St. Mary's Law Journal

Volume 29 | Number 2 Article 2

1-1-1998

Standards of Review in Texas.

W. Wendell Hall

STANDARDS OF REVIEW IN TEXAS

W. WENDELL HALL*

* B.A., University of Texas at Austin; J.D., St. Mary's University School of Law, Partner, Fulbright & Jaworski, L.L.P.

I. INTRODUCTION

"An appeal, Hinnissy, is where ye ask wan coort to show its contempt f'r another coort."[1]

Mr. Dooley had it right—every appealing party is in the unenviable position of asking a higher court to "show its contempt f'r another coort." Sometimes a trial court's errors are so egregious and harmful that the task of reversing the trial court is relatively simple. Depending upon the "make-up of the court," some courts take delight in showing contempt for another court.[2] However,

1. Finley Peter Dunne, *"The Big Fine," Mr. Dooley Says, in* MR. DOOLEY: NOW AND FOREVER 281, 283 (1910).

2. Showing contempt for a prior decision of the supreme court with which the concurring justice disagreed, Justice Mauzy quickly dismissed stare decisis and opined:

> The concurring opinion asks how this case is any different from *Dennis v. Allison,* 698 S.W.2d 94 [(Tex. 1985)]. The answer to that question is that the makeup of the court has changed. Predictability and stability in our law is not to be maintained at the cost of being wrong. Two wrong decisions do not make a right decision. The simple truth of the matter is that the dissent was right in 1985 and the majority was wrong. The people, speaking through the elective process, have constituted a new majority of this court which has not only the power but the duty to correct the incorrect conclusion arrived at by the then-majority in 1985 on this question.

Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 362 (Tex. 1987) (Mauzy, J., concurring). Ironically, Justice Mauzy (when he was no longer in the majority of the court) lamented the lack of respect for stare decisis in a subsequent case, exclaiming:

> So often this court has spoken of *stare decisis* and the stability of the law, yet in this instance the court ignores both legislative-made law and the court-made common law as announced in its previous opinion in *Barclay v. Campbell,* 704 S.W.2d 8 (Tex.

when the trial court's error is only marginal and its harmful effect is difficult to demonstrate, the likelihood of reversal becomes remote. Whatever the circumstances of the appeal, Mr. Dooley had it right: the appellant is asking the reviewing court to show its contempt for the lower court, and appellate courts generally do not like to show contempt for—or reverse—the lower courts. Once again, this Article presents a substantial and comprehensive update of standards of review applied by Texas appellate courts, focusing on appellate standards for reviewing trial court rulings on pretrial, trial, and posttrial proceedings.[3] Because "[n]o appellate court can ever be much better than its bar,"[4] this Article is intended to assist the bench and the bar in addressing one important aspect of appellate advocacy.

A. *Standards of Review Generally*

Standards of review distribute power within the judicial branch by defining the relationship between trial and appellate courts.[5] These standards "frame the issues, define the depth of review, assign power among judicial actors, and declare the proper materials to review."[6] Standards of review also define the parameters of a reviewing court's authority in determining whether a trial court erred and whether the error warrants reversal. As a leading scholar has observed, "standards of review were never meant to be the end of the inquiry but a frame and a limit on the substantive

---

1986). . . . Litigants should be able to confidently rely on the opinions handed down by this court and rely on the procedural rules mandated by its opinions.

McKinley v. Stripling, 763 S.W.2d 407, 410–11 (Tex. 1989) (Mauzy, J., dissenting).

3. *See* W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1041 (1993); W. Wendell Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865 (1990); *see also* IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp., 938 S.W.2d 440, 445–46 (Tex. 1997) (Baker, J., dissenting) (stating "the bench and bar are fortunate to have available two excellent law review articles that put this body of law [standards of review] together for ready reference").

4. Jones v. Superintendent, Va. State Farm, 465 F.2d 1091, 1093 (4th Cir. 1972), *cert. denied*, 410 U.S. 944 (1973).

5. *See* Patrick W. Brennan, *Standards of Appellate Review*, 33 DEF. 377, 378–79 (1984) (describing the functions of appellate courts).

6. Steven A. Childress, *Standards of Review in Federal Appeals*, *in* UNIV. TEX. 2ND ANNUAL CONF. ON TECHNIQUES FOR HANDLING CIVIL APPEALS IN STATE & FEDERAL COURT 4 (1992).

law."[7] Standards of review are simply the appellate court's "measuring stick"[8] or "the decibel level at which the appellate advocate [must] play to catch the judicial ear."[9] They are a "powerful organizing principle" and even when "hopelessly imprecise, they do provide a language which we can use to good advantage in giving logical form and focus to our arguments."[10] Therefore, a litigant must measure his factual and legal arguments against the appropriate "measuring stick" to write an effective and persuasive brief.[11]

Typically, lawyers make two mistakes in handling appeals. First, many lawyers are so obsessed with arguing the facts that they fail to discuss the governing standard of review, or to consider what that standard allows the reviewing court to do with those facts. Second, when lawyers do discuss the standard of review, they often recite the applicable standard with all the enthusiasm and conviction of a high school student reciting Shakespeare, thus losing an opportunity to use the standards as a roadmap for convincing the appellate court that the trial court erred and that the error requires reversal. A mechanical recitation of the relevant standard of review is no more helpful than complete abdication.[12] While it is important to discuss the facts accurately and persuasively argue the substantive law, a lawyer's failure to place his merits argument in the context of the applicable standard of review gives the appellate court little help. "If courts apply standards of review to give them meaning, litigants would be advised to give the review language life through application within an integrated strategy."[13] In other words, a formal statement of the standard of review will not ad-

---

7. STEVEN A. CHILDRESS & MARTHA S. DAVIS, 1 FEDERAL STANDARDS OF REVIEW § 1.3, at 1–30 (1992).

8. John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 810 (1976).

9. Alvin B. Rubin, *The Admiralty Case on Appeal in the Fifth Circuit*, 43 LA. L. REV. 869, 873 (1983).

10. Barry Sullivan, *Standards of Review*, *in* APPELLATE ADVOCACY 59, 62 (Peter J. Carre et al. eds., 1981).

11. *See* Mann v. Ramirez, 905 S.W.2d 275, 289 (Tex. App.—San Antonio 1995, writ denied) (Duncan, J., dissenting, joined by Green, J.) (criticizing the majority for failing to recognize and apply the applicable standard of review before applying harmless error/reversible error analysis).

12. *See* Barry Sullivan, *Standards of Review*, in APPELLATE ADVOCACY 59, 61 (Peter J. Carre et al. eds., 1981).

13. STEVEN A. CHILDRESS & MARTHA S. DAVIS, 1 FEDERAL STANDARDS OF REVIEW § 1.02, at 1–20 (1992).

vance the process of persuading the appellate court. Standards of review are the cornerstone of an appeal, and these standards must be woven into the discussion of the facts and the substantive law in a manner which persuades the appellate court that the trial court erred. Under Federal Rule of Appellate Procedure 28(a)(6) and a local rule of the Fifth Circuit, for example, the standard of review must be set forth with each argument.[14] Those practicing in state appellate courts would be wise to follow the federal rule and the Fifth Circuit's local rule.[15]

As one judge observed, "no single concept is more important than the standard of review."[16] As a result, the litigant who ignores the standard of review loses credibility with the reviewing court—even a credible appellate argument can be easily lost if not advanced in the context of the standard of review. If a party does not identify the relevant standard and vigorously approaches the standard in his brief, he leaves a void in his brief which will be necessarily filled by his adversary or the reviewing court, and the wrong standard may be applied.[17] Because the reviewing court will undoubtedly determine the relevant standard on its own and review the appeal accordingly, litigants who do not meaningfully address the standard of review risk that they will not persuade the reviewing court that the standard, as applied to the facts and the law, requires reversal.

---

14. *See* FED. R. APP. P. 28(a)(6); 5TH CIR. R. 28.2.6.

15. Appellate judges invariably advise that advocates address standards of review. *See* John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 Sw. L.J. 801, 811 (1976) (encouraging counsel to state to the court early in his presentation the standard of review that he considers applicable); Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431, 437 (1986) (calling omission of the standards of review the fifth sin); Alvin B. Rubin, *The Admiralty Case on Appeal in the Fifth Circuit*, 43 LA. L. REV. 869, 872 (1983) (indicating that an author should "start the brief by briefly stating the standard of review."); Leonard I. Garth, *How to Appeal to an Appellate Judge*, LITIG., Fall 1994, at 20, 22 (stating that "[s]tandard of review is the element of appellate advocacy that distinguishes the good appellate advocate").

16. Jacques L. Wiener, Jr., *Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 TUL. L. REV. 187, 189 (1995).

17. *See* United States v. Vonsteen, 950 F.2d 1086, 1091 (5th Cir.) (en banc), *cert. denied*, 505 U.S. 1223 (1992).

Identifying the standard of review in most cases is not complicated.[18] Like tying a shoe, it is often easier to demonstrate the proper use of the standard of review than it is to explain that use. For example, the abuse of discretion standard is the most common standard of review, but who can define the phrase in a simple way that will be useful in every case in which it applies? No one has met the challenge yet. While the words used to describe standards of review often escape a clear and precise definition, "[t]here are no talismanic words that can avoid the process" of applying the standard to the record and explaining in a cogent manner why the reviewing court should reach a certain result.[19]

Justice Felix Frankfurter described standards of review as "undefined defining terms."[20] While standards of review often escape precise definition, it remains incumbent upon the appellate litigants to identify the standards and apply them in an effective manner to the relevant facts. Otherwise, a litigant who is unfamiliar with the standard of review for each issue "may find himself trying to run for a touchdown when basketball rules are in effect."[21] Woe to that lawyer when the final score is tabulated.

B. *Distinguishing the Standard of Review from the Scope of Review*

Standards of review must be carefully distinguished from the scope of review. The standard of review is the formula a reviewing court uses to determine whether the trial court erred. For example, one incarnation of the formula is whether the trial court abused its discretion. By comparison, the scope of review describes that portion of the appellate record a reviewing court may examine to determine whether the trial court erred. Does the appellate court review the entire record or only some portion of the record to determine error? The scope of review includes the issues presented on appeal and the record relevant to the appellate complaints. Because the appropriate standard of review and scope of review gen-

---

18. *See* Nathan Hecht, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1041, 1041 (1993) (stating that the "law prescribing the standard of review applicable to a particular ruling is complex but relatively well settled").

19. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951).

20. *Id.* at 489.

21. John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 Sw. L.J. 801, 811 (1976).

erally determine the outcome of an appeal, a litigant must shape the factual and legal arguments in a manner that will satisfy the relevant standard as applied to the relevant evidence.

II. Abuse of Discretion Standard of Review

> 'When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'
> 'The question is,' said Alice, 'whether you *can* make words mean different things.'
> 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'[22]

A. *Abuse of Discretion Generally*

Perhaps no standard of review is subject to more abuse than "abuse of discretion." Lawyers often wonder how appellate courts can make "abuse of discretion" mean so many different things. The short answer is that it means whatever the appellate court says it means—neither more nor less. One appellate court panel's abuse of discretion is completely reasonable decisionmaking for another panel. Identifying an abuse of discretion, for most appellate judges, is similar to identifying pornography: "I know it when I see it."[23] One appellate court judge suggested his frustration with the standard and lamented that the abuse of discretion standard "means everything and nothing at the same time."[24] Some appellate opinions appear to invoke the phrase to bridge the appellant's argument and the court's conclusion, as if the phrase was itself both the explanation and the conclusion.

Even when the abuse of discretion standard is confined to its proper sphere, appellate courts have understandable difficulty in applying it consistently. This difficulty is inherent in the standard itself. It is an understatement to suggest that the abuse of discretion standard is a concept "not easily defined."[25] "[J]udicial attempts to define the concept almost routinely take the form of merely substituting other terms that are equally unrefined, varia-

---

22. Lewis Carroll, Through the Looking-Glass 114 (1950).

23. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

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

25. *Landon*, 724 S.W.2d at 934 (citing Bennett v. Northcutt, 544 S.W.2d 703, 706 (Tex. Civ. App.—Dallas 1976, no writ)).

ble, subjective and conclusory."[26] It is often easier for a reviewing court to state what is not an abuse of discretion than to determine what is an abuse of discretion. The amorphous concept of abuse of discretion often fails to aid appellate courts and trial courts in deciding cases,[27] and it also makes briefing difficult for appellate lawyers.

By requiring the trial court's conduct to be arbitrary, capricious, or unreasonable as a condition of reversal, appellate courts acknowledge the discretion trial courts must have to judge the credibility of witnesses and make decisions within broad legal parameters. At the same time, though, it is only by requiring trial courts to follow guiding rules and principles that appellate courts can impose some measure of control over ad hoc decisionmaking. The trial court's action is reasonable and, therefore, not an abuse of discretion, *only* when the court exercises its discretion within the correct legal parameters.

As one law professor observed, "[t]he area of discretion is a pasture in which the trial judge is free to graze. The appellate courts will not disturb the trial court's rulings—depending on the gradation of discretion that applies to the particular instance—but will defer to them."[28] Occasionally, however, "the appellate court calls a halt and cuts away a corner of the pasture even though it involves an area normally entrusted to trial court discretion."[29] It seems to be the nature of the beast that predicting whether, in the reviewing court's judgment, the trial court abused its discretion will always be challenging. Depending upon one's position in the appellate court, advocates must labor to persuade the appellate court to either cut away a corner of the discretion pasture or to leave it undisturbed.

---

26. *Id.*

27. In an attempt to make trial judges feel better about being reversed for abusing their discretion, one court observed that an "'[a]buse of discretion' is a phrase which sounds worse than it really is." *In re* Josephson, 218 F.2d 174, 182 (1st Cir. 1954); *see also* Pearson v. Dennison, 353 F.2d 24, 28 n.6 (9th Cir. 1965) (commenting that the pejorative connotation of "abuse" of discretion may be lessened by reframing the test as a "misuse" of discretion).

28. Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 180 (1975).

29. *Id.* at 180.

B. *Abuse of Discretion in Texas*

In Texas, "[t]he test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action."[30] Rather, a trial court abuses its discretion if its decision "is arbitrary, unreasonable, and without reference to [any] guiding [rules and] principles."[31] The abuse of discretion standard is similar to the federal standard of "clearly erroneous,"[32] and one supreme court justice has observed that it is debatable whether any real difference exists between the two standards.[33]

At its core, discretion means choice.[34] To find an abuse of discretion, the reviewing court "must determine that the facts and circumstances extinguish any discretion [or choice] in the matter."[35] Therefore, the mere fact that a trial court may decide a matter within its discretionary authority differently than a reviewing court under similar circumstances does not establish an abuse of discretion.[36] This discretion insulates the trial judge's choice from appellate second guessing.

---

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

31. Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex. 1997) (citing Mercedes-Benz Credit Corp. v. Rhyne, 925 S.W.2d 664, 666 (Tex. 1996)); *see Downer*, 701 S.W.2d at 241–42; 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, 393, 133 S.W.2d 124, 126 (1939). Earlier decisions suggested that an abuse of discretion "implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency." Bobbitt v. Gordon, 108 S.W.2d 234, 238 (Tex. Civ. App.—Beaumont 1937, no writ) (quoting Grayson County v. Harrell, 202 S.W.2d 160, 163 (Tex. Civ. App.—Amarillo 1918, no writ)). Fifty years of California case law recites the abuse of discretion standard as follows: "In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered." Berry v. Chaplin, 169 P.2d 453, 456 (Cal. Dist. Ct. App. 1946).

32. *Goode*, 943 S.W.2d at 446.

33. *See id.* at 454 (Gonzalez, J., concurring).

34. *See* Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 175 (1975).

35. Kaiser Found. Health Plan of Tex. v. Bridewell, 946 S.W.2d 642, 646 (Tex. App.—Waco 1997, orig. proceeding [leave denied]) (quoting F.A. Richard & Assoc. v. Millard, 856 S.W.2d 765, 767 (Tex. App.—Houston [1st Dist.] 1983, orig. proceeding)).

36. *See* Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 226 (Tex. 1991); Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 242 (Tex. 1985) (citing Southwestern Bell Tel. Co. v. Johnson, 389 S.W.2d 645, 648 (Tex. 1965)), *cert. denied*, 476 U.S. 1159 (1986); Jones v. Strayhorn, 159 Tex. 421, 428, 321 S.W.2d 290, 295 (1959); Schlueter v. City of Fort Worth, 947 S.W.2d 920, 925 (Tex. App.—Fort Worth 1997, writ denied).

There are at least two instances in which a perceived error does not constitute an abuse of discretion. First, a mere error of judgment is not an abuse of discretion.[37] Second, a trial court does not abuse its discretion if it reaches the right result for the wrong reason.[38] These exceptions demonstrate that appellate court standards permit a trial judge a limited right to be wrong without being reversed.

One appellate court[39] described four ways in which a trial court commits an abuse of discretion: first, a court abuses its discretion if it attempts to exercise a power of discretion that it does not legally possess;[40] second, a court abuses its discretion if it declines to exercise a power of discretion vested to it by law when the circumstances require that the power be exercised;[41] third, a court abuses its discretion if it purports to exercise its discretion without sufficient information upon which a rational decision may be made, as reflected in the appellate record;[42] and fourth, a court abuses its discretion if it exercises its power of discretion by making an erroneous choice as a matter of law, in one of the following ways: (i) by making a choice that is not within the range of choices permitted by law; (ii) by arriving at its choice in violation of an applicable legal rule, principle, or criterion; or (iii) by making a choice that "[is] legally unreasonable in the factual-legal context in which it [is] made."[43]

---

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

38. *See* Bruce Terminix Co. v. Carroll, 953 S.W.2d 537, 540 (Tex. App.—Waco 1997, no writ); Hawthorne v. Guenther, 917 S.W.2d 924, 931 (Tex. App.—Beaumont 1996, writ denied); Luxenberg v. Marshall, 835 S.W.2d 136, 141-42 (Tex. App.—Dallas 1992, no writ).

39. *See* Landon v. Jean-Paul Budinger, Inc., 724 S.W.2d 931, 937–39 (Tex. App.—Austin 1987, no writ). Other cases following the *Landon* analysis include: Minns v. Piotrowski, 904 S.W.2d 161, 168 (Tex. App.—Waco 1995), *writ denied per curiam*, 917 S.W.2d 796 (Tex. 1996); Stephens v. Stephens, 877 S.W.2d 801, 805 (Tex. App.—Waco 1994, writ denied); Methodist Hosps. of Dallas v. Texas Indus. Accident Bd., 798 S.W.2d 651, 660 (Tex. App.—Austin 1990, writ dism'd w.o.j.); Reyna v. Reyna, 738 S.W.2d 772, 774–75 (Tex. App.—Austin 1987, no writ).

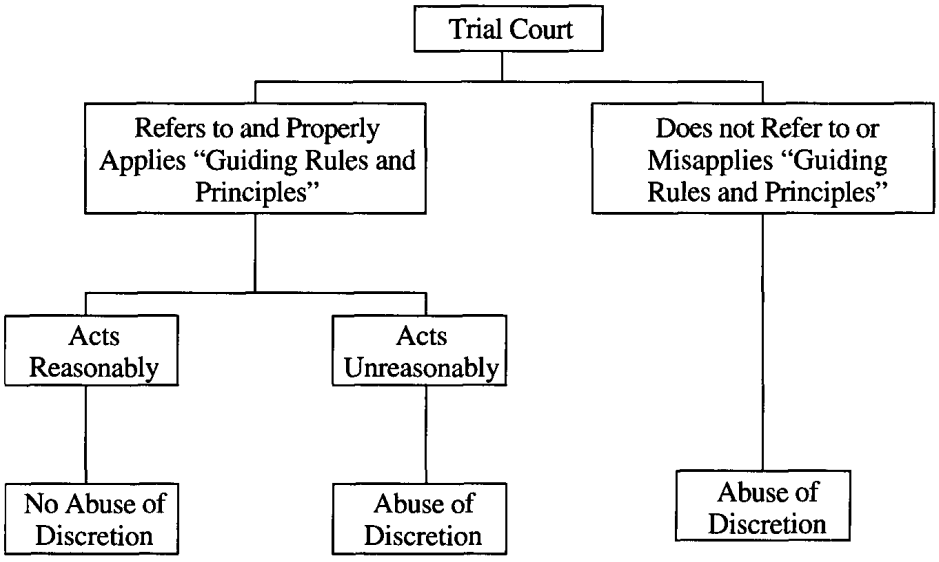
40. *See Landon*, 724 S.W.2d at 937.

41. *See id.* at 939.

42. *See id.*

43. *Id.* at 939–40.

The following chart may assist the reader in analyzing the abuse of discretion standard of review and its application to a particular challenged error.



C. *Abuse of Discretion in Texas Mandamus Proceedings*

Because the abuse of discretion standard applies in both appeals and mandamus actions,[44] the question arises whether there is any distinction between the standard of review on appeal and that required for the issuance of mandamus. With regard to whether "error" has in fact occurred for purposes of mandamus, mandamus issues only for a "clear" abuse of discretion,[45] while the standard of review on appeal is couched in terms of a simple abuse of discretion—without any requirement that the abuse be "clear."[46]

---

44. *See* Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex. 1997) (noting that Texas appellate courts use "abuse of discretion" standard to review trial court decisions); Walker v. Packer, 827 S.W.2d 833, 839–42 (Tex. 1992) (orig. proceeding) (using an abuse of discretion standard to review a mandamus action). In *Walker*, the Texas Supreme Court reaffirmed that a relator must show (1) that the trial court's action constitutes a "clear" abuse of discretion, and (2) that he has no adequate remedy by appeal. *See id.* at 839–42; *see also* National Tank Co. v. Brotherton, 851 S.W.2d 193, 196 (Tex. 1993) (orig. proceeding) (restating the two-part test in *Walker*).

45. *See Walker*, 827 S.W.2d at 839 (noting that the supreme court has used the writ of mandamus to correct a "clear abuse of discretion" committed by the trial court).

46. *See Goode*, 943 S.W.2d at 446 (noting that Texas has used the "abuse of discretion" standard in reviewing many trial court decisions).

In *Johnson v. Fourth Court of Appeals*,[47] and subsequently in *Walker v. Packer*,[48] both mandamus cases, the Texas Supreme Court held that an abuse of discretion occurs whenever the trial court's action is "so arbitrary and unreasonable as to be a clear and prejudicial error of law."[49] In *Walker v. Packer*, the court observed that the standard has "different applications in different circumstances."[50] With respect to the resolution of factual matters, "the relator must establish that the trial court could reasonably have reached only one decision,"[51] and the trial court's decision must be arbitrary and unreasonable.[52] However, mandamus review of a trial court's determination of the controlling legal principles is "reviewed with limited deference to the trial court."[53] Therefore, when a trial court fails to analyze or apply the law correctly or interprets the law erroneously, the trial court commits a clear abuse of discretion.[54]

D. *The Sliding Scale of Abuse of Discretion in Texas*

As this Article illustrates, a trial judge's discretion may be applied to scores of situations and in many different ways. Because the concept of discretion or choice defies uniform application to all situations, it is not surprising that the appellate courts' review of discretion is not uniform. In the final analysis, appellate lawyers should not be mislead into concluding that appellate judges approach every review of a trial judge's discretion in the same manner or with the same level of interest, deference, or analysis.

On appeal, the reviewing court often simply refers to an abuse of discretion. On other occasions, the court refers to a "clear" abuse of discretion or a "manifest" abuse of discretion. In mandamus proceedings, the courts refer to a "clear" abuse of discretion. Characterizing the abuse as clear or manifest—or merely as run-of-

47. 700 S.W.2d 916 (Tex. 1985) (orig. proceeding).

48. 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

49. *Walker*, 827 S.W.2d at 839; *Johnson*, 700 S.W.2d at 917.

50. *Walker*, 827 S.W.2d at 839.

51. *Id.* at 839–40. Factual disputes may not be resolved in a mandamus proceeding. *See* Dikeman v. Snell, 490 S.W.2d 183, 187 (Tex. 1973).

52. *See Walker*, 827 S.W.2d at 840.

53. Walker v. Packer 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding); *see* Ford Motor Co. v. Tyson, 943 S.W.2d 527, 536 (Tex. App.—Dallas 1997, orig. proceeding) (stating that the trial court has no discretion to determine what the law is).

54. *See Walker*, 827 S.W.2d at 840.

the-mill abuse—without more, is not useful or meaningful. The descriptive types of abuse of discretion seem to be perpetuated more by habit rather than any meaningful distinction. If there are in fact varying degrees of the abuse of discretion standard of review, then the courts should spell out any intended differences or limitation.[55] As Professor Rosenberg once observed, "[t]o tame the concept [of abuse of discretion] requires no less than to force ourselves to say *why* it is accorded or withheld, and to say so in a manner that provides assurance for today's case and some guidance for tomorrow's."[56]

In an ordinary appeal, an analysis of the standard seems to demonstrate that the simple "abuse of discretion" standard is sufficient. For example, if "abuse of discretion" were a single standard, no advocate could ever show a "clear" abuse of discretion. An "arbitrary, capricious, and irrational" decision remains so no matter how "clear" or "manifest" it may be: zero times zero equals zero, just as 100 times zero equals zero. In either situation, the trial court abused its discretion—whether a clear or manifest abuse or just an abuse. If there is a distinction to be made between a clear or manifest or simple abuse, perhaps courts want to communicate that any abuse above a simple abuse of discretion must be "more than just maybe or probably wrong," it must be so wrong that it strikes the appellate court "with the force of a five-week-old . . . dead fish."[57]

In a mandamus proceeding, it is clear—no pun intended—that the courts do impose upon relators a more rigorous abuse of discretion standard. Perhaps the courts simply need to define why a heightened abuse of discretion standard is required in mandamus proceedings and define that standard in more concrete terms. Some federal appellate courts hold that a relator is entitled to mandamus relief only where there is a strong showing of prejudice and that the error " 'so infect[s] the process that it compels the court to

55. *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L. REV. 747, 764 (1982) (wanting initially to apply a uniform definition, but concluding that "the differences are not only defensible but essential").

56. Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 185 (1975).

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

consider the issue.'"[58] Under this standard, it is not the trial court's error which compels the reviewing court to grant mandamus relief; rather, the extraordinary circumstances of the case compel mandamus relief. This definition comports with the supreme court's recent application of the test for reviewing cases in mandamus proceedings.[59]

III. REVERSIBLE ERROR

A. *Preservation of Complaints or Waiver and the Issue of Harm*

Preservation of complaints and waiver must be carefully distinguished from harm. Simply because a party has failed to preserve a complaint, or has waived it, does not lessen the harm caused by an error. Appellate advocates and courts should be careful to analyze an argument first in terms of waiver rather than harmless error.

B. *Invited Error*

The doctrine of invited error provides that a party cannot complain on appeal about an action or ruling which he requested the trial court to do.[60] The doctrine makes sense. It would be a waste of judicial resources to permit a party to ask a trial court to render a particular ruling and then ask the appellate court to reverse the trial court for that ruling. If a party asks a trial court to commit an error, the party has waived the complaint for appellate review.

C. *Reversible Error and Harmless Error*

Assessing the harm caused by an error (neither invited nor waived) is analytically distinct from the question of whether error in fact occurred. Lawyers, and sometimes appellate courts, confuse

---

58. STEVEN A. CHILDRESS & MARTHA S. DAVIS, STANDARDS OF REVIEW § 4.22, at 294 (1986) (quoting P. Davis, *Tips For Obtaining a Civil Writ*, 5 CALIF. LAW. 55, 55 (Aug. 1985)).

59. *See generally* Deloitte & Touche L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394, 398 (Tex. 1997) (orig. proceeding) (holding that court may review by mandamus a class certification interlocutory appeal, but finding that no extraordinary circumstances demonstrated that the court of appeals' review was inadequate); CSR Ltd. v. Link, 925 S.W.2d 591, 597 (Tex. 1996) (orig. proceeding) (holding that the trial court abused its discretion in denying a special appearance and that extraordinary circumstances justified mandamus relief).

60. *See* McInnes v. Yamaha Motor Corp., U.S.A., 673 S.W.2d 185, 188 (Tex. 1984); Litton Indus. v. Gammage, 668 S.W.2d 319, 322–23 (Tex. 1984).

these two terms and thus the law. A party can be grievously harmed by a trial court ruling that is perfectly correct under the law. Likewise, a trial court can make an error of the worst magnitude that has absolutely no effect on a party's rights. By keeping the two concepts of error and harm distinct, the appellate court not only will improve its own decisionmaking, but will make the handling of future appeals that much easier for counsel and the courts. Similarly, by presenting the concepts separately in their briefs, appellate lawyers can aid the court's decisionmaking and the future development of the law.

The standard of review provides the level of deference a court must give in finding error. Once found, however, the harmless error doctrine serves as a further check upon the reviewing court's authority to tamper with the trial court's rulings. If no error exists under the applicable standard of review, the court can stop its inquiry unless it wishes to make alternative holdings. Only if the court finds error under the applicable standard of review must the court confront the concept of reversible error. The requirement of reversible error serves administrative policies by moving cases through the system. It also mitigates expense to parties and taxpayers by precluding reversal of cases for technical errors that in reality did not affect the outcome. Similarly, errors that made a difference but did not cause an incorrect result will not be grounds for reversal. As the Fifth Circuit explained:

> These rules are based on the sensible concept that a new trial should not be granted because of an error that inflicted no harm. Perfection is an aspiration, but the failure to achieve it in the judicial process, as elsewhere in life, does not, absent injury, require a repeat performance.[61]

Stated another way, litigants are entitled to a fair trial, not a perfect one.[62]

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 Ap-

---

61. Miles v. M/V Mississippi Queen, 753 F.2d 1349, 1352 (5th Cir. 1985).

62. *See* McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553 (1984) (commenting that "'[a litigant] is entitled to a fair trial but not a perfect one,' for there are no perfect trials." (citing Brown v. United States, 411 U.S. 223, 231–32 (1973)) (quoting Burton v. United States, 391 U.S. 123, 135 (1953))).

pellate Procedure 44.1, 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 the error "probably prevented the appellant from properly presenting the case on appeal."[63] In determining whether an error rises to the level of reversible error, the courts do not apply a "but for" test; instead, they apply a test of probability.[64] Various formulations of the test reach the same end: Is it more likely than not (*i.e.*, probable) that the preserved error caused an improper judgment?[65] If the reviewing court answers in the affirmative, then the error is reversible; if not, then the error is harmless

The harmless error rule applies to all errors.[66] The supreme court has observed that the harmless error rule "ebbs and flows."[67] The reviewing court will review the record to determine if the complaining party received a materially unfair trial. For example, 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.[68] 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.[69] "This is a judgment call entrusted to the sound discretion and good sense of the reviewing court from an evaluation of the whole case."[70]

---

63. TEX. R. APP. P. 44.1 (formerly Rule 81(b)); *see* Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 839–40 (Tex. 1979); Correa v. General Motors Corp., 948 S.W.2d 515, 518 (Tex. App.—Corpus Christi 1997, no writ); Crown Plumbing, Inc. v. Petrozak, 751 S.W.2d 936, 940 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

64. *See* Texas Power & Light Co. v. Hering, 148 Tex. 350, 352, 224 S.W.2d 191, 192 (Tex. 1949).

65. *See, e.g.*, King v. Skelly, 452 S.W.2d 691, 696 (Tex. 1970); Aultman v. Dallas Ry. & Terminal Co., 152 Tex. 509, 516, 260 S.W.2d 596, 599 (Tex. 1953).

66. *See* Lorusso v. Members Mutual 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).

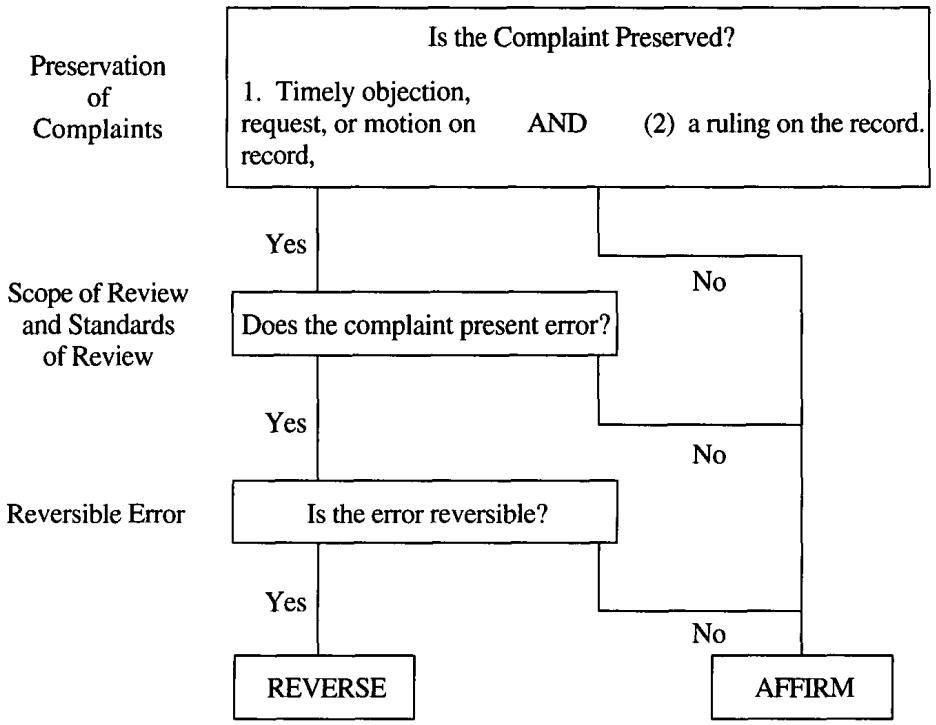
67. *Reese*, 584 S.W.2d at 839. *See generally* Robert W. Calvert, *The Development of the Doctrine of Harmless Error in Texas*, 31 TEX. L. REV. 1 (1952); Robert W. Calvert & Susan G. Perrin, *Is the Castle Crumbling? Harmless Error Revisited*, 20 S. TEX. L.J. 1 (1979); Jack Kenneth Dahlberg, Jr., *Analysis of Cumulative Error in the Harmless Error Doctrine*, 12 TEX. TECH L. REV. 561 (1981).

68. *See Lorusso*, 603 S.W.2d at 821.

69. *See id.*

70. First Employees Inc. Co. v. Skinner, 646 S.W.2d 170, 172 (Tex. 1983) (citing *Lorusso*, 603 S.W.2d at 819).

The following chart may assist in analyzing whether the record demonstrates reversible error or harmless error and its application to a particular challenged error.



D. *Fundamental Error*

Fundamental error may be raised for the first time on appeal.[71] Fundamental error is a rarity.[72] Thus, an appellate court has very limited authority to consider fundamental error.[73] Fundamental error 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.[74] It

71. *See* Pirtle v. Gregory, 629 S.W.2d 919, 920 (Tex. 1982); Nuchia v. Woodruff, 956 S.W.2d 612, 616 (Tex. App.—Houston [14th Dist.] 1997, pet. requested).

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

73. *See* Newman v. King, 433 S.W.2d 420, 421 (Tex. 1968).

74. *See* Wal-Mart Stores, Inc. v. Alexander, 868 S.W.2d 322, 328 (Tex. 1993); New York Underwriters Ins. Co. v. Sanchez, 799 S.W.2d 677, 679 (Tex. 1990); Central Educ.

also applies to complaints that the trial court lacked subject matter jurisdiction.[75]

E. *Cumulative Error*

Generally, when an appellant argues that a case should be reversed because of cumulative error, the appellant is alleging that the trial court's errors, nonreversible or harmless errors individually, pervaded the trial, and in the aggregate caused the rendition of an improper verdict.[76] The doctrine is seldom used to reverse a case. Reversal based upon cumulative error is predicated upon meeting the standards of reversible error in Rule 44.1.[77] That is, 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 the rendition of an improper judgment" or prevented the appellant from making a proper presentation of the case to the court.[78] The cumulative error doctrine, however, has evolved almost exclusively in cases involving improper jury argument or jury misconduct.[79]

The doctrine, in practice, makes little sense and has little impact on appeal. In determining whether an error constitutes reversible

---

Agency v. Burke, 711 S.W.2d 7, 8 (Tex. 1986); Grounds v. Tolar Indep. Sch. Dist., 707 S.W.2d 889, 893 (Tex. 1986); Texas Indus. Traffic League v. Railroad Comm'n of Tex., 633 S.W.2d 821, 823 (Tex. 1982), *writ ref'd n.r.e.*, 683 S.W.2d 368 (Tex. 1984); *Pirtle*, 629 S.W.2d at 920; Ramsey v. Dunlop, 146 Tex. 196, 202, 205 S.W.2d 979, 985 (1947); Texas Dep't of Transp. v. T. Brown Constructors, 947 S.W.2d 655, 659 (Tex. App.—Austin 1997, pet. requested); Elbar, Inc. v. Claussen, 774 S.W.2d 45, 52 (Tex. App.—Dallas 1989, writ dism'd); *see also* Hudson v. Markum, 948 S.W.2d 1, 3 (Tex. App.—Dallas 1997, writ denied) (allowing jurors to submit questions in a civil case does not constitute fundamental error); *In re* J.G., 905 S.W.2d 676, 680 n.1 (Tex. App.—Texarkana) (neither approving nor disapproving of juvenile's constitutional claims of fundamental error for the first time on appeal), *writ ref'd per curiam*, 916 S.W.2d 949 (Tex. 1995).

75. *See* Cox v. Johnson, 638 S.W.2d 867, 868 (Tex. 1982).

76. *See* Strange v. Treasure City, 608 S.W.2d 604, 609 (Tex. 1980); Scoggins v. Curtiss & Taylor, 148 Tex. 15, 19, 219 S.W.2d 451, 454 (1949); Smerke v. Office Equip. Co., 138 Tex. 236, 241, 158 S.W.2d 302, 305 (1941); McCormick v. Texas Commerce Bank, 751 S.W.2d 887, 892 (Tex. App.—Houston [14th Dist.] 1988, writ denied), *cert. denied*, 491 U.S. 910 (1989); Bott v. Bott, No. 14-96-00577-CV (Tex. App.—Houston [14th Dist.] Dec. 18, 1997, no pet. h.) (not released for publication yet), 1997 WL 840919, at *5.

77. *See* TEX. R. APP. P. 44.1; Mercy Hosp. v. Rios, 776 S.W.2d 626, 637 (Tex. App.—San Antonio 1989, writ denied); *McCormick*, 751 S.W.2d at 892.

78. *See McCormick*, 751 S.W.2d at 892.

79. *See* Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 809–10 (Tex. App.—Dallas 1987, no writ); Jack Kenneth Dahlberg, Jr., *Analysis of Cumulative Error in the Harmless Error Doctrine: A Case Study*, 12 TEX. TECH. L. REV. 561, 562 (1981).

error, the appellate court almost always reviews the entire record. One error under scrutiny will be considered against the whole record, including the other errors in the case. If the other errors compound the harm caused by the error under scrutiny, then reversible error exists from a review of the record as a whole. Consequently, the doctrine is essentially swallowed up by the reversible error analysis.

IV. PRETRIAL RULINGS

A. *Subject Matter Jurisdiction*

"Subject matter jurisdiction is essential to the authority of a court to decide a case;" it "is never presumed and cannot be waived."[80] The lack of subject matter jurisdiction renders a judgment void, rather than voidable.[81] At a hearing on a plea to the jurisdiction, the trial court determines the issue of subject matter jurisdiction solely by the allegations in the plaintiff's pleading and the allegations must be taken as true.[82] Unless the petition affirmatively demonstrates an absence of jurisdiction, the trial court construes the petition liberally in favor of jurisdiction.[83] If, however, a trial court lacks subject matter jurisdiction, it has no choice but to dismiss the case.[84] A trial court's lack of subject matter jurisdiction

80. Texas Ass'n of Bus. v. Texas Air Control Bd., 852 S.W.2d 440, 443-44 (Tex. 1993). "Ripeness is an element of subject matter jurisdiction." Mayhew v. Town of Sunnyvale, 41 Tex. Sup. Ct. J. 517, 519, 1998 WL 107927, at *4 (Mar 13, 1998) (citing State Bar of Texas v. Gomez, 891 S.W.2d 243, 245 (Tex. 1994) and City of Garland v. Louton, 691 S.W.2d 603, 605 (Tex. 1985)).

81. *See* Mapco, Inc. v. Forrest, 795 S.W.2d 700, 703 (Tex. 1990).

82. *See Texas Ass'n of Bus.*, 852 S.W.2d at 440; Hernandez v. Texas Workers' Compensation Ins. Fund, 946 S.W.2d 904, 906 (Tex. App.—Eastland 1997, no writ); Caspary v. Corpus Christi Downtown Management Dist., 942 S.W.2d 223, 225 (Tex. App.—Corpus Christi 1997, writ denied); North Alamo Water Supply Corp. v. Texas Dep't of Health, 839 S.W.2d 455, 457 (Tex. App.—Austin 1992, writ denied); Goad v. Goad, 768 S.W.2d 356, 358 (Tex. App.—Texarkana 1989, writ denied); Huston v. FDIC, 663 S.W.2d 126, 129 (Tex. App.—Eastland 1983, writ ref'd n.r.e.).

83. *See* Peek v. Equipment Serv. Co., 779 S.W.2d 802, 804 (Tex. 1989); *Hernandez*, 946 S.W.2d at 906.

84. *See Texas Ass'n of Bus.*, 852 S.W.2d at 443; American Pawn & Jewelry, Inc. v. Kayal, 923 S.W.2d 670, 672 (Tex. App.—Corpus Christi 1996, writ denied); Taiwan Shrimp Farm Village Ass'n v. U.S.A. Shrimp Farm Dev., Inc., 915 S.W.2d 61, 66 (Tex. App.—Corpus Christi 1996, writ denied); Union Pac. Fuels, Inc. v. Johnson, 909 S.W.2d 130, 134 (Tex. App.—Houston [14th Dist.] 1995, no writ).

is fundamental error and must be noted and reviewed by the appellate court at any time it appears.[85]

Whether a trial court has subject matter jurisdiction is a question of law subject to de novo review[86] reviewable by mandamus or appeal.[87] In reviewing an order of dismissal for want of jurisdiction, the reviewing court construes the pleadings in favor of the pleader and looks to the pleader's intent.[88] Only matters presented to the trial court will be reviewed upon appeal from the order dismissing the case for want of jurisdiction.[89]

B. *Standing*

Standing is an essential component of subject matter jurisdiction.[90] "A [party] has standing when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy."[91] An opinion issued in a lawsuit where there is no standing is an advisory opinion, which Texas courts are prohibited from issuing.[92] To establish standing a person must demonstrate a personal stake in the

---

85. *See* Rogers v. Clinton, 794 S.W.2d 9, 11 (Tex. 1990) (orig. proceeding); 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.); *see also* Mayhew v. Town of Sunnyvale, 41 Tex. Sup. Ct. J. 517, 519, 1998 WL 107927, at *4 (Mar. 13, 1998) (indicating that lack of subject matter jurisdiction can be raised sua sponte by the appellate court).

86. *See Mayhew*, 41 Tex. Sup. Ct. J. at 519, 1998 WL 107927, at *4; *American Pawn & Jewelry, Inc.*, 923 S.W.2d at 672; *North Alamo Water Supply Corp.*, 839 S.W.2d at 457.

87. *See* North Alamo Water Supply Corp. v. Texas Dep't of Health, 839 S.W.2d 455, 457 (Tex. App.—Texarkana 1989, writ denied); Qwest Microwave, Inc. v. Bedard, 756 S.W.2d 426, 434 (Tex. App.—Dallas 1988, orig. proceeding).

88. *See* Texas Ass'n of Bus. v. Texas Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993); Huston v. FDIC, 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.]), *aff'd*, 507 S.W.2d 526 (Tex. 1974).

89. *See Huston*, 663 S.W.2d at 129.

90. *See* Texas Workers' Compensation Comm'n v. Garcia, 893 S.W.2d 504, 517 & n.15 (Tex. 1995); *Texas Ass'n of Bus.*, 852 S.W.2d at 443; Munters Corp. v. Locher, 936 S.W.2d 494, 496 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

91. Nootsie, Ltd. v. Williamson County Appraisal Dist., 925 S.W.2d 659, 661 (Tex. 1996); Graves v. Diehl, 958 S.W.2d 468, 470 n.2 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (citing *Nootsie*).

92. *See Texas Ass'n of Bus.*, 852 S.W.2d at 444; *Munters Corp.*, 936 S.W.2d at 496.

controversy.[93] A court determines whether an individual has standing by analyzing whether there is "a real controversy between the parties which . . . will actually be determined by the judicial declaration sought."[94] For example, whether an association has standing to sue on behalf of its members is determined by reviewing whether its members would otherwise have standing to sue in their own right, whether the interests it seeks to protect are germane to the organization's purpose, and whether the claim asserted or the relief requested requires the participation of individual members in the lawsuit.[95] The standard of review applicable to subject matter jurisdiction applies to standing as well,[96] and as a component of subject matter jurisdiction, the issue of standing must be noted and reviewed by the appellate court at any time it appears.[97]

C. *Special Appearance*

"Personal jurisdiction concerns the court's power to bind a particular person or party."[98] A special appearance is used to challenge the trial court's jurisdiction over the person or property based on the claim that neither is amenable to process in this state.[99] To make this challenge a success, one must first be a nonresident of Texas because it is presumed that Texas courts automatically have jurisdiction over residents.[100] In entering a special appearance pursuant to Rule 120a of the Texas Rules of Civil Pro-

---

93. *See* Hunt v. Bass, 664 S.W.2d 323, 324 (Tex. 1984); Libhart v. Copeland, 949 S.W.2d 783, 795 (Tex. App.—Waco 1997, no writ); Wilkinson v. Wilkinson, 956 S.W.2d 821, 822 (Tex. App.—Houston [1st Dist.] 1997, no pet. h.) (opinion withdrawn).

94. *Garcia*, 893 S.W.2d at 517–18; Texas Ass'n of Bus. v. Texas Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993) (quoting Board of Water Eng'rs v. City of San Antonio, 155 Tex. 111, 114, 283 S.W.2d 722, 724 (1955)).

95. *See Garcia*, 893 S.W.2d at 518; *Texas Ass'n of Bus.*, 852 S.W.2d at 447 (citing Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)).

96. *See Texas Ass'n of Bus.*, 852 S.W.2d at 446.

97. *See* Texas Workers' Compensation Comm'n v. Garcia, 893 S.W.2d 504, 517 n.15 (Tex. 1995) (citing *Texas Ass'n of Business*, 852 S.W.2d at 445–56).

98. CSR Ltd. v. Link, 925 S.W.2d 591, 594 (Tex. 1996) (orig. proceeding).

99. *See* TEX. R. CIV. P. 120a; Accelerated Christian Educ., Inc. v. Oracle Corp., 925 S.W.2d 66, 70 (Tex. App.—Dallas 1996, no writ).

100. *See* Kawasaki Steel Corp. v. Middleton, 699 S.W.2d 199, 200 (Tex. 1985) (observing that Rule 120a only permits a *nonresident* defendant to challenge jurisdiction of the court over one's person or property).

cedure (hereinafter Rule(s)),[101] a nonresident bears the burden of proof to show his lack of amenability to long-arm process.[102] To prevail on a special appearance, the nonresident defendant has the burden to negate all bases of personal jurisdiction alleged by the plaintiff to support personal jurisdiction.[103] A trial court hearing a Rule 120a motion should only consider arguments regarding the forum's jurisdiction over the defendant, and not any arguments concerning defects in service.[104] If the trial court rejects the defendant's special appearance, the defendant should ask the court to prepare findings of fact and conclusions of law and include the reporter's record from the hearing on appeal.[105] All of the evidence before the trial court on the question of personal or in rem jurisdiction is considered by the appellate court in determining the propriety of the trial court's ruling.[106]

A trial court's order granting or denying a special appearance under Rule 120a is appealable as an interlocutory appeal.[107] The standard of review for a plea to the jurisdiction is sufficiency of the evidence.[108] Accordingly, the trial court's findings of fact are re-

---

101. TEX. R. CIV. P. 120a.

102. *See* Runnells v. Firestone, 746 S.W.2d 845, 848 (Tex. App.—Houston [14th Dist.]), *writ denied per curiam*, 760 S.W.2d 240 (Tex. 1988) (citing *Kawasaki Steel Corp.*, 699 S.W.2d at 202–03).

103. *See* CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996) (citing *Kawasaki Steel Corp.*, 699 S.W.2d at 203); Guardian Royal Exch. v. English China, 815 S.W.2d 223, 231 n.13 (Tex. 1991); Siskind v. Villa Found. for Educ., Inc., 642 S.W.2d 434, 438 (Tex. 1982); Fish v. Tandy Corp., 948 S.W.2d 886, 891 (Tex. App.—Fort Worth 1997, writ denied); XXT, Ltd. v. Nicotek Corp., No. 05-95-01410-CV (Tex. App.—Dallas Mar. 31, 1997, no writ) (not released for publication yet), 1997 WL 142743, at *3.

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

105. *See Fish*, 948 S.W.2d at 891–92.

106. *See id.* at 892; Linton v. Airbus Industrie, 934 S.W.2d 754, 757 (Tex. App.—Houston [14th Dist.] 1996, writ requested); Carbonit Houston, Inc. v. Exchange Bank, 628 S.W.2d 826, 829 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.); *XXT, Ltd.*, 1997 WL 142743, at *3.

107. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 1998). The interlocutory appeal stays the commencement of a trial in the trial court pending resolution of the appeal. *See id.* § 51.014(b); *see also* Raymond Overseas Holding, Ltd. v. Curry, 955 S.W.2d 470, 471 (Tex. App.—Fort Worth 1997, orig. proceeding) (stating that the recent amendments to the Civil Practice and Remedies Code provides for an interlocutory appeal from a granting or denying of a special appearance). The availability of this interlocutory appeal eliminates the need to seek mandamus relief on review of an order denying a special appearance. *See* CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996).

108. *See* Prins v. Van Damme, 953 S.W.2d 7, 13 (Tex. App.—Tyler 1997, writ denied); Fish v. Tandy Corp., 948 S.W.2d 886, 892 (Tex. App.—Fort Worth 1997, writ denied); Con-

viewed under the sufficiency of the evidence standard, and the trial court's conclusions of law are reviewed de novo.[109] "If the special appearance is based upon undisputed or otherwise established facts," the appellate court conducts "a de novo review of the trial court's order."[110]

D. *Plea in Abatement*

A plea in abatement alleges that there is some obstacle to prosecuting the case, which requires suspension or abatement of the proceedings until it is removed.[111] If the plea is sustained the action is abated until the obstacle is removed.[112] Perhaps the most common plea involves dominant jurisdiction, which occurs when two lawsuits concerning the same controversy and parties are pending in courts of coordinate jurisdiction.[113] The appellate court will review the trial court's action in granting or denying a plea in abatement based on the abuse of discretion standard.[114] Whether it was

---

ner v. Conticarriers & Terminals, Inc., 944 S.W.2d 405, 411 (Tex. App.—Houston [14th Dist.] 1997, no writ); Nikolai v. Strate, 922 S.W.2d 229, 236 (Tex. App.—Fort Worth 1996, writ denied); Hotel Partners v. KPMG Peat Marwick, 847 S.W.2d 630, 632 (Tex. App.—Dallas 1993, writ denied); Runnells v. Firestone, 746 S.W.2d 845, 849 (Tex. App.—Houston [14th Dist.]), *writ denied per curiam*, 760 S.W.2d 240 (Tex. 1988) (citing *Kawasaki Steel Corp.*, 699 S.W.2d at 202–03); XXT, Ltd. v. Nicotek Corp., No. 05-95-01410-CV (Tex. App.—Dallas Mar. 31, 1997, no writ) (not designated for publication), 1997 WL 142743, at *3. *But see* Schlobohm v. Schlobohm, 784 S.W.2d 355, 359 (Tex. 1990) (exercising de novo review of facts).

109. *See Linton*, 934 S.W.2d at 757; *Hotel Partners*, 847 S.W.2d at 632; *XXT, Ltd.*, 1997 WL 142743, at *3.

110. *Conner*, 944 S.W.2d at 411.

111. *See* Speer v. Stover, 685 S.W.2d 22, 23 (Tex. 1985).

112. *See Speer*, 685 S.W.2d at 23; Life Ass'n of America v. Goode, 71 Tex. 90, 96, 8 S.W. 639, 640 (1888); Union Pac. Fuels, Inc. v. Johnson, 909 S.W.2d 130, 134 (Tex. App.—Houston [14th Dist.] 1995, no writ); Mercure Co. v. Rowland, 715 S.W.2d 677, 680 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

113. *See* Wyatt v. Shaw Plumbing Co., 760 S.W.2d 245, 248 (Tex. 1988); Clawson v. Millard, 934 S.W.2d 899, 900 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding); Flores v. Peschel, 927 S.W.2d 209, 212 (Tex. App.—Corpus Christi 1996, orig. proceeding).

114. *See Wyatt*, 760 S.W.2d at 248; Taiwan Shrimp Farm Village Ass'n v. U.S.A. Shrimp Farm Dev. Inc., 915 S.W.2d 61, 68 (Tex. App.—Corpus Christi 1996, writ denied); Project Eng'g U.S.A. Corp. v. Gator Hawk, Inc., 833 S.W.2d 716, 724 (Tex. App.—Houston [1st Dist.] 1992, no writ); Space Master Int'l, Inc. v. Porta-Kamp Mfg. Co., 794 S.W.2d 944, 946 (Tex. App.—Houston [1st Dist.] 1990, no writ); *see also* Arbor v. Black, 695 S.W.2d 564, 567 (Tex. 1985) (declining to grant mandamus relief because the trial court did not abuse its discretion); Dolenz v. Continental Nat'l Bank, 620 S.W.2d 572, 575 (Tex. 1981) (holding that the trial court "did not act arbitrarily or unreasonably in denying [the] plea in abatement").

proper to sustain or overrule a plea in abatement depends upon the evidence offered at the hearing on the plea, which requires a reporter's record to attack the trial court's actions.[115] If the plea is sustained without hearing evidence, the appellate court must accept "allegations of fact in the petition as true and indulge every reasonable inference in support" of them.[116]

E. *Venue*

On appeal from a trial on the merits,[117] the reviewing court must consider the entire record including the trial itself to determine whether the trial court improperly transferred a case to another county under Rules 86[118] and 87[119] and the Texas Civil Practice and Remedies Code.[120] "If there is any probative evidence in the record" "that venue was proper in the county of suit[,]" "even if the preponderance of the evidence is to the contrary," the reviewing court "must defer to the trial court's determination" that venue was proper.[121] Appellate review of the venue determination thus differs greatly from the scope of the decision made by the trial

115. *See* Vestal v. Jackson, 598 S.W.2d 724, 725 (Tex. Civ. App.—Waco 1980, no writ).

116. Jenkins v. State, 570 S.W.2d 175, 177 (Tex. Civ. App.—Houston [14th Dist.] 1978), *overruled by* University of Tex. Med. Branch at Galveston v. York, 871 S.W.2d 175 (Tex. 1994).

117. The legislature recently revised the Texas Civil Practice and Remedies Code and now permits a party to file a petition for writ of mandamus to enforce the *mandatory* venue provisions. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (Vernon Supp. 1997); *In re* Missouri Pac. R.R. Co., No. 12-97-00361-CV (Tex. App.—Tyler Jan. 30, 1998, orig. proceeding) (not released for publication yet), 1998 WL 35158, at *4. Ordinary venue determinations are not subject to mandamus review. *See* Polaris Inv. Management Corp. v. Abascal, 892 S.W.2d 860, 862 (Tex. 1995) (orig. proceeding) (noting that "Texas law is quite clear that venue determinations are not reviewable by mandamus."); *see also* Bridgestone/Firestone, Inc. v. Thirteenth Court of Appeals, 929 S.W.2d 440, 442 (Tex. 1996) (per curiam) (stating that mandamus relief is not proper when the issue is a second continuance to obtain discovery on venue); Montalvo v. Fourth Court of Appeals, 917 S.W.2d 1, 2 (Tex. 1995) (per curiam) (concluding that the trial court's "order limiting discovery and setting an abbreviated schedule for a venue hearing" did not leave the plaintiff without an "adequate remedy on appeal").

118. TEX. R. CIV. P. 86.

119. TEX. R. CIV. P. 87.

120. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986); Wilson v. Texas Parks & Wildlife Dep't, 886 S.W.2d 259, 261 (Tex. 1994); Ruiz v. Conoco, Inc., 868 S.W.2d 752, 758 (Tex. 1992); *see also* TEX. R. CIV. P. 255–59 (discussing change of venue based on allegations of prejudice).

121. Ford Motor Co. v. Miles, 41 Tex. Sup. Ct. J. 562, 564, 1998 WL 124567, at *3 (Mar. 19, 1998) (citing Ruiz v. Conoco, Inc., 868 S.W.2d 752, 758 (Tex. 1993)).

judges, who must rule solely on the basis of certain documents without the benefit of live testimony and the entire record.[122] As a consequence, the trial court might properly overrule a motion to transfer venue and later determine based on additional evidence (or during trial) that venue lies in another county.[123] Criticizing this review standard, the appellate courts have observed that review of venue decisions puts the appellate courts in the position of considering matters in which the trial court had no opportunity to assess before making its decision.[124] Nevertheless, the appellate courts continue to review the trial court's determination by considering the entire record.[125] If venue was improper, the case must be reversed.[126] If venue was proper in both the county from which the case was transferred and the county to which the case was transferred, an order granting a motion to transfer venue must still be reversed.[127] Finally, a trial court's failure to grant a proper motion to transfer venue constitutes reversible error.[128]

F. *Joinder*

The Texas Civil Practice and Remedies Code provides that "[a]ny person seeking . . . joinder, who is unable to independently establish proper venue, or a party opposing . . . joinder of such a person may contest the decision of the trial court allowing . . . join-

---

122. *See* TEX. R. CIV. P. 87(3)(a); *Ruiz*, 868 S.W.2d at 757; Kansas City S. Ry. v. Carter, 778 S.W.2d 911, 915 (Tex. App.—Texarkana 1989, writ denied); Texas City Ref., Inc. v. Conoco, Inc., 767 S.W.2d 183, 185 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

123. *See Texas City Ref. Inc.*, 767 S.W.2d at 185.

124. *See Kansas City S. Ry.*, 778 S.W.2d at 915; *Texas City Ref., Inc.*, 767 S.W.2d at 185.

125. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon Supp. 1995); *see also Ruiz*, 868 S.W.2d at 757-58 (rejecting a preponderance of the evidence review and noting the confusion in interpreting, applying and harmonizing Rule 87 and § 15.064(b)).

126. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986); Ruiz v. Conoco, Inc., 868 S.W.2d 752, 758 (Tex. 1992).

127. *See* Wilson v. Texas Parks & Wildlife Dep't, 886 S.W.2d 259, 261 (Tex. 1994) (citing Marantha Temple, Inc. v. Enterprise Prods. Co., 833 S.W.2d 736, 741 (Tex. App.—Houston [1st Dist.] 1992, writ denied)).

128. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1997); Ford Motor Co. v. Miles, 41 Tex. Sup. Ct. J. 562, 566, 1998 WL 124567, at *6 (Mar. 19, 1998); Wichita County, Tex. v. Hart, 917 S.W.2d 779, 781 (Tex. 1996); Billings v. Concordia Heritage Ass'n, No. 08-96-00256-CV (Tex. App.—El Paso Apr. 25, 1997, writ denied) (not released for publication yet), 1997 WL 200523, at *4.

der by taking an interlocutory appeal. . . ."[129] This provision gives the appellate court authority over the single question of whether the joinder or intervention is proper.[130] The legislative intent of this provision was to guarantee a dissatisfied litigant speedy appellate review of a trial court's decision regarding whether certain plaintiffs may properly join in the suit.[131] However, this provision for interlocutory review may not be used to review a trial court's decision regarding transfer of venue.[132] In such an appeal, the appellate court shall "determine whether the joinder is proper based upon an independent determination from the record and not under either an abuse of discretion standard or substantial evidence standard."[133] Whether an "independent determination" requires a factual sufficiency review or de novo review is pending in a case in the Corpus Christi Court of Appeals.[134]

"Whether joinder is proper . . . involves a series of legal tests which evaluate needs, prejudice, and convenience to the parties."[135] "The ultimate determination of whether joinder is proper thus depends upon both (1) factual determinations concerning the nature of the underlying lawsuit and the situation of the various parties before the trial court, and (2) application of the legal tests of Section 15.003(a) to those facts."[136] If there is not an evidentiary hearing, the court of appeals will accept the implied findings of the trial court on controverted fact issues.[137] If there is an evidentiary hearing or evidence is presented in support of or opposing the joinder motion, the parties should request findings of fact, and if re-

129. Masonite Corp. v. Garcia, 951 S.W.2d 812, 815 (Tex. App.—San Antonio 1997, orig. proceeding) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c) (Vernon Supp. 1997)).

130. *See id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c)(1) (Vernon Supp. 1997)).

131. *See id.* The court stated that the legislative history demonstrates that the legislature had two goals in enacting Section 15.003: "(1) preventing plaintiffs with no connection to the forum from piggybacking their claims onto the claims of other plaintiffs, and (2) providing an interlocutory appeal of a trial court's joinder determination." *Id.* at 818.

132. *See id.*

133. *Id.*; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c)(1) (Vernon Supp. 1997).

134. Surgitek, Inc. v. Adams, 955 S.W.2d 884, 888 (Tex. App.—Corpus Christi 1997, pet. requested).

135. *Id.* at 888.

136. *Id.*

137. *See id.*

quested and filed, they may be challenged for their sufficiency.[138] The trial court's application of the legal tests for joinder are reviewed de novo.[139]

G. *Forum Non Conveniens*

The Texas Civil Practice and Remedies Code has been amended to provide that a case alleging personal injury or wrongful death may be stayed or dismissed in whole or in part under the doctrine of *forum non conveniens*.[140] The party seeking to stay or dismiss the claim has the burden of proving by a preponderance of the evidence that:

> (1) an alternative forum exists in which the claim or action may be tried; (2) the alternative forum provides an adequate remedy; (3) the maintenance of the claim in the courts of this state would work a substantial injustice to the moving party; (4) the alternative forum can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim; (5) the balance of the private interests of the parties and the public interests of the state predominate in favor of the claim or action being brought in an alternative forum; and (6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.[141]

However, if the plaintiff makes a prima facie showing that the proximate or producing cause of the claim of the injury or death occurred in this state, the case may not be stayed or dismissed.[142] To make this showing, the plaintiff need only come forward with credible, verified evidence and is not required to meet the prepon-

---

138. *See id.* In *Surgitek*, there was not an evidentiary hearing relating to the joinder motion. *See id.* at 889. Accordingly, as to controverted questions of fact, the court of appeals held that it would not substitute its findings for those of the trial court and would accept the implied findings of the trial court. *See id.* at 888. The court also held that the general rule that the court must presume that the trial court made all findings necessary to support its order had no application because there was not an evidentiary hearing. *See id.* at 888–89.

139. *See* Surgitek, Inc. v. Adams, 955 S.W.2d 884, 888 (Tex. App.—Corpus Christi 1997, pet. requested).

140. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (Vernon Supp. 1998); *see also id.* § 75.051(i) (extending section to cover actions involving personal injury or wrongful death).

141. *Id.* § 71.051(b)(1)–(6).

142. *See id.* § 75.051(f).

derance of the evidence standard.[143] Finally, the trial court does not have the discretion to stay or dismiss the case if the plaintiff is a resident of Texas.[144]

Because evidence may be submitted under this procedure, it is likely that the same standard of review applicable to a special appearance would also apply to a trial court's order staying or dismissing for *forum non conveniens*.[145]

H. *Default Judgment*

If a defendant fails to file a timely answer after properly being served, he or she may suffer a default judgment.[146] A post-answer default occurs when a defendant initially answers, but fails to make an appearance at trial.[147] Different rules apply to set aside a default judgment depending on whether the judgment was proper (secured in accordance with the statutes and rules) or defective (not secured in accordance with the statutes and rules).

1. Proper Default Judgment

A three-part test for determining whether a court should grant a motion for new trial to set aside a proper default judgment was established in the leading case of *Craddock v. Sunshine Bus Lines, Inc.*[148] Under this test, a trial court may set aside a default judgment and order a new trial in any case in which

> [(1)] the failure of the defendant 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;[149] [(2)] provided that the mo-

---

143. *See id.* A motion filed under this provision must be filed no later than 180 days after the date when a motion to transfer venue would have to be filed, and at least 21 days notice must be given before the hearing date. *See id.* § 75.051(d).

144. *See id.* § 75.051(e).

145. *See supra* Part IV.C.

146. *See* TEX. R. CIV. P. 239; Michael A. Pohl & David Hittner, *Judgments by Default in Texas*, 37 Sw. L.J. 421, 422 (1983).

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

148. 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939); *see* Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 82 (Tex. 1992) (reaffirming the three-part *Craddock* test); Bank One, N.A. v. Moody, 830 S.W.2d 81, 82–83 (Tex. 1992) (recognizing the *Craddock* test).

149. A slight excuse will suffice. *See* Harmon Truck Lines, Inc. v. Steele, 836 S.W.2d 262, 265 (Tex. App.—Texarkana 1992, writ dism'd) (citing Gotcher v. Barnett, 757 S.W.2d 398, 401 (Tex. App.—Houston [14th Dist.] 1988, no writ). If there is controverting evidence on this issue, the court may judge the credibility of the witnesses and determine the weight to be given to the testimony. *See id.* A conclusion that the party's failure to answer

> tion for a new trial sets up a meritorious defense;[150] and [(3)] is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.[151]

The *Craddock* test also applies to a postanswer default judgment[152] and to a summary judgment.[153] If the facts underlying the default judgment are disputed, the trial court may, but is not required to, make findings in support of its ruling.[154] These findings will be reviewed under a sufficiency of the evidence standard. In the absence of fact findings, the judgment must be upheld on any legal theory supported by the evidence.[155]

The trial court determines whether the defendant has satisfied the *Craddock* test, and the trial court's ruling will not be disturbed on appeal absent a showing of an abuse of discretion.[156] However, trial courts should exercise liberality in favor of a defaulted party when passing on a motion for new trial and the sufficiency of the supporting evidence so that the defaulted party may have their day

---

was intentional has to be supported by the record and proper as a matter of law. *See* Strackbein v. Prewitt, 671 S.W.2d 37, 39 (Tex. 1984).

150. *See* Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. 1966) (requiring the defendant to allege facts "which in law would constitute a defense to the plaintiff's claim and are supported by evidence"). A meritorious defense is one that if proved would cause a different result upon retrial of the case, although not necessarily a totally opposite result. *See* Holliday v. Holliday, 72 Tex. 581, 585, 10 S.W. 690, 692 (1889).

151. *See Craddock*, 134 Tex. at 391, 133 S.W.2d at 126 (citing Dowell v. Winters, 20 Tex. 793, 797–98 (1858)); *see also* Angelo v. Champion Restaurant Equip. Co., 713 S.W.2d 96, 97 (Tex. 1986) (reaffirming *Craddock*).

152. *See* LeBlanc v. LeBlanc, 778 S.W.2d 865, 865 (Tex. 1989); Lopez v. Lopez, 757 S.W.2d 721, 722 (Tex. 1988); Cliff v. Huggins, 724 S.W.2d 778, 779 (Tex. 1987); Grissom v. Watson, 704 S.W.2d 325, 326 (Tex. 1986); *Ivy*, 407 S.W.2d at 214.

153. *See* Washington v. McMillan, 898 S.W.2d 392, 395 (Tex. App.—San Antonio 1995, no writ) (citing Gonzalez v. Surplus Ins. Servs., 863 S.W.2d 96, 102 (Tex. App.—Beaumont 1993, writ denied)); Krchnak v. Fulton, 759 S.W.2d 524, 528-29 (Tex. App.—Amarillo 1988, writ denied); Costello v. Johnson, 680 S.W.2d 529, 531 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). *But see* Rabe v. Guaranty Nat'l Ins. Co., 787 S.W.2d 575, 579 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (refusing to apply *Craddock* in the summary judgment context); Enernational Corp. v. Exploitation Eng'g, 705 S.W.2d 749, 751 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (ruling that the *Craddock* test is inappropriate in summary judgment cases).

154. *See* Landon v. Jean-Paul Budinger, Inc., 724 S.W.2d 931, 940 (Tex. App.—Austin 1987, no writ); Dallas Heating Co. v. Pardee, 561 S.W.2d 16, 20 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

155. *See* Strackbein v. Prewitt, 671 S.W.2d 37, 38 (Tex. 1984); Cope v. U.S. Fidelity & Guar. Co., 752 S.W.2d 608, 609 (Tex. App.—El Paso 1988, no writ).

156. *See* Cliff v. Huggins, 724 S.W.2d 778, 778 (Tex. 1987); Grissom v. Watson, 704 S.W.2d 325, 326 (Tex. 1986); *Strackbein*, 671 S.W.2d at 38.

in court.[157] Furthermore, when the guidelines of *Craddock* have been met, it is an abuse of discretion to deny a new trial.[158]

2. Defective Default Judgment

"If the default judgment is not rendered in compliance with the statutes and rules and the defect is apparent on the face of the record, it may be set aside by either a motion to set aside, a motion for new trial, an appeal, or a writ of error to the court of appeals."[159] In reviewing a default judgment under any of these remedies, both trial and reviewing courts may only consider errors that appear on the face of the record.[160] 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.[161] It is imperative that the record affirmatively show strict compliance with the provided mode of service in order for a default judgment to withstand attack.[162] This showing must be made from the record as it existed

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

158. *See* J.H. Walker Trucking v. Allen Lund Co., 832 S.W.2d 454, 455 (Tex. App.—Houston [1st Dist.] 1992, no writ); 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 factual and legal standards as findings of fact after a trial on the merits. *See Landon*, 724 S.W.2d at 940; *Dallas Heating Co.*, 561 S.W.2d at 19. In the absence of fact findings, the judgment must be upheld on any legal theory that finds support in the evidence. *See Strackbein*, 671 S.W.2d at 38; *Cope*, 752 S.W.2d at 609.

159. Bagel v. Mason Road Bank, N.A., No. B14-91-00548-CV (Tex. App.—Houston [14th Dist.] Feb. 17, 1992, no writ) (not designated for publication), 1992 WL 43953, at *1; *see* Jordan v. Jordan, 890 S.W.2d 555, 560 (Tex. App.—Beaumont 1994, writ granted), *rev'd on other grounds*, 907 S.W.2d 471 (Tex. 1995); Harris v. Moore, No. 03-96-00702-CV (Tex. App.—Austin July 24, 1997, n.w.h.) (not designated for publication), 1997 WL 420781, at *5.

160. *See* Stubbs v. Stubbs, 685 S.W.2d 643, 644 (Tex. 1985); United Nat'l Bank v. Travel Music of San Antonio, Inc., 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, 642-44 (Tex. App.—Dallas 1987, no writ); *see also infra* Part IV.

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

162. *See* Primate Constr., Inc. v. Silver, 884 S.W.2d 151, 152 (Tex. 1994); Wilson v. Dunn, 800 S.W.2d 833, 836 (Tex. 1990); Uvalde Country Club v. Martin Linen Supply Co., 690 S.W.2d 884, 885 (Tex. 1985); McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965).

before the trial court when the default judgment was signed, unless the record is amended pursuant to Rule 118.[163]

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.[164] Absent a need for evidence, on appeal, the default judgment is simply reviewed to determine whether it was rendered in compliance with the statutes and rules.[165]

I. *Special Exceptions*

A petition is sufficient if it gives "fair and adequate notice of the facts on which the plaintiff pleader bases his claim."[166] Special exceptions are "used to challenge the sufficiency of a pleading."[167] If a pleading fails to give fair notice,[168] the defendant should specially except to the petition pursuant to Rule 91.[169] If no special exceptions are filed, the pleadings will be construed liberally in favor of

---

163. *See* TEX. R. CIV. P. 118 (authorizing a court to allow an amendment of service of process as long as it would not prejudice the other party); *see also* Higgonbotham v. General Life & Accident Ins. Co., 796 S.W.2d 695, 698 (Tex. 1990) (Phillips, C.J., dissenting, joined by Cook, Hightower & Hecht, JJ.) (finding trial court's order recognizing service as proper was, itself, "tantamount to formal amendment of the return of citation"); Laidlaw Waste Sys., Inc. v. Wallace, 944 S.W.2d 72, 73 (Tex. App.—Waco 1997, writ denied); Cox Marketing, Inc. v. Adams, 688 S.W.2d 215, 217-18 (Tex. App.—El Paso 1985, no writ).

164. *See* TEX. R. CIV. P. 324(b)(1); *see also* Bronze & Beautiful, Inc. v. Mahone, 750 S.W.2d 28, 29 (Tex. App.—Texarkana 1988, no writ) (stating that in a motion for new trial, "a party need not complain about invalid service . . . because it is not a complaint on which evidence must be heard within the meaning of Rule 324").

165. *See Bronze & Beautiful, Inc.*, 750 S.W.2d at 29 (requiring strict compliance with the rules for a default judgment to be upheld).

166. Roark v. Allen, 633 S.W.2d 804, 810 (Tex. 1982); *see, e.g.*, Smithkline Beecham Corp. v. Doe, 903 S.W.2d 347, 354 (Tex. 1995); Dickson v. State Farm Lloyds, 944 S.W.2d 666, 667 (Tex. App.—Corpus Christi 1997, no writ); Starcrest Trust v. Berry, 926 S.W.2d 343, 349 (Tex. App.—Austin 1996, no writ); Acevedo v. Droemer, 791 S.W.2d 668, 669 (Tex. App.—San Antonio 1990, no writ).

167. Friesenhahn v. Ryan, 41 Tex. Sup. Ct. J. 261, 262, 1998 WL 12359, at *2 (Jan. 16, 1985).

168. *See* City of Houston v. Howard, 786 S.W.2d 391, 393 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (defining the test of fair notice as whether the opposing party's attorney of reasonable competence is able to determine the nature of the controversy and the testimony that will probably be relevant).

169. *See* TEX. R. CIV. P. 91.

the pleader.[170] The purpose of special exceptions is to "point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations"[171] or otherwise require the adverse party to clarify his pleadings "when they are not clear or sufficiently specific."[172] In considering special exceptions, the trial court is granted broad discretion.[173]

Generally, if a trial court sustains a party's special exceptions, the other party must be given an opportunity to amend the pleadings before the case is dismissed.[174] If the defect in the pleading is not cured after amendment, the trial court may then dismiss the case.[175] In reviewing the trial court's order of dismissal upon special exceptions, the appellate court is required to accept as true all the factual allegations set forth in the pleading.[176] The trial court's ruling is reviewed for an abuse of discretion.[177]

If the pleading deficiency is so severe that it cannot be remedied by an amendment, there is no need to make a special exception and a summary judgment should be granted.[178] The distinction is

---

170. *See* Paramount Pipe & Supply Co. v. Muhr, 749 S.W.2d 491, 496 (Tex. 1988); Holt v. Reproductive Serv., Inc., 946 S.W.2d 602, 604 (Tex. App.—Corpus Christi 1997, writ denied).

171. TEX. R. CIV. P. 91.

172. Villarreal v. Martinez, 834 S.W.2d 450, 451 (Tex. App.—Corpus Christi 1992, no writ).

173. *See* City of Austin v. Houston Lighting & Power Co., 844 S.W.2d 773, 783 (Tex. App.—Dallas 1992, writ denied) (noting that the trial court's discretion extends to "hearing, construing, and sustaining special exceptions" (citing Bader v. Cox, 701 S.W.2d 677, 686 (Tex. App.—Dallas 1985, writ ref'd n.r.e.))).

174. *See* Friesenhahn v. Ryan, 41 Tex. Sup. Ct. 261, 262, 1998 WL 12359, at *2 (Jan. 16, 1985); 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)).

175. *See Friesenhahn*, 41 Tex. Sup. Ct. at 262, 1998 WL 12359, at *2; Russell v. Texas Dep't of Human Resources, 746 S.W.2d 510, 513 (Tex. App.—Texarkana 1988, writ denied).

176. *See Villarreal*, 834 S.W.2d at 452; Fidelity & Cas. Co. of N.Y. v. Sherbert, 646 S.W.2d 270, 277–78 (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.).

177. *See* LaRue v. Genescreen, Inc., 957 S.W.2d 958, 961 (Tex. App.—Beaumont 1997, no pet. h.); Holt v. Reproductive Serv., Inc., 946 S.W.2d 602, 604 (Tex. App.—Corpus Christi 1997, writ denied); *City of Austin*, 844 S.W.2d at 783 (citing *Bader*, 701 S.W.2d at 686).

178. *See Friesenhahn*, 41 Tex. Sup. Ct. at 262, 1998 WL 12359, at *2 (citing Swilley v. Hughes, 488 S.W.2d 64, 64 (Tex. 1972)); Hidalgo v. Surety Sav. & Loan Ass'n, 462 S.W.2d 540, 543 n.1 (Tex. 1971); James v. Hitchcock Indep. Sch. 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.

"between inadequately pleading a cause of action [special exception] and utterly failing to plead a viable cause of action [summary judgment]."[179] The cautious practitioner should always specially except to the pleading deficiency first, and if the plaintiff fails to correct the deficiency after being given an opportunity to replead, then move for summary judgment.[180]

J. *Temporary and Permanent Injunctions*

"At a hearing upon the request for a temporary injunction, the only question 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."[181] To be entitled to a temporary injunction, the movant must show: "(1) a probable right of recovery; (2) imminent, irreparable harm . . . in the interim; and (3) no adequate remedy at law."[182]

All orders which grant a temporary injunction are required to include an order designating that the case be set for trial on the merits concerning the relief that is ultimately being sought.[183] Failure to include an order setting the matter for a trial on the merits

---

App.—Amarillo 1987, no writ); Jacobs v. Cude, 641 S.W.2d 258, 261 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

179. Chambers v. Huggins, 709 S.W.2d 219, 224 (Tex. App.—Houston [14th Dist.] 1986, no writ).

180. *See, e.g.*, Baubles & Beads v. Louis Vuitton, S.A., 766 S.W.2d 377, 379 (Tex. App.—Texarkana 1989, no writ) (basing a summary judgment on the plaintiff's failure to plead a cause of action after having received an opportunity to be heard).

181. Davis v. Huey, 571 S.W.2d 859, 862 (Tex. 1978); *see* Camp v. Shannon, 162 Tex. 515, 517, 348 S.W.2d 517, 519 (1961); City of Lubbock v. Stubbs, 160 Tex. 111, 115, 327 S.W.2d 411, 415 (1959); Munson v. Milton, 948 S.W.2d 813, 815 (Tex. App.—San Antonio 1997, writ denied); University of Tex. Med. Sch. v. Than, 834 S.W.2d 425, 428 (Tex. App.—Houston [1st Dist.] 1992), *aff'd*, 901 S.W.2d 926 (Tex. 1995)); Alamo Sav. Ass'n of Tex. v. Forward Constr. Corp., 746 S.W.2d 897, 899 (Tex. App.—Corpus Christi 1988, writ dism'd w.o.j.).

182. *Munson*, 948 S.W.2d at 815; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 65.011 (Vernon 1997) (setting forth five possible prerequisites to the granting of a writ of temporary injunction); *see also* Sun Oil Co. v. Whitaker, 424 S.W.2d 216, 218 (Tex. 1968) (explaining that the applicant must show a probable right to relief before a court will grant or deny writs of temporary injunction); Inex Indus., Inc. v. Alpar Resources, Inc., 717 S.W.2d 685, 687–88 (Tex. App.—Amarillo 1986, no writ) (stating the requirements for a temporary injunction, including requirement that an applicant supply proof that the defendant engaged in wrongful conduct); Bob E. Shannon et al., *Temporary Restraining Orders and Temporary Injunctions in Texas—A Ten Year Survey, 1975-1985*, 17 ST. MARY'S L.J. 689, 700–21 (1986) (setting forth the factors for determining whether to issue injunctive relief).

183. *See* TEX. R. CIV. P. 683.

mandates dissolution of the injunction.[184] Furthermore, the trial court must detail the specific reasons it relied upon in ruling on whether a temporary injunction should be granted or denied.[185] It is not required that the trial court explain its reasons for believing that the applicant has shown a probable right to final relief, but it is necessary to give the reasons why injury will be suffered if the interlocutory relief is not ordered.[186] Failure of the order to meet these requirements renders it fatally defective and void, thereby requiring reversal, even if the issue is not raised by point of error.[187]

In an interlocutory appeal from a temporary injunction,[188] the merits of the movant's case are not presented for appellate review.[189] Appellate review is therefore strictly limited to whether there has been a clear abuse of discretion.[190] The appellate court is not to substitute its judgment for that of the trial court, but merely to determine whether the court's action was so arbitrary as to exceed the bounds of reasonable discretion.[191] The trial court abuses its discretion in granting or denying a temporary injunction when it misapplies the law to the established facts or when the evidence

---

184. *See* InterFirst Bank San Felipe v. Paz Constr. Co., 715 S.W.2d 640, 641 (Tex. 1986).

185. *See* Arrechea v. Plantowsky, 705 S.W.2d 186, 189 (Tex. App.—Houston [14th Dist.] 1985, no writ); Martin v. Linen Sys. for Hosps., 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).

186. *See* State v. Cook United, Inc., 464 S.W.2d 105, 106 (Tex. 1971); Transport Co. v. Robertson Transps., Inc., 152 Tex. 551, 556, 261 S.W.2d 549, 552 (1953); University of Tex. Med. Sch. v. Than, 834 S.W.2d 425, 428 (Tex. App.—Houston [1st Dist.] 1992), *aff'd*, 901 S.W.2d 926 (Tex. 1995)); Public Utility Comm'n of Tex. 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); *see also* TEX. R. CIV. P. 683 (requiring every order that grants an injunction or restraining order to "set forth the reasons for its issuance").

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

188. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon 1997).

189. *See* Davis v. Huey, 571 S.W.2d 859, 861 (Tex. 1978); Sherrod v. Moore, 819 S.W.2d 201, 202 (Tex. App.—Amarillo 1991, no writ).

190. *See Davis*, 571 S.W.2d at 861–62; 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, 617, 358 S.W.2d 589, 589 (1962); *Transport Co. of Tex.*, 152 Tex. at 556, 261 S.W.2d at 552; Uniden Am. Corp. v. Trunking Assoc., 841 S.W.2d 522, 523 (Tex. App.—Fort Worth 1992, no writ).

191. *See Davis*, 571 S.W.2d at 862; *Sherrod*, 819 S.W.2d at 202; Philipp Bros. v. Oil Country Specialists, Ltd., 709 S.W.2d 262, 265 (Tex. App.—Houston [1st Dist.] 1986, writ dism'd).

does not reasonably support the conclusion that the applicant has a probable right of recovery.[192] Additionally, where the facts definitively indicate that a party is in violation of the law, the court is under a duty to enjoin the violation, thereby eliminating the need for the court to exercise its discretion.[193] Finally, "in reviewing an order granting or denying a temporary injunction, the appellate court draws all legitimate inferences from the evidence in a manner most favorable to the trial court's judgment."[194]

In an appeal from a permanent injunction, the standard of review is based upon a clear abuse of discretion.[195] A litigant is entitled to a jury trial in an injunction action, but only the ultimate issues of fact are submitted for their determination.[196] The jury is not entitled to determine "the expediency, necessity or propriety of equitable relief."[197] Thus, the trial court's order granting or denying a permanent injunction based upon the ultimate facts is reviewed the same as a temporary injunction.[198]

K. *Severance and Consolidation of Causes*

Pursuant to Rules 41[199] and 174,[200] the trial court may sever or consolidate causes. The factors applicable to a trial court's decision to sever or consolidate are essentially identical.[201] Severance of a

192. *See Southwestern Bell Tel. Co.*, 526 S.W.2d at 528; *Uniden Am. Corp.*, 841 S.W.2d at 523; University of Tex. Med. Sch. v. Than, 834 S.W.2d 425, 429 (Tex. App.—Houston [1st Dist.] 1992), *aff'd*, 901 S.W.2d 926 (Tex. 1995)); City of San Antonio v. Bee-Jay Enter., Inc., 626 S.W.2d 802, 804 (Tex. App.—San Antonio 1981, no writ). Public interest is a factor the trial court should also consider in reviewing a temporary injunction. *See* Owens-Corning Fiberglass Corp. v. Baker, 838 S.W.2d 838, 842 (Tex. App.—Texarkana 1992, no writ).

193. *See* D. Priest & Van Zandt Comm'n Co. v. Texas Animal Health Comm'n, 780 S.W.2d 874, 876 (Tex. App.—Dallas 1989, no writ); 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.).

194. Miller v. K & M Partnership, 770 S.W.2d 84, 87 (Tex. App.—Houston [1st Dist.] 1989, no writ).

195. *See D. Priest & Van Zandt Comm'n Co.*, 780 S.W.2d at 875.

196. *See id.* at 876 (quoting State v. Texas Pet Foods, Inc., 591 S.W.2d 800, 803 (Tex. 1979)).

197. *See id.* (citing *Texas Pet Foods, Inc.*, 591 S.W.2d at 803); Alamo Title Co. v. San Antonio Bar Ass'n, 360 S.W.2d 814, 816 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.).

198. *See* D. Priest & Van Zandt Comm'n Co. v. Texas Animal Health Comm'n, 780 S.W.2d 874, 875–76 (Tex. App.—Dallas 1989, no writ).

199. *See* TEX. R. CIV. P. 41 (addressing misjoinder and nonjoinder of parties).

200. *See* TEX. R. CIV. P. 174 (discussing consolidation and separate trials).

201. *Compare* Lone Star Ford, Inc. v. McCormick, 838 S.W.2d 734, 737 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (indicating that actions to be consolidated should

claim is proper if "(1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues."[202] The purpose of granting a severance is to ensure justice is done, prejudice is avoided, and convenience is furthered.[203] A severance is required in cases where the facts and circumstances clearly require a separate trial to prevent injustice, no facts or circumstances support a contrary conclusion, and no prejudice will be experienced.[204] Under these circumstances, the failure to order a separate trial violates a plain legal duty and is considered an abuse of discretion.[205] 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.[206]

Similarly, the trial court also has broad discretion in the consolidation of cases pursuant to Rule 174.[207] The express purpose of Rule 174 is "to further convenience and avoid prejudice, and thus

---

relate to the same question, subject, transaction, or occurrence), *with* Dal-Briar Corp. v. Baskette, 833 S.W.2d 612, 616 (Tex. App.—El Paso 1992, orig. proceeding) (refusing to consolidate cases with three distinct factual scenarios).

202. Coalition of Cities for Affordable Util. Rates v. Public Util. Comm'n of Tex., 798 S.W.2d 560, 564 (Tex. 1990); Guaranty Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 658 (Tex. 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.)); *see* McGuire v. Commercial Union Ins. Co. of N.Y., 431 S.W.2d 347, 351 (Tex. 1968); Kansas Univ. Endowment Ass'n v. King, 162 Tex. 599, 611-12, 350 S.W.2d 11, 19 (1961).

203. *See Horseshoe Operating Co.*, 793 S.W.2d at 658 (citing St. Paul Ins. Co. v. McPeak, 641 S.W.2d 284, 289 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.)); State Farm Mut. Auto Ins. Co. v. Wilborn, 835 S.W.2d 260, 261 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

204. *See* Black v. Smith, 956 S.W.2d 72, 75 (Tex. App.—Houston [14th Dist.] 1997, orig. proceeding) (citing Womack v. Berry, 156 Tex. 44, 50, 291 S.W.2d 677, 683 (1956)).

205. *See id.*

206. *See Horseshoe Operating Co.*, 793 S.W.2d at 658; Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 525 (Tex. 1982); *McGuire*, 431 S.W.2d at 351; *Womack*, 156 Tex. at 51, 291 S.W.2d at 683; Hamilton v. Hamilton, 154 Tex. 511, 517, 280 S.W.2d 588, 591 (1955); Kaiser Found. Health Plan of Tex. v. Bridewell, 946 S.W.2d 642, 645 (Tex. App.—Waco 1997, orig. proceeding [leave denied]); Tracy v. Annie's Attic, Inc., 840 S.W.2d 527, 540 (Tex. App.—Tyler 1992, writ denied); *see also Wilborn*, 835 S.W.2d at 261 (noting that a trial court has discretion to order or not order separate trials when judicial convenience is served and prejudice is avoided).

207. *See* Crestway Care Center, Inc. v. Berchelmann, 945 S.W.2d 872, 873 (Tex. App.—San Antonio 1997, orig. proceeding [leave denied]) (en banc); Adams v. Petrade Int'l, Inc., 754 S.W.2d 696, 721 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

promote the ends of justice."[208] The trial court may consolidate actions that "relate to substantially the same transaction, occurrence, subject matter or question."[209] The actions must be so related that the evidence presented will be relevant, material and admissible in each case.[210] The trial court should balance the judicial economy and convenience gained by the consolidation against the risk of an unfair outcome because of prejudice or confusion to the jury.[211] If the facts and circumstances unquestionably require separate trials to avoid manifest injustice, and no facts or circumstances tend to support a contrary conclusion, then the trial court does not have the discretion to order consolidation.[212] Beyond those circumstances, the trial court's rulings on consolidation are within the broad discretion of the trial court and will not be reversed absent an abuse of discretion that is prejudicial to the complaining party.[213]

L. *Intervention*

Rule 60[214] allows a party to automatically intervene in an existing cause of action, "subject to being stricken out by the court

---

208. *Womack*, 156 Tex. at 51, 291 S.W.2d at 683; Dal-Briar Corp. v. Baskette, 833 S.W.2d 612, 615 (Tex. App.—El Paso 1992, orig. proceeding).

209. *Crestway Care Center, Inc.*, 945 S.W.2d at 873–74 (quoting Excel Corp. v. Valdez, 921 S.W.2d 444, 448 (Tex. App.—Corpus Christi 1996, orig. proceeding)); Owens-Corning Fiberglass Corp. v. Martin, 942 S.W.2d 712, 716 (Tex. App.—Dallas 1997, no writ) (citing Lone Star Ford, Inc. v. McCormick, 838 S.W.2d 734, 737 (Tex. App.—Houston [1st Dist.] 1992, writ denied)).

210. *See Crestway Care Center, Inc.*, 945 S.W.2d at 873–74 (quoting *Excel Corp.*, 921 S.W.2d at 448); *Martin*, 942 S.W.2d at 716 (quoting *Lone Star Ford, Inc.*, 838 S.W.2d at 737).

211. *See Crestway Care Center, Inc.*, 945 S.W.2d at 874 (citing *Excel Corp.*, 921 S.W.2d at 448); *Martin*, 942 S.W.2d at 716 (citing *Dal-Briar Corp.*, 833 S.W.2d at 615).

212. *See Martin*, 942 S.W.2d at 716 (citing *Womack*, 156 Tex. at 51, 291 S.W.2d at 683).

213. *See id.* (citing *Lone Star Ford, Inc.*, 942 S.W.2d at 738); *see also* Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 525 (Tex. 1982) (noting that a trial judge has broad discretion as to severance and consolidation); Allison v. Arkansas Louisiana Gas Co., 624 S.W.2d 566, 568 (Tex. 1981) (explaining that trial court's rulings on joinder and consolidation will only be overturned on appeal for abuse of discretion); General Life & Accident Ins. Co. v. Handy, 766 S.W.2d 370, 275 (Tex. App.— El Paso 1989, no writ) (acknowledging the trial court's discretion to grant separate trials); Marshall v. Harris, 764 S.W.2d 34, 35 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding) (stating that the trial court has broad discretion when granting or denying severance). Additionally, prejudice to the complaining party may not be presumed unless it is evidenced by the record. *See Martin*, 942 S.W.2d at 716.

214. TEX. R. CIV. P. 60.

for sufficient cause on the motion of any party."[215] The intervention must be filed before the judgment is rendered.[216] A party may not, however, intervene during the period between the signing of the judgment and the expiration of the trial court's jurisdiction.[217] Under Rule 60, persons or entities have the right to intervene if they could have brought the same action, or any part thereof, in their own name, or if they would have been able to defeat recovery, or some part thereof, had the action been brought against them.[218] The interest asserted may be legal or equitable.[219] It is important to remember that 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.[220] Absent a motion to strike filed by a party, the trial court is not authorized to strike the intervention.[221]

If a motion to strike is filed, the trial court should give the intervenor an opportunity to explain and show proof of its interest in the lawsuit before ruling on the motion to strike.[222] In response to the motion, the trial court may try the intervention claim, sever the

---

215. *Id.*

216. *See* First Alief Bank v. White, 682 S.W.2d 251, 252 (Tex. 1984); Comal County Rural High Sch. Dist. v. Nelson, 158 Tex. 564, 565, 314 S.W.2d 956, 957 (1958); *In re* York, 951 S.W.2d 122, 125 (Tex. App.—Corpus Christi 1997, writ denied) (citing Citizens State Bank v. Caney, 746 S.W.2d 477, 478 (Tex. 1988)); Preston v. American Eagle Ins. Co., 948 S.W.2d 18, 20 (Tex. App.—Dallas 1997, no writ).

217. *See Comal County Rural High Sch.*, 158 Tex. at 566, 314 S.W.2d at 957; Highlands Ins. Co. v. Lumberman's Mut. Cas. Co., 794 S.W.2d 600, 602-04 (Tex. App.—Austin 1990, no writ).

218. *See* Guaranty Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 657 (Tex. 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.)); King v. Olds, 71 Tex. 729, 731-32, 12 S.W. 65, 65-66 (1888); Texas Supply Ctr., Inc. v. Daon Corp., 641 S.W.2d 335, 337 (Tex. App.—Dallas 1982, writ ref'd n.r.e.).

219. *See Horseshoe Operating Co.*, 793 S.W.2d at 657 (citing *Moody*, 411 S.W.2d at 589); Mendez v. Brewer, 626 S.W.2d 498, 499 (Tex. 1982); Gracida v. Tagle, 946 S.W.2d 504, 506 (Tex. App.—Corpus Christi 1997, orig. proceeding).

220. *See Horseshoe Operating Co.*, 793 S.W.2d at 657.

221. *See id.*; Tony's Tortilla Factory, Inc. v. First Bank, 857 S.W.2d 580, 589 (Tex. App.—Houston [1st Dist.] 1993), *rev'd on other grounds*, 877 S.W.2d 285 (Tex. 1994); Ghidoni v. Stone Oak Inc., No. 04-97-00837-CV (Tex. App.—San Antonio Jan. 28, 1998, no pet. h.) (not released for publication yet), 1998 WL 28144, at *13.

222. *See In re* York, 951 S.W.2d 122, 126 (Tex. App.—Corpus Christi 1997, writ denied) (citing National Union Fire Ins. Co. v. Pennzoil Co., 866 S.W.2d 248, 250 (Tex. App—Corpus Christi 1993, no writ); Barrows v. Ezer, 624 S.W.2d 613, 617 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ)).

intervention, order a separate trial on the intervention issues, or strike the intervention for good cause.[223] 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."[224]

M. *Interpleader*

Rule 43,[225] providing for interpleader actions, extends and liberalizes the equitable remedy of bill of interpleader.[226] Rule 43 permits a disinterested and innocent stakeholder who has reasonable doubts as to which party is entitled to the property in his possession to file in good faith an interpleader action against the claimants.[227] The purpose of the interpleader procedure is to protect an innocent stakeholder from the "vexation and expense of multiple litigation and the risk of multiple liability."[228] A stakeholder is not required to be wholly disinterested in the suit;[229] he need only show that he may be exposed to double or multiple liability due to conflicting claims thereby justifying a reasonable doubt, either of law

---

223. *See* Saldana v. Saldana, 791 S.W.2d 316, 320 (Tex. App.—Corpus Christi 1990, no writ).

224. Guaranty Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 657 (Tex. 1990) (citing *Moody*, 411 S.W.2d at 589 and *Daon Corp.*, 641 S.W.2d at 337)); *see* Mendez v. Brewer, 626 S.W.2d 498, 499 (Tex. 1982); Camacho v. Samaniego, 954 S.W.2d 811, 828 (Tex. App.—El Paso 1997, pet. requested); *In re York*, 951 S.W.2d at 126; Gracida v. Tagle, 946 S.W.2d 504, 506 (Tex. App.—Corpus Christi 1997, orig. proceeding); H. Tebbs, Inc. v. Silver Eagle Distribs., 797 S.W.2d 80, 84 (Tex. App.—Austin 1990, no writ); *see also* Metromedia Long Distance, Inc. v. Hughes, 810 S.W.2d 494, 498 (Tex. App.—San Antonio 1991, writ denied) (noting that interventions are favored to avoid a multiplicity of lawsuits).

225. TEX. R. CIV. P. 43.

226. *See* Downing v. Laws, 419 S.W.2d 217, 220 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.); Barnett v. Woodland, 310 S.W.2d 644, 647 (Tex. Civ. App.—Austin 1958, writ ref'd n.r.e.); *see also* Sears Sav. & Profit Sharing Fund v. Stubbs, 734 S.W.2d 76, 79 (Tex. App.—Austin 1987, no writ) (discussing early and current interpleader practice); 1 R. MCDONALD, TEXAS CIVIL PRACTICE § 5:64, at 579 (1992) (referring to interpleader practice).

227. *See* United States v. Ray Thomas Gravel Co., 380 S.W.2d 576, 580 (Tex. 1964).

228. Dallas Bank & Trust Co. v. Commonwealth Dev. Corp., 686 S.W.2d 226, 230 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (citing 1 R. MCDONALD, TEXAS CIVIL PRACTICE § 3:38 (rev. 1981)).

229. *See Downing*, 419 S.W.2d at 219-20.

or fact, as to which claimant is entitled to funds or property.[230] Rule 43 requires a party filing an interpleader action to establish: "(1) that he is either subject to or has reasonable grounds to anticipate rival claims to the same fund or property;[231] (2) that he has not unreasonably delayed filing his action for interpleader;[232] and (3) that he has unconditionally tendered the fund [or property] into the court."[233] Every reasonable doubt is resolved in favor of allowing the interpleader.[234] The granting of interpleader, a final judgment,[235] is within the discretion of the trial court.[236]

N. *Discovery Rulings*

"Under Texas law evidence is presumed discoverable."[237] The cornerstone of discovery is to "seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed."[238] In line with this principle, the discovery process serves a number of important purposes: (1) it promotes "the administration of justice by allowing the parties to obtain the fullest knowledge of issues and facts prior to trial;"[239] (2) it helps prevent trial

---

230. *See* Davis v. East Tex. Sav. & Loan Ass'n, 163 Tex. 361, 365–66, 354 S.W.2d 926, 930 (1962); K & S Interests, Inc. v. Texas Am. Bank/Dallas, 749 S.W.2d 887, 889 (Tex. App.—Dallas 1988, writ denied); *Stubbs*, 734 S.W.2d at 79.

231. *See* Great Am. Reserve Ins. Co. v. Sanders, 525 S.W.2d 956, 958 (Tex. 1975); *Ray Thomas Gravel Co.*, 380 S.W.2d at 580; *Davis*, 163 Tex. at 354, 365–66, 354 S.W.2d at 930; Sears Sav. & Profit Sharing Fund v. Stubbs, 734 S.W.2d 76, 79 (Tex. App.—Austin 1987, no writ).

232. *See Stubbs*, 734 S.W.2d at 79.

233. Daniels v. Pecan Valley Ranch, Inc., 831 S.W.2d 372, 385 (Tex. App.—San Antonio 1992, writ denied); *Stubbs*, 734 S.W.2d at 79; *see* Cockrum v. Cal-Zona Corp., 373 S.W.2d 572, 574-75 (Tex. Civ. App.—Dallas 1963, no writ).

234. *See* Nixon v. Malone, 100 Tex. 250, 263, 98 S.W. 380, 385 (1906); *Stubbs*, 734 S.W.2d at 79; Dallas Bank & Trust Co. v. Commonwealth Dev. Corp., 686 S.W.2d 226, 230 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

235. *See* K & S Interests, Inc. v. Texas Am. Bank/Dallas, 749 S.W.2d 887, 889 (Tex. App.—Dallas 1988, writ denied); Taliaferro v. Texas Commerce Bank, 660 S.W.2d 151, 152 (Tex. App.—Fort Worth 1983, no writ).

236. *See* Danner v. Aetna Life Ins. Co., 496 S.W.2d 950, 953 (Tex. Civ. App.—Fort Worth 1973, no writ); Reid v. Uhlhorn, 359 S.W.2d 278, 281 (Tex. Civ. App.—San Antonio 1962, writ dism'd).

237. Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc., 957 S.W.2d 640, 645 (Tex. App.—Amarillo 1997, pet. requested) (citing TEX. R. CIV. P. 166b(2)(a) and Loftin v. Martin, 776 S.W.2d 145, 146 (Tex. 1989) (orig. proceeding)).

238. Garcia v. Peeples, 734 S.W.2d 343, 347 (Tex. 1987) (orig. proceeding) (quoting Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984) (orig. proceeding)).

239. West v. Solito, 563 S.W.2d 240, 243 (Tex. 1978) (orig. proceeding).

by ambush;[240] (3) it insures that a trial is based upon "the parties' claims and defenses rather than on an advantage obtained by one side through a surprise attack;"[241] and (4) it provides a mechanism to resolve disputes by the facts and not by the facts a party fails to reveal.[242] In summary, the "modern discovery rules are designed to 'make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.'"[243] Consequently, the courts tend to liberally construe the discovery rules to achieve these underlying policy goals.[244] These same principles also shape applicable rules for reviewing a trial court's ruling on discovery disputes.

1. Withdrawing Deemed Admissions

Once an action has officially commenced, one party can serve on any other a written request for admissions pursuant to Rule 169.[245] If the party to whom the request is directed does not respond within thirty days after service of the request (fifty days if also served with both the citation and petition), the requests are automatically deemed admitted and the trial court has no discretion to find otherwise.[246] "Any matter admitted . . . is conclusively established as to the party making the admission unless the court on motion permits withdrawal or amendment of the admission."[247]

When admissions are deemed against a party, the party should file a motion to withdraw or amend the admissions as soon as pos-

240. *See* Clark v. Trailways, Inc., 774 S.W.2d 644, 646 (Tex. 1989).

241. Smith v. Southwest Feed Yards, 835 S.W.2d 89, 90 (Tex. 1992).

242. *See* Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 559 (Tex. 1990) (orig. proceeding).

243. Garcia v. Peeples, 734 S.W.2d 343, 347 (Tex. 1987) (orig. proceeding) (quoting United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958)).

244. *See* Lindsey v. O'Neill, 689 S.W.2d 400, 402 (Tex. 1985) (orig. proceeding) (construing the discovery rules in favor of allowing discovery in medical malpractice case).

245. *See* TEX. R. CIV. P. 169(1).

246. *See* Hartman v. Trio Transp., Inc., 937 S.W.2d 575, 578 (Tex. App.—Texarkana 1996, writ denied); Ruiz v. Nicolas Trevino Forwarding Agency, Inc., 888 S.W.2d 86, 88 (Tex. App.—San Antonio 1994, no writ); Fibreboard Corp. v. Pool, 813 S.W.2d 658, 682 (Tex. App.—Texarkana 1991, writ denied), *cert. denied*, 508 U.S. 909 (1993).

247. TEX. R. CIV. P. 169(2); *see* Smith v. Home Indem. Co., 683 S.W.2d 559, 562 (Tex. App.—Fort Worth 1985, no writ).

sible.[248] Rule 169(2) permits the trial court to allow a party to withdraw or amend admissions:

> upon a showing of good cause for such withdrawal or amendment if the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved thereby.[249]

The motion should therefore allege: (1) that there is good cause for not having responded to the request on time; (2) that allowing withdrawal of the admissions will not "unduly" prejudice the party relying on the deemed admissions; and (3) that the case can be presented on the merits following the withdrawal of the admission.[250] The "*good cause*" requirement is the threshold issue which must be determined before the trial court may consider the remaining requirements of the rule.[251] The moving party should also attach affidavits setting out detailed facts supporting the elements of the rule and attach the answers it would have filed.[252]

The trial court has broad discretion in permitting the withdrawal or amendment of admissions, and its ruling will only be set aside on showing a clear abuse of discretion.[253] The reviewing court should consider that the objective of the rules of procedure is to obtain a

---

248. *See* Employers Ins. v. Halton, 792 S.W.2d 462, 464 (Tex. App.—Dallas 1990, writ denied) (noting previous cases when counsel's speedy action in moving to withdraw admissions was found to be a factor in good cause determination).

249. TEX. R. CIV. P. 169(2).

250. *See id.*

251. *See* Webb v. Ray, 944 S.W.2d 458, 460 (Tex. App.—Houston [14th Dist.] 1997, no writ); City of Houston v. Riner, 896 S.W.2d 317, 319 (Tex. App.—Houston [1st Dist.] 1995, writ denied); Boone v. Texas Employers' Ins. Ass'n, 790 S.W.2d 683, 688 (Tex. App.—Tyler 1990, no writ).

252. The party seeking to withdraw admissions should request a hearing on its motion. It should then notify the court reporter that a record of the hearing will be required. At the hearing, the moving party must present evidence and witnesses that are necessary to convince the trial court to permit withdrawal of the deemed admissions. Following the presentation of evidence, the party should obtain a ruling on its motion.

253. *See* Stelly v. Papania, 927 S.W.2d 620, 622 (Tex. 1996) (per curiam); *Webb*, 944 S.W.2d at 461; Graco Robotics, Inc. v. Oaklawn Bank, 914 S.W.2d 633, 642 (Tex. App.—Texarkana 1995, writ dism'd); *Riner*, 896 S.W.2d at 319; Ruiz v. Nicolas Trevino Forwarding Agency, Inc., 888 S.W.2d 86, 89 (Tex. App.—San Antonio 1994, no writ); Cudd v. Hydrostatic Transmission, Inc., 867 S.W.2d 101, 103 (Tex. App.—Corpus Christi 1993, no writ); Ramsey v. Criswell, 850 S.W.2d 258, 259 (Tex. App.—Texarkana 1993, no writ); Bell v. Hair, 832 S.W.2d 55, 56 (Tex. App.—Houston [14th Dist.] 1992, writ denied); Employers Ins. v. Halton, 792 S.W.2d 462, 467 (Tex. App.—Dallas 1990, writ denied); Rosenthal v. National Terrazzo Tile & Marble, Inc., 742 S.W.2d 55, 57 (Tex. App.—Houston [14th dist.] 1987, no writ). Mandamus relief is not available to review a trial court's actions on deemed

just, fair, equitable, and impartial adjudication of the rights of the litigants,[254] and that the purpose of Rule 169:

> is to simplify trials by eliminating matters about which there is no real controversy, but which may be difficult or expensive to prove. It was never intended to be used as a demand upon a plaintiff or defendant to admit that he had no cause of action or ground of defense.[255]

Furthermore, because the "ultimate purpose of discovery is to seek the truth,"[256] the rules should not be construed in a manner that will "prevent a litigant from presenting the truth" to the trier of facts.[257]

In *Employers Insurance of Wausau v. Halton*,[258] the court observed that there is an 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.[259] 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.[260] Consequently, even a weak excuse will suffice, particularly when the opposing party suffers no prejudice as a result of the delay.[261]

---

admissions. *See* Sutherland v. Moore, 716 S.W.2d 119, 121 (Tex. App.—El Paso 1986, orig. proceeding).

254. *See Stelly*, 927 S.W.2d at 622; *Cudd*, 867 S.W.2d at 104; North River Ins. Co. v. Greene, 824 S.W.2d 697, 700 (Tex. App.—El Paso 1992, writ denied) (citing TEX. R. CIV. P. 1).

255. *Stelly*, 927 S.W.2d at 622 (quoting Sanders v. Harder, 148 Tex. 593, 597, 227 S.W.2d 206, 208 (1950)); *see Cudd*, 867 S.W.2d at 104; *Greene*, 824 S.W.2d at 700.

256. *Stelly*, 927 S.W.2d at 622 (quoting Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984)).

257. *Id.* at 622; *see Cudd*, 867 S.W.2d at 104; *Greene*, 824 S.W.2d at 700 (citing Bynum v. Shatto, 514 S.W.2d 808, 811 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.)).

258. 792 S.W.2d 462 (Tex. App.—Dallas 1990, writ denied).

259. *See Wausau*, 792 S.W.2d at 465.

260. *See id.* at 465–66; Webb v. Ray, 944 S.W.2d 458, 460 (Tex. App.—Houston [14th Dist.] 1997, no writ); City of Houston v. Riner, 896 S.W.2d 317, 319 (Tex. App.—Houston [1st Dist.] 1995, writ denied); Cudd v. Hydrostatic Transmission, Inc., 867 S.W.2d 101, 104 (Tex. App.—Corpus Christi 1993, no writ); *see also* Fibreboard Corp. v. Pool, 813 S.W.2d 658, 683 (Tex. App.—Texarkana 1991, writ denied) (indicating that "[g]ood cause can be shown even though a party may have been negligent, if his negligence does not rise to the level of conscious indifference"), *cert. denied*, 508 U.S. 909 (1993).

261. *See Webb*, 944 S.W.2d at 460; *see also* Ramsey v. Criswell, 850 S.W.2d 258, 259 (Tex. App.—Texarkana 1993, no writ) (finding illness of counsel a sufficient excuse); North

Under Rule 215(4), "an evasive or incomplete answer may be treated as a failure to answer."[262] The requesting party may challenge the sufficiency of the answers or objections, and if the court finds the answer insufficient under Rule 169, it may order the matter admitted or order an amended answer to be served.[263] The trial court's order is reviewed for an abuse of discretion based upon the entire record.[264]

2. Amending Admissions

A party may amend or replace an admission "upon a showing of good cause for such withdrawal . . . if the court finds that the parties relying upon the responses . . . will not be unduly prejudiced and that the presentation of the merits of the action will be subserved thereby."[265] The same considerations applicable to a motion to withdraw deemed admissions apply to a party who seeks to withdraw his original response and substitute it with a new response.[266] Accordingly, the trial court has broad discretion in permitting the withdrawal or amendment of admissions, and its ruling will only be set aside on appeal if it amounted to a clear abuse of discretion.[267]

3. Supplementation of Discovery Responses

Pursuant to Rule 166b(6),[268] a party whose responses to a discovery request were correct and complete when made is not generally under a duty to supplement the response to include information acquired after it was made.[269] However, a duty to supplement may

---

River Ins. Co. v. Greene, 824 S.W.2d 697, 701 (Tex. App.—El Paso 1992, writ denied) (identifying a calendar diary error as a sufficient cause); Esparza v. Diaz, 802 S.W.2d 772, 776 (Tex. App.—Houston [14th Dist.] 1990, no writ) (emphasizing lack of prejudice to opposing party in finding good cause). However, while a clerical error may constitute good cause, being busy and overworked does not. *See Greene*, 824 S.W.2d at 700–01.

262. TEX. R. CIV. P. 215(4)(a).

263. *See* TEX. R. CIV. P. 215(4)(b); *see also* United States Fire Ins. Co. v. Maness, 775 S.W.2d 748, 749-50 (Tex. App.—Houston [1st Dist.] 1989, writ ref'd) (affirming the trial court's decision to deem matters admitted).

264. *See Maness*, 775 S.W.2d at 751.

265. Stelly v. Papania, 927 S.W.2d 620, 622 (Tex. 1996) (per curiam) (quoting TEX. R. CIV. P. 169(2)).

266. *See id.*

267. *See id.*

268. TEX. R. CIV. P. 166b(6).

269. *See id.*

exist if (1) imposed by order of the court;[270] (2) created by agreement of the parties;[271] (3) needed to prevent the response from being or becoming misleading;[272] (4) necessary to include an expert intended to be called when his identity or the subject matter of his testimony has not already been disclosed in response to a proper inquiry directly addressed to the matter;[273] or (5) required to document that an expert has changed his opinion about a material issue after being deposed.[274] This fifth duty is imposed because a last minute, material alteration in the expert's testimony is just as damaging as the complete failure to list an expert.[275]

The party supplementing discovery must serve his supplemental discovery not less than thirty days prior to the beginning of trial unless the court finds good cause for allowing late supplementation.[276] Pursuant to Rule 215(5), the sanction for failure to comply with the duty to supplement is the automatic exclusion of the evidence affected by the violation,[277] unless the offending party demonstrates good cause for the failure to supplement.[278] If good cause is not shown, the trial court has no choice but to apply the automatic sanction of Rule 215(5).[279]

One court has observed that the severity and potential unfairness of the application of the automatic sanction should not color the reviewing court's consideration of what is, and what is not, good cause.[280] In its opinion, "[t]he salutary purpose of Rule

---

270. *See* TEX. R. CIV. P. 166b(6)(c).

271. *See id.*

272. *See* TEX. R. CIV. P. 166b(6)(a)(1) & (2); Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989).

273. *See* TEX. R. CIV. P. 166b(6)(b).

274. *See* Aluminum Co. of America v. Bullock, 870 S.W.2d 2, 4 (Tex. 1994); Exxon Corp. v. West Tex. Gathering Co., 868 S.W.2d 299, 304 (Tex. 1993).

275. *See West Tex. Gathering Co.*, 868 S.W.2d at 305; Collins v. Collins, 904 S.W.2d 792, 801 (Tex. App.—Houston [1st Dist.] 1995), *writ denied per curiam*, 923 S.W.2d 569 (Tex. 1996).

276. *See* TEX. R. CIV. P. 166b(6).

277. *See* Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671 (Tex. 1990).

278. *See* TEX. R. CIV. P. 215(5); McKinney v. National Union Fire Ins. Co., 772 S.W.2d 72, 74 (Tex. 1989); Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395 (Tex. 1989). The automatic exclusion in Rule 215(5) does not apply when the original trial date is continued, and the date set is more than 30 days from the date of the original trial date. *See* H.B. Zachry Co. v. Gonzalez, 847 S.W.2d 246, 246 (Tex. 1993) (orig. proceeding).

279. *See* Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 914 (Tex. 1992).

280. *See* Klekar v. Southern Pac. Transp. Co., 874 S.W.2d 818, 825 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

215(5) is to require complete responses to discovery so as to promote responsible assessment of settlement and to prevent trial by ambush."[281] The trial court's determination on the issue of good cause will not be set aside unless there is an abuse of discretion.[282] 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 that the trial court's error was reasonably calculated to cause and probably did cause the rendition of an improper judgment.[283] For example, if the failure to supplement concerns a failure to designate a witness, and the witness testified about a material, disputed matter, the appellate court will probably reverse.[284] If the undesignated witness testified about matters that were cumulative of other evidence, the appellate court will probably hold the error harmless and affirm.[285] An examination of the entire record is necessary to determine the likelihood that the error actually caused an improper judgment to be rendered.[286]

a. Fact Witnesses

In general, a party must disclose the identity of "any potential party [or] persons having knowledge of relevant facts."[287] If after a proper discovery request, a fact witness is not disclosed at least thirty days prior to the beginning of trial, the witness cannot be called to testify.[288] There are two exceptions to this harsh sanction.

---

281. Aetna Cas. & Sur. Co. v. Specia, 849 S.W.2d 805, 807 (Tex. 1993) (orig. proceeding) (quoting *Alvarado*, 830 S.W.2d at 914).

282. *See* Morrow v. H.E.B., Inc., 714 S.W.2d 297, 298 (Tex. 1986); Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 442 (Tex. 1984).

283. *See* TEX. R. APP. P. 44.1; *Alvarado*, 830 S.W.2d at 917; McKinney v. National Union Fire Ins. Co., 772 S.W.2d 72, 75 (Tex. 1989).

284. *See* Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989); Collins v. Collins, 904 S.W.2d 792, 802 (Tex. App.—Houston [1st Dist.] 1985, *writ denied per curiam*, 923 S.W.2d 569 (Tex. 1996) (en banc).

285. *See Boothe*, 766 S.W.2d at 789; *Collins*, 904 S.W.2d at 802.

286. *See McKinney*, 772 S.W.2d at 75; Pittman v. Baladez, 158 Tex. 372, 381, 312 S.W.2d 210, 216 (1958).

287. TEX. R. CIV. P. 166b.

288. *See* Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 915 (Tex. 1992); Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671 (Tex. 1990); Clark v. Trailways, Inc., 774 S.W.2d 644, 646 (Tex. 1989); McKinney v. National Union Fire Ins. Co., 772 S.W.2d 72, 75 (Tex. 1989); *Boothe*, 766 S.W.2d at 789; Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395 (Tex. 1989); E.F. Hutton & Co. v. Youngblood, 741 S.W.2d 363, 364 (Tex. 1987); Gutierrez v. Dallas Indep. Sch. Dist., 729 S.W.2d 691, 693 (Tex. 1987); Morrow v. H.E.B., Inc., 714

Under the first exception, a party may demonstrate good cause, on the record, to allow testimony of the witness.[289] Unfortunately, trying to define "good cause" is like trying to define "abuse of discretion." It is usually easier to define what is not "good cause."[290] This concept requires a showing of good cause for the admission of the late designated witness's testimony, rather than good cause for the failure to timely designate the witness.[291]

Under the second exception, a party to the suit, although not disclosed as a person with knowledge of relevant facts in response to interrogatories propounded by the opposing party, may testify at trial "when [the] identity [of the party] is certain and when his or her personal knowledge of relevant facts has been communicated

---

S.W.2d 297, 298 (Tex. 1986); Yeldell v. Holiday Hills Retirement & Nursing Ctr., Inc., 701 S.W.2d 243, 246 (Tex. 1985).

289. *See Gee*, 765 S.W.2d at 395–96.

290. *See Alvarado*, 830 S.W.2d at 914 (observing that defining good cause rule is very problematic). The Texas Supreme Court has stated that the importance of the witness to the case should not be considered as an element in determining good cause. *See Clark*, 774 S.W.2d at 646. In contrast, lack of surprise may be considered as a factor in determining good cause. *See Gee*, 765 S.W.2d at 395 n.2. However, it is not enough in itself to establish good cause. *See Morrow*, 714 S.W.2d at 298. The importance of the testimony cannot be considered in determining whether good cause exists for failure to properly designate the witness. *See Alvarado*, 830 S.W.2d at 915; *Clark*, 774 S.W.2d at 645–46. Likewise, a party's claim that a denial of the testimony will cause it "great harm" does not establish good cause. *See* Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989). In *Clark*, the plaintiff attempted to introduce the testimony of the investigating officer who had not been located until ten days before trial. *See Clark*, 774 S.W.2d at 64. The court indicated that if a witness has been difficult to locate, the party attempting to introduce the evidence must demonstrate: (1) when the use of the witness was anticipated; (2) when the witness was located; and (3) what good faith efforts were made to locate them. *See id.* Mere failure to locate the witness until the last minute, then, will not suffice absent sufficient efforts to locate them. *See id.; see also* K-Mart Corp. v. Grebe, 787 S.W.2d 122, 126 (Tex. App.—Corpus Christi 1990, writ denied) (finding the plaintiff's search for a witness to be insufficient). The fact that a party expected a case to settle and, therefore, did not contact a witness until the day of trial, does not constitute good cause. *See* Rainbo Baking Co. v. Stafford, 787 S.W.2d 41, 41 (Tex. 1990). In addition, the fact that a witness's identity is known to all parties is not in itself good cause for the failure to supplement. *See Sharp*, 784 S.W.2d at 671. The Texas Supreme Court has noted that "a party is entitled to prepare for trial assured that a witness will not be called because opposing counsel has not identified him or her in response to a proper interrogatory." *Id.* Accordingly, the court held that the fact that a witness has been fully deposed (even if only his deposition testimony will be offered at trial) "is not enough to show good cause for admitting the evidence when the witness was not identified in response to discovery." *Id.* Inadvertence of counsel does not satisfy the good cause exception. *See* Remington Arms Co. v. Canales, 837 S.W.2d 624, 625 (Tex. 1992) (orig. proceeding); *Sharp*, 748 S.W.2d at 672.

291. *See Clark*, 774 S.W.2d at 645.

to all other parties, through pleadings by name and response to other discovery at least thirty . . . days in advance of trial."[292]

b. Expert Witnesses

Under Rule 166b(2)(e), there are four types of experts: (i) the testifying expert (the identity and reports of an expert designated by a party as a witness who will testify are discoverable); (ii) the nontestifying expert, whose opinions or reports are reviewed by testifying experts (if a testifying expert reviews the opinions, impressions or report of the nontestifying expert, the identity and reports of the nontestifying expert are discoverable); (iii) the consultant not hired in anticipation of litigation (the identity and reports of these experts are discoverable, irrespective of whether they will testify);[293] and (iv) the nontestifying consultant hired in anticipation of litigation (the identity and experts of these experts are not discoverable).[294]

Upon proper request, the failure to designate an expert as soon as is practical, and at least thirty days prior to the beginning of trial, will result in the automatic exclusion of the expert's testimony unless leave of court has been granted.[295] The only way to overcome this sanction is with a showing of good cause.[296] Factors that alone do not show good cause include: "(1) inadvertence of counsel, (2) lack of surprise, unfairness, or ambush, (3) uniqueness of the excluded evidence, (4) the fact that a witness has been deposed[297]

---

292. Henry S. Miller Co. v. Bynum, 836 S.W.2d 160, 162 (Tex. 1992); Smith v. Southwest Feed Yards, 835 S.W.2d 89, 91 (Tex. 1992); *see* Rogers v. Stell, 835 S.W.2d 100, 101 (Tex. 1992) (per curiam); Morris v. Short, 902 S.W.2d 566, 569-70 (Tex. App.—Houston [1st Dist.] 1995, writ denied); Guerrero v. Sanders, 846 S.W.2d 354, 356 (Tex. App.—Fort Worth 1992, no writ); Browne v. Las Pintas Ranch, Inc., 845 S.W.2d 370, 372-73 (Tex. App.—Houston [1st Dist.] 1992, no writ).

293. *See* Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 554 (Tex. 1990).

294. *See* TEX. R. CIV. P. 166b(2)(e).

295. *See* TEX. R. CIV. P. 166b(6)(b); TEX. R. CIV. P. 215(5); Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 914 (Tex. 1992); Morrow v. H.E.B., Inc., 714 S.W.2d 297, 297 (Tex. 1986); Collins v. Collins, 904 S.W.2d 792, 800 (Tex. App.—Houston [1st Dist.] 1995), *writ denied per curiam*, 923 S.W.2d 569 (Tex. 1996) (en banc).

296. *See* TEX. R. CIV. P. 166b(6)(b); Mentis v. Barnard, 870 S.W.2d 14, 15 (Tex. 1994); *Henry S. Miller Co.*, 836 S.W.2d at 162; Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671–72 (Tex. 1990); Clark v. Trailways, Inc., 774 S.W.2d 644, 646 (Tex. 1989).

297. *See* Rodriguez v. Hyundai Motor Co., 944 S.W.2d 757, 765–66 (Tex. App.—Corpus Christi 1997, writ granted); *In re* Striegler, 915 S.W.2d 629, 642 (Tex. App.—Amarillo 1996, writ denied); Patton v. Saint Joseph's Hosp., 887 S.W.2d 233, 239 (Tex. App.—Fort Worth 1994, writ denied).

[and (5)] the amount of time an expert had to prepare a report or form an opinion before trial."[298] A combination of these factors may show good cause.[299]

Rule 166(b)(6) provides that expert witnesses must be disclosed in response to a proper discovery request "as soon as is practical, but in no event less than thirty days prior to the beginning of trial except on leave of court."[300] However, the Texas Supreme Court has observed that the rule does not provide a time period by which a party must actually decide to retain its testifying experts.[301] The court also noted that the rule does not "require identification immediately upon contacting an expert for potential testimony."[302] Therefore, all the rule requires is that an attorney communicate the designation "as soon as practical" once it is finally decided that the expert is expected to testify.[303] The trial court is required to consider good cause for late identification only if it finds that the witness was not designated as soon as was practical.[304] Simply showing the trial court how long the case has been on file does not establish that the designation at an earlier date would have been practical.[305] The courts of appeals have considered the "as soon as practical" provision and have so far reached inconsistent results.[306]

---

298. *Rodriguez*, 944 S.W.2d at 765–66.

299. *See id.*; *In re* Striegler, 915 S.W.2d at 642; *Patton*, 887 S.W.2d at 239.

300. TEX. R. CIV. P. 166b(6)(b).

301. *See* Mentis v. Barnard, 870 S.W.2d 14, 16 (Tex. 1994).

302. *Mentis*, 870 S.W.2d at 16.

303. *See id.*

304. *See id.* at 15.

305. *See id.* at 16.

306. Tinsley v. Downey, 822 S.W.2d 784, 786 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding [leave denied]). In *Tinsley*, the appellate court recognized the division among the courts of appeals and reached a conclusion similar to the conclusion reached two years later by the Texas Supreme Court in *Mentis*. *See id.* at 786. Some Texas appellate courts have applied a more stringent standard. *See* First Title Co. of Waco v. Garrett, 802 S.W.2d 254, 263 (Tex. App.—Waco 1990), *rev'd on other grounds*, 860 S.W.2d 74 (Tex. 1993); Williams v. Crier, 734 S.W.2d 190, 192-93 (Tex. App.—Dallas 1987, orig. proceeding); Builder's Equip. Co. v. Onion, 713 S.W.2d 786, 788 (Tex. App.—San Antonio 1986, orig. proceeding). Other appellate courts have applied a much more lenient standard. *See* Pedraza v. Peters, 826 S.W.2d 741, 744-45 (Tex. App.—Houston [14th Dist.] 1992, no writ); Mother Frances Hosp. v. Coats, 796 S.W.2d 566, 570-71 (Tex. App.—Tyler 1990, orig. proceeding).

c. Rebuttal Witnesses

The fact that a witness will be used only as a rebuttal witness[307] does not eliminate the obligation to disclose their identity pursuant to the duty to supplement discovery; thus, the party offering the witness's testimony must still demonstrate good cause for the late disclosure.[308] Good cause may be established when counsel is unable to anticipate the need for such rebuttal evidence.[309]

4. Mandamus Review of Discovery Rulings

In *Walker v. Packer*[310] the supreme court established tighter parameters to limit future review of discovery rulings by writ of mandamus.[311] The court stated that there are approximately six categories of discovery rulings that would be properly the subject of mandamus review: first, when a trial court erroneously orders the discovery of privileged, confidential, or otherwise protected information which will materially affect the rights of the aggrieved party;[312] second, when a trial court "compels the production of patently irrelevant or duplicative documents such that it constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party";[313] third, when a trial court's order vitiates or severely compromises the party's ability to present a viable claim or defense at

307. "Rebuttal evidence" is evidence offered to disprove facts given in evidence by an adverse party. *See* Apresa v. Montford Ins. Co., 932 S.W.2d 246, 251 (Tex. App.—El Paso 1996, no writ); Valley Indus., Inc. v. Cook, 767 S.W.2d 458, 462 (Tex. App.—Dallas 1988, writ denied).

308. *See* Alvarado v. Farah Mgf. Co., 830 S.W.2d 911, 916-17 (Tex. 1992); Ramos v. Champlin Petroleum Co., 750 S.W.2d 873, 876 (Tex. App.—Corpus Christi 1988, writ denied); Greenstein, Logan & Co. v. Burgess Mktg., Inc., 744 S.W.2d 170, 178-79 (Tex. App.—Waco 1987, writ denied).

309. *See* Gannett Outdoor Co. of Tex. v. Kubeczka, 710 S.W.2d 79, 84 (Tex. App.—Houston [14th Dist.] 1986, no writ) (approving the admission of expert's testimony based on good cause when need for his testimony as rebuttal witness could not have been anticipated prior to unexpected false testimony of the opponent's witness).

310. 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

311. *See* Tilton v. Marshall, 925 S.W.2d 672, 681-82 (Tex. 1996) (orig. proceeding) (reaffirming *Walker's* requirement of compelling circumstances).

312. *See Walker*, 827 S.W.2d at 843 (discussing writ of mandamus in the context of attorney-client privilege and discussing writ of mandamus in the context of trade secrets) (citing West v. Solito, 563 S.W.2d 240 (Tex. 1978) (orig. proceeding) and Automatic Drilling Machs. v. Miller, 515 S.W.2d 256 (Tex. 1974) (orig. proceeding)).

313. *Id.* (citing Sears, Roebuck & Co. v. Ramirez, 824 S.W.2d 558 (Tex. 1992) and General Motors Corp. v. Lawrence, 651 S.W.2d 732 (Tex. 1983)); *see* Texas Water Comm'n

trial so that the trial could be a waste of judicial resources;[314] fourth, when the trial court's denial of discovery that goes "to the heart of a party's case";[315] fifth, when the trial court denies discovery "and the missing discovery cannot be made a part of the appellate record";[316] and sixth, when the trial court denies discovery and "refuses to make the requested discovery part of the record."[317]

Under *Walker*, an appellate court will issue mandamus to set aside a discovery order when the trial court fails to perform a clear legal duty, or commits a clear abuse of discretion;[318] when there is no adequate remedy by appeal;[319] and, in the supreme court, when the proceeding raises issues important to the state's jurisprudence.[320] A trial court abuses its discretion when its order is "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law."[321] As to the resolution of fact issues, the trial court's decision is binding and may only be set aside if the trial court could have reached only one decision.[322] However, as to the resolution of legal issues, the trial court's decision is not binding on appellate

---

v. Dellana, 849 S.W.2d 808, 810 (Tex. 1993) (orig. proceeding) (per curiam) (granting mandamus relief to vacate order compelling production of "patently irrelevant" discovery).

314. *See Walker*, 827 S.W.2d at 843 (reiterating its holding that "when a trial court imposes discovery sanctions which have the effect of *precluding a decision on the merits of a parties claims*-such as by striking pleadings, dismissing an action, or rendering default judgment-a party's remedy by eventual appeal is inadequate, unless the sanctions are imposed simultaneously with the rendition of a final, appealable judgment") (citing Trans-American Natural Gas Corp. v. Powell, 811 S.W.2d 913, 919 (Tex. 1991) (orig. proceeding)).

315. Walker v. Packer, 872 S.W.2d 843 (Tex. 1992) (orig. proceeding).

316. *Walker*, 872 S.W. at 843 (citing Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 558 (Tex. 1990)).

317. *Id.* (citing *Tom L. Scott, Inc.*, 798 S.W.2d at 558).

318. *See id.* at 839–40; McGough v. First Court of Appeals, 842 S.W.2d 637, 640 (Tex. 1992) (orig. proceeding) (per curiam); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 271 (Tex. 1992) (orig. proceeding); Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding); Jampole v. Touchy, 673 S.W.2d 569, 572 (Tex. 1984) (orig. proceeding).

319. *See McGough*, 842 S.W.2d at 640; *Tipps*, 842 S.W.2d at 271; *Walker*, 827 S.W.2d at 840; *Johnson*, 700 S.W.2d at 917; *Jampole*, 673 S.W.2d at 573.

320. *See* Tilton v. Marshall, 925 S.W.2d 672, 682 (Tex. 1996) (orig. proceeding) (citing *Walker*, 827 S.W.2d at 839, 840–41 n.7).

321. Walker v. Packer, 827 S.W.2d 839 (Tex. 1996) (orig. proceeding) (quoting *Johnson*, 700 S.W.2d at 917); *see McGough*, 842 S.W.2d at 640 (holding that a clear abuse of discretion is an act that is arbitrary, capricious, and without reference to guiding principles).

322. *See Walker*, 827 S.W.2d at 839-40 (citing Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 41-42 (Tex. 1989), and *Johnson*, 700 S.W.2d at 918). The mere fact that the

courts.[323] Accordingly, a failure to properly analyze or apply the law will constitute an abuse of discretion.[324]

A fundamental tenet of mandamus review is that the party seeking relief must establish that there is no adequate remedy at law.[325] Because mandamus is such an extraordinary remedy, it is available "only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies."[326] Remedy by appeal is not inadequate merely because it may cause more expense or delay than mandamus review.[327] Mandamus review "is justified only when parties stand to lose their substantial rights."[328]

The scope of review in a mandamus proceeding includes certified or sworn copies of the order complained of, other relevant exhibits,[329] and the reporter's record from the hearing on the complained of matter.[330] The failure of a party to include the reporter's record on appeal may cause the appellate court to presume that the trial court's ruling was actually supported by it.[331] In some instances, there is no need for a reporter's record when the trial court makes its determination without a hearing. In such a case, the relator should file an affidavit stating that the trial court's decision was

---

reviewing court would have decided the case differently is not a sufficient basis to disturb the trial court's ruling unless it is arbitrary and unreasonable. *See id.* at 840.

323. *See id.* at 840.

324. *See id.* (citing Joachim v. Chambers, 815 S.W.2d 234, 240 (Tex. 1991), and NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989), and Eanes Indep. Sch. Dist. v. Logue, 712 S.W.2d 741, 742 (Tex. 1986)).

325. *See id.* at 840 (citing Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 684 (Tex. 1989)).

326. Walker v. Packer, 827 S.W.2d 833 (Tex. 1992) (orig. proceeding) (citing *Holloway*, 767 S.W.2d at 684 (quoting JAMES SALES, ORIGINAL JURISDICTION OF THE SUPREME COURT AND THE COURTS OF CIVIL APPEALS OF TEXAS IN APPELLATE PROCEDURE IN TEXAS, § 1.4[1][b], at 47 (2d ed. 1979))); *see* Deloitte & Touche, L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394, 396 (Tex. 1997) (orig. proceeding) (noting that "mandamus is an extraordinary proceeding, encompassing an extraordinary remedy"); Republican Party v. Dietz, 940 S.W.2d 86, 88 (Tex. 1997) (referring to mandamus as "an extraordinary remedy . . . available in only limited circumstances" (quoting *Walker*, 827 S.W.2d at 840)); Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex. 1996) (reiterating that mandamus is "an extraordinary remedy, reserved for 'manifest and urgent necessity'" (quoting *Holloway*, 767 S.W.2d at 684)); Montalvo v. Fourth Court of Appeals, 917 S.W.2d 1, 2 (Tex. 1995) (orig. proceeding) (reaffirming that mandamus is an extraordinary remedy).

327. *See Walker*, 827 S.W.2d at 842.

328. *Id.* (quoting Iley v. Hughes, 158 Tex. 362, 368, 311 S.W.2d 648, 652 (1958)).

329. *See* TEX. R. APP. P. 52.3(j).

330. *See* TEX. R. APP. P. 52.3(g) & (j).

331. *See* Englander Co. v. Kennedy, 428 S.W.2d 806, 807 (Tex. 1968) (per curiam).

made without a hearing.[332] Instead of a reporter's record, the relator may include a "verified affidavit" of all facts necessary to establish the right to mandamus relief.[333] However, a reporter's record from the hearing is preferable.[334]

5. Appellate Review of Discovery Rulings

In an appeal from a discovery ruling or evidentiary ruling, the appellant must preserve error by presenting to the trial court a timely request, objection or motion, setting forth the specific basis for the request, objection or motion and by obtaining a ruling on its request, objection or motion.[335] In discovery matters, the appellate record should contain the discovery request at issue, along with any relevant objections and motions. Before an issue can be raised in an appellate court, the party must have raised the argument in the trial court.[336] The record must also contain a reporter's record from any evidentiary hearing held on the discovery issue. Finally, the standard of review is whether the trial court's order in light of the entire record and all of the offending party's conduct "was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment."[337]

---

332. *See* Barnes v. Whittington, 751 S.W.2d 493, 495 (Tex. 1988).

333. *See* TEX. R. APP. P. 52.3(j)(1)(D); *see also Barnes*, 751 S.W.2d at 495 (finding that a verified affidavit will satisfy relator's burden under Rule 121).

334. *See* TEX. R. APP. P. 52.3. If the court reporter cannot prepare the reporter's record as quickly as necessary, the relator should file the clerk's record and include a notation that the reporter's record has been requested and will be filed as soon as it is prepared.

335. *See* TEX. R. APP. P. 33.1.

336. *See* H.E. Butt Grocery Co. v. Williams, 751 S.W.2d 554, 556 (Tex. App.—San Antonio 1988, orig. proceeding) (holding that the failure to raise the issue of waiver at the trial court level precludes raising the argument in the appellate courts); Garcia v. Allen, 751 S.W.2d 236, 238 (Tex. App.—San Antonio 1988, writ denied) (ruling that complaint that interrogatories were too broad cannot be raised for the first time on appeal).

337. TEX. R. APP. P. 44.1; *see* Ramirez v. Otis Elevator Co., 837 S.W.2d 405, 409-10 (Tex. App.—Dallas 1995, writ denied); Lucas v. Titus County Hosp. Dist., No. 06-96-00069-CV (Tex. App.-Texarkana Mar. 13, 1998, no pet. h.) (not released for publication yet), 1998 WL 107989, at *10; *see also* Brunner v. Exxon Co., U.S.A., 752 S.W.2d 679, 682 (Tex. App.—Dallas 1988, writ denied) (warning that a "denial . . . [must be such] as was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment.").

O. *Discovery Sanctions*

The purpose of discovery is "to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial."[338] Rule 215(3), which authorizes trial courts to impose appropriate sanctions upon persons who abuse the discovery process, provides that orders imposing such sanctions "shall be subject to review on appeal from the final judgment."[339] There is no provision for interlocutory appeal; therefore, "[d]iscovery sanctions are not appealable until the district court renders a final judgment."[340]

Whether a sanctioned party may pursue a mandamus is determined by whether the trial court abused its discretion and whether the party has an adequate remedy by appeal.[341] If a sanctioned party has an adequate remedy at law, then mandamus is not available.[342] However, in *TransAmerican Natural Gas Corp. v. Powell*,[343] the supreme court held that when sanctions "have the effect of adjudicating a dispute, whether by striking pleadings, dismissing an action or rendering a default judgment, but . . . do not result in rendition of an appealable judgment, then the eventual remedy by appeal is inadequate."[344] Whether a trial court's sanction is reviewable by mandamus or by appeal is not clear in every case. "Death penalty" sanctions (striking pleadings and dismissing causes or defaulting defendants) are clearly reviewable by mandamus.[345] In addition, a monetary sanction may be reviewed by mandamus if it "raises the real possibility that a party's willingness or

338. Chapa v. Garcia, 848 S.W.2d 667, 668 (Tex. 1992) (orig. proceeding) (quoting Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 553 (Tex. 1990) (orig. proceeding)); *see* State v. Lowry, 802 S.W.2d 669, 671 (Tex. 1991) (observing that "discovery is [thus] the linchpin of the search for truth. . .").

339. TEX. R. CIV. P. 215(3).

340. Braden v. Downey, 811 S.W.2d 922, 928 (Tex. 1991) (quoting Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986)).

341. *See* Walker v. Packer, 827 S.W.2d 839 (Tex. 1992) (orig. proceeding); TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 919 (Tex. 1991) (orig. proceeding).

342. *See TransAmerican*, 811 S.W.2d at 919 (citing State v. Walker, 679 S.W.2d 484, 485 (Tex. 1984)).

343. 811 S.W.2d 913, 919 (Tex. 1991).

344. *TransAmerican*, 811 S.W.2d at 919.

345. *See id.* Death penalty sanctions are also limited by constitutional due process. *See* U.S. CONST. amend. XIV, § 1; TEX. CONST. art. I, § 19; *TransAmerican*, 811 S.W.2d at 917. Consequently, courts have strictly applied the requirements to impose sanctions, especially death penalty sanctions. *See* Hamill v. Level, 917 S.W.2d 15, 16 (Tex. 1996).

ability to continue the litigation will be significantly impaired."[346] There is a split among the courts of appeals on the issue of whether the striking of a party's witnesses may be reviewed by mandamus.[347]

Rule 215 permits a wide range of sanctions for a variety of purposes: "to secure compliance with the discovery rules, to deter

---

346. Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991) (quoting Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986)). In *Braden*, the court found that the large monetary sanction which had to be paid before supersedeas and appeal would be allowed was reviewable by mandamus. *See id.*; *see also* Ford Motor Co. v. Tyson, 943 S.W.2d 527, 534 (Tex. App.—Dallas 1997, orig. proceeding) (finding sanction of $10,000,000 was reviewable by mandamus). *But cf.* Stringer v. Eleventh Court of Appeals, 720 S.W.2d 801, 802 (Tex. 1986) (orig. proceeding) (per curiam) (ruling that a sanction of $200 in attorney's fees was not reviewable by mandamus); Street v. Second Court of Appeals, 715 S.W.2d 638, 639-40 (Tex. 1986) (per curiam) (holding that a sanction of $1,050 in attorney's fees or striking of pleadings was not reviewable by mandamus); Kern v. Gleason, 840 S.W.2d 730, 734, 739 (Tex. App.—Amarillo 1992, orig. proceeding) (deciding that sanctions of $5,100 and $2,850 in attorney's fees were not reviewable by mandamus); Susman Godfrey, L.L.P. v. Marshall, 832 S.W.2d 105, 107, 109 (Tex. App.—Dallas 1992, orig. proceeding) (asserting that a sanction of $25,000 against a law firm and a client was not reviewable by mandamus). If the court's imposition of monetary sanctions threatens a party's ability to continue the litigation, appeal is an adequate remedy only if the court defers payment of the sanction until the court renders final judgment. *See Braden*, 811 S.W.2d at 929. To preserve the issue, the sanctioned party must complain that the monetary sanction precludes his access to the court. *See id.* If the sanctioned party complains, the trial court must either provide that the sanction is payable at the time a final judgment is rendered, or make express written findings after a prompt hearing explaining why the sanction does not have a preclusive effect. *See id.*

347. *Compare* Pope v. Davidson, 849 S.W.2d 916, 920 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (concluding that striking a witness' testimony in part may be presented to and reviewed by court on appeal, and therefore, does not warrant mandamus), *and* City of Port Arthur v. Sanderson, 810 S.W.2d 476, 477 (Tex. App.—Beaumont 1991, orig. proceeding) (holding that striking all of a party's expert witnesses is *not* reviewable by mandamus because the affected party may make a bill of exceptions and present the complaint on appeal), *and* Humana Hosp. Corp. v. Casseb, 809 S.W.2d 543, 546 (Tex. App.—San Antonio 1991, orig. proceeding) (ruling that striking an expert witness may be reviewed on appeal by bill of exceptions), *with* Revco, D.S., Inc. v. Cooper, 873 S.W.2d 391, 395 (Tex. App.—El Paso 1994, orig. proceeding) (concluding that mandamus could lie when court excluded experts for late designation), *and* Mother Frances Hosp. v. Coats, 796 S.W.2d 566, 571-72 (Tex. App.—Tyler 1990, orig. proceeding) (finding that when an order striking witnesses amounts to an emasculation of a party's defense, an appeal is not an adequate remedy and mandamus will lie), *and* Williams v. Crier, 734 S.W.2d 190, 193 (Tex. App.—Dallas 1987, orig. proceeding) (accepting the argument that striking three witnesses should be reviewable by mandamus). Until a bright line rule is created (which probably will not occur), Justice Peeples' analysis of the issue remains correct: "The law does not permit pretrial mandamus review of witness-exclusion rulings except in extreme cases of complete emasculation" of a party's case. *Casseb*, 809 S.W.2d at 548 (Peeples, J., concurring).

other litigants from similar misconduct, to punish violators,"[348] "to insure a fair trial, to compensate a party for past prejudice, . . . and to deter certain bad faith conduct."[349] The sanctions, however, must be "just."[350] Whether the sanctions are just (*i.e.*, whether the trial court has abused its discretion) is determined by a two-pronged analysis.

The first prong of this analysis requires that "a direct relationship . . . exist between the offensive conduct and the sanction imposed."[351] Accordingly, the sanction imposed against the offending party "must be directed against the abuse and toward remedying the prejudice caused to the innocent party."[352] In other words, the sanctions must be specifically tailored to the abuse found.[353]

The second prong of this analysis requires that the sanction not be excessive—it must fit the crime.[354] The sanction should not be more severe than necessary to satisfy its legitimate purposes (*i.e.*, to promote compliance).[355] Moreover, as a general rule, a trial court should always impose lesser sanctions first, before imposing a death penalty sanction.[356]

In determining whether the sanction imposed is just, the appellate court may consider the "entire record of the case up to and

---

348. Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 849 (Tex. 1992) (orig. proceeding) (citing Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986)).

349. Aetna Cas. & Sur. Co. v. Specia, 849 S.W.2d 805, 807 n.4 (Tex. 1993) (orig. proceeding).

350. *See* TEX. R. CIV. P. 215(2)(b); Remington Arms Co. v. Caldwell, 850 S.W.2d 167, 171 (Tex. 1993) (orig. proceeding); *Blackmon*, 841 S.W.2d at 849; TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 930 (Tex. 1991) (orig. proceeding); *see also Braden*, 811 S.W.2d at 938 (asserting that "[j]ustice should not tolerate [discovery] abuse, but injustice cannot remedy it.").

351. *TransAmerican*, 811 S.W.2d at 917; Hamill v. Level, 917 S.W.2d 15, 16 (Tex. 1996).

352. *TransAmerican*, 811 S.W.2d at 917.

353. *See id.*

354. *See id.*

355. *See* TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 919 (Tex. 1991) (orig. proceeding).

356. *See* Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 849 (Tex. 1992) (orig. proceeding) (citing Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986)) (holding that lesser sanctions will suffice if they "promote compliance, deterrence, and discourage further abuse" (quoting *TransAmerican*, 811 S.W.2d at 917)); *see also* Hamill v. Level, 917 S.W.2d 15, 16 (Tex. 1996) (disapproving the appellate court's conclusion that a trial court is not required to first impose lesser sanctions before ordering death penalty sanction).

including the motion to be considered."[357] Therefore, the trial court is not limited to considering only the specific violation committed, but is entitled to consider other conduct occurring during discovery.[358]

In appropriate cases, the supreme court has encouraged trial judges to prepare written findings that set forth the trial court's reasons for imposing severe sanctions.[359] However, written findings are not required because they are often unnecessary and constitute an undue burden on the trial court.[360] Moreover, appellate courts are not required to defer to the trial court's written findings.[361] The reviewing court will review the findings in the same manner as findings in a nonjury case tried on the merits.[362]

---

357. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241 (Tex. 1985); Hartford Accident & Indem. Co. v. Abascal, 831 S.W.2d 559, 561 (Tex. App.—San Antonio 1992, orig. proceeding); *see* Garcia Distrib., Inc. v. Fedders Air Conditioning, USA, Inc., 773 S.W.2d 802, 806–07 (Tex. App.—San Antonio 1989, writ denied); 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).

358. *See Hartford Accident & Indem. Co.*, 831 S.W.2d at 561; *Garcia Distrib., Inc.*, 773 S.W.2d at 806–07; *Overstreet*, 747 S.W.2d at 826; *Medical Protective Co.*, 721 S.W.2d at 388. In *TransAmerican*, Justice Gonzalez identified fourteen factors commonly used to analyze sanctions under Rule 11 of the Federal Rules of Civil Procedure. *See Transamerican*, 811 S.W.2d at 920–21 (Gonzalez, J., concurring). In *Pelt v. Johnson*, 818 S.W.2d 212, 216 (Tex. App.—Waco 1991, orig. proceeding), and *Hanley v. Hanley*, 813 S.W.2d 511, 517–18 (Tex. App.—Dallas 1991, no writ), the Waco and Dallas Courts of Appeals adopted the six factors used by the Third Circuit in *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868–70 (3d Cir. 1984), to analyze whether the conduct warranted the particular sanction imposed. *See generally* Lisa Ann Mokry, Note, *Discovery Sanctions Must Be "Just," Consistent with Due Process, and Are Subject to Mandamus Review*: TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991), 23 TEX. TECH L. REV. 617, 640 (1992) (criticizing *TransAmerican* for failing to provide guiding rules and principles for the trial courts to follow).

359. *See* IKB Indus. v. Pro-Line Corp., 938 S.W.2d 440, 442 (Tex. 1997); *Blackmon*, 841 S.W.2d at 850; *TransAmerican*, 811 S.W.2d at 919 n.9. The supreme court noted three benefits to making findings: first, such findings aid appellate review in that they demonstrate whether the trial judge was guided by a reasoned analysis pursuant to the *TransAmerican* and *Braden* standards; second, such findings assure that the decision was the product of thoughtful judicial deliberation; and third, the articulation of the trial judge's analysis enhances the deterrent effect of the sanctions order. *See Blackmon*, 841 S.W.2d at 852.

360. *See IKB Indus.*, 938 S.W.2d at 442.

361. *See id.* (indicating that orders imposing sanctions can be reversed for abuse of discretion, despite the presence of written findings).

362. *See* Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 852 (Tex. 1992) (orig. proceeding) (citing Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986)).

P. *Inherent Power to Sanction*

1. Trial Court Power

The trial courts have the inherent power to sanction for bad faith abuse of the judicial process, which may not be covered by rule or statute.[363] The inherent powers of a trial court are those which it may use "to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity."[364] The inherent power is limited,[365] and it exists only "to deter, alleviate, and counteract bad faith abuse of the judicial process, such as any significant interference with core judicial functions."[366] The record before the trial court must support the use of such power, and the trial court must make findings of fact that the abuse significantly interfered with the core functions of the judici-

---

363. *See In re* Bennett, 41 Tex. Sup. Ct. J. 134, 137, 1997 WL 751572, at *3 (Dec. 4, 1997) (per curiam); Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 732 (Tex. 1997); Phillips & Akers, P.C. v. Cornwell, 927 S.W.2d 276, 280 (Tex. App.— Houston [1st Dist.] 1996, no writ); Stroud v. VBFSB Holding Corp., 917 S.W.2d 75, 83 (Tex. App.—San Antonio 1996, writ denied); Onwuteaka v. Gill, 908 S.W.2d 276, 280 (Tex. App.—Houston [1st Dist.] 1995, no writ); Metzger v. Sebek, 892 S.W.2d 20, 51 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Lawrence v. Kohl, 853 S.W.2d 697, 700 (Tex. App.—Houston [1st Dist.] 1993, no writ); Kutch v. Del Mar College, 831 S.W.2d 506, 509-10 (Tex. App.— Corpus Christi 1992, no writ) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 46-47 (1991)); *see also* Remington Arms Co. v. Caldwell, 850 S.W.2d 167, 172 (Tex. 1993) (holding that the trial court has inherent and statutory authority to discipline errant counsel for improper conduct in the exercise of its contempt power); Koslow's v. Mackie, 796 S.W.2d 700, 703 (Tex. 1990) (holding that the trial court has inherent power under Rule 166 to impose sanctions for violation of a pretrial order). *But cf.* Shook v. Gilmore & Tatge Mfg. Co., 851 S.W.2d 887, 891 (Tex. App.—Waco 1993), *appeal after remand*, 951 S.W.2d 294, writ denied) (holding that the Texas Supreme Court has not recognized inherent power of Texas courts to sanction a party's bad faith conduct during litigation, and declining to follow *Kutch* wholeheartedly). In the federal system, the district courts have the inherent powers to levy sanctions for abusive litigation practices. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980); *see also In re* Stone, 986 F.2d 898, 901-02 (5th Cir. 1993) (per curiam) (describing three categories of inherent powers of federal courts, including power to impose sanctions for abusive litigation practices (citing Eash v. Riggins Trucking, 757 F.2d 557, 562–64 (3d Cir. 1985) (en banc))).

364. Public Util. Comm'n of Tex. v. Cofer, 754 S.W.2d 121, 124 (Tex. 1988); Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979); *Kutch*, 831 S.W.2d at 509–10; Scott v. Watumull, No. 05–95–01451–CV (Tex. App.—Dallas Jan. 24, 1997, writ denied) (not designated for publication), 1997 WL 25473, at *10; *see Metzger*, 892 S.W.2d at 51.

365. *See Metzger*, 892 S.W.2d at 51 n.26 (recognizing limitations to the trial court's inherent power to sanction).

366. *Scott*, 1997 WL 25473, at *10 (citing *Kutch*, 831 S.W.2d at 509–10); *see Phillips & Akers, P.C.*, 927 S.W.2d at 280 (citing Onwuteaka v. Gill, 908 S.W.2d 276, 280 (Tex. App.— Houston [1st Dist.] 1995, no writ)).

ary:[367] "hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, entering final judgment and enforcing that judgment."[368] Because of the amorphous nature of this inherent power and its potency, the court of appeals has admonished the trial courts to use it sparingly and to be mindful of the sanctioned party's due process rights.[369] "A sanction must be just, there must be a direct relationship between the offensive conduct and the sanction imposed, and the sanction must not be excessive."[370] The scope of review is the entire record before the trial court and the standard of review is abuse of discretion.[371]

2. Appellate Court Power

In *Johnson v. Johnson*,[372] the San Antonio Court of Appeals held that if an attorney engages in misconduct before the court, the court "retain[s] the inherent power to discipline such behavior when reasonably necessary and to the extent deemed appropriate."[373] In *Johnson*, the appellant's attorney insulted the judge by questioning both his ability to understand the complexities of the case and his dedication to upholding the law.[374] Because the appellant's attorney chose to attack a trial judge personally instead of addressing the legal issues presented, the court held that its duty to maintain confidence in the legal system obligated it to assess monetary sanctions against the attorney and to forward the court's opin-

---

367. *See Kutch*, 831 S.W.2d at 510; *see also Scott*, 1997 WL 25473, at *10 (holding that "for inherent power to apply," there must exist evidence and factual findings that "conduce significantly interfered with the court's legitimate exercise of one of its core powers").

368. Kutch v. Del Mar College, 831 S.W.2d 506, 510 (Tex. App.—Corpus Christi 1992, no writ) (citing Armadillo Bail Bonds v. State, 802 S.W.2d 237, 239–40 (Tex. Crim. App. 1990))

369. *See Kutch*, 831 S.W.2d at 510–11.

370. Scott v. Watumull, No. 05–95–01451–CV (Tex. App.—Dallas Jan. 24, 1997, writ denied) (not designated for publication), 1997 WL 25473, at *10 (citing *Kutch*, 831 S.W.2d at 511-12).

371. *See id.* (citing *Kutch*, 831 S.W.2d at 511-12).

372. 948 S.W.2d 835 (Tex. App.—San Antonio 1997, writ requested). The supreme court cited *Johnson* and *In re Maloney*, 949 S.W.2d 385, 388 (Tex. App.—San Antonio 1997, orig. proceeding) (en banc) (per curiam) with approval in an order affording the plaintiffs' counsel an opportunity to explain why the court should not refer plaintiffs' counsel to the disciplinary authorities, prohibit one of the attorneys from practicing in Texas courts and imposing monetary penalties as sanctions. *See* Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 732 (Tex. 1997).

373. *Johnson*, 948 S.W.2d at 840.

374. *See id.*

ion to the Office of the General Counsel for the State Bar of Texas for investigation and any action it deemed necessary.[375] It is likely that the standards applicable to the trial courts would also be applicable to the courts of appeals: the sanction must be just, there must be a direct relationship between the offensive conduct and the sanction imposed, and the sanction must not be excessive. The scope of review would be the entire record before the court of appeals and the supreme court's standard of review of a court of appeals' sanction would be abuse of discretion.

Q. *Frivolous Pleadings*

Rule 13,[376] in combination with the Texas Civil Practice and Remedies Codes,[377] instructs the trial court to "impose appropriate sanctions available under Rule 215(2)(b) if a pleading, motion or other paper is [signed], groundless and brought in bad faith or for purposes of harassment."[378] Under Rule 13, a trial court must presume that the pleading, motion or, other paper is filed in good faith and may only impose sanctions[379] for good cause,[380] the particulars of which must be included in the sanctions order.[381] In determining

---

375. *See id.* at 841.

376. TEX. R. CIV. P. 13. Rule 13 is similar to its federal counterpart. *See* FED. R. CIV. P. 11.

377. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.001–.013, 10.001–.006 (Vernon Supp. 1997) (providing assessment of attorney's fees, costs, and damages for certain frivolous lawsuits and defenses).

378. Trimble v. Itz, 898 S.W.2d 370, 372–73 (Tex. App.—San Antonio) (listing different types of sanctions which may be imposed (citing TEX. R. CIV. P. 215(2)(b))), *writ denied per curiam*, 906 S.W.2d 481 (Tex. 1995); *see* Susman Godfrey, L.L.P. v. Marshall, 832 S.W.2d 105, 108 (Tex. App.—Dallas 1992, orig. proceeding).

379. In addition to monetary sanctions or dismissal of the frivolous pleading or motion under TEX. R. CIV. P. 13 and TEX. CIV. PRAC. & REM. CODE ANN. § 10.004 (Vernon Supp. 1997), the trial court may report the offending attorney to the grievance committee if she "consistently engage[s] in activity that results in sanctions under Section 9.012." TEX. CIV. PRAC. & REM. CODE ANN. § 9.013 (Vernon Supp. 1997).

380. *See* Tarrant County v. Chancey, 942 S.W.2d 151, 154 (Tex. App.—Fort Worth 1997, no writ); *Susman Godfrey*, 832 S.W.2d at 108.

381. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 10.005 (Vernon Supp. 1997); TEX. R. CIV. P. 13; *see also* Schexnider v. Scott & White Mem'l Hosp., 953 S.W.2d 439, 441 (Tex. App.—Austin 1997, writ granted) (reversing sanction order for failing to state reasons for sanction in order); Murphy v. Friendswood Dev. Co., No. 01–97–00085–CV (Tex. App.—Houston [1st Dist.] Mar. 12, 1998, no pet. h.) (not released for publication yet) (reversing sanction order for incorporating by reference a motion for sanctions to satisfy good cause requirements of Rule 13), 1998 WL 119620, at *1. There is a split among the courts of appeals whether a sanctioned party's failure to object to the lack of particularity of the trial

whether Rule 13 or the Code has been violated, a trial court must consider the facts available to the litigant, the circumstances existing at the time the document is filed, and whether the legal assertions within the document are "warranted by good faith argument for the extension, modification, or reversal of current law."[382] The court may also consider the amount of time available to prepare the pleading (*e.g.*, only a few days before the statute of limitations expires), and "examine the signer's credibility, taking into consideration all of the facts and circumstances available to him at the time of filing."[383] The courts have observed that Rule 13 should only be used "in those egregious situations where the worst of the bar" uses the judicial system for "ill motive without regard to reason and the guiding principles of the law," and that it should not be used as "a weapon . . . to punish those with whose intellect or philosophic viewpoint the trial court finds fault."[384] A trial court's order under Rule 13 or the Code is reviewed for an abuse of discretion.[385]

---

court's order waives that complaint. *See* Land v. AT & S Transp., Inc., 947 S.W.2d 665, 666–67 (Tex. App.—Austin 1997, no writ).

382. Home Owners Funding Corp. of America v. Scheppler, 815 S.W.2d 884, 889 (Tex. App.—Corpus Christi 1991, no writ); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 10.001 (Vernon Supp. 1997).

383. *Scheppler*, 815 S.W.2d at 889; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 9.012(b) (Vernon Supp. 1997). Rule 13 imposes a duty on the trial court to point out with particularity the act or omissions on which the sanctions are based. *See* Aldine Indep. Sch. Dist. v. Baty, 946 S.W.2d 851, 852 (Tex. App.—Houston [14th Dist.] 1997, no writ); Tarrant County v. Chancey, 942 S.W.2d 151, 155 (Tex. App.—Fort Worth 1997, no writ); Zarsky v. Zurich Management, Inc., 829 S.W.2d 398, 399 (Tex. App.—Houston [14th Dist.] 1992, no writ). Unlike Rule 13, Rule 215 does not require a trial court to state any reasons which create good cause. *See* Kahn v. Garcia, 816 S.W.2d 131, 133 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding).

384. *Chancey*, 942 S.W.2d at 154-55 (quoting Dyson Descendant Corp. v. Sonat Exploration Co., 861 S.W.2d 942, 951 (Tex. App.—Houston [1st Dist.] 1993, no writ)).

385. *See* GTE Communications Sys. Corp. v. Tanner, 856 S.W.2d 725, 730 (Tex. 1993); *Land*, 947 S.W.2d at 667; *Aldine Indep. Sch. Dist.*, 946 S.W.2d at 852; *Chancey*, 942 S.W.2d at 154; Delgado v. Methodist Hosp., 936 S.W.2d 479, 487 (Tex. App.—Houston [14th Dist.] 1996, no writ); Yang Ming Line v. Port of Houston Auth., 833 S.W.2d 750, 752 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Zarsky*, 829 S.W.2d at 399; Rodriguez v. State Dep't of Highways, 818 S.W.2d 503, 504 (Tex. App.—Corpus Christi 1991, no writ); *Scheppler*, 815 S.W.2d at 889.

R. *Vexatious Litigation*

The Texas Civil Practice and Remedies Code has been amended to include Chapter 11 in an attempt to deter nonmeritorious litigation.[386] The Code now provides that within 90 days after the date the defendant files an original answer or a special appearance, the defendant may file a motion asking the trial court for "an order determining that the plaintiff is a vexatious litigant; and requiring the plaintiff to furnish security."[387] After the defendant files this motion, the litigation is stayed until the trial court determines the merits of the motion.[388] The Code sets forth the criteria for determining whether a plaintiff is a vexatious litigant.[389]

If the trial court finds that the plaintiff is a vexatious litigant, then the trial court is required to "order the plaintiff to furnish security for the benefit of the [moving] defendant" in such an amount to compensate the defendant's reasonable expenses in connection with the litigation, including court costs and attorney's fees.[390] If the plaintiff fails to furnish the security within the time set by the court, the court shall dismiss the litigation.[391] After notice and a hearing, a trial court may also enter an order prohibiting a plaintiff from filing new litigation if the court finds that: (1) the plaintiff is a vexatious litigant, and (2) the local administrative judge of the court has not given the plaintiff permission to file the litigation.[392] If the plaintiff violates the order, he is subject to contempt of court.[393] It is likely that the abuse of discretion standard of review, applicable to Rule 13 motions, would also apply to a trial court's order ruling that a plaintiff is a vexatious litigant.[394]

---

386. *See* Act of June 17, 1997, 75th Leg., R.S., ch. 806, 1997 Tex. Sess. Law Serv. 2634 (Vernon) (to be codified as an amendment to TEX. CIV. PRAC. & REM. CODE ANN. § 11.001-.104).

387. TEX. CIV. PRAC. & REM. CODE ANN. § 11.051 (Vernon Supp. 1998).

388. *See id.* § 11.052.

389. *See id.* § 11.054.

390. *Id.* § 11.055.

391. *See id.* § 11.056.

392. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 11.101(a) (Vernon Supp. 1998).

393. *See id.* § 11.101(b).

394. *See id.* §§ 10.001, 13.001 (establishing the requirement that an action or argument be nonfrivolous).

S. *Summary Judgment: Rule 166a(a), (b)*

The underlying purpose of Texas' summary judgment rules is a narrow one—the elimination of "patently unmeritorious claims and untenable defenses."[395] Pursuant to Rule 166a(c), a summary judgment is proper only when a movant establishes that there is no genuine issue of material fact and that he or she is therefore entitled to judgment as a matter of law.[396] 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.[397] 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 by presenting to the trial court any issues that would preclude summary judgment.[398]

> "[T]he question on appeal is . . . *not* whether the summary judgment proof *raises [a] fact issue*, . . . but is whether the summary judgment proof *establishes as a matter of law that there is no genuine issue of fact* as to one or more of the essential elements of the plaintiff's cause of action."[399]

Summary judgments are reviewed in accordance with the following standards:

> (1) the movant has the burden of showing that there is no genuine issue of material fact and that [he] is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts must be resolved in favor of the nonmovant.[400]

---

395. Casso v. Brand, 776 S.W.2d 551, 556 (Tex. 1989); City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 n.5 (Tex. 1979); Gulbenkian v. Penn, 151 Tex. 412, 416, 252 S.W.2d 929, 931 (1952); Valores Corporativos, S.A. de C.V. v. McLane Co., 945 S.W.2d 160, 169 (Tex. App.—San Antonio 1997, writ denied) (quoting Roy W. McDonald, *Summary Judgment*, 30 TEX. L. REV. 286, 286 (1952)). For a complete discussion of summary judgment practice in the Texas and federal courts, see David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 5 (1998).

396. *See* TEX. R. CIV. P. 166a(c); Swilley v. Hughes, 488 S.W.2d 64, 67 (Tex. 1972).

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

398. *See Clear Creek Basin Auth.*, 589 S.W.2d at 679.

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

400. American Tobacco Co. v. Grinnell, 951 S.W.2d 420, 425 (Tex. 1997) (citing Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548–49 (Tex. 1985)); Black v. Victoria

A trial court should grant a defendant's motion for summary judgment if the defendant disproves at least one essential element of the plaintiff's causes of action, or if the defendant establishes all the elements of an affirmative defense as a matter of law.[401] The usual presumption that the judgment is correct does not apply to summary judgments.[402]

On appeal, evidence that favors the movant's position will rarely be considered unless it is uncontroverted.[403] Summary judgment, however, may be based on the uncontroverted evidence of an interested witness or expert witness "if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted."[404]

The scope of review in an appeal from summary judgment is also limited. A motion for summary judgment must expressly present the grounds upon which it is made, and it must stand or fall on these grounds alone.[405] Issues not expressly presented to the trial court by written motion or response to the motion for summary judgment cannot be considered on appeal as grounds for reversal.[406] The appellate court can consider the record only as it existed at the time summary judgment was entered.[407] Moreover, an appellate court may not raise grounds for reversing a summary judgment sua sponte.[408]

Lloyds Ins. Co., 797 S.W.2d 20, 23-24 (Tex. 1990); *see* Turboff v. Gertner, Aron & Ledet, Invs., 763 S.W.2d 827, 829 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (citing *Nixon*, 690 S.W.2d at 548–49).

401. *See American Tobacco*, 951 S.W.2d at 425; Science Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 911 (Tex. 1997); Lear Siegler, Inc. v. Perez, 819 S.W.2d 470, 471 (Tex. 1991).

402. *See* Montgomery v. Kennedy, 669 S.W.2d 309, 311 (Tex. 1984); Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply, 391 S.W.2d 41, 47 (Tex. 1965). Texas law generally considers summary judgment to be a harsh remedy. *See* Torres v. Caterpillar, Inc., 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996, writ denied).

403. *See Great Am. Reserve*, 391 S.W.2d at 47.

404. Republic Nat'l Leasing Corp. v. Schindler, 717 S.W.2d 606, 607 (Tex. 1986) (citing TEX. R. CIV. P. 166a(c)).

405. *See* TEX. R. CIV. P. 166a(c); *Science Spectrum, Inc.*, 941 S.W.2d at 911–12; McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 341 (Tex. 1983).

406. *See McConnell*, 858 S.W.2d at 339; City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 674–75 (Tex. 1979).

407. *See* Johnnie C. Ivy Plumbing Co. v. Keyser, 601 S.W.2d 158, 160 (Tex. Civ. App.—Waco 1980, no writ).

408. *See* San Jacinto River Auth. v. Duke, 783 S.W.2d 209, 210 (Tex. 1990) (citing Central Educ. Agency v. Burke, 711 S.W.2d 7, 9 (Tex. 1986)).

When the motion for summary judgment is based on several different grounds and the order granting the motion is silent as to the reason for granting the motion, the appellant must show that each independent ground alleged in the motion is insufficient to support summary judgment, and the summary judgment must be affirmed if any of the theories are meritorious.[409] If the reviewing court determines that summary judgment was improperly granted, the reviewing court will reverse the judgment and remand the cause for a trial on the merits.[410] Where both parties file a motion for summary judgment, and one is granted and one is denied, "the reviewing court should review the summary judgment evidence presented by both sides and determine all questions presented and render such judgment as the trial court should have rendered."[411] Finally, if a summary judgment order (1) contains a Mother Hubbard clause and (2) grants more relief than the movant requested, the appellate court should affirm that part of the summary judgment which is proper and reverse in part, since only a partial summary judgment should have been rendered, and remand the case to the trial court for further proceedings.[412]

T. *No Evidence Summary Judgment: Rule 166a(i)*

Effective September 1, 1997, litigants may assert an additional ground for summary judgment.[413] Under this new provision of Rule 166a, a litigant may file a motion for summary judgment seeking dismissal of all or part of a lawsuit if there is no evidence to support at least one of the elements of the adverse parties' claim or

---

409. *See* Malooly Bros. v. Napier, 461 S.W.2d 119, 121 (Tex. 1970); Basse Truck Line, Inc. v. First State Bank, 949 S.W.2d 17, 19 (Tex. App.—San Antonio 1997, writ denied); Valles v. Texas Comm'n on Jail Standards, 845 S.W.2d 284, 286 (Tex. App.—Austin 1992, writ denied); Kyle v. West Gulf Maritime, Ass'n, 792 S.W.2d 805, 807 (Tex. App.—Houston [14th Dist.] 1990, no writ).

410. *See* Tobin v. Garcia, 159 Tex. 58, 64, 316 S.W.2d 396, 400 (1958).

411. Commissioners Court v. Agan, 940 S.W.2d 77, 80 (Tex. 1997); *see* Jones v. Strauss, 745 S.W.2d 898, 900 (Tex. 1988).

412. *See* Bandera Elec. Coop., Inc. v. Gilchrist, 946 S.W.2d 336, 336–37 (Tex. 1997) (per curiam). The supreme court adopted Justice Duncan's analysis in her concurring and dissenting opinion in the court of appeals. *See id.*; Gilchrist v. Bandera Elec. Coop., 924 S.W.2d 388, 396 (Tex. App.—San Antonio 1996, writ granted) (Duncan, J., concurring in part & dissenting in part, joined by Rickhoff & Green, JJ.), *rev'd on other grounds*, 964 S.W.2d 336 (Tex. 1997).

413. *See* TEX. R. CIV. P. 166a(i).

defense.[414] However, it is inappropriate to file a Rule 166a(i) motion until after adequate time for discovery. Moreover, the Rule 166a(i) motion must specifically set forth the elements of the adverse party's claim or defense for which there is no evidence.[415] The motion cannot be conclusory or generally allege that there is no evidence to support the claims.[416] The filing of the motion shifts the burden to the nonmovant to come forward with enough evidence to be entitled to a jury trial. Under the new rule, if the nonmovant fails to provide enough evidence, the trial court must grant the motion.[417]

A Rule 166a(i) summary judgment uses a no evidence standard.[418] If the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove an essential element of the adverse party's claim or defense, or the evidence offered amounts to no more than a mere scintilla, the trial court should grant summary judgment.[419] More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions."[420] Therefore, a nonmovant will defeat a Rule 166a(i) motion for summary judgment by presenting the court with some evidence on each element of his or claim for which the movant claims there is no evidence.[421]

U. *Motion for Continuance*

Pursuant to Rule 251, a trial court may grant a continuance on sufficient cause supported by affidavit, by consent of the parties, or by operation of law.[422] The granting or denial of a motion for con-

---

414. *See* TEX. R. CIV. P. 166a(i) & cmt.

415. *See* TEX. R. CIV. P. 166a(i).

416. *See id.*

417. *See id.*

418. *See id.*

419. *See id.*; *see also* Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997) (listing the elements of the no-evidence analysis).

420. Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995) (quoting Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 25 (Tex. 1994)).

421. *See* TEX. R. CIV. P. 166a(i) & cmt.

422. *See* TEX. R. CIV. P. 251, 252 (granting continuance based on absence of material testimony); TEX. R. CIV. P. 253, 254 (granting continuance based on absence of counsel when absence was caused by attendance in legislature). The mere absence of a party does not entitle the party to a continuance. *See* Vickery v. Vickery, No. 01-94-01004-CV (Tex. App.—Houston [1st Dist.] Dec. 4, 1997, no pet. h.) (not designated for publication), 1997

tinuance is within the sound discretion of the trial court.[423] Therefore, the trial court's ruling will not be reversed unless the record shows a clear abuse of discretion.[424] Before the reviewing court will reverse the trial court's ruling, it should clearly appear from the record that the trial court has disregarded the party's rights.[425] An appellate court may reverse for abuse of discretion only if, after searching the entire record, it finds that the trial court's decision was clearly arbitrary and unreasonable.[426]

V. *Dismissal for Want of Prosecution*

The trial court has an obligation to control its docket and demand that parties diligently prosecute their suits.[427] Thus, a trial court has the authority to dismiss a case for want of prosecution pursuant to its inherent powers or pursuant to Rule 165a.[428] The

---

WL 751995, at *20. "The absent party must show that he had a reasonable excuse for not being present and that he was prejudiced by his absence." *Id.* at *20. The movant must show that "the testimony is material and what is expected to be proved by the testimony." *Id.* at *21.

423. *See* General Motors Corp. v. Gayle, 951 S.W.2d 469, 476 (Tex. 1997) (orig. proceeding) (citing Villegas v. Carter, 711 S.W.2d 624, 626 (Tex. 1986)); 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); Sipes v. General Motors Corp., 946 S.W.2d 143, 161 (Tex. App.—Texarkana 1997, writ requested); Hawthorne v. Guenther, 917 S.W.2d 924, 929 (Tex. App.—Beaumont 1996, writ denied); Taiwan Shrimp Farm Village Assoc. v. U.S.A. Shrimp Farm Dev., Inc., 915 S.W.2d 61, 69 (Tex. App.—Corpus Christi 1996, writ denied); Arit Int'l Corp. v. Allen, 910 S.W.2d 166, 173 (Tex. App.—Fort Worth 1995, no writ).

424. *See Villegas*, 711 S.W.2d at 626; State v. Crank, 666 S.W.2d 91, 94 (Tex. 1984).

425. *See Yowell*, 703 S.W.2d at 635; *Arit Int'l Corp.*, 910 S.W.2d at 173–74.

426. *See* Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 795 (Tex. 1987); Gregg v. Cecil, 844 S.W.2d 851, 853 (Tex. App.—Beaumont 1992, no writ); Central Nat'l Gulfbank v. Comdata Network, Inc., 773 S.W.2d 626, 627 (Tex. App.—Corpus Christi 1989, no writ).

427. *See* Texas Soc'y, Daughters of the Am. Revolution, Inc. v. Estate of Hubbard, 768 S.W.2d 858, 861 (Tex. App.—Texarkana 1989, no writ); *see also* State v. Rotello, 671 S.W.2d 507, 508–09 (Tex. 1984) (emphasizing the inherent power of trial court to dismiss cases not pursued with due diligence); Southern Pac. Transp. Co. v. Stoot, 530 S.W.2d 930, 932 (Tex. 1975) (requiring due diligence when seeking relief).

428. *See* TEX. R. CIV. P. 165a(1), (4); *Rotello*, 671 S.W.2d at 508-09; Veteran's Land Bd. v. Williams, 543 S.W.2d 89, 90 (Tex. 1976); Bevil v. Johnson, 157 Tex. 621, 625, 307 S.W.2d 85, 87 (1957); Clark v. Yarbrough, 900 S.W.2d 406, 408 (Tex. App.—Texarkana 1995, writ denied); Hosey v. County of Victoria, 832 S.W.2d 701, 704 (Tex. App.—Corpus Christi 1992, no writ); Ellmossallamy v. Huntsman, 830 S.W.2d 299, 300-01 (Tex. App.—Houston [14th Dist.] 1992, no writ); Miller v. Kossey, 802 S.W.2d 873, 877 (Tex. App.—Amarillo 1991, writ denied); Armentrout v. Murdock, 779 S.W.2d 119, 121 (Tex. App.—Houston [1st Dist.] 1989, no writ).

trial court's power to dismiss under Rule 165a(1) (failure to appear at a hearing or trial), Rule 165a(2) (failure to meet time standards promulgated by the supreme court), and Rule 165a(4) (lack of diligence) are cumulative and independent.[429]

Whether the plaintiff prosecuted the case with diligence is an issue confined solely to the trial court's discretion.[430] Moreover, when the record contains no findings of fact or conclusions of law and the trial court did not state the standard it used, the order of dismissal must be affirmed if any legal theory is supported by the record.[431] When resolving the central issue of whether the plaintiff exercised reasonable diligence,[432] the court may consider the entire history of the litigation, and no single factor is dispositive.[433] 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."[434] Furthermore, the fact that settlement activity is in progress,[435] or that the opposing parties have remained passive, does not prevent a case from being dismissed based upon want of diligence.[436] "The traditional factors generally considered in dismissals are 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

429. *See* TEX. R. CIV. P. 165a(4); *Williams*, 543 S.W.2d at 90; City of Houston v. Robinson, 837 S.W.2d 262, 264 (Tex. App.—Houston [1st Dist.] 1992, no writ); Ozuna v. Southwest Bio-Clinical Labs., 766 S.W.2d 900, 901–03 (Tex. App.—San Antonio 1989, writ denied).

430. *See Rotello*, 671 S.W.2d at 508–09; Dolenz v. Continental Nat'l Bank, 620 S.W.2d 572, 575–76 (Tex. 1981); *Ozuna*, 766 S.W.2d at 903; 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 W. Texas Mem'l Hosp., 665 S.W.2d 573, 575 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

431. *See* City of Houston v. Thomas, 838 S.W.2d 296, 297 (Tex. App.—Houston [1st Dist.] 1992, no writ).

432. *See* MacGregor v. Rich, 941 S.W.2d 74, 75 (Tex. 1997).

433. *See* Federal Deposit Ins. Corp. v. Kendrick, 897 S.W.2d 476, 481–82 (Tex. App.—Amarillo 1995, no writ); Brown v. Howeth Invs., Inc., 820 S.W.2d 900, 903 (Tex. App.—Houston [1st Dist.] 1991, writ denied); Armentrout v. Murdock, 779 S.W.2d 119, 121 (Tex. App.—Houston [1st Dist.] 1989, no writ); *Ozuna*, 766 S.W.2d at 902.

434. Ozuna v. Southwest Bio-Clinical Labs., 766 S.W.2d 900, 902 (Tex. App.—San Antonio 1989, writ denied); *see also* Bard v. Frank B. Hall & Co., 767 S.W.2d 839, 843 (Tex. App.—San Antonio 1989, writ denied) (ruling that merely making a request at dismissal docket call hearing that case be set for trial does not, of itself, preclude dismissal).

435. *See Kendrick*, 897 S.W.2d at 481; Texas Soc'y, Daughters of the Am. Revolution, Inc. v. Estate of Hubbard, 768 S.W.2d 858, 860–61 (Tex. App.—Texarkana 1989, no writ).

436. *See Estate of Hubbard*, 768 S.W.2d at 861 .

the delay."[437] These and other circumstances may be considered, such as periods of activity, intervals of inactivity, and the passage of time.[438]

If the dismissal is pursuant to Rule 165a (as opposed to the trial court's inherent power), then Rule 165a(3) requires the trial court to 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."[439] The reinstatement provisions in Rule 165a(3) only apply to dismissals for failure to appear at trial or a hearing,[440] and are slightly similar to the requisites for granting a new trial in a default judgment. 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.[441]

---

437. *Bard*, 767 S.W.2d at 843 (citing Nasa I Bus. Ctr. 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)).

438. *See Ozuna*, 766 S.W.2d at 902.

439. TEX. R. CIV. P. 165a(3); Brown v. Howeth Invs., Inc., 820 S.W.2d 900, 902 (Tex. App.—Houston [1st Dist.] 1991, writ denied); Quita, Inc. v. Haney, 810 S.W.2d 469, 470 (Tex. App.—Eastland 1991, no writ); Armentrout v. Murdock, 779 S.W.2d 119, 122 (Tex. App.—Houston [1st Dist.] 1989, no writ); *see also* Clark v. Yarbrough, 900 S.W.2d 406, 408–09 (Tex. App.—Texarkana 1995, writ denied) (comparing the standard for dismissal under Rule 165a and under court's inherent powers).

440. *See* Ozuna v. Southwest Bio-Clinical Labs., 766 S.W.2d 900, 903 (Tex. App.—San Antonio 1989, writ denied); *see also* Moore v. Armour & Co., 748 S.W.2d 327, 331 (Tex. App.—Amarillo 1988, no writ) (asserting that reinstatement provisions of Rule 165a(3) do not apply to dismissal for failure to prosecute with due diligence).

441. *See* MacGregor v. Rich, 941 S.W.2d 74, 75 (Tex. 1997); State v. Rotello, 671 S.W.2d 507, 509 (Tex. 1984); Veteran's Land Bd. v. Williams, 543 S.W.2d 89, 90 (Tex. 1976); Clark v. Yarbrough, 900 S.W.2d 406, 408–09 (Tex. App.—Texarkana 1995, writ denied); City of Houston v. Robinson, 837 S.W.2d 262, 264 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Brown*, 820 S.W.2d at 903; *Armentrout*, 779 S.W.2d at 119; *Ozuna*, 766 S.W.2d at 903; Knight v. Trent, 739 S.W.2d 116, 118 (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) (reversing the trial court and ordering it to conduct hearing, while dissent argued court should have reversed and remanded for a trial on the 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. *See* 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, 450 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.). If the trial court dismisses

W. *Jury Demand*

The supreme court has observed that "[t]he right to jury trial is one of our most precious rights, holding 'a sacred place in English and American history.'"[442] While a party has a constitutional right to trial by jury,[443] the right is not unlimited. If a party desires a jury trial, Rule 216 requires the party to file with the district clerk a written request within a "reasonable time before the date set for trial, but not less than thirty days in advance."[444] A request in advance of the thirty-day deadline is presumed to have been made a reasonable time before trial.[445] The court has no discretion to refuse a jury trial if the fee is paid and request is made on or before appearance date.[446] In determining whether a late request for a jury trial should be granted or denied, the supreme court has reminded the courts that a trial court should grant the right to jury trial if it can be done without interfering with the trial court's docket, delaying the trial, or injuring the opposing party.[447] The court will review the entire record and the order to determine the condition of the trial docket at the time of the untimely request.[448]

Without a reporter's record or order reflecting the trial docket status, the appellate court "must assume that the trial court found the jury docket too crowded to accommodate [the] . . . untimely

---

the case "with prejudice," the appellate court will reform the judgment to strike "with prejudice" from the judgment. *See Melton*, 727 S.W.2d at 303.

442. General Motors Corp. v. Gayle, 951 S.W.2d 469, 476 (Tex. 1997) (orig. proceeding) (quoting White v. White, 108 Tex. 570, 581, 196 S.W. 508, 512 (1917)).

443. *See* TEX. CONST. art. I, § 15; TEX. CONST. art. V, § 10; Mercedes-Benz Credit Corp. v. Rhyne, 925 S.W.2d 664, 666 (Tex. 1996).

444. TEX. R. CIV. P. 216(a).

445. *See* Halsell v. Dehoyos, 810 S.W.2d 371, 371 (Tex. 1991) (per curiam); Southern Farm Bureau Cas. Ins. Co. v. Penland, 923 S.W.2d 758, 760 (Tex. App.—Corpus Christi 1996, no writ); Weng Enters., Inc. v. Embassy World Travel, Inc., 837 S.W.2d 217, 222 (Tex. App.—Houston [1st Dist.] 1992, no writ).

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

447. *See* General Motors Corp. v. Gayle, 951 S.W.2d 469, 476 (Tex. 1997) (orig. proceeding). In *Gayle*, the court observed that "[t]he failure to make [a timely jury fee payment] does not forfeit the right to have a trial by jury when such failure does not operate to the prejudice of the opposite party." *Id.* (quoting Allen v. Plummer, 9 S.W. 672, 673 (Tex. 1888)).

448. *See* Brawner v. Arellano, 757 S.W.2d 526, 529 (Tex. App.—San Antonio 1988, orig. proceeding [leave denied]) (citing Peck v. Ray, 601 S.W.2d 165, 167 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.)).

request."[449] The trial court's decision will be set aside only upon the showing of an abuse of discretion.[450] 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.[451]

X. *Judicial Notice*

Pursuant to Rule 202 of the Texas Rules of Civil Evidence, 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."[452] A party who wants judicial notice to be taken of a given matter must provide the court with enough information to enable it to properly consider the request, and must provide all parties such notice as the court deems necessary for them to be able to counter the request.[453] Whether these requirements have been complied with is largely left to the trial court's discretion.[454] As one court has noted, "the sufficiency of a motion to take judicial notice is a question best answered by the trial court."[455] However, "once the law has been invoked by proper motion, the trial court has no discretion—it must acknowledge that law."[456]

Pursuant to Rule 201, a trial judge may also take judicial notice of a fact if it is "one not subject to reasonable dispute in that it is

---

449. *Brawner*, 757 S.W.2d at 529.

450. *See id.*

451. *See* Mercedes-Benz Credit Corp. v. Rhyne, 925 S.W.2d 664, 666 (Tex. 1996); Wright v. Brooks, 773 S.W.2d 649, 651 (Tex. App.—San Antonio 1989, writ denied). A refusal to grant a jury trial is harmless error only if the record shows that no material issues of fact exist and that an instructed verdict would have been proper. *See* Halsell v. Dehoyos, 810 S.W.2d 371, 372 (Tex. 1991) (per curiam); Wing Enters., Inc. v. Embassy World Travel, Inc., 837 S.W.2d 217, 222 (Tex. App.—Houston [1st Dist.] 1992, no writ).

452. TEX. R. EVID. 202.

453. *See id.*

454. *See* Daugherty v. Southern Pac. Transp. Co., 772 S.W.2d 81, 83 (Tex. 1989) (noting that the failure to plead statute or regulation does not preclude trial court from judicially noticing it).

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

456. *Keller*, 699 S.W.2d at 212; *see* Eppenauer v. Eppenauer, 831 S.W.2d 30, 31 n.1 (Tex. App.—El Paso 1992, no writ).

either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[457] In addition, facts that are notorious and indisputable,[458] or well known and easily ascertainable,[459] may be judicially noticed. However, simply because a trial judge has personal knowledge of a fact does not permit the judge to take judicial notice of it.[460] The test on review is whether the fact to be judicially noticed is "verifiably certain."[461]

Y. *Class Certification*

Pursuant to Rule 42(a):

> One or more members of a class may sue or be sued as representative parties on behalf of all, only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[462]

Additionally, the purported class must establish the requirements of Rule 42(b).[463] The plaintiffs bear the burden of proof at the

---

457. TEX. R. EVID. 201(b).

458. *See* Harper v. Killion, 162 Tex. 481, 483, 348 S.W.2d 521, 522 (1961); Levit v. Adams, 841 S.W.2d 478, 485 (Tex. App.—Houston [1st Dist.] 1992), *rev'd on other grounds*, 850 S.W.2d 469 (Tex. 1993).

459. *See* Barker v. Intercoast Jobbers & Brokers, 417 S.W.2d 154, 158 (Tex. 1967); *Levit*, 841 S.W.2d at 485; *see also* McDaniel v. Hale, 893 S.W.2d 652, 673 (Tex. App.—Amarillo 1994, writ denied) (deciding that the trial judge could take judicial notice of original case over which he presided, in determining whether plaintiff's bill of review sets up a meritorious defense).

460. *See* Eagle Trucking Co. v. Texas Bitulithic Co., 612 S.W.2d 503, 506 (Tex. 1981).

461. *See id.*; *Levit*, 841 S.W.2d at 485.

462. TEX. R. CIV. P. 42(a).

463. *See* TEX. R. CIV. P. 42(b). Rule 42(b) allows an act to proceed as a class action if, in addition to satisfying 42(a) prerequisites, one of the following elements is met: (1) maintaining separate actions would "create a risk of inconsistent or varying adjudications" of individual class members, or prosecuting individual class members would either "be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests"; (2) the opposing party "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole"; (3) when the purpose of the action is to settle claims which either potentially or actually affect specific property at issue in the cause of action; or (4) "questions of law or

certification stage to establish the right to maintain the suit as a class action.[464] Because the class proponents are not required to make an extensive evidentiary showing in support of a motion for class certification, the trial court may make its decision based solely on the pleadings or other material in the record.[465] Whether a party is a proper representative of a class and whether a suit should be certified as a class action is reviewed under the abuse of discretion standard.[466] A trial court abuses its discretion by failing to properly apply the law to the facts.[467]

Supreme court review of class certification orders is very limited. The appeal of an interlocutory class certification order is final in the court of appeals in the absence of a dissent or a conflict.[468] However, the supreme court may exercise mandamus jurisdiction to review a court of appeals' judgment relating to a class certification order if the order creates extraordinary circumstances causing irreparable harm.[469]

Z. Motion to Disqualify

A motion to disqualify "is the proper procedural vehicle to challenge an attorney's representation whenever an attorney seeks to represent an interest adverse to that of a former client."[470] However, since disqualification is such a severe remedy, the courts must

---

fact common to the members of the class predominate over any questions affecting only individual members" so that the class action is the fairest most efficient method of adjudication. *Id.*

464. *See* Clements v. LULAC, 800 S.W.2d 948, 952 (Tex. App.—Corpus Christi 1990, no writ).

465. *See id.* (citing National Gypsum Co. v. Kirbyville Indep. Sch. Dist., 770 S.W.2d 621, 627 (Tex. App.—Beaumont 1989, writ dism'd w.o.j.))

466. *See* Parker County v. Spindletop Oil & Gas Co., 628 S.W.2d 765, 769 (Tex. 1982); Glassell v. Ellis, 956 S.W.2d 676, 681 (Tex. App.–Texarkana 1997, pet. requested); Angeles/Quinoco Sec. Corp. v. Collision, 841 S.W.2d 511, 512 (Tex. App.—Houston [14th Dist.] 1992, no writ); *Clements*, 800 S.W.2d at 952. In the absence of controlling Texas law, the appellate court will look to federal law when reviewing the trial court's order, particularly since Rule 42 is patterned after its federal counterpart. *See* Adams v. Reagan, 791 S.W.2d 284, 288 (Tex. App.—Fort Worth 1990, no writ).

467. *See Angeles/Quinoco Sec. Corp.*, 841 S.W.2d at 512.

468. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(3) (Vernon 1997); TEX. GOV'T CODE ANN. § 22.225(c) (Vernon 1988); DeLoitte & Touche L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394, 395–96 (Tex. 1997) (orig. proceeding).

469. *See DeLoitte*, 951 S.W.2d at 395–96.

470. NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 399 (Tex. 1990). "This strict rule is based on a conclusive presumption that confidences and secrets were imparted to

be wary of ordering it or they will encourage its use as a dilatory trial tactic.[471]

To disqualify an attorney, the movant must timely offer to the court a preponderance of the facts proving a substantial relationship between the present matter and a previous representation.[472] The movant must prove that (1) during the existence of a prior attorney-client relationship, or some other relationship giving rise to an implied fiduciary obligation, (2) factual matters were involved that are so related to the facts in the pending litigation (3) that the prior relationship creates a "genuine threat that confidences revealed to the former attorney will be divulged to his or her present adversary."[473] To satisfy this burden, the movant must offer evidence of specific similarities capable of being recited in the disqualification order.[474]

The standard of review used in assessing whether a trial court's ruling on a motion to disqualify is the abuse of discretion standard.[475] In addition, the trial court's order granting or denying a motion to disqualify may be reviewed by mandamus.[476]

AA. *Recusal*

Pursuant to Rule 18a, a party may file a motion to recuse the trial judge if done at least ten days before the date of the trial or other hearing.[477] Upon filing the motion, the trial judge must

---

the attorney during the prior representation." Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831, 833 (Tex. 1994) (orig. proceeding).

471. *See Coker*, 765 S.W.2d at 399; *see also* Metropolitan Life Ins. v. Syntek Fin. Corp., 881 S.W.2d 319, 320–21 (Tex. 1994) (reiterating that substantial relationship test must be met in order for the movant to establish a basis for disqualification).

472. *See* National Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 128 (Tex. 1996); *Metropolitan Life Ins.*, 881 S.W.2d at 320–21; *Coker*, 765 S.W.2d at 400; Ghidoni v. Stone Oak, Inc., No. 04-94-00837-CV (Tex. App.—San Antonio Jan. 28, 1997, no pet. h.) (not designated for publication), 1998 WL 28144, at *4–5; *see also* Vaughan v. Walther, 875 S.W.2d 690, 690 (Tex. 1994) (orig. proceeding) (stating that "[a] party who fails to file its motion to disqualify opposing counsel in a timely manner waives the complaint.").

473. Texaco, Inc. v. Garcia, 891 S.W.2d 255, 257 (Tex. 1995) (orig. proceeding) (citing *Coker*, 765 S.W.2d at 400).

474. *See Coker*, 765 S.W.2d at 400.

475. *See Metropolitan Life Ins.*, 881 S.W.2d at 321; NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1990); *Ghidoni*, 1998 WL 28144, at *4.

476. *See Godbey*, 924 S.W.2d at 128; *Vaughan*, 875 S.W.2d at 691.

477. *See* TEX. R. CIV. P. 18a(a). If a judge is assigned to a case within the 10-day period, then the motion must "be filed at the earliest practicable time prior to the com-

either recuse himself or request the administrative judicial district's presiding judge to assign a judge to hear the motion.[478] Rule 18a(f) provides that if the motion is denied, the order is reviewed for an abuse of discretion.[479] However, an order granting a motion to recuse is not reviewable.[480]

BB. *Objection to Visiting Trial or Appellate Judge*

When a visiting judge is assigned to a case under the Texas Government Code,[481] the presiding judge is required to give notice to each party's attorney if it is reasonable and practicable, time permitting.[482] An objection to this assignment must be the first matter presented to the visiting judge for a ruling.[483] Furthermore, "[a] former judge or justice who was not a retired judge may not sit in a case if either party objects to the [assignment]."[484] If a party timely objects to the assignment, "the judge shall not hear the case."[485] The statute is mandatory and does not give the trial court any discretion to rule on the objection.[486]

A party may also object to a judge or justice who is assigned to hear that party's case on appeal.[487] If a party files a timely objection to the assignment of the judge or justice, the assigned judge

---

mencement of the trial or other hearing." TEX. R. CIV. P. 18a(e). The grounds for disqualification are set forth in TEX. CONST. art. V, § 11 and TEX. R. CIV. P. 18b.

478. *See* TEX. R. CIV. P. 18a(c), (d).

479. *See* Aguilar v. Anderson, 855 S.W.2d 799, 801 (Tex. App.—El Paso 1993, writ denied); J-IV Invs. v. David Lynn Mach., Inc., 784 S.W.2d 106, 107 (Tex. App.—Dallas 1990, no writ); *see also* CNA Ins. Co. v. Scheffey, 828 S.W.2d 785, 793 (Tex. App.—Texarkana 1992, writ denied) (finding that it could not conduct abuse of discretion review because the trial court failed to conduct a hearing on the motion to recuse).

480. *See* TEX. R. CIV. P. 18a(f).

481. *See* TEX. GOV'T CODE ANN. § 74.053 (Vernon Supp. 1997). When judges exchange districts or hold court for each other under TEX. CONST. art. V, § 11, Section 74.053 does not apply. *See* Gonzalez v. Ables, 945 S.W.2d 253, 254 (Tex. App.—San Antonio 1997, orig. proceeding).

482. *See* TEX. GOV'T CODE ANN. § 74.053(a) (Vernon Supp. 1997).

483. *See id.* § 74.053(c); Morris v. Short, 902 S.W.2d 566, 569 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

484. TEX. GOV'T CODE ANN. § 74.053(d) (Vernon Supp. 1998); *see also* Mitchell Energy Corp. v. Ashwork, 943 S.W.2d 436, 440-41 (Tex. 1997) (explaining that for purposes of objecting to visiting judges, the proper inquiry is whether the judge had vested under State Judicial Retirement System before leaving office, and not after).

485. TEX. GOV'T CODE ANN. § 74.053(b) (Vernon Supp. 1998).

486. *See Mitchell Energy Corp.*, 943 S.W.2d at 440–41.

487. *See* TEX. GOV'T CODE ANN. § 75.551 (Vernon Supp. 1998).

may not hear the case.[488] The objection must be made before the first hearing, which in most cases is oral argument.[489] In addition, each party (1) is only entitled to one objection for the case in the appellate court,[490] and (2) may not object in the same case to the assignment of a judge or justice under Section 74.053(b).[491] Finally, a former judge or justice who is not officially retired may not hear a case on appeal if either party timely objects to the assignment.[492]

CC. *Management of Docket*

A trial court is given wide discretion in managing its dockets[493] to achieve "economy of time and effort for itself, for counsel, and for litigants."[494] Under Rule 166, a trial court has the discretion to summon the parties and their counsel to a pretrial conference so that a discovery schedule may be set up and other important matters can be resolved.[495] A trial court's order relating to the management of its docket is reviewed for an abuse of discretion.[496]

DD. *Gag Orders*

When a trial court issues a gag order prohibiting discussion of a case outside of the courtroom (prior restraint), the order is reviewed for its constitutionality.[497] To withstand this review standard, the order must be supported by specific findings based on

---

488. *See id.* § 75.551(b).

489. *See id.* § 75.551(c).

490. *See id.* § 75.551(b)(1).

491. *See id.* § 75.551(b)(2).

492. *See* TEX. GOV'T CODE ANN. § 75.551(d) (Vernon Supp. 1998).

493. *See* Polaris Inv. Management Corp. v. Abascal, 892 S.W.2d 860, 861 (Tex. 1995) (orig. proceeding); Clanton v. Clark, 639 S.W.2d 929, 931 (Tex. 1982); *In re* Carter, 958 S.W.2d 919, 924 (Tex. App.—Amarillo 1997, orig. proceeding); Metzger v. Sebek, 892 S.W.2d 20, 38 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Employers Ins. v. Horton, 797 S.W.2d 677, 680 (Tex. App.—Texarkana 1990, no writ); *see also* Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979) (recognizing the inherent power of trial court "to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity").

494. *Metzger*, 892 S.W.2d at 38 (quoting Landis v. North Am. Co., 299 U.S. 248, 254 (1936)).

495. *See* Taiwan Shrimp Village Ass'n v. U.S.A. Shrimp Farm Dev., Inc., 915 S.W.2d 61, 69 (Tex. App.—Corpus Christi 1996, writ denied).

496. *See Clanton*, 639 S.W.2d at 931; *Metzger*, 892 S.W.2d at 38; *Horton*, 797 S.W.2d at 680.

497. *See* Grigsby v. Coker, 904 S.W.2d 619, 620 (Tex. 1995) (per curiam); Davenport v. Garcia, 834 S.W.2d 4, 10 (Tex. 1992) (orig. proceeding).

evidence establishing (1) that an imminent and irreparable harm to the judicial process will result which will deprive the litigants of a just resolution of their dispute, and (2) that the order represents the least restrictive means available to prevent the harm.[498] The specific findings may be challenged for their sufficiency.[499] It appears that the two-part constitutional test is a question of law as applied to the trial court's findings reviewed de novo.[500]

EE. *Sealing Court Records*

Rule 76a provides very specific guidelines for a trial court to follow in determining whether to seal court records.[501] The trial court must strictly adhere to these guidelines, because court records are presumed open to the public.[502] Any order on motion to seal or unseal public records must be supported by specific findings of fact that the requirements of Rule 76a(1) have been met.[503] Any order relating to the sealing or unsealing of court records is subject to immediate appellate review.[504] Whether the abuse of discretion standard of review or sufficiency of the evidence standard is applied to orders regarding motions to seal records is unclear.[505]

---

498. *See Davenport*, 834 S.W.2d at 10. The supreme court has applied the *Davenport* test to prior restraints on expression. *See Ex Parte* Tucci, 859 S.W.2d 1, 5–6 (Tex. 1993).

499. *See Ex parte Tucci*, 859 S.W.2d at 6.

500. *See* Markel v. World Flight, Inc., 938 S.W.2d 74, 79–80 (Tex. App.—San Antonio 1996, no writ); Siebert v. AFL-CIO Union Pines Hous. Trust, No. 04–95–00575–CV (Tex. App.—San Antonio, Nov. 30, 1995, no writ) (not designated for publication), 1995 WL 702533, at *1.

501. *See* TEX. R. CIV. P. 76a. The Rule allows court records to be sealed only if there is "(a) a specific, serious, and substantial interest which clearly outweighs: (1) [the] presumption of openness; (2) any probable adverse effect that sealing will have upon the general public health or safety; [and] (b) no less restrictive means . . . will adequately and effectively protect the specific interest asserted." *Id.*

502. *See* TEX. R. CIV. P. 76a(1); Davenport v. Garcia, 834 S.W.2d 4, 23 (Tex. 1992) (orig. proceeding).

503. *See* TEX. R. CIV. P. 76a(6).

504. *See* TEX. R. CIV. P. 76a(8); Chandler v. Hyundai Motor Co., 829 S.W.2d 774, 775 (Tex. 1992) (per curiam).

505. *See* Burlington Northern R.R. v. Southwestern Elec. Power Co., 905 S.W.2d 683, 686 (Tex. App.—Texarkana 1995, no writ). The court in *Burlington* observed that several courts apply the abuse of discretion standard including: *Boardman v. Elm Block Dev. Ltd. Partnership*, 872 S.W.2d 297, 299 (Tex. App.—Eastland 1994, no writ); *Upjohn Co. v. Freeman*, 847 S.W.2d 589, 590 (Tex. App.—Dallas 1992, no writ); *Dunshie v. General Motors Corp.*, 822 S.W.2d 345, 347 (Tex. App.—Beaumont 1992, no writ). One court of appeals reviewed the order for sufficiency of the evidence. *See* Fox v. Anonymous, 869 S.W.2d 499, 505 (Tex. App.—San Antonio 1993, writ denied).

FF. *In Forma Pauperis Proceedings*

The Texas Constitution and rules of procedure recognize that the "courts must be open to all with legitimate disputes, not just to those who can afford to pay the fees to get in."[506] However, when a plaintiff files an affidavit of inability to pay under Rule 145[507] (in forma pauperis) or under the Texas Civil Practice and Remedies Code Section 13.001,[508] the trial court has broad discretion to dismiss the suit as frivolous or malicious if the allegation of poverty is false.[509] In determining whether the action is frivolous, the court may consider whether "(1) the action's realistic chance of ultimate success is slight; (2) the claim has no arguable basis in law or in fact; or (3) it is clear that the party cannot prove a set of facts in support of the claim."[510]

The supreme court has analogized Section 13.001 to its federal counterpart, which allows dismissal of frivolous or malicious actions in federal court.[511] Of the three factors set forth in Section 13.001, the supreme court has essentially only approved of the second factor (whether the claim has an arguable basis in law or fact) as constitutionally sound.[512] Therefore, before dismissing a petition under Section 13.001(b)(2), the judge must examine it to

---

506. Griffin Indus., Inc. v. Thirteenth Court of Appeals, 934 S.W.2d 349, 353 (Tex. 1997) (orig. proceeding) (citing TEX. CONST. art. I, § 13, and TEX. R. CIV. P. 145, as well as TEX. R. APP. P. 20.1).

507. TEX. R. CIV. P. 145.

508. TEX. CIV. PRAC. & REM. CODE ANN. § 13.001(a)(2) (Vernon Supp. 1997).

509. *See* De La Vega v. Taco Cabana, Inc., No. 04-94-00835-CV, 1997 WL 212500, at *4 (Tex. App.—San Antonio Apr. 30, 1997, no writ); Felix v. Thaler, 923 S.W.2d 650, 651 (Tex. App.—Houston [1st Dist.] 1995, no writ); Thomas v. Pankey, 837 S.W.2d 826, 828 (Tex. App.—Tyler 1992, no writ); Onnette v. Reed, 832 S.W.2d 450, 452 (Tex. App.—Houston [1st Dist.] 1992, no writ); McFarland v. Collins, No. 01-96-00376-CV (Tex. App.—Houston [1st Dist.] Feb. 20, 1997, writ denied) (not designated for publication), 1997 WL 69860, at *2.

510. TEX. CIV. PRAC. & REM. CODE ANN. § 13.001(b) (Vernon Supp. 1997). In *De La Vega*, the court of appeals observed that "frivolous is defined as having no basis in law or fact." *De La Vega*, 1997 WL 212500, at *5 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 913 (1981)).

511. *See* Johnson v. Lynaugh, 796 S.W.2d 705, 706 (Tex. 1990) (per curiam) (citing 28 U.S.C. § 1915(d) (1990)).

512. *See id.* The supreme court observed that the United States Supreme Court has only approved the same federal factor as appropriate. *See id.* (citing Neitzke v. Williams, 490 U.S. 319, 327 (1989)). Furthermore, the court noted that the Fifth Circuit doubted the validity of the third factor in Section 13.001(b)(3). *See id.* (citing Payne v. Lynaugh, 843 F.2d 177, 178 (5th Cir. 1988)).

ensure that the claim is not based in law and in fact.[513] A claim that has no legal basis is one that is based upon an "indisputably meritless legal theory,"[514] and a claim that has no factual basis is one that arises out of "fantastic or delusional scenarios."[515] If the plaintiff desires to appeal without paying for the reporter's record, the trial court must find that the appeal is not frivolous and that the reporter's record is needed to decide the issues on appeal.[516] In doing so, the trial court may "consider whether the appellant has presented a substantial question for appellate review."[517]

V. TRIAL RULINGS

A. *Conduct of Trial in General*

Rulings that relate to the general conduct of a trial are within the broad discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion.[518] For example, a trial court may permit jurors to submit occasional questions to the witnesses in conjunction with appropriate procedural safeguards.[519]

---

513. *See* Carson v. Gomez, 841 S.W.2d 491, 494 (Tex. App.—Houston [1st Dist.] 1992, no writ) (citing Spellmon v. Sweeney, 819 S.W.2d 206, 210 (Tex. App.—Waco 1991, no writ)).

514. Thomas v. Holder, 836 S.W.2d 351, 352 (Tex. App.—Tyler 1992, no writ) (citing Thompson v. Erickson, 814 S.W.2d 805, 807 (Tex. App.—Waco 1991, no writ) (quoting *Neitzke*, 490 U.S. at 327); *see also* McFarland v. Collins, No. 01–00376–CV (Tex. App.—Houston [1st Dist.] Feb. 20, 1997, writ denied) (not designated for publication), 1997 WL 69860, at *3 (holding that a suit is frivolous if it "allege[s] substantially the same facts arising from a common series of events already unsuccessfully litigated").

515. *Thomas*, 836 S.W.2d at 352 (citing *Thompson*, 814 S.W.2d at 807).

516. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 13.003(a) (Vernon Supp. 1997); TEX. R. APP. P. 20.1.

517. TEX. CIV. PRAC. & REM. CODE ANN. § 13.003(b) (Vernon Supp. 1997).

518. *See* Hawthorne v. Guenther, 917 S.W.2d 924, 932 (Tex. App.—Beaumont 1996, writ denied); Ocean Transp., Inc. v. Greycas, Inc., 878 S.W.2d 256, 269 (Tex. App.—Corpus Christi 1994, writ denied); *In re* Marriage of D-M-B- & R-L-B-, 798 S.W.2d 399, 400 (Tex. App.—Amarillo 1990, no writ); *In re* Estate of Hill, 761 S.W.2d 527, 531 (Tex. App.—Amarillo 1988, no writ); 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, 738 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.); *see also* Metzger v. Sebek, 892 S.W.2d 20, 38 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (declaring that the trial court judge is responsible for management of its docket); Kreymer v. North Tex. Mun. Water Dist., 842 S.W.2d 750, 752 (Tex. App.—Dallas 1992, no writ) (emphasizing that the trial court has broad discretion concerning extent of cross-examination allowed).

519. *See* Hudson v. Markum, 948 S.W.2d 1, 2–3 (Tex. App.—Dallas 1997, writ denied) (citing Fazzino v. Guido, 836 S.W.2d 271, 276 (Tex. App.—Houston [1st Dist.] 1992, writ denied)).

The appellate court will review the entire record for an abuse of discretion[520] and then determine whether any error constituted probable prejudice to the opposing party.[521]

B. *Motion in Limine*

A motion in limine does not preserve any issue for appellate review.[522] To preserve error on appeal for the wrongful exclusion of evidence, the record must reflect that the party opposing the motion in limine actually attempted to introduce the excluded evidence during the trial, and obtained a ruling from the court that the evidence would not be admitted.[523] If a party complains of the wrongful admission of evidence, the record must reflect that the party seeking to exclude the evidence made a proper objection when the evidence was actually offered during the trial on the merits.[524] In either event, the standard of review is based on the rule of evidence invoked.[525]

C. *Voir Dire and Challenges for Cause*

The supreme court has instructed the trial courts to provide a litigant with broad latitude 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.[526] Although voir dire examination is largely within the sound discretion of the trial court, the trial court "abuses its discretion when its denial of the right to ask a proper question prevents determination of whether grounds exist to challenge for cause or denies intelli-

---

520. *See Adams*, 754 S.W.2d at 718.

521. *See* Pitt v. Bradford Farms, 843 S.W.2d 705, 708 (Tex. App.—Corpus Christi 1992, no writ) (citing Silcott v. Oglesby, 721 S.W.2d 290, 293 (Tex. 1986)).

522. *See* Collins v. Collins, 904 S.W.2d 792, 798 (Tex. App.—Houston [1st Dist.] 1995) *writ denied per curiam*, 923 S.W.2d 569 (Tex. 1996).

523. *See* CLS Assoc., Ltd. v. A___ B___, 762 S.W.2d 221, 224 (Tex. App.—Dallas 1988, no writ); National Living Ctrs., Inc. v. Cities Realty Corp., 619 S.W.2d 422, 425 (Tex. Civ. App.—Texarkana 1981, no writ).

524. *See Collins*, 904 S.W.2d at 798; Johnson v. Garza, 884 S.W.2d 831, 834 (Tex. App.—Austin 1994, writ denied); Wilkins v. Royal Indem. Co., 592 S.W.2d 64, 66–67 (Tex. Civ. App.—Tyler 1979, no writ).

525. *See infra* Part V.

526. *See* Babcock v. Northwest Mem'l Hosp., 767 S.W.2d 705, 709 (Tex. 1989); Haryanto v. Saeed, 860 S.W.2d 913, 918 (Tex. App.—Houston [14th Dist.] 1993, writ denied). Bias and prejudice are statutory grounds for disqualification. *See* TEX. GOV'T CODE ANN. § 62.105(4) (Vernon 1997).

gent use of peremptory challenges."[527] 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.[528]

Whether bias and prejudice exist is ordinarily a fact question.[529] However, if the evidence shows that a prospective juror has a state of mind in favor of or against a litigant or type of suit so that the juror is unable to act with impartiality and without prejudice, the juror is disqualified as a matter of law.[530] Where the evidence is not conclusive as a matter of law, the reviewing court must examine the evidence in a light most favorable to the trial court's ruling.[531] Once bias or prejudice is established, it is a legal disqualification, and reversible error automatically results if the court overrules a motion to strike.[532] A trial court's decision regarding challenges for cause is reviewed for an abuse of discretion.[533]

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

Questions regarding alignment and antagonism of the parties often arise in multiple party litigation.[534] Under Rule 233, the trial judge is required to assess whether antagonism exists among the parties on the same side of the case before assigning the number of peremptory challenges by the parties.[535] Upon motion of any of the litigants, the court must allot the number of peremptory challenges in such a way as to ensure that "no litigant or side is given

---

527. *Babcock*, 767 S.W.2d at 709; *see also* TEX. R. CIV. P. 228 (defining challenge for cause).

528. *See* TEX. R. CIV. P. 44.1.

529. *See* Snap Shop v. Fortune, 365 S.W.2d 151, 154 (Tex. 1963); Powers v. Palacios, 794 S.W.2d 493, 496 (Tex. App.—Corpus Christi 1990), *rev'd on other grounds*, 813 S.W.2d 489 (Tex. 1991).

530. *See* Gum v. Schaefer, 683 S.W.2d 803, 807 (Tex. App.—Corpus Christi 1984, no writ).

531. *See id.* at 807.

532. *See* Compton v. Henrie, 364 S.W.2d 179, 181–82 (Tex. 1963).

533. *See* Guerra v. Wal-Mart Stores, Inc., 943 S.W.2d 56, 59 (Tex. App.—San Antonio 1997, writ requested).

534. *See* Amis v. Ashworth, 802 S.W.2d 379, 385 (Tex. App.—Tyler 1990, orig. proceeding) (Ramey, C.J., dissenting).

535. *See* TEX. R. CIV. P. 233; Perkins v. Freeman, 518 S.W.2d 532, 533 (Tex. 1974); *Amis*, 802 S.W.2d at 385. Under the rule, "side" is defined as "one or more litigants who have common interests on the matters with which the jury is concerned." TEX. R. CIV. P. 233.

an unfair advantage."[536] A trial court's decision to grant a motion to realign a party as a plaintiff is permitted only when the burden of proof on the whole case rests with the defendant, or when the defendant makes the required admissions prior to trial.[537] On mandamus review, the appellate court reviews the record as it existed at the time the motion was heard to determine if the court abused its discretion.[538] Conversely, appellate review requires the appellate court to consider the entire record to determine if the court abused its discretion, and if so, whether the abuse constitutes reversible error.[539] To preserve error in the allocation of jury strikes, the party must lodge the objection after voir dire, but before exercising the strikes.[540]

The existence of antagonism between parties, *per se*, is a question of law.[541] 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 exercise of the strikes by the parties.[542] "The existence of antagonism must be finally determined after voir dire and prior to the exercise of the strikes of the parties."[543] The existence of antagonism is not a discretionary matter; it is a question of law determined from the above factors as to whether any litigants on the same side of the docket are antagonistic regarding an issue that the jury will be asked to answer.[544] "The nature and degree of the antagonism, and its effect on the number of peremp-

536. TEX. R. CIV. P. 233.

537. *See Amis*, 802 S.W.2d at 384 (citing TEX. R. CIV. P. 266).

538. *See id.* at 384 n.7.

539. *See* Amis v. Ashworth, 802 S.W.2d 379, 382–83 (Tex. App.—Tyler 1990, orig. proceeding) (Ramey, C.J., dissenting).

540. *See* Texas Commerce Bank v. Lebco Constructors, 865 S.W.2d 68, 77 (Tex. App.—Corpus Christi 1993, writ denied).

541. *See* Garcia v. Central Power & Light Co., 704 S.W.2d 734, 736 (Tex. 1986); Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1979); Cecil v. T.M.E. Invs., Inc., 893 S.W.2d 38, 55 (Tex. App.—Corpus Christi 1994, no writ); Diamond Shamrock Corp. v. Wendt, 718 S.W.2d 766, 768 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

542. *See Garcia*, 704 S.W.2d at 737; *Patterson Dental*, 592 S.W.2d at 919; *Cecil*, 893 S.W.2d at 55; Webster v. Lipsey, 787 S.W.2d 631, 638 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

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

544. *See Patterson Dental*, 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.).

tory jury strikes allocated to each litigant or side, however, are matters left to the discretion of the trial court."[545]

Thus, if the trial court based its finding upon "a reasonable assessment of the situation" as it existed at the time when the challenges are made, no abuse of discretion exists.[546] On the other hand, if the trial court has ignored the posture of the parties or has misconstrued or overlooked a vital factor, its decision should be reversed as an abuse of discretion.[547] The harmless error rule applies to the allocation of peremptory challenges given to a party; therefore, to obtain a reversal, the complaining party must establish that the trial was "materially unfair" based on the entire record.[548] When the evidence is sharply conflicting and the trial is hotly contested, the error automatically results in a materially unfair trial.[549]

E. *Batson/Edmonson Challenges*

The Equal Protection Clause of the United States Constitution[550] prohibits parties from using peremptory strikes to exclude members of a jury panel solely on the basis of race.[551] This proscription applies to both criminal and civil trials.[552] There is a three-step process in resolving a *Batson* objection to a peremptory challenge.[553] First, the opponent of the peremptory challenge must establish a prima facie case of racial discrimination.[554] Second, the burden shifts to the party who exercised the strike to present a race-neutral explanation.[555] Unless a discriminatory intent is in-

545. *Wendt*, 718 S.W.2d at 768.

546. *American Cyanamid Co.*, 732 S.W.2d at 661.

547. *See id.*

548. *See* Garcia v. Central Power & Light Co., 704 S.W.2d 734, 737 (Tex. 1986); Lorusso v. Members Mut. Ins. Co., 603 S.W.2d 818, 820-21 (Tex. 1980); Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919–21 (Tex. 1979).

549. *See Garcia*, 704 S.W.2d at 737; *Patterson Dental*, 592 S.W.2d at 918.

550. U.S. CONST. amend. XIV, § 1.

551. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986).

552. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 618–31 (1991); *see also* Goode v. Shoukfeh, 943 S.W.2d 441, 444–45 (Tex. 1997) (noting that supreme court has extended *Batson* to civil trials); Powers v. Palacios, 813 S.W.2d 489, 491 (Tex. 1991) (holding that use of peremptory challenge to exclude juror on basis of race violates the equal protection rights of the excluded juror).

553. *See Goode*, 943 S.W.2d at 445.

554. *See id.* at 445.

555. *See id.*

herent in the explanation, the reason offered will be deemed race-neutral.[556] Third, the trial court must then determine if the party challenging the strike has proven purposeful racial discrimination.[557] The issue of whether the race-neutral explanation should be believed is a question of fact for the trial court.[558]

The standard of review of a trial court's decision regarding a *Batson/Edmonson* challenge is abuse of discretion.[559] To preserve a *Batson/Edmonson* issue for appellate review, the complaining party must object to the allegedly offensive peremptory strikes before the jury is sworn in.[560]

F. *Opening Statements*

The trial court has broad discretion to limit opening statements, subject only to review for abuse of discretion.[561] While it is error to discuss evidence that is not eventually offered at the trial,[562] the error is reversible error only if it was calculated to and probably did cause the rendition of an improper judgment.[563]

G. *Trial, Postverdict and Postjudgment Trial Amendments*

When a request to amend pleadings is made within seven days of trial,[564] or thereafter under Rule 63,[565] or post-verdict pleading

---

556. *See id.*

557. *See id.* at 444–45.

558. *See Goode*, 943 S.W.2d at 446. Unless the explanation offered is too incredible to be believed, the reviewing court cannot reweigh the evidence and reach a different conclusion. *See id.*

559. *See id.* at 491. The Court of Criminal Appeals adopted the clearly erroneous standard. *See id.* (citing Whitsey v. State, 796 S.W.2d 707, 720–26 (Tex. Crim. App. 1989)).

560. *See* Jones v. Martin K. Eby Constr. Co., 841 S.W.2d 426, 429 (Tex. App.—Dallas 1992, writ denied).

561. *See* Guerrero v. Smith, 864 S.W.2d 797, 800 (Tex. App.—Houston [14th Dist.] 1993, no writ); Ranger Ins. Co. v. Rogers, 530 S.W.2d 162, 170 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

562. *See* TEX. R. CIV. P. 265(a); *see also Guerrero*, 864 S.W.2d at 799 (noting that opening statements have the potential to mislead the jury).

563. *See Guerrero*, 864 S.W.2d at 800.

564. *See* TEX. R. CIV. P. 63. The "day of trial" means the day the case is scheduled for trial, not the day the case actually begins trial. *See* Taiwan Shrimp Farm Village Ass'n v. U.S.A. Shrimp Farm Dev., Inc., 915 S.W.2d 61, 69 (Tex. App.—Corpus Christi 1996, writ denied); AmSav Group, Inc. v. American Sav. & Loan Ass'n, 796 S.W.2d 482, 490 (Tex. App.—Houston [14th Dist.] 1990, writ denied); Carr v. Houston Bus. Forms, Inc., 794 S.W.2d 849, 849-51 (Tex. App.—Houston [14th Dist.] 1990, no writ). The rule also applies to summary judgment proceedings because a summary judgment hearing is a trial. *See*

amendments are requested under Rule 66,[566] they must be granted unless "(1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face."[567] If the amendment is procedural in nature (*i.e.*, merely conforming the pleadings to the evidence at trial), the trial court must grant the amendment.[568] However, if the amendment is substantive in nature (*i.e.*, changing the bases of a party's causes of action), the trial court has discretion to grant or deny the amendment.[569]

The standard of review for granting a trial amendment is whether the trial court abused its discretion.[570] To establish an abuse of discretion in allowing the amendment, the complaining party must present evidence of surprise or prejudice[571] and request a continuance.[572] Mere allegations of surprise or prejudice are not

---

Goswami v. Metropolitan Sav. & Loan Ass'n, 751 S.W.2d 487, 490 (Tex. 1988); Austin Transp. Study Policy Advisory Comm'n v. Sierra Club, 843 S.W.2d 683, 687 (Tex. App.—Austin 1992, writ denied); Clade v. Larsen, 838 S.W.2d 277, 280 (Tex. App.—Dallas 1992, writ denied).

565. TEX. R. CIV. P. 63.

566. TEX. R. CIV. P. 66.

567. TEX. R. CIV. P. 63, 66; State Bar of Tex. v. Kilpatrick, 874 S.W.2d 656, 658 (Tex. 1994); Chapin & Chapin, Inc. v. Texas Sand & Gravel Co., 844 S.W.2d 664, 665 (Tex. 1992) (per curiam); Greenhalgh v. Service Lloyds Ins. Co., 787 S.W.2d 938, 939 (Tex. 1990). Surprise may be shown as a matter of law if the pleading asserts a new and independent cause of action or defense. *See* Bell v. Moores, 832 S.W.2d 749, 757 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

568. *See Chapin & Chapin*, 844 S.W.2d at 665 (citing *Greenhalgh*, 787 S.W.2d at 939-40); Libhart v. Copeland, 949 S.W.2d 783, 797 (Tex. App.—Waco 1997, no writ). The rule of trial by consent is limited to those exceptional cases where the parties clearly tried an unpleaded issue; therefore, the rule should be cautiously applied and is not appropriate in doubtful situations. *See id.*

569. *See* Taiwan Shrimp Farm Village Ass'n v. U.S.A. Shrimp Farm Dev., Inc., 915 S.W.2d 61, 70 (Tex. App.—Corpus Christi 1996, writ denied); *Libhart*, 949 S.W.2d at 797 (citing Hardin v. Hardin, 597 S.W.2d 347, 350 (Tex. 1980)).

570. *See Kilpatrick*, 874 S.W.2d at 658; *Greenhalgh*, 787 S.W.2d at 940-41; Houston Cable TV, Inc. v. Inwood West Civic Ass'n, 839 S.W.2d 497, 500 (Tex. App.—Houston [14th Dist.] 1992, writ dism'd), *judgm't set aside opinion not vacated*, 860 S.W.2d 72; Clade v. Larsen, 838 S.W.2d 277, 280 (Tex. App.—Dallas 1992, writ denied); AMSav Group, Inc. v. American Sav. & Loan Ass'n, 796 S.W.2d 482, 490 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

571. *See Greenhalgh*, 787 S.W.2d at 940-41; *Houston Cable TV*, 839 S.W.2d at 500; *Clade*, 838 S.W.2d at 280.

572. *See* Resolution Trust Corp. v. Cook, 840 S.W.2d 42, 46 (Tex. App.—Amarillo 1992, writ denied); James v. Texas Dep't of Human Servs., 836 S.W.2d 236, 238 (Tex. App.—Texarkana 1992, no writ); Louisiana & Ark. Ry. v. Blakely, 773 S.W.2d 595, 597 (Tex. App.—Texarkana 1989, writ denied).

sufficient.[573] Note, however, that while the trend is to give trial courts wide latitude in allowing amendments, postjudgment trial amendments are not permitted.[574]

H. *Evidence*

The admission or exclusion of evidence is a matter within the trial court's discretion.[575] 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 "the rendition of an improper judgment."[576] The supreme court has recognized the impossibility of prescribing a specific test for determining whether the erroneous admission or exclusion of evidence was reasonably calculated to cause and probably did cause the rendition of an improper judgment.[577] However, the complaining party is not required to prove that "but for" the error a different judgment would necessarily have resulted.[578] Instead, the complaining party must only show that the error "probably" resulted in an improper judgment.[579] In making this determination, the appellate court must review the entire record.[580] Reversible error does not usually occur in connection with rulings on questions of evidence, unless the appellant can demonstrate that the whole case turns on the par-

573. *See* Greenhalgh v. Service Lloyds Ins. Co., 787 S.W.2d 938, 940–41 (Tex. 1990).

574. *See* Boarder to Boarder Trucking, Inc. v. Mondi, Inc., 831 S.W.2d 495, 499 (Tex. App.—Corpus Christi 1992, no writ).

575. *See* City of Brownsville v. Alvarado, 897 S.W.2d 750, 753 (Tex. 1995); Tracy v. Annie's Attic, Inc., 840 S.W.2d 527, 531 (Tex. App.—Tyler 1992, writ denied); LSR Joint Venture No. 2 v. Callewart, 837 S.W.2d 693, 698 (Tex. App.—Dallas 1992, writ denied).

576. TEX. R. APP. P. 44.1; *see Alvarado*, 897 S.W.2d at 753; Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989); Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 396 (Tex. 1989); West Tex. Gathering Co. v. Exxon Corp., 837 S.W.2d 764, 775 (Tex. App.—El Paso 1992, writ granted), *rev'd*, 868 S.W.2d 299 (Tex. 1993).

577. *See* McCraw v. Maris, 828 S.W.2d 756, 757 (Tex. 1992); Lorusso v. Members Mut. Ins. Co., 603 S.W.2d 818, 821 (Tex. 1980).

578. *See McCraw*, 828 S.W.2d at 758; Texas Power & Light Co. v. Hering, 148 Tex. 350, 353, 224 S.W.2d 191, 192 (1949).

579. *See McCraw*, 828 S.W.2d at 758; King v. Skelly, 452 S.W.2d 691, 696 (Tex. 1970); Cecil v. T.M.E. Invs., Inc., 893 S.W.2d 38, 45 (Tex. App.—Corpus Christi 1994, no writ); *Callewart*, 837 S.W.2d at 699.

580. *See* City of Brownsville v. Alvarado, 897 S.W.2d 750, 754 (Tex. 1995); *McCraw*, 828 S.W.2d at 758 (citing *Gee*, 765 S.W.2d at 396 and *Lorusso*, 603 S.W.2d at 821); Jamail v. Anchor Mortgage Servs., Inc., 809 S.W.2d 221, 223 (Tex. 1991) (per curiam).

ticular evidence admitted or excluded.[581] Furthermore, error in the improper admission of evidence is usually deemed harmless if the objecting party "opens the door" by introducing the same evidence or evidence of a similar character,[582] subsequently permits the same or similar evidence to be introduced without objection[583] or if the evidence is merely cumulative of properly admitted evidence.[584]

1. Scientific Evidence

When a party objects to a proposed expert's testimony in a matter of science, the proponent of the expert testimony has the burden of demonstrating its admissibility.[585] Accordingly, the proponent must establish that the expert's testimony is based on a scientifically reliable foundation.[586] In *E.I. du Pont de Nemours & Co. v. Robinson*,[587] the Texas Supreme Court adopted the factors for admissibility of scientific evidence established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceutical, Inc.*[588] The *Daubert/Robinson* test focuses upon the relevancy and reliability of scientific evidence, requiring trial court judges, under TEX. R. EVID. 702,[589] to consider:

---

581. *See* West Tex. Gathering Co. v. Exxon Corp., 837 S.W.2d 764, 775 (Tex. App.—El Paso 1992, writ granted), *rev'd*, 868 S.W.2d 299 (Tex. 1993); Shenandoah Assoc. v. J & K Properties, Inc., 741 S.W.2d 470, 494 (Tex. App.—Dallas 1987, writ denied); Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 837 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); Atlantic Mut. Ins. Co. v. Middleman, 661 S.W.2d 182, 185 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

582. Southwestern Elec. Power Co. v. Burlington Northern R.R. Co., 41 Tex. Sup. Ct. J. 529, 533, 1998 WL 107920, at *6 (Mar. 13, 1998) (quoting McInnes v. Yahama Motor Co., 673 S.W.2d 185, 188 (Tex. 1984)).

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

584. *See Jamail*, 809 S.W.2d at 223; McInnes v. Yamaha Motor Corp., 673 S.W.2d 185, 188 (Tex. 1984); City of Austin v. Houston Lighting & Power Co., 844 S.W.2d 773, 791 (Tex. App.—Dallas 1992, writ denied).

585. *See* E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995).

586. *See id.*

587. 923 S.W.2d 549 (Tex. 1995).

588. 509 U.S. 579 (1993).

589. *See Robinson*, 923 S.W.2d at 556 (stating that "[Texas Rule of Civil Evidence] 702 contains three requirements for the admission of expert testimony: (1) the witness must be qualified; (2) the proposed testimony must be 'scientific . . . knowledge'; and (3) the testimony must 'assist the trier of fact to understand the evidence or to determine a fact in issue'").

> (1) the extent to which the theory has been or can be tested; (2) the extent to which the theory relies upon the subjective interpretation of the expert . . .; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the nonjudicial uses which have been made of the theory or technique.[590]

Both the admissibility and sufficiency of unreliable scientific evidence can be challenged on appeal.[591] The abuse of discretion standard applies to review of an order regarding the admissibility of scientific evidence.[592]

When reviewing the sufficiency of scientific evidence supporting a jury finding, unreliable scientific evidence is the legal equivalent of no evidence at all.[593] Thus, if the foundational data underlying the scientific opinion testimony is unreliable, or the expert used a flawed methodology or flawed reasoning, the scientific evidence—even if admitted without objection—is legally no evidence.[594] As Justice Gonzalez observed in *Robinson*, a reviewing court is not obligated to accept as some evidence the testimony of an expert who states "that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system."[595] Such evidence carries absolutely no weight.[596]

---

590. *Id.* at 557.

591. *Compare id.* (reviewing the trial court's order excluding scientific evidence), *with* Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711–12 (Tex. 1997) (considering a "no evidence" point of error).

592. *See* E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 558–59 (Tex. 1995) (holding that the trial court did not abuse its discretion by excluding the expert's scientific testimony because that evidence was not based upon reliable foundation, the expert used problematic methodology, the expert's opinion had not been subject to peer review, and the expert conducted his research for the purpose of litigation); *see also* Purina Mills, Inc. v. Odell, 948 S.W.2d 927, 932–34 (Tex. App.—Texarkana 1997, no writ) (holding that the expert's testimony lacked a reliable foundation, and therefore, its admission was an abuse of discretion).

593. *See Havner*, 953 S.W.2d at 712.

594. *See id.*

595. *Robinson*, 923 S.W.2d at 558.

596. *See* Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 712 (Tex. 1997).

2. Expert Testimony

Texas Rule of Evidence 702 permits expert testimony only if the testimony would assist the trier of fact.[597] The offering party has the burden of establishing an expert's qualifications.[598] The trial court must then determine whether the putative expert has the requisite knowledge, skill, experience, training, or education.[599] "The entire substance of the expert's testimony must be examined to determine if the opinion is based on demonstrable facts and does not rely solely on assumptions, possibility, speculation, and surmise."[600] A trial court's ruling that a witness is either qualified or unqualified to offer expert testimony is reviewed for an abuse of discretion.[601]

3. Demonstrative Evidence

Visual, real, or demonstrative evidence is admissible where it tends to resolve some issue at trial and is relevant, as long as its probative value outweighs its prejudicial effect.[602] In line with these principles, "a trial court should admit evidence of an out-of-court experiment only when there is a substantial similarity between the conditions existing at the time of the occurrence giving rise to the litigation and the conditions created by the experiment."[603] However, the conditions do not have to be identical, and if there is a dissimilarity in the conditions which are only minor and subject to explanation, the admission of the experiment is within the trial court's discretion subject to an abuse of discretion review.[604] A trial court may permit a demonstration of the plaintiff's

---

597. *See* TEX. R. EVID. 702; GTE Southwest, Inc. v. Bruce, 956 S.W.2d 636, 640 (Tex. App.—Texarkana 1997, pet. requested); United Blood Servs. v. Longoria, 938 S.W.2d 29, 30–31 (Tex. 1997) (per curiam).

598. *See Longoria*, 938 S.W.2d at 31 (citing Broders v. Heise, 924 S.W.2d 148, 151 (Tex. 1996)).

599. *See id.*

600. *Havner*, 953 S.W.2d at 712–13; Schaefer v. Texas Employers' Ins. Ass'n, 612 S.W.2d 199, 204–05 (Tex. 1980); Dico Tire, Inc. v. Cisneros, 953 S.W.2d 776, 786 (Tex. App.—Corpus Christi 1997, writ denied).

601. *See Longoria*, 938 S.W.2d at 31.

602. *See* TEX. R. EVID. 403; Ford Motor Co. v. Miles, 41 Tex. Sup. Ct. J. 562, 571–72, 1998 WL 124567, at *13–14 (Mar. 19, 1998) (holding that admission of videotapes of sled tests was harmful error) (Owen, J., concurring, joined by Hecht, J.).

603. Rodriguez v. Hyundai Motor Co., 944 S.W.2d 757, 767 (Tex. App.—Corpus Christi 1997, writ granted); *see* General Motors Corp. v. Gayle, 951 S.W.2d 469, 475 (Tex. 1997).

604. *See Rodriguez*, 944 S.W.2d at 767.

injury as long as it merely focuses on the extent and nature of the injury and is not designed to inflame the minds of the jury.[605] The admission of such demonstrative evidence is within the trial court's discretion subject to an abuse of discretion review.[606]

I. *Bifurcation of Trial on Punitive Damages*

If a defendant timely files a motion for bifurcated trial, a trial court must separate the determination of the amount of punitive damages from the remaining issues.[607] "Under this approach, the jury first hears evidence relevant to liability for actual damages, the amount of actual damages, and liability for punitive damages (*e.g.*, gross negligence), and then returns findings on those issues."[608] If the jury finds for the plaintiff on the issue of punitive damage liability, then the same jury is presented with evidence relevant to the issue of punitive damages—such as evidence of the plaintiff's net worth[609]—and determines the amount of damages considering all of the evidence presented at both phases of the trial.[610]

J. *Motion for Directed or Instructed Verdict*

1. Jury Trials

A directed or instructed verdict[611] is proper under Rule 268:[612]

(1) when a defect in the opponent's pleadings makes them insufficient to support a judgment; (2) when the evidence conclusively

---

605. *See* Parkway Hosp. Inc. v. Lee, 946 S.W.2d 580, 585 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

606. *See id.*

607. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.009 (Vernon Supp. 1995); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 30 (Tex. 1994); *see also* Hyman Farm Servs., Inc. v. Earth Oil & Gas Co., Inc., 920 S.W.2d 452, 457 (Tex. App.—Amarillo 1996, no writ) (noting that bifurcation is used to prevent the jury from considering a defendant's net worth when determining liability); Miller v. O'Neill, 775 S.W.2d 56, 57 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding) (observing that the trial court has discretion whether to order a bifurcated trial on punitive damages under the "Wyoming Plan").

608. *Moriel*, 879 S.W.2d at 30.

609. *See* Lunsford v. Morris, 746 S.W.2d 471, 472 (Tex. 1988) (noting that 43 states allow evidence of net worth to be admitted during assessment of punitive damages).

610. *See Moriel*, 879 S.W.2d at 30.

611. A directed verdict and instructed verdict are interchangeable terms. The title to Rule 268 uses the term "instructed verdict" while the body of the rule uses the term "directed verdict." *See* Sulak v. Hubenak, No. 01-95-01431-CV (Tex. App.—Houston [1st Dist.] May 29, 1997, no writ) (not designated for publication), 1997 WL 289665, at *1 n.1.

612. TEX. R. CIV. P. 268.

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.[613]

In reviewing the granting of a directed or instructed verdict by the trial court on an evidentiary basis, the reviewing court will decide whether there is any evidence of probative value to raise issues of fact on the material questions presented.[614] While doing so, the court must "consider all of the evidence in a light most favorable to the party against whom the verdict was instructed, disregard all contrary evidence and inferences, [and] give the losing party the benefit of all reasonable inferences created by the evidence."[615] "[E]very reasonable intendment deductible from the evidence is to be indulged in [the nonmovant's] favor."[616] "If there is any conflicting evidence of probative value on any theory of recovery, an instructed verdict is improper and the case must be reversed and remanded for the jury's determination on that issue."[617] "Where no evidence of probative force on an ultimate fact element

---

613. Kline v. O'Quinn, 874 S.W.2d 776, 785 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *see* Delp v. Douglas, 948 S.W.2d 483, 492 (Tex. App.—Fort Worth 1997, pet. granted); Edlund v. Bounds, 842 S.W.2d 719, 723-24 (Tex. App.—Dallas 1992, writ denied); M. N. Dannenbaum, Inc. v. Brummerhop, 840 S.W.2d 624, 629 (Tex. App.—Houston [14th Dist.] 1992, writ dism'd); Kelly v. Diocese of Corpus Christi, 832 S.W.2d 88, 90–91 (Tex. App.—Corpus Christi 1992, writ dism'd w.o.j.); Texas Employers' Ins. Ass'n v. Duree, 798 S.W.2d 406, 408 (Tex. App.—Fort Worth 1990, writ denied); Rudolph v. ABC Pest Control, Inc., 763 S.W.2d 930, 932 (Tex. App.—San Antonio 1989, writ denied); McCarley v. Hopkins, 687 S.W.2d 510, 512 (Tex. App.—Houston [1st Dist.] 1985, no writ); 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.).

614. *See* Qantel Bus. Sys., Inc. v. Custom Controls, 761 S.W.2d 302, 304 (Tex. 1988); White v. Southwestern Bell Tel. Co., 651 S.W.2d 260, 262 (Tex. 1983); Collora v. Navarro, 574 S.W.2d 65, 68 (Tex. 1978).

615. Szczepanik v. First S. Trust Co., 883 S.W.2d 648, 649 (Tex. 1994); *see Qantel*, 761 S.W.2d at 303–04; Porterfield v. Brinegar, 719 S.W.2d 558, 559 (Tex. 1986); *White*, 651 S.W.2d at 262; *Collora*, 574 S.W.2d at 68; Heinsohn v. Trans-Con Adjustment Bureau, 939 S.W.2d 793, 795 (Tex. App.—Fort Worth 1997, writ denied); Patton v. Saint Joseph Hosp., 887 S.W.2d 233, 241 (Tex. App.—Fort Worth 1994, writ denied); University Nat'l Bank v. Ernst & Whinney, 773 S.W.2d 707, 709 (Tex. App.—San Antonio 1989, no writ); *Rudolph*, 763 S.W.2d at 932; Graziadei v. D.D.R. Mach. Co., 740 S.W.2d 52, 56 (Tex. App.—Dallas 1987, writ denied).

616. Trenholm v. Ratcliff, 646 S.W.2d 927, 931 (Tex. 1983); *see University Nat'l Bank*, 773 S.W.2d at 709.

617. *Szczepanik*, 883 S.W.2d at 649; Jones v. Tarrant Util. Co., 638 S.W.2d 862, 865 (Tex. 1982); *Collora*, 574 S.W.2d at 68; *see Qantel*, 761 S.W.2d at 304; *White*, 651 S.W.2d at 262; Texas Employers' Ins. Ass'n v. Page, 553 S.W.2d 98, 102 (Tex. 1977).

exists or where the probative force of certain 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."[618] The reviewing court may affirm a directed verdict even if the trial court's rationale for granting the directed verdict is erroneous, provided it can be supported on another basis.[619]

2. Nonjury Trials

In a nonjury trial, the judge serves in the dual capacity of both fact finder and magistrate; as such, the judge has the power and the duty to weigh the evidence, draw inferences and make reasonable deductions from the evidence, and to believe or disbelieve all or part of it.[620] Prior to *Qantel Business Systems, Inc. v. Custom Controls Co.*,[621] the granting of a motion for judgment in a nonjury trial was the legal equivalent of the granting of a directed verdict in a trial by jury.[622] Since those two actions were deemed equivalent, the appellate standard of review for assessing the propriety of a directed verdict granted in a jury trial was held to be equally applicable to the review of a granted motion for judgment in a nonjury trial.[623] Thus, the trial judge could grant a motion for judgment upon conclusion of the plaintiff's case only if there was no evidence to support the plaintiff's cause of action.[624] The trial judge who could find some evidence to support the claim, but remained unconvinced, was required to hear the defendant's case before ruling on the factual sufficiency of the evidence.[625] However, the supreme court overruled that line of cases 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

618. ITT Consumer Fin. Corp. v. Tovar, 932 S.W.2d 147, 160 (Tex. App.—El Paso 1996, writ denied); *University Nat'l Bank*, 773 S.W.2d at 709.

619. *See* Kelly v. Diocese of Corpus Christ, 832 S.W.2d 88, 90 (Tex. App.—Corpus Christi 1992, writ dism'd w.o.j.).

620. *See* Qantel Bus. Sys., Inc. v. Custom Controls, 761 S.W.2d 302, 306 (Tex. 1988) (Gonzalez, J., concurring); Schwartz v. Pinnacle Communications, 944 S.W.2d 427, 431 (Tex. App.—Houston [14th Dist.] 1997, no writ).

621. 761 S.W.2d 302 (Tex. 1988).

622. *See Qantel*, 761 S.W.2d at 303.

623. *See id.* at 303–04.

624. *See id.* at 304.

625. *See id.*

and to make factual findings at that time if requested by a party.[626] On appeal, the legal and factual sufficiency of the evidence to support the judgment may be challenged as in any other nonjury case.[627] The standards of review in nonjury cases are discussed in Part VIII.

K. *Charge of the Court*

Great confusion exists regarding the standard of review for complaints about the court's charge to the jury.[628] The confusion is due to the existence of different standards for different aspects of charge practice, which courts sometimes simplistically fail to limit to their proper procedural context.[629]

1. Questions

Unless extraordinary circumstances exist, a trial court must submit broad form questions to the jury.[630] Rule 278 provides that "[t]he court shall submit the questions . . . in the form provided by Rule 277, which are raised by the written pleadings and evidence."[631] The supreme court has interpreted Rule 278 as providing "a substantive, nondiscretionary directive to trial courts

---

626. *See id.* at 304; Roberts Express, Inc. v. Expert Transp., Inc., 842 S.W.2d 766, 769-70 (Tex. App.—Dallas 1992, no writ).

627. *See Roberts*, 842 S.W.2d at 769–70; Schwartz v. Pinnacle Communications, 944 S.W.2d 427, 431 (Tex. App.—Houston [14th Dist.] 1997, no writ).

628. *See* State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 240 (Tex. 1992) (lamenting that "[t]he rules governing charge procedures are difficult enough; the caselaw applying them has made compliance a labyrinth daunting to the most experienced trial lawyer."). In *Payne*, the court severely criticized the traps involved in preserving error at the charge stage of the trial. *See id.* at 241. The court stated:

> The procedure for preparing and objecting to the jury charge has lost its philosophical moorings. There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle.

Id.

629. *See* Texas Dep't of Human Servs. v. E. B., 802 S.W.2d 647, 649 (Tex. 1990) (noting that "[t]he standard for review of the charge is abuse of discretion, [which] occurs only when the trial court acts without reference to any guiding principles.").

630. *See* TEX. R. CIV. P. 277; Keetch v. Kroger Co., 845 S.W.2d 262, 266–67 (Tex. 1992); *E.B.*, 802 S.W.2d at 649; Crawford v. Deets, 828 S.W.2d 795, 800 (Tex. App.—Fort Worth 1992, writ denied).

631. TEX. R. CIV. P. 278.

requiring them to submit requested questions to the jury if the pleadings and evidence support them."[632] Thus, as "long as matters are timely raised and properly requested as a part of the trial court's charge," a judgment must be reversed "when a party is denied proper submission of a valid theory of recovery or a vital defensive issue raised by the pleadings and evidence."[633]

The submission of controlling issues in the case—in terms of theories of recovery or a defense—appears to be a question of law and is reviewable de novo.[634] Likewise, other objections, such as those which claim that the issue in question was not supported by the pleadings,[635] that there is no cause of action or defense under the substantive law,[636] and that the evidence is not legally sufficient to support submission,[637] should be reviewed de novo because each complaint raises a question of law. Whether a trial court should submit a theory by questions or instructions is to be reviewed under an abuse of discretion test, recognizing, however, that there is a presumption in favor of broad form submission of questions.[638] "To determine whether an alleged error in the charge is reversible, the reviewing court must consider the pleadings of the parties, the evidence presented at trial, and the charge in its entirety."[639] In addition, the reversible error analysis applies to complaints about errors in the charge.[640] However, when the complaint alleges that an element of a theory has been omitted in the questions or instructions—either because the court believed that it was established as a matter of law or an element of the theory of recovery was omitted—the appropriate standard of review should be de novo.[641]

---

632. Elbaor v. Smith, 845 S.W.2d 240, 243 (Tex. 1992).

633. Exxon Corp. v. Perez, 842 S.W.2d 629, 631 (Tex. 1992).

634. *See* Continental Cas. Co. v. Street, 379 S.W.2d 648, 651 (Tex. 1964).

635. *See* McLennan Elec. Coop., Inc. v. Sims, 376 S.W.2d 924, 927 (Tex. Civ. App.—Waco 1964, writ ref'd n.r.e.).

636. *See id.* at 927.

637. *See* Elbaor v. Smith, 845 S.W.2d 240, 243 (Tex. 1992); Brown v. Goldstein, 685 S.W.2d 640, 641 (Tex. 1985); Garza v. Alviar, 395 S.W.2d 821, 824 (Tex. 1965).

638. *See* TEX. R. CIV. P. 277; Texas Dep't of Human Servs. v. E.B., 802 S.W.2d 647, 649 (Tex. 1990); Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 256 (Tex. 1974).

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

640. *See id.*

641. *See* State Dep't of Pub. Highways v. Payne, 838 S.W.2d 235, 240-41 (Tex. 1992) (emphasizing the plaintiff's failure to submit an element of his theory of recovery over the

2. Instructions and Definitions

The trial court should generally explain to the jury any legal or technical terms contained in instructions and definitions.[642] The decision of whether to submit a particular instruction or definition is reviewed for an abuse of discretion,[643] with the essential question being whether the instruction or definition aids the jury in answering the questions.[644] A court, accordingly, is given wide latitude to determine the sufficiency of explanatory instructions and definitions.[645] A court has considerably more discretion in submitting instructions and definitions than it has in submitting jury questions.[646]

When instructions or definitions are actually given, the question on review is whether the instruction or definition is "proper."[647] An instruction is "proper" if it assists the jury, is supported by the pleadings or evidence, and accurately states the law.[648] Examples of "improper" instructions include those which misstate the law or

---

defendant's objection); McKinley v. Stripling, 763 S.W.2d 407, 410 (Tex. 1989) (ruling that because the plaintiff refused to submit the proximate cause issue in informed consent action after the defendant properly objected to the omission of the issue on an element, he waived the issue and could not recover).

642. *See* TEX. R. CIV. P. 277; Lumbermens Mut. Cas. Co. v. Garcia, 758 S.W.2d 893, 894 (Tex. App.—Corpus Christi 1988, writ denied); K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632, 636 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

643. *See* State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 451 (Tex. 1997); Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 791 (Tex. 1995); Magro v. Ragsdale Bros., 721 S.W.2d 832, 836 (Tex. 1986).

644. *See* McReynolds v. First Office Management, 948 S.W.2d 342, 344 (Tex. App.—Dallas 1997, no writ); Owens-Corning Fiberglass Corp. v. Martin, 942 S.W.2d 712, 721 (Tex. App.—Dallas 1997, no writ); Torres v. Caterpillar, Inc., 928 S.W.2d 233, 241 (Tex. App.—San Antonio 1996, writ denied); Perez v. Weingarten Realty, Investors, 881 S.W.2d 490, 496 (Tex. App.—San Antonio 1994, writ denied); Louisiana & Ark. Ry. v. Blakely, 773 S.W.2d 595, 598 (Tex. App.—Texarkana 1989, writ denied); Harris v. Harris, 765 S.W.2d 798, 801 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

645. *See Plainsman*, 898 S.W.2d at 791; Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 256 (Tex. 1974); *Perez*, 881 S.W.2d at 496; M. N. Dannenbaum, Inc. v. Brummerhop, 840 S.W.2d 624, 631 (Tex. App.—Houston [14th Dist.] 1992, writ dism'd).

646. *See Harris*, 765 S.W.2d at 801.

647. *See* TEX. R. CIV. P. 277; *Plainsman*, 898 S.W.2d at 791; *M. N. Dannenbaum*, 840 S.W.2d at 631; Atlantic Mut. Ins. Co. v. Middleman, 661 S.W.2d 182, 187 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

648. *See McReynolds*, 948 S.W.2d at 344; *Martin*, 942 S.W.2d at 721; Operation Rescue-Nat'l v. Planned Parenthood Inc., 937 S.W.2d 60, 69 (Tex. App.—Houston [14th Dist.] 1996, writ granted); *Perez*, 881 S.W.2d at 496; *Blakely*, 773 S.W.2d at 598; 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).

mislead the jury,[649] or which comment on the weight of the evidence.[650] The test of sufficiency for a definition "is its reasonable clarity in performing [its] function."[651] This is reviewed under an abuse of discretion test.[652] However, whether the terms are properly defined or the instruction properly worded should be a question of law reviewable de novo.[653] A de novo standard of review should also be used when the complaint is that an explanatory instruction or definition misstates the law,[654] or directly comments on the weight of the evidence.[655] If the definition or instruction was improper, the reviewing court must then determine whether the error was harmless.[656]

When a party complains about the court's refusal to submit a requested instruction or definition, the question on review is whether the request was "reasonably necessary to enable the jury to render a proper verdict."[657] When the refusal is based on a de-

649. *See* Jackson v. Fontaine's Clinics, Inc., 499 S.W.2d 87, 89 (Tex. 1973); McReynolds v. First Office Management, 948 S.W.2d 342, 344 (Tex. App.—Dallas 1997, no writ); Owens-Corning Fiberglass Corp. v. Martin, 942 S.W.2d 712, 721 (Tex. App.—Dallas 1997, no writ).

650. *See* Torres v. Caterpillar, Inc., 928 S.W.2d 233, 241 (Tex. App.—San Antonio 1996, writ denied). A comment on the weight of the evidence may be demonstrated when the instruction assumes the "truth of a material, controverted fact or exaggerates, minimizes, or withdraws some pertinent evidence from the jury's consideration." *Id.* at 241-42.

651. Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 791 (Tex. 1995); Harris v. Harris, 765 S.W.2d 798, 801 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

652. *See Plainsman*, 898 S.W.2d at 791; *Torres*, 928 S.W.2d at 242; *Harris*, 765 S.W.2d at 801.

653. *See* M. N. Dannenbaum, Inc. v. Brummerhop, 840 S.W.2d 624, 631 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (asserting that an instruction is improper if it misstates the law); Villarreal v. Reza, 236 S.W.2d 239, 241 (Tex. Civ. App.—San Antonio 1951, no writ) (finding an instruction that fails to properly instruct the jury on the burden of proof issue erroneous).

654. *See, e.g., Harris*, 765 S.W.2d at 801; Wakefield v. Bevly, 704 S.W.2d 339, 350 (Tex. App.—Corpus Christi 1985, no writ); Bennett v. Bailey, 597 S.W.2d 532, 533 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.).

655. *See* City of Pearland v. Alexander, 483 S.W.2d 244, 249 (Tex. 1972); American Bakers Ins. Co. v. Caruth, 786 S.W.2d 427, 434-35 (Tex. App.—Dallas 1990, no writ).

656. *See* Owens-Corning Fiberglass Corp. v. Martin, 942 S.W.2d 712, 721 (Tex. App.—Dallas 1997, no writ); *M. N. Dannenbaum*, 840 S.W.2d at 631.

657. Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 790 (Tex. 1995); Vinson & Elkins v. Moran, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, writ requested); 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); *see also* TEX. R. CIV. P. 277 (describing what type of instructions and definitions are required).

termination that the request is unnecessary, the abuse of discretion standard of review should apply.[658] By contrast, when the refusal is based upon a determination that the instruction or definition was not raised by the pleadings,[659] was not supported by "some evidence,"[660] was not tendered in substantially correct form,[661] or was not an element of a ground of recovery or defense in broad form submission,[662] the complaint presents a legal question reviewable de novo. The harmless error rule applies when determining whether the improper refusal to submit a requested instruction or definition requires reversal.[663]

To determine whether an alleged error in the submission of instructions or definitions is reversible, the reviewing court must consider "the pleadings of the parties, the evidence presented at trial, and the charge in its entirety."[664] Error 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."[665]

---

658. *See Moran*, 946 S.W.2d at 405.

659. *See* Ellison v. Larson, 217 S.W.2d 416, 419 (Tex. Civ. App.—San Antonio 1948), *rev'd on other grounds*, 147, Tex. 465, 217 S.W.2d 420 (1949).

660. *See* Elbaor v. Smith, 845 S.W.2d 240, 243 (Tex. 1992); Ornelas v. Moore Serv. Bus Lines, 410 S.W.2d 919, 923 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.).

661. *See* Placencio v. Allied Indus. Int'l, Inc., 724 S.W.2d 20, 22 (Tex. 1987); *Ornelas*, 410 S.W.2d at 923.

662. *See* M.L. Rendleman v. Clarke, 909 S.W.2d 56, 60 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd).

663. *See* St. James Transp. Co. v. Porter, 840 S.W.2d 658, 664 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (citing Gulf Coast State Bank v. Emenhiser, 562 S.W.2d 449, 453-54 (Tex. 1978)); *see also* TEX. R. APP. P. 44.1 (detailing the reversible error doctrine).

664. Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n, 710 S.W.2d 551, 555 (Tex. 1986); Vinson & Elkins v. Moran, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, writ requested).

665. *Island Recreational*, 710 S.W.2d at 555; *see* TEX. R. APP. P. 44.1; *Moran*, 946 S.W.2d at 405; *cf.* Ford Motor Co. v. Miles, 41 Tex. Sup. Ct. J. 562, 570, 1998 WL 124567, at *11-12 (Mar. 19, 1998) (Owen, J., concurring, joined by Hecht & Abbott, JJ.) (stating that an erroneous instruction infects the entire charge). In *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 817 (Tex. 1997), the supreme court held that the submission of the charge was reversible error because the charge failed to instruct the jury on the proper measure of damages. *See id.* The court did not engage in a reversible error analysis. *See id.* However, in *State v. Williams*, 940 S.W.2d 583, 585 (Tex. 1996), the supreme court employed reversible error analysis as to an improper instruction and concluded that the error was not harmful error. *See id.*

L. *Jury Arguments*

To obtain reversal of a judgment on the basis of improper jury argument, an appellant must prove the existence of:

> (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) [that] was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the trial court.[666]

Additionally, if the argument is incurable,[667] the appellant must also prove "that the argument by its nature, extent, and degree constitutes reversible error."[668]

Improper jury arguments rarely result in reversible error.[669] Some notable examples include: appealing to racial or ethnic prejudice, accusing a defendant corporation of being a killer of families, or referring to a party as "cattle."[670] In those cases, the appellant must also prove that the argument by its nature, degree, and extent, constituted harmful error (focusing on the length of the argument, whether it was repeated or abandoned and whether

---

666. Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 839 (Tex. 1979); *see* Borg-Warner Protective Servs. Corp. v. Flores, 911 S.W.2d 861, 868 (Tex. App.—Corpus Christi 1997, no pet.); Rodriguez v. Hyundai Motor Co., 944 S.W.2d 757, 774 (Tex. App.—Corpus Christi 1997, writ granted); Isern v. Watson, 942 S.W.2d 186, 198 (Tex. App.—Beaumont 1997, pet. requested); Cecil v. T.M.E. Invs., Inc., 893 S.W.2d 38, 48-49 (Tex. App.—Corpus Christi 1994, no writ); Lone Star Ford, Inc. v. Carter, 848 S.W.2d 850, 853 (Tex. App.—Houston [14th Dist.] 1993, no writ); Texas Health Enters., Inc. v. Krell, 828 S.W.2d 192, 204 (Tex. App.—Corpus Christi) 1992, writ granted), *vacated*, 830 S.W.2d 922 (Tex. 1992); *see also* TEX. R. CIV. P. 269 (discussing rules for arguments).

667. "The true test [for incurability] is the degree of prejudice flowing from the argument—whether the argument, considered in its proper setting, was reasonably calculated to cause such prejudice to the opposing litigant that a withdrawal by counsel or an instruction from the court, or both, could not eliminate the probability that it resulted in an improper verdict." Texas Employers' Ins. Ass'n v. Haywood, 153 Tex. 242, 245, 266 S.W.2d 856, 858 (1954); Austin v. Shampine, 948 S.W.2d 900, 906-07 (Tex. App.—Texarkana 1997, no writ) (quoting *Haywood*).

668. *Reese*, 584 S.W.2d at 839–40; *see Shampine*, 948 S.W.2d at 907; *Carter*, 848 S.W.2d at 853. Only in the rare instance of incurable jury argument is error preserved without an objection. *See Rodriguez*, 944 S.W.2d at 774.

669. *See Reese*, 584 S.W.2d 835, 839; *Shampine*, 948 S.W.2d at 907; *Isern*, 942 S.W.2d at 198; Boone v. Panola County, 880 S.W.2d 195, 198 (Tex. App.—Tyler 1994, no writ); Haryanto v. Saeed, 860 S.W.2d 913, 919 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

670. *See* Southwestern Greyhound Lines v. Dickson, 149 Tex. 599, 605, 236 S.W.2d 115, 118 (1951); *Carter*, 848 S.W.2d at 854; Texas Employers' Ins. Ass'n v. Guerrero, 800 S.W.2d 859, 863, 865 (Tex. App.—San Antonio 1990, writ denied).

there was cumulative error are proper inquiries), 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.[671] Finally, the reviewing court must evaluate the improper jury argument in light of the whole case, beginning with voir dire and ending with closing argument.[672]

M. *Jury Deliberations*

Where the evidence is conflicting on the question of alleged jury misconduct during their deliberations, the appellate court will presume that misconduct did not occur.[673] To overcome this presumption, the complaining party must show that misconduct occurred and that it likely resulted in an improper verdict.[674] The scheduling of jury deliberations, sequestration of jurors, breaks, and the like are all reviewed for an abuse of discretion.[675] Responses to jury notes are reviewed in the same manner as regular charge practices.[676] Whether to repeat testimony to the jury and the extent of the repetition is discretionary, except that testimony must be reread if the requirements of Rule 287[677] are met. In the absence of disagreement between jurors, however, the court is not obligated to have testimony read back.[678] Furthermore the trial court has

---

671. *See Shampine*, 948 S.W.2d at 907; Rodriguez v. Hyundai Motor Co., 944 S.W.2d 757, 774 (Tex. App.—Corpus Christi 1997, writ granted); Isern v. Watson, 942 S.W.2d 186, 198 (Tex. App.—Beaumont 1997, pet. requested); *Boone*, 880 S.W.2d at 198; *Haryanto*, 860 S.W.2d at 919; *Guerrero*, 800 S.W.2d at 863, 865.

672. *See* Luna v. North Star Dodge Sales, Inc., 667 S.W.2d 115, 120 (Tex. 1984); Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 839–40 (Tex. 1979); *Boone*, 880 S.W.2d at 198; *Haryanto*, 860 S.W.2d at 919; *Guerrero*, 800 S.W.2d at 863, 865; Louisiana & Ark. Ry. v. Capps, 766 S.W.2d 291, 294 (Tex. App.—Texarkana 1989, writ denied).

673. *See* 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.).

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

675. *See* TEX. R. CIV. P. 282.

676. *See* TEX. R. CIV. P. 286.

677. *See* TEX. R. CIV. P. 287 (requiring disagreement among jurors as to witness statements before testimony can be read back to them).

678. *See* Hill v. Robinson, 592 S.W.2d 376, 384 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

broad discretion in deciding what portion of testimony is relevant to the point in dispute.[679]

A trial court has discretion to issue a supplemental charge to the jury ("verdict urging" or "dynamite" charge), or return a jury for further deliberations in an attempt to encourage them to reach a verdict.[680] Typically, when a supplemental charge is given the complaining party will contend that the jury was coerced into reaching a particular verdict. To test a supplemental charge for coerciveness, the supplemental charge must be broken down into its particulars and examined for its possible coercive effect.[681] A potentially coercive charge will not constitute reversible error unless the charge as a whole retains its coercive nature when all of the circumstances surrounding its rendition and effect are analyzed.[682] Additionally, the length of time a court allows for jury deliberations is a decision within the sound discretion of the trial court.[683] However, while the trial court has considerable latitude, if the complaining party can show substantial evidence on appeal that it was altogether improbable that the jury would reach a verdict, then the error is reversible.[684]

N. *Jury Misconduct*

When the evidence is conflicting on the question of alleged jury misconduct, the appellate court will generally presume that misconduct did not occur.[685] To obtain a new trial based upon jury

679. *See* Wirtz v. Orr, 575 S.W.2d 66, 72 (Tex. Civ. App.—Texarkana 1978, writ dism'd); Aetna Cas. & Sur. Co. v. Scott, 423 S.W.2d 351, 354 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ dism'd by agr.).

680. Under Texas Rule of Civil Procedure 286, the trial court may also issue a supplemental charge to correct an error in the original charge. *See* Lochinvar Corp. v. Meyers, 930 S.W.2d 182, 187 (Tex. App.—Dallas 1996, no writ). Violations of Rule 286 are reversed only if the error is prejudicial. *See id.* at 286.

681. *See* Stevens v. Travelers Ins. Co., 563 S.W.2d 223, 229 (Tex. 1978); Minnesota Mining & Mfg. Co. v. Nishika, Ltd., 885 S.W.2d 603, 632 (Tex. App.—Beaumont 1994, writ granted), question certified, answered 953 S.W.2d 733 (Tex. 1997).

682. *See Stevens*, 563 S.W.2d at 229, 232.

683. *See Minnesota Mining*, 885 S.W.2d at 632; Shaw v. Greater Houston Transp. Co., 791 S.W.2d 204, 205-06 (Tex. App.—Corpus Christi 1990, no writ).

684. *See Shaw*, 791 S.W.2d at 206.

685. *See* 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.).

misconduct, a party must show that misconduct occurred, that the misconduct was material, and that, based upon the whole record, it probably resulted in harm.[686] A motion for new trial premised on jury misconduct "must be supported by a juror's affidavit alleging that 'outside influences' were brought to bear upon the jury."[687] To obtain a hearing in the absence of a juror's affidavit, a party must explain why affidavits cannot be obtained and provide specific examples of material jury misconduct.[688]

O. *Conflicting Jury Findings*

In reviewing the legal question of whether jury findings irreconcilably conflict, the appellate court applies a de novo standard of review.[689] Because this is purely a legal question, the trial court's granting of a new trial on the express basis of irreconcilably conflicting jury findings can be challenged by mandamus.[690]

In reviewing jury findings for conflict, the threshold inquiry is whether the findings are about the same material fact.[691] A court may not strike down jury answers on the ground of conflict if any reasonable basis exists upon which the conflict can be reconciled.[692] 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

---

686. *See* TEX. R. CIV. P. 327a; Redinger v. Living, Inc., 689 S.W.2d 415, 419 (Tex. 1985); Ramsey v. Lucky Stores, Inc., 853 S.W.2d 623, 635 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *Phillips*, 255 S.W.2d at 366.

687. Weaver v. Westchester Fire Ins. Co., 739 S.W.2d 23, 24 (Tex. 1987, writ ref'd n.r.e.); *see* Mitchell v. Southern Pac. Transp. Co., 955 S.W.2d 300, 321 (Tex. App.—San Antonio 1997, no writ); Dubin v. Dal-Briar Corp., 871 S.W.2d 263, 271-72 (Tex. App.—El Paso 1994, writ denied); *Ramsey*, 853 S.W.2d at 635-36; Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 850 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *see also* TEX. R. CIV. P. 327b (limiting juror's ability to testify about deliberations to cases where outside influences were improperly used); TEX. R. EVID. 606(b) (barring juror's testimony regarding deliberations except when outside influence was used).

688. *See* Ray Jones Lumber Co. v. Murphy, 139 Tex. 478, 483, 163 S.W.2d 644, 646 (1942); *Ramsey*, 853 S.W.2d at 635-36.

689. *See* Bender v. Southern Pac. Transp. Co., 600 S.W.2d 257, 260 (Tex. 1980).

690. *See* Indemnity Ins. Co. v. Craik, 346 S.W.2d 830, 831-32 (Tex. 1961).

691. *See Bender*, 600 S.W.2d at 260; Graco Robotics, Inc. v. Oaklawn Bank, 914 S.W.2d 633, 640 (Tex. App.—Texarkana 1995, writ dism'd).

692. *See* Luna v. Southern Pac. Transp. Co., 724 S.W.2d 383, 384 (Tex. 1987); *Bender*, 600 S.W.2d at 260; Lee v. Huntsville Livestock Servs., 934 S.W.2d 158, 160 (Tex. App.—Houston [14th Dist.] 1996, no writ); *Graco Robotics*, 914 S.W.2d at 640.

as a whole.[693] When the issues submitted may have more than one reasonable construction, the reviewing court will generally adopt the construction that avoids a conflict in the answers.[694]

Appellate review is "limited to the question of conflict, and . . . review of the jury findings is limited to a consideration of the factors before the jury."[695] Similarly, when no conflict exists, the appellate court cannot use the jury's answer to one question to challenge the insufficiency of the evidence supporting the jury's answer to another question.[696]

P. *Motion for Mistrial*

An order granting a motion for mistrial is an interlocutory order and is not appealable.[697] The remedy for review of an order granting a mistrial is by mandamus.[698] An order denying a motion for mistrial may be reviewed on appeal for an abuse of discretion.[699]

VI. Post-Trial Rulings

A. *Motion to Disregard Jury Findings*

A trial court may disregard a jury's finding and grant a motion to that effect if there is no evidence to support the jury's finding.[700] If the issue is immaterial[701] or has no support in the evidence, or if

---

693. *See Luna*, 724 S.W.2d at 384; *Bender*, 600 S.W.2d at 260; *Lee*, 934 S.W.2d at 160; *Graco Robotics*, 914 S.W.2d at 640.

694. *See Luna*, 724 S.W.2d at 384; Bender v. Southern Pac. Transp. Co., 600 S.W.2d 257, 260 (Tex. 1980); *Lee*, 934 S.W.2d at 160; *Graco Robotics*, 914 S.W.2d at 640.

695. *Bender*, 600 S.W.2d at 260.

696. *See* Huber v. Ryan, 627 S.W.2d 145, 145-46 (Tex. 1981) (holding that a jury's findings of injury and zero damages for past pain and suffering could be reconciled).

697. *See* Cummins v. Paisan Constr. Co., 682 S.W.2d 235, 236 (Tex. 1984); *In re* S.G., 935 S.W.2d 919, 923 (Tex. App.—San Antonio 1996, writ dism'd w.o.j.); Galvan v. Downey, 933 S.W.2d 316, 321 (Tex. App.—Houston [14th Dist.] 1996, writ denied); Fox v. Lewis, 344 S.W.2d 731, 734 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.).

698. *See Galvan*, 933 S.W.2d at 321.

699. *See* Sowards v. Yanes, 955 S.W.2d 456, 458 (Tex. App.—Fort Worth 1997, pet. requested).

700. *See* Alm v. Aluminum Co. of America, 717 S.W.2d 588, 593 (Tex. 1986); Stuart v. Baylers, 945 S.W.2d 131, 146 (Tex. App.—Houston [1st Dist.] 1996, no writ); Harris County v. McFerren, 788 S.W.2d 76, 78 (Tex. App.—Houston [1st Dist.] 1990, writ denied); Arch Constr., Inc. v. Tyburec, 730 S.W.2d 47, 51 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

701. "A jury finding is immaterial only if the question should not have been submitted or if the question, though properly submitted, was rendered immaterial by other findings."

the evidence establishes a contrary finding, then the court may disregard an answer and substitute its own finding.[702]

In reviewing the grant of a motion to disregard jury findings, the reviewing court must review all testimony in a light most favorable to the verdict, indulging every reasonable inference deductible in its favor.[703] Where some evidence supports the disregarded finding, the reviewing court must reverse and render a judgment unless the appellee asserts crosspoints showing grounds for a new trial.[704]

B. *Motion for Judgment Notwithstanding the Verdict (JNOV)*

A trial court may disregard a jury's findings and grant a motion for judgment notwithstanding the verdict, pursuant to Rules 301[705] and 324(c),[706] only when there is no evidence upon which the jury could have made its findings.[707] In other words, a trial court may render JNOV if a directed verdict would have been proper.[708] 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

---

Salinas v. Rafati, 948 S.W.2d 286, 288 (Tex. 1997) (citing Spencer v. Eagle Star Ins. Co. of America, 876 S.W.2d 154, 157 (Tex. 1994) (citing C. & R. Transp., Inc. v. Campbell, 406 S.W.2d 191, 194 (Tex. 1966))); *see Stuart*, 945 S.W.2d at 146.

702. *See* TEX. R. CIV. P. 301; Green Int'l, Inc. v. Solis, 951 S.W.2d 384, 389 (Tex. 1997) (citing *Spencer*, 876 S.W.2d at 157); Eubanks v. Winn, 420 S.W.2d 698, 701 (Tex. 1967); *McFerren*, 788 S.W.2d at 78; U.S. Fire Ins. Co. v. Twin City Concrete, Inc., 684 S.W.2d 171, 173 (Tex. App.—Houston [14th Dist.] 1984, no writ).

703. *See Alm*, 717 S.W.2d at 593; Schaefer v. Texas Employers' Ins. Ass'n, 612 S.W.2d 199, 201 (Tex. 1980).

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

705. TEX. R. CIV. P. 301.

706. TEX. R. CIV. P. 324(c).

707. *See* Mancorp, Inc. v. Culpepper, 802 S.W.2d 226, 227 (Tex. 1990); Exxon Corp. v. Quinn, 726 S.W.2d 17, 19 (Tex. 1987); Navarette v. Temple Indep. Sch. Dist., 706 S.W.2d 308, 309 (Tex. 1986); Dowling v. NADW Mktg., Inc., 631 S.W.2d 726, 728 (Tex. 1982); Williams v. Bennett, 610 S.W.2d 144, 145 (Tex. 1980); Farias v. Laredo Nat'l Bank, 955 S.W.2d 328, 330 (Tex. App.—San Antonio 1997, pet. requested); Purina Mills, Inc. v. Odell, 948 S.W.2d 927, 932 (Tex. App.—Texarkana 1997, no writ); Lone Star Ford, Inc. v. McCormick, 838 S.W.2d 734, 738 (Tex. App.—Houston [1st Dist.] 1992, writ denied); Wal-Mart Stores, Inc. v. Berry, 833 S.W.2d 587, 590 (Tex. App.—Texarkana 1992, writ denied); Sun Power, Inc. v. Adams, 751 S.W.2d 689, 692 (Tex. App.—Fort Worth 1988, no writ).

708. *See* TEX. R. CIV. P. 301; Fort Bend County Drainage Dist. v. Sbrusch, 818 S.W.2d 392, 394 (Tex. 1991); Eubanks v. Winn, 420 S.W.2d 698, 701 (Tex. 1967); *Farias*, 955 S.W.2d at 330; Mier v. Jatczak, No. 01-96-00730-CV (Tex. App.—Houston [1st Dist.] July 24, 1997, n.w.h.) (not released for publication yet), 1997 WL 414946, at *1.

record is reviewed in the light most favorable to the finding, considering only the evidence and inferences that support the finding and rejecting the evidence and inferences contrary to the finding.[709] If there is more than a scintilla of competent evidence to support the jury's finding, then the judgment notwithstanding the verdict will be reversed.[710]

C. *Receipt of Additional Evidence*

Rule 270 states that "when it clearly appears to be necessary to the due administration of justice, the court may permit additional evidence to be offered at any time; provided that in a jury case no evidence on a controversial matter shall be received after the verdict of the jury."[711] The rule does not apply to nonjury cases.[712] In either a jury or nonjury trial, the trial court has discretion to reopen the evidence on an uncontested or noncontroversial matter.[713] After having rested a case, the party's right to reopen the case and introduce additional evidence is a matter within the sound discretion of the trial court.[714] While a trial court should liberally exercise its discretion to permit both sides of the case to reopen the case, a trial court does not abuse its discretion when "the party seeking to reopen has not shown diligence in attempting to produce the evidence in a timely fashion."[715] The trial court automatically abuses its discretion if it reopens, post-verdict, the evidence on a contested matter in a jury case because to do so is contrary to law.[716]

---

709. *See Navarette*, 706 S.W.2d at 309; *Williams*, 610 S.W.2d at 145.

710. *See* Southern States Transp., Inc. v. State, 774 S.W.2d 639, 640 (Tex. 1989); *Navarette*, 706 S.W.2d at 309.

711. TEX. R. CIV. P. 270.

712. *See In re* Johnson, 886 S.W.2d 869, 873 (Tex. App.—Beaumont 1994, no writ).

713. *See* TEX. R. CIV. P. 270.

714. *See* Binford v. Snyder, 144 Tex. 134, 145, 189 S.W.2d 471, 476 (1945); Apresa v. Montfort Ins. Co., 932 S.W.2d 246, 249 (Tex. App.—El Paso 1996, no writ).

715. *Apresa*, 932 S.W.2d at 250 (citing McNamara v. Fulks, 855 S.W.2d 782, 784 (Tex. App.—El Paso 1993, no writ)).

716. *See* TEX. R. CIV. P. 270 (allowing additional testimony only before the jury verdict rendered).

D. *Newly Discovered Evidence*

To obtain a new trial based upon newly discovered evidence,[717] a movant must show:

> [(1)] that the evidence has come to his knowledge since the trial;
>
> [(2)] that it was not owing to the want of diligence that it did not come to his attention sooner;
>
> [(3)] that it is not cumulative; and
>
> [(4)] that it was so material that it would probably produce a different result if a new trial were granted.[718]

Furthermore, the newly discovered evidence must be admissible, competent evidence.[719]

Whether a motion for new trial based on the ground of newly discovered evidence will be granted or denied lies within the sound discretion of the trial court, and the court's decision will not be disturbed absent a manifest abuse of discretion.[720] When a trial court refuses to grant a new trial based on newly discovered evidence, the appellate court will accept every reasonable inference in favor of affirming the trial court's decision.[721] In reviewing the trial court's decision to refuse a new trial, appellate courts recognize the well established principle that motions for new trial based on newly discovered evidence are disfavored, and therefore should be reviewed with careful scrutiny.[722]

---

717. *See* TEX. R. CIV. P. 324(b)(1).

718. Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983); *see* State v. Vega, 927 S.W.2d 81, 83 (Tex. App.—Houston [1st Dist.] 1996, writ dism'd w.o.j.); Kirkpatrick v. Memorial Hosp., 862 S.W.2d 762, 775 (Tex. App.—Dallas 1993, writ denied); Ramirez v. Otis Elevator Co., 837 S.W.2d 405, 412 (Tex. App.—Dallas, 1992, writ denied); Rankin v. Atwood Vacuum Mach. Co., 831 S.W.2d 463, 467 (Tex. App.—Houston [14th Dist.]) 1992, *writ denied per curiam*, 841 S.W.2d 856 (Tex. 1992); Pan Am. Life Ins. Co. v. Erbauer Constr. Co., 791 S.W.2d 146, 151 (Tex. App.—Houston [1st Dist.] 1990), *rev'd on other grounds*, 805 S.W.2d 395 (Tex. 1991); Sifuentes v. Texas Employers' Ins. Ass'n, 754 S.W.2d 784, 787 (Tex. App.—Dallas 1988, no writ).

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

720. *See Jackson*, 660 S.W.2d at 809; *Vega*, 927 S.W.2d at 83–84; *Kirkpatrick*, 862 S.W.2d at 774–75; *Ramirez*, 837 S.W.2d at 412; Eikenhorst v. Eikenhorst, 746 S.W.2d 882, 886 (Tex. App.—Houston [1st Dist.] 1988, no writ); Southwest Inns, Ltd. v. General Elec. Co., 744 S.W.2d 258, 264 (Tex. App.—Houston [14th Dist.] 1987, writ denied).

721. *See Nguyen*, 744 S.W.2d at 622.

722. *See* State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 452 (Tex. 1997); *Kirkpatrick*, 862 S.W.2d at 775; *Nguyen*, 744 S.W.2d at 622.

E. *Motion for New Trial, Generally*

A trial court has broad discretion in deciding whether or not to grant a new trial, before or after judgment.[723] In addition to the reasons stated in Rule 320,[724] a trial court may, in its discretion, grant a new trial "in the interest of justice."[725] While trial courts have discretion to grant a new trial, they do not have unbridled discretion to resolve cases as they might deem appropriate while ignoring basic guiding rules or principles.[726] The granting of a new trial is never reviewable by direct appeal.[727] However, the order granting a new trial is subject to mandamus review if (1) the trial court's plenary power had expired prior to the grant,[728] or (2) the order was based on the sole ground of irreconcilably conflicting jury answers.[729] In either event, mandamus is available in place of traditional appellate review.[730] The standard is de novo because these are questions of law.

The denial of a motion for new trial is reviewable by appeal.[731] As a general rule, the denial of a motion for new trial that does not contain one of the complaints enumerated in Rule 324(b) is reviewed under an abuse of discretion.[732] The standard of review depends on the nature of the complaint preserved by the motion for

---

723. *See* Champion Int'l Corp. v. Twelfth Court of Appeals, 762 S.W.2d 898, 899 (Tex. 1988) (orig. proceeding); Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985); Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983).

724. *See* TEX. R. CIV. P. 320 (providing for the grant of a new trial when damages are too small or too large).

725. *Id.*; *Champion Int'l*, 762 S.W.2d at 899; *Johnson*, 700 S.W.2d at 918.

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

727. *See* Cummins v. Paisan Constr. Co., 682 S.W.2d 235, 236 (Tex. 1984); Atchison, Topeka & Santa Fe Ry. v. Brown, 750 S.W.2d 332, 333 (Tex. App.—Eastland 1988, writ denied), *cert. denied*, 493 U.S. 811 (1989)).

728. *See* Fulton v. Finch, 162 Tex. 351, 358–60, 346 S.W.2d 823, 829–30 (1961).

729. *See* Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985).

730. *See* Rogers v. Clinton, 794 S.W.2d 9, 11 (Tex. 1990) (finding mandamus proper remedy to cure the judge's order because judge granted order for a new trial after the party withdrew the motion for new trial).

731. *See* Delgado v. Hernandez, 951 S.W.2d 97, 98 (Tex. App.—Corpus Christi 1997, no writ).

732. *See* Champion Int'l Corp. v. Twelfth Court of Appeals, 762 S.W.2d 898, 899 (Tex. 1988) (orig. proceeding); *Delgado*, 951 S.W.2d at 98; Washington v. McMillan, 898 S.W.2d 392, 394 (Tex. App.—San Antonio 1995, no writ).

new trial.[733] Sufficiency of the evidence challenges are, of course, governed by the legal and factual sufficiency standards of review.[734]

F. *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.[735] Rule 324(b) requires that the following issues be raised by motion for new trial:

> (1) 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;
>
> (2) a complaint of the factual insufficiency of the evidence to support a jury finding;
>
> (3) a complaint that a jury finding is against the overwhelming weight of the evidence;
>
> (4) a complaint of inadequacy or excessiveness of the damages found by the jury; or
>
> (5) incurable jury argument if not otherwise ruled on by the trial court.[736]

The reason for requiring that these matters first be brought to the attention of the trial court is to give it the opportunity to correct any errors that were not considered prior to the motion.[737] 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.[738]

---

733. *See* TEX. R. CIV. P. 324 (presenting prerequisites for motion for new trial); *Delgado*, 951 S.W.2d at 98.

734. *See infra* Parts VII–VIII.

735. *See* TEX. R. CIV. P. 324(b).

736. TEX. R. CIV. P. 324(b)(1)-(5).

737. *See* Stillman v. Hirsch, 128 Tex. 359, 369, 99 S.W.2d 270, 275 (1936); Mushinski v. Mushinski, 621 S.W.2d 669, 671 (Tex. Civ. App.—Waco 1981, no writ). The motion for new trial may be overruled by signed order or by operation of law if not ruled upon within 75 days after the judgment is signed. *See* Cecil v. Smith, 804 S.W.2d 509, 511-12 (Tex. 1991).

738. *See* Champion Int'l Corp. v. Twelfth Court of Appeals, 762 S.W.2d 898, 899 (Tex. 1988) (orig. proceeding); Griswold 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); Peterson v. Reyna, 908 S.W.2d 472, 478 (Tex. App.—San Antonio 1995), *judgm't modified per curiam*, 920 S.W.2d 288 (Tex. 1996); Allied Rent-All, Inc. v. International Rental Ins.,

G. *Motion for Judgment Nunc Pro Tunc*

After the trial court's plenary power over its own judgment terminates and the judgment becomes final, the trial court still retains the authority to correct clerical errors made in entering the judgment through a judgment nunc pro tunc.[739] A clerical error does not result from judicial decisionmaking.[740] Consequently, a judgment nunc pro tunc cannot correct judicial errors made in rendering the final judgment.[741] A judicial error is the type of error that occurs during the rendering of the judgment as distinguished from the mere entering of a judgment.[742] 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 that was actually rendered and not to the judgment that should or might have been rendered.[743] The decision of whether an error in a judgment is a judicial or clerical error is a question of law that is not binding on the appellate court.[744]

---

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).

739. *See* TEX. R. CIV. P. 316; Escobar v. Escobar, 711 S.W.2d 230, 231 (Tex. 1986); Comet Aluminum Co. v. Dibrell, 450 S.W.2d 56, 58 (Tex. 1970); Traylor Bros. v. Garcia, 949 S.W.2d 368, 369–70 (Tex. App.—San Antonio 1997, no writ); National Unity Ins. Co. v. Johnson, 926 S.W.2d 818, 820 (Tex. App.—San Antonio 1996, no writ); Cannon v. ICO Tubular Servs., Inc., 905 S.W.2d 380, 389 (Tex. App.—Houston [1st Dist.] 1995, no writ); Crocker v. Synpol, Inc., 732 S.W.2d 429, 436 (Tex. App.—Beaumont 1987, no writ).

740. *See* Andrews v. Koch, 702 S.W.2d 584, 585 (Tex. 1986); Riner v. Briargrove Park Property Owners, Inc., No. 01–96–0093–CV (Tex. App.—Houston [1st Dist.] Aug. 7, 1997, n.w.h.) (not released for publication yet), 1997 WL 454088, at *2.

741. *See Escobar*, 711 S.W.2d at 231.

742. *See id.*; Knox v. Long, 152 Tex. 291, 295, 257 S.W.2d 289, 291 (1953); *Crocker*, 732 S.W.2d at 436.

743. *See* Coleman v. Zapp, 105 Tex. 491, 493, 151 S.W. 1040, 1041 (1912); *National Unity*, 926 S.W.2d at 820; *Crocker*, 732 S.W.2d at 436.

744. *See* Finlay v. Jones, 435 S.W.2d 136, 138 (Tex. 1968); Dickens V. Willis, 957 S.W.2d 657, 659 (Tex. App.—Austin 1997, no pet. h.); H.E. Butt Grocery Co. v. Pais, 955 S.W.2d 384, 388 (Tex. App.—San Antonio 1997, no pet. h.); National Unity Ins. Co. v. Johnson, 926 S.W.2d 818, 820 (Tex. App.—San Antonio 1996, no writ); Seago v. Bell, 764 S.W.2d 362, 364 (Tex. App.—Beaumont 1989, no writ); Crocker v. Synpol, Inc., 732 S.W.2d 429, 436 (Tex. App.—Beaumont 1987, no writ). One court has suggested that a judgment nunc pro tunc should be granted only if the evidence is clear and convincing that a clerical error was made. *See Riner*, 1997 WL 454088, at *2 (citing Pruet v. Coastal States Trading, Inc., 715 S.W.2d 702, 705 (Tex. App.—Houston [1st Dist.] 1986, no writ)).

H. *Remittitur*

The remittitur process arises out of the trial court's almost unbridled discretion to grant new trials.[745] Professors Powers and Ratliff correctly observe that when a trial court believes that a jury's award of damages is excessive, the trial court can use its autonomy to force the plaintiff to make what amounts to a settlement offer.[746] In such a situation, the trial court typically denies the defendant's motion for new trial on the condition that the plaintiff remit a specified amount of damages so that the trial judge may sign a lesser judgment.[747] The plaintiff has two choices: to remit the suggested amount unconditionally or to have a new trial.[748] Because the trial court has no authority to change the jury's award, the trial court judge cannot compel a remittitur, but may only "suggest" it.[749]

Like the trial courts, the courts of appeals "also have the power to suggest a remittitur in lieu of a new trial, whether or not the trial court has done so."[750] The court of appeals may order a remittitur if the evidence is factually insufficient to support the award, and the court of appeals' order is reviewable by the supreme court to determine if the court of appeals applied the correct legal standard in doing so.[751] Therefore, while the supreme court lacks jurisdiction to review or to order a remittitur, it does have jurisdiction to determine if the court of appeals applied the proper standard of review in reviewing the remittitur issue.[752]

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.[753] The court of appeals must

---

745. *See* William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 564 (1991).

746. *See id.*

747. *See id.*

748. *See* Larson v. Cactus Util. Co., 730 S.W.2d 640, 641 (Tex. 1987) (holding that if the plaintiff rejects the "suggestion," the trial court may grant a new trial).

749. *See* William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 564 (1991).

750. *Id.* at 565.

751. *See infra* Part VII for a discussion of the factual insufficiency of the evidence standard of review.

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

753. *See* Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 30 (Tex. 1994) (explaining that factual sufficiency standard should be used for the review of punitive damage awards); Snoke v. Republic Underwriters Ins. Co., 770 S.W.2d 777, 777-78 (Tex. 1989) (applying a factual sufficiency standard to attorney's fees); Larson v. Cactus Util. Co., 730 S.W.2d 640,

"examine all the evidence in the record to determine whether sufficient evidence supports the damage award, remitting only if some portion is so factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust."[754] The courts of appeals must also comply with the requirements of the "Pool" rule[755] if they either order or affirm a suggestion of a remittitur of damages.[756]

I. *Actual Damages*

1. Unliquidated Damages

The process of awarding damages for amorphous, discretionary injuries, such as mental anguish and pain and suffering, is inherently difficult because the injury constitutes a subjective, unliquidated, nonpecuniary loss.[757] It is necessarily an arbitrary process, not subject to objective analysis or mathematical calculation.[758] Because there are no objective guidelines to assess the money

---

641 (Tex. 1987) (applying a factual sufficiency standard to actual damages); *Pope*, 711 S.W.2d at 624 (applying a factual sufficiency review standard to review of remittitur); *see also* TEX. R. APP. P. 46.2 (providing for appellate review of remittitur request); TEX. R. CIV. P. 315 (providing for remittitur generally); TEX. R. CIV. P. 324(b)(2) (discussing factual insufficiency to support jury findings).

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

755. *See* Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986). The "*Pool* rule" requires the court of appeals to provide detailed reasons as to why they reversed a jury's finding on factual insufficiency grounds. *See id.* at 635.

756. *See Pope*, 711 S.W.2d at 624; *see also infra* Part VII(C) for a discussion of *Pool*.

757. *See* Housing Auth. v. Guerra, No. 08-96-00112-CV, 1997 WL 318067, at *5 (Tex. App.—El Paso June 12, 1997, no writ); Martin v. Texas Dental Plans, Inc., 948 S.W.2d 799, 805 (Tex. App.—San Antonio 1997, writ denied); Owens-Corning Fiberglas Corp. v. Martin, 942 S.W.2d 712, 719 (Tex. App.—Dallas 1997, no writ); Duron v. Merritt, 846 S.W.2d 23, 26 (Tex. App.—Corpus Christi 1991, no writ); Texas Farmers Ins. Co. v. Soriano, 844 S.W.2d 808, 826 (Tex. App.—San Antonio 1992), *rev'd on other grounds*, 881 S.W.2d 312 (Tex. 1994); Baylor Med. Plaza Servs. Corp. v. Kidd, 834 S.W.2d 69, 78 (Tex. App.—Texarkana 1992, writ denied); Worsham Steel Co. v. Arias, 831 S.W.2d 81, 85 (Tex. App.—El Paso 1992, no writ).

758. *See* Southwest Tex. Coors, Inc. v. Morales, 948 S.W.2d 948, 951-52 (Tex. App.—San Antonio 1997, no writ); *Martin*, 942 S.W.2d at 719; Hyundai Motor Co. v. Chandler, 882 S.W.2d 606, 615 (Tex. App.—Corpus Christi 1994, writ denied); Baptist Mem'l Hosp. Sys. v. Smith, 822 S.W.2d 67, 78 (Tex. App.—San Antonio 1991, writ denied); LaCoure v. LaCoure, 820 S.W.2d 228, 234 (Tex. App.—El Paso 1991, writ denied); State Farm Fire & Cas. Co. v. Gros, 818 S.W.2d 908, 915 (Tex. App.—Austin 1991, no writ); State Farm Mut. Auto. Ins. Co. v. Zubiate, 808 S.W.2d 590, 601 (Tex. App.—El Paso 1990, writ denied); Skaggs Alpha Beta, Inc. v. Nabhan, 808 S.W.2d 198, 202 (Tex. App.—El Paso 1991, no writ); National Union Fire Ins. Co. v. Dominguez, 793 S.W.2d 66, 73 (Tex. App.—El Paso 1990), *rev'd on other grounds*, 873 S.W.2d 373 (Tex. 1994).

equivalent of such injuries, the jury is given a great deal of discretion in awarding an amount of damages it determines appropriate.[759] One court observed that once there is some amount of mental anguish—or pain and suffering—established by the evidence, the award of damages is "virtually unreviewable."[760] The court added that while the damages are clearly reviewable under a sufficiency of the evidence review, there are tremendous difficulties "inherent in an appellate court's review of discretionary damages."[761] Nevertheless, a challenge to a damages award for these types of unliquidated and intangible injuries is reviewed as any other challenge based upon the sufficiency of the evidence or excessiveness of the damages.[762]

---

759. *See* Bourg Chem. Distrib., Inc. v. Mosier, 955 S.W.2d 140, 145 (Tex. App.—Beaumont 1997), *vacated by agreement*, 41 Tex. Sup. Ct. J. 470 (Feb. 28, 1998); Dico Tire, Inc. v. Cisneros, 953 S.W.2d 776, 791–92 (Tex. App.—Corpus Christi 1997, writ denied); Texarkana Mem'l Hosp., Inc. v. Murdock, 946 S.W.2d 836, 841 (Tex. 1997); *Guerra*, 1997 WL 318067, at *5; Harris v. Balderas, 949 S.W.2d 42, 44 (Tex. App.—San Antonio 1997, no writ); *Morales*, 948 S.W.2d at 951; *Texas Dental Plans*, 948 S.W.2d at 805; *Martin*, 942 S.W.2d at 719; Peterson v. Reyna, 908 S.W.2d 472, 476 (Tex. App.—San Antonio 1995), *judgm't modified per curiam*, 920 S.W.2d 288 (Tex. 1996); *Chandler*, 882 S.W.2d at 615; Hicks v. Ricardo, 834 S.W.2d 587, 591 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Kidd*, 834 S.W.2d at 78; *Baptist Mem'l Hosp. Sys.*, 822 S.W.2d at 78; *LaCoure*, 820 S.W.2d at 234; *Zubiate*, 808 S.W.2d at 601; *see also* Wal-Mart Stores, Inc. v. Holland, 956 S.W.2d 590, 598 (Tex. App.—Tyler 1997, pet. requested) (holding that award of personal injury damages is particularly within the discretion of the jury); Greater Houston Transp. Co. v. Zrubeck, 850 S.W.2d 579, 589 (Tex. App.—Corpus Christi 1993, writ denied) (holding that an award of discretionary damages such as mental anguish "will be shunted to the discretionary domain of the jury"); *Duron*, 846 S.W.2d at 26 (holding that it is within the jury's province "to resolve the speculative matters of pain and suffering, future pain and suffering, future disfigurement, and future physical impairment" and award damages accordingly); Marshall v. Superior Heat Treating Co., 826 S.W.2d 197, 200 (Tex. App.—Fort Worth 1992, no writ) (holding that damage awards for past and future physical pain, mental anguish, and physical impairment are "particularly within the province of the jury").

760. *See* Beneficial Personnel Servs. of Tex., Inc. v. Rey, 927 S.W.2d 157, 174 (Tex. App.—El Paso 1996), *writ granted w.r.m.*, 938 S.W.2d 717 (Tex. 1997); *Arias*, 831 S.W.2d at 85; *Martin*, 948 S.W.2d at 805–06 (citing the virtually unreviewable language in *Arias*).

761. *Arias*, 831 S.W.2d at 85 n.2.

762. *See* Larson v. Cactus Util. Co., 730 S.W.2d 640, 641–42 (Tex. 1987). In *Another Look at "No Evidence" and "Insufficient Evidence,"* the authors note that when intangible damages are at issue, appellate courts find it difficult to refer to specific testimony that demonstrates inadequacy or excessiveness as required by *Pool*. *See* Williams Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 567 (1991). "Nevertheless, common sense suggests that courts should have some authority to review excessive or inadequate damage awards. It would be unwise to permit a

2. Zero Damages

The zero-damages rule provides that in cases involving unliquidated damages, the jury must award some amount of money for every element of damage proved, or the case will be reversed and remanded for a new trial.[763] Based on the zero-damages rule, some courts have concluded that once the fact of an injury is either established by the evidence or acknowledged by the jury by a finding of some resulting damages—such as medical expenses—the jury's failure to award damages for pain and suffering or some other intangible injury is regarded as against the great weight and preponderance of the evidence.[764] In contrast, other courts have upheld jury findings and evidence of injury and some resulting damages, by simply concluding that the failure to find damages was not against the great weight and preponderance of the evidence.[765]

The zero-damages rule has been criticized as contrary to supreme court standards of evidentiary review and as adverse to the enforcement of those standards as required by *Pool*;[766] as a re-

---

jury to make any award it thinks fit without limit, even though it is dealing with damages that resist exact calculation or quantification." *Id.* at 567.

763. *See* Raul A. Gonzalez & Rob Gilbreath, *Appellate Review of a Jury's Finding of "Zero Damages,"* 54 TEX. B.J. 418, 418 (1991).

764. *See, e.g.*, Davis v. Davison, 905 S.W.2d 789, 791-94 (Tex. App.—Beaumont 1995, no writ) (finding the failure to award damages against the great weight and preponderance of evidence); Blizzard v. Nationwide Mut. Fire Ins. Co., 756 S.W.2d 801, 805–06 (Tex. App.—Dallas 1988, no writ) (denying additional damages for pain and suffering); Hammond v. Estate of Rimmer, 643 S.W.2d 222, 224 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (awarding damages due to obvious pain and suffering); Taylor v. Head, 414 S.W.2d 542, 544 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.) (reversing the trial court and remanding for award of damages upon finding of pain and suffering); Bolen v. Timmons, 407 S.W.2d 947, 949 (Tex. Civ. App.—Amarillo 1966, no writ) (reversing the trial court for arbitrarily fixing damages unsupported by evidence); *see also* Peterson v. Reyna, 908 S.W.2d 472, 482 (Tex. App.—San Antonio 1995), *judgm't modified per curiam*, 920 S.W.2d 288 (Tex. 1996) (dissenting because evidence of medical expenses was uncontroverted).

765. *See* Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc., 957 S.W.2d 640, 650 (Tex. App.—Amarillo 1997, pet. requested); Crow v. Burnett, 951 S.W.2d 894, 899 (Tex. App.—Waco 1997, writ denied); Jacobs-Cathey Co. v. Cockrum, 947 S.W.2d 288, 299 (Tex. App.—Waco 1997, writ denied) (Vance, J., dissenting); Barrajas v. VIA Metro Transit Auth., 945 S.W.2d 207, 209 (Tex. App.—San Antonio 1997, no writ); Gant v. Dumas Glass & Mirror, Inc., 935 S.W.2d 202, 209 (Tex. App.—Amarillo 1996, no writ); Kirkpatrick v. Mem'l Hosp., 862 S.W.2d 762, 774 (Tex. App.—Dallas 1993, writ denied); *Blizzard*, 756 S.W.2d at 805.

766. *See Davis*, 905 S.W.2d at 792 (Stover, J., concurring) (criticizing *Pool*); Raul A. Gonzalez & Rob Gilbreath, *Appellate Review of a Jury's Finding of "Zero Damages,"* 54 TEX. B.J. 418, 420 (1991).

sult, the rule has now been rejected by the courts.[767] Whether there is objective, uncontroverted evidence of damages, or only subjective evidence, or both objective and subjective evidence, the court of appeals should apply the *Pool* standard to the jury's finding of zero damages.[768] Accordingly, a challenge to an award of zero damages is reviewed as any other challenge based upon the sufficiency of the evidence; therefore, the award of zero damages will only be reversed if it was "so against the great weight and preponderance of the evidence as to be manifestly unjust. . . ."[769]

J. *Punitive Damages*

If a plaintiff seeks punitive damages, the defendant may file a motion with the trial court asking it to bifurcate the determination of punitive damages from the remaining issues.[770] "Under this approach, the jury first hears evidence relevant to liability for actual damages . . . and liability for punitive damages, and then returns findings on these issues."[771] If the jury finds for the plaintiff on the punitive damage liability question, "the same jury is then presented

---

767. *See* Pilkington v. Kornell, 822 S.W.2d 223, 225 (Tex. App.—Dallas 1991, writ denied); Schmeltekopf v. Johnson Well Serv., 810 S.W.2d 865, 869 (Tex. App.—Austin 1991, no writ). *But cf.* Hyler v. Boytor, 823 S.W.2d 425, 427 (Tex. App.—Houston [1st Dist.] 1992, no writ) (holding that in challenge to finding of zero damages "the relevant determination . . . is whether the indicia of inquiry is more subjective than objective"); *Blizzard*, 756 S.W.2d at 805 (concluding that the evidence of outward signs of pain make it more likely that appellate court will reverse jury finding of no damages for pain and suffering).

768. *See Davis*, 905 S.W.2d at 793 (Stover, J., concurring) (discussing cases which apply the *Pool* Standard).

769. D.E.W., Inc. v. Depco Forms, Inc., 827 S.W.2d 379, 383 (Tex. App.—San Antonio 1992, no writ); Marshall v. Superior Heating Co., 826 S.W.2d 197, 200 (Tex. App.—Fort Worth 1992, no writ); *Pilkington*, 822 S.W.2d at 225; Elliott v. Dow, 818 S.W.2d 222, 224 (Tex. App.—Houston [14th Dist.] 1991, no writ); Paschall v. Peevey, 813 S.W.2d 710, 714-15 (Tex. App.—Austin 1991, no writ). Two authors interpret the *Pool* rule as follows:

> To require a new trial under *Pool* . . . the reviewing court must conclude, after weighing all the evidence, including the evidence in support of the $0 finding, that the element of damages was so abundantly established that the discrepancy between the evidence and the finding of zero dollars is manifestly unjust. The evidence must do more than establish a threshold level of proof that the plaintiff experienced an element of damages; it must establish that element of damages so thoroughly that it would be manifestly unjust to tolerate the award of $0. The zero damages rule should be discarded because it interferes with the jury's role as a finder of fact.

Raul A. Gonzalez & Rob Gilbreath, *Appellate Review of a Jury's Finding of "Zero Damages,"* 54 TEX. B.J. 418, 420 (1991).

770. *See* Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 30 (Tex. 1994).

771. *Id.*

evidence relevant only to the amount of punitive damages, considering the totality of the evidence from both phases of the trial."[772] "There is a split of authority as to whether the same ten jurors who found liability in the first phase of the trial must [all] agree upon the amount of punitive damages in the second phase of a bifurcated trial."[773] To preserve the issue, the complaining party must object to the dissenting jurors' participation in the punitive damages deliberations.[774]

Punitive (exemplary) damages are levied against a defendant to punish the defendant for outrageous, malicious, or otherwise morally culpable conduct.[775] The legal justification for punitive damages is similar to that for criminal punishment; like criminal punishment, punitive damages require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment.[776] Although punitive damages are levied for the public purpose of punishment and deterrence, the proceeds end up becoming a private windfall.[777] In contrast, criminal fines are paid to a governmental entity and used for public benefit.[778] The duty of reviewing courts in civil cases, then, like the duty of criminal courts, is to ensure that defendants who deserve to be punished in fact receive an appropriate level of punishment, while preventing punishment that is excessive or otherwise erroneous.[779]

Punitive damages are reviewed for factual sufficiency in a motion for new trial.[780] When reviewing an award of punitive damages,

---

772. *Id.*

773. Operation Rescue-Nat'l v. Planned Parenthood, Inc., 937 S.W.2d 60, 85 (Tex. App.—Houston [14th Dist.] 1996, writ granted). *Compare* Hyman Farm Serv., Inc. v. Earth Oil & Gas Co., 920 S.W.2d 452, 457-58 (Tex. App.—Amarillo 1996, no writ) (holding that Rule 292 requires same 10 or more jurors to concur in all answers necessary to judgment including answer to the amount of punitive damages awarded, if any, in bifurcated trial), *with* Greater Houston Transp. Co. v. Zrubeck, 850 S.W.2d 579, 587 (Tex. App.—Corpus Christi 1993, writ denied) (holding "[Rule 292] does not require concurrence 'between separate' trials").

774. *See Operation Rescue*, 937 S.W.2d at 85.

775. *See* Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 16 (Tex. 1994); Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587, 600–01 (1880); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(3) (Vernon Supp. 1997) (defining "exemplary damages" as "any damages awarded as a penalty or by way of punishment").

776. *See Moriel*, 879 S.W.2d at 16.

777. *See id.* at 17.

778. *See id.*

779. *See id.*

780. *See* TEX. R. CIV. P. 324(b)(4); Pope v. Moore, 711 S.W.2d 622, 624 (Tex. 1986).

the reviewing court must consider a number of factors to determine the reasonableness of the award. One factor is the relation of punitive damages to actual damages, for as one court has noted, "actual damages are used to indicate the reasonableness of [punitive] damages under the rule that [punitive] damages must be rationally related to actual damages."[781] There is no exact formula to measure punitive damages by actual damages.[782] Rather, this ratio is merely one tool to assist the courts in determining whether a punitive damage award is the product of passion on the part of the jury rather than reason.[783] In addition to the ratio of punitive to actual damages, the appellate court also considers: "(1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of the culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which such conduct offends a public sense of justice in propriety; (6) and the net worth of the defendant."[784]

K. *Attorney's Fees*

An award of attorney's fees must be based upon some statutory or contractual authority.[785] Attorney's fees may not be recovered

781. Wright v. Gifford-Hill & Co., 725 S.W.2d 712, 714 (Tex. 1987); *see* Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 129 (Tex. 1994) (citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991)).

782. *See* Tatum v. Preston Carter Co., 702 S.W.2d 186, 188 (Tex. 1986); *see also* InterFirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 909 (Tex. App.—Texarkana 1987, no writ) (discussing the "reasonable relationship test" for punitive damages). The ratio of actual damages to punitive damages has been substantially reduced by the Tort Reform Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon 1997) (providing, in most cases, that exemplary damages may not exceed the greater of $200,000 or two times the amount of actual damages).

783. *See Tatum*, 702 S.W.2d at 188; *Risser*, 789 S.W.2d at 909.

784. TEX. CIV. PRAC. & REM. CODE ANN. § 41.011 (Vernon 1997); *see Moriel*, 879 S.W.2d at 28; *Tatum*, 702 S.W.2d at 188; Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981). In *TXO Production Corp. v. Alliance Resources Corp.*, the West Virginia Supreme Court concluded that the post-*Haslip* decisions fell into three categories: "(1) really stupid defendants; (2) really mean defendants; and (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm." TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 887-88 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993).

785. *See* TEX. REV. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1997); Dallas Cent. Appraisal Dist. v. Seven Inv. Co., 835 S.W.2d 75, 77 (Tex. 1992); New Amsterdam Cas. Co. v. Texas Indus. Inc., 414 S.W.2d 914, 915 (Tex. 1967); Jackson v. Biotectronics, Inc., 937 S.W.2d 38, 44 (Tex. App.—Houston [14th Dist.] 1996, writ requested); *In re* Striegler, 915 S.W.2d 629, 640 (Tex. App.—Amarillo 1996, writ denied).

in tort cases.[786] In reviewing the reasonableness of an award of attorney's fees, which may include a legal assistant's time under certain conditions,[787] the reviewing court should consider:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.[788]

To determine whether an attorney's fee award is excessive, "the reviewing court may draw upon the common knowledge of the justices of the court and their experiences as lawyers and judges."[789] A "short hand version of these considerations is that the trial court may award those fees that are reasonable and necessary for the prosecution of the suit."[790] Finally, a trial court may not grant an unconditional award of appellate attorney's fees; such an award must be conditioned upon the appellant's unsuccessful appeal.[791]

When multiple causes of action or multiple parties are involved, the party who asserts those causes must separate the hours for which fees may be recovered from the hours for which fees cannot be recovered, and from which party they may be recovered.[792] An exception to the duty to segregate exists when the attorney's fees

---

786. *See* Knebel v. Capital Nat'l Bank, 518 S.W.2d 795, 803-04 (Tex. 1974).

787. *See* Gill Sav. Ass'n v. International Supply Co., 759 S.W.2d 697, 702-05 (Tex. App.—Dallas 1988, writ denied).

788. Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997) (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04 (1996)).

789. City of Fort Worth v. Groves, 746 S.W.2d 907, 918 (Tex. App.—Fort Worth 1988, no writ); Argonaut Ins. Co. v. ABC Steel Prods. Co., 582 S.W.2d 883, 889 (Tex. Civ. App.—Texarkana, 1979, writ ref'd n.r.e.).

790. Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 10 (Tex. 1991).

791. *See* Rittgers v. Rittgers, 802 S.W.2d 109, 115 (Tex. App.—Corpus Christi 1990, writ denied).

792. *See* Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 73 (Tex. 1997); *Sterling*, 822 S.W.2d at 10–11; Aetna Cas. & Sur. v. Wild, 944 S.W.2d 37, 40-41 (Tex. App.—Amarillo 1997, writ requested); Southern Concrete Co. v. Metrotech Fin., Inc., 775 S.W.2d 446, 449

are rendered in connection with claims arising out of the same transaction, when such claims are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts.[793]

The standard of review of a trial court's award granting attorney's fees is sufficiency of the evidence.[794] If a trial court suggests a remittitur of an award of attorney's fees, the trial court's remittitur will be affirmed when the evidence is factually insufficient to support the verdict.[795]

L. *Guardian Ad Litem Attorney's Fees*

Rule 173 of the Texas Rules of Civil Procedure allows a trial court to appoint a guardian ad litem when a minor is represented by a guardian or next of friend, who appears to have an interest adverse to that of the minor.[796] When an attorney is appointed a guardian ad litem pursuant to Rule 173, the attorney is entitled to a reasonable fee to be taxed as costs pursuant to Rules 131 and 141.[797] As a general rule, ad litem fees are assessed against the losing party.[798] Generally, the same factors applicable to determine the reasonableness of attorney's fees are controlling.[799] An ad litem may not recover fees after resolution of the conflict for

---

(Tex. App.—Dallas 1989, no writ); Bullock v. Kehoe, 678 S.W.2d 558, 560 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

793. *See Aiello*, 941 S.W.2d at 73; *Sterling*, 822 S.W.2d at 11; *Wild*, 944 S.W.2d at 41.

794. *See Sterling*, 882 S.W.2d at 12; Snoke v. Republic Underwriters Ins. Co., 770 S.W.2d 777, 777–78 (Tex. 1989) (per curiam); Larson v. Cactus Util. Co., 730 S.W.2d 640, 641 (Tex. 1987). *But see* Herring v. Bocquet, 933 S.W.2d 611, 613 (Tex. App.—San Antonio 1996, pet. requested) (applying an abuse of discretion standard of review to the trial court's findings of fact as to amount of attorney's fees awarded).

795. *See Snoke*, 770 S.W.2d at 778.

796. *See* TEX. R. CIV. P. 173; Brownsville-Valley Reg'l Med. Ctr. v. Gamez, 894 S.W.2d 753, 755 (Tex. 1995); McGouch v. First Court of Appeals, 842 S.W.2d 637, 640 (Tex. 1992); Davenport v. Garcia, 834 S.W.2d 4, 24 (Tex. 1992); Newman v. King, 433 S.W.2d 420, 421 (Tex. 1968); Missouri Pac. R.R. v. Alderete, 945 S.W.2d 148, 149 (Tex. App.—San Antonio 1996, no writ).

797. *See* TEX. R. CIV. P. 173; *see also* Dover Elevator Co. v. Servellon, 812 S.W.2d 366, 367 (Tex. App.—Dallas 1991, no writ) (remanding a case for proper assessment of costs pursuant to Rules 131 and 141).

798. *See Servellon*, 812 S.W.2d at 367 (citing TEX. R. CIV. P. 131, 141).

799. *See* Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 794 (Tex. 1987); Parkway Hosp., Inc. v. Lee, 946 S.W.2d 580, 591 (Tex. App.—Houston [14th Dist.] 1997, writ denied); *Alderete*, 945 S.W.2d at 151 (Green, J., concurring & dissenting).

which the ad litem has been appointed.[800] In applying those considerations, the award of guardian ad litem attorney's fees is a matter within the sound discretion of the trial court.[801] When an ad litem fee is unreasonable or excessive, the appellate court may fix the amount of the fee.[802]

M. *Court Costs*

Under Rule 131,[803] the successful party in a suit is entitled to recover from an adversary all costs incurred in the suit, except where otherwise provided.[804] A successful party is "one who obtains a judgment of a competent court vindicating a claim of right, civil in nature."[805] Pursuant to Rule 141, the trial court may assess the costs other than as provided by law or the rules for good cause stated on the record.[806] Even when the trial court states good cause on the record, the supreme court has admonished the appellate courts to "scrutinize the record" to determine whether it supports the trial court's determination to assess part or all of the costs against the prevailing party.[807] "Good cause" is an "elusive concept" to be determined on a case-by-case basis.[808] However, when the trial court assesses costs in a manner other than under the gen-

---

800. *See Gamez*, 894 S.W.2d at 757.

801. *See* Brownsville-Valley Reg'l Med. Ctr. v. Gamez, 894 S.W.2d 753, 756 (Tex. 1995); *Simon*, 739 S.W.2d at 794; Missouri Pac. R.R. v. Alderete, 945 S.W.2d 148, 150 (Tex. App.—San Antonio 1996, no writ); Sever v. Massachusetts Mut. Life Ins. Co., 944 S.W.2d 486, 492 (Tex. App.—Amarillo 1997, writ denied).

802. *See* Hirczy v. Hirczy, 838 S.W.2d 783, 787 (Tex. App.—Corpus Christi 1992, writ denied); Celanese Chem. Co. v. Burleson, 821 S.W.2d 257, 262 (Tex. App.—Houston [1st Dist.] 1991, no writ).

803. TEX. R. CIV. P. 131.

804. *See id.*; Rogers v. Walmart Stores, Inc., 686 S.W.2d 599, 601 (Tex. 1985); Allen v. Crabtree, 936 S.W.2d 6, 7–8 (Tex. App.—Texarkana 1996, no writ); Contemporary Health Management, Inc. v. Palacios, 832 S.W.2d 743, 745 (Tex. App.—Houston [14th Dist.] 1992, no writ). Both the Texas Civil Practice and Remedies Code and the Texas Rules of Civil Procedure specify items recoverable as costs. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 31.007(b) (Vernon Supp. 1997); TEX. R. CIV. P. 206.

805. Crow v. Burnett, 951 S.W.2d 894, 899 (Tex. App.—Waco 1997, pet. denied) (citing Lovato v. Ranger Ins. Co., 597 S.W.2d 34, 37 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.) (quoting Siepert v. Brewer, 433 S.W.2d 773, 775 (Tex. Civ. App.—Texarkana 1968, writ ref'd n.r.e.))).

806. *See* TEX. R. CIV. P. 141

807. *Rogers*, 686 S.W.2d at 601.

808. *See id.* (holding that the unnecessary lengthening of trial is a sufficient good cause to assess costs against a successful defendant); Gleason v. Lawson, 850 S.W.2d 714, 717 (Tex. App.—Corpus Christi 1993, no writ) (noting that Rules 131 and 141 should not

eral rule and fails to state good cause on the record, the courts generally hold that the trial court abused its discretion.[809] The trial court's determination of good cause and its assessment of court costs is reviewed for an abuse of discretion.[810]

N. *Exercise of Plenary Power*

A trial court has both plenary power and the jurisdiction to reconsider not only its own judgment, but also its interlocutory orders until thirty days after the date a final judgment is signed or, if a motion for new trial or its equivalent is filed, until thirty days after the motion is overruled by signed, written order, or operation of law, whichever occurs first.[811] During this period, plenary power is "full, entire, complete, absolute, perfect, [and] unqualified."[812] 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.[813] A void judgment "is good nowhere and bad everywhere."[814]

O. *Supersedeas Bond*

Generally, if a party loses at the trial court, a writ of supersedeas will stay execution of the judgment pending appeal, and guarantee the appellee the benefits of the judgment if affirmed.[815] To obtain

---

be used to penalize party for refusal to enter into settlement negotiations when party has not been ordered or encouraged to do so).

809. *See* Allen v. Crabtree, 936 S.W.2d 6, 9 (Tex. App.—Texarkana 1996, no writ).

810. *See* Rogers v. Walmart Stores, Inc., 686 S.W.2d 599, 601 (Tex. 1985); *Allen*, 936 S.W.2d at 7; State v. Castle Hills Forest, Inc., 842 S.W.2d 370, 372 (Tex. App.—San Antonio 1992, writ denied); State v. Brown, 802 S.W.2d 898, 901 (Tex. App.—San Antonio 1991, no writ); San Antonio Hous. Auth. v. Underwood, 782 S.W.2d 25, 27 (Tex. App.—San Antonio 1989, no writ).

811. *See* Fruehauf Corp. v. Carrillo, 848 S.W.2d 83, 84 (Tex. 1993).

812. Orion Enters., Inc. v. Pope, 927 S.W.2d 654, 658 (Tex. Civ. App.—San Antonio 1996, orig. proceeding) (quoting Mesa Agro v. R.C. Dave & Sons, 584 S.W.2d 506, 508 (Tex. App.—El Paso 1979, writ ref'd n.r.e.)).

813. *See* Graham Nat'l Bank v. Fifth Court of Appeals, 747 S.W.2d 370, 370 (Tex. 1987); Times Herald Printing Co. v. Jones, 730 S.W.2d 648, 649 (Tex. 1987).

814. Munters Corp. v. Locher, 936 S.W.2d 494, 498 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (quoting Dews v. Floyd, 413 S.W.2d 800, 804 (Tex. Civ. App.—Tyler 1967, no writ)).

815. *See* Edlund v. Bounds, 842 S.W.2d 719, 732 (Tex. App.—Dallas 1992, writ denied); Cooper v. Bowser, 583 S.W.2d 805, 807 (Tex. Civ. App.—San Antonio 1979, no writ).

a writ of supersedeas, a party generally deposits with the clerk a "good and sufficient" supersedeas bond or deposit.[816] 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.[817]

---

816. *See* TEX. R. APP. P. 24.1(a)(2). 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. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 6.001-.003 (Vernon 1986 & Supp. 1997); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 6.001 (Vernon Supp. 1997) (exempting Veteran's Administration, any national mortgage association, and "any national mortgage savings and loan insurance incorporation created" as a national relief organization); TEX. CIV. PRAC. & REM. CODE ANN. § 6.002 (Vernon Supp. 1997) (exempting incorporated cities and towns); TEX. PROB. CODE ANN. § 29 (Vernon Supp. 1997) (exempting executors or administrators in their fiduciary capacity). Exempt entities supersede the judgment by filing a notice of appeal. TEX. CIV. PRAC. & REM. CODE ANN. § 6.001 (Vernon 1986 & Supp. 1997); 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, orig. proceeding).

817. *See* TEX. R. APP. P. 24.2(a)(3); Isern v. Ninth Court of Appeals, 925 S.W.2d 604, 606 (Tex. 1996) (per curiam). Texas Rule of Appellate Procedure 24.2 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. *See* TEX. R. APP. P. 24.2(a)(1)-(5). 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), in "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 "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 (Vernon 1997). To the extent Chapter 52 of the Texas Civil Practice and Remedies Code conflicts with the Texas Rules of Appellate Procedure, Chapter 52 controls. *See id.* § 52.005. Under Texas Rule of Appellate Procedure Rule 24.2(a)(3), 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. However, the trial court has discretion to refuse 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 by an appellate court that such relief was improper. *See* TEX. R. APP. P. 24.2(a)(3). "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. Sch. Dist. v. Fourteenth Court of Appeals, 720 S.W.2d 87, 88 (Tex.

The numerous rules for posting an appropriate supersedeas bond depend upon the type of judgment and are beyond the scope of this Article.[818] 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.[819]

Texas Rule of Appellate Procedure 29.2 governs the suspension of interlocutory orders pending review by the appellate courts.[820] 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.[821] Denial of supersedeas "may be reviewed for abuse of discretion on motion by the appellate court."[822] Similarly, an appellate court may issue any necessary temporary orders to ensure that the rights of the parties are protected pending disposition of the appeal, and may require such security as it deems appropriate.[823] However, if the appellant's right may be adequately protected by supersedeas, then the appellate court may not suspend the trial court's order.[824]

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.[825] If a

---

1986) (citing Hill v. Fourteenth Court of Appeals, 695 S.W.2d 554, 555 (Tex. 1985)). The trial court's decision is reviewed under an abuse of discretion standard. *See id.*

818. *See* Roger Townsend & Sarah B. Duncan, *Stay of Judgments* (discussing rules for posting supersedeas bonds), *in* STATE BAR OF TEXAS PROF'L DEV. PROGRAM, 1 ADVANCED APPELLATE PRACTICE COURSE M (1987).

819. *See* State Bar of Tex. v. Heard, 603 S.W.2d 829, 832-33 (Tex. 1980); Man-Gas Transmission v. Osborne Oil Co., 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, orig. proceeding); Jennings v. Berry, 153 S.W.2d 725, 726 (Tex. Civ. App.—Texarkana 1941, no writ).

820. *See* TEX. R. APP. P. 29.2.

821. *See* TEX. R. APP. P. 29.2; TEX. R. APP. P. 24.

822. TEX. R. APP. P. 29.2.

823. *See* TEX. R. APP. P. 29.3.

824. *See id.*

825. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 52.003 (Vernon 1997); TEX. R. APP. P. 14.4; TransAmerican Nat'l Gas Corp. v. Finkelstein, 911 S.W.2d 153, 155 (Tex. App.—San Antonio 1995, no writ); Culbertson v. Brodsky, 775 S.W.2d 451, 452 (Tex. App.—Fort

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.[826] 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;[827] however, upon a finding that the bond is excessive, the court "may" reduce the amount of the original bond.[828]

Texas Rule of Appellate Procedure 24.3(a) 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.[829] Any changes ordered by the trial court, however, must be made known to the court of appeals.[830] The review of security and changes to it also remain with the appellate court.[831] 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.[832]

P. *Turnover Orders*

Section 31.002 of the Texas Civil Practice and Remedies Code[833] (commonly referred to as the turnover statute), is a procedural de-

---

Worth 1989, writ dism'd w.o.j.); Bank of E. Tex. v. Jones, 758 S.W.2d 293, 294 (Tex. App.—Tyler 1988, orig. proceeding).

826. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 52.004 (Vernon 1997); TEX. R. APP. P. 24.4. The district clerk's determination of the sufficiency or insufficiency of the tendered supersedeas bond is reversed only upon a showing of an abuse of discretion. *See* Universal Transp. & Distrib. Co. v. Cantu, 75 S.W.2d 697, 698 (Tex. Civ. App.—San Antonio 1934, orig. proceeding).

827. *See* TEX. R. APP. P. 24.4(d); Gullo-Haas Toyota, Inc. v. Davidson, Eagleson & Co., 832 S.W.2d 418, 419 (Tex. App.—Houston [1st Dist.] 1992, no writ).

828. *See* TEX. R. APP. P. 24.4(d).

829. *See* TEX. R. APP. P. 24.3(a); *Gullo-Haas*, 832 S.W.2d at 419.

830. *See* TEX. R. APP. P. 24.3(b); *Gullo-Haas*, 832 S.W.2d at 419.

831. *See* TEX. R. APP. P. 24.4(b); *Gullo-Haas*, 832 S.W.2d at 419.

832. *See* TEX. R. APP. P. 24.4(c), (d); *see also* Culbertson v. Brodsky, 775 S.W.2d 451, 455 (Tex. App.—Fort Worth 1989, writ dism'd w.o.j.) (setting aside the order of the trial court regarding the amount of supersedeas, and remanding to the trial court with instructions to conduct a hearing and consider evidence relating to sufficiency of supersedeas bond); Lowe v. Monsanto Co., No. 08-97-00339-CV (Tex. App.—El Paso Mar. 19, 1998, no pet. h.) (per curiam) (not released for publication yet) (vacating trial court's order and remanding issue to trial court for entry of findings of fact and for the taking of evidence as to the estimated duration of the appeal and the proper amount of postjudment interest), 1998 WL 119978, at *1-2.

833. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a) (Vernon 1997).

vice that allows creditors to reach certain assets of debtors that are usually difficult to attach and levy on by normal legal process.[834] Under the statute, a judgment creditor may "apply to a court for an injunction or other means to satisfy a judgment debt through a judgment debtor's property, including present or future property."[835] The trial court may order the judgment debtor to turn over property in the debtor's possession or control to a sheriff, and may also appoint a receiver to take possession of the property.[836] The trial court's decision to grant or deny a turnover order, a final appealable judgment,[837] is reviewed under an abuse of discretion standard.[838]

VII. 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[839] 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."[840] "Legal sufficiency points

834. *See* Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 224 (Tex. 1991); *see also* Burns v. Miller, Hiersche, Martens & Hayward, P.C., 948 S.W.2d 317, 321 (Tex. App.—Dallas 1997, writ denied) (identifying types of property exempted from statute).

835. *Burns*, 948 S.W.2d at 321 (citing Tex. Civ. Prac. & Rem. Code Ann. § 31.002(a) (Vernon 1997)).

836. *See id.* (explaining Tex. Civ. Prac. & Rem. Code Ann. § 31.002(b) (Vernon 1997)).

837. *See In re* Long, 946 S.W.2d 97, 98 (Tex. App.—Texarkana 1997, no writ).

838. *See* Parks v. Parker, 957 S.W.2d 666, 667–68 (Tex. App.—Austin 1997, no pet. h.); *Buller*, 806 S.W.2d at 226; *Burns*, 948 S.W.2d at 321; Associated Ready Mix, Inc. v. Douglas, 843 S.W.2d 758, 761 (Tex. App.—Waco 1992, orig. proceeding); Criswell v. Ginsberg & Foreman, 843 S.W.2d 304, 306 (Tex. App.—Dallas 1992, no writ).

839. The courts of appeals and the supreme court have jurisdiction to review challenges to the legal sufficiency of the evidence. *See* Choate v. San Antonio & A.P. Ry., 91 Tex. 406, 409, 44 S.W. 69, 69–70 (1898).

840. Cecil v. Smith, 804 S.W.2d 509, 510–11 (Tex. 1991); Aero Energy, Inc. v. Circle C Drilling Co., 699 S.W.2d 821, 822 (Tex. 1985); Hart v. Moore, 952 S.W.2d, 90, 94 (Tex. App.—Amarillo 1997, writ denied); Pipgras v. Hart, 832 S.W.2d 360, 367 (Tex. App.—Fort Worth 1992, writ denied); *see* Tex. R. Civ. P. 301; 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); Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 Tex. L. Rev. 361, 362 (1960).

of error assert a complete lack of evidence on an issue,"[841] and are designated as "no evidence" points, or "matter of law" points, depending upon whether the complaining party had the burden of proof.[842] 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.[843]

In reviewing legal sufficiency, the supreme court has held that it is "required to determine whether the proffered evidence as a whole rises to the level that would enable reasonable and fair-minded people to differ in their conclusions."[844] As the court observed, it is not "simply directed to determine whether evidence exists that has some remote relation to the verdict."[845] "'The evidence presented, viewed in the light most favorable to the prevailing party, must be such as to permit the logical inference [that the jury must reach].'"[846] Whether logical or inferential, there must be a logical connection "between the evidence offered and the fact to be proved."[847] The court admonished reviewing courts to "bear in mind the difference between materiality of the evidence and the issue of evidentiary sufficiency."[848] Furthermore, simply because some evidence is material in the sense that it makes a fact that is of consequence to the determination of the action more or less probable does not render the evidence legally sufficient.[849] Quoting

---

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

842. *See id.*

843. Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997) (citing Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-63 (1960)); *Cecil*, 804 S.W.2d at 511 n.2.

844. Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 25 (Tex. 1994).

845. *Id.* at 24.

846. *Id.* (quoting Lyons v. Millers Casualty Ins. Co., 866 S.W.2d 597, 600 (Tex. 1993)).

847. *Id.* (citing *Lyons*, 866 S.W.2d at 600).

848. *Id.*

849. *See* Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 24–25 (Tex. 1994).

Professor McCormick, the supreme court observed, "a brick is not a wall."[850]

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, the appellant must demonstrate on appeal that there is no evidence to support the adverse finding.[851]

"The traditional statement of the standard of review"[852] for reviewing no evidence points of error is that the reviewing court considers only the evidence and inferences that tend to support the finding and disregards all evidence and inferences to the contrary.[853] The scope of review is clear: only the evidence and inferences supporting the finding are considered.

---

850. *Id.* at 25 (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 152 (West ed. 1954)).

851. *See* TEX. R. APP. P. 38.1(e); Croucher v. Croucher, 660 S.W.2d 55, 58 (Tex. 1983); Hickey v. Couchman, 797 S.W.2d 103, 109 (Tex. App.—Corpus Christi 1990, writ denied); Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 276 (Tex. App.—Amarillo 1988, writ denied). *See generally* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 364–68 (1960) (discussing the requirements necessary to prove legal insufficiency).

852. Lyons v. Miller Cas. Ins. Co., 866 S.W.2d 597, 600 (Tex. 1993) (citing W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1045, 1133 (1993)).

853. *See* State Farm Fire & Cas. Co. v. Simmons, 41 Tex. Sup. Ct. J. 371, 372, 1998 WL 59210, at *3 (Feb. 13, 1998); Minnesota Mining & Mfg. Co. v Nishika, Ltd., 953 S.W.2d 733, 738 (Tex. 1997); ACS Investors, Inc. v. McLaughlin, 943 S.W.2d 426, 430 (Tex. 1997); Continental Coffee Prods. Co. v. Casarez, 937 S.W.2d 444, 450 (Tex. 1996); Leitch v. Hornsby, 935 S.W.2d 114, 118 (Tex. 1996); Ellis County State Bank v. Keever, 888 S.W.2d 790, 794 (Tex. 1994); *Lyons*, 866 S.W.2d at 600; Weirich v. Weirich, 833 S.W.2d 942, 945 (Tex. 1992); Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 458 (Tex. 1992); Orozco v. Sander, 824 S.W.2d 555, 556 (Tex. 1992); State v. $11,014.00, 820 S.W.2d 783, 784 (Tex. 1991) (per curiam); Mancorp, Inc. v. Culpepper, 802 S.W.2d 226, 227 (Tex. 1990); Lewelling v. Lewelling, 796 S.W.2d 164, 166 (Tex. 1990); Best v. Ryan Auto Group, Inc., 786 S.W.2d 670, 671 (Tex. 1990); Responsive Terminal Sys., Inc. v. Boy Scouts of America, 774 S.W.2d 666, 668 (Tex. 1989); 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); Jacobs v. Danny Darby Real Estate, 750 S.W.2d 174, 175 (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 America, 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); Tomlinson v. Jones, 677 S.W.2d 490, 492 (Tex. 1984); 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, 608 S.W.2d 901, 904 (Tex. 1980); Ray v. Farmers' State Bank, 576 S.W.2d 607, 609 (Tex. 1978); Garza v. Alviar, 395 S.W.2d

In 1997, the supreme court restated the traditional standard and scope of review. The supreme court stated that, in reviewing no evidence points of error, the reviewing court must consider *all of the record evidence* in a light most favorable to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from the evidence is to be indulged in that party's favor.[854] Under this restated statement of the standard of review, the scope of review has been expanded: all of the evidence is considered.[855] The expanded scope of review may significantly effect one's analysis of the viability of a legal insufficiency challenge.

Under either statement of the standard, it remains settled that if there is any evidence of probative force to support the finding, the no evidence issue must be overruled and the finding upheld.[856] Stated another way, if there is more than a scintilla of evidence to support the finding, the no evidence challenge fails.[857]

821, 823 (Tex. 1965); Benoit v. Wilson, 150 Tex. 273, 280–81, 239 S.W.2d 792, 796 (1951); Cartwright v. Canode, 106 Tex. 502, 507, 171 S.W. 696, 698 (1914).

854. *See* Associated Indem. Corp. v. Cat Contracting, Inc., 41 Tex. Sup. Ct. J. 389, 396, 1998 WL 58990, at *11 (Feb. 13, 1998) (citing Harbin v. Seale, 461 S.W.2d 591, 592 (Tex. 1970)); Formosa Plastics Corp. USA v. Presidio Eng'rs, 41 Tex. Sup. Ct. J. 289, 293-94, 1998 WL 18981, at *7 (Jan. 18, 1998) (citing *Harbin*, 461 S.W.2d at 592); Merrell Dow Pharmas., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997) (citing *Harbin*, 461 S.W.2d at 592); Putman v. Missouri Valley, Inc., 616 S.W.2d 930, 931 (Tex. 1981) (quoting *Harbin*, 461 S.W.2d at 592); Burk Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981) (same); *Harbin*, 461 S.W.2d at 592 (citing Burt v. Lochausen, 151 Tex. 289, 298, 249 S.W.2d 194, 199 (1952)).

855. The *Formosa Plastics* and *Merrell Dow* decisions both cite to *Harbin v. Seale*, 461 S.W.2d 591 (Tex. 1970), which was written by Chief Justice Calvert. Interestingly, ten years earlier, then Associate Justice Calvert stated, in his often cited law review article, the standard of review as follows: "the courts follow the further rule of viewing the evidence in its most favorable light in support of the finding of the vital fact, considering only the evidence which support the finding and rejecting the evidence and the inferences which are contrary to the finding." Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 364 (1960) (citing Cartwright v. Canode, 106 Tex. 502, 502–07, 171 S.W. 696, 696–97 (1914)).

856. *See ACS Investors, Inc.*, 943 S.W.2d at 430; *Leitch*, 935 S.W.2d at 118; *Southern States*, 774 S.W.2d at 640; *In re* King's Estate, 150 Tex. 662, 664, 244 S.W.2d 660, 661 (1951). In one case, the supreme court even considered-posttrial-overruling a legal insufficiency challenge. *See Weirich*, 833 S.W.2d at 946 (Tex. 1992) (considering telephone records discovered after the trial).

857. *See Formosa Plastics Corp.*, 41 Tex. Sup. Ct. J. at 294 (*citing Continental Coffee*, 937 S.W.2d at 450 and Browning-Ferris, Inc. v. Reyna, 865 S.W.2d 925, 928 (Tex. 1993)); *Leitch*, 935 S.W.2d at 118; *Stafford*, 726 S.W.2d at 16.

What is a "scintilla" of evidence?[858] "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."[859] "More than a scintilla exists when the evidence supporting the finding, as a whole, 'rises to the level that would enable reasonable and fair-minded people to differ in their conclusions.'"[860] 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.[861] In any other situation, the appellate court may not second guess the fact finder unless only one inference may be drawn from the evidence.[862] "Whether other possible inferences may be drawn from the evidence is not a relevant inquiry."[863] 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 and the no evidence challenge should be overruled.[864]

"Any ultimate fact may be proved by circumstantial evidence."[865] However, the legal equivalent of no evidence exists

---

858. Scintilla is defined as "a barely perceptible manifestation" and "the slightest particle or trace." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2033 (1986). It is also defined as "[a] spark; a remaining particle; a trifle; the least particle." BLACK'S LAW DICTIONARY 1207 (5th ed. 1979).

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

860. Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997) (citing Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995) (quoting Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 25 (Tex. 1994)).

861. *Kindred*, 650 S.W.2d at 63; Woods v. Townsend, 144 Tex. 594, 599, 192 S.W.2d 884, 886 (1946); Joske v. Irvine, 91 Tex. 574, 582, 44 S.W. 1059, 1063 (1898); Choate v. San Antonio A.P. Ry., 90 Tex. 82, 88, 37 S.W. 319, 319 (1896); Lee v. International & G.N. R., 89 Tex. 583, 588, 36 S.W. 63, 65 (1896).

862. *See* State v. $11,014.00, 820 S.W.2d 783, 785 (Tex. 1991) (citing Ross v. Green, 135 Tex. 103, 118, 139 S.W.2d 565, 572 (1940)).

863. Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 459 (Tex. 1992).

864. *See id.* at 459.

865. Transportation Ins. Co. v. Faircloth, 898 S.W.2d 269, 285 (Tex. 1995); *$11,014.00*, 820 S.W.2d at 785; *see* Farley v. M.M. Cattle Co., 529 S.W.2d 751, 755 (Tex. 1975); Prudential Ins. Co. of America v. Krayer, 366 S.W.2d 779, 780 (Tex. 1963); Dallas County Flood Control Dist. No. 1 v. Cross, 815 S.W.2d 271, 279 (Tex. App.—Dallas 1991, writ denied). "A fact is established by circumstantial evidence when the fact may be fairly and reasonably drawn from other facts proved in the case." *Cross*, 815 S.W.2d at 279.

when "[meager] circumstantial evidence give[s] rise to inferences equally consistent with two different propositions."[866] Furthermore, where circumstances are equally consistent with either of two facts and "nothing shows that one is more probable than the other, neither fact can be inferred" and the no evidence challenge must be sustained.[867] Circumstantial evidence still must consist of more than a scintilla to withstand a no evidence challenge.[868]

"Inferences may also support a judgment so long as they are reasonable in light of all the facts and circumstances."[869] The supreme court recently observed that the reviewing court is not required to "disregard undisputed evidence that allows of only one logical inference."[870] Under the no evidence standard of review, inference stacking is not permissible. "[A] vital fact may not be established by piling inference upon inference."[871]

2. As a Matter of Law

If an appellant is "attacking the legal sufficiency of an adverse finding to an issue on which [he] had the burden of proof, [he] must demonstrate on appeal that the evidence conclusively estab-

866. $56,700 in U.S. Currency v. State, 730 S.W.2d 659, 660 (Tex. 1987).

867. Continental Coffee Prods. Co. v. Casarez, 937 S.W.2d 444, 450 (Tex. 1996); Ortiz v. Jones, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam); *$56,700 in U.S. Currency*, 730 S.W.2d at 662; Litton Indus. Prod., Inc. v. Gammage, 668 S.W.2d 319, 324 (Tex. 1984). An inference may not be drawn when "the facts prove to give rise to opposing inferences which are equally reasonable and plausible." Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 365 (1960).

868. *See* Blount v. Bordens, Inc., 910 S.W.2d 931, 933 (Tex. 1995) (per curiam); *Litton*, 668 S.W.2d at 324.

869. *Ortiz*, 917 S.W.2d at 772; Briones v. Levine's Dep't Store, Inc., 446 S.W.2d 7, 10 (Tex. 1969); Simmons & Simmons Constr. Co. v. Rea, 155 Tex. 353, 359, 286 S.W.2d 415, 419 (1955). Even under a "no evidence" standard of review, the court must consider not only facts and circumstances that give rise to an inference but also "facts and circumstances in derogation of that inference." Woodward v. Ortiz, 150 Tex. 75, 81, 237 S.W.2d 286, 290 (1951); Texas & N.O. RR. v. Burden, 146 Tex. 109, 123, 203 S.W.2d 522, 530 (1947).

870. Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 51 n.1 (Tex. 1997) (plurality opinion) (citing Wininger v. Fort Worth & D.C. Ry., 143 S.W. 1150, 1152 (Tex. 1912) and Texas & N.O. R.R. v. Rookes, 293 S.W. 554, 556–57 (Tex. Comm'n App. 1927)); *see id.* at 74 (Hecht, J., concurring, joined by Phillips, C.J., & Gonzalez & Owen, JJ.).

871. Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp., 435 S.W.2d 854, 858 (Tex. 1968); Texas Sling Co. v. Emanuel, 431 S.W.2d 538, 541 (Tex. 1968); *see* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 365 (1960) (concluding that a vital fact may not be established "by piling inference upon inference" (citing Rounsaville v. Bullard, 154 Tex. 260, 265, 276 S.W.2d 791, 784 (1955))); Lobley v. Gilbert, 149 Tex. 493, 497, 236 S.W.2d 121, 123 (1951)).

lished all vital facts in support of the issue."[872] In reviewing a "matter of law" challenge, the reviewing court employs a two prong test.[873] The court will first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary.[874] 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.[875] If the contrary proposition is established conclusively by the evidence, the point of error will be sustained.[876]

Texas courts have repeatedly held that although a jury is the finder of fact, the jury may not disregard uncontroverted evidence.[877] Similarly, the appellate court must consider undisputed or uncontradicted evidence and has no "right to disregard the undisputed evidence and decide such issue[s] in accordance with [its] wishes."[878]

Nevertheless, contradictory cases also hold that a jury's failure to find the existence of a particular fact need not be supported by any

---

872. Smith v. Central Freight Lines, Inc., 774 S.W.2d 411, 412 (Tex. App.—Houston [14th Dist.] 1989, writ denied); *see* Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 940 (Tex. 1991); Sterner v. Marathon Oil Co., 767 S.W.2d 686, 690 (Tex. 1989); Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982); Pacific Employers Ins. Co. v. Dayton, 958 S.W.2d 452, 455 (Tex. App.—Fort Worth 1997, no pet. h.); Murphy v. Fannin County Elec. Coop., Inc., 957 S.W.2d 900, 903 (Tex. App.—Texarkana 1997, no pet.); Hickey v. Couchman, 797 S.W.2d 103, 109 (Tex. App.—Corpus Christi 1990, writ denied); Ritchey v. Crawford, 734 S.W.2d 85, 86 (Tex. App.—Houston [1st Dist.] 1987, no writ).

873. *See Dayton*, 958 S.W.2d at 455 (citing *Brady*, 811 S.W.2d at 940).

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

875. *See Sterner*, 767 S.W.2d at 690; *Holley*, 629 S.W.2d at 696-97; N.O.R.R. v. Burden, 146 Tex. 109, 124, 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).

876. *See* 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.).

877. *See, e.g.*, Kennedy v. Missouri Pac. R.R., 778 S.W.2d 552, 557 (Tex. App.—Beaumont 1989, writ denied); Ralston Purina Co. v. Barkley Feed & Seed Co., 722 S.W.2d 431, 434 (Tex. App.—Houston [1st Dist.] 1986), *rev'd on other grounds sub nom.* International Proteins Corp. v. Ralston Purina Co., 744 S.W.2d 932 (Tex. 1988); Berry v. Griffin, 531 S.W.2d 394, 396 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

878. *Burden*, 146 Tex. at 123, 203 S.W.2d at 530; *see* Nichols v. Nichols, 727 S.W.2d 303, 305 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.); Watts v. St. Mary's Hall, Inc., 662 S.W.2d 55, 59 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.); *see also* Cochran v. Wool Growers Cent. Storage Co., 140 Tex. 184, 191, 166 S.W.2d 904, 908 (1942) (observing that "where the testimony of an interested witness is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon, it is taken as true, as a matter of law").

evidence because the jury is free to disbelieve the witnesses of the party bearing the burden of proof.[879] These two lines of cases are impossible to reconcile. Given the scope of review, which requires the court to disregard all evidence contrary to the verdict, the latter line of cases is clearly correct when the appellant raises an "as a matter of law" challenge.

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.[880] A motion for new trial, however, is not required in a non-jury case to challenge either the legal *or* factual sufficiency of the evidence.[881] When reviewing a challenge to the factual sufficiency of the evidence, the court of appeals must consider all of the evidence.[882] "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."[883] "Factual sufficiency points of error are designated as 'insufficient evidence' points or 'great weight and preponderance of evidence' points . . . depending upon whether the complaining party had the burden of proof."[884] Although both points are generally classified as "insufficient evidence" points, they are distinct.[885]

---

879. *See* Yap v. ANR Freight Sys., 789 S.W.2d 424, 425 (Tex. App.—Houston [1st Dist.] 1990, no writ).

880. *See* TEX. R. CIV. P. 324(b)(2), (3).

881. *See* 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).

882. *See* Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989); Lofton v. Texas Brine Corp., 720 S.W.2d 804, 805 (Tex. 1986).

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

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

885. *See* Ritchey v. Crawford, 734 S.W.2d 85, 86–87 n.1 (Tex. App.—Houston [1st Dist.] 1987, no writ) (citing Robert W. 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 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 nonexistence. *See id.* The Calvert article does not fully discuss the problem of challenging a negative finding on an issue. *But see* Blonstein v. Blonstein, 831 S.W.2d 468, 473 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (emphasizing that

According to the *Pool* case, when an appellate court reverses a case on grounds of factual insufficiency, it must "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 of the evidence," and "state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict."[886] Similarly, when a court of appeals reviews a factual insufficiency challenge to a punitive damage award, the court must detail the relevant evidence in its opinion, explaining why that evidence either supports or does not support the punitive damages award in light of the factors enumerated in Section 41.011 of the Texas Civil Practice and Remedies Code.[887]

The *Pool* requirement does not extend to *affirmances* by the court of appeals when there has been a factual sufficiency or great weight challenge, except as to challenges to punitive damage awards outlined above.[888] However, the *Pool* requirement or some variation of *Pool* should be extended to liability findings and actual damage awards as well. Due process suggests that a court of appeals at least mention some evidence that it believes is sufficient to support the jury's verdict. The court should not be permitted to simply conclude that it has reviewed the evidence and found it sufficient to support the jury's finding.[889]

---

the standard of review is the same for factual insufficiency challenges regardless of the burden of proof and regardless of whether the court is reviewing affirmative or negative findings).

886. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); *see* Lofton v. Texas Brine Corp., 777 S.W.2d 384, 385 (Tex. 1989).

887. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.013 (Vernon Supp. 1995); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 31 (Tex. 1994). In assessing whether an award of punitive damages are appropriate, the court is to consider the following (commonly referred to as the *Kraus* factors):

> (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which the conduct offends a public sense of justice and propriety and (6) the net worth of the defendant.

See TEX. CIV. PRAC. & REM. CODE ANN. § 41.011 (Vernon Supp. 1995).

888. *See* Ellis County State Bank v. Keever, 915 S.W.2d 478, 479 (Tex. 1996) (explaining that *Pool* is appropriate in challenges regarding punitive damages); *Moriel*, 879 S.W.2d at 31 (stating that a *Pool* review is required when a court of appeals affirms a punitive damage award).

889. *See generally* TEX. R. APP. P. 47.1 (requiring courts of appeals to write opinions for their decisions).

1. Insufficient Evidence

If a party is attacking the factual sufficiency of an adverse finding on an issue to which the other party had the burden of proof, the attacking party must demonstrate that there is insufficient evidence to support the adverse finding.[890] In reviewing an insufficiency of the evidence challenge, the court of appeals[891] must first consider, weigh, and examine all of the evidence which supports and which is contrary to the jury's determination.[892] Having done so, the court should set aside the verdict only if the evidence which supports the jury finding is so weak as to be clearly wrong and manifestly unjust.[893]

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.[894] In reviewing a challenge that the jury finding is against the great weight and preponderance of the evidence, the court of appeals must first examine the record to determine if there is some evidence to support the finding; if such is the case, then the court of appeals must determine, in light of the entire record,

---

890. *See* Hickey v. Couchman, 797 S.W.2d 103, 109 (Tex. App.—Corpus Christi 1990, writ denied); Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 275-76 (Tex. App.—Amarillo 1988, writ denied).

891. The court of appeals has conclusive jurisdiction over questions of fact. *See* TEX. CONST. art. V, § 6; Coulson v. Lake LBJ Util. Dist., 781 S.W.2d 594, 597 (Tex. 1989); 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).

892. *See* Plas-Tex, Inc. v. U.S. 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).

893. *See* Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam); Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); 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) (per curiam); Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 276 (Tex. App.—Corpus Christ 1988, writ denied); 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).

894. *See* Croucher v. Croucher, 660 S.W.2d 55, 58 (Tex. 1983); Murphy v. Fannin County Elec. Coop., Inc., 957 S.W.2d 900, 903 (Tex. App.—Texarkana 1997, no pet.); Correa v. General Motors Corp., 948 S.W.2d 515, 519 (Tex. App.—Corpus Christi 1997, no writ); *Hickey*, 797 S.W.2d at 109; *Raw Hide Oil & Gas*, 766 S.W.2d at 275–76.

whether the finding is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, or whether the great preponderance of the evidence supports its nonexistence.[895] Whether the great weight challenge is to a finding or a nonfinding, a court of appeals may reverse and remand a case for a new trial only when it concludes that the finding or nonfinding is against the great weight and preponderance of the evidence.[896]

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 of the fact that the jury was not convinced by a preponderance of the evidence.[897] In such cases, a court of appeals may not reverse simply "because [it] concludes that the evidence preponderates toward an affirmative answer."[898] The courts of appeals may only reverse where "the great weight of the evidence supports an affirmative answer."[899] While a court of appeals may "unfind" certain facts, it cannot affirmatively find facts that would be the basis of a rendition.[900] The court of appeals may only reverse and remand for a new trial.[901] The following diagram is a brief summary of Justice Michol O'Connor's extensive and thorough diagrams analyzing the legal and factual insufficiency standards of review.[902]

---

895. *See Cain*, 709 S.W.2d at 176; *Dyson*, 692 S.W.2d at 457; 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.

896. *See* Ames v. Ames, 776 S.W.2d 154, 158 (Tex. 1989), *cert. denied*, 494 U.S. 1080 (1990); Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 651 (Tex. 1988).

897. *See* Herbert v. Herbert, 754 S.W.2d 141, 144 (Tex. 1988); Peterson v. Reyna, 908 S.W.2d 472, 476 (Tex. App.—San Antonio 1995), *judgm't modified per curiam*, 920 S.W.2d 288 (Tex. 1996).

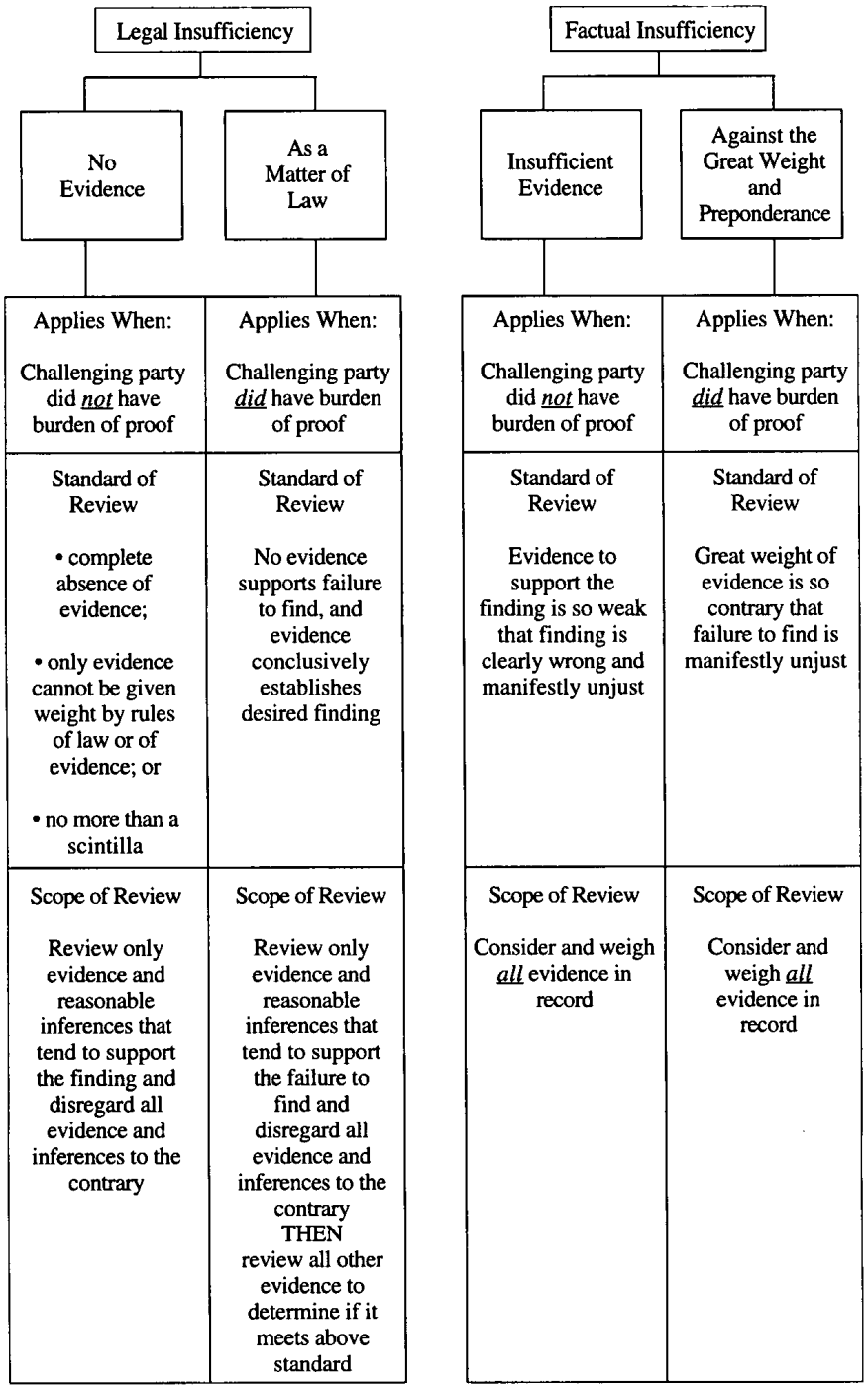
898. *Herbert*, 754 S.W.2d at 144; *see Peterson*, 908 S.W.2d at 476.

899. *Herbert*, 754 S.W.2d at 144; *Peterson*, 908 S.W.2d at 476.

900. *See* Texas Nat'l Bank v. Karnes, 717 S.W.2d 901, 903 (Tex. 1986); Carr v. Norstok Bldg. Sys., Inc., 767 S.W.2d 936, 943 (Tex. App.—Beaumont 1989, no writ).

901. *See Carr*, 767 S.W.2d at 943.

902. *See* Michol O'Connor, *Appealing Jury Findings*, 12 HOUS. L. REV. 65, 66–67, 79, 83 (1974) (providing a comprehensive and scholarly analysis of appealing jury findings under the legal and factual sufficiency of evidence standards of review in Texas).


Legal Insufficiency
No Evidence
As a Matter of Law
Applies When:
Challenging party did not have burden of proof
Applies When:
Challenging party did have burden of proof
Standard of Review
• complete absence of evidence;
• only evidence cannot be given weight by rules of law or of evidence; or
• no more than a scintilla
Standard of Review
No evidence supports failure to find, and evidence conclusively establishes desired finding
Scope of Review
Review only evidence and reasonable inferences that tend to support the finding and disregard all evidence and inferences to the contrary
Scope of Review
Review only evidence and reasonable inferences that tend to support the failure to find and disregard all evidence and inferences to the contrary
THEN
review all other evidence to determine if it meets above standard
Factual Insufficiency
Insufficient Evidence
Against the Great Weight and Preponderance
Applies When:
Challenging party did not have burden of proof
Applies When:
Challenging party did have burden of proof
Standard of Review
Evidence to support the finding is so weak that finding is clearly wrong and manifestly unjust
Standard of Review
Great weight of evidence is so contrary that failure to find is manifestly unjust
Scope of Review
Consider and weigh all evidence in record
Scope of Review
Consider and weigh all evidence in record

C. *Pool and the Constitutional Conflict Between the Right to Trial by Jury and the Court of Appeals' Conclusive Jurisdiction over Issues of Fact*

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."[903] This constitutional provision limits the supreme court's authority, restricting its jurisdiction to questions of law.[904] The courts of appeals conclusive jurisdiction over issues of "fact," however, is complicated by the Texas Bill of Rights, which provides that every person has a "right of trial by jury"[905] and that this right "shall remain inviolate."[906] The supreme court recently reaffirmed that the right to a jury trial is one of Texas's "most precious rights, holding 'a sacred place in English and American history.'"[907] Recognizing that the Texas Constitution confers an exceptionally broad jury trial right upon litigants, the supreme court has cautioned that "the courts must not lightly deprive our people of this jury right by taking an issue away from a jury."[908]

These two constitutional provisions can come into conflict in cases where a jury decides on a fact issue at trial, and the court of appeals later throws out the jury's finding because it concludes that the finding is not supported by sufficient evidence. In 1898, only seven years after the Texas Constitution was amended, the supreme court recognized the potential constitutional conflict and observed that Article V, Section 6, which gives courts of appeals conclusive jurisdiction over questions of fact, "was not to enlarge

---

903. TEX. CONST. art. V, § 6 (amended 1891); *see* Leitch v. Hornsby, 935 S.W.2d 114, 120 (Tex. 1996) (Abbott, J., concurring); E-Z Mart Stores, Inc. v. Havner, 832 S.W.2d 368, 369 (Tex. App.—Texarkana 1992, writ denied).

904. *See* Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 73 (Tex. 1997) (Hecht, J., concurring, joined by Phillips, C.J., & Gonzalez & Owen, JJ.); *Leitch*, 935 S.W.2d at 120 (Abbott, J., concurring); Choate v. San Antonio & A.P. Ry., 91 Tex. 406, 410, 44 S.W. 69, 69 (1898); *E-Z Mart Stores*, 832 S.W.2d at 369.

905. TEX. CONST. art. V, § 10; *see also* TEX. R. CIV. P. 226(a) (requiring the trial judge to admonish the jury that they "are the sole judges of the credibility of the witnesses and the weight to be given their testimony. . .").

906. TEX. CONST. art. I, § 15.

907. General Motors Corp. v. Gayle, 951 S.W.2d 469, 476 (Tex. 1997) (quoting White v. White, 108 Tex. 570, 581, 196 S.W. 508, 512 (1917)).

908. *Giles*, 950 S.W.2d at 56 (quoting Young v. Blain, 245 S.W. 65, 67 (Tex. Comm'n App. 1922, judgm't adopted, holding approved)).

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."[909] Thus, the absence of any significant evidence and the conclusiveness of the evidence are legal questions which the supreme court may address, but the weight and preponderance of the evidence is a factual question within the exclusive jurisdiction of the courts of appeals.[910] The supreme court also recognized that the courts of appeals' jurisdiction does not give them the authority to pass upon the credibility of witnesses or 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.[911]

Almost seventy-five years later, in *In re King's Estate*,[912] the supreme court established that it might accept jurisdiction, notwithstanding Texas Constitution Article V, Section 6, to determine if a correct legal standard had been applied by the courts of

---

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

910. *See* Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 73 (Tex. 1997) (Hecht, J., concurring, joined by Phillips, C.J., & Gonzalez & Owens, JJ.) (citing *In re* King's Estate, 244 S.W.2d 660 (Tex. 1951)); *see also* Continental Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 450 (Tex. 1996) (holding that the supreme court cannot determine whether the remaining probative evidence is factually sufficient); Leitch v. Hornsby, 935 S.W.2d 114, 120 (Tex. 1996) (Abbott, J., concurring) (reaffirming that the supreme court has no jurisdiction to conduct a factual sufficiency review).

911. *See Choate*, 91 Tex. 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*. *See* Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 647 (Tex. 1988) (observing that courts of appeals may only "unfind" facts and reverse but cannot usurp jury's fact finding function); *In re* Rodriguez, 940 S.W.2d 265, 271 (Tex. App.—San Antonio 1997, writ denied) (stating that "[w]e are not permitted to act, and will not act, as a second jury. . . ."); Clancy v. Zale Corp., 705 S.W.2d 820, 826 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (re-affirming that the court is not to be a fact-finder); *see also* Pool v. Ford Motor Co., 715 S.W.2d 629, 633–35 (Tex. 1986) (ruling that the court of appeals may reverse a trial court's fact finding only if contrary to the overwhelming weight of evidence); Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985) (ruling that the court of appeals may only evaluate the sufficiency of the evidence to support a lower court's judgment, but may not decide factual issues as a basis for judgment); *In re* King's Estate, 150 Tex. at 666, 244 S.W.2d at 662 (forbidding the court of appeals from overturning a jury verdict simply because different inferences or conclusions could have been derived by the jury); Benoit v. Wilson, 150 Tex. 273, 281–82, 239 S.W.2d 792, 796 (1951) (referring to the jury as "the exclusive judge of the facts proved").

912. 150 Tex. 662, 244 S.W.2d 660 (1951). *In re King's Estate* is a per curiam opinion that dealt only with the scope of review; it simply held that a court of appeals must pass on all dispositive points raised by an appellant. *See In re* King's Estate, 150 Tex. at 664-65, 244 S.W.2d at 661-62.

appeals.[913] Since *In re King's Estate*, the supreme court continues to accept jurisdiction to determine whether the court of appeals utilized an incorrect legal principle in reviewing factual insufficiency points.[914] In *Dyson v. Olin Corp.*,[915] the supreme court again concluded that while it does not have jurisdiction over questions of fact, it does "have jurisdiction to determine whether the courts of appeals used the correct rules of law in reaching their conclusions."[916] As the court correctly recognized, the use of the wrong rule of law, a purely legal question, is within the supreme court's jurisdiction.[917] More importantly, in his concurring opinion, Justice Robertson expressly raised the issue of whether the supreme court would continue to adhere to prior case law interpreting Article V, Section 6.[918] Justice Robertson expressed his view that Article V, Section 6 improperly allows the courts of appeals to usurp the jury's fact-finding function.[919]

Justice Robertson's challenge to the continued viability of Article V, Section 6 was subsequently raised in *Pool v. Ford Motor Co.*[920] While the supreme court chose "to adhere to previous interpretations that harmonize[d] the two constitutional provisions" and reaffirmed the courts of appeals' jurisdiction to review cases for factual insufficiency of the evidence,[921] it also held that it had the authority to review the court of appeals' opinions to determine if the appellate court had applied the correct standard of review to the facts.[922] In order to determine whether the courts of appeals

913. *See id.* 150 Tex. at 665, 244 S.W.2d at 661.

914. *See* Harmon v. Sohio Pipeline Co., 623 S.W.2d 314, 314–15 (Tex. 1981) (noting that the supreme court has jurisdiction to review an appellate court's application of the rules of law); Garza v. Alviar, 395 S.W.2d 821, 823–24 (Tex. 1965) (recognizing that the supreme court has the power to determine if the appellate court had jurisdiction over an issue); Puryear v. Porter, 153 Tex. 82, 92, 264 S.W.2d 689, 690 (1954) (taking note of the fact that the supreme court may remand to the appellate court for reconsideration of the applicable rules of law).

915. 692 S.W.2d 456 (Tex. 1985).

916. *Dyson*, 692 S.W.2d at 457.

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

918. *See id.* (Robertson, J., concurring).

919. *See id.* at 458 (Robertson, J., concurring).

920. 715 S.W.2d 629 (Tex. 1986). The Pools argued that the court of appeals "exercised its fact jurisdiction in a manner that undermined the jury verdict in contravention of the constitutional right to trial by jury." *Pool*, 715 S.W.2d at 633.

921. *See id.* at 634.

922. *See id.* at 634–35.

applied the correct legal principles to the facts, the supreme court held that:

> [The] 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.[923]

Pool clearly takes the supreme court's earlier decision in *Dyson* one step further by allowing it to review a court of appeals' application of the correct legal standard to the facts, instead of only determining whether the correct legal standard was utilized.[924] Therefore, the courts of appeals must do more than simply recite the *Pool* standard of review, they must prove that they actually followed the standard.[925]

The inherent constitutional conflict of the courts of appeals' jurisdiction over questions of fact and the right to trial by jury was again raised and addressed in *Cropper v. Caterpillar Tractor Co.*[926] In that case, the supreme court rejected a 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 and fifty years" and are "thoroughly rooted in our constitution and judicial system."[927] While the court recognized the "inescapable fact" that it could not amend the constitution to remove the conflict, it concluded that even if the court was empowered to, it was "not prepared to sacrifice either [constitutional provision] for the benefit of the other."[928]

---

923. *Id.* at 635.

924. *See id.*

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

926. 754 S.W.2d 646, 648 (Tex. 1988).

927. *Cropper*, 754 S.W.2d at 652.

928. *Id.*; *see also* Herbert v. Herbert, 754 S.W.2d 141, 144 (Tex. 1988) (reiterating the 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) (suggesting that the courts of appeals' authority to review sufficiency of jury's fact-finding should be eliminated).

While the supreme court has continued to recognize the courts of appeals' conclusive jurisdiction over questions of fact,[929] it has in the past circumvented its own constitutional limitation in two interesting and sharply divided cases. In *Lofton v. Texas Brine Corp.*,[930] the supreme court, in a 5-4 decision, reversed the court of appeals' decision for a second time,[931] holding that the jury's finding was supported by evidence that was factually sufficient.[932] 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*,[933] was using *Pool* to second guess the courts of appeals' constitutional prerogative to judge the factual sufficiency of the evidence in a case.[934] While the supreme court again recognized its lack of jurisdiction to determine the factual sufficiency of the evidence,[935] it nevertheless explained in great detail why all of the evidence was sufficient to support the jury's finding.[936] It is clear from the court's "extensive, and unauthorized, analysis"[937] that while the court was unwilling to explicitly overrule *Herbert* and *Cropper*, it was now going to review the court of appeals' factual sufficiency analysis.[938] In his dissent, Justice Hecht observed that the majority in *Lofton* "stymied . . . the constitution" by allowing the supreme court to "keep reversing the judgment of the court of appeals until it reached a result [of which] the [c]ourt approve[d]."[939] Subse-

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

930. 777 S.W.2d 384 (Tex. 1989).

931. *See Lofton*, 777 S.W.2d 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 the first remand is reported at *Texas Brine Corp. v. Lofton*, 751 S.W.2d 197 (Tex. App.—Houston [14th Dist.] 1988, writ granted), *rev'd*, 777 S.W.2d 384 (Tex. 1989).

932. *See Lofton*, 777 S.W.2d at 387.

933. *See* Pool v. Ford Motor Co., 715 S.W.2d 629, 633 (Tex. 1986). In his concurring opinion, Justice Gonzalez 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. *Id.* at 638 (Gonzalez, J., concurring).

934. *See Lofton*, 777 S.W.2d at 387–88 (Gonzalez, J., dissenting); *id.* at 388-89 (Hecht, J., dissenting, joined by Phillips, C.J., & Cook, J.)).

935. *See* Lofton v. Texas Brine Corp., 777 S.W.2d 384, 387 (Tex. 1989).

936. *See id.* at 386–87.

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

938. *See id.* at 388.

939. *Id.*

quently, reiterating Justice Hecht's concern in *Lofton*, Justice Gonzalez noted that the supreme court should try to avoid the "yo-yo effect" that occurs "when a majority of the court keeps reversing the judgment of the court of appeals until it reaches a result that the majority approves."[940]

In *Aluminum Co. of America v. Alm*,[941] the supreme court once again circumvented the court of appeals' constitutionally binding conclusion that the jury's finding of gross negligence was supported by factually insufficient evidence.[942] 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.[943] Ignoring the evidence of care introduced by Alcoa,[944] the supreme court refused to accept the court of appeals' analysis of the factual sufficiency of the evidence and concluded that Alcoa was grossly negligent as a matter of law, a legal issue over which the supreme court has jurisdiction.[945] 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."[946]

While most practitioners and courts assume 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 have been resolved, it is clear that the supreme court, at least as it was constituted at the

940. Havner v. E-Z Mart Stores, Inc., 846 S.W.2d 286, 287 (Tex. 1993) (citing Lofton v. Texas Brine Corp., 720 S.W.2d 804 (Tex. 1986)) (per curiam) (remanding for second factual sufficiency review); *see Lofton*, 777 S.W.2d at 387 (remanding for third factual sufficiency review); *see also* William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 533 (1991) (discussing concerns of Justices Hecht and Gonzalez that the supreme court cannot reverse an appeals court until that court reaches a result the supreme court approves).

941. 785 S.W.2d 137 (Tex. 1990).

942. *See Alm*, 785 S.W.2d at 141 (Gonzalez, J., dissenting, joined by Phillips, C.J., Cook, & Hecht, JJ.) (interpreting the majority's opinion to mean "that a jury could not disbelieve a plaintiff's case as to gross negligence when the issue is disputed, and that a court should determine this issue as a matter of law").

943. *See id.* at 140, 142.

944. *See id.* at 143 (Gonzalez, J., dissenting).

945. *See id.* at 141.

946. Aluminum Co. of America v. Alm, 785 S.W.2d 143 (Tex. 1990).

time of *Lofton* and *Alm*, was deeply divided on the issue. The concurring and dissenting opinions on denial of application for writ of error in *Havner v. E-Z Mart Stores, Inc.*,[947] indicate that the questions surrounding the courts of appeals' constitutional conclusive jurisdiction over questions of fact may not yet be truly resolved.[948] In any event, appellate practitioners must be aware of the potential conflict on the supreme court and understand that the inherent constitutional conflict remains. 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 nonfinding for factual insufficiency, and uses any language that may be construed as an "inappropriate standard of review" or as a "legal conclusion," an able opponent will surely seek review in the supreme court. Given the supreme court's decisions in *Lofton*, *Alm*, and *E-Z Mart*, appellate practitioners should be wary of assuming that the supreme court will not review the court of appeals' disposition of the factual challenge in some manner.[949]

VIII. Challenges to the Sufficiency of the Evidence in Nonjury Trials

In any case or issue tried to the court without a jury, a party may request the court to prepare findings of fact and conclusions of

947. 846 S.W.2d 286, 286–87 (Tex. 1993) (Gonzalez, J., concurring & Doggett, J., dissenting, joined by Gammage & Spector, JJ.); *see also* Formosa Plastics Corp. USA v. Presidio Eng'rs, 41 Tex. Sup. Ct. J. 289, 298, 1998 WL 18981, at *11 (Jan. 16, 1998) (Baker, J., dissenting, joined by Spector, J.) (accusing the majority of reweighing the evidence to determine its factual sufficiency); May v. United Servs. Ass'n of America, 844 S.W.2d 666, 674 (Tex. 1992) (Doggett, J., dissenting) (accusing the majority of review undertaking a factual sufficiency).

948. *See* William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 Tex. L. Rev. 515, 557 (1991) (noting that "[a]fter *Cropper*, the power of courts of appeals to order new trials on factual sufficiency grounds seems to be settled, *at least for the time being*.") (emphasis added); *see also* William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 Tex. L. Rev. 1699, 1699 n.3 (1997) (finding that "[f]ew issues of Texas procedural law have drawn more attention than the respective roles of judge and jury on questions of fact.").

949. *See* Griffin Indus., Inc. v. Thirteenth Court of Appeals, 934 S.W.2d 349, 355 (Tex. 1996) (orig. proceeding) (Baker, J., dissenting, joined by Enoch, J.) (criticizing the majority because it reached its conclusion by reweighing the evidence and reevaluating witnesses' credibility).

law.[950] The trial court's findings of fact "shall not be recited in a judgment,"[951] and oral comments from the bench will not constitute findings of fact and conclusions of law.[952] While the rules do not require or even authorize a party to request findings of facts and conclusions of law in connection with other trial court rulings, the careful practitioner will request the trial court to prepare findings and conclusions whenever the trial court acts as a factfinder.[953]

A. *Findings of Fact Filed*

1. With Reporter's Record

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,[954] they are not conclusive when a complete reporter's record appears in the record.[955] In addition, the trial court's "findings of fact are reviewable for legal and factual sufficiency of the evidence" to support

---

950. *See* TEX. R. CIV. P. 296.

951. TEX. R. CIV. P. 299a; *see* Kondos Entertainment, Inc. v. Quinney Elec., Inc., 948 S.W.2d 820, 826-27 (Tex. App.—San Antonio 1997, writ requested) (Duncan, J., dissenting) (discussing Rule 299a).

952. *See in re* W.E.R., 669 S.W.2d 716, 717 (Tex. 1984) (per curiam); Sharp v. Hobart Corp., 957 S.W.2d 650, 652 n.5 (Tex. App.—Austin 1997, no pet. h.).

953. *See* Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 33 (Tex. 1994) (emphasizing that findings would be helpful with respect to trial court's review of punitive damages award); Transamerican Natural Gas Co. v. Powell, 811 S.W.2d 913, 919 n.9 (Tex. 1991) (noting that findings would be helpful with respect to sanctions order); Fish v. Tandy Corp., 948 S.W.2d 886, 891-92 (Tex. App.—Fort Worth 1997, pet. denied) (concluding that upon denial of special appearance, defendant should request findings of fact pursuant to Rule 296).

954. *See* Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex. 1994); Ashcroft v. Lookadoo, 952 S.W.2d 907, 910 (Tex. App.—Dallas 1997, pet. requested) (en banc); Tigner v. City of Angleton, 949 S.W.2d 887, 888 (Tex. App—Houston [14th Dist.] 1997, no writ); Hitzelberger v. Samedan Oil Corp., 948 S.W.2d 497, 503 (Tex. App.—Waco 1997, writ denied); Schwartz v. Pinnacle Communications, 944 S.W.2d 427, 431 (Tex. App.—Houston [14th Dist.] 1997, no writ); Starcrest Trust v. Berry, 926 S.W.2d 343, 352 (Tex. App.—Austin 1996, no writ); *In re* Striegler, 915 S.W.2d 629, 638 (Tex. App.—Amarillo 1996, writ denied); Tucker v. Tucker, 908 S.W.2d 530, 532 (Tex. App.—San Antonio 1995, writ denied); Taiwan Shrimp Farm Village Ass'n v. U.S.A. Shrimp Dev., Inc., 915 S.W.2d 61, 70 (Tex. App.—Corpus Christi 1996, writ denied); 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.).

955. *See Tucker*, 908 S.W.2d at 532; Middleton v. Kawasaki Steel Co., 687 S.W.2d 42, 44 (Tex. App.—Houston [14th Dist.]), *writ ref'd n.r.e. per curiam*, 699 S.W.2d 199 (Tex. 1985); Stephenson v. Perlitz, 537 S.W.2d 287, 289 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.). When a trial court files its findings of fact late, the error is considered harmless absent some showing that the late filing injured the complaining party. *See* Ford v. Darwin, 767 S.W.2d 851, 856 (Tex. App.—Dallas 1989, writ denied).

them,[956] "by the same standards that are applied in reviewing" the legal or factual sufficiency of the evidence supporting jury findings.[957] Although a trial court's conclusions of law may not be challenged for factual insufficiency, the appellate court may review the conclusions independently and then examine the legal conclusions drawn from the facts to determine their correctness.[958]

2. Without Reporter's Record

If no reporter's record 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 that the judgment was based upon those findings and conclusions.[959]

---

956. Asai v. Vanco Insulation Abatement, Inc., 932 S.W.2d 118, 121 (Tex. App.—El Paso 1996, no writ); Autohaus, Inc. v. Aguilar, 794 S.W.2d 459, 461 (Tex. App.—Dallas 1990, writ denied); *see* NCL Studs, Inc. v. Jandl, 792 S.W.2d 182, 187 (Tex. App.—Houston [1st Dist.] 1990, writ denied); Zieben v. Platt, 786 S.W.2d 797, 799 (Tex. App.—Houston [14th Dist.] 1990, no writ); Valencia v. Garza, 765 S.W.2d 893, 896 (Tex. App.—San Antonio 1989, no writ); First Nat'l Bank v. Kinabrew, 589 S.W.2d 137, 146 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

957. *Hitzelberger*, 948 S.W.2d at 503; *Asai*, 932 S.W.2d at 121; *see* Ortiz v. Jones, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam); Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex. 1994); Anderson v. City of Seven Points, 806 S.W.2d 791, 794 (Tex. 1991); Southern States Transp., Inc. v. State, 774 S.W.2d 639, 640 (Tex. 1989); *In re* Striegler, 915 S.W.2d at 638; *Taiwan Shrimp Farm Village*, 915 S.W.2d at 70; Criton Corp. v. Highlands Ins. Co., 809 S.W.2d 355, 358 (Tex. App.—Houston [14th Dist.] 1991, writ denied); Burrows v. Miller, 797 S.W.2d 358, 360 (Tex. App.—Tyler 1990, no writ); *Zieben*, 786 S.W.2d at 799; Aerospatiale Helicopter Corp. v. Universal Health Servs., Inc., 778 S.W.2d 492, 497 (Tex. App.—Dallas 1989, writ denied); *Middleton*, 687 S.W.2d at 44; Okon v. Levy, 612 S.W.2d 938, 941 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

958. *See Ashcroft*, 952 S.W.2d at 910; *Tigner*, 949 S.W.2d at 889; *Hitzelberger*, 948 S.W.2d at 503; Zieba v. Martin, 928 S.W.2d 782, 787 n.3 (Tex. App.—Houston [14th Dist.] 1996, no writ); Mercer v. Bludworth, 715 S.W.2d 693, 697 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *see also Asai*, 932 S.W.2d at 121 (stating that the trial court's conclusions of law are reviewed de novo).

959. *See* Mays v. Pierce, 154 Tex. 487, 493, 281 S.W.2d 79, 82 (1955); Nelkin v. Panzer, 833 S.W.2d 267, 268 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.); 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, 534 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

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

1. With Reporter's Record

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,[960] provided that: "(1) the proposition is one raised by the pleadings and supported by the evidence; and (2) the 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."[961] "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."[962] However, when a reporter's record is a part of the record, the legal and factual sufficiency of the implied findings may be challenged on appeal "the same as jury findings or a trial court's findings of fact."[963] The applicable standard of review is the same as that applied in the review of jury findings or a

960. *See* IKB Indus. v. Pro-Line Corp., 938 S.W.2d 440, 445 (Tex. 1997) (Baker, J., dissenting); Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 83 (Tex. 1992); Worford v. Stamper, 801 S.W.2d 108, 109 (Tex. 1990); Roberson v. Robinson, 768 S.W.2d 280, 281 (Tex. 1989); 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); Goodyear Tire & Rubber Co. v. Jefferson Constr. Co., 565 S.W.2d 916, 918 (Tex. 1978); Buchanan v. Byrd, 519 S.W.2d 841, 842 (Tex. 1975); Stum v. Stum, 845 S.W.2d 407, 410 (Tex. App.—Fort Worth 1992, no writ); Giangrosso v. Crosley, 840 S.W.2d 765, 769 (Tex. App.—Houston [1st Dist.] 1992, no writ); Oak v. Oak, 814 S.W.2d 834, 838 (Tex. App.—Houston [14th Dist.] 1991, writ denied); Schoeffler v. Denton, 813 S.W.2d 742, 745 (Tex. App.—Houston [14th Dist.] 1991, no writ); Marynick v. Bockelmann, 773 S.W.2d 665, 667 (Tex. App.—Dallas 1989), *rev'd on other grounds*, 788 S.W.2d 569 (Tex. 1990); Wade v. Commission for Lawyer Discipline, No. 01-95-01080-CV (Tex. App.—Houston [1st Dist.] Aug. 7, 1997, writ denied) (not released for publication yet), 1997 WL 454079, at *7.

961. Austin Area Teachers Fed. Credit Union v. First City Bank - Northwest Hills, N.A., 825 S.W.2d 795, 801 (Tex. App.—Austin 1992, writ denied); Brodhead v. Dodgin, 824 S.W.2d 616, 619-20 (Tex. App.—Austin 1991, writ denied); Franklin v. Donoho, 774 S.W.2d 308, 311 (Tex. App.—Austin 1989, no writ); *see* Friedman v. New Westbury Village Assocs., 787 S.W.2d 154, 158 (Tex. App.—Houston [1st Dist.] 1990, no writ).

962. *Brodhead*, 824 S.W.2d at 620; *Franklin*, 774 S.W.2d at 311.

963. *Roberson*, 768 S.W.2d at 281; *see Holt Atherton*, 835 S.W.2d at 84; Las Vegas Pecan & Cattle Co., Inc. v. Zavala County, 682 S.W.2d 254, 256 (Tex. 1984); *Burnett*, 610 S.W.2d at 736; Lassiter v. Bliss, 559 S.W.2d 353, 357 (Tex. 1978); Valley Mechanical Contractors, Inc. v. Gonzales, 894 S.W.2d 832, 834 (Tex. App.—Corpus Christi 1995, no writ); *Giangrosso*, 840 S.W.2d at 769; 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, no writ); National

trial court's findings of fact.[964] When the implied findings of fact are supported by the evidence, the appellate court must uphold the judgment on any theory of law applicable to the case.[965] 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.[966]

2. Without Reporter's Record

When there are no findings of fact and conclusions of law and no reporter's record included in the record on appeal, the reviewing court presumes that all facts necessary to support the judgment have been found.[967] Only in an exceptional case (*i.e.*, when fundamental error is presented), is an appellant entitled to a reversal of the trial court's judgment.[968]

Bugmobiles, Inc. v. Jobi Properties, 773 S.W.2d 616, 620 (Tex. App.—Corpus Christi 1989, writ denied); *Wade*, 1997 WL 454079, at *7.

964. *See Wade*, 1997 WL 454079, at *7.

965. *See* Point Lookout West, Inc. v. Whorton, 742 S.W.2d 277, 278 (Tex. 1987); Allen v. Allen, 717 S.W.2d 311, 313 (Tex. 1986); *In re W.E.R.*, 669 S.W.2d at 717; *Lassiter*, 559 S.W.2d at 358; Mondragon v. Austin, 954 S.W.2d 191, 193 (Tex. App.—Austin 1997, pet. denied); *Valley Mechanical*, 894 S.W.2d at 834; Giangrosso v. Crosley, 840 S.W.2d 765, 769 (Tex. App.—Houston [1st Dist.] 1992, no writ); Weng Enters., Inc. v. Embassy World Travel, Inc., 837 S.W.2d 217, 223 (Tex. App.—Houston [1st Dist.] 1992, no writ); Marynick v. Bockelmann, 773 S.W.2d 665, 667 (Tex. App.—Dallas 1989), *rev'd on other grounds*, 788 S.W.2d 569 (Tex. 1990); Lute Riley Motors, Inc. v. T. C. Crist, Inc., 767 S.W.2d 439, 440 (Tex. App.—Dallas 1988, writ denied).

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

967. *See* 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); Trevino & Gonzalez Co. v. R.F. Muller Co., 949 S.W.2d 39, 41 (Tex. App.—San Antonio 1997, no writ); Antonio v. Marino, 910 S.W.2d 624, 626 (Tex. App.—Houston [14th Dist.] 1995, no writ); Stum v. Stum, 845 S.W.2d 407, 416 (Tex. App.—Fort Worth 1992, no writ); Dueitt v. Dueitt, 802 S.W.2d 859, 864 (Tex. App.—Houston [1st Dist.] 1991, no writ); Carns v. Carns, 776 S.W.2d 603, 604 (Tex. App.—Tyler 1989, no writ); 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, no writ); Cloer v. Ford & Calhoun GMC Truck Co., 553 S.W.2d 183, 185 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

968. *See Trevino & Gonzalez*, 949 S.W.2d at 41; *Carns*, 776 S.W.2d at 604; *Ette*, 764 S.W.2d at 595.

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

1. With Reporter's Record

When a party properly requests the trial court to file findings of fact and conclusions of law pursuant to Rules 296[969] and 297,[970] and a statement of facts is presented to the appellate court for review, harm is presumed and the appellate court must reverse the judgment, unless the record affirmatively shows that no injury resulted from the trial court's failure to comply with Rule 296.[971] The test of whether harm exists depends upon whether the circumstances of the particular case would require an appellant to guess the reasons that the trial judge ruled against the appellant or whether they are obvious.[972] In factually complicated situations when there are two or more possible grounds for recovery or defense, an undue burden is placed on an appellant,[973] that is, the appellant is prevented from making a proper presentation of the case to the appellate court.[974]

If the record does not plainly show that the appellant suffered no injury by the trial court's failure to file findings of fact and conclusions of law as requested, 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 cer-

---

969. TEX. R. CIV. P. 296.

970. TEX. R. CIV. P. 297.

971. *See* Cherne Indus., Inc. v. Magallenes, 763 S.W.2d 768, 772 (Tex. 1989); Wagner v. Riske, 142 Tex. 337, 342, 178 S.W.2d 117, 120 (1944); *In re* Marriage of Combs, 958 S.W.2d 848, 851 (Tex. App.—Amarillo 1997, no pet. h.); Valero South Tex. Processing Co. v. Starr County Appraisal Dist., 954 S.W.2d 863, 865 (Tex. App.—San Antonio 1997, pet. denied); Humphrey v. Camelot Retirement Community, 893 S.W.2d 55, 61 (Tex. App.—Corpus Christi 1994, no writ); Sheldon Pollack Corp. v. Pioneer Concrete of Tex., 765 S.W.2d 843, 845 (Tex. App.—Dallas 1989, writ denied); Castle v. Castle, 734 S.W.2d 410, 412 (Tex. App.—Houston [1st Dist.] 1987, no writ); 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.).

972. *See* Elizondo v. Gomez, 957 S.W.2d 862, 865 (Tex. App.—San Antonio 1997, writ requested); *Humphrey*, 893 S.W.2d at 61; *In re* O.L., 834 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1992, no writ); *Sheldon Pollack*, 765 S.W.2d at 845.

973. *See Humphrey*, 893 S.W.2d at 61; Guzman v. Guzman, 827 S.W.2d 445, 446-47 (Tex. App.—Corpus Christi), *writ denied improvidently granted*, 843 S.W.2d 486 (Tex. 1992).

974. *See Humphrey*, 893 S.W.2d at 61; *In re O.L.*, 834 S.W.2d at 418; Eye Site, Inc. v. Blackburn, 750 S.W.2d 274, 277 (Tex. App.—Houston [14th Dist.] 1988), *rev'd on other grounds*, 796 S.W.2d 160 (Tex. 1990); Anzaldua v. Anzaldua, 742 S.W.2d 782, 783 (Tex. App.—Corpus Christi 1987, writ denied).

tify those findings to the appellate court for review pursuant to Rule 44.4.[975]

2. Without Reporter's Record

When a party properly requests the trial court to file findings of fact and conclusions of law, and a reporter's record 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 proven at trial.[976]

D. *Mixed Questions of Law and Fact*

When the trial court's findings involve questions of law and fact, the appellate court reviews the trial court's decision for an abuse of discretion.[977] In applying the standard, the reviewing court defers to the trial court's factual determinations if they are supported by the evidence and reviews its legal determinations de novo.[978] This standard permits the appellate court to review de novo that part of the decision involving the law and its application while recognizing the trial court's authority to weigh and interpret the evidence.[979] Accordingly, the trial court abuses its discretion if the court fails to properly apply the law to the facts, if it acts arbitrarily or unreason-

---

975. *See* TEX. R. APP. P. 44.4; *Cherne Indus.*, 763 S.W.2d at 773; City of Los Fresnos v. Gonzalez, 830 S.W.2d 627, 630 (Tex. App.—Corpus Christi 1992, no writ); Electronic Power Design, Inc. v. R. A. Hanson Co., 821 S.W.2d 170, 171-72 (Tex. App.—Houston [14th Dist.] 1991, no writ).

976. *See* Saenz v. Saenz, 756 S.W.2d 93, 95 (Tex. App.—San Antonio 1988, no writ); Rowland v. Doebbler, No. 04-93-00096-CV (Tex. App.—San Antonio Nov. 8, 1995, no writ) (not designated for publication), 1995 WL 654550, at *5.

977. *See* El Paso Natural Gas Co. v. Minco Oil & Gas Co., 958 S.W.2d 889, 894–95 (Tex. App.—Amarillo 1997, no pet. h.) (applying standard to finding of unconscionability); Pony Express Courier Corp. v. Morris, 921 S.W.2d 817, 820 (Tex. App.–San Antonio 1996, no writ) (applying standard to finding of unconscionability); Remington Arms Co. v. Luna, No. 04–96–00547–CV (Tex. App.—San Antonio Feb. 11, 1998, no pet. h.) (not released for publication yet) (applying standard to class certification findings), 1998 WL 52277, at *2.

978. *See Pony Express Courier Corp.*, 921 S.W.2d at 820; *Remington Arms Co.*, 1998 WL 52277, at *2.

979. *See El Paso Natural Gas Co.*, 958 S.W.2d at 895 (citing *Pony Express Courier Corp.*, 921 S.W.2d at 820).

ably, or if its ruling is based on factual assertions not supported by the record.[980]

IX. CONCLUSIONS OF LAW

Conclusions of law are always reviewable.[981] In fact, conclusions of law in a nonjury trial are reviewable even without preservation under Texas Rule of Appellate Procedure 33.1.[982]

Conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence.[983] Conclusions of law will not be reversed, unless they are erroneous as a matter of law.[984] In addition, a trial court's conclusions of law are reviewed de novo as legal questions.[985] Incorrect conclusions

---

980. *See Remington Arms Co.*, 1998 WL 52277, at *2 (citing Microsoft Corp. v. Manning, 914 S.W.2d 602, 607 (Tex. App.—Texarkana 1995, writ dism'd)).

981. *See* State Bar of Texas v. Leighton, 956 S.W.2d 667, 671 (Tex. App.—San Antonio 1997, pet. requested); Montanaro v. Montanaro, 946 S.W.2d 428, 431 (Tex. App.—Corpus Christi 1997, no writ); Piazza v. City of Granger, 909 S.W.2d 529, 532 (Tex. App.—Austin 1995, no writ); Westech Eng'g, Inc. v. Clearwater Constructors, Inc., 835 S.W.2d 190, 196 (Tex. App.—Austin 1992, no writ); 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); Muller v. Nelson, Sherrod & Carter, 563 S.W.2d 697, 702 (Tex. Civ. App.—Fort Worth 1978, no writ).

982. *See* Sammons v. Elder, 940 S.W.2d 276, 279 (Tex. App.—Waco 1997, writ denied). *But see* Regan v. Lee, 879 S.W.2d 133, 136 (Tex. App.—Houston [14th Dist.] 1994, no writ) (noting that preservation of error is the "general rule"); Winters v. Arm Ref. Co., Inc., 830 S.W.2d 737, 738-39 (Tex. App.—Corpus Christi 1992, writ denied) (requiring that post-judgment request, objection or motion in compliance with Texas Rule of Appellate Procedure 33.1 always be made to preserve the trial court's conclusion of law for review).

983. *See Leighton*, 956 S.W.2d at 671; Spiller v. Spiller, 901 S.W.2d 553, 556 (Tex. App.—San Antonio 1995, writ denied); Kotis v. Nowlin Jewelry, Inc., 844 S.W.2d 920, 922 (Tex. App.—Houston [14th Dist.] 1992, no writ); *Westech Eng'g*, 835 S.W.2d at 196; Simpson v. Simpson, 727 S.W.2d 662, 664 (Tex. App.—Dallas 1987, no writ).

984. *See* Arch Petroleum, Inc. v. Sharp, 958 S.W.2d 475, 477 (Tex. App.—Austin 1997, no. pet. h.); Hitzelberger v. Samedan Oil Corp., 948 S.W.2d 497, 503 (Tex. App.—Waco 1997, pet. denied); *Montanaro*, 946 S.W.2d at 431; *Piazza*, 909 S.W.2d at 532; *Westech Eng'g*, 835 S.W.2d at 196; Mercer v. Bludworth, 715 S.W.2d 693, 697 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

985. *See Hitzelberger*, 948 S.W.2d at 503; Armbrister v. Morales, 943 S.W.2d 202, 205 (Tex. App.—Austin 1997, no writ) (citing Barber v. Colorado Indep. Sch. Dist., 901 S.W.2d 447, 450 (Tex. 1995)); Precast Structures, Inc. v. City of Houston, 942 S.W.2d 632, 636 (Tex. App.—Houston [14th Dist.] 1996, no writ) (citing State v. Heal, 917 S.W.2d 6, 9 (Tex. 1996)).

of law will not require a reversal, however, if the controlling finding of facts will support a correct legal theory.[986]

X. Other Evidentiary Review Standards

A. *Clear and Convincing Evidence*

Clear and convincing evidence is "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 of the allegations sought to be established."[987] The clear and convincing standard "is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings."[988] When an appellate court hears a challenge to a finding of fact made under a clear and convincing standard, it reviews the record to determine if the fact finder could have reasonably found that the fact was "highly probable."[989] The court must consider all of the evidence in making this determination.[990] The court of appeals will sustain a challenge to the sufficiency of the evidence under this standard "if the fact finder could

---

986. *See Hitzelberger*, 948 S.W.2d at 503; Piazza v. City of Granger, 909 S.W.2d 529, 532 (Tex. App.—Austin 1995, no writ); Westech Eng'g, Inc. v. Clearwater Constructors, Inc., 835 S.W.2d 190, 196 (Tex. App.—Austin 1992, no writ); Valencia v. Garza, 765 S.W.2d 893, 898 (Tex. App.—San Antonio 1989, no writ).

987. Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 31 (Tex. 1994) (citing State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979) and Tex. Fam. Code Ann. § 101.007 (Vernon 1996)).

988. *In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980); Trimble v. Texas Dep't of Protective & Regulatory Serv., 958 S.W.2d 906, 911 (Tex. App.—Houston [14th Dist.] 1997, no pet. h.); *In re* B.T., 954 S.W.2d 44, 46 (Tex. App.—San Antonio 1997, writ denied); Edwards v. Texas Dep't of Protective & Regulatory Servs., 946 S.W.2d 130, 135 (Tex. App.—El Paso 1997, no writ); *In re* L.R.M., 763 S.W.2d 64, 67 (Tex. App.—Fort Worth 1989, no writ); *see* Williams v. Texas Dep't of Human Servs., 788 S.W.2d 922, 925 (Tex. App.—Houston [1st Dist.] 1990, no writ).

989. *See In re* G.B.R., 953 S.W.2d 391, 396 (Tex. App.—El Paso 1997, no writ); *In re* B.R., 950 S.W.2d 113, 119 (Tex. App.—El Paso 1997, no writ) (discussing cases applying stricter standard of review and cases that have backed away from stricter standard); Mezick v. State, 920 S.W.2d 427, 430 (Tex. App.—Houston [1st Dist.] 1996, no writ); Ybarra v. Texas Dep't of Human Servs., 869 S.W.2d 574, 579–80 (Tex. App.—Corpus Christi 1993, no writ); Neal v. Texas Dep't of Human Servs., 814 S.W.2d 216, 222 (Tex. App.—San Antonio 1991, writ denied); *Williams*, 788 S.W.2d at 926; Wetzel v. Wetzel, 715 S.W.2d 387, 389 (Tex. App.—Dallas 1986, no writ); Neiswander v. Bailey, 645 S.W.2d 835, 835–36 (Tex. App.—Dallas 1982, no writ).

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

not have reasonably found that the fact was established by clear and convincing evidence."[991]

The clear and convincing evidence standard is only applied in limited situations. Most recently, the legislature amended the Civil Practice and Remedies Code to apply the clear and convincing standard to punitive damage awards.[992] The courts also apply the clear and convincing evidence standard to the termination of parental rights[993] because they are constitutionally protected.[994] The standard also applies by statute in civil involuntary commitments.[995] The intermediate appellate standard of review applicable in involuntary termination of parent-child relationships adopted in *In re G.M.*[996] is applicable in involuntary commitment cases as well.[997]

B. *Administrative Agency Rulings*

A suit for judicial review of an administrative agency's decision of a contested case is governed by the Administrative Procedure Act (the "APA").[998] The APA[999] sets forth six distinct bases for reversal of an administrative order.[1000] Review of the administra-

---

991. *In re G.B.R.*, 953 S.W.2d at 396; *Mezick*, 920 S.W.2d at 430; Neal v. Texas Dep't of Human Servs., 814 S.W.2d 216, 222 (Tex. App.—San Antonio 1991, writ denied); *Williams*, 788 S.W.2d at 296; *see* Faram v. Gervitz-Faram, 895 S.W.2d 839, 843 n.2 (Tex. App.—Fort Worth 1995, no writ); *In re L.R.M.*, 763 S.W.2d at 66–67.

992. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b) (Vernon Supp. 1998).

993. *See In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980).

994. *See* Ellis County State Bank v. Keever, 888 S.W.2d 790, 792 n.5 (Tex. 1994); *In re G.M.*, 596 S.W.2d at 847; Edwards v. Texas Dep't of Protective Servs. & Regulatory Servs., 946 S.W.2d 130, 135 (Tex. App.—El Paso 1997, no writ).

995. *See* TEX. HEALTH & SAFETY CODE ANN. § 574.034 (Vernon 1992).

996. 596 S.W.2d 846 (Tex. 1980).

997. *See* State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979); *see also* K.L.M. v. State, 735 S.W.2d 324, 326 (Tex. App.—Fort Worth 1987, no writ) (explaining that the court of appeals must review all evidence to determine if it was sufficient to produce a firm belief or conviction in the fact finder as to allegations pled).

998. *See* TEX. GOV'T CODE ANN. § 2001.003(1) (Vernon Supp. 1998). A contested case means "a proceeding including a ratemaking or licensing proceeding, in which the legal rights, duties or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." *Id.*

999. *Id.* §§ 2001.172–.174.

1000. *See id.* § 2001.174. The statute provides:

> If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but:

tive orders are subject to two separate standards of review: "pure trial de novo" and "pure substantial evidence."[1001] Which one of these two standards of review will be used depends upon what law is at issue, and should be spelled out in the governing statute.[1002] In limited circumstances, both standards of review will be used in reviewing the same agency decision.[1003]

1. Trial De Novo Review

If the manner of review is by trial de novo, the reviewing court tries "each issue of fact and law in the manner that applies to other civil suits."[1004] The appeal is handled as though there had been no

---

(1) may affirm the agency decision in whole or in part; and

(2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(A) in violation of constitutional or statutory provisions;

(B) in excess of the agency's statutory authority;

(C) made through unlawful procedure;

(D) affected by other error of law;

(E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or

(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

1001. *See id.* §§ 2001.173-174; San Benito Consol. Indep. Sch. Dist. v. McGinnis, Lockridge & Kilgore, L.L.P., No. 03-96-00643-CV (Tex. App.—Austin, Aug. 14, 1997, no pet.) (not designated for publication), 1997 WL 461912, at *2–3.

1002. *See* TEX. GOV'T CODE ANN. § 2001.172 (Vernon Supp. 1998) (explaining that the scope of review of state agency decision will be determined "as provided by law under which review is sought"); Dickerson-Seely & Assoc., Inc. v. Texas Employment Comm'n, 784 S.W.2d 573, 574 (Tex. App.—Austin 1990, no writ) (explaining that the proper scope of review "is the one provided by law pursuant to which the action is instituted"); *see also* Texas Employment Comm'n v. Remington York, Inc., 948 S.W.2d 352, 358 (Tex. App.—Dallas 1997, no writ) (noting that judicial review of administrative agency actions under the Labor Code is de novo); *San Benito*, 1997 WL 461912, at *2 (rejecting arguments that the standard of review was governed by the Education Code, as opposed to the APA).

1003. *See* Texas Workers' Compensation Comm'n v. Garcia, 893 S.W.2d 504, 530 (Tex. 1995) (affirming a hybrid judicial review scheme for decisions of Texas Workers' Compensation Commission in contested cases, which requires de novo review of some issues, but substantial evidence review of others).

1004. TEX. GOV'T CODE ANN. § 2001.173(a) (Vernon Supp. 1998).

intervening agency action,[1005] and in line with this principle, the reviewing court cannot admit the agency's decision into evidence.[1006] The reviewing court is to base its decision on its own determination of the issues of law and fact in the case,[1007] and may also consider new evidence, not presented before the agency.[1008] As in other civil cases, the standard of proof is a preponderance of the evidence.[1009] Finally, a party may request a jury trial on each issue of fact.[1010]

2. Substantial Evidence Under the APA

The substantial evidence rule is the traditional test utilized by the appellate courts in evaluating agency decisions under the APA.[1011] In determining whether substantial evidence exists to support an agency's decision, the basic inquiry of the reviewing court has traditionally been whether reasonable minds could have reached the same conclusion that the agency reached.[1012] In an ap-

---

1005. *See id.*; *see also Dickerson-Seely*, 784 S.W.2d at 574 (characterizing the agency's decision as "a nullity"); *San Benito*, 1997 WL 461912, at *2 (explaining that an appeal vacates the agency's decision).

1006. *See* TEX. GOV'T CODE ANN. § 2001.173(a) (Vernon Supp. 1998); *Dickerson-Seely*, 784 S.W.2d at 574. An exception exists in that the fact that the decision has been made can be used for the purpose of showing that the reviewing court has been properly vested with jurisdiction to act on the matter. *See* TEX. GOV'T CODE ANN. § 2001.173.

1007. *See* TEX. GOV'T CODE ANN. § 2001.173(a); Dickerson-Seely & Assoc., Inc. v. Texas Employment Comm'n, 784 S.W.2d 573, 574 (Tex. App.—Austin 1990, no writ); San Benito Consol. Indep. Sch. Dist. v. McGinnis, Lockridge & Kilgore, L.L.P., No. 03-96-00643-CV (Tex. App.—Austin, Aug. 14, 1997, no pet.) (not designated for publication), 1997 WL 461912, at *2–3.

1008. *See San Benito*, 1997 WL 461912, at *2.

1009. *See Dickerson-Seely*, 784 S.W.2d at 574–75.

1010. *See* TEX. GOV'T CODE ANN. § 2001.173(b) (Vernon Supp. 1998).

1011. *See* Gulf States Util. Co. v. Public Util. Comm'n, 947 S.W.2d 887, 890 (Tex. 1997) (using the substantial evidence test as the standard of review for Public Utilities Commission's decision in contested case).

1012. *See* City of El Paso v. Public Util. Comm'n, 883 S.W.2d 179, 186 (Tex. 1994); Dotson v. Texas State Bd. of Med. Exam'rs, 612 S.W.2d 921, 922 (Tex. 1981); Auto Convoy Co. v. Railroad Comm'n, 507 S.W.2d 718, 722 (Tex. 1974); Railroad Comm'n v. Shell Oil Co., 139 Tex. 66, 79, 161 S.W.2d 1022, 1030 (1942). "Substantial evidence" is a term of art, which means "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'" of fact. *See* Lauderdale v. Texas Dep't of Agric., 923 S.W.2d 834, 836 (Tex. App.—Austin 1996, no writ) (quoting Pierce v. Underwood, 487 U.S. 552, 564–65 (1988)).

> [The Austin Court of Appeals] summarized the various articulations of the substantial evidence rule as follows: (1) The findings, inferences, conclusions, and decisions of an agency are presumed to be supported by substantial evidence, and the burden is on

peal from an agency order governed by the substantial evidence rule, the agency order is presumed to be valid and the appellant has the burden to overcome that presumption.[1013] One endeavoring to reverse administrative findings, conclusions, or decisions because of lack of substantial evidence will face a difficult task.[1014]

"At its core, the substantial evidence rule is a reasonableness test or a rational basis test."[1015] If the agency decision is not "supported by substantial evidence in the record, or if the [decision] is arbitrary, capricious, or an abuse of discretion," the decision must be reversed.[1016] The scope of review is based upon "the reliable and probative evidence in the record as a whole."[1017] However, the agency's decision should be affirmed if "(1) the findings of the underlying fact[s] in the order fairly support the [agency's] findings of ultimate fact[s] and conclusions of law, and (2) the evidence presented at the hearing reasonably supports the findings of under-

---

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 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.

Texas Health Enters., Inc. v. Texas Dep't of Health, 954 S.W.2d 168, 171 (Tex. App.—Austin 1997, no pet.) (citing North Alamo Water Supply Corp. v. Texas Dep't of Health, 839 S.W.2d 448, 452–53 (Tex. App.—Austin 1992, writ denied).

1013. *See* Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc., 665 S.W.2d 446, 453 (Tex. 1984); City of San Antonio v. Texas Water Comm'n, 407 S.W.2d 752, 758 (Tex. 1966); Fetchin v. Meno, 922 S.W.2d 549, 552 (Tex. App.—Austin 1995), *rev'd on other grounds,* 916 S.W.2d 961 (Tex. 1996).

1014. *See Charter Med.*, 665 S.W.2d at 452; *Fetchin*, 922 S.W.2d at 552.

1015. Railroad Comm'n of Tex. v. Pend Oreille Oil & Gas Co., 817 S.W.2d 36, 41 (Tex. 1991); *see Charter Med.*, 665 S.W.2d at 452; Southwest-Tex Leasing Co. v. Bomer, 943 S.W.2d 954, 957 (Tex. App.—Austin 1997, no writ); *see also* William H. Chamblee, Comment, *Administrative Law: Journey Through the Administrative Process and Judicial Review of Administrative Actions*, 16 ST. MARY'S L.J. 155, 182-83 (1984) (discussing the supreme court's decision in *Charter Medical*).

1016. Public Util. Comm'n of Tex. v. Gulf States Util. Co., 809 S.W.2d 201, 210-11 (Tex. 1991).

1017. *Id.* at 211; *see* San Benito Consol. Indep. Sch. Dist. v. McGinnis, Lockridge & Kilgore, L.L.P., No. 03-96-00643-CV (Tex. App.—Austin Aug. 14, 1997, no pet.) (not designated for publication), 1997 WL 461912, at *3–4.

lying fact[s]."[1018] Resolution of factual conflicts and ambiguities is within the province of the agency and the goal of the substantial evidence rule is to protect that function.[1019] Therefore, the reviewing court is only concerned with the *reasonableness* of the agency order and not the *correctness* of the order.[1020] In applying this test, the reviewing court may not substitute its judgment as to the weight of the evidence for that of the agency.[1021] Finally, the question of whether the administrative decision is supported by substantial evidence is a question of law.[1022]

3. Arbitrary and Capricious Standard

"Substantial evidence" and "arbitrary and capricious" may at first appear to be 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.[1023] However, a decision may be supported by substantial evidence, yet still be arbitrary and capricious, therefore, justifying reversal.[1024] An agency's decision is arbitrary

---

1018. Texas Water Comm'n v. Customers of Combined Water Sys., Inc., 843 S.W.2d 678, 681 (Tex. App.—Austin 1992, no writ); *see San Benito*, 1997 WL 461912, at *3; *see also* Public Util. Comm'n of Tex. v. GTE-SW, 833 S.W.2d 153, 159 (Tex. App.—Austin 1992, writ denied) (interpreting the substantial evidence test to mean "such relevant evidence as a reasonable mind might accept as adequate to support conclusion"), *rev'd on other grounds*, 901 S.W.2d 401 (Tex. 1995).

1019. *See* Texas Alcoholic Beverage Comm'n v. Mini, Inc., 832 S.W.2d 147, 150 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

1020. *See* Railroad Comm'n of Tex. v. Pend Oreille Oil & Gas Co., 817 S.W.2d 36, 41 (Tex. 1991) (citing Texas State Bd. of Dental Exam'rs v. Sizemore, 759 S.W.2d 114, 117 (Tex. 1988) and Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer, 662 S.W.2d 953, 956 (Tex. 1983)); Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc., 665 S.W.2d 446, 452 (Tex. 1984).

1021. *See Pend Oreille*, 817 S.W.2d at 40; *Brinkmeyer*, 662 S.W.2d at 956.

1022. *See* Hunnicutt v. Texas Employment Comm'n, 949 S.W.2d 52, 54 (Tex. App.—Amarillo 1997, pet. granted); San Benito Consol. Indep. Sch. Dist. v. McGinnis, Lockridge & Kilgore, L.L.P., No. 03-96-00643-CV (Tex. App.—Austin Aug. 14, 1997, no pet.) (not designated for publication), 1997 WL 461912, at *3–4.

1023. *See* Public Util. Comm'n of Tex. v. Gulf State Util. Comm'n, 809 S.W.2d 201, 211 (Tex. 1991); *Charter Med.*, 665 S.W.2d at 454.

1024. *See, e.g.*, Lewis v. Metropolitan Sav. & Loan Ass'n, 550 S.W.2d 11, 12 (Tex. 1977) (holding an order of the Savings and Loan Commission invalid, despite the fact that "the order may be said to have reasonable factual support under the precepts of the substantial evidence rule"); Railroad Comm'n of Tex. v. Alamo Express, Inc., 158 Tex. 68, 73, 308 S.W.2d 843, 846 (1958) (stressing that when the agency totally fails to make findings of fact, and bases its decision on findings in another case, it can be reversed); Public Util. Comm'n of Tex. v. South Plains Elec. Coop., Inc., 635 S.W.2d 954, 957 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (ignoring question of whether substantial evidence existed because

if the agency "(1) fail[s] to consider a factor the legislature directed it to consider; (2) considers an irrelevant factor; or (3) weighs only relevant factors that the legislature direct[ed] it to consider, but still reache[d] a completely unreasonable result."[1025]

4. Procedure for Review Under Substantial Evidence Rule or Undefined Scope of Review

Upon review of an agency decision where the subject of complaint does not require review by trial de novo, the agency is required to send to the reviewing court the entire record of the proceeding under review, unless shortened by stipulation of the parties.[1026] A party may request that additional evidence be presented to the reviewing court if it is material and a good reason existed for failing to present it before the agency proceeding.[1027] The party seeking judicial review must offer, and the reviewing court must admit, the agency record into evidence as an exhibit.[1028] The reviewing court reviews the agency decision without a jury and is limited to the agency record.[1029]

XI. Presumptions from an Incomplete Record on Appeal

In the absence of a clerk's record (formerly the transcript), there can be no appeal.[1030] Without a complete reporter's record (formerly the statement of facts) or a complete clerk's record, the appellate court will presume that the omitted evidence supports the trial court's judgment.[1031] Stated another way, when an appellant

---

improper standards were used by the agency in making its determination); Starr County v. Starr Indus. Servs., Inc., 584 S.W.2d 352, 355 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (finding that a lack of notice justified a reversal of the agency decision without any consideration of the substantial evidence question).

1025. City of El Paso v. Public Util. Comm'n of Tex., 883 S.W.2d 179, 184 (Tex. 1993).

1026. *See* Tex. Gov't Code Ann. § 2001.175(a), (b) (Vernon Supp. 1995); Nueces Canyon Consol. Ind. Sch. Dist. v. Central Educ. Agency, 917 S.W.2d 773, 776 (Tex. 1996).

1027. *See* Tex. Gov't Code Ann. § 2001.175(c) (Vernon Supp. 1998).

1028. *See id.* § 2001.175(d); Texas Dep't of Pub. Safety v. Stacy, 954 S.W.2d 80, 82 (Tex. App.—San Antonio 1997, no writ).

1029. *See* Tex. Gov't Code Ann. § 2001.175(e) (Vernon Supp. 1998).

1030. *See* Western Credit Co. v. Olshan Enter., Inc., 714 S.W.2d 137, 138 (Tex. App.—Houston [1st Dist.] 1986, no writ).

1031. *See* 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); Englander Co. v. Kennedy, 428 S.W.2d 806, 806-07 (Tex. 1968); Haynes v. McIntosh, 776 S.W.2d 784, 785 (Tex. App.—Corpus Christi 1989, writ denied); E.B. v. Texas Dep't of Human Servs., 766 S.W.2d 387, 388 (Tex.

fails to bring forward a complete record on appeal, it is presumed that the omitted portions are relevant to the disposition of the appeal.[1032] This precludes the reviewing court from finding reversible error[1033] 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.[1034] An incomplete reporter's record prevents the reviewing court from determining whether a particular ruling by the trial court is reversible error in the context of the entire case.[1035]

When there is no reporter's record, 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.[1036] However, when the appellant, through no fault of his own, is unable to obtain a reporter's record, the appellate court may reverse the judgment.[1037]

There is an exception to the general rule requiring a complete reporter's record on appeal. Under Texas Rule of Appellate Procedure 34.6(c),[1038] an appellant may bring forward a partial reporter's record if the appellant includes in the request for a partial reporter's record a statement of the points to be relied upon on appeal. When an appellant complies with this rule, a presumption on appeal exists that nothing omitted from the record is relevant to any of the specified points or to the disposition of the case on ap-

---

App.—Austin 1989), *rev'd on other grounds*, 802 S.W.2d 647 (Tex. 1990); Collins v. Williamson Printing Corp., 746 S.W.2d 489, 492-93 (Tex. App.—Dallas 1988, no writ).

1032. *See* Guthrie v. National Homes Corp., 394 S.W.2d 494, 495 (Tex. 1965); Protechnics Int'l, Inc. v. Tru-Tag Sys., Inc., 843 S.W.2d 734, 735 (Tex. App.—Houston [14th Dist.] 1992, no writ).

1033. *See* Gallagher v. Fire Ins. Exchange, 950 S.W.2d 379, 380 (Tex. 1997) (per curiam); Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990) (per curiam).

1034. *See* TEX. R. APP. P. 44.1.

1035. *See Christiansen*, 782 S.W.2d at 843.

1036. *See Protechnics Int'l*, 843 S.W.2d at 735; Collins v. Williamson Printing Corp., 746 S.W.2d 489, 491 (Tex. App.—Dallas 1988, no writ); *see also* Bexar County Criminal Dist. Attorney's Office v. Mayo, 773 S.W.2d 642, 643 (Tex. App.—San Antonio 1989, no writ) (declaring that conclusions of law will not bind the appellate court if erroneous).

1037. *See* Smith v. Smith, 544 S.W.2d 121, 123 (Tex. 1976).

1038. TEX. R. APP. P. 34.6(c).

peal.[1039] However, the failure of the appellant to comply with Rule 34.6(c) in this situation will preclude the reviewing court from finding reversible error.[1040]

XII. Agreed Factual Statement

A case may be submitted to the trial court upon an agreed stipulation of facts.[1041] This procedure is similar to a special verdict and constitutes a request for judgment in accordance with applicable law.[1042] Both the trial court and the reviewing court are precluded from finding any facts not conforming to the agreed statement, unless provided otherwise in the agreed statement.[1043] Therefore, the sole question on appeal is "did the trial court correctly apply the law to the admitted facts."[1044]

XIII. Arbitration Awards

A. *Texas General Arbitration Act*

Texas courts favor arbitration agreements.[1045] Therefore, any doubts regarding the scope of an arbitration agreement are resolved in favor of arbitration.[1046] "Whether arbitration is required is a matter of contract interpretation and a question of law for the court."[1047] In determining whether to compel an arbitration agreement, a trial court must consider: "(1) whether a valid arbitration

---

1039. *See* Producer's 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 387, 388 (Tex. App.—Austin 1989), *rev'd on other grounds*, 802 S.W.2d 647 (Tex. 1990).

1040. *See* Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990) (per curiam); Kwik Wash Laundries, Inc. v. McIntyre, 840 S.W.2d 739, 741 (Tex. App.—Austin 1992, no writ).

1041. *See* Tex. R. Civ. P. 263.

1042. *See* Commission for Lawyer Discipline v. Sherman, 945 S.W.2d 227, 228 (Tex. App.—Houston [1st Dist.] 1997, no pet.); City of Galveston v. Giles, 902 S.W.2d 167, 170 (Tex. App.—Houston [1st Dist.] 1995, no writ).

1043. *See Sherman*, 945 S.W.2d at 228; State Bar of Tex. v. Faubion, 821 S.W.2d 203, 205 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

1044. *Sherman*, 945 S.W.2d at 228.

1045. *See* Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 268 (Tex. 1992); Brazoria County v. Knutson, 142 Tex. 172, 178, 176 S.W.2d 740, 743 (1943); Nationwide of Fort Worth, Inc. v. Wigington, 945 S.W.2d 883, 884 (Tex. App.—Waco 1997, writ requested).

1046. *See Wigington*, 945 S.W.2d at 884; Emerald Tex., Inc. v. Peel, 920 S.W.2d 398, 403 (Tex. App.—Houston [1st Dist.] 1996, no writ).

1047. *Peel*, 920 S.W.2d at 403; Kline v. O'Quinn, 874 S.W.2d 776, 882 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

agreement exists, and (2) if so, whether the claims fall within the scope of that agreement."[1048] An appeal may be taken from an order denying an application to compel arbitration, or from an order granting an application to stay arbitration, but not from an order compelling arbitration.[1049]

Arbitrations may be conducted under the common law[1050] or pursuant to the Texas General Arbitration Act.[1051] "Statutory arbitration is cumulative of the common law."[1052] To set aside an arbitration award, the complaining party must allege a statutory or common law ground to vacate the award.[1053] An arbitration award under the common law may be set aside by a court only if the decision is tainted with "fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment."[1054] In addition to the common law grounds for setting aside an arbitration award, the statute also authorizes a court to vacate an award if: (1) the arbitrators exceed their powers; (2) the arbitrators refuse to postpone a hearing when a party shows sufficient cause for a postponement; (3) the arbitrators refuse to hear evidence material to the controversy or so conduct the hearing as to substantially prejudice the rights of a party; or (4) "there was no arbitration agreement and the issue was not adversely determined in proceedings" to compel or stay arbitration "and the party did not participate in the arbitration hearing without raising the objec-

---

1048. *Wigington*, 945 S.W.2d at 884.

1049. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.017(a)(1)-(2) (Vernon Supp. 1997); Materials Evolution Dev. USA, Inc. v. Jablonowski, 949 S.W.2d 31, 33 (Tex. App.—San Antonio 1997, no writ); Lipshy Motorcars, Inc. v. Sovereign Assocs., Inc., 944 S.W.2d 68, 69 (Tex. App.—Amarillo 1997, no writ); Burlington Northern R.R. v. Akpan, 943 S.W.2d 48, 50 (Tex. App.—Fort Worth 1996, no writ).

1050. *See* Riha v. Smulcer, 843 S.W.2d 289, 292 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

1051. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.000–.020 (Vernon Supp. 1997).

1052. *Riha*, 843 S.W.2d at 292 (citing House Grain Co. v. Obst, 659 S.W.2d 903, 905 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.)).

1053. *See* Anzilotti v. Gene D. Liggin, Inc., 899 S.W.2d 264, 266 (Tex. App.—Houston [14th Dist.] 1995, no writ) (citing Powell v. Gulf Coast Carriers, Inc., 872 S.W.2d 22, 24 (Tex. App.—Houston [14th Dist.] 1994, no writ)).

1054. Nuno v. Pulido, 946 S.W.2d 448, 452 (Tex. App.—Corpus Christi 1997, no writ); *see Anzilotti*, 899 S.W.2d at 266 (quoting Carpenter v. North River Ins. Co., 436 S.W.2d 549, 551 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.)); *see also* Emerald Tex., Inc. v. Peel, 920 S.W.2d 398, 402 (Tex. App.—Houston [1st Dist.] 1996, no writ) (noting that an agreement to arbitrate is valid unless legal or equitable grounds exist for its revocation, such as fraud or unconscionability).

tion."[1055] Under the statute, an award may be modified by a court if there was: (1) a miscalculation of figures; (2) a "mistake in the description of any person, thing or property;" (3) the arbitrators made an award on an issue "not submitted to them and the award may be corrected without affecting the merits" of the issues submitted; or (4) the award is imperfect in form only.[1056]

Because arbitration awards are favored by the courts as a means of disposing of disputes, the courts indulge every reasonable presumption in favor of upholding the awards.[1057] "A mere mistake of fact or law alone is insufficient to set aside an arbitration award."[1058] An arbitration award is to be given the same weight as a trial court's judgment, and the reviewing court may not substitute its judgment for the arbitrator's merely because it would have reached a different result.[1059] The scope of review is the entire record.[1060]

B. *Federal Arbitration Act*

The Federal Arbitration Act applies to contracts relating to interstate commerce.[1061] There is a presumption favoring agree-

---

1055. TEX. CIV. PRAC. & REM. CODE ANN. § 171.014 (Vernon Supp. 1997). Like the common law, Section 1 provides that an award may be vacated if "procured by corruption, fraud or other undue means," and Section 2 provides that an award may be vacated if any party's rights are prejudiced because an arbitrator was not impartial, was corrupt, or was guilty of misconduct or wilful misbehavior. *Id.*; *see* Holk v. Biard, 920 S.W.2d 803, 806 (Tex. App.—Texarkana 1996, orig. proceeding [leave denied]); *Riha*, 843 S.W.2d at 292.

1056. TEX. CIV. PRAC. & REM. CODE ANN. § 171.015 (Vernon Supp. 1987).

1057. *See Nuno*, 946 S.W.2d at 452; Raffaelli v. Raffaelli, 946 S.W.2d 139, 142 (Tex. App.—Texarkana 1997, no writ); *Anzilotti*, 899 S.W.2d at 266; Brozo v. Shearson Lehman Hutton Inc., 865 S.W.2d 509, 510 (Tex. App.—Corpus Christi 1993, no writ); Riha v. Smulcer, 843 S.W.2d 289, 292–93 (Tex. App.—Houston [14th Dist.] 1992, writ denied); Bailey & Williams v. Westfall, 727 S.W.2d 86, 90 (Tex. App.—Dallas 1990, writ ref'd n.r.e.); *House Grain*, 659 S.W.2d at 903.

1058. *Nuno*, 946 S.W.2d at 452; Anzilotti v. Gene D. Liggin, Inc., 899 S.W.2d 264, 266 (Tex. App.—Houston [14th Dist.] 1995, no writ); *Powell*, 872 S.W.2d at 24.

1059. *See* Nuno v. Pulido, 946 S.W.2d 448, 452 (Tex. App.—Corpus Christi 1997, no writ); *Holk*, 920 S.W.2d at 806; City of Baytown v. C.L. Winter, Inc., 886 S.W.2d 515, 518 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Riha*, 843 S.W.2d at 293-94 (citing *Bailey & Williams*, 727 S.W.2d at 90).

1060. *See Riha*, 843 S.W.2d at 294.

1061. *See* 9 U.S.C. § 2 (1970); Perry v. Thomas, 482 U.S. 483, 489 (1987); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 269–70 (Tex. 1992) (orig. proceeding); Stewart Title Guar. Co. v. Mack, 945 S.W.2d 330, 333 (Tex. App.—Houston [1st Dist.] 1997, writ dism'd w.o.j.); Hardin Constr. Group, Inc. v. Strictly Painting, Inc., 945 S.W.2d 308, 311 (Tex.

ments to arbitrate under the federal act,[1062] and the court should resolve any doubts in favor of arbitration.[1063] However, a party seeking to compel arbitration has the burden of establishing that an arbitration agreement existed under the federal act.[1064] An agreement to arbitrate is valid and enforceable, unless some grounds exist at law or in equity for the revocation of any contract, such as fraud or unconscionability.[1065] If the party meets the burden, and the opposing party does not defeat that right, the trial court is obligated to compel arbitration.[1066] A trial court's order granting or denying a motion to compel arbitration under the federal act is reviewable by mandamus for an abuse of discretion.[1067]

XIV. FRIVOLOUS APPEALS

Because meritless litigation constitutes an unnecessary burden on parties to the litigation and the courts, Texas Rules of Appellate Procedure 45 and 62 shift to the appellant part of the prevailing party's expense and burden of defending a frivolous appeal.[1068]

App.—San Antonio 1997, orig. proceeding); Palm Harbor Homes, Inc. v. McCoy, 944 S.W.2d 716, 719 (Tex. App.—Fort Worth 1997, orig. proceeding).

1062. *See* Cantella & Co. v. Goodwin, 924 S.W.2d 943, 944 (Tex. 1996); Circuit City Stores, Inc. v. Curry, 946 S.W.2d 486, 488 (Tex. App.—Fort Worth 1997, orig. proceeding); *Mack*, 945 S.W.2d at 333.

1063. *See Curry*, 946 S.W.2d at 488.

1064. *See Cantella & Co.*, 924 S.W.2d at 944; *Mack*, 945 S.W.2d at 333. Where the federal act applies, the courts apply Texas law to determine whether the parties agreed to arbitrate. *See Hardin Constr.*, 945 S.W.2d at 312 (citing First Options, Inc. v. Kaplan, 514 U.S. 938, 948 (1995)).

1065. *See* 9 U.S.C. § 2 (1970); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280–82 (1995); *Palm Harbor*, 944 S.W.2d at 719.

1066. *See Cantella & Co.*, 924 S.W.2d at 944; *Curry*, 946 S.W.2d at 488; Stewart Title Guar. Co. v. Mack, 945 S.W.2d 330, 333 (Tex. App.—Houston [1st Dist.] 1997, writ dism'd w.o.j.); Palm Harbor Homes, Inc. v. McCoy, 944 S.W.2d 716, 724 (Tex. App.–Fort Worth 1997, orig. proceeding).

1067. *See* EZ Pawn Corp. v. Mancias, 934 S.W.2d 87, 91 (Tex. 1996) (orig. proceeding); Prudential Sec., Inc. v. Marshall, 909 S.W.2d 896, 900 (Tex. 1995) (orig. proceeding); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 272 (Tex. 1992); Hardin Constr. Group, Inc. v. Strictly Painting, Inc., 945 S.W.2d 308, 312 (Tex. App.—San Antonio 1997, orig. proceeding).

1068. *See* TEX. R. APP. P. 45; Starcrest Trust v. Berry, 926 S.W.2d 343, 356 (Tex. App.—Austin 1996, no writ); Campos v. Investment Management Properties, Inc., 917 S.W.2d 351, 357-58 (Tex. App.—San Antonio 1996, writ denied) (Green, J., concurring); Roever v. Roever, 824 S.W.2d 674, 677 (Tex. App.—Dallas 1992, no writ); Dolenz v. American Gen. Fire & Cas. Co., 798 S.W.2d 862, 865 (Tex. App.—Dallas 1990, writ denied).

Rules 45 and 62 provide that if the supreme court or the courts of appeals determine that an appeal is "frivolous,"[1069] the courts may award "just damages" to any prevailing party on their own motion or the motion of any party.[1070] The appellate courts are no longer limited to assessing damages against the offending party alone; the attorney may also be sanctioned.[1071] In determining the propriety of awarding sanctions, the courts may not consider any matter that is not in "the record, briefs, or other papers filed in the court of appeals" or supreme court.[1072] Whether to grant sanctions is a matter within the reviewing court's discretion.[1073]

There are two competing concerns in awarding damages for frivolous appeals. First, the right to an appeal is "a sacred and valuable right."[1074] As a result, frivolous appeal damages are to be assessed "with prudence, caution and [only] after careful deliberation."[1075] As long as the argument, "even if unconvincing, had a reasonable basis in law and constituted an informed, good faith challenge to the trial court's judgment," frivolous appeal damages

---

1069. *See* BLACK'S LAW DICTIONARY 601 (5th ed. 1979) (describing "frivolous" as being "[o]f little weight or importance."); WEBSTER'S THIRD NEW INT'L DICTIONARY 913 (1986) (defining "frivolous" as "having no basis in law or fact").

1070. *See* TEX. R. APP. P. 45, 62. Under the old rules (84 and 182(b)), if an appeal was taken for delay and without sufficient cause, the supreme court or court of appeals could award each prevailing party 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. *See* TEX. R. APP. P. 45, 62; *Campos*, 917 S.W.2d at 356; *see also* Ramirez v. Pecan Deluxe Candy Co., 839 S.W.2d 101, 108 (Tex. App.—Dallas 1992, writ denied) (recognizing that the court must make two findings before assessing damages: that the appeal was brought for delay *and* without sufficient cause). If there was no money damage award, then the court could award each prevailing party an amount not to exceed ten times the total taxable costs as damages. *See Campos*, 917 S.W.2d at 356.

1071. *See* TEX. R. APP. P. 45, 62.

1072. TEX. R. APP. P. 45.

1073. *See* Tate v. E.J. Du Pont de Nemours & Co., 954 S.W.2d 871, 875 (Tex. App.—Houston [14th Dist.] 1997, no pet.); Jackson v. Biotectronics, Inc., 937 S.W.2d 38, 46 (Tex. App.—Houston [14th Dist.] 1996, no writ).

1074. Masterson v. Hogue, 842 S.W.2d 696, 698 (Tex. App.—Tyler 1992, no writ); Loyd Elec. Co. v. Millett, 767 S.W.2d 476, 484 (Tex. App.—San Antonio 1989, no writ); *see In re* Kidd, 812 S.W.2d 356, 360 (Tex. App.—Amarillo 1991, writ denied).

1075. *Tate*, 954 S.W.2d at 875; *Jackson*, 937 S.W.2d at 46; Klein v. Dooley, 933 S.W.2d 255, 261 (Tex. App.—Houston [14th Dist.] 1996), *rev'd in part*, 949 S.W.2d 307, 308 (Tex. 1997) (per curiam); *see* City of Alamo v. Holton, 934 S.W.2d 833, 837 (Tex. App.—Corpus Christi 1996, no writ); Starcrest Trust v. Berry, 926 S.W.2d 343, 356 (Tex. App.—Austin 1996, no writ); *Masterson*, 842 S.W.2d at 699.

are not appropriate.[1076] Thus, reviewing the case from the appealing party's point of view at the time of appeal, the appellant will not be penalized absent a clear showing that there was no reasonable basis to conclude that the judgment could be reversed.[1077] In the absence of some evidence showing that the appeal was taken in bad faith, "poor lawyering" alone is not a basis for sanctions.[1078] Furthermore, "whether the matter is groundless and thus without sufficient cause must be decided on the basis of objective legal expectations."[1079]

Second, judicial resources are severely strained and frivolous appeals seriously harm the orderly administration of justice[1080] and divert scarce resources away from cases deserving more attention.[1081] One court has observed that "the decision to appeal should not be driven by comparative economies or wishful thinking; rather, it should be based on professional judgment made after a careful review of the record for preserved error and the standard of review applicable to the error."[1082] The court also noted that a

---

1076. General Elec. Credit Corp. v. Midland Cent. Appraisal Dist., 826 S.W.2d 124, 125 (Tex. 1991) (per curiam); *In re* Long, 946 S.W.2d 97, 99 (Tex. App.—Texarkana 1997, writ requested).

1077. *See Jackson*, 937 S.W.2d at 46; Campos v. Investment Management Properties, Inc., 917 S.W.2d 351, 356 (Tex. App.—San Antonio 1996, writ denied) (Green, J., concurring); Hicks v. Western Funding, Inc., 809 S.W.2d 787, 788 (Tex. App.—Houston [1st Dist.] 1991, writ denied); Beago v. Ceres, 619 S.W.2d 293, 295 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ). An unconvincing argument does not constitute a frivolous appeal. *See* Smith v. Renz, 840 S.W.2d 702, 706 (Tex. App.—Corpus Christi 1992, writ denied).

1078. *See* Morriss v. Enron Oil & Gas Co., 948 S.W.2d 858, 873 (Tex. App.—San Antonio 1997, no writ). The court reasoned that sanctions for poor lawyering would only punish the client. *See id.*

1079. Goad v. Goad, 768 S.W.2d 356, 360 (Tex. App.—Texarkana 1989, writ denied); *see* Roever v. Roever, 824 S.W.2d 674, 677 (Tex. App.—Dallas 1992, no writ). Texas courts have applied the following factors to determine if the appeal is frivolous: (1) an unexplained absence of part of the record; (2) the unexplained absence of a motion for new trial, if necessary; (3) a poorly written brief that does not raise any arguable points of error; (4) the failure to appear at oral argument with no explanation; (5) the filing of a supersedeas bond. *See* Baw v. Baw, 949 S.W.2d 764, 768 (Tex. App.—Dallas 1997, no writ); *Morriss*, 948 S.W.2d at 872; *Hicks*, 809 S.W.2d at 788.

1080. *See Campos, Inc.*, 917 S.W.2d at 357–58 (Green, J., concurring).

1081. *See id.* at 357; *see also* Lewis v. Deaf Smith Elec. Coop., Inc., 768 S.W.2d 511, 514 (Tex. App.—Amarillo 1989, no writ) (stating that a frivolous appeal "requires judicial time and effort that would be better spent on meritorious cases" (quoting Bainbridge v. Bainbridge, 662 S.W.2d 655, 657 (Tex. App.—Dallas 1983, no writ))).

1082. *In re* S.B.C., 952 S.W.2d 15, 20 (Tex. App.—San Antonio 1997, no writ) (quoting *Campos*, 917 S.W.2d at 357 (Green, J., concurring)); *see* Elm Creek Villas Homeowner Ass'n v. Beldon Roofing & Remodeling Co., 940 S.W.2d 150, 156 (Tex. App.—San

bad result at the trial level is not, by itself, reason enough to appeal.[1083] In addition, the court observed that the decision to appeal "is not a mechanical exercise, but requires dutiful application of lawyering skills."[1084] While the old rules in effect at the time limited the court's authority to deal with the problem,[1085] the court reaffirmed that the appellate courts "must not be hesitant to use the tools we have."[1086] The practice of "let's just throw up as much mud as we can on the wall and see if any of it sticks" must be discouraged.[1087]

XV. RESTRICTED APPEALS

A restricted appeal (formerly an appeal by writ of error) is not an equitable proceeding such as a bill of review.[1088] It is simply another method of appeal.[1089] A restricted appeal is only available to a party "who did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of and who did not timely file a post-judgment motion or request for findings of fact and conclusions of law, or a notice of appeal within the time permitted by Rule 26.1(a)."[1090] Presumably the caselaw interpreting appeals by writ of error will apply to restricted appeals.

Under the caselaw interpreting former Rule 45, the appealing party was required to show that: (1) the petition for writ of error was filed within six months after the final judgment was rendered; (2) by a party to the suit; (3) who was not a participant at trial; and

---

Antonio 1996, no writ). Justice Green, writing for the court, stated that "[a]n appeal must be based upon more than wishful thinking." *Id.* at 156.

1083. *See* Campos v. Investment Management Properties, Inc., 917 S.W.2d 351, 356 (Tex. App.—San Antonio 1996, writ denied) (Green, J., concurring).

1084. *Id.* at 357.

1085. *See id.* at 357 n.4. Under the old rules, the appellate court could only award damages against the offending party and not the attorney. *See id.* Justice Green invited the supreme court to remove that limitation, and the supreme court did so in Texas Rules of Appellate Procedure 45 and 62. *See id.*

1086. *Id.* at 357; *see* Dolenz v. A___ B___, 742 S.W.2d 82, 86 (Tex. App.—Dallas 1987, writ denied) (emphasizing that "spurious litigation, unnecessarily burdening parties and courts alike, should not go unsanctioned").

1087. *In re* S.B.C., 952 S.W.2d 15, 20 (Tex. App.—San Antonio 1997, no writ) (quoting *Campos*, 917 S.W.2d at 357 (Green, J., concurring)).

1088. *See* Texaco, Inc. v. Central Power & Light Co., 925 S.W.2d 586, 590 (Tex. 1996).

1089. *See id.* (citing Smith v. Smith, 544 S.W.2d 121, 122 (Tex. 1976)).

1090. TEX. R. APP. P. 30.

(4) that the error is apparent on the face of the record.[1091] A restricted appeal constitutes a direct attack on a judgment, and when appropriate, affords review of the trial proceedings of the same scope as an ordinary appeal.[1092] Generally, the same standards of review and powers of disposition that govern ordinary direct appeals also govern a review of default judgment.[1093] However, like summary judgments, the usual presumption of the validity of the judgment does not apply when the reviewing court considers a judgment by restricted appeal (writ of error).[1094]

Whether the appellant participated in the hearing that resulted in the judgment, thereby precluding a restricted appeal, depends upon the nature and extent of participation because trial courts decide cases in a wide variety of procedural settings.[1095] The question is whether the appellant has participated in "the decisionmaking event" that results in the judgment complained of.[1096] The policy behind the nonparticipation requirement is to preclude a restricted appeal by an appellant who should have resorted to the quicker method of appeal.[1097]

1091. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.013 (Vernon 1986); TEX. R. APP. P. 30; Norman Communications v. Texas Eastman Co., 955 S.W.2d 269, 270 (Tex. 1997) (per curiam); General Elec Co. v. Falcon Ridge Apartments, 811 S.W.2d 942, 943 (Tex. 1991); Stubbs v. Stubbs, 685 S.W.2d 643, 644 (Tex. 1985); Brown v. McLennan County Children's Protective Servs., 627 S.W.2d 390, 392 (Tex. 1982); W. Wendell Hall, *Appellate Review of Default Judgments by Writ of Error*, 51 TEX. B. J. 192, 192 (1988); W. Wendell Hall, *Appeal, Writ of Error, or Bill of Review . . . Which Should I Choose?*, I THE APPELLATE ADVOCATE (State Bar of Texas Appellate Practice and Advocacy Section Report), Summer 1988, at 3.

1092. *See Norman Communications*, 955 S.W.2d at 270; Pace Sports, Inc. v. Davis Bros. Pub. Co., 514 S.W.2d 247, 247 (Tex. 1974) (per curiam); Gunn v. Cavanaugh, 391 S.W.2d 723, 724 (Tex. 1965); Norman Communications v. Texas Eastman Co., 956 S.W.2d 68, 69 (Tex. App.—Tyler 1997, pet. granted); Robert S. Wilson Invs. No. 16 Ltd. v. Blumer, 837 S.W.2d 860, 861 (Tex. App.—Houston [1st Dist.] 1992, no writ); First Dallas Petroleum, Inc. v. Hawkins, 727 S.W.2d 640, 644–45 (Tex. App.—Dallas 1987, no writ).

1093. *See* Lakeside Leasing v. Kirkwood Atrium Office Park Phase 3, 750 S.W.2d 847, 849 (Tex. App.—Houston [14th Dist.] 1988, no writ).

1094. *See* McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965); *Lakeside*, 750 S.W.2d at 849.

1095. *See* Texaco, Inc. v. Central Power & Light Co., 925 S.W.2d 586, 589 (Tex. 1996) (citing *Stubbs*, 685 S.W.2d at 645).

1096. *See id.*

1097. *See id.* at 590 (citing Lawyers Lloyds v. Webb, 137 Tex. 107, 111, 152 S.W.2d 1096, 1098 (1941)).

The "face of the record" simply means the entire record of a case in court up to the point at which reference is made to it.[1098] On appeal by restricted appeal (writ of error), the reviewing court is not limited to a review of the clerk's record.[1099] The reviewing court may test the validity of a judgment by reference to all of the papers on file in the case including the reporter's record[1100] (*i.e.*, the legal and factual sufficiency of the evidence to support the judgment).[1101] In the absence of a reporter's record, the reviewing court may assume that every fact necessary to support the judgment, within the limits of the pleadings, was proved at trial.[1102] Therefore, when an appellant fails to bring forward a reporter's record or when there is no evidence that a reporter's record was not made, the court may hold that the appellant failed to establish "error on the face of the record."[1103]

XVI. BILL OF REVIEW

Rule 329b(f) provides that "on expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause. . . ."[1104] A bill of review "is the proper method to attack a

---

1098. *See* Barnes v. Barnes, 775 S.W.2d 430, 431 (Tex. App.—Houston [1st Dist.] 1989, no writ); First Dallas Petroleum, Inc., v. Hawkins, 727 S.W.2d 640, 643 (Tex. App.—Dallas 1987, no writ).

1099. *See* Morales v. Dalworth Oil Co., 698 S.W.2d 772, 774 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.) (citing Behar v. Patrick, 680 S.W.2d 36, 38 (Tex. App.—Amarillo 1984, no writ)).

1100. *See* Norman Communications v. Texas Eastman Co., 955 S.W.2d 269, 270 (Tex. 1997) (per curiam); DSC Fin. Corp. v. Moffitt, 815 S.W.2d 551, 551 (Tex. 1991) (per curiam). Extrinsic evidence is not admissible to challenge a judgment on appeal by writ of error. *See* General Elec. Co. v. Falcon Ridge Apartments, 811 S.W.2d 942, 944 (Tex. 1991); *see also* Garcia v. Arbot Green Owner's Ass'n, 838 S.W.2d 800, 803 n.2 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (holding that when extrinsic evidence is necessary to challenge judgment, appropriate remedy is by motion for new trial, TEXAS RULE OF CIVIL PROCEDURE 320, 324(b)(1), or by equitable bill of review); Robert S. Wilson Invs. No. 16 Ltd. v. Blumer, 837 S.W.2d 860, 862 n.1 (Tex. App.—Houston [1st Dist.] 1992, no writ) (noting alternatives of motion for new trial or bill of review).

1101. *See* Texaco, Inc. v. Central Power & Light Co., 955 S.W.2d 373, 375 (Tex. App.—San Antonio 1997, pet. requested); Rubalcaba v. Pacific/Atlantic Crop. Exch., Inc., 952 S.W.2d 552, 555 (Tex. App.—El Paso 1997, no writ).

1102. *See* Jaramillo v. Liberty Mut. Fire Ins. Co., 694 S.W.2d 585, 587 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

1103. *Id.*; *see* Salazar v. Tower, 683 S.W.2d 797, 799–800 (Tex. App.—Corpus Christi 1984, no writ).

1104. TEX. R. CIV. P. 329b(f).

judgment when the trial court had jurisdiction to render judgment on the merits."[1105] The purpose of the bill of review proceeding is to launch a direct attack as opposed to a collateral attack[1106] on the former judgment, and to secure entry of a correct judgment.[1107]

Using a bill of review to attack a judgment is a difficult task.[1108] It is an independent proceeding that is only used "to prevent manifest injustice,"[1109] which permits a trial court to "set aside a judgment that is no longer appealable or subject to a motion for new trial"[1110] or subject to appeal by writ of error.[1111] If these legal remedies were available but ignored, the equitable remedy of a bill of review cannot be obtained.[1112] The burden on the complainant is harsh, but justified by the important public policy that judgments must become final at some point.[1113] Therefore, the grounds on

---

1105. Holloway v. Starnes, 840 S.W.2d 14, 18 (Tex. App.—Dallas 1992, writ denied).

1106. A direct attack differs from a collateral attack in that a collateral attack is only proper if the judgment is void. *See* Cook v. Cameron, 733 S.W.2d 137, 140 (Tex. 1987). A judgment is void only where the court had no jurisdiction over the person or his or her property, no subject matter jurisdiction, no jurisdiction to enter the particular judgment, or no capacity to act as a court. *See* State v. Owens, 907 S.W.2d 484, 485 (Tex. 1995); Mapco, Inc. v. Forrest, 795 S.W.2d 700, 703 (Tex. 1990) (per curiam); *Cook*, 733 S.W.2d at 140 (citing Browning v. Placke, 698 S.W.2d 362, 363 (Tex. 1985) (per curiam)). Errors other than lack of jurisdiction render the judgment merely voidable rather than void. *See Mapco*, 795 S.W.2d at 703. In a collateral attack, extrinsic evidence may not be used to establish the lack of jurisdiction. *See Holloway*, 840 S.W.2d at 18 (citing Huffstatler v. Koons, 789 S.W.2d 707, 710 (Tex. App.—Dallas 1990, orig proceeding) (en banc)). A party making a collateral attack does not have to meet the elements of a bill of review; therefore, when a bill of review fails as a direct attack, it may constitute a collateral attack. *See* Texas Dep't of Transp. v. T. Brown Constructors, Inc., 947 S.W.2d 655, 659 (Tex. App.—Austin 1997, no writ).

1107. *See* Austin Indep. Sch. Dist. v. Sierra Club, 495 S.W.2d 878, 881 (Tex. 1973).

1108. *See* W. Wendell Hall, *Appeal, Writ of Error or Bill of Review . . . Which Should I Choose?*, I THE APPELLATE ADVOCATE (State Bar of Texas Appellate Practice and Advocacy Section Report), Summer 1988, at 4.

1109. French v. Brown, 424 S.W.2d 893, 895 (Tex. 1967).

1110. Ortega v. First Republic Bank, Fort Worth, N.A., 792 S.W.2d 452, 453 (Tex. 1990); *see* 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 (Tex. 1987); Baker v. Goldsmith, 582 S.W.2d 404, 406 (Tex. 1979).

1111. *See* General Elec. Co. v. Falcon Ridge Apartments, 811 S.W.2d 942, 944 n.2 (Tex. 1991).

1112. *See* Tice v. City of Pasadena, 767 S.W.2d 700, 702 (Tex. 1989); Cannon v. ICO Tubular Servs., Inc., 905 S.W.2d 380, 384 (Tex. App.—Houston [1st Dist.] 1995, no writ) (citing McEwen v. Harrison, 162 Tex. 125, 131–32, 345 S.W.2d 706, 711 (1961)).

1113. *See Transworld Fin. Servs.*, 722 S.W.2d at 407; Steward v. Steward, 734 S.W.2d 432, 434 (Tex. App.—Fort Worth 1987, no writ).

which bills of review are granted are narrow and restricted and will not be relaxed merely because of an apparent injustice.[1114]

The rules fail to define "sufficient cause" for purposes of a bill of review, but the courts have established several requirements that must be satisfied before a complainant will be entitled to relief by bill of review.[1115] 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) an excuse justifying the failure to make that defense based on the fraud, accident, or wrongful act of the opposing party; (3) unmixed with any fault or negligence of [his own]."[1116] In relation to attacks on final judgments, fraud is classified as either extrinsic or intrinsic.[1117] Only extrinsic fraud will support relief by bill of review.[1118]

A complainant must exhaust all available legal remedies before pursuing a bill of review.[1119] From the date a complainant learns of the judgment, or by the exercise of due diligence could have learned of it, the complainant must pursue all legal remedies still available.[1120] 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.[1121] Accordingly, if a party permits a judgment to become final by neglecting to file a motion for new trial, appeal, or appeal by writ of error, then the party is precluded from proceeding on

---

1114. *See Transworld Fin. Servs.*, 722 S.W.2d at 407; Alexander v. Hagedorn, 148 Tex. 565, 568-69, 226 S.W.2d 996, 998 (1950); *Steward*, 734 S.W.2d at 434.

1115. *See* Baker v. Goldsmith, 582 S.W.2d 404, 406 (Tex. 1979).

1116. Beck v. Beck, 771 S.W.2d 141, 141 (Tex. 1989); *see* Transworld Fin. Servs. Corp. v. Briscoe, 722 S.W.2d 407, 408 (Tex. 1987); *Baker*, 582 S.W.2d at 406; Hanks v. Rosser, 378 S.W.2d 31, 34 (Tex. 1964); *Alexander*, 148 Tex. at 568–69, 226 S.W.2d at 998.

1117. *See* Montgomery v. Kennedy, 669 S.W.2d 309, 312 (Tex. 1984).

1118. *See* Tice v. City of Pasadena, 767 S.W.2d 700, 702 (Tex. 1989); *Montgomery*, 669 S.W.2d at 312. Extrinsic fraud requires some proof of deception by the adverse party, not directly connected to the issues in the case, that prevented the bill of review plaintiff from fully presenting his claim or defense in the underlying action. *See Tice*, 767 S.W.2d at 702; *Montgomery*, 669 S.W.2d at 312. Intrinsic fraud is inherent in the matter considered and determined in the trial, so that the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were or could have been litigated in the underlying action. *See Tice*, 767 S.W.2d at 702; *Montgomery*, 669 S.W.2d at 313.

1119. *See* French v. Brown, 424 S.W.2d 893, 894 (Tex. 1967).

1120. *See* Rixk v. Mayad, 603 S.W.2d 773, 775 (Tex. 1980).

1121. *See* Law v. Law, 792 S.W.2d 150, 153 (Tex. App.—Houston [1st Dist.] 1990, writ denied); 4 ROY W. MCDONALD, TEXAS CIVIL PRACTICE § 18.27.6 (1984).

petition for bill of review, unless the complainant shows a good excuse for failure to exhaust adequate legal remedies.[1122]

In *State v. 1985 Chevrolet Pickup Truck*,[1123] the supreme court set forth the steps necessary to be followed in a bill of review proceeding: "First, to invoke the equitable powers of the court, the bill of review petitioner must file a petition alleging factually and with particularity that the prior judgment was rendered either (1) as a result of fraud, accident or wrongful act of the opposite party" or (2) as the result of "reliance on erroneous information [provided] by an official court functionary"[1124] and unmixed with any of petitioner's own negligence.[1125] "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."[1126] 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.[1127] The supreme court has directed that the petitioner be required to present prima facie proof of a meritorious defense as a pretrial matter to assure that valuable court time is not wasted by conducting a spurious "full-blown" trial on the merits.[1128] A trial of the issues is required if a prima facie meritorious defense has been shown.[1129] However, "[i]f the trial court determines that a prima facie defense [has] not been made out, it may dismiss the case."[1130] The petitioner must open and assume the burden of proof on this issue.[1131]

1122. *See French*, 424 S.W.2d at 895; Steward v. Steward, 734 S.W.2d 432, 435 (Tex. App.—Fort Worth 1987, no writ).

1123. 772 S.W.2d 447 (Tex. 1989).

1124. Levit v. Adams, 841 S.W.2d 478, 481 n.5 (Tex. App.—Houston [1st Dist.] 1992), *rev'd on other grounds*, 850 S.W.2d 469 (Tex. 1993).

1125. *See 1985 Chevrolet Pickup*, 772 S.W.2d at 448 (citing Baker v. Goldsmith, 582 S.W.2d 404, 408 (Tex. 1979)).

1126. *Id.* at 448–49. A prima facie meritorious defense is shown when the trial court determines that the complainant's defense is not automatically barred as a matter of law, and that he would be entitled to judgment if no evidence to the contrary is introduced. *Baker*, 582 S.W.2d at 409.

1127. *See Baker*, 582 S.W.2d at 408–09.

1128. *See* Beck v. Beck, 771 S.W.2d 141, 142 (Tex. 1989) (citing *Baker*, 582 S.W.2d at 408–09).

1129. *See id.*

1130. *Id.*

1131. *See id.*

"Second, if a prima facie defense has been shown, the court will conduct a trial."[1132] "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."[1133] "If the petitioner meets this burden, the factfinder will then determine whether the bill of review defendant, the original plaintiff, has proved the elements of his original cause of action."[1134] Once the court finds that the petitioner is suffering under a wrongfully obtained judgment that is unsupported by the weight of the evidence, it should grant the requested relief because equity is satisfied. If the complainant's bill of review is granted, the case proceeds to trial on the issues outlined above, which are reviewed under the same standards as any other trial. A bill of review, which sets aside a prior judgment but does not dispose of the case on the merits, is interlocutory and not appealable.[1135]

There is an exception to the general rule of requiring a showing of a meritorious defense. A meritorious defense is not required if the service of the petition was invalid and the defendant was not given notice in a meaningful time and in a meaningful manner so that the defendant would have had the opportunity to be heard.[1136] Such a requirement, in the absence of notice, violates the due process clause of the Fourteenth Amendment to the United States Constitution.[1137]

1132. State v. 1985 Chevrolet Pickup, 772 S.W.2d 447, 449 (Tex. 1989).

1133. *Id.* (citing *Baker*, 582 S.W.2d at 409).

1134. *Id.*

1135. *See* Jordan v. Jordan, 907 S.W.2d 471, 472 (Tex. 1995) (per curiam); Tesoro Petroleum v. Smith, 796 S.W.2d 705, 705 (Tex. 1990) (per curiam); Warren v. Walter, 414 S.W.2d 423, 423 (Tex. 1967).

1136. *See* Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 86 (1988); Lopez v. Lopez, 757 S.W.2d 721, 723 (Tex. 1988) (per curiam); Bronze & Beautiful, Inc. v. Mahone, 750 S.W.2d 28, 30 (Tex. App.—Texarkana 1988, no writ).

1137. *See 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) (holding that due process of law is afforded when defendant is properly served with citation, and requiring him to allege facts in his motion for new trial does not conflict with *Peralta*).

XVII. CONCLUSION

Application of the appropriate standard of review to the proper scope of review to show error or lack of error is an essential prerequisite to success on appeal. Equally important to success on appeal is a forceful and persuasive brief that demonstrates the harmfulness or harmlessness of the error. While standards of review are, by their very nature, imprecise, they identify the fundamental questions for the reviewing court and narrow the focus of those questions for the court. Without identification and application of the standard, an appellate brief will not present a persuasive argument. Although there are certainly no guarantees of a successful outcome in the appellate process, the appellate advocate will be most effective when that person focuses on the applicable standard of review and demonstrates for the appellate court how that standard, as applied to the scope of review, mandates the result the appellate advocates.