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# Standards of Review in Texas.

W. Wendell Hall

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# ARTICLE

## STANDARDS OF REVIEW IN TEXAS

W. WENDELL HALL*

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## 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.'"[2] Sometimes a trial court's errors are so egregious and harmful that the task of reversing the trial court is relatively simple. However, when the trial court's error is only marginal and its harmful effect is difficult to demonstrate, the likelihood of reversal becomes remote.

In Texas, where we elect our judiciary, a change in court personnel may significantly alter the outcome of any appeal. So, when the "make-up of the court" changes, the new court may not hesitate to show contempt for a prior decision of that court.[3] While it is not unusual that the supreme court may overrule one of its prior decisions, and it is certainly expected that the supreme court may reverse a lower court's decision, predictability in the law is eviscerated when a lower court refuses to follow the precedent of a higher

---

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

2. *Id.*

3. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 362 (Tex. 1987) (Mauzy, J., concurring) (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 at 94 [(Tex. 1985)]. The answer to that question is that the makeup of this 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.

*Id.* 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. 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).

court.[4] That kind of contempt for our constitutional and judicial system creates an intolerable disregard for supreme court authority. As the supreme court has stated, "[i]t is not the function of a court of appeals to abrogate or modify established precedent."[5] That responsibility lies solely with the supreme court.[6] The doctrine of stare decisis dictates that "once the [s]upreme [c]ourt announces a proposition of law, the decision is considered binding precedent"[7] until such time as the supreme court modifies that precedent.[8]

Whatever the circumstances of the appeal or the make-up of the court, Mr. Dooley's observation rings true: on appeal, the appellant is asking the reviewing court to show its contempt for the lower court (or for one of its prior decisions), and appellate courts generally do not like to show contempt for—or reverse—the lower courts (or one of its prior decisions).[9] 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 post-trial proceedings.[10] Because "[n]o appellate court can ever be

---

4. *See In re* Doe 11, 45 Tex. Sup. Ct. J. 40, 40, 2002 WL 31318006, at *1 (Oct. 10, 2002) (cautioning lower courts to follow pronouncements of the supreme court); *In re* K.M.S., 68 S.W.3d 61, 68-70 (Tex. App.—Dallas 2001) (declining to follow Tex. Dep't of Protective & Reg. Servs. v. Sherry, 46 S.W.3d 857 (Tex. 2001)), *pet. denied*, 45 Tex. Sup. Ct. J. 877, 877, 2002 WL 1338100 (June 20, 2002) (per curiam) (pointing out that the "courts of appeal are not free to disregard pronouncements from this Court, as did the court of appeals here"). The supreme court reminded the court of appeals that the supreme court "need not defend its opinions from criticism from courts of appeals; rather[,] they must follow this court's pronouncements." *In re* K.M.S., 45 Tex. Sup. Ct. J. 877, 877, 2002 WL 1338100, at *1 (June 20, 2002) (per curiam) (quoting Lofton v. Tex. Brine Corp., 777 S.W.2d 384, 386 (Tex. 1989)); Champion Builders v. City of Terrell Hills, 70 S.W.3d 221, 223 (Tex. App.—San Antonio 2001, no pet.) (Duncan, J., dissenting) (observing that the majority failed to follow binding supreme court precedent).

5. Lubbock County v. Trammel's Lubbock Bail Bonds, 80 S.W.3d 580, 585 (Tex. 2002) (citing Stark v. Am. Nat'l Bank of Beaumont, 100 S.W.2d 208, 212 (Tex. Civ. App.—Beaumont 1936, writ ref'd)).

6. *Id.*

7. *Id.* (citing Swilley v. McCain, 374 S.W.2d 871, 875 (Tex. 1964)).

8. *Id.* (citing Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985)).

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

10. W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351 (1998); W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1045 (1993); W. Wendell Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865 (1990); *see* IKB Indus. (Nig.), Ltd. v. Pro-Line Corp., 938 S.W.2d 440, 445-46 (Tex.

much better than its bar," this Article is intended to assist the bench and the bar in addressing one important aspect of appellate advocacy.[11]

## A. *Standards of Review Generally*

Standards of review distribute power within the judicial branch by defining the relationship between trial and appellate courts.[12] These standards "frame the issues, define the depth of review, assign power among judicial actors, and declare the proper materials to review."[13] 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. Standards of review are simply the appellate court's "measuring stick"[14] or "the decibel level at which the appellate advocate must play to catch the judicial ear."[15] 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."[16] Therefore, a litigant must measure his factual and legal arguments against the appropriate "measuring stick" to write an effective and persuasive brief.[17] As one leading scholar has observed, "standards of review were never meant to be the end of the inquiry but rather a frame and limit on the substantive law."[18]

---

1997) (Baker, J., dissenting) (stating that "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").

11. Jones v. Superintendent, Va. State Farm, 465 F.2d 1091, 1093 (4th Cir. 1972).

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

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

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

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

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

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

18. 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, STANDARDS OF REVIEW: FEDERAL CIVIL CASES AND REVIEW PROCESS § 1.3, at 21 (1986).

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. Typically, lawyers make two mistakes in handling appeals. First, many lawyers are so focused on 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. Appellate judges agree that a mechanical recitation of the relevant standard of review without more is no more helpful than completely ignoring the standard altogether.[19] While it is important to discuss the facts accurately and persuasively argue the substantive law, a lawyer's failure to place meritorious arguments 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.[20] In other words, a formal statement of the standard of review standing alone will not advance the process of persuading the appellate court. 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 identified and set forth with each argument.[21] Those practicing in state appellate courts would be wise to follow the federal rule and the Fifth Circuit's local rule.[22]

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

20. 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, STANDARDS OF REVIEW: FEDERAL CIVIL CASES AND REVIEW PROCESS § 1.2, at 13-14 (1986).

21. FED. R. APP. P. 28(a)(6); 5TH CIR. R. 28.2.6.

22. FED. R. APP. P. 28(a)(6); 5TH CIR. R. 28.2.6. 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 counsels' omission of the standards of review in appellate brief writing "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 "[s]tart the brief by stating briefly the applicable standard of review"); Leo-

As one judge observed, "no single concept is more important than the standard of review."[23] Consequently, the litigant who ignores the standard of review loses credibility with the reviewing court—even a credible appellate argument can be easily lost if it is not advanced in the context of the governing standard of review. If a party does not identify the relevant standard and vigorously approach that 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.[24] 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.

Identifying the standard of review in most cases is not complicated.[25] 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 is applied? 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.[26]

Justice Felix Frankfurter described standards of review as "undefined defining terms."[27] While standards of review often escape precise definition, it is incumbent upon the appellate litigants to identify the standards and apply them in an effective manner to the

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nard I. Garth, *How to Appeal to an Appellate Judge*, 21 LITIG., Fall 1994 at 20, 22 (stating that the "[s]tandard of review is the element of appellate advocacy that distinguishes the good appellate advocate").

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

24. United States v. Vontsteen, 950 F.2d 1086, 1091 (5th Cir. 1992) (en banc).

25. *See* Nathan L. Hecht, *Introduction to W. Wendell Hall, 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").

26. Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474, 489 (1951).

27. *Id.*

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."[28] 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 framework in which a reviewing court determines whether the trial court erred. 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?[29] 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 generally 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.'[30]

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

29. *See* Furr's Supermarkets, Inc. v. Bethune, 53 S.W.3d 375, 380 (Tex. 2001) (Baker, J., dissenting) (stating generally that, but not in all cases, whether a trial court abused its discretion is viewed in the context of the *entire* record).

30. LEWIS CARROLL, THROUGH THE LOOKING-GLASS 114 (1950); *see also* County of Cameron v. Brown, 80 S.W.3d 549, 565-66 (Tex. 2002) (Hecht, J., dissenting) (noting that "the Court does not [always] really mean what it says"). Continuing, Justice Hecht observed that sometimes one case is "just another 'restricted railroad ticket, good for this day and train only.'" *Id.* (quoting Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)).

### A. *Abuse of Discretion Generally*

Perhaps no standard of review is subject to more abuse than the most common standard: 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, like Humpty Dumpty, says it means—nothing more and nothing less. One appellate court panel's abuse of discretion is completely reasonable decision-making for another panel. Identifying an abuse of discretion, for most appellate judges, is similar to identifying pornography: "I know it when I see it."[31] 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."[32] The phrase "abuse of discretion" sometimes appears 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'"[33] nor susceptible to rigid definition.[34] "[J]udicial attempts to define the concept almost routinely take the form of merely substituting other terms that are equally unrefined, variable, subjective, and conclusory."[35] 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, and it also makes briefing difficult for appellate lawyers.[36]

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

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

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

34. Hodson v. Keiser, 81 S.W.3d 363, 368 (Tex. App.—El Paso 2002, no pet.).

35. *Landon*, 724 S.W.2d at 934.

36. *See* 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); *In re* Josephson, 218 F.2d 174, 182 (1st Cir. 1954) (attempting to make trial judges feel better about being reversed for abusing their discretion, by observing that an "'[a]buse of discretion' is a phrase which sounds worse than it really is").

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, 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."[37] 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."[38] Seemingly, it is the nature of the beast that will always be challenging whether, in the reviewing court's judgment, the trial court abused its discretion. 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.

### B. *Abuse of Discretion in Texas*

The abuse of discretion standard, the most common standard of review in Texas, "is typically applied to procedural or other trial management" decisions.[39] As Justice McClure[40] correctly observed, "[a]n appeal directed toward demonstrating an abuse of discretion is one of the tougher appellate propositions."[41] In Texas, abuse of discretion is routinely defined in the following manner: "[t]he test for abuse of discretion is not whether, in the opinion of

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

38. *Id.*

39. *In re* Doe, 19 S.W.3d 249, 253 (Tex. 2000).

40. Justice Ann McClure, an outstanding member of the Texas judiciary, is board certified in civil appellate law and family law, and she is a frequent lecturer on appellate and family law topics.

41. Lindsey v. Lindsey, 965 S.W.2d 589, 592 (Tex. App.—El Paso 1998, no pet.).

the reviewing court, the facts present an appropriate case for the trial court's action."[42] Rather, "[a] trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles."[43]

The "abuse of discretion standard is similar . . . to the federal standard of 'clearly erroneous,'"[44] and one supreme court justice has observed that it is debatable whether any real difference exists between the two standards.[45] Once it is determined that the abuse of discretion standard applies, one court of appeals held that the reviewing "court should engage in a two-pronged inquiry: (1) Did the trial court have sufficient information upon which to exercise its discretion[,] and (2) Did the trial court err in its application of discretion?"[46]

At its core, discretion means choice.[47] "To find an abuse of discretion," the reviewing court "must determine that the facts and circumstances presented 'extinguish any discretion [or choice] in

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42. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241 (Tex. 1985).

43. BMC Software Belg., N.V. v. Marchand, 45 Tex. Sup. Ct. J. 930, 937, 2001 WL 1898473 (June 27, 2002) (stating that "[a] trial court 'abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law'"); Bowie Mem'l Hosp. v. Wright, 79 S.W.3d 48, 52 (Tex. 2002); Furr's Supermarkets, Inc. v. Bethune, 53 S.W.3d 375, 379 (Tex. 2001) (Baker, J., dissenting); Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998); 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)); Beaumont Bank v. Buller, 806 S.W.2d 223, 226 (Tex. 1991); *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, 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: "[i]n 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).

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

45. *Id.* at 454 (Gonzalez, J., concurring).

46. Lindsey v. Lindsey, 965 S.W.2d 589, 592 (Tex. App.—El Paso 1998, no pet.) (adopting approach recommended in R. Townsend, *State Standards of Review: Cornerstone of the Appeal*, *in* UNIV. TEX. 6TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS M (1996)).

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

the matter.'"[48] 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.[49] In other words, the reviewing court "may not substitute its own judgment for the trial court's judgment."[50] This discretion insulates the trial judge's reasonable choice from appellate second guessing.

There are at least two instances in which a perceived error does not constitute an abuse of discretion. First, a mere error of judgment does not constitute an abuse of discretion.[51] Second, a trial court does not abuse its discretion if it reaches the right result for the wrong reason.[52] These exceptions demonstrate that appellate court standards permit a trial judge a limited right to be wrong without being reversed.

One appellate court[53] 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

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48. 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)).

49. 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)); Jones v. Strayhorn, 159 Tex. 421, 321 S.W.2d 290, 295 (1959); Schleuter v. City of Fort Worth, 947 S.W.2d 920, 925 (Tex. App.—Fort Worth 1997, writ denied).

50. Bowie Mem'l Hosp. v. Wright, 79 S.W.3d 48, 52 (Tex. 2002); *see* Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 41 (Tex. 1989) (orig. proceeding) (indicating that a lower court's decision should not be altered absent an abuse of discretion).

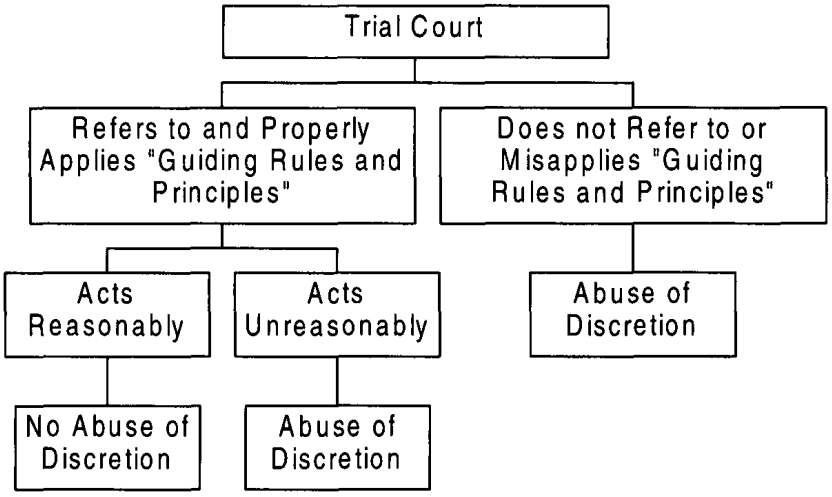
51. Loftin v. Martin, 776 S.W.2d 145, 146 (Tex. 1989) (orig. proceeding); Oakwood Mobile Homes, Inc. v. Cabler, 73 S.W.3d 363, 374-75 (Tex. App.—El Paso 2002, no pet.); Toyota Motor Sales, U.S.A., Inc. v. Heard, 774 S.W.2d 316, 319 (Tex. App.—Houston [14th Dist.] 1989) (orig. proceeding).

52. Bruce Terminix Co. v. Carroll, 953 S.W.2d 537, 540 (Tex. App.—Waco 1997, orig. proceeding); Hawthorne v. Guenther, 917 S.W.2d 924, 931 (Tex. App.—Beaumont 1996, writ denied); Luxenberg v. Marshall, 835 S.W.2d 136, 142 (Tex. App.—Dallas 1992, orig. proceeding [leave denied]).

53. Landon v. Jean-Paul Budinger, Inc., 724 S.W.2d 931, 937-39 (Tex. App.—Austin 1987, no writ); *see also* Minns v. Piotrowski, 904 S.W.2d 161, 168 (Tex. App.—Waco 1995) (referring to the abuse of discretion analysis applied in *Landon*); Stephens v. Stephens, 877 S.W.2d 801, 805 (Tex. App.—Waco 1994, writ denied) (extending the *Landon* abuse of discretion analysis to the present case); Methodist Hosps. of Dallas v. Tex. Indus. Accident Bd., 798 S.W.2d 651, 660 (Tex. App.—Austin 1990, writ dism'd w.o.j.) (outlining elements for consideration in abuse of discretion inquiries); Reyna v. Reyna, 738 S.W.2d 772, 774-75 (Tex. App.—Austin 1987, no writ) (considering possible grounds in which a court's exercise of discretionary power constitutes a legal error).

possess;[54] 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;[55] 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;[56] 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."[57]

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, the question arises whether there is any distinction between the standard of review on appeal and that re-

54. *Landon*, 724 S.W.2d at 937.
55. *Id.* at 939.
56. *Id.*
57. *Id.* at 939-40.

quired for the issuance of mandamus.[58] With regard to whether "error" has in fact occurred for purposes of mandamus, writs of mandamus issue only for a "clear" abuse of discretion.[59] The standard of review on appeal is couched in terms of a simple abuse of discretion—without any requirement that the abuse be "clear."[60]

In *Johnson v. Fourth Court of Appeals*,[61] and subsequently in *Walker v. Packer*,[62] 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 amount to a clear and prejudicial error of law."[63] In *Walker*, the court observed that the standard has "different applications in different circumstances."[64] With respect to the resolution of factual matters, "[t]he relator must establish that the trial court could reasonably have reached only one decision,"[65] and the trial court's decision must be so arbitrary and unreasonable as to amount to an abuse of discretion.[66] However, mandamus review of a trial court's determination of the controlling legal principles is "reviewed with limited deference to the trial court."[67] 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.[68]

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58. *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.*; *see also* Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 196 (Tex. 1993) (orig. proceeding) (restating the two-part test in *Walker*).

59. *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).

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

61. 700 S.W.2d 916 (Tex. 1985) (orig. proceeding).

62. 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

63. Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding); Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding).

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

65. *Id.* at 839-40. Factual disputes may not be resolved in a mandamus proceeding. *See* Dikeman v. Snell, 490 S.W.2d 183, 186-87 (Tex. 1973) (orig. proceeding).

66. *Walker*, 827 S.W.2d at 840.

67. *Id.*; *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 the law).

68. *Walker*, 827 S.W.2d at 840.

### 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 misled 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.

Often, reviewing courts simply refer to an "abuse" of discretion. Other times, reviewing courts refer to a "clear" or a "manifest" abuse of discretion.[69] In mandamus proceedings, the courts refer to a "clear" abuse of discretion. Characterizing the abuse as clear or manifest—or merely as run-of-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 limitations.[70] 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."[71]

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.[72] If there is a distinction to be made between a clear

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69. *Id.*

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

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

72. *See In re* Doe, 19 S.W.3d 300, 303-04 (Tex. 2000) (per curiam) (discussing various statutory definitions of "abuse"). In that context, Justice Enoch noted that "abuse is

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."[73]

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 the error "'so infect[s] the process that it compels the court to consider the issue.'"[74] 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 Texas Supreme Court's application of the test for reviewing cases in mandamus proceedings.[75]

## 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. Nonetheless, the unpreserved complaint cannot be reviewed

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abuse." *Id.* at 307 (Enoch, J., concurring and dissenting); *id.* at 318 (Hecht, J., dissenting) (stating that "'[a]buse is abuse' and that is certainly hard to contradict").

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

74. 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, STANDARDS OF REVIEW: FEDERAL CIVIL CASES AND REVIEW PROCESS § 4.22, at 294 (1986) (quoting P. Davis, *Tips for Obtaining a Civil Writ,* 5 CAL. LAW. 55, 55 (1985)).

75. *See* Deloitte & Touche, L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394, 398 (Tex. 1997) (orig. proceeding) (holding that a 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).

on appeal, regardless of any error which may be present.[76] 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.[77] 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 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 to a trial court in finding error.[78] 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.

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76. *See* TEX. R. APP. P. 33.1 (requiring preservation of a complaint before it can be presented on appeal).

77. McInnes v. Yamaha Motor Corp., U.S.A., 673 S.W.2d 185, 188 (Tex. 1984); Litton Indus. Prod., Inc. v. Gammage, 668 S.W.2d 319, 321-22 (Tex. 1984).

78. *See* TEX. R. APP. P. 44.1 (indicating the standard to be used in assessing the character of the error).

Only if the court finds error under the applicable standard of review must the court confront the concept of reversible error.[79] 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.[80] 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.[81]

Stated another way, litigants are entitled to a fair trial, not a perfect one.[82]

Before a judgment can be reversed and a new trial ordered on the ground that an error of law has been committed by the trial court, the reviewing court must find, pursuant to Texas Rule of Appellate Procedure 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.[83] In determining

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79. *See id.* (stating that a judgment will not be reversed on appeal unless the error complained of "probably caused the rendition of an improper judgment" or "probably prevented the appellant from properly presenting the case to the court of appeals").

80. *See* Miles v. M/V Miss. Queen, 753 F.2d 1349, 1352 (5th Cir. 1985) (recognizing error to be present and properly preserved but not affecting the substantial rights of the parties so as to warrant reversal).

81. *Id.*

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

83. TEX. R. APP. P. 44.1; Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 388 & n.7 (Tex. 2000); Hill v. Winn Dixie Tex., Inc., 849 S.W.2d 802, 803-04 (Tex. 1992); Elbaor v. Smith, 845 S.W.2d 240, 251 (Tex. 1992); Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 917 n.8 (Tex. 1992); McCraw v. Maris, 828 S.W.2d 756, 757-58 (Tex. 1992); Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 396 (Tex. 1989); Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 840 (Tex. 1979); Correa v. Gen. 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); *see* Franco v. Franco, 81 S.W.3d 319, 343 (Tex. App.—El Paso 2002, no pet.) (stating that while formulations of the harmless error rule have varied from time to time, since 1989 the supreme court has consistently followed

whether an error rises to the level of reversible error, the courts do not apply a "but for" test; instead, courts apply a test of probability.[84] 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?[85] If the reviewing court answers in the affirmative, then the error is reversible; if not, the error is harmless.

The harmless error rule applies to all errors.[86] The supreme court has observed that the harmless error rule "ebbs and flows."[87] The reviewing court will review the record to determine if the complaining party failed to prove his cause of action or defense, in which case the trial court's error could not have resulted in a "materially unfair" trial.[88] 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.[89] This determination is a judgment call entrusted to the reviewing court's sound discretion and good sense upon evaluation of the entire case.[90]

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

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the formulation in former TEX. R. APP. P. 81(b)(1)). Under that former rule, harmful error is shown "when the evidence is controlling on a material issue and is not cumulative." *Id.* at 344.

84. TEX. R. APP. P. 44.1; *see* Tex. Power & Light Co. v. Hering, 148 Tex. 350, 224 S.W.2d 191, 192 (Tex. 1949) (recognizing that the complaining party must show at least that the error "probably resulted" to his prejudice instead of a "but for the erroneous ruling" query).

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

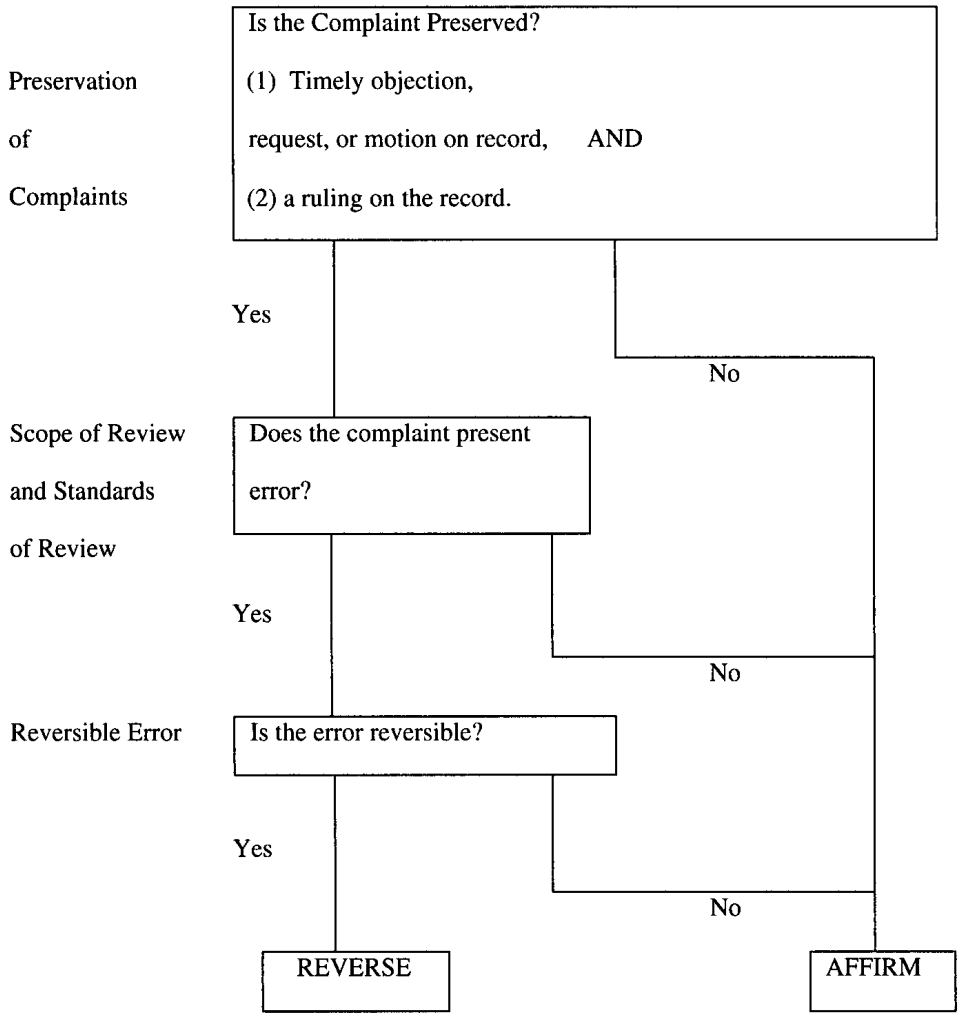
86. Lorusso v. Members Mut. Ins. Co., 603 S.W.2d 818, 820 (Tex. 1980); Prezelski v. Christiansen, 775 S.W.2d 764, 768 n.4 (Tex. App.—San Antonio 1989), *rev'd on other grounds*, 782 S.W.2d 842 (Tex. 1990). The harmless error rule, by its very terms, "applies to all errors in that it draws no distinction as to the type of errors involved in its requirement for reversal." *Lorusso*, 60 S.W.2d at 820.

87. *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).

88. *Lorusso*, 603 S.W.2d at 820.

89. *Id.*

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




## D. *Fundamental Error*

Fundamental error may be raised for the first time on appeal;[91] however, fundamental error is a rarity.[92] An appellate court has very limited authority to consider fundamental error.[93] Fundamental error survives only in those rare instances in which the record

91. Nuchia v. Woodruff, 956 S.W.2d 612, 616 (Tex. App.—Houston [14th Dist.] 1997, pet. denied); *cf.* Pirtle v. Gregory, 629 S.W.2d 919, 920 (Tex. 1982) (reasoning that the requirement of preserving error to complain on appeal avoids surprising the opponent by complaining for the first time on appeal).

92. Am. Gen. Fire & Cas. Co. v. Weinberg, 639 S.W.2d 688, 689 (Tex. 1982).

93. Newman v. King, 433 S.W.2d 420, 421 (Tex. 1968); *see, e.g.*, Hodde v. Young, 672 S.W.2d 45, 47 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (holding that the

on appeal shows on its face that the court was without jurisdiction or that the public interest would be directly and adversely affected as declared in the statutes or the Texas Constitution.[94]

### 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.[95] The doctrine is seldom used to reverse a case. Generally, appellants make the mistake of simply restating their complaints in one final issue.[96] Reversal based upon cumulative error is predicated upon meeting the standards of reversible error in Rule 44.1.[97] 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

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erroneous rendition of a final judgment is not fundamental error, thus the aggrieved parties are left with no alternative but to appeal).

94. Wal-Mart Stores, Inc. v. Alexander, 868 S.W.2d 322, 328 (Tex. 1993); N.Y. Underwriters Ins. Co. v. Sanchez, 799 S.W.2d 677, 679 (Tex. 1990); Cent. Educ. 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); Tex. Indus. Traffic League v. R.R. Comm'n of Tex., 633 S.W.2d 821, 823 (Tex. 1982); Cox v. Johnson, 638 S.W.2d 867, 868 (Tex. 1982); *Pirtle*, 629 S.W.2d at 920; Ramsey v. Dunlop, 146 Tex. 196, 205 S.W.2d 979, 985 (1947); Tex. Dep't of Transp. v. T. Brown Constructors, 947 S.W.2d 655, 659 (Tex. App.—Austin 1997, writ denied); Elbar, Inc. v. Claussen, 774 S.W.2d 45, 52 (Tex. App.—Dallas 1989, writ dism'd); *see* 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 1995), *writ denied*, 916 S.W.2d 949 (Tex. 1995) (per curiam) (neither approving nor disapproving of juvenile's constitutional claims of fundamental error for the first time on appeal).

95. Strange v. Treasure City, 608 S.W.2d 604, 609 (Tex. 1980); Scoggins v. Curtiss & Taylor, 148 Tex. 15, 219 S.W.2d 451, 453-54 (1949); Smerke v. Office Equip. Co., 138 Tex. 236, 158 S.W.2d 302, 305 (1941); Volkswagen of Am., Inc. v. Ramirez, 79 S.W.3d 113, 125 (Tex. App.—Corpus Christi 2002, pet. filed); Weidner v. Sanchez, 14 S.W.3d 353, 377 (Tex. App.—Houston [14th Dist.] 2000, no pet.); Bott v. Bott, 962 S.W.2d 626, 631 (Tex. App.—Houston [14th Dist.] 1997, no pet.); Brown v. Hopkins, 921 S.W.2d 306, 319 (Tex. App.—Corpus Christi 1996, no writ); Fibreboard Corp. v. Pool, 813 S.W.2d 658, 695 (Tex. App.—Texarkana 1991, writ denied); McCormick v. Tex. Commerce Bank N.A., 751 S.W.2d 887, 892 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

96. Crescendo Invs., Inc. v. Brice, 61 S.W.3d 465, 481 n.16 (Tex. App.—San Antonio 2001, pet. denied); Sanchez v. Brownsville Sports Ctr., Inc., 51 S.W.3d 643, 667 (Tex. App.—Corpus Christi 2001, pet. granted).

97. TEX. R. APP. P. 44.1; Mercy Hosp. v. Rios, 776 S.W.2d 626, 638 (Tex. App.—San Antonio 1989, writ denied); *McCormick*, 751 S.W.2d at 892.

improper judgment" or prevented the appellant from making a proper presentation of the case to the court.[98] The cumulative error doctrine "infrequently finds favor with the appellate courts,"[99] and it has evolved almost exclusively in cases involving improper jury argument or jury misconduct.[100]

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

Standing, a constitutional prerequisite to maintaining a suit, is an essential component of subject matter jurisdiction.[101] Standing is an implied "prerequisite to subject-matter jurisdiction, and subject-matter jurisdiction is essential to a court's power to decide a case."[102] 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

98. *Ramirez*, 79 S.W.3d at 125; *Weidner*, 14 S.W.3d at 377; *Fibreboard Corp.*, 813 S.W.2d at 695-96; *McCormick*, 751 S.W.2d at 892.

99. *Ramirez*, 79 S.W.3d at 125 (citing Crescendo Invs., Inc. v. Brice, 61 S.W.3d 465, 481 n.16 (Tex. App.—San Antonio 2001, pet. denied)).

100. Town E. 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).

101. M.D. Anderson Cancer Ctr. v. Novak, 52 S.W.3d 704, 708 (Tex. 2001); Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 553-54 (Tex. 2000); Waco Indep. Sch. Dist. v. Gibson, 22 S.W.3d 849, 850 (Tex. 2000); Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 517 & n.15 (Tex. 1995); Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443-44 (Tex. 1993); Cornyn v. Fifty-Two Members of the Schoppa Family, 70 S.W.3d 895, 899 (Tex. App.—Amarillo 2001, no pet.); Munters Corp. v. Locher, 936 S.W.2d 494, 496 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

102. Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 553-54 (Tex. 2000) (citing *Tex. Ass'n of Bus.*, 852 S.W.2d at 443); *Cornyn*, 70 S.W.3d at 899; *Munters Corp.*, 936 S.W.2d at 496.

whether it has a justiciable interest in the controversy.'"[103] An opinion issued in a lawsuit where there is no standing is an advisory opinion, which Texas courts are prohibited from issuing.[104]

To establish standing, a person must demonstrate a personal stake in the controversy.[105] A court determines whether an individual has standing by analyzing whether there is "a real controversy between the parties, which . . . will be actually determined by the judicial declaration sought."[106] 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.[107] The standard of review applicable to subject matter jurisdiction applies to standing as well,[108] and

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103. Coastal Liquids Transp., L.P. v. Harris County Appraisal Dist., 46 S.W.3d 880, 884 (Tex. 2001); 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.).

104. McAllen Med. Ctr., Inc. v. Cortez, 66 S.W.3d 227, 234 (Tex. 2001), *rev'd on other grounds*, 66 S.W.3d 227 (Tex. 2001); *Tex. Ass'n of Bus.*, 852 S.W.2d at 444; *Munters Corp.*, 936 S.W.2d at 496; *Ex parte* Cross, 69 S.W.3d 810, 814 (Tex. App.—El Paso 2002, no pet.); Faddoul v. Oaxaca, 52 S.W.3d 209, 212 (Tex. App.—El Paso 2001, no pet.). The Texas Supreme Court has interpreted the separation of powers article to mean that courts are prohibited from issuing advisory opinions since such a function is that of the executive branch of government rather than the judicial. TEX. CONST. art. II, § 1; *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

105. *McAllen Med. Ctr., Inc.*, 66 S.W.3d at 234; Hunt v. Bass, 664 S.W.2d 323, 324 (Tex. 1984); Boyd v. Boyd, 67 S.W.3d 398, 412 (Tex. App.—Fort Worth 2002, no pet.); Senn v. Texaco, Inc., 55 S.W.3d 222, 226 (Tex. App.—Eastland 2001, pet. denied); *In re* M.C.R., 55 S.W.3d 104, 107 (Tex. App.—San Antonio 2001, no pet.); Stein v. Killough, 53 S.W.3d 36, 40 (Tex. App.—San Antonio 2001, no pet.); Libhart v. Copeland, 949 S.W.2d 783, 795 (Tex. App.—Waco 1997, no writ).

106. Nootsie, Ltd. v. Williamson County Appraisal Dist., 925 S.W.2d 659, 662 (Tex. 1996); *Garcia*, 893 S.W.2d at 517-18; *Tex. Ass'n of Bus.*, 852 S.W.2d at 446 (quoting Bd. of Water Eng'rs v. City of San Antonio, 155 Tex. 111, 283 S.W.2d 722, 724 (1955)); City of Houston v. Northwood Mun. Util. Dist., 73 S.W.3d 304, 308 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); Met-Rx USA, Inc. v. Shipman, 62 S.W.3d 807, 810 (Tex. App.—Waco 2001, no pet.); El Paso County Hosp. Dist. v. Gilbert, 64 S.W.3d 200, 202 (Tex. App.—El Paso 2001, pet. filed).

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

108. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446; Galveston Historical Found. v. Zoning Bd. of Adjustment, 17 S.W.3d 414, 416 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); Njuku v. Middleton, 20 S.W.3d 176, 177 (Tex. App.—Dallas 2000, pet. denied); Perry v.

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.[109]

### B. *Subject Matter Jurisdiction*

A plea to jurisdiction challenges a trial court's subject matter jurisdiction, although it may be challenged by summary judgment or other procedural vehicles as well.[110] Challenging subject matter jurisdiction is a dilatory plea to defeat a cause of action without regard to whether the claims have any merit.[111] In reviewing a challenge to the court's subject matter jurisdiction, the trial court may review the pleadings and any other evidence relevant to the subject matter jurisdiction issue.[112]

Subject matter jurisdiction is essential for a court to decide a case; it "is never presumed and cannot be waived."[113] The lack of subject matter jurisdiction renders a judgment void, rather than voidable.[114] Unless the petition affirmatively demonstrates an absence of jurisdiction, the trial court construes the petition liberally in favor of jurisdiction.[115] If, however, a trial court lacks subject matter jurisdiction, it has no choice but to dismiss the case[116] be-

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Breland, 16 S.W.3d 182, 186 (Tex. App.—Eastland 2000, pet. denied); Jansen v. Fitzpatrick, 14 S.W.3d 426, 431 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

109. *Garcia*, 893 S.W.2d at 517 n.15 (citing *Tex. Ass'n of Bus.*, 852 S.W.2d at 445-56); *In re* City of San Benito, 63 S.W.3d 19, 24 (Tex. App.—Corpus Christi 2001, no pet.); Texas-Ohio Gas, Inc. v. Mecom, 28 S.W.3d 129, 143 (Tex. App.—Texarkana 2000, no pet.); *McAllen Med. Ctr., Inc.*, 17 S.W.3d at 309.

110. Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 554 (Tex. 2000).

111. *Id.*

112. County of Cameron v. Brown, 80 S.W.3d 549, 555 (Tex. 2002); *Bland*, 34 S.W.3d at 554-55.

113. Tex. Ass'n of Bus. v. Tex. 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, 964 S.W.2d 922, 928 (Tex. 1998) (citing State Bar of Tex. v. Gomez, 891 S.W.2d 243, 245 (Tex. 1994) and City of Garland v. Louton, 691 S.W.2d 603, 605 (Tex. 1985)).

114. *In re* Masonite Corp., 997 S.W.2d 194, 198 (Tex. 1999) (citing Mapco, Inc. v. Forrest, 795 S.W.2d 700, 703 (Tex. 1990)).

115. *Brown*, 80 S.W.3d at 555; Peek v. Equip. Serv. Co., 779 S.W.2d 802, 804 (Tex. 1989); City of San Angelo v. Smith, 69 S.W.3d 303, 306 (Tex. App.—Austin 2002, no pet.); Dallas Indep. Sch. Dist. v. Powell, 68 S.W.3d 89, 90 (Tex. App.—Dallas 2001, no pet.); City of Austin v. Ender, 30 S.W.3d 590, 593 (Tex. App.—Austin 2000, no pet.); Hernandez v. Tex. Workers' Comp. Ins. Fund, 946 S.W.2d 904, 906 (Tex. App.—Eastland 1997, no pet.).

116. Am. Motorists Ins. Co. v. Fodge, 63 S.W.3d 801, 805 (Tex. 2001); *Tex. Ass'n of Bus.*, 852 S.W.2d at 443; *Ender*, 30 S.W.3d at 593; Am. Pawn & Jewelry, Inc. v. Kayal, 923 S.W.2d 670, 672 (Tex. App.—Corpus Christi 1996, writ denied); Taiwan Shrimp Farm Vill.

cause subject matter jurisdiction cannot be conferred upon the trial court by consent or waiver.[117] When a plaintiff fails to plead facts establishing jurisdiction, but the petition does not affirmatively demonstrate incurable defects in jurisdiction, it is an issue of pleading sufficiency and the plaintiff should be given the opportunity to amend.[118] If, however, the pleadings affirmatively negate jurisdiction, then the trial court may grant a plea to the jurisdiction without allowing the plaintiff an opportunity to amend.[119] A trial court's lack of subject matter jurisdiction is fundamental error and must be noted and reviewed by the appellate court at any time it appears.[120]

Whether a trial court has subject matter jurisdiction is a question of law subject to de novo review[121] reviewable by mandamus or

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Ass'n v. U.S.A. Shrimp Farm Dev., 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).

117. Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 76 (Tex. 2000).

118. *County of Cameron*, 80 S.W.3d at 555.

119. *Id.*

120. Tullos v. Eaton Corp., 695 S.W.2d 568, 568 (Tex. 1985); Tex. Employment Comm'n v. Int'l Union of Elec., Radio & Mach. Workers, 163 Tex. 135, 352 S.W.2d 252, 253 (1961); Supak v. Zboril, 56 S.W.3d 785, 793 (Tex. App.—Houston [14th Dist.] 2001, no pet.); Coleman v. Sitel Corp., 21 S.W.3d 411, 413 (Tex. App.—San Antonio 2000, no pet.); 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*, 964 S.W.2d at 928 (indicating that lack of subject matter jurisdiction can be raised sua sponte by the appellate court).

121. State *ex rel.* State Dep't of Highways and Public Transp. v. Gonzalez, 82 S.W.3d 322, 327 (Tex. 2001); Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 855 (Tex. 2002); *Mayhew*, 964 S.W.2d at 519; Bexar County v. Grant, 70 S.W.3d 289, 292 (Tex. App.—San Antonio 2002, pet. denied); Houston v. Northwood Mun. Util. Dist., 73 S.W.3d 304, 308 (Tex. App.—Houston [1st Dist.] 2001, pet. filed); Sunchase Capital Group, Inc. v. City of Crandall, 69 S.W.3d 594, 595 (Tex. App.—Tyler 2001, no pet.); *Smith*, 69 S.W.3d at 305; *Powell*, 68 S.W.3d at 91; Met-Rx USA, Inc. v. Shipman, 62 S.W.3d 807, 809 (Tex. App.—Waco 2001, pet. denied); Reynosa v. Univ. of Tex. Health Sci. Ctr. at San Antonio, 57 S.W.3d 442, 444 (Tex. App.—San Antonio 2001, pet. denied); *Ender*, 30 S.W.3d at 593. For example, whether a state agency has primary or exclusive jurisdiction requires statutory construction and raises jurisdictional issues. Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 222 (Tex. 2002); *see Gonzalez*, 82 S.W.3d at 327 (citing El Paso Nat. Gas Co. v. Minco Oil & Gas, Inc., 8 S.W.3d 309, 312 (Tex. 1999)). Statutory construction matters are reviewed de novo. *Gonzalez*, 82 S.W.3d at 327. Accordingly, whether a state agency has primary or exclusive jurisdiction are questions of law reviewed de novo. *Id.*; *Subaru of Am. Inc.*, 84 S.W.3d at 222. A trial court's order on a jurisdictional plea based on sovereign immunity is reviewed de novo. *IT-Davy*, 74 S.W.3d at 855.

appeal.[122] In reviewing an order of dismissal for want of jurisdiction based on the pleadings, the reviewing court construes the pleadings in favor of the pleader and looks to the pleader's intent.[123] Only matters presented to the trial court will be reviewed upon appeal from the order dismissing the case for want of jurisdiction.[124]

### C. *Special Appearance*

"[P]ersonal jurisdiction concerns the court's power to bind a particular person or party."[125] 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.[126] 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 Texas residents.[127]

The plaintiff bears the initial burden of pleading sufficient allegations to bring a nonresident within the provisions of the long-arm statute.[128] In entering a special appearance pursuant to Rule 120a of the Texas Rules of Civil Procedure,[129] "a non-resident bears the burden of proof to show his lack of amenability to [the] long-arm process."[130] To prevail on a special appearance, the nonresident defendant has the burden to negate all bases of personal jurisdic-

122. N. Alamo Water Supply Corp. v. Tex. Dep't of Health, 839 S.W.2d 455, 457 (Tex. App.—Austin 1992, writ denied); Qwest Microwave, Inc. v. Bedard, 756 S.W.2d 426, 434 (Tex. App.—Dallas 1988, orig. proceeding).

123. Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993); *Met-Rx*, 62 S.W.3d at 810; *Reynosa*, 57 S.W.3d at 444; Huston v. FDIC, 663 S.W.2d 126, 129 (Tex. App.—Eastland 1983, writ ref'd n.r.e.); Paradissis v. Royal Indem. Co., 496 S.W.2d 146, 148 (Tex. Civ. App.—Houston [14th Dist.] 1973), *aff'd*, 507 S.W.2d 526 (Tex. 1974).

124. *Huston*, 663 S.W.2d at 129 (quoting *Paradissis*, 496 S.W.2d at 148).

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

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

127. *See* Kawasaki Steel Corp. v. Middleton, 699 S.W.2d 199, 203 (Tex. 1985) (per curiam) (observing that Rule 120a permits only a nonresident defendant to challenge jurisdiction of the court over one's person or property).

128. BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 793 (Tex. 2002) (requiring the plaintiff to prove an alter ego theory of jurisdiction).

129. TEX. R. CIV. P. 120a.

130. Runnells v. Firestone, 746 S.W.2d 845, 848 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (citing *Kawasaki Steel Corp.*, 699 S.W.2d at 202).

tion alleged by the plaintiff to support personal jurisdiction.[131] 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.[132] 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.[133] 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.[134]

A trial court's order granting or denying a special appearance under Rule 120a is appealable as an interlocutory appeal.[135] Whether a trial court has personal jurisdiction over a defendant is a

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131. *BMC Software*, 83 S.W.3d at 793; CSR, Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996) (citing *Kawasaki Steel*, 699 S.W.2d at 203); Guardian Royal Exch. Assurance, Ltd. 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); Gessmann v. Stephens, 51 S.W.3d 329, 334 (Tex. App.—Tyler 2001, no pet.); Magnolia Gas Co. v. Knight Equip. & Mfg. Corp., 994 S.W.2d 684, 689 (Tex. App.—San Antonio 1998, no pet.); Garner v. Furmanite Australia Prop., Ltd., 966 S.W.2d 798, 802 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); Fish v. Tandy Corp., 948 S.W.2d 886, 891 (Tex. App.—Forth Worth 1997, writ denied); XXT, Ltd. v. Nicotek Corp., No. 05-95-01410-CV, 1997 WL 142743, at *3 (Tex. App.—Dallas Mar. 31, 1997, no writ) (not designated for publication).

132. Middleton v. Kawasaki Steel Corp., 687 S.W.2d 42, 47 (Tex. App.—Houston [14th Dist.] 1985), *writ ref'd n.r.e.*, 699 S.W.2d 1999 (Tex. 1985).

133. Pessina v. Rosson, 77 S.W.3d 293, 297 (Tex. App.—Austin 2001, pet. denied); Daimler-Benz Aktiengesellschaft v. Olson, 21 S.W.3d 707, 715 (Tex. App.—Austin 2000, pet. dism'd w.o.j.); *Fish*, 948 S.W.2d at 891-92.

134. *Fish*, 948 S.W.2d at 892; Texana Cmty. MHMR Ctr. v. Silvas, 62 S.W.3d 317, 323 (Tex. App.—Corpus Christi 2001, no pet.); Valsangiacomo v. Am. Juice Imp., Inc., 35 S.W.3d 201, 205 (Tex. App.—Corpus Christi 2000, no pet.); Silva v. Ysleta Del Sur Pueblo, 28 S.W.3d 122, 124 (Tex. App.—El Paso 2000, pet. denied); Preussag Aktiengesellschaft v. Coleman, 16 S.W.3d 110, 113 (Tex. App.—Houston [1st Dist.] 2000, pet. dism'd w.o.j.); Cartlidge v. Hernandez, 9 S.W.3d 341, 345-46 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *In re* Gonzalez, 993 S.W.2d 147, 153 (Tex. App.—San Antonio 1999, no pet.); Linton v. Airbus Indus., 934 S.W.2d 754, 757 (Tex. App.—Houston [14th Dist.] 1996, writ denied); Carbonit Houston, Inc. v. Exch. 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.

135. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 2002). The interlocutory appeal stays the commencement of a trial in the trial court pending resolution of the appeal. *Id.* § 51.014(b); *see* 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 provide 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).

question of law.[136] Generally, a trial court must resolve disputed questions of fact before resolving the jurisdiction issue.[137] If the trial court issues findings of fact and conclusions of law, the findings of fact are subject to legal and factual sufficiency standard of review.[138] The trial court's conclusions of law are reviewed de novo.[139] While an appellant may not challenge conclusions of law for factual sufficiency, the appellate court may review the lower court's legal conclusions based on the facts to determine their correctness.[140] If the reviewing court finds an erroneous conclusion of law, but the trial court rendered the proper judgment, the erroneous legal conclusion will not warrant reversal.[141]

If a trial court issues findings of fact and conclusions of law with its order on special appearance, and the record on appeal does not include the reporter's record or clerk's record, all facts which are necessary to support the judgment as well as those facts supported by the evidence are implied.[142] When the record includes both the reporter's record and the clerk's record, the implied findings are inconclusive and thus, they may be challenged for legal and factual sufficiency.[143] If the special appearance is based upon undisputed

136. *BMC Software*, 83 S.W.3d at 794.

137. *Id.*

138. *Id.*; *see* Lonza AG v. Blum, 70 S.W.3d 184, 188-89 (Tex. App.—San Antonio 2001, pet. denied) (citing W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 375-76 (1998)). In *BMC Software*, the supreme court resolved a conflict among the courts of appeals; in the San Antonio Court of Appeals, the standard of review for a trial court's denial of a special appearance was abuse of discretion, whereas the other courts of appeals reviewed a trial court's factual findings for legal and factual insufficiency, and a trial court's conclusions of law de novo. *BMC Software*, 83 S.W.3d at 794 (citing numerous cases in which the other Texas courts of appeals have employed a sufficiency of the evidence standard for factual findings and a de novo review for legal conclusions). The supreme court did not cite the San Antonio Court of Appeals' decision in *Lonza*, where the San Antonio appellate court reviewed the trial court's findings of fact under a sufficiency of the evidence standard and the trial court's conclusions of law de novo, which is in conformity with the other Texas courts of appeals. *Id.*

139. *BMC Software*, 83 S.W.3d at 794; Amquip Corp. v. Cloud, 73 S.W.3d 380, 384 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Lonza AG*, 70 S.W.3d at 189 (citing W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 375-76 (1998)); Ahadi v. Ahadi, 61 S.W.3d 714, 718 (Tex. App.—Corpus Christi 2001, pet. denied); Conner v. Conticarriers & Terminals, Inc., 944 S.W.2d 405, 411 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

140. *BMC Software*, 83 S.W.3d at 794.

141. *Id.*

142. *Id.* at 795.

143. *Id.*

or established facts, the appellate court conducts a de novo review of the trial court's order.[144]

### 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.[145] If the plea is sustained, the action is abated until the obstacle is removed.[146] 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.[147] 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.[148] Whether the trial court properly sustained or overruled 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.[149] If the plea is sustained without hearing evidence, the appellate court

144. *Ahadi*, 61 S.W.3d at 718; *Conner*, 944 S.W.2d at 411.

145. Speer v. Stover, 685 S.W.2d 22, 23 (Tex. 1985); Garcia-Marroquin v. Nueces County Bail Bond Bd., 1 S.W.3d 366, 374 (Tex. App.—Corpus Christi 1999, no pet.).

146. *Speer*, 685 S.W.2d at 23; Life Ass'n of Am. v. Goode, 71 Tex. 90, 8 S.W. 639, 640 (1888); Kubovy v. Cypress-Fairbanks Indep. Sch. Dist., 972 S.W.2d 130, 133 (Tex. App.—Houston [14th Dist.] 1998, no pet.); 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.).

147. Wyatt v. Shaw Plumbing Co., 760 S.W.2d 245, 248 (Tex. 1988); Tovia v. Wildwood Props. P'ship, L.P., 67 S.W.3d 527, 529 (Tex. App.—Houston [1st Dist.] 2002, no pet.); 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).

148. *Wyatt*, 760 S.W.2d at 248; S. County Mut. Ins. Co. v. Ochoa, 19 S.W.3d 452, 468 (Tex. App.—Corpus Christi 2000, no pet.); Taiwan Shrimp Farm Vill. 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. Cont'l 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").

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

must accept "allegations of fact in the petition as true and indulge every reasonable inference in support [of them]."[150]

## E. *Venue*

On appeal from a trial on the merits, 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 Texas Rules of Civil Procedure 86[151] and 87[152] and the Texas Civil Practice and Remedies Code.[153] If any probative evidence is in the record evidencing proper venue, the reviewing court "must defer to the trial court's determination that venue was proper in the county of suit" despite a preponderance of evidence to the contrary.[154] Appellate review of the venue determination thus differs greatly from the scope of the decision made by the trial

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150. Jenkins v. State, 570 S.W.2d 175, 177 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ). The supreme court subsequently disapproved of the Jenkins' court definition on an unrelated issue. *See* Univ. of Tex. Med. Branch at Galveston v. York, 871 S.W.2d 175 (Tex. 1994) ("expressly [disapproving]" of the appellate court's inclusion of a patient's medical records as tangible personal property).

151. TEX. R. CIV. P. 86 (pertaining to motions to transfer venue).

152. TEX. R. CIV. P. 87 (regarding determination of motions to transfer venue).

153. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986) (stating that appellate courts shall consider the entire record, which includes a trial on the merits, in determining whether venue was proper); *see also* Wilson v. Tex. Parks & Wildlife Dep't, 886 S.W.2d 259, 261 (Tex. 1994); Ruiz v. Conoco, Inc., 868 S.W.2d 752, 758 (Tex. 1992); Bristol v. Placid Oil Co., 74 S.W.3d 156, 158 (Tex. App.—Amarillo 2002, no pet.); S. County Mut. Ins. Co. v. Ochoa, 19 S.W.3d 452, 457 (Tex. App.—Corpus Christi 2000, no pet.); Excel Corp. v. Porras, 14 S.W.3d 307, 310 (Tex. App.—Corpus Christi 1999, pet. denied). *See generally* TEX. R. CIV. P. 255-59 (discussing change of venue based on allegations of prejudice). 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. TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (Vernon Supp. 2002); *see In re* Mo. Pac. R.R., 970 S.W.2d 47, 50 (Tex. App.—Tyler 1998, orig. proceeding) (referring to the code revision regarding writ of mandamus procedures). However, ordinary venue determinations are not subject to mandamus review. *See In re* Masonite Corp., 997 S.W.2d 194, 197 (Tex. 1999) (noting "venue determinations as a rule are not reviewable by mandamus"); 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"); Polaris Inv. Mgmt. 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").

154. Ford Motor Co. v. Miles, 967 S.W.2d 377, 380 (Tex. 1998) (citing *Ruiz*, 868 S.W.2d at 758).

judges, who must rule solely on the basis of certain documents without the benefit of live testimony and the entire record.[155] As a consequence, the trial court may properly overrule a motion to transfer venue and later determine, based on additional evidence (or during trial), that venue lies in another county.[156] This scope of review puts the appellate courts in the position of considering matters which the trial court had no opportunity to assess before making its decision.[157] Nevertheless, the appellate courts continue to review the trial court's determination by considering the entire record.[158] If venue was improper, the case must be reversed.[159] 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.[160] Finally, a trial court's failure to grant a proper motion to transfer venue constitutes reversible error.[161]

### F. *Joinder*

The Texas Civil Practice and Remedies Code provides that "[a]ny person seeking . . . joinder, who is unable to independently

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155. *See* TEX. R. CIV. P. 87(3)(b) (requiring the court to base its decision on the pleadings, party stipulations, affidavits, and attachments filed by the parties); *Ruiz*, 868 S.W.2d at 757 (noting that appellate review is based on the entire record); Kansas City S. Ry. Co. v. Carter, 778 S.W.2d 911, 915 (Tex. App.—Texarkana 1989, writ denied) (referring to a trial court's limited sources when determining venue under Rule 87(3)(b)); Tex. City Ref., Inc. v. Conoco, Inc., 767 S.W.2d 183, 185 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (stating that the scope of appellate review encompasses the entire record).

156. *Tex. City Ref.*, 767 S.W.2d at 185.

157. *Bristol*, 74 S.W.3d at 158; *Kansas City S. Ry.*, 778 S.W.2d at 915; *Tex. City Ref.*, 767 S.W.2d at 185.

158. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986); *see 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 with § 15.064(b)).

159. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986); *Ruiz*, 868 S.W.2d at 758; Russell v. Panhandle Producing Co., 975 S.W.2d 702, 710 (Tex. App.—Amarillo 1998, no pet.).

160. Wilson v. Tex. Parks & Wildlife Dep't, 886 S.W.2d 259, 261 (Tex. 1994) (citing Maranatha Temple, Inc. v. Enter. Prods., Co., 833 S.W.2d 736, 741 (Tex. App.—Houston [1st Dist.] 1992, writ denied)); McIntosh v. Copeland, 894 S.W.2d 60, 65 (Tex. App.—Austin 1995, writ denied) (orig. proceeding).

161. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986); *In re* Masonite, 997 S.W.2d 194, 198 (Tex. 1999); Ford Motor Co. v. Miles, 967 S.W.2d 377, 382 (Tex. 1998); Wichita County, Tex. v. Hart, 917 S.W.2d 779, 781 (Tex. 1996); *Russell*, 975 S.W.2d at 710; Billings v. Concordia Heritage Ass'n, 960 S.W.2d 688, 693 (Tex. App.—El Paso 1997, writ denied).

establish proper venue, or a party opposing . . . joinder of such a person may contest the decision of the trial court allowing . . . joinder by taking an interlocutory appeal. . . ."[162] This provision gives the appellate court authority to determine whether joinder is proper.[163] 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.[164] However, this provision for interlocutory review may not be used to review a trial court's decision regarding transfer of venue.[165] In such an appeal, the appellate court shall "determine whether the joinder [ ] is proper based on an independent determination from the record and not under either an abuse of discretion or substantial evidence standard."[166]

"Whether joinder is proper . . . involves a series of legal tests which evaluate needs, prejudice, and convenience to the parties."[167] "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."[168] If there is not an evidentiary hearing, the court of appeals will accept the implied findings of the

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162. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c) (Vernon Supp. 2002); *accord* Am. Home Prods. Corp. v. Clark, 38 S.W.3d 92, 96 (Tex. 2000); Masonite Corp. v. Garcia, 951 S.W.2d 812, 816 (Tex. App.—San Antonio 1997, orig. proceeding).

163. *Am. Home Prods.*, 38 S.W.3d at 96; *Masonite*, 951 S.W.2d at 816 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c)(1) (Vernon Supp. 2002)).

164. *Masonite*, 951 S.W.2d at 816. 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.

165. *Am. Home Prods.*, 38 S.W.3d at 96 (stating that neither a court of appeals nor the supreme court can review the propriety of a trial court's venue determination). Section 15.003 is a joinder statute—not a venue statute. *Id.* Thus, even if a trial court erroneously concludes that venue is proper, an interlocutory appeal under this section is unavailable. *Id.*

166. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c)(1) (Vernon Supp. 2002); Surgitek, Inc. v. Adams, 955 S.W.2d 884, 888 (Tex. App.—Corpus Christi 1997, pet. dism'd by agr.); *Masonite*, 951 S.W.2d at 816.

167. *Adams*, 955 S.W.2d at 888; *see* Sabre Oil & Gas Corp. v. Gibson, 72 S.W.3d 812, 816 (Tex. App.—Eastland 2002, no pet.) (noting that the proper focus is on whether the court ought to proceed rather than on whether it has jurisdiction).

168. *Surgitek*, 955 S.W.2d at 888.

trial court on controverted fact issues.[169] With regard to the legal tests, the reviewing court applies the de novo standard of review.[170] 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 requested and filed, they may be challenged for their sufficiency.[171]

## G. *Forum Non Conveniens*

Under the doctrine of *forum non conveniens*, the trial court has discretionary power to decline jurisdiction if the convenience of the parties and the ends of justice would be better served in another forum that could have maintained the suit.[172] Upon a party's written motion, the trial court may refuse to impose its jurisdiction over the case even though venue is proper in the instant forum.[173] 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 alternate forum provides an adequate remedy;
> (3) maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;
> (4) the alternate forum, as a result of the submission of the parties or otherwise, 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 alternate forum; and
> (6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.[174]

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169. *Id.*

170. *Id.*

171. *Id.* In *Surgitek*, there was not an evidentiary hearing relating to the joinder motion. *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 Surgitek*, 955 S.W.2d 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. *Id.* at 888-89.

172. BLACK'S LAW DICTIONARY 589 (5th ed. 1979).

173. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (Vernon Supp. 2002); BLACK'S LAW DICTIONARY 589 (5th ed. 1979).

174. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b)(1)-(6) (Vernon Supp. 2002).

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*.[175] 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.[176] To make this showing, the plaintiff need only come forward with credible, verified evidence and is not required to meet the preponderance of the evidence standard.[177] Finally, the trial court does not have the discretion to stay or dismiss the case if the plaintiff is a resident of Texas.[178] Dismissals based on *forum non conveniens* are reviewed under an abuse of discretion standard of review.[179]

## H. *Default Judgment*

If a defendant fails to file a timely answer after properly being served, he may suffer a default judgment.[180] A postanswer default occurs when a defendant initially answers, but fails to make an appearance at trial.[181] Different rules apply to set aside a default judgment depending on whether the judgment was proper (secured

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175. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(i) (Vernon Supp. 2002) (extending the section to cover actions involving personal injury or wrongful death).

176. TEX. CIV. PRAC. & REM. CODE ANN. § 75.051(f) (Vernon Supp. 2002); *see also* Berg v. AMF Inc., 29 S.W.3d 212, 219 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

177. TEX. CIV. PRAC. & REM. CODE ANN. § 75.051(f) (Vernon Supp. 2002); *Berg*, 29 S.W.3d at 219. 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. TEX. CIV. PRAC. & REM. CODE ANN. § 75.051(d) (Vernon Supp. 2002).

178. TEX. CIV. PRAC. & REM. CODE ANN. § 75.051(e) (Vernon Supp. 2002); Owens Corning v. Carter, 997 S.W.2d 560, 569 (Tex. 1999).

179. Feltham v. Bell Helicopter Textron, Inc., 41 S.W.2d 384, 387 (Tex. App.—Fort Worth 2001, no pet.); Tullis v. Georgia-Pac. Corp., 45 S.W.3d 118, 121 (Tex. App.—Fort Worth 2000, no pet.); Berg v. AMF Inc., 29 S.W.3d 212, 215 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

180. TEX. R. CIV. P. 239; Tex. Prop. & Cas. Ins. Guar. Ass'n v. Johnson, 4 S.W.3d 328, 332 n.2 (Tex. App.—Austin 1999, pet. denied); Jatoi v. Decker, Jones, McMackin, Hall & Bates, 955 S.W.2d 430, 432 (Tex. App.—Fort Worth 1997, pet. denied); Michael A. Pohl & David Hittner, *Judgments by Default in Texas*, 37 Sw. L.J. 421, 422 (1983); *see* Aguilar v. Alvarado, 39 S.W.3d 244, 248 (Tex. App.—Waco 1999, pet. denied) (stating that the trial court may not grant a default judgment once the defendant has filed an answer).

181. Stoner v. Thompson, 578 S.W.2d 679, 682 (Tex. 1979); Mahand v. Delaney, 60 S.W.3d 371, 373 (Tex. App.—Houston [1st Dist.] 2001, no pet.); Mabon Ltd. v. Afri-Carib Enters., Inc., 29 S.W.3d 291, 296 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *In re*

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.*[182] Under this test, a trial court may set aside a default judgment and order a new trial in any case 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;[183] [(2)] provided the motion for a new trial sets up a meritorious defense[184] and [(3)] is filed at a time

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Marriage of Parker, 20 S.W.3d 812, 815 (Tex. App.—Texarkana 2000, no pet.); *Jatoi*, 955 S.W.2d at 433.

182. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 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, Tex., N.A. v. Moody, 830 S.W.2d 81, 82-83 (Tex. 1992) (recognizing the *Craddock* test); *accord* Gen. Elec. Capital Auto Fin. Leasing Servs., Inc. v. Stanfield, 71 S.W.3d 351, 356 (Tex. App.—Tyler 2001, pet. denied); Konkel v. Otwell, 65 S.W.3d 183, 186 (Tex. App.—Eastland 2001, no pet.); Coastal Banc SSB v. Helle, 48 S.W.3d 796, 800-01 (Tex. App.—Corpus Christi 2001, pet. denied).

183. *Craddock*, 133 S.W.2d at 126. A slight excuse will suffice, especially when not resulting in delay or prejudice. Harmon Truck Lines, Inc. v. Steele, 836 S.W.2d 262, 265 (Tex. App.—Texarkana 1992, writ dism'd); Gotcher v. Barnett, 757 S.W.2d 398, 401 (Tex. App.—Houston [14th Dist.] 1988, no writ); *see also In re* R.H., 75 S.W.3d 126, 131 (Tex. App.—San Antonio 2002, no pet.) (holding that "[s]ome excuse, but not necessarily a good excuse" is sufficient), *overruled on other grounds by In re* K.C., No. 04-01-00580-CV, 2002 WL 1475676 (Tex. App.—San Antonio July 10, 2002, no pet.); *In re* A.P.P., 74 S.W.3d 570, 573 (Tex. App.—Corpus Christi 2002, no pet.) (affirming that only "some excuse" is necessary); *Stanfield*, 71 S.W.3d at 357 (holding an unchallenged assertion of a mistake is sufficient); *Konkel*, 65 S.W.3d at 186 (distinguishing an intentional action from a mistake); *Mahand*, 60 S.W.3d at 374 (acknowledging a slight excuse to be sufficient); *Coastal Banc*, 48 S.W.3d at 800-01 (determining that not being advised of the hearing date is a sufficient excuse for failure to appear). 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. *Harmon Truck Lines*, 836 S.W.2d at 265. A conclusion that the party's failure to answer 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) (looking to the defendant's knowledge and acts to determine intent).

184. *Craddock*, 133 S.W.2d at 126; *accord In re* A.P.P., 74 S.W.3d at 573; *Stanfield*, 71 S.W.3d at 357; *Konkel*, 65 S.W.3d at 186; *Coastal Banc*, 48 S.W.3d at 800-01; Shull v. United Parcel Serv., 4 S.W.3d 46, 52 (Tex. App.—San Antonio 1999); *see also* Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. 1966) (requiring the defendant to allege facts constituting a defense to the plaintiff's claim that is supported by evidence). A meritorious defense is one that if

> when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.[185]

The *Craddock* test also applies to a postanswer default judgment[186] and to a summary judgment.[187] 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.[188] 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.[189]

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.[190] 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

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proved would cause a different result upon retrial of the case, although not necessarily a totally opposite result. Holliday v. Holliday, 72 Tex. 581, 10 S.W. 690, 692 (1889).

185. *Craddock*, 133 S.W.2d at 126; *accord* Carpenter v. Cimarron Hydocarbons Corp., 45 Tex. Sup. Ct. J. 1031, 1032, 2002 WL 1902793 (July 3, 2002); Angelo v. Champion Rest. Equip. Co., 713 S.W.2d 96, 97 (Tex. 1986); *Stanfield*, 71 S.W.3d at 357; *Konkel*, 65 S.W.3d at 186; *Coastal Banc*, 48 S.W.3d at 800-01; Lab. Corp. of Am. v. Mid-Town Surgical Ctr., Inc., 16 S.W.3d 527, 528 (Tex. App.—Dallas 2000, no pet.).

186. 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; Lowe v. Lowe, 971 S.W.2d 720, 723 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

187. Huffine v. Tomball Hosp. Auth., 979 S.W.2d 795, 798-99 (Tex. App.—Houston [14th Dist.] 1998, no pet.); 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 (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. Guar. 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'rs, Inc., 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).

188. 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.).

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

190. 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; Cont'l Cas. Co. v. Hartford Ins., 74 S.W.3d 432, 434 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

in court.[191] Furthermore, when the guidelines of *Craddock* have been met, it is an abuse of discretion to deny a new trial.[192]

2. Defective Default Judgment

> If a default judgment is not rendered in compliance with the statutes and rules and the defect is apparent on the face of the record, the default judgment may be set aside by a motion to set aside, a motion for new trial, an appeal, or by [restricted appeal] to the court of appeals.[193]

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.[194] 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

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191. Sexton v. Sexton, 737 S.W.2d 131, 133 (Tex. App.—San Antonio 1987, no writ); *see In re* A.P.P., 74 S.W.3d 570, 573 (Tex. App.—Corpus Christi 2002, no pet.) (noting that courts have applied the first prong of the *Craddock* test liberally).

192. Tanknology/NDE Corp. v. Bowyer, 80 S.W.3d 97, 100 (Tex. App.—Eastland 2002, no pet.); *In re* A.P.P., 74 S.W.3d at 573; Kubovy v. Cypress-Fairbanks Indep. Sch. Dist., 972 S.W.2d 130, 134 (Tex. App.—Houston [14th Dist.] 1998, no pet.); Medina v. W. Waste Indus., 959 S.W.2d 328, 329-30 (Tex. App.—Houston [14th Dist.] 1997, pet. denied); 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*, 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. *Strackbein*, 671 S.W.2d at 38; *Cope*, 752 S.W.2d at 609.

193. Bagel v. Mason Rd. Bank, N.A., No. B14-91-00548-CV, 1992 WL 43953, at *1 (Tex. App.—Houston [14th Dist.] Feb. 17, 1992, no writ) (not designated for publication); *see* Jordan v. Jordan, 890 S.W.2d 555, 560 (Tex. App.—Beaumont 1994) (holding that courts may look to the face of the record to determine appellate error), *rev'd on other grounds*, 907 S.W.2d 471 (Tex. 1995).

194. Quaestor Invs., Inc. v. State of Chiapas, 997 S.W.2d 226, 227 (Tex. 1999); Stubbs v. Stubbs, 685 S.W.2d 643, 644 (Tex. 1985); O'Neal v. O'Neal, 69 S.W.3d 347, 348 (Tex. App.—Eastland 2002, no pet.); Clopton v. Pak, 66 S.W.3d 513, 515 (Tex. App.—Fort Worth 2001, pet. denied); Hercules Concrete Pumping Serv., Inc. v. Bencon Mgmt. & Gen. Contracting Corp., 62 S.W.3d 308, 308 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); Pino v. Perez, 52 S.W.3d 357, 358 (Tex. App.—Corpus Christi 2001, no pet.); 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 (Tex. App.—Dallas 1987, no writ); *see also infra* Part IV.

trial after a proper default judgment.[195] 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.[196] This showing must be made from the record as it existed before the trial court when the default judgment was signed, unless the record is amended pursuant to Rule 118.[197]

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.[198] 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.[199]

## I. *Special Exceptions*

A petition is sufficient "if it gives fair and adequate notice of the facts upon which the pleader bases his claim."[200] Special excep-

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

196. 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); *see In re* Martinez Ramirez, 994 S.W.2d 682, 683 (Tex. App.—San Antonio 1998, orig. proceeding) (holding that courts must consider sufficiency of process when determining whether to grant default judgment); Seib v. Bekker, 964 S.W.2d 25, 27-28 (Tex. App.—Tyler 1997, no writ).

197. *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. Gen. Life & Accident Ins. Co., 796 S.W.2d 695, 697-98 (Tex. 1990) (Phillips, C.J., dissenting) (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) (holding that service of citation failed to strictly comply with civil procedure rules and did not support a default judgment); Cox Mktg., Inc. v. Adams, 688 S.W.2d 215, 218 (Tex. App.—El Paso 1985, no writ) (reversing the trial court's default judgment based on insufficient service of citation).

198. TEX. R. CIV. P. 324(b)(1); *see* 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").

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

200. Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 897 (Tex. 2000) (citing Roark v. Allen, 633 S.W.2d 804, 810 (Tex. 1982)); Smithkline Beecham Corp. v. Doe, 903 S.W.2d 347, 354 (Tex. 1995); Town of Flower Mound v. Stafford Estates L.P., 71 S.W.3d 18, 37 (Tex. App.—Fort Worth 2002, pet. filed); Lohmann v. Lohmann, 62 S.W.3d 875, 879-80

tions are "used to challenge the sufficiency of a pleading."[201] If a pleading fails to give fair notice,[202] the defendant should specially except to the petition pursuant to Rule 91.[203] If no special exceptions are filed, the pleadings will be construed liberally in favor of the pleader.[204] 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"[205] or otherwise require the adverse party to clarify his pleadings "when they are not clear or sufficiently specific."[206] In considering special exceptions, the trial court is granted broad discretion.[207]

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(Tex. App.—El Paso 2001, no pet.); 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).

201. Friesenhahn v. Ryan, 960 S.W.2d 656, 658 (Tex. 1998); White v. Bayless, 32 S.W.3d 271, 274 (Tex. App.—San Antonio 2000, pet. denied); Godley Indep. Sch. Dist. v. Woods, 21 S.W.3d 656, 660-61 (Tex. App.—Waco 2000, pet. denied).

202. *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); *accord Town of Flower Mound*, 71 S.W.3d at 37; Hays County v. Hays County Water Planning P'ship, 69 S.W.3d 253, 258 (Tex. App.—Austin 2002, no pet.); Southwestern Bell Tel. Co. v. Garza, 58 S.W.3d 214, 226 (Tex. App.—Corpus Christi 2001, pet. filed); Woolam v. Tussing, 54 S.W.3d 442, 447 (Tex. App.—Corpus Christi 2001, no pet.); Rosenboom Mach. & Tool, Inc. v. Machala, 995 S.W.2d 817, 823-24 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); Wright v. Fowler, 991 S.W.2d 343, 353 (Tex. App.—Fort Worth 1999, no pet.).

203. TEX. R. CIV. P. 91.

204. Paramount Pipe & Supply Co. v. Muhr, 749 S.W.2d 491, 496 (Tex. 1988); *Horizon*, 34 S.W.3d at 897; *Town of Flower Mound*, 71 S.W.3d at 38; *Lohmann*, 62 S.W.3d at 879-80; *Garza*, 58 S.W.3d at 226; *Woolam*, 54 S.W.3d at 448; Holt v. Reprod. Servs., Inc., 946 S.W.2d 602, 604 (Tex. App.—Corpus Christi 1997, writ denied).

205. TEX. R. CIV. P. 91; State *ex rel.* White v. Bradley, 956 S.W.2d 725, 744 (Tex. App.—Fort Worth 1997), *rev'd on other grounds*, 990 S.W.2d 245 (1999).

206. Villarreal v. Martinez, 834 S.W.2d 450, 451 (Tex. App.—Corpus Christi 1992, no writ); *accord* Clayton v. Richards, 47 S.W.3d 149, 152 (Tex. App.—Texarkana 2001, pet. denied); San Benito Bank & Trust Co. v. Landair Travels, 31 S.W.3d 312, 317 (Tex. App.—Corpus Christi 2000, no pet.); Godley Indep. Sch. Dist. v. Woods, 21 S.W.3d 656, 661 (Tex. App.—Waco 2000, pet. denied).

207. 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"); *accord* Pace Concerts Ltd. v. Resendez, 72 S.W.3d 700, 703 (Tex. App.—San Antonio 2002, pet. denied); Ledesma v. Allstate Ins. Co., 68 S.W.3d 765, 773 (Tex. App.—Dallas 2001, no pet.); Leyva v. Soltero, 966 S.W.2d 765, 768 (Tex. App.—El Paso 1998, no pet.); Bader v. Cox, 701 S.W.2d 677, 686 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

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.[208] If the defect in the pleading is not cured after amendment, the trial court may then dismiss the case.[209] 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.[210] The trial court's ruling is reviewed for an abuse of discretion.[211] However, if the trial court dismisses a case for failure to state a cause of action, the order is reviewed de novo.[212]

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.[213] The distinction is

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208. Friesenhahn v. Ryan, 960 S.W.2d 656, 658 (Tex. 1998); Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983) (quoting Tex. Dep't of Corr. v. Herring, 513 S.W.2d 6, 10 (Tex. 1974)); Alashmawi v. IBP, Inc., 65 S.W.3d 162, 173 (Tex. App.—Amarillo 2001, pet. denied); Clayton v. Richards, 47 S.W.3d 149, 152 (Tex. App.—Texarkana 2001, pet. denied); Wyatt v. Longoria, 33 S.W.3d 26, 30 (Tex. App.—El Paso 2000, no pet.); San Benito Bank & Trust Co. v. Landair Travels, 31 S.W.3d 312, 317 (Tex. App.—Corpus Christi 2000, no pet.); Texas-Ohio Gas, Inc. v. Mecom, 28 S.W.3d 129, 141 (Tex. App.—Texarkana 2000, no pet.); Pearce v. City of Round Rock, 992 S.W.2d 668, 672 (Tex. App.—Austin 1999, pet. denied).

209. *Friesenhahn*, 960 S.W.2d at 658; W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis, 78 S.W.3d 529, 538 (Tex. App.—Austin 2002, no pet.); Butler Weldments Corp. v. Liberty Mut. Ins. Co., 3 S.W.3d 654, 658 (Tex. App.—Austin 1999, no pet.); Melendez v. Exxon Corp., 998 S.W.2d 266, 272 (Tex. App.—Houston [14th Dist.] 1999, no pet.); Russell v. Tex. Dep't of Human Res., 746 S.W.2d 510, 513 (Tex. App.—Texarkana 1988, writ denied).

210. Pack v. Crossroads, Inc., 53 S.W.3d 492, 507 (Tex. App.—Fort Worth 2001, pet. denied); *Villarreal*, 834 S.W.2d at 452; Fid. & Cas. Co. of N.Y. v. Shubert, 646 S.W.2d 270, 277-78 (Tex. 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.).

211. LaRue v. GeneScreen, Inc., 957 S.W.2d 958, 961 (Tex. App.—Beaumont 1997, pet. denied); Holt v. Reprod. Servs., 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).

212. Orange-Cove Consol. Sch. Dist. v. Alanis, 78 S.W.3d 529, 538 (Tex. App.—Austin 2002, pet. filed).

213. *Friesenhahn*, 960 S.W.2d at 658 (citing Swilley v. Hughes, 488 S.W.2d 64, 67 (Tex. 1972)); Hidalgo v. Sur. Sav. & Loan Ass'n, 462 S.W.2d 540, 543 n.1 (Tex. 1971); *Alanis*, 78 S.W.3d at 539; *In re* A.L.H.C., 49 S.W.3d 911, 915 (Tex. App.—Dallas 2001, pet. denied); Mendez v. San Benito/Cameron County Drainage Dist., 45 S.W.3d 746, 754 (Tex. App.—Corpus Christi 2001, pet. denied); St. Paul Ins. Co. v. Mefford, 994 S.W.2d 715, 718 (Tex. App.—Dallas 1999, pet. denied); 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. 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.).

"between inadequately pleading a cause of action [special exception] and utterly failing to plead a viable cause of action [summary judgment]."[214] 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.[215]

## J. *Temporary and Permanent Injunctions*

The purpose of a temporary injunction "is to preserve the status quo of the litigation's subject matter pending a trial on the merits."[216] The trial court may grant any writ necessary to administer justice between the parties, preserve the subject matter of the litigation, and make its judgment effective.[217] "A temporary injunc-

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214. Chambers v. Huggins, 709 S.W.2d 219, 223-24 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (emphasizing the distinction between "failing to adequately state a cause of action and failing to set forth any cause of action whatsoever"); *see also* Tex. Dep't of Corr. v. Herring, 513 S.W.2d 6, 9 (Tex. 1974) (distinguishing instances in which summary judgment is proper from instances in which special exception is proper). A defendant's motion for summary judgment is properly granted in situations where the plaintiff "plead[s] himself out of court," or in other words, pleading facts that affirmatively negate his cause of action. *Herring*, 513 S.W.2d at 9. Conversely, when the plaintiff's pleading is merely insufficient, i.e., the pleading fails to state a cause of action, a special exception is proper. *Id.* Once a special exception is sustained by the court, the plaintiff will have an opportunity to amend his pleading as a matter of right. *Id.* If the amended pleading is still deficient, the court may then dismiss the case for failure to state a cause of action upon which relief may be granted. *Id.* at 10.

215. *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 ruling on the plaintiff's failure to plead a cause of action after having received an opportunity to be heard); *see also* Clayton v. Richards, 47 S.W.3d 149, 152 (Tex. App.—Texarkana 2001, pet. denied) (stating that a special exception is appropriate when the plaintiff needs to clarify a cause of action); *Larue*, 957 S.W.2d at 961 (affirming summary judgment after plaintiffs failed to replead their cause of action after the trial court sustained special exceptions).

216. Butnaru v. Ford Motor Co., 45 Tex. Sup. Ct. J. 916, 919, 2002 WL 1898460 (June 27, 2002); Walling v. Metcalfe, 863 S.W.2d 56, 57 (Tex. 1993); Davis v. Huey, 571 S.W.2d 859, 862 (Tex. 1978), *rev'd on other grounds*, 620 S.W.2d 561 (Tex. 1981); Camp v. Shannon, 162 Tex. 515, 348 S.W.2d 517, 519 (1961); City of Lubbock v. Stubbs, 160 Tex. 111, 327 S.W.2d 411, 414-15 (1959); Matagorda County Hosp. Dist. v. City of Palacios, 47 S.W.3d 96, 100 (Tex. App.—Corpus Christi 2001, no pet.); Ctr. for Econ. Justice v. Am. Ins. Ass'n, 39 S.W.3d 337, 343 (Tex. App.—Austin 2001, no pet.); McDill Columbus Corp. v. Univ. Woods Apartments, Inc., 7 S.W.3d 923, 926-27 (Tex. App.—Texarkana 2000, no pet.); Munson v. Milton, 948 S.W.2d 813, 815 (Tex. App.—San Antonio 1997, writ denied); Univ. of Tex. Med. Sch. at Houston 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.).

217. City of Dallas v. Wright, 120 Tex. 190, 36 S.W.2d 973, 975 (1931).

tion is an extraordinary remedy and does not issue as a matter of right."[218] To be entitled to a temporary injunction, the movant must show: "(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim."[219] An irreparable injury exists if the party injured cannot adequately be compensated in damages, or if the damages are immeasurable by pecuniary standards.[220]

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.[221] Failure to include an order setting the matter for a trial on the merits mandates dissolution of the injunction.[222] Furthermore, the trial court must detail the specific reasons it relied upon in ruling on whether a temporary injunction should be granted or denied.[223] The trial court is not required to explain its reasons for believing

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218. *Butnaru*, 2002 WL 1898460, at *4; *Walling*, 863 S.W.2d at 57.

219. *Butnaru*, 2002 WL 1898460, at *4 (citing *Walling*, 863 S.W.2d at 57); *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); 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 Res., Inc., 717 S.W.2d 685, 687-88 (Tex. App.—Amarillo 1986, no writ) (stating the requirements for a temporary injunction, including a 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, 700-01 (1986) (setting forth the factors for determining whether to issue injunctive relief); *see also* City of Galveston v. Flagship Hotel, Ltd., 73 S.W.3d 422, 424 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); Ebony Lake Healthcare Ctr. v. Tex. Dep't of Human Servs., 62 S.W.3d 867, 871 (Tex. App.—Austin 2001, no pet.); Tenet Health Ltd. v. Zamora, 13 S.W.3d 464, 468 (Tex. App.—Corpus Christi 2000, pet. dism'd w.o.j.).

220. *Butnaru*, 2002 WL 1898460, at *4 (citing Canteen Corp. v. Republic of Tex. Props., Inc., 773 S.W.2d 398, 401 (Tex. App.—Dallas 1989, no writ)).

221. TEX. R. CIV. P. 683; Qwest Communications Corp. v. AT & T Corp., 24 S.W.3d 334, 337 (Tex. 2000); EOG Res., Inc. v. Gutierrez, 75 S.W.3d 50, 52 (Tex. App.—San Antonio 2002, no pet.).

222. *Qwest*, 24 S.W.3d at 337; InterFirst Bank San Felipe v. Paz Constr. Co., 715 S.W.2d 640, 641 (Tex. 1986); *EOG Res.*, 75 S.W.3d at 52; *Ebony Lake Healthcare Ctr.*, 62 S.W.3d at 870.

223. Big D Props., Inc. v. Foster, 2 S.W.3d 21, 22 (Tex. App.—Forth Worth 1999, no pet.); 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); Univ. Interscholastic League v. Torres, 616 S.W.2d 355, 357-58 (Tex. Civ. App.—San Antonio 1981, no writ).

that an applicant has shown a probable right to final relief; however, the trial court must give the reasons why an injury will be suffered if the interlocutory relief is not granted.[224] If the order fails to meet these requirements, it is rendered fatally defective and void, thereby requiring reversal, even if the issue is not raised by issue on appeal.[225]

In an interlocutory appeal from a temporary injunction,[226] the merits of the movant's case are not presented for appellate review.[227] Appellate review is therefore strictly limited to evaluating whether there has been a clear abuse of discretion.[228] 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.[229] The trial court abuses its discretion in granting or denying a temporary in-

224. TEX. R. CIV. P. 683 (requiring every order that grants an injunction or restraining order to "set forth the reasons for its issuance"); *accord* State v. Cook United, Inc., 464 S.W.2d 105, 106 (Tex. 1971); Transp. Co. of Tex. v. Robertson Transps., Inc., 152 Tex. 551, 261 S.W.2d 549, 552-53 (1953); Univ. of Tex. Med. Sch. at Houston v. Than, 834 S.W.2d 425, 428 (Tex. App.—Houston [1st Dist.] 1992), *aff'd*, 901 S.W.2d 926 (Tex. 1995)); Pub. Util. 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).

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

226. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon 1997 & Supp. 2002).

227. Davis v. Huey, 571 S.W.2d 859, 861 (Tex. 1978); Synergy Ctr., Ltd. v. Lone Star Franchising, Inc., 63 S.W.3d 561, 564 (Tex. App.—Austin 2001, no pet.); City of San Antonio v. Hardee, 70 S.W.3d 207, 210 (Tex. App.—San Antonio 2001, no pet.); *Ebony Lake Healthcare*, 62 S.W.3d at 871; Salazar v. Gallardo, 57 S.W.3d 629, 632 (Tex. App.—Corpus Christi 2001, no pet.); Sherrod v. Moore, 819 S.W.2d 201, 202 (Tex. App.—Amarillo 1991, no writ).

228. Butnaru v. Ford Motor Co., 45 Tex. Sup. Ct. J. 916, 924, 2002 WL 1898460 (June 27, 2002); Walling v. Metcalfe, 863 S.W.2d 56, 57 (Tex. 1993); State v. Walker, 679 S.W.2d 484, 485 (Tex. 1985); *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 Forth Worth, 163 Tex. 616, 358 S.W.2d 589, 589 (1962) (per curiam); *Transp. Co. of Tex.*, 261 S.W.2d at 552; Allied Capital Corp. v. Cravens, 67 S.W.3d 486, 489 (Tex. App.—Corpus Christi 2002, no pet.); Ebony Lake Healthcare Ctr. v. Tex. Dep't of Human Servs., 62 S.W.3d 867, 871 (Tex. App.—Austin 2001, no pet.); City of Houston v. Todd, 41 S.W.3d 289, 294 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); Uniden Am. Corp. v. Trucking Assoc., 841 S.W.2d 522, 523 (Tex. App.—Fort Worth 1992, no writ).

229. *In re* Nitla S.A. de C.V., 45 Tex. Sup. Ct. J. 571, 573, 2002 WL 534089, at *3 (Apr. 11, 2002) (per curiam); *Davis*, 571 S.W.2d at 862; *In re* Dynamic Health Ins., 32 S.W.3d 876, 882 (Tex. App.—Texarkana 2000, no pet.); Case v. Grammar, 31 S.W.3d 304, 308 (Tex. App.—San Antonio 2000, no pet.); Reliable Consultants, Inc. v. Jaquez, 25 S.W.3d 336, 344 (Tex. App.—Austin 2000, pet. denied); Green v. Tex. Dep't of Protective & Reg. Servs., 25 S.W.3d 213, 218 (Tex. App.—El Paso 2000, no pet.); *Sherrod*, 819 S.W.2d at 202; Philipp

junction when it misapplies the law to the established facts or "when the evidence does not reasonably support the conclusion that the applicant has a probable right of recovery."[230] 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.[231] 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."[232]

In an appeal from a permanent injunction, the standard of review is based upon a clear abuse of discretion.[233] A litigant is entitled to a jury trial in an injunction action, but only the ultimate factual issues are submitted for their determination.[234] The jury is not entitled to "determine the expediency, necessity or propriety of equitable relief."[235] Thus, the trial court's order granting or deny-

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Bros. v. Oil Country Specialists, Ltd., 709 S.W.2d 262, 265 (Tex. App.—Houston [1st Dist.] 1986, writ dism'd).

230. *Southwestern Bell Tel. Co.*, 526 S.W.2d at 528; Menna v. Romero, 48 S.W.3d 247, 252 (Tex. App.—San Antonio 2001, pet. denied); Ctr. for Econ. Justice v. Am. Ins. Ass'n, 39 S.W.3d 337, 347 (Tex. App.—Austin 2001, no pet.); Herring v. Welborn, 27 S.W.3d 132, 141 (Tex. App.—San Antonio 2000, pet. denied); City of Friendswood v. Registered Nurse Care Home, 965 S.W.2d 705, 707 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *Uniden Am. Corp.*, 841 S.W.2d at 523; Univ. of Tex. Med. Sch. at Houston 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 when reviewing a temporary injunction. Owens-Corning Fiberglas Corp. v. Baker, 838 S.W.2d 838, 842 (Tex. App.—Texarkana 1992, no writ).

231. Priest v. Tex. Animal Health Comm'n, 780 S.W.2d 874, 876 (Tex. App.—Dallas 1989, no writ); City of Houston v. Mem'l Bend Util. Co., 331 S.W.2d 418, 422 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.).

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

233. *Priest*, 780 S.W.2d at 875; Synergy Ctr., Ltd. v. Lone Star Franchising, Inc., 63 S.W.3d 561, 564 (Tex. App.—Austin 2001, no pet.); Jim Rutherford Inv., Inc. v. Terramar Beach Cmty. Ass'n, 25 S.W.3d 845, 848 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Tri-State Pipe & Equip., Inc. v. S. County Mut. Ins. Co., 8 S.W.3d 394, 401 (Tex. App.—Texarkana 1999, no pet.); SRS Prods. Co., Inc. v. LG Eng'g Co., Ltd., 994 S.W.2d 380, 383 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

234. *Priest*, 780 S.W.2d at 876 (quoting State v. Tex. Pet Foods, Inc., 591 S.W.2d 800, 803 (Tex. 1979)).

235. *Id.* (citing *Tex. 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.).

ing a permanent injunction based upon the ultimate facts is reviewed the same as a temporary injunction.[236]

## K. *Severance and Consolidation of Causes*

Pursuant to Rules 41[237] and 174,[238] the trial court may sever or consolidate causes. The factors applicable to a trial court's decision to sever or consolidate are essentially identical.[239] Severance of a claim is proper if "(1) the controversy involves more than one cause of action; (2) the severed claim is one that could be asserted independently in a separate lawsuit; and (3) the severed actions are not so interwoven with the other claims that they involve the same facts and issues."[240] The purpose of granting a severance is to ensure justice is done, prejudice is avoided, and convenience is furthered.[241] A severance is required in cases where the facts and circumstances clearly require a separate trial to prevent injustice, where no facts or circumstances support a contrary conclusion, and

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236. *Priest*, 780 S.W.2d at 875-76.

237. TEX. R. CIV. P. 41 (addressing misjoinder and nonjoinder of parties).

238. TEX. R. CIV. P. 174 (discussing consolidation and separate trials).

239. *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 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).

240. Liberty Nat'l Fire Ins. Co. v. Akin, 927 S.W.2d 627, 629 (Tex. 1996); *accord* Coalition of Cities for Affordable Util. Rates v. Pub. Util. Comm'n of Tex., 798 S.W.2d 560, 564 (Tex. 1990); Guar. 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.)); McGuire v. Commercial Union Ins. Co. of N.Y., 431 S.W.2d 347, 351 (Tex. 1968); F.F.P. Operating Partners, L.P. v. Duenez, 69 S.W.3d 800, 807 (Tex. App.—Corpus Christi 2002, pet. filed); *In re* Trinity Univ., 64 S.W.3d 463, 465 (Tex. App.—Amarillo 2001, no pet.); Duncan v. Calhoun County Navigation Dist., 28 S.W.3d 707, 709 (Tex. App.—Corpus Christi 2000, pet. denied); Pilgrim Enter., Inc. v. Maryland Cas. Co., 24 S.W.3d 488, 491-92 (Tex. App.—Houston [1st Dist.] 2000, no pet.); *In re* Burgett, 23 S.W.3d 124, 127 (Tex. App.—Texarkana 2000, no pet.); Kansas Univ. Endowment Ass'n v. King, 162 Tex. 599, 350 S.W.2d 11, 19 (1961).

241. *Horseshoe Operating*, 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.)); *In re* Trinity Univ., 64 S.W.3d at 465; *Pilgrim Enter.*, 24 S.W.3d at 491; *In re* C.P., 998 S.W.2d 703, 710 (Tex. App.—Waco 1999, no pet.); Adams v. Baxter Healthcare Corp., 998 S.W.2d 349, 357 (Tex. App.—Austin 1999, no pet.); State Farm Mut. Auto Ins. Co. v. Wilborn, 835 S.W.2d 260, 261 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

where no prejudice will be experienced.[242] Under these circumstances, the failure to order a separate trial violates a plain legal duty and is considered an abuse of discretion.[243] Rule 41 gives the trial court discretion to grant a severance, which will not be reversed absent an abuse of discretion.[244]

Similarly, the trial court also has broad discretion in the consolidation of cases pursuant to Rule 174.[245] The express purpose of Rule 174 is "to further convenience and avoid prejudice, and thus promote the ends of justice."[246] The trial court may consolidate actions that "relate to substantially the same transaction, occurrence, subject matter, or question."[247] The actions must be so related that the evidence presented will be relevant, material, and admissible in each case.[248] The trial court should balance the judicial economy and convenience gained by the consolidation against

242. *In re* Burgett, 23 S.W.3d 124, 126 n.1 (Tex. App.—Texarkana 2000, no pet.); Black v. Smith, 956 S.W.2d 72, 75 (Tex. App.—Houston [14th Dist.] 1997, orig. proceeding) (citing Womack v. Berry, 156 Tex. 44, 291 S.W.2d 677, 683 (1956)).

243. *In re* Burgett, 23 S.W.3d at 126 n.1; *Black*, 956 S.W.2d at 75 (citing Womack v. Berry, 156 Tex. 44, 291 S.W.2d 677, 683 (1956)).

244. TEX. R. CIV. P. 41; *Horseshoe Operating*, 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*, 291 S.W.2d at 683; Hamilton v. Hamilton, 154 Tex. 511, 280 S.W.2d 588, 591 (1955); Duncan v. Calhoun County Navigation Dist., 28 S.W.3d 707, 710 (Tex. App.—Corpus Christi 2000, pet. denied); *Pilgrim Enter.*, 24 S.W.3d at 491; N. Am. Refractory Co. v. Easter, 988 S.W.2d 904, 916-17 (Tex. App.—Corpus Christi 1999, pet. denied); 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 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).

245. TEX. R. CIV. P. 174; Perry v. Del Rio, 53 S.W.3d 818, 825 (Tex. App.—Austin 2001), *appeal dismissed*, 66 S.W.3d 239 (Tex. 2001); Crestway Care Ctr., Inc. v. Berchelmann, 945 S.W.2d 872, 873 (Tex. App.—San Antonio 1997, orig. proceeding [leave denied]) (en banc).

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

247. *Crestway Care Ctr.*, 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 Fiberglas 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)).

248. *Crestway Care Ctr.*, 945 S.W.2d at 873 (quoting *Excel Corp.*, 921 S.W.2d at 448); *Martin*, 942 S.W.2d at 716 (quoting *Lone Star Ford*, 838 S.W.2d at 737).

the risk of an unfair outcome due to prejudice or jury confusion.[249] 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.[250] 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.[251]

## L. *Intervention*

Rule 60[252] allows a party to automatically intervene in an existing cause of action, "subject to being stricken out by the court for sufficient cause on the motion of any party."[253] The intervention must be filed before the judgment is rendered.[254] A party may not, however, intervene during the period between the signing of

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249. *In re* Levi Strauss & Co., 959 S.W.2d 700, 703 (Tex. App.—El Paso 1998, no pet.); *Crestway Care Ctr.*, 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).

250. *Martin*, 942 S.W.2d at 716 (citing *Womack*, 291 S.W.2d at 683).

251. Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 525-26 (Tex. 1981) (explaining that trial court's rulings on joinder and consolidation will only be overturned on appeal for abuse of discretion); Pilgrim Enter., Inc. v. Maryland Cas. Co., 24 S.W.3d 488, 491 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (recognizing the trial court's broad discretion to consolidate); N. Am. Refractory Co. v. Easter, 988 S.W.2d 904, 916-17 (Tex. App.—Corpus Christi 1999, pet. denied) (indicating that a trial court's consolidation ruling will not be disturbed unless there was an abuse of discretion); *Martin*, 942 S.W.2d at 716 (citing *Lone Star Ford*, 838 S.W.2d at 737); Gen. Life & Accident Ins. Co. v. Handy, 766 S.W.2d 370, 375 (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. *Martin*, 942 S.W.2d at 716.

252. TEX. R. CIV. P. 60.

253. *Id.*

254. First Alief Bank v. White, 682 S.W.2d 251, 252 (Tex. 1984); Comal County Rural High Sch. Dist. v. Nelson, 158 Tex. 564, 314 S.W.2d 956, 957 (1958); Grizzle v. Tex. Commerce Bank, 38 S.W.3d 265, 272-73 (Tex. App.—Dallas 2001, pet. granted); *In re* Guerra & Moore, L.L.P., 35 S.W.3d 210, 217 (Tex. App.—Corpus Christi 2000, no pet.); City of Port Arthur v. Southwestern Bell Tel. Co., 13 S.W.3d 841, 843 (Tex. App.—Austin 2000, no pet.); *In re* Estate of 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. Am. Eagle Ins. Co., 948 S.W.2d 18, 20 (Tex. App.—Dallas 1997, no writ).

the judgment and the expiration of the trial court's jurisdiction.[255] Under Rule 60, persons or entities have the right to intervene if they, or any party thereof, could have brought the same action themselves, or if they would have been able to defeat recovery, or some part thereof, had the action been brought against them.[256] The interest asserted may be legal or equitable.[257] It is important to remember that an intervenor does not have the burden of seeking permission from the court to intervene; rather, the party opposing the intervention has the burden of challenging it by a motion to strike.[258] Absent a motion to strike filed by a party, the trial court is not authorized to strike the intervention.[259]

If a motion to strike is filed, the trial court should give the intervenor the opportunity to explain and prove his interest in the suit before ruling on the motion to strike.[260] In response to the motion, the trial court may choose to try the intervention claim, sever the intervention, order a separate trial on the intervention issues, or strike the intervention for good cause.[261] The party opposing the intervention must file a motion to strike, and while the trial court

255. *Nelson*, 314 S.W.2d at 957; Highlands Ins. Co. v. Lumbermen's Mut. Cas. Co., 794 S.W.2d 600, 602-04 (Tex. App.—Austin 1990, no writ).

256. Guar. Fed. Sav. Bank. v. Horseshoe Operating Co., 793 S.W.2d 652, 657 (Tex. 1990) (citing Inter-Cont'l 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, 12 S.W. 65, 65-66 (1888); Caprock Inv. Corp. v. FDIC, 17 S.W.3d 707, 710 (Tex. App.—Eastland 2000, pet. denied); Miami Indep. Sch. Dist. v. Moses, 989 S.W.2d 871, 878 (Tex. App.—Austin 1999, pet. denied); Tex. Supply Ctr., Inc. v. Daon Corp., 641 S.W.2d 335, 337 (Tex. App.—Dallas 1982, writ ref'd n.r.e.).

257. *Horseshoe Operating*, 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); *Caprock Inv. Corp.*, 17 S.W.3d at 710; Gracida v. Tagle, 946 S.W.2d 504, 506 (Tex. App.—Corpus Christi 1997, orig. proceeding).

258. *Horseshoe Operating*, 793 S.W.2d at 657; *Grizzle*, 38 S.W.3d at 272; Intermarque Auto. Prod., Inc. v. Feldman, 21 S.W.3d 544, 549 (Tex. App.—Texarkana 2000, no pet.); Bryant v. United Shoreline Inc. Assurance Servs., N.A., 984 S.W.2d 292, 295 (Tex. App.—Fort Worth 1998, no pet.); Ghidoni v. Stone Oak, Inc., 966 S.W.2d 573, 586 (Tex. App.—San Antonio 1998, pet. denied).

259. *Horseshoe Operating*, 793 S.W.2d at 657; *Ghidoni*, 966 S.W.2d at 607; 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).

260. *Grizzle*, 38 S.W.3d at 273; *In re* Estate of York, 951 S.W.2d 122, 126 (Tex. App.—Corpus Christi 1997, writ denied) (citing Nat'l 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. App.—Houston [14th Dist.] 1981, no writ).

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

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 an excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the intervenor's interest."[262]

## M. *Joinder of Plaintiffs*

When more than one plaintiff joins a case, each plaintiff must establish proper venue independently of any other plaintiff.[263] If a plaintiff cannot independently demonstrate "proper venue" under a mandatory or permissive venue statute, then he must establish the four joinder requirements of Section 15.003(a) of the Civil Practice and Remedies Code.[264] In determining proper venue, "[p]roperly pleaded venue facts are taken as true unless specifically denied," in which case prima facie proof must be made, including affidavits and duly proved attachments.[265] An order granting or denying intervention or joinder is an appealable interlocutory order.[266] The standard of review applicable to the trial court's order is, by statute, de novo review.[267]

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262. *Horseshoe Operating*, 793 S.W.2d at 657 (citing *Moody*, 411 S.W.2d at 589 and Tex. Supply Ctr., Inc. v. Daon Corp., 641 S.W.2d 335, 337 (Tex. App.—Dallas 1982, writ ref'd n.r.e.)); Mendez v. Brewer, 626 S.W.2d 498, 499 (Tex. 1982); *Grizzle*, 38 S.W.3d at 272-74; *Caprock Inv. Corp.*, 17 S.W.3d at 710-11; City of Port Arthur v. Southwestern Bell Tel. Co., 13 S.W.3d 841, 843 (Tex. App.—Austin 2000, no pet.); Atchley v. Spurgeon, 964 S.W.2d 169, 171 (Tex. App.—San Antonio 1998, no pet.); Camacho v. Samaniego, 954 S.W.2d 811, 828 (Tex. App.—El Paso 1997, writ denied); *In re* Estate of 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).

263. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a) (Vernon Supp. 2002).

264. O'Quinn v. Hall, 77 S.W.3d 438, 448-49 (Tex. App.—Corpus Christi 2002, no pet.).

265. *Id.* at 449.

266. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c) (Vernon Supp. 2002)

267. *Id.*; Surgitek v. Abel, 997 S.W.2d 598, 603 (Tex. 1999).

## N. *Interpleader*

Rule 43,[268] providing for interpleader actions, extends and liberalizes the equitable remedy of bill of interpleader.[269] 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.[270] 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."[271] A stakeholder is not required to be completely disinterested in the suit;[272] he need only show that he may be subject to double or multiple liability due to conflicting claims, thereby justifying a reasonable doubt, either in law or fact, as to which claimant is entitled to funds or property.[273] Interpleader relief will be granted if: "(1) the party is either subject to, or has reasonable grounds to anticipate, rival claims to the same fund or property;[274] (2) the party has not unreasonably delayed filing an action for interpleader;[275] and (3) the party has unconditionally tendered the fund or property into the court's reg-

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268. TEX. R. CIV. P. 43.

269. 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* Sav. & Profit Sharing Fund of Sears Employees 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 156 (1992) (referring to interpleader practice).

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

271. 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)); *see also* Tri-State Pipe & Equip. Inc. v. S. County Mut. Ins. Co., 8 S.W.3d 394, 401-02 (Tex. App.—Texarkana 1999, no pet.) (stating that interpleader provides relief for a stakeholder, who without such an action, would have to act as judge and jury at his own peril when faced with conflicting claims).

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

273. Davis v. E. Tex. Sav. & Loan Ass'n, 163 Tex. 361, 354 S.W.2d 926, 930 (1962); *Tri-State Pipe and Equip.*, 8 S.W.3d at 402; K & S Interests, Inc. v. Tex. Am. Bank/Dallas, 749 S.W.2d 887, 889 (Tex. App.—Dallas 1988, writ denied); *Stubbs*, 734 S.W.2d at 79.

274. Bryant v. United Shoreline Inc. Assurance Servs., N.A., 984 S.W.2d 292, 296 (Tex. App.--Fort Worth 1998, no pet.); *accord* 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*, 354 S.W.2d at 930; Tex. Workforce Comm'n v. Gill, 964 S.W.2d 308, 310 (Tex. App.—Corpus Christi 1998, no pet.); *Stubbs*, 734 S.W.2d at 79.

275. *Bryant*, 984 S.W.2d at 296; *Stubbs*, 734 S.W.2d at 79.

istry."[276] Every reasonable doubt is resolved in favor of allowing the stakeholder to interplead.[277] The granting of interpleader, which is a final judgment,[278] is reviewed for an abuse of discretion.[279] Absent an abuse of that discretion, a reviewing court may not disturb the trial court's decision.[280]

## O. *Discovery Rulings*

"Under Texas law[,] evidence is presumed discoverable."[281] 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.'"[282] 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;"[283] (2) it helps prevent trial by ambush;[284] (3) it insures that a trial is based upon "the parties'

276. *Bryant*, 984 S.W.2d at 296; 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; Cockrum v. Cal-Zona Corp., 373 S.W.2d 572, 574-75 (Tex. Civ. App.—Dallas 1963, no writ).

277. Nixon v. Malone, 100 Tex. 250, 98 S.W. 380, 385 (1906); *Bryant*, 984 S.W.2d at 296; *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.).

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

279. *Bryant*, 984 S.W.2d at 296; 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).

280. Barnett v. Woodland, 310 S.W.2d 644, 647 (Tex. Civ. App.—Austin 1958, writ ref'd n.r.e.) (viewing the evidence in favor of the trial court's findings and judgment).

281. Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc., 957 S.W.2d 640, 645 (Tex. App.—Amarillo 1997, pet. denied) (citing Loftin v. Martin, 776 S.W.2d 145, 146 (Tex. 1989) (orig. proceeding)).

282. 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)); *accord In re* Alford Chevrolet-Geo, 997 S.W.2d 173, 180 (Tex. 1999); Rendon v. Avance, 67 S.W.3d 303, 309 (Tex. App.—Fort Worth 2001, pet. granted, remanded); Tempay, Inc. v. TNT Concrete & Constr., Inc., 37 S.W.3d 517, 521 (Tex. App.—Austin 2001, pet. denied); *In re* Dynamic Health Inc., 32 S.W.3d 876, 886 (Tex. App.—Texarkana 2000, no pet.); *In re* Fontenot, 13 S.W.3d 111, 113 (Tex. App.—Fort Worth 2000, no pet.).

283. West v. Solito, 563 S.W.2d 240, 243 (Tex. 1978) (orig. proceeding); Avary v. Bank of Am., 72 S.W.3d 779, 787 (Tex. App.—Dallas 2002, no pet.); *In re* Dynamic Health Inc., 32 S.W.3d 876, 886 (Tex. App.—Texarkana 2000, no pet.); *In re* Maurer, 15 S.W.3d 256, 261 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

284. Clark v. Trailways, Inc., 774 S.W.2d 644, 646 (Tex. 1989); Ersek v. Davis & Davis, P.C., 69 S.W.3d 268, 274 (Tex. App.—Austin 2002, pet. denied); Best Indus. Unif. Supply

claims and defenses rather than on an advantage obtained by one side through a surprise attack;"[285] and (4) it provides a mechanism to resolve disputes by the facts and not by the facts a party fails to reveal.[286] 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.'"[287] Consequently, courts tend to liberally construe the discovery rules to achieve these underlying policy goals.[288] 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 party a written request for admissions pursuant to Rule 198.[289] 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),[290] the requests are automatically deemed admitted and the trial court has no discretion to find otherwise.[291] "A matter admitted . . . is conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission."[292]

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Co. v. Gulf Coast Alloy Welding, Inc., 41 S.W.3d 145, 147 (Tex. App.—Amarillo 2000, pet. denied).

285. Smith v. Southwest Feed Yards, 835 S.W.2d 89, 90 (Tex. 1992); *Ersek*, 69 S.W.3d at 274.

286. Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 559 (Tex. 1990) (orig. proceeding); *In re* Fontenot, 13 S.W.3d at 113.

287. 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)).

288. *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).

289. TEX. R. CIV. P. 198.1.

290. TEX. R. CIV. P. 198.2(a).

291. TEX. R. CIV. P. 198.2(c); Beasley v. Burns, 7 S.W.3d 768, 769 (Tex. App.—Texarkana 1999, pet. denied); Morgan v. Timmers Chevrolet, Inc., 1 S.W.3d 803, 805 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); 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).

292. TEX. R. CIV. P. 198.3; *accord* Cont'l Carbon Co. v. Sea-Land Serv., Inc., 27 S.W.3d 184, 190 (Tex. App.—Dallas 2000, pet. denied); *Beasley*, 7 S.W.3d at 769; Smith v. Home Indem. Co., 683 S.W.2d 559, 562 (Tex. App.—Forth Worth 1985, no writ).

When admissions are deemed against a party, the party should file a motion to withdraw or amend the admissions as soon as possible.[293] Rule 198.3 permits the trial court to allow a party to withdraw or amend admissions if:

> (a) the party shows good cause for such withdrawal or amendment; and (b) 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 by permitting the party to amend or withdraw the admission.[294]

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.[295] The "good cause" requirement is the threshold issue which must be determined before the trial court may consider the remaining requirements of the rule.[296] 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.[297]

The trial court has broad discretion in permitting the withdrawal or amendment of deemed admissions, and its ruling will only be set aside on showing a clear abuse of discretion.[298] The reviewing

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293. *See* Employers Ins. of Wausau 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).

294. TEX. R. CIV. P. 198.3; Tex. Capital Sec., Inc. v. Sandefer, 58 S.W.3d 760, 770 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *Morgan*, 1 S.W.3d at 807.

295. *Sandefer*, 58 S.W.3d at 770; *Morgan*, 1 S.W.3d at 807.

296. Webb v. Ray, 944 S.W.2d 458, 461 (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. Tex. Employers' Ins. Ass'n, 790 S.W.2d 683, 688 (Tex. App.—Tyler 1990, no writ).

297. 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.

298. Stelly v. Papania, 927 S.W.2d 620, 622 (Tex. 1996) (per curiam); *Sandefer*, 58 S.W.3d at 770; *In re* Kellogg Brown & Root, Inc., 45 S.W.3d 772, 775 (Tex. App.—Tyler 2001, no pet.); Payton v. Ashton, 29 S.W.3d 896, 899 (Tex. App.—Amarillo 2000, no pet.); Steffan v. Steffan, 29 S.W.3d 627, 631 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *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

court should consider that the objective of the rules of procedure is to obtain a just, fair, equitable, and impartial adjudication of the rights of the litigants,[299] and that the purpose of Rule 198 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."[300] Furthermore, because the "'ultimate purpose of discovery is to seek the truth,'"[301] the rules should not be construed in a manner that will "prevent a [litigant] from presenting the truth" to the trier of facts.[302]

In *Employers Insurance of Wausau v. Halton*,[303] 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.[304] 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

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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); *Halton*, 792 S.W.2d at 467; Rosenthal v. Nat'l 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 admissions. Sutherland v. Moore, 716 S.W.2d 119, 120 (Tex. App.—El Paso 1986, orig. proceeding).

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

300. *Stelly*, 927 S.W.2d at 622 (quoting Sanders v. Harder, 148 Tex. 593, 227 S.W.2d 206, 208 (1950)); *see Cudd*, 867 S.W.2d at 104; *Greene*, 24 S.W.2d at 700.

301. *Stelly*, 927 S.W.2d at 622 (quoting Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984)); Tempay, Inc. v. TNT Concrete & Constr., Inc., 37 S.W.3d 517, 521 (Tex. App.—Austin 2001, pet. denied); *In re* Kellogg Brown & Root, Inc., 45 S.W.3d 772, 777 (Tex. App.—Tyler 2001, no pet.); *In re* Dynamic Health, Inc., 32 S.W.3d 876, 886 (Tex. App.—Texarkana 2000, no pet.).

302. Nat'l Cas. Co. v. Lane Exp. Inc., 998 S.W.2d 256, 260 (Tex. App.—Dallas 1999, pet. denied); *Stelly*, 927 S.W.2d at 622 (quoting *Jampole*, 673 S.W.2d at 573; *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.)).

303. 792 S.W.2d 462 (Tex. App.—Dallas 1990, writ denied).

304. Employers Ins. of Wausau v. Halton, 792 S.W.2d 462, 465 (Tex. App.—Dallas 1990, writ denied).

requests.[305] Consequently, even a weak excuse will suffice, particularly when the opposing party suffers no prejudice as a result of the delay.[306]

Under Rule 215.4, "an evasive or incomplete answer may be treated as a failure to answer."[307] The requesting party may challenge the sufficiency of the answers or objections, and if the court finds the answer insufficient under Rule 198, it may order the matter admitted or order an amended answer to be served.[308] The trial court's order is reviewed for an abuse of discretion based upon the entire record.[309]

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."[310] 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 re-

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305. *In re* Kellogg Brown & Root, 45 S.W.3d at 775; Steffan v. Steffan, 29 S.W.3d 627, 631 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Morgan v. Timmers Chevrolet, Inc., 1 S.W.3d 803, 807 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); *Wausau*, 792 S.W.2d 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*, 867 S.W.2d at 104; *see* 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").

306. *In re* Kellogg Brown & Root, 45 S.W.3d at 775; Credit Car Ctr., Inc. v. Chambers, 969 S.W.2d 459, 462 (Tex. App.—El Paso 1998, no pet.); Spiecker v. Petroff, 971 S.W.2d 536, 538 (Tex. App.—Dallas 1997, no pet.); *Webb*, 944 S.W.2d at 460; *see* Ramsey v. Criswell, 850 S.W.2d 258, 259 (Tex. App.—Texarkana 1993, no writ) (finding illness of counsel a sufficient excuse); *Greene*, 824 S.W.2d at 700 (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. *Greene*, 824 S.W.2d at 700-01.

307. TEX. R. CIV. P. 215.4(a).

308. TEX. R. CIV. P. 215.4(b); *see* United States Fire Ins. Co. v. Maness, 775 S.W.2d 748, 749 (Tex. App.—Houston [1st Dist.] 1989, writ ref'd) (affirming the trial court's decision to deem matters admitted).

309. *Maness*, 775 S.W.2d at 751.

310. Stelly v. Papania, 927 S.W.2d 620, 622 (Tex. 1996) (per curiam); *accord* TEX. R. CIV. P. 198.3.

sponse.[311] 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.[312]

### 3. Supplementation of Discovery Responses

Pursuant to Rule 193.5, a party whose response to a discovery request were correct and complete when made are, nonetheless, under a duty to amend or supplement the response:

> (1) to the extent that the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, and
> (2) to the extent that the written discovery sought other information, unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses.[313]

The party supplementing discovery must serve his supplemental discovery response "reasonably promptly" after the necessity arises.[314] If the supplemental response is made less than thirty days prior to the beginning of trial, the court will presume that the response was not made in a reasonable, prompt manner.[315] Pursuant to Rule 193.6, the sanction for a party's failure to comply with the duty to supplement is the exclusion of the evidence affected by the

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311. TEX. R. CIV. P. 198.3; *Stelly*, 927 S.W.2d at 622.

312. *Stelly*, 927 S.W.2d at 622. Tex. Capital Sec., Inc. v. Sandefer, 58 S.W.3d 760, 770 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *In re* Kellogg Brown & Root, 45 S.W.3d 772, 775 (Tex. App.—Tyler 2001, no pet.); Steffan v. Steffan, 29 S.W.3d 627, 631 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

313. TEX. R. CIV. P. 193.5. This rule, which was effective January 1, 1999, differs significantly from the former rule on supplementing discovery responses. Under the former rule, there was generally no affirmative duty to amend or supplement a response to discovery if the response was correct and complete when initially made. TEX. R. CIV. P. 166b (repealed 1999). The duty to supplement arose only when imposed by court order, by party agreement, to prevent the response from becoming misleading, which includes an expert witness whose testimony would respond to a proper inquiry, or when required to document a change in expert testimony on a material issue after having been deposed. TEX. R. CIV. P. 166b (repealed 1999). Rule 193.5 does not apply to deposition testimony. *See* TEX. R. CIV. P. 193.5 cmt. 5 (noting that the duty to supplement deposition testimony is governed by Rule 195.6).

314. TEX. R. CIV. P. 193.5(b).

315. *Id.*

violation,[316] unless the court finds good cause for the failure to supplement,[317] or the untimely response will not "unfairly surprise or unfairly prejudice" the other parties.[318] The party seeking to introduce the evidence has the burden of establishing good cause or lack of unfair surprise or unfair prejudice, which must be supported by the record.[319] However, the court may decide to grant a continuance or postpone the trial temporarily to allow a supplemental response to be made even if the party seeking to introduce the evidence fails to meet its burden.[320]

The salutary purpose of Rule 193.6 is to "'require complete responses to discovery so as to promote responsible assessment of settlement and to prevent trial by ambush.'"[321] The trial court's determination on the issue of good cause will not be set aside unless there is an abuse of discretion.[322] 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 judg-

316. TEX. R. CIV. P. 193.6(a).

317. TEX. R. CIV. P. 193.6(a)(1); Carpenter v. Cimarron Hydrocarbons Corp., 45 Tex. Sup. Ct. J. 1031, 1033, 2001 WL 1902793, at *4-5 (July 3, 2002) (defining "good cause" as in the analogues deemed admissions context).

318. TEX. R. CIV. P. 193.6(a)(2).

319. TEX. R. CIV. P. 193.6(b).

320. TEX. R. CIV. P. 193.6(c) (stating that the court has discretion to temporarily delay the trial, even if the party seeking to introduce evidence fails to meet the burden set forth in subsection b of this rule). The exclusion 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).

321. Aetna Cas. & Sur. Co. v. Specia, 849 S.W.2d 805, 807 (Tex. 1993) (orig. proceeding) (quoting Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 914 (Tex. 1992)); Etheridge v. Oak Creek Mobile Homes, Inc., 989 S.W.2d 412, 416 (Tex. App.—Beaumont 1999, no pet.); Castillo v. Am. Garment Finishers Corp., 965 S.W.2d 646, 652 (Tex. App.—El Paso 1998, no pet.). The cases refer to former rule 215(5), which is superseded by Rule 193.6. TEX. R. CIV. P. 193.6 (reflecting the subject matter of former rule 215(5) after the 1998 legislative amendments, which became effective on January 1, 1999).

322. *Carpenter*, 2001 WL 1902793, at *4-5; 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); *In re* P.M.B., 2 S.W.3d 618, 624 (Tex. App.—Houston [14th Dist.] 1999, no pet.); Aldine Indep. Sch. Dist. v. Baty, 999 S.W.2d 113, 115 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *In re* Estate of Waits, 994 S.W.2d 433, 434 (Tex. App.—Beaumont 1999, no pet.); Vaughn v. DAP Fin. Servs., Inc., 982 S.W.2d 1, 8 (Tex. App.—Houston [1st Dist.] 1997, no pet.).

ment.[323] 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.[324] If the undesignated witness testified about matters that were cumulative of other evidence, the appellate court will probably hold the error harmless and affirm.[325] An examination of the entire record is necessary to determine the likelihood that the error actually caused an improper judgment to be rendered.[326]

a. Fact Witnesses

In general, a party must disclose the identity of any potential party or persons having knowledge of relevant facts.[327] If after a proper discovery request, a fact witness is not disclosed at least thirty days prior to the beginning of trial, the witness may not be called to testify.[328] There are two exceptions to this harsh sanction. Under the first exception, a party may demonstrate good cause, on the record, to allow testimony of the witness.[329] Unfortunately, trying to define "good cause" is like trying to define "abuse of dis-

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

324. 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.] 1995), *writ denied*, 923 S.W.2d 569 (Tex. 1996) (per curiam).

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

326. *McKinney*, 772 S.W.2d at 75; Pittman v. Baladez, 158 Tex. 372, 312 S.W.2d 210, 216 (1958); Marathon Corp. v. Pitzner, 55 S.W.3d 114, 138 (Tex. App.—Corpus Christi 2001, no pet.); Prestige Ford Co. v. Gilmore, 56 S.W.3d 73, 79 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); Cruz v. Hinojosa, 12 S.W.3d 545, 550 (Tex. App.—San Antonio 1999, pet. denied).

327. TEX. R. CIV. P. 192.3.

328. TEX. R. CIV. P. 193.5(b); *Alvarado*, 830 S.W.2d at 915; 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*, 772 S.W.2d at 75; *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 S.W.2d 297, 298 (Tex. 1986); Yeldell v. Holiday Hills Ret. & Nursing Ctr., Inc., 701 S.W.2d 243, 246 (Tex. 1985).

329. TEX. R. CIV. P. 193.6(a)(1), (b); *Gee*, 765 S.W.2d at 395-96; Dolenz v. State Bar of Tex., 72 S.W.3d 385, 387 (Tex. App.—Dallas 2001, no pet.); F & H Inv. Inc. v. State, 55 S.W.3d 663, 669 (Tex. App.—Waco 2001, no pet.); Swain v. Southwestern Bell Yellow Pages, Inc., 998 S.W.2d 731, 732-33 (Tex. App.—Fort Worth 1999, no pet.); Birnbaum v. Alliance of Am. Insurers, 994 S.W.2d 766, 781 (Tex. App.—Austin 1999, pet. denied).

cretion." It is usually easier to define what is not "good cause."[330] 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.[331] Under the second exception, the untimely identified witness may testify if the party seeking to introduce the testimony demonstrates that the other parties will not be unfairly surprised or prejudiced by the late response.[332]

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330. *See* Carpenter v. Cimarron Hydrocarbons Corp., 45 Tex. Sup. Ct. J. 1031, 1033, 2001 WL 1902793, at *4-5 (July 3, 2002) (analogizing the definition of "good cause" in the deemed admissions context to the failure to timely respond context after noting that the court's prior inquiries established only what did not constitute "good cause"). *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. *Clark*, 774 S.W.2d at 646. In contrast, lack of surprise may be considered as a factor in determining good cause. *Gee*, 765 S.W.2d at 395 n.2. However, it is not enough in itself to establish good cause. *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. *Alvarado*, 830 S.W.2d at 915; *Clark*, 774 S.W.2d at 646. Likewise, a party's claim that a denial of the testimony will cause it "great harm" does not establish good cause. *Boothe*, 766 S.W.2d at 789. In *Clark*, the plaintiff attempted to introduce the testimony of the investigating officer who had not been located until ten days before trial. *Clark*, 774 S.W.2d at 647. 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. *Id.* Mere failure to locate the witness until the last minute, then, will not suffice absent sufficient efforts to locate them. *Id.*; *see also* K-Mart Corp. v. Grebe, 787 S.W.2d 122, 126-27 (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. Rainbo Baking Co. v. Stafford, 787 S.W.2d 41, 41 (Tex. 1990). In addition, the fact that the identity of the witness is known to all parties is not in itself good cause for the failure to supplement. *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*, 784 S.W.2d at 672.

331. *Clark*, 774 S.W.2d at 645-46; Mayes v. Stewart, 11 S.W.3d 440, 456 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Rundle v. Comm'n for Lawyer Discipline, 1 S.W.3d 209, 215 (Tex. App.—Amarillo 1999, no pet.).

332. TEX. R. CIV. P. 193.6(a)(2), (b).

Texas Rule of Civil Procedure 193.6, however, does not apply to parties named in the suit.[333] Thus, named parties may testify as fact witnesses even though that party may have failed to provide their name as a fact witness in the discovery response in a timely manner.[334] A named party to the suit 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 to all other parties, through pleadings by name and response to other discovery at least thirty . . . days in advance of trial."[335]

b. Expert Witnesses

Under Rule 192.7, there are two types of expert witnesses: (1) a testifying expert,[336] and (2) a consulting expert.[337] A party may discover the identity, mental impressions, and opinions of a testifying expert, as well as the identity, mental impressions, and opinions of a consulting expert if those conclusions have been reviewed by a testifying expert.[338] However, if those conclusions have not been reviewed by a testifying expert, neither the consulting expert's identity nor his conclusions are discoverable.[339]

Pursuant to Rule 195, a party may request the disclosure of information regarding testifying expert witnesses.[340] This request must be done via a request for disclosure.[341] Upon proper request,

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333. TEX. R. CIV. P. 193.6(a).

334. *See* TEX. R. CIV. P. 193.6(a) (stating that a party who untimely responds to a discovery request may not introduce the testimony of a witness "other than a named party," save the two listed exceptions).

335. Henry S. Miller Co. v. Bynum, 836 S.W.2d 160, 162 (Tex. 1992); Rogers v. Stell, 835 S.W.2d 100, 101 (Tex. 1992) (per curiam); Smith v. Southwest Feed Yards, 835 S.W.2d 89, 91 (Tex. 1992); Northwestern County Mut. Ins. Co. v. Rodriquez, 18 S.W.3d 718, 721 (Tex. App.—San Antonio 2000, pet. denied); Etheridge v. Oak Creek Mobile Homes, Inc., 989 S.W.2d 412, 416 (Tex. App.—Beaumont 1999, no pet.); 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, 356-57 (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).

336. TEX. R. CIV. P. 192.7(c) (defining a testifying expert as "an expert who may be called to testify as an expert witness at trial").

337. TEX. R. CIV. P. 192.7(d) (defining a consulting expert as an expert consulted, retained, or employed by a party "in anticipation of litigation or in preparation for trial, but who is not a testifying expert").

338. TEX. R. CIV. P. 192.3(e).

339. *Id.*

340. TEX. R. CIV. P. 195.1.

341. TEX. R. CIV. P. 195.1, 194.1, 194.2(f).

a party must "designate" experts (i.e., disclose the requested information) by: "[t]he later of . . . [thirty] days after the request is served, or—a) with regard to all experts testifying for a party seeking affirmative relief, [ninety] days before the end of the discovery period; b) with regard to all other experts, [sixty] days before the end of the discovery period."[342]

Any amendment or supplement to the response regarding expert testimony must be made "reasonably promptly after the party discovers the necessity for such a response."[343] If an amended or supplemental response is made fewer than thirty days before trial, it is presumed to have been made without reasonable promptness.[344] This failure to designate an expert in a timely manner will result in the exclusion of the expert's testimony unless the party seeking to call the expert witness can show good cause for failing to timely

342. TEX. R. CIV. P. 195.2; *see* TEX. R. CIV. P. 191.1 (stating that discovery rules can be modified by party agreement or by the court for good cause).

343. TEX. R. CIV. P. 193.5(b), 195.6. Under the former rule 166b(6)(b), expert witnesses were to be disclosed "as soon as is practical." TEX. R. CIV. P. 166b(6)(b) (repealed, 1999). In *Mentis v. Barnard*, the supreme court observed that since the rule did not provide a time period by which a party must actually decide to retain its testifying experts, "as soon as is practical" meant that the attorney was required to communicate the witness designation once it was finally decided that the expert was expected to testify. Mentis v. Barnard, 870 S.W.2d 14, 16 (Tex. 1994). The trial court was to consider good cause for late identification only if the court found that the witness was not designated "as soon as [was] practical." *Mentis*, 870 S.W.2d at 15. The new rule replaces "as soon as is practical" with "reasonably promptly" after the necessity for the response is discovered and also allows an exception for lack of unfair surprise and unfair prejudice to the other parties, in addition to the good cause exception. TEX. R. CIV. P. 193.5(b), 193.6(a)(2). There is also no longer the mandatory sanction of automatic exclusion if the exceptions do not apply. *See* Gutierrez v. Gutierrez, No. 08-00-00329-CV, 2002 WL 1729225 (Tex. App.—El Paso July 25, 2002, no pet.) (stating that the new rule 193.6 is "less burdensome" than the former rule).)

344. TEX. R. CIV. P. 193.5. One appellate court has concluded that supplemental responses submitted prior to the onset of the presumption of unreasonableness does not constitute a presumption that the response is made "reasonably promptly." Snider v. Stanley, 44 S.W.3d 713, 715 (Tex. App.—Beaumont 2001, pet. denied). The *Snider* court distinguished *Mentis v. Barnard* in its decision on the ground that *Mentis* was decided under the former rule 166b. *Snider*, 44 S.W.3d at 716.

respond,[345] or that the failure to timely respond "will not unfairly surprise or unfairly prejudice the other parties."[346]

c. Rebuttal Witnesses

The fact that a witness will be used only as a rebuttal witness does not eliminate the obligation to disclose their identity pursuant to the duty to supplement discovery;[347] thus, the party offering the witness's testimony must still demonstrate good cause or the lack of unfair surprise to the other parties for the late disclosure.[348] Good cause may be established when counsel is unable to reasonably anticipate the need for such rebuttal evidence.[349]

4. Mandamus Review of Discovery Rulings

In *Walker v. Packer*,[350] the supreme court established tighter parameters to limit future review of discovery rulings by writ of mandamus.[351] The court listed six instances in which discovery rulings would be the proper subject of mandamus review: first, when a trial court erroneously orders the discovery of privileged, confiden-

345. TEX. R. CIV. P. 193.6(a)(1). 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," and (5) the amount of time an expert had to prepare or form an opinion before trial; however, a combination of these factors may show good cause. *Accord Rodriguez*, 944 S.W.2d at 765-66; Colo. Interstate Gas Co. v. Hunt Energy Co., 47 S.W.3d 1, 14 (Tex. App.—Amarillo 2000, pet. denied).

346. TEX. R. CIV. P. 193.6(a)(2); F & H Invs., Inc. v. State, 55 S.W.3d 663, 670 (Tex. App.—Waco 2001, pet. denied).

347. TEX. R. CIV. P. 193.5; *see* Apresa v. Montfort Ins. Co., 932 S.W.2d 246, 251 (Tex. App.—El Paso 1996, no writ) (stating that "[r]ebuttal evidence," which includes rebuttal witness testimony, disproves facts introduced into evidence by an adverse party).

348. TEX. R. CIV. P. 193.6(a). Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 916 (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 (Tex. App.—Waco 1987, writ denied).

349. TEX. R. CIV. P. 192.3(d); *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 the need for his testimony as rebuttal witness could not have been anticipated prior to the unexpected false testimony of the opponent's witness).

350. 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

351. Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding) (holding that a party seeking mandamus review of a discovery order must demonstrate that an ordinary appeal would be inadequate); *see* Tilton v. Marshall, 925 S.W.2d 672, 681-82 (Tex. 1996) (orig. proceeding) (reaffirming *Walker's* requirement of compelling circumstances).

tial, or otherwise protected information which will materially affect the rights of the aggrieved party;[352] second, when a trial court "compels the production of patently irrelevant or duplicative documents, such that it clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party";[353] third, when a trial court's order vitiates or severely compromises the party's ability to present a viable claim or defense at trial so the trial could be a waste of judicial resources;[354] fourth, when the trial court's denial of discovery goes "to the heart of a party's case";[355] fifth, when the trial court denies "discovery and the missing discovery cannot be made a part of the appellate record";[356] and sixth, when the trial court denies discovery and "refuses to make [the requested discovery] part of the record."[357]

Under *Walker*, an appellate court will issue mandamus to set aside a discovery order when the trial court fails to perform a clear

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352. *Walker*, 827 S.W.2d at 843; *accord* Perry v. Del Rio, 66 S.W.3d 239, 257 (Tex. 2001); *In re* Ford Motor Co., 988 S.W.2d 714, 721 (Tex. 1998) (orig. proceeding); *In re* Family Hospice, Ltd., 62 S.W.3d 313, 316 (Tex. App.—El Paso 2001, orig. proceeding); *In re* Learjet, Inc., 59 S.W.3d 842, 845 (Tex. App.—Texarkana 2001, orig. proceeding [leave denied]); *In re* Valero Energy Corp., 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding).

353. *Walker*, 827 S.W.2d at 843 (citing Sears, Roebuck & Co. v. Ramirez, 824 S.W.2d 558 (Tex. 1992) (orig. proceeding); Gen. Motors Corp. v. Lawrence, 651 S.W.2d 732 (Tex. 1983) (orig. proceeding)); *see* Tex. Water Comm'n 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).

354. *See Walker*, 827 S.W.2d at 843. The court held that

> when a trial court imposes discovery sanctions which have the effect of *precluding a decision on the merits of a party's 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.

*Id.*; *see also In re* Ford Motor Co., 988 S.W.2d at 721 (stating that a discovery order is not adequate if the party is unable to present a viable claim or defense); *accord In re* Family Hospice, 62 S.W.3d at 317; *In re* Frank A. Smith Sales, Inc., 32 S.W.3d 871, 875 (Tex. App.—Corpus Christi 2000, orig. proceeding); *In re* Kellogg Brown & Root, 7 S.W.3d 655, 657 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding [leave denied]); *In re* Valero Energy Corp., 973 S.W.2d at 457.

355. *Walker*, 827 S.W.2d at 843.

356. *Id.* (citing Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 558 (Tex. 1990) (orig. proceeding)); *accord In re* Ford Motor Co., 988 S.W.2d at 721; *In re* Family Hospice, Ltd., 62 S.W.3d at 316; *In re* Frank A. Smith Sales, Inc., 32 S.W.3d at 875; *In re* Kellogg Brown & Root, 7 S.W.3d at 657; *In re* Valero Energy Corp., 973 S.W.2d at 457.

357. *Walker*, 827 S.W.2d at 843 (citing *Tom L. Scott, Inc.*, 798 S.W.2d at 558).

legal duty, or commits a clear abuse of discretion;[358] when there is no adequate remedy by appeal;[359] and in the supreme court, when the proceeding raises issues important to the state's jurisprudence.[360] 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."[361] 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.[362] However, as to the resolution of legal issues, the trial court's decision is not binding on appellate courts.[363] Accordingly, a failure to properly analyze or apply the law will constitute an abuse of discretion.[364]

A fundamental tenet of mandamus review is that the party seeking relief must establish that there is no adequate remedy at law.[365] Because mandamus is such an extraordinary remedy, it is available "'only in situations involving manifest and urgent necessity and not

358. *Id.* at 839-40; Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 271 (Tex. 1992) (orig. proceeding); McGough v. First Court of Appeals, 842 S.W.2d 637, 640 (Tex. 1992) (orig. proceeding) (per curiam); 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).

359. *Tipps*, 842 S.W.2d at 271; *McGough*, 842 S.W.2d at 640; *Walker*, 827 S.W.2d at 840; *Johnson*, 700 S.W.2d at 917; *Jampole*, 673 S.W.2d at 573. If the challenged order is void, the relator need not show the lack of an appellate remedy. *In re* Southwestern Bell Tel. Co., 35 S.W.3d 602, 605 (Tex. 2000) (per curiam).

360. 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).

361. *Walker*, 827 S.W.2d at 839 (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).

362. *Walker*, 827 S.W.2d at 839-40 (citing Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 41-42 (Tex. 1989)); *Johnson*, 700 S.W.2d at 917-18. The mere fact that the 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. *Id.* at 840.

363. Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding); *In re* Consol. Freightways, Inc., 75 S.W.3d 147, 151 (Tex. App.—San Antonio 2002, no pet.); *In re* Kellogg Brown & Root, Inc., 45 S.W.3d at 775.

364. *Walker*, 827 S.W.2d at 840 (citing Joachim v. Chambers, 815 S.W.2d 234, 240 (Tex. 1991)); *In re* Consol. Freightways, Inc., 75 S.W.3d at 151; *In re* Adkins, 70 S.W.3d 384, 389 (Tex. App.—Fort Worth 2002, orig. proceeding); Glazer's Wholesale Distrib., Inc. v. Heineken USA, Inc., No. 05-99-01685-CV, 2001 WL 727351, at *3 (Tex. App.—Dallas June 29, 2001, pet. granted); *In re* Rangel, 45 S.W.3d 783, 786 (Tex. App.—Waco 2001, no pet.); *In re* Kellogg Brown & Root, Inc., 45 S.W.3d at 775.

365. *Walker*, 827 S.W.2d at 840 (citing Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 684 (Tex. 1989)); *In re* Patton, 47 S.W.3d 825, 827 (Tex. App.—Fort Worth 2001, orig. proceeding); *In re* Tija, 50 S.W.3d 616, 616 (Tex. App.—Amarillo 2001, orig. proceeding).

for grievances that may be addressed by other remedies.' "[366] Generally, remedy by appeal is not inadequate merely because it may cause more expense or delay than mandamus review.[367] Mandamus review "'is justified only when parties stand to lose their substantial rights.' "[368]

The scope of review in a mandamus proceeding includes certified or sworn copies of the order complained of, other relevant exhibits,[369] and the reporter's record from the hearing on the matter.[370] The failure of a party to include the reporter's record on mandamus may cause the reviewing court to presume that the trial court's ruling was actually supported by the record.[371] In some instances, such as when the trial court makes its determination without a hearing, there is no need for a reporter's record. In such a case, the relator should file an affidavit stating that the trial court's decision

366. *Walker*, 827 S.W.2d at 840 (citing *Holloway*, 767 S.W.2d at 684); *see* Deloitte & Touche, L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394, 396 (Tex. 1997) (orig. proceeding) (noting that "[m]andamus is an extraordinary proceeding, encompassing an extraordinary remedy"); Republican Party of Tex. v. Dietz, 940 S.W.2d 86, 88 (Tex. 1997) (referring to mandamus as "an 'extraordinary' remedy . . . 'available only in 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); *In re* Burgett, 23 S.W.3d 124, 126 (Tex. App.—Texarkana 2000, orig. proceeding).

367. *Walker*, 827 S.W.2d at 842; Tarrant County Hosp. Dist. v. Henry, 52 S.W.3d 434, 453 (Tex. App.—Fort Worth 2001, no pet.); *Glazer's Wholesale Distrib.*, 2001 WL 727351, at *3; *In re* Rogers, 43 S.W.3d 20, 24 (Tex. App.—Amarillo 2001, no pet.).

368. *Walker*, 827 S.W.2d at 842 (quoting Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648, 652 (1958)); *accord* Perry v. Del Rio, 66 S.W.3d 239, 257 (Tex. 2001); *In re* State, 65 S.W.3d 383, 387 (Tex. App.—Tyler 2002, no pet.); *In re* Learjet, Inc., 59 S.W.3d 842, 845 (Tex. App.—Texarkana 2001, pet. denied); *Glazer's Wholesale Distrib.* 2001 WL 727351, at *3.

369. TEX. R. APP. P. 52.3(j).

370. TEX. R. APP. P. 52.3(g), (j).

371. *In re* Daisy Mfg. Co., 17 S.W.3d 654, 660 (Tex. 2000) (orig. proceeding) (mandating the court of appeals to set aside its improperly granted mandamus order because the trial court could reasonably conclude from the record the party's failure to show that the less intrusive discovery was insufficient). The court stated that the intermediate court incorrectly relied on unanswered areas of inquiry in arriving at its conclusion. *Id.* at 659. Consequently, because the trial court did not abuse its discretion in its discovery ruling, the appellate court erred in granting mandamus relief. *Id.* at 660. Similarly, the same presumption (that the trial court's ruling was supported by the record) arises in appeals cases (mandamus proceedings are original proceedings, not appellate) lacking the reporter's record. *See* Englander Co. v. Kennedy, 428 S.W.2d 806, 806-07 (Tex. 1968) (per curiam) (presuming sufficient evidence existed to support the trial court's findings, since an incomplete record was before the appellate court).

was made without a hearing.[372] Instead of a reporter's record, the relator may include a "verified affidavit" of all facts necessary to establish the right to mandamus relief.[373] However, a reporter's record from a hearing is preferable.[374]

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.[375] 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.[376] 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 ruling was an abuse of discretion and whether the trial court's order, in light of the entire record and the offending party's conduct, "was reasonably calculated, and probably did cause, the rendition of an improper judgment."[377]

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

373. TEX. R. APP. P. 52.3; *see also Barnes*, 751 S.W.2d at 495 (finding that a verified affidavit will suffice).

374. 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.

375. TEX. R. APP. P. 33.1.

376. *See* Dallas Fire Ins. Co. v. Davis, 893 S.W.2d 288, 293 (Tex. App.—Fort Worth 1995, orig. proceeding) (stating that because the estoppel claim was not raised at trial, it could not be considered by the appellate court); 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 the complaint that interrogatories were too broad cannot be raised for the first time on appeal).

377. Lucas v. Titus County Hosp. Dist., 964 S.W.2d 144, 157 (Tex. App.—Texarkana 1998, pet. denied); *accord* TEX. R. APP. P. 44.1; Bott v. Bott, 962 S.W.2d 626, 628 (Tex. App.—Houston [14th Dist.] 1997, no pet.); Ramirez v. Otis Elevator Co., 837 S.W.2d 405, 409-10 (Tex. App.—Dallas 1992, writ denied); *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").

P. *Discovery Sanctions*

The purpose of discovery is "to allow the litigants to obtain the fullest knowledge the facts and issues prior to trial."[378] 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."[379] There is no provision for interlocutory appeal; therefore, discovery sanctions cannot be appealed until the trial court renders a final judgment.[380]

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.[381] If a sanctioned party has an adequate remedy at law, then mandamus is not available.[382] However, in *TransAmerican Natural Gas Corp. v. Powell*,[383] 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."[384] Whether a trial court's sanction is reviewable by mandamus or by appeal is not clear in every case. A "death-penalty" sanction, which is any sanction that is "case determinative," (i.e., any claim in which the sanction precludes the mer-

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378. 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)); Avary v. Bank of Am., 72 S.W.3d 779, 787 (Tex. App.—Dallas 2002, no pet.); *see* State v. Lowry, 802 S.W.2d 669, 671 (Tex. 1991) (observing that "[d]iscovery is [ ] the linchpin of the search for truth").

379. TEX. R. CIV. P. 215.3.

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

381. Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding); Trans-American Natural Gas Corp. v. Powell, 811 S.W.2d 913, 919 (Tex. 1991) (orig. proceeding); *In re* Shipmon, 68 S.W.3d 815, 818 (Tex. App.—Amarillo 2001, orig. proceeding); *In re* Energas, 63 S.W.3d 50, 52 (Tex. App.—Amarillo 2001, orig. proceeding); *In re* City of San Benito, 63 S.W.3d 19, 25-26 (Tex. App.—Corpus Christi 2001, orig. proceeding); *In re* Patton, 47 S.W.3d 825, 827 (Tex. App.—Fort Worth 2001, orig. proceeding); *In re* Tija, 50 S.W.3d 614, 616 (Tex. App.—Amarillo 2001, orig. proceeding).

382. *In re* Southwestern Bell Tel. Co., 35 S.W.3d 602, 605 (Tex. 2000); *TransAmerican*, 811 S.W.2d at 919 (citing State v. Walker, 679 S.W.2d 484, 485 (Tex. 1984)).

383. 811 S.W.2d 913 (Tex. 1991).

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

its of the case from being presented)[385] is clearly reviewable by mandamus.[386] In addition, a monetary sanction may be reviewed by mandamus if it "raises the real possibility that a party's willingness or ability to continue the litigation will be significantly impaired."[387] 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.[388]

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385. Perez v. Murff, 972 S.W.2d 78, 81 (Tex. App.—Texarkana 1998, no pet.) (citing Eason v. Eason, 860 S.W.2d 187, 191 (Tex. App.—Houston [14th Dist.] 1993, no writ); Smith v. Nguyen, 855 S.W.2d 263, 267 (Tex. App.—Houston [14th Dist.] 1993, writ denied)); Perkins v. Patrick, No. 05-98-00585-CV, 2000 WL 361524, at *1 (Tex. App.—Dallas Apr. 10, 2001, no pet.) (not designated for publication) (citing Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991)).

386. *Perkins*, 2000 WL 361524, at *1; *Smith*, 855 S.W.2d at 267. Death-penalty sanctions are also limited by constitutional due process. 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) (stating that courts may not use death-penalty sanctions unless the sanctioned party's conduct justifies the presumption of a meritless claim).

387. *Braden*, 811 S.W.2d at 929 (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 an appeal would be allowed, was reviewable by mandamus. *Id.*; *see* Ford Motor Co. v. Tyson, 943 S.W.2d 527, 532 (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 (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. *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. *Id.* If the sanctioned party complains, the trial court must provide either that the sanction is to be paid at the time a final judgment is rendered, or make express written findings explaining why the sanction does not have a preclusive effect. *Id.*

388. *Compare* Pope v. Davidson, 849 S.W.2d 916, 920 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (concluding that striking a witness's 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.

Rule 215 permits a wide range of sanctions for a variety of purposes:[389] "to secure compliance with the discovery rules, . . . to deter other litigants from similar misconduct, . . . to punish violators,"[390] "to insure a fair trial, to compensate a party for past prejudice, . . . and to deter certain bad faith conduct."[391] The sanctions, however, must be "just."[392] 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."[393] Accordingly, the sanction imposed against the offending party "must be directed against the abuse and toward remedying the prejudice caused to the innocent party."[394] In other

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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 appears to state the rule that the supreme court would follow "The law does not permit pre-trial 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).

389. TEX. R. CIV. P. 215.

390. 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)); Spohn Hosp. v. Mayer, 72 S.W.3d 52, 63 (Tex. App.—Corpus Christi 2001, pet. filed); Roberts v. Rose, 37 S.W.3d 31, 34 (Tex. App.—San Antonio 2000, no pet.).

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

392. 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, 917 (Tex. 1991) (orig. proceeding); State Farm Fire & Cas. Co. v. Rodriquez, No. 04-01-00268-CV, 2002 WL 1624680, at *10 (Tex. App.—San Antonio July 24, 2002, no pet.); *In re* Adkins, 70 S.W.3d 384, 389 (Tex. App.—Fort Worth 2002, no pet.); *see Braden*, 811 S.W.2d at 930 (asserting that "[j]ustice should not tolerate [discovery] abuse, but injustice cannot remedy it.").

393. Hamill v. Level, 917 S.W.2d 15, 16 (Tex. 1996); *TransAmerican*, 811 S.W.2d at 917; *Rodriquez*, 2002 WL 1624680, at *10; *In re* Adkins, 70 S.W.3d at 389; *In re* Polaris Indus., Inc., 65 S.W.3d 746, 751 (Tex. App.—Beaumont 2001, no pet.).

394. *TransAmerican*, 811 S.W.2d at 917; *In re* Adkins, 70 S.W.3d at 390; *In re* Polaris Indus., 65 S.W.3d at 751.

words, the sanctions must be specifically tailored to the abuse found.[395]

The second prong of this analysis requires that the sanction not be excessive; the sanction must fit the offensive conduct.[396] The sanction should not be more severe than necessary to satisfy its legitimate purpose (i.e., to promote compliance).[397] Moreover, as a general rule, a trial court should always impose lesser sanctions first, before imposing a death-penalty sanction.[398]

In determining whether the sanction imposed is just, the trial court may consider the "entire record of the case up to and including the motion to be considered."[399] Therefore, the trial court is not limited to considering only the specific violation committed, but is entitled to consider other conduct occurring during discovery.[400]

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

396. *Id.*; *Rodriquez*, 2002 WL 1624680, at *10; *In re* Adkins, 70 S.W.3d at 390; Sanchez *ex rel.* Estate of Galvan v. Brownsville Sports Ctr., Inc., 51 S.W.3d 643, 659 (Tex. App.—Corpus Christi 2001, pet. granted); *see In re* Polaris Indus., 65 S.W.3d at 751 (stating that "[t]he 'punishment should fit the crime'").

397. *TransAmerican*, 811 S.W.2d at 917; *In re* Adkins, 70 S.W.3d at 390; Shamrock Oil Co. v. Gulf Coast Natural Gas Inc., 68 S.W.3d 737, 740 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); Best Indus. Unif. Supply Co. v. Gulf Coast Alloy Welding Inc., 41 S.W.3d 145, 148 ( Tex. App.—Amarillo 2000, pet. denied); Roberts v. Rose, 37 S.W.3d 31, 33 (Tex. App.—San Antonio 2000, no pet.).

398. *Hamill*, 917 S.W.2d at 16 (disapproving the appellate court's conclusion that a trial court is not required to first impose lesser sanctions before ordering death-penalty sanction); Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 849 (Tex. 1992) (orig. proceeding) (holding that lesser sanctions will suffice if they "promote compliance, deterrence, and discourage further abuse"); *accord Shamrock Oil*, 68 S.W.3d at 740; *Best Indus. Unif. Supply Co.*, 41 S.W.3d at 148; *Roberts*, 37 S.W.3d at 34; Wal-Mart Stores, Inc. v. Davis, 979 S.W.2d 30, 46 (Tex. App.—Austin 1998, pet. denied).

399. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241 (Tex. 1985); Sharpe v. Kilcoyne, 962 S.W.2d 697, 702 (Tex. App.—Fort Worth 1998, no pet.); Hartford Accident & Indem. Co. v. Abascal, 831 S.W.2d 559, 561 (Tex. App.—San Antonio 1992, orig. proceeding); Garcia Distrib., Inc. v. Fedders Air Conditioning, USA Inc., 773 S.W.2d 802, 806-07 (Tex. App.—Dallas 1987, writ denied); Med. Protective Co. v. Glanz, 721 S.W.2d 382, 388 (Tex. App.—Corpus Christi 1986, writ ref'd).

400. *Sharpe*, 962 S.W.2d at 702; *Hartford Accident & Indem. Co.*, 831 S.W.2d at 561; *Garcia Distrib., Inc.*, 773 S.W.2d at 806-07; *Med. 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. *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.

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.[401] However, written findings are not required because they are often unnecessary and constitute an undue burden on the trial court.[402] Moreover, appellate courts are not required to defer to the trial court's written findings.[403] The reviewing court will review the findings in the same manner as findings in a nonjury case tried on the merits.[404]

## Q. *Inherent Power to Sanction*

### 1. Trial Court Power

Trial courts have the inherent power to impose sanctions for bad faith abuse of the judicial process, which may not be covered by rule or statute.[405] The inherent powers of a trial court are those

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*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).

401. 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 aide 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 help assure that the decision was the result of thoughtful judicial deliberation; and third, the articulation of the trial judge's analysis enhances the effect of deterrence via the sanctions order. *Blackmon*, 841 S.W.2d at 852.

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

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

404. *Blackmon*, 841 S.W.2d at 852 (citing Rossa v. U.S. Fidelity & Guar. Co., 830 S.W.2d 668, 672 (Tex. App.—Waco, writ denied)).

405. *In re* Bennett, 960 S.W.2d 35, 40 (Tex. 1997) (per curiam); Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 732 (Tex. 1997); Mills v. Ghilain, 68 S.W.3d 141, 145 (Tex. App.—Corpus Christi 2001, no pet.); Roberts v. Rose, 37 S.W.3d 31, 33 (Tex. App.—San Antonio 2000, no pet.); Williams v. Akzo Nobel Chems., Inc. 999 S.W.2d 836, 843 (Tex. App.—Tyler 1999, no pet.); 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 Coll., 831 S.W.2d 506, 509 (Tex. App.—Corpus Christi 1992, no writ) (citing Chambers v. NASCO, Inc. 501 U.S. 32, 46-47 (1991)); *see* Remington Arms Co. v. Caldwell, 850 S.W.2d 167, 172 (Tex. 1993) (holding that the trial court has "inherent and statutory power to discipline errant counsel for improper trial conduct in the exercise of its contempt powers"); Koslow's v. Mackie, 796

which "aid in the exercise of its jurisdiction, in the administration of justice, and in preservation of its independence and integrity."[406] The inherent power is limited;[407] it exists only "to deter, alleviate, and counteract bad faith abuse of the judicial process, such as any significant interference with a court's traditional core functions."[408] 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 judiciary, such as,[409] "hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, entering final judgment and

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S.W.2d 700, 703 (Tex. 1990) (holding that the trial court has inherent power to impose sanctions for violations of a pretrial order). *But cf.* Shook v. Gilmore & Tatge Mfg. Co., 851 S.W.2d 887, 891 (Tex. App.—Waco 1993, 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) (holding that since a court has the power to impose fees on a party litigating in bad faith, then it must also have the power to impose expenses on those who willfully abuse the judicial process); *In re* Stone, 986 F.2d 898, 901-02 (5th Cir. 1993) (per curiam) (citing Eash v. Riggins Trucking, 757 F.2d 557, 562-64 (3d Cir. 1985) (en banc)). The court described three categories of inherent powers of federal courts, including power to impose sanctions for abusive litigation practices. *Id.* at 901.02.

406. Pub. 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); Cont'l Carbon Co. v. Sea-Land Servs., Inc., 27 S.W.3d 184, 189 (Tex. App.—Dallas 2000, pet. denied); *In re* Polybutylene Plumbing Litig., 23 S.W.3d 428, 438 (Tex. App.—Houston [1st Dist.] 2000, pet. filed); *Roberts*, 37 S.W.3d at 33; Rodriquez v. State, 970 S.W.2d 133, 135 (Tex. App.—Amarillo 1998, pet. ref'd); *Kutch*, 831 S.W.2d at 510; *see Metzger*, 892 S.W.2d at 51 (granting trial courts inherent power to "administer justice and preserve their dignity and integrity").

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

408. Scott v. Watumull, No. 05-95-01451-CV, 1997 WL 25473, at *10 (Tex. App.—Dallas Jan. 24, 1997, writ denied) (not designated for publication) (citing *Kutch*, 831 S.W.2d at 509-510); *see* Mills v. Ghilain, 68 S.W.3d 141, 145 (Tex. App.—Corpus Christi 2001, no pet.) (allowing courts to sanction attorneys for improper conduct); Toles v. Toles, 45 S.W.3d 252, 266-67 (Tex. App.—Dallas 2001, pet. denied) (holding that a court has the inherent power to sanction attorneys who abuse the judicial process); *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)).

409. McWhorter v. Sheller, 993 S.W.2d 781, 789 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *see Scott*, 1997 WL 25473, at *10 (holding that for a court's inherent power to apply, there must exist evidence and factual findings that the "conduct significantly interfered with the court's legitimate exercise of one of its core powers"); *Kutch*, 831 S.W.2d at 510 (requiring a showing that the complained-of conduct interfered with the court's legitimate exercise of power).

enforcing that judgment."[410] Because of the amorphous nature of this inherent power and its potency, the courts of appeals have admonished the trial courts to use it sparingly and to be mindful of the sanctioned party's due process rights.[411] A sanction must be just, a direct correlation between the offensive conduct and the sanction imposed must exist, and the sanction must not be excessive.[412] The scope of review is the entire record before the trial court and the standard of review is abuse of discretion.[413]

2. Appellate Court Power

In *Johnson v. Johnson*,[414] 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."[415] In *Johnson,* the appellant's attorney insulted the judge by questioning both his ability to understand the complexities of the case and his decision to uphold the law.[416] 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 opinion to the Office of the General Counsel for the State Bar of Texas for investigation and any action it deemed necessary.[417] The San Antonio Court of Appeals also has held that it has the inherent

410. Kutch v. Del Mar Coll., 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)).

411. *Kutch*, 831 S.W.2d at 510-11 (reiterating the due process limitations on a court's power to sanction).

412. *Scott*, 1997 WL 25473, at *10 (citing *Kutch*, 831 S.W.2d at 511-12).

413. *Id.* (citing *Kutch*, 831 S.W.2d at 511-12); *see* Hart v. Wright, 16 S.W.3d 872, 875 (Tex. App.—Fort Worth 2002, pet. denied) (concluding that an abuse of discretion occurs when a court acts unreasonably and arbitrarily, and without reference to guiding principles).

414. 948 S.W.2d 835 (Tex. App.—San Antonio 1997, writ denied).

415. Johnson v. Johnson, 948 S.W.2d 835, 840 (Tex. App.—San Antonio 1997, writ denied).

416. *Id.*

417. *Id.* at 841. 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

power to sanction a court reporter for failing to comply with an order requiring her to file the reporter's record by a day and time certain.[418] 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's of appeals' sanction would be abuse of discretion.

## R. *Frivolous Pleadings*

Rule 13,[419] in combination with the Texas Civil Practice and Remedies Code,[420] instructs the trial court to "impose appropriate sanctions available under [R]ule 215(2)(b) if a pleading, motion or other paper is [signed,] groundless and brought in bad faith or for purposes of harassment."[421] 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 for good cause,[422] the particulars of

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Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 732 (Tex. 1997) (Spector, J., concurring) (advocating a distinction between "'respectful advocacy and judicial denigration'").

418. Ryan v. Lopez, 993 S.W.2d 294, 298 (Tex. App.—San Antonio 1999, no pet.) (quoting Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979) (recognizing the inherent power of the court to sanction "to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of [its] independence and integrity")).

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

420. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.001-.013, 10.001-.006 (Vernon Supp. 2002) (providing assessment of attorney's fees, costs, and damages for certain frivolous lawsuits and defenses).

421. Trimble v. Itz, 898 S.W.2d 370, 372-73 (Tex. App.—San Antonio 1995, writ denied); *accord* Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios, 46 S.W.3d 873, 878 (Tex. 2001); Susman Godfrey, L.L.P. v. Marshall, 832 S.W.2d 105, 108 (Tex. App.—Dallas 1992, orig. proceeding).

422. Appelton v. Appelton, 76 S.W.3d 78, 86 (Tex. App.—Houston [14th Dist.] 2002, no pet.); 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. 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. 2002), 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. 2002).

which must be included in the sanctions order.[423] In determining 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 existing law.'"[424] 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."[425] 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'"; Rule 13 should not be used as "'a weapon . . . to punish those with whose intellect

423. TEX. R. CIV. P. 13; TEX. CIV. PRAC. & REM. CODE ANN. § 10.005 (Vernon Supp. 2002); *see* Murphy v. Friendswood Dev. Co., 965 S.W.2d 708, 710 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (reversing a sanction order incorporated by reference a motion for sanctions to satisfy good cause requirements of Rule 13); 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). 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 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) (acknowledging the split and agreeing with the courts that require an objection to the lack of particularity in order to properly preserve a complaint for appellate review). The court reasoned that although Rule 13 calls for particularity, the appellant did not object to the lack thereof. *Id.* at 667; *see also Appelton*, 76 S.W.3d at 87 (holding appellant's failure to object to sanctions entered without specific good cause justification did not preserve error for appeal).

424. Home Owners Funding Corp. of Am. v. Scheppler, 815 S.W.2d 884, 889 (Tex. App.—Corpus Christi 1991, no writ); *accord* TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(2) (Vernon Supp. 2002); *In re* United Servs. Auto Ass'n, 76 S.W.3d 112, 116 (Tex. App.—San Antonio 2002, no pet.).

425. *Scheppler*, 815 S.W.2d at 889; *accord* Mattly v. Spiegel, Inc., 19 S.W.3d 890, 896 (Tex. App.—Houston [14th Dist.] 2000, no pet.); Williams v. Akzo Nobel Chems., Inc., 999 S.W.2d 836, 845 (Tex. App.—Tyler 1999, no pet.); Karagounis v. Prop. Co. of Am., 970 S.W.2d 761, 764 (Tex. App.—Amarillo 1998, pet. denied); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 9.012(b) (Vernon Supp. 2002) (listing factors that the court must consider). Rule 13 imposes a duty on the trial court to point out with particularity the act or omission on which the sanctions are based. 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 Mgmt., 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. TEX. R. CIV. P. 13,215; Kahn v. Garcia, 816 S.W.2d 131, 133 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding).

or philosophic viewpoint the trial court finds fault.'"[426] A trial court's order under Rule 13 or the Code is reviewed for an abuse of discretion.[427]

### S. *Section 13.01 Expert Reports*

Under Article 4590i, § 13.01 of the Medical Liability and Insurance Improvement Act, a medical-malpractice plaintiff is required to file, within ninety days of filing suit, an expert report providing a fair summary of the expert's opinions about the standard of care, breach, and causation.[428] After ninety days, the defendant may request that the plaintiff file a cost bond for each physician or health care provider if the plaintiff has not complied with the expert report requirement.[429] Within 180 days of filing suit, the plaintiff must either provide each physician or health care provider with an expert report and the expert's curriculum vitae or nonsuit the claims.[430] The supreme court outlined the legislature's intent by stating:

> [b]ecause expert testimony is crucial to a medical-malpractice case, knowing what specific conduct the plaintiff's experts have called into question is critical to both the defendant's ability to prepare for trial and the trial court's ability to evaluate the viability of the plaintiff's claims. This makes eliciting an expert's opinions early in the litiga-

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426. *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)).

427. Am. Transitional Care Ctr. of Tex., Inc. v. Palacios, 46 S.W.3d 873, 877 (Tex. 2001); GTE Communications Sys. Corp. v. Tanner, 856 S.W.2d 725, 730 (Tex. 1993); Kugle v. Daimler Chrysler Corp., No. 04-00-00617-CV, 2002 WL 1905225, at *4, (Tex. App.—San Antonio Aug. 21, 2002, no pet.); Mills v. Ghilain, 68 S.W.3d 141, 145 (Tex. App.—Corpus Christi 2001, no pet.); Land v. AT & S Transp., Inc., 947 S.W.2d 665, 667 (Tex. App.—Austin 1997, no writ); *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*, 816 S.W.2d at 889.

428. TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(a), (r)(6) (Vernon Supp. 2002). The statute defines an "expert report" as "a written report by an expert that provides a fair summary of the expert's opinions . . . regarding applicable standards of care, the manner in which the care [is] rendered . . . failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed." *Id.* § 13.01(r)(6).

429. *Id.* § 13.01(a), (b).

430. *Id.* § 13.01(d)(i); Bowie Mem'l Hosp. v. Wright, 79 S.W.3d 48, 51 (Tex. 2002); *Palacios*, 46 S.W.3d at 877.

> tion an obvious place to start in attempting to reduce frivolous lawsuits.[431]

If the plaintiff does not comply with the expert report requirement, the trial court must sanction the plaintiff by dismissing the case with prejudice, award attorney's fees to the defendant, and order the forfeiture of any applicable cost bond necessary to pay the award.[432] If the plaintiff does file a timely report, the defendant may file a motion challenging the adequacy of the report, and the trial court must grant the motion and dismiss the claims against that defendant if it appears that the report does not comply with the statutory requirements and the time for filing the report has passed.[433] When considering a motion to dismiss under Section 13.01(1), the issue is whether the expert report represents a good faith effort to comply with the statute.[434] To constitute a good faith effort, the report must "(1) inform the defendant of the specific conduct the plaintiff has called into question," and (2) "provide a basis for the trial court to conclude that the claims have merit."[435] The standard of review of a trial court's decision as to the adequacy of the expert report is abuse of discretion.[436]

### T. *Vexatious Litigation*

The Texas Civil Practice and Remedies Code has been amended to include Chapter 11 in an attempt to deter nonmeritorious litigation.[437] The Code now provides that within ninety 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."[438] After the defendant files this motion, the litigation is stayed until the trial court deter-

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431. *Palacios*, 46 S.W.3d at 876-77 (citing HOUSE COMM. ON CIV. PRAC., BILL ANALYSIS, Tex. H.B. 971, 74th Leg., R.S. (1995)).

432. TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(e) (Vernon Supp. 2001); *Palacios*, 46 S.W.3d at 877.

433. TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(e) (Vernon Supp. 2001); *Palacios*, 46 S.W.3d at 877.

434. Bowie Mem'l Hosp. v. Wright, 79 S.W.3d 48, 52 (Tex. 2002).

435. *Id.*

436. *Palacios*, 46 S.W.3d at 877-78.

437. TEX. CIV. PRAC. & REM. CODE ANN. § 11.001-.104 (Vernon Supp. 2002).

438. *Id.* § 11.051.

mines the merits of the motion.[439] The Code sets forth the criteria for determining whether a plaintiff is a vexatious litigant.[440]

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.[441] If the plaintiff fails to furnish the security within the time set by the court, the court shall dismiss the litigation.[442] 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 court judge has not given the plaintiff permission to file the litigation.[443] If the plaintiff violates the order, he is subject to contempt of court.[444] 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.[445]

### U. *Summary Judgment; Rule 166a(c)*

The underlying purpose of Texas' summary judgment rules is a narrow one — the elimination of "patently unmeritorious claims and untenable defenses."[446] 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 is therefore entitled to judgment as a matter of law.[447] 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 mo-

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439. *Id.* § 11.052.
440. *Id.* § 11.054.
441. *Id.* § 11.055.
442. TEX. CIV. PRAC. & REM. CODE ANN. § 11.056 (Vernon Supp. 2002).
443. *Id.* § 11.101(a).
444. *Id.* § 11.101(b).
445. *Id.* §§ 11.101, 13.001 (establishing the requirement that an action or argument be nonfrivolous).
446. 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, 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). For a complete discussion of summary judgment practice in the Texas and federal courts, see generally David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 54 BAYLOR L. REV. 1 (2002).
447. TEX. R. CIV. P. 166a(c); Swilley v. Hughes, 488 S.W.2d 64, 67 (Tex. 1972).

vant.[448] Once the movant has established a right to a summary judgment, the burden shifts to the nonmovant.[449] The nonmovant must then respond to the motion for summary judgment by presenting to the trial court any issues that would preclude summary judgment.[450]

> [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.[451]

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 the movant 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 also be resolved in favor of the nonmovant.[452]

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

449. Macias v. Fiesta Mart, Inc., 988 S.W.2d 316, 317 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

450. *Clear Creek Basin Auth.*, 589 S.W.2d at 679. Recently, the supreme court held that the motion for new trial standards in *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124 (Tex. 1939), do not apply to a motion for new trial after summary judgment is granted when the nonmovant fails to timely respond to the motion when (1) the nonmovant had notice of the hearing and (2) an opportunity to move to extend time to alter the deadlines in Rule 166a. Carpenter v. Cimarron Hydrocarbons Corp., 45 Tex. Sup. Ct. J. 1031, 1033, 2002 WL 1902793, at *3 (July 3, 2002). The court held that a motion for leave to file a late summary-judgment response should be granted when the nonmovant establishes good cause for failing to timely respond by showing that (1) the failure to respond was not intentional or the result of conscious indifference, but the result of accident or mistake, and (2) allowing the late response will not cause undue delay or otherwise injure the party seeking summary judgment. *Id.* at *5. A trial court's order on a motion for leave to file a late summary-judgment response is reviewed for an abuse of discretion. *Id.* at *2.

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

452. D. Houston, Inc. v. Love, 45 Tex. Sup. Ct. J. 943, 945, 2001 WL 1898482 (June 27, 2002); Limestone Prods. Distribution, Inc. v. McNamara, 71 S.W.3d 308, 311 (Tex. 2002) (per curiam); Shah v. Moss, 67 S.W.3d 836, 842 (Tex. 2001); Holy Cross Church of God in Christ v. Wolf, 44 S.W.3d 562, 566 (Tex. 2001); Pustejovsky v. Rapid-American Corp., 35 S.W.3d 643, 646 (Tex. 2000); Havlen v. McDougall, 22 S.W.3d 343, 345 (Tex. 2000); Hughes Wood Prods., Inc. v. Wagner, 18 S.W.3d 202, 204 (Tex. 2000); Rhone-Poulenc, Inc. v. Steel, 997 S.W.2d 217, 223 (Tex. 1999); KPMG Peat Marwick v. Harrison County Houston Fin. Corp., 988 S.W.2d 746, 748 (Tex. 1999); Am. Tobacco Co. v. Grinnell, 951 S.W.2d 420, 425

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 cause of action, or if the defendant establishes all the elements of an affirmative defense as a matter of law.[453] The usual presumption that the judgment is correct does not apply to summary judgments.[454]

A summary judgment is reviewed de novo.[455] On appeal, evidence that favors the movant's position will rarely be considered unless it is uncontroverted.[456] Summary judgment, however, may be based on the uncontroverted evidence of an interested witness or expert witness "if the evidence is clear, positive, direct, otherwise credible, and free from contradictions and inconsistencies, and could have been readily controverted."[457]

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.[458] Issues which are not expressly presented to the trial court by written motion or response to the motion for summary judgment cannot be considered by an appellate court as grounds for reversal.[459] The appellate court can consider the record only as it existed at the time summary judgment was en-

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(Tex. 1997); Walker v. Harris, 924 S.W.2d 375, 377 (Tex. 1996); Cathey v. Booth, 900 S.W.2d 339, 341 (Tex. 1995); Lear Siegler, Inc. v. Perez, 819 S.W.2d 470, 471 (Tex. 1991); Black v. Victoria Lloyds Ins. Co., 797 S.W.2d 20, 23 (Tex. 1990); Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548-49 (Tex. 1985).

453. *Love*, 2001 WL 1898482, at *3; *Am. Tobacco*, 951 S.W.2d at 425; Sci. Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 911 (Tex. 1997); *Lear Siegler*, 819 S.W.2d at 471.

454. *See* Montgomery v. Kennedy, 669 S.W.2d 309, 311 (Tex. 1984) (holding that the facts of the case caused a more extensive evaluation of the summary judgment); Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply, 391 S.W.2d 41, 47 (Tex. 1965) (reconsidering the summary judgment due to conflicting testimony). Texas law generally considers summary judgment to be a harsh remedy. Torres v. Caterpillar, Inc., 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996, writ denied).

455. Natividad v. Alexis, Inc., 875 S.W.2d 695, 699 (Tex. 1994); *Nixon*, 690 S.W.2d at 548-49.

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

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

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

459. TEX. R. CIV. P. 166a(c); Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 204 (Tex. 2002) (citing *Sci. Spectrum*, 941 S.W.2d at 912); *McConnell*, 858 S.W.2d at 339; City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 674-75 (Tex. 1979).

tered.[460] Moreover, an appellate court may not raise grounds for reversing a summary judgment sua sponte.[461]

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.[462] 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.[463] 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.[464]

A summary judgment order is not necessarily interlocutory because the order grants more relief than the movant requested (for example, by granting summary judgment on claims that were not addressed in the summary judgment motion).[465] "[A]n order that expressly disposes of the entire case is not interlocutory merely be-

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

461. San Jacinto River Auth. v. Drake, 783 S.W.2d 209, 210 (Tex. 1990) (citing Cent. Educ. Agency v. Burke, 711 S.W.2d 7, 9 (Tex. 1986)).

462. FM Props. Operating, Co. v. City of Austin, 22 S.W.3d 868, 872-73 (Tex. 2001); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473 (Tex. 1995); State Farm Fire Ins. & Cas. Co. v. S.S. & G.W., 858 S.W.2d 374, 380 (Tex. 1993); Carr v. Brasher, 776 S.W.2d 567, 569 (Tex. 1989); 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. Tex. Comm'n on Jail Standards, 845 S.W.2d 284, 286 (Tex. App.—Austin 1992, writ denied); Kyle v. W. Gulf Mar. Ass'n, 792 S.W.2d 805, 807 (Tex. App.—Houston [14th Dist.] 1990, no writ).

463. Lubbock County, Tex. v. Trammel's Lubbock Bail Bonds, 80 S.W.3d 580, 584 (Tex. 2002); Holy Cross Church of God in Christ v. Wolf, 44 S.W.3d 562, 566 (Tex. 2001); Tobin v. Garcia, 159 Tex. 58, 316 S.W.2d 396, 400 (1958).

464. Lubbock County, Tex. v. Trammel's Lubbock Bail Bonds, 80 S.W.3d 580, 583 (Tex. 2002); FM Props. Operating, Co. v. City of Austin, 22 S.W.3d 868, 872 (Tex. 2001); City of Garland v. Dallas Morning News, 22 S.W.3d 351, 356 (Tex. 2000); Jones v. Strauss, 745 S.W.2d 898, 900 (Tex. 1988); Members Mut. Ins. Co. v. Hermann Hosp., 664 S.W.2d 325, 328 (Tex. 1984).

465. Lehmann v. Har-Con Corp., 39 S.W.3d 191, 206 (Tex. 2001); *see generally* William J. Boyce, *Finality Plus, in* UNIV. TEX. 12TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS 3 (June 2002) (discussing the issue of finality of summary judgments); William J. Boyce, *Is Lehmann the Final Word on Summary Judgment Finality?*, XIV THE

cause the record fails to show an adequate motion or other legal basis for the disposition."[466] "Language that the plaintiff take nothing by his claims in the case, or that the case is dismissed, shows finality if there are no other claims by other parties . . . ."[467] The correct resolution under these circumstances is to treat the summary judgment as final and appealable. Any claimed error regarding the adequacy of the motion may result in a reversal on appeal and remand to the trial court, but it should not result in dismissal of the appeal for lack of a final judgment.[468]

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

Under 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 party's claim or defense.[469] However, it is inappropriate to file a Rule 166a(i) motion until after adequate time for discovery. A trial court's determination that there has been adequate time for discovery in response to a no-evidence motion for summary judgment is reviewed for an abuse of discretion.[470] 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.[471] The motion cannot be conclusory or generally allege that there is no evidence to support the claims.[472] By filing the motion, the burden shifts to the nonmovant, who must present "more than a scintilla of probative evidence to raise a genuine issue of material fact."[473] Under the new rule, if the nonmovant fails to provide enough evidence, the trial court must grant the motion.[474]

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APP. ADVOC. 4 (Summer 2001) (analyzing the finality issue of summary judgments after *Lehmann*).

466. *Lehmann*, 39 S.W.3d at 206.

467. *Id.* at 205.

468. Ritzell v. Espeche, 45 Tex. Sup. Ct. J. 878, 879, 2002 WL 1338108, at *2 (June 20, 2002) (per curiam).

469. TEX. R. CIV. P. 166a(i) & cmt.

470. Moorehouse v. Chase Manhattan Bank, 76 S.W.3d 608, 612 (Tex. App—San Antonio 2002, no pet.).

471. TEX. R. CIV. P. 166a(i).

472. *Id.*

473. Haas v. George, 71 S.W.3d 904, 911 (Tex. App.—Texarkana 2002, no pet.); Jackson v. Fiesta Mart, Inc., 979 S.W.2d 68, 70-71 (Tex. App.—Austin 1998, no pet.).

474. *See Jackson*, 979 S.W.2d at 70 (requiring courts to grant summary judgment unless respondent "raises a genuine issue of material fact").

A Rule 166a(i) summary judgment uses a no-evidence standard.[475] A no-evidence summary judgment is essentially a pre-trial directed verdict and the same legal sufficiency standard is applied.[476] 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 a summary judgment.[477] 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."[478] 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 claim for which the movant asserts there is no evidence.[479]

## W. *Motion for Continuance*

Pursuant to Rule 251, a trial court may grant a continuance on sufficient cause "supported by affidavit, or by consent of the parties, or by operation of law."[480] Whether the trial court grants or denies a motion for continuance is within its sound discretion.[481]

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475. *Id.*

476. Tex. Capital Sec. Mgmt., Inc. v. Sandefer, 80 S.W.3d 260, 264 (Tex. App.—Texarkana 2002, pet. denied); Dodd v. City of Beverly Hills, 78 S.W.3d 509, 512 (Tex. App.—Waco 2002, pet. denied); *Haas*, 71 S.W.3d at 911; Kelly v. DeMoss Owners Ass'n, 71 S.W.3d 419, 423 (Tex. App.—Amarillo 2002, no pet.); Maguire Oil Co. v. City of Houston, 69 S.W.3d 350, 357 (Tex. App.—Texarkana 2002, no pet.); Rocha v. Faltys, 69 S.W.3d 315, 320 (Tex. App.—Austin 2002, no pet.).

477. *Kelly*, 71 S.W.3d at 423; *Maguire Oil*, 69 S.W.3d at 357; *see also* Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997) (listing the elements of the no-evidence analysis).

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

479. TEX. R. CIV. P. 166a(i) & cmt.

480. 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 also* Vickery v. Vickery, No. 01-94-01004-CV, 1997 WL 751995, at * 20 (Tex. App.—Houston [1st Dist.] Dec. 4, 1997, no pet.) (not designated for publication). "The absent party must show that he had a reasonable excuse for not being present, and that he was prejudiced by his absence." *Id.* The movant must show that "the testimony is material and what is expected to be proved by the testimony." *Id.*

481. BMC Software Belg., N.V. v. Marchand, 45 Tex. Sup. Ct. J. 930, 931, 2001 WL 1898473, at *2 (June 27, 2002); Gen. 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

Therefore, the trial court's ruling will not be reversed unless the record shows a clear abuse of discretion.[482] 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.[483] An appellate court may reverse for abuse of discretion only when, after examining the entire record, it determines that the trial court's ruling was clearly arbitrary and unreasonable.[484]

## X. *Dismissal for Want of Prosecution*

The trial court has an obligation to control its docket and demand that parties diligently prosecute their suits.[485] 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.[486] The

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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); Jones v. Jones, 64 S.W.3d 206, 211 (Tex. App.—El Paso 2001, no pet.); Clemons v. Citizens Med. Ctr., 54 S.W.3d 463, 468-69 (Tex. App.—Corpus Christi 2001, no pet.); Amalgamated Acme Affiliates, Inc. v. Minton, 33 S.W.3d 387, 396 (Tex. App.—Austin 2000, no pet.); Dallas Indep. Sch. Dist. v. Finlan, 27 S.W.3d 220, 235 (Tex. App.—Dallas 2000, pet. denied), *cert. denied*, 122 S. Ct. 342 (2001); Sipes v. Gen. Motors Corp., 946 S.W.2d 143, 161 (Tex. App.—Texarkana 1997, writ denied); Hawthorne v. Guenther, 917 S.W.2d 924, 929 (Tex. App.—Beaumont 1996, writ denied); Taiwan Shrimp Farm Vill. 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).

482. *Villegas*, 711 S.W.2d at 626; State v. Crank, 666 S.W.2d 91, 94 (Tex. 1984); Royal Mortgage Corp. v. Montague, 41 S.W.3d 721, 738 (Tex. App.—Fort Worth 2001, no pet.).

483. *Yowell*, 703 S.W.2d at 635; *Royal Mortgage*, 41 S.W.3d at 738; *Dallas Indep. Sch. Dist.*, 27 S.W.3d at 235; *Arit Int'l,* 910 S.W.2d at 173-74.

484. Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 795 (Tex. 1987); Medford v. Medford, 68 S.W.3d 242, 247-48 (Tex. App.—Fort Worth 2002, no pet.); Gregg v. Cecil, 844 S.W.2d 851, 853 (Tex. App.—Beaumont 1992, no writ); Cent. Nat'l Gulfbank v. Comdata Network, Inc., 773 S.W.2d 626, 627 (Tex. App.—Corpus Christi 1989, no writ). In *In re* N. Am. Refractories Co., 71 S.W.3d 391 (Tex. App.—Beaumont 2001, orig. proceeding), the Beaumont Court of Appeals granted mandamus relief against a trial judge who refused to grant a motion for continuance filed pursuant to a lawyer's vacation letter filed in compliance with the local rule. *Id.* at 394. Because the local rule is mandatory, the trial court's refusal to grant the continuance was an abuse of discretion for which there was no adequate remedy at law. *Id.*

485. 3V, Inc. v. JTS Enter., Inc., 40 S.W.3d 533, 540 (Tex. App.—Houston [14th Dist.] 2000, no pet.); Tex. 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 a trial court to dismiss cases not prosecuted with due diligence).

486. TEX. R. CIV. P. 165a(1), (4); *Rotello*, 671 S.W.2d at 508-09; Veteran Land Bd. v. Williams, 543 S.W.2d 89, 90 (Tex. 1976) (per curiam); Bevil v. Johnson, 157 Tex. 621, 307 S.W.2d 85, 87 (1957); Lynda's Boutique v. Alexander, No. 03-00-00498-CV, 2001 WL

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.[487]

Whether the plaintiff prosecuted the case with diligence is an issue confined solely to the trial court's discretion.[488] Moreover, when the record contains no findings of fact or conclusions of law and the trial court fails to state the standard it used, the order of dismissal must be affirmed if any legal theory is supported by the record.[489] When resolving the central issue of whether the plaintiff exercised reasonable diligence,[490] the court may consider the entire trial history, and no single factor is dispositive.[491] Whether the plaintiff intended to abandon the litigation is not the inquiry, nor is it "the existence of a belated trial setting or an asserted eagerness to proceed to trial conclusive[ly]."[492] Furthermore, the fact that

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1193900, at *2 (Tex. App.—Austin Oct. 11, 2001, pet. filed); Christian v. Christian, 985 S.W.2d 513, 514 (Tex. App.—San Antonio 1998, no pet.); Clark v. Yarbrough, 900 S.W.2d 406, 408 (Tex. App.—Texarkana 1992, writ denied); 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).

487. TEX. R. CIV. P. 165a(4); *Williams*, 543 S.W.2d at 90; Franklin v. Sherman Indep. Sch. Dist., 53 S.W.3d 398, 401 (Tex. App.—Dallas 2001, pet. denied); 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).

488. *Rotello*, 671 S.W.2d at 509; Dolenz v. Cont'l Nat'l Bank, 620 S.W.2d 572, 575-76 (Tex. 1981); *Ozuna*, 766 S.W.2d at 901; Mercure Co. v. Rowland, 715 S.W.2d 677, 680 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); McCormick v. Shannon W. Tex. Mem'l Hosp., 665 S.W.2d 573, 575 (Tex. App.—Austin 1984, writ ref'd n.r.e).

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

490. MacGregor v. Rich, 941 S.W.2d 74, 75 (Tex. 1997) (per curiam); *Christian*, 985 S.W.2d at 515; Pedraza v. Crossroads Sec. Sys., 960 S.W.2d 339, 342 (Tex. App.—Corpus Christi 1997, no pet.).

491. Scoville v. Shaffer, 9 S.W.3d 201, 204 (Tex. App.—San Antonio 1999, no pet.); Christian v. Christian, 985 S.W.2d 513, 514-15 (Tex. App.—San Antonio 1998, no pet.); Villarreal v. San Antonio Truck & Equip., Inc., 974 S.W.2d 275, 278 (Tex. App.—San Antonio 1998), *rev'd on other grounds*, 994 S.W.2d 628 (Tex. 1998); FDIC 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.

492. *Ozuna*, 766 S.W.2d at 902; *accord Scoville*, 9 S.W.3d at 204; Jimenez v. Transwestern Prop. Co., 999 S.W.2d 125, 129 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Villar-*

settlement activity is in progress,[493] or that the opposing parties have remained passive, does not prevent a case from being dismissed based upon want of diligence.[494] The traditional factors generally considered in dismissals are: "the length of time the case was on file[,] [t]he extent of activity in the case[,] [w]hether a trial setting was requested[,] and the [ . . . ] existence of reasonable excuses for the delay."[495] Other circumstances may be considered as well, such as periods of activity, intervals of inactivity, and the passage of time.[496]

If the dismissal is pursuant to Rule 165a (as opposed to the trial court's inherent power), then Rule 165(a) 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."[497] The reinstatement provisions in Rule 165a(3) only apply to dismissals for failure to appear at trial or a hearing,[498] 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 prosecu-

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*real*, 974 S.W.2d at 278; *see* Bard v. Frank B. Hall & Co., 767 S.W.2d 839, 843 (Tex. App.—San Antonio 1989, writ denied) (ruling that merely requesting that a case be set for trial does not, alone, preclude dismissal).

493. *Kendrick*, 897 S.W.2d at 481; Tex. 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).

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

495. Rainbow Home Health, Inc. v. Schmidt, 76 S.W.3d 53, 56 (Tex. App.—San Antonio 2002, pet. denied); *Scoville*, 9 S.W.3d at 204; Maida v. Fire Ins. Exch., 990 S.W.2d 836, 842 (Tex. App.—Fort Worth 1999, no pet.); *Christian*, 985 S.W.2d at 514-15; *Villarreal*, 974 S.W.2d at 278; *Bard*, 767 S.W.2d at 843 (citing Nasa I Bus. Ctr. v. Am. Nat'l Ins. Co., 747 S.W.2d 36, 38 (Tex. App.—Houston [1st Dist.] 1998, writ denied)).

496. *Ozuna*, 766 S.W.2d at 902.

497. TEX. R. CIV. P. 165a(3); Stolz v. Honeycutt, 42 S.W.3d 305, 309 (Tex. App.—Houston [14th Dist.] 2001, no pet.); Burton v. Hoffman, 959 S.W.2d 351, 354 (Tex. App.—Austin 1998, no pet.); 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 with the court's inherent power to dismiss).

498. Burton v. Hoffman, 959 S.W.2d 351, 354 (Tex. App.—Austin 1998, no pet.); *Ozuna*, 766 S.W.2d at 903; *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).

tion or the overruling of a motion to reinstate is whether the trial court committed a clear abuse of discretion.[499]

## Y. *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.'"[500] While a party has a constitutional right to trial by jury,[501] the right is not absolute. If a party desires a jury trial, Rule 216 requires the party (1) 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"[502] and (2) to pay the jury fee.[503] A request made before the thirty-day deadline is presumed to have been made at a reasonable time before trial.[504]

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499. MacGregor v. Rich, 941 S.W.2d 74, 75 (Tex. 1997); State v. Rotello, 671 S.W.2d 507, 509 (Tex. 1984); Veterans' Land Bd. v. Williams, 543 S.W.2d 89, 90 (Tex. 1976); Johnson-Snodgrass v. KTAO, Inc., 75 S.W.3d 84, 87 (Tex. App.—Fort Worth 2002, no pet.); Bynog v. Prater, 60 S.W.3d 310, 312 (Tex. App.—Eastland 2001, pet. denied); Lopez v. Harding, 68 S.W.3d 78, 80 (Tex. App.—Dallas 2001, no pet.); *Clark*, 900 S.W.2d at 408-09; 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 901-02; *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 the motion to reinstate, the dismissal order will be reversed on appeal. 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 a hearing). The dissent argued, however, that the court should have reversed and remanded for a trial on the merits. *Id.* (Howell, J., dissenting). A dismissal for want of prosecution does not preclude the filing of another suit, and therefore, a dismissal of the case "with prejudice" is improper. Melton v. Rylander, 727 S.W.2d 299, 303 (Tex. App.—Dallas 1987, writ ref'd n.r.e.); Willis v. Barron, 604 S.W.2d 447, 450 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.). If the trial court dismisses the case with prejudice, the appellate court will reform the judgment to strike the words "with prejudice" from the judgment. *Melton*, 727 S.W.2d at 303.

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

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

502. TEX. R. CIV. P. 216(a); Glazer's Wholesale Distribs., Inc. v. Heineken USA, Inc., No. 05-99-01685-CV, 2001 WL 727351, at *14 (Tex. App.—Dallas June 29, 2001, pet. granted).

503. Huddle v. Huddle, 696 S.W.2d 895, 895 (Tex. 1985); *Heineken U.S.A.*, 2001 WL 727351, at *14; Universal Printing Co. v. Premier Victorian Homes, Inc., 73 S.W.3d 283, 289 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

504. Halsell v. Dehoyos, 810 S.W.2d 371, 371 (Tex. 1991) (per curiam); Taylor v. Taylor, 63 S.W.3d 93, 101 (Tex. App.—Waco 2001, no pet.); Crittenden v. Crittenden, 52 S.W.3d 768, 769 (Tex. App.—San Antonio 2001, pet. denied); S. Farm Bureau Cas. Ins. Co.

The court has no discretion to refuse a jury trial if the fee is paid and request is made on or before appearance date.[505] 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.[506] 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.[507]

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 request."[508] The trial court's decision will be set aside only upon the showing of an abuse of discretion.[509] The decision, in order to be an abuse of discretion, must be so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law.[510]

## Z. *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

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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).

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

506. Gen. Motors Corp. v. Gayle, 951 S.W.2d 469, 476 (Tex. 1997) (orig. proceeding). Taylor v. Taylor, 63 S.W.3d 93, 100-01 (Tex. App.—Waco 2001, no pet.). 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, 71 Tex. 546, 9 S.W. 672, 673 (1888)).

507. 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.)).

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

509. *Id.*; *accord Taylor*, 63 S.W.3d at 101; *In re* V.R.W., 41 S.W.3d 183, 194 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *In re* W.B.W., Jr., 2 S.W.3d 421, 422 (Tex. App.—San Antonio 1999, no pet.).

510. Mercedes-Benz Credit Corp. v. Rhyne, 925 S.W.2d 664, 666 (Tex. 1996); *Taylor*, 63 S.W.3d at 101; 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. Halsell v. Dehoyos, 810 S.W.2d 371, 372 (Tex. 1991) (per curiam); Weng Enters., Inc. v. Embassy World Travel, Inc., 837 S.W.2d 217, 222 (Tex. App.—Houston [1st. Dist.] 1992, no writ).

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."[511] 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 counter the request.[512] Whether these requirements have been met is left largely to the trial court's discretion.[513] As one court has noted, "the sufficiency of a motion to take judicial notice is a question best [offered] by the trial court."[514] However, "once the law has been invoked by proper motion, the trial court has no discretion—it must acknowledge that law."[515]

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 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."[516] In addition, facts that are notorious and indisputable,[517] or well known and easily ascertainable,[518] 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

511. TEX. R. EVID. 202.

512. *Id.*

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

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

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

516. TEX. R. EVID. 201(b); Krishnan v. Ramirez, 42 S.W.3d 205, 222 (Tex. App.—Corpus Christi 2001, pet. denied).

517. Harper v. Killion, 162 Tex. 481, 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).

518. Barber v. Intercoast Jobbers & Brokers, 417 S.W.2d 154, 158 (Tex. 1967); City of Houston v. Todd, 41 S.W.3d 289, 301 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

it.[519] The test on review is whether the fact to be judicially noticed is "verifiably certain."[520]

### AA. *Class Certification*

The purpose of class certification is to provide meaningful recompense to groups of injured parties whose injuries would be too small to be cost-effective if pursued individually.[521] However, there is no right to litigate a claim as a class action.[522] 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.[523]

Additionally, the purported class must establish the requirements of Rule 42(b).[524] The plaintiffs bear the burden of proof at the certification stage to establish the right to maintain the suit as a class action.[525] Because the class proponents are not required to

519. Eagle Trucking Co. v. Tex. Bitulithic Co., 612 S.W.2d 503, 506 (Tex. 1981).

520. *Id.*; *Levit*, 841 S.W.2d at 485.

521. Wood v. Victoria Bank & Trust Co., 69 S.W.3d 235, 239 (Tex. App.—Corpus Christi 2001, no pet.); *accord* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997); Gen. Motors Corp. v. Bloyed, 916 S.W.2d 949, 952 (Tex. 1996).

522. Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 439 (Tex. 2000).

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

524. TEX. R. CIV. P. 42(b). Rule 42(b) allows an action 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 fact common to the members of the class predominate over any questions affecting only individual members" so that the class action is the most fair and efficient method of adjudication. *Id.*

525. State Indus., Inc. v. Fain, 38 S.W.3d 167, 168 (Tex. App.—Waco 2000, pet. denied); Nissan Motor Co. v. Fry, 27 S.W.3d 573, 584 (Tex. App.—Corpus Christi 2000, pet. denied); Spera v. Fleming, Hovenkamp & Grayson, P.C., 4 S.W.3d 805, 810 (Tex. App.—

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.[526] Whether a party is a proper representative of a class and whether a suit should be certified as a class action is reviewed under an abuse of discretion standard.[527] A trial court abuses its discretion by failing to properly apply the law to the facts.[528]

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.[529] 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.[530]

## BB. *Motion to Disqualify*

"A motion to disqualify counsel 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."[531] However, since disqualification is such a severe remedy, courts are

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Houston [14th Dist.] 1999, no pet.); Clements v. LULAC, 800 S.W.2d 948, 952 (Tex. App.—Corpus Christi 1990, no writ).

526. *Wood*, 69 S.W.3d at 238; Union Pac. Res. Group, Inc. v. Hankins, 51 S.W.3d 741, 748 (Tex. App.—El Paso 2001, pet. filed); *State Indus.*, 38 S.W.3d at 168; *Clements*, 800 S.W.2d at 952 (citing Nat'l Gypsum Co. v. Kirbyville Indep. Sch. Dist., 770 S.W.2d 621, 627 (Tex. App.—Beaumont 1989, writ dism'd w.o.j.)).

527. Parker County v. Spindletop Oil & Gas Co., 628 S.W.2d 765, 769 (Tex. 1982); Becton Dickinson & Co. v. Usrey, 57 S.W.3d 488, 492 (Tex. App.—Fort Worth 2001, no pet.); *Wood*, 69 S.W.3d at 238; *Union Pac. Res. Group*, 51 S.W.3d at 748; Glassell v. Ellis, 956 S.W.2d 676, 681 (Tex. App.—Texarkana 1997, pet. dism'd w.o.j.); Angeles/Quinoco Sec. Corp. v. Collison, 841 S.W.2d 511, 512 (Tex. App.—Houston [14th Dist.] 1992, no writ).

528. *Angeles/Quinoco Sec.*, 841 S.W.2d at 512.

529. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(3) (Vernon Supp. 2002); TEX. GOV'T CODE ANN. § 22.225(c) (Vernon 1988 & Supp. 2002); Deloitte & Touche, L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394, 395-96 (Tex. 1997) (orig. proceeding).

530. *Deloitte & Touche*, 951 S.W.2d at 395-96.

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

wary of ordering such a remedy because they do not want to encourage the use of disqualification as a dilatory trial tactic.[532]

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.[533] 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 his former counsel will be divulged to his present adversary."[534] To satisfy this burden, the movant must offer "evidence of specific similarities capable of being recited in the disqualification order."[535]

The standard of review used in assessing whether a trial court's ruling on a motion to disqualify is the abuse of discretion standard.[536] In addition, the trial court's order granting or denying a motion to disqualify may be reviewed by mandamus.[537]

## CC. *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

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532. *See* Metro. 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); *Coker*, 765 S.W.2d at 399 (stressing the need to strictly adhere to guidelines when considering a motion to disqualify); *In re* Taylor, 67 S.W.3d 530, 533 (Tex. App.—Waco 2002, orig. proceeding) (noting that counsel disqualification is an extreme remedy); *accord* Walton v. Canon, Short & Gaston, 23 S.W.3d 143, 157 (Tex. App.—El Paso 2000, no pet.).

533. Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 126 (Tex. 1996); *Metro. Life Ins.*, 881 S.W.2d at 320-21; *Coker*, 765 S.W.2d at 400; Ghidoni v. Stone Oak, Inc., 966 S.W.2d 573, 579 (Tex. App.—San Antonio 1998, pet. denied); *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").

534. Texaco, Inc. v. Garcia, 891 S.W.2d 255, 257 (Tex. 1995) (orig. proceeding) (citing *Coker*, 765 S.W.2d at 400); *In re* Cap Rock Elec. Co-op., Inc., 35 S.W.2d 222, 230 (Tex. App.—Texarkana 2000, no pet.); *Walton*, 23 S.W.3d at 151; *In re* Butler, 987 S.W.2d 221, 224 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

535. *Coker*, 765 S.W.2d at 400.

536. *Metro. Life Ins.*, 881 S.W.2d at 321; *Coker*, 765 S.W.2d at 400; *Walton*, 23 S.W.3d at 151; *Ghidoni*, 966 S.W.2d 573.

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

other hearing.[538] Upon filing the motion, the trial judge must either recuse himself or request the administrative judicial district's presiding judge to assign a judge to hear the motion.[539] Rule 18a(f) provides that if the motion is denied, the order is reviewed for an abuse of discretion.[540] However, an order granting a motion to recuse is not reviewable.[541]

### DD. *Objection to Visiting Trial or Appellate Judge*

When a visiting judge is assigned to a case the presiding judge is required to give notice to each party's attorney if it is reasonable and practicable, time permitting.[542] An objection to this assignment must be the first matter presented to the visiting judge for a ruling.[543] 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]."[544] If a party timely objects to the assignment, "the judge shall not hear the case."[545] That statute is mandatory and

538. TEX. R. CIV. P. 18a(a); *see also* Johnson v. Pumjani, 56 S.W.3d 670, 672 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (acknowledging that an untimely recusal motion will fail); *In re* Rio Grande Valley Gas Co., 987 S.W.2d 167, 177 (Tex. App.—Corpus Christi 1999, no pet.). If a judge is assigned to a case within the ten day period, then the motion must "be filed at the earliest practicable time prior to the commencement 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. 18a(a).

539. TEX. R. CIV. P. 18a(c), (d); Rosas v. State, 76 S.W.3d 771, 773 (Tex. App.—Houston[1st Dist.] 2002, no pet.). If a trial judge should have been recused and is not recused, any orders or judgments rendered by that judge are void and without effect. *In re* O'Connor, 45 Tex. Sup. Ct. J. 970, 972, 2002 WL 1379069, at *3 (June 27, 2002) (per curiam) (citing *In re* Union Pac. Res. Co., 969 S.W.2d 427, 428 (Tex. 1998)).

540. 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).

541. TEX. R. CIV. P. 18a(f).

542. TEX. GOV'T CODE ANN. § 74.053(a) (Vernon Supp. 2002).

543. *Id.* § 74.053(c); Chandler v. Chandler, 991 S.W.2d 367, 383 (Tex. App.—El Paso 1999); Morris v. Short, 902 S.W.2d 566, 569 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

544. TEX. GOV'T CODE ANN. § 74.053(d) (Vernon 1998); *In re* Cuban, 24 S.W.3d 381, 382 (Tex. App.—Dallas 2000, orig. proceeding); *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 the State Judicial Retirement System before leaving office, and not after).

545. TEX. GOV'T CODE ANN. § 74.053(b) (Vernon 1998); *In re* Cuban, 24 S.W.3d 381, 382 (Tex. App.—Dallas 2000, no pet.).

does not give the trial court any discretion to rule on the objection.[546]

A party may also object to a judge or justice who is assigned to hear that party's case on appeal.[547] If a party files a timely objection to the assignment of the judge or justice, the assigned judge may not hear the case.[548] The objection must be made before the first hearing, which in most cases is oral argument.[549] In addition, each party (1) is only entitled to one objection for the case in the appellate court,[550] and (2) may not object in the same case to the assignment of a judge or justice under both Sections 74.053(b) and 75.551(b)(2) of the Government Code.[551] 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.[552]

## EE. *Management of Docket*

A trial court is given wide discretion in managing its dockets[553] to achieve "economy of time and effort for itself, for counsel, and for litigants."[554] 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.[555] A trial court's order relating to the management of its docket is reviewed for an abuse of discretion.[556]

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546. *Mitchell Energy*, 943 S.W.2d at 441.

547. TEX. GOV'T CODE ANN. § 75.551 (Vernon 1998).

548. *Id.* § 75.551(b).

549. *Id.* § 75.551(c).

550. *Id.* § 75.551(b)(1).

551. *Id.* § 74.053(b), 75.551(b)(2).

552. TEX. GOV'T CODE ANN. § 75.551(d) (Vernon 1998).

553. Polaris Inv. Mgmt. 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. 1997) (recognizing the inherent power of a trial court "to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity").

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

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

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

## FF. *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.[557] To withstand this review standard, the order must be supported by specific findings based on 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.[558] The specific findings may be challenged for their sufficiency.[559] It appears that the two-part constitutional test is a question of law as applied to the trial court's findings reviewed de novo.[560]

## GG. *Sealing Court Records*

Rule 76a provides very specific guidelines for a trial court to follow in determining whether to seal court records.[561] The trial court must strictly adhere to these guidelines, because court records are presumed open to the public.[562] 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.[563] Any order relating to the sealing or unsealing of court records is subject to immediate appellate review.[564] The abuse of discretion standard of

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557. 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).

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

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

560. 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 Houston Trust, No. 04-95-00575-CV, 1995 WL 702533, at *1-2 (Tex. App.—San Antonio, Nov. 30, 1995, no writ) (not designated for publication).

561. 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 than . . . will adequately and effectively protect the specific interest asserted." *Id.*

562. TEX. R. CIV. P. 76a(1); *Davenport*, 834 S.W.2d at 23.

563. TEX. R. CIV. P. 76a(6).

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

review applies to orders regarding motions to seal or unseal records.[565]

## HH. 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."[566] However, when a plaintiff files an affidavit of inability to pay under Rule 145[567] (*in forma pauperis*) or under the Texas Civil Practice and Remedies Code Section 13.001,[568] the trial court has broad discretion to dismiss the suit as frivolous or malicious if the allegation of poverty is false.[569] 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."[570] However, the Texas Supreme Court has cautioned trial courts against dismissing cases based on the first and third factors.[571] A trial court's dismissal of a case under section 13.001 is reviewed for an abuse of discretion.[572]

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565. *See* Gen. Tire, Inc. v. Kepple, 970 S.W.2d 520, 526 (Tex. 1988) (holding that Rule 76a decisions must be reviewed by an abuse of discretion standard).

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

567. TEX. R. CIV. P. 145.

568. TEX. CIV. PRAC. & REM. CODE ANN. § 13.001(a)(2) (Vernon Supp. 2002).

569. 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, 1997 WL 69860, at *2 (Tex. App.—Houston [1st Dist.] Feb. 20, 1997, writ denied) (not designated for publication). A trial court's dismissal of an action under Chapter 14 of the Texas Civil Practice and Remedies Code is reviewed for an abuse of discretion. Johnson v. Tex. Dep't of Criminal Justice, 71 S.W.3d 492, 493 (Tex. App.—El Paso 2002, no pet. h.).

570. TEX. CIV. PRAC. & REM. CODE ANN. § 13.001(b) (Vernon Supp. 2002). In *De La Vega,* the court of appeals observed that "frivolous" is defined as having no basis in law or fact. De La Vega v. Taco Cabana, Inc. 974 S.W.2d 152, 154 (Tex. App.—San Antonio 1998, no pet.) (quoting Neitzke v. Williams, 490 U.S. 319, 325 (1989)).

571. Johnson v. Lynaugh, 796 S.W.2d 705, 706 (Tex. 1990); Jones v. CGU Ins. Co., 78 S.W.3d 626, 628 (Tex. App. Austin 2002, no pet.).

572. *Jones*, 78 S.W.3d at 628; Bohanna v. Tex. Bd. of Criminal Justice, 942 S.W.2d 113, 115 (Tex. App.—Austin 1997, writ denied).

The supreme court has analogized Section 13.001 to its federal counterpart, which allows dismissal of frivolous or malicious actions in federal court.[573] 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.[574] Therefore, before dismissing a petition under Section 13.001(b)(2), the judge must examine it to ensure that the claim is not based in law and in fact.[575] A claim that has no legal basis is one that is based upon an "indisputably meritless legal theory,"[576] and a claim that has no factual basis is one that arises out of "fantastic or delusional scenarios."[577] 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.[578] In doing so, the trial court "may consider whether the appellant has presented a substantial question for appellate review."[579]

## 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 ap-

573. *Johnson*, 796 S.W.2d at 706 (citing 28 U.S.C. § 1915(d) (1990)).

574. *Id.* The supreme court observed that the United States Supreme Court has approved the same factor (the lack of arguable basis in law or fact) as appropriate in the federal context. *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 (that the party is unable to prove facts in support of the claim) in Section 13.001(b)(3). *Id.* (citing Payne v. Lynaugh, 843 F.2d 177, 178 (5th Cir. 1988)).

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

576. Thomas v. Holder, 836 S.W.2d 351, 352 (Tex. App.—Tyler 1992, no writ) (citing Thompson v. Ereckson, 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. 01-96-00376-CV, 1997 WL 69860, at *3 (Tex. App.—Houston [1st Dist.] Feb. 20, 1997, writ denied) (not designated for publication) (holding that a suit is frivolous if it "allege[s] substantially the same facts arising from a common series of events already unsuccessfully litigated").

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

578. TEX. CIV. PRAC. & REM. CODE ANN. § 13.003(a) (Vernon Supp. 2002); TEX. R. APP. P. 20.1.

579. TEX. CIV. PRAC. & REM. CODE ANN. § 13.003(b) (Vernon Supp. 2002).

peal absent a manifest abuse of discretion.[580] A trial court has the authority to express itself in exercising its discretion.[581] A trial court may intervene to maintain control in the courtroom, to expedite the trial, to prevent a waste of time, and the trial court may even make remarks "that are critical or disapproving of, or even hostile to, counsel, parties, or their cases."[582] A trial court may permit jurors to submit occasional questions to the witness in conjunction with appropriate procedural safeguards.[583] In summary, a trial court has inherent power to control the disposition of cases "'with economy of time and effort for itself, for counsel, and for the litigants.'"[584] The appellate court will review the entire record for an abuse of discretion,[585] and then determine whether any error constituted probable prejudice to the opposing party.[586]

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580. Dow Chem. Co. v. Francis, 46 S.W.3d 237, 239 (Tex. 2001) (per curiam); Schroeder v. Brandon, 141 Tex. 319, 172 S.W.2d 488, 491 (1943); Martinez v. City of San Antonio, 40 S.W.3d 587, 592 (Tex. App.—San Antonio 2001, pet. denied); Morton Int'l v. Gillespie, 39 S.W.3d 651, 655 (Tex. App.—Texarkana 2001, pet. denied); 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-M-B-, 798 S.W.2d 399, 406 (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, 740 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.); *see* 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. N. 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).

581. *Dow Chem.*, 46 S.W.3d at 240-41 (citing Bott v. Bott, 962 S.W.2d 626, 631 (Tex. App.—Houston [14th Dist.] 1997, no pet.)).

582. *Id.* at 240 (citing Liteky v. United States, 510 U.S. 540, 555 (1994); Great Global Assurance Co. v. Keltex Props., Inc. 904 S.W.2d 771, 777 (Tex. App.—Corpus Christi 1995, no writ).

583. 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)).

584. *Dow Chem.*, 46 S.W.3d at 240 (citing Landis v. N. Am. Co., 299 U.S. 248, 254 (1936)).

585. *See* Adams v. Petrade Int'l, Inc., 754 S.W.2d 696, 718 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (finding no abuse of discretion in the record).

586. 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)).

B. *Invoking the Rule*

Texas Rule of Evidence 614 and Texas Rule of Civil Procedure 267 govern sequestration of witnesses in civil litigation.[587] The purpose of sequestration or "invoking the rule" is to minimize "witnesses' tailoring their testimony in response to that of other witnesses and [to] prevent[ ] collusion among witnesses testifying for the same side."[588] Either the parties or the court, on its own motion, may sequester witnesses.[589] "The Rule" is not discretionary; a court must exclude witnesses upon request of the parties.[590] The rules provide that at the request of any party, the witnesses in the case shall be removed from the courtroom to some place where they cannot hear the testimony of any other witness in the case.[591] Certain witnesses are exempt from sequestration, including: (1) a party who is a natural person or his or her spouse; (2) an officer or employee of a party who is not a natural person and who is designated as the company's representative by its attorney; and (3) a person whose presence is shown by a party to be essential to the presentation of the case.[592] Although an expert witness is generally found to be exempt under the essential presence exception, experts are not automatically exempt.[593] Instead, Rules 614 and 267 give the trial court broad discretion to determine whether a witness is essential.[594] A party has the burden of showing why the presence of its witness is essential to the presentation of its case.[595] A trial court's refusal to grant a party's request for a witness to remain present during trial is reviewed for abuse of discretion.[596]

When a party or the court invokes the Rule, the parties should request that the trial court "exempt any prospective witnesses whose presence is essential to the presentation of the [case]."[597] The party seeking the exemption from the rule has the burden to

587. Drilex Sys., Inc. v. Flores, 1 S.W.3d 112, 116 (Tex. 1999).
588. *Id.*
589. *Id.* at 116 & n.2.
590. Elbar, Inc. v. Claussen, 774 S.W.2d 45, 51 (Tex. App.—Dallas 1989, writ dism'd).
591. *Id.*
592. *Drilex Sys.*, 1 S.W.3d at 116-17 (citing TEX. R. CIV. P. 267(b); TEX. R. EVID. 614).
593. *Id.* at 118.
594. *Id.* at 118-19.
595. *Id.* at 117
596. *Id.*
597. *Drilex Sys.*, 1 S.W.3d at 117.

establish that the witness's presence is necessary.[598] If the witness is exempt, then the witness is not "placed under the Rule" and need not be sworn or admonished.[599] When the Rule is invoked, all nonexempt witnesses are placed under the Rule and excluded from the courtroom.[600] Generally, a witness under the Rule may not discuss the case with anyone other than the attorneys in the case.[601]

The Rule is violated when (1) a nonexempt witness remains in the courtroom during the testimony of another witness, or (2) when a nonexempt witness learns about another witness's trial testimony through discussions with persons other than the attorneys in the case or by reading reports or comments about the testimony.[602] When the Rule is violated, a party may file a motion to exclude the witness, and the trial court, considering all of the circumstances,[603] may "allow the testimony of the potential witness, exclude the testimony, or hold the violator in contempt."[604] The trial court's decision is reviewed for an abuse of discretion.[605]

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598. *Id.*

599. *Id.* (citing TEX. R. CIV. P.267(d)).

600. Drilex Sys., Inc. v. Flores, 1 S.W.3d 112, 117 (Tex. 1999).

601. *Id.* Before being excluded, the trial court should admonish a witness under the Rule that he is not to converse with other witnesses placed under the Rule or with any other person about the case other than the attorneys in the case, except by permission of the trial court, and that he is not to read any report of or comment upon the testimony in the case while under the Rule. *Id.* (citing TEX. R. CIV. P.267(a), (d)). In short, a witness under the Rule may not discuss the case with anyone other than the attorneys in the case. *Id.*

602. *Id.*

603. The supreme court noted that some of the "circumstances" may include: whether the party calling the witness was at fault in causing or permitting the violation, whether the witness's testimony is cumulative, and whether the witness is a fact witness. *Id.* at 117 n.3 (citing Southwestern Bell Tel. Co. v. Johnson, 389 S.W.2d 645, 648 (Tex. 1965)); Upton v. State, 894 S.W.2d 426, 428 (Tex. App.—Amarillo 1995, pet. ref'd); Garza v. Cole, 753 S.W.2d 245, 247 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.); Holstein v. Grier, 262 S.W.2d 954, 955 (Tex. Civ. App.—San Antonio 1953, no writ).

604. *Drilex Sys.*, 1 S.W.3d at 117 (citing TEX. R. CIV. P.267(e)); Triton Oil & Gas Corp. v. E. W. Moran Drilling Co., 509 S.W.2d 678, 684 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.).

605. *Drilex Sys.*, 1 S.W.3d at 117-18 (citing *Johnson*, 389 S.W.2d at 648); Burrhus v. M&S Supply, Inc., 933 S.W.2d 635, 638 (Tex. App.—San Antonio 1996, writ denied); Southwestern Pub. Serv. Co. v. Vanderburg, 581 S.W.2d 239, 247 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.)).

### C. *Motion in Limine*

A motion in limine does not preserve any issue for appellate review.[606] 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.[607] 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 offering during the trial on the merits.[608] In either event, the standard of review is based on the rule of evidence invoked.[609]

### D. *Jury Shuffle*

Under Rule 223 of the Texas Rules of Civil Procedure, a party has the right to demand a jury shuffle as long as it is timely requested.[610] The demand must be made before voir dire and only one shuffle may be granted.[611] "Before voir dire" means prior to jury-questionnaire responses being examined by any of the parties.[612] Rule 223 procedures for a jury shuffle are mandatory and failure to comply with them is error.[613] Error may be preserved by making a clear and timely objection before the trial court.[614]

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606. Hiroms v. Scheffey, 76 S.W.3d 486, 489 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Owens-Corning Fiberglas Corp v. Malone, 916 S.W.2d 551, 557 (Tex. App.—Houston [1st Dist.] 1996), *aff'd*, 972 S.W.2d 35 (Tex. 1998); Collins v. Collins, 904 S.W.2d 792, 798 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *see* Rescar, Inc. v. Ward, 60 S.W.3d 169, 183 (Tex. App.—Houston [1st Dist.] 2001, pet. filed) (granting the party's motion in limine and noting that no error was preserved).

607. Richards v. Comm'n for Lawyer Discipline, 35 S.W.3d 243, 252 (Tex. App.—Houston 2000, no pet.).

608. *Richards*, 35 S.W.3d at 252; *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).

609. *See infra* Part V.

610. TEX. R. CIV. P. 223; Carr v. Smith, 22 S.W.3d 128, 133 (Tex. App.—Fort Worth 2000, pet. denied); Whiteside v. Watson, 12 S.W.3d 614, 618 (Tex. App.—Eastland 2000, pet. dism'd by agr., judgm't vacated w.r.m.); Martinez v. City of Austin, 852 S.W.2d 71, 73 (Tex. App.—Austin 1993, writ denied).

611. TEX. R. CIV. P. 223; *Carr*, 22 S.W.3d at 133; *Whiteside*, 12 S.W.3d at 618; *Martinez*, 852 S.W.2d at 73.

612. *Carr*, 22 S.W.3d at 133-34.

613. *Id.*; *Whiteside*, 12 S.W.3d at 619.

614. *Carr*, 22 S.W.3d at 134.

In deciding whether to grant a new trial, one court of appeals used a traditional harmless error analysis.[615] Under this analysis, the court requires appellants to show that violation of Rule 223 caused a rendition of an improper judgment.[616] Otherwise, a violation of the rule will generally not be an "infringement upon the fundamental right to [a] trial by jury" and any error will be harmless.[617] Another court of appeals adopted the "relaxed" harmless error standard used in the jury selection context.[618] Under this analysis, a complaining party must show a trial "was materially unfair, without having to show more."[619] Furthermore, the appellate court must examine the entire record.[620] Under this standard, a party does not have to show specific harm or prejudice arising from the inappropriate shuffle, however, it does require "some showing that the randomness of the jury has suffered."[621] Such a showing will result in the granting of a new trial.[622]

### E. *Voir Dire, Juror Answers, 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.[623] 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 intelligent use of peremptory challenges."[624] To obtain a reversal, the

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615. *Whiteside*, 12 S.W.3d at 620 (citing TEX. R. APP. P. 44.1; Rivas v. Liberty Mut. Ins. Co., 480 S.W.2d 610, 612 (Tex. 1972)).

616. *Id.* at 620.

617. *Id.*

618. *Carr*, 22 S.W.3d at 135.

619. *Carr*, 22 S.W.3d at 135 (citing Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 921 (Tex. 1979)).

620. *Id.*

621. *Id.* at 136.

622. *Id.*

623. Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d 362, 375 (Tex. 2000) (citing 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. TEX. GOV'T CODE ANN. § 62.105(4) (Vernon 1998).

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

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.[625]

Whether bias and prejudice exist is ordinarily a fact question.[626] 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.[627] If the evidence is not conclusive as a matter of law, the reviewing court must examine the evidence "in [the] light most favorable to the trial court's ruling."[628] Once bias or prejudice is established, it is a legal disqualification, and reversible error automatically results if the court overrules a motion to strike.[629] A trial court's decision regarding challenges for cause is review for an abuse of discretion.[630]

An erroneous or incorrect answer given by a potential juror during voir dire constitutes grounds for a new trial based upon jury misconduct.[631] A new trial must be granted if the movant establishes (1) that the misconduct occurred, (2) it was material, and (3) it probably caused injury.[632] Whether jury misconduct occurred is a question of fact for the trial court, and if there is conflicting evidence on the issue, the trial court's finding will be upheld on appeal[633]

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625. TEX. R. APP. P. 44.1.

626. Malone v. Foster, 977 S.W.2d 562, 564 (Tex. 1998); Swap Shop v. Fortune, 365 S.W.2d 151, 154 (Tex. 1963).

627. Kiefer v. Cont'l Airlines, Inc., 10 S.W.3d 34, 39 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (citing Gum v. Schaefer, 683 S.W.2d 803, 807 (Tex. App.—Corpus Christi 1984, no writ)). Bias is an indication toward one side or another, and prejudice means prejudgment and includes bias. Compton v. Henrie, 364 S.W.2d 179, 182 (Tex. 1963)

628. *Kiefer*, 10 S.W.3d at 39.

629. *See Compton*, 364 S.W.2d at 181-82.

630. State v. Dick, 69 S.W.3d 612, 618 (Tex. App.—Tyler 2001, no pet.); *Kiefer*, 10 S.W.3d at 39 (citing Guerra v. Wal-Mart Stores, Inc. 943 S.W.2d 56, 59 (Tex. App.—San Antonio 1997, writ denied)).

631. TEX. R. CIV. P. 327(a).

632. Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d 262, 372 (Tex. 2000).

633. Pharo v. Chambers County, Tex., 922 S.W.2d 945, 948 (Tex. 1996); Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40, 48 (Tex. App.—San Antonio 2002, pet. filed). A prospective juror's failure to answer a question accurately does not alone establish misconduct.

## F. *Alignment of Parties and Allocation of Peremptory Strikes*

Questions regarding alignment and antagonism of the parties often arise in multiple party litigation.[634] 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.[635] 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 an unfair advantage."[636] 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.[637] On mandamus review, the appellate court reviews the record as it existed at the time the motion was heard to determine whether the court abused its discretion.[638] 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.[639] To preserve error in the allocation of jury strikes, the party must lodge the objection after voir dire, but before exercising the strikes.[640]

Whether antagonism exists between parties, *per se*, is a question of law.[641] 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

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634. Amis v. Ashworth, 802 S.W.2d 379, 384 & n.7 (Tex. App.—Tyler 1990, orig. proceeding).

635. 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.

636. TEX. R. CIV. P. 233.

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

638. *Id.* at 384 n.7.

639. *Id.* at 382-83.

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

641. Garcia v. Cent. Power & Light Co., 704 S.W.2d 734, 736 (Tex. 1986); Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1979); "Y" Propane Serv., Inc. v. Garcia, 61 S.W.3d 559, 570 (Tex. App.—San Antonio 2001, no pet.); 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.).

trial court before the parties exercise their strikes.[642] "The existence of antagonism must be finally determined after voir dire and prior to the exercise of the strikes of the parties."[643] 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.[644] "The nature and degree of the antagonism, and its effect on the number of peremptory jury strikes allocated to each litigant or side, [however,] are matters left to the discretion of the trial court."[645]

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.[646] On the other hand, if the trial court has disregarded the posture of the parties, or has overlooked or misconstrued a crucial factor, the trial court's decision should be reversed as an abuse of discretion.[647] 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.[648] When the evidence is sharply conflicting and the trial is hotly contested, the error automatically results in a materially unfair trial.[649]

### G. *Batson/Edmonson* Challenges

The Equal Protection Clause of the United States Constitution[650] prohibits parties from using peremptory strikes to exclude members of a jury panel solely on the basis of race.[651] This pro-

642. *See Garcia*, 704 S.W.2d at 737; *Patterson Dental*, 592 S.W.2d at 919; *"Y" Propane Serv.*, 61 S.W.3d at 570; *Cecil*, 893 S.W.2d at 55; Webster v. Lipsey, 787 S.W.2d 631, 638 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

643. *Garcia*, 704 S.W.2d at 737.

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

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

646. *Am. Cyanamid Co.*, 732 S.W.2d at 661.

647. *Id.*

648. Garcia v. Cent. 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*, 592 S.W.2d at 920.

649. *Garcia*, 704 S.W.2d at 737; *Patterson Dental*, 592 S.W.2d at 921.

650. U.S. CONST. amend. XIV, § 1.

651. Batson v. Kentucky, 476 U.S. 79, 89 (1986).

scription applies to both criminal and civil trials.[652] The United States Supreme Court explained the three-step process in resolving a *Batson* objection to a peremptory challenge.[653] First, the opponent of the challenge must establish a prima facie case of racial discrimination.[654] Second, the burden shifts to the party exercising the strike to present a race-neutral explanation.[655] Unless discriminatory intent is inherent in the reason offered, the explanation will be deemed race-neutral.[656] Third, the trial court must then determine whether the challenging party has proven "purposeful racial discrimination."[657] The issue of whether the race-neutral explanation should be believed is a question of fact for the trial court.[658] The standard of review of a trial court's decision regarding a *Batson/Edmonson* challenge is abuse of discretion.[659] 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.[660]

## H. *Opening Statements*

The trial court has broad discretion to limit opening statements, subject only to review for abuse of discretion.[661] It is error to discuss evidence that is not eventually offered at the trial.[662] None-

652. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991); *accord* Goode v. Shoukfeh, 943 S.W.2d 441, 444-45 (Tex. 1997) (noting that the Supreme Court has extended *Batson* to civil trials); Powers v. Palacios, 813 S.W.2d 489, 491 (Tex. 1991) (holding that use of peremptory challenges to exclude juror on basis of race violates the equal protection rights of the excluded juror).

653. *Goode*, 943 S.W.2d at 445.

654. *Id.*

655. *Id.*

656. *Id.*

657. *Id.*

658. *Goode*, 943 S.W.2d at 445. Unless the explanation offered is too incredible to be believed, the reviewing court cannot reweigh the evidence and reach a different conclusion. *Id.*

659. *Id.* The Court of Criminal Appeals adopted the clearly erroneous standard. *Id.* (citing Whitsey v. State, 796 S.W.2d 707, 720-26 (Tex. Crim. App. 1989)).

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

661. 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.).

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

theless, the error is reversible error only if it was calculated to and probably did cause the rendition of an improper judgment.[663]

## I. *Trial, Postverdict, and Postjudgment Trial Amendments*

When a request to amend pleadings is made within seven days of trial,[664] or thereafter under Rule 63,[665] or postverdict pleading amendments are requested under Rule 66,[666] the request 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."[667] 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.[668] However, if the amendment is substantive in nature (i.e., changing the basis of a party's cause of action), the trial court has discretion to grant or deny the amendment.[669]

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663. *Guerrero*, 864 S.W.2d at 800.

664. 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. Taiwan Shrimp Farm Vill. 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. Am. 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, 851 (Tex. App.—Houston [14th Dist.] 1990, no writ). The rule also applies to summary judgment proceedings because a summary judgment hearing is a trial. Goswami v. Metro. Sav. & Loan Ass'n, 751 S.W.2d 487, 490 (Tex. 1988); McIntyre v. Wilson, 50 S.W.3d 674, 684 (Tex. App.—Dallas 2001, pet. denied); Austin Transp. Study Policy Advisory Comm'n v. Sierra Club, 843 S.W.2d 2d 683, 687 (Tex. App.—Austin 1992, writ denied).

665. TEX. R. CIV. P. 63.

666. TEX. R. CIV. P. 66.

667. State Bar of Tex. v. Kilpatrick, 874 S.W.2d 656, 658 (Tex. 1994); Chapin & Chapin, Inc. v. Tex. Sand & Gravel Co., 844 S.W.2d 664, 665 (Tex. 1992) (per curiam); Greenhalgh v. Serv. 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. Bell v. Moores, 832 S.W.2d 749, 757 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

668. *Chapin & Chapin*, 844 S.W.2d at 665 (citing *Greenhalgh*, 787 S.W.2d at 939-40); Stephenson v. Le Boeuf, 16 S.W.3d 829, 839 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); 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. *Libhart*, 949 S.W.2d at 797.

669. Smith v. Heard, 980 S.W.2d 693, 698 (Tex. App.—San Antonio 1998, pet. denied); *Taiwan Shrimp Farm Vill. Ass'n*, 915 S.W.2d at 70; *Libhart*, 949 S.W.2d at 797 (citing Hardin v. Hardin, 597 S.W.2d 347, 350 (Tex. 1980)).

The standard of review for granting a trial amendment is whether the trial court abused its discretion.[670] To establish an abuse of discretion in allowing the amendment, the complaining party must present evidence of surprise or prejudice,[671] and request a continuance.[672] Mere allegations of surprise or prejudice are not sufficient.[673] Note, however, that while the trend is to give trial courts wide latitude in allowing amendments, postjudgment trial amendments are not permitted.[674]

## J. *Evidence*

The admission or exclusion of evidence is a matter within the trial court's discretion.[675] 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."[676] 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

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670. *Kilpatrick*, 874 S.W.2d at 658; *Greenhalgh*, 787 S.W.2d at 941; Williams v. Williams, 19 S.W.3d 544, 546 (Tex. App.—Fort Worth 2000, pet. denied); Clade v. Larsen, 838 S.W.2d 277, 280 (Tex. App.—Dallas 1992, writ denied); AmSav Group, Inc. v. Am. Sav. & Loan Ass'n, 796 S.W.2d 482, 490 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

671. *Greenhalgh*, 787 S.W.2d at 940; *Clade*, 838 S.W.2d at 280.

672. Fletcher v. Edwards, 26 S.W.3d 66, 74 (Tex. App.—Waco 2000, pet. denied); Resolution Trust Corp. v. Cook, 840 S.W.2d 42, 46 (Tex. App.—Amarillo 1992, writ denied); James v. Tex. Dep't of Human Servs., 836 S.W.2d 236, 238 (Tex. App.—Texarkana 1992, no writ); La. & Ark. Ry. Co. v. Blakely, 773 S.W.2d 595, 597 (Tex. App.—Texarkana 1989, writ denied).

673. *Greenhalgh*, 787 S.W.2d at 941; Weidner v. Sanchez, 14 S.W.3d 353, 376-77 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

674. Mitchell v. Laflamme, 60 S.W.3d 123, 132 (Tex. App.—Houston [14th Dist.] 2000, no pet.); Boarder to Boarder Trucking, Inc. v. Mondi, Inc., 831 S.W.2d 495, 499 (Tex. App.—Corpus Christi 1992, no writ).

675. Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 43 (Tex. 1998); 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) (discussing the balancing factors related to the admission or exclusion of evidence).

676. TEX. R. APP. P. 44.1; *Owens-Corning Fiberglas Corp.*, 972 S.W.2d at 43; *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); W. Tex. Gathering Co. v. Exxon Corp., 837 S.W.2d 764, 775 (Tex. App.—El Paso 1992, writ granted), *rev'd on other grounds*, 868 S.W.2d 299 (Tex. 1993).

an improper judgment.[677] However, the complaining party is not required to prove that "but for" the error, a different judgment would necessarily have resulted.[678] Instead, the complaining party must only show that the error "probably" resulted in an improper judgment.[679] In making this determination, the appellate court must review the entire record.[680] 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 particular evidence admitted or excluded.[681] 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,[682] subsequently permits the same or similar evidence to be introduced without objection,[683] or if the evidence is merely cumulative of properly admitted evidence.[684]

1. Expert Testimony

When a party objects to an expert's proposed testimony regarding a matter of science, or any other technical or specialized knowledge, whether novel or conventional, the proponent of the expert

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677. 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).

678. *McCraw*, 828 S.W.2d at 758; Tex. Power & Light Co. v. Hering, 148 Tex. 350, 224 S.W.2d 191, 192 (1949); Marathon Corp. v. Pitzner, 55 S.W.3d 114, 142 (Tex. App.—Corpus Christi 2001, pet. filed).

679. *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.

680. Interstate Northborough P'ship v. State, 66 S.W.3d 213, 220 (Tex. 2001); *Alvarado*, 897 S.W.2d at 754; *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).

681. *Interstate Northborough P'ship*, 66 S.W.3d at 220; *W. Tex. Gathering Co.*, 837 S.W.2d at 775; Shenandoah Assocs. v. J & K Props., Inc., 741 S.W.2d 470, 493 (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.); Atl. Mut. Ins. Co. v. Middleman, 661 S.W.2d 182, 185 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

682. Southwestern Elec. Power Co. v. Burlington N. R.R. Co., 966 S.W.2d 467, 473 (Tex. 1998) (quoting McInnes v. Yamaha Motor Co., 673 S.W.2d 185, 188 (Tex. 1984)).

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

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

testimony has the burden of demonstrating its admissibility.[685] Accordingly, the proponent must establish that the expert's testimony is based on a reliable foundation.[686] Texas Rule of Evidence 702 provides a two-part test to determine the admissibility of an expert's testimony.[687] First, the expert must be qualified, and second, the expert's opinion must be relevant to the issues in the case and based upon a reliable foundation.[688] In *E.I. du Pont de Nemours & Co. v. Robinson*,[689] the Texas Supreme Court determined that the trial court is the evidentiary gatekeeper to determine whether the expert and his proffered testimony met these two tests.[690] Both the admissibility and sufficiency of unreliable scientific evidence can be challenged on appeal.[691] While the trial court serves as an "evidentiary gatekeeper" by screening for irrelevant and unreliable expert evidence, the trial court has broad discretion in determining the admissibility of the evidence.[692]

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685. Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998); E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995). In *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998), the supreme court held that the *Robinson* factors apply to all expert testimony offered under TEX. R. EVID. 702. *Gammill*, 972 S.W.2d at 726. To preserve error on a complaint that expert testimony is not reliable and therefore no evidence, a party must object to the evidence before trial or when the evidence is offered. *Ellis*, 971 S.W.2d at 402. In his concurrence, Justice Gonzalez outlined the steps he thought necessary to preserve a *Daubert/Robinson* challenge for appellate review. *Id.* at 412-15 (Gonzalez, J., concurring).

686. *Robinson*, 923 S.W.2d at 556.

687. TEX. R. EVID. 702.

688. TEX. R. APP. P. 702; Exxon Pipeline Co. v. Zwahr, 45 Tex. Sup. Ct. J. 691, 694, 2002 WL 1027003, at *4 (May 23, 2002); Guadalupe-Blanco River Auth. v. Kraft, 77 S.W.3d 805, 807 (Tex. 2002); Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 499 (Tex. 2001); *Gammill*, 972 S.W.2d at 720; *Robinson*, 923 S.W.2d at 556.

689. 923 S.W.2d 549 (Tex. 1995).

690. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995) (adopting the approach defined by the United States Supreme Court in *Daubert*, 509 U.S. 579, 592-95 (1993)); *Helena Chem. Co.*, 47 S.W.3d at 499; Gen. Motors Corp. v. Sanchez, 997 S.W.2d 584, 590 (Tex. 1999); *Gammill*, 972 S.W.2d at 720; *Ellis*, 971 S.W.2d at 409.

691. *Compare Ellis*, 971 S.W.2d at 409 (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" issue).

692. *Zwahr*, 2002 WL 1027003, at *4 (citing *Sanchez*, 997 S.W.2d at 590); *Helena Chem. Co.*, 47 S.W.3d at 499; *Gammill*, 972 S.W.2d at 727; *see Robinson*, 923 S.W.2d at 558-59 (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).

Under Rule 104(a),[693] whether an expert is qualified is a preliminary question for the trial court to decide, and the party offering the expert's testimony has the burden to establish that the witness is qualified under Rule 702.[694] In determining whether an expert is qualified, the trial court must make certain that the purported expert truly has the expertise concerning the subject matter about which he is offering an opinion.[695] The supreme court has noted that the trial court is not to decide whether an expert's conclusion is correct, but instead, only determine whether the analysis used to reach the conclusion is reliable.[696] A trial court's acceptance of a witness' qualifications as an expert is reviewed for an abuse of discretion.[697]

The relevance requirement, which incorporates the relevancy analysis under Rules 401 and 402,[698] is met if the expert testimony is "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute."[699] If the evidence has no relationship to any issue in the case, the evidence does not satisfy Rule 702 and is inadmissible.

The reliability requirement, with respect to expert testimony, focuses on the "principles, research, and methodology underlying an expert's conclusions."[700] In *Robinson*, the Texas Supreme Court adopted six nonexclusive factors for admissibility of scientific evidence established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*:[701]

> (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;

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693. TEX. R. EVID. 104(a).

694. *Gammill*, 972 S.W.2d at 718; Broders v. Heise, 924 S.W.2d 148, 151 (Tex. 1996).

695. *Helena Chem. Co.*, 47 S.W.3d at 499; *Gammill*, 972 S.W.2d at 719; *Broders*, 924 S.W.2d at 152.

696. *Gammill*, 972 S.W.2d at 728.

697. *Gammill*, 972 S.W.2d at 718; *Broders*, 924 S.W.2d at 151.

698. TEX. R. EVID. 401, 402.

699. Exxon Pipeline Co. v. Zwahr, 45 Tex. Sup. Ct. J. 691, 694, 2002 WL 1027003, at *4 (May 23, 2002) (citing *Robinson*, 923 S.W.2d at 556) (quoting United States v. Downing, 753 F.2d 1224, 1242 (D.C. Cir. 1985)).

700. *Zwahr*, 2002 WL 1027003, at *4 (citing *Robinson*, 923 S.W.2d at 557).

701. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

> (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique.[702]

The supreme court recognized in *Gammill* that the *Robinson* factors may not apply to certain testimony;[703] however, in those cases there still must be some basis for the opinion offered to demonstrate reliability.[704] To determine reliability, the supreme court observed:

> *Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it will have a reliable basis in the knowledge and experience of the discipline.[705]

The suggested inquiries in assessing the reliability of expert testimony are flexible and not exclusive, or even required; a trial court may choose to make other inquiries, instead of, or in addition to, those noted in *Robinson*.[706] The courts have emphasized that it is ultimately up to the trial court, in exercising its duty as evidentiary gatekeeper, to determine how to assess the reliability of particular expert testimony.[707]

The cases have developed some principles for determining reliability. Under the reliability requirement, the "expert testimony is unreliable if it is not grounded 'in the methods and procedures of science'" and is no more than "'subjective belief or unsupported speculation.'"[708] Additionally, if the analytical gap, between the data the expert relies upon and the opinion offered is too great, the

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702. *Robinson*, 923 S.W.2d at 557 (citations omitted); Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 499 (Tex. 2001); Gen. Motors Corp. v. Sanchez, 997 S.W.2d 584, 590 (Tex. 1999); *accord Gammill*, 972 S.W.2d at 720.

703. *Helena Chem. Co.*, 47 S.W.3d at 499; *Gammill*, 972 S.W.2d at 726.

704. *Helena Chem. Co.*, 47 S.W.3d at 499 (citing *Gammill*, 972 S.W.2d at 726).

705. *Id.*

706. Coastal Tankships, Inc. v. Anderson, No. 01-99-01345-CV, 2002 WL 1227316, *4, 11 (Tex. App.—Houston [1st Dist.] May 31, 2002, pet. filed).

707. *Helena Chem. Co.*, 47 S.W.3d at 499; Coastal Tankships, Inc. v. Anderson, 2002 WL 1227316, at *11 (citing Hernandez v. State, 53 S.W.3d 742, 752 (Tex. App.—Houston [1st Dist.] 2001, no pet.)).

708. Exxon Pipeline Co. v. Zwahr, 45 Tex. Sup. Ct. J. 691, 694, 2002 WL 1027003, at *4 (May 23, 2002) (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 (1993)).

expert testimony is unreliable.[709] Thus, if an expert relies upon unreliable foundational data, any opinion based upon that data is unreliable; if the underlying data is sound, but the expert's methodology is flawed, the opinion is also unreliable.[710] In applying the reliability standard, the trial court does not determine whether the expert's conclusions are correct; rather, the trial court's role is to determine whether the analysis used to reach those conclusions is reliable.[711]

When reviewing the sufficiency of the scientific evidence supporting a jury finding, unreliable scientific evidence is the legal equivalent of no evidence at all.[712] 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."[713] 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."[714] Such evidence carries absolutely no weight and is the equivalent of no evidence.[715]

2. Demonstrative Evidence

Visual, real, or demonstrative evidence is admissible where it tends to resolve some issue at trial and is relevant, so long as its probative value outweighs its prejudicial effect.[716] 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 experi-

709. *Id.* (citing Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 727 (Tex. 1998)).

710. *Helena Chem. Co.*, 47 S.W.3d at 499 (citing *Havner*, 953 S.W.2d at 714).

711. *Zwahr*, 2002 WL 1027003, at *4 (citing *Gammill*, 972 S.W.2d at 728).

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

713. *Id.*

714. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 558 (Tex. 1995).

715. *Havner*, 953 S.W.2d at 712.

716. TEX. R. EVID. 403; *see* Ford Motor Co. v. Miles, 967 S.W.2d 377, 388-89 (Tex. 1998) (Owen, J., concurring) (holding that admission of videotapes of sled tests was harmful error).

ment."[717] However, the conditions do not have to be identical; the experiment may be admitted if the trial court, in exercising its discretion, finds the difference in condition to be minor.[718] A trial court may permit a demonstration of the plaintiff's injury as long as it focuses on the extent and nature of the injury, and is not designed to inflame the minds of the jury.[719] The admission of such demonstrative evidence is within the trial court's discretion, and subject to an abuse of discretion review.[720]

## K. *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.[721] "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."[722] If the jury finds in favor of the plaintiff on the issue of punitive damages liability, then the same jury is presented with evidence relevant to punitive damages, such as evidence of the defendant's net worth.[723] The jury would then determine the amount of damages to award after considering all of the evidence presented at both

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717. Rodriguez v. Hyundai Motor Co., 944 S.W.2d 757, 767 (Tex. App.—Corpus Christi 1997), *rev'd on other grounds*, 995 S.W.2d 661 (Tex. 1999); *accord* Gen. Motors Corp. v. Gayle, 951 S.W.2d 469, 475 (Tex. 1997).

718. *Rodriguez*, 944 S.W.2d at 767.

719. Parkway Hosp., Inc. v. Lee, 946 S.W.2d 580, 585 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

720. *Id.*

721. TEX. CIV. PRAC. & REM. CODE ANN. § 41.009 (Vernon 1997); *see* Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 430-31 (Tex. 2000) (applying the *Moriel* standards to all future punitive damages cases and refusing to make an exception for class action suits); Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 30 (Tex. 1994) (requiring a bifurcated trial when punitive damages are sought); Hyman Farm Servs., Inc. v. Earth Oil & Gas Co., 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).

722. *Moriel*, 879 S.W.2d at 30.

723. *See* Lunsford v. Morris, 746 S.W.2d 471, 472 (Tex. 1988) (orig. proceeding) (noting that forty-three states allow evidence of net worth to be admitted during assessment of punitive damages); Durban v. Guajardo, 79 S.W.3d 198, 210-11 (Tex. App.—Dallas 2002, no pet.) (asserting that evidence of a defendant's net worth is not a necessary element for a plaintiff to recover punitive damages, but instead is merely a relative issue).

phases of the trial.[724] A punitive damages award is reviewed under a factual sufficiency standard and will not be set aside unless, upon a review of the entire record, the appellate court determines that the award is "so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and manifestly unjust."[725]

"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."[726] To preserve the issue, the complaining party must object to the dissenting jurors' participation in the punitive damages deliberations.[727] If the trial court refuses to bifurcate the trial, the reviewing court will apply the harmless error rule to determine whether the error was "reasonably calculated to cause and probably did cause rendition of an improper judgment."[728]

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724. *Moriel*, 879 S.W.2d at 30; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 41.010(b) (Vernon 1997) (stating that whether to award punitive damages, as well as the amount of punitive damages, is within the discretion of the trier of fact).

725. Ellis County State Bank v. Keever, 936 S.W.2d 683, 685 (Tex. App.—Dallas, no writ); *accord* Pope v. Moore, 711 S.W.2d 622, 624 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Although there is no set formula or rule in calculating the ration between punitive damages and actual damages (because the determination of reasonableness is fact specific to each case), the ration between the two must be reasonably proportional. Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981). When reviewing a punitive damages award for factual sufficiency, the court must explain why the evidence either supports or fails to support the award, in light of the *Kraus* factors. *Moriel*, 879 S.W.2d at 31.

726. Operation Rescue-Nat'l v. Planned Parenthood of Houston & Southeast Tex., Inc., 937 S.W.2d 60, 85 (Tex. App.—Houston [14th Dist.] 1996), *modified*, 975 S.W.2d 546 (Tex. 1998). *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 the same ten or more jurors to concur in all answers necessary to judgment including answer to the amount of punitive damages awarded, if any, in a bifurcated trial), *with* Greater Houston Transp. Co. v. Zrubeck, 850 S.W.2d 579, 587 (Tex. App.—Corpus Christi 1993, writ denied) (holding that "[Rule 292] does not require concurrence 'between separate' trials").

727. *Operation Rescue Nat'l*, 937 S.W.2d at 85; *see also* Ford Motor Co. v. Sheldon, 22 S.W.3d 444, 461 (Tex. 2000) (discussing *Zrubeck* but not commenting on its correctness).

728. Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 342 (Tex. 1998) (citing TEX. R. APP. P. 61.1).

## L. *Motion for Directed or Instructed Verdict*

### 1. Jury Trials

A directed or instructed verdict[729] is proper under Rule 268:[730]

> (1) when a defect in the opponent's pleadings makes them insufficient to support a judgment; (2) when the evidence conclusively proves a fact that establishes a party's right to judgment as a matter of law; or (3) when the evidence offered on a cause of action is insufficient to raise an issue of fact.[731]

An appeal from the denial of a motion for directed verdict is in essence a challenge to the legal sufficiency to the evidence.[732] Generally, a directed verdict in favor of a defendant may be proper in two situations: first when a plaintiff does not present evidence "raising a fact issue essential to the plaintiff's right of recovery;"[733] and second, when the plaintiff "admits or the evidence conclusively establishes a defense to the plaintiff's cause of action."[734] In reviewing the granting of a directed or instructed verdict by the trial court on an evidentiary basis, the reviewing court will decide

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729. *See* Sulak v. Hubenak, No. 01-95-01431-CV, 1997 WL 289665, at *1 n.1 (Tex. App.—Houston [1st Dist.] May 29, 1997, no writ) (not designated for publication) (noting that 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." *Id.*

730. TEX. R. CIV. P. 268.

731. Kline v. O'Quinn, 874 S.W.2d 776, 785 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *accord* Delp v. Douglas, 948 S.W.2d 483, 492 (Tex. App.—Fort Worth 1997), *rev'd and vacated in part on other grounds*, 987 S.W.2d 879 (Tex. 1999); 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 denied); Kelly v. Diocese of Corpus Christi, 832 S.W.2d 88, 90-91 (Tex. App.—Corpus Christi 1992, writ dism'd w.o.j.); Tex. 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.).

732. Haynes & Boone, L.L.P. v. Chason, 81 S.W.3d 307, 309 (Tex. App.—Tyler 2002, pet. denied).

733. Prudential Ins. Co. v. Fin. Review Servs., 29 S.W.3d 74, 77 (Tex. 2000) (citing Latham v. Castillo, 972 S.W.2d 66, 67-68, 70-71 (Tex. 1998)); Vance v. My Apartment Steak House of San Antonio, Inc., 677 S.W.2d 480, 483 (Tex. 1984).

734. *Prudential*, 29 S.W.3d at 77; (citing Villegas v. Griffin Indus., 975 S.W.2d 745, 748-49 (Tex. App.—Corpus Christi 1998, pet. denied)); Davis v. Mathis, 846 S.W.2d 84, 86 (Tex. App.—Dallas 1992, no writ); 4 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 21:52 (2d ed. 2001).

whether there is any evidence of probative value to raise issues of fact on the material questions presented.[735] Upon review, 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."[736] "'[E]very reasonable intendment deductible from the evidence is to be indulged in [the nonmovant's] favor.'"[737] "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 of that issue."[738] "Where no evidence of probative force on an ultimate fact element 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."[739] The reviewing court may affirm a directed verdict even if the trial court's rationale for granting the directed verdict is erroneous, provided the verdict can be supported on another basis.[740]

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735. Dow Chem. v. Francis, 46 S.W.3d 237, 242 (Tex. 2001); *Prudential*, 29 S.W.3d at 77 (citing Szczepanik v. First S. Trust Co., 883 S.W.2d 648, 649 (Tex. 1994) (per curiam)); Qantel Bus. Sys., Inc. v. Custom Controls Co., 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).

736. Szczepanik v. First S. Trust Co., 883 S.W.2d 648, 649 (Tex. 1994); *accord Dow Chem.*, 46 S.W.3d at 242; *Qantel*, 761 S.W.2d at 303; 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's Hosp., 887 S.W.2d 233, 241 (Tex. App.—Fort Worth 1994, writ denied); Univ. 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).

737. Trenholm v. Ratcliff, 646 S.W.2d 927, 931 (Tex. 1983); *accord Univ. Nat'l Bank*, 773 S.W.2d at 709.

738. *Szczepanik*, 883 S.W.2d at 649; *accord* Jones v. Tarrant Util. Co., 638 S.W.2d 862, 865 (Tex. 1982); *Qantel*, 761 S.W.2d at 304; *White*, 651 S.W.2d at 262; *Collora*, 574 S.W.2d at 68; Tex. Employers Ins. Ass'n v. Page, 553 S.W.2d 98, 102 (Tex. 1977).

739. ITT Consumer Fin. Corp. v. Tovar, 932 S.W.2d 147, 160 (Tex. App.—El Paso 1996, writ denied); *accord* Reyna v. First Nat'l Bank, 55 S.W.3d 58, 69 (Tex. App.—Corpus Christi; 2001, no pet.); *Univ. Nat'l Bank*, 773 S.W.2d at 709.

740. Robbins v. Payne, 55 S.W.3d 740, 746 (Tex. App.—Amarillo 2001, pet. denied); Kelly v. Diocese of Corpus Christi, 832 S.W.2d 88, 90 (Tex. App.—Corpus Christi 1992, writ dism'd w.o.j.).

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, just as a jury [would do]."[741] Prior to the decision in *Qantel Business Systems, Inc. v. Custom Controls Co.*,[742] 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.[743] 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.[744] 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.[745] The trial judge, if able to find some evidence to support the claim, but remained unconvinced, was required, nonetheless, to hear the defendant's case before ruling on the factual sufficiency of the evidence.[746] However, the supreme court in *Qantel* overruled that line of cases and held that when a plaintiff rests his case, on motion for judgment by the defendant, the judge has the power to rule on both the factual and legal issues and to make factual findings at that time upon a party's request.[747] On appeal, the legal and factual sufficiency of the evidence to support the judgment may be challenged as in any other nonjury case.[748] The standards of review in nonjury cases are discussed in Part VIII.

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741. *Qantel*, 761 S.W.2d at 306 (Gonzalez, J., concurring); Schwartz v. Pinnacle Communications, 944 S.W.2d 427, 431 (Tex. App.—Houston [14th Dist.] 1997, no writ).

742. 761 S.W.2d 302 (Tex. 1988).

743. Qantel Bus. Sys., Inc. v. Custom Controls, 761 S.W.2d 302, 303 (Tex. 1988).

744. *Id.* at 303-04.

745. *Id.* at 304.

746. *Id.*

747. *Id.* at 304; Roberts Express, Inc. v. Expert Transp., Inc., 842 S.W.2d 766, 769-70 (Tex. App.—Dallas 1992, no writ).

748. *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).

## M. *Charge of the Court*

Great confusion exists regarding the standard of review for complaints about the court's charge to the jury.[749] 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.[750]

### 1. Questions

Unless extraordinary circumstances exist, a trial court must submit broad form questions to the jury.[751] 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 the evidence."[752] The supreme court has interpreted Rule 278 as providing "a substantive, non-discretionary directive to trial courts requiring them to submit requested questions to the jury if the pleadings and any evidence support them."[753] Thus, as "long as matters are timely raised and properly requested as a part of a trial

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749. *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.*

750. *See* Tex. 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 principle"). However, when a trial court submits a single broad-form liability question incorporating multiple theories of liability, one of which is an invalid theory, and the reviewing court cannot determine whether the jury based its verdict on the invalid theory, the error is harmful and a new trial must be granted. Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 388 (Tex. 2000); *cf.* City of Fort Worth v. Zimlich, 29 S.W.3d 62, 69 n.1 (Tex. 2000) (noting court has not decided whether the rationale in *Casteel* should be extended to cases in which there allegedly was no evidence to support one or more theories included within a broad form submission).

751. TEX. R. CIV. P. 277; Keetch v. Kroger Co., 845 S.W.2d 262, 266 (Tex. 1992); Crawford v. Deets, 828 S.W.2d 795, 800 (Tex. App.—Fort Worth 1992, writ denied); *E.B.*, 802 S.W.2d at 649.

752. TEX. R. CIV. P. 278.

753. Elbaor v. Smith, 845 S.W.2d 240, 243 (Tex. 1992).

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."[754]

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.[755] Likewise, other objections, such as those which claim that the issue in question was not supported by the pleadings,[756] that there is no cause of action or defense under the substantive law,[757] and that the evidence is not legally sufficient to support submission,[758] 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.[759] "To determine whether an alleged error in the jury charge is reversible, the reviewing court must consider the pleadings of the parties, the evidence presented at trial, and the charge in its entirety."[760] In addition, the reversible error analysis applies to complaints about errors in the charge.[761] 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.[762]

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754. Exxon Corp. v. Perez, 842 S.W.2d 629, 631 (Tex. 1992).

755. Cont'l Cas. Co. v. Street, 379 S.W.2d 648, 651 (Tex. 1964).

756. McLennan Elec. Coop., Inc. v. Sims, 376 S.W.2d 924, 927 (Tex. Civ. App.—Waco 1964, writ ref'd n.r.e.).

757. *Id.* at 927.

758. *Elbaor*, 845 S.W.2d at 243; Brown v. Goldstein, 685 S.W.2d 640, 641 (Tex. 1985); Garza v. Alviar, 395 S.W.2d 821, 824 (Tex. 1965).

759. TEX. R. CIV. P. 277; Tex. 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).

760. Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n, 710 S.W.2d 551, 555 (Tex. 1986); *cf.* Browning-Ferris Indus., Inc. v. Lieck, 881 S.W.2d 288, 293 (Tex. 1994) (noting that the holding in *Island Recreational* would not be extended to the instant case nor would the court even consider overruling it).

761. Lee Lewis Constr., Inc. v. Harrison, 70 S.W.3d 778, 786-87 (Tex. 2001) (citing TEX. R. APP. P. 61.1); *Island Recreational*, 710 S.W.2d at 555.

762. *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 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 ac-

### 2. Instructions and Definitions

The trial court should generally explain to the jury any legal or technical terms contained in instructions and definitions.[763] The decision of whether to submit a particular instruction or definition is reviewed for an abuse of discretion,[764] with the essential question being whether the instruction or definition aids the jury in answering the questions.[765] Accordingly, a court is given wide latitude to determine the sufficiency of explanatory instructions and definitions.[766] A court has considerably more discretion in submitting instructions and definitions than it has in submitting jury questions.[767]

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tion after the defendant properly objected to the omission of the issue on an element, he waived the issue and could not recover).

763. TEX. R. CIV. P. 277; Niemeyer v. Tana Oil & Gas Corp., 39 S.W.3d 380, 387 (Tex. App.—Austin 2001, no pet.); 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.).

764. State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 451 (Tex. 1997); Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 793 (Tex. 1995); Magro v. Ragsdale Bros., 721 S.W.2d 832, 836 (Tex. 1986).

765. McReynolds v. First Office Mgmt., 948 S.W.2d 342, 344 (Tex. App.—Dallas 1997, no writ); Owens-Corning Fiberglas 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); La. & Ark. Ry. Co. v. Blakely, 773 S.W.2d 585, 598 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

766. *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 denied).

767. Harris v. Harris, 765 S.W.2d 798, 801 (Tex. App.—Houston [14th Dist.] 1988, writ denied); *cf.* Hyundai Motor Co. v. Rodriguez, 995 S.W.2d 661, 664 (Tex. 1999) (stating that the "submission of a single question relating to multiple theories may be necessary to avoid the risk that the jury will become confused and answer questions inconsistently"). The goal of the jury charge is to submit the issues for decision "logically, simply, clearly, fairly, correctly, and completely." *Rodriguez*, 995 S.W.2d at 664. Toward that end, the trial judge has broad discretion, as long as the jury charge is legally correct. *Id.* Generally, plaintiffs are entitled to obtain findings in support of alternative recovery theories, even if those theories address a single injury. *Id.* at 668. In those cases, the trial court should structure the charge so as to allow the plaintiff to elect a basis of recovery, and allow the defendant to assert defenses which may not be available under all theories. *Id.* The *Rodriguez* court further stated that "[o]ur holding today does not hamper the trial court from submitting a charge on multiple theories." *Id.* Interestingly, the court in *Rodriguez* did not cite or discuss Rule 278 which provides that judgment will not be reversed because of the failure to submit alternate wordings of the same question. TEX. R. CIV. P. 278.

When instructions or definitions are actually given, the question on review is whether the instruction or definition is "proper."[768] An instruction is "proper" if it assists the jury, is supported by the pleadings or evidence, and accurately states the law.[769] Examples of "improper" instructions include those which misstate the law or mislead the jury,[770] or those which comment on the weight of the evidence.[771] The test of sufficiency for a definition is its "reasonable clarity in performing [its] function."[772] This is reviewed under an abuse of discretion test.[773] However, whether the terms are properly defined or the instruction properly worded should be a question of law reviewable de novo.[774] A de novo standard of review should also be used when the complaint is that an explanatory instruction or definition misstates the law,[775] or directly comments on the weight of the evidence.[776] If the definition or instruction

768. TEX. R. CIV. P. 277; *Plainsman,* 898 S.W.2d at 791; *M.N. Dannenbaum*, 840 S.W.2d at 631; Atl. Mut. Ins. Co. v. Middleman, 661 S.W.2d 182, 187 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

769. Tex. Workers' Comp. Ins. Fund v. Mandlbauer, 34 S.W.3d 909, 912 (Tex. 2000); El Paso Ref., Inc. v. Scurlock Permian Corp., 77 S.W.3d 374, 388 (Tex. App.—El Paso 2002, pet. filed).

770. Jackson v. Fontaine's Clinics, Inc., 499 S.W.2d 87, 89 (Tex. 1973); Steak & Ale of Tex., Inc. v. Borneman, 62 S.W.3d 898, 904 (Tex. App.—Fort Worth 2001, no pet.); McReynolds v. First Office Mgmt., 948 S.W.2d 342, 344 (Tex. App.—Dallas 1997, no writ); Owens-Corning Fiberglas Corp. v. Martin, 942 S.W.2d 712, 721 (Tex. App.—Dallas 1997, no writ).

771. 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 242; *accord* H.E. Butt Grocery Co. v. Bilotto, 985 S.W.2d 22, 24 (Tex. 1998).

772. Harris v. Harris, 765 S.W.2d 798, 801 (Tex. App.—Houston [14th Dist.] 1989, writ denied); *accord Plainsman Trading Co.*, 898 S.W.2d at 791.

773. *Plainsman*, 898 S.W.2d at 791; *Torres*, 928 S.W.2d at 242; *Harris*, 765 S.W.2d at 801.

774. *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); Villareal 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 is erroneous).

775. *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.).

776. City of Pearland v. Alexander, 483 S.W.2d 244, 249 (Tex. 1972); Am. Bankers Ins. Co. of Fla. v. Caruth, 786 S.W.2d 427, 434-35 (Tex. App.—Dallas 1990, no writ).

was improper, the reviewing court must then determine whether the error was harmless.[777]

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."[778] When the refusal is based on a determination that the request is unnecessary, the abuse of discretion standard of review should apply.[779] In contrast, when the refusal is based upon a determination that the instruction or definition was not raised by the pleadings,[780] was not supported by at least "some evidence,"[781] was not tendered in substantially correct form, or was not an element of a ground of recovery or defense in broad form submission,[782] the complaint presents a legal question reviewable de novo.[783] Except (perhaps) for refusal to submit instructions concerning otherwise nonsubmitted elements of a party's cause of action or defense (which implicates the constitutional right of trial by jury), the harmless error rule applies when determining whether the improper refusal to submit a requested instruction or definition requires reversal.[784]

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777. Quantum Chem. Corp. v. Toennies, 47 S.W.3d 473, 480 (Tex. 2001); *see* Owens-Corning Fiberglas Corp. v. Martin, 942 S.W.2d 712, 721 (Tex. App.—Dallas 1997, no writ); *M.N. Dannenbaum*, 840 S.W.2d at 631.

778. Vinson & Elkins v. Moran, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.); *accord Plainsman Trading Co.*, 898 S.W.2d at 790; 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* TEX. R. CIV. P. 277 (describing what type of instructions and definitions are required).

779. *Moran*, 946 S.W.2d at 405.

780. *See* St. Joseph Hosp. v. Wolff, 999 S.W.2d 579, 594 (Tex. App.—Austin 1999, pet. granted) (holding that the trial court did not err in excluding negligence instruction from the jury charge since it was not alleged in the pleadings).

781. 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.).

782. Union Pac. R.R. v. Williams, 45 Tex. Sup. Ct. J. 774, 779-80, 2002 WL 1205248, at *7, 8 (June 6, 2002); Placencio v. Allied Indus. Int'l, Inc., 724 S.W.2d 20, 22 (Tex. 1987); M.L. Rendleman v. Clarke, 909 S.W.2d 56, 60 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd); *Ornelas,* 410 S.W.2d at 923.

783. *See Saint Joseph Hosp.*, 999 S.W.2d at 586 (stating that the appropriate test for reviewing a trial court's legal conclusions, such as the substance of a submitted definition, is de novo).

784. St. James Transp. Co. v. Porter, 840 S.W.2d 658, 664 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd); Vingcard A.S. v. Merrimac Hospitality Sys., Inc., 59 S.W.3d 847, 865 (Tex. App.—Fort Worth 2001, pet. denied); *cf. Williams*, 2002 WL 1205248, at *8 (citing TEX. R. APP. P. 61.1(a) and earlier erroneous admonition by the trial court to the jury).

In determining 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."[785] The error will constitute reversible error only if, when viewed in light of the totality of these circumstances, the error amounted to such a denial of the complaining party's rights "as was reasonably calculated and probably did cause the rendition of an improper judgment."[786]

## N. *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 judge [trial court].[787]

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785. 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 dism'd by agr.).

786. *Island Recreational*, 710 S.W.2d at 555; *accord* TEX. R. APP. P. 44.1; *Moran*, 946 S.W.2d at 405; *cf.* Ford Motor Co. v. Miles, 967 S.W.2d 377, 387 (Tex. 1998) (Owen, J., concurring) (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. *Id.* The court, however, did not engage in a reversible error analysis. *Id.* Conversely, in *State v. Williams*, 940 S.W.2d 583 (Tex. 1996) (per curiam), the supreme court did employ a reversible error analysis to an improper instruction and concluded that the error was not harmful. *Williams*, 940 S.W.2d at 585.

787. Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 839 (Tex. 1979); *accord* Schindler Elevator Corp. v. Anderson, 78 S.W.3d 392, 405 (Tex. App.—Houston [14th Dist.] 2001, pet. filed); Borg-Warner Protective Servs. Corp. v. Flores, 955 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), *rev'd on other grounds*, 995 S.W.2d 661 (Tex. 1999); Isern v. Watson, 942 S.W.2d 186, 188 (Tex. App.—Beaumont 1997, writ denied); 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); *see also* TEX. R. CIV. P. 269 (discussing rules for arguments).

Additionally, if the argument is incurable,[788] the appellant must also prove that the argument, by its nature, extent, and degree, constitutes reversible error.[789]

Improper jury arguments rarely result in reversible error.[790] Some notable examples of improper jury arguments include appealing to racial or ethnic prejudice, accusing a defendant corporation of being a killer of families, and referring to a party as "cattle."[791] In these instances, the appellant must prove "that the argument, by its nature, degree[,] and extent[,] constituted reversibly harmful error" (proper inquiries include the length of the argument, whether the argument was repeated or abandoned, and whether cumulative error existed), and "that the probability that the improper argument caused harm is greater than the probability that the verdict was grounded on the [based upon] proper proceedings and evidence."[792] Finally, the reviewing court must evaluate

788. *See* Tex. Employers Ins. Ass'n v. Haywood, 153 Tex. 242, 266 S.W.2d 856, 858 (1954) (stating that the true test for incurability is the degree of prejudice that flows 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 by the court, or both, could not eliminate the probability that it resulted in an improper verdict"); *accord* Austin v. Shampine, 948 S.W.2d 900, 906-07 (Tex. App.—Texarkana 1997, no writ).

789. *Reese*, 584 S.W.2d at 839-40; *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 (stressing the requirement that error must be preserved on most claims of improper argument).

790. *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).

791. *See* Southwestern Greyhound Lines v. Dickson, 149 Tex. 599, 236 S.W.2d 115, 118, 120 (1951) (holding the trial court's "curative" instruction for the jury to disregard plaintiff's counsel's inflammatory and abusive statement that the defendant was "lacking in 'common decency' and acted as 'cattle'" was still prejudicial to the defendant's rights and thus, constituted reversible error); *Carter*, 848 S.W.2d at 854 (finding reversible error present in attorney's statement which suggested that Ford Motor Company knowingly manufactured cars that killed people and valued greater profits over human life); Tex. Employers Ins. Ass'n v. Guerrero, 800 S.W.2d 859, 865 (Tex. App.—San Antonio 1990, writ denied) (holding incurable, reversible error occurred by counsel appealing for ethnic unity in his closing argument to the jury).

792. *Shampine*, 948 S.W.2d at 907; *accord* Rodriguez v. Hyundai Motor Co., 944 S.W.2d 757, 774 (Tex. App.—Corpus Christi 1997) *rev'd on other grounds*, 995 S.W.2d 661 (Tex. 1999); Isern v. Watson, 942 S.W.2d 186, 198 (Tex. App.—Beaumont 1997, writ denied); *Boone*, 880 S.W.2d at 198; *Haryanto*, 860 S.W.2d at 919.

the improper jury argument in light of the entire case—from voir dire to closing arguments.[793]

## O. *Jury Deliberations*

Where the evidence is conflicting on the question of alleged jury misconduct during its deliberations, the appellate court will presume that misconduct did not occur.[794] To overcome this presumption, the complaining party must show that misconduct occurred and that it likely resulted in an improper verdict.[795] The trial court's scheduling of jury deliberations, sequestration of jurors, breaks and the like are all reviewed for an abuse of discretion.[796] Responses to jury notes are reviewed in the same manner as regular charge practices.[797] 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 are met.[798] In the absence of disagreement between jurors, however, the court is not obligated to have testimony read back.[799] Furthermore, the trial court has broad discretion in deciding what portion of testimony is relevant to the point in dispute.[800]

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

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793. Luna v. N. 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; La. & Ark. Ry. Co. v. Capps, 766 S.W.2d 291, 294 (Tex. App.—Texarkana 1989, writ denied).

794. Landreth v. Reed, 570 S.W.2d 486, 491 (Tex. Civ. App.—Texarkana 1978, no writ); Tex. 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. W. Cent. Drilling Co., 195 S.W.2d 387, 393 (Tex. Civ. App.—Eastland 1946, writ ref'd n.r.e.).

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

796. TEX. R. CIV. P. 282.

797. TEX. R. CIV. P. 286.

798. *See* TEX. R. CIV. P. 287 (requiring disagreement among jurors as to witness statements before testimony can be read back to them).

799. Krishnan v. Ramirez, 42 S.W.3d 205, 225-26 (Tex. App.—Corpus Christi 2001, pet. denied) (citing Hill v. Robinson, 592 S.W.2d 376, 384 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.)).

800. *Id.*; 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.).

verdict.[801] Typically, when a supplemental charge is given, the complaining party will contend that the jury was coerced into reaching a particular verdict.[802] To test for coerciveness, the supplemental charge must be broken down into its particulars and examined for its possible coercive effect.[803] 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.[804] Additionally, the length of time a court allows for jury deliberations is a decision within the sound discretion of the trial court.[805] 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.[806]

### P. *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.[807] To obtain a new trial based upon jury 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.[808] A motion for new trial premised on jury misconduct "must be supported by a juror's affidavit alleging

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801. *See* Lochinvar Corp. v. Meyers, 930 S.W.2d 182, 187 (Tex. App.—Dallas 1996, no writ) (stating that under Texas Rules of Civil Procedure 286, the trial court may also issue a supplemental charge to correct an error in the original charge). Violations of Rule 286 are reversed only if the error is prejudicial. *Id.* at 187.

802. *See* Stevens v. Travelers Ins. Co., 563 S.W.2d 223, 228 (Tex. 1978) (addressing the complaining party's argument that the supplemental charge given was coercive).

803. *Stevens*, 563 S.W.2d at 229; Minn. Mining & Mfg. Co. v. Nishika Ltd., 885 S.W.2d 603, 632 (Tex. App.—Beaumont 1994), *rev'd on other grounds*, 953 S.W.2d 733 (Tex. 1997).

804. *Stevens*, 563 S.W.2d at 229, 232.

805. *Minn. 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).

806. *Shaw*, 791 S.W.2d at 206.

807. Pharo v. Chambers County, 922 S.W.2d 945, 948 (Tex. 1996); Landreth v. Reed, 570 S.W.2d 486, 491 (Tex. Civ. App.—Texarkana 1978, no writ); Tex. 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. W. Cent. Drilling Co., 195 S.W.2d 387, 393 (Tex. Civ. App.—Eastland 1946, writ ref'd n.r.e.).

808. TEX. R. CIV. P. 327(a); Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d 362, 372 (Tex. 2000); Redinger v. Living, Inc., 689 S.W.2d 415, 419 (Tex. 1985); Chavarria v. Valley Transit Co., 75 S.W.3d 107, 110 (Tex. App.—San Antonio 2002, no pet.); Ramsey v.

[that] 'outside influences' were brought to bear upon the jury."[809] 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.[810]

### Q. *Conflicting Jury Findings*

In reviewing the legal question of whether jury findings irreconcilably conflict, the appellate court applies a de novo standard of review.[811] 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.[812]

In reviewing jury findings for conflict, the threshold inquiry is whether the findings implicate the same material fact.[813] A court may not strike jury answers based on conflict if any reasonable basis exists upon which the conflict can be reconciled.[814] The reviewing court must reconcile apparent conflicts in the jury's findings, if reasonably possible, considering the pleadings and evidence, the manner of submission, and the other findings considered as a whole.[815] When the issues submitted may have more than one rea-

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Lucky Stores, Inc., 853 S.W.2d 623, 635 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *Phillips*, 255 S.W.2d at 366.

809. Weaver v. Westchester Fire Ins. Co., 739 S.W.2d 23, 24 (Tex. 1987, writ ref'd n.r.e.); *accord* Mitchell v. S. Pac. Transp. Co., 955 S.W.2d 300, 321 (Tex. App.—San Antonio 1997, no writ); Durbin 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* TEX. R. CIV. P. 327(b) (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).

810. Roy Jones Lumber Co. v. Murphy, 139 Tex. 478, 163 S.W.2d 644, 646 (Tex. 1942); *Ramsey*, 853 S.W.2d at 635-36.

811. *See* Saint Joseph Hosp. v. Wolff, 999 S.W.2d 579, 586 (Tex. App.—Austin 1999, pet. granted) (stating that a court's legal conclusions are reviewed de novo).

812. Indem. Ins. Co. v. Craik, 162 Tex. 260, 346 S.W.2d 830, 831-32 (Tex. 1961).

813. Bender v. S. Pac. Transp. Co., 600 S.W.2d 257, 260 (Tex. 1980); Crescendo Invs., Inc. v. Brice, 61 S.W.3d 465, 476 (Tex. App.—San Antonio 2001, pet. denied); Graco Robotics, Inc. v. Oaklawn Bank, 914 S.W.2d 633, 640 (Tex. App.—Texarkana 1995, writ dism'd).

814. Luna v. S. Pac. Transp. Co., 724 S.W.2d 383, 384 (Tex. 1987); *Bender*, 600 S.W.2d at 260; *Crescendo Invs.*, 61 S.W.3d at 476; 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.

815. *Luna*, 724 S.W.2d at 384; *Bender*, 600 S.W.2d at 260; *Crescendo Invs.*, 61 S.W.3d at 476; *Lee*, 934 S.W.2d at 160; *Graco Robotics*, 914 S.W.2d at 640.

sonable construction, the reviewing court will generally adopt the construction that avoids a conflict in the answers.[816]

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."[817] 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.[818]

### R. *Motion for Mistrial*

An order granting a motion for mistrial is an interlocutory order and is not appealable.[819] The remedy for review of an order granting a mistrial is by mandamus.[820] An order denying a motion for mistrial may be reviewed on appeal for an abuse of discretion.[821]

## 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.[822] If the issue is immaterial, or has no support in the evidence, or if the evidence establishes a contrary finding, then the

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816. *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.

817. *Bender*, 600 S.W.2d at 260.

818. *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).

819. Cummins v. Paisan Constr. Co., 682 S.W.2d 235, 236 (Tex. 1984); Otis Spunkmeyer, Inc. v. Blakely, 30 S.W.3d 678, 683 (Tex. App.—Dallas 2000, pet. filed); *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.).

820. *Galvan*, 933 S.W.2d at 321.

821. Schlafly v. Schlafly, 33 S.W.3d 863, 868 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Sowards v. Yanes, 955 S.W.2d 456, 458 (Tex. App.—Fort Worth 1997), *rev'd on other grounds*, 996 S.W.2d 849 (Tex. 1999).

822. Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 593 (Tex. 1986); Stuart v. Bayless, 945 S.W.2d 131, 146 (Tex. App.—Houston [1st Dist.] 1996), *rev'd on other grounds*, 964 S.W.2d 920 (Tex. 1998); Brown v. Bank of Galveston Nat'l Ass'n, 930 S.W.2d 140, 143 (Tex. App.—Houston [14th Dist.] 1996), *aff'd*, 963 S.W.2d 511 (Tex. 1998); 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).

court may disregard an answer and substitute its own finding.[823] 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 deducible in its favor.[824] 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.[825]

### 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[826] and 324(c),[827] only when there is no evidence upon which the jury could have made its findings.[828] In other words, a trial court may render JNOV if a directed verdict would have been proper.[829] In reviewing the grant of a motion for judgment notwithstanding the verdict, the reviewing court must determine whether there is any

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823. TEX. R. CIV. P. 301; Green Int'l, Inc. v. Solis, 951 S.W.2d 384, 389 (Tex. 1997); 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). A jury finding is immaterial if the question should not have been submitted to the jury, or if the question, although properly submitted, was rendered immaterial by other findings. Spencer v. Eagle Star Ins. Co. of Am., 876 S.W.2d 154, 157 (Tex. 1994).

824. Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 77 S.W.3d 253, 268 (Tex. 2002); Bradford v. Vento, 48 S.W.3d 749, 754 (Tex. 2000); *Alm*, 717 S.W.2d at 593; Schaefer v. Tex. Employers' Ins. Ass'n, 612 S.W.2d 199, 201 (Tex. 1980).

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

826. TEX. R. CIV. P. 301.

827. TEX. R. CIV. P. 324(c).

828. 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); Strauss v. Cont'l Airlines, Inc., 67 S.W.3d 428, 434 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Wal-Mart Stores, Inc. v. Bolado, 54 S.W.3d 837, 841 (Tex. App.—Corpus Christi 2001, no pet.); Villegas v. Nationwide Mut. Ins. Co., 10 S.W.3d 380, 382 (Tex. App.—Austin 1999, pet. denied); Purina Mills, Inc. v. Odell, 948 S.W.2d 927, 932 (Tex. App.—Texarkana 1997, writ denied); 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).

829. 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); *Bolado*, 54 S.W.3d at 841; Stephenson v. LeBoeuf, 16 S.W.3d 829, 840 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

evidence upon which the jury could have made the finding. The 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.[830] 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.[831]

### C. *Receipt of Additional Evidence*

Rule 270 states that "[w]hen 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."[832] The rule does not apply to nonjury cases.[833] In either a jury or nonjury trial, the trial court has discretion to reopen the evidence on an uncontested or noncontroversial matter.[834] 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.[835] 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."[836] The trial court automatically abuses its discretion if it reopens, post-verdict, the evidence

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830. *Navarette*, 706 S.W.2d at 309; *Williams*, 610 S.W.2d at 145; Komet v. Graves, 40 S.W.3d 596, 600 (Tex. App.—San Antonio 2001, no pet.); Chappell Hill Bank v. Lane Bank Equip., 38 S.W.3d 237, 243 (Tex. App.—Texarkana 2001, pet. denied).

831. S. States Transp., Inc. v. State, 774 S.W.2d 639, 640 (Tex. 1989); *Navarette*, 706 S.W.2d at 309; *Bolado*, 54 S.W.3d at 841; Tex. Animal Health Comm'n v. Garza, 27 S.W.3d 54, 62 (Tex. App.—San Antonio 2000, pet. denied).

832. TEX. R. CIV. P. 270.

833. *In re* Johnson, 886 S.W.2d 869, 873 (Tex. App.—Beaumont 1994, no writ).

834. TEX. R. CIV. P. 270.

835. Binford v. Snyder, 144 Tex. 134, 189 S.W.2d 471, 476 (1945); Lopez v. Lopez, 55 S.W.3d 194, 201 (Tex. App.—Corpus Christi 2001, no pet.); *In re* Hawk, 5 S.W.3d 874, 876-77 (Tex. App.—Houston [14th Dist.] 1999, no pet.); Apresa v. Montfort Ins. Co., 932 S.W.2d 246, 249 (Tex. App.—El Paso, 1996, no writ).

836. *Lopez*, 55 S.W.3d at 201; *Apresa*, 932 S.W.2d at 249-50 (citing McNamara v. Fulks, 855 S.W.2d 782, 784 (Tex. App.—El Paso 1993, no writ)).

on a contested matter in a jury case because to do so is contrary to law.[837]

### D. *Newly Discovered Evidence*

To obtain a new trial based upon newly discovered evidence,[838] 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 due diligence that it did not come sooner; (3) that it was not cumulative; and (4) that it is so material that it would probably produce a different result if a new trial were granted.[839]

Furthermore, the newly discovered evidence must be admissible, competent evidence.[840]

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.[841] When a trial court refuses to grant a new trial based on newly discovered evidence, the appellate court will accept every reasonable inference in

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837. *See* TEX. R. CIV. P. 270 (allowing additional noncontroversial testimony only before the jury verdict is rendered).

838. TEX. R. CIV. P. 324(b)(1).

839. Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983); *In re* M.A.N.M., 75 S.W.3d 73, 80 (Tex. App.—San Antonio 2002, no pet.); Burleson State Bank v. Plunkett, 27 S.W.3d 605, 621 (Tex. App.—Waco 2000, pet. denied); Garcia v. Allen, 28 S.W.3d 587, 602-03 (Tex. App.—Corpus Christi 2000, pet. denied); Medlock v. Comm'n for Lawyer Discipline, 24 S.W.3d 865, 871 (Tex. App.—Texarkana 2000, no pet.); State v. Vega, 927 S.W.2d 81, 83 (Tex. App.—Houston [1st Dist.] 1996, writ dism'd w.o.j.); Kirkpatrick v. Mem'l Hosp. of Garland, 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); 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. Tex. Employers' Ins. Ass'n, 754 S.W.2d 784, 787 (Tex. App.—Dallas 1988, no writ).

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

841. *Jackson*, 660 S.W.2d at 809; *In re* M.A.N.M., 75 S.W.3d at 80; *Burleson State Bank*, 27 S.W.3d at 621; *Garcia*, 28 S.W.3d at 602; *Medlock*, 24 S.W.3d at 870; *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. Gen. Elec. Co., 744 S.W.2d 258, 264 (Tex. App.—Houston [14th Dist.] 1987, writ denied).

favor of affirming the trial court's decision.[842] 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.[843]

## 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.[844] In addition to the reasons stated in Rule 320,[845] a trial court may, in its discretion, grant a new trial "in the interest of justice."[846] 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.[847] In Texas, the granting of a new trial is not reviewable by direct appeal.[848] However, the

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842. *In re* M.A.N.M., 75 S.W.3d at 80; *Burleson State Bank*, 27 S.W.3d at 621; *Medlock*, 24 S.W.3d at 871; *Nguyen*, 744 S.W.2d at 622.

843. *See* State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 452 (Tex. 1997) (affirming the court of appeals decision that denied remand for trial based on newly discovered evidence); *Kirkpatrick*, 862 S.W.2d at 775 (holding that motions for a new trial based on newly discovered evidence is disfavored unless the new evidence would cause a different result); *Nguyen*, 744 S.W.2d at 622 (requiring appellate courts to review with careful scrutiny a motion for new trial based upon newly discovered evidence).

844. 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, 918 (Tex. 1985) (orig. proceeding); Jackson v. Van Winkle, 660 S.W.2d 807, 808 (Tex. 1983); Prestige Ford Co. v. Gilmore, 56 S.W.3d 73, 77 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

845. *See* TEX. R. CIV. P. 320 (providing for the grant of a new trial when damages are too small or too large).

846. *Champion Int'l*, 762 S.W.2d at 899; *Johnson*, 700 S.W.2d at 918; *see Gilmore*, 56 S.W.3d at 77 (noting that a court should grant a motion for new trial if the motion demonstrates the granting will not cause delay nor injure the other party).

847. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124, 126 (1939); Cont'l Cas. Co. v. Hartford Ins., 74 S.W.3d 432, 434-35 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

848. Cummins v. Paisan Constr. Co., 682 S.W.2d 235, 236 (Tex. 1984); Otis Spunkmeyer, Inc. v. Blakely, 30 S.W.3d 678, 683 (Tex. App.—Dallas 2000, no pet.); Sommers v. Concepcion, 20 S.W.3d 27, 36 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Atchison, Topeka & Sante Fe Ry. Co. v. Brown, 750 S.W.2d 332, 333 (Tex. App.—Eastland 1988, writ denied), *cert. denied*, 493 U. S. 811 (1989)); *cf.* Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 37 (1980) (reversing the appellate court's mandamus order to restore the jury's verdict after the trial court granted a motion for new trial). Appellate review is proper once a final judgment has been rendered by the trial court. *Daiflon*, 449 U.S. at 35. An order granting a new trial is not immediately appealable because of its interlocatory nature. *Id.* at 34. To allow a direct appeal of an order granting a new trial would usurp the

order granting a new trial is subject to mandamus review if (1) the trial court's plenary power had expired prior to the granting[849] or "ungranting" of a motion for new trial,[850] or (2) the order was based on the sole ground of irreconcilably conflicting jury answers.[851] In either event, mandamus is available in place of traditional appellate review.[852] The standard is de novo because these are questions of law.

The denial of a motion for new trial is reviewable by appeal.[853] 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 for an abuse of discretion.[854] A trial court's order on a motion for new trial based upon jury misconduct is reviewed for an abuse of discretion.[855] The standard of review depends on the nature of the complaint preserved by the motion for new trial.[856] Suf-

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trial judge's exercise of discretion and undermine the policy against piecemeal appellate review. *Id.* at 36.

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

850. Porter v. Vick, 888 S.W.2d 789, 789-90 (Tex. 1994) (orig. proceeding) (per curiam); Fruehauf Corp. v. Carillo, 848 S.W.2d 83, 84 (Tex. 1993); *In re* Luster, 77 S.W.3d 331, 334-35 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding) (analyzing cases on this issue). The majority of courts have held that the trial court's power to vacate or "ungrant" a motion for new trial or otherwise reinstating a judgment ends when the motion for new trial would have been overruled by operation of law, which is seventy-five days after the original judgment is signed.

851. Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985) (orig. proceeding).

852. *See* Rogers v. Clinton, 794 S.W.2d 9, 11 (Tex. 1990) (orig. proceeding) (finding mandamus to be the 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).

853. *In re* Marriage of Edwards, 79 S.W.3d 88, 102 (Tex. App.—Texarkana 2002, no pet.); *In re* M.A.N.M., 75 S.W.3d 73, 80 (Tex. App.—San Antonio 2002, no pet.); Prestige Ford Co. v. Gilmore, 56 S.W.3d 73, 77 (Tex. App.—Houston [14th Dist.] 2001, no pet.); Delgado v. Hernandez, 951 S.W.2d 97, 98 (Tex. App.—Corpus Christi 1997, no writ).

854. Champion Int'l Corp. v. Twelfth Court of Appeals, 762 S.W.2d 898, 899 (Tex. 1988) (orig. proceeding); *In re* Marriage of Edwards, 79 S.W.3d at 102; *In re* M.A.N.M., 75 S.W.3d at 80; *Gilmore*, 56 S.W.3d at 73, 77; *Delgado*, 951 S.W.2d at 98; Washington v. McMillan, 898 S.W.2d 392, 394 (Tex. App.—San Antonio 1995, no writ).

855. Pabich v. Kellar, 71 S.W.3d 500, 510 (Tex. App.—Fort Worth 2002, pet. granted). To obtain a new trial based upon jury misconduct, the movant must show that (1) misconduct occurred, (2) it was material, (3) based on the entire record, and (4) the misconduct resulted in harm to the movant. *Id.*

856. *See* TEX. R. CIV. P. 324 (presenting prerequisites for motion for new trial); *Delgado*, 951 S.W.2d at 98.

ficiency of the evidence challenges are, of course, governed by the legal and factual sufficiency standards of review.[857]

### 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.[858] 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 of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;
> (2) [a] complaint of 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) [i]ncurable jury argument if not otherwise ruled on by the trial court.[859]

The reason for requiring that these matters first be brought to the attention of the trial court is for the trial court to have the opportunity to correct any errors that were not considered prior to the motion.[860] 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.[861]

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857. *See infra* Parts VII-VIII.

858. TEX. R. CIV. P. 324(a).

859. TEX. R. CIV. P. 324(b)(1)-(5).

860. Stillman v. Hirsch, 128 Tex. 359, 99 S.W.2d 270, 275 (1936); *In re* Marriage of Wilburn, 18 S.W.3d 837, 842 (Tex. App.—Tyler 2000, pet. denied); Mushinski v. Mushinski, 621 S.W.2d 669, 670-71 (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 seventy-five days after the judgment is signed. Cecil v. Smith, 804 S.W.2d 509, 511 (Tex. 1991).

861. 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); *In re* M.A.N.M., 75 S.W.3d at 80; *Cont'l Cas. Co.*, 74 S.W.3d at 434; *Garcia*, 28 S.W.3d at 602; *Medlock*, 24 S.W.3d at 871; Peterson v. Reyna, 908 S.W.2d 472, 478 (Tex. App.—San Antonio 1995), *modified*, 920 S.W.2d 288 (Tex. 1996); Allied Rent-All, Inc. v. Int'l Rental Ins., 764 S.W.2d 11, 13 (Tex. App.—Houston [14th Dist.] 1988, no writ); Fillinger v. Fuller, 746 S.W.2d 506, 508 (Tex. App.—Texarkana 1988, no writ).

## 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.[862] A clerical error does not result from judicial decisionmaking.[863] Consequently, a judgment nunc pro tunc cannot correct judicial errors made in rendering the final judgment.[864] 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.[865] 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 have been rendered.[866] 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.[867]

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862. 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); *In re* Dryden, 52 S.W.2d 257, 262 (Tex. App.—Corpus Christi 2001, no pet.); Butler v. Cont'l Airlines, Inc., 31 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *In re* Wal-Mart Stores, Inc., 20 S.W.3d 734, 738 (Tex. App.—El Paso 2000, no pet.); Jenkins v. Jenkins, 16 S.W.3d 473, 482 (Tex. App.—El Paso 2000, no pet.); Traylor Bros. v. Garcia, 949 S.W.2d 368, 369 (Tex. App.—San Antonio 1997, no writ); Nat'l Unity Ins. Co. v. Johnson, 926 S.W.2d 818, 820 (Tex. App.—San Antonio 1996, no writ); Crocker v. Synpol, Inc., 732 S.W.2d 429, 436 (Tex. App.—Beaumont 1987, no writ).

863. Andrews v. Koch, 702 S.W.2d 584, 585 (Tex. 1986); Tex. Dep't of Pub. Safety v. Moore, 51 S.W.3d 355, 358 (Tex. App.—Tyler 2001, no pet.); *Jenkins*, 16 S.W.3d at 482; *In re* Ellebracht, 30 S.W.3d 605, 608 (Tex. App.—Texarkana 2000, no pet.); Riner v. Briargrove Park Prop. Owners, Inc., 976 S.W.2d 680, 682 (Tex. App.—Houston [1st Dist.] 1997, no writ).

864. *Escobar*, 711 S.W.2d at 231; *Jenkins*, 16 S.W.3d at 482.

865. *Escobar*, 711 S.W.2d at 231; Knox v. Long, 152 Tex. 291, 257 S.W.2d 289, 291 (1953), *overruled on other grounds by* Jackson v. Hernandez, 155 Tex. 249, 285 S.W.2d 184 (1955); *In re* Fuselier, 56 S.W.3d 265, 267 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Crocker*, 732 S.W.2d at 436.

866. Coleman v. Zapp, 105 Tex. 491, 151 S.W. 1040, 1041 (1912); *In re* Wal-Mart Stores, Inc., 20 S.W.3d at 739 n.5; *Nat'l Unity Ins. Co.*, 926 S.W.2d at 820; *Crocker*, 732 S.W.2d at 436.

867. Finlay v. Jones, 435 S.W.2d 136, 138 (Tex. 1968); *In re* Dryden, 52 S.W.2d at 262; *Moore*, 51 S.W.3d at 358; Dickens v. Willis, 957 S.W.2d 657, 659 (Tex. App.—Austin 1997, no pet.); H.E. Butt Grocery Co. v. Pais, 955 S.W.2d 384, 388 (Tex. App.—San Antonio 1997, no pet.); *Nat'l Unity Ins.*, 926 S.W.2d at 820; Seago v. Bell, 764 S.W.2d 362, 364 (Tex. App.—Beaumont 1989, no writ); *Crocker*, 732 S.W.2d at 436. One court has suggested that a judgment nunc pro tunc should be granted only if the evidence is clear and convincing

## H. *Remittitur*

The remittitur process arises out of the trial court's almost unbridled discretion to grant new trials.[868] 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.[869] 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.[870] The plaintiff has two choices: to remit the suggested amount unconditionally or to have a new trial.[871] 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.[872]

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."[873] 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.[874] 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 in reviewing the remittitur issue.[875]

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.[876] The court of appeals must

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that a clerical error was made. *See Riner*, 976 S.W.2d at 683 (citing Pruet v. Coastal States Trading, Inc., 715 S.W.2d 702, 705 (Tex. App.—Houston [1st Dist.] 1986, no writ)).

868. William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 564 (1991).

869. *Id.*

870. *Id.*

871. *Id.* 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).

872. William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 564 (1991).

873. *Id.* at 565.

874. *See infra* Part VII for a discussion of the factual insufficiency of the evidence standard of review.

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

876. *See* Transp. 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);

"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."[877] The courts of appeals must also comply with the requirements of the "*Pool* rule"[878] if they either order or affirm a suggestion of a remittitur of damages.[879]

## 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.[880] It is necessarily an arbitrary process, not subject to objective analysis or mathematical calculation.[881]

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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*, 730 S.W.2d at 641 (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* 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).

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

878. Pool v. Ford Motor Co., 715 S.W.2d 629, 629-30 (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. *Id.* at 635.

879. *Pope*, 711 S.W.2d at 624; *see infra* Part VII(C) for a discussion of *Pool*.

880. Dollison v. Hayes, 79 S.W.3d 246, 249 (Tex. App.—Texarkana 2002, no pet.); Schindler Elevator Co. v. Anderson, 78 S.W.3d 392, 415 (Tex. App.—Houston [14th Dist.] 2001, pet. filed); Spohn Hosp. v. Mayer, 72 S.W.3d 52, 67 (Tex. App.—Corpus Christi 2001, pet. filed); Krishnan v. Ramirez, 42 S.W.3d 205, 218 (Tex. App.—Corpus Christi 2001, pet. denied); Hous. Auth. of El Paso v. Guerra, 963 S.W.2d 946, 952 (Tex. App.—El Paso 1998, pet. denied); Martin v. Tex. 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 1992, no writ); Tex. 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).

881. Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40, 45 (Tex. App.—San Antonio 2002, no pet.); Rescar v. Ward, 60 S.W.3d 169, 178-79 (Tex. App.—Houston [1st Dist.] 2001, pet. filed); *Schindler Elevator Co.*, 78 S.W.3d at 415; *Krishnan*, 42 S.W.3d at 218; 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

Because there are no objective guidelines to assess the money equivalent of such injuries, the jury is given a great deal of discretion in awarding an amount of damages it determines appropriate.[882] 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."[883] However, a jury's discretion in compensation for mental anguish is limited to that which causes a "'substantial disruption in [the plaintiff's] daily routine,'" or a "'high degree of mental pain and distress.'"[884] 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 dam-

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S.W.2d 228, 234 (Tex. App.—El Paso 1991, writ denied); State Farm Mut. Auto. Ins. Co. v. Zubiate, 808 S.W.2d 590, 601 (Tex. App.—El Paso 1991, writ denied); Skaggs Alpha Beta, Inc. v. Nabhan, 808 S.W.2d 198, 202 (Tex. App.—El Paso 1991, writ dism'd); Nat'l 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).

882. Texarkana Mem'l Hosp. v. Murdock, 946 S.W.2d 836, 841 (Tex. 1997); Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40, 45 (Tex. App.—San Antonio 2002, no pet.); Healthcare Ctrs. of Tex., Inc. v. Rigby, No. 14-00-00790-CV, 2002 WL 369960, at *9 (Tex. App.—Houston [14th Dist.] Mar. 7, 2002, no pet.) Southwestern Bell Tel. Co. v. Garza, 58 S.W.3d 214, 235 (Tex. App.—Corpus Christi 2001, pet. filed); *Schindler Elevator Co.*, 78 S.W.3d at 415; Dico Tire, Inc. v. Cisneros, 953 S.W.2d 776, 791-92 (Tex. App.—Corpus Christi 1997, writ denied); *Guerra*, 963 S.W.2d at 952; Harris v. Balderas, 949 S.W.2d 42, 44 (Tex. App.—San Antonio 1997, no writ); *Morales*, 948 S.W.2d at 951; Martin v. Tex. Dental Plans, 948 S.W.2d 799, 805 (Tex. App.—San Antonio 1997, writ denied); *Martin*, 942 S.W.2d at 719; Peterson v. Reyna, 908 S.W.2d 472, 476 (Tex. App.—San Antonio 1995), *modified*, 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), *rev'd on other grounds*, 1 S.W.3d 91 (Tex. 1999) (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, 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").

883. *Martin*, 948 S.W.2d at 805-06 (citing the "virtually unreviewable" language in *Arias*); *Arias*, 831 S.W.2d at 85.

884. Saenz v. Fid. & Guar. Ins. Underwriters, 925 S.W.2d 607, 614 (Tex. 1996).

ages."[885] 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 (legal and factual)[886] or based upon the factual sufficiency of the evidence where the excessiveness of the damages is challenged.[887]

2. Zero Damages

The zero-damages rule provides that in cases involving unliquidated damages, the jury must award some amount of money for each element of damage proved, or the case will be reversed and remanded for a new trial.[888] Based on the zero-damages rule, some appellate courts have concluded that once the fact of an injury is either established by the evidence or acknowledged by a jury 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.[889] In contrast, other appellate courts have

885. *Arias*, 831 S.W.2d at 85 n.2.

886. Larson v. Cactus Util. Co., 730 S.W.2d 640, 641-42 (Tex. 1987); *Southwestern Bell Tel. Co.*, 58 S.W.3d at 234; Colonial County Mut. Ins. Co. v. Valdez, 30 S.W.3d 514, 525-26 (Tex. App.—Corpus Christi 2000, no writ); Tex. Animal Health Comm'n v. Garza, 27 S.W.3d 54, 63 (Tex. App.—San Antonio 2000, pet. denied). 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. 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 jury to make any award it thinks fit without limit, even though it is dealing with damages that resist exact calculation or quantification." *Id.*

887. Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 406 (Tex. 1998); Rose v. Doctors Hosp., 801 S.W.2d 841, 847-48 (Tex. 1990); Pope v. Moore, 711 S.W.2d 622, 624 (Tex. 1986).

888. Raul A. Gonzalez & Rob Gilbreath, *Appellate Review of a Jury's Finding of "Zero Damages,"* 54 TEX. B.J. 418, 418 (1991).

889. *E.g.*, Waltrip v. Bilbon Corp., 38 S.W.3d 873, 880 n.2 (Tex. App.—Beaumont 2001, pet. ref'd); Davis v. Davison, 905 S.W.2d 789, 791 (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, 804 (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

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.[890]

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*;[891] as a result, the rule has now been rejected by the courts.[892] 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.[893] 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 contrary to the great weight and preponderance of the evidence to be manifestly unjust."[894]

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S.W.2d 472, 482 (Tex. App.—San Antonio 1995) (Duncan, J., dissenting) (dissenting because evidence of medical expense was uncontroverted), *modified,* 920 S.W.2d 288 (Tex. 1996).

890. Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc., 957 S.W.2d 640, 650 (Tex. App.—Amarillo 1997, pet. denied); Crow v. Burnett, 951 S.W.2d 894, 899 (Tex. App.—Waco 1991, 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. of Garland, 862 S.W.2d 762, 774 (Tex. App.—Dallas 1993, writ denied); *Blizzard*, 756 S.W.2d at 805.

891. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); *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).

892. *Waltrip*, 38 S.W.3d at 882 n.2; Gainsco County Mut. Ins. Co. v. Martinez, 27 S.W.3d 97, 103 (Tex. App.—San Antonio 2000, pet. dism'd by agr.); Pilkington v. Kornell, 822 S.W.2d 223, 225 (Tex. App.—Dallas 1991, writ denied); Schmeltekopf v. Johnson Well Serv. of Luling, 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 the appellate court will reverse a jury finding of no damages for pain and suffering).

893. *Davis*, 905 S.W.2d at 792-93 (Stover, J., concurring) (discussing cases which apply the *Pool* standard).

894. Marshall v. Superior Heat Treating, 826 S.W.2d 197, 200 (Tex. App.—Fort Worth 1992, no writ); D.E.W., Inc. v. Depco Forms, Inc., 827 S.W.2d 379, 383 (Tex. App.—San Antonio 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, 715 (Tex. App.—Austin 1991, writ denied). Two authors interpret the *Pool* rule as follows:

## J. *Punitive Damages*

The primary purpose of awarding punitive damages is not to compensate individuals, but to punish a wrongdoer and to serve as a deterrent to future wrongdoers.[895] "Punitive [ ] damages are levied against a defendant to punish the defendant for outrageous, malicious, or otherwise morally culpable conduct."[896] The legal justification for punitive damages is similar to the justification for criminal punishment. Like criminal punishment, punitive damages require "appropriate substantive and procedural safeguards to minimize risk of unjust punishment."[897] Although punitive damages are imposed to serve the public purposes of punishment and deterrence, the end result is the proceeds become a private windfall.[898] In contrast, criminal fines paid to a governmental entity are used for the public's benefit.[899] Thus, the duty of reviewing courts in civil cases, like the duty of criminal courts, is to ensure that defendants deserving of punishment receive an appropriate level of punishment, while preventing the imposition of excessive or otherwise erroneous punishment.[900]

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> To require a new trial under *Pool* . . . the reviewing court must conclude, after weighing all of 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 the 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).

895. Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 49 (Tex. 1998); Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 16-17 (Tex. 1994); Lunsford v. Morris, 746 S.W.2d 471, 471-72 (Tex. 1988) (orig. proceeding); Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 555-56 (Tex. 1985).

896. *Moriel*, 879 S.W.2d at 16; S. Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587, 600-01 (1880); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon 1997) (defining "exemplary damages" as "any damages awarded as a penalty or by way of punishment").

897. *Moriel*, 879 S.W.2d at 16-17; Celanese Ltd. v. Chem. Waste Mgmt., 75 S.W.3d 593, 599-600 (Tex. App.—Texarkana 2002, no pet.); Steak & Ale of Tex., Inc. v. Borneman, 62 S.W.3d 898, 907 (Tex. App.—Fort Worth 2001, no pet.); Hall v. Diamond Shamrock Ref. Co., 82 S.W.3d 5, 22 (Tex. App.—San Antonio 2001, pet. filed); Burleson State Bank v. Plunkett, 27 S.W.3d 605, 620 (Tex. App.—Waco 2000, pet. denied).

898. *Moriel*, 879 S.W.2d at 17; *Celanese*, 75 S.W.3d at 600; *Bornemann*, 62 S.W.3d at 907; *Hall*, 82 S.W.3d at 22; *Burleson State Bank*, 27 S.W.3d at 620.

899. *Moriel*, 879 S.W.2d at 17.

900. *Id.*

Applying the clear and convincing standard,[901] punitive damages are reviewed for legal and factual sufficiency of the evidence or excessiveness.[902] When reviewing an award of punitive damages, the reviewing court must consider a number of factors to determine the reasonableness of the award.[903] 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."[904] There is no exact formula to measure punitive damages by actual damages.[905] 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.[906] 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 culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which such con-

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901. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b) (Vernon 1997).

902. Pope v. Moore, 711 S.W.2d 622, 624 (Tex. 1986); Myers v. Walker, 61 S.W.3d 722, 731-32 (Tex. App.—Eastland 2001, pet. denied); *see* TEX. R. CIV. P. 301 (noting the legal insufficiency raised in a motion for judgment notwithstanding the verdict); TEX. R. CIV. P. 324(b)(4) (stating that factual sufficiency or excessiveness issues are raised in a motion for new trial). Recently, the United States Supreme Court held that the standard of review of punitive damages is de novo review. Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 431 (2001). It is doubtful, however, that the Supreme Court's decision in that case will have an impact on Texas court's review of punitive damages awards.

903. Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 31 (Tex. 1994) (applying the *Kraus* factors to determine whether the evidence supports the award of punitive damages).

904. Wright v. Gifford-Hill & Co., 725 S.W.2d 712, 714 (Tex. 1987); *accord Moriel*, 879 S.W.2d at 29 (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991)); Foley v. Parlier, 68 S.W.3d 870, 881 (Tex. App.—Fort Worth 2002, no pet.); McLure v. Tiller, 63 S.W.3d 72, 86 (Tex. App.—El Paso 2001, pet. filed).

905. *See* Tatum v. Preston Carter Co., 702 S.W.2d 186, 188 (Tex. 1986) (stating that no set rule exists to measure punitive damages by actual damages); *accord Foley*, 68 S.W.3d at 881; *McLure*, 63 S.W.3d at 86; *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).

906. *Tatum*, 702 S.W.2d at 188; *Risser*, 739 S.W.2d at 909.

duct offends a public sense of justice and propriety; and (6) the net worth of the defendant."[907]

## K. *Attorney's Fees*

### 1. Fees Based on Contract or Statutes Generally

An award of attorney's fees must be based upon some statutory or contractual authority.[908] Generally, the reasonableness of statutory attorney's fees is a question for the jury.[909] Attorney's fees may not be recovered in tort cases.[910] In reviewing the reasonableness of an award of attorney's fees, which may include a legal assistant's time under certain conditions,[911] 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

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907. TEX. CIV. PRAC. & REM. CODE ANN. § 41.011(a) (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 Prod. v. Alliance Res. 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 Res. Corp., 419 S.E.2d 870, 887-88 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993).

908. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1997); Holland v. Wal-Mart Stores, Inc., 1 S.W.3d 91, 95 (Tex. 1999); Travelers Indem. Co. v. Mayfield, 923 S.W.2d 590, 592 (Tex. 1996) (orig. proceeding); Dallas Cent. Appraisal Dist. v. Seven Inv. Co., 835 S.W.2d 75, 77 (Tex. 1992); New Amsterdam Cas. Co. v. Tex. Indus. Inc., 414 S.W.2d 914, 915 (Tex. 1967); FCLT Loans, L.P. v. Estate of Bracher, No. 14-00-00577-CV, 2002 WL 287805, *12 (Tex. App.—Houston [14th Dist.] 2002, no pet.); De Leon v. Vela, M.D., 70 S.W.3d 194, 201 (Tex. App.—San Antonio 2001, pet. denied); Aquila Southwest Pipeline, Inc. v. Harmony Exploration, Inc., 48 S.W.3d 225, 241 (Tex. App.—San Antonio 2001, pet. denied); Acad. Corp. v. Interior Buildout & Turnkey Constr., Inc., 21 S.W.3d 732, 743 (Tex. App.—Houston [14th Dist.] 2000, no pet.); Jackson v. Biotectronics, Inc., 937 S.W.2d 38, 44 (Tex. App.—Houston [14th Dist.] 1996, no writ); *In re* Striegler, 915 S.W.2d 629, 640 (Tex. App.—Amarillo 1996, writ denied).

909. City of Garland v. Dallas Morning News, 22 S.W.3d 351, 367 (Tex. 2000); Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998); Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 73 (Tex. 1997); Great Am. Reserve Ins. Co. v. Britton, 406 S.W.2d 901, 907 (Tex. 1996).

910. Knebel v. Capital Nat'l Bank in Austin, 518 S.W.2d 795, 803-04 (Tex. 1974); *Acad. Corp.*, 21 S.W.3d at 743.

911. Gill Sav. Ass'n v. Int'l Supply Co., 759 S.W.2d 697, 702 (Tex. App.—Dallas 1988, writ denied).

> 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.[912]

"To determine whether an attorney's fee award is excessive, the reviewing court may draw upon the common knowledge of the justice[s] of the court and their experiences as lawyers and judges."[913] 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."[914] 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.[915]

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.[916] An

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912. Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997) (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04); *Aquila Southwest Pipeline*, 48 S.W.3d at 240-41; *Acad. Corp.*, 21 S.W.3d at 741-42.

913. *Aquila Southwest Pipeline*, 48 S.W.3d at 241; O'Farrill Avila v. Gonzalez, 974 S.W.2d 237, 249 (Tex. App.—San Antonio 1998, pet. denied); 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.)

914. Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 10 (Tex. 1991); *see* Hagedorn v. Tisdale, 73 S.W.3d 341, 353 (Tex. App.—Amarillo 2002, pet. filed); *Aquila Southwest Pipeline*, 48 S.W.3d at 241.

915. Pickett v. Keene, 47 S.W.3d 67, 78 (Tex. App.—Corpus Christi 2001, pet. dism'd); Moore v. Bank Midwest, N.A., 39 S.W.3d 395, 404 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); Tex. Farmers Ins. Co. v. Cameron, 24 S.W.3d 386, 400-01 (Tex. App.—Dallas 2000, pet. denied); Rittgers v. Rittgers, 802 S.W.2d 109, 115 (Tex. App.—Corpus Christi 1990, writ denied).

916. Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 73 (Tex. 1997); *Sterling*, 822 S.W.2d at 10-11; Lee v. Lee, 47 S.W.3d 767, 796 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); Amerada Hess Corp. v. Wood Group Prod. Tech., 30 S.W.3d 5, 13 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Aetna Cas. & Sur. v. Wild, 944 S.W.2d 37, 40-41 (Tex. App.—Amarillo 1997, writ denied); S. Concrete Co. v. Metrotech Fin., Inc., 775 S.W.2d 446, 449 (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.).

exception to the duty to segregate exists when the attorney's fees 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."[917]

The standard of review for a trial court's award of attorney's fees is legal and factual sufficiency of the evidence.[918] 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 finding on attorney's fees.[919]

2. Fees Under the Commission on Human Rights Act

Under the Texas Commission on Human Rights Act, the trial court may award the prevailing party a reasonable attorney's fee as part of costs.[920] Using the "lodestar" method of determining fees, the court first determines the number of hours reasonably spent on the case and then multiplies those hours by an hourly rate the court finds reasonable for similarly complex, noncontingent fee work.[921] Then, the lodestar figure may be adjusted for factors, known as multipliers, including the complexity of the case, the skill of the attorney, whether the fee is contingent, and the novelty of the issues raised.[922] Stated another way, the trial court may adjust the lodestar amount to consider the factors set forth in *Johnson v. Georgia Highway Express, Inc.*:[923]

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917. *Aiello*, 941 S.W.2d at 73; *Sterling*, 882 S.W.2d at 11; *Lee*, 47 S.W.3d at 797; *Amerada Hess Corp.*, 30 S.W.3d at 13-14; Hartmann v. Solbrig, 12 S.W.3d 587, 594 (Tex. App.—San Antonio 2000, pet. denied); *Wild*, 944 S.W.2d at 41.

918. *Sterling*, 822 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); *Hagedorn*, 73 S.W.3d at 353; *Aquila Southwest Pipeline*, 48 S.W.3d at 240; *Hartmann*, 12 S.W.3d at 594. *But see* Herring v. Bocquet, 933 S.W.2d 611, 613 (Tex. App.—San Antonio 1996) (applying an abuse of discretion standard of review to the trial court's findings of fact as to amount of attorney's fees awarded), *rev'd on other grounds*, 972 S.W.2d 19 (Tex. 1998). In *Bocquet*, remarkably, in its analysis of the attorney's fee award, the court of appeals appears to rely on a fiction writer to support the notion that lawyers fabricate time entries related to conference calls. *Herring*, 933 S.W.2d at 614.

919. *Snoke*, 770 S.W.2d at 778.

920. TEX. LAB. CODE ANN. § 21.259(a) (Vernon 1996).

921. Dillard Dep't Stores, Inc. v. Gonzales, 72 S.W.3d 398, 412 (Tex. App.—El Paso 2002, pet. denied) (citing Borg-Warner Protective Servs. Corp. v. Flores, 955 S.W.2d 861, 870 (Tex. App.—Corpus Christi 1997, no pet.)).

922. *Id.*

923. 488 F.2d 714 (5th Cir. 1974).

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> (1) [t]he time and labor required[;] . . . (2) [t]he novelty and difficulty of the questions[;] . . . (3) [t]he skill requisite to perform the legal service properly[;] . . . (4) [t]he preclusion of other employment by the attorney due to acceptance of the case[;] . . . (5) [t]he customary fee[;] . . . (6) [w]hether the fee is fixed or contingent[;] . . . (7) [t]ime limitations imposed by the client or the circumstances[;] . . . (8) [t]he amount involved and the result obtained[;] . . . (9) [t]he experience, reputation, and ability of the attorney[;] . . . (10) [t]he 'undesirability' of the case[;] . . . (11) [t]he nature and length of the professional relationship with the client[;] . . . and (12) [a]wards in similar cases.[924]

The trial court's award of attorney's fees is reviewed for an abuse of discretion.[925]

## 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.[926] 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.[927] As a general rule, ad litem fees are assessed against the losing party.[928] Generally, the same factors applicable to determine the reasonableness of attorney's fees are controlling.[929] An

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924. Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). Unlike federal law, Texas courts allow the use of a multiplier based upon the contingent nature of the fee under Texas statutes allowing recovery of attorney's fees. *Dillard Dep't Stores*, 72 S.W.3d at 413; Guity v. C.C.I. Enter. Co., 54 S.W.3d 526, 529 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Borg-Warner*, 955 S.W.2d at 870; Crouch v. Tenneco, 853 S.W.2d 643, 648 (Tex. App.—Waco 1993, writ denied).

925. *Dillard Dep't Stores*, 72 S.W.3d at 412; *Crouch*, 853 S.W.2d at 646.

926. TEX. R. CIV. P. 173; Brownsville-Valley Reg'l Med. Ctr. v. Gamez, 894 S.W.2d 753, 755 (Tex. 1995); McGough 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); Borden, Inc. v. Martinez, 19 S.W.3d 469, 472 (Tex. App.—San Antonio 2000, no pet.); Mo. Pac. R.R. v. Alderete, 945 S.W.2d 148, 149 (Tex. App.—San Antonio 1996, writ denied).

927. TEX. R. CIV. P. 173; Dover Elevator Co. v. Servellon, 812 S.W.2d 366, 367 (Tex. App.—Dallas 1991, writ denied).

928. *Servellon*, 812 S.W.2d at 367 (citing TEX. R. CIV. P. 131, 141).

929. Garcia v. Martinez, 988 S.W.2d 219, 222 (Tex. 1999); Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 794 (Tex. 1987); Tex-Pac Express, L.P. v. Martin, 80 S.W.3d 666, 668 (Tex. App.—Tyler 2002, no pet.); DaimlerChrysler Corp. v. Brannon, 67 S.W.3d

ad litem may not recover fees after resolution of the conflict for which the ad litem has been appointed.[930] In applying those considerations, the award of guardian ad litem attorney fees is a matter within the sound discretion of the trial court.[931] When an ad litem fee is unreasonable or excessive, the appellate court may fix the amount of the fee.[932]

## M. *Court Costs*

Under Rule 131,[933] the successful party in a suit is entitled to recover from an adversary all costs incurred in the suit, except where otherwise provided.[934] Taxing costs against a successful party generally contravenes Rule 131.[935] "A successful party is 'one who obtains a judgment of a competent court vindicating a claim of right, civil in nature.'"[936] The purpose of Rule 131 "is to ensure that the prevailing party is freed of the burden of court costs and that the losing party pays those costs."[937] Pursuant to Rule 141, the trial court may assess the costs other than as pro-

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294, 301 (Tex. App.—Texarkana 2001, no pet.); *Borden*, 19 S.W.3d at 472; 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 and dissenting).

930. *Gamez*, 894 S.W.2d at 757.

931. *Id.* at 756; *Simon*, 739 S.W.2d at 794; *DaimlerChrysler Corp.*, 67 S.W.3d at 299; *Alderete*, 945 S.W.2d at 150; Sever v. Mass. Mut. Life Ins. Co., 944 S.W.2d 486, 492 (Tex. App.—Amarillo 1997, writ denied).

932. 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).

933. TEX. R. CIV. P. 131.

934. *Id.*; Furr's Supermarkets, Inc. v. Bethune, 53 S.W.3d 375, 376 (Tex. 2001); Martinez v. Peirce, 759 S.W.2d 114, 114 (Tex. 1988); 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 Mgmt., Inc. v. Palacios, 832 S.W.2d 743, 745 (Tex. App.—Houston [14th Dist.] 1992, writ denied). *But see Bethune*, 53 S.W.3d at 381 (Baker, J., dissenting) (suggesting that the majority implicitly overrules *Rogers v. Walmart Stores, Inc.*, 686 S.W.2d 599 (Tex. 1985). Both the Texas Civil Practice and Remedies Code and the Texas Rules of Civil Procedure specify items recoverable as costs. TEX. CIV. PRAC. & REM. CODE ANN. § 31.007(b) (Vernon 1997); TEX. R. CIV. P. 140, 141.

935. *Bethune*, 53 S.W.3d at 376; *Martinez*, 759 S.W.2d at 114.

936. Crow v. Burnett, 951 S.W.2d 894, 899 (Tex. App.—Waco 1991, writ denied) (quoting 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.)); *see* Williamson v. Roberts, 52 S.W.3d 354, 356 (Tex. App.—Texarkana 2001, pet. granted) (concluding that a party does not have to prevail on every claim to be considered successful).

937. *Bethune*, 53 S.W.3d at 378.

vided by law or the rules for good cause stated on the record.[938] 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, and to assess part or all of the costs against the prevailing party.[939] "Good cause" is an "elusive concept" to be determined on a case-by-case basis.[940] The supreme court has observed that "good cause" usually means that "the prevailing party unnecessarily prolonged the proceedings, unreasonably increased costs, or otherwise did something that should be penalized," however potential harm caused to a losing party, or an inability to pay court costs, do not constitute good cause as a matter of law.[941] However, when the trial court assesses costs in a manner other than under the general rule and fails to state good cause on the record, the courts generally hold that the trial court abused its discretion.[942] The trial court's determination of good cause and its assessment of court costs are reviewed for an abuse of discretion.[943]

## N. *Prejudment Interest*

The statutory prejudgment interest provisions[944] are intended as a financial incentive to parties to encourage them to seek a prompt

938. TEX. R. CIV. P. 141; *Bethune*, 53 S.W.3d at 378 (recognizing good cause reflected on the record to be the two requirements of Rule 141).

939. *Rogers*, 686 S.W.2d at 601; *Williamson*, 52 S.W.3d at 356.

940. *Rogers*, 686 S.W.2d at 601 (holding that the unnecessary lengthening of trial is a sufficient good cause to assess costs against a successful defendant); *Williamson*, 52 S.W.3d at 356 (finding that good cause is an elusive concept requiring appellate courts to scrutinize the record to ascertain whether the trial court abused its discretion); Gleason v. Lawson, 850 S.W.2d 714, 717 (Tex. App.—Corpus Christi 1993, no writ) (noting that Rules 131 and 141 should not be used to penalize party for refusal to enter into settlement negotiations when party has not been ordered or encouraged to do so).

941. *Bethune*, 53 S.W.3d at 377-78.

942. *Williamson*, 52 S.W.3d at 355; Allen v. Crabtree, 936 S.W.2d 6, 9 (Tex. App.—Texarkana 1996, writ denied).

943. *Rogers*, 686 S.W.2d at, 701; *Williamson*, 52 S.W.3d at 355; *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. Estate of 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).

944. TEX. FIN. CODE ANN. §§ 304.001-304.302 (Vernon Supp. 2002).

resolution of their disputes.[945] A court may order that prejudgment interest does not accrue during periods of delay during the pendency of the case.[946] An appellate court reviews a trial court's award of prejudgment interest under an abuse of discretion standard of review.[947]

### O. *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.[948] Additionally, a timely filed postjudgment motion that requests a substantive change in the existing judgment constitutes a motion to modify under Rule 329b(g), thereby extending the trial court's plenary jurisdiction and the appellate timetable.[949] During this period, "[p]lenary power 'is [f]ull, entire, complete, absolute, perfect, [and] unqualified.'"[950] 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.[951] A void judgment "'is good nowhere and bad every-

945. Volkswagen of Am., Inc. v. Ramirez, 79 S.W.3d 113, 126 (Tex. App.—Corpus Christi 2002, pet. filed); Purcell Constr., Inc. v. Welch, 17 S.W.3d 398, 403 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

946. TEX. FIN. CODE ANN. § 304.108(a) (Vernon Supp. 2002); *Ramirez*, 79 S.W.3d at 126.

947. *Ramirez*, 79 S.W.3d at 126. J.C. Penny Life Ins. Co. v. Heinrich, 32 S.W.3d 280, 289 (Tex. App.—San Antonio 2000, pet. denied); European Crossroads Shopping Ctr., Ltd. v. Criswell, 910 S.W.2d 45, 55 (Tex. App.—Dallas 1955, writ denied).

948. Lane Bank Equip. Co. v. Smith S. Equip., Inc., 10 S.W.3d 308, 310 (Tex. 2000); Fruchauf Corp. v. Carrillo, 848 S.W.2d 83, 84 (Tex. 1993).

949. *See Lane Bank Equip. Co.*, 10 S.W.3d at 314 (holding that a postjudgment motion for sanctions seeking to add an award of attorney's fees as a sanction for frivolous litigation extends the trial court's plenary jurisdiction).

950. 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. Dove & Sons, 584 S.W.2d 506, 508 (Tex. App.—El Paso 1979, writ ref'd n.r.e.)); *accord* Zarate v. Sun Operating Ltd., Inc., 40 S.W.3d 617, 619 (Tex. App.—San Antonio 2001, pet. denied).

951. 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) (per curiam).

where.'"[952] Whether a trial court properly exercised its plenary power is a question of law reviewed de novo by the reviewing court.[953]

P. *Supersedeas Bond*

Generally, if a party loses at the trial court, a writ of supersedeas will stay execution of the judgment pending appeal,[954] and guarantee the appellee the benefits of the judgment if affirmed.[955] To obtain a writ of supersedeas, a party generally deposits with the clerk a "good and sufficient" supersedeas bond or deposit.[956] 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.[957]

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952. 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)).

953. *See* Saint Joseph Hosp. v. Wolff, 999 S.W.2d 579, 586 (Tex. App.—Austin 1999, pet. granted) (stating that questions of law should be reviewed de novo); *see also Lane Bank Equip. Co.*, 10 S.W.3d at 314 (affirming lower court's exercise of plenary power by interpreting the statutory language).

954. *See* Cudd Pressure Control, Inv. v. Sonat Exploration Co., 74 S.W.3d 185, 189 (Tex. App.—Texarkana 2002, pet. filed).

955. 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).

956. 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 (Vernon 1997 & Vernon Supp. 2002) (exempting Veteran's Administration, any national mortgage association, and "any national mortgage savings and loan insurance corporation created" as a national relief organization); TEX. CIV. PRAC. & REM. CODE ANN. § 6.002 (Vernon 1997 & Vernon Supp. 2002) (exempting incorporated cities and towns). Exempt entities supersede the judgment by filing a notice of appeal. TEX. CIV. PRAC. & REM. CODE ANN. § 6.001 (Vernon 1997 & Vernon Supp. 2002); Ammex Warehouse Co. v. Archer, 381 S.W.2d 478, 481-82 (Tex. 1964); Weber v. Walker, 591 S.W.2d 559, 562 (Tex. Civ. App.—Dallas 1979, no writ).

957. 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. 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

The numerous rules for posting an appropriate supersedeas bond depend upon the type of judgment and are beyond the scope of this Article.[958] 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.[959]

Texas Rule of Appellate Procedure 29.2 governs the suspension of interlocutory orders pending review by the appellate courts.[960] 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 24.[961] Denial of supersedeas may be reviewed by an appellate court for abuse of discretion.[962] Similarly, an appellate court may

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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. *Id.* § 52.005. Under Texas Rule of Appellate Procedure 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. TEX. R. APP. P 24.2(a)(3). 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. *Id.* "The rule was intended to permit a trial court to deny supersedeas of an injunction, conditioned upon the setting of a bond sufficient to protect the appealing party's interests." Klein Indep. Sch. Dist. v. Fourteenth Court of Appeals, 720 S.W.2d 87, 88 (Tex. 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. *Id.*

958. *See generally* Elaine A. Carlson, *Enforcing and Superseding the Judgment While on Appeal, in* STATE BAR OF TEX. PROF'L DEV. PROGRAM, 12th ADVANCED CIVIL APPELLATE PRACTICE COURSES (1998) (discussing rules for posting supersedeas bonds).

959. 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); Cont'l 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).

960. TEX. R. APP. P. 29.2.

961. *Id.*; TEX. R. APP. P. 24.

962. TEX. R. APP. P. 29.2.

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.[963] However, if the appellant's right may be adequately protected by supersedeas, then the appellate court may not suspend the trial court's order.[964]

If the trial court improperly sets the amount of the bond, or the clerk improperly approves it, or if it is believed that an initially sufficient bond has become insufficient, the remedy is by motion in the court of appeals once appellate jurisdiction has attached.[965] If a party believes that the trial court's order setting the amount of the bond is excessive, the party may have the trial court's order reviewed by motion in the court of appeals.[966] If the appellate court finds that the bond is insufficient upon review of the bond, the court "shall" require an additional bond;[967] however, upon a finding that the bond is excessive, the court "may" reduce the amount of the original bond.[968]

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.[969] Any changes ordered by the trial court, however, must be made known to the court of appeals.[970] The review of security, as well as any changes to the security, also remain with the appellate court.[971] Thus, in carrying out the review, the appellate court can

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963. TEX. R. APP. P. 29.3.

964. *Id.*

965. TEX. CIV. PRAC. & REM. CODE ANN. § 52.003 (Vernon 1997); 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 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).

966. 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).

967. TEX. R. APP. P. 24.4(d); McDill Columbus Corp. v. Univ. Woods Apartment, 7 S.W.3d 923, 925 (Tex. App.—Texarkana 2000, no pet.); Gullo-Haas Toyota, Inc. v. Davidson, Eagleson & Co., 832 S.W.2d 418, 419 (Tex. App.—Houston [1st Dist.] 1992, no writ).

968. TEX. R. APP. P. 24.4(d).

969. TEX. R. APP. P. 24.3(a); *Gullo-Haas Toyota*, 832 S.W.2d at 419.

970. TEX. R. APP. P. 24.3(b); *Gullo-Haas Toyota*, 832 S.W.2d at 419.

971. TEX. R. APP. P. 24.3(b); *Gullo-Haas Toyota*, 832 S.W.2d at 419.

issue any necessary temporary orders or remand the matter to the trial court for evidentiary determinations.[972]

## Q. *Turnover Orders*

Section 31.002 of the Texas Civil Practice and Remedies Code,[973] commonly referred to as the "turnover" statute, is a procedural device that allows creditors to reach certain assets of debtors that are usually difficult to attach and levy on by normal legal process.[974] "Under the statute, a judgment creditor can 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 rights."[975] The trial court may order property in the judgment debtor's possession or control to be turned over to a sheriff, and may also appoint a receiver to take possession of the property.[976] The trial court's decision to grant or deny a turnover order, a final appealable judgment,[977] is reviewed under an abuse of discretion standard.[978]

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972. TEX. R. APP. P. 24.4(c), (d); *see* 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., 965 S.W.2d 741, 742 (Tex. App.—El Paso 1998, pet. denied) (per curiam) (vacating trial court's order and remanding issue to trial court for entry of findings of fact and for taking of evidence as to the estimated duration of the appeal and the proper amount of postjudgment interest).

973. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a) (Vernon 1997 & Vernon Supp. 2002).

974. Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 224 (Tex. 1991); Burns v. Miller, Hiersche, Martens & Hayward, P.C., 948 S.W.2d 317, 321 (Tex. App.—Dallas 1997, writ denied).

975. *Burns*, 948 S.W.2d at 321 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a) (Vernon 1997 & Vernon Supp. 2002)).

976. *Id.* (explaining TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(b) (Vernon 1997 & Vernon Supp. 2002)).

977. *In re* Marriage of Long, 946 S.W.2d 97, 98 (Tex. App.—Texarkana 1997, no writ).

978. *Beaumont Bank*, 806 S.W.2d at 226; Roebuck v. Horn, 74 S.W.3d 160, 163 (Tex. App.—Beaumont 2002, no pet.); Parks v. Parker, 957 S.W.2d 666, 667 (Tex. App.—Austin 1997, no pet.); *Burns*, 948 S.W.2d at 321; Criswell v. Ginsberg & Foreman, 843 S.W.2d 304, 306 (Tex. App.—Dallas 1992, no writ); Associated Ready Mix, Inc. v. Douglas, 843 S.W.2d 758, 761 (Tex. App.—Waco 1992, no writ).

## 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[979] 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.[980] Legally insufficient issues assert "a complete lack of evidence on an issue,"[981] and are called "no evidence" issues, or "matter of law" issues, depending upon whether the complaining party had the burden proof.[982] Challenges to the legal sufficiency of the evidence must be sustained if the record reflects one of the following:

> (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of 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; or (4) the evidence establishes conclusively the opposite of [a] vital fact.[983]

In reviewing legal sufficiency, the supreme court has held that it is "required to determine whether the proffered evidence as a whole rises to a level that would enable reasonable and fair-minded people to differ in their conclusions."[984] As the court ob-

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979. *See* Choate v. San Antonio & A.P. Ry. Co., 91 Tex. 406, 44 S.W.2d 69, 69-70 (1898) (recognizing that the courts of appeals and the supreme court have jurisdiction to review challenges to the legal sufficiency of the evidence).

980. Cecil v. Smith, 804 S.W.2d 509, 510-11 (Tex. 1991); *accord* Tex. R. Civ. P. 301; Salinas v. Fort Worth Cab & Baggage Co., 725 S.W.2d 701, 704 (Tex. 1987); 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); Tribble & Stephens Co. v. Consol. 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).

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

982. *Id.*

983. Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 334 (Tex. 1998); Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998); Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997); *Cecil*, 804 S.W.2d at 510 n.2; Juliette Fowler Homes, Inc. v. Welch Assocs., Inc., 793 S.W.2d 660, 666 n.9 (Tex. 1990).

984. Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 25 (Tex. 1994).

served, it is "not simply directed to determine whether evidence exists that has some remote relation to the verdict."[985] "'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].'"[986] Whether direct or inferential, there must be a logical connection "between the evidence offered and the fact to be proved."[987] The court admonished reviewing courts to "bear in mind the difference between materiality of the evidence and the issue of evidentiary sufficiency."[988] 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*."[989] Quoting Professor McCormick, the supreme court observed, "a brick is not a wall."[990]

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.[991] The "traditional statement of the standard of review"[992] for reviewing no evidence issues 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.[993] The scope of review is clear: only the

985. *Id.* at 24.

986. *Id.* (quoting Lyons v. Millers Cas. Ins. Co., 866 S.W.2d 597, 600 (Tex. 1993)).

987. *Id.*

988. *Id.*

989. *Moriel*, 879 S.W.2d. at 24-25 (citation omitted).

990. *Id.* at 25 (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 152 (West ed. 1954)).

991. 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).

992. Lyons v. Millers 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)).

993. Southwest Key Program, Inc. v. Gil-Perez, 81 S.W.3d 269, 274 (Tex. 2002); Minyard Food Stores, Inc. v. Goodman, 80 S.W.3d 573, 577 (Tex. 2002); Lee Lewis Constr., Inc. v. Harrison, 70 S.W.3d 778, 782 (Tex. 2001); Bradford v. Vento, 48 S.W.3d 749, 754 (Tex.

evidence and inferences supporting the finding are considered.[994] Recently, in *Lenz v. Lenz*,[995] a unanimous supreme court reaffirmed the traditional and historical statement of the scope of review then the court stated: "[w]e emphasize . . . that under a legal-sufficiency review, we must disregard all evidence and inferences contrary to the jury's finding."[996]

However, in 1997, the supreme court appeared to have reformulated the traditional standard and scope of review. In a series of cases, the supreme court stated that, in reviewing no evidence issues, 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

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2001); Dow Chem. Co. v. Francis, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam); State Farm Fire & Cas. Co. v. Simmons, 963 S.W.2d 42, 44 (Tex. 1998); Minn. 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); Cont'l 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 Am., 774 S.W.2d 666, 668 (Tex. 1989); S. 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, Inc., 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 Am., 717 S.W.2d 588, 593 (Tex. 1986); Larson v. Cook Consultants, Inc., 690 S.W.2d 567, 568 (Tex. 1985); King v. Bauer, 688 S.W.2d 845, 846 (Tex. 1985); Tomlinson v. Jones, 677 S.W.2d 490, 492 (Tex. 1984); Roark v. Allen, 633 S.W.2d 804, 809 (Tex. 1982); Glover v. Tex. Gen. Indem. Co., 619 S.W.2d 400, 401 (Tex. 1981); McClure v. Allied Stores of Tex., Inc., 608 S.W.2d 901, 904 (Tex. 1980); Ray v. Farmers' State Bank of Hart, 576 S.W.2d 607, 609 (Tex. 1979); Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965); Benoit v. Wilson, 150 Tex. 273, 239 S.W.2d 792, 796 (1951); Cartwright v. Canode, 106 Tex. 502, 171 S.W.2d 696, 698 (1914).

994. Lenz v. Lenz, 79 S.W.3d 10, 19 (Tex. 2002).

995. 79 S.W.3d 10, 19 (Tex. 2002).

996. *Lenz*, 79 S.W.3d at 19 (citing Bradford v. Vento, 48 S.W.3d 749, 754 (Tex. 2001); Minyard Food Stores, Inc. v. Goodman, 80 S.W.3d 573, 577 (Tex. 2002); State *ex rel* State Dep't of Highways & Public Transp. v. Gonzalez, 82 S.W.3d 322, 327 (Tex. 2002); Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 77 S.W.3d 253, 262 (Tex. 2000). *Bradford* now seems to be the seminal no evidence scope of review case. *Bradford*, 48 S.W.3d at 754.

evidence is to be indulged in that party's favor.[997] Under this restatement of the standard of review, the scope of review appeared to have been expanded: all of the evidence is considered.[998] This line of cases cite to and misinterpret the supreme court's opinion in *Harbin v. Seale*, where Chief Justice Calvert stated the scope of review as follows: "all evidence must be considered 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 such party's favor."[999]

That statement of the rule does not support an expanded scope of review in reviewing no evidence challenges. The rule simply provides that the reviewing court must look to the entire record to find evidence favorable to the jury's fining—it does not suggest that all of the record evidence, favorable and unfavorable, is considered in reviewing the jury's finding.[1000] Chief Justice Calvert's statement of the scope of review in *Harbin v. Seale* is consistent

997. Harbin v. Seale, 461 S.W.2d 591, 592 (Tex. 1970); *accord* Associated Indem. Corp. v. CAT Contracting, Inc., 964 S.W.2d 276, 285-86 (Tex. 1998) (citing Harbin v. Seale, 461 S.W.2d 591, 592 (Tex. 1970)); Formosa Plastics Corp. USA v. Presidio Eng'rs, 960 S.W.2d 41, 48 (Tex. 1998) (citing *Harbin*, 461 S.W.2d at 592); Putman v. Mo. 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 930, 931 (Tex. 1981) (quoting *Harbin*, 461 S.W.2d at 592).

998. 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: "[T]he 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 and the inferences 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, 171 S.W. 696, 696-97 (1914)).

999. Harbin v. Seale, 461 S.W.2d 591, 592 (Tex. 1970).

1000. Century Marine, Inc. v. Vaglica, 27 S.W.3d 703 (Tex. App.—Beaumont 2000), improvidently granted, 45 Tex. Sup. Ct. J. 163 (Dec. 6, 2003) (placing squarely before the supreme court the question of the correct scope of review in no evidence cases). In light of the supreme court's clarification of the scope of review in *Lenz*, perhaps the supreme court no longer thought it was necessary to address the issue presented in *Century Marine*. The supreme court heard arguments, however, subsequently withdrew the improvidently granted petition. Century Marine, Inc. v. Vaglica, 45 Tex. Sup. Ct. J. 984 (July 6, 2002). *See Lenz*, 79 S.W.3d at 19 (emphasizing "that under a legal-sufficiency review, we must disregard all evidence and inferences contrary to the jury's finding").

with his often-cited law review article "*No Evidence" and "Insufficient Evidence" Points of Error.*[1001]

The expanded scope of review may significantly affect one's analysis of the viability of a legal insufficiency challenge. While the supreme court seems to have returned to the traditional statement of the standard of review (considering only the evidence and inferences which support the jury's finding), it did so without discussing the two lines of supreme court authority.[1002]

Under either statement of the standard, it remains settled that if there is any evidence of probative force to support the jury's finding, the no evidence issue must be overruled and the finding upheld.[1003] Stated another way, if more than a scintilla of evidence exists to support the finding, the no evidence challenge fails.[1004]

What is a "scintilla" of evidence?[1005] "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."[1006] "More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, 'rises to a level that would enable reasonable and

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1001. *See* 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).

1002. *See Lenz*, 79 S.W.3d at 19 (disregarding all evidence and inferences not supporting the jury's finding); *cf. Formosa Plastics*, 960 S.W.2d at 48 (considering all of the record evidence in the light most favorable to the verdict rendered). The supreme court made no mention of the conflicting standards of review regarding "no evidence" findings when setting forth the "traditional standard" it applied. *Lenz*, 79 S.W.3d at 19; *Bradford*, 48 S.W.3d at 754.

1003. ACS Investors, Inc. v. McLaughlin, 943 S.W.2d 426, 430 (Tex. 1997); Leitch v. Hornsby, 935 S.W.2d 114, 118 (Tex. 1996); S. States Transp., Inc. v. State, 774 S.W.2d 639, 640 (Tex. 1989); *In re* King's Estate, 150 Tex. 662, 244 S.W.2d 660, 661 (1951). In one case, the supreme court even considered—posttrial—overruling a legal insufficiency challenge. *See* Weirich v. Weirich, 833 S.W.2d 942, 946 (Tex. 1992) (considering telephone records discovered after the trial).

1004. *Formosa Plastics Corp.*, 960 S.W.2d at 48; *Leitch*, 935 S.W.2d at 118; *Stafford*, 726 S.W.2d at 16.

1005. 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).

1006. Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983).

fair-minded people to differ in their conclusions.'"[1007] 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.[1008] In any other situation, the appellate court may not second-guess the fact finder unless only one inference may be drawn from the evidence.[1009] "Whether other possible inferences may be drawn from the evidence is not the relevant inquiry."[1010] 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 thus, the no evidence challenge should be overruled.[1011]

"Any ultimate fact may be prove[d] by circumstantial evidence."[1012] However, the legal equivalent of no evidence exists when meager "circumstantial evidence giving rise to inferences . . . equally consistent" with two different propositions."[1013] 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

1007. Minyard Food Stores, Inc. v. Goodman, 80 S.W.3d 573, 577 (Tex. 2002); *Rocor Int'l, Inc.*, 77 S.W.3d at 262; Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997).

1008. *Kindred*, 650 S.W.2d at 63; Woods v. Townsend, 144 Tex. 594, 192 S.W.2d 884, 886 (1946); Joske v. Irvine, 91 Tex. 574, 44 S.W. 1059, 1063 (1898); Choate v. San Antonio A.P. Ry. Co., 90 Tex. 82, 37 S.W. 319, 319 (1896); Lee v. Int'l & G.N.R. Co., 89 Tex. 583, 36 S.W. 63, 65 (1896).

1009. State v. $11,014.00, 820 S.W.2d 783, 785 (Tex. 1991) (citing Ross v. Green, 135 Tex. 103, 139 S.W.2d 565, 572 (1940)).

1010. Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 459 (Tex. 1992).

1011. *Id.*

1012. Transp. Ins. Co. v. Faircloth, 898 S.W.2d 269, 285 (Tex. 1995); *$11,014.00*, 820 S.W.2d at 785; Farley v. M.M. Cattle Co., 529 S.W.2d 751, 755 (Tex. 1975); Prudential Ins. Co. of Am. 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 inferred from other facts proved in the case." *Cross*, 815 S.W.2d at 279-80.

1013. Fifty-Six Thousand Seven Hundred in U.S. Currency v. State, 730 S.W.2d 659, 660 (Tex. 1987).

must be sustained."[1014] For circumstantial evidence to withstand a no evidence challenge, it must consist of more than a scintilla.[1015]

"[I]nferences may [also] support a judgment so long as they are reasonable in light of all [the facts and circumstances]."[1016] The supreme court observed that the reviewing court is not required to "disregard undisputed evidence that allows of only one logical inference."[1017] Under the no evidence standard of review, inference stacking is not permissible. As the court has noted, "a vital fact may not be established by piling inference upon inference."[1018]

2. As a Matter of Law

If an appellant is "attack[ing] the legal sufficiency of an adverse finding [to] an issue on which [he] has the burden of proof, [he] must demonstrate on appeal that the evidence [conclusively] establish[ed] . . . all vital facts in support of the issue."[1019] In reviewing a

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1014. Cont'l 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); *Fifty-Six Thousand Seven Hundred 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 give rise to equally reasonable and plausible opposing inferences. Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 365 (1960).

1015. Blount v. Bordens, Inc., 910 S.W.2d 931, 933 (Tex. 1995) (per curiam); *Litton*, 668 S.W.2d at 324.

1016. *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, 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, 237 S.W.2d 286, 290 (1951); Tex. & N.O. R. Co. v. Burden, 146 Tex. 109, 203 S.W.2d 522, 530 (1947).

1017. Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 51 n.1 (Tex. 1997); *id.* at 74 (Hecht, J., concurring).

1018. Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp., 435 S.W.2d 854, 858 (Tex. 1968); Tex. 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"); Lobley v. Gilbert, 149 Tex. 493, 236 S.W.2d 121, 123 (1951).

1019. Dow Chem. Co. v. Francis, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam); *accord* Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 340 (Tex. 1998); 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); Pac. Employers Ins. Co. v. Dayton, 958 S.W.2d 452, 455 (Tex. App.—Fort Worth 1997, pet. denied); 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); Smith v. Cent. Freight Lines, Inc., 774 S.W.2d 411, 412 (Tex. App.—Houston [14th Dist.] 1989, writ denied); Ritchey v. Crawford, 734 S.W.2d 85, 86 (Tex. App.—Hous-

"matter of law" challenge, the reviewing court employs a two prong test.[1020] The court will first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary.[1021] 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.[1022] If the contrary proposition is established conclusively by the evidence, the issue will be sustained.[1023]

Texas courts have repeatedly held that although a jury is the finder of fact, the jury may not disregard uncontroverted evidence.[1024] 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."[1025] Nevertheless, contradictory cases also hold that a jury's failure to find the existence of a particular fact need not be supported by any evidence because the jury is free to disbelieve the witnesses of the party bearing the burden of proof.[1026] These two lines of cases are impossible to reconcile. Given the scope of re-

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ton [1st Dist.] 1987, no writ); W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 481-82 (1998).

1020. *Dayton*, 958 S.W.2d at 455 (citing *Brady*, 811 S.W.2d at 940).

1021. *Dow Chem. Co.*, 46 S.W.3d at 241 (citing Sterner v. Marathon Oil Co., 767 S.W.2d 686, 690 (Tex. 1989)); *Holley*, 629 S.W.2d at 696; W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 482 (1998).

1022. *Dow Chem. Co.*, 46 S.W.3d at 241 (citing *Sterner*, 767 S.W.2d at 690); *Holley*, 629 S.W.2d at 696-97; Tex. & N.O.R. Co. v. Burden, 146 Tex. 109, 203 S.W.2d 522, 530 (1947); Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 276 (Tex. App.—Amarillo 1988, writ denied); W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 482 (1998).

1023. *Dow Chem. Co.*, 46 S.W.3d at 241 (citing Croucher v. Croucher, 660 S.W.2d 55, 58 (Tex. 1983)); Meyerland Cmty. Improvement Ass'n v. Temple, 700 S.W.2d 263, 267 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 481-82 (1998).

1024. *E.g.*, Kennedy v. Mo. Pac. R.R., 778 S.W.2d 552, 557 (Tex. App.—Beaumont 1989, writ denied); Berry v. Griffin, 531 S.W.2d 394, 396 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

1025. *Burden*, 203 S.W.2d at 530; 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. 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").

1026. Yap v. ANR Freight Sys., 789 S.W.2d 424, 425 (Tex. App.—Houston [1st Dist.] 1990, no writ) (holding that a jury's failure to find in favor of the party with the burden of

view, 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.

3. The Equal Inference Rule

Inferences may be drawn from direct or circumstantial evidence. "[A]ny ultimate fact may be proven by circumstantial evidence."[1027] Common sense dictates that any conclusion drawn from circumstantial evidence is nothing more than an inference.[1028] "By its very nature, circumstantial evidence often involves linking what may be apparently insignificant and unrelated events to establish a pattern."[1029] The supreme court has observed that circumstantial evidence establishes a fact when the fact may be "inferred from other facts proved in the case."[1030] Circumstantial evidence and any inferences drawn from the evidence still must consist of more than a scintilla to withstand a no evidence challenge.[1031] This analysis is known as the equal inference rule.

In a per curiam opinion, *Lozano v. Lozano*,[1032] a five-member majority concurrence of the Texas Supreme Court defined the equal inference rule as follows:

> The equal inference rule provides that a jury may not reasonably infer an ultimate fact from meager circumstantial evidence 'which could give rise to any number of inferences, none more probable than another.' [Thus, in cases with only slight circumstantial evi-

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proof on an issue will be upheld against a "no evidence" challenge despite the lack of evidence to support its finding).

1027. Transp. Ins. Co. v. Faircloth, 898 S.W.2d 269, 285 (Tex. 1995); State v. $11,014.00, 820 S.W.2d 783, 785 (Tex. 1991) (per curiam); Farley v. M.M. Cattle Co., 529 S.W.2d 751, 755 (Tex. 1975); Prudential Ins. Co. of Am. 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).

1028. BLACK'S LAW DICTIONARY defines "inference" as "[a] conclusion reached by considering other facts and deducting a logical consequence from them." BLACK'S LAW DICTIONARY 781 (7th ed. 1999).

1029. Browning-Ferris, Inc. v. Reyna, 865 S.W.2d 925, 927 (Tex. 1993).

1030. Wal-Mart Stores, Inc. v. Reece, 81 S.W.3d 812, 817 (Tex. 2002) (citing Russell v. Russell, 865 S.W.2d 929, 933 (Tex. 1993) (quoting Dallas County Flood Control v. Cross, 815 S.W.2d 271, 279-80 (Tex. App.—Dallas 1991, writ denied))).

1031. Blount v. Bordens, Inc., 910 S.W.2d 931, 933 (Tex. 1995) (per curiam); Litton Indus. Prods., Inc. v. Gammage, 668 S.W.2d 319, 324 (Tex. 1984).

1032. 52 S.W.3d 141 (Tex. 2001) (per curiam).

> dence, something else must be found in the record to corroborate the probability of the fact's existence or non-existence.]
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> . . . .
>
> Properly applied, the equal inference rule is but a species of the no evidence rule, emphasizing that when the circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence. But circumstantial evidence is not legally insufficient merely because more than one reasonable inference may be drawn from it. If circumstantial evidence will support more than one reasonable inference, it is for the jury to decide which is more reasonable, subject only to review by the trial court and the court of appeals to assure that such evidence is factually sufficient.
>
> Circumstantial evidence often requires a fact finder to choose among opposing reasonable inferences. And this choice in turn may be influenced by the fact finder's views on credibility. Thus, a jury is entitled to consider the circumstantial evidence, weigh witnesses' credibility, and make reasonable inferences from the evidence it chooses to believe.[1033]

The majority concurrence adopts the supreme court's earlier pronouncement of the rule in *Farley v. MM Cattle Co.*[1034] and *Benoit v. Wilson.*[1035] However, the majority concurrence does not expressly overrule the more recent supreme court pronouncements of the rule which are inconsistent with the majority's concurrence.[1036]

Justice Hecht, joined by Justice Owen, dissented and argued that the majority concurrence departed from recent supreme court authority and "turned [the rule] to mush."[1037] Primarily, Justice Hecht relied upon *Hammerly Oaks, Inc. v. Edwards*[1038] and *Litton Industrial Products, Inc. v. Gammage.*[1039] The dissenters argued that these two more recent cases "expressly require[ ] that an ac-

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1033. Lozano v. Lozano, 52 S.W.3d 141, 157-58 (Tex. 2001) (citations omitted).

1034. 529 S.W.2d 751 (Tex. 1975).

1035. 150 Tex. 273, 239 S.W.2d 792 (1951); *see also Lozano*, 52 S.W.3d 141, 148 (Tex. 2001) (citing Farley v. MM Cattle Co., 529 S.W.2d 751, 757 (Tex. 1975); Benoit v. Wilson, 150 Tex. 273, 239 S.W.2d 792, 797 (1951)).

1036. *See Lozano*, 52 S.W.3d 141, 148-49 (failing to address or mention conflicting case law).

1037. *Id.* at 157 (Hecht, J., concurring in part and dissenting in part).

1038. 958 S.W.2d 387 (Tex. 1997).

1039. 668 S.W.2d 319 (Tex. 1984); *Lozano*, 52 S.W.3d at 157-58.

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cepted inference not only be reasonable but that it be probable."[1040] Justice Hecht argued that

> if circumstantial evidence supports two reasonable inferences, neither of which is any more likely '[probable] than the other, can a jury pick one? The equal inference' rule says no. It is not enough that one inference is as reasonable as another; to be given weight, an inference must be more probable than others.[1041]

All participating members of the *Lozano* court agreed that the "equal inference rule provides that a jury may not reasonably infer an ultimate fact from meager circumstantial evidence which could give rise to any number of inferences, none more probable than another."[1042] Stated another way, "'[w]hen circumstances are consistent with either of the two facts and nothing shows that one is more probable than the other, neither fact can be inferred.'"[1043] Beyond these two sentences in *Lozano*, the court could not agree.

It does not appear that one may confidently rely upon the majority concurrence in *Lozano v. Lozano* as a clear statement of the equal inference rule. First, only seven members of the court participated in *Lozano v. Lozano.*[1044] Second, of the five-member majority concurrence, only two of the five justices will remain on the supreme court as of January 1, 2003.[1045] It is unclear why the majority concurrence did not overrule inconsistent supreme court cases. Perhaps the court is intentionally leaving the equal inference rule vague because it is not clear how the rule might apply in future cases. Because *Lozano* involved difficult and emotionally

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1040. *Lozano*, 52 S.W.3d at 158.

1041. *Id.*; *see* Freeman v. Pevehouse, 79 S.W.3d 637, 641-42 (Tex. App.—Waco 2002, no pet.) (appearing to follow Justice Hecht's analysis).

1042. *Id.* at 148, 157 (citing Hammerly Oaks, Inc. v. Edwards, 958 S.W.2d 387, 392 (Tex. 1997)); *see* Wal-Mart Stores, Inc. v. Amos, 79 S.W.3d 178, 185 (Tex. App.—Texarkana 2002, no pet.) (citing *Lozano* quote upon which all justices agreed).

1043. *Id.* at 148, 157 (citing Litton Indus. Prod., Inc. v. Gammage, 668 S.W.2d 319, 324 (Tex. 1984)). An inference may not be drawn when "the facts proved 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).

1044. Justice O'Neill was a member of the panel that decided *Lozano* while she was on the court of appeals, and Justice Gonzalez participated in the original opinion of the supreme court, but resigned his office on December 25, 2000, and did not participate in the opinion on motion for rehearing. *Lozano,* 52 S.W.2d. at 144.

1045. Justices Abbott and Baker have resigned from the court, and Justice Hankinson is not seeking re-election. Only Chief Justice Phillips and Justice Enoch will remain on the court.

charged facts, the court may wish to wait on another case before deciding how clearly it wishes to define the boundaries of the equal inference rule. On the other hand, perhaps the majority concurrence simply did not have a majority of justices who were willing to vote to overrule prior inconsistent supreme court authority. Whatever the reason, the aggressive appellate advocate will argue that statement of the equal inference rule that favors his position on appeal.

Over the years, the supreme court has provided the following nonexclusive principles or standards for application of the equal inference rule:

- Circumstantial evidence may be used to establish any material fact, but it must transcend mere suspicion, conjecture or a guess.[1046]
- Circumstantial evidence may establish a fact if the fact may be fairly and reasonably drawn from other facts proved in the case.[1047]
- There must be a logical bridge between the proffered evidence and the fact sought to be established by inference.[1048]
- Circumstantial evidence must not be viewed in isolation, but in light of all the known circumstances.[1049]
- The material fact must be reasonably inferred from the known circumstances.[1050]
- Under the "no evidence" standard of review, the reviewing court must consider not only facts and circumstances that give

1046. *Lozano*, 52 S.W.3d at 152; Browning-Ferris, Inc. v. Reyna, 865 S.W.2d 925, 928 (Tex. 1993). "Inferences may also support a judgment so long as they are reasonable in light of all the evidence." *Ortiz*, 917 S.W.2d at 772; Briones v. Levine's Dep't Store, Inc., 446 S.W.2d 7, 10 (Tex. 1969); *see* Simmons & Simmons Constr. Co. v. Rea, 155 Tex. 353, 286 S.W.2d 415, 419 (1955) (holding that the test for determining whether the evidence supports the jury verdict is whether reasonable minds would decide the same).

1047. Dallas County Flood Control Dist. No. 1 v. Cross, 815 S.W.2d 271, 279 (Tex. App.—Dallas 1991, writ denied).

1048. *Lozano*, 52 S.W.3d at 152 (citing Joske v. Irvine, 91 Tex. 574, 44 S.W. 1059, 1064 (1898)).

1049. *Id.* at 149.

1050. *See* Joske v. Irvine, 91 Tex. 574, 44 S.W. 1059, 1064 (1898) (finding that an inference is merely a deduction from proven facts).

rise to an inference, but also facts and circumstances in derogation of that inference.[1051]

- The reviewing court is not required to "disregard undisputed evidence that allows of only one logical inference."[1052]

As a final matter related to the equal inference rule, under the no evidence standard of review, inference stacking is not permissible. "[A] vital fact may not be established by piling inference upon inference."[1053]

### B. *Factual Insufficiency*

Only the courts of appeals may review factual sufficiency challenges; the supreme court may only review legal sufficiency challenges.[1054] 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.[1055] A motion for new trial, however, is not required in a nonjury case to challenge either the legal or factual sufficiency of the evidence.[1056] When reviewing a challenge to the factual sufficiency of the evidence, the court of appeals must consider all of the evidence.[1057] "Factual sufficiency [issues] 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."[1058] "Factual sufficiency [issues] are designated as 'insufficient evidence [issues]' or 'great weight and preponderance evidence [issues],' depending

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1051. Woodward v. Ortiz, 150 Tex. 75, 237 S.W.2d 286, 290 (1951); Tex. & N.O. R. Co. v. Burden, 146 Tex. 109, 203 S.W.2d 522, 530 (1947).

1052. Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 51 n.1 (Tex. 1997); *see id.* at 74 (Hecht, J., concurring).

1053. Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp., 435 S.W.2d 854, 858 (Tex. 1968); Tex. 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, 276 S.W.2d 791, 784 (1955))); Lobley v. Gilbert, 149 Tex. 493, 236 S.W.2d 121, 123 (1951) (requiring an inference to be based on an established fact and not on presumed facts).

1054. *In re* Doe, 19 S.W.3d 249, 253 (Tex. 2000).

1055. TEX. R. CIV. P. 324(b)(2), (3).

1056. 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).

1057. Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989); Lofton v. Tex. Brine Corp., 720 S.W.2d 804, 805 (Tex. 1986) (per curiam).

1058. Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied).

upon whether the complaining party had the burden of proof."[1059] Although both issues are generally classified as "insufficient evidence" issues, they are distinct.[1060]

According to *Pool v. Ford Motor Co.*,[1061] when an appellate court reverses a case on grounds of factual insufficiency, it must "detail the evidence relevant to the issue" and "state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict."[1062] 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.[1063]

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 punitive damage award challenges

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1059. *Id.*; Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 770 n.2 (Tex. 1987) (Robertson, J., dissenting).

1060. 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 alone 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. *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 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).

1061. 715 S.W.2d 629 (Tex. 1986).

1062. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); *accord* Dow Chem. Co. v. Francis, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam) (citing Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986)); Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 407 (Tex. 1998); Lofton v. Tex. Brine Corp., 777 S.W.2d 384, 385 (Tex. 1989).

1063. TEX. CIV. PRAC. & REM. CODE ANN. § 41.013 (Vernon Supp. 1995); Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 31 (Tex. 1994) (per curiam). In assessing whether an award of punitive damages is appropriate, the court is to consider the following factors (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." TEX. CIV. PRAC. & REM. CODE ANN. § 41.011 (Vernon 1997).

outlined above.[1064] However, the *Pool* requirement, or some variation thereof, 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 sufficiently supports 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.[1065]

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.[1066] In reviewing an insufficiency of the evidence challenge, the court of appeals must first consider, weigh, and examine all of the evidence which supports and which is contrary to the jury's determination.[1067] Having done so, the court should set aside the verdict only if the evidence that supports the jury finding is so weak as to be clearly wrong and manifestly unjust.[1068]

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1064. *See* Ellis County State Bank v. Keever, 915 S.W.2d 478, 479 (Tex. 1995) (per curiam) (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).

1065. *See generally* TEX. R. APP. P. 47.1 (requiring courts of appeals to write opinions for their decisions).

1066. 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).

1067. Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989) (per curiam); Sosa v. City of Balch Springs, 772 S.W.2d 71, 72 (Tex. 1989); Lofton v. Tex. Brine Corp., 720 S.W.2d 804, 805 (Tex. 1986) (per curiam); Harco Nat'l Ins. Co. v. Villanueva, 765 S.W.2d 809, 810 (Tex. App.—Dallas 1988, writ denied). The courts of appeals have conclusive jurisdiction over questions of fact. TEX. CONST. art. V, § 6; Coulson v. Lake LBJ Util. Dist., 781 S.W.2d 594, 597 (Tex. 1989); 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).

1068. 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, 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 Christi 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).

### 2. Great Weight and Preponderance

If a party is challenging a jury finding regarding an issue upon which that party had the burden of proof, the moving party must demonstrate that "the adverse finding is against the great weight and preponderance of the evidence."[1069] 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, 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.[1070] 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.[1071]

In reviewing great weight issues, 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.[1072] In such cases, a court of appeals may not reverse simply because it concludes that "the evidence preponderates toward an affirmative answer."[1073] The courts of appeals may only reverse where "the great weight of [the]

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1069. Dow Chem. Co. v. Francis, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam) (citing 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. Gen. 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; W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 485 (1998).

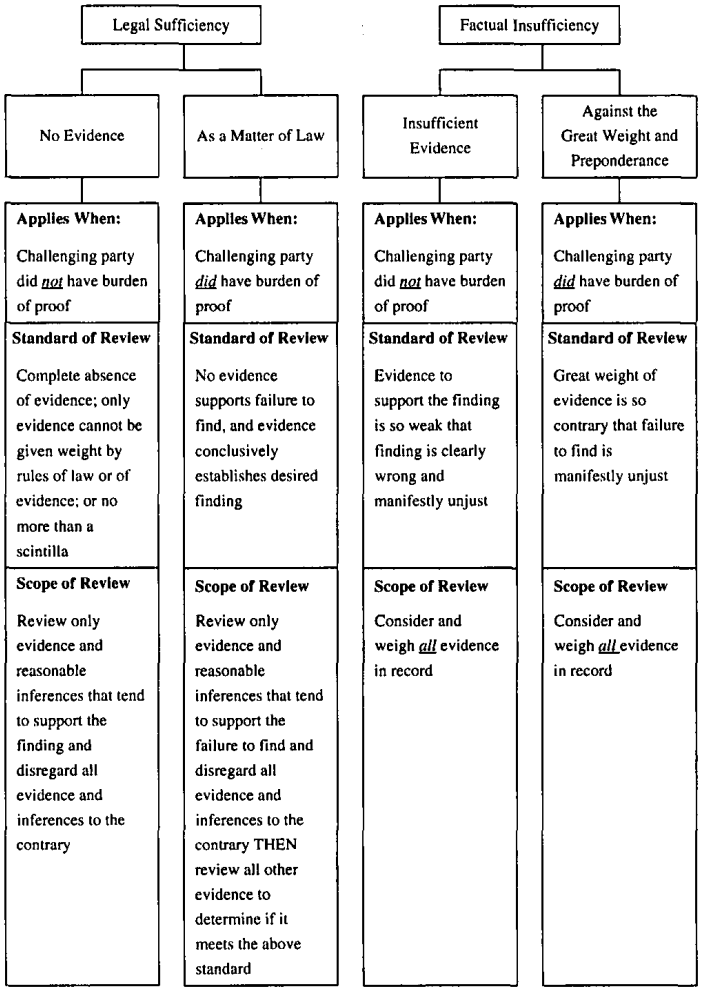
1070. *Dow Chem Co.*, 46 S.W.3d at 241 (citing Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); *Cain*, 709 S.W.2d at 176; *Dyson*, 692 S.W.2d at 457; Traylor v. Goulding, 497 S.W.2d 944, 945 (Tex. 1973); *In re King's Estate*, 244 S.W.2d at 661; Hopson v. Gulf Oil Corp., 150 Tex. 1, 237 S.W.2d 352, 358 (1951); *Raw Hide Oil & Gas*, 766 S.W.2d at 276; *Wilson*, 753 S.W.2d at 448; W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 484 (1998).

1071. Ames v. Ames, 776 S.W.2d 154, 158 (Tex. 1989); Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 651 (Tex. 1988).

1072. 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), *modified*, 920 S.W.2d 288 (Tex. 1996).

1073. *Herbert*, 754 S.W.2d at 144; *Peterson*, 908 S.W.2d at 476.

evidence supports an affirmative answer."[1074] While a court of appeals may "unfind" certain facts, it cannot affirmatively find facts that would be the basis of a rendition.[1075] The court of appeals may only reverse and remand for a new trial.[1076] 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.[1077]




1074. *Herbert*, 754 S.W.2d at 144; *Peterson*, 908 S.W.2d at 476.

1075. Tex. 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).

1076. *Carr*, 767 S.W.2d at 943.

1077. *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).

### 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."[1078] This constitutional provision limits the supreme court's authority, restricting its jurisdiction to questions of law.[1079] 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"[1080] and that this right "shall remain inviolate."[1081] 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.'"[1082] 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 right by taking an issue away from the jury."[1083]

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 their power over questions of fact, but to restrict, in express terms, the jurisdiction of the supreme court, and to confine it to questions

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1078. TEX. CONST. art. V, § 6; 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).

1079. Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 73 (Tex. 1997) (Hecht, J., concurring); *Leitch*, 935 S.W.2d at 120 (Abbott, J., concurring); Choate v. San Antonio & A.P. Ry. Co., 91 Tex. 406, 44 S.W. 69, 69 (1898); *E-Z Mart Stores*, 832 S.W.2d at 369.

1080. TEX. CONST. art V, § 10; *see* 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").

1081. TEX. CONST. art. I, § 15.

1082. Gen. Motors Corp. v. Gayle, 951 S.W.2d 469, 476 (Tex. 1997) (orig. proceeding) (quoting White v. White, 108 Tex. 570, 196 S.W. 508, 512 (1917)).

1083. *Giles*, 950 S.W.2d at 56.

of law."[1084] Thus, "the absence of any significant evidence and the conclusiveness of the evidence are legal questions which [the supreme court] must address, but . . . the weight and preponderance of the evidence is a factual question within the exclusive jurisdiction of the courts of appeals."[1085] 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[1086] when the record contains evidence of, and gives equal support to, inconsistent inferences in support of the jury's finding.[1087]

Almost seventy-five years later, in *In re King's Estate*,[1088] the supreme court established that it might accept jurisdiction, notwithstanding Texas Constitution Article V, Section 6, to determine if a

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1084. *Choate*, 44 S.W.2d at 69.

1085. *Giles*, 950 S.W.2d at 73 (Hecht, J., concurring) (citing *In re* King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951) (per curiam)); *see* Cont'l 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).

1086. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986); *In re* Masonite, 997 S.W.2d 194, 198 (Tex. 1999); Ford Motor Co. v. Miles, 967 S.W.2d 377, 382 (Tex. 1998); Wichita County, Tex. v. Hart, 917 S.W.2d 779, 781 (Tex. 1996); *Russell*, 975 at S.W.2d at 710; Billings v. Concordia Heritage Ass'n, 960 S.W.2d 688, 693 (Tex. App.—El Paso 1997, writ denied).

1087. *Choate*, 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* Turner v. KTRK Television, Inc., 38 S.W.3d 103, 134 (Tex. 2000) (Baker, J., concurring in part and dissenting in part) (stating that a reviewing court may not review a fact finder's credibility determinations because the jury is the "exclusive judge" regarding fact and credibility issues); Pool v. Ford Motor Co., 715 S.W.2d 629, 633-35 (Tex. 1986) (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, 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, 239 S.W.2d 792, 796 (1951) (referring to the jury as "the exclusive judge of the facts proved").

1088. 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. *In re* King's Estate, 150 Tex. 662, 244 S.W.2d 660, 661-62 (1951).

correct legal standard had been applied by the courts of appeals.[1089] 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.[1090] In *Dyson v. Olin Corp.*,[1091] the supreme court again concluded that while it does not have jurisdiction over questions of fact, it does "have jurisdiction to determine whether the court of appeals used the correct rules of law in reaching its conclusion."[1092] As the court correctly recognized, the use of the wrong rule of law, a purely legal question, is within the supreme court's jurisdiction.[1093] 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.[1094] Justice Robertson expressed his view that Article V, Section 6 improperly allows the courts of appeals to usurp the jury's fact-finding function.[1095]

Justice Robertson's challenge to the continued viability of Article V, Section 6 was subsequently raised in *Pool v. Ford Motor Co.*[1096] 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,[1097] it also held that it had the authority to review the court of appeals' opinions to determine

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1089. *Id.*

1090. *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, 824 (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, 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).

1091. 692 S.W.2d 456 (Tex. 1985).

1092. Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985).

1093. *See id.* (emphasizing that supreme court can, as matter of law, review appellate court's application of rules of law).

1094. *Id.* at 458 (Robertson, J., concurring).

1095. *See id.* (concluding that such an interpretation is antagonistic to constitutional guarantees).

1096. Pool v. Ford Motor Co., 715 S.W.2d 629, 633 (Tex. 1986). The Pools argued that the court of appeals exercised its fact jurisdiction in a manner that undermined the jury verdict which is in contravention to the constitutional right to trial by jury. *Pool*, 715 S.W.2d at 633.

1097. *Id.* at 634.

if the appellate court had applied the correct standard of review to the facts.[1098] In order to determine whether the courts of appeals 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.[1099]

*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.[1100] Therefore, the courts of appeals must do more than simply recite the *Pool* standard of review, they must demonstrate that they actually followed the standard.[1101]

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.*[1102] In *Cropper*, the supreme court rejected a challenge to the courts of appeals' constitutional obligation to review fact questions and pointed out that the right to a 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."[1103] 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 empow-

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1098. *Id.* at 634-35.

1099. *Id.* at 635.

1100. *Id.*

1101. Stewart v. Allied Bancshares, Inc., 770 S.W.2d 837, 838 (Tex. App.—Tyler 1989, writ denied).

1102. 754 S.W.2d 646, 648 (Tex. 1988).

1103. *Cropper*, 754 S.W.2d at 652.

ered to, it was "not prepared to sacrifice either [constitutional provision] for the benefit of the other."[1104]

While the supreme court has continued to recognize the courts of appeals' conclusive jurisdiction over questions of fact,[1105] it has in the past circumvented its own constitutional limitation in two interesting and sharply divided cases. In *Lofton v. Texas Brine Corp.*,[1106] the supreme court, in a 5-4 decision, reversed the court of appeals' decision for a second time,[1107] holding that the jury's finding was supported by evidence that was factually sufficient.[1108] 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 *Lofton* decision is that the court, as Justice Gonzalez predicted in *Pool*,[1109] was using *Pool* to second guess the courts of appeals' constitutional prerogative to judge the factual sufficiency of the evidence in a case.[1110] While the supreme court again recognized its lack of jurisdiction to determine the factual sufficiency of the evidence,[1111] it is nevertheless explained in great detail why all of the evidence was sufficient to support the jury's finding.[1112] It is clear from the court's "extensive, and unauthorized, analysis"[1113] that while the court was unwilling to explicitly

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1104. *Id.*; *see* Herbert v. Herbert, 754 S.W.2d 141, 144 (Tex. 1988) (reiterating the courts of appeals' conclusive jurisdiction over questions of fact); Hurlbut 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).

1105. *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").

1106. 777 S.W.2d 384 (Tex. 1989).

1107. Lofton v. Tex. Brine Corp., 777 S.W.2d 384, 387 (Tex. 1989). The case was reversed for the first time in *Lofton v. Tex. Brine Corp.*, 720 S.W.2d 804, 805 (Tex. 1986) (per curiam). The *Lofton* opinion on the first remand is reported at *Tex. 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).

1108. *Lofton*, 777 S.W.2d at 387.

1109. 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).

1110. *See Lofton*, 777 S.W.2d at 387-88 (Gonzalez, J., dissenting); *id.* at 388-89 (Hecht, J., dissenting).

1111. *Id.* at 387.

1112. *Id.* at 386-87.

1113. *Id.* at 389 (Hecht, J., dissenting).

overrule *Herbert* and *Cropper*, it was now going to review the court of appeals' factual sufficiency analysis.[1114] In his *Lofton* dissent, Justice Hecht observed that the majority "stymied . . . the constitution" by allowing the supreme court to "keep reversing the judgment of the court of appeals until it reache[d] a result that the [c]ourt approve[d]."[1115] Subsequently, reiterating Justice Hecht's concern in *Lofton*, Justice Gonzalez noted that the supreme court should try to avoid "playing ping pong with the court of appeals" by using *Pool* to second guess the courts of appeals.[1116]

In *Aluminum Co. of America v. Alm*,[1117] 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[1118] In *Alm*, 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.[1119] Ignoring the evidence of care introduced by Alcoa,[1120] 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.[1121] 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."[1122] While most practitioners and courts assume that the inherent conflict between the court of ap-

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1114. *Id.* at 388 (Hecht, J., dissenting).

1115. *Lofton*, 777 S.W.2d at 388 (Hecht, J., dissenting).

1116. *Id.* at 387-88 (Gonzalez, J., dissenting); *see* William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 533 (1991) (discussing the 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).

1117. 785 S.W.2d 137 (Tex. 1990).

1118. Aluminum Co. of Am. v. Alm, 785 S.W.2d 137, 140-41 (Tex. 1990) (Gonzalez, J., dissenting) (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").

1119. *Id.* at 140.

1120. *Id.* at 143 (Gonzalez, J., dissenting).

1121. *Id.* at 141 (Gonzalez, J., dissenting).

1122. *Id.* at 143 (Gonzalez, J., dissenting).

peals' 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 time of *Lofton* and *Alm*, was deeply divided on the issue.[1123] The concurring and dissenting opinions on denial of application for writ of error in *Havner v. E-Z Mart Stores, Inc.*[1124] indicate that the questions surrounding the courts of appeals' constitutional conclusive jurisdiction over questions of fact may not yet be truly resolved.[1125] In any event, appellate practitioners must be aware of the potential conflict in 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 non finding 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.[1126]

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1123. *Alm*, 785 S.W.2d at 140; *Lofton*, 777 S.W.2d at 387.

1124. 846 S.W.2d 286 (Tex. 1993).

1125. Havner v. E-Z Mart Stores, Inc., 846 S.W.2d 286, 286-87 (Tex. 1993) (Gonzalez, J., concurring); *id.* (Doggett, J., dissenting); *see* Formosa Plastics Corp. USA v. Presidio Eng'rs, 960 S.W.2d 41, 52 (Tex. 1998) (Baker, J., dissenting) (accusing the majority of undertaking a factual sufficiency review); 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").

1126. *Havner*, 846 S.W.2d at 286; *Alm*, 785 S.W.2d at 140; Lofton v. Tex. Brine Corp., 777 S.W.2d 384, 387 (Tex. 1989); *see* Griffin Indus., Inc. v. Thirteenth Court of Appeals, 934 S.W.2d 349, 355 (Tex. 1996) (orig. proceeding) (Baker, J., dissenting) (criticizing the majority because it reached its conclusion by reweighing the evidence and re-evaluating the witnesses' credibility).

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## 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 law.[1127] The trial court's findings of fact "shall not be recited in a judgment,"[1128] and oral comments from the bench will not constitute findings of fact and conclusions of law.[1129] 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 fact finder.[1130] When the trial court acts as a fact finder, its findings are reviewed under legal and factual sufficiency standards.[1131]

### A. *Findings of Fact Filed*

#### 1. With Reporter's Record

Findings of fact in a case tried to the court have the same force and dignity as a jury's verdict upon jury questions;[1132] however, they are not conclusive when a complete reporter's record appears

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1127. TEX. R. CIV. P. 296.

1128. TEX. R. CIV. P. 299a.

1129. *In re* Doe 10, 78 S.W.3d 338, 340 n.2 (Tex. 2002); *In re* W.E.R., 669 S.W.2d 716, 717 (Tex. 1984) (per curiam); Roberts v. Roberts, 999 S.W.2d 424, 440 (Tex. App.—El Paso 1999, no pet.); Sharp v. Hobart Corp., 957 S.W.2d 650, 652 n.5 (Tex. App.—Austin 1997, no pet.).

1130. *See* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 33 (Tex. 1994) (emphasizing that findings would be helpful with respect to a trial court's review of punitive damages awards); TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 919 n.9 (Tex. 1991) (noting that findings would be helpful with respect to sanction orders); 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).

1131. *In re* Doe, 19 S.W.3d 249, 253 (Tex. 2000).

1132. Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex. 1994); Franco v. Franco, 81 S.W.3d 319, 332 (Tex. App.—El Paso 2002, no pet.); Ashcraft v. Lookadoo, 952 S.W.2d 907, 910 (Tex. App.—Dallas 1997, pet. denied) (en banc); Tigner v. City of Angleton, 949 S.W.2d 887, 888 (Tex. App.—Houston [14 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); Taiwan Shrimp Farm Vill. Ass'n v. U.S.A. Shrimp Farm Dev., Inc., 915 S.W.2d 61, 70 (Tex. App.—Corpus Christi 1996, writ denied); Tucker v. Tucker, 908 S.W.2d 530, 532 (Tex. App.—San Antonio

in the record.[1133] The trial court's fact findings are reviewed for legal and factual sufficiency of the evidence,[1134] which is the same standard applied when reviewing evidence supporting jury findings.[1135] Although a trial court's conclusions of law may not be challenged for factual insufficiency, the appellate court may review the conclusions drawn from the facts to determine their correctness.[1136]

### 2. Without Report'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.[1137]

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1995, 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.).

1133. *Tucker*, 908 S.W.2d at 532; Middleton v. Kawasaki Steel Co., 687 S.W.2d 42, 44 (Tex. App.—Houston [14th Dist.] 1995, writ ref'd n.r.e.); 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. Ford v. Darwin, 767 S.W.2d 851, 856 (Tex. App.—Dallas, 1989, writ denied).

1134. Mays v. Pierce, 154 Tex. 487, 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 Vill. Joint Venture v. MBank Lincoln Ctr., 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.).

1135. 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); S. States Transp., Inc. v. State, 774 S.W.2d 639, 640 (Tex. 1989); Hitzelberger v. Samadan Oil Corp., 948 S.W.2d 497, 503 (Tex. App.—Waco 1997, pet. denied); Asai v. Vanco Insulation Abatement, Inc., 932 S.W.2d 118, 121 (Tex. App.—El Paso 1996, no writ); *In re* Striegler, 915 S.W.2d at 638; *Taiwan Shrimp Farm Vill.*, 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 v. Platt, 786 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.).

1136. *Ashcraft*, 952 S.W.2d at 910; Tigner v. City of Angleton, 949 S.W.2d 887, 889 (Tex. App.—Houston 1997, no writ); *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).

1137. *Mays*, 281 S.W.2d at 82; Nelkin v. Panzer, 833 S.W.2d 267, 268 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.); *Tripp Vill. Joint Venture*, 774 S.W.2d at 751;

## 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,[1138] provided the proposition is raised in the pleadings and supported by evidence and that "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."[1139] To prevail, the appellant may show that the undisputed evidence negates at least one of the essential elements of the decision or he may show that the appellee's pleadings lack one or more of the elements essential to the decision, and that the trial court was limited to the pleadings.[1140] 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."[1141] The applicable standard of review is the same as that ap-

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Alexander v. Barlow, 671 S.W.2d 531, 534 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

1138. 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) (per curiam); 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); Brandywood Hous., Ltd. v. Tex. Dep't of Transp., 74 S.W.3d 421, 427 (Tex. App.—Houston [1st Dist.] 2001, no pet.); 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).

1139. Franklin v. Donoho, 774 S.W.2d 308, 311 (Tex. App.—Austin 1989, no writ); *accord* 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, 620 (Tex. App.—Austin 1991, writ denied); Friedman v. New Westbury Vill. Assocs., 787 S.W.2d 154, 157 (Tex. App.—Houston [1st Dist.] 1990, no writ).

1140. *Brodhead*, 824 S.W.2d at 620; *Franklin*, 774 S.W.2d at 311.

1141. *Roberson*, 768 S.W.2d at 281; *accord Heine*, 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); *Brandywood Hous., Ltd.*, 74 S.W.3d at 427; Valley Mech. Contractors, Inc. v. Gonzales, 894 S.W.2d 832, 834 (Tex. App.—Corpus Christi 1995, no writ); *Crosley*, 840 S.W.2d at 769; Money of the United

plied in the review of jury findings or a trial court's findings of fact.[1142] 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.[1143] 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.[1144]

### 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.[1145] 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.[1146]

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States in the Amount of $8,500 v. State, 774 S.W.2d 788, 791 (Tex. App.—Houston [14th Dist.] 1989, no writ); Nat'l Bugmobiles, Inc. v. Jobi Props., 73 S.W.2d 616, 620 (Tex. App.—Corpus Christi 1989, writ denied).

1142. Wade v. Comm'n for Lawyer Discipline, 961 S.W.2d 366, 374 (Tex. App.—Houston [1st Dist.] 1997, no writ).

1143. Point Lookout W., 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 Mech.*, 894 S.W.2d at 834; *Giangrosso*, 840 S.W.2d at 769; Weng Enters., Inc. v. Embassy World Travel, Inc., 837 S.W.2d 217, 223 (Tex. App.—Dallas 1989, writ denied); Lute Riley Motors, Inc. v. T.C. Crist, Inc., 767 S.W.2d 439, 440 (Tex. App.—Dallas 1988, writ denied).

1144. Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S.W.2d 609, 613 (1950).

1145. Guthrie v. Nat'l Homes Corp., 394 S.W.2d 494, 495 (Tex. 1965); Commercial Credit Corp. v. Smith, 143 Tex. 612, 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); Carns v. Carns, 776 S.W.2d 603, 604 (Tex. App.—San Antonio 1989, writ denied); 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.).

1146. *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, harm is presumed if the trial court fails to do so.[1147] This presumption may be rebutted, however, if the record before the appellate court affirmatively shows that no injury resulted from the trial court's failure to comply with the rules.[1148] The test of whether harm exists depends upon whether the circumstances of the particular case would require an appellant to speculate as to why the trial judge ruled against the appellant, or whether those reasons are obvious.[1149] In factually complicated situations, such as when there are two or more possible grounds for recovery or defense, an undue burden is placed on an appellant.[1150] This burden prevents the appellant from making a proper presentation of the case to the appellate court.[1151]

If an appellant is harmed 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

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1147. *See* TEX. R. CIV. P. 296 (regarding requests for findings of facts and conclusions of law); TEX. R. CIV. P. 297 (concerning the time to file findings of fact and conclusions of law); Wagner v. Riske, 142 Tex. 337, 178 S.W.2d 117, 120 (1944) (stating that a trial court must file fact findings and conclusions of law upon request, and the failure to do so is presumed harmful unless the record affirmatively shows that no injury has been suffered by the complaining party); *accord* Cherne Indus., Inc. v. Magallenes, 763 S.W.2d 768, 772 (Tex. 1989); *In re* Marriage of Combs, 958 S.W.2d 848, 851 (Tex. App.—Amarillo 1997, no pet.); Valero S. Tex. Processing Co. v. Starr County Appraisal Dist., 954 S.W.2d 863, 865 (Tex. App.—San Antonio 1997, pet. denied); Humphrey v. Camelot Ret. Cmty., 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.).

1148. Sheldon Pollack Corp. v. Pioneer Concrete of Tex., Inc., 765 S.W.2d 843, 845 (Tex. App.—Dallas 1989, writ denied); *Magallenes*, 763 S.W.2d at 772.

1149. *See* Elizondo v. Gomez, 957 S.W.2d 862, 865 (Tex. App.—San Antonio 1997, pet. denied); *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.

1150. *Humphrey*, 893 S.W.2d at 61; Guzman v. Guzman, 827 S.W.2d 445, 446-47 (Tex. App.—Corpus Christi 1992, writ denied).

1151. *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, 784 (Tex. App.—Corpus Christi 1987, writ denied).

and order the trial court to make the appropriate findings and conclusions and to certify those findings to the appellate court for review pursuant to Rule 44.4.[1152] If the original judge is no longer available to prepare findings and conclusions, a successor judge may make them.[1153]

### 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."[1154]

## 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.[1155] In applying the standard, the reviewing court defers to the trial court's factual determinations if they are supported by

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1152. TEX. R. APP. P. 44.4; *Magallenes*, 763 S.W.2d at 773; Roberts v. Roberts, 999 S.W.2d 424, 441-42 (Tex. App.—El Paso 1999, no pet.); City of Los Fresnos v. Gonzalez, 830 S.W.2d 627, 630 (Tex. App.—Corpus Christi 1992, no writ); Elec. Power Design, Inc. v. R. A. Hanson, Co., 821 S.W.2d 170, 171-72 (Tex. App.—Houston [14th Dist.] 1991, no writ).

1153. TEX. CIV. PRAC. & REM. CODE ANN. § 30.002 (Vernon 1997); Ikard v. Ikard, 819 S.W.2d 644, 651 (Tex. App.—El Paso 1991, no writ). *Contra* FDIC v. Morris, 782 S.W.2d 521, 524 (Tex. App.—Dallas 1989, no writ).

1154. *See* Saenz v. Saenz, 756 S.W.2d 93, 95 (Tex. App.—San Antonio 1988, no writ) (stating that the appellant has the burden of presenting a sufficient record to the appellate court to determine whether there was an error requiring reversal); *accord* Rowland v. Doebbler, No. 04-93-00096-CV, 1995 WL 654550, at *5 (Tex. App.—San Antonio Nov. 8, 1995, no writ) (not designated for publication). Without a statement of facts in the record or findings of fact filed, the appellate court will presume that the evidence at trial was sufficient to support the trial court's holding. *Saenz*, 756 S.W.2d at 95. Similarly, if only a partial statement of the facts is before an appellate court, the presumption of sufficient evidence to support the trial court's judgment will apply. *Rowland*, 1995 WL 654550, at *5.

1155. *See* El Paso Natural Gas Co. v. Minco Oil & Gas Co., 964 S.W.2d 54, 61 (Tex. App.—Amarillo 1997) (applying standard to finding of unconscionability), *rev'd on other grounds*, 8 S.W.3d 309 (Tex. 1999); 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); *see also* Remington Arms Co. v. Luna, 966 S.W.2d 641, 643 (Tex. App.—San Antonio 1998, pet. denied) (applying standard to class certification findings).

the evidence and reviews its legal determinations de novo.[1156] 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.[1157] Accordingly, the trial court abuses its discretion if the court fails to properly apply the law to the facts, if it acts arbitrarily or unreasonably, or if its ruling is based on factual assertions not supported by the record.[1158]

## IX. Conclusions of Law

Conclusions of law are always reviewable.[1159] In fact, conclusions of law in a nonjury trial are reviewable even without preservation under Texas Rule of Appellate Procedure 33.1.[1160] "Conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence."[1161] Conclusions of law will not be reversed, unless they are erroneous

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1156. *Remington Arms Co.*, 966 S.W.2d at 643; *Pony Express Courier Corp.*, 921 S.W.2d at 820.

1157. *El Paso Natural Gas Co.*, 964 S.W.2d at 61 (citing *Pony Express Courier Corp.*, 921 S.W.2d at 820).

1158. *Remington Arms Co.*, 966 S.W.2d at 643 (citing Microsoft Corp. v. Manning, 914 S.W.2d 602, 607 (Tex. App.—Texarkana 1995, writ dism'd)).

1159. Tex. Dep't of Transp. v. City of Sunset Valley, No. 03-00-00744-CV, 2002 WL 1991160, *2 (Tex. App.—Austin, Aug. 30, 2002, no pet.); ASI Technologies, Inc. v. Johnson Equip. Co., 75 S.W.3d 545, 547 (Tex. App.—San Antonio 2002, pet. denied); Tex. Dep't of Pub. Safety v. Stockton, 53 S.W.3d 421, 423 (Tex. App.—San Antonio 2001, no pet.); *In re* W.D.H., 43 S.W.3d 30, 33 n.4 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); State Bar of Tex. v. Leighton, 956 S.W.2d 667, 671 (Tex. App.—San Antonio 1997, no pet.); 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); Muller v. Nelson, Sherrod & Carter, 563 S.W.2d 697, 702 (Tex. Civ. App.—Fort Worth 1978, no writ).

1160. Tex. R. App. P. 33.1; *City of Sunset Valley*, 2002 WL 1991160, *2; 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., 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).

1161. *Stockton*, 53 S.W.3d at 423; *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).

as a matter of law.[1162] In addition, a trial court's conclusions of law are reviewed de novo as legal questions,[1163] and the reviewing court affords no deference to the lower court's decision.[1164] Under de novo review, the reviewing court exercises its own judgment and redetermines each legal issue.[1165] Incorrect conclusions of law will not require a reversal if the controlling finding of facts will support a correct legal theory.[1166]

## 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."[1167] The clear and convincing standard "is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of

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1162. Vinson v. Brown, 80 S.W.3d 221, 230 (Tex. App.—Austin 2002, no pet.); *Stockton*, 53 S.W.3d at 423; Arch Petroleum, Inc. v. Sharp, 958 S.W.2d 475, 477 (Tex. App.—Austin 1997, no pet.); Hitzelberger v. Samedan Oil Corp., 948 S.W.2d 497, 503 (Tex. App.—Waco 1997, writ 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.).

1163. State v. Heal, 917 S.W.2d 6, 9 (Tex. 1996); Town of Flower Mound v. Stafford Estates, L.P., 71 S.W.3d 18, 26 (Tex. App.—Fort Worth 2002, no pet.); Panola County Appraisal Dist. v. Panola County Fresh Water Supply Dist. No. One, 69 S.W.3d 278, 287 (Tex. App.—Texarkana 2002, no pet.); *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. Colo. 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)).

1164. Subaru of Am., Inc. v. David McDavid Nissan, Inc., 45 Tex. Sup. Ct. J. 907, 911, 2001 WL 1898454, at *6 (June 27, 2002); Quick v. City of Austin, 7 S.W.3d 109, 116 (Tex. 1998); *Heal*, 917 S.W.2d at 9; *City of Sunset Valley*, 2002 WL 1991160, at *2.

1165. *In re* C.H., 45 Tex. Sup. Ct. J. 1000, 1006, 2001 WL 1903109, at *11 (July 3, 2002); *Subaru of Am.*, 2001 WL 1898454, at *6; *Quick*, 7 S.W.3d at 116.

1166. Long Distance Int'l, Inc. v. Telefonos de Mexico, S.A. de C.V., 49 S.W.3d 347, 351 (Tex. 2001); Thomas v. Cornyn, 71 S.W.3d 473, 485 (Tex. App.—Austin 2002, no pet.); Aguero v. Ramirez, 70 S.W.3d 372, 373 (Tex. App.—Corpus Christi 2002, pet. denied); *Hitzelberger*, 948 S.W.2d at 503; *Piazza*, 909 S.W.2d at 532; *Westech Eng'g*, 835 S.W.2d at 196; Valencia v. Garza, 765 S.W.2d 893, 898 (Tex. App.—San Antonio 1989, no writ).

1167. Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 31 (Tex. 1994) (citing State v. Addington, 588 S.W.2d 659, 570 (Tex. 1979); Tex. Fam. Code Ann. § 101.007 (Vernon 1986).

criminal proceedings."[1168] 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."[1169] When making this determination, the court must consider all of the evidence.[1170] The court of appeals will sustain a challenge to the sufficiency of the evidence under this standard "if the fact finder could not have reasonably found the fact was established by clear and convincing evidence."[1171]

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.[1172] The courts also apply the clear and convincing evidence standard to a finding of actual malice in public-figure defamation cases.[1173] The standard also applies to the termination of parental rights[1174] because they are constitu-

1168. *In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980); *accord* Trimble v. Tex. Dep't of Protective & Reg. Servs., 981 S.W.2d 211, 216 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *In re* B.T., 954 S.W.2d 44, 46 (Tex. App.—San Antonio 1997, writ denied); Edwards v. Tex. Dep't of Protective & Reg. Servs., 946 S.W.2d 130, 135 (Tex. App.—El Paso 1997, no writ); Williams v. Tex. Dep't of Human Servs., 788 S.W.2d 922, 925 (Tex. App.—Houston [1st Dist.] 1990, no writ); *In re* L.R.M., 763 S.W.2d 64, 67 (Tex. App.—Fort Worth 1989, no writ).

1169. *In re* A.L.S., 74 S.W.3d 173, 177 (Tex. App.—El Paso 2002, no pet.); Salas v. Tex. Dep't of Protective & Reg. Servs., 71 S.W.3d 783, 789 (Tex. App.—El Paso 2002, no pet.); *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); Mezick v. State, 920 S.W.2d 427, 430 (Tex. App.—Houston [1st Dist.] 1996, no writ); Ybarra v. Tex. Dep't of Human Servs., 869 S.W.2d 574, 579-80 (Tex. App.—Corpus Christi 1993, no writ); *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); *see also* Neal v. Tex. Dep't of Human Servs., 814 S.W.2d 216, 222 (Tex. App.—San Antonio 1991, writ denied) (permitting error for insufficient evidence only where no reasonable basis exists for the fact finder to meet clear and convincing standard).

1170. *In re* D. E., 761 S.W.2d 596, 599 (Tex. App.—Fort Worth 1988, no writ).

1171. *In re G.B.R.*, 953 S.W.2d at 396; *Mezick*, 920 S.W.2d at 430; Faram v. Gervitz-Faram, 895 S.W.2d 839, 843 n.2 (Tex. App.—Fort Worth 1995, no writ); *Neal*, 814 S.W.2d at 222; *Williams*, 788 S.W.2d at 926; *In re* L.R.M., 763 S.W.2d at 66-67.

1172. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b) (Vernon 1997).

1173. Turner v. KTRK Television, Inc., 30 S.W.3d 103, 109 (Tex. 2000); Huckabee v. Time Warner Enter. Co., 19 S.W.3d 413, 420 (Tex. 2000).

1174. *In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980).

tionally protected,[1175] and it applies by statute in civil involuntary commitments.[1176] The intermediate appellate standard of review applicable in involuntary termination of parent-child relationships adopted by *In re G.M.*[1177] is applicable in involuntary commitment cases as well.[1178]

### B. *Administrative Agency Rulings*

A suit for judicial review of an administrative agency's contested-case decision is governed by the Administrative Procedure Act (APA).[1179] Under the APA,[1180] a reviewing court acts in an appellate capacity and may not substitute its judgment for that of the agency.[1181] The reviewing court may reverse the agency's decision only if it violates one of the six distinct bases for reversal set forth in the APA.[1182] Review of the administrative orders are subject to two separate standards of review: "pure trial de novo" and

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1175. 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. Tex. Dep't of Protective & Reg. Servs., 946 S.W.2d 130, 135 (Tex. App.—El Paso 1997, no writ).

1176. TEX. HEALTH & SAFETY CODE ANN. § 574.034 (Vernon 2001 & Supp. 2002).

1177. *In re* G.M., 596 S.W.2d at 847.

1178. State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979); *see* 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 examine all the evidence to determine "if . . . [it] was sufficient to produce a firm belief or conviction in the fact finder . . . [as to] allegations pled").

1179. TEX. GOV'T CODE ANN. § 2001.003(1) (Vernon 2000). A "'[c]ontested 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.*

1180. *Id.* § 2001.172-.174.

1181. Cash Am. Int'l, Inc. v. Bennett, 35 S.W.3d 12, 17 (Tex. 2000).

1182. *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:
> (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 provision;
> (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

"pure substantial evidence."[1183] 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.[1184] In limited circumstances, both standards of review will be used in reviewing the same agency decision.[1185]

1. Trial De Novo Review

If the manner of review is trial de novo, the reviewing court tries "each issue of fact and law in the manner that applies to other civil suits."[1186] The appeal is handled as though there had not been an intervening agency action,[1187] and in line with this principle, the reviewing court cannot admit the agency's decision into evidence.[1188] The reviewing court is to base its decision on its own determination of the issues of law and fact in the case[1189] and may

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(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

*Id.*

1183. *Id.* § 2001.173-.174; San Benito Consol. Indep. Sch. Dist. v. McGinnis, Lochridge & Kilgore, L.L.P., No. 03-96-00643-CV, 1997 WL 461912, at *2-3 (Tex. App.—Austin, Aug. 14, 1997, no pet.) (not designated for publication).

1184. TEX. LAB. CODE ANN. § 410.255 (Vernon 1996) (stating that the Workers Compensation Act provides for substantial evidence review under the APA); TEX. GOV'T CODE ANN. § 2001.172 (Vernon 2000) (explaining that the scope of review of state agency decision will be determined "as provided by the law under which review is sought"); Dickerson-Seely & Assocs., Inc. v. Tex. 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 the law pursuant to which the action is instituted"); *see* Tex. 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).

1185. *See* Tex. Workers' Comp. 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).

1186. TEX. GOV'T CODE ANN. § 2001.173(a) (Vernon 2000).

1187. *Id.*; *see 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).

1188. 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. TEX. GOV'T CODE ANN. § 2001.173.

1189. TEX. GOV'T CODE ANN. § 2001.173(a); *Dickerson-Seely*, 784 S.W.2d at 574; *San Benito*, 1997 WL 461912, at *2-3.

also consider new evidence not presented before the agency.[1190] As in other civil cases, the standard of proof is a preponderance of the evidence.[1191] Finally, a party may request a jury trial on each issue of fact.[1192]

### 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.[1193] 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.[1194] In an appeal from an agency order governed by the substantial evidence rule, the agency order is presumed to be valid and the appellant

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1190. *San Benito*, 1997 WL 461912, at *2 (explaining that the reviewing court is not confined to the record in determining whether the lower court erred).

1191. *Dickerson-Seely*, 784 S.W.2d at 574-75.

1192. TEX. GOV'T CODE ANN. § 2001.173(b) (2000).

1193. *See* Gulf States Util. Co. v. Pub. 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 cases).

1194. City of El Paso v. Pub. Util. Comm'n, 883 S.W.2d 179, 186 (Tex. 1994); Dotson v. Tex. State Bd. of Med. Exam'rs, 612 S.W.2d 921, 922 (Tex. 1981); Auto Convoy Co. v. R.R. Comm'n, 507 S.W.2d 718, 722 (Tex. 1974); R.R. Comm'n v. Shell Oil Co., 139 Tex. 66, 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. Lauderdale v. Tex. 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 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.

Tex. Health Enters., Inc. v. Tex. Dep't of Health, 954 S.W.2d 168, 171 (Tex. App.—Austin 1997, no pet.) (citing N. Alamo Water Supply Corp. v. Tex. Dep't of Health, 839 S.W.2d 448, 452-53 (Tex. App.—Austin 1992, writ denied).

has the burden to overcome that presumption.[1195] The substantial evidence standard of review requires "only more than a mere scintilla" to support an agency's determination.[1196] One endeavoring to reverse administrative findings, conclusions, or decisions because of lack of substantial evidence faces a difficult task.[1197]

"At its core, the substantial evidence rule is a reasonableness test or a rational basis test."[1198] 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.[1199] The scope of review is based upon "the reliable and probative evidence in the record as a whole."[1200] 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 underlying fact[s]."[1201] Resolution of factual inconsistencies and ambiguities is within the realm of the agency and the goal of the substantial evidence rule is to guard that function.[1202] Therefore, the reviewing court is only concerned with the *reasonableness* of the agency's order and "not the *correctness* of the or-

1195. Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc., 665 S.W.2d 446, 453 (Tex. 1984); City of San Antonio v. Tex. 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).

1196. Montgomery Indep. Sch. Dist. v. Davis, 34 S.W.3d 559, 566 (Tex. 2000) (quoting R.R. Comm'n of Tex. v. Torch Operating Co., 912 S.W.2d 790, 792-93 (Tex. 1995)).

1197. *Charter Med.*, 665 S.W.2d at 452; *Fetchin*, 922 S.W.2d at 552.

1198. R.R. 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, 181-82 (1984) (discussing the supreme court's decision in *Charter Medical*).

1199. Pub. Util. Comm'n of Tex. v. Gulf States Util. Co., 809 S.W.2d 201, 210-11 (Tex. 1991).

1200. *Id.* at 211; San Benito Consol. Indep. Sch. Dist. v. McGinnis, Lockridge &Kilgore, L.L.P., No. 03-96-00643-CV, 1997 WL 461912, at *3-4 (Tex. App.—Austin Aug. 14, 1997, no pet.) (not designated for publication).

1201. Tex. Water Comm'n v. Customers of Combined Water Sys., Inc., 843 S.W.2d 678, 681 (Tex. App.—Austin 1992, no writ).

1202. Tex. Alcoholic Beverage Comm'n v. Mini, Inc., 832 S.W.2d 147, 150 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

der."[1203] In applying this test, the reviewing court may not substitute its judgment as to the weight of the evidence for that of the agency.[1204] Finally, the question of whether the administrative decision is supported by substantial evidence is a question of law.[1205]

### 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's decision is not supported by substantial evidence, then it is deemed to be arbitrary and capricious.[1206] However, a decision may be supported by substantial evidence, yet still be arbitrary and capricious, therefore, justifying reversal.[1207] An agency's decision is arbitrary when the agency "(1) fail[s] to consider a factor the legislature direct[ed] 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."[1208]

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1203. *Pend Oreille*, 817 S.W.2d at 41 (alteration in original); *Charter Med.*, 665 S.W.2d at 452.

1204. *Pend Oreille*, 817 S.W.2d at 40; Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer, 662 S.W.2d 953, 956 (Tex. 1983).

1205. Montgomery Indep. Sch. Dist. v. Davis, 34 S.W.3d 559, 566 (Tex. 2000); *Brinkmeyer*, 662 S.W.2d at 956; Bd. of Firemen's Relief & Ret. Fund Trs. v. Marks, 150 Tex. 433, 242 S.W.2d 181, 183 (1951).

1206. Pub. Util. Comm'n of Tex. v. Gulf State Util. Co., 809 S.W.2d 201, 211 (Tex. 1991); *Charter Med.*, 665 S.W.2d at 454.

1207. *See, e.g.*, Lewis v. Metro. Sav. & Loan Ass'n, 550 S.W.2d 11, 12 (Tex. 1977) (holding that 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"); R.R. Comm'n of Tex. v. Alamo Express, Inc., 158 Tex. 68, 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); Pub. Util. Comm'n of Tex. v. S. 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 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. 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).

1208. City of El Paso v. Pub. Util. Comm'n of Tex. 883 S.W.2d 179, 184 (Tex. 1994).

### 4. Procedure for Review Under Substantial Evidence Rule or Undefined Scope of Review

Upon review of an agency's decision where the subject of complaint does not require review by trial de novo, the agency is required to send the reviewing court the entire record of the proceeding under review unless shortened by stipulation of the parties.[1209] 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.[1210] The party seeking judicial review must offer, and the reviewing court must admit, the agency record into evidence as an exhibit.[1211] The reviewing court reviews the agency decision without a jury and is limited to the agency record.[1212]

## XI. PRESUMPTIONS FROM AN INCOMPLETE RECORD ON APPEAL

In the absence of a clerk's record, there can be no appeal.[1213] Without a complete reporter's record or a complete clerk's record, the appellate court will presume that the omitted evidence supports the trial court's judgment.[1214] Stated another way, when an appellant fails to bring forward a complete record on appeal, it is presumed that the omitted portions are relevant to the disposition of the appeal.[1215] This precludes the reviewing court from finding

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1209. TEX. GOV'T CODE ANN. § 2001.175(a), (b) (Vernon 2000); Nueces Canyon Consol. Ind. Sch. Dist. v. Cent. Educ. Agency, 917 S.W.2d 773, 776 (Tex. 1996).

1210. TEX. GOV'T CODE ANN. § 2001.175(c) (Vernon 2000).

1211. *Id.* § 2001.175(d); Tex. Dep't of Pub. Safety v. Stacy, 954 S.W.2d 80, 82 (Tex. App.—San Antonio 1997, no writ).

1212. TEX. GOV'T CODE ANN. § 2001.175(e) (Vernon 2000).

1213. W. Credit Co. v. Olshan Enter., Inc., 714 S.W.2d 137, 138 (Tex. App.—Houston [1st Dist.] 1986, no writ).

1214. 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. 1987); Englander Co. v. Kennedy, 428 S.W.2d 806, 806 (Tex. 1968); Haynes v. McIntosh, 776 S.W.2d 784, 785 (Tex. App.—Corpus Christi 1989, writ denied); E.B. v. Tex. 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); Collins v. Williamson Printing Corp., 746 S.W.2d 489, 492 (Tex. App.—Dallas 1988, no writ).

1215. Guthrie v. Nat'l Homes Corp., 394 S.W.2d 494, 495 (Tex. 1965); Sandoval v. Comm'n for Lawyer Discipline, 25 S.W.3d 720, 722 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Protechnics Int'l, Inc. v. Tru-Tag Sys., Inc., 843 S.W.2d 734, 735 (Tex. App.—Houston [14th Dist.] 1992, no writ); *see* Foust v. Estate of Walters, 21 S.W.3d 495, 504 (Tex. App.—San Antonio 2000, pet. denied) (stating that because appellant failed to file the expert's deposition testimony in support of his complaint on appeal that the expert should

reversible error[1216] 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.[1217] 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.[1218]

When there is no reporter's record, appellate court review is generally limited to complaints involving errors of law, erroneous pleadings or rulings, erroneous charges, irreconcilable conflicts of jury findings, summary judgments, and fundamental error.[1219] The reviewing court cannot review the legal or factual sufficiency of the evidence in the absence of a complete record or an agreed upon statement of facts.[1220] 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.[1221]

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), 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.[1222] When an appellant complies with this rule, including setting forth the statement of issues to be presented on appeal,[1223] a presumption on appeal exists that nothing omitted from the re-

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not have been permitted to testify; therefore, the court "indulge[d] every presumption in favor of the trial court's decision" to overrule the motion to strike the expert's testimony).

1216. Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990) (per curiam).

1217. TEX. R. APP. P. 44.1.

1218. *Christiansen*, 782 S.W.2d at 843-44.

1219. *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* 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).

1220. Englander Co. v. Kennedy, 428 S.W.2d 806, 807 (Tex. 1968) (per curiam); Andrews v. Sullivan, 76 S.W.3d 702, 705 (Tex. App.—Corpus Christi 2002, no pet.); Gardner v. Baker & Botts, L.L.P., 6. S.W.3d 295, 297-98 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); Wal-Mart Stores, Inc. v. McKenzie, 22 S.W.3d 566, 571 (Tex. App.—Eastland 2000, pet. denied).

1221. Smith v. Smith, 544 S.W.2d 121, 123 (Tex. 1976).

1222. TEX. R. APP. P. 34.6(c).

1223. TEX. R. APP. P. 34.6(c)(1); Furrs' Supermarkets, Inc. v. Bethune, 53 S.W.3d 375, 377 (Tex. 2001); *Gardner*, 6 S.W.3d at 297-98.

cord is relevant to any of the specified points or to the disposition of the case on appeal.[1224] However, the failure of the appellant to comply with Rule 34.6(c) will cause the reviewing court to presume that the omitted evidence supports the trial court's judgment.[1225]

## XII. AGREED FACTUAL STATEMENT

A case may be submitted to the trial court upon an agreed stipulation of facts.[1226] This procedure is similar to a special verdict and constitutes a request for judgment in accordance with applicable law.[1227] 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.[1228] Therefore, the sole issue on appeal is whether the trial court correctly applied the law to the admitted facts.[1229]

## XIII. ARBITRATION AWARDS

### A. *Texas General Arbitration Act*

Texas courts favor arbitration agreements.[1230] Therefore, any doubts concerning the scope of an arbitration agreement are resolved in favor of arbitration.[1231] "Whether arbitration is required is a matter of contract interpretation and a question of law for the

1224. *Bethune*, 53 S.W.3d at 377; Producer's Constr. Co. v. Muegge, 669 S.W.2d 717, 718 (Tex. 1984); E.B. v. Tex. 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).

1225. Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990) (per curiam); Sandoval v. Comm'n for Lawyer Discipline, 25 S.W.3d 720, 722 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Kwik Wash Laundries, Inc. v. McIntyre, 840 S.W.2d 739, 741 (Tex. App.—Austin 1992, no writ).

1226. TEX. R. CIV. P. 263.

1227. Comm'n 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).

1228. *Sherman*, 945 S.W.2d at 288; State Bar of Tex. v. Faubion, 821 S.W.2d 203, 205 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

1229. *Sherman*, 945 S.W.2d at 228; Port Arthur Indep. Sch. Dist. v. Port Arthur Teachers Ass'n, 990 S.W.2d 955, 956 (Tex. App.—Beaumont 1999, pet. denied).

1230. Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 268 (Tex. 1992); Brazoria County v. Knutson, 142 Tex. 172, 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 dism'd w.o.j.).

1231. *Wigington*, 945 S.W.2d at 884 (indicating the court's acceptance of all reasonable presumptions favoring arbitration); Emerald Tex., Inc. v. Peel, 920 S.W.2d 398, 403 (Tex. App.—Houston [1st Dist.] 1996, no writ).

court."[1232] In determining whether to compel an arbitration agreement, a trial court must consider: "(1) whether a valid arbitration agreement exists, and (2) if so, whether the claims asserted fall within the scope of the agreement."[1233] 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.[1234]

Arbitrations may be conducted under the common law[1235] or pursuant to the Texas General Arbitration Act.[1236] "Statutory arbitration is cumulative of the common law."[1237] To set aside an arbitration award, the complaining party must allege a statutory or common law ground to vacate the award.[1238] An arbitration award under the common law may be set aside by a court only if the decision is tainted by "fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment."[1239] 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

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1232. *Peel*, 920 S.W.2d at 403; Kline v. O'Quinn, 874 S.W.2d 776, 882 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

1233. *Wigington*, 945 S.W.2d at 884.

1234. TEX. CIV. PRAC. & REM. CODE ANN. § 171.017(a)(1)-(2) (Vernon 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.—Dallas 1997, no writ); Burlington N. R.R. v. Akpan, 943 S.W.2d 48, 50 (Tex. App.—Fort Worth 1996, no writ).

1235. Riha v. Smulcer, 843 S.W.2d 289, 292 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

1236. TEX. CIV. PRAC. & REM. CODE ANN. § 171.001-.023 (Vernon 1997 & Supp. 2002).

1237. *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.)).

1238. 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)).

1239. Nuno v. Pulido, 946 S.W.2d 448, 452 (Tex. App.—Corpus Christi 1997, no writ); *Anzilotti*, 899 S.W.2d at 266 (quoting Carpenter v. N. River Ins. Co., 436 S.W.2d 549, 551 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.)); *see* 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).

substantially prejudice the rights of a party; or (4) "there was no agreement to arbitrate, the issue was not adversely determined in a proceeding" to compel or stay arbitration, "and the party did not participate in the arbitration hearing without raising the objection."[1240] Under the statute, an award may be modified by a court if there was: (1) a miscalculation of figures; (2) a mistaken description of any person, thing or property; (3) the arbitrators made an award of 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.[1241]

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.[1242] "A mere mistake of fact or law is insufficient to set aside an arbitration award."[1243] 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.[1244] The scope of review is the entire record.[1245]

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1240. TEX. CIV. PRAC. & REM. CODE ANN. § 171.088 (Vernon Supp. 2002). Like the common law, Section 1 provides that an award may be vacated if "obtained 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 willful misbehavior. *Id.*; *see* Holk v. Biard, 920 S.W.2d 803, 806 (Tex. App.—Texarkana 1996, orig. proceeding [leave denied]).

1241. TEX. CIV. PRAC. & REM. CODE ANN. § 171.091 (Vernon Supp. 2002); *Riha*, 843 S.W.2d at 292.

1242. *In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 753 (Tex. 2001) (orig. proceeding); *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*, 843 S.W.2d at 292-93; Bailey & Williams v. Westfall, 727 S.W.2d 86, 90 (Tex. App.—Dallas 1987, writ ref'd n.r.e.); *House Grain*, 659 S.W.2d at 905.

1243. *Nuno*, 946 S.W.2d at 452; *Anzilotti*, 899 S.W.2d at 266; *Powell*, 872 S.W.2d at 24.

1244. 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).

1245. *See Riha*, 843 S.W.2d at 294 (reviewing the record as a whole).

### B. *Federal Arbitration Act*

The Federal Arbitration Act applies to contracts relating to interstate commerce.[1246] There is a presumption favoring agreements to arbitrate under the federal act,[1247] and the court should resolve any doubts in favor of arbitration.[1248] However, a party seeking to compel arbitration has the burden of establishing that an arbitration agreement existed under the federal act.[1249] An agreement to arbitrate is valid and enforceable, unless some ground exists at law or in equity for the revocation of any contract, such as fraud or unconscionability.[1250] If the party meets the burden, and the opposing party does not defeat that right, the trial court is obligated to compel arbitration.[1251] 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.[1252]

## XIV. FRIVOLOUS APPEALS

Because meritless litigation constitutes an unnecessary burden on parties to the litigation and diverts judicial resources from legiti-

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1246. 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. 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).

1247. Cantella & Co. v. Goodwin, 924 S.W.2d 943, 944 (Tex. 1996) (orig. proceeding) (per curiam); 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.

1248. *In re* Am. Homestar of Lancaster, Inc., 50 S.W.3d 480, 484 (Tex. 2001) (orig. proceeding); *see* Prudential Sec. Inc. v. Marshall, 909 S.W.2d 896, 898 (Tex. 1995) (orig. proceeding) (noting that arbitration of disputes is strongly favored under federal and state law).

1249. *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. *Hardin Constr.*, 945 S.W.2d at 312 (citing First Options, Inc. v. Kaplan, 514 U.S. 938, 948 (1995)).

1250. 9 U.S.C. § 2 (1970); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995); *Palm Harbor*, 944 S.W.2d at 719.

1251. *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.); *McCoy*, 944 S.W.2d at 724.

1252. EZ Pawn Corp. v. Mancias, 934 S.W.2d 87, 91 (Tex. 1996) (orig. proceeding); *Marshall*, 909 S.W.2d at 900; 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).

mate appeals,[1253] 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,[1254] and Rule 52.11 permits "just sanctions" for filing a frivolous original proceeding.[1255] The State Bar Disciplinary Rules and the Standards for Appellate Conduct also provide that a lawyer shall not bring or defend a frivolous proceeding or assert a frivolous issue.[1256]

Rules 45 and 62 provide that if the supreme court or the courts of appeals determine that an appeal is "frivolous,"[1257] the courts may award "just damages" to any prevailing party on their own motion or the motion of any party.[1258] The appellate courts are no longer limited to assessing damages against the offending party alone; the attorney may also be sanctioned.[1259] 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.[1260] Whether to grant sanctions is within the reviewing court's discretion.[1261]

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1253. Chapman v. Hootman, 999 S.W.2d 118, 125 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

1254. TEX. R. APP. P. 45; TEX. R. APP. 62; Starcrest Trust v. Berry, 926 S.W.2d 343, 356 (Tex. App.—Austin 1996, no writ); Campos v. Inv. Mgmt. Props., 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. Am. Gen. Fire & Cas. Co., 798 S.W.2d 862, 865 (Tex. App.—Dallas 1990, writ denied).

1255. TEX. R. APP. P. 52.11.

1256. TEX. R. DISCIPLINARY P. 3.01, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998); *Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

1257. 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 (1966) (defining "frivolous" as "having no basis in law or fact").

1258. 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. 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. *Campos*, 917 S.W.2d at 356.

1259. TEX. R. APP. P. 45, 62.

1260. *Id.*

1261. Tate v. E.I. Du Pont de Nemours & Co., 954 S.W.2d 872, 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).

There are two competing concerns in awarding damages for frivolous appeals. First, "'The right to an appeal is a most sacred and valuable one.'"[1262] As a result, frivolous appeal damages are to be assessed with prudence, caution, and careful deliberation.[1263] As long as the argument had a reasonable basis in law, even if unconvincing, and constituted "an informed, good-faith challenge to a trial court judgment," frivolous appeal damages are not appropriate.[1264] 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.[1265] In the absence of some evidence showing that the appeal was taken in bad faith or sometimes phrased as a lack of good faith,[1266] "poor lawyering" alone is not a basis for sanctions.[1267] However, the First Court of Appeals has held that bad faith is not required under Rule 45.[1268]

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1262. Smith v. Brown, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); Bradt v. West, 892 S.W.2d 56, 78 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Masterson v. Hogue, 842 S.W.2d 696, 698 (Tex. App.—Tyler 1992, no writ); *In re* Kidd, 812 S.W.2d 356, 360 (Tex. App.—Amarillo 1991, writ denied); Loyd Elec. Co. v. Millett, 767 S.W.2d 476, 484 (Tex. App.—San Antonio 1989, no writ).

1263. City of Houston v. Precast Structures, Inc., 60 S.W.3d 331, 340 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Smith*, 51 S.W.3d at 381; *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); 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.

1264. Gen. 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, no writ).

1265. Faddoul, Glasheen & Valles, P.C. v. Oaxaca, 52 S.W.3d 209, 213 (Tex. App.—El Paso 2001, no pet.); *Jackson*, 937 S.W.2d at 46; Campos v. Inv. Mgmt. Props., Inc., 917 S.W.2d 351, 356 (Tex. App.—San Antonio 1996, writ denied); Hicks v. W. 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. Smith v. Renz, 840 S.W.2d 702, 706 (Tex. App.—Corpus Christi 1992, writ denied).

1266. *Campos*, 917 S.W.2d at 356.

1267. Morriss v. Enron Oil & Gas Co., 948 S.W.2d 858, 873 (Tex. App.—San Antonio 1997, no writ) (reasoning that sanctions for poor lawyering would only punish the client); *accord* Herring v. Welborn, 27 S.W.3d 132, 146 (Tex. App.—San Antonio 2000, pet. denied). *But see* Mid-Continent Cas. Co. v. Safe Tire Disposal Corp., 2 S.W.3d 393, 396-97 (Tex. App.—San Antonio 1999, no pet.) (rejecting bad faith as a prerequisite to Rule 45 sanctions).

1268. Smith v. Brown, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). Most of the courts of appeals continue to apply a bad faith or lack of good faith

"Whether the matter is groundless and thus without sufficient cause must be decided on the basis of objective legal expectations."[1269] However, there is not a consensus among the courts of appeals as to the standard applicable for imposing sanctions under Rule 45.[1270] Some of the principles applied include: the appeal was taken for delay, and there was no sufficient cause for the appeal;[1271] the appellant had no reasonable expectation of reversal *and* pursued the appeal in bad faith;[1272] the appellant had no reasonable expectation of reversal *or* pursued the appeal in bad faith;[1273] the circumstances for taking the appeal are truly egre-

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standard. Tex. Dep't of Transp. v. Beckner 74 S.W.3d 98, 105 (Tex. App.—Waco 2002, no pet.); Compass Exploration, Inc. v. B-E Drilling Co., 60 S.W.3d 273, 279 (Tex. App.—Waco 2001, no pet.).

1269. Goad v. Goad, 768 S.W.2d 356, 360 (Tex. App.—Texarkana 1989, writ denied); 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; and (5) the filing of a supersedeas bond. 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.

1270. *Beckner*, 74 S.W.3d at 105 (recognizing lack if uniformity of standard for imposing sanctions); *Compass Exploration*, 60 S.W.3d at 279-80. The El Paso Court of Appeals observed that the courts of appeals have identified four factors which tend to indicate that an appeal is frivolous: "(1) the unexplained absence of a statement of facts; (2) the unexplained failure to file a motion for new trial when it is required to successfully assert factual sufficiency on appeal; (3) a poorly written brief raising no arguable [issues]; and (4) the appellant's unexplained failure to appear at oral argument." Faddoul, Glasheen & Valles, P.C. v. Oaxaca, 52 S.W.3d 209, 213 (Tex. App.—El Paso 2001, no pet.).

1271. Keever v. Finlan, 988 S.W.2d 300, 315 (Tex. App.—Dallas 1999, pet. dism'd) (adopting old Rule 84 standards for new Rule 45).

1272. *Oaxaca*, 52 S.W.3d at 213; King v. Graham, 47 S.W.3d 595, 612 (Tex. App.—San Antonio 2001, pet. filed); Guajardo v. Conwell, 30 S.W.3d 15, 18 (Tex. App.—Houston [14th Dist.] 2000), *aff'd*, 46 S.W.3d 862 (Tex. 2002); Bridges v. Robinson, 20 S.W.3d 104, 115 (Tex. App.—Houston [14th Dist.] 2000, no pet.); Easter v. Providence Lloyds Ins. Co., 17 S.W.3d 788, 792 (Tex. App.—Austin 2000, pet. denied). The San Antonio Court of Appeals has not formulated a consistent standard. *See* San Antonio State Hosp. v. Lopez, 82 S.W.3d 566, 570 (Tex. App.—San Antonio 2002, pet. denied) (denying the requested sanctions because although the court disagreed with the movant's position, it did not find the appeal to be frivolous and filed only for delay); *King*, 47 S.W.3d at 612 (suggesting lack of good faith is a consideration); *Herring*, 27 S.W.3d at 143 (suggesting bad faith is a consideration).

1273. Diana Rivera & Assocs., P.C. v. Calvillo, 986 S.W.2d 795, 799 (Tex. App.—Corpus Christi 1999, pet. denied).

gious;[1274] or the appeal is objectively frivolous and injures the appellee.[1275]

Second, judicial resources are severely strained, and frivolous appeals seriously harm the orderly administration of justice[1276] and divert scarce resources away from cases deserving more attention.[1277] 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 careful review of the record for preserved error and after applying applicable standards of review.'"[1278] The court also noted that a bad result at the trial level is not, by itself, reason enough to appeal.[1279] In addition, the court observed that the decision to appeal "is not a mechanical exercise, but requires the dutiful application of lawyering skills."[1280] While the old rules in effect at the time limited the court's authority to deal with the problem,[1281] the court

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1274. Conseco Fin. Servicing v. Klein Indep. Sch. Dist., 78 S.W.3d 666, 676 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Jackson v. Gutierrez, 77 S.W.3d 898, 904 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Brazos Transit Dist. v. Lozano, 72 S.W.3d 442, 445 (Tex. App.—Beaumont 2002, no pet.); City of Houston v. Precast Structures, Inc., 60 S.W.3d 331, 340 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); Angelou v. African Overseas Union, 33 S.W.3d 269, 282 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *see* Brazos Transit Dist. v. Lozano, 72 S.W.3d 442, 445 (Tex. App.—Beaumont 2002, no pet.) (holding that circumstances were not so egregious as to warrant sanctions).

1275. Mid-Continent Cas. Co. v. Safe Tire Disposal Corp., 2 S.W.3d 393, 397 (Tex. App.—San Antonio 1999, no pet.) (stating that "[u]nder the current rule, 'just damages' are permitted if an appeal is objectively frivolous and injures the appellee," but "[b]ad faith is thus no longer dispositive or necessarily even material").

1276. *Campos*, 917 S.W.2d at 357 (Green, J., concurring).

1277. *See* 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").

1278. *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)); *accord* Tex. Dep't of Transp. v. Beckner, 74 S.W.3d 98, 105 (Tex. App.—Waco 2002, pet. denied); Compass Exploration, Inc. v. B-E Drilling Co., 60 S.W.3d 273, 280 (Tex. App.—Waco 2001, no pet.); *see also* Elm Creek Villas Homeowner Ass'n v. Beldon Roofing & Remodeling Co., 940 S.W.2d 150, 156 (Tex. App.—San Antonio 1996, no writ) (awarding judgment for sanctions against appellants for filing a frivolous appeal). Justice Green, writing for the court, stated that "the mere fact that an . . . appeal is theoretically possible does not mean one should be filed[,] . . . . [a]n appeal must be based upon more than wishful thinking." *Id.* at 156.

1279. *Campos*, 917 S.W.2d at 356 (Green, J., concurring) (stating that "[a] bad result below, by itself, is simply not a reason to appeal—not every case is properly appealable").

1280. *Id.* at 357.

1281. *Id.* at 357 n.4. Under the old rules, the appellate court could only award damages against the offending party and not the attorney. *Id.* Justice Green invited the su-

reaffirmed that the appellate courts "must not be hesitant to use the tools that we have."[1282] The San Antonio Court of Appeals observed that the practice of "'let's just throw as much mud as we can up on the wall and see if any of it sticks'" must be discouraged.[1283] However, where a party's argument on appeal fails to convince the appellate court, but has a reasonable basis in law and constitutes an informed, good-faith challenge to the trial court's judgment, sanctions are not appropriate.[1284]

## XV. RESTRICTED APPEALS

A restricted appeal (formerly an appeal by writ of error)[1285] is not an equitable proceeding, such as a bill of review.[1286] It is simply another method of appeal.[1287] 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 postjudgment 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)."[1288] The caselaw interpreting appeals by writ of error will apply to restricted appeals.

Under the case law 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

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preme court to remove that limitation, and the supreme court did so in Texas Rules of Appellate Procedure 45 and 62. *Id.*

1282. *Campos*, 917 S.W.2d at 357 (Green, J., concurring); *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").

1283. *In re* S.B.C., 952 S.W.2d at 20 (quoting *Campos*, 917 S.W.2d at 356-57 (Green, J., concurring)).

1284. Gen. Elec. Credit Corp. v. Midland Cent. Appraisal Dist., 826 S.W.2d 124, 125 (Tex. 1991).

1285. Quaestor Invs., Inc. v. State of Chiapas, Mex., 997 S.W.2d 226, 227 n.1 (Tex. 1999) (per curiam); Coastal Banc SSB v. Helle, 988 S.W.2d 214, 214 n.1 (Tex. 1999) (per curiam); Carmona v. Bunzl Distrib., 76 S.W.3d 723, 724 (Tex. App.—Corpus Christi 2002, no pet.); Campbell v. Fincher, 72 S.W.2d 723, 723 (Tex. App.—Waco 2002, no pet.).

1286. Texaco, Inc. v. Cent. Power & Light Co., 925 S.W.2d 586, 590 (Tex. 1996).

1287. *Id.* (citing Smith v. Smith, 544 S.W.2d 121, 122 (Tex. 1976)).

1288. TEX. R. APP. P. 30.

(4) that the error is apparent on the face of the record.[1289] The six-month time limit is mandatory and jurisdictional.[1290] 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.[1291] Generally, the same standards of review and powers of disposition which govern ordinary direct appeals also govern reviews of default judgments by restricted appeal.[1292] 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.[1293]

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.[1294] The question is whether or not the appellant has participated in "the decisionmaking event" resulting in the complained of judgment.[1295] 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.[1296]

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1289. TEX. CIV. PRAC. & REM. CODE ANN. § 51.013 (Vernon 1986); TEX. R. APP. P. 30; *Quaestor Invs.*, 997 S.W.2d at 227; Norman Communications v. Tex. Eastman Co., 955 S.W.2d 269, 270 (Tex. 1997) (per curiam); Gen. Elec. Co. v. Falcon Ridge Apartments, Joint Venture, 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.

1290. *Quaestor Invs.*, 997 S.W.2d at 227 (citing Linton v. Smith 137 Tex. 479, 154 S.W.2d 643, 645 (1941)).

1291. *Norman Communications*, 955 S.W.2d at 270; Pace Sports, Inc. v. Davis Bros. Publ'g Co., 514 S.W.2d 247, 247 (Tex. 1974) (per curiam); Gunn v. Cavanaugh, 391 S.W.2d 723, 724 (Tex. 1965); Conseco Fin. Servicing v. Klein Indep. Sch. Dist., 78 S.W.3d 666, 670 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Diles v. Henderson, 76 S.W.3d 807, 809 (Tex. App.—Corpus Christi 2002, no pet.); 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).

1292. Lakeside Leasing Corp. v. Kirkwood Atrium Office Park Phase 3, 750 S.W.2d 847, 849 (Tex. App.—Houston [14th Dist.] 1988, no writ).

1293. McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965); *Lakeside Leasing*, 750 S.W.2d at 849.

1294. Texaco, Inc. v. Cent. Power & Light Co., 925 S.W.2d 586, 589 (Tex. 1996).

1295. *Id.*; Clopton v. Pak, 66 S.W.3d 513, 516 (Tex. App.—Fort Worth 2001, pet. denied).

1296. *Texaco*, 925 S.W.2d at 590 (citing Lawyers Lloyds of Tex. v. Webb, 137 Tex. 107, 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.'"[1297] On appeal by a restricted appeal, the reviewing court is not limited to a review of the clerk's record.[1298] 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,[1299] that is, a restricted appeal affords the appellant the same scope of review as an ordinary appeal (i.e., the legal and factual sufficiency of the evidence to support the judgment).[1300] 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.[1301] 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."[1302]

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1297. 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).

1298. 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)).

1299. Norman Communications v. Tex. 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. Gen. Elec. Co. v. Falcon Ridge Apartments, Joint Venture, 811 S.W.2d 942, 944 (Tex. 1991); *accord* Conseco Fin. Servicing v. Klein Indep. Sch. Dist., 78 S.W.3d 666, 670 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Diles v. Henderson, 76 S.W.3d 807, 809 (Tex. App.—Corpus Christi 2002, no pet.); 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 or 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).

1300. Jackson v. Gutierrez, 77 S.W.3d 898, 901 (Tex. App.—Houston [14th Dist.] 2002, no pet.) Texaco, Inc. v. Cent. Power & Light Co., 955 S.W.2d 373, 375 (Tex. App.—San Antonio 1997, pet. denied); Rubalcaba v. Pac./Atl. Crop. Exch., Inc., 952 S.W.2d 552, 555 (Tex. App.—El Paso 1997, no writ).

1301. Jaramillo v. Liberty Mut. Fire Ins. Co., 694 S.W.2d 585, 587 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

1302. *Id.*; *see* Salazar v. Tower, 683 S.W.2d 797, 799-800 (Tex. App.—Corpus Christi 1984, no writ) (holding that appellant's unsubstantiated allegations that the court reporter would not respond to his request for a record were insufficient to establish a point of error). The appellant has the burden of providing the court a record which shows reversible error. *Salazar*, 683 S.W.2d at 799. The appellant may be entitled to a new trial if he "exercises due diligence and, through no fault of his own, is unable to obtain a proper record." *Id. But see* Stubbs v. Stubbs, 685 S.W.2d 643, 645 (Tex. 1985) (finding error on

## XVI. BILL OF REVIEW

A bill of review, which is an equitable proceeding, is an independent action brought to set aside a judgment that is no longer appealable or subject to challenge by motion for new trial.[1303] Rule 329b(f) provides that "[o]n 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."[1304] A bill of review "is the proper method to attack a judgment when the trial court had jurisdiction to render judgment on the merits."[1305] The purpose of the bill of review proceeding is to launch a direct attack as opposed to a collateral attack[1306] on the former judgment, and to secure entry of a correct judgment.[1307]

Using a bill of review to attack a judgment is a difficult task.[1308] Generally, a bill of review is available "only if a party has exercised due diligence in pursuing all adequate legal remedies [in an appeal or restricted appeal] against a former judgment and, through no fault of its own, has been prevented from making a meritorious claim or defense by the fraud, accident, or wrongful act of the op-

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the face of the record for the court's failure to provide Ruth Stubbs with a record of the trial proceedings, in violation of Section 11.4(d) of the Texas Family Code).

1303. Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 926-27 (Tex. 1999).

1304. TEX. R. CIV. P. 329b(f).

1305. Holloway v. Starnes, 840 S.W.2d 14, 18 (Tex. App.—Dallas 1992, writ denied).

1306. Cook v. Cameron, 733 S.W.2d 137, 140 (Tex. 1987). A direct attack differs from a collateral attack in that a collateral attack is only proper if the judgment is void. *Id.* 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. 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. *Mapco*, 795 S.W.2d at 703. In a collateral attack, extrinsic evidence may not be used to establish the lack of jurisdiction. *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. Tex. Dep't of Transp. v. T. Brown Constructors, Inc., 947 S.W.2d 655, 659 (Tex. App.—Austin 1997, writ denied).

1307. Austin Indep. Sch. Dist. v. Sierra Club, 495 S.W.2d 878, 881 (Tex. 1973).

1308. 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.

posing party."[1309] It is an independent proceeding that is only used "to prevent manifest injustice,"[1310] which permits a trial court to "set aside a judgment that is no longer appealable or subject to a motion for new trial"[1311] or subject to appeal by restricted appeal.[1312] Although it is an equitable proceeding, the mere fact that an injustice may have occurred is not sufficient grounds to justify relief by bill of review.[1313] If these legal remedies were available but ignored, one cannot obtain the equitable remedy of a bill of review.[1314] The burden on the complainant is harsh, but justified by the important public policy requiring judgments to become final at some point.[1315] Therefore, the grounds on which bills of review are granted are narrow and restricted and will not be relaxed merely because of an apparent injustice.[1316]

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.[1317] 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 which is based on the fraud, accident[,] or wrongful act of the opposing party; and (3) an excuse unmixed with

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1309. Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 927 (Tex. 1999) (per curiam) (citing Tice v. City of Pasedena, 767 S.W.2d 700, 702 (Tex. 1989)); Petro-Chemical Transp., Inc. v. Carroll, 514 S.W.2d 240, 243 (Tex. 1974)).

1310. French v. Brown, 424 S.W.2d 893, 895 (Tex. 1967).

1311. Ortega v. First Republic Bank, Fort Worth, N.A., 792 S.W.2d 452, 453 (Tex. 1990); *accord Wembley Inv. Co.*, 11 S.W.3d at 927-28; Caldwell v. Barnes, 975 S.W.2d 535, 537 (Tex. 1998); 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).

1312. Gen. Elec. Co. v. Falcon Ridge Apartments, Joint Venture, 811 S.W.2d 942, 944 n.2 (Tex. 1991).

1313. *Wembley Inv. Co.*, 11 S.W.3d at 927 (citing Alexander v. Hagedorn, 148 Tex. 565, 226 S.W.2d 996, 998 (1950)).

1314. *Id.* (citing *Caldwell*, 975 S.W.2d at 537); *Tice*, 767 S.W.2d at 702; 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, 345 S.W.2d 706, 711 (1961)).

1315. *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).

1316. *Transworld Fin. Servs.*, 722 S.W.2d at 407; Alexander v. Hagedorn, 148 Tex. 565, 226 S.W.2d 996, 998 (1950); *Steward*, 734 S.W.2d at 434.

1317. Baker v. Goldsmith, 582 S.W.2d 404, 406 (Tex. 1979).

the fault or negligence of the petitioner."[1318] In relation to attacks on final judgments, fraud may be classified as either extrinsic or intrinsic;[1319] however, only extrinsic fraud will support relief by bill of review.[1320]

A complainant must exhaust all available legal remedies before pursuing a bill of review.[1321] 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.[1322] 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.[1323] Accordingly, if a party permits a judgment to become final by neglecting to file a motion for new trial, appeal, or appeal by restricted appeal, then the party is precluded from proceeding on petition for bill of review, unless the complainant can show a good excuse for failure to exhaust adequate legal remedies.[1324] However, if the party is not guilty of failing to pursue legal remedies, a delay in bringing a bill of review proceeding does not bar relief absent some element of estoppel or extraordinary circumstance that would render granting relief inequitable.[1325]

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1318. Beck v. Beck, 771 S.W.2d 141, 141 (Tex. 1989); *Transworld Fin. Servs.*, 722 S.W.2d at 407; *Baker*, 582 S.W.2d at 406; Hanks v. Rosser, 378 S.W.2d 31, 34 (Tex. 1964); *Alexander*, 226 S.W.2d at 998.

1319. Montgomery v. Kennedy, 669 S.W.2d 309, 312 (Tex. 1984).

1320. 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. *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. *Tice*, 767 S.W.2d at 702; *Montgomery*, 669 S.W.2d at 313.

1321. *See* French v. Brown, 424 S.W.2d 893, 894 (Tex. 1967) (holding that availability of appeal bars consideration for bill of review).

1322. *See* Rizk v. Mayad, 603 S.W.2d 773, 775 (Tex. 1980) (stating that availability of appeal bars relief by way of bill of review).

1323. *See* Law v. Law, 792 S.W.2d 150, 153 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (stressing that the remedy of bill of review is only available after a final judgment).

1324. *French*, 424 S.W.2d at 895; Steward v. Steward, 734 S.W.2d 432, 435 (Tex. App.—Fort Worth 1987, no writ).

1325. Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 928 (Tex. 1999) (per curiam).

In *State v. 1985 Chevrolet Pickup Truck*,[1326] the supreme court set forth the steps necessary to be followed in a bill of review proceeding.[1327] First, the equitable powers of the court will be invoked when a bill of review petitioner files a petition alleging, factually and with particularity, that the prior judgment was rendered either as a result of (1) fraud, accident, or wrongful act of the opposite party or (2) reliance on erroneous information provided "by an official court functionary"[1328] and unmixed with any of the petitioner's own negligence.[1329] "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."[1330] 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.[1331] 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.[1332] A trial of the issues is required if a prima facie meritorious defense has been shown.[1333] However, "if the trial court determines that a prima facie defense [has] not [been] made out, it may dismiss the case."[1334] The petitioner must open and assume the burden of proof on this issue.[1335]

Second, if the petitioner demonstrates a prima facie defense, the court will conduct a trial.[1336] At this trial, the petitioner must prove, by a preponderance of the evidence, "that the judgment was

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1326. 772 S.W.2d 447 (Tex. 1989).

1327. State v. 1985 Chevrolet Pickup Truck, 772 S.W.2d 447, 448 (Tex. 1989).

1328. Levit v. Adams, 841 S.W.2d 478, 481 n.5 (Tex. App.—Houston [1st Dist.] 1992), *rev'd on other grounds*, 840 S.W.2d 469 (Tex. 1993).

1329. *1985 Chevrolet Pickup*, 772 S.W.2d at 448 (citing Baker v. Goldsmith, 582 S.W.2d 404, 408 (Tex. 1979)).

1330. *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 408-09.

1331. *Baker*, 582 S.W.2d at 408-09.

1332. Beck v. Beck, 771 S.W.2d 141, 142 (Tex. 1989) (citing *Baker*, 582 S.W.2d at 408-09).

1333. *Id.*

1334. *Id.*

1335. *Id.*

1336. *1985 Chevrolet Pickup*, 772 S.W.2d at 449.

rendered as the result of fraud, accident or wrongful act of the opposite party or official mistake unmixed with any negligence of his own."[1337] If this burden is met, "the fact finder will then determine whether the bill of review defendant, the original plaintiff, has proved the elements of his original cause of action."[1338] 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 does not dispose of the case on the merits, but merely sets aside a prior judgment, is interlocutory and not appealable.[1339] However, an erroneously granted bill of review may be subject to mandamus relief.[1340]

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.[1341] Such a requirement, in the absence of notice, violates the due process clause of the Fourteenth Amendment to the United States Constitution.[1342]

## 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 pre-

1337. *Id.* (citing *Baker*, 582 S.W.2d at 409).

1338. *Id.*

1339. 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).

1340. *In re* Nat'l Unity Ins. Co., 963 S.W.2d 876, 877 (Tex. App.—San Antonio 1998, orig. proceeding) (citing Thursby v. Stovall, 647 S.W.2d 953, 954 (Tex. 1983) (per curiam)).

1341. 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).

1342. *Lopez*, 757 S.W.2d at 723; *see* 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*).

requisite 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 he 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.