St. Mary's Law Journal

Volume 21 | Number 4 Article 10

1-1-1990

Standards of Appellate Review in Civil Appeals.

W. Wendell Hall

STANDARDS OF APPELLATE REVIEW IN CIVIL APPEALS

W. WENDELL HALL*

* B.A., The University of Texas; J.D., St. Mary's University. Partner, Fulbright & Jaworski, San Antonio.

I. INTRODUCTION

It is a common problem for lawyers to become preoccupied with arguing the facts of their case and the applicable substantive law and to ignore completely the standard of review that controls the disposition of their appeal. When lawyers do set forth the standard of review in their briefs, they often use the standard as a meaningless phrase rather than as a tool to organize their argument. Because the appropriate standard of review will control the outcome of an appeal, appel-

late practitioners must consider the standard of review with the same thoughtful consideration that they give to the facts and the substantive law.

Most standards of review define the parameters of a reviewing court's authority to determine whether a case warrants reversal. As Judge John C. Godbold of the Fifth Circuit observed, the standard of review is the appellate judge's "measuring stick."[1] Therefore, until an appellate practitioner analyzes his factual and legal arguments in light of the appropriate standard of review or "measuring stick," he cannot begin to write an effective brief.

It is difficult to overstate the practical significance of the standard of review. An appellate practitioner must shape his factual and legal arguments in a manner that will satisfy the relevant standard. While identification of the appropriate standard of review is very important, an appellate practitioner must do more than simply recite the relevant standard in his brief. It must become an integral part of the argument. Therefore, the standard of review must be applied to the facts and to the substantive law in a manner that will convince the reviewing court that the case warrants reversal. The Seventh Circuit recently made it clear how difficult, and yet how important, it is to convince a reviewing court that the standard requires reversal. In determining whether a trial court's decision was clearly erroneous, the court observed that the "decision must be more than just maybe or probably wrong, it must . . . strike us as wrong with the force of a five-week-old dead, unrefrigerated fish."[2]

There is nothing to be gained by avoiding the standard of review. The appellate practitioner who ignores the standard loses credibility with the reviewing court. If an appellate practitioner does not identify the relevant standard and vigorously approach the standard in his brief, he leaves a void in his brief which will be filled by his adversary, the reviewing court, or the court's clerks. Because the reviewing court will determine the relevant standard on its own and review the appeal accordingly, it is a naive practitioner who avoids the standard and misses the opportunity to persuade the reviewing court why the standard, as applied to the facts and the law, requires reversal.

If the appropriate standard of review is critical to the disposition of

---

1. Godbold, *Twenty Pages and Twenty Minutes - Effective Advocacy on Appeal*, 4 Fifth Circuit Reporter 161, 169 (Jan. 1987).

2. Parts & Elec. Motors, Inc. v. Sterling Elec., 866 F.2d 228, 233 (7th Cir. 1988).

an appeal, why do appellate practitioners fail to weave the standard into the fabric of their briefs? The answer is that while the standard of review may be easily identified, the application of the standard to one's case often presents a difficult hurdle. For example, while the abuse of discretion standard is the most common standard of review, its application causes tremendous problems for appellate practitioners and reviewing courts. As Justice John Powers of the Austin Court of Appeals observed, the abuse of discretion standard "means everything and nothing at the same time."[3] However, while the words used to describe standards of review often escape a clear and precise definition, they provide a framework for the form and focus of the appellate argument.

Although most standards of review are amorphous at best, unless an appellate practitioner "is familiar with the standard of review for each issue, he may find himself trying to run for a touchdown when basketball rules are in effect."[4] While it is impossible to provide a standard formula for analyzing a given case according to the applicable standard of review, it is possible to identify the "rules in effect for the game." Hopefully, this article will provide appellate practitioners and the courts with the relevant standards of review in effect for reviewing a trial court's rulings during pretrial, trial and post-trial proceedings.

II. PRETRIAL RULINGS

A. *Subject-Matter Jurisdiction*

The trial court determines the issue of jurisdiction solely by the allegations in the plaintiff's pleading at a hearing on a plea to jurisdiction.[5] The allegations must be taken as true.[6] If a trial court lacks subject matter jurisdiction, it has no discretionary power and must dismiss the case.[7] A trial court's lack of subject matter jurisdiction is fundamental error, and it must be noted and reviewed by the appel-

3. Landon v. Jean-Paul Budinger, Inc., 724 S.W.2d 931, 935 (Tex. App.—Austin 1987, no writ).

4. Godbold, *Twenty Pages and Twenty Minutes - Effective Advocacy on Appeal*, 4 Fifth Circuit Reporter 161, 169 (Jan. 1987).

5. *Id.*

6. *See* Goad v. Goad, 768 S.W.2d 356, 358 (Tex App.—Texarkana 1989, writ. denied), *cert. denied*, __ U.S. __, 110 S. Ct. 772, 107 L. Ed. 2d 742 (1990).

7. *See id.* at 358-59 (court lacks jurisdiction where plaintiff fails to allege cognizable cause of action).

late court at any time it appears.[8] However, unless the petition affirmatively demonstrates an absence of jurisdiction, the trial court construes the petition liberally in favor of jurisdiction.[9]

Whether a trial court has subject matter jurisdiction is a question of law.[10] When reviewing an order of dismissal for want of jurisdiction, the appellate court construes the pleadings in favor of the pleader in an effort to determine the pleader's intent.[11] Only matters presented to the trial court are reviewed upon appeal from the order dismissing the case for want of jurisdiction.[12]

B. *Special Appearance*

"By entering a special appearance pursuant to Texas Rule of Civil Procedure 120a, a non-resident bears the burden of proof to show his lack of amenability to long-arm process. . . ."[13] The trial court which hears the Rule 120a motion should "only consider arguments regarding the forum's jurisdiction over the defendant, and not any arguments concerning defects in service."[14] The parties should request the trial court to make findings of fact and conclusions of law which are reviewable for factual or legal sufficiency.[15]

C. *Venue*

In determining whether the trial court improperly transferred a case to another county, the reviewing court must consider the entire

---

8. Texas Employment Comm'n v. International Union of Elec., Radio & Mach. Workers, 163 Tex. 135, 137, 352 S.W.2d 252, 253 (1961); Fincher v. City of Texarkana, 598 S.W.2d 22, 23 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.).

9. *See* Peek v. Equipment Serv. Co., 33 Tex. Sup. Ct. J. 77, 79 (Nov. 1989)(plaintiff allowed to amend petition).

10. Qwest Microwave, Inc. v. Bedard, 756 S.W.2d 426, 436 (Tex. App.—Dallas 1988, n.w.h.).

11. Huston v. Federal Deposit Ins. Corp., 663 S.W.2d 126, 129 (Tex. App.—Eastland 1984, writ ref'd n.r.e.); Paradissis v. Royal Indem. Co., 496 S.W.2d 146, 148 (Tex. Civ. App.—Houston [14th Dist.] 1973), *aff'd*, 507 S.W.2d 526 (Tex. 1974).

12. *Huston*, 663 S.W.2d at 129.

13. Runnells v. Firestone, 746 S.W.2d 845, 848 (Tex. App.—Houston [14th Dist.] 1988), *writ denied per curiam*, 760 S.W.2d 240 (Tex. 1988). The three-part test used by the Texas courts to determine whether a Texas court may exercise jurisdiction over a non-resident is set forth in *Schlobohm v. Schapiro*. 33 Tex. Sup. Ct., J. 222, 223-24 (Feb. 14, 1990).

14. Middleton v. Kawasaki Steel Corp., 687 S.W.2d 42, 47 (Tex. App.—Houston [14th Dist.] 1985), *writ ref'd n.r.e.*, 699 S.W.2d 199 (Tex. 1985).

15. *Runnells*, 746 S.W.2d at 849.

record, including the trial on the merits.[16] Appellate review of the venue determination, thus, differs greatly from the scope of the decision made by the trial court because the appellate court must rule solely on the basis of certain documents, without the benefit of live testimony and the entire record.[17] Thus, the trial court might properly overrule a motion to transfer venue and later determine based on additional evidence that venue lies in another county.[18] Appellate courts have criticized this review standard and have observed that the present approach to the review of venue decisions is the one situation in which an appellate court may review a matter upon which the trial court had no opportunity to act.[19] Nevertheless, the appellate court reviews the trial court's determination by employing a preponderance of the evidence standard of review.[20] If venue was improper, the case must be reversed.[21] If venue was proper in both the county from which the case was transferred and the county to which the case was transferred, the appellate court may only reverse if the transfer resulted in reversible error under Texas Rule of Appellate Procedure 81(b)(1).[22]

D. *Appeal of Default Judgments*

A default judgment is entered against a defendant who fails to timely answer although he was served properly.[23] A post answer default occurs when a defendant has answered, but has failed to make an appearance at trial.[24] Different rules apply to set aside a default judgment depending on whether the judgment was proper (it was se-

16. TEX. CIV. PRAC. & REM. CODE § 15.064(b) (Vernon 1986); Texas City Ref., Inc. v. Conoco, Inc., 767 S.W.2d 183, 185 (Tex. App.—Houston [14th Dist.] 1989, writ denied); Cox Eng'g, Inc. v. Funston Mach. & Supply Co., 749 S.W.2d 508, 511-12 n.2 (Tex. App.—Fort Worth 1988, no writ); Lone Star Steel Co. v. Scott, 759 S.W.2d 144, 147 n.1 (Tex. App.—Texarkana 1988, no writ.).

17. TEX. R. CIV. P. 87; Kansas City S. Ry. v. Carter, 778 S.W.2d 911, 915 (Tex. App.—Texarkana 1989, writ requested); *Conoco*, 767 S.W.2d at 185.

18. *Conoco*, 767 S.W.2d at 185.

19. *Carter*, 778 S.W.2d at 915; *Conoco*, 767 S.W.2d at 185.

20. *Conoco*, 767 S.W.2d at 185.

21. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986)(improper venue shall be reversible error).

22. Cox Eng'g Inc. v. Funston Mach. & Supply Co., 749 S.W.2d 508, 511-12 (Tex. App.—Fort Worth 1988, no writ).

23. Pohl & Hittner, *Judgments by Default in Texas*, 37 SW. L.J. 421, 422-23 (1983)(discussing effects of default judgment upon defendant).

24. Stoner v. Thompson, 578 S.W.2d 679, 682 (Tex. 1979).

cured in accordance with the statutes and rules) or was defective (it was not secured in accordance with the statutes and rules).

1. Proper Default Judgment

The guidelines to determine whether a motion for new trial to set aside a proper default judgment should be granted were set forth in the leading case of *Craddock v. Sunshine Bus Lines, Inc.*[25] A trial court may set aside a default judgment and order a new trial in any case where the defendant's failure to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident. The motion for new trial must set up a meritorious defense and must be filed at a time when the granting of the motion will occasion no delay, or otherwise work an injury to, the plaintiff.[26] The *Craddock* standards also apply to a post-answer default judgment.[27]

The trial court determines whether the defendant has satisfied the *Craddock* test, and the court's ruling will not be disturbed on appeal absent a showing of an abuse of discretion.[28] "However, the trial courts should exercise liberality in favor of a defaulted party having a day in court in passing on a motion for new trial and the sufficiency of the supporting evidence."[29] Where the court determines that the guidelines of *Craddock* have been met, it is an abuse of discretion to deny a new trial.[30]

---

25. 134 Tex. 388, 391, 133 S.W.2d 124, 126 (1939).

26. *Id.* at 391, 133 S.W.2d at 126; *see also* Angelo v. Champion Restaurant Equip. Co., 713 S.W.2d 96, 97 (Tex. 1986)(reaffirming *Craddock*).

27. *E.g.*, LeBlanc v. LeBlanc, 778 S.W.2d 865, 865 (Tex. 1989); Cliff v. Huggins, 724 S.W.2d 778, 779 (Tex. 1987); Grissom v. Watson, 704 S.W.2d 325, 326 (Tex. 1986); Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. 1966).

28. *Cliff*, 724 S.W.2d at 779; *Grissom*, 704 S.W.2d at 326; Strackbein v. Prewitt, 671 S.W.2d 37, 38-39 (Tex. 1984).

29. Sexton v. Sexton, 737 S.W.2d 131, 133 (Tex. App.—San Antonio 1987, no writ).

30. Blake v. Blake, 725 S.W.2d 797, 800 (Tex. App.—Houston [1st Dist.] 1987, no writ); O'Hara v. Hexter, 550 S.W.2d 379, 383 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.). If the facts underlying the default judgment are disputed, the trial court may make findings in support of its ruling which will be reviewed under the same standard as those for findings of fact after a trial on the merits. Dallas Heating Co. v. Pardee, 561 S.W.2d 16, 19 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.); *see also* Landon v. Jean-Paul Budinger, Inc., 724 S.W.2d 931, 940 (Tex. App.—Austin 1987, no writ). In the absence of fact findings, the judgment must be upheld on any legal theory supported by the evidence. *Strackbein*, 671 S.W.2d at 38; *see also* Cope v. United States Fidelity & Guar. Co., 752 S.W.2d 608, 609 (Tex. App.—El Paso 1988, no writ).

2. Defective Default Judgment

If the default judgment is not rendered in compliance with the statutes and the rules and the defect is apparent on the face of the record, the default judgment may be set aside by a motion to set aside, by a motion for new trial, by an appeal, or by a writ of error to the court of appeals. The trial court and the reviewing court may only consider errors that appear on the face of the record in reviewing a default judgment under any of these remedies.[31] A motion for new trial following a defective default judgment does not have to meet the *Craddock* requirements and should not be confused with a motion for new trial after a proper default judgment.[32]

A defendant against whom a defective default judgment has been taken may urge the error for the first time on appeal, unless the nature of the error requires that evidence be presented and a finding of fact be made by the trial court.[33] Absent this need for evidence the default judgment is reviewed to determine whether it was rendered in compliance with the statutes and rules on appeal.

E. *Plea in Abatement*

"A plea in abatement is a plea setting forth some obstacle to further prosecution of the cause until it is removed, and if the plea is sustained the action is abated until the impediment is removed."[34] Abuse of discretion is the standard of review in determining whether a trial court correctly granted or denied a plea in abatement.[35]

F. *Special Exceptions*

Special exceptions must "point out intelligibly and with particular-

31. Stubbs v. Stubbs, 685 S.W.2d 643, 644-45 (Tex. 1985); *see also* United Nat'l Bank v. Travel Music, 737 S.W.2d 30, 33 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.); First Dallas Petroleum, Inc. v. Hawkins, 727 S.W.2d 640, 642-44 (Tex. App.—Dallas 1987, no writ). *See generally* Part XI, *infra*.

32. Dan Edge Motors, Inc. v. Scott, 657 S.W.2d 822, 824 (Tex. App.—Texarkana 1983, no writ).

33. TEX. R. CIV. P. 324(a), (b)(1); *see also* Bronze & Beautiful, Inc. v. Mahone, 750 S.W.2d 28, 29 (Tex. App.—Texarkana 1988, no writ). A party is not required to complain about defective service in a motion for new trial because evidence is not required to be heard pursuant to Texas Rule of Civil Procedure 324(a). *Id.*

34. Mercure Co. v. Rowland, 715 S.W.2d 677, 680 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

35. Arbor v. Black, 695 S.W.2d 564, 567 (Tex. 1985); Dolenz v. Continental Nat'l Bank, 620 S.W.2d 527, 572 (Tex. 1981).

ity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations."[36] Generally, if a trial court sustains one party's special exceptions, the opposing party must be given an opportunity to amend its petition before the case is dismissed.[37] If the defect in the pleading is not cured after amendment, the trial court may dismiss the case.[38] In reviewing the trial court's order of dismissal upon special exceptions, the appellate court is required to accept "all the factual allegations set forth in the pleading as true."[39]

If, however, the pleading deficiency cannot be cured by an amendment, a special exception is unnecessary and a summary judgment based on the pleadings is appropriate.[40] The distinction is that "inadequately pleading a cause of action" warrants a special exception, while "utterly failing to plead a viable cause of action" warrants a summary judgment.[41] Nevertheless, the cautious practitioner should specially except to the pleading deficiency. If the plaintiff fails to correct the deficiency after being given an opportunity to replead, then the defendant should move for summary judgment.[42]

G. *Temporary and Permanent Injunctions*

At a hearing upon the request for a temporary injunction, the only issue before the trial court is "whether the applicant is entitled to the preservation of the status quo of the subject matter of the suit pending trial on the merits."[43] To be entitled to a temporary injunction, the movant must show: (1) a probable right to recovery; (2) that immi-

---

36. TEX. R. CIV. P. 91.

37. Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983)(quoting Texas Dep't of Corrections v. Herring, 513 S.W.2d 6, 10 (Tex. 1974)).

38. *Id.*; Russell v. Texas Dep't of Human Resources, 746 S.W.2d 510, 512-13 (Tex. App.—Texarkana 1988, writ denied).

39. *See* Jacobs v. Cude, 641 S.W.2d 258, 261 (Tex. App.—Houston [14th Dist] 1982, writ ref'd n.r.e.); Fidelity & Casualty Co. v. Shubert, 646 S.W.2d 277, 278-78 (Tex. Civ. App.—Tyler 1983, writ ref'd n.r.e.); Armendariz v. Bill Sears Supermarket No. 1, 562 S.W.2d 529, 530 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

40. Hidalgo v. Surety Sav. & Loan Ass'n, 462 S.W.2d 540, 543 n.1 (Tex. 1979); *see also* James v. Hitchcock Indep. School Dist., 742 S.W.2d 701, 704 (Tex. App.—Houston [1st Dist.] 1987, writ denied); Gay v. State, 730 S.W.2d 154, 158-59 (Tex. App.—Amarillo 1987, no writ); *Jacobs*, 641 S.W.2d at 261.

41. Chambers v. Huggins, 709 S.W.2d 219, 224 (Tex. App.—Houston [14th Dist.] 1985, no writ).

42. *Id.* at 224.

43. Davis v. Huey, 571 S.W.2d 859, 862 (Tex. 1978); Alamo Sav. Ass'n v. Forward Constr. Corp., 746 S.W.2d 897, 899 (Tex. App.—Corpus Christi 1988, writ dism'd w.o.j.).

nent and irreparable harm will occur in the interim if the request is not granted; and (3) that no adequate remedy at law exists.[44]

Every order which grants a temporary injunction "must include an order setting the cause for a trial on the merits with respect to the ultimate relief sought."[45] Failure to include an order setting the matter for a trial on the merits mandates dissolution of the injunction.[46] Furthermore, "the trial court's stated reasons for granting or denying a temporary injunction must be specific and legally sufficient and not merely conclusory."[47] The trial court is not required to explain its reasons for concluding that the applicant has shown a probable right to final relief, but it is required to give the reasons why it believes that injury will result if the interlocutory relief is not granted.[48] Failure to meet these requirements renders the order "fatally defective and void, thereby requiring reversal, even if the issue is not raised specifically by [a] point of error."[49]

Because an appeal of an order granting or denying a temporary injunction or granting or overruling a motion to dissolve a temporary injunction is an appeal from an interlocutory order,[50] the merits of the movant's case are not considered upon appeal.[51] Appellate review is, therefore, strictly limited to whether the trial court has clearly abused its discretion.[52] The appellate court should not substitute its judg-

---

44. Sun Oil Co. v. Whitaker, 424 S.W.2d 216, 218 (Tex. 1968); Inex Indus., Inc. v. Alpar Resources, Inc., 717 S.W.2d 685, 687-88 (Tex. App.—Amarillo 1986, no writ).

45. TEX. R. CIV. P. 683.

46. Interfirst Bank San Felipe v. Paz Constr. Co., 715 S.W.2d 640, 641 (Tex. 1986).

47. Arrechea v. Plantowsky, 705 S.W.2d 186, 189 (Tex. App.—Houston [14th Dist.] 1985, no writ); Martin v. Linen Sys. for Hosp., Inc., 671 S.W.2d 706, 710 (Tex. App.—Houston [1st Dist.] 1984, no writ); University Interscholastic League v. Torres, 616 S.W.2d 355, 358 (Tex. Civ. App.—San Antonio 1981, no writ).

48. State v. Cook United, Inc., 464 S.W. 105, 106 (Tex. 1971); Transport Co. v. Robertson Transp., Inc., 152 Tex. 551, 556, 261 S.W.2d 549, 552 (1953); *see also* Public Util. Comm'n v. City of Austin, 710 S.W.2d 658, 660 (Tex. App.—Austin 1986, no writ); Beckham v. Beckham, 672 S.W.2d 41, 43 (Tex. App.—Houston [14th Dist.] 1984, no writ).

49. *Arrechea*, 705 S.W.2d at 189; *Torres*, 616 S.W.2d at 358.

50. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 1990)(temporary injunction is interlocutory order which may be appealed).

51. Davis v. Huey, 571 S.W.2d 859, 861 (Tex. 1978).

52. *Id.* at 861-62; e.g., State v. Southwestern Bell Tel. Co., 526 S.W.2d 526, 528 (Tex. 1975); Janus Films, Inc. v. City of Fort Worth, 163 Tex. 616, 358 S.W.2d 589, 590 (1962); *Transport Co.*, 152 Tex. at 556, 261 S.W.2d at 552; *see also* Cellular Mktg., Inc. v. Houston Cellular Tel. Co., No. A14-88-01075-CV (Tex. App.—Houston [14th Dist.] Jan. 18, 1990)(WESTLAW, Texas cases database)(appeal from denial of motion to dissolve temporary injunction subject to abuse of discretion standard of review).

ment for that of the lower court, but rather it should determine whether the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion.[53] The trial court abuses its discretion when the court misapplies the law to "the established facts or when the evidence does not reasonably support the conclusion that the applicant has a probable right of recovery."[54] Additionally, "where the facts conclusively show that a party is violating the substantive law it becomes the duty of the court to enjoin the violation" and there is, therefore, "no discretion to be exercised."[55] In its review of an order which grants or denies a temporary injunction, the appellate court should draw inferences from the evidence in a manner which is most favorable to the trial court's judgment.[56]

In an appeal from a permanent injunction, the standard of review is clear abuse of discretion.[57] While "a litigant has a right to a trial by jury in an equitable injunction action, only ultimate issues of fact are submitted for jury determination."[58] A jury will not "determine the expediency, necessity or propriety of equitable relief."[59] Thus, the trial court's order granting or denying a permanent injunction, based upon the ultimate facts, is reviewed in the same manner as a temporary injunction is reviewed.[60]

H. *Severance and Consolidation of Causes*

The trial court may sever or consolidate causes pursuant to Texas Rules of Civil Procedure 41 and 174.[61] A claim is properly severable if "the controversy involves more than one cause of action, the severed claim is one that would be the proper subject to a lawsuit if inde-

---

53. *Davis*, 571 S.W.2d at 862; *see also* Philipp Bros. v. Oil Country Specialists, Ltd., 709 S.W.2d 262, 265 (Tex. App.—Houston [1st Dist.] 1986, writ dism'd).

54. State v. Southwestern Bell Tel. Co., 526 S.W.2d 526, 528 (Tex. 1975); City of San Antonio v. Bee-Jay Enter., 626 S.W.2d 802, 804 (Tex. App.—San Antonio 1981, no writ).

55. Priest & Van Comm'n, Inc. v. Texas Animal Health Comm'n, 780 S.W.2d 874, 876 (Tex. App.—Dallas 1989, n.w.h.) City of Houston v. Memorial Bend Util. Co., 331 S.W.2d 418, 422 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.).

56. *See* James v. Wall, 783 S.W.2d 615, 619 (Tex. App.—Houston [14th Dist.] 1989, n.w.h.)(appellate court considers evidence which tends to support trial court's findings); Miller v. K & M Partnerhsip, 770 S.W.2d 84, 87 (Tex. App.—Houston [1st Dist.] 1989, n.w.h.).

57. *Priest & Van Comm'n, Inc.* 780 S.W.2d at 875.

58. *Id.* at 876 (citing State v. Texas Pet Food, Inc., 591 S.W.2d 800, 803 (Tex. 1979)).

59. *Id.*

60. *Id.*

61. TEX. R. CIV. P. 41 (governs misjoinder and non-joinder of parties); TEX. R. CIV. P. 174 (governs consolidation and separate trials).

pendently asserted, and the severed claim" is not so interwoven with the remaining action that they involve the same facts and issues.[62] The controlling reasons for granting a severance are to do justice, avoid prejudice and further convenience.[63] Rule 41 gives the trial court broad discretion in the matter of severance, and the trial court's decision to grant a severance will not be reversed absent an abuse of discretion.[64] The trial court also has broad discretion in the consolidation of cases pursuant to Texas Rule of Civil Procedure 174.[65] The trial court's rulings on consolidation are within the discretion of the trial court and will not be reversed absent an abuse of discretion which is prejudicial to the complaining party.[66]

I. *Intervention*

Texas Rule of Civil Procedure 60 allows a party to intervene in an existing cause of action, subject to being stricken by the court for sufficient cause on the motion of any party.[67] Under Rule 60, a person or entity has the right to intervene if the intervenor could have brought the same action or any part thereof, in his own name, or if the action had been brought against him, he would be able to defeat recovery or some part thereof.[68] The interest asserted may be legal or equitable.[69]

---

62. Guaranty Fed. Sav. Bank v. Horseshoe Operating Co., 33 Tex. Sup. Ct. J. 150, 153-54 (Jan. 3, 1990)(citing Saxer v. Nash Phillips-Copus Co. Real Estate, 678 S.W.2d 736, 739 (Tex. App.—Tyler 1984, writ ref'd n.r.e.)); McRoberts v. Tesoro Sav. & Loan Ass'n, 781 S.W.2d 705, 706 (Tex. App.—San Antonio 1989, writ requested).

63. Utilities Natural Gas Corp. v. Hill, 239 S.W.2d 431, 434 (Tex. Civ. App.—Dallas 1951, no writ).

64. *Guaranty Fed. Sav. Bank*, 33 Tex. Sup. Ct. J. at 153; *see also* Mathis v. Bill De La Garza & Assoc., 778 S.W.2d 105, 106 (Tex. App.—Texarkana 1989, no writ)(severance of compulsory counterclaim which arises out of the same contract or issue that is the subject matter of the suit constitutes an abuse of discretion and reversible error); McGuide v. Commercial Union Ins. Co., 431 S.W.2d 347, 349 (Tex. 1968).

65. Cherokee Water Co. v. Forderhouse, 641 S.W.2d 522, 525 (Tex. 1982); Adams v. Petrade Int'l, Inc., 754 S.W.2d 696, 721 (Tex. App.—Houston [1st Dist.] 1988, writ granted).

66. *Cherokee Water Co.*, 641 S.W.2d at 525; Allison v. Arkansas La. Gas Co., 624 S.W.2d 566, 528 (Tex. 1981); General Life & Accident Ins. Co. v. Handy, 766 S.W.2d 370, 375 (Tex. App.—El Paso 1989, n.w.h.); Marshall v. Harris, 764 S.W.2d 34, 35 (Tex. App.—Houston [1st Dist.] 1989)(no writ); *Adams*, 745 S.W.2d at 721.

67. TEX. R. CIV. P. 60.

68. Guaranty Fed. Sav. Bank v. Horseshoe Operating Co., 33 Tex. Sup. Ct. J. 150, 153 (Jan. 13, 1990)(citing Inter-Continental Corp. v. Moody, 411 S.W.2d 578, 589 (Tex. Civ. App.—Houston [1st Dist.] 1966, writ ref'd n.r.e.)); Texas Supply Center, Inc. v. Daon Corp., 641 S.W.2d 335, 337 (Tex. App.—Dallas 1982, writ ref'd n.r.e.)).

69. *Guaranty Fed. Sav. Bank*, 33 Tex. Sup. Ct. J. at 153 (citing *Moody*, 411 S.W.2d at 589); Mendez v. Bower, 626 S.W.2d 498, 499 (Tex. 1982).

An intervenor does not have the burden of seeking permission to intervene, rather, the party opposing the intervention has the burden to challenge it by a motion to strike.[70] The party opposing the intervention must file a motion to strike, and while the trial court has broad discretion in ruling on the motion, the trial court abuses its discretion if "(1) the intervenor meets the above test, (2) the intervention will not complicate the case by excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the intervenor's interest."[71]

J. *Discovery Rulings and Sanctions*

In recent years, and with increasing frequency, trial court discovery orders have been reviewed by the courts of appeals and the supreme court through petitions for a writ of mandamus.[72] Traditionally, a writ of mandamus, which is an extraordinary remedy, can only be obtained in extreme and unusual situations. Specifically, it is available only: (1) where the relator has a clear right to relief (such as from an illegal or void order or where a public official refuses to perform a ministerial act),[73] and (2) there is no other adequate remedy at law to remedy the error.[74]

In recent years, however, the supreme court has relaxed the requirements for obtaining a writ of mandamus in the discovery context. In *Jampole v. Touchy*,[75] the supreme court recognized that an appeal of a trial court's erroneous ruling on discovery matters did not provide an adequate remedy, and as a result, the door was opened for challenging pretrial discovery orders by writ of mandamus.[76] Accordingly, the traditional test for reviewing a petition for a writ of mandamus, as set forth above, has been modified in the context of pretrial rulings on discovery matters, except when sanctions are ordered for discovery abuse.

---

70. *Guaranty Fed. Sav. Bank*, 33 Tex. S. Ct. J. at 153; *Mendez*, 626 S.W.2d at 499.

71. *Guaranty Fed. Sav. Bank*, 33 Tex. Sup. Ct. J. at 153 (citing *Moody*, 411 S.W.2d at 589; *Daon Corp.*, 641 S.W.2d at 337)).

72. TEX. R. APP. P. 121, 122.

73. King v. Payne, 156 Tex. 105, 112, 292 S.W.2d 331, 336 (1956); *see also* Womack v. Berry, 156 Tex. 44, 50-51, 291 S.W.2d 677, 682-83 (1956)(no case found in which writ issued to correct action of an official).

74. Finch v. Finch, 162 Tex. 351, 359, 346 S.W.2d 823, 829 (1961).

75. 673 S.W.2d 569 (Tex. 1984).

76. *Id.* at 572.

The standard of review of a trial court's pretrial discovery order is whether the trial court abused its discretion in granting or denying discovery.[77] A relator who attacks the ruling of a trial court as an abuse of discretion "labors under a heavy burden" because a trial court has abused its discretion only when it has reached a decision that is "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law."[78] The reviewing court must determine whether the lower court acted without reference to any guiding rules and principles such that the act was arbitrary and unreasonable.[79] The court of appeals has acted in excess of its authority when it grants mandamus relief absent these circumstances because mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy.[80]

A trial court may sanction any party which abuses the discovery process.[81] Any discovery sanctions imposed by a trial court are within that court's discretion and will be set aside on appeal only if the court clearly abused its discretion.[82] "The trial court is to be given the broadest discretion in imposing sanctions for discovery abuse,"[83] and "in exercising its discretion in choosing the appropriate sanction, the trial court is not limited to considering only the specific violation for which sanctions are finally imposed, but can consider everything that has occurred during the history of the litigation."[84]

In reviewing the trial court's sanction, the appellate court may not substitute its judgment for that of the trial court.[85] To prove a clear

---

77. Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985).

78. *Id.*

79. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986).

80. *Johnson*, 700 S.W.2d at 917; Peeples v. Honorable Fourth Supreme Judicial Dist., 701 S.W.2d 635, 637 (Tex. 1985).

81. TEX. R. CIV. P. 215 (governing abuse of discovery and imposition of sanctions).

82. Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986).

83. Tate v. Commodore County Mut. Ins. Co., 767 S.W.2d 219 (Tex. App.—Dallas 1989, writ denied).

84. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241 (Tex. 1985), *cert. denied,* 476 U.S. 1159 (1986); Garcia Distrib., Inc. v. Fedders Air Conditioning, USA, Inc., 773 S.W.2d 802, 806-07 (Tex. App.—San Antonio 1989, n.w.h.); Overstreet v. Home Indem. Co., 747 S.W.2d 822, 826 (Tex. App.—Dallas 1987, writ denied); Medical Protective Co. v. Glanz, 721 S.W.2d 382, 388 (Tex. App.—Corpus Christi 1986, writ ref'd).

85. *Downer*, 701 S.W.2d at 242; *Garcia Distrib., Inc.*, 773 S.W.2d at 806-07; *Tate*, 767 S.W.2d at 224-25; Carr v. Harris County, 745 S.W.2d 531, 532 (Tex. App.—Houston [1st Dist.] 1988, no writ).

abuse of discretion, it must be shown that, in light of all the circumstances of the case, the trial court's action was arbitrary or unreasonable. [86] A trial court has abused its discretion when it imposes a sanction which does not further one of the purposes that discovery sanctions were intended to further.[87] The supreme court has identified the purposes of discovery sanctions: (1) to secure broad compliance with the rules of discovery; (2) to deter other litigants from violating the discovery rules; and (3) to punish parties that violate the rules of discovery.[88] If the sanction satisfies one of these purposes, the trial court has not committed an abuse of discretion.[89]

K. *Failure to Supplement Discovery and Failure to Answer Request for Admissions*

Parties have an affirmative duty to supplement answers to discovery requests if an answer "is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading."[90] The trial court may sanction a party for failure to comply with this rule by excluding the evidence affected by the violation.[91] An exception to this strict rule exists when the party presenting such evidence establishes that good cause exists for allowing the evidence.[92] The burden of establishing good cause is on the party offering the evidence.[93] The trial court's determination will not be set aside unless there is an abuse of discretion.[94] If the party offering the evidence fails to establish good cause, and the trial court admits the evidence over the opposing party's objection, the objecting party must show

---

86. Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 443 (Tex. 1984).

87. Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986). *See* Hogan v. Beckel, 783 S.W.2d 307, 309-10 (Tex. App.—San Antonio 1989, n.w.h.) (extreme sanction of dismissal for failure of plaintiff to attend one deposition held to be an abuse of discretion where there is no showing of actual bad faith by plaintiff with resulting serious harm to defendant).

88. *Id.*; *Downer*, 701 S.W.2d at 242.

89. Garcia Distrib., Inc. v. Fidders Air Conditioning, USA, Inc., 773 S.W.2d 802, 806-07 (Tex. App.—San Antonio 1989, n.w.h.).

90. TEX. R. CIV. P. 166b(6)(a)(2); *see also* Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989).

91. TEX. R. CIV. P. 215(5); *Boothe*, 766 S.W.2d at 789; Morrow v. H.E.B., Inc., 714 S.W.2d 297, 297 (Tex. 1986).

92. McKinney v. National Union Fire Ins. Co., 772 S.W.2d 72, 77 (Tex. 1989); Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395 (Tex. 1989).

93. *McKinney*, 776 S.W.2d at 77; *Gee*, 765 S.W.2d at 395.

94. *Morrow*, 714 S.W.2d at 298; Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 442 (Tex. 1984).

that the trial court's error "was reasonably calculated to cause and probably did cause the rendition of an improper judgment."[95] The appellate court will determine whether the error probably caused the rendition of an improper judgment in light of the record as a whole.[96]

When a party fails to respond to a request for admission as required by Rule 169, the matter is admitted without necessity of a court order. The deemed admission may be withdrawn or amended upon motion of the party making the admission if the party shows good cause and upon a showing that the party relying upon the admission will not be prejudiced by the withdrawl and the merits of the cause will be served by the withdrawl.[97] The "good cause" requirement is the threshold issue which must be determined before the trial court may consider the remaining requirements of the rule.[98] The courts have construed the good cause requirement under Rule 169 to be equivalent to the good cause requirement under Rule 320.[99] Thus, a party may establish "good cause" by showing that he did not act intentionally or with conscious disregard in failing to timely file answers to the requests.[100] The trial court's ruling on a motion to withdraw or amend deemed admissions is subject to the abuse of discretion standard of review.[101]

L. *Summary Judgment*

Pursuant to Texas Rule of Civil Procedure 166a(c) a summary judgment is proper only when a movant establishes that there is no

---

95. TEX. R. APP. P. 81(b); *McKinney*, 772 S.W.2d at 75.

96. McKinney v. National Union Fire Ins. Co., 772 S.W.2d 72, 75 (Tex. 1989); Pittman v. Baladez, 312 S.W.2d 210, 216 (Tex. 1958).

97. Tex. R. Civ. P. 169(2). The trial court's discretion to permit withdrawl or amendment is also subject to the provisions of Rule 166 governing amendment of a pre-trial order and Rule 166b(6) governing the duty to supplement discovery responses.

98. Boone v. Texas Employers' Ins. Ass'n, No. 12-88-00207-CV (Tex. App.—Tyler Feb. 28, 1990, n.w.h.)(Westlaw, Texas cases database).

99. *Id.* (citing Employers Ins. of Wausau v. Halton, No. 05-89-00065-CV (Tex. App.—Dallas Oct. 19, 1989, n.w.h.) (not yet published)). The court of appeals observed that "[t]here is a clear analogy between a motion to set aside a default judgment, occasioned by a failure to file a timely answer, and a motion to set aside admissions of fact occasioned by a party's failure to timely file proper responses." *Id.*

100. *Id.* The court noted that Rule 169 is a useful discovery tool provided that it is "wisely administered" and that it is not construed to give one party the opportunity to obtain a favorable judgment without supporting testimony "when, without injustice to either party, the case can be opened for a full hearing on the evidence." *Id.*

101. *Id.*

genuine issue of material fact and that he is entitled to judgment as a matter of law.[102] In a summary judgment proceeding, the burden of proof is on the movant, and all doubts as to the existence of a genuine issue of fact are resolved against the movant.[103] Once the movant has established a right to a summary judgment, the burden shifts to the nonmovant. The nonmovant must then respond to the motion for summary judgment and present to the trial court any issues that would preclude summary judgment.[104]

The question on appeal "is not whether the summary judgment proof raises a fact issue," but "whether the summary judgment proof establishes as a matter of law that there is no genuine issue of a material fact as to one or more of the essential elements of the plaintiff's cause of action."[105] Summary judgments are reviewed in accordance with the following standards:

1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.
2. In deciding whether or not there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.
3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.[106]

The reviewing court will reverse the judgment and remand the cause for a trial on the merits where it determines that summary judgment was improperly granted.[107] Where both parties file a motion for summary judgment, and one is granted and one is denied, the denial may be considered by the reviewing court only if the appealing party complains of both the granting of the opponent's motion and the de-

---

102. *See* Swilley v. Hughes, 488 S.W.2d 64, 67 (Tex. 1972).

103. Roskey v. Texas Health Facilities Comm'n, 639 S.W.2d 302, 303 (Tex. 1982).

104. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979). *See generally* Hittner & Liberato, *Summary Judgments in Texas*, 20 ST. MARY'S L.J. 243, 274-77 (1989)(discussing procedures for responding to and opposing summary judgments); Hittner, *Summary Judgments in Texas*, 22 HOUS. L. REV. 1109, 1116-32 (1985)(discussing summary judgment requirements).

105. Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970).

106. Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-59 (Tex. 1985); Turboff v. Gertner, Aron & Ledet, Invs., 763 S.W.2d 827, 829 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

107. Tobin v. Garcia, 159 Tex. 58, 63-64, 316 S.W.2d 396, 400 (1958).

nial of his own motion.[108] If the only action taken by the trial court is the denial of the motion for a summary judgment, that order is interlocutory in nature and is not an issue for appeal.[109]

M. *Motion for Continuance*

Whether to grant or deny a motion for continuance is within the sound discretion of the trial court.[110] The trial court's ruling will not be reversed unless the record shows a clear abuse of discretion.[111] Before a reviewing court can reverse the trial court's ruling, it must appear clearly from the record that trial court disregarded the rights of a party.[112] "An appellate court may reverse for abuse of discretion only if, after searching the record, it is clear that the trial court's decision was arbitrary and unreasonable."[113]

N. *Dismissal for Want of Prosecution*

A trial court has a duty and an obligation to maintain control of its docket and to require that each party prosecute its suit with diligence.[114] Thus, "a trial court has the authority to dismiss a case for want of prosecution pursuant to its inherent powers" or pursuant to Texas Rule of Civil Procedure 165a.[115] The trial court's power to dismiss under Rule 165a(1) (the failure to appear at a hearing or trial), under Rule 165a(2) (failure to meet time standards promulgated by the supreme court), and under Rule 165a(4) (lack of dili-

---

108. *Id.*; Resource Sav. Ass'n v. Neary, 782 S.W.2d 897, 903 (Tex. App.—Dallas 1989, n.w.h.).

109. *Tobin*, 159 Tex. at 63-64, 316 S.W.2d at 400; *see also* TEX. R. CIV. P. 166 (a) (summary judgment interlocutory in character).

110. State v. Wood Oil Distrib., Inc., 751 S.W.2d 863, 865 (Tex. 1988); Yowell v. Piper Aircraft Corp., 703 S.W.2d 630, 635 (Tex. 1986).

111. Villegas v. Carter, 711 S.W.2d 624, 626 (Tex. 1986); State v. Crank, 666 S.W.2d 91, 94 (Tex. 1984), *cert. denied*, 469 U.S. 833 (1984).

112. *Yowell*, 703 S.W.2d at 635 (Tex. 1986); Metro Aviation, Inc. v. Bristow Offshore Helicopters, Inc., 740 S.W.2d 873, 874 (Tex. App.—Beaumont 1987, no writ).

113. Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 795 (Tex. 1987); Central Nat'l Gulfbank v. Comdata Network, Inc., 773 S.W.2d 626, 627 (Tex. App.—Corpus Christi 1989, n.w.h.).

114. Texas Soc'y, Daughters of the Amer. Revolution, Inc. v. Estate of Hubbard, 768 S.W.2d 858, 861 (Tex. App.—Texarkana 1989, n.w.h.).

115. Veteran's Land Bd. v. Williams, 543 S.W.2d 89, 90 (Tex. 1976); Armentrout v. Murdock, 779 S.W.2d 119, 121 (Tex. App.—Houston [1st Dist.] 1989, n.w.h); Hicks v. First Nat'l Bank, 778 S.W.2d 98, 101 (Tex. App — Amarillo 1989, writ denied).

gence) are cumulative and independent.[116]

Specifically, the trial court has statutory power to dismiss a suit for failure to prosecute it with due diligence under Rule 165a(4).[117] Whether the plaintiff prosecuted the case with diligence is an issue confined solely to the trial court's discretion.[118] To determine the issue of diligence, the court may consider the entire history of the litigation, and no single factor is dispositive.[119] Whether the plaintiff intended to abandon the litigation is not the inquiry, "nor is the existence of a belated trial setting or an asserted eagerness to proceed to trial conclusive."[120] Settlement activity does not excuse want of diligent prosecution,[121] nor does the passive attitude of opposing parties excuse want of diligence.[122] Traditionally, the courts consider: "the length of time the case was on file, the extent of activity in the case, whether a trial setting was requested, and the existence of reasonable excuses for the delay."[123] Other circumstances may also be considered, such as "periods of activity, intervals of inactivity, reasons for lack of attention, and the passage of time."[124]

---

116. *See Williams*, 543 S.W.2d at 90; Ozuna v. Southwest Bio-Clinical Laboratories, 766 S.W.2d 900, 901-03 (Tex. App.—San Antonio 1989, n.w.h.).

117. TEX. R. CIV. P. 165a(4); *see also* State v. Rotello, 671 S.W.2d 507, 508-09 (Tex. 1984)(trial judge may dismiss for failure to prosecute with diligence); Rizk v. Mayad, 603 S.W.2d 773, 776 (Tex. 1980)(purpose of Rule 165(a) is to ameliorate effects of dismissal); e.g., *Williams*, 543 S.W.2d at 90; Bard v. Frank B. Hall & Co., 767 S.W.2d 839, 843 (Tex. App.—San Antonio 1989, writ denied); *Ozuna*, 766 S.W.2d at 903; Knight v. Trent, 739 S.W.2d 116, 118 (Tex. App.—San Antonio 1987, no writ).

118. Bevil v. Johnson, 307 S.W.2d 85, 87 (Tex. 1957); *see also* Dolenz v. Continental Nat'l Bank, 620 S.W.2d 572, 575-76 (Tex. 1981); *Ozuna*, 766 S.W.2d 900, 901; Mercure Co. v. Rowland, 715 S.W.2d 677, 680 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); McCormick v. Shannon West Tex. Memorial Hosp., 665 S.W.2d 573, 675 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

119. *Ozuna*, 766 S.W.2d at 903 (trial court has discretion to review complete history of action); *see also* Armentrout v. Murdock, 779 S.W.2d 119, 121 (Tex. App.—Houston [1st Dist.] 1989, n.w.h.).

120. Ozuna v. Southwest Bio-Clinical Laboratories, 766 S.W.2d 900, 903 (Tex. App.—San Antonio 1989, n.w.h.)(citations omitted); *see also* Bard v. Frank B. Hall & Co., 767 S.W.2d 839, 843 (Tex. App.—San Antonio 1989, writ denied). A request "at the dismissal docket call hearing that the case be set for trial does not, of itself, preclude dismissal." *Bard*, 767 S.W. at 843.

121. Texas Soc'y, Daughters of the Am. Revolution, Inc. v. Estate of Hubbard, 768 S.W.2d 858, 860 (Tex. App.—Texarkana 1989, n.w.h.).

122. *Id* at 861.

123. *Bard*, 767 S.W.2d at 843; *see also* NASA I Bus. Center v. American Nat'l Ins. Co., 747 S.W.2d 36, 38 (Tex. App.—Houston [1st Dist.]), *writ denied per curiam*, 754 S.W.2d 152 (Tex. 1988)(factors relevant to discretionary inquiry).

124. Ozuna v. Southwest Bio-Clinical Laboratories, 766 S.W.2d 900, 903 (Tex. App.—

The dismissal may be pursuant to Rule 165a(3), as opposed to the trial court's inherent power. Under Rule 165a(3) the trial court "shall reinstate the case upon finding after a hearing that the failure of the party or his attorney [to appear] was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained."[125] The reinstatement provisions in Rule 165a(3) apply only to dismissals for failure to appear at trial or at a hearing and are slightly similar to the requisites for granting new trial in a default judgment.[126] The standard of review of a dismissal for want of prosecution or the overruling of a motion to reinstate is whether the trial court committed a clear abuse of discretion.[127]

O. *Jury Demand*

Texas Rules of Civil Procedure 216(1) requires a party who desires a jury trial to file a written request with the district clerk for a jury

---

San Antonio 1989, n.w.h.). In *Hicks v. First Nat'l Bank*, the court held that in reviewing a motion to dismiss for want of prosecution if a case has been on file for an unreasonable length of time, a rebuttable presumption of abandonment arises. 778 S.W.2d 98, 101-02 (Tex. App.—Amarillo 1989, writ. denied). If the party who filed the proceeding establishes good reason for the delay, the presumption is rebutted and the motion should be overruled; however, if the party refuses or is unable to establish a good reason, the presumption becomes conclusive and the motion to dismiss should be granted. *Id.* (citing Denton County v. Brammer, 361 S.W.2d 198, 201 (Tex. 1962) (Calvert, C.J., dissenting)).

125. TEX. R. CIV. P. 165a(3); *see also* Armentrout v. Murdock, 779 S.W.2d 119, 122 (Tex. App.—Houston [1st Dist.] 1989, n.w.h.); *Ozuna*, 766 S.W.2d at 903 (discussing "failure" as used in Rule 165(a)(3)).

126. *Compare Ozuna*, 766 S.W.2d at 903 (Rule 165(a)(3) applies to reinstatement for failure to appear) *with* Moore v. Armour & Co., 748 S.W.2d 327, 331 (Tex. App.—Amarillo 1988, no writ)(reinstatement provisions of Rule 165a(3) do not apply to dismissal for failure to prosecute with due diligence).

127. Bevil v. Johnson, 157 Tex. 621, 625, 307 S.W.2d 85, 87 (1957); *see also* Veteran's Land Bd. v. Williams, 543 S.W.2d 89, 90 Tex. 1976); *Ozuna*, 766 S.W.2d at 903; *Armentrout*, 779 S.W.2d at 119; Knight v. Trent, 739 S.W.2d 116, 120 Tex. App.—San Antonio 1987, no writ); Speck v. Ford Motor Co., 709 S.W.2d 273, 276 (Tex. App.—Houston [14th Dist.] 1986, no writ). If the trial court fails to set and conduct a hearing on a motion to reinstate, the dismissal order will be reversed on appeal. *See* Reed v. City of Dallas, 774 S.W.2d 384, 385 (Tex. App.—Dallas 1989, writ denied)(court reversed and ordered trial court to conduct hearing. *But see id.* (Howell, J., dissenting)(arguing court should have reversed and remanded for trial on merits). A dismissal for want of prosecution does not preclude the filing of another suit, and, therefore, a dismissal of the case "with prejudice" is improper. Melton v. Rylander, 727 S.W.2d 299, 303 (Tex. App.—Dallas 1987, writ ref'd n.r.e.); Willis v. Barron, 604 S.W.2d 447, 447-48 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.). If the trial court dismisses the case "with prejudice," the appellate court will reform the judgment to strike "with prejudice" from the judgment. *Melton*, 727 S.W.2d at 303.

trial within a reasonable time before the date set for trial, but not fewer than 30 days in advance.[128] In determining whether a late request for a jury trial should be granted or denied, the trial court should ascertain whether "the granting of the jury trial would injure the adverse party or would result in an interference with the orderly handling of the court's docket or delay the trial of the case."[129] The trial court's decision will be set aside only upon the showing of an abuse of discretion.[130] "The decision, in order to be an abuse of discretion, must be so arbitrary and unreasonable as to amount to a clear and prejudicial error of law."[131]

The right to trial by jury becomes absolute only where it is timely requested and a jury fee is paid.[132] A request for jury trial should be made any reasonable time before the date set for trial, but not less than thirty days in advance of the trial setting.[133] The court does not have discretion to refuse a jury trial where the fee has been paid and the request is made on or before appearance date.[134]

P. *Judicial Notice*

Pursuant to Texas Rule of Civil Procedure 184 and Texas Rule of Civil Evidence 202, a trial court "upon its own motion may, or upon the motion of a party shall, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States."[135] A party requesting that judicial notice be taken should furnish the court with sufficient information to enable the court to properly comply with the request, and shall give all parties, which the court deems necessary, notice such that each may fairly

---

128. TEX. R. CIV. P. 216(1)(setting forth procedures and requirements for jury trial). *See* Buller v. Beaumont Bank, N.A., 777 S.W.2d 763 (Tex. App.—Beaumont 1989, writ requested). "The right to trial by jury is not absolute but is dependent on written request and payment of the jury fee a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance." *Id.*

129. Brawner v. Arellano, 757 S.W.2d 526, 529 (Tex. App.—San Antonio 1988, writ dism'd by agr.)(citing Peck v. Ray, 601 S.W.2d 165, 167 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.)).

130. *Id.* at 527-28.

131. Wright v. Brooks, 773 S.W.2d 649, 651 (Tex. App.—San Antonio 1989, no writ).

132. TEX. R. CIV. P. 216.

133. *Id.*

134. Squires v. Squires, 673 S.W.2d 681, 684 (Tex. App.—Corpus Christi 1984, no writ).

135. TEX. R. CIV. P. 184; TEX. R. EVID. 202.

prepare to meet the request. Determination of whether a party has complied with these requirements is within the discretion of the trial court.[136] However, "once the law has been invoked by proper motion, the trial court has no discretion—it must acknowledge that law."[137]

III. TRIAL RULINGS

A. *Conduct of Trial in General*

Rulings that relate to the conduct of a trial are largely within the broad discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion.[138]

B. *Motion in Limine*

In order to preserve error on appeal for the wrongful suppression of evidence, the record must reflect that the party opposing the motion in limine offered the suppressed evidence during the trial and obtained an adverse ruling from the court.[139] If there is a claim of the wrongful admission of evidence, the record must reflect that the party seeking to suppress the evidence made a proper objection when the evidence was actually offered during the trial on the merits.[140] The standard of review is governed by Texas Rule of Appellate Procedure 81(b)(1).[141]

C. *Voir Dire and Challenge for Cause*

The Texas Supreme Court has instructed the trial courts that

---

136. *See* Daugherty v. Southern Pac. Transp. Co., 772 S.W.2d 81, 83 (Tex. 1989)(failure to plead a statute or regulation is not proper ground for trial court's refusal to take judicial notice).

137. Keller v. Nevel, 699 S.W.2d 211, 212 (Tex. 1985). The appellate courts may also take "judicial notice of their own records." Victory v. State, 138 Tex. 285, 288, 158 S.W. 2d 760, 763 (1942); *see also* Birds v. Holbrook, 775 S.W. 2d 411, 412 (Tex. App.—Fort Worth 1989, writ denied).

138. Schroeder v. Brandon, 141 Tex. 319, 325, 172 S.W.2d 488, 491 (1943); *see also* Watson v. Isern, 782 S.W.2d 546, 550 (Tex. App.—Beaumont 1989, n.w.h.); *In re* Estate of *Hill*, 761 S.W.2d 527, 531 (Tex. App.—Corpus Christi 1988, n.w.h.); Adams v. Petrade Int'l, Inc., 754 S.W.2d 696, 718 (Tex. App.—Houston [1st Dist.] 1988, writ denied); Looney v. Traders & Gen. Ins. Co., 231 S.W.2d 735, 740 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.).

139. CLS Assocs., Ltd. v. A— B—, 762 S.W.2d 221, 224 (Tex. App.—Dallas 1988, no writ); National Living Centers, Inc. v. Cities Reality Corp., 619 S.W.2d 422, 425 (Tex. Civ. App.—Texarkana 1981, no writ).

140. Wilkins v. Royal Indemn. Co., 592 S.W.2d 64, 66-67 (Tex. Civ. App.—Tyler 1979, no writ).

141. TEX. R. APP. P. 81(b)(1) (governing standard of review for motions in limine).

"broad latitude should be allowed to a litigant during voir dire examination [to] enable the litigant to discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised."[142] Although voir dire examination is largely within the sound discretion of the trial court, the trial court abuses this discretion where its denial of the right to ask a proper question prevents determination of "whether grounds exist to challenge for cause or denies intelligent use of peremptory challenges."[143] In order to obtain a reversal, the complaining party must show that the trial court abused its discretion and that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment.[144]

The question of whether bias and prejudice exists is a fact question and will not be disturbed on appeal unless there is an abuse of discretion.[145] Furthermore, the appellate court must consider the evidence in the light most favorable to upholding the trial court's ruling.[146] However, once bias or prejudice is established, it is a legal disqualification; reversible error results if the court overrules a motion to strike.[147]

D. *Alignment of Parties and Allocation of Peremptory Strikes*

The existence of antagonism between parties is a question of law.[148] In determining whether antagonism exists, the trial court must consider the pleadings, information disclosed by pretrial discovery, information and representations made during voir dire of the jury panel, and any information brought to the attention of the trial court before the parties exercise their strikes.[149] The antagonism must be finally determined after voir dire and prior to the exercise of the strikes.[150]

---

142. Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705, 709 (Tex. 1989).

143. *Id.*

144. *Id.*

145. *See* Swap Shop v. Fortune, 365 S.W.2d 151, 154 (Tex. 1963)(prejudicial or bias jury indicates abuse of discretion); Sullemon v. United States Fidelity & Guar Co., 734 S.W.2d 10, 15 (Tex. App.—Dallas 1987, no writ)(discussing trial court's abuse of discretion).

146. *Id.*; Gum v. Schaefer, 683 S.W.2d 803, 807 (Tex. App.—Corpus Christi 1984, no writ); Duke v. Power Elec. & Hardware Co., 674 S.W.2d 400, 405-06 (Tex. App.—Corpus Christi 1984, no writ).

147. Compton v. Henrie, 364 S.W.2d 179, 181-82 (Tex. 1983).

148. Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1979); Diamond Shamrock Corp. v. Wendt, 718 S.W.2d 766, 768 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

149. Garcia v. Central Power & Light Co., 704 S.W.2d 734, 736 (Tex. 1986); *Dunn*, 592 S.W.2d at 919.

150. *Garcia*, 704 S.W.2d at 736.

"The existence of antagonism is not a discretionary matter; it is a question of law determined from the above factors whether any litigants on the same side of the docket are antagonistic with respect to an issue that the jury will be asked to answer."[151]

The nature and degree of the antagonism, and its effect on the number of peremptory jury strikes allocated to each litigant or side, however, are matters left to the discretion of the trial court.[152] In considering the number of peremptory challenges to be allocated between the litigants or sides, the trial court "must determine, based on the information gleaned from pleadings, pre-trial discovery, and representation made during voir dire examination, what antagonism, if any, exists between the parties."[153] "In multiple party cases, the trial judge shall equalize the number of peremptory challenges so that no litigant or side is given an unfair advantage and so as to promote the ends of justice."[154] Whether the trial court abused its discretion in its allocation of peremptory challenges is determined at the time the court made its decision and not in hindsight.[155] Thus, if the trial court's decision "is based upon a reasonable assessment of the situation before it at the time the challenges are made," there is no abuse of discretion.[156] Where, however, a trial court has disregarded the posture of the parties or has misconstrued or overlooked a vital point, the decision shall be reversed as an abuse of discretion.[157]

E. *Opening Statements*

The trial court has broad discretion to limit opening statements subject only to review for abuse of discretion.[158] While it is error to discuss evidence that is not eventually offered at the trial,[159] the error

151. *Dunn*, 592 S.W.2d at 919; American Cyanamid Co. v. Frankson, 732 S.W.2d 648, 652 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.).

152. *Wendt*, 718 S.W.2d at 769.

153. Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 4-5 (Tex. 1986); *Wendt*, 718 S.W.2d at 769.

154. TEX. R. CIV. P. 233; Diamond Shamrock Corp. v. Wendt, 718 S.W.2d 768, 769 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

155. *Frankson*, 732 S.W.2d at 653, 660 (citing Garcia v. Central Power & Light Co., 704 S.W.2d 734, 736 (Tex. 1986)).

156. *Id.* at 661.

157. *Id.*

158. Ranger Ins. Co. v. Rogers, 530 S.W.2d 162, 170 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

159. *See id.* (jurors should not be mislead and confused with evidence counsel does not expect to introduce at trial).

is reversible error if it was calculated to and probably did cause the rendition of an improper judgment.[160]

F. *Trial and Postverdict Trial Amendments*

1. Trial Amendments

Under Texas Rule of Civil Procedure 63 pleading amendments which are sought within seven days of the date of trial will be granted if there is no surprise and prejudice to the opposite party.[161] If surprise is not shown, Rule 63 requires the trial court to allow the amendment.[162] "A mere allegation of surprise is not a sufficient showing."[163] The standard of review for granting a trial amendment is whether the trial court abused its discretion.[164] To establish an abuse of discretion in allowing the amendment, the complaining party must show surprise and prejudice and request a continuance.[165]

2. Postverdict Trial Amendments

Under Texas Rules Civil Procedure 66 and 67,[166] the standard of review for granting "a post-verdict trial amendment to conform the pleadings to the jury's verdict on matters established by the evidence is whether the trial court abused its discretion."[167] In determining

---

160. *Id.*; Texas Employers' Ins. Ass'n v. Garza, 675 S.W.2d 245, 249 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.)(jury prejudice leads to improper judgment).

161. TEX. R. CIV. P. 63; *see also* Lee v. Key West Towers, Inc., 783 S.W.2d 586, 588 (Tex. 1989). Rule 63 must be liberally construed and where the record does not reflect whether leave of court was requested or granted, and there is no indication that the trial court denied leave to file, and where there is no showing of surprise or prejudice to the opposing party, leave of court will be presumed. Id. (citing Goswami v. Metropolitan Sav. & Loan Ass'n, 751 S.W.2d 487, 490 (Tex. 1988)); *see also* County of El Paso v. Boy's Concessions, Inc., 772 S.W.2d 291, 294 (Tex. App.—El Paso 1989, no writ); Reynolds v. Wilder, 768 S.W.2d 463, 464 (Tex. App.—Tyler 1989, no writ); Rogers v. Gonzales, 654 S.W.2d 509, 515 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

162. Louisiana & A. Ry. v. Blakely, 773 S.W.2d 595, 597 (Tex. App.—Texarkana 1989, n.w.h.).

163. *Id.*

164. Bell v. Meeks, 725 S.W.2d 179, 180 (Tex. 1987); Yowell v. Piper Aircraft Corp., 703 S.W.2d 630, 634 (Tex. 1986); Cissne v. Robertson, 782 S.W.2d 912, 921 (Tex. App.—Dallas 1989, writ requested); Heritage Manor, Inc. v. Tidball, 724 S.W.2d 952, 954 (Tex. App.—San Antonio 1987, no writ).

165. *Blakely*, 773 S.W.2d at 597.

166. TEX. R. CIV. P. 66 (trial amendment procedures); TEX. R. CIV. P. 67 (amendments should conform to matters tried without objection).

167. Dorchester Gas Prod. Co. v. Harlow Corp., 743 S.W.2d 243, 259 (Tex. App.—Amarillo 1987, no writ); *see also* Whatley v. City of Dallas, 758 S.W.2d 301, 306 (Tex. App.—

whether the parties have impliedly consented to the trial of an unpleaded cause of action, the trial court is required to consider carefully the proceedings as a whole.[168] While the trial court should exercise that discretion liberally in favor of justice with regard to preverdict trial amendments,[169] postverdict "trial amendments are the exception, not the rule, and should not be allowed in doubtful cases."[170] If the opposing party can show harm or prejudice, he may be able to show an abuse of discretion.[171] However, in each case, there comes a time when a post verdict trial amendment will constitute harm to the other party.[172]

G. *Evidence*

To obtain reversal of a judgment based on error in the admission or exclusion of evidence, an appellant must show that the trial court's ruling was in error and that the error was "calculated to cause and probably did cause rendition of an improper judgment."[173] Reversible error will not usually occur in connection with rulings on questions of evidence unless "the appellant can demonstrate that the whole case turns on the particular evidence admitted or excluded."[174] Further, error in the improper admission of evidence is usually deemed harmless "if the objecting party subsequently permits the same or similar evidence to be introduced without objection."[175]

Dallas 1988, writ ref'd); City of Watauga v. Taylor, 752 S.W.2d 199, 206 (Tex. App.—Fort Worth 1988, no writ); American Home Assurance Co. v. Guevara, 717 S.W.2d 381, 384 (Tex. App.—San Antonio 1986, no writ).

168. *Whatley*, 758 S.W.2d at 306.

169. *Id.*

170. *Id.*

171. *Harlow Corp.*, 743 S.W.2d at 259; *Guevara*, 717 S.W.2d at 384.

172. Dorchester Gas Prod. Co. v. Harlow Corp., 743 S.W.2d 243, 260 (Tex. App.—Amarillo 1987, no writ)(three months after jury verdict is too late).

173. TEX. R. APP. P. 81(b)(1) (governs reversal in civil cases); *see also* Booth v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989); Gee v. Liberty Mutual Fire Ins. Co., 765 S.W.2d 394, 396 (Tex. 1989); Harrison v. Texas Employers Ins. Ass'n, 747 S.W.2d 494, 498 (Tex. App.—Beaumont 1988, writ denied); Texaco, Inc. v. Pennzoil, Inc., 729 S.W.2d 768, 837 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. dismissed*, 485 U.S. 994 (1988); Atlantic Mut. Ins. Co. v. Middleman, 661 S.W.2d 182, 185 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

174. Shanendoah Assoc. v. J & K Properties, Inc., 741 S.W.2d 470, 493 (Tex. App.—Dallas 1987, writ denied); *Texaco, Inc.*, 729 S.W.2d at 837; *Middleman*, 661 S.W.2d at 185.

175. Richardson v. Green, 677 S.W.2d 497, 501 (Tex. 1984); *Shenandoah Assoc.*, 741 S.W.2d at 494.

H. *Bifurcation of Trial*

In furtherance of convenience and to avoid prejudice, pursuant to Texas Rule of Civil Procedure 174(b), a trial court may generally order a bifurcated trial on the issues of liability and damages.[176] A trial court's decision whether to order a bifurcated trial is subject to review for an abuse of discretion.[177] However, in tort cases, issues of liability and damages are indivisible and must be tried together and may not be bifurcated.[178]

A trial court has discretion whether to order a bifurcated trial on punitive damages under the "Wyoming Plan."[179] Under the Wyoming Plan, if the evidence at trial establishes a fact issue regarding punitive damages, the charge should include questions on compensatory damages and whether punitive damages should be awarded.[180] If the jury determines that punitive damages should be awarded, it then hears evidence of the defendant's net worth and returns a separate verdict setting the amount of punitive damages.[181] A trial court's action ordering a bifurcated trial is not an abuse of discretion,[182] and will not be the basis for reversal unless the complaining party can show reversible error under Texas Rule of Appellate Procedure 81(b).

I. *Motion for Directed or Instructed Verdict*

1. Jury Trials

A directed or instructed verdict is proper:

---

176. *See* Minns v. Minns, 762 S.W.2d 675, 677 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (Dunn, J., concurring) (issue of common law marriage bifurcated from all other issues in divorce case); *see also* Cox v. Realty Dev. Corp., 748 S.W.2d 492, 493 (Tex. App.—Dallas 1988, no writ.) (liability and damages issues bifurcated); TEX. R. CIV. P. 174(b).

177. Guaranty Fed. Sav. Bank v. The Horeshoe Operating Co., 33 Tex. Sup. Ct. J. 150, 153-54 (Jan. 3, 1990).

178. Eubanks v. Winn, 420 S.W.2d 698, 701 (Tex. 1967); *see also* Iley v. Hughes, 158 Tex. 362, 365-66, 311 S.W.2d 648, 651 (1958); Waples-Platter Co. v. Commercial Standard Ins. Co., 156 Tex. 234, 237, 294 S.W.2d 375, 377 (1956); Piper Aircraft Corp. v. Yowell, 675 S.W.2d 447, 454 (Tex. App.—Fort. Worth 1984), *rev'd on other grounds*, 703 S.W.2d 630 (Tex. 1986). *See* Rosales v. Honda Motor Co., 726 F.2d 259, 261-62 (5th Cir. 1984) (recognizing Texas rule that in personal injury litigation issues of liability and damages must be tried together).

179. Miller v. O'Neill, 775 S.W.2d 56, 57 (Tex. App.—Houston [1st Dist.] 1989, orig. proc.); *see also* Lunsford v. Morris, 746 S.W.2d 471, 474-75 (Tex. 1988) (Gonzalez, J., dissenting) (recommending use of the Wyoming Plan).

180. *Id.* (citing *Campen v. Stone*, 635 P.2d 1121, 1132 (Wyo. 1981)).

181. *Id.*

182. *Id.*

(1) when a defect in the opponent's pleadings makes them insufficient to support a judgment; (2) when the evidence conclusively proves a fact that establishes a party's right to judgment as a matter of law; or (3) when the evidence offered on a cause of action is insufficient to raise an issue of fact.[183]

In reviewing the granting of a directed or instructed verdict by the trial court on an evidentiary basis, the reviewing court will "determine whether there is any evidence of probative force to raise fact issues on the material questions presented."[184] The court considers "all of the evidence in a light most favorable to the party against whom the verdict was instructed, . . . disregard[s] all contrary evidence and inferences," and gives the losing party the benefit of all reasonable inferences arising therefrom.[185] If there is any conflicting evidence of probative value on any theory of recovery, the issue is for the jury; an instructed verdict is improper and the case must be reversed and remanded for the jury's determination on that issue.[186] Where no evidence of probative force on an ultimate fact element exists or where the probative force of the testimony is so weak that only a mere surmise or suspicion is raised as to the existence of essential facts, the trial court has the duty to instruct the verdict.[187]

2. Nonjury Trials

In a nonjury trial, "the judge serves the dual capacity of fact finder and magistrate" and "has the power and the duty to weigh the evidence, draw inferences and make reasonable deductions from the evi-

---

183. McCarley v. Hopkins, 687 S.W.2d 510, 512 (Tex. App.—Houston [1st Dist.] 1985, no writ); *see also* Rudolph v. ABC Pest Control, Inc., 763 S.W.2d 930, 932 (Tex. App.—San Antonio 1989, writ denied); Rowland v. City of Corpus Christi, 620 S.W.2d 930, 932-33 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

184. Collora v. Navarro, 574 S.W.2d 65, 68 (Tex. 1978); *see also* C & C Partners v. Sun Exploration & Production Co., 783 S.W.2d 707, 712 (Tex. App.—Dallas 1989, writ requested).

185. White v. Southwestern Bell Tel. Co., 651 S.W.2d 260, 262 (Tex. 1983); *C & C Partners*, 783 S.W.2d at 712; *see also* Trenholm v. Ratcliff, 646 S.W. 2d 927, 931 (Tex. 1983); *Collora*, 574 S.W.2d at 68; University Nat'l Bank v. Ernst & Whinney, 773 S.W.2d 707, 709-10 (Tex. App.—San Antonio 1989, n.w.h.); Rudolph v. ABC Pest Control, Inc., 763 S.W.2d 930, 932 (Tex. App.—San Antonio 1989, writ denied); Graziadei v. D.D.R. Machine Co., 740 S.W.2d 52, 55 (Tex. App.—Dallas 1987, writ denied).

186. *White*, 651 S.W.2d at 262; Jones v. Tarrant Util. Co., 638 S.W.2d 862, 865 (Tex. 1982); *Collora*, 574 S.W.2d at 68; Texas Employers Ins. Ass'n v. Page, 553 S.W.2d 98, 102 (Tex. 1977).

187. *University Nat'l Bank*, 773 S.W.2d at 709-10.

dence and to believe or disbelieve all or part of it."[188] Previously, the granting of a motion for judgment in a nonjury trial was the legal equivalent of the granting of a directed verdict in a jury trial.[189] Since those two actions were deemed equivalent, the appellate standard of review for reviewing the propriety of a directed verdict granted in a jury trial was held to be equally applicable to review of a granted motion for judgment in a nonjury trial.[190] Thus, the "trial judge could grant a motion for judgment at the close of the plaintiff's case only when there was no evidence to support the plaintiff's cause of action."[191] The trial judge who was unpersuaded by the plaintiff's evidence, but could find some evidence supporting the claim, was required to hear the defendant's case before ruling on the factual sufficiency of the evidence.[192] The supreme court overruled that line of cases in *Quantel Business Systems, Inc. v. Custom Controls Co.* and held that when the plaintiff rests his case, on motion for judgment by the defendant, the judge has "the power to rule on both the factual and legal issues" and "to make factual findings at that time if requested by a party."[193] On appeal, the legal and factual sufficiency of the evidence to support the judgment may be challenged as in any other nonjury case.[194] The standards of review in nonjury cases are discussed in Part VI.

J. *Charge of the Court*

1. Objections to the Charge

Generally, if the trial court submits a jury question, definition or instruction, and it is erroneous or defective, an objection is required to preserve the right to complain. A request for a correct substitute question, definition or instruction would not suffice to preserve error.[195] Objections must be presented in writing, or dictated to the

188. Quantel Business Sys., Inc. v. Custom Controls Co., 761 S.W.2d 302, 306 (Tex. 1988)(Gonzalez, J., concurring).

189. *Id.* at 303.

190. *Id.* at 303-04.

191. *Id.* at 304.

192. *Id.* at 304.

193. *Id.*; Chase Commercial Corp. v. Datapoint Corp., 774 S.W.2d 359, 362 (Tex. App.—Dallas 1989, n.w.h.).

194. *Chase*, 774 S.W.2d at 361; *see also* State v. Arnold, 778 S.W.2d 68, 70 (Tex. 1989) (no evidence challenge in a nonjury setting is equivalent to review in a jury setting).

195. TEX. R. CIV. P. 274.

court reporter, in the presence of the court reporter and opposing counsel.[196] The objection must point out with particularity the objectionable matter or error and the grounds of the objection.[197]

The reviewing court should consider the pleadings of each party, the evidence which was presented at trial, and the charge in its entirety to determine whether an alleged error in the jury charge is reversible.[198] "[E]rror will be deemed reversible error only if, when viewed in light of the totality of these circumstances, it amounted to such a denial of the rights of the complaining party as was reasonably calculated and probably did cause the rendition of an improper judgment."[199]

2. Request for Submission of Questions, Instructions and Definitions

Generally, if the trial court omits a question, definition or instruction relied on by the complaining party, only a request for the submission of the omitted matter preserves error.[200] Requests must be tendered in writing and in substantially correct wording,[201] and they must be tendered separate and apart from objections to the charge.[202] "Substantially correct wording" essentially means that the request cannot be objectionable.[203]

There is one exception to the rule that a request is required to complain of an omitted question, definition or instruction. Texas Rule of Civil Procedure 278 provides that a "[f]ailure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party."[204]

---

196. TEX. R. CIV. P. 272.

197. TEX. R. CIV. P. 274; Castleberry v. Branscum, 721 S.W.2d 270, 276 (Tex. 1986).

198. Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n, 710 S.W.2d 551, 555 (Tex. 1986).

199. *Id.*; TEX. R. APP. P. 81(b)(1).

200. TEX. R. CIV. P. 274, 278, 279.

201. TEX. R. CIV. P. 278.

202. TEX. R. CIV. P. 273.

203. *See* Placencio v. Allied Indus. Int'l Inc., 724 S.W.2d 20, 22 (Tex. 1987)(submission must not be affirmatively incorrect); Adams v. Rhodes, 543 S.W.2d 18, 19 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.)(special issue must be errorless).

204. TEX. R. CIV. P. 278.

Thus, if the ground consists of more than one issue, one or more of which is submitted, and one or more of which is omitted, the party relying upon the ground must request, but the opposing party may either request or object.[205]

A trial court has great discretion in submitting broad-form jury questions.[206] This discretion is subject only to the requirement that the questions submitted must control the disposition of the case being raised by the pleadings and evidence and properly submit the disputed issues for the jury's determination.[207] In reviewing errors which involve the submission of jury questions, the submission should be considered as a whole to determine whether the error was prejudicial.[208] To determine if the trial court has abused its discretion in refusing to submit requested questions, the reviewing court reviews the evidence as if the court had instructed the verdict.[209] The evidence must be considered in favor of the party against whom the questions were refused, and if there is any conflicting probative evidence in the record, those questions are for the jury's determination.[210] The trial court may not properly refuse to submit a question merely because the evidence is factually insufficient to support an affirmative finding.[211] The trial court has considerably more discretion when submitting instructions and definitions to the jury than it has in submitting jury questions.[212] In submitting a case to the jury, a trial court should issue such explanatory instructions and definitions as will enable the jury, as the trier of fact, to render a verdict. The court must explain to the

---

205. Morris v. Holt, 714 S.W.2d 311, 312-13 (Tex. 1986).

206. TEX. R. CIV. P. 277; Mobil Chem. v. Bell, 517 S.W.2d 245, 256 (Tex. 1974).

207. Baker Marine Corp. v. Moseley, 645 S.W.2d 486, 489 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.); Texas Gen. Indem. Co. v. Villaneuva, 619 S.W.2d 15, 17 (Tex. Civ. App.—Corpus Christi 1981, no writ); *see also* TEX. R. CIV. P. 277.

208. InterFirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 897 (Tex. App.—Texarkana 1987, writ dism'd by agr.).

209. Phillips Pipeline Co. v. Richardson, 680 S.W.2d 43, 48 (Tex. App.—El Paso 1984, no writ).

210. *Id.*

211. Garza v. Alviar, 395 S.W.2d 821, 824 (Tex. 1965); Ulrickson v. Hawkins, 696 S.W.2d 704, 707 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.); General Elec. Co. v. Schmal, 623 S.W.2d 482, 486 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.).

212. Harris v. Harris, 765 S.W.2d 798, 801 (Tex. App.—Houston [14th Dist.] 1989, writ denied); *see also* Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 256 (Tex. 1974); Brown v. Tucker, 652 S.W.2d 492, 495 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd. n.r.e.); Houston Nat'l Bank v. Biber, 613 S.W.2d 771, 775-76 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

jury any legal or technical terms, however, the court is given wide discretion to determine the sufficiency of such explanations.[213] "The standard of review of a trial court's instruction to the jury is that an error on instructing or failing to instruct must have caused or can be reasonably calculated to have caused the rendition of an improper verdict."[214] When an instruction is given, the question on review is whether the instruction is proper.[215] "An instruction is proper if it finds support in any evidence of probative value and if it might be of some assistance to the jury in answering the questions submitted."[216] Similarly when a definition is given, "the test of the sufficiency of the definition is its reasonable clarity in performing this function."[217] "An explanatory instruction is improper only if it is a misstatement of the law as applicable to the facts."[218] However, the trial court should refuse to submit unnecessary instructions even if they represent correct statements of the law.[219] Where an instruction is requested and refused, the question on review is whether the instruction was reasonably necessary to enable the jury to render a proper verdict.[220]

K. *Jury Argument*

To obtain reversal of a judgment on the basis of an improper jury argument, an appellant must prove: "(1) an error; (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, and (4) was not curable by an instruction, by a prompt

213. *Bell*, 517 S.W.2d at 256; Lumbermens Mut. Casualty Co. v. Garcia, 758 S.W.2d 893, 894 (Tex. App.—Corpus Christi 1988, writ denied); K-Mart Corp. v. Trotti, 677 S.W.2d 632, 636 (Tex. App.—Houston [1st Dist.] 1984), *writ denied*, 686 S.W.2d 593 (Tex. 1985).

214. Minchen v. Rogers, 596 S.W.2d 179, 183 (Tex. App.—Houston [1st Dist.] 1980, no writ); *see* InterFirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 897 (Tex. App.—Texarkana 1987, writ dism'd by agr.).

215. TEX. R. CIV. P. 277 (court must submit proper instructions); *see also* Atlantic Mut. Ins. Co. v. Middleman, 661 S.W.2d 182, 187 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)(definition of proper instructions).

216. Louisiana & A. Ry. v. Blakely, 773 S.W.2d 595, 598 (Tex. App.—Texarkana 1989, n.w.h.); St. Louis S.W. Ry. v. Marks, 749 S.W.2d 911, 914-15 (Tex. App.—Texarkana 1988, writ denied).

217. Harris v. Harris, 765 S.W.2d 798, 801 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

218. *Id.*

219. *Blakely*, 773 S.W.2d at 598.

220. Johnson v. Whitehurst, 652 S.W.2d 441, 447 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); Steinberger v. Archer County, 621 S.W.2d 838, 841 (Tex. App.—Fort Worth 1981, no writ).

withdrawal of the statement, or a reprimand by the judge."[221] There are only rare instances of incurable harm from improper argument. In those cases, the appellant must also prove "that the argument by its nature, degree, and extent, constituted reversibly harmful error" and "that the probability that the improper argument caused harm is greater than the probability that the verdict was based upon proper proceedings and evidence."[222] The length of the argument, whether it was repeated or abandoned and whether there was cumulative error are proper inquiries. Finally, the reviewing court must evaluate the improper jury argument in light of the whole case, beginning with the voir dire and ending with closing argument.[223]

L. *Jury Deliberations*

Where the evidence conflicts on the question of alleged jury misconduct during jury deliberations, the appellate court will presume that misconduct did not occur.[224] The complaining party must show that misconduct occurred and that it probably caused an improper verdict to be rendered.[225]

M. *Conflicting Jury Findings*

In reviewing alleged conflicts between a jury's answers to jury questions, the threshold inquiry is whether the answers address the same material fact.[226] The test for determining whether there is an irreconcilable conflict between jury answers is whether, taking into consideration the remainder of the "verdict supported by the evidence, one finding alone requires judgment in the plaintiff's favor and the other

---

221. Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 839 (Tex. 1979).

222. *Id.* at 839-40. *See* Texas Employers' Ins. Ass'n v. Guerrero, No. 04-88-00400-CV (Tex. App.—San Antonio Feb. 28, 1990, n.w.h.) (closing argument appealing to ethnic unity held to be incurable jury argument warranting reversal).

223. *Reese*, 584 S.W.2d at 840; Luna v. North Star Dodge Sales, Inc., 667 S.W.2d 115, 120 (Tex. 1984); *Reese*, 584 S.W.2d at 839-40; Louisiana & A. Ry. v. Capps, 766 S.W.2d 291, 294 (Tex. App.—Texarkana 1989, n.w.h.).

224. Landreth v. Reed, 570 S.W.2d 486, 491 (Tex. Civ. App.—Texarkana 1978, no writ); Texas Employers' Ins. Ass'n v. Phillips, 255 S.W.2d 364, 366 (Tex. Civ. App.—Eastland 1953, writ ref'd n.r.e.); Hudson v. West Cent. Drilling Co., 195 S.W.2d 387, 393 (Tex. Civ. App.—Eastland 1946, writ ref'd n.r.e.).

225. Bradbury v. State, 503 S.W.2d 619, 623 (Tex. Civ. App.—Tyler 1973, no writ); *Phillips*, 255 S.W.2d at 366.

226. Bender v. Southern Pac. Transp. Co., 600 S.W.2d 257, 260 (Tex. 1980); *see also* Luna v. Southern Pac. Transp. Co., 724 S.W. 2d 303, 304 (Tex. 1987).

finding taken alone requires judgment in the defendant's favor."[227] If there exists some reasonable basis upon which to reconcile an alleged conflict, the reviewing court cannot strike down the jury's answers.[228] "The reviewing court must reconcile apparent conflicts in the jury's findings if reasonably possible in light of the pleadings and evidence, the manner of submission, and the other findings considered as a whole."[229] Where the issues submitted lead to more than one reasonable construction, the reviewing court will generally adopt the construction which avoids a conflict in the answers.[230]

IV. POSTTRIAL PROCEEDINGS

A. *Motion to Disregard Jury Findings*

In order for a trial court to disregard a jury's finding and to grant a motion to disregard jury findings, the court must determine that there is no evidence to support the jury's finding.[231] Only when the issue is immaterial or has no support in the evidence or when the evidence establishes a contrary finding may the court disregard an answer and substitute its own finding.[232]

In reviewing the grant of a motion to disregard jury findings, the appellate court must consider all testimony in a light most favorable to the verdict, indulging every reasonable inference deductible in its favor.[233] Where some evidence supports the disregarded finding, the reviewing court must reverse and render judgment unless the appellee asserts cross-points showing grounds for a new trial.[234]

B. *Motion for Judgment N.O.V.*

In order for a trial court to disregard a jury's findings and to grant a motion for judgment notwithstanding the verdict, "it must be deter-

227. Garcia v. Dependable Shell Core Macs., Inc., 783 S.W.2d 246, 249 (Tex. App.—Corpus Christi 1989, n.w.h.).

228. *Bender*, 600 S.W.2d at 260; *see also Luna*, 724 S.W.2d at 384.

229. *Bender*, 600 S.W.2d at 260; *see also Luna*, 724 S.W.2d at 384.

230. *Bender*, 600 S.W.2d at 260; *see also Luna*, 724 S.W.2d at 384.

231. Arch Constr., Inc. v. Tyburec, 730 S.W.2d 47, 51 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

232. United States Fire Ins. Co. v. Twin City Concrete, Inc., 684 S.W.2d 171, 173 (Tex. App.—Houston [14th Dist.] 1984, no writ).

233. Schaefer v. Texas Employers' Ins. Ass'n, 612 S.W.2d 199, 201 (Tex. 1980).

234. Basin Operating Co. v. Valley Steel Prod., 620 S.W.2d 773, 776 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

mined that there is no evidence upon which the jury could have made the findings relied upon."[235] In reviewing the grant of a motion for judgment notwithstanding the verdict, the reviewing court must determine whether there is any evidence upon which the jury could have made the finding. The record is "reviewed in the light most favorable to the jury finding, considering only the evidence and inferences which support them and rejecting the evidence and inferences contrary to the findings."[236] Where there is more than a scintilla of competent evidence to support the jury's finding, then the judgment notwithstanding the verdict should be reversed.[237]

C. *Newly Discovered Evidence*

To obtain a new trial based upon newly discovered evidence, a movant must show:

1. that the evidence had come to his knowledge since the trial;
2. that it was not owing to want of due diligence that it had not come [to his attention] sooner;
3. that it is not cumulative; and
4. that it is so material that it would probably produce a different result if a new trial were granted.[238]

Further, the newly discovered evidence must be admissible, competent evidence.[239]

Whether a motion for new trial which is based on the ground of newly discovered evidence will be granted or denied lies "within the sound discretion of the trial court, and its decision will not be disturbed absent a manifest abuse of discretion."[240] When a trial court refuses to grant a new trial based on newly discovered evidence, every reasonable presumption will be made to affirm the trial court's deci-

---

235. Exxon Corp. v. Quinn, 726 S.W.2d 17, 19 (Tex. 1987); Navarette v. Temple Indep. School Dist., 706 S.W.2d 308, 309 (Tex. 1986); Sun Power, Inc. v. Adams, 751 S.W.2d 689, 692 (Tex. App.—Fort Worth 1988, no writ).

236. *Navarette*, 706 S.W.2d at 309; Williams v. Bennett, 610 S.W.2d 144, 145 (Tex. 1980); *see also* Best v. Ryan Auto Group, Inc., 33 Tex. Sup. Ct. J. 314, 314 (Mar. 21, 1990).

237. *Navarette*, 706 S.W.2d at 309.

238. Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983); Sifuentes v. Texas Employers' Ins. Ass'n, 754 S.W.2d 784, 787 (Tex. App.—Dallas 1988, no writ); Eikenhorst v. Eikenhorst, 746 S.W.2d 882, 886 (Tex. App.—Houston [1st Dist.] 1988, no writ).

239. Nguyen v. Minh Food Co., 744 S.W.2d 620, 621 (Tex. App.—Dallas 1987, writ denied).

240. *Jackson*, 660 S.W.2d at 809; *Eikenhorst*, 746 S.W.2d at 886; Southwest Inns, Ltd. v. General Elec. Co., 744 S.W.2d 258, 264 (Tex. App.—Houston [14th Dist.] 1987, writ denied).

sion.[241] In reviewing the trial court's decision refusing a new trial, appellate courts recognize the well established principle that courts do not favor motions for new trial on the ground of newly discovered evidence, and such motions are reviewed with careful scrutiny.[242]

D. *Motion for New Trial Generally*

"A trial court has broad discretion in granting a new trial, before or after judgment."[243] In addition to the good cause reason stated in Rule 320,[244] a trial court may use its discretion to grant a new trial "in the interest of justice."[245] While trial courts have discretion to grant a new trial, which "they have in all cases governed by equitable principles, it is not an unbridled discretion to decide cases as they might deem proper without reference to any guiding rule or principle."[246] The granting of a motion for a new trial "is not subject to review either by direct appeal or from a final judgment rendered after further proceedings in the trial court."[247]

E. *Rule 324 Motion for New Trial*

A motion for new trial is not a prerequisite to appeal in either a jury or nonjury trial unless the complaint concerns matters that have not otherwise been brought to the court's attention or for which additional evidence is needed. Texas Rule of Civil Procedure 324(b) requires that the following issues be raised by motion for new trial: (a) a complaint on which evidence must be heard, such as one for jury misconduct, newly discovered evidence, or failure to set aside a judgment by default; (b) a complaint of the factual insufficiency of the evidence to support a jury finding; (c) a complaint that a jury finding is against the overwhelming weight of the evidence; (d) a complaint of inadequacy or excessiveness of the damages found by the jury; or (e)

---

241. *Nguyen*, 744 S.W.2d at 622.

242. *Id.*

243. Champion Int'l Corp. v. Twelfth Court of Appeals, 762 S.W.2d 898, 899 (Tex. 1988); Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985).

244. TEX. R. CIV. P. 300 (new trial granted for good cause on motion of a party or on courts own motion).

245. *Champion Int'l Corp.*, 762 S.W.2d at 89; *Johnson*, 700 S.W.2d at 918.

246. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939).

247. Cummins v. Paisan Constr. Co., 682 S.W.2d 235, 236 (Tex. 1984); Atchison, T. & S. F. Ry. v. Brown, 750 S.W.2d 332, 333 (Tex. App.—Eastland 1988, writ denied).

incurable jury argument if not otherwise ruled on by the trial court.[248]

The reason for requiring that these matters first be brought to the attention of the trial court is to give the trial court the opportunity to correct any errors that were not considered prior to the motion.[249] A trial court has wide discretion in granting a new trial, and the trial court's discretion will not be disturbed on appeal absent a showing of a manifest abuse of discretion.[250]

F. *Motion to Correct, Reform or Modify Judgment or Judgment Nunc Pro Tunc*

After the trial court's plenary power over its own judgment terminates and the judgment becomes final, a *nunc pro tunc* is appropriate only to correct clerical errors in entering the judgment.[251] However, it cannot correct judicial errors made in rendering the final judgment.[252] A judicial error is the "type of error which occurs in the rendering of the judgment, as distinguished from the entering of a judgment."[253] In determining whether the trial court's attempted correction is a correction of a judicial error or a clerical error, the appellate court is "required to look to the judgment or order that was actually rendered and not to the judgment or order that should or might have been rendered."[254] The decision of whether an error in a judgment is a judicial error or clerical error is a question of law which is not binding on the appellate court.[255]

---

248. TEX. R. CIV. P. 324(b).

249. Stillman v. Hirsch, 128 Tex. 359, 369, 99 S.W.2d 270, 275 (1936); Mushinski v. Mushinski, 621 S.W.2d 669, 670-71 (Tex. Civ. App.—Waco 1981, no writ).

250. Champion Int'l Corp. v. Twelfth Court of Appeals, 762 S.W.2d 898, 899 (Tex. 1988); Grissom, v. Watson, 704 S.W.2d 325, 326 (Tex. 1986); Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983); Mitchell v. Bass, 26 Tex. 372, 377 (1862); Allied Rent-All, Inc. v. International Rental Ins., 764 S.W.2d 11, 13 (Tex. App.—Houston [14th Dist.] 1988, no writ); Fillinger v. Fuller, 746 S.W.2d 506, 508 (Tex. App.—Texarkana 1988, no writ).

251. Crocker v. Synpol, Inc., 732 S.W.2d 429, 436 (Tex. App.—Beaumont 1987, no writ); *see also* Comet Aluminum Co. v. Dibrell, 450 S.W.2d 56, 58 (Tex. 1970). .

252. Escobar v. Escobar, 711 S.W.2d 230, 231-32 (Tex. 1986).

253. *Crocker*, 732 S.W.2d at 436; *see also* Knox v. Long, 152 Tex. 291, 257 S.W.2d 289, 291-92 (1953).

254. *Crocker*, 732 S.W.2d at 436; *see also* Coleman v. Zapp, 105 Tex. 491, 151 S.W. 1040, 1041 (1912); .

255. Finlay v. Jones, 435 S.W.2d 136, 138 (Tex. 1968); Seago v. Bell, 764 S.W.2d 362, 365 (Tex. App.—Beaumont 1989, n.w.h.); *Crocker*, 732 S.W.2d at 436.

G. *Exercise of Plenary Power*

Once a trial court loses plenary power over its judgment, the judgment becomes final and any attempt to exercise further jurisdiction over the judgment, except to correct clerical errors will be set aside as void.[256]

H. *Supersedeas Bond*

Generally, if a party loses at the trial court, a writ of supersedeas will stay execution of the judgment pending appeal, and guarantees the appellee the benefits of his judgment if affirmed.[257] To obtain a writ of supersedeas, a party generally deposits with the clerk a "good and sufficient" supersedeas bond or deposit.[258] In cases where the judgment is for other than money, property, or foreclosure, the decision of whether and under what circumstances to permit supersedeas lies within the discretion of the trial or appellate court.[259]

---

256. *See* Graham Nat'l Bank v. Fifth Court of Appeals, 747 S.W.2d 370, 370 (Tex. 1987)(trial court order void because plenary power expired); Times Herald Printing Co. v. Jones, 730 S.W.2d 648, 649 (Tex. 1987)(trial court had no jurisdiction to consider motion to unseal because plenary power lost).

257. Cooper v. Bowser, 583 S.W.2d 805, 807 (Tex. Civ. App.—San Antonio 1979, no writ).

258. *See* TEX. R. APP. P. 47(a). A few judgments are stayed without the requirement of posting a supersedeas bond or deposit. Specifically, those exempt from filing a bond include: the State Bar of Texas, any county in Texas, any state department, any State Department Head, water districts and the like. TEX. CIV. PRAC. & REM. CODE ANN. §§ 6.001-.003 (Vernon 1986); TEX. REV. CIV. STAT. ANN. art. 4446 (Vernon 1976); TEX. PROP. CODE ANN. §§ 21.011-.16 (Vernon 1984); TEX. PROB. CODE ANN. § 29 (Vernon 1980)(executors, administrators, or guardians in their fiduciary capacity); TEX. CIV. PRAC. & REM. CODE ANN. §§ 6.001-.002 (Vernon 1986)(incorporated cities and towns); TEX. REV. CIV. STAT. ANN. art. 1174 (Vernon 1963); TEX. CIV. PRAC. & REM. CODE ANN. § 6.001 (Vernon 1986)(Veteran's Administration, any national mortgage association, any national mortgage savings and loan insurance incorporation created as a national relief organization). Exempt entities supersede the judgment by filing a notice of appeal. TEX. CIV. PRAC. & REM. CODE ANN. § 6.001 (Vernon 1986); Ammex Warehouse Co. v. Archer, 381 S.W.2d 478, 481-82 (Tex. 1964); Weber v. Walker, 591 S.W.2d 559, 562 (Tex. Civ. App.—Dallas 1979, no writ).

259. TEX. R. APP. P. 47. Texas Rule of Appellate Procedure 47 sets forth the applicable rules for superseding a judgment involving money, land or property, foreclosure on real estate, foreclosure on personal property, other judgments, conservatorship or custody, and for the State and municipality, a State agency, or a subdivision of the State in its governmental capacity. TEX. R. APP. P. 47(b)-(h). Section 52.002 of the Texas Civil Practice and Remedies Code provides that a trial court may set the security for less than the amount of the judgment, interests, and costs in a money judgment (other than in a bond forfeiture proceeding), "a personal injury or wrongful death action, a claim covered by liability insurance, or a workers' compensation claim," if, after notice and a hearing, the trial court finds that complete security "would cause irreparable harm to the judgment debtor" and that less than complete security

The numerous rules for posting an appropriate supersedeas bond depend upon the type of judgement and are beyond the scope of this article.[260] Unless the decision of whether to allow a supersedeas bond is committed to the trial court's discretion, the right to supersedeas is absolute and enforceable by mandamus, even though the trial court may retain discretion in fixing the amount of the bond.[261]

Texas Rule of Appellate Procedure 43(b) governs the suspension of interlocutory orders pending review by the appellate courts. Under this rule, the trial court may suspend an interlocutory order pending an appeal if the appellant files a supersedeas bond or makes a deposit pursuant to Texas Rule of Appellate Procedure 47.[262] Denial of supersedeas "may be reviewed for abuse of discretion on motion by the appellate court."[263] Similarly, an appellate court may issue any necessary temporary orders to preserve the rights of the party until disposition of the appeal and may require such security as it deems appropriate. However, if the appellant's right may be adequately protected by supersedeas, then the appellate court may not suspend the trial court's order.[264]

"would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies." TEX. CIV. PRAC. & REM. CODE ANN. § 52.002(1), (2) (Vernon Supp. 1990). To the extent Chapter 52 of the Texas Civil Practice and Remedies Code conflicts with the Texas Rules of Appellate Procedure, Chapter 52 controls. *Id.* § 52.005.

Under Rule 47(f), an appellant may supersede execution on a judgment for other than money or the recovery of property or foreclosure by filing a bond in the amount fixed "by the trial court as will secure the judgment creditor for any loss or damage occasioned by the appeal." *Id.* Rule 47(f). However, the trial court has discretion to "decline to permit the judgment to be suspended on filing by the judgment creditor of security to be ordered by the trial court in such an amount as will secure the judgment debtor in any loss or damage caused by any relief granted if it is determined on final disposition that such relief was improper." *Id.* "The rule was intended to permit a trial court to deny supersedeas of an injunction, conditioned upon the setting of a bond sufficient to protect the appealing party's interests." Klein Indep. School Dist. v. Fourteenth Court of Appeals, 720 S.W.2d 87, 88 (Tex. 1986). The trial court's decision is reviewed under an abuse discretion of standard. *Id.*

260. Townsend & Duncan, *Stay of Judgments*, Advanced Appellate Practice Course, State Bar of Texas (1987)(discussing rules for posting supersedeas bonds).

261. State Bar of Tex. v. Heard, 603 S.W.2d 829, 832-33 (Tex 1980); *see also* Man-Gas Transmission v. Osborne Oil, 693 S.W.2d 576, 577 (Tex. App.—San Antonio 1985, no writ); Continental Oil Co. v. Lesher, 500 S.W.2d 183, 185 (Tex. Civ. App.—Houston [1st Dist.] 1973, *mand. overr.*, Jennings v. Berry, 153 S.W.2d 725, (Tex. Civ. App.—Texarkana 1941, no writ).

262. TEX. R. APP. P. 43(b).

263. *Id.*; Reyes v. Atkins, 619 S.W.2d 26, 27 (Tex. App.—Fort Worth 1981, no writ).

264. TEX. R. APP. P. 43(c).

If the trial court improperly sets the amount of the bond or the clerk improperly approves it, or if it is believed an initially sufficient bond has become insufficient, the remedy is by motion in the court of appeals once appellate jurisdiction has attached.[265] If a party believes that the trial court's order setting the amount of the bond is excessive, the party may have the trial court's order reviewed by motion in the court of appeals.[266] Upon review of the amount of the bond, if the appellate court finds that the bond is insufficient, the court "shall" require an additional bond;[267] however, upon a finding that the bond is excessive, the court "may" reduce the amount of the original bond.[268]

Texas Rule of Appellate Procedure 47(k) gives the trial court continuing jurisdiction, even beyond the expiration of its plenary power and perfection of the appeal, to monitor and modify the security.[269] Any changes ordered by the trial court, however, must be made known to the court of appeals.[270] The review of security and changes to it also remain with the appellate court.[271] Thus, in carrying out that review, the appellate court can issue any necessary temporary orders or remand the matter to the trial court for evidentiary determinations.[272]

---

265. TEX. R. APP. P. 49; TEX. CIV. PRAC. & REM. CODE ANN. § 52.003 (Vernon Supp. 1990; Bank of E. Tex. v. Jones, 758 S.W.2d 293, 294 (Tex. App.—Tyler 1988, mand. overr.); Culbertson v. Brodsky, 775 S.W.2d 451, 452 (Tex. App.—Fort Worth 1989, writ dism'd w.o.j.).

266. TEX. R. APP. P. 49; TEX. CIV. PRAC. & REM. CODE ANN. § 52.004 (Vernon Supp. 1990). The district clerk's determination of the sufficiency or insufficiency of the tendered supersedeas bond is reviewed only upon a showing of an abuse of discretion. Universal Transp. & Distrib. Co. v. Cantu, 75 S.W.2d 697, 698 (Tex. Civ. App.—San Antonio 1934, mand. overr.).

267. TEX. R. APP. P. 49(a).

268. TEX. R. APP. P. 49(b).

269. TEX. R. APP. P. 47(k).

270. *Id.*

271. *Id.*

272. TEX. R. APP. P. 49(b); *see also* Culbertson v. Brodsky, 775 S.W.2d 451, 455 (Tex. App.—Fort Worth 1989, writ dism'd w.o.j.)(order of trial court regarding amount of supersedeas set aside and remanded to trial court with instructions to conduct hearing and consider evidence relating to sufficiency of supersedeas bond).

V. CHALLENGES TO THE SUFFICIENCY OF THE EVIDENCE IN JURY TRIALS

A. *Legal Insufficiency*

In a jury trial, challenges to the legal insufficiency of the evidence are preserved by: "(1) a motion for instructed verdict; (2) a motion for judgment notwithstanding the verdict; (3) an objection to the submission of the issue to the jury; (4) a motion to disregard the jury's answer to a vital fact issue or, (5) a motion for new trial specifically raising the complaint."[273] "Legal sufficiency points of error assert a complete lack of evidence on an issue,"[274] and are designated as 'no evidence' points, or 'matter of law' points, depending upon whether the complaining party had the burden of proof.[275] Challenges to the legal insufficiency of the evidence points of error

> must be sustained when the record discloses one of the following: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla of evidence; or (4) the evidence established conclusively the opposite of a vital fact.[276]

1. No Evidence

If an appellant is attacking the legal sufficiency of an adverse finding of an issue on which he did not have the burden of proof, he must demonstrate on appeal that there is no evidence to support the adverse finding.[277] In reviewing "no evidence" points, the reviewing

---

273. Aero Energy, Inc., v. Circle C Drilling Co., 699 S.W. 2d 821, 822, (Tex. 1985); *see also* Salinas v. Fort Worth Cab & Baggage Co., 725 S.W.2d 701, 704 (Tex. 1987); Tribble & Stephens Co. v. Consolidated Servs., Inc., 744 S.W.2d 945, 947 (Tex. App.—San Antonio 1987, writ denied).

274. Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied).

275. *Id.*

276. TEX. R. APP. P. 74(d); Caskey v. Bradley, 773 S.W.2d 735, 739 (Tex. App.—Fort Worth 1989, n.w.h.); *see also* Otis Elevator Co. v. Joseph, 749 S.W.2d 920, 923 (Tex. App.—Houston [1st Dist.] 1988, no writ); Commonwealth Lloyd's Ins. Co. v. Thomas, 678 S.W.2d 278, 288 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.). *See generally* Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 364-68 (1960)(points of error procedures discussed).

277. TEX. R. APP. P. 74(d); *see also* Croucher v. Croucher, 660 S.W.2d 55, 58 (Tex. 1983); Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 276 (Tex. App.—Amarillo 1988, writ denied). *See generally* Calvert, *"No Evidence" and "Insufficient*

court[278] considers only the evidence and inferences that tend to support the finding, and disregards all evidence and inferences to the contrary.[279] If there is any evidence of probative force to support the finding, the point must be overruled and the finding upheld.[280] Accordingly, if there is more than a scintilla of evidence to support the finding the no evidence challenge fails.[281] What is a "scintilla" of evidence? "When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence."[282] The application of this rule provides that "if reasonable minds cannot differ from the conclusion that the evidence offered to support the existence of a vital fact lacks probative force," then it is the legal equivalent of no evidence.[283] However, when the evidence furnishes a reasonable basis for reasonable minds to reach differing conclusions as to the existence of the crucial fact, it amounts to more than a scintilla of evidence.[284]

2. As a Matter of Law

If an appellant is attacking the legal sufficiency of an adverse find-

---

Evidence" Points of Error, 38 TEX. L. REV. 361, 364-68 (1960)(discussing requirements necessary to prove legal insufficiency).

278. The courts of appeals and the supreme court have jurisdiction to review challenges to the legal sufficiency of the evidence. Choate v. San Antonio & A.P. Ry., 91 Tex. 406, 409, 44 S.W.2d 69, 72 (1898).

279. Best v. Ryan Auto Group, Inc., 33 Tex. Sup. Ct. J. 314, 314 (Mar. 21, 1990); Responsive Terminal Sys., Inc. v. Boy Scouts of Am., 774 S.W.2d 666, 668 (Tex. 1989); *see also* Southern States Transp., Inc. v. State, 774 S.W.2d 639, 640 (Tex. 1989); Sherman v. First Nat'l Bank, 760 S.W.2d 240, 242 (Tex. 1988); Davis v. City of San Antonio, 752 S.W.2d 518, 522 (Tex. 1988); Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 765 (Tex. 1987); Stafford v. Stafford, 726 S.W.2d 14, 16 (Tex. 1987); Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 593 (Tex. 1986); Larson v. Cook Consultants, Inc., 690 S.W.2d 567, 568 (Tex. 1985); King v. Bauer, 688 S.W.2d 845, 846 (Tex. 1985); Roark v. Allen, 633 S.W.2d 804, 809 (Tex. 1982); Glover v. Texas Gen. Indem. Co., 619 S.W.2d 400, 401 (Tex. 1981); McClure v. Allied Stores, 609 S.W.2d 901, 904 (Tex. 1980); Ray v. Farmers' State Bank, 576 S.W.2d 607, 609 (Tex. 1978); Garza v. Alviar, 295 S.W.2d 821, 923 (Tex. 1965); Benoit v. Wilson, 150 Tex. 273, 280-81, 239 S.W.2d 792, 796 (1951).

280. *Southern States*, 774 S.W.2d at 640; *In re* King's Estate, 150 Tex. 662, 664, 244 S.W.2d 660, 661 (1951).

281. *Stafford*, 726 S.W.2d at 16.

282. Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983); Seideneck v. Cal Bayreuther Assoc., 451 S.W.2d 752, 755 (Tex. 1970); Joske v. Irvine, 91 Tex. 574, 581-82, 44 S.W. 1059, 1062 (1898).

283. *Kindred*, 650 S.W.2d at 63.

284. *Id.*

ing on an issue on which he had the burden of proof, "he must demonstrate on appeal that the evidence conclusively established all vital facts in support of the issue."[285] In reviewing a "matter of law" challenge, the reviewing court employs a two prong test. The court will first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary.[286] If there is no evidence to support the finding, the reviewing court will then examine the entire record to determine if the contrary proposition is established as a matter of law.[287] If the contrary proposition is established conclusively by the evidence, the point of error will be sustained.[288]

B. *Factual Insufficiency*

In a jury trial, a complaint that the evidence is factually insufficient to support a jury finding must be raised in a motion for new trial.[289] A motion for new trial, however, is not required in a nonjury case to challenge the legal or factual sufficiency of the evidence.[290] "Factual sufficiency points of error concede conflicting evidence on an issue, yet maintain that the evidence against the jury's finding is so great as to make the finding erroneous."[291] Factual sufficiency points of error are designated as "insufficient evidence" points or "great weight and preponderance of evidence" points, again depending upon whether the complaining party had the burden of proof.[292] Although both points are generally classified as "insufficient evidence" points, they are distinct.[293]

---

285. Sterner v. Marathon Oil Co., 767 S.W.2d 686, 690 (Tex. 1989); *see also* Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982); Smith v. Central Freight Lines, Inc., 774 S.W.2d 411, 412 (Tex. App.—Houston [14th Dist.] 1989, writ denied); Ritchey v. Crawford, 734 S.W.2d 85, 86 (Tex. App.—Houston [1st Dist.] 1987, no writ).

286. *Sterner*, 767 S.W.2d at 690; *Holley*, 629 S.W.2d at 696.

287. *Sterner*, 767 S.W.2d at 690; *Holley*, 629 S.W.2d at 696-97; Texas & N.O.R. Co. v. Burden, 146 Tex. 109, 203 S.W.2d 522, 530 (1947); Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 276 (Tex. App.—Amarillo 1988, writ denied).

288. Meyerland Community Improvement Ass'n v. Temple, 700 S.W.2d 263, 267 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

289. TEX. R. CIV. P. 324(b); TEX. R. APP. P. 52(d).

290. TEX. R. CIV. P. 324(b); Farmer's Mut. Protective Ass'n v. Wright, 702 S.W.2d 295, 296-97 (Tex. App.—Eastland 1985, no writ).

291. *Raw Hide Oil & Gas*, 766 S.W.2d at 275.

292. *Id.*; *see also* Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 770 n.2 (Tex. 1987)(Robertson, J., dissenting)(joined by Ray and Mauzy, JJ.)

293. Ritchey v. Crawford, 734 S.W.2d 85, 86 n.1 (Tex. App.—Houston [1st Dist.] 1987, no writ)(citing Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 366 (1960)). An "insufficient evidence" point simply asserts that the "evidence

1. Insufficient Evidence

If a party is attacking the factual sufficiency of an adverse finding on an issue to which he did not have the burden of proof, he must demonstrate that there is insufficient evidence to support the adverse finding.[294] In reviewing an insufficiency of the evidence challenge, the court of appeals[295] must first consider, weigh, and examine all of the evidence which supports and which is contrary to the jury's determination.[296] Having done so, the court should set aside the verdict only if the evidence standing alone is too weak to support the finding, or the answer is so against the overwhelming weight of the evidence that it is manifestly unjust and clearly wrong.[297]

2. Great Weight and Preponderance

If a party is attacking a jury finding concerning an issue upon which he had the burden of proof, he must demonstrate that the adverse finding is against the great weight and preponderance of the evidence.[298] In reviewing a challenge that the jury finding is against the great weight and preponderance of the evidence, the court of appeals must examine the record to determine if there is some evidence to support the finding; that the finding is so contrary to the overwhelm-

---

adduced to support the vital fact, even if it is the only evidence adduced on an issue, is factually too weak to support it." *Id.* A "great weight" point simply asserts that the evidence in support of a finding of the existence of a vital fact in response to a jury's affirmative finding is insufficient because the great preponderance of the evidence supports its non-existence. *Id.* The *Calvert* article does not fully discuss the problem of challenging a negative finding on an issue. *Id.*

294. *See*, Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 275-76 (Tex. App.—Amarillo 1988, writ denied)(must claim insufficient evidence or no evidence).

295. The court of appeals has conclusive jurisdiction over questions of fact. TEX. CONST. art. V, § 6; Coulson v. Lake LBJ Util. Dist., 781 S.W.2d 594, 597 (Tex. 1989); *see also* Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 648-49 (Tex. 1988); Herbert v. Herbert, 754 S.W.2d 141, 144 (Tex. 1988).

296. Plas-Tex, Inc. v. United States Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989); Sosa v. City of Balch Springs, 772 S.W.2d 71, 72 (Tex. 1989); Lofton v. Texas Brine Corp., 720 S.W.2d 804, 805 (Tex. 1986); Harco Nat'l Ins. Co. v. Villanueva, 765 S.W.2d 809, 810 (Tex. App.—Dallas 1988, writ denied).

297. Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965); In re King's Estate, 150 Tex. 662, 664-65, 244 S.W.2d 660, 661 (1951); *Raw Hide Oil & Gas*, 766 S.W.2d at 276; Wilson v. Goodyear Tire & Rubber Co., 753 S.W.2d 442, 448 (Tex. App.—Texarkana 1988, writ denied); Otis Elevator Co. v. Joseph, 749 S.W.2d 920, 923 (Tex. App.—Houston [1st Dist.] 1988, no writ).

298. Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 776 S.W.2d 264, 275-76 (Tex. App.—Amarillo 1988, writ denied).

ing weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or that the great preponderance of the evidence supports its nonexistence.[299] In *Cropper v. Caterpillar Tractor Co.*,[300] the supreme court held that the courts of appeals have the authority to determine whether a jury's nonfinding, or failure to find, is against the great weight and preponderance of the evidence.[301] Therefore, whether the great weight challenge is to a finding or a non-finding, a court of appeals may reverse and remand a case for a new trial when it concludes that the finding or non-finding is against the great weight and preponderance of the evidence.[302]

In reviewing great weight points which complain of a jury's failure to find a fact, the supreme court has admonished the courts of appeals to be mindful that the jury was not convinced by a preponderance of the evidence.[303] In such cases, the courts of appeals may not reverse simply because they conclude that the evidence preponderates toward an affirmative answer.[304] The courts of appeals may only reverse where the great weight of the evidence supports an affirmative answer.[305] While the court of appeals may "unfind" certain facts, it cannot affirmatively find facts that would be the basis of a rendition. It may only reverse and remand for a new trial.[306]

3. *Pool* and the Constitutional Question

In 1891, the Texas Constitution was amended to provide that "the decision of [the courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error."[307] The courts of appeals conclusive jurisdiction over issues of "fact," however, is complicated by the Texas Bill of Rights which provides that every person

---

299. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); Traylor v. Goulding, 497 S.W.2d 944, 945 (Tex. 1973); *In re King's Estate*, 150 Tex. at 664-65, 244 S.W.2d at 661; Hopson v. Gulf Oil Corp., 150 Tex. 1, 11, 237 S.W.2d 352, 358 (1951); *Raw Hide Oil & Gas*, 766 S.W.2d at 276; *Wilson*, 753 S.W.2d at 448.

300. 754 S.W.2d 646 (Tex. 1988).

301. *Id.* at 651. *See* Ames v. Ames, 776 S.W.2d 154, 158 (Tex. 1989)(courts of appeals may reverse and remand case for new trial if failure to find is against great weight and preponderance of evidence).

302. Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 651 (Tex. 1988).

303. Herbert v. Herbert, 754 S.W.2d 141, 144 (Tex. 1988).

304. *Id.*

305. *Id.*

306. Texas Nat'l Bank v. Karnes, 717 S.W.2d 901, 903 (Tex. 1986); Carr v. Norstock Bldg. Sys., Inc., 767 S.W.2d 936, 943 (Tex. App.—Beaumont 1989, n.w.h.).

307. TEX. CONST. art. V, § 6.

has a "right of trial by jury"[308] and that this right "shall remain inviolate."[309] In 1898, only seven years after the Texas Constitution was amended, the supreme court recognized the potential constitutional conflict and observed that article V, § 6, which gave courts of appeals conclusive jurisdiction over questions of fact, "was not to enlarge their power over questions of fact but to restrict, in express terms, the jurisdiction of the supreme court and to confine it to questions of law."[310] Equally important, the court also recognized that the courts of appeals' jurisdiction does not give them the authority to substitute their finding for a jury's finding when the record contains evidence of, and gives equal support to, inconsistent inferences in support of the jury's finding.[311]

Almost seventy-five years later, in *In re King's Estate*,[312] the supreme court established that it might accept jurisdiction, notwithstanding Texas Constitution article V, § 6, to determine if a correct legal standard had been applied by the courts of appeals.[313] After *In re King's Estate*, the supreme court continued to review factual insufficiency points where the court of appeals utilized an incorrect legal principle.[314] Subsequently, in *Dyson v. Olin Corp.*,[315] the supreme

308. *Id.* art. V, § 10; *see also* TEX. R. CIV. P. 226(a). Rule 226(a) provides that juries are the "sole judges of the credibility of the witnesses and the weight to be given their testimony . . . ."

309. TEX. CONST., art. I, § 15.

310. Choate v. San Antonio & A.P. Ry., 91 Tex. 406, 410, 44 S.W.2d 69, 69 (1898).

311. *Id.* at 409-10, 44 S.W.2d at 69. The court's admonition was often repeated prior to the issue squarely confronting the supreme court in *Cropper*. Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646 (Tex. 1988)(courts of appeals may only "unfind" facts and reverse; cannot usurp jury's fact finding function); *see also* Pool v. Ford Motor Co., 715 S.W.2d 629, 633-35 (Tex. 1986)(court of appeals may reverse trial court's fact finding only if contrary to overwhelming weight of evidence); Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985)(court of appeals may only evaluate sufficiency of evidence to support lower court's judgment but may not decide factual issues as basis for judgment); *In re* King's Estate, 150 Tex. 662, 666, 244 S.W.2d 660, 662 (1951) (jury verdict cannot be overturned by court of appeals simply because different inferences or conclusions could have been derived by jury); Benoit v. Wilson, 150 Tex. 273, 281-82, 239 S.W.2d 792, 797 (1951).

312. 150 Tex. 662, 244 S.W.2d 660 (1951).

313. *Id.* at 665, 244 S.W.2d at 661.

314. *See* Harmon v. Sohio Pipeline Co., 623 S.W.2d 314, 314-15 (Tex. 1981)(supreme court has jurisdiction to review appellate court's application of rules of law); Garza v. Alviar, 395 S.W.2d 821, 823-24 (Tex. 1965)(supreme court has power to determine if appellate court had jurisdiction over issue); Puryear v. Porter, 153 Tex. 82, 264 S.W.2d 689, 690 (1954)(supreme court may remand to appellate court for reconsideration of applicable rules of law).

315. 692 S.W.2d 456 (Tex. 1985).

court again concluded that while it does not have jurisdiction over questions of fact, it did have jurisdiction to determine whether the courts of appeals used the correct rules of law in reaching their conclusions.[316] As the court correctly recognized, the use of the wrong rule of law, a purely legal question, is within the supreme court's jurisdiction.[317] More importantly, in a concurring opinion Justice Robertson expressly raised the issue of whether the supreme court would continue to adhere to prior case law interpreting article V, § 6. Justice Robertson expressed his view that article V, § 6 improperly allows the courts of appeals to usurp the jury's factfinding function.[318]

Justice Robertson's challenge to the continued viability of article V, § 6 was subsequently raised in *Pool v. Ford Motor Co.*[319] While the supreme court chose "to adhere to previous interpretations that harmonize[d] the two constitutional provisions" and re-affirmed the courts of appeals' jurisdiction to review cases for factual insufficiency of the evidence.[320] The supreme court also held that it had the authority to review the court of appeals' opinions to determine if the intermediate courts applied the correct standard of review to the facts.[321] In order to determine whether the courts of appeals applied the correct legal principles to the facts, the supreme court held:

> [T]he courts of appeals, when reversing on insufficiency grounds, should, in their opinions, detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias. Further, those courts, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.[322]

Pool clearly takes the courts' earlier decision in *Dyson* one step further by allowing the supreme court to review a court of appeals' application of the correct legal standard *to the facts*, instead of only deter-

316. *Id.* at 457.

317. *See id.* (supreme court can, as matter of law, review appellate court's application of rules of law).

318. *Id.* at 458 (Robertson, J., concurring).

319. 715 S.W.2d 629, 633 (Tex. 1986). The Pools argued that the court of appeals exercised its fact jurisdiction in a manner that undermined the jury verdict in violation of the constitutional right of trial by jury. *Id.*

320. *Id.* at 634.

321. *Id.* at 634-35.

322. *Id.* at 635.

mining whether the correct legal standard was utilized.[323] Therefore, the courts of appeals must do more than recite the *Pool* standard of review, they must *prove* that they followed the standard.[324] Justice Gonzalez, in a concurring opinion to *Pool*, expressed fear that the supreme court would use *Pool* "to second guess the courts of appeals," thereby interfering with their conclusive jurisdiction over questions of fact.[325]

The inherent constitutional conflict of the courts of appeals' jurisdiction over questions of fact vis-a-vis the right to trial by jury was again raised and addressed in *Cropper v. Caterpillar Tractor Co.*[326] Specifically, the court reviewed the authority of the courts of appeals to review a jury's non-finding or failure to find, as opposed to a jury's finding.[327] The court held that to the extent *Pool* created a distinction between review of findings and review of non-findings the courts of appeals had the authority to review both findings and non-findings for their factual sufficiency.[328] More importantly, the court rejected the challenge to the courts of appeals' constitutional obligation to review fact questions and pointed out that the right to jury trial and the appellate court's right to review fact questions have "peacefully co-existed for almost one-hundred fifty-years" and were "thoroughly rooted in our constitution and judicial system."[329] Since the court could not amend the constitution to remove the conflict, it concluded that it was "not prepared to sacrifice either [constitutional provision] for the benefit of the other."[330]

While the supreme court has continued to recognize the courts' of appeals conclusive jurisdiction over questions of fact,[331] the supreme

---

323. *Id.*

324. Stewart v. Allied Bancshares, Inc., 770 S.W.2d 837, 838 (Tex. App.—Tyler 1989, writ denied).

325. Pool v. Ford Motor Co., 715 S.W.2d 629, 638 (Tex. 1986)(Gonzalez, J., concurring).

326. 754 S.W.2d 646, 648 (Tex. 1988).

327. *Id.* at 649.

328. *Id.* at 649-51.

329. *Id.* at 652.

330. Cropper v. Caterpiller Tractor Co., 754 S.W.2d 646,652 (Tex. 1988); *see also* Herbert v. Herbert, 754 S.W.2d 141, 144 (Tex. 1988)(reiterates courts of appeals' conclusive jurisdiction over questions of fact); Hurlburt v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 770-71 (Tex. 1987)(Robertson. J. dissenting)(courts of appeals' authority to review a sufficiency of jury's fact-finding should be eliminated).

331. *See* Coulson v. Lake LBJ Municipal Util. Dist., 781 S.W.2d 594, 597 (Tex. 1989) ("the task of weighing all of the evidence and determining its sufficiency is a power confined exclusively to the court[s] of appeals").

court has circumvented its own constitutional limitation in two interesting cases. In *Lofton v. Texas Brine Corporation*,[332] the supreme court, in a 5-4 decision, reversed the court of appeals' decision for a second time,[333] holding once again that the jury's finding was supported by evidence which was factually insufficient.[334] The court presumably reversed the court of appeals' second opinion pursuant to *Pool* for a third review of the case. The fundamental problem with the decision is that the court, as Justice Gonzalez predicted in *Pool*,[335] was using *Pool* to second guess the courts of appeals' constitutional prerogative to judge the factual sufficiency of the evidence in a case.[336] While the supreme court again recognized its lack of jurisdiction to determine the factual sufficiency of the evidence,[337] nevertheless, it explained why the evidence was sufficient to support the jury's finding in great detail.[338] It is clear from the court's "extensive, and unauthorized, analysis"[339] that while the court was unwilling to overrule *Herbert* and *Cropper*, it was willing to review the court of appeals' factual sufficiency analysis.[340] The supreme court's decision compels the conclusion that the court is pressuring the court of appeals on remand to reach a result that it would have reached if it had jurisdiction over questions of fact.[341] The court's review of the facts and its remand of the case to the court of appeals violates Texas Constitution article V, § 6.[342] Ironically, if the supreme court had affirmed the court of appeals' opinion and simply disapproved of its language, Lofton would have gotten his new trial. Instead, the case has been remanded to the court of appeals for a third review.[343]

---

332. 777 S.W.2d 384 (Tex. 1989).

333. *Id.* at 387. The case was reversed for the first time in *Lofton v. Texas Brine Corp.*, 720 S.W.2d 804, 805 (Tex. 1986)(per curiam). The *Lofton* opinion on remand is reported at 751 S.W.2d 197 (Tex. 1988).

334. *Lofton*, 777 S.W.2d at 387.

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

336. Lofton v. Texas Brine Corp., 777 S.W.2d 384, 387-88 (Tex. 1989)(Gonzalez, J., dissenting); *id.* at 388-89 (Hecht, J., dissenting)(joined by Phillips, C.J., and Cook, J.).

337. *Id.* at 387.

338. *Id.* at 386-87.

339. *Id.* at 389 (Hecht, J., dissenting).

340. *Id.*

341. *Id.*

342. *Id.* at 388 (Gonzalez, J., dissenting).

343. *Id.* at 387; *see also* Dyson v. Olin Corp., 692 S.W.2d 456 (Tex. 1985)(Robertson, J., concurring). Justice Robertson observed that "[a] jury trial is of little importance if an appellate court can remand until it gets a jury to agree with it." *Dyson*, 692 S.W. 2d at 459. It

Recently, in *Aluminum Co. of America v. Alm*,[344] the supreme court again circumvented the court of appeals' constitutionally binding conclusion that the jury's finding of gross negligence was supported by factually insufficient evidence.[345] In another 5-4 decision, a deeply divided court reversed the court of appeals' conclusion and held that Alcoa was grossly negligent as a matter of law.[346] Ignoring the evidence of care introduced by Alcoa,[347] the court avoided the court of appeals' analysis of the factual sufficiency of the evidence and concluded that it was grossly negligent as a matter of law, a legal issue over which the supreme court has jurisdiction.[348] The dissenters accurately summarized the real meaning of the court's decision: whenever a majority of the court is dissatisfied with a court of appeals' conclusion on a factual sufficiency point, it may impose any result it chooses "merely by holding that a party proved the necessary facts conclusively, i.e., as a matter of law."[349]

While most practitioners and courts assumed that the inherent conflict between the court of appeals' constitutional and conclusive prerogative to review factual insufficiency challenges and a person's constitutional right of trial by jury had been resolved, it is clear that the supreme court remains deeply divided on the issue. In any event, appellate practitioners must be aware of the conflict on the court and understand that the inherent constitutional conflict has not been resolved. Because of this vexing problem, appellate practitioners should brief the facts and the appropriate legal standard in detail and with complete accuracy when raising factual sufficiency points to a court of appeals. If a court of appeals reverses a jury finding or non-finding for factual insufficiency, and uses any language that may be construed as a "legal conclusion," an able opponent will surely seek review in the supreme court. Given the supreme court's decisions in *Lofton* and *Alm*, which clearly signal the court's willingness to find creative ways to avoid the court of appeals' conclusive jurisdiction over fact ques-

---

appears from *Lofton II* that if the supreme court is unsatisfied with the court of appeals' resolution of fact question that it can remand until it gets [the court of appeals] to agree with it.

344. 33 Tex. Sup. Ct. J. 187 (Jan. 11, 1990).

345. *Id.* at 191 (Gonzalez, J., dissenting)(joined by Phillips, C.J., Cook and Hecht JJ.).

346. *Id.*

347. *Aluminum Co. of Am.*, 33 Tex. Sup. Ct. J. at 191 (Gonzalez, J., dissenting).

348. *Id.* at 191.

349. *Id.*

tions, appellate practitioners may no longer assume that a court of appeals' determination of a factual sufficiency point is conclusive.

C. *Remittitur*

1. Actual Damages

Remittitur raises a question of fact. Accordingly, the supreme court lacks jurisdiction to review or to order a remittitur. The supreme court, however, does have jurisdiction to determine if the court of appeals applied the proper standard of review.[350]

In either ordering a remittitur or in reviewing a trial court's order of remittitur, the proper standard of review is factual sufficiency, not abuse of discretion.[351] The court of appeals must "examine all the evidence in the record to determine whether sufficient evidence supports the damage award and remit only if some portion is so factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust."[352]

If the evidence is insufficient to support a damages verdict, a take-nothing judgment for that amount should be rendered by the appellate court.[353] Where the evidentiary support for part of a damage verdict is insufficient, the court of appeals should "suggest a remittitur of that part of the verdict."[354] The party which prevailed in the trial court should then be given the option of either accepting the remittitur or of having the case remanded.[355] If a remand is ordered, then the court of appeals must detail and analyze the evidence as required by *Pool v. Ford Motor Co.*[356]

2. Punitive Damages

When reviewing an award of punitive damages, the reviewing court must consider a number of factors to determine the reasonableness of the award. "Actual damages are used to indicate the reasonableness of punitive damages under the rule that punitive damages must be

---

350. Pope v. Moore, 711 S.W.2d 622, 623 (Tex. 1986).

351. Snoke v. Republic Underwriters Ins. Co., 770 S.W.2d 777, 777-78 (Tex. 1989); Larson v. Cactus Util. Co., 730 S.W.2d 640, 641 (Tex. 1987); *Pope*, 711 S.W.2d at 624.

352. *Pope*, 711 S.W.2d at 624.

353. *Larson*, 730 S.W.2d at 641.

354. *Id.*

355. *Id.*

356. 715 S.W.2d 629 (Tex. 1986).

rationally related to actual damages."[357] This ratio, however, is merely a tool to assist the courts in determining when a punitive damage award is the product of passion on the part of the jury rather than reason.[358] There is no exact formula by which punitive damages are measured to actual damages.[359]

"In addition to the ratio of punitive to actual damages, the appellate court may consider: the nature of the wrong, the character of the conduct involved, the degree of the culpability of the wrongdoer, the situation and sensibilities of the parties concerned, and the extent to which such conduct offends a public sense of justice in propriety."[360]

An award of punitive damages "rests in the jury's discretion and will not be set aside as excessive unless the amount is so large as to indicate that it is the result of passion and prejudice, or that the evidence has been disregarded."[361] Punitive damages do not depend upon the rules of fair compensation, but are based on the rules of just punishment.[362] Thus, "when a jury honestly attempts to assess an amount which punishes a wrongdoer, which does not oppress him, but which is great enough to cause him and others similarly situated to refrain from similar acts in the future, the judgment should not be disturbed by an appellate court."[363]

3. Attorney's Fees and Court Costs

An award of attorneys' fees must be based upon some statutory or contractual authority.[364] When multiple causes of action are involved, the party who asserts those causes must separate those hours for which fees may be recovered from those hours for which fees can-

357. Wright v. Gifford-Hill & Co., 725 S.W.2d 712, 714 (Tex. 1987).

358. *Id.*

359. Tatum v. Preston Carter Co., 702 S.W.2d 186, 188 (Tex. 1986); InterFirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 909 (Tex. App.—Dallas 1987, writ dism'd by agr.)(discussing the "reasonable relationship test").

360. *Tatum*, 702 S.W.2d at 188; Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981).

361. Aetna Casualty & Sur. Co. v. Joseph, 769 S.W.2d 603, 607 (Tex. App.—Dallas 1989, no writ).

362. *Id.* at 608.

363. *Id.* (citing Southwestern Inv. Co. v. Neeley, 443 S.W.2d 573, 580 (Tex. Civ. App.—Fort Worth 1969), *rev'd on other grounds*, 452 S.W.2d 705 (Tex. 1970)).

364. Southern Concrete Co. v. Metrotec Fin., Inc., 775 S.W.2d 446, 449 (Tex. App.—Dallas 1989, no writ).

not be recovered.[365] The appropriate standard of review of a trial court's order of remittitur of an award of attorney's fees is sufficiency of the evidence.[366] Therefore, the trial court's remittitur will be affirmed when the evidence is factually insufficient to support the verdict.[367]

In determining against which party court costs should be taxed, a trial court has discretion to assess court costs as it deems appropriate.[368] The court may assess costs against either party or apportion the costs between the parties in a fair and equitable manner.[369] The trial court's assessment of costs is review for abuse of discretion.[370]

D. *Presumptions From an Incomplete Record*

There can be no appeal in the absence of a transcript.[371] Without a complete statement of facts or a complete transcript, the appellate court will presume that the evidence before the trial court supported its judgment.[372] Stated another way, where an appellant fails to bring forward a complete record on appeal, it is presumed that the omitted portions are not relevant to the disposition of the appeal. This precludes the reviewing court from finding reversible error[373] because a reviewing court must examine the entire record to determine whether an error was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment.[374] An incomplete statement of facts prevents the reviewing court from determining whether a particular ruling by the trial court is reversible error in the context of the

---

365. *Id.*; Bullock v. Kehoe, 678 S.W.2d 558, 560 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

366. Snoke v. Republic Underwriters Ins. Co., 32 Tex. Sup. Ct. J. 357, 358 (May 3, 1989); Larson v. Cactus Util. Co., 730 S.W.2d 640, 641 (Tex. 1987).

367. *Snoke*, 32 Tex. S. Ct. J. at 358.

368. San Antonio Housing Auth. v. Underwood, 782 S.W.2d 25, 27 (Tex. App.—San Antonio 1989, no writ).

369. *Id.* (citing Jones v. Strayhorn, 159 Tex. 421, 426, 321 S.W.2d 290, 294 (1959)).

370. *Id.*

371. Western Credit Co. v. Olshan Enter., Inc., 714 S.W.2d 137, 138 (Tex. App.—Houston [1st Dist.] 1986, no writ).

372. Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 795 (Tex. 1987); Murray v. Devco, Ltd., 731 S.W.2d 555, 557 (Tex. 1986); *see also* Haynes v. McIntosh, 776 S.W.2d 784, 785 (Tex. App.—Corpus Christi 1989, error denied); E.B. v. Texas Dep't of Human Servs., 766 S.W.2d 387, 388(Tex. App.—Austin 1989, n.w.h.); Collins v. Williamson Printing Corp., 746 S.W.2d 489, 492-93 (Tex. App.—Dallas 1988, no writ).

373. Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990).

374. TEX. R. APP. P. 81(b).

entire case.[375]

Where there is no statement of facts, appellate court review is limited generally to complaints involving: errors of law, erroneous pleadings or rulings thereon, an erroneous charge, irreconcilable conflicts of jury findings, summary judgments, and fundamental error.[376] However, where the appellant, through no fault of his own, is unable to obtain a statement of facts, the appellate court may reverse the judgment.[377]

There is an exception to the general rule requiring a complete statement of facts on appeal. Under Texas Rule of Appellate Procedure 53(d) an appellant may bring forward a partial statement of facts if he includes in his request for a partial statement of facts a statement of the points to be relied upon on appeal. When an appellant complies with this rule, there is a presumption on appeal that nothing omitted from the record is relevant to any of the specified points or to the disposition of the case on appeal.[378] However, the failure of the appellant to comply with Rule 53(d) will preclude the reviewing court from finding reversible error.[379]

VI. CHALLENGES TO THE SUFFICIENCY OF THE EVIDENCE IN NONJURY TRIALS

A. *Findings of Fact Filed*

1. With Statement of Facts

While findings of fact in a case tried to the court have the same force and dignity as a jury's verdict upon jury questions,[380] the trial court judge's "findings of fact are not conclusive when a complete statement of facts appears in the record."[381] The judge's findings of

375. *Christiansen*, 782 S.W.2d at 843.

376. *Collins*, 746 S.W.2d at 491; *see also* Bexar County Criminal Dist. Attorney v. Mayo, 773 S.W.2d 642, 643 (Tex. App.—San Antonio 1989, n.w.h.)(conclusions of law will not bind appellate court if erroneous).

377. Smith v. Smith, 544 S.W.2d 121, 123 (Tex. 1976).

378. Producers Constr. Co. v. Muegge, 669 S.W.2d 717, 718 (Tex. 1984); E.B. v. Texas Dep't of Human Servs., 766 S.W.2d at 387, 388 (Tex. App. - Austin 1989, n.w.h.).

379. Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990).

380. City of Clute v. City of Lake Jackson, 559 S.W.2d 391, 395 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).

381. *See* Middleton v. Kawasaki Steel Corp., 687 S.W.2d 42, 44 (Tex. App.—Houston [14th Dist.] 1985), *writ ref'd n.r.e. per curiam*, 699 S.W.2d 199 (Tex. 1985)(fact-finding inconclusive if contrary circumstances established as matter of law or no evidence to support find-

fact are reviewable for legal and factual sufficiency of the evidence" to support them,[382] "by the same standards which are applied in reviewing the legal or factual sufficiency of the evidence" which support jury findings.[383] Although a trial court's conclusions of law may not be challenged for factual insufficiency, the trial court's conclusions drawn from the facts may be reviewed to determine their correctness.[384]

2. Without Statement of Facts

If no statement of facts is made part of the record on appeal, the reviewing court presumes that sufficient evidence was introduced to support the trial court's findings of fact and conclusions of law and the judgment was based upon the findings and conclusions.[385]

B. *Findings of Fact Not Requested and Not Filed*

1. With Statement of Facts

If findings of fact or conclusions of law are neither filed nor requested, the judgment of the trial court implies all necessary findings of fact to support it are present[386] provided: "the proposition is one raised by the pleadings and supported by the evidence; and . . . the

---

ing); Stephenson v. Perlitz, 537 S.W.2d 287, 289 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.)(statement of facts on record rendered fact-finding inconclusive on appeal). Where a trial court files its findings of fact late, "the error is harmless error absent some showing that the late filing injured the complaining party." Ford v. Darwin, 767 S.W.2d 851, 856 (Tex. App.—Dallas 1989, writ denied).

382. *See* Valencia v. Garza, 765 S.W.2d 893, 896 (Tex. App.—San Antonio 1989, n.w.h.)(only evidence supporting finding considered in legal insufficiency challenge, all evidence considered in factual insufficiency challenge); First Nat'l Bank v. Kinabrew, 589 S.W.2d 137, 146 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.)(fact-finding of a trial court is reviewable for factual and legal insufficiency of evidence).

383. Gill Savs. Ass'n v. Chair King, Inc., 783 S.W.2d 674, 676-77 (Tex. App.—Houston [14th Dist.] 1989, n.w.h.); Aerospatiale Helicopter Corp. v. Universal Health Servs., Inc., 778 S.W.2d 492, 497 (Tex. App.—Dallas 1989, n.w.h.); Okan v. Levy, 612 S.W.2d 938, 941 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

384. Mercer v. Bludworth, 715 S.W.2d 693, 697 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

385. Mays v. Pierce, 154 Tex. 487, 493, 281 S.W.2d 79, 82 (1955); Tripp Village Joint Venture v. MBank Lincoln Centre, N.A., 774 S.W.2d 746, 751 (Tex. App.—Dallas 1989, writ denied); Alexander v. Barlow, 671 S.W.2d 531, 535 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

386. Lemons v. EMW Mfg. Co., 747 S.W.2d 372, 373 (Tex. 1988); *In re* W.E.R., 669 S.W.2d 716, 717 (Tex. 1984); Burnett v. Motyka, 610 S.W.2d 735, 736 (Tex. 1980); Marynick v. Bockelmann, 773 S.W.2d 665, 667 (Tex. App.—Dallas 1989, writ granted).

trial judge's decision can be sustained on any reasonable theory that is consistent with the evidence and the applicable law, considering only the evidence favorable to the decision."[387] To prevail in this situation, "the appellant may show that the undisputed evidence *negatives* one or more of the elements essential to the decision; or he may show that the appellee's pleadings omit one or more of the essential elements, and that the trial court was confined to the pleadings."[388] However, when a statement of facts is a part of the record, the legal and factual sufficiency of the implied findings may be challenged on appeal in the same manner as jury findings or a trial court's findings of fact are challenged.[389] The applicable standard of review is the same as that applied in the review of jury findings or a trial court's findings of fact.[390] Where the implied findings of fact are supported by the evidence, the appellate court must uphold the judgment of the trial court on any theory of law applicable to the case.[391] In this determination, the appellate court will consider only the evidence most favorable to the implied factual findings and will disregard all opposing or contradictory evidence.[392] Where the parties stipulate to the facts, however, findings of fact and conclusions of law need not be requested not filed.[393] In that instance, the standard of review is limited to the issue of the correctness of the application of the law to the admitted facts.[394]

---

387. Franklin v. Donoho, 774 S.W.2d 308, 311 (Tex. App.—Austin 1989, n.w.h.).

388. *Id.* (emphasis in original).

389. Roberson v. Robinson, 768 S.W.2d 280, 281 (Tex. 1989); Las Vegas Pecan & Cattle Co. v. Zavala County, 682 S.W.2d 254, 256 (Tex. 1984); *Burnett*, 610 S.W.2d at 736; Money of the United States in the Amount of $8,500 v. State, 774 S.W.2d 788, 791 (Tex. App.—Houston [14th Dist.] 1989, n.w.h.); National Bugmobiles, Inc. v. Jobi Properties, 773 S.W.2d 616, 620 (Tex. App.—Corpus Christ 1989, writ denied).

390. *Roberson*, 768 S.W.2d at 281; *Zavala County*, 682 S.W.2d at 256; *Burnett*, 610 S.W.2d at 736; *Money of the United States*, 714 S.W.2d at 791; *National Bugmobiles, Inc.*, 773 S.W.2d at 620.

391. Allen v. Allen, 717 S.W.2d 311, 313 (Tex. 1986); *In re* W.E.R., 669 S.W.2d 716, 717 (Tex. 1984) Lassiter v. Bliss, 559 S.W.2d 353, 358 (Tex. 1978); *see also* Lute Riley Motors, Inc. v. T. C. Crist, Inc., 767 S.W.2d 439, 440 (Tex. App.—Dallas 1988, writ denied)(findings of fact and conclusions of law not requested in timely manner).

392. Renfro Drug Co. v. Lewis, 149 Tex. 507, 513, 235 S.W.2d 609, 613 (1950).

393. Sharyland Water Supply Co. v. Hidalgo County Appraisal Dist., 783 S.W.2d 297, 298 (Tex. App.—Corpus Christi 1989, writ. requested).

394. *Id.*

2. Without Statement of Facts

Where there are no findings of fact and conclusions of law, and no statement of facts included in the record on appeal, the reviewing court presumes that all facts necessary to support the judgment have been found.[395] Only in an exceptional case, i.e., "where fundamental error is presented, is an appellant entitled to a reversal of the trial court's judgment."[396]

C. *Findings of Fact Requested Properly, But Not Filed*

1. With Statement of Facts

Pursuant to Texas Rule of Civil Procedure 296, upon the request of either party, the judge must present in writing the findings of fact and the conclusions of law.[397] When the statement of facts is presented to the appellate court for review, harm is presumed and the judgment must be reversed unless the record affirmatively shows that no harm resulted from the trial court's failure to comply with Rule 296. [398] "The test of whether there is harm depends on whether the circumstances of the particular case would require an appellant to have to guess the reason or reasons that the trial judge ruled against [him]."[399] This would place an undue burden on the appellant in a complicated situation where the facts support several grounds of recovery or defense.[400] Another court stated "the test of injury is whether the party was prevented from making a proper presentation of the case to the appellate court."[401]

---

395. Guthrie v. National Homes Corp., 394 S.W.2d 494, 495 (Tex. 1965); Commercial Credit Corp. v. Smith, 143 Tex. 612, 616, 187 S.W.2d 363, 365 (1945); Carns v. Carns, 776 S.W.2d 603, 604 (Tex. App.—Tyler 1989, n.w.h.); Bard v. Frank B. Hall & Co., 767 S.W.2d 839, 845 (Tex. App.—San Antonio 1989, writ denied); Ette v. Arlington Bank of Commerce, 764 S.W.2d 594, 595 (Tex. App.—Fort Worth 1989, n.w.h.); Cloer v. Ford & Calhoun GMC Truck Co., 553 S.W.2d 183, 185 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

396. *Carns*, 776 S.W.2d at 604; *Ette*, 764 S.W.2d at 595.

397. TEX. R. CIV. P. 296.

398. Cherne Indus., Inc. v. Magallanes, 763 S.W.2d 768, 772 (Tex. 1989); Wagner v. Riske, 142 Tex. 337, 343, 178 S.W.2d 117, 120 (1944); Castle v. Castle, 734 S.W.2d 410, 412 (Tex. App.—Houston [1st dist.] 1987, no writ); Sheldon Pollack Corp. v. Pioneer Concrete, 765 S.W.2d 843, 845 (Tex. App.—Dallas 1989, writ denied); Carr v. Hubbard, 664 S.W.2d 151, 153 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); Lee v. Thornton, 658 S.W.2d 234, 235 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

399. *Sheldon Pollack Corp.*, 765 S.W.2d at 845.

400. *Id.*

401. Eye Site, Inc. v. Blackburn, 750 S.W.2d 274, 277 (Tex. App.-Houston [14th Dist.] 1988, writ granted).

There was a split among the courts of appeals regarding the appropriate remedy under these circumstances. Some courts have held that "the proper remedy is not to reverse the trial court's judgment, but to abate the appeal, and order the trial court to make the appropriate findings and conclusions, and to certify those findings to the appellate court for review."[402] Other courts of appeals have held that the appellate court must reverse and remand the case for a new trial.[403] In *Cherne Industries, Inc. v. Magallanes*,[404] the supreme court appeared to resolve the conflict and implicitly overruled the appellate courts by instructing the court of appeals to direct the trial court to remedy the error by supplementing the record with appropriate findings of fact and conclusions of law pursuant to Texas Rule of Appellate Procedure 81(a).[405]

2. Without Statement of Facts

Where a party properly requests the trial court to file findings of fact and conclusions of law, and a statement of facts is not presented to the appellate court for review, the appellate court presumes that the evidence was sufficient and that "every fact necessary to support the findings and judgment within the scope of the pleadings was proved at trial."[406] The appellant has the burden to ensure that a record is given to the appellate court sufficient to show an error requiring reversal.[407]

VII. CONCLUSIONS OF LAW

Conclusions of law, which are always reviewable,[408] will be upheld

402. Morrison v. Morrison, 713 S.W.2d 377, 381 (Tex. App.—Dallas 1986, writ dism'd); Wallen v. State, 667 S.W.2d 621, 624 (Tex. App.—Austin 1984, no writ); Carr v. Hubbard, 664 S.W.2d 151, 153-54 (Tex. App. — Houston [1st. Dist.] 1983, writ ref'd n.r.e.).

403. Barnes v. Coffman, 753 S.W.2d 823, 823 (Tex. App.—Houston [14th Dist.] 1988, writ denied); Joseph v. Joseph, 731 S.W.2d 597, 599-600 (Tex. App.—Houston [14th Dist.] 1988, no writ); Anzaldua v. Anzaldua, 742 S.W.2d 782, 783 (Tex. App.—Corpus Christi 1987, writ denied).

404. 763 S.W.2d 768 (Tex. 1989).

405. *Id.* at 770. Where the original trial judge who heard the evidence is no longer on the court, and consequently, no longer available to respond to a court of appeals' order to prepare findings of fact and conclusions of law, the remedy of abatement is no longer available and the case must be reversed and remanded for a new trial. Federal Deposit Ins. Corp. v. Morris, 782 S.W. 2d 521, 524 (Tex. App.—Dallas 1989, writ requested).

406. Saenz v. Saenz, 756 S.W.2d 93, 95 (Tex. App.—San Antonio 1988, no writ).

407. TEX. R. APP. P. 50(d).

408. Middleton v. Kawasaki Steel Corp., 687 S.W.2d 42, 44 (Tex. App.—Houston [14th

on appeal if the judgment can be sustained on any legal theory supported by the evidence.[409] Conclusions of law must be attacked as erroneous as a matter of law.[410] Incorrect conclusions of law will not require a reversal, however, if the controlling finding of facts will support a correct legal theory.[411]

VIII. FRIVOLOUS APPEALS

If an appeal is taken for delay and without sufficient cause, the court of appeals or the supreme court may award each prevailing appellee or respondent an amount not to exceed ten percent of the amount of damages awarded to such appellee or respondent as damages against such appellant or petitioner. If there is no money damage award, then the court may award each prevailing appellee or respondent an amount not to exceed ten times the total taxable costs as damages.[412] The damages may be awarded on motion of a party or by the court *sua sponte*.[413] "The right to an appeal is a sacred and valuable right."[414] Thus, the appellant will not be penalized absent a clear showing "that appellant had no reasonable ground to believe the judgment would be reversed."[415] The court must look at the case from the point of view of the advocate and determine whether he had reasonable grounds to believe that the case would be reversed.[416] "Whether the matter is groundless and thus without sufficient cause must be decided on the basis of objective legal expectations."[417] Some cases have framed the basis of an award of damages simply as lack of merit, rather than expressly performing the analysis indicated by the language of the rule. Thus, an appellant's conscious indifference to

---

Dist.] 1985) *writ ref'd n.r.e. per curiam*, 699 S.W.2d 199 (Tex. 1985); Muller v. Nelson, Sherrod & Carter, 563 S.W.2d 697, 702 (Tex. Civ. App.—Fort Worth 1978, no writ).

409. Simpson v. Simpson, 727 S.W.2d 662, 664 (Tex. App.—Dallas 1987, no writ).

410. Mercer v. Bludworth, 715 S.W.2d 693, 697 (Tex. App.— Houston [1st Dist.] 1986, writ ref'd n.r.e.).

411. Valencia v. Garza, 765 S.W.2d 893, 898 (Tex. App.—San Antonio 1989, n.w.h.).

412. TEX. R. APP. P. 84 (damages for delay in civil cases); TEX. R. APP. P. 182(b)(damages for delay without sufficient cause).

413. Dolenz v. A— B—, 742 S.W.2d 82, 86 (Tex. App.—Dallas 1987, writ denied).

414. Loyd Elec. Co. v. Millett, 767 S.W.2d 476, 484 (Tex. App.—San Antonio 1989, n.w.h.).

415. Beago v. Ceres, 619 S.W.2d 293, 295 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

416. Gaines v. Frawley, 739 S.W.2d 950, 956 (Tex. App.—Fort Worth 1987, no writ).

417. Goad v. Goad, 768 S.W.2d 356, 360 (Tex. App.—Texarkana 1989, writ denied), *cert. denied*, __ U.S. __, 110 S. Ct. 772, 107 L. Ed. 2d 742 (1990).

settled rules of law has been held to warrant damages.[418]

Pointing out errors in an appellant's brief which are inconsistent with the record will not suffice to show entitlement to damages.[419] However, an appellant's complete failure to advance arguments in support of his position may result in damages.[420] Some courts have held that the failure to file a statement of facts is sufficient demonstration alone that the appeal has been taken without sufficient cause.[421] Although one court has stressed that an appeal must have been taken solely for delay before damages are authorized,[422] most courts have not been so strict.[423]

---

418. *In re* Estate of Diggs, 733 S.W.2d 681, 687 (Tex. App.—Amarillo 1987, writ denied); Bullock v. Sage Energy Co., 728 S.W.2d 465, 468 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

419. *Gaines*, 739 S.W.2d at 956.

420. Burdett v. Gifford-Hall & Co., 739 S.W.2d 663, 664-65 (Tex. App.—Fort Worth 1987, no writ).

421. Ward v. Lubojasky, 772 S.W.2d 156, 158 (Tex. App.—Houston [14th Dist.] 1989, n.w.h.); A. T. Lowry Toyota, Inc. v. Peters, 727 S.W.2d 307, 309 (Tex. App.—Houston [1st Dist.] 1987, no writ); *see also* Ward v. Lubojasky, 777 S.W.2d 156, 157-78 (Tex. App.—Houston [14th Dist.] 1989, no writ) (recognizing split of authority over whether sanctions are available when neither party files a statement of facts, the court held that the better view is that the "failure to present a statement of facts can constitute reliable evidence that a party is not serious about prosecuting an appeal"; therefore, sanctions are appropriate); Texas Employers' Ins. Ass'n v. Armstrong, 774 S.W.2d 755, 756 (Tex. App.—Houston [1st Dist.] 1989, n.w.h.). The failure to file a statement of facts demonstrated "conscious indifference to settled rules of law" because caselaw established that the appellate court could not consider evidence in a late-filed statement of facts. *Id. Contra* A.T.&T. Communications v. Glass, 783 S.W.2d 305, 306 (Tex. App.—Tyler 1990, n.w.h.). In *Glass*, the court held that the absence of the statement of facts did not result in a frivolous appeal because "Rule 84 implicitly requires that the determination whether an appeal is frivolous is made at the time the appeal is taken or perfected." *Id.* at 306; *see also* TEX. R. APP. P. 84. The court observed that this date was several weeks before the filing of the statement of facts was due. *Id.* The court, however, has overlooked Rule 53 which requires that an appellant "shall" make a written request to the official court reporter for the statement of facts "at or before the time prescribed for perfecting the appeal." *Id.*; *see also* TEX. R. APP. 53. Thus, at a minimum, the appellant should have requested that the court reporter prepare the statement of facts prior to perfection of the appeal.

422. Gaines v. Frawley, 739 S.W.2d 950, 957 (Tex. App.—Fort Worth 1987, no writ).

423. Lewis v. Deaf Smith Elec. Co-op., Inc., 768 S.W.2d 511, 514, (Tex. App.—Amarillo 1989, n.w.h.)(quoting Bainbridge v. Bainbridge, 662 S.W.2d 655, 657 (Tex. App.—Dallas 1983, no writ)). "An appeal should not be taken, however, to delay execution of the judgment or to prolong the litigation in the hope of obtaining a more favorable result through negotiation. Besides the damage to the appellee, such an appeal requires judicial time and effort that would be better spent on meritorious cases." *Id.*; *see also* Goad v. Goad, 768 S.W.2d 356, 360 (Tex. App.—Texarkana 1989, writ denied)(sanctions may be invoked when there is an attempt to further delay the resolution of the litigation), *cert. denied*, __ U.S. __, 110 S. Ct. 772, 107 L. Ed. 2d 742 (1990); Dolenz v. A— B—, 742 S.W.2d 82, 86 (Tex. App.—Dallas 1987, writ denied)("spurious litigation, unnecessarily burdening parties and courts alike, should not go

IX. CLEAR AND CONVINCING EVIDENCE

A. Termination of Parental Rights

Termination of parental rights is a drastic remedy and is of such weight and gravity that due process requires the petitioner to justify termination by "clear and convincing evidence."[424] This standard is defined as "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth or the allegations sought to be established."[425] The clear and convincing standard is an intermediate standard of proof, "falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings."[426] In *In re L.R.M.*,[427] the court, noting that the standard of review of the clear and convincing evidence standard is not as well defined at the appellate level, defined the standard as follows: "when the trier of fact is required to make a finding by clear and convincing evidence, the court of appeals will only sustain a point of error alleging insufficient evidence the trier of fact could not reasonably find the existence of the fact to be established by clear and convincing evidence."[428] The court must consider all of the evidence in making this determination.[429] This standard of appellate review is also an intermediate standard of review.[430]

B. *Involuntary Commitment*

The more onerous requirement of clear and convincing evidence has been mandated by statute in civil involuntary commitments.[431] Presumably, therefore, the intermediate appellate standard of review applicable in involuntary termination of parent-child relationships

---

unsanctioned"); Dallas County Appraisal Dist. v. The Leaves, Inc., 742 S.W.2d 424, 431 (Tex. App.—Dallas 1987, writ denied). The rule does not require that the "delay found by the court result from any particular motivation, financial or otherwise; it is the fact of delay that is important, not the reason." *The Leaves, Inc*, 742 S.W. 2d at 431.

424. *In re* L.R.M., 763 S.W.2d 64, 65 (Tex. App.—Fort Worth 1989, n.w.h.)(quoting *In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980)).

425. *Id.*

426. *Id.* at 67.

427. 763 S.W.2d 64 (Tex. App.—Fort Worth 1989, n.w.h.).

428. *Id.* at 66-67.

429. *In re* D.E., 761 S.W.2d 596, 599 (Tex. App.—Fort Worth 1988, no writ).

430. *In re* L.R.M., 763 S.W. 2d at 67.

431. TEX. REV. CIV. STAT. ANN. arts. 5547-5551 (Vernon Supp. 1990) (Mental Health Code).

adopted in *In re L.R.M.*,[432] is applicable in involuntary commitment cases.[433]

X. ADMINISTRATIVE AGENCY RULINGS

The Administrative Procedure and Texas Register Act (APTRA),[434] sets forth six distinct bases where the reversal of an administrative order may be warranted.[435] The traditional substantial evidence rule is simply one of the tests utilized by appellate courts in evaluating agency decisions under APTRA.[436]

A. *Substantial Evidence Under the APTRA*

In determining whether there is substantial evidence to support an agency's decision, the basic inquiry of the reviewing courts traditionally has been whether reasonable minds could have reached the same conclusion that the agency reached.[437] In an appeal from an agency order governed by the substantial evidence rule, the agency order is

---

432. 763 S.W.2d 64 (Tex. App.—Fort Worth 1989, n.w.h.).

433. *See* K.L.M. v. State, 735 S.W.2d 324, 326 (Tex. App.—Fort Worth 1987, no writ). The court of appeals must review all the evidence to determine if the evidence was sufficient to produce a firm belief or conviction in the allegations plea. *Id.*

434. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(e) (Vernon Supp. 1990).

435. *Id.* Section 19(e) provides:

> The scope of judicial review of agency decisions is as provided by the law under which review is sought. Where the law authorizes appeal by trial de novo, the courts shall try the case in the manner applicable to other civil suits in this state and as though there had been no intervening agency action or decision. Where the law authorizes review under the substantial evidence rule, or where the law does not define the scope of judicial review, the court may not substitute its judgment for that of the agency as to the weight of the evidence on questions committed to agency discretion but may affirm the decision of the agency in whole or in part and shall reverse or remand the case for further proceeding if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> 1. in violation of constitutional or statutory provisions;
> 2. in excess of the statutory authority of the agency;
> 3. made upon unlawful procedure;
> 4. affected by other error of law;
> 5. not reasonably supported by substantial evidence in view of the reliable and probative evidence in the record as a whole; or
> 6. arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

436. *Id.*

437. Railroad Comm'n v. Shell Oil Co., 139 Tex. 66, 79, 161 S.W.2d 1022, 1030 (1942); *see also* Dotson v. Texas State Bd. of Medical Examiners, 612 S.W.2d 921, 922 (Tex. 1981); Auto Convoy Co. v. Railroad Comm'n, 507 S.W.2d 718, 722 (Tex. 1974).

presumed to be valid and it is the appellant's burden to overcome that presumption.[438] In *City of League City v. Texas Water Commission*,[439] the court of appeals summarized the standards of review under the substantial evidence rule:

> 1. The findings, inferences, conclusions, and decisions of an agency are presumed to be supported by substantial evidence, and the burden is on the party contesting the order to prove otherwise.
> 2. In applying the substantial evidence test, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence of questions committed to agency discretion.
> 3. Substantial evidence is more than a scintilla, but the evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence.
> 4. The true test is not whether the agency reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken by the agency.
> 5. The agency's action will be sustained if the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action.[440]

The court also noted that substantial evidence has been characterized as "less than that needed to sustain a verdict being attacked as against the great weight and preponderance of the evidence."[441] The burden of proof is upon the complaining party "to show an absence of substantial evidence and that the order is unreasonable and unjust."[442] One endeavoring to reverse administrative findings, conclusions or decisions because of lack of substantial evidence assumes a heavy burden.[443]

---

438. San Antonio v. Texas Water Comm'n, 407 S.W.2d 752, 758 (Tex. 1966).

439. 777 S.W.2d 802 (Tex. App.—Austin 1989, n.w.h.).

440. *Id.* at 805; *see also* Texas Alcoholic Beverage Comm'n v. Sierra, 33 Tex. Sup. Ct. J. 227, 227 (Feb. 14, 1990) (substantial evidence test is "whether the evidence as a whole is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action") (quoting Texas State Bd. of Dental Examiners v. Sizemore, 759 S.W.2d 114, 116 (Tex. 1988)).

441. *League City*, 777 S.W.2d at 805.

442. Imperial Am. Resources Fund v. Railroad Comm'n, 557 S.W.2d 280, 286 (Tex. 1977).

443. Texas Health Facilities Comm'n v. Charter-Medical Dallas, Inc., 665 S.W.2d 446, 452 (Tex. 1984).

B. *Arbitrary and Capricious Standard*

"Substantial evidence" and "arbitrary and capricious" are two sides of the same coin. If an agency decision is not supported by substantial evidence, then it is deemed to be arbitrary and capricious.[444] However, a decision may be supported by substantial evidence, yet still be arbitrary and capricious and will therefore be reversed.[445]

C. *Standard of Review Under Non-APTRA Cases*

The standard of review for most non-APTRA administrative decisions is substantial evidence - de novo review unless a statute specifically limits review to the agency record or provides for pure de novo review. In this type of review, the reviewing court (the district court) is not limited to consideration of the agency record, if any, and may hear evidence anew.[446]

XI. APPEAL BY WRIT OF ERROR

To appeal by writ of error, the appealing party must show that within six months after the final judgment was rendered the petition for writ of error was filed by one of the parties to the suit, who was not a participant at trial and, the error must be apparent on the face of the record.[447] A writ of error constitutes a direct attack on a default judgment, and where appropriate, affords review of the trial pro-

---

444. *Id.* at 454.

445. Lewis v. Metropolitan Sav. & Loan Ass'n, 550 S.W.2d 11, 16 (Tex. 1977)(denial of due process prejudiced substantial rights of litigant); Railroad Comm'n v. Alamo Express, Inc., 158 Tex. 68, 73, 308 S.W.2d 843, 846 (1958)(agency failed to make findings of fact but based its decision on findings in another case); *see also* Public Util. Comm'n v. South Plains Elec. Coop., Inc., 635 S.W.2d 954, 957 (Tex. App.—Austin 1982, writ ref'd n.r.e.); Starr County v. Starr Indus. Servs., Inc., 584 S.W. 352, 355 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

446. West Gulf Maritime Ass'n v. Sabine Pilots Ass'n, 617 S.W.2d 744, 747-48 (Tex. App.—Beaumont 1981, writ ref'd n.r.e.); Board of Adjustment v. Leon, 621 S.W.2d 431, 433-34 (Tex. Civ. App.—San Antonio 1981, no writ).

447. TEX. R. APP. P. 45; Stubbs v. Stubbs, 685 S.W.2d 643, 644 (Tex. 1985); *see also* Brown v. McLennan County Children's Protective Servs., 627 S.W.2d 390, 392 (Tex. 1982); United Nat'l Bank v. Travel Music, 737 S.W.2d 30, 32 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.); First Dallas Petroleum, Inc. v. Hawkins, 727 S.W.2d 640, 642 (Tex. App.—Dallas 1987, no writ). *See generally* Hall, *Appellate Review of Default Judgments by Writ of Error*, 51 TEX. B.J. 192, 192-94 (Feb. 1988)(procedures used to attack default judgments by Writ of Error); Hall, *Appeal, Writ of Error, or Bill of Review . . . Which Should I Choose?*, I The Appellate Advocate IV, IV-VII (Summer 1988)(discussing appellate procedures under Texas law).

cess to the same extent as an ordinary appeal.[448] Generally, "the same standards of review and powers of disposition as govern ordinary direct appeals govern review of a default judgment."[449] "However, the usual presumption of the validity of the judgment does not apply when the reviewing court reviews a default judgment by writ of error."[450]

The term, "face of the record", simply refers to the entire record of a case up to the point at which reference is made to it.[451] On appeal by writ of error, the reviewing court is not limited to a review of the transcript, but[452] it may refer to all of the papers on file in the case including the statement of facts to test the validity of the judgment.[453] In the absence of a statement of facts, the reviewing court may assume that every fact necessary to support the judgment, within the limits of the pleadings, was proved at trial.[454] Therefore, where an appellant fails to bring forward a statement of facts, or where there is no evidence that a statement of facts was not made, then the appellant may be held to have failed to have established "error on the face of the record."[455]

XII. BILL OF REVIEW

A. *Generally*

Attacking a judgment by bill of review is an onerous burden.[456] It is an "independent equitable proceeding to set aside a judgment that

448. Gunn v. Cavanaugh, 391 S.W.2d 723, 724 (Tex. 1965); *Hawkins*, 727 S.W.2d at 644-45.

449. *Stubbs*, 685 S.W.2d at 644; Lakeside Leasing Corp. v. Kirkwood Atrium Office Park Phase 3, 750 S.W.2d 847, 849 (Tex. App.—Houston [14th Dist.] 1988, no writ).

450. McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965); *Lakeside Leasing Corp.*, 750 S.W.2d at 849.

451. Barnes v. Barnes, 775 S.W.2d 430, 431 (Tex. App.—Houston [1st Dist.] 1989, n.w.h.); First Dallas Petroleum, Inc. v. Hawkins, 727 S.W.2d 640, 643 (Tex. App.—Dallas 1987, no writ).

452. Morales v. Dalworth Oil Co., 698 S.W.2d 772, 774 (Tex. App.—Fort Worth 1985, no writ).

453. *Id.*

454. Jaramillo v. Liberty Mut. Fire Ins. Co., 694 S.W.2d 585, 587 (Tex. App.—Corpus Christi 1985, no writ).

455. *Id*; Salazar v. Tower, 683 S.W.2d 797, 799-800 (Tex. App.—Corpus Christi 1984, no writ).

456. Hall, *Appeal, Writ of Error or Bill of Review . . . Which Should I Choose?*, I The Appellate Advocate IV, V (Summer 1988)(discussing bill of review requirements).

is no longer appealable or subject to a motion for new trial."[457] The "burden on the complainant is harsh because of the justifiable public policy that judgments must become final at some point."[458] Therefore, the grounds on which bills of review are granted are narrow and restricted and will not be relaxed merely because of an apparent injustice.[459]

> The narrow essentials that must be alleged and proven are: (1) a meritorious defense to the cause of action alleged to support the judgment; (2) that a party was prevented from making by fraud, accident, or wrongful act of the opposing party; and (3) unmixed with any fault or negligence on that party's own part.[460]

In *State v. 1985 Chevrolet Pickup Truck*,[461] the supreme court set forth the steps to be followed in a bill of review proceeding. First, the petitioner must invoke the equitable powers of the court by filing a petition alleging "factually and with particularity that the prior judgment was rendered as a result of fraud, accident or wrongful act of the opposite party or official mistake unmixed with his own negligence."[462] The petitioner must further allege, with particularity, sworn facts sufficient to constitute a defense and, as a pretrial matter, present prima facie proof to support the contention.[463] The petitioner must open and assume the burden of proof on this issue.[464]

Second, the court will conduct a trial if a prima facie defense has been shown.[465] At this trial, the petitioner must open and assume the burden of proving by a preponderance of the evidence that the judgment was rendered as the result of fraud, accident or wrongful act of the opposite party or official mistake unmixed with any negligence of his own.[466] "If the petitioner meets this burden, the factfinder will

---

457. State v. 1985 Chevrolet Pickup Truck, 772 S.W.2d 447, 448 (Tex. 1989); Transworld Fin. Servs. Corp. v. Briscoe, 722 S.W.2d 407, 407-08 (Tex. 1987); Steward v. Steward, 734 S.W.2d 432, 434 (Tex. App.—Fort Worth 1987, no writ).

458. *Briscoe*, 722 S.W.2d at 407-08; *Steward*, 734 S.W.2d at 434.

459. *Briscoe*, 722 S.W.2d at 407-08.

460. Beck v. Beck, 771 S.W.2d 141, 141 (Tex. 1989); *Briscoe*, 722 S.W.2d at 408; Baker v. Goldsmith, 582 S.W.2d 404, 406-07 (Tex. 1979); Hanks v. Rosser, 378 S.W.2d 31, 34 (Tex. 1964); Alexander v. Hagedorn, 148 Tex. 565, 568-69, 226 S.W.2d 996, 998 (1950).

461. 772 S.W.2d 447 (Tex. 1989).

462. *Id.* at 448 (citing Baker v. Goldsmith, 582 S.W.2d 404, 408 (Tex. 1979)).

463. *Id.*

464. Beck v. Beck, 771 S.W.2d 141, 142 (Tex. 1989).

465. State v. 1985 Chevrolet Pickup Truck, 772 S.W.2d 447, 449 (Tex. 1989).

466. *Id.* (citing *Baker*, 582 S.W.2d at 409).

then determine whether the bill of review defendant, the original plaintiff, has proved the elements of his original cause of action."[467] When the appellate court finds that a judgment was wrongfully obtained because it is unsupported by the weight of the evidence, "equity is satisfied and the court should grant the requested relief."[468] There are two exceptions to the general rule. First, a complainant may be relieved of proving fraud, accident, or wrongful act of the opposing party by showing deprivation of the right to appeal because of an act or omission of an officer of the court.[469] Second, the requirement of showing a meritorious defense is not required if the service of the petition was invalid because the defendant was not given notice in a meaningful time and in a meaningful manner so that he lacked the opportunity to be heard as required by the due process clause of the United States Constitution. In *Peralta v. Heights Medical Center, Inc.*,[470] the United States Supreme Court held that such a requirement, in the absence of notice, would violate the due process clause of the fourteenth amendment.[471]

However, if the bill of review complainant does not fall within the *Peralta* exception, then a prima facie meritorious defense must be shown when the trial court determines that the "complainant's defense is not barred as a matter of law, and that he will be entitled to judgment if no evidence to the contrary is" introduced.[472]

B. *Procedure*

A bill of review complainant must exhaust all available legal remedies before he may pursue a bill of review to achieve the same result.[473] From the date a complainant learns of the judgment, or by the exercise of due diligence would have learned of it, he must pursue

---

467. *Id.*

468. *Id.*

469. Baker v. Goldsmith, 582 S.W.2d 404, 407 (Tex. 1979); Hanks v. Rosser, 378 S.W.2d 31, 35 (Tex. 1964).

470. 485 U.S. 80, 86 (1988); Lopez v. Lopez, 757 S.W.2d 721, 723 (Tex. 1988); Bronze & Beautiful, Inc. v. Mahone, 750 S.W.2d 28, 30 (Tex. App.-Texarkana 1988, no writ).

471. *Peralta*, 485 U.S. at 86; *Lopez*, 757 S.W.2d at 723; *see also* Richmond Mfg. Co. v. Fluitt, 754 S.W.2d 359, 360 (Tex. App.—San Antonio 1988, no writ)(due process of law afforded where defendant properly served with citation, and in his motion for new trial does not conflict with *Peralta*.)

472. Baker v. Goldsmith, 582 S.W.2d 404, 409 (Tex. 1979).

473. French v. Brown, 424 S.W.2d 893, 894 (Tex. 1967).

all legal remedies still available.[474] A bill of review is not a mere alternative of review on motion for new trial or upon appeal and may be successfully urged only when there remains no other method of assailing the judgment.[475] Accordingly, if a party permits a judgment to become final by neglecting to file a motion for new trial or by invoking the right of appeal or appeal by writ of error, then the party is precluded from proceeding on petition for bill of review, unless the complainant shows a good excuse for failure to exhaust adequate legal remedies.[476]

Before conducting an actual trial of the issues, the trial court must determine whether "the complainant's defense is barred as a matter of law."[477] The supreme court has directed that the petitioner be required to present prima facie proof of a meritorious defense as a pretrial matter to avoid wasting valuable judicial resources by conducting a spurious "full-blown" trial on the merits.[478] A trial of the issues is required if a prima facie meritorious defense has been shown.[479] It is within the trial court's "discretion to conduct the trial on the issues in one hearing or in separate hearings."[480] If the trial court determines that a prima facie defense has not been made out, it may dismiss the case.[481]

C. *Standard of Review*

Where the trial court has determined that as a matter of law the complainant's bill of review is barred, the reviewing court must review the record to determine whether the complainant presented evidence of a prima facie meritorious defense, unless the *Peralta* exception applies.[482] If, however, the complainant's bill of review is

474. Rizk v. Mayad, 603 S.W.2d 773, 775 (Tex. 1980).

475. 4 R. McDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 18.27.6 (1984)(discussing bills of review).

476. *Brown*, 424 S.W.2d at 895; Steward v. Steward, 734 S.W.2d 432, 435 (Tex. App.—Fort Worth 1987, no writ).

477. Baker v. Goldsmith, 582 S.W.2d 404, 408-09 (Tex. 1979).

478. *Id.*; Beck v. Beck, 771 S.W.2d 141, 142 (Tex. 1989)(discussing *Baker*, 582 S.W.2d at 408-09).

479. *Id.*

480. *Baker*, 582 S.W.2d at 408-09.

481. *Beck*, 771 S.W.2d at 142.

482. *Id.*; Cooper v. Hall, 489 S.W.2d 409, 417 (Tex. App.—Amarillo 1972, writ ref'd n.r.e.); *see also* Lambert v. Coachmen Indus., 761 S.W.2d 82, 86 (Tex. App.—Houston [14th Dist.]) 1988, no writ).

granted, the case proceeds to a trial on the issues outlined above, which are reviewable under the same standards as any other trial.

XIII. REVIEW STANDARDS

A. *Abuse of Discretion*

It has been said that "abuse of discretion" is a concept "not easily defined."[483] The test is not whether the facts present an appropriate case for the trial court's action;[484] but instead, whether the trial court acted without reference to any guiding rules and principles, or in other words, acts in an arbitrary or unreasonable manner.[485] The mere fact that a trial court may decide a matter within its discretionary authority differently from what a reviewing court would decide in "similar circumstances does not demonstrate that an abuse of discretion has occurred."[486] "A mere error of judgment is not an abuse of discretion."[487]

In *Landon v. Jean-Paul Budinger, Inc.*,[488] Justice Powers explained in detail the amorphous abuse of discretion standard.[489] It provides a great deal of insight into the dilemma often faced by the reviewing courts in determining whether a particular act of the trial court amounts to an abuse of discretion. Justice Powers recommended the following analysis:

> 1. The determination complained of on appeal on a matter committed by law to the trial court's discretion? . . .
> 2. Did the trial court, in making the determination complained of on appeal, recognized and purported to act in an exercise of the discretion committed to it by law? . . .

---

483. Landon v. Jean-Paul Budinger, Inc., 724 S.W.2d 931, 934 (Tex. App.—Austin 1987, no writ).

484. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986).

485. *Id.* at 241-42; *see also* Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 443 (Tex. 1984); Landry v. Travelers Ins. Co., 458 S.W.2d 649, 651 (Tex. 1970); Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124, 126 (Tex. Comm'n App. 1939, opinion adopted).

486. *Downer*, 701 S.W.2d at 242 (citing Southwestern Bell Tel. Co. v. Johnson, 389 S.W.2d 645, 648 (Tex. 1965)); Jones v. Stryhorn, 159 Tex. 421, 428, 321 S.W.2d 290, 295 (Tex. 1959)).

487. Loftin v. Martin, 776 S.W.2d 145, 146 (Tex. 1989); Toyota Motor Sales, U.S.A., Inc. v. Heard, 774 S.W.2d 316, 319 (Tex. App.—Houston [14th Dist.] 1989, mand. overr.).

488. 724 S.W.2d 931, 934 (Tex. App.—Austin 1987, no writ).

489. *Id.* at 934-37.

3. Does the appellate record reveals sufficient facts upon which the trial court could act rationally in an exercise of its discretion? . . .
4. Did the trial court exercised erroneously the discretion committed to it by law? . . .[490]

Justice Powers suggested that an analysis of the appellate record in this manner is "more practical, logical, illuminating and consistent with the important purposes the abuse of discretion standard is meant to serve."[491] Subsequently, in *Reyna v. Reyna*,[492] Justice Powers recited, in a slightly different manner, four ways in which a trial court's exercise of discretion was legally erroneous thereby constituting reversible error:

> *First*, a court commits legal error if it attempts to exercise a power of discretion that it does not legally possess. . . .
>
> *Second*, [a] court commits legal error if it declines to exercise a power of discretion committed to it by law when the circumstances require that the power be exercised. . .
>
> *Third*, [a] court commits legal error if it purports to exercise its discretion without sufficient information upon which a rational decision may be made, as reflected in the appellate record. . . .
>
> *Fourth*, the court commits legal error if it exercises its power of discretion by making an erroneous choice as a matter of law, in any one of the following ways: (a) by making a choice that was not within the range of choices permitted the court by law; (b) by arriving at its choice in violation of an applicable legal rule, principle, or criterion; or (c) by making a choice that was legally unreasonable in the factual-legal context in which it was made.[493]

B. *Harmless Error/Reversible Error*

Before a judgment can be reversed and a new trial ordered on the ground that an error of law has been committed by the trial court, the reviewing court must find, pursuant to Texas Rule of Appellate Procedure 81(b), "that the error complained of amounted to such a denial of [the appellant's rights] as was reasonably calculated to cause and probably did cause the rendition of an improper judgment," or that

490. *Id.* at 937-39.

491. *Id.* at 937.

492. 738 S.W.2d 772 (Tex. App.—Austin 1987, no writ).

493. *Id.* at 774-75. Justice Powers' opinions are the only opinions which give the appellate practitioner some guidance in evaluating the facts of his case to the abuse of discretion standard.

the error probably prevented the appellant from properly presenting the case on appeal.[494] If the reviewing court answers in the affirmative, then the error is reversible; if on the other hand, the reviewing court answers in the negative, then the error is harmless. The harmless error rule applies to all errors.[495] The reviewing court will review the record to determine if the complaining party received a materially unfair trial. If the complaining party failed to prove his cause of action or defense, the trial court's error could not have resulted in a materially unfair trial.[496] However, if the trial is contested and the evidence is sharply conflicting, the trial court's error results in a materially unfair trial without showing more.[497] This judgment call is entrusted to the sound discretion and good sense of the reviewing court from an evaluation of the whole case.[498]

C. *Fundamental Error*

Fundamental error is rare.[499] It "survives today only in those rare instances in which the record on appeal shows on its face that the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Texas Constitution."[500] Fundamental error may be raised for the first time on appeal.[501]

D. *Cumulative Error*

Generally, when an appellant argues that a case should be reversed because of cumulative error, he is alleging that the trial court's errors,

---

494. TEX. R. APP. P. 81(b)(1); *see also* Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 839-40 (Tex. 1979); Crown Plumbing, Inc. v. Petrozak, 751 S.W.2d 936, 940 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

495. Lorusso v. Members Mut. Ins. Co., 603 S.W.2d 818, 820 (Tex. 1980); Prezelski v. Christiansen, 775 S.W.2d 764, 768 n.4 (Tex. App.—San Antonio 1989), *rev'd on other grounds*, 782 S.W.2d 842 (Tex. 1990).

496. *Lorusso*, 603 S.W.2d 818, 821 (citing Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 921 (Tex. 1979)).

497. *Id.*

498. First Employees Ins. Co. v. Skinner, 646 S.W.2d 170, 172 (Tex. 1983).

499. American Gen. Fire & Casualty Co. v. Weinberg, 639 S.W.2d 688, 689 (Tex. 1982).

500. Central Educ. Agency v. Burke, 711 S.W.2d 7, 8 (Tex. 1986); Grounds v. Tolar Ind. School Dist., 707 S.W.2d 889, 893 (Tex. 1986); Texas Indus. Traffic League v. Railroad Comm'n, 633 S.W.2d 821, 823 (Tex. 1982); Ramsey v. Dunlop, 146 Tex. 196, 206, 205 S.W.2d 979, 985 (1947); Elbar, Inc. v. Claussen, 774 S.W.2d 45, 52 (Tex. App.—Dallas 1989, n.w.h.).

501. Pirtle v. Gregory, 629 S.W.2d 919, 920 (Tex. 1982); McCauley v. Consolidated Underwriters, 157 Tex. 475, 478, 304 S.W.2d 265, 266 (1957); *Elbar, Inc.*, 774 S.W.2d at 52.

nonreversible or harmless errors, pervaded the trial, and "in the aggregate caused the rendition of an improper verdict."[502] Reversal based upon cumulative error is predicated upon meeting the standards of Texas Rule of Appellate Procedure 81(b).[503] The errors complained of must "amount to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment or prevented the appellant from making a proper presentation of the case to the court."[504] The cumulative error doctrine, however, "has evolved almost exclusively in cases involving improper jury argument or jury misconduct."[505]

XIV. CONCLUSION

If you are under the impression that the various standards of review are hopelessly imprecise, you are probably right. However, applying the appropriate standard of review to the facts and substantive law may be used to your advantage to give logical form and focus to your arguments. The standard provides a structure for your brief that will keep the appellate court centered on the fundamental questions in your case. This one aspect of writing the appellate brief is an integral part of persuasive writing that cannot be avoided without seriously detracting from your arguments. Just as there are no talismanic words that will relieve appellate judges of the task of determining whether an error is reversible, there are none that will relieve appellate practitioners from the task of convincing the judges that the applicable standard of review requires a particular result. In the final analysis, however, one is in a better position to explain the appellate court's decision if an effective brief has been written. If you have forcefully and persuasively argued in your brief that the applicable standard requires a certain result, then neither your client, nor the court, can expect anything more.

---

502. McCormick v. Texas Commerce Bank Nat'l Ass'n, 751 S.W.2d 887, 892 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

503. *Id.*; Mercy Hosp. v. Rios, 776 S.W.2d 626, 637 (Tex. App.—San Antonio 1989, n.w.h.).

504. *McCormick*, 751 S.W.2d at 892.

505. Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 809-10 (Tex. App.—Dallas 1987, no writ); Gill Savs. Ass'n v. Chair King, Inc., 783 S.W.2d 674, 681 (Tex. App.—Houston [14 Dist.] 1989, n.w.h.) (accumulation of errors, other procedural errors, and trial judge's unorthodox conduct did not constitute cumulative error). *See generally* Dahlberg, *Analysis of Cumulative Error in the Harmless Error Doctrine: A Case Study*, 12 TEX. TECH L. REV. 561, 572 (1981)(cumulative error frequently involves jury argument).