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How can an errorless judgment become erroneous? For the answer to this question, see the *Pool* decisions, which are discussed in detail in this article. The *Pool* decisions started with the court of appeals in *Ford Motor Co. v. Pool*, 688 S.W.2d 879 (Tex. App.—Texarkana 1985) and then went up to the Texas Supreme Court in *Pool v. Ford Motor Co.*, 29 Tex. Sup. Ct. J. 204 (Feb. 12, 1986), in which the court

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of appeal's decision was reversed in part and affirmed in part. The Texas Supreme Court granted rehearing and withdrew its February 12, 1986 decision and remanded the case back to the court of appeals in *Pool v. Ford Motor Co.*, 715 S.W.2d 629 (Tex. 1986). The *Pool* case went back down to the court of appeals on remand, *Ford Motor Co. v. Pool*, 718 S.W.2d 910 (Tex. App.—Texarkana 1986), and was finally decided by the Texas Supreme Court in *Pool v. Ford Motor Co.*, 749 S.W.2d 489 (Tex. 1988).

As a prelude to consideration of the *Pool* decisions, notice should be taken of a relevant law review article and a long standing Texas Supreme Court *per curiam* opinion.

I. THE ARTICLE

In 1960, the author of this article, then an associate justice of the Supreme Court of Texas, published an article in the *Texas Law Review* entitled " 'No Evidence' and 'Insufficient Evidence' Points of Error" (*The Article*).[1] *The Article* has been cited favorably and relied upon as sound authority by the Texas Supreme Court and the courts of civil appeals (now courts of appeals) some 600 times.[2] The heart of *The Article* was put in place up front on page one; all else was filler.

In *The Article*, the author asserted that, in an effort to implement the aims of Tex. R. Civ. P. 1, "magic in words in points of error should be as extinct as the dodo bird."[3] As examples of words that should be as extinct as the dodo bird, the author stated:

> Expressions in points of error such as 'no evidence,' 'insufficient evidence,' 'no sufficient evidence,' 'no legally sufficient evidence,' 'against the great weight of the evidence,' 'contrary to the preponderance of the evidence,' *ad infinitum*, have definite connotations in the mind of an appellate judge, but, except in a very limited way, they are not, or at least should not be, controlling. *The controlling consideration with an appellate court in passing on a point of error directed at the state of the evidence is not whether the point uses the preferable, or even the proper, terminology, but is whether the point is based upon and related to a particular procedural step in the trial and appellate process and is a proper predicate for the relief sought.*[4]

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1. 38 TEX. L. REV. 361 (1960).
2. Shepard's L. Rev. Citations, 1969 Edition (1988).
3. 38 TEX. L. REV. 361, 371 (1960).
4. *Id.* at 361-62. Emphasis is the author's unless otherwise indicated.

II. THE CHEMICAL CLEANING PER CURIAM

In 1970, the Texas Supreme Court reviewed a decision of the Beaumont Court of Civil Appeals in *Chemical Cleaning, Inc. v. Chemical Cleaning and Equipment Service, Inc. (Chemical)*.[5] In that case, the Beaumont court gave some gratuitous advice in an inoffensive looking footnote. The footnote on its face would not have excited the slightest interest on the part of any busy lawyer or curiosity on the part of most judges. It just so happened, however, that the losing party in *Chemical* applied to the supreme court for writ of error, and the record in the case wound up for study in the office of a justice who had a fairly clear recollection of some decisions by the supreme court and by a court of civil appeals, exactly contrary to the footnote. Research convinced the supreme court justice that his memory served him well, and he wrote a brief *per curiam* opinion, presented it to the court in conference, and obtained its approval.

A full statement of the *Chemical* footnote and the *per curiam* opinion is in order:

The footnote:

> The trial court erred in rendering judgment for cross-plaintiff for exemplary damages because the jury's answer to Special Issue No. 14, finding appellant acted with malice, was so against the overwhelming weight and preponderance of the evidence adduced at the trial as to be clearly wrong . . . .[6]

The *per curiam* opinion:

> A trial court may commit error in overruling a motion for new trial because [asserting that] vital jury findings are contrary to the great weight and preponderance of the evidence, but it does not for that reason commit error in rendering judgment on the verdict. Hence, a point of error which states that the trial court erred in rendering judgment on a verdict because of the state of the evidence — if it is adequate for any purpose — is only a 'no evidence' point.[7]

It is obvious that the issue was clearly drawn between the two courts. The court of civil appeals cited no authority for its suggested point of error, and the supreme court, seeing no need for extensive citations,

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5. 456 S.W.2d 724 (Tex. Civ. App.—Beaumont), *writ ref'd n.r.e. per curiam*, 462 S.W.2d 276 (Tex. 1970).

6. *Id.* at 727-28 n.2.

7. Chemical Cleaning, Inc. v. Chemical Cleaning and Equipment Service, Inc., 462 S.W.2d 276, 277 (Tex. 1970).

cited only *Travelers Ins. Co. v. Williams*.[8] That case will be noticed later in this article.

III. POOL V. FORD MOTOR COMPANY

Ronnie Pool sued Ford Motor Company for damages resulting from alleged negligence, and Ford defended on grounds of contributory negligence. The jury found Ford negligent, but in answer to certain special issues failed to find Pool contributorily negligent. At that point, the status of the case and the rights of the parties seemed reasonably clear; therefore, the trial court proceeded to render judgment for Pool for damages as found by the jury. Unfortunately, what seemed clear at that point became unbelievably unclear when the case reached the appellate courts.

Ford had only one point of error in the court of appeals respecting the jury's findings in answer to the contributory negligence issues. It reads:

> The trial court erred in entering judgment for the plaintiffs, because the jury's finding, in answer to Special Issue No. 6, that Ronnie Pool was not at all negligent in speeding, having a medically tested blood-alcohol level of .119, and failing to wear his seatbelt while driving under those conditions after midnight is so against the great weight and preponderance of the evidence as to be manifestly unjust.[9]

The court of appeals treated the point of error as raising only questions of factual sufficiency and great weight and preponderance of the evidence, sustained the points, and reversed the trial court's judgment and remanded the cause for retrial.[10] The supreme court granted writ of error.

On February 12, 1986, the supreme court handed down an opinion in the case of *Pool v. Ford Motor Company* (*Pool*).[11] The court quoted

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8. *See id.* In *Travelers Ins. Co. v. Williams*, 378 S.W.2d 110, 112 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.), the court held that a point of error that attacked the trial court's judgment due to insufficient evidence to support verdict was a "no evidence" point. *See id.*

9. Pool v. Ford Motor Co., 715 S.W.2d 629, 632 (Tex. 1986). The error identified is that "the trial court erred in entering judgment for the plaintiffs." *Id.* The remainder of the point gives reasons why counsel believes the trial court action to be erroneous. The point is not set out in the court of appeals' opinion.

10. Ford Motor Co. v. Pool, 688 S.W.2d 879, 883-84 (Tex. Civ. App.—Texarkana 1985). For a complete prior and subsequent history of this case, see the introduction to this article.

11. 29 Tex. Sup. Ct. J. 204 (February 12, 1986).

Ford's one point of error in the court of appeals and, citing *Chemical* as authority, held that the "point [did not] preserve factual insufficiency for review."[12] Speaking further to the problem, the court said:

> An allegation of trial court error in rendering judgment on the verdict is a contention that no evidence existed to support the jury's verdict, and thus a judgment *non obstante veredicto* would have been proper.
>
> . . .
>
> Therefore, what Ford Motor Company has presented to the court of appeals is a no evidence or legal insufficiency point . . . .[13]

The court cited *Gulf, Colorado & Santa Fe Railway Co. v. Deen*[14] as authority for its holding.[15] So holding, the court reversed the judgment of the court of appeals and remanded the case to that court to consider remittitur points. Four justices dissented.

On April 2, 1986, the supreme court did a complete about face.[16] With the same justice writing on rehearing for a unanimous court in *Pool II*, this time the *per curiam* opinion in *Chemical* was rejected as unsound precedential authority. As a predicate for its action, the court said:

> Ford Motor Company and its amici contend that this court's holding in *Chemical Cleaning* was effectively overruled by the 1981 adoption of Tex. R. Civ. P. 418(d). Alternatively, they assert that if not already impliedly overruled, this court should now expressly overrule that decision.[17]

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12. *Id.* at 205-06.

13. *Id.* at 206.

14. 158 Tex. 466, 471, 312 S.W.2d 933, 937 (1958).

15. *See id.* at 206.

16. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986)(*Pool* II court held contra to *Pool* I decision).

17. *Id.* at 632. Rule 418(d), which was repealed October 1, 1984, stated:

> A statement of the points upon which the appeal is predicated shall be stated in short form without argument and be separately numbered. In parenthesis after each point, reference shall be made to the page of the record where the matter complained of is to be found. Such points will be sufficient if they direct the attention of the court to the error relied upon. complaints that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single point of error raising both contentions if the record references and the argument under such point sufficiently direct the court's attention to the nature of the complaint made regarding each such issue or finding or legal conclusion based thereon. Complaints made as to several issues or findings relating to one element of recovery or defense may be combined in one point, if separate record references are made.

TEX. R. CIV. P. 418(d) (Vernon Supp. 1982).

Responding to the plea, the court accepted the invitation and paid its respects to the author of the *per curiam* and to its predecessor court that approved it, in the following ringing declaration:

> *Chemical Cleaning* represents a strictness of briefing requirements that is as foreign to current thinking as is demurrer to pleadings or granulated issues to broad submission of jury questions.[18]

Moreover, at some point in time between February 12 and April 2, the *Deen* case got lost, was no longer regarded as controlling authority, and was not even cited; but, as will be shown, it was resurrected when needed.

A close examination of the supreme court's second opinion will reflect that the only holding on this problem was that the *form* of the point of error was not necessarily a no evidence point; that whether it was or was not, was dependent on all relevant considerations, including argument under the point. Adopting that approach, *the court overruled "the application of that decision [Chemical] to cases when the complained error is readily apparent from the argument briefed,"* and said:

> It is obvious from the discussion under point of error 11, as well as the wording of the point, that Ford Motor Company *intended it to be a complaint of factual insufficiency*. Thus, we remand to the court of appeals for it to determine, pursuant to the correct standard, whether the jury's negative answers as to Pool's alleged speed and intoxication were against the great weight and preponderance of the evidence.[19]

What a party intends by a point of error is at best a fragile basis for evaluating a point of error, particularly when, as here, the found intent is in direct conflict with the identified error.

Generally, points of error contain two parts, to wit: (1) identification of an act or omission of a lower court claimed to be erroneous, and (2) the reasons why the act or omission is asserted to be erroneous. If there is a conflict in the two parts as in *Pool, The Article* and a series of the court's earlier decisions to be noticed *infra*, would give effect to the first part, while the present court by its decision in *Pool* gave controlling effect to the second part.

By its treatment of Ford's one point of error on the record before it, the court held, *sub silentio*, that presentation by point of error on ap-

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18. *Pool*, 715 S.W.2d at 633.
19. *Id.*

peal of an erroneous act or omission by the trial court is no longer required as a basis for reversal of that court's judgment if the requirement stands in the way of reaching a desired result; rather, *reversal may be ordered on a presumed or perceived intention to assign error on appeal on some ground that could have been preserved by point of error, but was not.* In *Pool*, for example, Ford filed a motion for new trial and sought therein a new trial on the ground that the negative answers to special issue number 11 were against the great weight and preponderance of the evidence. The motion was overruled. A point of error on appeal assigning that action as error would have preserved the matter for review. Having no such point before it, the court charitably filled the void and treated the point of error before it as if it complained of the action of the trial court in overruling the motion for new trial.

Just ninety days after overruling *Chemical*, the supreme court cited the *Deen* case as authority in an opinion written by the same justice in *Alm v. Aluminum Company of America* (*Alm*).[20] In the *Alm* case, the appellant complained of the trial court's action in "disregarding the jury's finding of gross negligence." The trial judge recited in his judgment that he had disregarded the jury's answers to issues numbers 11 and 12 because he found that while there was "some evidence to support such answers of the jury, such answers . . . [were] against the great weight and overwhelming preponderance of the evidence."[21] In disagreeing with that action, the supreme court said:

> Rule 301, Texas Rules of Civil Procedure, expressly provides that a trial court may "disregard any Special Issue Jury Finding that has no support in the evidence." *A trial court may not disregard a jury's answer because it is against the great weight and preponderance of the evidence.*[22] *In such a situation, the trial court may only grant a new trial.*[23]

IV. REVERSAL OF AN ERRORLESS JUDGMENT

The appellate court process in civil cases in this state is based en-

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20. 717 S.W.2d 588 (Tex. 1986).

21. *Id.* at 594.

22. *Id.* As authority, the court cited the following: *Campbell v. Northwestern Nat'l Life Ins. Co.*, 573 S.W.2d 496, 497 (Tex. 1978); *Garza v. Alviar*, 395 S.W.2d 821, 824 (Tex. 1965).

23. Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 594 (Tex. 1986). As support for this proposition, the court cited *Gulf, Colorado & Sante Fe Ry. Co. v. Deen*, 158 Tex. 466, 470-71, 312 S.W.2d 933, 937, *cert. denied*, 358 U.S. 874 (1958).

tirely on the correction of errors.[24] Except in a limited category of cases, trial court errors are reviewed in the first instance by the courts of appeals, whose rulings are then subject to review by the supreme court, review at each level being only on *Points of Error*.[25] Reversal of lower court judgments may be ordered by either court *only on the ground that an error of law has been committed by the trial court*, and then only if the reviewing court shall be of the opinion that the error was "reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case."[26]

The basic requirement of a point of error is that it identify some act or omission of the trial court that was erroneous. Even Texas Rule of Appellate Procedure 418(d), on which the supreme court placed emphasis in its opinion in *Pool II*, expressly required that a point of error identify the error relied upon. That rule provided: "A statement of the points upon which the appeal is predicated shall be stated in short form without argument and be separately numbered . . . . *Such points will be sufficient if they direct the attention of the court to the error relied upon.*"[27] Once the error was identified, the rule authorized liberality in briefing "no evidence" and "factually insufficient evidence" points, as pointed out in the *Pool II* opinion; but, even so, *the rule did not relieve an appellant of the obligation to establish that the trial court committed error or the obligation to identify the error.* Chief Justice Chadick of the Texarkana Court of Civil Appeals, now retired, defined and described the primary purpose of a point of error, as well as anyone could, when he wrote in *National Carloading Corp. v. Kitchen Designs, Inc.*,[28] as follows:

> A point of error should succinctly designate or describe and thereby segregate the particular act, omission, conduct or circumstance in the trial court that is urged as reversible error. The points' function is to particularize and direct the appellate court's attention to a specific error in the trial proceeding.[29]

Accepting that the court's holding on the form of the Ford point of error is correct, as we must, where was the "error" in the "point of

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24. TEX. R. APP. P. 81.
25. TEX. R. APP. P. 74(d), 131(e).
26. TEX. R. APP. P. 81(b), 184(b).
27. TEX. R. CIV. P. 418(d) (Vernon Supp. 1982).
28. 471 S.W.2d 90 (Tex. Civ. App.—Texarkana 1971, writ ref'd n.r.e.).
29. *Id.* at 93 (citation omitted).

error"? *The only action of the trial court, identified and charged as error in Ford's point of error, was the entry of judgment on the jury's answers to the contributory negligence issues.* Surely all lawyers and judges will agree that action could only have been erroneous if the negative answers had no support in the evidence, not if they were only against the great weight and preponderance of the evidence. Surely all lawyers and judges should also agree that *the trial court's action was not erroneous if it had a duty to enter judgment for the plaintiff Pool*, even though the jury's answers were against the great weight and preponderance of the evidence. If the supreme court's own decisions and opinions, ignored in *Pool II*, are to be given any validity or *stare decisis* value whatever, the trial court did have such a duty.

V. SUPREME COURT CASES OVERRULED SUB SILENTIO

Chemical was not the first case in which the supreme court announced the rule followed in that case. In *McDonald v. New York Central Mutual Fire Insurance Co.* (*McDonald*),[30] a party sought a remand of its case to the trial court on the theory that the court of civil appeals' holding of no evidence to support jury findings included a finding of insufficient evidence. In rejecting the argument, the *McDonald* court stated:

> Its points are premised on the proposition that the Court erred in entering judgment on the jury's verdict and correspond to the grounds appearing in its amended motion for new trial. The points are in the following form:
>
> 'The Court erred in overruling defendant's motions for instructed verdict and judgment n.o.v. and in entering judgment on the jury's verdict because there was insufficient evidence that the damage to plaintiff's beach house was covered by the policy sued upon in that there was insufficient evidence that the damage was caused by the wind and insufficient evidence that it was not caused by water or the concurring action of wind with rising water and wind driven water.'
>
> The points do not seek relief from the jury findings on the ground that they are not supported by sufficient evidence or that they are against the great weight of the evidence, but relate only to the type of judgment that the Court entered. They are not applicable to the granting of a new trial after the entry of a judgment. We therefore hold that the points in the Court of Civil Appeals above referred to only raised

30. 380 S.W.2d 545 (Tex. 1964).

the legal sufficiency of the evidence or the point of no evidence.[31]

Neither was *Chemical* the last supreme court case to honor the rule. The rule was reaffirmed by the court in 1975 by a *per curiam* opinion in *Meadows v. Green* (*Meadows*),[32] in which the court stated:

> The points of error attacking factual sufficiency of the evidence before the Court of Civil Appeals are in proper form, but the only complaints in the trial court were Green's contentions that error was committed in submitting issues to the jury and in rendering judgment on the verdict. Those complaints do not go to the great weight and preponderance, or factual sufficiency, of the evidence.[33]

The rule as stated in *The Article* and emphasized in section one of this article was reaffirmed once again in a different procedural context in *Airway Insurance Co. v. Hank's Flite Center, Inc.* (*Airway*),[34] opinion by Justice Price Daniel. The issue there was whether points of error asserting that jury findings were so "against the overwhelming weight and preponderance of the evidence as to be clearly wrong" could be treated as "no evidence" points directed at the alleged error of the trial court in overruling Airway's motion for judgment *non obstante veredicto*. The court examined Airway's points of error and arguments meticulously, and, finding that all arguments related to weight and preponderance, declined to treat them as "no evidence" points.[35] There, as in *Chemical*, the only error asserted was a "no evidence" error, and the only arguments were weight and preponderance arguments.

The opinion in *Garza v. Alviar*[36] was authored by Justice Ruel C. Walker who wrote as follows:

> If the contention [factual insufficiency] is sustained, the finding under attack may be set aside and a new trial ordered. Factual insufficiency of the evidence does not, however, authorize the court to disregard the finding entirely or make a contrary finding in entering final judgment for one of the parties.[37]

It is also worth noting that in the 15-year period from the date of

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31. *Id.* at 548.
32. 524 S.W.2d 509 (Tex. 1975).
33. *Id.* at 510 (citations omitted).
34. 534 S.W.2d 878 (Tex. 1976).
35. *Id.* at 882.
36. 395 S.W.2d 821 (Tex. 1965).
37. *Id.* at 823 (citations omitted).

the *Chemical* opinion through Volume 675 of the Southwestern Reporter, second series, the rule there announced has been consistently followed by the courts of appeals.

Typical of the opinions on the subject by courts of appeals are *Norman v. First Bank & Trust, Bryan*,[38] and *Travelers Insurance Co. v. Williams, supra*, decided before and cited in the *Chemical per curiam* opinion.

In *Norman*, the court said:

> In her motion for new trial appellant asserts that the finding of the jury in answer to Special Issue No. 4 is contrary to the great weight and preponderance of the evidence and that, therefore, the trial court erred in entering judgment on the verdict. It is well established that where the evidence raises an issue of fact it must be submitted to the jury and that a judgment must be entered on the answer made thereto. *The trial court does not err in entering a judgment based on the jury's answer to an issue even though he considers that the answer is contrary to great weight and preponderance of the evidence.*[39]

Returning to *Travelers Insurance Co. v. Williams*, the court stated:

> Although appellant's seventh point of error contends there was 'insufficient evidence' to support the jury finding and that such finding is 'against the great weight and overwhelming preponderance of the evidence' *the point is based on the action of the trial court in refusing to grant appellant's motion for judgment non obstante veredicto. Such an attack necessarily constitutes a 'no evidence' point as opposed to an 'insufficient evidence' point.*[40]

Measured and judged by the supreme court's prior decisions and opinions, the trial court did not err in *Pool* by entering judgment on the jury's answers to the contributory negligence issues; *it had a duty to do so*. Nevertheless, treating the point as a factual insufficiency or weight and preponderance point of error, rather than as a no evidence point, Ford sought, and the supreme court entered, an order directing the court of appeals to consider and "determine, pursuant to the correct standard, whether the jury's negative answers as to Pool's alleged speed and intoxication were against the great weight and preponder-

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38. 557 S.W.2d 797 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.).

39. *Id.* at 803.

40. Travelers Ins. Co. v. Williams, 378 S.W.2d 110, 112 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.)(citation omitted).

ance of the evidence."[41] Impliedly, the court also ordered the court of appeals to reverse the trial court's judgment if it determined that the findings were against the great weight and preponderance of the evidence. That order, in turn, impliedly overruled a host of supreme court decisions holding that an errorless judgment cannot be reversed.[42]

If the supreme court's ruling in *Pool II* is allowed to stand as a controlling precedent, the court will have (1) overruled by implication its prior decisions in *Deen*, *McDonald*, *Chemical*, *Meadows*, *Alviar* and *Airway*, insofar as those cases held that a point of error asserting that the trial court erred in entering judgment on a jury's verdict was a no evidence point; (2) overruled by implication all of its prior decisions that have held an errorless judgment may not be reversed; and (3) undermined the value of *The Article* after its acceptance by the judiciary and other members of the legal profession for 25 years and in some 600 decisional recognitions of its validity. Those results would seem a high price to pay to rescue counsel in one case from its failure to pursue a readily available new trial remedy. The only logical alternative is to consider the *Pool* treatment of its *per curiam* opinion in *Chemical* as the single case, result-oriented law that will lead inevitably to decisions termed by Justice Roberts in *Smith v. Awright*,[43] as tending "to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."[44]

Readers of the two opinions in *Pool* and the opinion in *Alm*, all written by the same justice, may be left wondering just what he and three of his fellow justices meant by their philosophy as expressed in their dissenting opinion in *Nabours v. Longview Savings & Loan Association*[45] as follows:

THIS COURT SHOULD NOT OVERRULE WELL ESTABLISHED

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41. Pool v. Ford Motor Co., 715 S.W.2d 629, 633 (Tex. 1986).

42. *See, e.g.*, Clifton v. Southern Pacific Transp. Co., 709 S.W.2d 636, 639 (Tex. 1986) (court cannot reverse judgment unless error found); City of Houston v. Blackbird, 394 S.W.2d 159, 165 (Tex. 1965)(in order for appellate court to reverse judgment, error must be found); Davis v. Davis, 141 Tex. 613, 620, 175 S.W.2d 226, 230 (1943)(error must be found before reversal is proper); National Life Co. v. McKelvey, 131 Tex. 81, 85, 113 S.W.2d 160, 162 (1938)(judgment will stand unless error found); Texas Employers Ins. Ass'n v. Brandon, 126 Tex. 636, 641, 89 S.W.2d 982, 984 (1936)(improper to reverse without erroneous judgment).

43. 321 U.S. 649 (1944).

44. *Id.* at 669.

45. 700 S.W.2d 901 (Tex. 1985).

TEXAS PRECEDENT AND IGNORE FUNDAMENTAL CONCEPTS OF LAW TO REACH A DESIRED RESULT.[46]

VI. On Remand to the Court of Appeals

When the case was returned to the court of appeals on remand, that court, without finding a point of error as a basis for its decision, nevertheless proceeded, as directed, to examine the record to determine whether the jury's negative answers to issue number 11 were against the great weight and preponderance of the evidence. Having determined that they were, the court of appeals reversed the judgment of the trial court and remanded the cause to that court for retrial.[47] The court also ordered the plaintiff to make a substantial remittitur of damages. Application for writ of error was granted once again by the supreme court,[48] and the case was submitted for decision on March 7, 1987.[49] Strangely, it remained under submission and undecided for fourteen months and on May 4, 1988, was finally settled and remanded to the trial court for entry of judgment.[50]

VII. Epilogue

After this article was written, the supreme court handed down a *per curiam* opinion in *Davis v. Bryan & Bryan, Inc.*,[51] in which the court of appeals had reversed a trial court judgment without finding error. The supreme court said:

> A reviewing court *can reverse only when there is error in the judgment of the court below.* The holding of the court of appeals is in conflict with these supreme court decisions and Tex. R. App. P. 81, 180 (Vernon Supp. 1987). *Absent error* in the trial court mandating a reversal, *the court of appeals cannot reverse in the interest of justice.*[52]

Murray v. Devco, Ltd.[53] is another recent supreme court case in which the court stated:

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46. *Id.* at 912 (emphasis provided by author).

47. *See* Ford Motor Co. v. Pool 718 S.W.2d 910, 913 (Tex. App.—Texarkana 1986). For a complete prior and subsequent history of this case, see the introduction to this article.

48. Pool v. Ford Motor Co., 30 Tex. Sup. Ct. J. 140 (January 14, 1987).

49. Pool v. Ford Motor Co., 30 Tex. Sup. Ct. J. 265 (March 7, 1987)(cause submitted).

50. *See* Pool v. Ford Motor Co., 749 S.W.2d 489 (Tex. 1988)(decided May 4, 1988).

51. 730 S.W.2d 643 (Tex. 1987).

52. *Id.* at 644 (citations omitted).

53. 731 S.W.2d 555 (Tex. 1987).

> *[T]he burden is on a party appealing* from a trial court judgment *to show that the judgment is erroneous in order to obtain a reversal. Englander Co. v. Kennedy*, 428 S.W.2d 806, 807 (Tex. 1968).[54]

Lawyers must wonder how the reasoning in *Pool II*, on the one hand, and in *Davis v. Bryan & Bryan* and *Murray v. Devco*, on the other hand, are to be reconciled. Is it that the supreme court can reverse errorless judgments, but courts of appeal may not? Or is it that each errorless judgment must stand or fall on the court's perceived intent of the author? Or is it on the strength of the appeal of the equities in the case and thus that the supreme court may reverse "in the interest of justice" although the courts of appeal may not? Or, finally, is it possible that *Pool* having been settled and remanded, the criticism in the *Pool II* opinion of the *Chemical per curiam* is now regarded as pure dictum and no longer counts?

54. *Id.* at 557.