which the general rules regarding the supreme court's treatment of points of error not considered below do not apply. If a court of civil appeals dismisses an appeal for any reason, the supreme court, in overturning the dismissal, will not attempt to dispose of the case on merits not considered by the court of civil appeals; the only judgment the supreme court can enter is one which reverses the court of civil appeals and orders the cause reinstated on the lower court's docket for disposition on the merits.[70]

Practical Usage of Cross Points

Although *McKelvy* eliminated many of the instances in which it was necessary to assign cross points, their usage is still commended and encouraged by the supreme court. The practitioner should consider utilizing cross points in these situations:

(1) To bring to the court's attention any independent ground of recovery not considered or overruled by the court of civil appeals that would require its judgment be affirmed;

(2) to call to the court's attention any other points of error or cross points which the respondent had before but were not considered by the court of civil appeals that would require a less favorable judgment be entered in respondent's favor; and

(3) to inform the court of any points of error or cross points which respondent had before the court of civil appeals within that court's exclusive jurisdiction.

Doing so will prompt a more efficient dispatch of the case by the

there had to be brought forward by application for writ of error, rather than by cross point in the answer to the application.

70. Simon v. L.D. Brinkman & Co., 459 S.W.2d 190, 194 (Tex. Sup. 1970); North East Independent School Dist. v. Aldridge, 400 S.W.2d 893, 898 (Tex. Sup. 1966); Bay v. Mecom, 393 S.W.2d 819, 821 (Tex. Sup. 1965); Hunt v. Wichita County Water Improvement Dist. No. 2, 147 Tex. 47, 50-51, 211 S.W.2d 743, 744-45 (1948).

supreme court by saving it the time and trouble of combing the briefs of the appealing parties for such points, and it will prevent any such points from being overlooked in the court's disposition of the case.

If it can be done with an economy of briefing, cross points should be briefed and argued in the answer to the application for writ of error so that the court may have the benefit of all argument and authority in one brief. If re-briefing the points would unduly lengthen the answer, it is permissible for counsel to cite the court to particular argument in his brief below.[71]

No Evidence and Insufficient Evidence Points of Error

Points of error which assert that there is "no evidence" to support either answers to special issues, findings by the trial court, or findings implied in support of a judgment are not the same as points of error which assert that such findings are not supported by "factually sufficient" evidence or that they are "so against the great weight and preponderance of the evidence as to be unjust."[72] "No evidence" points include neither "factual insufficiency" points nor "weight and preponderance" points.[73] Because the two types of points are so different they command different preservation for review, consideration and disposition by the appellate courts.

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71. The following form, to be included immediately after the statement of respondent's reply points, is suggested:

CROSS POINTS

In the event the court is of the opinion that the judgment of the court of civil appeals cannot be sustained on its stated basis, respondent respectfully directs the court's attention to the following points of error, which were also before the court of civil appeals, in so far as they may affect this court's disposition of the judgment below:

* * * * * * * * * * * * *

Since a full presentation of those points would unduly lengthen this brief, respondent adopts the argument thereon made in its brief below and refers the court to the following pages therein wherein such argument and authorities may be found.

72. Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. Sup. 1965); *In re* King's Estate, 150 Tex. 662, 665, 244 S.W.2d 660, 661 (1952); *see* Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error,* 38 Texas L. Rev. 361 (1960); Garwood, *The Question of Insufficient Evidence on Appeal,* 30 Texas L. Rev. 803 (1952).

73. Parker Petroleum Co. v. Laws, 150 Tex. 430, 432-33, 242 S.W.2d 164, 165 (1951); Wisdom v. Smith, 146 Tex. 420, 425, 209 S.W.2d 164, 166 (1948); Liberty Film Lines v. Porter, 136 Tex. 49, 52-53, 146 S.W.2d 982, 986-87 (1941); Ochoa v. Winrich Motor Sales Co., 127 Tex. 542, 552, 94 S.W.2d 416, 421 (1936); Hall Music Co. v. Robinson, 117 Tex. 261, 262-63, 1 S.W.2d 857 (1928).

For a more detailed consideration of the nature of "no evidence" and "insufficient evidence" points of error and the appellate court's treatment of the same, see Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error,* 38 Texas L. Rev. 361 (1960).

Preservation for Review

A party appealing from a trial court judgment who desires review of the state of the evidence to support the judgment must follow the required procedure. He must lay the proper predicate at the trial stage,[74] and assign in his brief in the court of civil appeals a point or points which specifically assert that there is "no evidence" to support each vital finding attacked, or that such findings are not supported by "factually sufficient" evidence, or that they are "so against the great weight and overwhelming preponderance of the evidence as to be unjust."[75]

The appellate advocate should be vigilant, however, to distinguish between an evidentiary attack upon an affirmative finding of a vital fact and an attack upon a failure to find such a fact. For example, a jury's failure to answer a special issue affirmatively is not an affirmative finding of the converse of the fact submitted in the issue (*e.g.*, the jury's failure to find that one of the parties kept an improper lookout is not a finding that such party kept a proper lookout); such an answer is merely a refusal by the jury to find that the vital fact was proved by a preponderance of the evidence.[76] As such, a failure to find a vital fact does not need evidence to support it,[77] and, technically, it cannot be attacked by a "no evidence" point—although a point so contending would probably be treated as sufficient, since the question presented is a spurious or hybrid "no evidence" point.[78] At any rate, judicially recognized attacks upon a failure of a trier of fact to affirmatively find an ultimate fact are (1) that the fact is established "conclusively," or "as a matter of law," and/or (2) that the failure to find is so against the great weight and overwhelming preponderance

74. City of Austin v. Daniels, 160 Tex. 628, 636, 335 S.W.2d 753, 758-59 (1960).

75. Wisdom v. Smith, 146 Tex. 420, 424-25, 209 S.W.2d 164, 166 (1948).

Each finding or special issue alleged to be sufficient in the evidence should be attacked by its own separate point of error shown to be related to a procedural step where the evidentiary question was preserved. TEX. R. CIV. P. 418(b). Two or more findings should not be attacked by one point of error, nor should a point of error combine different grounds of attack (*i.e.*, "no evidence" and "insufficient evidence"), lest they be treated as multifarious by the court of civil appeals. Heldt v. McCreary, 399 S.W.2d 181, 184 (Tex. Civ. App.—Corpus Christi 1966, no writ); J. Weingarten, Inc. v. Benavides, 323 S.W.2d 166, 171 (Tex. Civ. App.—Texarkana 1959, no writ). It is permissible, however, to argue the points together in the brief. Biggers v. Continental Bus System, Inc., 157 Tex. 351, 365, 303 S.W.2d 359, 368 (1957).

76. C. & R. Transport, Inc. v. Campbell, 406 S.W.2d 191, 194 (Tex. Sup. 1966).

77. Smith v. Safeway Stores, Inc., 433 S.W.2d 217, 218-19 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

78. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEXAS L. REV. 361, 363-64 (1960).

of the evidence as to be unjust.[79] The supreme court would have jurisdiction to review the former because it is clearly a question of law,[80] but not the latter which is purely a question of fact.[81]

Disposition by the Court of Civil Appeals

Where the only point of error before a court of civil appeals is a true "no evidence" point of error, *and* the point is related to a procedural step which would entitle the appealing party to rendition of judgment,[82] normally[83] the court of civil appeals can only reverse and render judgment for the prevailing party.[84] If, instead, the court of civil appeals reverses and *remands* when it sustains a "no evidence" point, both parties are aggrieved by the judgment and, if willing to risk the possibility of a more adverse judgment, either may obtain supreme court review by application for writ of error.[85] That is the only method by which such review can be secured.[86]

The situation just mentioned should be carefully distinguished from

79. Smith v. Safeway Stores, Inc., 433 S.W.2d 217, 218-19 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); Ross v. Sher, 483 S.W.2d 297, 299 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.); Conrey v. McGehee, 473 S.W.2d 617, 622 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.).

80. Wisdom v. Smith, 146 Tex. 420, 424-25, 209 S.W.2d 164, 166 (1948).

81. Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. Sup. 1965).

82. TEX. R. CIV. P. 324; Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEXAS L. REV. 361, 362-63 (1960).

83. An exception exists in that portion of Rule 434 which states:

> When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for new trial.

TEX. R. CIV. P. 434. The supreme court has the same authority under Rule 504. *See* Jackson v. Hall, 147 Tex. 245, 247-48, 214 S.W.2d 458, 458-59 (1948); London Terrace, Inc. v. McAlister, 142 Tex. 608, 612-13, 180 S.W.2d 619, 620-21 (1944); Maupin v. Chaney, 139 Tex. 426, 432, 163 S.W.2d 380, 384 (1942). That power, however, may not be exercised unless the court of civil appeals first finds error in the trial court judgment and reverses. United States Fire Ins. Co. v. Carter, 473 S.W.2d 2, 3 (Tex. Sup. 1971).

When an appellate court should and should not exercise the power to remand to the trial court under Rules 434 and 504 is more fully discussed in Calvert, ". . . *In the Interest of Justice.*", 4 ST. MARY'S L.J. 291 (1972).

84. National Life & Accident Ins. Co. v. Blagg, 438 S.W.2d 905, 909 (Tex. Sup. 1969); Jackson v. Ewton, 411 S.W.2d 715, 717 (Tex. Sup. 1967).

85. *See, e.g.*, TEX. CONST. art. V § 3; TEX. R. CIV. P. 476; TEX. REV. CIV. STAT. ANN. art. 1728 (1962); Waisath v. Lack's Stores, Inc., 474 S.W.2d 444, 448 (Tex. Sup. 1971); Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. Sup. 1965).

86. Pruitt v. Republic Bankers Life Ins. Co., 491 S.W.2d 109, 112 (Tex. Sup. 1973), *rev'g* 483 S.W.2d 686 (Tex. Civ. App.—Amarillo 1972); Jackson v. Ewton, 411 S.W.2d 715, 717 (Tex. Sup. 1967); Texas Employers' Ins. Ass'n v. Lightfoot, 139 Tex. 304, 308, 162 S.W.2d 929, 930-31 (1942).

the one where a "no evidence" point of error assigned by the appellant is preserved for review *only* in a motion for new trial. Since *Rosas v. Shafer*[87] it is settled that such a point of error is valid, in the sense that it does not have to be related to a procedural step which seeks rendition of judgment,[88] but, if sustained by a court of civil appeals, it will entitle the prevailing party only to a remand for a new trial.[89] Since a "no evidence" point does pose a question of law per se, the supreme court would have jurisdiction to review a "no evidence" point preserved only in a motion for new trial,[90] but it, too, could only remand, if it sustained the point, since the procedural step to which the point relates is only one which seeks a new trial.

Where the only point of error before a court of civil appeals is an "insufficient evidence" point or a "weight and preponderance" point, the court may only affirm or reverse and remand;[91] the supreme court has no jurisdiction to review either action.[92] Either party may have the ruling of the court of civil appeals on a "no evidence" point reviewed by the supreme court.[93]

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87. 415 S.W.2d 889 (Tex. Sup. 1967).

88. *See* Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error,* 38 TEXAS L. REV. 361, 362 (1960).

89. Gillespey v. Sylvia, 496 S.W.2d 234, 235 (Tex. Civ. App.—El Paso 1973, no writ); State v. Wilson, 439 S.W.2d 134, 140 (Tex. Civ. App.—Tyler 1969, no writ).

90. Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. Sup. 1965).

91. Woods v. Townsend, 144 Tex. 594, 599-600, 192 S.W.2d 884, 886 (1946); Childre v. Casstevens, 148 Tex. 297, 299-300, 224 S.W.2d 461, 462 (1949); San Antonio & A.P. R.R. v. Choate, 35 S.W. 180, 181 (Tex. Civ. App.), *rev'd,* 90 Tex. 82, 35 S.W. 472 (1896). (This last case has an interesting history in marking the jurisdictional boundaries between the courts of civil appeals and the supreme court.)

92. TEX. CONST. art. V, § 6; Johnson v. American Gen. Ins. Co., 464 S.W.2d 83, 87 (Tex. Sup. 1971); Hammer v. Dallas Transit Co., 400 S.W.2d 885, 889 (Tex. Sup. 1966); St. Louis Southwestern Ry. v. Gregory, 387 S.W.2d 27, 29 (Tex. Sup. 1965); Childre v. Casstevens, 148 Tex. 297, 299-300, 224 S.W.2d 461, 462 (1949); Long v. Long, 133 Tex. 623, 624, 138 S.W.2d 798 (1939); Electric Express & Baggage Co. v. Ablon, 110 Tex. 235, 242, 218 S.W. 1030, 1034 (1920).

93. Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. Sup. 1965). To determine whether a point of error is a "no evidence" point or a "factually insufficient" evidence point or a "great weight" point, the reviewing court will look beyond the strict wording of the point and consider the procedural steps to which the point is related, the context out of which it arises, the court's disposition (reversal or remand) in response to the point, and the statement and argument under it. *See* Gleason v. Davis, 155 Tex. 467, 470-71, 289 S.W.2d 228, 230-31 (1956); Woodward v. Ortiz, 150 Tex. 75, 79-80, 237 S.W.2d 286, 292 (1951); Fambrough v. Wagley, 140 Tex. 577, 585, 169 S.W.2d 478, 482 (1943); Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error,* 38 TEXAS L. REV. 361, 362 (1960).

Significant confusion in this regard can be eliminated if counsel would employ standard designations to describe the varying states of evidence at issue, such as those tacitly suggested in Garza v. Alviar, 395 S.W.2d 821 (Tex. Sup. 1965): "no evidence" or "no legally sufficient evidence" to designate a total lack of evidence to support a vital finding; "established as a matter of law" to denote a contention that a given fact is con-

Disposition by the Supreme Court

If the only point before a court of civil appeals is treated as a "no evidence" point, and the supreme court reverses the lower court's holding thereon, its disposition of the case is simple. It renders judgment, or affirms a lower court's judgment, for the party entitled to prevail on the state of the evidence as found by the supreme court.[94] But, if a court of civil appeals has before it both "no evidence" and "insufficient evidence" points of error, it may sustain the "no evidence" point, leaving other factual points undecided. When the supreme court has reversed that type of holding, its manner of disposition of the cause has varied over the years.

Prior to January of 1971, the supreme court's standard practice in such situations was to presume that, having found "no evidence" to support the judgment, the court of civil appeals would also find the evidence to support it "factually insufficient" or against the "weight and preponderance" of the evidence; thus, its policy was to remand the case directly to the trial court for a new trial,[95] unless the case had been reviewed below on an erroneous legal theory, in which event the court remanded to the court of civil appeals for assessment of the "factual insufficiency" or "weight and preponderance" points under the proper theory.[96] That procedure was adopted in 1954 in the opinion *Barker v. Coastal Builders, Inc.*,[97] when the supreme court was squarely confronted with a choice between its own conflicting opinions on the matter.[98]

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clusively established in the evidence; "factually insufficient evidence" to describe evidence alleged to be too weak factually to support a vital finding; and "against the great weight and overwhelming preponderance of the evidence as to be unjust" where the balance of evidence against the finding is at issue. *Id.* at 823.

94. Enloe v. Barfield, 422 S.W.2d 905, 908 (Tex. Sup. 1967).

95. First Nat'l Bank v. Thomas, 402 S.W.2d 890, 894 (Tex. Sup. 1966); Great American Ins. Co. v. Langdeau, 379 S.W.2d 62, 74 Tex. Sup. 1964); Gulf, Colo. & S.F. Ry. v. Deen, 158 Tex. 466, 471, 312 S.W.2d 933, 938, *cert. denied*, 358 U.S. 874 (1958); Hopson v. Gulf Oil Corp., 150 Tex. 1, 10, 237 S.W.2d 352, 358 (1951); Bowman v. Puckett, 144 Tex. 125, 134, 188 S.W.2d 571, 575 (1945).

96. Johnson v. Pacific Employers Indem. Co., 439 S.W.2d 824, 829 (Tex. Sup. 1969); Motsenbocker v. Wyatt, 369 S.W.2d 319, 325 (1963); Perry v. National Bank, 161 Tex. 340, 346, 340 S.W.2d 483, 487-88 (Tex. Sup. 1960); Hubacek v. Ennis State Bank, 159 Tex. 166, 175, 317 S.W.2d 30, 35 (1958); Vasquez v. Meaders, 156 Tex. 28, 35-36, 291 S.W.2d 926, 930-31 (1956); Porter v. Puryear, 258 S.W.2d 182 (Tex. Civ. App.—Amarillo 1953), *aff'd*, 153 Tex. 82, 262 S.W.2d 933, *set aside & rev'd*, 153 Tex. 82, 92, 264 S.W.2d 689, 690 (1954).

97. 153 Tex. 540, 271 S.W.2d 798 (1954).

98. *See* Long v. Long, 133 Tex. 96, 103, 125 S.W.2d 1034, 1038 (1939); Henry v. Kirby Lumber Co., 110 Tex. 218, 218 S.W. 363 (1920).

In January of 1971, however, that policy was abandoned by the decision in *Stanfield v. O'Boyle*[99] in favor of the policy of remanding to the court of civil appeals in *every* case for disposition of any "factual insufficiency" or "weight and preponderance" points not decided in its original opinion. The court believes justice to be more adequately served by that procedure. In its decisions, the supreme court often changes existing law, discusses the relevance of evidence under the controlling principles of law, rules upon the admissibility of evidence, discusses or decides such things as burden of proof, standards of review, and measure of damages—all of which could bear upon the relevance or weight given certain evidence.[100] Remanding to the court of civil appeals thus serves the ends of justice by permitting the intermediate court to exercise its exclusive fact finding jurisdiction in light of the exemplification in the supreme court's opinion.[101]

The supreme court has not yet indicated what disposition it will make when a court of civil appeals sustains "no evidence" points but also affirmatively sustains "factual insufficiency" or "weight and preponderance" points contingent upon its "no evidence" holding being reversed by the supreme court. The supreme court could remand directly to the trial court, although the presence in the supreme court's opinion of one or more of these factors would also justify remanding to the court of civil appeals so that it could reassess the factual questions in light of the supreme court's opinion.[102]

MULTIPLE POINT PROBLEMS

The principles and rules of decisions discussed heretofore essentially define the "ground rules" under which the supreme court exercises its appellate jurisdiction on application for writ of error. When a court of civil appeals has before it and rules upon only one point of error, the problems of supreme court review are relatively simple. But when appeals are prosecuted upon, and a court of civil appeals rules upon, multiple points of error supreme court review can become complex.

99. 462 S.W.2d 270, 272-73 (Tex. Sup. 1971).

100. See, for example, Sears, Roebuck & Co. v. Duke, 441 S.W.2d 521, 524 (Tex. Sup. 1969); Puryear v. Porter, 153 Tex. 82, 92-93, 264 S.W.2d 689, 690 (1954); Woods v. Townsend, 144 Tex. 594, 601-602, 192 S.W.2d 884, 887-88 (1946).

For other discussions of considerations in support of the supreme court's current policy, see the dissenting opinion in Barker v. Coastal Builders, Inc. 153 Tex. 540, 556-63, 271 S.W.2d 798, 808-12 (1954) (Calvert, J., dissenting).

101. *See* Dyess v. Connecticut Gen. Life Ins. Co., 463 S.W.2d 724, 729 (Tex. Sup. 1971).

102. *See* Puryear v. Porter, 153 Tex. 82, 92-93, 264 S.W.2d 689, 690 (1954).

An attempt is made in the following paragraphs to correlate the ground rules to multiple-point problems in the following situations in which they are most frequently encountered:

(A) Where a court of civil appeals has before it two or more points of error each of which advances a separate ground for reversing a trial court's judgment and *rendering* judgment for the appellant;

(B) Where a court of civil appeals has before it two or more points of error each of which advances a separate ground for reversing a trial court's judgment and *remanding* the case for a new trial; and

(C) Where a court of civil appeals has before it two or more points of error which advance separate grounds for reversing and rendering judgment for the appellant and two or more points of error which advance separate grounds for *reversing* and *remanding* for a new trial.

The procedural steps which litigants *must* or *should* discharge in response to a court of civil appeals ruling in order to properly invoke and obtain supreme court review in these situations are dependent upon the rulings made (or not made) by a court of civil appeals and the judgment that that court enters. The course of action which a particular party *must* or *should* take to review a court of civil appeals holding and judgment in given situations is based upon the principles already discussed and the decisions previously cited. To simplify the problems in the following examples it will be assumed that X has obtained a trial court judgment against Y for all relief sought and that Y has perfected an appeal to a court of civil appeals so as to create the three appellate situations under examination.

(A) Rendition points

Y's brief contains two or more points of error each of which advances a separate ground for reversal of the trial court's judgment and rendition of judgment for Y:

1. If the court of civil appeals overrules all of Y's points of error and affirms the judgment of the trial court, Y *must* file an application for writ of error, and the application *must* contain points of error which challenge *each* ruling or Y will be held to have waived or abandoned any points not brought forward and review will be limited to those points presented in the application.

2. If the court of civil appeals overrules some of Y's points of error and affirms without considering the balance of his points, Y *must* file an application for writ of error and the application *must* assign

points of error which challenge the court of civil appeals holding on *each* of the points overruled by the court and each of the points not considered by it as well. Otherwise, Y will be held to have waived any of the points not brought forward and review will be limited to those points preserved in the application.

3. If the court of civil appeals sustains all of Y's points of error, reverses the judgment of the trial court, and renders judgment for Y, X *must* file an application for writ of error, and the application *must* contain points of error which challenge the court of civil appeals' ruling on *each* point, or the application will be denied.

4. If the court of civil appeals sustains some of Y's points of error and overrules or fails to decide the others, reverses the trial court's judgment, and renders judgment for Y, X *must* file an application for writ of error, and the application *must* contain points of error which challenge *each* ruling that sustains a point of error, or the application will be denied. Y, in his answer to the application, should bring forward by cross points for the supreme court's consideration each overruled or undecided point of error so they will not be overlooked by the supreme court in its disposition of the case.

5. If the court of civil appeals sustains one or more of Y's points of error, but reverses and remands instead of rendering judgment for Y, Y *must* file an application for writ of error challenging the court of civil appeals' disposition of the case, and if X wishes an affirmance of the trial court judgment in his favor, he *must* file an application for writ of error, and the application *must* contain points of error which attack *each* ruling by the court of civil appeals which sustains one of Y's points of error.

(B) Remand points

Y's brief contains two or more points of error each of which advances a separate ground for reversal of the trial court's judgment and remand of the case for a new trial.

1. If the court of civil appeals overrules all of Y's points of error and affirms the trial court judgment, Y *must* file an application for writ of error, and the application *must* contain points of error which challenge *each* ruling by the court of civil appeals, or he will be held to have waived or abandoned those points not brought forward, and supreme court review will be limited to those points brought forward.

2. If the court of civil appeals sustains all of Y's points, reverses the judgment of the trial court, and remands for a new trial, X *must*

file an application for writ of error, and the application *must* contain points of error which challenge *each* ruling by the court of civil appeals or the application will be denied.

3. If the court of civil appeals sustains some of Y's points of error and overrules or fails to decide the others, and reverses the judgment of the trial court and remands for new trial, X *must* file an application for writ of error, and the application *must* contain points of error which challenge *each* ruling that sustains one of Y's points of error. In order to aid the court in its disposition of the case should X's application for writ of error be granted, Y *should* assign cross points in his answer to the application which bring forward for review each overruled and each undecided point he had before the court of civil appeals.

(C) Combined rendition and remand points

Y's brief contains two or more points of error which assert independent grounds for reversing the judgment of the trial court and rendering judgment in his favor and two or more points of error which assert independent grounds for reversing the judgment of the trial court and remanding for a new trial.

1. If the court of civil appeals overrules all of Y's points of error and affirms the judgment of the trial court, Y *must* file an application for writ of error to obtain supreme court review. If Y wishes to pursue his efforts to have the trial court's judgment reversed and judgment rendered in his favor or, alternatively, to have the judgment reversed and the cause remanded for a new trial, his application *must* contain points of error which challenge the overruling of *each* rendition and *each* remand point; otherwise, he will be held to have waived or abandoned those points not brought forward, and review will be limited to those points brought forward.

2. If the court of civil appeals sustains all of Y's rendition points and fails to consider any of his remand points, reverses the judgment of the trial court and renders judgment for Y, X *must* file an application for writ of error, and the application *must* contain points of error which challenge each ruling by the court of civil appeals that sustains one of Y's rendition points or the application will be denied. If the supreme court disagrees with the holding of the court of civil appeals, it will consider and dispose of the undecided remand points in Y's brief before the court of civil appeals even though they are not brought forward as cross points in Y's answer to the application for writ of

error. Therefore, Y *should* assign his remand points as cross points in his answer in order to aid the supreme court in its disposition of the case.

3. If, in the foregoing example, the court of civil appeals sustains all of Y's rendition points but also expressly overrules one or more of his remand points, Y *must* assign the overruling of each remand point as a cross point in his answer to X's application for writ of error or run the risk that the supreme court will hold that he has waived or abandoned the point for supreme court review.

4. If the court of civil appeals sustains one or more of Y's rendition points but overrules or fails to decide the others and reverses and renders judgment for Y without considering his remand points, X *must* file an application for writ of error to obtain review of the reversal and rendition, and the application *must* contain points of error which challenge *each* ruling that sustains one of Y's rendition points or the application will be denied. Y *should* bring forward for the supreme court's consideration by cross points in his answer to the application all undecided rendition points and remand points to aid the supreme court in its disposition of the case should it disagree with the holding of the court of civil appeals.

5. If, in the foregoing example, the court of civil appeals expressly overrules some of Y's remand points, he *must* assign the court's ruling thereon as a cross point in his answer to the application for writ of error or run the risk that the supreme court will hold the points have been waived or abandoned.

6. If the court of civil appeals overrules all of Y's rendition points but sustains all of his remand points and reverses and remands for a new trial, in order to obtain review of the reversal, X *must* file an application for writ of error, and it *must* contain points of error which challenge *each* holding which sustains a remand point; otherwise, he will be held to have waived or abandoned any of such points not brought forward in the application. In order to obtain review of the court's holding overruling the rendition points, Y *must* file an application for writ of error, and it *must* contain points of error which challenge *each* holding overruling one of his rendition points or the application will be denied.

7. If the court of civil appeals overrules all of Y's rendition points but sustains some of his remand points and reverses and remands without deciding the remaining remand points, then in order to obtain review of the reversal, X *must* file an application for writ of error, and

it *must* contain points of error which challenge *each* holding that sustains one of Y's remand points or the application will be denied. If Y still wishes review of the holdings overruling his rendition points, he *must* file an application for writ of error, and the application *must* contain points of error which challenge *each* holding overruling one of his rendition points, or he will be held to have waived or abandoned those points not brought forward. Furthermore, Y's answer to X's application for writ of error *should* bring forward as cross points for the supreme court's consideration his remand points not decided by the court of civil appeals in order to aid the supreme court in its disposition of the case if it should disagree with the court of civil appeals.

8. If, in the foregoing example, the court of civil appeals specifically overrules some of Y's remand points, he *must* assign those points as a cross point in his answer to X's application for writ of error or run the risk that the supreme court will hold that he has waived or abandoned the point.

CONCLUSION

This article does not attempt to provide ready-made solutions for every case appealed to the Supreme Court of Texas; it would be virtually impossible to define and treat every fact situation which may confront a litigant who becomes involved in an appeal to that court. It is intended, however, that this is to be a useful guide for use in all but the most unusual situations which may be encountered in seeking supreme court review. Where areas of doubt exist as to the proper procedure currently to be followed—and there are some—we have suggested that course of action most likely to avoid loss of the right to appeal or waiver of error. It should be kept in mind, though, that the interim between publication of the original article and its re-publication here saw major, significant changes in the applicable rules of law and procedure—a trend which may very well continue. While the thrust of that trend has definitely been toward liberalizing the procedural niceties surrounding supreme court review so as to disencumber it from pitfalls for the uncautious, the appellate practitioner is still cautioned to be aware of current changes in the rules of procedure, supreme court policy, and case law insofar as they may affect the "ground rules" discussed here. Otherwise, it is hoped that this article will not only benefit the appellate bar for years to come but also that, in some measure, it may serve to increase the quality, effectiveness, and efficiency of review in the Supreme Court of Texas. It is with that hope that it has been written.