St. Mary's Law Journal

Volume 38 | Number 1 Article 2

1-1-2006

Standards of Review in Texas.

W. Wendell Hall

ARTICLE

STANDARDS OF REVIEW IN TEXAS

W. WENDELL HALL*

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

I. INTRODUCTION

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

"Appeal, v.t. In law, to put the dice into the box for another throw."[2]

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.'"[3] 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 much less certain. In many cases, an appeal is much like another throw of the dice.

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.[4] While it

---

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

2. Ambrose Bierce, *The Devil's Dictionary*, http://www.thedevilsdictionary.com/?A (select appeal from the right column) (last visited October 17, 2006) (on file with the *St. Mary's Law Journal*).

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

4. *E.g.*, 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 with surprising candor:

> The concurring opinion asks how this case is any different from [Dennis v. Allison, 698 S.W.2d 94, 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. In life, what goes around, usually comes around. Ironically, two years later, when Justice Mauzy was no longer in the majority of the court, he then 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.

is not unusual for the Texas Supreme Court to 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 court.[5] 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."[6] That responsibility lies solely with the supreme court.[7] The doctrine of stare decisis dictates that "once the [s]upreme [c]ourt announces a proposition of law, the decision is considered binding precedent"[8] until such time as the supreme court modifies that precedent.[9]

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 their prior decisions).[10] In truth, no appellate court intends for its reversal of a lower court, or a finding that the trial court abused its discretion, to be viewed as a pejorative label

---

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

5. *See In re* Doe 11, 92 S.W.3d 511, 512 (Tex. 2002) (per curiam) (cautioning the trial court to follow the supreme court's decisions after the lower court sua sponte concluded the abortion parental bypass law was unconstitutional); *see also In re* K.M.S., 68 S.W.3d 61, 68-70 (Tex. App.—Dallas 2001) (declining to follow a statute interpretation of the supreme court decision in *Tex. Dep't of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857 (Tex. 2001), *pet. denied per curiam*, 91 S.W.3d 331, 331 (Tex. 2002), which pointed out that the "courts of appeals are not free to disregard pronouncements from this [c]ourt, 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." *K.M.S.*, 91 S.W.3d at 331 (quoting Lofton v. Tex. Brine Corp., 777 S.W.2d 384, 386 (Tex. 1989)); *see also* Champion Builders v. City of Terrell Hills, 70 S.W.3d 221, 233 (Tex. App.—San Antonio 2001) (en banc) (Duncan, J., dissenting) (observing that the majority failed to follow binding supreme court precedent), *rev'd in part,* Ballantyne v. Champion Builders, Inc., 144 S.W.3d 417 (Tex. 2004).

6. 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)).

7. *Id.*

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

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

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

on the trial court.[11] To avoid the appearance of labeling a lower court, appellate courts adhere to the time-tested standards of review.

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.[12] Because "[n]o appellate court can ever be much better than its bar," this Article is intended to assist the bench and the bar in addressing one important aspect of appellate advocacy as they have another throw of the dice.[13]

A. *Standards of Review Generally*

Standards of review distribute power within the judicial branch by defining the relationship between trial and appellate courts.[14] These standards "frame the issues, define the depth of review, assign power among judicial actors, and declare the proper materials to review."[15] 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"[16] or "the decibel level at which the appellate advocate must play to catch the judicial

---

11. *See* Sam's Style Shop v. Cosmos Broad. Corp., 694 F.2d 998, 1007 n.21 (5th Cir. 1982) (expressing "[t]he term 'abuse of discretion' is unfortunate, for it has no pejorative content").

12. *See generally* W. Wendell Hall, *Standards of Review in Texas*, 34 ST. MARY'S L.J. 1 (2002); 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). *Cf.* IKB Indus. (Nig.) Ltd. v. Pro-Line Corp., 938 S.W.2d 440, 445-46 (Tex. 1997) (Baker, J., dissenting) (concluding 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").

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

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

15. 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).

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

ear."[17] 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."[18] Therefore, a litigant must measure his factual and legal arguments against the appropriate "measuring stick" to write an effective and persuasive brief.[19] 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."[20]

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 in boilerplate language and 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. As Professors Childress and Davis noted:

> Standards of review, though slippery, cannot be dismissed as sheer politics, especially as the court-watcher begins to look at the practical meaning below the surface catchphrase. The ubiquitous standard, either in basic form or as defined and refined, is presented as a meaningful guidepost to frame both the arguments to the appellate court and that court's analytical response. Even when the slogans have no real internal meaning, in many cases it is clear that the issue framing

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

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

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

20. 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, STANDARDS OF REVIEW: FEDERAL CIVIL CASES AND REVIEW PROCESS § 1.3, at 21 (1986).

> or assignment of power *behind* the words is the turning point of the decision.[21]

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.[22] 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."[23] 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 Fifth Circuit Rule 28.2.6, for example, the standard of review must be identified and set forth with each argument.[24] Those practicing in state appellate courts would be wise to follow the federal rule and the Fifth Circuit's local rule.[25]

As one judge observed, "no single concept is more important than the standard of review."[26] 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

---

21. 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 1.01, at 1-2 (3d ed., Lexis Pub., 1999).

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

23. 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 1.02, at 1-20 (3d ed., Lexis Pub., 1999).

24. FED. R. APP. P. 28(a)(9)(B); 5TH CIR. R. 28.2.6.

25. Appellate judges invariably advise that advocates address standards of review. *See* Leonard 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"); John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 811 (1976) ("Early in his presentation counsel should state to the court the standard of review which 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").

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

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.[27] 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 failing to persuade the reviewing court that the standard, as applied to the facts and the law, requires reversal. No advocate wants the reviewing court to write: "The critical issue in this case is one not discussed by the parties: our standard of review."[28]

Identifying the standard of review in most cases is not complicated.[29] 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 of describing the standard so that it may be applied objectively in every appeal. While the words used to describe standards of review may 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.[30]

Justice Felix Frankfurter described standards of review as "undefined defining terms."[31] 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 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."[32] Woe to that lawyer when the final score is tabulated.

---

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

28. Fox v. Comm'r of Internal Revenue, 718 F.2d 251, 253 (7th Cir. 1983).

29. *See* Nathan L. Hecht, *Foreword: 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").

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

31. *Id.*

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

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?[33] 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.'[34]

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

---

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

34. Lewis Carroll, Through the Looking-Glass 114 (1950 (MacMillan & Co., Ltd. 1950) (1871); *see also* County of Cameron v. Brown, 80 S.W.3d 549, 565-66 (Tex. 2002) (Hecht, J., dissenting) (noting that "the [c]ourt 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.* (Hecht, J., dissenting) (quoting Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)).

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. Similar to identifying pornography, knowing when there has been an abuse of discretion, for most appellate judges, tracks Justice Stewart's famous line: "I know it when I see it."[35] 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."[36] 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'"[37] nor "susceptible to rigid definition."[38] "[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."[39] Consequently, 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. As a result, the amorphous concept of abuse of discretion often fails to assist appellate courts and trial courts in deciding cases, and it also makes briefing difficult for appellate lawyers.[40]

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

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

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

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

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

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

40. *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").

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."[41] 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."[42] 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.[43] As Justice McClure[44] correctly observed, "[a]n appeal directed toward demonstrating an abuse of discretion is one of the tougher appellate propositions."[45] In Texas, abuse of discretion is routinely defined in the following manner: "The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action."[46] Rather, a trial court abuses its discretion if

---

41. Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 180 (1978).

42. *Id.*

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

44. 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.

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

46. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241 (Tex. 1985); *see* Cire v. Cummings, 134 S.W.3d 835, 838-89 (Tex. 2004) (quoting *Downer*, 701 S.W.2d at 241).

its decision is "arbitrary, unreasonable, and without reference to [any] guiding [rules and] principles"[47] or is "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law."[48]

The abuse of discretion standard is similar to the federal standard of "clearly erroneous,"[49] and one supreme court justice has observed that it is debatable whether any real difference exists between the two standards.[50] 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 that discretion?"[51]

At its core, discretion means choice.[52] To find an abuse of discretion, the reviewing court "must determine that the facts and cir-

47. Mercedes-Benz Credit Corp. v. Rhyne, 925 S.W.2d 664, 666 (Tex. 1996) (citing *Downer*, 701 S.W.2d at 241); *accord* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 766 (Tex. 2006) (Medina, J., joined by Wainwright & Johnson, JJ., dissenting) ("A court abuses it discretion when it renders an arbitrary decision, lacking support in the facts and circumstances of the case."); Cire v. Cummings, 134 S.W.3d 835, 839 (Tex. 2004); Butnaru v. Ford Motor Co., 84 S.W.3d 198, 211 (Tex. 2002); BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 800 (Tex. 2002) (quoting Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1986) (orig. proceeding)) ("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); *In re* Nitla S.A. de C.V., 92 S.W.3d 419, 422 (Tex. 2002) (per curiam); 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); Beaumont Bank v. Buller, 806 S.W.2d 223, 226 (Tex. 1991); 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. 160, 163 (Tex. Civ. App.—Amarillo 1918, writ ref'd)). Fifty years of California case law recites the abuse of discretion standard as follows: "In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered." Berry v. Chaplin, 169 P.2d 453, 456 (Cal. Dist. Ct. App. 1946).

48. *In re* Bass, 113 S.W.3d 735, 738 (Tex. 2003) (quoting Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding); *accord BMC Software*, 83 S.W.3d at 800 (quoting *Johnson*, 700 S.W.2d at 917).

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

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

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

52. Maurice Rosenberg, *Appellate Review of Trial Court Discretion,* 79 F.R.D. 173, 175 (1978).

cumstances presented 'extinguish any discretion [or choice] in the matter.'"[53] Therefore, simply because a trial court has the discretion to decide a matter differently than a reviewing court under similar circumstances does not establish an abuse of discretion.[54] In other words, the reviewing court "may not substitute its own judgment for the trial court's judgment."[55] 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."[56] Second, a trial court does not abuse its discretion if it reaches the right result for the wrong reason.[57] These exceptions demonstrate that appellate court standards permit a trial judge a limited right to be wrong without being reversed.

One appellate court[58] described four ways in which a trial court commits an abuse of discretion: first, a court abuses its discretion if

---

53. Kaiser Found. Health Plan of Tex. v. Bridewell, 946 S.W.2d 642, 646 (Tex. App.—Waco 1997, orig. proceeding [leave denied]) (per curiam) (quoting F.A. Richard & Assoc. v. Millard, 856 S.W.2d 765, 767 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding)); *see also In re* Nitla S.A. de C.V., 92 S.W.3d 419, 422 (Tex. 2002) (per curiam) (noting that a reviewing court may not set aside a trial court's order unless the record clearly shows that the court could only arrive at one decision).

54. Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 226 (Tex. 1991); Downer v. Aquamarine Operators, Inc., 701 S.W.2d at 238, 241 (Tex. 1985) (citing Sw. 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).

55. Bowie Mem'l Hosp. v. Wright, 79 S.W.3d 48, 52 (Tex. 2002); *Nitla*, 92 S.W.3d at 422 (Tex. 2002) (per curiam) (citing *Walker*, 827 S.W.2d at 839); *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), *modified*, Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193 (Tex. 1993) (orig. proceeding).

56. Loftin v. Martin, 776 S.W.2d 145, 146 (Tex. 1989) (orig. proceeding); *accord* Oakwood Mobile Homes, Inc. v. Cabler, 73 S.W.3d 363, 374-75 (Tex. App.—El Paso 2002, pet. denied); Toyota Motor Sales, U.S.A., Inc. v. Heard, 774 S.W.2d 316, 319 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding [leave denied]) (per curiam).

57. Bruce Terminix Co. v. Carroll, 953 S.W.2d 537, 540 (Tex. App.—Waco 1997, orig. proceeding), *mand. granted*, *In re* Bruce Terminix Co., 988 S.W.2d 702 (Tex. 1998); 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).

58. Landon v. Jean-Paul Budinger, Inc., 724 S.W.2d 931, 937-40 (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*), *writ denied per curiam*, 917 S.W.2d 796 (Tex. 1996); Stephens v. Stephens, 877 S.W.2d 801, 805 (Tex. App.—Waco 1994, writ denied) (extending the *Landon* abuse of discretion analysis to the present case);

it attempts to exercise a power of discretion that it does not legally possess;[59] 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;[60] 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;[61] 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."[62]

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

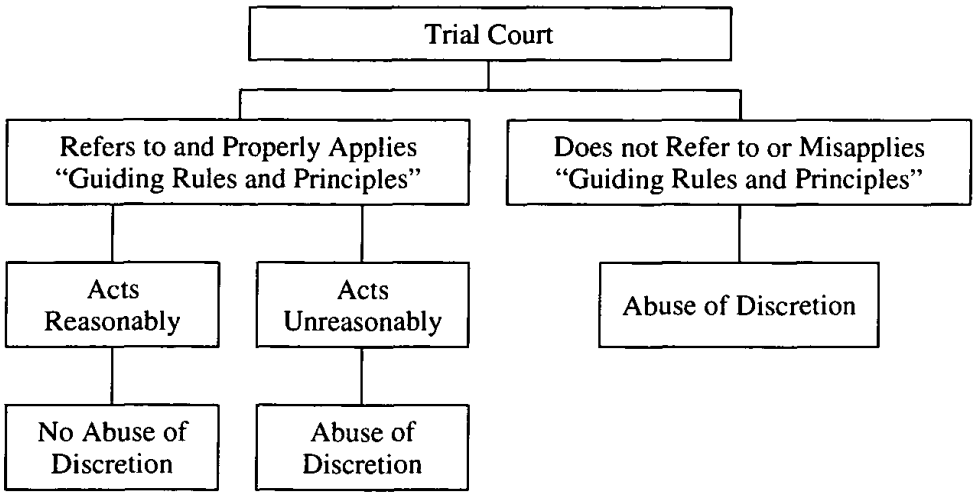
Methodist Hosps. of Dallas v. Tex. Indus. Accident Bd., 798 S.W.2d 651, 660 (Tex. App.—Austin 1990, writ dism'd w.o.j.) (outlining elements for consideration in abuse of discretion inquiries), *superseded by statute on other grounds*, Act of Jun. 18, 1999, 76th Leg., R.S., ch. 1499, § 1.11(a), 1999 Tex. Gen. Laws 5164, 5166-67 (Vernon 1999) (codified at TEX. GOV'T CODE ANN. § 2001.039 (Vernon 2000), *as recognized in* Lower Laguna Madre Found., Inc. v. Tex. Natural Resource Conservation Comm'n, 4 S.W.3d 419 (Tex. App.—Austin 1999, no pet.); 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).

59. *Landon*, 724 S.W.2d at 937.

60. *Id.* at 938.

61. *Id.*

62. *Id.* at 939-40.



C. *Texas Mandamus Proceedings*

In Texas, to be entitled to a writ of mandamus, the relator must establish that the ruling of the trial court constitutes a clear abuse of discretion and that there is no adequate remedy at law.[63]

1. "Clear" Abuse of Discretion

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 required for the issuance of mandamus.[64] With regard to whether "error" has in fact occurred for purposes of mandamus, writs of mandamus issue only for a "clear" abuse of discretion.[65] The stan-

63. Walker v. Packer, 827 S.W.2d 833, 839-40 (Tex. 1992) (orig. proceeding).

64. *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*, 827 S.W.2d at 839-40 (using an abuse of discretion standard to review a mandamus action). In *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding), 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 also* Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 196 (Tex. 1993) (orig. proceeding) (restating the two-part test in *Walker*).

65. *Prudential*, 148 S.W.3d at 135 (noting that the relator must "show that the trial court clearly abused its discretion" (citing *Walker*, 827 S.W.2d at 840)); *In re* AIU Ins. Co., 148 S.W.3d 109, 114-15 (Tex. 2004) ("To the extent the trial court concluded otherwise, it clearly abused its discretion."); *In re* Van Waters & Rogers, Inc., 145 S.W.3d 203, 210-11 (Tex. 2004) (per curiam) (finding an abuse of discretion and no adequate remedy by appeal); *In re* Kansas City S. Indus., Inc., 139 S.W.3d 669, 670 (Tex. 2004) (orig. proceeding); *In re* Entergy Corp., 142 S.W.3d 316, 320 (Tex. 2004) (orig. proceeding); *In re* E.I. DuPont de Nemours and Co., 136 S.W.3d 218, 222 (Tex. 2004) (orig. proceeding) (per curiam); *In re*

dard of review on appeal is couched in terms of a simple abuse of discretion—without any requirement that the abuse be "clear."[66] In Texas, a litigant may obtain mandamus relief from a trial court ruling if (1) the trial court clearly abused its discretion and (2) the party requesting mandamus relief has no adequate remedy by appeal.[67]

2. Adequate Remedy at Law

In two cases decided by a sharply divided court on the same day, *In re AIU Insurance Co.*[68] and *In re Prudential Insurance Co. of America*,[69] the Texas Supreme Court made it clear in 5-4 decisions[70] that mandamus review would be more welcome in the court than it had been since the court's seminal 1992 decision, *Walker v. Packer*. The court relaxed the standard for meeting the second element of mandamus relief—adequate remedy at law. The court stated that "[a]n appellate remedy is 'adequate' when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate."[71]

The court observed that "adequate" defies comprehensive definition and that it is simply a "proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of

---

Kuntz, 124 S.W.3d 179, 180-81 (Tex. 2003) (orig. proceeding); *In re* CSX Corp., 124 S.W.3d 149, 151 (Tex. 2003) (orig. proceeding) (per curiam); *In re* Bass, 113 S.W.3d 735, 738 (Tex. 2003) (orig. proceeding) (quoting *Walker*, 827 S.W.2d at 839); *In re* Swepi, 85 S.W.3d 800, 804 (Tex. 2002) (orig. proceeding); *In re* Nitla S.A. de C.V., 92 S.W.3d 419, 422 (Tex. 2002); *In re* TXU Elec. Co., 67 S.W.3d 130, 132 (Tex. 2001) (orig. proceeding) (quoting *Walker*, 827 S.W.2d at 840); *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).

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

67. *In re* Living Ctrs. of Tex., Inc., 175 S.W.3d 253, 255-56 (Tex. 2005); *Prudential*, 148 S.W.3d at 135-36; *In re* Kuntz, 124 S.W.3d 179, 180 (Tex. 2004); Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992).

68. 148 S.W.3d 109 (Tex. 2004) (orig. proceeding) (granting mandamus relief to enforce a forum-selection clause).

69. 148 S.W.3d 124 (Tex. 2004) (orig. proceeding) (granting mandamus relief to enforce a contractual jury waiver).

70. In both cases, the majority consisted of Justices Hecht, Owen, Smith, Wainwright, and Brister, and the dissent consisted of Chief Justice Phillips and Justices O'Neill, Jefferson, and Schneider.

71. *Prudential*, 148 S.W.3d at 136.

lower courts."[72] The court noted that mandamus should be reserved for:

> significant rulings in exceptional cases [which] may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.[73]

Whether an appeal is "adequate" is not an "abstract or formulaic one"; rather "it is practical and prudential."[74] The court rejected the notion that whether an appeal is adequate should be governed by rigid rules; instead, whether an appeal is adequate should remain flexible, which is consistent with the principal virtue of mandamus proceedings.[75]

The court reasoned that the consideration of whether to grant mandamus relief is not limited to private concerns, and that forcing the civil justice system to grind through proceedings that will amount to no more than a fiction and a resulting waste of judicial and public resources are equally important considerations.[76] The court added that "[p]rudent mandamus relief is also preferable to legislative enlargement of interlocutory appeals."[77] The court observed that using mandamus review as a selective procedure to correct clear errors in exceptional cases and afford guidance to the law without the burden of an interlocutory appeal was beneficial to Texas law.[78] But, the court concluded, "[a]ppellate courts must be mindful . . . that the benefits of mandamus review are easily lost by overuse."[79]

---

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Prudential*, 148 S.W.3d at 137 (citing *In re* Masonite Corp., 997 S.W.2d 194 (Tex. 1999); Travelers Indemn. Co. of Conn. v. Mayfield, 923 S.W.2d 590 (Tex. 1996))

77. *Prudential*, 148 S.W.3d at 140 (noting legislative authorization of mandamus review of venue rulings and interlocutory appeals for denial of a special appearance and to review the sufficiency of expert reports).

78. *Id.* at 138.

79. *Id.*

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.[80] 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.[81] 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."[82]

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

---

80. Walker v. Packer, 827 S.W.2d 833, 40 (Tex. 1992) (orig. proceeding) (citing State v. Walker, 679 S.W.2d 484, 485 (Tex. 1984) (orig. proceeding); Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 684 (Tex. 1989) (orig. proceeding)); *see* City of Dallas v. Vanesko, 189 S.W.3d 769, 771 (Tex. 2006) (holding that the standard of review in a zoning cases requires a "clear" abuse of discretion before reversing a zoning board's decision).

81. *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").

82. Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 185 (1978) (emphasis added).

court abused its discretion—whether a clear or manifest abuse or just an abuse. If there is a distinction to be made between a clear or manifest, or simple abuse, perhaps courts want to communicate that any abuse above a simple abuse of discretion must be "more than just maybe or probably wrong"; it must be so wrong that it strikes the appellate court "with the force of a five-week-old, unrefrigerated dead fish."[83]

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.'"[84] Under this standard, it is not the trial court's error which compels the reviewing court to grant mandamus relief; rather, the extraordinary circumstances of the case compel mandamus relief. This definition comports with the supreme court's recent application of the test for reviewing cases in mandamus proceedings.[85]

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

83. Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988); *see* Gochicoa v. Johnson, 238 F.3d 278, 292 (5th Cir. 2000) (relying upon *Sterling Electric*); United States v. Becerra, 155 F.3d 740, 756 (5th Cir. 1998) (referencing *Sterling Electric*).

84. 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)).

85. *See, e.g.*, 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).

on appeal, regardless of any error which may be present.[86] 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.[87] 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.[88] 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

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

87. Tittizer v. Union Gas Corp., 171 S.W.3d 857, 861 (Tex. 2005); 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); Ne. Tex. Motor Lines, Inc. v. Hodges, 138 Tex. 280, 158 S.W.2d 487, 488 (1942).

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

can stop its inquiry unless it wishes to make alternative holdings. Only if the court finds error under the applicable standard of review must the court confront the concept of reversible error.[89] 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.[90] 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.[91]

Stated another way, litigants are entitled to a fair trial, not a perfect one.[92]

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]."[93] In determining

---

89. *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").

90. *See* Miles v. M/V Miss. Queen, 753 F.2d 1349, 1352 (5th Cir. 1985) (quoting FED. R. CIV. P. 61) (recognizing error to be present and properly preserved, but not affecting the substantial rights of the parties so as to warrant reversal).

91. *Id.*

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

93. TEX. R. APP. P. 44.1; *accord* Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 388 n.7 (Tex. 2000) (expressing that "the harmless error [was] recodified without substantive change as TEX. R. APP. P. 44.1"); 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 (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

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.[94] 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?[95] 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.[96] The supreme court has observed that the harmless error rule "ebbs and flows."[97] 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.[98] 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."[99] This determination is a judgment call delegated to the reviewing court's "sound discretion and good sense" upon evaluation of the entire case.[100]

(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 "[f]ormulations of the harmless error rule have [varied] from time to time," since 1989, the supreme court has repeatedly followed the rule 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." *Franco*, 81 S.W.3d at 344.

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

95. *E.g.*, King v. Skelly, 452 S.W.2d 691, 696 (Tex. 1970) (declaring that reversal should not occur unless the erroneous admission "was calculated to and probably did cause the rendition of an improper judgment"); Aultman v. Dallas Ry. & Terminal Co., 152 Tex. 509, 260 S.W.2d 596, 599 (1953) (reiterating the "probably did cause" standard).

96. 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).

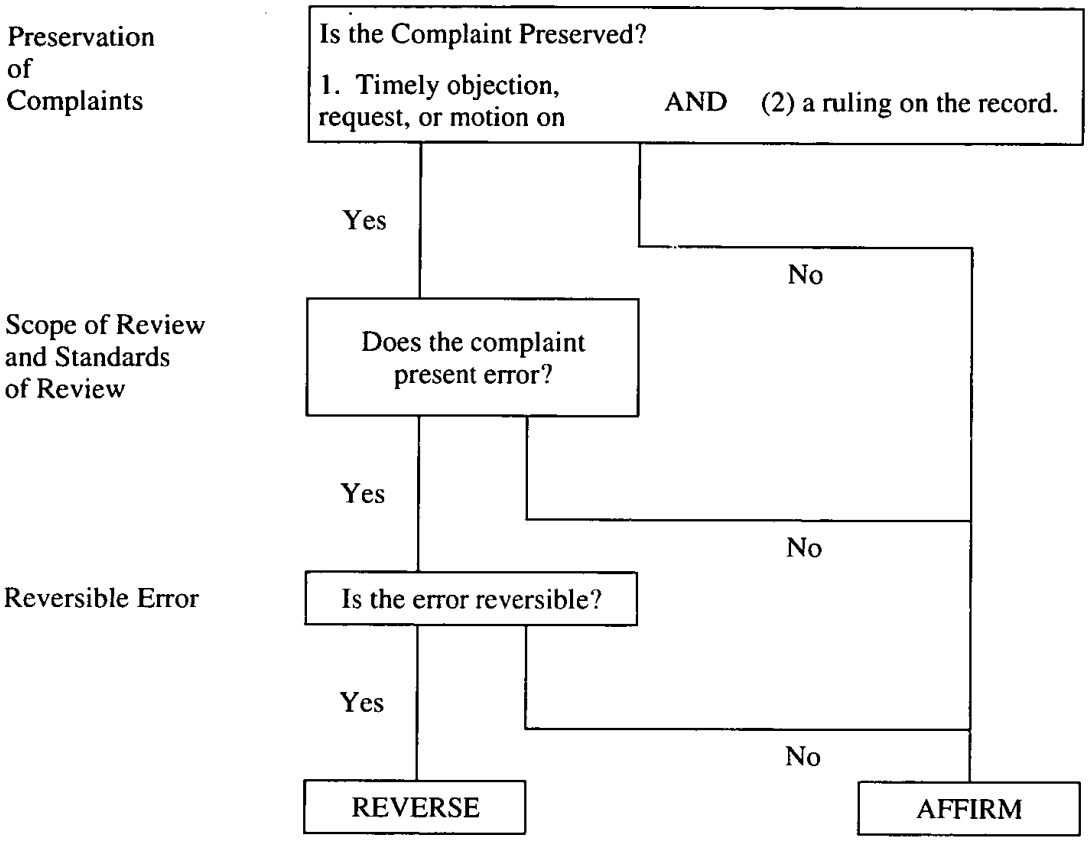
97. *Reese*, 584 S.W.2d at 839. *See generally* Robert W. Calvert, *The Development of the Doctrine of Harmless Error in Texas*, 31 TEX. L. REV. 1 (1952); Robert W. Calvert & Susan G. Perin, *Is the Castle Crumbling? Harmless Error Revisited*, 20 S. TEX. L.J. 1 (1979); Jack Kenneth Dahlberg, Jr., *Analysis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

98. *Lorusso*, 603 S.W.2d at 820-21 (quoting Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 921 (Tex. 1979)).

99. *Id.* (quoting *Patterson Dental Co.*, 592 S.W.2d at 921).

100. First Employees Ins. Co. v. Skinner, 646 S.W.2d 170, 172 (Tex. 1983) (citing *Lorusso*, 603 S.W.2d at 821).

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



D. *Fundamental Error*

The Texas Supreme Court first recognized fundamental error in 1846 when the court observed that "if the *foundation of the action has manifestly failed*, we cannot, without shocking the common sense of justice, allow a recovery to stand."[101] Fundamental error describes those situations in which a reviewing court reviews "error that was neither raised in the trial court nor assigned on appeal."[102] While fundamental error may be raised for the first time on appeal,[103] it is used very infrequently[104] and has been called "a dis-

101. Jones v. Black, 1 Tex. 527, 530 (1846) (quoting Palmer v. Lorillard, 16 Johns. 348 (N.Y. Sup. Ct. 1819)).

102. *In re* B.L.D., 113 S.W.3d 340, 350 (Tex. 2003) (citing McCauley v. Consol. Underwriters, 157 Tex. 475, 304 S.W.2d 265, 266 (1957) (per curiam)).

103. Nuchia v. Woodruff, 956 S.W.2d 612, 616 (Tex. App.—Houston [14th Dist.] 1997, pet. denied); *see also* Pirtle v. Gregory, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam) (rea-

credited doctrine."[105] In Texas, an appellate court has very limited authority to consider fundamental error.[106] Fundamental error survives only in those rare situations in which the record on appeal shows on its face that the court was without jurisdiction or that public policy or public interest would be "directly and adversely affected as" declared in the statutes or the Texas Constitution.[107]

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.[108] The doctrine is seldom used to reverse a

---

soning that the requirement of preserving error to complain on appeal avoids surprising the opponent by complaining for the first time on appeal).

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

105. *B.L.D.*, 113 S.W.3d at 350 (citing Cox v. Johnson, 638 S.W.2d 867, 868 (Tex. 1982) (per curiam)).

106. 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.]) (holding that the erroneous rendition of a final judgment is not fundamental error; thus, the aggrieved parties are left with no alternative but to appeal), *writ ref'd n.r.e.*, 682 S.W.2d 236 (Tex. 1984).

107. 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), *abrogated by* Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71 (Tex. 2000); Tex. Indus. Traffic League v. R.R. Comm'n of Tex., 633 S.W.2d 821, 823 (Tex. 1982), *overruled on other grounds by* Tex. Ass'n Business v. Tex. Air Control Bd., 852 S.W.2d 440 (Tex. 1993); 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) (Alexander, J., concurring); 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 is not fundamental error); *In re* J.G., 905 S.W.2d 676, 680 n.1 (Tex. App.—Texarkana) (expressing neither approval nor disapproval of juvenile's constitutional claims of fundamental error for the first time on appeal), *writ denied*, 916 S.W.2d 949 (Tex. 1995) (per curiam). The supreme court has held that the error preservation rules must be followed in parental rights termination cases. *In re* K.A.F., 160 S.W.3d 923, 928 (Tex. 2005) (adding "fundamental-error doctrine does not apply to procedural preservation rules, nor does due process require appellate review of unpreserved complaints in parental rights termination cases" (citing *In re* B.L.D., 113 S.W.3d 240, 350-51 (Tex. 2003))). *But see In re* J.F.C., 96 S.W.3d 256, 291-93 (Tex. 2002) (Hankinson, J., dissenting) (discussing the history of the fundamental error doctrine in Texas and arguing that the doctrine should apply to involuntary termination of parental rights cases).

108. Strange v. Treasure City, 608 S.W.2d 604, 609 (Tex. 1980) (considering whether the total effects of the misconduct resulted in probable harm); Scoggins v. Curtiss & Tay-

case. Generally, appellants make the mistake of simply restating their complaints in one final issue.[109] Reversal based upon cumulative error is predicated upon meeting the standards of reversible error in Rule 44.1.[110] That is, the errors complained of must amount to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did "cause the rendition of an improper judgment or prevented [the appellant] from making a proper presentation of the case to [the] court."[111] The cumulative error doctrine "infrequently finds favor with appellate

---

lor. 148 Tex. 15, 219 S.W.2d 451, 453-54 (1949) (stating that acts of misconduct, when taken together, probably caused the rendition of an improper verdict); Smerke v. Office Equip. Co., 138 Tex. 236, 158 S.W.2d 302, 305 (1941) (expressing the errors, taken in the aggregate, probably caused the rendition of an improper verdict); Nat'l Freight, Inc. v. Snyder, 191 S.W.3d 416, 424 (Tex. App.—Eastland 2006, no. pet.) (recognizing a "cumulative-error doctrine," but holding it does not apply (quoting Univ. of Tex. at Austin v. Hinton, 822 S.W.2d 197, 205 (Tex. App.—Austin 1991, no writ))); Volkswagen of Am., Inc. v. Ramirez, 79 S.W.3d 113, 125 (Tex. App.—Corpus Christi 2002) (explaining multiple errors may have cumulative effect of harm), *rev'd on other grounds*, 159 S.W.3d 897 (Tex. 2004); Weidner v. Sanchez, 14 S.W.3d 353, 377 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (explaining cumulative error); Bott v. Bott, 962 S.W.2d 626, 631 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (rejecting consideration of cumulative error); Brown v. Hopkins, 921 S.W.2d 306, 319 (Tex. App.—Corpus Christi 1996, no writ) (failing to prove that the trial court's errors were cumulative); Fibreboard Corp. v. Pool, 813 S.W.2d 658, 695 (Tex. App.—Texarkana 1991, writ denied) (holding it was harmless error, when cumulative effect of errors was taken together); McCormick v. Tex. Commerce Bank Nat'l Ass'n, 751 S.W.2d 887, 892 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (overruling appellant's issue of cumulative error).

109. *See* Crescendo Invs., Inc. v. Brice, 61 S.W.3d 465, 481 n.16 (Tex. App.—San Antonio 2001, pet. denied) (expressing that some cases refuse to discuss cumulative error points as redundant); Sanchez *ex rel.* Estate of Galvan v. Brownsville Sports Ctr., Inc., 51 S.W.3d 643, 667 (Tex. App.—Corpus Christi 2001, pet. granted, judgm't vacated by agr.) (declining to address each point of error because appellant simply restated the issues in raising cumulative error).

110. TEX. R. APP. P. 44.1; *see* Mercy Hosp. v. Rios, 776 S.W.2d 626, 637-38 (Tex. App.—San Antonio 1989, writ denied) (holding appellant's cumulative effects point failed since it did not show error or that its trial was materially unfair); *McCormick*, 751 S.W.2d at 892 ("Reversal based upon cumulative error is predicated upon meeting the standards of Texas Rule of Appellate Procedure 81(b)."). TEX. R. APP. P. 81(b)(1) has been recodified as TEX. R. APP. P. 44.1. CROWN LIFE INS. CO. V. CASTEEL, 22 S.W.3d 378, 388 n.7 (Tex. 2000).

111. *McCormick*, 751 S.W.2d at 892; *see also Weidner*, 14 S.W.3d at 378 (noting that 44.1 standards must be met before reversal); *Fibreboard Corp.*, 813 S.W.2d at 695-96 (stating the procedure for determining if cumulative error "denied the appellants their right to a fair trial").

courts,"[112] and it "has evolved almost exclusively in cases involving [improper] jury argument or jury misconduct."[113]

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 is a constitutional prerequisite to maintaining suit."[114] It is an essential "component of subject matter jurisdiction."[115] Standing is an implied "prerequisite to subject-matter jurisdiction, and subject-matter jurisdiction is essential to a court's power to decide a case."[116] A party has standing "when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has *capacity* when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy."[117] To

---

112. *Ramirez*, 79 S.W.3d at 125 (citing *Crescendo*, 61 S.W.3d at 481 n.16).

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

114. Tex. Dep't of Transp. v. City of Sunset Valley, 146 S.W.3d 637, 646 (Tex. 2004).

115. *Sunset Valley*, 146 S.W.3d at 646; *accord* 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); Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 517-18 & n.15 (Tex. 1995); Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443-44 (Tex. 1993); Munters Corp. v. Locher, 936 S.W.2d 494, 496 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

116. *Bland*, 34 S.W.3d at 553-54 (citing *Tex. Ass'n of Bus.*, 852 S.W.2d at 443); *see also* Austin Nursing Ctr., Inc. v. Lovato, 171 S.W.3d 845, 849 (Tex. 2005) ("Without standing, a court lacks subject matter jurisdiction to hear the case." (citing *Tex. Ass'n of Bus.*, 852 S.W.2d at 443)); Cornyn v. Fifty-Two Members of the Schoppa Family, 70 S.W.3d 895, 899 (Tex. App.—Amarillo 2001, no pet.) (holding standing is "implicit in the concept of subject matter jurisdiction"); *Munters Corp.*, 936 S.W.2d at 496 (expressing that the absence of subject matter makes the judgment void).

117. *Austin Nursing Ctr.*, 171 S.W.3d at 848-49 (quoting Nootsie, Ltd. v. Williamson County Appraisal Dist., 925 S.W.2d 659, 661 (Tex. 1996)); *accord* Coastal Liquids Transp., L.P. v. Harris County Appraisal Dist., 46 S.W.3d 880, 884 (Tex. 2001); Graves v. Diehl, 958

have standing, a party must have suffered a threatened or actual injury.[118] An opinion issued in a lawsuit where there is no standing (or where there is no case or controversy)[119] is an advisory opinion, which Texas courts are prohibited from issuing.[120]

To establish standing, a person "must demonstrate a personal stake in the controversy."[121] A court determines whether an individual has standing by analyzing whether there is "(1) 'a real controversy between the parties,' that (2) 'will be actually determined by the judicial declaration sought.'"[122] 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

---

S.W.2d 468, 470 n.2 (Tex. App.—Houston [14th Dist.] 1997, no pet.). In addition to standing, a party must have capacity to pursue a claim. *Austin Nursing Ctr.*, 171 S.W.3d at 848-49; Lorentz v. Dunn, 171 S.W.3d 854, 856 (Tex. 2005); *Coastal Liquids*, 46 S.W.3d at 884.

118. Allstate Indemn. Co. v. Fourth, No. 05-0057, 2006 WL 1043529, at *2 (Tex. Apr. 21, 2006) (per curiam) (citing *Novak*, 52 S.W.3d at 708-09).

119. Brooks v. Northglen Ass'n, 141 S.W.3d 158, 164 (Tex. 2004). "A judicial decision reached without a case or controversy is an advisory opinion, which is barred by the separation of powers provision of the Texas Constitution." *Id.* (citing TEX. CONST. art II, § 1).

120. McAllen Med. Ctr., Inc. v. Cortez, 66 S.W.3d 227, 232 (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 because such [is] the function of the executive rather than the judicial department." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444; *see* TEX. CONST. art. II, § 1 (describing Texas's separation of powers).

121. Libhart v. Copeland, 949 S.W.2d 783, 795 (Tex. App.—Waco 1997, no writ); *accord Austin Nursing Ctr.*, 171 S.W.3d at 849 (quoting *Nootsie*, 925 S.W.2d at 662); *McAllen Med. Ctr.*, 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.); *see* Tex. Dep't of Transp. v. City of Sunset Valley, 146 S.W.3d 637, 646 (Tex. 2004) ("Standing consists of some interest peculiar to the person individually and not as a member of the general public." (quoting *Hunt*, 664 S.W.2d at 324)).

122. Austin Nursing Ctr., Inc. v. Lovato, 171 S.W.3d 845, 849 (Tex. 2005) (quoting *Nootsie*, 925 S.W.2d at 662); *accord* Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 517-18 (Tex. 1995); Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993) (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. No. 1, 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, pet. denied); El Paso County Hosp. Dist. v. Gilbert, 64 S.W.3d 200, 202 (Tex. App.—El Paso 2001, pet. denied).

whether "'the claim asserted [or] the relief requested requires the participation of individual members in the lawsuit.'"[123] The de novo standard of review applicable to subject matter jurisdiction applies to standing as well, and "as a component of subject matter jurisdiction,"[124] the issue of standing "may be raised for the first time on appeal."[125]

B. *Subject Matter Jurisdiction*

"A plea to the jurisdiction" challenges a trial court's subject matter jurisdiction, although it may be challenged by summary judgment or other procedural vehicles, as well.[126] Challenging subject matter jurisdiction is a dilatory plea "to defeat a cause of action without regard to whether the claims . . . have [any] merit."[127] 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.[128]

Subject matter jurisdiction is essential for a court to decide a case; it is "never presumed and cannot be waived."[129] Without sub-

---

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

124. *Sunset Valley*, 146 S.W.3d at 646; *accord Tex. Ass'n of Bus.*, 852 S.W.2d at 445-46; *In re* City of San Benito, 63 S.W.3d 19, 24 (Tex. App.—Corpus Christi 2001), *rev'd in part on other grounds*, 109 S.W.3d 750 (Tex. 2003); 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) (mem. op.); Perry v. 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.).

125. *Austin Nursing Ctr.*, 171 S.W.3d at 849; *accord Garcia*, 893 S.W.2d at 517 n.15 (citing *Tex. Ass'n of Bus.* 852 S.W.2d at 445-46); Tex.-Ohio Gas, Inc. v. Mecom, 28 S.W.3d 129, 142-43 (Tex. App.—Texarkana 2000, no pet.); *see also* McAllen Med. Ctr., Inc. v. Cortez, 66 S.W.3d 227, 238 (Tex. 2001) (stating that standing as an element of subject-matter jurisdiction cannot be waived).

126. Harris County v. Sykes, 136 S.W. 3d 636, 638 (Tex. 2004); *see* Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 553-54 (Tex. 2000) (stating that a plea to the jurisdiction should not force the plaintiffs to prove the merits of their case).

127. *Bland Indep. Sch. Dist.*, 34 S.W.3d at 554.

128. *Id.* at 554-55.

129. 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); City of Garland v. Louton, 691 S.W.2d 603, 605 (Tex. 1985)).

ject matter jurisdiction a judgment is void, rather than voidable.[130] Unless the petition affirmatively demonstrates an absence of jurisdiction, the trial court construes the petition liberally in favor of jurisdiction.[131] If the petition does not contain adequate facts that affirmatively demonstrate jurisdiction, but does not affirmatively reveal incurable defects in jurisdiction, the trial court should give the plaintiff an opportunity to amend.[132] If the petition affirmatively negates jurisdiction, then the jurisdictional plea may be granted without permitting the plaintiff to amend.[133] If, however, a trial court lacks subject matter jurisdiction, it has no choice, but must dismiss the case[134] because subject matter jurisdiction cannot be conferred upon the trial court by either consent or waiver.[135]

If a jurisdictional plea challenges the jurisdictional facts, the reviewing court will consider pertinent evidence submitted by the parties to resolve the jurisdictional issues introduced, as is required of the trial court.[136] The supreme court has stated that:

---

130. Taiwan Shrimp Farm v. U.S.A. Shrimp Farm, 915 S.W.2d 61, 66 (Tex. App.—Corpus Christi 1996, writ denied) (citing Mapco, Inc. v. Forrest, 795 S.W.2d 700, 703 (Tex. 1990)).

131. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226-27 (Tex. 2004); *Tex. Ass'n of Bus.*, 852 S.W.2d at 446 (quoting Huston v. Fed. Deposit Ins. Corp., 663 S.W.2d 126, 129 (Tex. App.—Eastland 1983, writ ref'd n.r.e.)); Peek v. Equip. Serv. Co. of San Antonio, 779 S.W.2d 802, 804 (Tex. 1989); City of San Angelo v. Smith, 69 S.W.3d 303, 305-06 (Tex. App.—Austin 2002, pet. denied); Dallas Indep. Sch. Dist. v. Powell, 68 S.W.3d 89, 90-91 (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 writ).

132. *Miranda*, 133 S.W.3d at 226-27 (Tex. 2004) (citing County of Cameron v. Brown, 80 S.W.3d 549, 555 (Tex. 2002)).

133. *Id.* (citing *Brown*, 80 S.W.3d at 555).

134. Am. Motorists Ins. Co. v. Fodge, 63 S.W.3d 801, 805 (Tex. 2001); *Tex. Ass'n of Bus.*, 852 S.W.2d at 446; *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), *overruled on other grounds by* Cash Am. Intern. Inc. v. Bennett, 35 S.W.3d 12 (Tex. 2000); Union Pac. Fuels, Inc. v. Johnson, 909 S.W.2d 130, 134 (Tex. App.—Houston [14th Dist.] 1995, no writ); *see also* Taiwan Shrimp Farm Vill. Ass'n, Inc. v. U.S.A. Shrimp Farm Dev., Inc., 915 S.W.2d 61, 66 & n.1 (Tex. App.—Corpus Christi 1996, writ denied) ("A judge may not sit or act in a case unless it is within the jurisdiction of his court." (quoting TEX. GOV'T CODE ANN. § 74.121(a))).

135. Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser, 140 S.W.3d 351, 358 (Tex. 2004) (quoting Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 76 (Tex. 2000)), *superseded by statute on other grounds*, Act of June 18, 2005, 79th Leg., R.S., ch. 1150, § 1, 2005 Tex. Gen Laws 3783, 3783 (codified by TEX. GOV'T CODE ANN. § 311.034 (Vernon 2005)).

136. *Miranda*, 133 S.W.3d at 227 (citing Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 555 (Tex. 2000)).

> When the consideration of a trial court's subject matter jurisdiction requires the examination of evidence, the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case, mindful that this determination must be made as soon as practicable.[137]

Where the jurisdictional challenge involves the merits of the plaintiff's claim "and the plea to jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists."[138] If the evidence raises a question of fact regarding jurisdiction, "then the trial court cannot grant the plea to the jurisdiction" and the fact-finder will resolve the fact issue.[139] If, however, the evidence is undisputed or does not raise a fact issue on the question of jurisdiction, then "the trial court rules on the plea to the jurisdiction as a matter of law."[140]

"Whether a trial court has subject matter jurisdiction is a question of law" that is reviewed by de novo review[141] and also can be reviewed by interlocutory appeal.[142] A trial court's lack of subject

---

137. *Id.* (citing *Bland*, 34 S.W.3d at 554).

138. *Id.*

139. *Id.* at 227-28.

140. *Id.* at 228.

141. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex. 2004); *accord* State v. Gonzalez, 82 S.W.3d 322, 327 (Tex. 2002); Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 855 (Tex. 2002); Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 928 (Tex. 1998); City of San Angelo v. Smith, 69 S.W.3d 303, 305 (Tex. App.—Austin 2002, pet. denied); Bexar County v. Gant, 70 S.W.3d 289, 292 (Tex. App.—San Antonio 2002, pet. denied); Sunchase Capital Group, Inc. v. City of Crandall, 69 S.W.3d 594, 595 (Tex. App.—Tyler 2001, no pet.); City of Houston v. Northwood Mun. Util. Dist. No. 1, 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, 809 (Tex. App.—Waco 2001, pet. denied); Dallas Indep. Sch. Dist. v. Powell, 68 S.W.3d 89, 91 (Tex. App.—Dallas 2001, no pet.); Reynosa v. Univ. of Tex. Health Sci. Ctr. at San Antonio, 57 S.W.3d 442, 444 (Tex. App.—San Antonio 2001, pet. denied); City of Austin v. Ender, 30 S.W.3d 590, 593 (Tex. App.—Austin 2000, no pet.). 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, 221 (Tex. 2002); *see Gonzalez*, 82 S.W.3d. at 327 (explaining that because sovereign immunity can defeat a trial court's jurisdiction, statutory construction is necessary to determine if a statute waives the immunity). Statutory construction matters are reviewed de novo. *Id.* (citing El Paso Nat. Gas Co. v. Minco Oil & Gas, Inc., 8 S.W.3d 309, 312 (Tex. 1999)). Accordingly, whether a state agency has primary or exclusive jurisdiction are questions of law reviewed de novo. *Subaru of Am., Inc.*, 84 S.W.3d at 222.

142. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 2005); BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 793 (Tex. 2002).

matter jurisdiction "is fundamental error and must be noted and reviewed by the appellate court at any time it appears."[143] In reviewing an order of dismissal for want of jurisdiction, the reviewing court construes the pleadings in favor of the pleader and looks at the pleader's intent.[144] Whether a petition alleges facts that affirmatively demonstrate subject matter jurisdiction is treated as a question of law and is reviewed de novo.[145] Similarly, whether uncontroverted evidence of jurisdictional facts demonstrates subject matter jurisdiction is also a question of law.[146] In some cases, disputed evidence of jurisdictional facts that also implicate the merits of the case may require resolution by the fact-finder.[147] "When reviewing a plea to the jurisdiction in which the pleading requirement has been met and evidence has been submitted to support the plea that implicates the merits of the case, [the reviewing court accepts] as true all evidence favorable to the nonmovant," and indulges every logical inference and resolves any doubts in favor of the nonmovant.[148] Only matters presented to the trial court will be reviewed upon appeal from the order dismissing the case for want of jurisdiction.[149]

C. *Special Appearance*

"[P]ersonal jurisdiction concerns the court's power to bind a particular person or party."[150] "[F]or a court to exercise personal jurisdiction over a nonresident defendant, due process requires [that

143. Fincher v. City of Texarkana, 598 S.W.2d 22, 23 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.); *accord* Tullos v. Eaton Corp., 695 S.W.2d 568, 568 (Tex. 1985) (per curiam); Tex. Employment Comm'n v. Int'l Union of Elec., Radio & Mach. Workers, Local 782, 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.); *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).

144. Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993) (quoting Huston v. Fed. Deposit Ins. Corp., 663 S.W.2d 126, 129 (Tex. App.—Eastland 1983, writ ref'd n.r.e.)); *Met-Rx*, 62 S.W.3d at 810; *Reynosa*, 57 S.W.3d at 444; 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).

145. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex. 2004).

146. *Id.*

147. *Id.* at 227-28.

148. *Id.* at 228 (noting that this standard mirrors the summary judgment standard).

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

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

the defendant] have purposefully established such minimum contacts with the forum state that it could reasonably anticipate being sued in the courts" of Texas.[151] The nonresident's contacts with Texas "may give rise to either general or specific jurisdiction."[152] If the defendant has "continuous and systematic contacts with the forum," general jurisdiction is established.[153] Furthermore, when the defendant's alleged liability relates to or arises from activity that occurred within the state, specific jurisdiction is established.[154]

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.[155] 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.[156] "The plaintiff bears the initial burden of pleading sufficient allegations to bring a nonresident . . . within the provisions of the long-arm statute."[157] In entering a special appearance pursuant to rule 120a of the Texas Rules of Civil Procedure,[158] "a nonresident bears the burden of proof to show his lack of amenability to [the] long-arm process."[159] To prevail on a special appearance, the nonresident defendant has the burden to negate all forms of personal jurisdiction claimed by the plaintiff.[160] A trial court con-

---

151. Commonwealth Gen. Corp. v. York, 177 S.W.3d 923, 924 (Tex. 2005) (per curiam).

152. *Id.* at 925 (citing *BMC Software*, 83 S.W.3d at 795).

153. *Id.* (citing *BMC Software*, 83 S.W.3d at 796).

154. *Id.* (citing *BMC Software*, 83 S.W.3d at 796; Am. Type Culture Collection, Inc. v. Coleman, 83 S.W.3d 801, 806 (Tex. 2002)).

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

156. *See* Kawasaki Steel Corp. v. Middleton, 699 S.W.2d 199, 201, 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).

157. BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 793 (Tex. 2002).

158. TEX. R. CIV. P. 120a.

159. Runnells v. Firestone, 746 S.W.2d 845, 848 (Tex. App.—Houston [14th Dist.] 1988) (citing *Kawasaki Steel Corp.*, 699 S.W.2d at 202-03, *overruled on other grounds by* Michiana Easy Livin' Country, Inc. v. Holten, 168 S.W.3d 777 (Tex. 2005)).

160. *BMC Software*, 83 S.W.3d at 793; CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996) (orig. proceeding) (citing *Kawasaki Steel*, 699 S.W.2d at 203); Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C., 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.), *abrogated by BMC Software*, 83 S.W.3d 789; Garner v. Furmanite Austl. Pty., Ltd., 966 S.W.2d

sidering a Rule 120a motion considers arguments concerning the forum's jurisdiction over the defendant, and should not hear any arguments regarding defects in service.[161] If defendant's special appearance is rejected, the defendant should ask the court to prepare findings of fact and conclusions of law, including the reporter's record from the hearing on appeal.[162] The reporter's record is necessary only if the trial court considered evidence at the hearing—that is, more than a hearing conducted on paper, or with affidavits or exhibits filed with the clerk—using exhibits and testimony presented in open court beyond that which is already on file with the clerk.[163] 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.[164]

A trial court's order granting or denying a special appearance under Rule 120a is appealable as an interlocutory appeal.[165]

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).

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

162. 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.

163. Michiana Easy Livin' Country, Inc. v. Holten, 168 S.W.3d 777, 781-82 (Tex. 2005).

164. *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. Americana 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.); *XXT, Ltd.*, 1997 WL 142743, at *3; 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.).

165. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 2005). The interlocutory appeal "stays the commencement of a trial in the trial court pending resolution of the appeal." *Id.* § 51.014(b); *accord In re* AIU Ins. Co., 148 S.W.3d. 109, 119 (Tex. 2004); *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.

"Whether a trial court has personal jurisdiction over a defendant is a question of law."[166] Generally, a trial court must resolve disputed questions of fact before resolving the jurisdiction issue.[167] If the trial judge enters findings of fact and conclusions of law, the factual determinations are subject to legal and factual sufficiency standards of review.[168] The trial judge's legal conclusions are reviewed de novo.[169] While an appellant may not challenge conclusions of law for their factual sufficiency, the appellate court may review the lower court's legal conclusions based on the facts to review their correctness.[170] If the reviewing court finds an erroneous conclusion of law, but the trial court's judgment was proper, the erroneous legal conclusion will not warrant reversal.[171]

V. Link, 925 S.W.2d 591, 596 (Tex. 1996) (orig. proceeding) (expressing that circumstances worthy of mandamus relief are not found when a special appearance is denied in an ordinary case, but allowing mandamus to be used upon denial of special appearance in mass tort case due to "extraordinary circumstances").

166. Am. Type Culture Collection, Inc. v. Coleman, 83 S.W.3d 801, 805-06 (Tex. 2002) (reviewing legal conclusions de novo); *accord* BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 794 (Tex. 2002).

167. *Am. Type Culture Collection*, 83 S.W.3d at 806; *BMC Software*, 83 S.W.3d at 794.

168. *Id.*; Lonza AG v. Blum, 70 S.W.3d 184, 189 (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)); *see also Commonwealth Gen. Corp.*, 177 S.W.3d 923, 924-25 (Tex. 2005) (per curiam) (concluding that there was insufficient evidence to support the trial court's factual finding). In *BMC Software*, the supreme court resolved the conflict among the courts of appeals; the San Antonio Court of Appeals' 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 793-94 (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's *BMC Software* decision came after the San Antonio Court of Appeals' decision in *Lonza*, in which the San Antonio appellate court seemed to overrule its prior decisions that applied the abuse of discretion standard of review, instead reviewing 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. *Lonza AG*, 70 S.W.3d at 189.

169. BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 794 (Tex. 2002); 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), *overruled on other grounds by* Michiana Easy Livin' Country, Inc. v. Holten, 168 S.W.3d 777 (Tex. 2005); Conner v. Conticarriers & Terminals, Inc., 944 S.W.2d 405, 411 (Tex. App.—Houston [14th Dist.] 1997, no writ).

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

171. *Id.*

If a trial court fails to include findings of fact and conclusions of law in 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 uphold the judgment as well as those facts supported by the evidence are implied.[172] 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 their factual and legal sufficiency.[173] Finally, if findings of fact are not issued, the reviewing court should assume that the trial court found all factual disputes favorable to its order.[174] If the special appearance is based upon undisputed or established facts, the appellate court conducts a de novo review of the trial court's order.[175]

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.[176] If the plea is sustained, the action is abated until the obstacle is removed.[177] 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."[178] The appellate court will review the trial court's plea in abatement decision with an abuse of

---

172. *Id.* at 795.

173. *Id.*

174. *Am. Type Culture Collection*, 83 S.W.3d at 806; *see BMC Software*, 83 S.W.3d at 795 (noting that simply more than a scintilla of evidence will defeat the evidence challenge).

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

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

177. *Speer*, 685 S.W.2d at 23; Life Ass'n of Am. v. Goode, 71 Tex. 90, 8 S.W. 639, 640 (1888) (quoting J. STORY, COMMENTARIES ON EQUITY PLEADINGS § 354 (2d ed. 1840)); 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.).

178. Flores v. Peschel, 927 S.W.2d 209, 212 (Tex. App.—Corpus Christi 1996, no writ) (orig. proceeding); *accord* Wyatt v. Shaw Plumbing Co., 760 S.W.2d 245, 248 (Tex. 1988); Tovias 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, no writ) (orig. proceeding).

discretion standard.[179] 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.[180] If the plea is sustained without hearing evidence, the appellate court must accept "allegations of fact in the petition as true and indulge every reasonable inference in support [of them]."[181]

E. *Venue*

On appeal from a trial on the merits, the reviewing court must consider the entire record and the trial itself to determine whether the trial court improperly transferred a case to another county under Texas Rules of Civil Procedure 86[182] and 87[183] and Texas Civil Practice and Remedies Code section 15.064(b).[184] If any pro-

---

179. S. County Mut. Ins. Co. v. Ochoa, 19 S.W.3d 452, 468 (Tex. App.—Corpus Christi 2000, no pet.) (citing *Wyatt*, 760 S.W.2d at 248); Shrimp Farm Vill. Ass'n, Inc. v. U.S.A. Shrimp Farm Dev., Inc., 915 S.W.2d 61, 68 (Tex. App.—Corpus Christi 1996, writ denied); Project Eng'g USA 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* Abor v. Black, 695 S.W.2d 564, 567 (Tex. 1985) (orig. proceeding) (declining to grant mandamus relief because the trial court did not abuse its discretion in denying relator's plea in abatement); Dolenz v. Cont'l Nat'l Bank of Ft. Worth, 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").

180. *See* Vestal v. Jackson, 598 S.W.2d 724, 725-26 (Tex. Civ. App.—Waco 1980, no writ) (refusing to hold that the trial court abused its discretion for failing to abate the case in the absence of a statement of facts).

181. 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's court's definition on an unrelated issue. *See* Univ. of Tex. Med. Branch at Galveston v. York, 871 S.W.2d 175, 179 & n.7 (Tex. 1994) ("expressly disapprov[ing]" of the appellate court's inclusion of a patient's medical records as tangible personal property).

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

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

184. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 2002) (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) (citing Dan R. Price, *New Texas Venue Statute: Legislative History*, 15 ST. MARY'S L.J. 855, 877-79 (1984) (addressing the appellate court's consideration of the entire record during transfer of venue review)); Ruiz v. Conoco, Inc., 868 S.W.2d 752, 757-58 (Tex. 1993) (explaining that this entire record review need not be for factual sufficiency); Bristol v. Placid Oil Co., 74 S.W.3d 156, 158 (Tex. App.—Amarillo 2002, no pet.) (allowing the appellate court to review a "record different than that before the district court at the time it ruled upon the issue"); *S. County Mut. Ins.*, 19 S.W.3d at 457 (obliging the appellate court to "conduct an independent review of the entire record to determine whether venue was proper"); Excel Corp. v. Porras, 14 S.W.3d 307, 310 (Tex.

bative 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.[185] Appellate review of the venue determination thus differs greatly from the scope of the decision made by the trial judges, who must rule solely on the basis of certain documents without the benefit of live testimony and the entire record.[186] 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.[187] This scope of review puts the appellate courts in the position of considering matters which the trial court had no opportunity to as-

---

App.—Corpus Christi 1999, pet. denied) (reviewing the entire record for any probative evidence to support the venue). *See generally* TEX. R. CIV. P. 255, 257-59 (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 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) (per curiam) (orig. proceeding) (noting that "Texas law is quite clear that venue determinations are not reviewable by mandamus").

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

186. *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 757-58 (noting the difference between the trial court's venue transfer hearing, which must take prima facie evidence as true, and the appellate court's, which must reverse if any evidence destroys the prima facie proof); Kansas City S. Ry. Co. v. Carter, 778 S.W.2d 911, 914-15 (Tex. App.—Texarkana 1989, writ denied) (discussing 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 while the scope of appellate review encompasses the entire record, the trial court must look only to certain documents and may not hear live testimony), *abrogated by Ruiz*, 868 S.W.2d 752 (abrogating the preponderance of the evidence standard of review adopted by *Texas City Refining*).

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

sess before making its decision.[188] Nevertheless, the appellate courts continue to review the trial court's determination by considering the entire record.[189] If venue was improper, the case must be reversed.[190] 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.[191] Finally, a trial court's failure to grant a proper motion to transfer venue constitutes reversible error.[192]

F. *Joinder*

The Texas Civil Practice and Remedies Code provides that "[a]ny person seeking . . . joinder, who is unable to independently establish proper venue, or a party opposing . . . joinder of such a person may contest the decision of the trial court allowing . . . joinder by taking an interlocutory appeal."[193] This provision gives the appellate court authority to determine whether joinder is proper.[194] The legislative intent of this provision was to guarantee a dissatis-

---

188. Bristol v. Placid Oil Co., 74 S.W.3d 156, 158 (Tex. App.—Amarillo 2002, no pet.); *Kansas City S. Ry.*, 778 S.W.2d at 915; *Tex. City Ref.*, 767 S.W.2d at 185.

189. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 2002); *see* Ruiz v. Conoco, Inc., 868 S.W.2d 752, 757-58 (Tex. 1993) (rejecting a preponderance of the evidence review and noting the confusion in interpreting, applying, and harmonizing Rule 87 with section 15.064(b)).

190. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 2002); *Ruiz*, 868 S.W.2d at 758; Russell v. Panhandle Producing Co., 975 S.W.2d 702, 710 (Tex. App.—Amarillo 1998, no pet.).

191. 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)), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.005, 15.064(b) (Vernon 2002); McIntosh v. Copeland, 894 S.W.2d 60, 64-65 (Tex. App.—Austin 1995, orig. proceeding).

192. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 2002); *In re* Masonite Corp., 997 S.W.2d 194, 197-98 (Tex. 1999); Ford Motor Co. v. Miles, 967 S.W.2d 377, 382 (Tex. 1998) (holding that the trial court erred in failing to grant a transfer venue order to the proper county); 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, Inc., 960 S.W.2d 688, 692 (Tex. App.—El Paso 1997, writ denied).

193. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c) (Vernon 2002); *accord* Am. Home Prods. Corp. v. Clark, 38 S.W.3d 92, 96 (Tex. 2000), *superseded by statute on other grounds*, TEX. CIV. PRAC. & REM. CODE ANN. § 15.003 (Vernon Supp. 2006); Masonite Corp. v. Garcia, 951 S.W.2d 812, 816 (Tex. App.—San Antonio 1997, pet. dism'd) (orig. proceeding), *mand. granted*, *In re* Masonite Corp., 997 S.W.2d 194 (Tex. 1999).

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

fied litigant "speedy appellate review of a trial court's decision regarding whether certain plaintiffs may properly join in the suit."[195] However, this provision for interlocutory review may not be used to review a trial court's decision regarding transfer of venue.[196] In such an appeal, the appellate court shall "determine whether the joinder . . . is proper based upon an independent determination from the record and not under either an abuse of discretion or substantial evidence standard."[197]

"Whether joinder is proper . . . involves a series of legal tests which evaluate needs, prejudice, and convenience to the parties."[198] "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."[199] If there is not an evidentiary hearing, the court of appeals will defer to the trial court and accept its controverted fact issues.[200] With regard to the legal tests, the reviewing court applies the de novo standard of review.[201] If there is an evidentiary hearing or evidence is presented in support of or opposing the joinder motion, the parties should request findings of

---

195. *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.

196. *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); *Masonite*, 951 S.W.2d at 815, 817. Section 15.003 is a joinder statute—not a venue statute. *Am. Home Prods.*, 38 S.W.3d at 96. Thus, even if a trial court erroneously concludes that venue is proper, an interlocutory appeal under this section is unavailable. *Id.*

197. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c)(1) (Vernon Supp. 2006); *accord* 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.

198. *Surgitek*, 955 S.W.2d at 888; *see* Sabre Oil & Gas Corp. v. Gibson, 72 S.W.3d 812, 815-16 (Tex. App.—Eastland 2002, pet. denied) (noting that the proper focus is on whether the court ought to proceed rather than on whether it has jurisdiction).

199. *Surgitek*, 955 S.W.2d at 888; *see In re* Van Waters & Rogers, Inc., 145 S.W.3d 203, 207-08 (Tex. 2004) (per curiam) (setting forth factors in determining "whether consolidation is appropriate in a mass tort case" involving alleged toxic exposure in the workplace).

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

201. *Id.*

fact and, if requested and filed, they may be challenged for their sufficiency.[202]

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 justice would be better served in another forum that could have maintained the suit.[203] 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.[204] 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 interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state; and (6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.[205]

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

---

202. *See id.* (explaining that because no evidentiary hearing was had, the pretrial joinder motion was unnecessary, but implying that if an evidentiary hearing had been held and findings of fact and conclusions of law had been requested, these findings could be challenged). 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. *Id.* at 888-89. The court also held that the general rule that the court must presume that the trial court made all findings necessary to support its order had no application because there was not an evidentiary hearing. *See Surgitek*, 955 S.W.2d at 889.

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

204. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b) (Vernon Supp. 2006); BLACK'S LAW DICTIONARY 589 (5th ed. 1979).

205. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b)(1)-(6) (Vernon Supp. 2006).

of forum non conveniens.[206] If a trial court grants requested relief under the forum non coveniens doctrine, it must issue findings of fact and conclusions of law.[207] Finally, the trial court does not have the discretion to stay or dismiss the case if the plaintiff is a resident of Texas.[208]

H. *Default Judgment*

If a defendant fails to file a timely answer after properly being served, he or she may suffer a default judgment.[209] A post-answer default occurs when a defendant initially answers, but fails to make an appearance at trial.[210] When a default judgment is attacked by motion for new trial, the parties may introduce evidence such as "affidavits, depositions, testimony, and exhibits" that demonstrate why the default judgment should be set aside.[211] Different rules apply to set aside a default judgment depending on whether the judgment was proper (secured in accordance with the statutes and rules) or defective (not secured in accordance with the statutes and rules).

---

206. *Id.* § 71.051(i) (extending the section to cover actions involving personal injury or wrongful death).

207. *Id.* § 71.051(f).

208. *Id.* § 71.051(e); Owens Corning v. Carter, 997 S.W.2d 560, 568-71 (Tex. 1999). Dismissals based on forum non conveniens are reviewed under an abuse of discretion standard. Feltham v. Bell Helicopter Textron, Inc., 41 S.W.3d 384, 387 (Tex. App.—Fort Worth 2001, no pet.); Tullis v. Ga.-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.).

209. 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 award a default judgment once the defendant files an answer).

210. 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.) (quoting *Stoner*, 578 S.W.2d at 682); Mabon Ltd. v. Afri-Carib Enters., Inc., 29 S.W.3d 291, 295-96 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *In re* Marriage of Parker, 20 S.W.3d 812, 815 (Tex. App.—Texarkana 2000, no pet.); *Jatoi*, 955 S.W.2d at 432-33.

211. Fidelity & Guar. Ins. Co. v. Drewery Constr. Co., 186 S.W.3d 571, 573-74 (Tex. 2006) (per curiam).

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.*[212] The purpose of *Craddock* is to "alleviate unduly harsh and unjust results . . . when the defaulting party has no other remedy available."[213] It is based upon equitable principles and prevents an injustice to the defaulted party without producing an injustice on the plaintiff.[214] 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;[215] [(2)] provided the motion for

---

212. 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); Konkel v. Otwell, 65 S.W.3d 183, 186 (Tex. App.—Eastland 2001, no pet.) (applying the three-part *Craddock* test); Gen. Elec. Capital Auto Fin. Leasing Servs., Inc. v. Stanfield, 71 S.W.3d 351, 356-57 (Tex. App.—Tyler 2001, pet. denied) (expanding *Craddock's* three-part test to four parts); Coastal Banc SSB v. Helle, 48 S.W.3d 796, 800-01 (Tex. App.—Corpus Christi 2001, pet. denied) (utilizing the three-part *Craddock* test).

213. Carpenter v. Cimarron Hydrocarbons Corp., 98 S.W.3d 682, 686 (Tex. 2002).

214. *Id.* (quoting *Craddock*, 133 S.W.2d at 126).

215. *Craddock*, 133 S.W.2d at 126. If the defaulting party received the suit papers but then lost or misplaced them, the affidavit only needs to be signed by the person most likely to have received or seen them or known of the efforts made to find them; the affidavit does not need to explain how the loss occurred. *Drewery Constr. Co.*, 186 S.W.3d at 575. A valid excuse does not have to be a good excuse to satisfy this burden. *Id.* at 576. A slight excuse will suffice, particularly 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 "some excuse, but not necessarily a good excuse" is sufficient), *overruled on other grounds by In re* K.C., 88 S.W.3d 277 (Tex. App.—San Antonio 2002, pet. denied); *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); *Mahand*, 60 S.W.3d at 374 (acknowledging a slight excuse to be sufficient); *Stanfield*, 71 S.W.3d at 357 (holding an unchallenged assertion of a mistake is sufficient); *cf. 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 witnesses' credibility and determine the weight to be given to the testimony. *Harmon Truck Lines*, 836 S.W.2d at 265. Intentional actions resulting in a default judgment will not satisfy *Craddock*'s mistaken failure to answer prong. *See Konkel*, 65 S.W.3d at 186 (distinguishing an intentional action from a mistake). A conclusion that the party's failure to answer was intentional has to be supported by the

> a new trial sets up a meritorious defense[216] and [(3)] is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.[217]

When the first element is established with proof that the defaulted party did not receive notice of a trial setting or other dispositive hearing, the defaulted party need not prove the second element of the *Craddock* test for due process reasons.[218]

The *Craddock* test also applies to post-answer default judgments[219] and to summary judgments,[220] unless the motion for new trial is filed after judgment has been granted on a summary judg-

---

record and be 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).

216. *Craddock*, 133 S.W.2d at 126; *accord A.P.P.*, 74 S.W.3d at 574-75; *Konkel*, 65 S.W.3d at 187; *Stanfield*, 71 S.W.3d at 357; *Coastal Banc*, 48 S.W.3d at 800-01; *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 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).

217. *Craddock*, 133 S.W.2d at 126; *accord Carpenter*, 98 S.W.3d at 685; Angelo v. Champion Rest. Equip. Co., 713 S.W.2d 96, 97-98 (Tex. 1986); *Konkel*, 65 S.W.3d at 187; *Stanfield*, 71 S.W.3d at 357; *Coastal Banc*, 48 S.W.3d at 801.

218. Lopez v. Lopez, 757 S.W.2d 721, 723 (Tex. 1988) (per curiam) (citing Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 84-86 (1988)); *see* Mathis v. Lockwood, 166 S.W.3d 743, 744 (Tex. 2005) (per curiam) (re-affirming *Lopez*); Shull v. United Parcel Serv., 4 S.W.3d 46, 52 n.1 (Tex. App.—San Antonio 1999, pet. denied) (explaining that when a party shows he had no notice of the trial setting, he does not have to prove a meritorious defense). It is likely that the third element would not have to be proved in the same circumstances for the same due process reasons. *Mathis*, 166 S.W.3d at 744.

219. LeBlanc v. LeBlanc, 778 S.W.2d 865, 865 (Tex. 1989) (per curiam); *Lopez*, 757 S.W.2d at 722; 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).

220. Huffine v. Tomball Hosp. Auth., 979 S.W.2d 795, 798-99 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (citing Medina v. W. Waste Indus., 959 S.W.2d 328, 329-31 (Tex. App.—Houston [14th Dist.] 1997, pet. denied), *overruled in part on other grounds by* Carpenter v. Cimarron Hydrocarbons Corp., 98 S.W.3d 682 (Tex. 2002)); Washington v. McMillan, 898 S.W.2d 392, 396 (Tex. App.—San Antonio 1995, no writ) (citing Gonzales v. Surplus Ins. Servs., 863 S.W.2d 96, 102 (Tex. App.—Beaumont 1993, writ denied), *overruled in part on other grounds by Carpenter*, 98 S.W.3d 682); Krchnak v. Fulton, 759 S.W.2d 524, 528-29 (Tex. App.—Amarillo 1988, writ denied), *overruled in part on other grounds by Carpenter*, 98 S.W.3d 682; 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).

ment motion to which the nonmovant failed to respond when he had the opportunity to do so.[221] 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.[222] These findings will be reviewed under a sufficiency of the evidence standard.[223] In the absence of fact findings, the "judgment must be upheld on any legal theory" supported by the evidence.[224]

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.[225] 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 its day in court.[226] Accordingly, when the guidelines of *Craddock* have been met, it is an abuse of discretion to deny a new trial.[227]

---

221. *Carpenter*, 98 S.W.3d at 685-86.

222. *See* Dallas Heating Co. v. Pardee, 561 S.W.2d 16, 20 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) (noting that "findings of fact would be authorized" if the facts were controverted); *see also* Landon v. Jean-Paul Budinger, Inc., 724 S.W.2d 931, 940 (Tex. App.—Austin 1987, no writ) (opining that the better course is for the trial court to give its reasoning in the record and urging the Texas Supreme Court to require it).

223. *See* Mays v. Pierce, 154 Tex. 487, 281 S.W.2d 79, 82 (1955) (stating that on review the court must "presume there was evidence to support the findings of fact").

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

225. 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.).

226. 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).

227. Tanknology/NDE Corp. v. Bowyer, 80 S.W.3d 97, 100 (Tex. App.—Eastland 2002, no pet.); *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), *overruled on other grounds by* Carpenter v. Cimarron Hydrocarbons Corp., 98 S.W.3d 682, 685 (Tex. 2002); 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 (noting that a trial court's findings of fact help the appellate court ascertain whether the trial court abused its discretion); *Dallas Heating*, 561 S.W.2d at 19 (stating that it would consider the trial court's findings of fact if the findings were made on facts

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.[228]

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.[229] A motion for new trial following a defective default judgment does not have to meet the *Craddock* requirements and should not be confused with a motion for new trial after a proper default judgment.[230] "It is imperative . . . that the record affirmatively show a strict compliance with the provided mode of service" in order for a default judgment to withstand attack.[231] This showing must be made from the record as it existed

---

which were disputed by the parties). 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 (quoting Lassiter v. Bliss, 559 S.W.2d 353, 358 (Tex. 1977), *overruled on other grounds by* Cherne Indus., Inc. v. Magallanes, 763 S.W.2d 768 (Tex. 1989)); *Cope*, 752 S.W.2d at 609.

228. 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).

229. Quaestor Invs., Inc. v. Chiapas, Mex., 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, 309 (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 (discussing pretrial rulings).

230. *See* Dan Edge Motors, Inc. v. Scott, 657 S.W.2d 822, 824 (Tex. App.—Texarkana 1983, no writ) (holding that when "the record fails to show a valid issuance and service of citation to the defendant, or a voluntary appearance prior to rendition of the default judgment, the judgment must be reversed" without the defendant having to "excuse his failure to appear, and set up a meritorious defense").

231. McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965); *accord* 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); *see In re* 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) ("The

before the trial court when the default judgment was signed, unless the record is amended pursuant to Rule 118 of the Texas Rules of Civil Procedure.[232]

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.[233] 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.[234]

I. *Special Exceptions*

"A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim."[235] Special exceptions are "used to challenge the sufficiency of a pleading."[236] If a

---

Supreme Court requires that strict compliance with the rules for service of citation affirmatively appear on the record in order for a default judgment to withstand direct attack." (citing *Primate Constr.*, 884 S.W.2d at 152)).

232. *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* Higginbotham v. Gen. Life & Accident Ins. Co., 796 S.W.2d 695, 697 (Tex. 1990) (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).

233. TEX. R. CIV. P. 324(b)(1) (stating that a motion for new trial is required to complain on appeal about the failure to vacate a default judgment); *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").

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

235. Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 897 (Tex. 2000) (quoting 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), *aff'd*, 135 S.W.3d 620 (Tex. 2004); Lohmann v. Lohmann, 62 S.W.3d 875, 879-80 (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) (quoting Kissman v. Bendix Home Sys., Inc., 587 S.W.2d 675, 677 (Tex. 1979)).

236. Friesenhahn v. Ryan, 960 S.W.2d 656, 658 (Tex. 1998); *accord* White v. Bayless, 32 S.W.3d 271, 274 (Tex. App.—San Antonio 2000, pet. denied); Godley Indep. Sch. Dist.

pleading fails to give fair notice,[237] the defendant should specially except to the petition pursuant to Texas Rule of Civil Procedure 91.[238] If no special exceptions are filed, the pleadings will be construed liberally in the pleading party's favor.[239] 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"[240] or otherwise require the adverse party to clarify his pleadings "when they are not clear or sufficiently specific."[241] In considering special exceptions, the trial court is granted broad discretion.[242]

Generally, if a trial court sustains a party's special exceptions, the other party must be afforded the opportunity to make amend-

---

v. Woods, 21 S.W.3d 656, 660-61 (Tex. App.—Waco 2000, pet. denied) (quoting Fernandez v. City of El Paso, 876 S.W.2d 370, 372 (Tex. App.—El Paso 1993, writ denied)).

237. *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 a reasonably competent opposing attorney is able to understand the character of the controversy and what testimony probably will 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.); Sw. Bell Tel. Co. v. Garza, 58 S.W.3d 214, 226 (Tex. App.—Corpus Christi 2001) (quoting State Fid. Mortgage Co. v. Varner, 740 S.W.2d 477, 479 (Tex. App.—Houston [1st Dist.] 1987, writ denied)), *aff'd in part, rev'd in part on other grounds*, 164 S.W.3d 607 (Tex. 2004); 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.) (quoting Sage v. Wong, 720 S.W.2d 882, 884 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.).

238. TEX. R. CIV. P. 91.

239. *Horizon*, 34 S.W.3d at 897; Paramount Pipe & Supply Co. v. Muhr, 749 S.W.2d 491, 495 (Tex. 1988); *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).

240. TEX. R. CIV. P. 91; *accord* 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 (Tex. 1999).

241. 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.); *Woods*, 21 S.W.3d at 661.

242. 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) (quoting Secure Comm., Inc. v. Anderson, 31 S.W.3d 428, 430 n.2 (Tex. App.—Austin 2000, no pet.); 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.).

ments to the pleadings before the case is dismissed.[243] If the defect in the pleading is not cured after amendment, the trial court may then dismiss the case.[244] 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 pleadings.[245] The trial court's ruling is reviewed for an abuse of discretion.[246]

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.[247] The distinction is "between inadequately pleading a cause of action [(special excep-

243. 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, 174 (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.*, 31 S.W.3d at 317; Tex.-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); *see also* W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis, 78 S.W.3d 529, 538 (Tex. App.—Austin 2002) (pointing out that while courts usually should give the pleading party a chance to amend, such is unnecessary if the defect is beyond repair), *rev'd on other grounds*, 78 S.W.3d 529 (Tex. 2003).

244. *Friesenhahn*, 960 S.W.2d at 658; 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, 512-13 (Tex. App.—Texarkana 1988, writ denied).

245. 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.).

246. 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).

247. *Friesenhahn*, 960 S.W.2d at 658 (citing Swilley v. Hughes, 488 S.W.2d 64, 67 (Tex. 1972)); *Alanis*, 78 S.W.3d at 538; Mendez v. San Benito/Cameron County Drainage Dist. No. 3, 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.); *see In re* A.L.H.C., 49 S.W.3d 911, 915 (Tex. App.—Dallas 2001, pet. denied) (expressing that a summary judgment will dispose of the plaintiff's case if the plaintiff cannot win on any of the causes pleaded); *see also* Hidalgo v. Sur. Sav. & Loan Ass'n, 462 S.W.2d 540, 543 n.1 (Tex. 1971) (noting that when the petition fails to state a cause of action, summary judgment is given, not based on any proof or evidence, but merely on the petition's deficiencies).

tion)] and utterly failing to plead a viable cause of action [(summary judgment)]."[248] 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.[249]

J. *T.R.O.'s, Temporary and Permanent Injunctions*

"The purpose of a temporary restraining order is to preserve the status quo, which . . . [is] 'the last, actual, peaceable, non-contested status which preceded the pending controversy.'"[250] The purpose of a temporary injunction "is to preserve the status quo of the litigation's subject matter pending a trial on the merits."[251] 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."[252] Temporary injunctions are extraordinary remedies, not relief owed to a party.[253] To be entitled to a

---

248. Chambers v. Huggins, 709 S.W.2d 219, 224 (Tex. App.—Houston [14th Dist.] 1982, no writ).

249. *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 961-62 (affirming summary judgment after plaintiffs failed to replead their cause of action after the trial court sustained special exceptions).

250. *In re* Newton, 146 S.W.3d 648, 651 (Tex. 2004) (citing Cannan v. Green Oaks Apartments, Ltd., 758 S.W.2d 753, 755 (Tex. 1988) (per curiam)); *accord* Janus Films, Inc. v. City of Fort Worth, 162 Tex. 616, 358 S.W.2d 589, 589 (1962) (per curiam).

251. Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002); *accord* 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.); *see also Newton*, 146 S.W.3d at 651 n.12 ("The issuance of a temporary restraining order, like the issuance of a temporary injunction, is to maintain the status quo between the parties." (quoting *Cannan*, 758 S.W.2d at 755)).

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

253. *Butnaru*, 84 S.W.3d at 204 (citing *Walling*, 863 S.W.2d at 57).

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."[254] An irreparable injury exists if the party injured cannot sufficiently be compensated in damages or the amount of damages is immeasurable by pecuniary standards.[255]

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.[256] Failure to include an order setting the matter for a trial on the merits mandates dissolution of the injunction.[257] Furthermore, the trial court must detail the specific reasons it relied upon in ruling on whether a temporary injunction should be granted or denied.[258] The trial court is not required to explain why it believes an appli-

---

254. *Id.*; *accord 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, 700-21 (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, no pet.) ("An applicant for a temporary injunction must establish it has a probable right to the relief sought and it will suffer a probable injury in the interim pending trial on the merits."); Ebony Lake Healthcare Ctr. v. Tex. Dep't of Human Servs., 62 S.W.3d 867, 871 (Tex. App.—Austin 2001, no pet.) ("In a temporary injunction hearing, the trial court assesses whether the applicant has shown a probable right to recovery and a probable injury in the interim."); Tenet Health Ltd. v. Zamora, 13 S.W.3d 464, 468 (Tex. App.—Corpus Christi 2000, pet. dism'd w.o.j.) (stating the requirements that a plaintiff must show to obtain an injunction).

255. *Butnaru*, 84 S.W. 3d at 204 (citing Canteen Corp. v. Republic of Tex. Props., Inc., 773 S.W.2d 398, 401 (Tex. App.—Dallas 1989, no writ)).

256. TEX. R. CIV. P. 683; Qwest Commc'ns 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.) (citing *Qwest*, 24 S.W.3d at 337).

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

258. Big D Props., Inc. v. Foster, 2 S.W.3d 21, 22 (Tex. App.—Fort Worth 1999, no pet.) (quoting TEX. R. CIV. P. 683); 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).

cant has shown probable entitlement to final relief; however, the trial court must divulge the reasons why injury will occur if the temporary injunction is not granted.[259] If the order fails to meet these requirements, it is rendered fatally defective and void, requiring reversal regardless of whether the issue was raised by point of error.[260]

In an interlocutory appeal from a temporary injunction,[261] the merits of the movant's case are not presented for the appellate court's review;[262] therefore, a trial court may not grant a temporary injunction which would accomplish the objective of the law suit.[263] Appellate review is therefore strictly limited to evaluating whether there has been a clear abuse of discretion.[264] The appellate court is not to replace the trial court's judgment with its own, but merely should determine whether the court's action was so arbitrary as to exceed the bounds of reasonable discretion.[265] "The trial court

---

259. State v. Cook United, Inc., 464 S.W.2d 105, 106 (Tex. 1971); Pub. Util. Comm'n of Tex. v. City of Austin, 710 S.W.2d 658, 660 (Tex. App.—Austin 1986, no writ); *accord* 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); Beckham v. Beckham 672 S.W.2d 41, 43 (Tex. App.—Houston [14th Dist.] 1984, no writ); *see* TEX. R. CIV. P. 683 (requiring every order that grants an injunction or restraining order to "set forth the reasons for its issuance").

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

261. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4) (Vernon 1997).

262. 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*, 62 S.W.3d at 871; Salazar v. Gallardo, 57 S.W.3d 629, 632 n.2 (Tex. App.—Corpus Christi 2001, no pet.); Sherrod v. Moore, 819 S.W.2d 201, 202 (Tex. App.—Amarillo 1991, no writ).

263. Tex. Foundries, Inc. v. Int'l Moulders & Foundry Workers' Union, 151 Tex. 239, 248 S.W.2d 460, 464 (1952); *accord In re* Francis, 186 S.W.3d 534, 552 (Tex. 2006) (Wainwright, J., joined by O'Neill & Johnson, JJ., dissenting) (citing *Tex. Foundries*, 248 S.W.2d at 464).

264. Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002); Walling v. Metcalfe, 863 S.W.2d 56, 58 (Tex. 1993); State v. Walker, 679 S.W.2d 484, 485 (Tex. 1985); *Davis*, 571 S.W.2d at 861-62; State v. Sw. 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*, 62 S.W.3d at 871; City of Houston v. Todd, 41 S.W.3d 289, 294 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); Uniden Am. Corp. v. Trucking Assocs., 841 S.W.2d 522, 523 (Tex. App.—Fort Worth 1992, no writ).

265. *In re* Nitla S.A. de C.V., 92 S.W.3d 419, 422 (Tex. 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,

abuses its discretion in granting or denying a temporary injunction 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."[266] 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.[267] Finally, "[i]n 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."[268]

In an appeal from a permanent injunction, the standard of review is based upon a clear abuse of discretion.[269] A litigant is entitled to a jury trial in an injunction action, but only the ultimate

---

orig. proceeding); Case v. Grammar, 31 S.W.3d 304, 308 (Tex. App.—San Antonio 2000, no pet.), *abrogated by* BMC Software Belguim, N.V. v. Marchand, 83 S.W.3d 789 (Tex. 2002); Reliable Consultants, Inc. v. Jaquez, 25 S.W.3d 336, 344 (Tex. App.—Austin 2000, pet. denied), *superseded by statute on other grounds*, Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 6.02, 2003 Tex. Gen. Laws 862, 862 (codified at TEX. FIN. CODE ANN. § 304.1045 (Vernon 2006)); Green v. Tex. Dep't of Protective & Regulatory Servs., 25 S.W.3d 213, 218 (Tex. App.—El Paso 2000, no pet.) (quoting Yowell v. Piper Aircraft Corp., 703 S.W.2d 630, 635 (Tex. 1986)); *Sherrod*, 819 S.W.2d at 202 (citing Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985)); Philipp Bros., Inc. v. Oil Country Specialists, Ltd., 709 S.W.2d 262, 265 (Tex. App.—Houston [1st Dist.] 1986, writ dism'd).

266. Menna v. Romero, 48 S.W.3d 247, 253 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.) (citing *Sw. Bell Tel. Co.*, 526 S.W.2d at 528); *accord* 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 also a factor that should be considered when reviewing a temporary injunction. Owens-Corning Fiberglas Corp. v. Baker, 838 S.W.2d 838, 842 (Tex. App.—Texarkana 1992, no writ).

267. 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.).

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

269. *Priest*, 780 S.W.2d at 875; *accord* 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.).

factual issues are submitted for their determination.[270] The jury is not entitled to "determine the expediency, necessity or propriety of equitable relief."[271] Thus, the trial court's order granting or denying a permanent injunction based upon the ultimate facts is reviewed the same as a temporary injunction.[272]

1. Equitable Defenses

A temporary injunction is subject to equitable principles such as laches or the clean hands doctrine.[273] Whether a party is entitled to invoke an equitable defense is a determination left to the sound discretion of the trial court.[274]

K. *Severance and Consolidation of Causes*

Pursuant to Rules 41[275] and 174[276] of the Texas Rules of Civil Procedure, the trial court may sever or consolidate causes. The factors applicable to a trial court's decision to sever or consolidate are essentially identical.[277] 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 is-

---

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

271. *Id.*; *accord* 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.).

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

273. *See In re* Gamble, 71 S.W.3d 313, 317 (Tex. 2002) (noting that a request for injunctive relief calls upon a court's equity jurisdiction); *see also In re* Francis, 186 S.W.3d 534, 551 (Tex. 2006) (orig. proceeding) (Wainwright, J., joined by O'Neill & Johnson, JJ., dissenting) (citing *Gamble*, 715 S.W.3d at 317) (recognizing that the clean hands doctrine can prevent a party from seeking a temporary injunction).

274. *Francis*, 186 S.W.3d at 551 (Wainwright, J., joined by O'Neill & Johnson, JJ., dissenting) (citing Grohn v. Marquardt, 657 S.W.2d 851, 855 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)).

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

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

277. *See* 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); Dal-Briar Corp. v. Baskette, 833 S.W.2d 612, 616 (Tex. App.—El Paso 1992, orig. proceeding) (refusing to consolidate cases which, while united by common issues of law, had distinct factual scenarios).

sues."[278] The purpose of granting a severance is to ensure justice, deter prejudice, and add convenience.[279] A severance is required in cases where the facts and circumstances clearly require a separate trial to prevent injustice, where the facts and circumstances do not support a contrary determination, and where no prejudice will be experienced.[280] Under these circumstances, the failure to order separate trials violates a plain legal duty and is considered an abuse of discretion.[281] Rule 41 gives the trial court discretion to grant a severance, which will not be reversed absent an abuse of discretion.[282]

---

278. 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); Kansas Univ. Endowment Ass'n v. King, 162 Tex. 599, 350 S.W.2d 11, 19 (1961); F.F.P. Operating Partners, L.P. v. Duenez, 69 S.W.3d 800, 807 (Tex. App.—Corpus Christi 2002), *aff'd on other grounds*, No. 02-0381, 2004 WL 1966008 (Tex. Sep. 3, 2004); *In re* Trinity Universal Ins. Co., 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 Enters., Inc. v. Md. 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.).

279. *Guar. Fed. Sav. Bank*, 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.)); *Trinity Univ.*, 64 S.W.3d at 465; *Pilgrim Enters.*, 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).

280. *Burgett*, 23 S.W.3d at 126 n.1 (citing Womack v. Berry, 156 Tex. 44, 51, 291 S.W.2d 677, 683 (1956)); Black v. Smith, 956 S.W.2d 72, 75 (Tex. App.—Houston [14th Dist.] 1997, orig. proceeding).

281. *Burgett*, 23 S.W.3d at 126 n.1; *Black*, 956 S.W.2d at 75.

282. TEX. R. CIV. P. 41; *Guar. Fed. Sav. Bank*, 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*, 28 S.W.3d at 710; *Pilgrim Enters.*, 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 wide discretion to order or not order separate trials when judicial convenience is served and prejudice avoided").

Similarly, the trial court also has broad discretion in the consolidation of cases pursuant to Rule 174.[283] The express purpose of Rule 174 "is to further convenience and avoid prejudice, and thus promote the ends of justice."[284] The trial court may consolidate actions that "'relate to substantially the same transaction, occurrence, subject matter, or question.'"[285] The actions "'must be so related that evidence presented will be material, relevant and admissible in each case.'"[286] The trial court "must balance the judicial economy and convenience . . . gained by the consolidation against the risk of an unfair outcome because of prejudice or jury confusion."[287] 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 has no discretion to order consolidation.[288] 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.[289]

---

283. TEX. R. CIV. P. 174(a); Perry v. Del Rio, 53 S.W.3d 818, 825 n.6 (Tex. App.—Austin 2001), *appeal dism'd*, 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).

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

285. *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 [leave denied])); 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)).

286. *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).

287. *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); *accord In re* Levi Strauss & Co., 959 S.W.2d 700, 703 (Tex. App.—El Paso 1998, orig. proceeding [mand. denied]).

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

289. *See* Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 525-26 (Tex. 1982) (explaining that trial court rulings on joinder and consolidation will only be overturned on appeal for abuse of discretion); Pilgrim Enters., Inc. v. Md. 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 is an abuse of discretion); *Martin*, 942 S.W.2d at 716 (citing *Lone Star Ford*, 838 S.W.2d at 737) (noting that the Texas Rules of Civil Procedure allow the trial judge great discretion to consolidate cases); Marshall v. Harris, 764 S.W.2d 34, 35

L. *Intervention*

Texas Rule of Civil Procedure 60[290] 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."[291] The intervention must be filed before the judgment is rendered.[292] A party may not, however, intervene during the period between the signing of the judgment and the expiration of the trial court's jurisdiction.[293] 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.[294] The interest asserted can be legal or equitable.[295] 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 bears the burden

---

(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.

290. TEX. R. CIV. P. 60.

291. *Id.*

292. First Alief Bank v. White, 682 S.W.2d 251, 252 (Tex. 1984) (orig. proceeding) (per curiam); Comal County Rural High Sch. Dist. No. 705 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), *rev'd in part on other grounds*, 96 S.W.3d 240 (Tex. 2002); *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. Sw. 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).

293. *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).

294. 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.)); *accord* King v. Olds, 71 Tex. 729, 732, 12 S.W. 65, 65-66 (1888) (quoting JOHN N. POMEROY, REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION § 430 (2d ed. 1883)); Caprock Inv. Corp. v. F.D.I.C., 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.).

295. *Guar. Fed. Sav. Bank*, 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).

of challenging with a motion to strike.[296] Absent a motion to strike filed by a party, the trial court is not authorized to strike the intervention.[297]

If a motion to strike is filed, the trial court should give the intervenor opportunity to explain and prove his interest in the suit before ruling on the motion to strike.[298] In response to the motion, the trial court "may choose to: (a) try the intervention claim; (b) sever the intervention; (c) order a separate trial on the intervention issues; or (d) strike the intervention for good cause."[299] The party opposing the intervention must file a motion to strike, and while the trial court's order is reviewed for an abuse of discretion,[300] the trial court abuses its discretion in striking the plea 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."[301]

---

296. *Guar. Fed. Sav. Bank*, 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 Shortline 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).

297. *Guar. Fed. Sav. Bank*, 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).

298. *Grizzle*, 38 S.W.3d at 273; *Estate of York*, 951 S.W.2d at 126; 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).

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

300. *In re* Lumbermens Mut. Cas. Co., 184 S.W.3d 718, 722 (Tex. 2006).

301. 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.)); *Daon Corp*, 641 S.W.2d at 337); *accord Caprock Inv. Corp.*, 17 S.W.3d at 710-11; City of Port Arthur v. Sw. 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, pet. denied); *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., Inc., 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 suits").

M. *Joinder of Plaintiffs*

When more than one plaintiff joins a case, each plaintiff must establish proper venue independently from all other plaintiffs.[302] 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 Texas Civil Practice and Remedies Code.[303] 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.[304] An order granting or denying intervention or joinder is an appealable interlocutory order.[305] The standard of review applicable to the trial court's order is, by statute, de novo review.[306]

N. *Interpleader*

Texas Rule of Civil Procedure 43,[307] providing for interpleader actions, extends and liberalizes the equitable remedy of bill of interpleader.[308] 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

---

302. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a) (Vernon Supp. 2006).

303. O'Quinn v. Hall, 77 S.W.3d 438, 448-49 (Tex. App.—Corpus Christi 2002, no pet.). The four-prong joinder requirements are:

> (1) Joinder of that plaintiff or intervention in the suit by that plaintiff is proper under the Texas Rules of Civil Procedure; (2) maintaining venue as to that plaintiff in the county of suit does not unfairly prejudice another party to the suit; (3) there is an essential need to have that plaintiff's claim tried in the county in which the suit is pending; and (4) the county in which the suit is pending is a fair and convenient venue for that plaintiff and all persons against whom the suit is brought.

TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a)(1)-(4) (Vernon Supp. 2006).

304. *O'Quinn*, 77 S.W.3d at 449.

305. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(b) (Vernon Supp. 2006).

306. *Id.* § 15.003 (c)(1); Surgitek, Bristol-Myers Corp. v. Abel, 997 S.W.2d 598, 603 (Tex. 1999).

307. TEX. R. CIV. P. 43.

308. 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.) (quoting Sec. State Bank of Pharr v. Shanley, 182 S.W.2d 136, 138 (Tex. Civ. App.—San Antonio 1944, no writ)); *see also* Savs. & 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).

action against the claimants.[309] "The purpose of the interpleader procedure is to relieve an innocent stakeholder of the vexation and expense of multiple litigation and the risk of multiple liability."[310] A stakeholder is not required to be completely disinterested in the suit;[311] 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 who is rightfully entitled to funds or property.[312] 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;[313] 2) the party has not unreasonably delayed filing an action for interpleader;[314] and 3) the party has unconditionally tendered the fund or property into the court's registry."[315] Every reasonable doubt is resolved in

309. *See* United States v. Ray Thomas Gravel Co., 380 S.W.2d 576, 580 (Tex. 1964) (discussing when a party who files an interpleader action may receive attorney's fees) (quoting M. O. Regensteiner, Annotation, *Allowance of Attorney's Fees to Party Interpleading Claimants to Funds or Property*, 48 A.L.R. 190, 192 (1956)).

310. 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 protection for a stakeholder, who would otherwise have "to act as judge and jury at his own peril when faced with conflicting claims").

311. *Downing*, 419 S.W.2d at 219-20 (quoting TEX. R. CIV. P. 43).

312. Davis v. E. Tex. Sav. & Loan Ass'n, 163 Tex. 361, 354 S.W.2d 926, 930 (1962) (quoting TEX. R. CIV. P. 43); *Tri-State Pipe & 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) (quoting Taliaferro v. Tex. Comm. Bank, 660 S.W.2d 151, 153 (Tex. App.—Fort Worth 1983, no writ)); *Stubbs*, 734 S.W.2d at 79. An interpleader suit is allowable if a reasonable doubt exists about which claimant is entitled to payment. Employers' Cas. Co. v. Rockwall County, 120 Tex. 441, 35 S.W.2d 690, 693 (1931).

313. Bryant v. United Shortline 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 (quoting M. O. Regensteiner, Annotation, *Allowance of Attorney's Fees to Party Interpleading Claimants to Funds or Property*, 48 A.L.R. 190, 192 (1956)); *Davis*, 354 S.W.2d at 930 (quoting Nixon v. Malone, 100 Tex. 250, 98 S.W. 380, 385 (1906), *overruled in part by* Glenn v. McCarty, 130 Tex. 641, 110 S.W.2d 1148, 1151 (1937)); Tex. Workforce Comm'n v. Gill, 964 S.W.2d 308, 310 n.3 (Tex. App.—Corpus Christi 1998, no pet.) (citing Serna v. Webster, 908 S.W.2d 487, 491 (Tex. App.—San Antonio 1955, no writ)); *Stubbs*, 734 S.W.2d at 79.

314. *Bryant*, 984 S.W.2d at 296; Sav. & Profit Sharing Fund v. Stubbs, 734 S.W.2d 76, 79 (Tex. App.—Austin 1987, no writ).

315. *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).

favor of allowing the stakeholder to interplead.[316] The granting of interpleader, a final judgment,[317] "is within the discretion of the trial court."[318]

O. *Discovery Rulings*

"Under Texas law evidence is presumed discoverable."[319] 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."[320] Thus, the party seeking to limit discovery has the burden of proving the exemption from discovery.[321] 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;"[322] (2) it helps prevent trial by ambush;[323] (3) it insures that a trial is based upon "the parties' claims and defenses rather than on

316. *Nixon*, 98 S.W. at 385; *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.).

317. *K & S Interests, Inc.*, 749 S.W.2d at 889; *Taliaferro*, 660 S.W.2d at 152.

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

319. 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), *overruled by* Walker v. Packer, 827 S.W.2d 832 (Tex. 1992)).

320. 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), *overruled by Walker*, 827 S.W.2d 832); *accord In re* Alford Chevrolet-Geo, 997 S.W.2d 173, 180 (Tex. 1999) (quoting *Jampole*, 673 S.W.2d at 573); Rendon v. Avance, 67 S.W.3d 303, 309 (Tex. App.—Fort Worth 2001, pet. granted); Tempay, Inc. v. TNT Concrete & Constr., Inc., 37 S.W.3d 517, 521 (Tex. App.—Austin 2001, pet. denied) (quoting *Jampole*, 673 S.W.2d at 573); *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.).

321. *In re* E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 223 (Tex. 2004) (citing Jordan v. Fourth Court of Appeals, 701 S.W.2d 644, 648-49 (Tex. 1985)).

322. West v. Solito, 563 S.W.2d 240, 243 (Tex. 1978) (orig. proceeding); *accord* Avary v. Bank of Am., 72 S.W.3d 779, 787 (Tex. App.—Dallas 2002, pet. denied); *In re* Dynamic Health Inc., 32 S.W.3d 876, 886 (Tex. App.—Texarkana 2000, orig. proceeding [mand. denied]); *In re* Maurer, 15 S.W.3d 256, 261 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding [mand. denied]).

323. Clark v. Trailways, Inc., 774 S.W.2d 644, 646 (Tex. 1989) (quoting Gutierrez v. Dallas Indep. Sch. Dist., 729 S.W.2d 691, 693 (Tex. 1987)); Ersek v. Davis & Davis, P.C., 69 S.W.3d 268, 274 (Tex. App.—Austin 2002, pet. denied); Best Indus. Unif. Supply Co. v. Gulf Coast Alloy Welding, Inc., 41 S.W.3d 145, 147 (Tex. App.—Amarillo 2000, pet. denied).

an advantage obtained by one side through a surprise attack;"[324] and (4) it provides a mechanism to resolve disputes by the facts rather than by the facts a party fails to reveal.[325] In summary, the "modern discovery rules were 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.'"[326] The supreme court has held "absent flagrant bad faith or callous disregard for the rules, due process bars merits-preclusive sanctions," including bars on depositions, interrogatories, requests for production, requests for disclosure, and deemed admissions.[327] Consequently, courts tend to liberally construe the discovery rules to achieve these underlying policy goals.[328] These same principles also shape applicable rules for reviewing a trial court's ruling on discovery disputes.[329]

1. Withdrawing Deemed Admissions

Once an action has officially commenced, a party can serve on any other party a written request for admissions pursuant to Rule

---

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

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

326. Garcia v. Peeples, 734 S.W.2d 343, 347 (Tex. 1987) (orig. proceeding) (quoting United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958)).

327. Wheeler v. Green, 157 S.W.3d 439, 443 & n.2 (Tex. 2005) (per curiam) (analogizing deemed admissions, which may allow a case to be decided on untrue facts, with merits-preclusive sanctions, which can stop a case in its tracks); *accord* Spohn Hosp. v. Mayer, 104 S.W.3d 878, 883 (Tex. 2003) (determining that the failure to respond to requests for disclosure is insufficient to justify merits-inhibiting sanctions); GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 729-30 (Tex. 1993) (orig. proceeding) (ruling that the trial court acted unjustly in striking the defendant's pleading when it failed to respond to the plaintiff's requests for production); Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 846, 849-50 (Tex. 1992) (orig. proceeding) (finding the death-penalty sanction excessive where the defendant failed to comply with interrogatories and requests for production); TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917-19 (Tex. 1991) (orig. proceeding) (refusing to give automatic merits-preclusive sanctions for the failure to comply with requests for depositions).

328. *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), *overruled on other grounds by* Walker v. Packer, 827 S.W.2d 833 (Tex. 1992).

329. *See, e.g.*, Stelly v. Papania, 927 S.W.2d 620, 622 (Tex. 1996) (per curiam) (expressing that a trial court's decision will only be overruled due to a clear abuse of discretion and then explaining the purposes of the discovery rules applied by the trial court).

198 of the Texas Rules of Civil Procedure.[330] If the party given the request does not respond before thirty days after the request was served (fifty days if a defendant is served before his answer is due),[331] the requests are automatically deemed admitted with no discretion to find otherwise.[332] "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."[333]

When admissions are deemed against a party, the party should file a motion to withdraw or amend the admissions as soon as possible.[334] Rule 198.3 permits the trial court to allow a party to withdraw or amend admissions if:

> (a) the party shows good cause for the 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.[335]

Therefore, the motion should 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.[336] "The 'good cause' requirement is a threshold issue which

---

330. TEX. R. CIV. P. 198.1.

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

332. 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).

333. 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) (quoting TEX. R. CIV. P. 198.3); *Beasley*, 7 S.W.3d at 769; Smith v. Home Indem. Co., 683 S.W.2d 559, 562 (Tex. App.—Fort Worth 1985, no writ).

334. *See* Employers Ins. of Wausau v. Halton, 792 S.W.2d 462, 467 (Tex. App.—Dallas 1990, writ denied) (holding that while defense counsel's response to admission requests were over fifty days late, counsel showed good cause and was diligent in filing a motion to withdraw the deemed admissions).

335. TEX. R. CIV. P. 198.3; *accord* 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.

336. *Sandefer*, 58 S.W.3d at 770; *Morgan*, 1 S.W.3d at 807; *see* Wheeler v. Green, 157 S.W.3d 439, 442 (Tex. 2005) (per curiam) (noting that withdrawing deemed admissions is proper upon a showing of good cause and no undue prejudice).

must be determined before the trial judge can even consider the remaining requirements set forth in the rule."[337] Generally, undue prejudice depends upon whether withdrawal of the deemed admission will delay trial or seriously hamper the opposition's ability to prepare for trial.[338] 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.[339]

The trial court is given broad discretion in permitting the withdrawal or amendment of deemed admissions and will only be overruled by showing it clearly abused its discretion.[340] The reviewing court should consider that the "objective of [the] rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of the litigants,"[341] and that the purpose of Rule 198 is to make trials less complicated "by eliminating matters about

337. Boone v. Tex. Employers' Ins. Ass'n, 790 S.W.2d 683, 688 (Tex. App.—Tyler 1990, no writ); *accord* Webb v. Ray, 944 S.W.2d 458, 461 (Tex. App.—Houston [14th Dist.] 1997, no writ) (explaining that good cause can arise by showing the failure to answer was an accident); City of Houston v. Riner, 896 S.W.2d 317, 319 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

338. *Wheeler*, 157 S.W.3d at 443.

339. *See Halton*, 792 S.W.2d at 467 (basing its decision to withdraw deemed admissions on the affidavits and additional evidence provided by the defense counsel). 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.

340. 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.) (quoting *Stelly*, 927 S.W.2d at 622); Steffan v. Steffan, 29 S.W.3d 627, 631 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Payton v. Ashton, 29 S.W.3d 896, 899 n.3 (Tex. App.—Amarillo 2000, no pet.); *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), *overruled on other grounds by* Great Am. Ins. Co., v. N. Austin Mun. Util. Dist. No. 1, 914 S.W.2d 371, 373 (Tex. 1999); *Riner*, 896 S.W.2d at 319; Ruiz v. Nicolas Trevino Forwarding Agency, Inc., 888 S.W.2d 86, 89 (Tex. App.—San Antonio 1994, no writ); Cudd v. Hydrostatic Transmission, Inc., 867 S.W.2d 101, 103 (Tex. App.—Corpus Christi 1993, no writ); Ramsey v. Criswell, 850 S.W.2d 258, 259 (Tex. App.—Texarkana 1993, no writ); Bell v. Hair, 832 S.W.2d 55, 56 (Tex. App.—Houston [14th Dist.] 1992, writ denied); Employers Ins. of Wausau v. Halton, 792 S.W.2d 462, 467 (Tex. App.—Dallas 1990, writ denied); 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).

341. TEX. R. CIV. P. 1; *accord 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).

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."[342] Furthermore, because the "'ultimate purpose of discovery is to seek the truth,'"[343] the rules should not be construed in a manner that will "prevent a litigant from presenting the truth to the trier of facts."[344]

In *Employers Insurance of Wausau v. Halton*,[345] 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.[346] Thus, a party may establish "good cause" by proving that he did not act intentionally or with conscious disregard in failing to timely file answers to the requests.[347] Consequently, even a weak excuse will suffice, particu-

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

343. *Stelly*, 927 S.W.2d at 622 (quoting Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984), *overruled on other grounds by* Walker v. Packer, 827 S.W.2d 833 (Tex. 1992)); *accord* Tempay, Inc. v. TNT Concrete & Constr., Inc., 37 S.W.3d 517, 521 (Tex. App.—Austin 2001, pet. denied) (quoting *Jampole*, 673 S.W.2d at 573); *Kellogg-Brown & Root*, 45 S.W.3d at 777 (quoting *Stelley*, 927 S.W.2d at 622); *In re* Dynamic Health Inc., 32 S.W.3d 876, 886 (Tex. App.—Texarkana 2000, orig. proceeding [mand. denied]) (quoting 3 McDONALD TEXAS CIVIL PRACTICE § 12.2 (1992)).

344. Bynum v. Shatto, 514 S.W.2d 808, 811 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.); *accord Stelly*, 927 S.W.2d at 622; Nat'l Cas. Co. v. Lane Express, Inc., 998 S.W.2d 256, 260 (Tex. App.—Dallas 1999, pet. denied); *Cudd*, 867 S.W.2d at 104; *Greene*, 824 S.W.2d at 700.

345. 792 S.W.2d 462 (Tex. App.—Dallas 1990, writ denied).

346. Employers Ins. of Wausau v. Halton, 792 S.W.2d 462, 465-66 (Tex. App.—Dallas 1990, writ denied) (quoting TEX. R. CIV. P. 320). Rule 320 states that trial courts may grant motions for new trial and set aside judgment when good cause is shown. TEX. R. CIV. P. 320.

347. *In re* Kellogg-Brown & Root, 45 S.W.3d 772, 775 (Tex. App.—Tyler 2001, no pet.) (citing Wal-Mart Stores, Inc. v. Deggs, 968 S.W.2d 354, 356 (Tex. 1998) (per curiam)); Steffan v. Steffan, 29 S.W.3d 627, 631 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Morgan v. Trimmers Chevrolet, Inc., 1 S.W.3d 803, 807 n.3 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); Webb v. Ray, 944 S.W.2d 458, 460 (Tex. App.—Houston [14th Dist.] 1997, no writ); City of Houston v. Riner, 896 S.W.2d 317, 319 (Tex. App.—Houston [1st Dist.] 1995, writ denied); Cudd v. Hydrostatic Transmission, Inc., 867 S.W.2d 101, 104 (Tex. App.—Corpus Christi 1993, no writ); *Halton*, 792 S.W.2d at 465-66; *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").

larly when the opposing party suffers no prejudice as a result of the delay.[348]

Under Rule 215.4, "an evasive or incomplete answer may be treated as a failure to answer."[349] 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.[350] The trial court's order is reviewed for an abuse of discretion based upon the entire record.[351]

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."[352] The same considerations applicable to a motion to withdraw deemed admissions apply to a party who seeks to withdraw his original response and substitute it with a new response.[353] Accordingly, the trial court enjoys broad discretion in allowing the withdrawal or amendment of admissions, and its ruling will only be set aside on appeal if it was a clear abuse of discretion.[354]

---

348. *Kellogg-Brown & Root*, 45 S.W.3d at 775 (citing Spiecker v. Petroff, 971 S.W.2d 536, 538 (Tex. App.—Dallas 1997, no pet.)); Credit Car Ctr., Inc. v. Chambers, 969 S.W.2d 459, 462 (Tex. App.—El Paso 1998, 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) (admitting that while slight, a lawyer's illness can be a sufficient excuse); N. River Ins. Co. v. Greene, 824 S.W.2d 697, 700-01 (Tex. App.—El Paso 1992, writ denied) (identifying a calendar diary error as a sufficient cause); Esparza v. Diaz, 802 S.W.2d 772, 776 (Tex. App.—Houston [14th Dist.] 1990, no writ) (quoting *Halton*, 792 S.W.2d at 466) (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.

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

350. *Id.*; *see* U. S. 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).

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

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

353. *Stelly*, 927 S.W.2d at 621-22; *see also* TEX. R. CIV. P. 198.3(a)-(b) (explaining the requirements for response amendment).

354. *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, Inc., 45

3. Supplementation of Discovery Responses

Pursuant to Texas Rule of Civil Procedure 193.5, a party whose response to a discovery request is correct and complete when made is, nonetheless, under a duty to make the response accurate by amendment or supplement:

> (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.[355]

The party supplementing discovery must serve his supplemental discovery response "reasonably promptly" after the necessity arises.[356] If the supplemental response is given 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.[357] Pursuant to Rule 193.6 of the Texas Rules of Civil Procedure, the sanction for a party's failure to comply with the duty to supplement is the exclusion of the evidence affected by the violation,[358] unless the court finds good cause for the failure to supplement[359] or the untimely "response will not unfairly surprise or unfairly prejudice the other parties."[360] The party seeking to introduce the evidence has

---

S.W.3d 772, 775 (Tex. App.—Tyler 2001, no pet.) (quoting *Stelly*, 927 S.W.2d at 622); Steffan v. Steffan, 29 S.W.3d 627, 631 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

355. TEX. R. CIV. P. 193.5. This new rule, effective as of 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 (Vernon 1998, repealed 1999). The duty to supplement arose only when imposed by court order, by party agreement, to prevent the response from becoming misleading, which included 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. *Id.* 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).

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

357. *Id.*

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

359. TEX. R. CIV. P. 193.6(a)(1); Carpenter v. Cimarron Hydrocarbons Corp., 98 S.W.3d 682, 687 (Tex. 2002) (defining "good cause" in motions for withdrawal and amendment of deemed admissions (citing Stelly v. Papania, 927 S.W.2d 620, 622 (Tex. 1996) (per curiam))).

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

the burden of establishing good cause or lack of unfair surprise or unfair prejudice, which must be supported by the record.[361] 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.[362]

The useful benefit of Rule 193.6 is the resultant "complete responses to discovery so as to promote responsible assessment of settlement and to prevent trial by ambush."[363] The trial court's determination on the issue of good cause will not be set aside unless there is an abuse of discretion.[364] If the party offering the evidence fails to establish good cause, and the trial court admits the evidence over the opposing party's objection, the objecting party must show that the trial court's "error was reasonably calculated to cause and probably did cause the rendition of an improper judgment."[365] For example, if the failure to supplement concerns a failure to designate a witness, and the witness testified about a material disputed

---

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

362. 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). However, the exclusion does not apply when the original trial date is continued, and the date set is more than thirty days from the date of the original trial date. H.B. Zachry Co. v. Gonzalez, 847 S.W.2d 246, 246 (Tex. 1993) (orig. proceeding) (per curiam).

363. 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)); *accord* 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 was the predecessor to Rule 193.6. *Compare* 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), *with* TEX. R. CIV. P. 215(5) (Vernon 1998, superseded 1999), *and* TEX. R. CIV. P. 215.5 cmt. (noting that 215.5 was superseded by 193.6); *see also* Mauzey v. Sutliff, 125 S.W.3d 71, 77 n.6 (Tex. App.—Austin 2003, pet. denied) (noting that former Rule 215(5) is largely the same as present Rule 193.6).

364. *Carpenter*, 98 S.W.3d at 684, 686-87; Morrow v. H.E.B., Inc., 714 S.W.2d 297, 298 (Tex. 1986) (per curiam); 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.) (quoting *Alvarado*, 830 S.W.2d at 914-16); *In re* Estate of Waits, 994 S.W.2d 433, 434 (Tex. App.—Beaumont 1999, no pet.) (per curiam); Vaughn v. DAP Fin. Servs., Inc., 982 S.W.2d 1, 8 (Tex. App.—Houston [1st Dist.] 1997, no pet.).

365. McKinney v. Nat'l Union Fire Ins. Co., 772 S.W.2d 72, 74-75 (Tex. 1989) (stating that appellant must show that an improper judgment may have been caused by allowing an excluded witness to testify); *accord* TEX. R. APP. P. 44.1; *Alvarado*, 830 S.W.2d at 918.

matter, the appellate court will probably reverse.[366] If the undesignated witness's testimony only concerned matters cumulative of other evidence and testimony, the court of appeals will likely hold the error harmless and affirm.[367] An examination of the entire record is necessary to determine the likelihood that the error actually caused an improper judgment to be rendered.[368]

a. Fact Witnesses

In general, a party must disclose the identity of any potential party or persons having knowledge of relevant facts.[369] 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.[370] 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.[371] Unfortunately, trying to define "good cause" is like trying to define "abuse of discretion." It is usually easier to define what is not "good cause."[372]

---

366. Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989) (per curiam); Collins v. Collins, 904 S.W.2d 792, 802 (Tex. App.—Houston [1st Dist.] 1995) (en banc), *writ denied*, 923 S.W.2d 569 (Tex. 1996) (per curiam).

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

368. *McKinney*, 772 S.W.2d at 75; Pittman v. Baladez, 158 Tex. 372, 312 S.W.2d 210, 216 (1958); Prestige Ford Co. v. Gilmore, 56 S.W.3d 73, 78 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); Cruz v. Hinojosa, 12 S.W.3d 545, 550 (Tex. App.—San Antonio 1999, pet. denied).

369. TEX. R. CIV. P. 192.3(c), (i).

370. *Alvarado*, 830 S.W.2d at 915 (citing Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671 (Tex. 1990)); *McKinney*, 772 S.W.2d at 75; Clark v. Trailways, Inc., 774 S.W.2d 644, 646 (Tex. 1989); *Boothe*, 766 S.W.2d at 789; Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395 (Tex. 1989); E.F. Hutton & Co. v. Youngblood, 741 S.W.2d 363, 364 (Tex. 1987); Gutierrez v. Dallas Indep. Sch. Dist., 729 S.W.2d 691, 693 (Tex. 1987); Morrow v. H.E.B., Inc., 714 S.W.2d 297, 297-98 (Tex. 1986) (per curiam); Yeldell v. Holiday Hills Ret. & Nursing Ctr., Inc., 701 S.W.2d 243, 246 (Tex. 1985) (quoting former Texas Rule of Civil Procedure 168(7)); *see also* TEX. R. CIV. P. 193.5(b) (amendments not made before thirty days before trial are not considered reasonably prompt).

371. 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.) (quoting *Alvarado*, 830 S.W.2d at 914); Swain v. Sw. 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), *abrogated by In re* Bass, 113 S.W.3d 735 (Tex. 2003).

372. *See* Carpenter v. Cimarron Hydrocarbons Corp., 98 S.W.3d 682, 687 (Tex. 2002) (reviewing several cases that did not "specifically define 'good cause,'" but instead held "inadvertent failure to supplement responses was insufficient to establish good cause"); Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 914 (Tex. 1992) (observing that the defining

This concept requires a showing of good cause for the failure to timely designate the witness.[373]

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.[374] Texas Rule of Civil Procedure 193.6, however, does not apply to parties named in the suit.[375] Thus, named parties may testify as fact witnesses even though that party failed to supplement the discovery response in a timely manner. A named

---

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. *Id.* at 915; *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. Likewise, a party's claim that a denial of the testimony will cause it "great harm" does not establish good cause. Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989) (per curiam). 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's analysis shows that if a witness has been difficult to locate, the party attempting to introduce the evidence should 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) (per curiam). In addition, the fact that the identity of the witness is known by each party is not in itself a 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 even if a witness was fully deposed (even if only his deposition testimony is to be offered at trial) it "is not enough to show good cause for admitting the evidence when the witness was not identified in response to discovery." *Id.* Also, inadvertence of counsel is not enough to satisfy the good cause exception. *Id.* at 672; Remington Arms Co. v. Canales, 837 S.W.2d 624, 625 (Tex. 1992) (orig. proceeding).

373. Norfolk Southern Ry. Co. v. Bailey, 92 S.W.3d 577, 580-81 (Tex. App.—Austin, 2002, pet. granted). Former Rule 215(5) required that the party show good cause exists for requiring admission of the testimony or evidence. TEX. R. CIV. P. 215(5) (Vernon 1998, superseded 1999); 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.). Before rule 193.6 superseded 215(5), however, some courts held that the offering party must show good cause for its failure to properly respond to the discovery request. *See Clark*, 774 S.W.2d at 646.

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

375. TEX. R. CIV. P. 193.6(a) (including language stating that parties are not included as witnesses whose testimony must be disclosed).

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."[376]

b. Expert Witnesses

Under Rule 192.7, there are two types of expert witnesses: (1) a testifying expert,[377] and (2) a consulting expert.[378] 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 whose mental impressions and opinions have . . . been reviewed by a testifying expert . . . ."[379] However, if those conclusions have not been reviewed by a testifying expert, neither the consulting expert's identity nor his conclusions are discoverable.[380]

Pursuant to Rule 195, a party may request the disclosure of information regarding testifying expert witnesses.[381] This request must be done via a request for disclosure.[382] Upon proper request, a party must "designate" experts (i.e., disclose the requested information) by: "the later of . . . [thirty] days after the request is served, or . . . with regard to all experts testifying for a party seeking affirmative relief, [ninety] days before the end of the discovery pe-

376. Henry S. Miller Co. v. Bynum, 836 S.W.2d 160, 162 (Tex. 1992); *accord* Rogers v. Stell, 835 S.W.2d 100, 100-01 (Tex. 1992) (per curiam) (quoting Smith v. Sw. Feed Yards, 835 S.W.2d 89, 91 (Tex. 1992)); Nw. Nat'l County Mut. Ins. Co. v. Rodriguez, 18 S.W.3d 718, 723 (Tex. App.—San Antonio 2000, pet. denied) (holding that the attorney showed good cause for allowing his testimony about attorney's fees); 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, 570 (Tex. App.—Houston [1st Dist.] 1995, writ denied); Browne v. Las Pintas Ranch, Inc., 845 S.W.2d 370, 372-73 (Tex. App.—Houston [1st Dist.] 1992, no writ) (quoting *Henry S. Miller Co.*, 836 S.W.2d at 162).

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

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

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

380. *Id.*

381. TEX. R. CIV. P. 195.1.

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

riod; . . . with regard to all other experts, [sixty] days before the end of the discovery period."[383]

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."[384] If an amended or supplemental response is made fewer than thirty days before trial, it is presumed to have been made without reasonable promptness.[385] 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 respond,[386] or that the failure to timely respond "will not unfairly

---

383. 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).

384. TEX. R. CIV. P. 193.5(b); *accord* TEX. R. CIV. P. 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) (Vernon 1998, 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." *Id.* 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, 86 S.W.3d 729, 734 (Tex. App.—El Paso 2002, no pet.) (stating that the "new Rule 193.6 is 'less burdensome' than the former rule").

385. TEX. R. CIV. P. 193.5(b). 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). In ruling that the plaintiff's choice to wait just before thirty days before designating their expert was not reasonably prompt, the *Snider* court distinguished the *Mentis v. Barnard* decision, which the appellants relied upon, on the ground that *Mentis* was decided under the former rule 166b. *Id.* at 716.

386. 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 excluded evidence, (4) the fact that a witness has been deposed[,] . . . [and (5)] the amount of time an expert had to prepare a report or form an opinion before trial." Rodriguez v. Hyundai Motor Co., 944 S.W.2d 757, 765-66 (Tex. App.—Corpus Christi 1997), *rev'd on other grounds*, 995 S.W.2d 661 (Tex. 1999); *accord* Colo. Interstate Gas Co. v. Hunt Energy Co., 47 S.W.3d 1, 14 (Tex. App.—Amarillo 2000, pet. denied). However, a combination of these factors may show good cause. *Rodriguez*, 944 S.W.2d at 765-66; *Colo. Interstate Gas Co.*, 47 S.W.3d at 14.

surprise or unfairly prejudice the other parties."[387]

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.[388] 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.[389] Good cause may be established when counsel is unable to reasonably anticipate the need for such rebuttal evidence.[390]

4. Mandamus Review of Discovery Rulings

In a mandamus proceeding challenging a trial court's ruling on discovery, the relator may obtain mandamus relief if "(1) the trial court clearly abused its discretion and (2) the [relator] has no adequate remedy by appeal."[391] In *Walker v. Packer*,[392] the supreme court established tighter parameters to limit future review of dis-

---

387. TEX. R. CIV. P. 193.6(a)(2); *accord* F & H Inv. Inc. v. State, 55 S.W.3d 663, 670 (Tex. App.—Waco 2001, no pet.).

388. *See* TEX. R. CIV. P. 193.5(a)(1) (obligating the responding party to amend his response "to the extent written discovery sought identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses"); *see also* Apresa v. Montfort Ins. Co., 932 S.W.2d 246, 251 (Tex. App.—El Paso 1996, no writ) (quoting Valley Indus., Inc. v. Cook, 767 S.W.2d 458, 462 (Tex. App.—Dallas 1988, writ denied) (stating that rebuttal evidence, which includes rebuttal witness testimony, disproves facts introduced into evidence by an opposing party)).

389. TEX. R. CIV. P. 193.6(a)(1), (2); *see* Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 916-17 (Tex. 1992) (explaining that Alvarado failed to assert a good cause for failing to disclose a rebuttal witness); Ramos v. Champlin Petroleum Co., 750 S.W.2d 873, 876-77 (Tex. App.—Corpus Christi 1988, writ denied) (finding that the trial court erred in allowing rebuttal witness's testimony, since appellee failed to supplement its answer as to the witness's address), *abrogated by* Reagan v. Vaughn, 804 S.W.2d 463 (Tex. 1990); Greenstein, Logan & Co. v. Burgess Mktg., Inc., 744 S.W.2d 170, 178-79 (Tex. App.—Waco 1987, writ denied) (rejecting the contention that rebuttal witnesses need to be designated prior to trial).

390. 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 an expert's testimony based on good cause when the need for his testimony as a rebuttal witness could not have been anticipated prior to the unexpected false testimony of the opponent's witness).

391. *In re* Living Ctrs. of Tex., Inc., 175 S.W.3d 253, 255-56 (Tex. 2005) (citing *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 135-36 (Tex. 2004)); *In re* Kuntz, 124 S.W.3d 179, 180 (Tex. 2003); Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding).

392. 827 S.W.2d 833 (Tex. 1992).

covery rulings by writ of mandamus.[393] The court listed several instances in which discovery rulings would be the proper subject of mandamus review: when a trial court wrongly orders discovery of privileged, confidential, or otherwise protected information which will have a material effect on the aggrieved party's rights;[394] when a trial court "compels the production of patently irrelevant or duplicative documents, such that it constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party";[395] 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;[396] when the trial court's denial of discovery goes "to the heart of a party's case";[397] when the trial court denies discovery "and the missing discovery cannot be made part of the ap-

393. *See Walker*, 827 S.W.2d at 842 (holding that a party seeking mandamus review of a discovery order must demonstrate that no sufficient remedy by appeal exists); *see also* Tilton v. Marshall, 925 S.W.2d 672, 681-82 (Tex. 1996) (orig. proceeding) (quoting Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 684 (Tex. 1989)) (reaffirming *Walker*'s requirement of compelling circumstances).

394. *Walker*, 827 S.W.2d at 843; *accord Living Ctrs. of Tex.*, 175 S.W.3d at 255-56; *In re* Ford Motor Co., 988 S.W.2d 714, 721 (Tex. 1998) (orig. proceeding); Mem'l Hosp.—The Woodlands v. McCown, 927 S.W.2d 1, 12 (Tex. 1996); *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 [mand. denied]); *In re* Valero Energy Corp., 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding); *see also* Perry v. Del Rio, 66 S.W.3d 239, 257 (Tex. 2001) (quoting *Walker*, 827 S.W.2d at 842) (expressing that mandamus is justified when substantial rights are at risk).

395. *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).

396. *See Walker*, 827 S.W.2d at 843 (reiterating its holding that "when a trial court imposes discovery sanctions which have the effect of *precluding a decision on the merits of a 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"); *see also 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 Family Hospice, Ltd.*, 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]); *Valero*, 973 S.W.2d at 457.

397. Walker v. Packer, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding).

pellate record";[398] finally, when the trial court denies discovery and "refuses to make [the requested discovery] part of the record."[399]

Under *Walker*, an appellate court will issue mandamus to set aside a discovery order when the trial court fails to perform a clear legal duty, or commits "a clear abuse of discretion";[400] "when there is no adequate remedy by appeal";[401] and in the supreme court, when the proceeding raises issues important to the state's jurisprudence.[402] 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.'"[403] 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 come to only one decision.[404] The appellate court will not resolve or address disputed issues of fact in mandamus proceedings.[405] However, as to the resolution of legal issues, the trial

---

398. *Walker*, 827 S.W.2d at 843 (quoting Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 558 (Tex. 1990) (orig. proceeding)); *accord Ford Motor Co.*, 988 S.W.2d at 721; *Family Hospice, Ltd.*, 62 S.W.3d at 316; *Frank A. Smith Sales,* 32 S.W.3d at 875; *Kellogg Brown & Root*, 7 S.W.3d at 657; *Valero*, 973 S.W.2d at 457; *see also* Barnes v. Whittington, 751 S.W.2d 493, 496 (Tex. 1988) (holding that the trial court committed an abuse of discretion by issuing a protective order for discoverable documents), *overruled on other grounds by Walker*, 827 S.W.2d 833.

399. *Walker*, 827 S.W.2d at 843 ("'Because the evidence exempted from discovery would not appear in the record, the appellate courts would find it impossible to determine whether denying the discovery was harmful.'" (quoting Jampole v. Touchy, 673 S.W.2d 569, 576 (Tex. 1984), *overruled on other grounds by Walker*, 827 S.W.2d 833)).

400. *Walker*, 827 S.W.2d. at 839-40 (quoting Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding)); *accord* 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); Jampole v. Touchy, 673 S.W.2d 569, 572 (Tex. 1984) (orig. proceeding), *overruled on other grounds by Walker*, 827 S.W.2d 833.

401. *Walker*, 827 S.W.2d at 839 (quoting *Johnson*, 700 S.W.2d at 917); *accord Jack B. Anglin*, 842 S.W.2d at 271; *McGough*, 842 S.W.2d at 640; *Jampole*, 673 S.W.2d at 573.

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

403. Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (quoting *Johnson*, 700 S.W.2d at 917); *see McGough*, 842 S.W.2d at 640 (holding that a clear abuse of discretion is an act that is arbitrary, capricious, and with no reference to guiding principles).

404. *Walker*, 827 S.W.2d at 839-40 (citing Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 41 (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.

405. *In re* Angelini, 186 S.W.3d 558, 560 (Tex. 2006) (per curiam) (quoting Brady v. Fourteenth Court of Appeals, 795 S.W.2d 712, 714 (Tex. 1990)).

court's decision is not binding on appellate courts because the "trial court has no 'discretion' in determining what the law is or applying the law to the facts."[406] Accordingly, a clear failure to properly "analyze or apply the law" will amount to an abuse of discretion.[407]

A "'fundamental tenet'" of mandamus review is that the party seeking relief must establish that no adequate appellate remedy exists.[408] Because mandamus is such an extraordinary remedy, it is available "only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies."[409] Remedy by appeal is not inadequate simply because it might be more expensive or cause more delays than mandamus review.[410] Mandamus review "is justified only when parties stand to lose their substantial rights."[411]

---

406. *Walker*, 827 S.W.2d at 840; *accord In re* Dillard Dep't Stores, Inc., 198 S.W.3d 778, 780 (Tex. 2006) (orig. proceeding) (per curiam) (quoting *Walker*, 827 S.W.2d at 840); *In re* Consol. Freightways, Inc., 75 S.W.3d 147, 151 (Tex. App.—San Antonio 2002, no pet.); *In re* Kellogg-Brown & Root, 45 S.W.3d 772, 775 (Tex. App.—Tyler 2001, no pet.).

407. *Walker*, 827 S.W.2d at 840 (citing Joachim v. Chambers, 815 S.W.2d 234, 240 (Tex. 1991)); *Consol. Freightways*, 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 Distribs., Inc. v. Heineken USA, Inc., 95 S.W.3d 286, 293 (Tex. App.—Dallas 2001, pet. granted, judgm't vacated w.r.m.); *In re* Rangel, 45 S.W.3d 783, 786 (Tex. App.—Waco 2001, no pet.); *Kellogg-Brown & Root*, 45 S.W.3d at 775.

408. *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* Tjia, 50 S.W.3d 614, 616 (Tex. App.—Amarillo 2001, orig. proceeding).

409. Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) (citing *Holloway*, 767 S.W.2d at 684); *accord* 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 in only limited circumstances'" (quoting *Walker*, 827 S.W.2d at 840)); Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex. 1996) (reiterating that "mandamus is an 'extraordinary' remedy, reserved for 'manifest and urgent necessity'" (quoting *Holloway*, 767 S.W.2d at 684)); Montalvo v. Fourth Court of Appeals, 917 S.W.2d 1, 2 (Tex. 1995) (orig. proceeding) (per curiam) (reaffirming that "mandamus is an extraordinary remedy"); *In re* Burgett, 23 S.W.3d 124, 126 (Tex. App.—Texarkana 2000, orig. proceeding).

410. *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 Distribs.*, 95 S.W.3d at 294; *In re* Rogers, 43 S.W.3d 20, 24 (Tex. App.—Amarillo 2001, no pet.).

411. *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, orig. proceeding [mand. denied]); *Glazer's Wholesale Distribs.*, 95 S.W.3d at 294.

The scope of review in a mandamus proceeding includes certified or sworn copies of the order complained of, other relevant exhibits,[412] and the reporter's record from the hearing on the matter.[413] The failure of a party to include the reporter's record on appeal may cause the appellate court to presume that the trial court's ruling was actually supported by the record.[414] 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 was made without a hearing.[415] Instead of a reporter's record, the relator may include a "verified affidavit" stating all of the facts needed to establish the right to mandamus relief.[416] However, a reporter's record from a hearing is preferable.[417]

5. Appellate Review of Discovery Rulings

In an appeal from a discovery or evidentiary ruling, the appellant must preserve error by presenting a "timely request, objection, or motion," setting forth its specific basis, and by obtaining a ruling from the trial court.[418] Thus, 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.[419] The appellate record should also contain a reporter's

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

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

414. Englander Co. v. Kennedy, 428 S.W.2d 806, 806-07 (Tex. 1968) (per curiam) (quoting Englander Co. v. Kennedy, 424 S.W.2d 305, 308 (Tex. Civ. App.—Dallas 1968), *writ ref'd n.r.e.*, *Englander*, 428 S.W.2d 806).

415. Barnes v. Whittington, 751 S.W.2d 493, 495 (Tex. 1988), *overruled on other grounds by Walker*, 827 S.W.2d 833. *Barnes* relied upon former Texas Rule of Appellate Procedure 121, which was merged into Rule 52.3. *See* TEX. R. APP. P. 52.3 cmt (listing those rules, including Rule 121, which were merged into Rule 52.3).

416. *See Barnes*, 751 S.W.2d at 495 (finding that a verified affidavit will suffice); *see also* TEX. R. APP. P. 52.3 (mandating that "[a]ll factual statements in the petition must be verified by affidavit made on personal knowledge").

417. *See* TEX. R. APP. P. 52.3 (asking petitioner to file a concise and pertinent statement of fact supported by the record). 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.

418. TEX. R. APP. P. 33.1.

419. *See, e.g.*, Dallas Fire Ins. Co. v. Davis, 893 S.W.2d 288, 293 (Tex. App.—Fort Worth 1995, orig. proceeding) (stating that since the estoppel claim had not been raised at trial, it could not be considered by the appellate court); H.E. Butt Grocery Co. v. Williams,

record from any evidentiary hearing held on the discovery issue.[420] Finally, the standard of review is whether the trial court's order, in light of the entire record and the offending party's conduct, "(1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals."[421]

P. *Discovery Sanctions*

The purpose of discovery is "to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial."[422] A court may impose sanctions "to assure compliance with discovery and to deter those who might be tempted to abuse discovery in the absence of a deterrent."[423] 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."[424] There is no provision for interlocutory appeal; therefore, discovery sanc-

---

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 precluded raising the argument at the appellate court); Garcia v. Allen, 751 S.W.2d 236, 237 (Tex. App.—San Antonio 1988, writ denied) (ruling the complaint that interrogatories were too broad cannot be raised for the first time on appeal).

420. TEX. R. APP. P. 34.1 (explaining that an appellate record contains the clerk's record and where necessary, the reporter's record).

421. TEX. R. APP. P. 44.1. Former Texas Rule of Appellate Procedure 81(b)(1) contained a standard of review similar to the current standard. Lucas v. Titus County Hosp. Dist., 964 S.W.2d 144, 157 (Tex. App.—Texarkana 1998), *pet. denied*, 988 S.W.2d 740 (Tex. 1998) (per curiam); Bott v. Bott, 962 S.W.2d 626, 628 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (quoting TEX. R. APP. P. 81(b)); Ramirez v. Otis Elevator Co., 837 S.W.2d 405, 410 (Tex. App.—Dallas 1992, writ denied); *see also* Bruner 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").

422. 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)); *accord* Avary v. Bank of Am., 72 S.W.3d 779, 787 (Tex. App.—Dallas 2002, pet. denied); *see* State v. Lowry, 802 S.W.2d 669, 671 (Tex. 1991) (observing that "discovery is . . . the linchpin of the search for truth").

423. Cire v. Cummings, 134 S.W.3d 835, 839 (Tex. 2004) (citing Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 242 (Tex. 1985)).

424. TEX. R. CIV. P. 215.3.

tions cannot be appealed until the trial court renders a final judgment.[425]

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.[426] If a sanctioned party has an adequate remedy at law, then mandamus is not available,[427] unless the judgment or order is void when issued, which, despite adequate remedies, allows for mandamus.[428] However, in *TransAmerican Natural Gas Corp. v. Powell*,[429] 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."[430] 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 merits of the

425. *In re* Smith, 192 S.W.3d 564, 569 (Tex. 2006) ("A sanctions order is appealable when the judgment is signed" (citing Arndt v. Farias, 633 S.W.2d 497, 500 (Tex. 1992))); 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) (per curiam).

426. *In re* Dana Corp., 138 S.W.3d 298, 301 (Tex. 2004) (orig. proceeding) (per curiam); Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (quoting Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985)); TransAmerican 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 [mand. denied]); *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), *rev'd on other grounds*, 109 S.W.3d 705 (Tex. 2003); *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); *see also In re* Aguilar, No. 08-02-00514-CV, 2003 WL 131529, at *1-3 (Tex.—El Paso Jan. 16, 2003, orig. proceeding) (mem. op.) (explaining the clear abuse of discretion and no adequate appellate remedy standards).

427. *In re* Sw. 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)).

428. *In re* Mask, No 4-06-00097-CV, 2006 WL 622515, at *1 (Tex. App.—San Antonio Mar. 15, 2006, orig. proceeding).

429. 811 S.W.2d 913 (Tex. 1991) (orig. proceeding).

430. *TransAmerican*, 811 S.W.2d at 919; *see also* Spohn Hosp. v. Mayer, 104 S.W.3d 878, 882 (Tex. 2003) (per curiam) (reiterating, "'[c]ase determinative sanctions may be imposed in the first instance only in exceptional cases when they are clearly justified and it is fully apparent that no lesser sanction would promote compliance with the rules'" (quoting GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 729 (Tex. 1993))).

case from being presented)[431] is clearly reviewable by mandamus.[432] 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."[433] 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 manda-

---

431. *Spohn*, 104 S.W.3d at 883 (citing *TransAmerican*, 811 S.W.2d at 918); 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) (orig. proceeding)); Perez v. Murff, 972 S.W.2d 78, 81 (Tex. App.—Texarkana 1998, pet. denied) (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)).

432. *See, e.g.*, *Tanner*, 856 S.W.2d 725, 729 (Tex. 1993) (reviewing death-penalty sanctions in original mandamus proceeding). 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) (per curiam) (quoting *TransAmerican*, 811 S.W.2d at 918) (stating that courts may not use death-penalty sanctions unless the sanctioned party's conduct justifies the presumption of a meritless claim).

433. *Braden*, 811 S.W.2d at 929. 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.* at 929-30; *see* Ford Motor Co. v. Tyson, 943 S.W.2d 527, 532 (Tex. App.—Dallas 1997, orig. proceeding) (finding that a sanction of $10,000,000 was reviewable by mandamus), *mand. granted*, *In re* Ford Motor Co., 988 S.W.2d 714 (Tex. 1998) (orig. proceeding). *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) (orig. proceeding) (per curiam) (holding that a sanction that $1,050 in attorney's fees be paid or the pleading would be struck 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.* (quoting Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 882-83 (5th Cir. 1988)). 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 preclude the complaining litigant's access to court. *Braden*, 811 S.W.2d at 929 (quoting *Thomas*, 836 F.2d at 882-83).

mus.[434] It generally depends on whether the sanction is case-determinative.[435]

Rule 215 permits a wide range of sanctions for a variety of purposes:[436] "to secure compliance with the discovery rules; . . . to deter other litigants from similar misconduct; . . . to punish violators;"[437] "to insure a fair trial[;] to compensate a party for past prejudice[;] . . . and to deter certain bad faith conduct."[438] The sanctions, however, must be "just."[439] Whether the sanctions are

---

434. *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 a court on appeal, and therefore, does not warrant mandamus), *and* Humana Hosp. Corp. v. Casseb, 809 S.W.2d 543, 546 (Tex. App.—San Antonio 1991, orig. proceeding) (ruling that striking an expert witness may be reviewed on appeal by bill of exceptions), *with* Revco, D.S., Inc. v. Cooper, 873 S.W.2d 391, 395 (Tex. App.—El Paso 1994, orig. proceeding) (concluding that mandamus could lie when court excluded experts for late designation), *and* Buyers Prods. Co. v. Clark, 847 S.W.2d 270, 272, 273-74 (Tex. App.—Beaumont 1992, orig. proceeding) (determining that it was inappropriate for the trial court to strike the defendant's witnesses for its attorney's violations and conditionally issuing a writ of mandamus), *and* Mother Frances Hosp. v. Coats, 796 S.W.2d 566, 571-72 (Tex. App.—Tyler 1990, orig. proceeding) (per curiam) (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).

435. *See* State Farm Fire & Cas. Co. v. Rodriguez, 88 S.W.3d 313, 325-26 (Tex. App.—San Antonio 2002, pet. denied) (holding that as long as exclusion of testimony impairs only the party's presentation of its case and does not prohibit a trial from being heard on its merits, the striking of testimony is within the court's discretion and is not a case-determinative sanction). Until a bright line rule is created (which probably will not occur), Justice Peeples's analysis of the issue remains correct: "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).

436. TEX. R. CIV. P. 215.

437. 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) (per curiam)); *accord* Vela v. Wagner & Brown, No. 04-04-00745, 2006 WL 1684191, at *14 (Tex. App.—San Antonio June 21, 2006, no pet.); Roberts v. Rose, 37 S.W.3d 31, 34 (Tex. App.—San Antonio 2000, pet. denied); *see also* Spohn Hosp. v. Mayer, 104 S.W.3d 878, 882 (Tex. 2003) (per curiam) (discussing the legitimate purposes of sanctions).

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

439. TEX. R. CIV. P. 215 (2)(b); *Spohn*, 104 S.W.3d at 882; 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); *Vela*, 2006 WL 1684191, at *14; State Farm Fire & Cas. Co. v. Rodriquez, 88 S.W.3d 313, 326 (Tex. App.—San Antonio 2002, pet. denied); *In re* Adkins, 70 S.W.3d 384, 390 (Tex. App.—Fort Worth 2002, orig. proceeding); *see* Braden v. Downey, 811 S.W.2d

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."[440] Accordingly, the sanction imposed against the offending party "must be directed against the abuse and toward remedying the prejudice caused the innocent party."[441] In other words, the sanctions must be specifically tailored to the abuse found.[442]

The second prong of this analysis requires that the sanction not be excessive; the sanction must fit the offensive conduct.[443] The sanction should not be more severe than necessary to satisfy its legitimate purpose (i.e., to promote compliance).[444] Moreover, as a general rule, a trial court should always impose lesser sanctions first, before imposing a death-penalty sanction.[445] However, the

---

922, 930 (Tex. 1991) (orig. proceeding) (asserting that "[j]ustice should not tolerate [discovery] abuse, but injustice cannot remedy it").

440. Hamill v. Level, 917 S.W.2d 15, 16 (Tex. 1996); *accord TransAmerican*, 811 S.W.2d at 917; Mahan v. Baskerville, No. 4-05-00392-CV, 2006 WL 1539585, at *2 (Tex. App.—San Antonio June 7, 2006, no pet.) (mem. op.); Hernandez v. Mid-Loop, Inc., 170 S.W.3d 138, 143 (Tex. App.—San Antonio 2005, no pet.); *Rodriquez*, 88 S.W.3d at 326; *Adkins*, 70 S.W.3d at 390; *In re* Polaris Indus., Inc., 65 S.W.3d 746, 751 (Tex. App.—Beaumont 2001, orig. proceeding).

441. *TransAmerican*, 811 S.W.2d at 917; *accord* Paradigm Oil v. Retamco Operating, Inc., 161 S.W.3d 531, 538 (Tex. App.—San Antonio 2005, pet. denied); *Adkins*, 70 S.W.3d at 390; *Polaris*, 65 S.W.3d at 751.

442. *TransAmerican*, 811 S.W.2d at 917; *Paradigm*, 161 S.W.3d at 537; *see* Vela v. Wagner & Brown, No. 04-04-00745, 2006 WL 1684191, at *16-17 (Tex. App.—San Antonio June 21, 2006, no pet.) (finding a direct relationship between the abuse and misconduct documented by the trial court and the sanctions imposed).

443. *TransAmerican*, 811 S.W.2d at 917; *Rodriquez*, 88 S.W.3d at 326; *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, judgm't vacated w.r.m.); *see Vela*, 2006 WL 1684191, at *14 ("[T]he sanction imposed must not be excessive." (citing *Spohn*, 104 S.W.2d at 882)); *Polaris*, 65 S.W.3d at 751 (stating that the "punishment should fit the crime" (quoting *TransAmerican*, 811 S.W.2d at 917)).

444. Am. Flood Research, Inc. v. Jones, 192 S.W.3d 581, 583 (Tex. 2006) (per curiam); *TransAmerican*, 811 S.W.2d at 917; *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, pet. denied).

445. Hamill v. Level, 917 S.W.2d 15, 16 (Tex. 1996) (disapproving of the appellate court's conclusion that a trial court is not required to first impose lesser sanctions before ordering a death-penalty sanction); Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 849 (Tex.

supreme court has emphasized "that case-determinative sanctions may only be imposed in 'exceptional cases' where they are 'clearly justified' and it is 'fully apparent that no lesser sanctions would promote compliance with the rules.'"[446] Trial courts, however, are not required to "test the effectiveness of lesser sanctions by actually implementing and ordering each and every sanction."[447] Instead, trial courts "must analyze the available sanctions and offer a reasoned explanation as to the appropriateness of the sanction imposed."[448]

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."[449] Therefore, the trial court is not limited to considering only the specific violation committed, but is entitled to consider other conduct occurring during discovery.[450] The trial court's ruling on a motion for sanctions is

---

1992) (orig. proceeding) (holding that lesser sanctions will suffice if they "promote compliance, deterrence, and discourage further abuse"); *accord* Hernandez v. Mid-Loop, Inc., 170 S.W.3d 138, 143 (Tex. App.—San Antonio 2005, no pet.); *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).

446. Cire v. Cummings, 134 S.W.3d 835, 840-41 (Tex. 2004) (quoting GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 729-30 (Tex. 1993)); *see also* Spohn Hosp. v. Mayer, 104 S.W.3d 878, 882 (Tex. 2003) (per curiam) (quoting *Tanner* and requiring that courts first consider less preclusive sanctions).

447. *Cire*, 134 S.W.3d at 842.

448. *Id.*

449. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241 (Tex. 1985); *accord* 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 denied).

450. *Hernandez*, 170 S.W.3d at 143 (citing Berry-Parks Rental Equip. Co. v. Sinsheimer, 842 S.W.2d 754, 757 (Tex. App.—Houston [1st Dist.] 1992, no writ)); Paradigm Oil v. Retamco Operating, Inc., 161 S.W.3d 531, 536 (Tex. App.—San Antonio 2005, pet. denied); *Sharpe*, 962 S.W.2d at 702; *Hartford*, 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 Natural Gas Corp. v. Powell, 811 S.W.2d 913, 920-21 (Tex. 1991) (orig. proceeding) (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. *But see* Lisa Ann Mokry, Note, *Discovery Sanctions Must Be*

reviewed for an abuse of discretion.[451]

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.[452] However, written findings are not required because they are often unnecessary and constitute an undue burden on the trial court.[453] Moreover, appellate courts are not required to defer to the trial court's written findings.[454] The reviewing court will use the findings as an aid in its abuse of discretion review, instead of conducting a legal and factual sufficiency review in the same manner as in a nonjury case tried on the merits.[455]

"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).

451. *Cire*, 134 S.W.3d at 838; Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986) (per curiam).

452. IKB Indus. v. Pro-Line Corp., 938 S.W.2d 440, 442 (Tex. 1997); Chrysler Corp. v. Blackmon, 841 S.W.2d 814, 850 (Tex. 1992) (orig. proceeding) (citing Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991) (orig. proceeding)); *TransAmerican*, 811 S.W.2d at 919 n.9. The supreme court noted three benefits to making findings: first, such findings are useful in appellate review in that they demonstrate whether the trial judge followed a reasoned analysis pursuant to the *TransAmerican* and *Braden* standards; second, such findings help assure the parties involved that the decision resulted from 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.

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

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

455. Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 852 (Tex. 1992) (orig. proceeding) (citing Rossa v. U.S. Fid. & Guar. Co., 830 S.W.2d 668, 672 (Tex. App.—Waco 1992, writ denied)); *TransAmerican*, 811 S.W.2d at 919 n.9 (expressing the help that findings in support of sanctions are to appellate courts reviewing the trial court's determination). The supreme court has expressly rejected applying the same legal presumptions favoring a nonjury trial judgment to review sanctions on mandamus. *Blackmon*, 841 S.W.2d at 852 (overruling the sanctions review adopted by *Hartford Accident & Indem. Co. v. Abascal*, 831 S.W.2d 559 (Tex. App.—San Antonio 1992, orig. proceeding)); Vela v. Wagner & Brown, No. 04-04-00745, 2006 WL 1684191, at *12 (Tex. App.—San Antonio June 21, 2006, no pet.) (noting that a "trial court's findings of fact made in a discovery abuse context are entitled to less deference than findings of fact entered in a non-jury case").

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.[456] The inherent powers of a trial court are those which "aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity."[457] The inherent power exists only to the extent necessary[458]

---

456. *In re* Sheshtawy, 154 S.W.3d 114, 124 (Tex. 2004) ("'A court's contempt power does not depend on statutory authority. . . . [I]t is an inherent power that is an essential element of judicial independence and authority.'" (quoting *Ex parte* Gorena, 595 S.W.2d 841, 845 (Tex. 1979))); *In re* Bennett, 960 S.W.2d 35, 40 (Tex. 1997) (orig. proceeding) (per curiam); Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 732 (Tex. 1997); *Vela*, 2006 WL 1684191, at *18; *In re* K.A.R., 171 S.W.3d 705, 721 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (Guzman, J., dissenting); Vulcan Materials Co. v. Bowers, No. 4-04-00062-CV, 2004 WL 2997852, at *4 (Tex. App.—San Antonio Dec. 29, 2004, pet. denied) (mem. op.); Howell v. Tex. Worker's Comp. Comm'n, 143 S.W.3d 416, 446 (Tex. App.—Austin 2004, pet. denied); 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, pet. denied); 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) (orig. proceeding) (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 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), *superseded by statute on other grounds*, Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1154, 1156 (1980) (codified as amended at 28 U.S.C. § 1927 (2000)); *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) (describing three categories of inherent powers of federal courts, including power to impose sanctions for abusive litigation practices), *superseded by statute on other grounds*, Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1154, 1156 (1980) (codified as amended at 28 U.S.C. § 1927 (2000))).

457. *Bennett*, 960 S.W.2d at 40 (quoting Eichelberger v. Eichelberger, 582 S.W.2d 395, 398-99 (Tex. 1979)); *accord* Pub. Util. Comm'n of Tex. v. Cofer, 754 S.W.2d 121, 124 (Tex.

"to deter, alleviate, and counteract bad faith abuse of the judicial process, such as any significant interference with a court's traditional core functions."[459] Assessing sanctions under the trial court's inherent power requires a two-step process: "First, the trial court must 'rely upon the statutes and rules expressly authorizing sanctions,' and second, the trial court must make factual findings to determine whether there is some evidence that the conduct complained of significantly interfered with the court's legitimate exercise of its core functions."[460] In that regard, "there must be a direct relationship between the offensive conduct and the sanction imposed[,] . . . and the sanction imposed must not be excessive."[461]

1988); *K.A.R.*, 171 S.W.3d at 721 (Guzman, J., dissenting) (quoting *Kutch*, 831 S.W.2d at 510); *Howell*, 143 S.W.3d at 446; King's Park Apts., Ltd. v. Nat'l Union Fire Ins. Co., of Pitts., Pa., 101 S.W.3d 525, 540 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); *In re* N.R.C., 94 S.W.3d 799, 809 n.7 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Roberts*, 37 S.W.3d at 33; Cont'l Carbon Co. v. Sea-Land Serv., 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. dism'd); 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").

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

459. 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 510); *see In re* Martin, No. 05-06-00072-CV, 2006 WL 234411, at *2 (Tex. App.—Dallas Feb. 1, 2006, orig. proceeding) (mem. op.) (citing *Eichelberger*, 582 S.W.2d at 398-99) (noting that sanctions under a court's inherent powers are supported when a party significantly interferes with the court's core functions); *K.A.R.*, 171 S.W.3d at 721 (Guzman, J., dissenting) (expressing one area of a trial court's inherent power to sanction as being to remedy "any significant interference with the traditional core functions of Texas courts." (quoting *N.R.C.*, 94 S.W.3d at 809 n.7)); *Mills*, 68 S.W.3d at 145 (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. v. Cornwell, 927 S.W.2d 276, 280 (Tex. App.—Houston [1st Dist.] 1996, no writ) (citing Onwuteaka v. Gill, 908 S.W.2d 276, 280 (Tex. App.—Houston [1st Dist.] 1995, no writ)) (stating the limits on a court's inherent power to sanction).

460. King's Park Apts., Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 101 S.W.3d 525, 541 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (quoting Island Entm't Inc. v. Castaneda, 882 S.W.2d 2, 5 (Tex. App.—Houston [1st Dist.] 1994, writ denied)).

461. Long v. United Welding Supply, Inc., No. 01-03-00034-CV, 2006 WL 1428823, at *14 (Tex. App.—Houston [1st Dist.] May 25, 2006, no pet.) (mem. op.) (citing Greiner v. Jameson, 865 S.W.2d 493, 499 (Tex. App.—Dallas 1993, writ denied)); *accord K.A.R.*, 171 S.W.3d at 725 (Guzman, J., dissenting) (citing *Shook*, 851 S.W.2d at 892); *Scott*, 1997 WL 25473, at *10 (citing Kutch v. Del Mar Coll., 831 S.W.2d 506, 511-12 (Tex. App.—Corpus Christi 1992, no writ)).

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,[462] such as, "hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, entering final judgment and enforcing that judgment."[463] 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.[464] The scope of review is the entire record before the trial court, and the standard of review is abuse of discretion.[465]

2. Appellate Court Power

In *Johnson v. Johnson*,[466] 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."[467] In *Johnson,* the appellant's attorney insulted the trial judge

---

462. *K.A.R.*, 171 S.W.3d at 721-22 (Guzman, J., dissenting); Howell v. Tex. Worker's Comp. Comm'n, 143 S.W.3d 416, 447 (Tex. App.—Austin 2004, pet. denied); Kennedy v. Kennedy, 125 S.W.3d 14, 19 (Tex. App.—Austin 2002, pet. denied); 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 to apply its inherent power, 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 obstructed the court's legitimate exercise of power).

463. *Id.* (citing Armadillo Bail Bonds v. State, 802 S.W.2d 237, 239-40 (Tex. Crim. App. 1990 (en banc))).

464. *In re* K.A.R., 71 S.W.3d 705, 721 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (Guzman, J., dissenting); *In re* Bennett, 960 S.W.2d 35, 40 (Tex. 1997) (orig. proceeding) (per curiam) (reminding that "[t]he power to sanction is of course limited by the due process clause"); *Kutch*, 831 S.W.2d at 510-11 (reiterating the due process limitations on a court's power to sanction).

465. *K.A.R.*, 171 S.W.3d at 722 (Guzman, J., dissenting); *N.R.C.*, 94 S.W.3d at 809 n.7; *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 "[a]n abuse of discretion occurs when a trial court acts in an unreasonable and arbitrary manner, or . . . without reference to any guiding principles").

466. 948 S.W.2d 835 (Tex. App.—San Antonio 1997, writ denied).

467. Johnson v. Johnson, 948 S.W.2d 835, 840 (Tex. App.—San Antonio 1997, writ denied) (citing Campos v. Inv. Mgmt. Props., Inc., 917 S.W.2d 351, 358 (Tex. App.—San Antonio 1996, writ denied) (Green, J., concurring). "[W]hen attorneys speak disrespectfully of the trial court, they 'exceed their rights and evidence a want of proper respect for the court . . . .'" *Johnson*, 948 S.W.2d at 840 (citing Mossop v. Zapp, 179 S.W. 685, 685

by questioning both his ability to understand the complexities of the case and his decision to uphold the law.[468] 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.[469] Subsequently, in *In re Maloney*,[470] an attorney was ordered to answer a show cause order of the San Antonio Court of Appeals based upon her accusations that the court made its decision based on politics and her comment that "[i]t must be embarrassing to take such a pro-rapist, pro-big-insurance-defense-firm position with so appallingly non-existent legal or logical basis."[471] The court held:

(Tex. Civ. App.—Galveston 1915, no writ)); *cf.* Howell v. Tex. Worker's Comp. Comm'n, 143 S.W.3d 416, 447 (Tex. App.—Austin 2004, pet. denied) (quoting Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979)) (ruling that inherent powers give a trial court authority to impose sanctions on a party for its actions in a separate court). The San Antonio Court of Appeals also has held that it has the inherent 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. *In re* Ryan, 993 S.W.2d 294, 298 (Tex. App.—San Antonio 1999, no pet.) (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'" (quoting *Eichelberger*, 582 S.W.2d at 398)).

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

469. *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 impose monetary penalties as sanctions. *See* Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 732-33 (Tex. 1997) (advocating a distinction between "respectful advocacy and judicial denigration" (quoting *Maloney*, 949 S.W.2d at 388)).

470. 949 S.W.2d 385 (Tex. App.—San Antonio, 1997, orig. proceeding) (en banc) (per curiam).

471. *In re* Maloney, 949 S.W.2d 385, 386 (Tex. App.—San Antonio, 1997, orig. proceeding) (en banc) (per curiam). In *In re Maloney*, the motions for rehearing in that case, as described by the court, "ascribe improper political motivations for the court's decision and imply that the court misrepresented the record in its opinion," and added:

> Specifically, Maloney asserts in the motion that "[p]olitics should not win the day over incapacitated rape victims," and "Plaintiffs can think of no reason for this opinion other than politics." Maloney further contends that "[i]t must be embarrassing to take such a pro-rapist, pro-big-insurance-defense-firm position with so appallingly non-existent legal or logical basis," and "[the] [c]ourt should admit it is writing new law to assist the insurance companies of a sleazy nursing home that happen to be represented by an insurance defense firm." Finally, Maloney describes the court's reasoning as

> A distinction must be drawn between respectful advocacy and judicial denigration. Although the former is entitled to a protected voice, the latter can only be condoned at the expense of the public's confidence in the judicial process. Even were this court willing to tolerate the personal insult levied by [counsel], we are obligated to maintain the respect due this Court and the legal system we took an oath to serve.[472]

The court held the attorney's comments in her "original motion for rehearing and in her response to the court's show cause order are direct attacks on the integrity of the justices of this Court" and referred the court's opinion to the State Bar for its consideration of disciplinary action.[473]

In *Merrell Dow Pharmaceuticals, Inc. v. Havner*,[474] the Texas Supreme Court was confronted with a similar attack on the integrity of the court.[475] In its order overruling the petitioner's motion for

---

"specious" and states that the court "goes on to make some rather outlandish representations which are not supported by the record, the transcript, or by any matter before the court."

In her response to our show cause order, Maloney initially apologizes if she was inappropriate or offensive; however, the substance of her response supports our interpretation of her initial remarks. Maloney asserts that: "The panel was comprised exclusively of Republican judges, one of whom had a very hard fought, very close election where I was a known active supporter of his opponent; also, it was well known that I have a long history of supporting the Democratic party. There existed more than one reason why the panel could savor a bit of political revenge."

Maloney, 949 S.W.2d at 386-87.

472. *Id.* at 388.

473. *Id.*

474. 953 S.W.2d 706 (Tex. 1997).

475. Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 732 (Tex. 1997) (addressing the behavior of respondents' counsel). The supreme court did not identify in the order the nature of the offensive conduct. *Id.* The following are a few of the likely candidates from the respondents' motion for rehearing: "Outlined against a hazy July sky, the four horsemen rode again last Wednesday, July 9, 1997. You know them: Pestilence, Death, Famine, and this Texas Supreme Court"; "Shucking its collective black robe and confidently donning the familiar, white lab coat, . . . this [c]ourt has taken on the world of science. Almost. Instead, [the opinion] is no more than a detailed, 58-page, science fiction, filled with skewed observations and prissy platitudes. . . . This Texas Supreme Court, fervent to follow the law laid out for it by those who would kill and injure for profit, stand stiffly in a row, nine nutty professors, hands clasped tightly together, shoulder to shoulder, chanting with glazed eyes and cultlike precision"; "A simple, painful truth: No little girl, or anyone else, will take away corporate money, no matter what – not on our watch"; and "Justice is no longer for sale in Texas, the money has been escrowed, the deed has been signed, the deal has been done." Respondents' Motion for Rehearing at 1-5, Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997) (No. 95-1036). Respondents' motion

rehearing, the court noted that "[c]ourts possess the inherent power to discipline an attorney's behavior" and that "'[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence.'"[476] The court added: "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process."[477] Following the reasoning of the San Antonio Court of Appeals' decisions in *Johnson* and *In re Maloney*, the Texas Supreme Court began the procedure of referring the offending attorneys to the State Bar Grievance Committee.[478]

It is likely that the standards applicable to the trial courts would also be applicable to the courts of appeals—the sanction must be just, there must be a direct relationship between the offensive conduct and the sanction imposed, and the sanction must not be excessive. The scope of review would be the entire record before the court of appeals, and the supreme court's standard of review of a court of appeals' sanction would be abuse of discretion.

R. *Frivolous Pleadings*

Rule 13,[479] in combination with the Texas Civil Practice and Remedies Code,[480] 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

---

also contained multiple references to a fundraising letter written by Merrell Dow's counsel on behalf of the re-election campaign of one of the justices. *Id.*

476. *Havner*, 953 S.W.2d at 732 (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991)).

477. *Id.* (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 4, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9)).

478. *Id.* at 732-33.

479. TEX. R. CIV. P. 13. Rule 13 is similar to its federal counterpart. *See* FED. R. CIV. P. 11 (discussing the procedure for sanctions applicable to the signing of pleadings and motions).

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

or for purposes of harassment."[481] Under Rule 13, a trial court must presume that all pleadings and motions have been filed in good faith and may only impose sanctions for good cause,[482] the particulars of which must be included in the sanctions order.[483] 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 [current] law."[484] The court may also consider the amount of time available

---

481. Trimble v. Itz, 898 S.W.2d 370, 372-73 (Tex. App.—San Antonio 1995, writ denied) (citing Susman Godfrey, L.L.P. v. Marshall, 832 S.W.2d 105, 108 (Tex. App.—Dallas 1992, orig. proceeding)) (describing the purpose of Rule 13); *accord* Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios, 46 S.W.3d 873, 878 (Tex. 2001) (declaring that "filing a frivolous lawsuit can be litigation misconduct subject to sanction").

482. TEX. R. CIV. P. 13; *In re* K.N.R., No. 05-03-00214-CV, 2004 WL 878273, at *2 (Tex. App.—Dallas Apr. 26, 2004, no pet.) (mem. op.) (citing Appelton v. Appelton, 76 S.W.3d 78, 86 (Tex. App.—Houston [14th Dist.] 2002, no pet.)); Daniel v. Webb, 110 S.W.3d 708, 711 (Tex. App.—Amarillo 2003, 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 [s]ection 9.012." TEX. CIV. PRAC. & REM. CODE ANN. § 9.013 (Vernon Supp. 2002).

483. TEX. CIV. PRAC. & REM. CODE ANN. § 10.005 (Vernon Supp. 2002); TEX. R. CIV. P. 13; *see* Murphy v. Friendswood Dev. Co., 965 S.W.2d 708, 710 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (reversing a sanction order which merely 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, no writ) (failing to determine the facts supporting sanctions due to the trial court's bare 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* Birnbaum v. Law Office G. David Westfall, 120 S.W.3d 470, 475-76 (Tex. App.—Dallas 2003, pet. denied) (refusing to address the validity of a trial court's sanctions because the issue was not preserved); 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 lacking order. *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).

484. Home Owners Funding Corp. of Am. v. Scheppler, 815 S.W.2d 884, 889 (Tex. App.—Corpus Christi 1991, no writ) (quoting TEX. R. CIV. P. 13); *accord* TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(2) (Vernon Supp. 2002) (attaching warranties to each legal contention in a pleading or motion); *In re* United Servs. Auto Ass'n, 76 S.W.3d 112, 116 (Tex. App.—San Antonio 2002, orig. proceeding) (noting that a trial court should ask,

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."[485] 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 or philosophic viewpoint the trial court finds fault."[486] A trial court's order under Rule 13 or the Texas Civil Practice and Remedies Code is reviewed for an abuse of discretion.[487]

"[D]id the party . . . make a reasonable inquiry into the legal and factual basis of the claim?"); *see also In re* A.C.B., 103 S.W.3d 570, 576 (Tex. App.—San Antonio 2003, no pet.) (allowing findings and conclusions to be filed after sanctions are issued).

485. Mattly v. Spiegel, Inc., 19 S.W.3d 890, 896 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *accord* 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) (quoting McCain v. NME Hosps. Inc., 856 S.W.2d 751, 757-58 (Tex. App.—Dallas 1993, no writ)); *Scheppler*, 815 S.W.2d at 889; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 9.012(b) (Vernon Supp. 2005) (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. 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); *see* Aldine Indep. Sch. Dist. v. Baty, 946 S.W.2d 851, 852 (Tex. App.—Houston [14th Dist.] 1997, no writ) (holding that the trial court's spontaneous sanction order failed to meet Rule 13 requirements). Unlike Rule 13, Rule 215 does not require a trial court to state any reasons which create good cause. TEX. R. CIV. P. 215; Kahn v. Garcia, 816 S.W.2d 131, 133 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding).

486. *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)).

487. Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios, 46 S.W.3d 873, 877 (Tex. 2001); GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 730 (Tex. 1993); Koslow's v. Mackie, 796 S.W.2d 700, 704 (Tex. 1990); Emeritus Corp. v. Highsmith, No. 04-05-00551-CV, 2006 WL 1466542, at *4 (Tex. App.—San Antonio May 31, 2006, no pet.); Howell v. Texas Worker's Comp. Comm'n, 143 S.W.3d 416, 446 (Tex. App.—Austin 2004, pet. denied); 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); *Chancey*, 942 S.W.2d at 154; *Baty*, 946 S.W.2d at 852; 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; *see also* Rodriguez v. State Dep't of Highways, 818 S.W.2d 503, 504 (Tex. App.—Corpus Christi 1991, no writ) (adopting the abuse of discretion standard because of the similarity of Rule 13 to FED. R. CIV. P. 11); *Scheppler*, 815 S.W.2d at 889 (looking to FED. R. CIV. P. 11 for the abuse of discretion standard).

S. *Chapter 74 Expert Reports*

In Texas, traditional "medical malpractice" litigation was fundamentally altered in 1977 when the Texas Legislature enacted the Medical Liability and Insurance Improvement Act in response to a perceived health care crisis.[488] Article 4590i of the Revised Civil Statutes provided a notice of suit provision and capped recoverable damages in those cases described as "health care liability claims."[489]

Despite the enactment of article 4590i, the Texas Legislature was still faced with what was considered to be "a medical malpractice crisis in this state" almost twenty years later.[490] To address the continuing and growing concerns, the legislature responded by adding the requirement of an expert report:

> By 1995, the [l]egislature's concerns [about a health care crisis] had not abated but had deepened. As part of its continuing efforts to reduce the cost of health care . . . , the [l]egislature amended article 4590i to require[, among other things,] trial courts to dismiss health care lawsuits unless an expert report that met certain requirements was filed within the first 180 days of the suit . . . . The obvious intent of this statutory provision was to stop suits that had no merit from proceeding through the courts.[491]

In 2003, the legislature expressed concern "that the number of health care liability claims" had still not decreased but had actually

---

488. McGlothin v. Cullington, 989 S.W.2d 449, 451 (Tex. App.—Austin 1999, pet. denied) (discussing Medical Liability and Insurance Improvement Act, 65th Leg., R.S., ch. 817, § 1.02(a)(5), 1977 Tex. Gen. Laws 2040).

489. Medical Liability and Insurance Improvement Act, 65th Leg., R.S., ch. 817, §§ 4.01(c), 11.02, 11.04, 1977 Tex. Gen. Laws 2039, 2048, 2053, *repealed by* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884. The Act defined "health care provider" as "any person, partnership, professional association, corporation, facility, or institution duly licensed or chartered by the State of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, pharmacist, or nursing home, or an officer, employee, or agent thereof acting in the course and scope of his employment." *Id.* § 1.03(3). A "health care liability claim" was "a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient, whether the patient's claim or cause of action sounds in tort or contract." *Id.* § 1.03(4).

490. *In re* Woman's Hosp. of Tex., Inc., 141 S.W.3d 144, 147 (Tex. 2004) (orig. proceeding) (Owen, J., joined by Hecht & Brister, JJ., concurring & dissenting).

491. *Id.*

increased "inordinately."[492] Once again attempting to reduce the cost of health care, the legislature repealed [a]rticle 4590i and enacted chapter 74 of the Civil Practice and Remedies Code.[493] In enacting the specific provisions of section 74.351, the legislature made extensive changes to the expert report requirement.[494]

Under section 74.351, within 120 days after filing the original petition, a plaintiff must serve on all parties or their attorneys the expert reports, with a curriculum vitae for each reporting expert.[495] The parties, however, may arrange to extend the deadline for serving the expert report by a written agreement.[496] If an expert report is not timely served, the trial court, "on the motion of the affected physician or health care provider, shall . . . [dismiss] the claim with respect to the physician or health care provider, with prejudice" and award to the affected "healthcare provider reasonable attorney's fees and costs."[497] If an expert report is served within 120 days but "elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency."[498]

The trial court's failure to dismiss under section 74.351(b) is subject to interlocutory appeal.[499] The threshold decision regarding

---

492. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(a)(1), 2003 Tex. Gen. Laws 847, 884.

493. Mokkala v. Mead, 178 S.W.3d 66, 74 (Tex. App.—Houston [14th Dist.] 2005, pet. filed). *See generally* Act of June 11, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847 (repealing the Medical Liability and Insurance Improvement Act of 1977).

494. *Mokkala*, 178 S.W.3d at 75; *see* McGahey v. Daughters of Charity Health Servs. of Waco, No. 10-02-00288-CV, 2004 WL 1903300, at *2 (Tex. App.—Waco Aug. 25, 2004, no pet.) (mem. op.) (noting some of the differences in seeking extensions for filing expert reports between section 74.351(a) of the Texas Civil Practice and Remedies Code and former article 4590i).

495. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon Supp. 2005); *see id.* § 74.351(r)(6) (defining the requirements necessary to comprise an expert report).

496. *Id.* § 74.351(a) (Vernon Supp. 2005).

497. *Id.* § 74.351(b)(1)-(2) (Vernon Supp. 2005).

498. *Id.* § 74.351(c) (Vernon Supp. 2005).

499. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (Vernon 1997 & Supp. 2005) (providing interlocutory appeal of an order that "denies all or part of the relief sought by a motion under [s]ection 74.351(b), except that an appeal may not be taken from an order granting an extension under [s]ection 74.351"). The extent of this right to appeal is an issue currently pending before the supreme court. *See* Badiga v. Lopez, No. 13-04-00452-CV, 2005 WL 1572273, at *1 (Tex. App.—Corpus Christi July 7, 2005, pet. filed) (declining to exercise appellate jurisdiction when the "legality of the 30-day extension provided by the trial court" is questioned). *But see* Emeritus Corp. v. Highsmith, No. 04-05-00551-CV, 2006 WL 1466542, at *3 (Tex. App.—San Antonio May 31, 2006, no pet.) ("[W]e hold that

whether the statute applies is a question of law subject to de novo review.[500] A trial court's decision to dismiss a case under section 74.351(b), like its decision under the predecessor statute, article 4590i, section 13.01, is reviewed for abuse of discretion.[501] However, when an expert report is not timely served, the trial court has no discretion but to dismiss a health care liability claim.[502]

T. *Vexatious Litigation*

The Texas Civil Practice and Remedies Code has been amended to include chapter 11 in an attempt to deter non-meritorious litigation.[503] 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 "(1) determining that the plaintiff is a vexatious litigant; and (2) requiring the plaintiff to furnish security."[504] After the defendant files this motion, the litigation is stayed until the trial court deter-

---

section 51.014(a)(9) authorizes an interlocutory appeal of an order denying a defendant's motion to dismiss in whole or in part *unless* the order also grants a claimant an extension of time pursuant to [s]ection 74.351(c) to cure the deficiencies in a timely-served report.").

500. Wickware v. Sullivan, 70 S.W.3d 214, 218 (Tex. App.—San Antonio 2001, no pet.) (citing Johnson v. City of Fort Worth, 774 S.W.2d 653, 656 (Tex. 1989)). Chapter 74 defines a "health care liability claim" as the following:

> [A] cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (Vernon 2005). The definition of "health care provider" is also wider than under the predecessor statute. *See id.* § 74.001(a)(12)(B) (including in the term any "officer, director, shareholder, member, partner, manager, owner, or affiliate of a health care provider or physician," and any employees of such acting within the scope of their employment).

501. *Compare* McIntyre v. Ramirez, 109 S.W.3d 741, 749 (Tex. 2003) (discussing the standard under chapter 74), *with* Bowie Mem'l Hosp. v. Wright, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam) (explaining the standard under former article 4590i), *and* Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios, 46 S.W.3d 873, 875 (Tex. 2001) (noting the standard for reviewing article 4590i), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (Vernon Supp. 2005).

502. *See Emeritus Corp.*, 2006 WL 1466542, at *7 (noting that the trial court had no choice but to dismiss the medical liability claim where no expert report was served or extension agreement made).

503. TEX. CIV. PRAC. & REM. CODE ANN. §§ 11.001-.104 (Vernon 2002) (dealing with vexatious litigants).

504. *Id.* § 11.051 (Vernon 2002).

mines the merits of the motion.[505] The code sets forth the criteria for determining whether a plaintiff is a vexatious litigant.[506]

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.[507] If the plaintiff fails to provide the security before the set timeframe ends, the court shall dismiss the litigation.[508] After notice and a hearing, the trial court may also enter an order prohibiting the 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.[509] If the plaintiff violates the order, he "is subject to contempt of court."[510] 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.[511]

U. *Summary Judgment: Rule 166a(c)*

The underlying purpose of Texas's summary judgment rules is a narrow one—the elimination of "patently unmeritorious claims and untenable defenses."[512] Pursuant to Rule 166a(c), a summary judgment is proper only when a movant establishes that there is not a genuine issue of material fact and that he is therefore "enti-

505. *Id.* § 11.052 (Vernon 2002).
506. *Id.* § 11.054 (Vernon 2002).
507. *Id.* § 11.055 (Vernon 2002).
508. TEX. CIV. PRAC. & REM. CODE ANN. § 11.056 (Vernon 2002).
509. *Id.* § 11.101(a) (Vernon 2002).
510. *Id.* § 11.101(b) (Vernon 2002).
511. *Compare id.* § 11.101 (Vernon 2002) (giving the trial court the ability to ban a vexatious litigant from the Texas court system), *with id.* § 13.001 (Vernon 2002) (establishing the requirement that an action or argument be nonfrivolous); Jones v. CGU Ins. Co., 78 S.W.3d 626, 628 (Tex. App.—Austin 2002, no pet.) (reviewing the trial court's dismissal of appellant's lawsuit pursuant to section 13.001 for an abuse of discretion).
512. Casso v. Brand, 776 S.W.2d 551, 556 (Tex. 1989) (quoting City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 n.5 (Tex. 1979)); *accord* Gulbenkian v. Penn, 151 Tex. 412, 252 S.W.2d 929, 931 (1952); Breceda v. Whi, 187 S.W.3d 148, 152 (Tex. App.—El Paso 2006, no pet.); Valores Corporativos, S.A. de C.V. v. McLane Co., 945 S.W.2d 160, 169 (Tex. App.—San Antonio 1997, writ denied). *See generally* David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 54 BAYLOR L. REV. 1 (2002) (examining summary judgment practice in the Texas and federal courts).

tled to judgment as a matter of law."[513] In a summary judgment proceeding, the burden of proof is on the movant, who, unless he has leave of court, has twenty-one days prior to the date set for hearing to file and serve the summary judgment motion and supporting affidavits.[514] Likewise, the party opposing the motion must file and serve his response and opposing affidavits prior to seven days before the hearing, unless the court grants an extension.[515] Once the movant has established a right to a summary judgment, the burden of proof shifts to the nonmovant.[516] To avoid a summary judgment against it, the nonmovant must then respond to the motion and present to the trial court any issues that would preclude summary judgment.[517] If the summary judgment evidence set out in the motion and response shows that no genuine issue of material fact exists, and the motioning party is owed judgment as a matter of law, the summary judgment will be granted.[518]

---

513. TEX. R. CIV. P. 166a(c); Browning v. Prostok, 165 S.W.3d 336, 344, (Tex. 2005); W. Invs., Inc. v. Urena, 162 S.W.3d 547, 550 (Tex. 2005); Little v. Tex. Dep't of Criminal Justice, 148 S.W.3d 374, 381 (Tex. 2004); Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 157 (Tex. 2004); Fort Worth Osteopathic Hosp., Inc. v. Reese, 148 S.W.3d 94, 99 (Tex. 2004); Provident Life & Accident Ins. Co. v. Knott, 128 S.W.3d 211, 215-16 (Tex. 2003); 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); Swilley v. Hughes, 488 S.W.2d 64, 67 (Tex. 1972).

514. TEX. R. CIV. P. 166a(c); Roskey v. Tex. Health Facilities Comm'n, 639 S.W.2d 302, 303 (Tex. 1982) (per curiam).

515. TEX. R. CIV. P. 166a(c).

516. Boyd v. Kallam, 152 S.W.3d 670, 676 (Tex. App.—Fort Worth 2004, pet. granted) (citing City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979)); Raburn v. KJI Bluechip Invs., 50 S.W.3d 699, 702 (Tex. App.—Fort Worth 2001, no pet.). A summary judgment cannot be granted simply because the nonmovant fails to respond when the movant's summary judgment evidence is not legally sufficient. *Clear Creek Basin Auth.*, 589 S.W.2d at 678.

517. *Id.* 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 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., 98 S.W.3d 682, 686 (Tex. 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 by showing that the failure to timely respond (1) was not intentional or the result of conscious indifference, but the result of accident or mistake, and (2) that allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment." *Id.* at 688. 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.*

518. TEX. R. CIV. P. 166a(c); D. Houston, Inc. v. Love, 92 S.W.3d 450, 454 (Tex. 2002) (citing Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548 (Tex. 1985)).

> [T]he question on appeal . . . is *not* whether the summary judgment proof *raises fact issues* . . . , 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.[519]

On appeal, 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 it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts must be resolved in favor of the nonmovant.[520]

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,"[521] or establishes all the elements

---

519. Gibbs v. Gen. Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970); *see* IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason, 143 S.W.3d 794, 798 (Tex. 2003) (citing Sw. Elec. Power Co. v. Grant, 73 S.W.3d 211, 215 (Tex. 2002)).

520. Am. Tobacco Co. v. Grinnell, 951 S.W.2d 420, 425 (Tex. 1997) (citing Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548-49 (Tex. 1985)); *accord* Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842, 846 (Tex. 2005) (citing Sw. Elec. Power Co. v. Grant, 73 S.W.3d 211, 215 (Tex. 2002)); W. Invs., Inc. v. Urena, 162 S.W.3d 547, 550 (Tex. 2005); Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 157 (Tex. 2004); IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason, 143 S.W.3d 794, 798 (Tex. 2004); Provident Life & Accident Ins. Co. v. Knott, 128 S.W.3d 211, 215 (Tex. 2003); D. Houston, Inc. v. Love, 92 S.W.3d 450, 454 (Tex. 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); Pustejovsky v. Rapid-Am. Corp., 35 S.W.3d 643, 645-46 (Tex. 2000); Hughes Wood Prods., Inc. v. Wagner, 18 S.W.3d 202, 205 (Tex. 2000); Havlen v. McDougall, 22 S.W.3d 343, 345 (Tex. 2000); Rhône-Poulenc, Inc. v. Steel, 997 S.W.2d 217, 223 (Tex. 1999); KPMG Peat Marwick v. Harrison County Hous. Fin. Corp., 988 S.W.2d 746, 748 (Tex. 1999); Sci. Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 911 (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).

521. Little v. Tex. Dep't of Criminal Justice, 148 S.W.3d 374, 381 (Tex. 2004) (citing Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995)); *Love*, 92 S.W.3d at 454; *Am. Tobacco Co.*, 951 S.W.2d at 425; *Sci. Spectrum, Inc.*, 941 S.W.2d at 911; *Lear Siegler, Inc.*, 819 S.W.2d at 471.

of an affirmative defense as a matter of law.[522] However, because the appellate court views all evidence in favor of the nonmovant, the usual presumption that the judgment is correct does not apply to summary judgments.[523]

A summary judgment is reviewed de novo.[524] On appeal, evidence that favors the movant will not be "considered unless it is uncontroverted."[525] 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, free from contradictions and inconsistencies, and could have been readily controverted."[526]

When appealing from summary judgment, the scope of review is also limited.[527] The movant's motion "for summary judgment must itself expressly present the grounds upon which it is made, and must stand or fall on these grounds alone."[528] Issues which were not expressly presented to the trial court by the written motion for

---

522. *Shah*, 67 S.W.3d at 842 (citing Velsicol Chem. Corp. v. Winograd, 956 S.W.2d 529, 530 (Tex. 1997) (per curiam)); Welch v. Milton, 185 S.W.3d 586, 593 (Tex. App.—Dallas 2006, pet. filed).

523. *See*, *Diversicare*, 185 S.W.3d at 846 (declaring that all competent evidence is taken in favor of the nonmovant); *accord Mason*, 143 S.W.3d at 798; *Knott*, 128 S.W.3d at 215; *Grant*, 73 S.W.3d at 215 (citing *Sci. Spectrum, Inc.*, 941 S.W.2d at 911); *Limestone Prods. Distribution*, 71 S.W.3d at 311; *cf.* Montgomery v. Kennedy, 669 S.W.2d 309, 310 (Tex. 1984) (describing the voluminous and detailed summary judgment record to be reviewed); Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co., 391 S.W.2d 41, 47 (Tex. 1965) (refusing to consider movant's summary judgment evidence 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).

524. Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 661 (Tex. 2005) (citing *Knott*, 128 S.W.3d at 215); Enter. Leasing Co. of Houston v. Barrios, 156 S.W.3d 547, 549 (Tex. 2004) (per curiam); *Little*, 148 S.W.3d at 381; Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 290 n.137 (Tex. 2004) (citing *Knott*, 128 S.W.3d at 215); *Joe*, 145 S.W.3d at 156; Natividad v. Alexsis, Inc., 875 S.W.2d 695, 699 (Tex. 1994); *see* Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 549 (Tex. 1985) (reviewing the summary judgment by reexamining each element of the cause of action).

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

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

527. Capitol Indem. Corp. v. Kirby Rest. Equip. & Chem. Supply Co., 170 S.W.3d 144, 146 (Tex. App.—San Antonio 2005, pet. denied).

528. Sci. Spectrum Inc. v. Martinez, 941 S.W.2d 910, 912 (Tex. 1997) (citing McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 341 (Tex. 1993)); *accord* Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 204 (Tex. 2002) (noting that "[a] court cannot grant summary judgment on grounds that were not presented" (citing *Sci. Spectrum, Inc.*,

summary judgment or response to the motion cannot be considered by an appellate court as grounds for reversal.[529] The appellate court "can consider the record only as it existed at the time summary judgment was entered."[530] Moreover, an appellate court may not raise grounds for reversing a summary judgment *sua sponte*.[531] However, the appellate court should review "all grounds presented to the trial court and preserved on appeal in the interest of judicial economy."[532]

When the motion for summary judgment is based on several different grounds[533] 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 is insufficient to support summary judgment granted."[534] The summary judgment must be affirmed if any of the theories are meritorious.[535] If the reviewing

---

941 S.W.2d at 912)); *see also* TEX. R. CIV. P. 166a(c) (requiring the movant's motion to explicitly state the specific grounds for the summary judgment).

529. TEX. R. CIV. P. 166a(c); Progressive County Mut. Ins. Co. v. Boyd, 177 S.W.3d 919, 921 (Tex. 2005) (per curiam); *Johnson*, 73 S.W.3d at 204 (denying summary judgment to movant's claim because issues were not included in original motion before the trial court); *McConnell*, 858 S.W.2d at 339; City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 674-75 (Tex. 1979).

530. McGee v. Deere & Co., No. 03-04-00222-CV, 2005 WL 670505, at *1 (Tex. App.—Austin Mar. 24, 2005, pet. denied) (mem. op.) (citing Johnnie C. Ivy Plumbing Co. v. Keyser, 601 S.W.2d 158, 160 (Tex. Civ. App.—Waco 1980, no writ)).

531. San Jacinto River Auth. v. Duke, 783 S.W.2d 209, 210 (Tex. 1990) (citing Cent. Educ. Agency v. Burke, 711 S.W.2d 7, 9 (Tex. 1986)); *see* Jacobs v. Satterwhite, 65 S.W.3d 653, 655 (Tex. 2001) (stating that the appellate court erred in reversing a summary judgment on a claim which the movant never pled in the trial court); *see also* Brown v. Hearthwood II Owners Ass'n, Inc., No. 14-04-01104-CV, 2006 WL 1459833, at *5 (Tex. App.—Houston [14th Dist.] May 30, 2006, no pet.) (plurality op.) (explaining that the court lacks the ability to evaluate a summary judgment claim when it has not been raised in the trial court).

532. Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842, 846 (Tex. 2005) (citing Provident Life & Accident Ins. Co. v. Knott, 128, S.W.3d 211, 216 (Tex. 2003); Cincinnati Life Ins. Co. v. Cates, 927 S.W.2d 623, 626 (Tex. 1996)).

533. The reviewing court should "affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review" have merit. Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 157 (Tex. 2004) (citing *Cates*, 927 S.W.2d at 626; Carr v. Brasher, 776 S.W.2d 567, 569 (Tex. 1989)).

534. Skiles v. Jack in the Box, Inc., 170 S.W.3d 173, 178 (Tex. App.—Dallas 2005, no pet.); *accord* State Farm Fire & Cas. Co. v. S.S. & G.W., 858 S.W.2d 374, 380 (Tex. 1993) (noting that courts consider whether any of the movant's theories support summary judgment); Basse Truck Line, Inc. v. First State Bank, Bandera, Tex., 949 S.W.2d 17, 19 (Tex. App.—San Antonio 1997, writ denied).

535. W. Invs., Inc. v. Urena, 162 S.W.3d 547, 550 (Tex. 2005); Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex., 136 S.W.3d 643, 648 (Tex. 2004) (citing FM Props.

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.[536] However, if both parties file a motion for summary judgment with the trial court, and one is granted and one is denied, the reviewing court should determine all presented questions and render the judgment that should have been issued by the trial court.[537]

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).[538] "[A]n order that expressly disposes of the entire case is not interlocutory merely because the record fails to show an adequate motion or other legal basis for the disposition."[539] Thus, despite perceived inadequacies in the record, language in the record expressing finality may help the appellate court in determining whether the order should be considered final; "[l]anguage that the plaintiff take nothing by his

---

Operating Co. v. City of Austin, 22 S.W.3d 868, 872-73 (Tex. 2000)); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473 (Tex. 1995); Carr v. Brasher, 776 S.W.2d 567, 569 (Tex. 1989); Malooly Bros., Inc. v. Napier, 461 S.W.2d 119, 121 (Tex. 1970); *Skiles*, 170 S.W.3d at 178; Valles v. Tex. Comm'n on Jail Standards, 845 S.W.2d 284, 287 (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).

536. Jones v. Strauss, 745 S.W.2d 898, 900 (Tex. 1988); *accord* Lubbock County, Tex. v. Trammel's Lubbock Bail Bonds, 80 S.W.3d 580, 584 (Tex. 2002); *see also Skiles*, 170 S.W.3d at 185 (reversing and remanding summary judgment of three issues on appeal because of trial court error).

537. *Patient Advocates of Tex.*, 136 S.W.3d at 648; *accord* SAS Inst., Inc. v. Breitenfeld, 167 S.W.3d 840, 841 (Tex. 2005) (per curiam); Argonaut Ins. Co. v. Baker, 87 S.W.3d 526, 529 (Tex. 2002) (citing City of Garland v. Dallas Morning News, 22 S.W.3d 351, 356 (Tex. 2000)); Holy Cross Church of God in Christ v. Wolf, 44 S.W.3d 562, 566 (Tex. 2001); FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 872 (Tex. 2000); *Jones*, 745 S.W.2d at 900; Members Mut. Ins. Co. v. Hermann Hosp., 664 S.W.2d 325, 328 (Tex. 1984); Tobin v. Garcia, 159 Tex. 58, 316 S.W.2d 396, 400-01 (1958).

538. Lehmann v. Har-Con Corp., 39 S.W.3d 191, 204 (Tex. 2001); Sultan v. Mathew, 178 S.W.3d 747, 751 (Tex. 2005) (explaining that to be final and appealable, the judgment given must dispose each issue and party); *cf. In re* Lynd Co., 195 S.W.3d 682, 685 (Tex. 2006) (orig. proceeding) (expressing during the appeal of a default judgment, appellate review is only proper upon a final judgment expressly disposing of the case). *See generally* William J. Boyce, *Finality Plus, in* UNIV. TEX. 12TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS (June 2002) (discussing the issue of finality of summary judgments); William J. Boyce, *Is Lehmann the Final Word on Summary Judgment Finality?*, XIV THE APP. ADVOC. 4 (Summer 2001) (analyzing the finality issue of summary judgments after Lehmann).

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

claims in the case, or that the case is dismissed, shows finality if there are no other claims by other parties . . . ."[540] The correct resolution under these circumstances, therefore, is to treat the summary judgment as final and appealable.[541] 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.[542]

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

Since 1997, litigants may assert an additional ground for summary judgment.[543] Under Texas Rule of Civil Procedure 166a(i), 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.[544] However, it is inappropriate to file a Rule 166a(i) motion until there has been adequate time for discovery.[545] Moreover, a Rule 166a(i) motion must specifically set forth the elements of the adverse party's claim or defense for which there is no evidence.[546] The motion cannot be conclusory or generally allege that there is no evidence to support the claims.[547] 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."[548] Under the rule, if the nonmovant fails to provide enough

---

540. *Id.* at 205.

541. Ritzell v. Espeche, 87 S.W.3d 536, 537-38 (Tex. 2002) (per curiam) (explaining that the trial court's summary judgment order was unmistakably clear that all claims were adjudicated, thus making the summary judgment final).

542. *Id.* at 538.

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

544. *Id.* & cmt.; W. Invs., Inc. v. Urena, 162 S.W.3d 547, 550 (Tex. 2005).

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

546. *Id.* (requiring that the motion cannot be conclusory or generally allege that there is no evidence to support the claims).

547. Keszler v. Mem. Med. Ctr. of E. Tex., 105 S.W.3d 122, 127-28 (Tex. App.—Corpus Christi 2003, no pet.) (citing Oasis Oil Corp. v. Koch Ref. Co., 60 S.W.3d 248, 252 (Tex. App.—Corpus Christi 2001, pet. denied)).

548. Forbes Inc. v. Granada Biosciences, Inc., 124 S.W.3d 167, 172 (Tex. 2003); *accord* Haas v. George, 71 S.W.3d 904, 911 (Tex. App.—Texarkana 2002, no pet.) (citing Jackson v. Fiesta Mart, Inc., 979 S.W.2d 68, 70-71 (Tex. App.—Austin 1998, no pet.)); Maguire Oil Co. v. City of Houston, 69 S.W.3d 350, 357 (Tex. App.—Texarkana 2002, pet. denied); Kelly v. DeMoss Owners Ass'n, 71 S.W.3d 419, 423 (Tex. App.—Amarillo 2002, no pet.); *accord* Fort Worth Osteopathic Hosp., Inc. v. Reese, 148 S.W.3d 94, 99 (Tex. 2004) (citing Ford Motor Co. v. Ridgway, 135 S.W.3d at 600; Morgan v. Anthony, 27 S.W.3d 928, 929

evidence, the trial court must grant the motion.[549]

A Rule 166a(i) summary judgment uses a no-evidence standard.[550] "A no-evidence summary judgment is essentially a pretrial directed verdict[,]" and the same legal sufficiency standard is applied.[551] The trial court should grant a summary judgment, sustaining a no-evidence point, when one of the following is present:

> (a) [T]here is a complete absence of evidence of a vital fact[;] (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove . . . [an essential element of the adverse party's claim or defense][;] (c) the evidence offered to prove a vital fact is no more than a mere scintilla[;] or (d) the evidence conclusively establishes the opposite of the vital fact.[552]

The court will determine there is a genuine issue of material fact when the nonmovant presents "more than a scintilla of evidence establishing the existence of the challenged element."[553] More than a scintilla of evidence is found when the evidence is enough that would allow "reasonable and fair-minded people to differ in their conclusions."[554] Therefore, a nonmovant will defeat a Rule 166a(i) motion for summary judgment by presenting the court with

---

(Tex. 2000)); Beverick v. Koch Power, Inc., 186 S.W.3d 145, 149 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

549. Wyndham Int'l, Inc. v. Ace Am. Ins. Co., 186 S.W.3d 682, 686 (Tex. App.—Dallas 2006, no pet.); *see Jackson*, 979 S.W.2d at 70 (requiring courts to grant summary judgment unless respondent "raise[s] a genuine issue of material fact").

550. *Jackson*, 979 S.W.2d at 70 (stating that the standard of review for a no evidence summary judgment is "to determine whether the plaintiff has produced any evidence of probative force to raise fact issues on the material questions presented").

551. King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 750-51 (Tex. 2003); *accord Wyndham*, 186 S.W.3d at 686; *Haas*, 71 S.W.3d at 911; *Maguire Oil Co.*, 69 S.W.3d at 357; Rocha v. Faltys, 69 S.W.3d 315, 320 (Tex. App.—Austin 2002, no pet.); *Kelly*, 71 S.W.3d at 423.

552. *Chapman*, 118 S.W.3d at 751 (quoting Merrell Dow Pharms., Inc., v. Havner, 953 S.W.2d 706, 711 (Tex. 1997)).

553. Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 600 (Tex. 2004) (citing Morgan v. Anthony, 27 S.W.3d 928, 929 (Tex. 2000)); *see* Forbes Inc. v. Granada Biosciences, Inc., 124 S.W.3d 167, 172 (Tex. 2003) (explaining that summary judgment will be denied if more than a scintilla of evidence is raised by the nonmovant).

554. *Forbes*, 124 S.W.3d at 172 (citing *Chapman*, 118 S.W.3d at 751); *accord* 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)); Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983), *superseded by statute on other grounds*, TEX. CIV. PRAC. & REM. CODE ANN. § 82.005 (Vernon 2005).

some evidence on each element of his or her claim for which the movant asserts there is no evidence.[555]

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."[556] Whether the trial court grants or denies a motion for continuance is within its sound discretion.[557] Therefore, the trial court's ruling will not be reversed unless the record shows a clear abuse of discretion.[558] Reversal of the lower court's decision should occur if the record reflects "that the trial

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

556. TEX. R. CIV. P. 251; *see also* TEX. R. CIV. P. 252 (granting continuance based on want of testimony); TEX. R. CIV. P. 254 (granting continuance based on absence of counsel when absence was caused by attendance in legislature). The mere absence of counsel does not entitle the party to a continuance. TEX. R. CIV. P. 253; *see also* Vickery v. Vickery, No. 01-94-01004-CV, 1997 WL 751995, at *20 (Tex. App.—Houston [1st Dist.] Dec. 4, 1997, pet. denied) (not designated for publication) (explaining that absence of a party is not itself grounds for continuance and that "[t]he absent party must show that he had a reasonable excuse for not being present, and that he was prejudiced by his absence"). For the continuance to be granted for necessity of testimony of the absent party, the movant must show "the testimony is material and what is expected to be proved by the testimony." *Id.*

557. BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 800 (Tex. 2002); Gen. Motors Corp. v. Gayle, 951 S.W.2d 469, 476 (Tex. 1997) (orig. proceeding) (quoting Villegas v. Carter, 711 S.W.2d 624, 626 (Tex. 1986)); State v. Wood Oil Distrib., Inc., 751 S.W.2d 863, 865 (Tex. 1988); Yowell v. Piper Aircraft Corp., 703 S.W.2d 630, 635 (Tex. 1986); MKC Energy Invs., Inc. v. Sheldon, 182 S.W.3d 372, 378 (Tex. App.—Beaumont 2005, no. pet); Barr v. AAA Tex., LLC, 167 S.W.3d 32, 38 (Tex. App.—Waco 2005, no pet.); Jones v. Jones, 64 S.W.3d 206, 211 (Tex. App.—El Paso 2001, no pet.), *overruled on other grounds by In re* Z.L.T., 124 S.W.3d 163 (Tex. 2003); 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); 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), *overruled on other grounds by* Humphreys v. Meadows, 938 S.W.2d 750, 752 (Tex. App.—Fort Worth 1996, writ denied).

558. Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 161 (Tex. 2004) (citing *Marchand*, 83 S.W.3d at 800); *Villegas*, 711 S.W.2d at 626; State v. Crank, 666 S.W.2d 91, 94 (Tex. 1984); Cunningham v. Columbia/St. David's Healthcare Sys., L.P., 185 S.W.3d 7, 16 (Tex. App.—Austin 2005, no pet.); Royal Mortgage Corp. v. Montague, 41 S.W.3d 721, 738 (Tex. App.—Fort Worth 2001, no pet.).

court has disregarded the party's rights."[559] 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 arbitrary and unreasonable.[560]

A trial court may grant a continuance for a response to a motion for summary judgment if the affidavits of the party seeking the continuance show that he cannot present facts necessary to justify his opposition.[561] The trial court should consider the following list of nonexclusive factors in ruling on a motion for continuance of a summary judgment hearing to conduct more discovery: "the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the continuance has exercised due diligence to obtain the discovery sought."[562] The standard of review for a trial court's denial of a motion for continuance is abuse of discretion decided on a case-by-case basis.[563]

X. *Dismissal for Want of Prosecution*

The trial court has an obligation to control its docket and demand that parties diligently prosecute their suits.[564] Thus, a trial

559. *Finlan*, 27 S.W.3d at 235 (citing *Yowell*, 703 S.W.2d at 635)); *accord Royal Mortgage*, 41 S.W.3d at 738 (citing *Arit Int'l*, 910 S.W.2d at 173-74)).

560. Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 795 (Tex. 1987); MKC Energy Invs., Inc. v. Sheldon, 182 S.W.3d 372, 378 (Tex. App—Beaumont 2005, no pet.); Medford v. Medford, 68 S.W.3d 242, 247-48 (Tex. App.—Fort Worth 2002, pet. granted); 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 a local rule allowing attorneys to designate vacation weeks was 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.* at 393-34; *see also* White v. Eikner, No. 12-05-00168-CV, 2006 WL 1460228, at *1 (Tex. App.—Tyler May 26, 2006, no pet.) (mem. op.) (upholding decision to deny motion because appellant failed to "follow the procedures established by the Texas Rules of Civil Procedure in filing her motion for continuance").

561. TEX. R. CIV. P. 166a(g); *Joe*, 145 S.W.3d at 161.

562. *Joe*, 145 S.W.3d at 161 (citing *Marchand*, 83 S.W.3d at 800).

563. *Id.* (citing *Marchand*, 83 S.W.3d at 800).

564. 3V, Inc. v. JTS Enters., Inc., 40 S.W.3d 533, 540 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (quoting 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").

court has the authority to dismiss a case for want of prosecution pursuant to its inherent powers or pursuant to Texas Rule of Civil Procedure 165a.[565] The 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) (want of prosecution and trial court's inherent powers) are cumulative and independent.[566]

"Whether the plaintiff prosecuted the case with diligence is an issue" confined solely to the trial court's discretion.[567] Moreover, when the record contains no "findings of facts or conclusions of law, and the trial court did not specify the standard of dismissal used," the order of dismissal must be affirmed if any legal theory is supported by the record.[568] When resolving the central issue of "whether the plaintiffs exercised reasonable diligence,"[569] the court

---

565. TEX. R. CIV. P. 165a(1), (4); Alexander v. Lynda's Boutique, 134 S.W.3d 845, 850 (Tex. 2004) (citing Villarreal v. San Antonio Truck & Equip., 994 S.W.2d 628, 630 (Tex. 1999)); Veterans' Land Bd. v. Williams, 543 S.W.2d 89, 90 (Tex. 1976) (per curiam) (citing Bevil v. Johnson, 157 Tex. 621, 307 S.W.2d 85, 87 (1957)); 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 1995, 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).

566. TEX. R. CIV. P. 165a(4) (explaining that dismissal procedures are "cumulative of the rules and laws governing any other procedures available to the parties in such cases," including the court's inherent powers); *Williams*, 543 S.W.2d at 90 (quoting TEX. R. CIV. P. 165a(4)); Franklin v. Sherman Indep. Sch. Dist., 53 S.W.3d 398, 401 (Tex. App.—Dallas 2001, pet. denied) (per curiam); City of Houston v. Robinson, 837 S.W.2d 262, 264 (Tex. App.—Houston [1st Dist.] 1992, no writ); Ozuna v. Sw. Bio-Clinical Labs., 766 S.W.2d 900, 901 (Tex. App.—San Antonio 1989, writ denied), *overruled on other grounds by Villarreal*, 994 S.W.2d at 633.

567. *Ozuna*, 766 S.W.2d at 901; *accord* Dolenz v. Cont'l Nat'l Bank of Fort Worth, 620 S.W.2d 572, 575-76 (Tex. 1981); Mercure Co., N.V. 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); *see also* Hung v. Bullock, 180 S.W.3d 931, 932 (Tex. App.—Dallas 2006, no pet.) (citing *Rotello*, 671 S.W.2d at 509) (explaining that the trial court "may consider the entire trial history with no single factor being dispositive" when it decides whether a plaintiff prosecuted with reasonable diligence).

568. City of Houston v. Thomas, 838 S.W.2d 296, 297 (Tex. App.—Houston [1st Dist.] 1992, no writ); *accord* Fox v. Wardy, No. 08-05-00205-CV, 2005 WL 3214906, at *1 (Tex. App.—El Paso Nov. 30, 2005, pet. denied).

569. MacGregor v. Rich, 941 S.W.2d 74, 75 (Tex. 1997) (per curiam); *accord* Pedraza v. Crossroads Sec. Sys., 960 S.W.2d 339, 342 (Tex. App.—Corpus Christi 1997, no pet.); *see Christian*, 985 S.W.2d at 515 (discussing various reasons given by the plaintiff to determine if reasonable diligence was exercised).

may consider the entire trial history, and "[n]o single factor is dispositive."[570] Whether the plaintiff intended to abandon the litigation is not the inquiry, "[n]or is the existence of a belated trial setting or an asserted eagerness to proceed to trial conclusive."[571] Furthermore, the fact that settlement activity is in progress,[572] or that the opposing parties have remained passive, does not prevent a case from being dismissed based upon want of diligence.[573] Similar to a trial court's considerations on whether to grant a motion for continuance, factors traditionally examined when deciding on a dismissal for want of prosecution are "the length of time the case was on file, the extent of activity in the case, whether a trial setting was requested, and the existence of reasonable excuses for the delay."[574] Other circumstances may be considered as well, "such as periods of activity, intervals of inactivity, reasons for lack of attention, and the passage of time."[575]

If the dismissal is pursuant to Rule 165a, as opposed to the trial court's inherent power, then Rule 165a(3) requires the trial court to reinstate the case "upon finding after a hearing that the failure

---

570. Dueitt v. Arrowhead Lakes Prop. Owners, Inc., 180 S.W.3d 733, 739 (Tex. App.—Waco 2005, pet. denied); *accord* Scoville v. Shaffer, 9 S.W.3d 201, 204 (Tex. App.—San Antonio 1999, no pet.) (citing *Ozuna*, 766 S.W.2d at 902)); *Christian*, 985 S.W.2d at 514-15; Villarreal v. San Antonio Truck & Equip., Inc., 974 S.W.2d 275, 278 (Tex. App.—San Antonio 1998), *rev'd on other grounds by* 994 S.W.2d 628 (Tex. 1999); 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) (citing Armentrout v. Murdock, 779 S.W.2d 119, 121 (Tex. App.—Houston [1st Dist.] 1989, no writ)).

571. *Ozuna*, 766 S.W.2d at 902; *accord Dueitt*, 180 S.W.3d at 739; *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.); *Villarreal*, 974 S.W.2d at 278; *see also* Bard v. Frank B. Hall & Co., 767 S.W.2d 839, 843-44 (Tex. App.—San Antonio 1989, writ denied) (ruling that merely requesting that a case be set for trial does not, alone, preclude dismissal).

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

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

574. *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.] 1988), *writ denied*, 754 S.W.2d 152 (Tex. 1988) (per curiam)); *accord* Rainbow Home Health, Inc. v. Schmidt, 76 S.W.3d 53, 56 (Tex. App.—San Antonio 2002, pet. denied) (citing Christian v. Christian, 985 S.W.2d 513, 514-15 (Tex. App.—San Antonio 1998, no pet.)); *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.); *Villarreal*, 974 S.W.2d at 278.

575. Ozuna v. Sw. Bio-Clinical Labs., 766 S.W.2d 900, 902 (Tex. App.—San Antonio 1989, writ denied).

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."[576] The reinstatement provisions in Rule 165a(3) only apply to dismissals for failure to appear at trial or a hearing,[577] and they share several similarities with the *Craddock* requisites for granting a new trial in a default judgment.[578] The standard of review of a dismissal for want of prosecution, or the overruling of a motion to reinstate, is whether the trial court committed a clear abuse of discretion.[579]

---

576. TEX. R. CIV. P. 165a(3); *accord* 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); *see also* Armentrout v. Murdock, 779 S.W.2d 119, 122 (Tex. App.—Houston [1st Dist.] 1989, no writ) (noting that after conducting the hearing required by Rule 165a(3), the trial court has the discretion not to reinstate the case); *cf.* Clark v. Yarbrough, 900 S.W.2d 406, 408-09 (Tex. App.—Texarkana 1995, writ denied) (describing the trial court's ability to dismiss for want of prosecution and the process of reinstatement).

577. *Burton*, 959 S.W.2d at 354; *Clark*, 900 S.W.2d at 408-09; *Ozuna*, 766 S.W.2d at 903; *see* Moore v. Armour & Co., 748 S.W.2d 327, 331 (Tex. App.—Amarillo 1988, no writ) (asserting that the reinstatement provisions of Rule 165a(3) do not apply to dismissal under the court's inherent powers for failure to prosecute with due diligence).

578. *See* TEX. R. CIV. P. 165a(3) (mandating that a court reinstate a case if it finds that the party's failure 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"); Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124, 126 (1939) (instructing judges to set aside a default judgment if the defendant's failure to answer "was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident").

579. MacGregor v. Rich, 941 S.W.2d 74, 75 (Tex. 1997) (per curiam); State v. Rotello, 671 S.W.2d 507, 509 (Tex. 1984) (quoting Bevil v. Johnson, 157 Tex. 621, 307 S.W.2d 85, 87 (1957)); Veterans' Land Bd. v. Williams, 543 S.W.2d 89, 90 (Tex. 1976) (per curiam); Johnson-Snodgrass v. KTAO, Inc., 75 S.W.3d 84, 87 (Tex. App.—Fort Worth 2002, pet. dism'd); 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 409; City of Houston v. Robinson, 837 S.W.2d 262, 264 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Brown*, 820 S.W.2d at 903 (citing *Armentrout*, 779 S.W.2d at 122); *Ozuna*, 766 S.W.2d at 902; Knight v. Trent, 739 S.W.2d 116, 119 (Tex. App.—San Antonio 1987, no writ), *overruled on other grounds by Villarreal v. San Antonio Truck & Equip., Inc.*, 994 S.W.2d 628, 633 (Tex, 1999); 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. *See* Dueitt v. Arrowhead Lakes Prop. Owners, Inc., 180 S.W.3d 733, 740 (Tex. App.—Waco 2005, pet. denied) ("The rule is mandatory, and the trial court has no discretion about whether to set a hearing on the motion."); Reed v. City of Dallas, 774 S.W.2d 384, 385 (Tex. App.—Dallas

Y. *Jury Demand*

The Texas 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.'"[580] While a party has a constitutional right to trial by jury,[581] the right is not absolute.[582] If a party desires a jury trial, Rule 216 requires the party (1) to file with the court clerk a written request within a "reasonable time before the date set for trial . . . but not less than thirty days in advance"[583] and (2) to pay the jury fee.[584] As long as the party requests a jury trial at least thirty days before trial, it "is presumed to have been made a reasonable time before trial."[585] The court has no discretion to refuse a jury trial if the fee is paid and request is made on or before the appearance date.[586] If the trial court denies a jury trial, it will

---

1989, writ denied) (reversing the trial court and ordering it to conduct a hearing). The dissent in *Reed*, however, argued that the court should have reversed and remanded for a trial on the merits. *Reed*, 774 S.W.2d at 385 (Howell, J., dissenting). It is also important to note that "dismissal for want of prosecution does not preclude the filing of another suit and therefore, a dismissal of the case 'with prejudice' is improper." Willis v. Barron, 604 S.W.2d 447, 450 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.); *see* Melton v. Ryander, 727 S.W.2d 299, 303 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (noting that a dismissal for want of prosecution does not make an adjudication on the merits of the case). 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." *Id.*

580. 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)).

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

582. TEX. CONST. art. V, § 10.

583. TEX. R. CIV. P. 216(a); *accord* Glazer's Wholesale Distribs., Inc. v. Heineken USA, Inc., 95 S.W.3d 286, 305-06 (Tex. App.—Dallas 2001, judgm't vacated w.r.m.) (noting that a litigant perfects his jury trial request when he demands a jury trial and pays the necessary fee).

584. TEX. R. CIV. P. 216(b); Huddle v. Huddle, 696 S.W.2d 895, 895 (Tex. 1985) (per curiam); *In re* J.N.F., 116 S.W.3d 426, 431 (Tex. App.—Houston [14th Dist.] 2003, no pet.); Universal Printing Co. v. Premier Victorian Homes, Inc., 73 S.W.3d 283, 289 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

585. Halsell v. Dehoyos, 810 S.W.2d 371, 371 (Tex. 1991) (per curiam); *accord* Taylor v. Taylor, 63 S.W.3d 93, 102 (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. 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); *see also In re* T.H. 131 S.W.3d 598, 601-02 (Tex. App.—Texarkana 2004, pet. denied) (upholding the denial of request for jury trial made after trial had already begun).

586. Caldwell v. Barnes, 154 S.W.3d 93, 98 (Tex. 2004) (per curiam) (citing TEX. R. CIV. P. 216, 220; *Rhyne*, 925 S.W.2d at 667); Squires v. Squires, 673 S.W.2d 681, 684 (Tex. App.—Corpus Christi 1984, no writ).

be considered harmful error if the case involves questions of material fact.[587] 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 court's docket, delaying the trial, or injuring the opposing party."[588] 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.[589]

The trial court's decision will be set aside only upon the showing of an abuse of discretion.[590] For the decision to be an abuse of discretion, it must be so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law.[591]

Z. *Judicial Notice*

Pursuant to Rule 202 of the Texas Rules of Evidence, a trial court "upon its own motion may, or upon the motion of a party shall, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every

---

587. *Caldwell*, 154 S.W.3d at 98 (citing Mercedes-Benz Credit Corp. v. Rhyne, 925 S.W.2d 664, 667 (Tex. 1996)).

588. Gen. Motors Corp. v. Gayle, 951 S.W.2d 469, 476 (Tex. 1997) (orig. proceeding); *see also* Taylor v. Taylor, 63 S.W.3d 93, 101 (Tex. App.—Waco 2001, no pet.) (citing Crenshaw v. Chapman, 814 S.W.2d 400, 402 (Tex. App.—Waco 1991, no writ)) (noting that courts abuse their discretion if they deny a properly made request for a jury trial if the opposition has not shown that such granting would cause it injury, interfere with the docket, or infringe on court procedure). In *Gayle*, the court observed that a "'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.'" *Gayle*, 951 S.W.2d at 476 (quoting Allen v. Plummer, 71 Tex. 546, 9 S.W. 672, 673 (1888)).

589. Peck v. Ray, 601 S.W.2d 165, 167-68 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.); *see In re* D.R., 177 S.W.3d 574, 580 (Tex. App.—Houston [1st Dist.] 2005, pet. filed) (upholding denial of jury request when trial court record revealed other side had been preparing case and submitting evidence based on the understanding there would not be a jury).

590. *Rhyne*, 925 S.W.2d at 666; *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., 2 S.W.3d 421, 422 (Tex. App.—San Antonio 1999, no pet.).

591. Rhyne, 925 S.W.2d at 666; *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 an instructed verdict would have been justified." 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).

other state, territory, or jurisdiction of the United States."[592] A party who wants judicial notice to be taken of a given matter must provide the court with enough information to allow it to properly consider the request, and must provide all parties such notice as the court deems necessary for them to counter the request.[593] Whether these requirements have been met is left largely to the trial court's discretion.[594] As one court has noted, "the sufficiency of a motion to take judicial notice is a question best answered by the trial court."[595] However, "once the law has been invoked by proper motion, the trial court has no discretion—it must acknowledge that law."[596]

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."[597] In addition, facts that are notorious and indisputable,[598] or "well known and easily ascertainable,"[599] 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

---

592. TEX. R. EVID. 202.

593. *Id.*

594. *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).

595. Keller v. Nevel, 699 S.W.2d 211, 211 (Tex. 1985) (per curiam). 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. Holbrook, 775 S.W.2d 411, 412 (Tex. App.—Fort Worth 1989, writ denied).

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

597. TEX. R. EVID. 201(b); *accord In re* J.L., 163 S.W.3d 79, 84 (Tex. 2005) (quoting Rule 201(b)); Krishnan v. Ramirez, 42 S.W.3d 205, 222 (Tex. App.—Corpus Christi 2001, pet. denied).

598. Harper v. Killion, 162 Tex. 481, 348 S.W.2d 521, 522 (1961) (quoting Miller v. Texas & N. O. R. Co., 83 Tex. 518, 18 S.W. 954, 955 (1892)); 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).

599. Barber v. Intercoast Jobbers & Brokers, 417 S.W.2d 154, 158 (Tex. 1967) (naming well known geographical facts as an example of things that are commonly judicially noticed); *accord* City of Houston v. Todd, 41 S.W.3d 289, 301 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *Levit*, 841 S.W.2d at 485.

it.[600] The test on review is whether the fact to be judicially noticed is "verifiably certain."[601]

AA. *Class Action Certification*

The purpose of class certification is to provide "meaningful recompense to groups of injured parties whose injuries would be too small to make it cost-effective to prosecute them individually."[602] Whether or not to certify a class action presents the court with several challenging and complicated decisions because "[o]n one hand, the class-action device affords an avenue for relief to large numbers of people who might not otherwise be able to pursue individual claims; on the other hand, the decision to certify a class can have staggering economic consequences."[603] To obtain certification of a class, the representative party or parties must meet the requirements of Rule 42 of the Texas Rules of Civil Procedure, which is patterned after its federal counterpart, Rule 23 of the Federal Rules of Civil Procedure.[604] As a result, the supreme court looks to federal decisions and authorities interpreting federal class action requirements.[605] 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 [numerosity], (2) there are questions of law, or fact common to the class [commonality], (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality], and (4) the representative

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

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

602. Wood v. Victoria Bank & Trust Co., 69 S.W.3d 235, 239 (Tex. App.—Corpus Christi 2001, no pet.) (quoting Northrup v. Sw. Bell Tel. Co., 72 S.W.3d 1, 5 (Tex. App.—Corpus Christi 2001, no pet.)); *accord* Gen. Motors Corp. v. Bloyed, 916 S.W.2d 949, 952 (Tex. 1996) (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980)); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (7th Cir. 1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997)) (discussing the underlying goals and requirements to qualify as a class action suit under Rule 23 of the Federal Rules of Civil Procedure).

603. Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 701 (Tex. 2002) (O'Neill, J., joined by Enoch & Hankinson, JJ., dissenting).

604. Sw. Ref. Co. v. Bernal, 22 S.W.3d 425, 433 (Tex. 2000).

605. *Id.* (explaining that such authority is persuasive to Texas class action certification).

parties will fairly and adequately protect the interests of the class [adequacy of representation].[606]

In addition to these four requirements, class actions must satisfy one of the four subdivisions of Rule 42(b).[607]

The supreme court requires the trial court to pursue a rigorous analysis before ruling on a motion for class certification "to determine whether all prerequisites to certification have been met."[608] The court has rejected the "certify now and worry later" approach to class certification.[609] While it may not be an abuse of discretion to certify a class that will later fail, the court stated that a "cautious approach to class certification is essential."[610] Accordingly, it is improper for a trial court to certify a class "without knowing how the claims can and will likely be tried."[611] The trial court's order must set forth a plan as to how the claims will be tried so that the appellate court can meaningfully review the trial court's compliance with Rule 42.[612] "The formulation of a trial plan assures that a trial court has fulfilled its obligation to rigorously analyze all certification prerequisites and 'understand[s] the claims, defenses, relevant

606. TEX. R. CIV. P. 42(a); *Stromboe*, 102 S.W.3d at 692; *accord Bernal*, 22 S.W.3d at 433.

607. 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.*; *accord* Compaq Computer Co. v. Lapray, 135 S.W.3d 657, 663 (Tex. 2004); Union Pac. Res. Group, Inc. v. Hankins, 111 S.W.3d 69, 71 (Tex. 2003); Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 689 (Tex. 2002); *Bernal*, 22 S.W.3d at 433.

608. BMG Direct Mktg., Inc. v. Peake, 178 S.W.3d 763, 777 (Tex. 2005) (quoting *Bernal*, 22 S.W.3d at 435); *see* Nat'l W. Life Ins. Co. v. Rowe, 164 S.W.3d 389, 392-93 (Tex. 2005) (noting the trial court's failure to rigorously analyze class certification requirements).

609. *Peake*, 178 S.W.3d at 776-77 (quoting *Bernal*, 22 S.W.3d at 435).

610. Sw. Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000).

611. *Peake*, 178 S.W.3d at 777 (quoting *Bernal*, 22 S.W.3d at 435); *accord* State Farm Mut. Auto. Ins. Co. v. Lopez, 156 S.W.3d 550, 555 (Tex. 2004).

612. *Peake*, 178 S.W.3d at 777 (quoting *Bernal*, 22 S.W.3d at 435); N. Am. Mortgage Co. v. O'Hara, 153 S.W.3d 43, 44 (Tex. 2004).

facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'"[613]

If it cannot be determined "from the outset that the individual issues can be considered in a manageable, time-efficient, yet fair manner, then certification is not appropriate."[614]

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.[615] However, the reviewing court does not indulge every presumption in favor of the order because compliance with class action requirements must be demonstrated rather than presumed.[616]

BB. *Motion to Disqualify*

A motion to disqualify "is the proper procedural vehicle to challenge an attorney's representation whenever an attorney seeks to represent an interest adverse to that of a former client."[617] However, because disqualification is so severe, courts must be wary of ordering such a remedy.[618] Disqualification may result in palpable harm, disrupt trial court proceedings, and deprive a party of the right to have counsel of choice.[619] In considering a disqualification motion, the court must strictly adhere to an exacting standard so

---

613. *Peake*, 178 S.W.3d at 778 (quoting *Bernal*, 22 S.W.3d at 435).

614. *Bernal*, 22 S.W.3d at 436.

615. Nat'l W. Life Ins. Co. v. Rowe, 164 S.W.3d 389, 392 (Tex. 2005); Compaq Computer Corp. v. Lapray, 135 S.W.3d 657, 671 (Tex. 2004); Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 691 (Tex. 2002); 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 v. Victoria Bank & Trust Co., N.A., 69 S.W.3d 235, 238 (Tex. App.—Corpus Christi 2001, no pet.); Union Pac. Res. Group v. Hankins, 51 S.W.3d 741, 748 (Tex. App.—El Paso 2001), *rev'd on other grounds*, 111 S.W.3d 69 (Tex. 2003); 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), *overruled on other grounds by* Tracker Marine L.P. v. Ogle, 108 S.W.3d 349 (Tex. App. —Houston [14th Dist.] 2003, no pet.).

616. *Lapray*, 135 S.W.3d at 671 (citing *Stromboe*, 102 S.W.3d at 691).

617. 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).

618. *In re* Nitla S.A. de C.V., 92 S.W.3d 419, 423 (Tex. 2002).

619. *Id.* at 422-23.

that disqualification is not used as a dilatory trial tactic.[620] Further, a motion to disqualify an attorney must be timely filed.[621] Courts have found that a six-month delay was too long[622] but that a two-month delay was not a waiver.[623]

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.[624] 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."[625] To satisfy this burden, the movant must offer "evidence of specific similarities capable of being recited in the disqualification order."[626]

The standard of review used in assessing a trial court's ruling on a motion to disqualify is the abuse of discretion standard.[627] In ad-

---

620. *Id.* at 422 (citing Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 656 (Tex. 1990)); *see* Metro. Life Ins. Co. v. Syntek Fin. Corp., 881 S.W.2d 319, 320-21 (Tex. 1994) (reiterating that "the 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); Walton v. Canon, Short & Gaston, 23 S.W.3d 143, 157 (Tex. App.—El Paso 2000, no pet.) (declaring that disqualification is a severe remedy that will only be reversed for abuse of discretion).

621. *In re* George, 28 S.W.3d 511, 513 (Tex. 2000).

622. Vaughan v. Walther, 875 S.W.2d 690, 691 (Tex. 1994) (orig. proceeding).

623. *In re* Am. Home Prods. Corp., 985 S.W.2d 68, 73 (Tex. 1998).

624. *In re* Meador, 968 S.W.2d 346, 350-51 (Tex. 1998); Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 126 (Tex. 1996); *Syntek Fin. Corp.*, 881 S.W.2d at 320-21; NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1990); Ghidoni v. Stone Oak, Inc., 966 S.W.2d 573, 579 (Tex. App.—San Antonio 1998, pet. denied); *see also Vaughan*, 875 S.W.2d at 690 ("A party who fails to file its motion to disqualify opposing counsel in a timely manner waives the complaint.").

625. *Meador*, 968 S.W.2d at 353; *accord* 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.3d 222, 230 (Tex. App.—Texarkana 2000, no pet.); Walton v. Canon, Short & Gaston, 23 S.W.3d, 143, 151 (Tex. App.—El Paso 2000, no pet.); *In re* Butler, 987 S.W.2d 221, 224 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

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

627. *In re* Nitla S.A. de C.V., 92 S.W.3d 419, 420 (Tex. 2002); Metro. Life Ins. Co. v. Syntek Fin. Corp., 881 S.W.2d 319, 321 (Tex. 1994); *Coker*, 765 S.W.2d at 400; *Walton*, 23

dition, the trial court's order granting or denying a motion to disqualify may be reviewed by mandamus.[628]

CC. *Judicial Disqualification and Recusal*

Pursuant both to the Texas Constitution and Rule 18a, a party may file a motion to recuse the trial judge if done at least ten days before the date of the trial or other hearing.[629] Upon the filing of such 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.[630] However, "[t]he procedural requisites for recusal in Rule 18(a) are mandatory, and a party who fails to conform waives his right to complain of a judge's failure to recuse himself."[631] Rule 18a(f) provides that if the motion is denied, the order is reviewed for an abuse of discretion.[632] However, an order granting a motion to recuse is not reviewable.[633]

S.W.3d at 151; Ghidoni v. Stone Oak, Inc., 966 S.W.2d 573, 579 (Tex. App.—San Antonio 1998, pet. denied).

628. Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 128 (Tex. 1996); Vaughan v. Walther, 875 S.W.2d 690, 691 (Tex. 1994).

629. TEX. CONST. art. V, § 11; TEX. R. CIV. P. 18a(a); *In re* O'Connor, 92 S.W.3d 446, 448 (Tex. 2002) (per curiam); *In re* Rio Grande Valley Gas Co., 987 S.W.2d 167, 177 (Tex. App.—Corpus Christi 1999, no pet.); *see* 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); *see also* Dishner v. Huitt-Zollars, Inc., 162 S.W.3d 370, 374 (Tex. App.—Dallas 2005, no pet.) (holding that a phone call ten days before the hearing was sufficient notice). 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).

630. 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. *O'Connor*, 92 S.W.3d at 449 (citing *In re* Union Pac. Res. Co., 969 S.W.2d 427, 428 (Tex. 1998)).

631. Barron v. State Attorney Gen., 108 S.W.3d 379, 382-83 (Tex. App.—Tyler 2003, no pet.).

632. TEX. R. CIV. P. 18a(f); 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 no abuse of discretion review could be conducted because the trial court failed to conduct a hearing on the motion to recuse).

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

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.[634] "If a party to a civil case files a timely objection. . .the judge shall not hear the case."[635] An objection must be filed "not later than the seventh day after the date the party receives actual notice of the assignment or before the date the first hearing or trial, including pretrial hearings, commences, whichever date occurs earlier," although the presiding judge may extend the time to file an objection on written motion and with good cause.[636] An objection to this assignment must be the first matter presented to the visiting judge for a ruling.[637] 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.[638] If a party timely objects to the assignment, "the judge shall not hear the case."[639] The governing statute, Tex. Gov't Code Ann. § 74.053, is mandatory and does not give the trial court any discretion to rule on the objection.[640]

A party may also object to a judge or justice who is assigned to hear that party's case on appeal.[641] If a party files a timely objection to the assignment of the judge or justice, the assigned judge may not hear the case.[642] The objection "must be filed not later than the seventh day after the date the party receives actual notice of the assignment or before the date the case is submitted to the

634. TEX. GOV'T CODE ANN. § 74.053(a) (Vernon 2005).

635. *Id.* § 74.053(b) (Vernon 2005).

636. *Id.* § 74.053(c) (Vernon 2005).

637. *Id.* § 74.053(c) (Vernon 2005); Chandler v. Chandler, 991 S.W.2d 367, 383 (Tex. App.—El Paso 1999, pet. denied); Morris v. Short, 902 S.W.2d 566, 569 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

638. TEX. GOV'T CODE ANN. § 74.053(d) (Vernon 2005); *accord 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).

639. TEX. GOV'T CODE ANN. § 74.053(b) (Vernon 2005); *accord In re* M.A.S., No. 05-03-00401-CV, 2005 WL 1039967, at *2 (Tex. App.—Dallas May 5, 2005, no pet.); *Cuban*, 24 S.W.3d at 382.

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

641. TEX. GOV'T CODE ANN. § 75.551 (Vernon 2005).

642. *Id.* § 75.551(b) (Vernon 2005).

court, whichever date occurs earlier."[643] In addition, each party (1) is only entitled to one objection for the case in the appellate court,[644] and (2) may not object in the same case to the assignment of a judge or justice under section 74.053(b).[645] 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.[646]

EE. *Management of Docket*

A trial court is given wide discretion in managing its docket[647] to achieve "economy of time and effort for itself, for counsel, and for litigants."[648] Although a trial court is given wide latitude in managing discovery and preparing a case for trial, that latitude is not unbounded.[649] 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 and other important matters can be resolved.[650] A trial court's order relating to the management of its docket is reviewed for an abuse of discretion.[651]

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 re-

---

643. *Id.* § 75.551(c) (Vernon 2005).

644. *Id.* § 75.551(b) (Vernon 2005).

645. *Id.*

646. TEX. GOV'T CODE ANN. § 75.551(d) (Vernon 2005).

647. 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); Stockton v. Cotton Bledsoe Tighe & Dawson, P.C., No. 09-03-586-CV, 2005 WL 66570, at *2 (Tex. App.—Beaumont Jan. 13, 2005, no pet.); *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. of Wausau v. Horton, 797 S.W.2d 677, 680 (Tex. App.—Texarkana 1990, no writ); *see also* Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979) (recognizing the inherent power of 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").

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

649. *In re* Van Waters & Rogers, Inc., 62 S.W.3d 197, 200 (Tex. 2001) (per curiam) (holding that a blanket abatement of discovery in a mass tort case is an abuse of discretion).

650. 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).

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

viewed for its constitutionality.[652] To withstand this review standard, the court must make written findings supported by the evidence.[653] 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.[654] The specific findings may be challenged for their sufficiency.[655] Gag orders may be challenged by mandamus.[656] It appears that the two-part constitutional test is a question of law as applied to the trial court's findings, which are reviewed de novo.[657]

GG. *Sealing Court Records*

Rule 76a provides very specific guidelines for a trial court to follow in determining whether to seal court records.[658] The trial court must strictly adhere to these guidelines because court records are presumed to be open to the public.[659] 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.[660] Any order relating to the sealing or unsealing of court records is subject

652. 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).

653. *Grigsby*, 904 S.W.2d at 620.

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

655. *Tucci*, 859 S.W.2d at 6.

656. *Id.*

657. 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).

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

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

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

to immediate appellate review.[661] The abuse of discretion standard of review applies to orders regarding motions to seal records.[662]

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."[663] However, when a plaintiff files an affidavit of inability to pay under Rule 145[664] (*in forma pauperis*) or under the Texas Civil Practice and Remedies Code section 13.001,[665] "the trial court has broad discretion to dismiss the suit as frivolous or malicious" if the allegation of poverty is false[666] or the action is frivolous or malicious.[667] 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."[668] However, the Texas Supreme Court has cautioned trial courts against dismissing cases based on the first and third factors.[669] In

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

662. Gen. Tire, Inc. v. Kepple, 970 S.W.2d 520, 526 (Tex. 1988); BP Prods. N. Am., Inc. v. Houston Chron. Publ'g Co., Nos. 01-05-01032-CV, 01-05-01-01033-CV, 2006 WL 1350303, at *2 (Tex. App.—Houston [1st Dist.] May 18, 2006, no pet.).

663. 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; TEX. R. APP. P. 20.1).

664. TEX. R. CIV. P. 145.

665. TEX. CIV. PRAC. & REM. CODE ANN. § 13.001 (Vernon 2002).

666. 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); *accord* TEX. CIV. PRAC. & REM. CODE ANN. § 13.001(a)(1) (Vernon 2002); 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). 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.).

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

668. *Id.* § 13.001(b) (Vernon 2002). In *De La Vega,* the Fourth 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)).

669. 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.).

2005, the Rule was amended to prohibit the contest of an affidavit that is accompanied by an attorney's IOLTA certificate.[670] A trial court's dismissal of a case under section 13.001 is reviewed for an abuse of discretion.[671]

The supreme court has analogized section 13.001 to its federal counterpart, which allows dismissal of frivolous or malicious actions in federal court.[672] Of the three factors set forth in section 13.001, the supreme court has essentially only approved the second factor (whether the claim has an arguable basis in law or fact) as constitutionally sound.[673] Therefore, before dismissing a petition under section 13.001(b)(2), the judge must examine it to ensure that the claim has no basis in law and in fact.[674] A claim that has no legal basis is one based upon an "indisputably meritless legal theory,"[675] and a claim that has no factual basis is one that arises out of "fantastic or delusional scenarios."[676] 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 not needed to decide the issues on appeal.[677] In doing so,

---

670. TEX. R. CIV. P. 145(c).

671. Williams v. TDCJ, 176 S.W.3d 590, 593 (Tex. App.—Tyler 2005, pet. denied); Jones v. CGU Ins. Co., 78 S.W.3d 626, 628 (Tex. App.—Austin 2002, no pet.); Bohannan v. Tex. Bd. of Criminal Justice, 942 S.W.2d 113, 115 (Tex. App.—Austin 1997, writ denied).

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

673. *Id.* The Texas 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)).

674. 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)).

675. Black v. Jackson, 82 S.W.3d 44, 53 (Tex. App.—Tyler 2002); *accord* Thomas v. Holder, 836 S.W.2d 351, 352 (Tex. App.—Tyler 1992, no writ) (per curiam) (citing Thompson v. Ereckson, 814 S.W.2d 805, 807 (Tex. App.—Waco 1991, no writ)); *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").

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

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

the trial court may consider "whether the appellant has presented a substantial question for appellate review."[678]

V. TRIAL RULINGS

A. *Conduct of Trial in General*

Rulings that relate to the general conduct of a trial are within the broad discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion,[679] but that latitude is not unbounded.[680] For example, a trial court may not abate discovery for years without justification.[681] A trial court has the authority to express itself in exercising its discretion.[682] A trial court may intervene to maintain control in the courtroom, to expedite the trial, to prevent a waste of time, and may even make remarks that are "critical or disapproving of, or even hostile to, counsel, the parties, or their cases."[683] A trial court may permit jurors to submit occasional questions to the witnesses in conjunction with appropriate

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

679. Dow Chem. Co. v. Francis, 46 S.W.3d 237, 240-41 (Tex. 2001) (per curiam); Schroeder v. Brandon, 172 S.W.2d 488, 491 (Tex. 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_ , 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 the extent of cross-examination allowed).

680. *In re* Van Waters & Rogers, Inc., 62 S.W.3d 197, 201 (Tex. 2001) (per curiam) ("While it is certainly true that a trial court must be given latitude in managing discovery and preparing a case for trial, especially in a [mass tort case], that latitude is not unbounded.").

681. *Id.* at 200-01.

682. *Francis*, 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.)).

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

procedural safeguards.[684] 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."[685] The appellate court will review the entire record for an abuse of discretion,[686] and then it will determine whether any error constituted probable prejudice to the opposing party.[687]

B. *Invoking the Rule*

Texas Rule of Evidence 614 and Texas Rule of Civil Procedure 267 govern sequestration of witnesses in civil litigation.[688] 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."[689] Either the parties or the court, on its own motion, may sequester witnesses.[690] "The Rule" is not discretionary; a court must exclude witnesses upon request of the parties.[691] The rules provide that at the request of any party, the witnesses in the case shall be removed from the courtroom to a place where they cannot hear the testimony of any other witness in the case.[692] 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 that is not a natural person and who is designated as its representative by its attorney; and (3) a person whose

684. 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)).

685. Dow Chem. Co. v. Francis, 46 S.W.3d 237, 240 (Tex. 2001) (per curiam) (quoting Landis v. N. Am. Co., 299 U.S. 248, 254 (1936)).

686. Markowitz v. Markowitz, 118 S.W.3d 82, 91 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (citing Wright v. Wright, 65 S.W.3d 715, 717 (Tex. App.—Eastland 2001, no pet.)); *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).

687. *Markowitz*, 118 S.W.3d at 86 (citing Metzger v. Sebek, 892 S.W.2d 20, 39 (Tex. App.—Houston [1st Dist.] 1994, writ denied)); 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)).

688. Drilex Sys., Inc. v. Flores, 1 S.W.3d 112, 116 (Tex. 1999); *In re* K.M.B., 91 S.W.3d 18, 28 (Tex. App.—Fort Worth 2002, no pet.).

689. *Drilex Sys, Inc.*, 1 S.W.3d at 116.

690. *Id.* at 116 & n.2.

691. Elbar, Inc. v. Claussen, 774 S.W.2d 45, 51 (Tex. App.—Dallas 1989, writ dism'd).

692. *Id.*

> presence is shown by a party to be essential to the presentation of the [case.][693]

Although an expert witness is generally found to be exempt under the essential presence exception, experts are not automatically exempt.[694] Instead, Rules 614 and 267 give the trial court broad discretion to determine whether a witness is essential.[695] A party has the burden of showing why the presence of its witness is essential to the presentation of its case.[696] A trial court's refusal to grant a party's request for a witness to remain during trial is reviewed for abuse of discretion.[697]

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]."[698] The party seeking the exemption from the rule has the burden to establish that the witness's presence is necessary.[699] If the witness is exempt, then the witness is not "placed under the Rule" and "need not be sworn or admonished."[700] When "the Rule is invoked, all nonexempt witnesses must be placed under the Rule and excluded from the courtroom."[701] Generally, "witnesses under the Rule . . . may not discuss the case with anyone other than the attorneys in the case."[702]

The Rule is violated "when a nonexempt prospective witness remains in the courtroom during the testimony of another witness, or when a nonexempt prospective 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

---

693. *Drilex Sys, Inc.*, 1 S.W.3d at 116-17 (citing TEX. R. CIV. P. 267(b); TEX. R. EVID. 614); *accord K.M.B.*, 91 S.W.3d at 28 (citing TEX. R. CIV. P. 267; TEX. R. EVID. 614).

694. Drilex Sys., Inc. v. Flores, 1 S.W.3d 112, 116-17 (Tex. 1999).

695. *Id.* at 118-19.

696. *Id.* at 117.

697. *Id.* at 117-18.

698. *Id.* at 117.

699. *Drilex Sys., Inc.*, 1 S.W.3d at 117.

700. *Id.*

701. *Id.*

702. *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 [R]ule." *Id.* (quoting TEX. R. CIV. P.267(a), (d)).

the testimony."[703] When the Rule is violated, a party may file a motion to exclude the witness and the trial court, considering all of the circumstances,[704] may (1) "allow the testimony of the potential witness[; (2)] exclude the testimony[;] or [(3)] hold the violator in contempt."[705] The trial court's decision is reviewed for an abuse of discretion.[706]

C. *Motion in Limine*

A motion in limine does not preserve any issue for appellate review.[707] 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.[708] If a party complains of the wrongful admission of evidence, the record must reflect that the party seeking to exclude the evidence made a proper objection when the evidence was actually offered during the trial on the mer-

---

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

704. 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 Sw. 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)).

705. *Drilex Sys., Inc.*, 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.)).

706. *Drilex Sys., Inc.*, 1 S.W.3d at 117-18 (citing *Johnson*, 389 S.W.2d at 647-48); *In re* K.M.B., 91 S.W.3d 18, 28 (Tex. App.—Fort Worth 2002, no pet.) (citing Nat'l Liab. & Fire Ins. Co. v. Allen, 15 S.W.3d 525, 527-28 (Tex. 2000); Burrhus v. M&S Supply, Inc., 933 S.W.2d 635, 638 (Tex. App.—San Antonio 1996, writ denied); Sw. Pub. Serv. Co. v. Vanderburg, 581 S.W.2d 239, 247 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.)).

707. Zinda v. McCann St., 178 S.W.3d 883, 894 (Tex. App.—Texarkana 2005, pet. denied) (citing Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963); Greenberg Traurig of N.Y., P.C. v. Moody, 161 S.W.3d 56, 91 (Tex. App.—Houston [14th Dist.] 2004, no pet.)); Collins v. Collins, 904 S.W.2d 792, 798 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

708. *Zinda*, 178 S.W.3d at 894; Richards v. Comm'n for Lawyer Discipline, 35 S.W.3d 243, 252 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

its.[709] In either event, the standard of review is based on the rule of evidence invoked.[710]

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.[711] The demand must be made before voir dire and only one shuffle may be granted.[712] "Before voir dire" means prior to jury-questionnaire responses being examined by any of the parties.[713] Rule 223 procedures for a jury shuffle are mandatory and failure to comply with them is error.[714] Error may be preserved by making a clear and timely objection before the trial court.[715]

In deciding whether to grant a new trial, one court of appeals used a traditional harmless error analysis.[716] Under this analysis, the court requires appellants to show that "violation of Rule 223 probably caused the rendition of an improper judgment."[717] 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.[718] Another court of appeals adopted the "relaxed" harmless error standard used in the jury selection context.[719] Under this analysis, a complaining party must show that a "trial was materially unfair, without having to show more."[720] Further-

709. *Richards*, 35 S.W.3d at 252; Collins v. Collins, 904 S.W.2d 792, 798 (Tex. App.—Houston [1st Dist.] 1995, writ denied); 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 (Tex. Civ. App.—Tyler 1979, no writ).

710. *See infra* Part V.

711. 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).

712. 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.

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

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

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

716. *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)).

717. *Id.*

718. *Id.*

719. Carr v. Smith, 22 S.W.3d 128, 135 (Tex. App.—Fort Worth 2000, pet. denied).

720. *Id.* (citing Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 921 (Tex. 1979)).

more, the appellate court must examine the entire record.[721] 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."[722] Such a showing will result in the granting of a new trial.[723]

E. *Voir Dire and Challenges for Cause*

The supreme court has instructed the trial courts to provide a litigant with broad latitude during voir dire examination to enable the litigant to discover any bias or prejudice by the potential jurors so that "peremptory challenges may be intelligently exercised."[724] Although voir dire examination is largely within the sound discretion of the trial court,[725] 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."[726] "[T]o preserve a complaint that a trial court improperly restricted voir dire, a party must timely alert the trial court as to the specific manner in which it intends to pursue the inquiry."[727] To obtain a reversal, the complaining party must show that the trial court abused its discretion and that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment.[728]

---

721. *Id.*

722. *Id.* at 136.

723. *Id.*

724. Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 749 (Tex. 2006) (citing Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705, 709 (Tex. 1989)); Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d 362, 375 (Tex. 2000); 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 2005).

725. Cortez v. HCCI–San Antonio, Inc., 159 S.W.3d 87, 92 (Tex. 2005) (citing *Babcock*, 767 S.W.2d at 709).

726. *Babcock*, 767 S.W.2d at 709; *see Vasquez*, 189 S.W.3d at 750 (noting that inquiry into juror bias and prejudice is proper to determine whether potential jurors are statutorily disqualified); *Cortez*, 159 S.W.3d at 92 (declaring that "trial judges must not be too hasty in cutting off examination that may yet prove fruitful"); *see also* TEX. R. CIV. P. 228 (defining challenge for cause).

727. *Vasquez*, 189 S.W.3d at 758.

728. TEX. R. APP. P. 44.1.

Whether bias and prejudice exist is ordinarily a fact question.[729] 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.[730] "[T]he relevant inquiry is not where the jurors *start* but where they are likely to *end*."[731] 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."[732] Once bias or prejudice is established, it is a legal disqualification, and reversible error automatically results if the court overrules a motion to strike.[733] "[W]hen a challenge for cause is denied, [in order to preserve error,] a party must use a peremptory challenge against the veniremember involved, exhaust [all of the party's] remaining challenges, and notify the trial court that a specific objectionable veniremember will remain on the jury" panel in light of the court's denial of a challenge for cause.[734] A trial court's decision regarding challenges for cause is reviewed for an abuse of discretion.[735]

It is improper for counsel to question veniremembers about their potential verdict in light of certain evidence.[736] Questions to prospective jurors should address their biases and prejudices and not their opinions about evidence.[737] Questions to prospective jurors

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

730. Hafi v. Baker, 164 S.W.3d 383, 385 (Tex. 2005) (per curiam); 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).

731. *Hafi*, 164 S.W.3d at 385 (quoting Cortez v. HCCI-San Antonio, Inc. 159 S.W.3d 87, 93 (Tex. 2005)).

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

733. *See Compton*, 364 S.W.2d at 182 (holding that "[i]t is only where there are grounds for disqualification other than those provided for in the statute that the discretionary powers of the trial judge may be exercised").

734. *Cortez*, 159 S.W.3d at 90-91 (citing Hallett v. Houston Nw. Med. Ctr., 689 S.W.2d 888, 890 (Tex. 1985)).

735. *Id.* (citing Malone v. Foster, 977 S.W.2d 562, 564 (Tex. 1998)); 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)).

736. Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 751 (Tex. 2006) (interpreting *Cortez*, 159 S.W.3d 87 (Tex. 2005)).

737. *Id.* at 751-52.

cannot isolate one relevant piece of evidence.[738] "[A] trial court does not abuse its discretion in refusing to allow questions that seek to determine the weight to be given (or not to be given) a particular fact or set of relevant facts."[739] Trial courts have discretion to decide whether an inquiry of potential jurors explores external biases and unfair prejudices or possible verdicts based on evidence.[740]

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

Questions regarding alignment and antagonism of the parties often arise in multiple party litigation.[741] 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.[742] 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."[743] A trial court's decision to grant a motion to realign a party as a plaintiff is permitted "only where the burden of proof *on the whole case* rests on the defendant, or where the defendant makes the required admissions before trial."[744] 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.[745] 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.[746] To preserve error in the allocation

738. *Id.*

739. *Id.* at 753 (citing Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87, 94 (Tex. 2005)).

740. *Vasquez*, 189 S.W.3d at 754-55.

741. Amis v. Ashworth, 802 S.W.2d 379, 385 (Tex. App.—Tyler 1990, orig. proceeding [leave denied]) (Ramey, C.J., dissenting).

742. TEX. R. CIV. P. 233; Perkins v. Freeman, 518 S.W.2d 532, 533 (Tex. 1974); *Amis*, 802 S.W.2d at 385 (Ramey, C.J., dissenting). 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.

743. TEX. R. CIV. P. 233.

744. *Amis*, 802 S.W.2d at 384.

745. *Id.* at 384 n.7.

746. *Id.* at 382-83.

of jury strikes, the party must lodge the objection after voir dire, but before exercising the strikes.[747]

Whether antagonism exists between parties, per se, is a question of law.[748] "[I]n determining whether antagonism exists, the trial court must consider the pleadings, information disclosed by pretrial discovery, information and representations made during voir dire of the jury panel, and any information brought to the attention of the trial court before the" parties exercise their strikes.[749] "The existence of antagonism must be finally determined after voir dire and prior to the exercise of the strikes of the parties."[750] The existence of antagonism is not a discretionary matter; "it is a question of law [determined from the above factors as to] whether any of the litigants . . . on the same side of the docket are antagonistic" regarding an issue that the jury will be asked to answer.[751] "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."[752]

Thus, if the trial court based its finding "upon a reasonable assessment of the situation" as it existed at the time when the challenges were made, no abuse of discretion exists.[753] On the other hand, if the trial court has disregarded "the posture of the parties, or has misconstrued or overlooked" a crucial factor, the trial court's "decision should be reversed as an abuse of discretion."[754] The harmless error rule applies to the allocation of peremptory challenges given to a party; therefore, to obtain a reversal, the

---

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

748. 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.).

749. *Garcia*, 704 S.W.2d at 737; *accord Patterson Dental Co.*, 592 S.W.2d at 919; *"Y" Propane Serv., Inc.*, 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).

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

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

752. Diamond Shamrock Corp. v. Wendt, 718 S.W.2d 766, 768 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

753. *Am. Cyanamid Co.*, 732 S.W.2d at 661.

754. *Id.*

complaining party must establish that the trial was "materially unfair" based on the entire record.[755] "When the trial is hotly contested and the evidence is sharply conflicting, the error" automatically results in a materially unfair trial.[756]

G. *Batson/Edmonson Challenges*

The Equal Protection Clause of the United States Constitution[757] prohibits parties from using peremptory strikes to exclude members of a jury panel solely on the basis of race.[758] This proscription applies to both criminal and civil trials.[759] The United States Supreme Court has explained the three-step process in resolving a *Batson* objection to a peremptory challenge.[760] First, "the opponent of the . . . challenge must establish a prima facie case of racial discrimination."[761] Second, the burden shifts to the party exercising the strike to present a race-neutral explanation.[762] "Unless discriminatory intent is inherent in the" reason offered, the explanation "will be deemed race-neutral."[763] Third, the trial court must then determine whether the challenging party "has proven purposeful racial discrimination."[764] The issue of whether the race-neutral explanation should be believed is a question of fact for the trial court.[765] The standard of review of a trial court's decision regarding a *Batson/Edmonson* challenge is abuse of dis-

---

755. Garcia v. Cent. Power & Light Co., 704 S.W.2d 734, 737 (Tex. 1986); *accord* Lorusso v. Members Mut. Ins. Co., 603 S.W.2d 818, 820-21 (Tex. 1980); Patterson Dental Co. v. Gunn, 592 S.W.2d 914, 920 (Tex. 1979).

756. *Garcia*, 704 S.W.2d at 737; *accord Patterson Dental Co.*, 592 S.W.2d at 921.

757. U.S. CONST. amend. XIV, § 1.

758. Batson v. Kentucky, 476 U.S. 79, 89 (1986).

759. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 629 (1991); *see* Goode v. Shoukfeh, 943 S.W.2d 441, 444 (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 jurors on the basis of race violates the equal protection rights of the excluded juror).

760. *Goode*, 943 S.W.2d at 445.

761. *Id.*

762. *Id.*

763. *Id.*

764. *Id.*

765. Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex. 1997). Unless the explanation offered is too incredible to be believed, the reviewing court cannot reweigh the evidence and reach a different conclusion. *Id.*

cretion.[766] To preserve a *Batson/Edmonson* issue for appellate review, the complaining party must object to the allegedly offensive peremptory strikes before swearing in the jury.[767]

H. *Opening Statements*

The trial court has broad discretion to limit opening statements, subject only to review for abuse of discretion.[768] It is error to discuss evidence that is not eventually offered at the trial.[769] Nonetheless, the error is reversible error only if it was calculated to and probably did cause the rendition of an improper judgment.[770]

I. *Trial, Post-verdict, and Post-judgment Trial Amendments*

When a request to amend pleadings is made within seven days of trial,[771] or thereafter under Rule 63,[772] or post-verdict pleading amendments are requested under Rule 66,[773] 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."[774] If the

---

766. *Id.* "The Texas 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)).

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

768. 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.).

769. 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).

770. *Id.* at 800.

771. 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. v. Sierra Club, 843 S.W.2d 683, 687 (Tex. App.—Austin 1992, writ denied).

772. TEX. R. CIV. P. 63.

773. TEX. R. CIV. P. 66.

774. State Bar of Tex. v. Kilpatrick, 874 S.W.2d 656, 658 (Tex. 1994); *accord* 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

amendment is procedural in nature (*i.e.*, merely conforming the pleadings to the evidence at trial), the trial court must grant the amendment.[775] However, if the amendment is substantive in nature (*i.e.*, changing the basis of a party's causes of action), the trial court has discretion to grant or deny the amendment.[776]

The standard of review for granting a trial amendment is whether the trial court abused its discretion.[777] To establish an abuse of discretion in allowing the amendment, the complaining party must (1) present evidence of surprise or prejudice;[778] and (2) request a continuance.[779] Mere allegations of surprise or prejudice are not sufficient.[780] Note, however, that while "the trend is to give trial courts wide latitude in allowing amendments," post-judgment trial amendments are not permitted.[781]

J. *Evidence*

The admission or exclusion of evidence is a matter within the trial court's discretion.[782] To obtain reversal of a judgment based

---

defense." Bell v. Moores, 832 S.W.2d 749, 757 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

775. *Chapin & Chapin, Inc.*, 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). "The rule of trial by consent is limited to those exceptional cases where the parties clearly tried an unpleaded issue[;] . . . [therefore, t]he rule should be cautiously applied and [is] not [appropriate] in doubtful situations." Libhart v. Copeland, 949 S.W.2d 783, 797 (Tex. App.—Waco 1997, no writ).

776. 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 *Kilpatrick*, 874 S.W.2d at 658).

777. *Kilpatrick*, 874 S.W.2d at 658; *Greenhalgh*, 787 S.W.2d at 939; 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).

778. *Greenhalgh*, 787 S.W.2d at 940; *Clade*, 838 S.W.2d at 280.

779. 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).

780. *Greenhalgh*, 787 S.W.2d at 941; Weidner v. Sanchez, 14 S.W.3d 353, 376-77 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

781. Boarder to Boarder Trucking, Inc. v. Mondi, Inc., 831 S.W.2d 495, 499 (Tex. App.—Corpus Christi 1992, no writ); *accord* Mitchell v. LaFlamme, 60 S.W.3d 123, 132 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

782. *In re* J.P.B., 180 S.W.3d 570, 575 (Tex. 2005) (citing State v. Bristol Hotel Asset Co., 65 S.W.3d 638, 647 (Tex. 2001)); Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897,

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."[783] The supreme court has recognized "the impossibility of prescribing a specific test for determining whether [the erroneous admission or exclusion of evidence] was reasonably calculated to cause and probably did cause the rendition of an improper judgment."[784] However, the complaining party is not required to prove that "but for" the error, a different judgment would necessarily have resulted.[785] Instead, the complaining party must only show that the error "probably" resulted in an improper judgment.[786] In making this determination, the appellate court must review the entire record.[787] 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

---

918 (Tex. 2004) (Jefferson, C.J., joined by O'Neill, J., dissenting); Interstate Northborough P'ship v. State, 66 S.W.3d 213, 220 (Tex. 2001); Tex. Dep't of Transp. v. Able, 35 S.W.3d 608, 617 (Tex. 2000); 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); *see also* 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).

783. TEX. R. APP. P. 44.1; *accord Ramirez*, 159 S.W.3d at 918 (Jefferson, C.J., joined by O'Neill, J., dissenting); Nissan Motor Co. v. Armstrong 145 S.W.3d 131, 144 (Tex. 2004); *Malone*, 972 S.W.2d at 43; *City of Brownsville*, 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), *rev'd on other grounds*, 868 S.W.2d 299 (Tex. 1993).

784. McCraw v. Maris, 828 S.W.2d 756, 757 (Tex. 1992); *accord* Lorusso v. Members Mut. Ins. Co., 603 S.W.2d 818, 821 (Tex. 1980). Determining whether erroneous admission is harmful "is more a matter of judgment than precise measurement." *Armstrong*, 145 S.W.3d at 144.

785. *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), *rev'd on other grounds*, 106 S.W.3d 724 (Tex. 2003).

786. *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); *LSR Joint Venture No. 2*, 837 S.W.2d at 699.

787. *Ramirez*, 159 S.W.3d at 918 (Jefferson, C.J., joined by O'Neill, J., dissenting); Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 144 (Tex. 2004); *Interstate Northborough P'ship*, 66 S.W.3d at 220; *Able*, 35 S.W.3d at 617; City of Brownsville v. Alvarado, 897 S.W.2d 750, 754 (Tex. 1995); *McCraw*, 828 S.W.2d at 758 (citing Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 396 (Tex. 1989); *Lorusso*, 603 S.W.2d at 821); Jamail v. Anchor Mortgage Servs., Inc., 809 S.W.2d 221, 223 (Tex. 1991) (per curiam).

the particular evidence admitted or excluded.[788] Furthermore, error from the improper admission of evidence is usually deemed harmless if (1) the objecting party "opens the door" by introducing the same evidence or evidence of a similar character;[789] (2) the objecting party "opens the door" by subsequently permitting the same or similar evidence to be introduced without objection;[790] or (3) the evidence is merely cumulative of properly admitted evidence.[791]

K. *Expert Testimony*

"Expert testimony is necessary when the alleged [conduct] is of such a nature [that it is not] within the experience of [a] layman."[792] 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 testimony has the burden of demonstrating its admissibility.[793] Accordingly, the proponent must establish that the expert's

---

788. *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), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 31.007 (Vernon 1986); Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 837 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), *superseded by rule,* TEX. R. APP. P. 47; Atl. Mut. Ins. Co. v. Middleman, 661 S.W.2d 182, 185 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

789. Sw. Elec. Power Co. v. Burlington N. R.R., 966 S.W.2d 467, 473 (Tex. 1998) (quoting McInnes v. Yamaha Motor Co., 673 S.W.2d 185, 188 (Tex. 1984)).

790. Richardson v. Green, 677 S.W.2d 497, 501 (Tex. 1984); *Shenandoah Assocs.*, 741 S.W.2d at 494, *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN § 31.007 (Vernon 1986).

791. *Ramirez*, 159 S.W.3d at 918; *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).

792. FFE Transp. Servs., Inc. v. Fulgham, 154 S.W.3d 84, 90 (Tex. 2004) (quoting Roark v. Allen, 633 S.W.2d 804, 809 (Tex. 1982)).

793. Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 410 (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 409. 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).

testimony is based on a reliable foundation.[794] Texas Rule of Evidence 702 provides a two-part test to determine the admissibility of an expert's testimony.[795] 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.[796]

Qualified. Under Rule 104(a),[797] 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.[798] 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.[799] The supreme court has noted that the trial court is not to decide whether an expert's conclusion is correct, but instead, should only determine whether the analysis used to reach the conclusion is reliable.[800]

Relevant. The relevance requirement, which incorporates the relevancy analysis under Rules 401 and 402,[801] 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."[802] If the evidence has no relationship to any issue in the case, the evidence does not satisfy

---

794. *Robinson*, 923 S.W.2d at 556.

795. TEX. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.").

796. *Id.*; Cooper Tire & Rubber Co. v. Mendez, No. 04-1039, 2006 WL 1652234, at *2 (Tex. June 16, 2006) (citing Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 499 (Tex. 2001)); Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 628 (Tex. 2002); *Helena Chem. Co.*, 47 S.W.3d at 499; *Gammill*, 972 S.W.2d at 720; *Robinson*, 923 S.W.2d at 556. "The exacting standards for expert testimony set forth by the United States Supreme Court" and by the Texas Supreme Court "are well-known to Texas litigators." Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 259 (Tex. 2004) (citing Kuhmo Tire Co. v. Carmichael, 526 U.S. 137 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); *Gammill*, 972 S.W.2d 713; Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997); *Robinson*, 923 S.W.2d 549)).

797. TEX. R. EVID. 104(a).

798. *Gammill*, 972 S.W.2d at 718.

799. *Helena Chem. Co.*, 47 S.W.3d at 499; *Gammill*, 972 S.W.2d at 719.

800. *Id.* at 728.

801. TEX. R. EVID. 401, 402.

802. Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 629 (Tex. 2002) (citing TEX. R. EVID. 401, 402); *accord* E.I. du Pont de Nemours & Co., Inc. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995) (quoting United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)).

Rule 702 and is inadmissible.[803] "Opinion testimony that is conclusory or speculative is not relevant . . . because it does not tend to make the existence of a . . . fact" more or less probable, and such testimony is incompetent evidence which cannot support a judgment.[804] Similarly, an expert who offers only his credentials and subjective opinions has offered fundamentally unsupported evidence and evidence that is of no assistance to the jury.[805] As the court in *Cooper Tire & Rubber Co. v. Mendez*[806] pointed out, "Rule 702, by its terms, only provides for the admission of expert testimony that actually assists the finder of fact."[807] 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."[808] Such evidence carries absolutely no weight and is the equivalent of no evidence.[809]

Reliable. "The reliability requirement focuses on the principles, research, and methodology underlying an expert's conclusions."[810] Expert testimony is not reliable if it "is not grounded 'in the methods and procedures of science'" and is the equivalent of "no more than 'subjective belief or unsupported speculation.'"[811] If an expert's scientific evidence is not reliable, then it is not evidence.[812] 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.

---

803. *See* TEX. R. EVID. 702 (requiring that the expert's knowledge "assist the trier of fact to understand the evidence or to determine a fact in issue").

804. Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 232 (Tex. 2004) (citing TEX. R. EVID. 410; *accord* Cas. Underwriters v. Rhone, 134 Tex. 50, 132 S.W.2d 97, 99 (1939)).

805. Cooper Tire & Rubber Co. v. Mendez, No. 04-1039, 2006 WL 1652234, at *2 (Tex. June 16, 2006); Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 712 (Tex. 1997); *Coastal Transp. Co.*, 136 S.W.3d at 232.

806. No. 04-1039, 2006 WL 1652234 (Tex. June 16, 2006).

807. *Mendez*, 2006 WL 1652234, at *3.

808. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 558 (Tex. 1995).

809. *Havner*, 953 S.W.2d at 712.

810. Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 254 (Tex. 2004) (quoting Exxon Corp. v. Zwahr, 88 S.W.3d 623, 629 (Tex. 2002)).

811. *Robinson*, 923 S.W.2d at 556 (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590 (1993)).

812. Cooper Tire & Rubber Co. v. Mendez, No. 04-1039, 2006 WL 1652234, at *2 (Tex. June 16, 2006) (citing Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 713 (Tex. 1997)).

> 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."[813]

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.*[814]

> (1) the extent to which the theory has been or can be tested;
> (2) the extent to which the technique relies upon the subjective interpretation of the expert . . .;
> (3) whether the theory has been subjected to peer review and/or publication;
> (4) the technique's potential rate of error;
> (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
> (6) the [non-judicial] uses which have been made of the theory or technique.[815]

In *Cooper Tire & Rubber Co. v. Mendez*, the supreme court emphasized that the six factors are not exclusive and "that Rule 702 contemplates a flexible inquiry."[816] The supreme court recognized in *Gammill* "that the *Robinson* factors may not apply to certain testimony;"[817] however, in those cases there still must be some basis for the opinion offered to demonstrate reliability.[818] 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.[819]

---

813. Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 725-26 (Tex. 1998) (quoting Watkins v. Telsmith, 121 F.3d 984, 991 (5th Cir. 1997)).

814. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995); *see generally Daubert*, 509 U.S. 579 (1993) (addressing factors to be considered).

815. *Robinson*, 923 S.W.2d at 557; *accord Mendez*, 2006 WL 1652234, at *2; 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); *see also Gammill*, 972 S.W.2d at 720 (reviewing the factors that a trial judge may consider when determining admissibility of scientific evidence).

816. *Mendez*, 2006 WL 1652234, at *2.

817. *Helena Chem. Co.*, 47 S.W.3d at 499; *accord Gammill*, 972 S.W.2d at 726.

818. *Helena Chem. Co.*, 47 S.W.3d at 499 (citing *Gammill*, 972 S.W.2d at 726).

819. *Id.*; Coastal Tankships, Inc. v. Anderson, 87 S.W.3d 591, 611 (Tex. App.— Houston [1st Dist.] 2002, pet. denied) (citing Hernandez v. State, 53 S.W.3d 742, 751-52 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd)).

Case law has developed some principles for determining reliability. In deciding whether an expert is qualified, the trial court must ensure that purported experts truly have expertise concerning the actual subject matter about which they offer an opinion.[820] 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."[821] Additionally, if the analytical gap, between the data the expert relies upon and the opinion offered is too great, the expert testimony is unreliable.[822] The reviewing court is not required to ignore fatal gaps in an expert's analysis or assertions that are simply incorrect.[823] 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.[824] 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.[825] As the court stated in *General Motors Corp. v. Iracheta*:[826]

> We noted in *Burrow v. Arce* that, although expert opinion testimony often provides valuable evidence in a case, "it is the basis of the witness's opinion, and the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere *ipse dixit* [an assertion made not proved] of a credentialed witness." . . . Opinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to

820. *Mendez*, 2006 WL 1652234, at *2 (quoting Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 719 (Tex. 1998)).

821. *Mendez*, 2006 WL 1652234, at *2 (quoting E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995)); *accord* Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 629 (Tex. 2002) (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590 (1993)).

822. *Mendez*, 2006 WL 1652234, at *2 (quoting *Gammill*, 972 S.W.2d at 727); Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 254 (Tex. 2004) (quoting *Gammill*, 972 S.W.2d at 726); *Zwahr*, 88 S.W.3d at 629 (citing *Gammill*, 972 S.W.2d at 727).

823. *Mendez*, 2006 WL 1652234, at *2 (quoting Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 912 (Tex. 2004)).

824. Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 499 (Tex. 2001) (citing Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 714 (Tex. 1997)).

825. *Kerr-McGee Corp.*, 133 S.W.3d at 254 (citing *Zwahr*, 88 S.W.3d at 629); *Gammill*, 972 S.W.2d at 728.

826. 161 S.W.3d 462 (Tex. 2005).

> make the existence of a material fact "more or less probable." . . . This Court has labeled such testimony as "incompetent evidence," and has often held that such conclusory testimony cannot support a judgment." . . . Furthermore, this Court has held that such conclusory statements cannot support a judgment even when no evidence objection was made to the [testimony].[827]

While the *Robinson* factors cannot always be used to determine an expert's reliability, "there must be some basis for the opinion offered to show its reliability."[828] The court emphasized, however, that the relevance and reliability requirements apply to all expert testimony.[829]

"A flaw in the expert's reasoning from the date may render reliance on a study unreasonable and render the inferences drawn therefrom dubious. Under that circumstance, the expert's scientific testimony is unreliable and, legally, no evidence."[830] When reviewing the sufficiency of the scientific evidence supporting a jury finding, unreliable scientific evidence is the legal equivalent of no evidence at all.[831] 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."[832]

In *E.I. DuPont de Nemours & Co. v. Robinson*, the Texas Supreme Court determined that the trial court is the evidentiary gatekeeper to determine whether the expert and his proffered testimony meet these two tests.[833] While the trial court serves as an

---

827. Gen. Motors Corp. v. Iracheta, 161 S.W.3d 462, 470-71 (Tex. 2005) (quoting TEX. R. EVID. 401; Burrow v. Arce, 997 S.W.2d 229, 225 (Tex. 1999)); *see* Cooper Tire & Rubber Co. v. Mendez, No. 04-1039, 2006 WL 1652234, at *2 (Tex. June 16, 2006) (explaining the trial court is "not required to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert" (quoting Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 727 (Tex. 1998))); *accord* Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 232 (Tex. 2004) (quoting Burrow v. Arce, 997 S.W.2d 229, 235 (Tex. 1999)).

828. *Mendez*, 2006 WL 1652234, at *3 (quoting *Gammill*, 972 S.W.2d at 726).

829. *Id.* (quoting *Gammill*, 972 S.W.2d at 726).

830. *Id.* (quoting Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 714 (Tex. 1997)).

831. *Havner*, 953 S.W.2d at 712.

832. *Id.*; *see Iracheta*, 161 S.W.3d at 471 (concluding that expert testimony was unreliable and did not "rise to the level of competent evidence").

833. 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 v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-95 (1993)); Helena Chem. Co. v. Wilkins, 47 S.W.3d

"evidentiary gatekeeper" by screening for irrelevant and unreliable expert evidence, the trial court has broad discretion in determining the admissibility of the evidence.[834] The trial court's determination that these requirements have been met is reviewed for an abuse of discretion.[835] "The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles."[836] If the expert testimony does not meet the requirements, then it is an abuse of discretion to admit the testimony.[837] Both the admissibility and sufficiency of unreliable scientific evidence may be challenged on appeal.[838]

1. 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.[839] In line with these principles, "[a] trial court should admit evidence of an out-of-court experiment only when there is [a] substantial similarity between [the] conditions existing at the time of the occurrence giving rise to the litigation and the conditions created by the experiment."[840] However, the conditions do not have to be identical; the

---

486, 499 (Tex. 2001); Gen. Motors Corp. v. Sanchez, 997 S.W.2d 584, 590 (Tex. 1999); Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998).

834. Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 629 (Tex. 2002) (citing *Sanchez*, 997 S.W.2d at 590; *Robinson*, 923 S.W.2d at 558); *Helena Chem. Co.*, 47 S.W.3d at 499; Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726 (Tex. 1998); *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").

835. Cooper Tire & Rubber Co. v. Mendez, No. 04-1039, 2006 WL 1652234, at *2 (Tex. June 16, 2006) (citing *Helena Chem. Co.*, 47 S.W.3d at 499); Guadalupe-Blanco River Auth. v. Kraft, 77 S.W.3d 805, 807 (Tex. 2002); *Gammill*, 972 S.W.2d at 718-719; Broders v. Heise, 924 S.W.2d 148, 151 (Tex. 1996).

836. *Mendez*, 2006 WL 1652234, at *2 (quoting *Robinson*, 923 S.W.2d at 558).

837. *See id.* (citing *Kraft*, 77 S.W.3d at 810).

838. *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 (Tex. 1997) (considering a "no evidence" point of error).

839. TEX. R. EVID. 403; *In re* C.J.F., 134 S.W.3d 343, 356 (Tex. App.—Amarillo 2003, pet. denied); *see* Ford Motor Co. v. Miles, 967 S.W.2d 377, 389 (Tex. 1998) (Owen, J., concurring) (holding that admission of videotapes of sled tests was harmful error).

840. Gen. Motors Corp. v. Gayle, 951 S.W.2d 469, 475 (Tex. 1997); *accord* 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); Horn v. Hefner, 115 S.W.3d 255, 256 (Tex.

experiment may be admitted if the trial court, in exercising its discretion, finds the difference in condition to be minor.[841] 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.[842] The admission of such demonstrative evidence is within the trial court's discretion and is subject to an abuse of discretion review.[843]

L. *Bifurcation Generally of Trial on Punitive Damages*

Under Rule 174(b),[844] a trial court may order a separate trial on any issue in the interest of convenience and to avoid prejudice to a party.[845] A trial court's order on bifurcation is reviewed for an abuse of discretion.[846]

If a defendant timely files a motion for bifurcated trial as to punitive damages, a trial court must separate the determination of the amount of punitive damages from the remaining issues.[847] "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."[848] 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 plaintiff's net worth.[849] The jury would then determine the

---

App.—Texarkana 2003, no pet.) (citing Fort Worth & Denver Ry. Co. v. Williams, 375 S.W.2d 279, 281-82 (Tex. 1964)).

841. *Rodriguez*, 944 S.W.2d at 767; *Williams*, 375 S.W.2d at 282.

842. Parkway Hosp., Inc. v. Lee, 946 S.W.2d 580, 585 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

843. *Id.*

844. TEX. R. CIV. P. 174(b).

845. Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 556 (Tex. 2004).

846. *Id.* (citing Allison v. Ark. La. Gas Co., 624 S.W.2d 566, 568 (Tex. 1981) (per curiam)).

847. TEX. CIV. PRAC. & REM. CODE ANN. § 41.009 (Vernon 1997); Sw. Ref. Co. v. Bernal, 22 S.W.3d 425, 430-31 (Tex. 2000); Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 30 (Tex. 1994); *see* 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).

848. *Moriel*, 879 S.W.2d at 30.

849. *See* Lunsford v. Morris, 746 S.W.2d 471, 472 (Tex. 1988) (noting that forty-three states allow evidence of net worth to be admitted during assessment of punitive damages).

amount of damages to award after considering all of the evidence presented at both phases of the trial.[850]

M. *Motion for Directed or Instructed Verdict*

1. Jury Trials

A directed or instructed verdict[851] is proper under Rule 268:[852]

> (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.[853]

Generally, a directed verdict in favor of a defendant may be proper in two situations: (1) when a plaintiff does not present evidence "raising a fact issue essential to the plaintiff's right of recovery;"[854] and (2) when a plaintiff "admits or the evidence conclusively establishes a defense to the plaintiff's cause of action."[855]

---

850. *Moriel*, 879 S.W.2d at 30.

851. *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.*

852. TEX. R. CIV. P. 268.

853. 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.).

854. 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)); *accord* Vance v. My Apartment Steak House, Inc., 677 S.W.2d 480, 483 (Tex. 1984).

855. *Fin. Review Servs.*, 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)); *accord* 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).

The standard for reviewing a directed verdict includes both an inclusive and exclusive standard, for which the differences are "more semantic than real."[856] The exclusive standard requires the reviewing court to "consider only evidence supporting the non-movant's case" and to "disregard all contrary evidence."[857] The inclusive standard requires the reviewing court to consider "all the evidence in a light contrary to the directed verdict."[858] Thus, the reviewing court will credit "all favorable evidence that reasonable jurors could believe" and disregard "all contrary evidence except that which they could not ignore."[859] In reviewing the granting of a directed or instructed verdict by the trial court on an evidentiary basis, the reviewing court will decide whether there is any evidence of probative value that raises issues of fact on the material questions presented.[860] If the evidence rises to a level to allow "reasonable and fair minded people to differ in their conclusions, it constitutes more than a scintilla of evidence, [an instructed verdict is improper], and the case must be reversed and remanded for the jury's determination."[861] "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."[862] The reviewing court may affirm a directed verdict even if the trial court's rationale for granting the

856. City of Keller v. Wilson, 168 S.W.3d 802, 823-26 (Tex. 2005).

857. *Id.* at 823.

858. *Id.*

859. *Id.* at 830.

860. Bostrom Seating, Inc. v. Crane Carrier Co., 140 S.W.3d 681, 684 (Tex. 2004) (citing Dow Chem. Co. v. Francis, 46 S.W.3d 237, 242 (Tex. 2001)); Prudential Ins. Co. v. Fin. Review Servs., 29 S.W.3d 74, 77 (Tex. 2000) (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. Sw. Bell Tel. Co., 651 S.W.2d 260, 262 (Tex. 1983); Collora v. Navarro, 574 S.W.2d 65, 68 (Tex. 1978).

861. Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 234 (Tex. 2004) (quoting Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 25 (Tex. 1994)).

862. 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 v. Ernst & Whitney, 773 S.W.2d 707, 709-10 (Tex. App.—San Antonio 1989, no writ).

directed verdict is erroneous, provided the verdict can be supported on another basis.[863]

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]."[864] Prior to the decision in *Qantel Business Systems, Inc. v. Custom Controls Co.*,[865] 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.[866] 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.[867] Thus, the trial judge could "grant a motion for judgment [upon conclusion] of the plaintiff's case only when there [wa]s no evidence . . . to support the plaintiff's cause of action."[868] "[T]he judge, who [wa]s unpersuaded by the evidence, but f[ound] the existence of some evidence to support the plaintiff's claim, [wa]s forced to dutifully listen to the defendant's portion of the case."[869] 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.[870] On appeal, the legal and factual sufficiency of the evidence to support the judgment may be challenged

863. 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.).

864. *Qantel Bus. Sys., Inc.*, 761 S.W.2d at 306 (Gonzalez, J., concurring); *accord* Schwartz v. Pinnacle Commc'ns, 944 S.W.2d 427, 431 (Tex. App.—Houston [14th Dist.] 1997, no writ).

865. 761 S.W.2d 302 (Tex. 1988).

866. *Qantel Bus. Sys., Inc.*, 761 S.W.2d at 303.

867. *Id.*

868. *Id.* at 304.

869. *Id.*

870. *Qantel Bus. Sys., Inc.*, 761 S.W.2d at 304; Roberts Express, Inc. v. Expert Transp., Inc., 842 S.W.2d 766, 769-70 (Tex. App.—Dallas 1992, no writ).

as in any other nonjury case.[871] The standards of review in nonjury cases are discussed in Part VIII.

N. *Charge of the Court*

There remains confusion regarding the standard of review applicable to complaints about the court's charge to the jury.[872] 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.[873]

---

871. *Roberts Express, Inc.*, 842 S.W.2d at 769-70; Schwartz v. Pinnacle Commc'ns, 944 S.W.2d 427, 431 (Tex. App.—Houston [14th Dist.] 1997, no writ).

872. *See* First Valley Bank v. Martin, 144 S.W.3d 466, 474 (Tex. 2004) (explaining that in *Payne*, "the [c]ourt took a significant step forward in this process [of focusing appellate review on substantive issues as opposed to technical traps] by holding that in some cases a request can serve as an objection sufficient to preserve error in a jury charge") (citing State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 239-40 (Tex. 1992)); *see also Payne*, 838 S.W.2d at 240 (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. *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.

873. *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"); Shupe v. Lingafelter, 192 S.W.3d 577, 579 (Tex. 2006) (explaining that "[the appellate court] review[s] a trial court's decision to submit or refuse a particular instruction under an abuse of discretion standard") (citing La.-Pac. Corp. v. Knighten, 976 S.W.2d 674, 676 (Tex. 1998)). 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); Romero v. KPH Consolidation, Inc., 166 S.W.3d 212, 226, 230 (Tex. 2005) (affirming *Casteel* and *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), and explaining that the "reversible error rule of *Casteel* and *Harris County* neither requires parties to submit separate questions for every possible issue or combination of issues; the rule *does* both encourage and require parties not to submit issues that have no basis in law and fact in such a way that the error cannot be corrected without retrial"); *cf.* City of Fort Worth v. Zimlich, 29 S.W.3d 62, 69 n.1 (Tex. 2000) (noting that the 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).

1. Questions

Unless extraordinary circumstances exist, a trial court must submit broad-form questions to the jury.[874] The broad-form submission requirement was "intended to simplify jury charges for the benefit of the jury, the parties, and the trial court."[875] The supreme court has stated that "[w]hen properly utilized, broad-form submission can simplify charge conferences and provide more comprehensible questions for the jury."[876] 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."[877] The supreme court has interpreted Rule 278 as providing "a substantive, nondiscretionary directive to trial courts requiring them to submit requested questions to the jury if the pleadings and any evidence support them."[878] Thus, as "long as matters are timely raised and properly requested as a part of a trial court's charge," a judgment must be reversed "when a party is denied proper submission of a valid theory of recovery or a vital defensive issue raised by the pleadings and evidence."[879]

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.[880] Likewise, other objections, such as those which claim that the issue in question was "not supported by the pleadings"[881] or that the evidence is not legally sufficient to sup-

874. TEX. R. CIV. P. 277 ("In all jury cases the court shall, whenever feasible, submit the cause upon broad-form submission."); Keetch v. Kroger Co., 845 S.W.2d 262, 266 (Tex. 1992); *E.B.*, 802 S.W.2d at 649; Crawford v. Deets, 828 S.W.2d 795, 800 (Tex. App.—Fort Worth 1992, writ denied).

875. *Romero*, 166 S.W.3d at 230. The court also explained that "when properly utilized, broad-form submission can simplify charge conferences and provide more comprehensible questions for the jury"; however, "broad-form submission is not always practicable . . . and . . . cannot be used to broaden the harmless error rule to deny a party the correct charge to which it would otherwise be entitled." *Id.*

876. *Smith*, 96 S.W.3d at 235; *see Romero*, 166 S.W.3d at 226, 230 (following *Harris County*).

877. TEX. R. CIV. P. 278; *see Romero*, 166 S.W.3d at 226, 215 (explaining that questions should be submitted to the jury in broad-form as required by TEX. R. CIV. P. 277 "whenever feasible"; however, "broad-form submission cannot be used to put before the jury issues that have no basis in the law or evidence").

878. Elbaor v. Smith, 845 S.W.2d 240, 243 (Tex. 1992).

879. Exxon Corp. v. Perez, 842 S.W.2d 629, 631 (Tex. 1992).

880. Cont'l Cas. Co. v. Street, 379 S.W.2d 648, 651 (Tex. 1964).

881. McLennan Elec. Coop., Inc. v. Sims, 376 S.W.2d 924, 927 (Tex. Civ. App.—Waco 1964, writ ref'd n.r.e.).

port submission,[882] 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.[883] "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."[884] In addition, the reversible error analysis applies to complaints about errors in the charge.[885] 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.[886]

2. Instructions and Definitions

A litigant has the right to have the jury properly instructed on the issues "authorized and supported by the law governing the case."[887] The trial court should generally explain to the jury any

882. *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). However, "stock no-evidence" objections and general objections that do not address the issue of broad-form submission are not sufficient to preserve error. Tefsa v. Stewart, 135 S.W.3d 272, 276 (Tex. App.—Fort Worth 2004, pet. denied).

883. 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).

884. 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 consider overruling it).

885. Lee Lewis Constr., Inc. v. Harrison, 70 S.W.3d 778, 786-87 (Tex. 2001) (citing TEX. R. APP. P. 61.1); *Island Recreational Dev. Corp.*, 710 S.W.2d at 555.

886. *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); *see also* Sterling Trust Co. v. Adderly, 168 S.W.3d 835, 846 n.4 (Tex. 2005) (applying *Payne* and concluding that error was preserved because counsel "made a clear, timely objection and obtained a ruling"); McKinley v. Stripling, 763 S.W.2d 407, 410 (Tex. 1989) (ruling that because the plaintiff refused to submit the proximate cause issue in informed consent action after the defendant properly objected to the omission of the issue on an element, he waived the issue and could not recover).

887. Harris County v. Smith, 96 S.W.3d 230, 234 (Tex. 2002) (citing Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 389 (Tex. 2000) (quoting Lancaster v. Fitch, 112 Tex. 293, 246 S.W. 1015, 1016 (1923))).

legal or technical terms contained in instructions and definitions.[888] The decision of whether to submit a particular instruction or definition is reviewed for an abuse of discretion,[889] with the essential question being whether the instruction or definition aids the jury in answering the questions.[890] Accordingly, a court is given wide latitude to determine the sufficiency of explanatory instructions and definitions.[891] A court has considerably more discretion in submitting instructions and definitions than it has in submitting jury questions.[892]

---

888. TEX. R. CIV. P. 277; Union Pac. R.R. v. Williams, 85 S.W.3d 162, 166 (Tex. 2002); Niemeyer v. Tana Oil & Gas Corp., 39 S.W.3d 380, 387 (Tex. App.—Austin 2001, pet. denied); 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.).

889. Shupe v. Lingafelter, 192 S.W.3d 577, 579 (Tex. 2006); State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 452 (Tex. 1997); Magro v. Ragsdale Bros., Inc., 721 S.W.2d 832, 836 (Tex. 1986).

890. *See* Sterling Trust Co. v. Adderly, 168 S.W.3d 835, 842-43 (Tex. 2005) (quoting TEX. R. CIV. P. 277 that "[t]he trial court is required to 'submit such instructions and definitions a shall be proper to enable the jury to render a verdict'"); 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 595, 598 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

891. Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 791 (Tex. 1995); 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).

892. 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) ("[S]ubmission 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."[893] An instruction is proper if it assists the jury, is supported by the pleadings or evidence, and accurately states the law.[894] Examples of "improper" instructions include those which misstate the law or mislead the jury;[895] those which "comment on the weight of the evidence";[896] or those which " 'nudge' or 'tilt' the jury."[897] The test of sufficiency for a definition is its "reasonable clarity in performing [its] function."[898] Both instructions and definitions are reviewed under an abuse of discretion test.[899] However, whether the terms are properly defined or the instruction properly worded should be a question of law reviewable de novo.[900] A de novo standard of review should also be used when the complaint is that an explanatory instruction or definition misstates the law[901] or di-

---

893. TEX. R. CIV. P. 277; *Plainsman Trading Co.*, 898 S.W.2d at 791; *M.N. Dannenbaum, Inc.*, 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.).

894. Union Pac. R.R. v. Williams, 85 S.W.3d 162, 166 (Tex. 2002); 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. denied).

895. 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, 904-05 (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).

896. Torres v. Caterpillar, Inc., 928 S.W.2d 233, 241 (Tex. App.—San Antonio 1996, writ denied). A "comment on the weight of the evidence" may be demonstrated when the instruction "assumes the truth of a material controverted fact, or exaggerates, minimizes, or withdraws some pertinent evidence from the jury's consideration." *Id.* at 241-42; *accord* H.E. Butt Grocery Co. v. Bilotto, 985 S.W.2d 22, 24 (Tex. 1998).

897. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 724 (Tex. 2003).

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

899. *Torres*, 928 S.W.2d at 241; *see also* Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 791 (Tex. 1995) (recognizing that an incidental comment on evidence is permissible "when it is properly a part of an instruction or definition"); *Harris*, 765 S.W.2d at 801 (defining an improper explanatory instruction as one that misstates the law as applied to the facts).

900. *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).

901. *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.).

rectly comments on the weight of the evidence.[902] If the definition or instruction was improper, the reviewing court must then determine whether the error was harmless.[903]

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."[904] When "the refusal is based on a determination that the request is unnecessary, the abuse of discretion standard" of review should apply.[905] In contrast, when the refusal is based upon a determination that the instruction or definition was not raised by the pleadings,[906] was not supported by at least "some evidence,"[907] was not tendered in substantially correct form, or was not an element of a ground of recovery or defense in broad-form submission,[908] the complaint presents a legal question reviewable de novo.[909] 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

---

902. 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).

903. Quantum Chem. Corp. v. Toennies, 47 S.W.3d 473, 480 (Tex. 2001); Owens-Corning Fiberglas Corp. v. Martin, 942 S.W.2d 712, 722 (Tex. App.—Dallas 1997, no writ); *M.N. Dannenbaum, Inc.*, 840 S.W.2d at 631.

904. 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 also* TEX. R. CIV. P. 277 (describing what type of instructions and definitions are required).

905. *Moran*, 946 S.W.2d at 405.

906. *See* St. Joseph Hosp. v. Wolff, 999 S.W.2d 579, 594 (Tex. App.—Austin 1999) (holding that the trial court did not err in excluding negligence instruction from the jury charge since it was not alleged in the pleadings), *rev'd on other grounds*, 94 S.W.3d 513 (Tex. 2002).

907. Elbaor v. Smith, 845 S.W.2d 240, 243-44 (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.).

908. Union Pac. R.R. v. Williams, 85 S.W.3d 162, 168-69 (Tex. 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.

909. *See Wolff*, 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").

determining whether the improper refusal to submit a requested instruction or definition requires reversal.[910]

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."[911] 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."[912]

O. *Jury Arguments*

To obtain reversal of a judgment on the basis of improper jury argument, an appellant must prove the existence of:

> (1) an error (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, and (4) [that] was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the [trial court].[913]

---

910. Shupe v. Lingafelter, 192 S.W.3d 577, 579 (Tex. 2006) (citing TEX. R. CIV. APP. 61.1(a), 44.1(a); Wal-Mart Stores, Inc., v. Johnson, 106 S.W.3d 718, 723 (Tex. 2003)); St. James Transp. Co. v. Porter, 840 S.W.2d 658, 664 (Tex. App.—Houston [1st Dist.] 1995, writ denied); Vingcard A.S. v. Merrimac Hospitality Sys., Inc., 59 S.W.3d 847, 865 (Tex. App.—Fort Worth 2001, pet. denied); *cf. Williams*, 85 S.W.3d at 170 (referring to TEX. R. APP. P. 61.1(a) and an earlier erroneous admonition by the trial court to the jury).

911. Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n, 710 S.W.2d 551, 555 (Tex. 1986); *accord* Vinson & Elkins v. Moran, 946 S.W.2d 381, 406 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.).

912. *Island Recreational Dev. Corp.*, 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 . . . infect[s] the entire charge"). In *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812 (Tex. 1997), the supreme court held that the submission of the charge was reversible error "[b]ecause the charge failed to instruct the jury on the proper measure of damages." *Id.* at 817. 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. *Id.* at 585; *see also Johnson*, 106 S.W. 3d at 723 (finding that, although the trial court had abused its discretion in allowing an instruction, it did not cause an improper verdict).

913. Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 839 (Tex. 1979); *accord* 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

Additionally, if the argument is incurable,[914] the appellant must also "prove . . . that the argument by its nature, degree and extent constitute[s] reversibl[e] . . . error."[915]

Improper jury arguments rarely result in reversible error.[916] Some notable examples of improper jury arguments include appealing to racial or ethnic prejudice, accusing a defendant corporation of being a killer of families, referring to a party as "cattle,"[917] and a "party's personal expression of gratitude to the jury."[918] 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 er-

---

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).

914. *See* Tex. Employers Ins. Ass'n v. Haywood, 153 Tex. 242, 266 S.W.2d 856, 858 (1954) ("The true test [for incurability] is the degree of prejudice flowing from the argument—whether the argument, considered in its proper setting, was reasonably calculated to cause such prejudice to the opposing litigant that a withdrawal by counsel or an instruction 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, pet. withdrawn).

915. *Reese*, 584 S.W.2d at 839; *accord 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).

916. *Reese*, 584 S.W.2d at 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) (quoting Haryanto v. Saeed, 860 S.W.2d 913, 919 (Tex. App.—Houston [14th Dist.] 1993, writ denied)).

917. *See* Sw. Greyhound Lines v. Dickson, 149 Tex. 599, 236 S.W.2d 115, 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); Lone Star Ford, Inc. v. Carter, 848 S.W.2d 850, 854 (Tex. App.—Houston [14th Dist.] 1993, no writ) (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, 866-67 (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).

918. Gen. Motors Corp. v. Iracheta, 161 S.W.3d 462, 472 (Tex. 2005) ("A party's personal expression of gratitude [in Spanish] to the [all-Hispanic] jury at the close of a case is [manifest] error that cannot be repaired and therefore need not be objected to.").

ror existed),[919] and that "the probability that the improper argument caused harm exceeds the probability that the verdict was based upon proper proceedings and evidence."[920] Finally, the reviewing court must evaluate the improper jury argument in light of the entire case, from voir dire to closing arguments.[921]

P. *Jury Deliberations*

Where the evidence is conflicting on the question of alleged jury misconduct during deliberations, the appellate court will presume that misconduct did not occur.[922] To overcome this presumption, the complaining party must show that misconduct occurred and that it likely resulted in an improper verdict.[923] The scheduling of jury deliberations, sequestration of jurors, breaks, and the like are all reviewed for an abuse of discretion.[924] Responses to jury notes are reviewed in the same manner as regular charge practices.[925] 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 Texas Rule of Civil Procedure 287 are met.[926] In the absence of disagreement between jurors, however, the court is not obligated to have testimony read back.[927] Furthermore, the

---

919. 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).

920. Austin v. Shampine, 948 S.W.2d 900, 907 (Tex. App.—Texarkana 1997, pet. withdrawn); *accord* Isern v. Watson, 942 S.W.2d 186, 198 (Tex. App.—Beaumont 1997, writ denied); *Boone*, 880 S.W.2d at 198 (quoting *Haryanto*, 860 S.W.2d at 919).

921. 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 (quoting *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) (quoting *Reese*, 584 S.W.2d at 835).

922. 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.).

923. 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.

924. TEX. R. CIV. P. 282.

925. TEX. R. CIV. P. 286.

926. *See* TEX. R. CIV. P. 287 (requiring disagreement among jurors as to witness statements before testimony can be read back to them).

927. 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.)).

trial court has broad discretion in deciding what portion of testimony is relevant to the point in dispute.[928]

A trial court has discretion to issue a supplemental charge to the jury ("verdict urging" or "dynamite" charge) or return a jury for further deliberations in an attempt to encourage them to reach a verdict.[929] Typically, to test a supplemental charge for coerciveness, the supplemental charge must be "broken down into its several particulars and analyzed for [its] possible coercive [effect]."[930] A potentially coercive charge will not constitute reversible error unless the charge as a whole retains its coercive nature when all the circumstances surrounding its rendition and effect are analyzed.[931] Additionally, the length of time a court allows for jury deliberations is a decision within the sound discretion of the trial court.[932] Although 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.[933]

Q. *Jury Misconduct*

When the evidence on the question of alleged jury misconduct is conflicting, the appellate court will generally presume that misconduct did not occur.[934] To obtain a new trial based upon jury mis-

---

928. *Id.* at 226; 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.).

929. *See* Lochinvar Corp. v. Meyers, 930 S.W.2d 182, 187 (Tex. App.—Dallas 1996, no writ) (stating that under Texas Rule of Civil Procedure 286, the trial court may also issue a supplemental charge to correct an error in the original charge); *see also* TEX. R. CIV. P. 286 (permitting courts to issue written instructions to juries during deliberations). Violations of Rule 286 are reversed only if the error is prejudicial. *Lochinvar Corp.*, 930 S.W.2d at 187.

930. Stevens v. Travelers Ins. Co., 563 S.W.2d 223, 229 (Tex. 1978); *accord* 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).

931. *Stevens*, 563 S.W.2d at 229, 232.

932. *Nishika*, 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).

933. *Shaw*, 791 S.W.2d at 206.

934. Pharo v. Chambers County, 922 S.W.2d 945, 948-49 (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.).

conduct, a party must show (1) that misconduct occurred; (2) that the misconduct was material; and (3) that, based upon the whole record, it probably resulted in harm.[935] A motion for new trial premised on jury misconduct "must be supported by a juror's affidavit alleging [that] 'outside influences' were brought to bear upon the jury."[936] 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.[937]

R. *Conflicting Jury Findings*

In reviewing the legal question of whether jury findings irreconcilably conflict, the appellate court applies a de novo standard of review.[938] 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.[939]

"In reviewing . . . jury findings for conflict, the threshold [inquiry] is whether the findings [implicate] the same material fact."[940]

---

935. 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); Ramsey v. Lucky Stores, Inc., 853 S.W.2d 623, 635 (Tex. App.—Houston [1st Dist.] 1993, writ denied); Tex. Employers' Ins. Ass'n v. Phillips, 255 S.W.2d 364, 366 (Tex. Civ. App.—Eastland 1953, writ ref'd n.r.e.).

936. 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, 272 (Tex. App.—El Paso 1994), *overruled on other grounds by Golden Eagle Archery, Inc.*, 24 S.W.3d 362 (Tex. 2000); Ramsey v. Lucky Stores, Inc., 853 S.W.2d 623, 635-36 (Tex. App.—Houston [1st Dist.] 1993, writ denied); 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).

937. Roy Jones Lumber Co. v. Murphy, 163 S.W.2d 644, 646 (Tex. 1942); *Ramsey*, 853 S.W.2d at 636.

938. *See* FFE Transp. Servs. v. Fulgham, 154 S.W.3d 84, 89-90 (Tex. 2004) (stating that issues of law are decided de novo) (citing Barber v. Colo. Ind. Sch. Dist., 901 S.W.2d 447, 450 (Tex. 1995)); *see also* St. Joseph Hosp. v. Wolff, 999 S.W.2d 579, 586 (Tex. App.—Austin 1999) (stating that a court's legal conclusions are reviewed de novo), *rev'd on other grounds*, 94 S.W.3d 513 (Tex. 2002).

939. Indem. Ins. Co. of N. Am. v. Craik, 346 S.W.2d 830, 831-32 (Tex. 1961).

940. Bender v. S. Pac. Transp. Co., 600 S.W.2d 257, 260 (Tex. 1980); *accord* 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).

If the conflict can be reasonably reconciled, the reviewing "court may not strike [conflicting] jury answers."[941] 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."[942] When "the issues submitted '[may have] more than one reasonable construction,'" the reviewing court will generally adopt the construction that "avoids a conflict in the answers."[943]

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."[944] 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.[945]

S. *Motion for Mistrial*

An order granting a motion for mistrial is an interlocutory order and is not appealable.[946] The remedy for review of an order granting a mistrial is by mandamus.[947] An order denying a motion for mistrial may be reviewed on appeal for an abuse of discretion.[948]

---

941. *Bender*, 600 S.W.2d at 260; *accord* Luna v. S. Pac. Transp. Co., 724 S.W.2d 383, 384 (Tex. 1987); *Crescendo Invs., Inc.*, 61 S.W.3d at 476; Lee v. Huntsville Livestock Servs., 934 S.W.2d 158, 160 (Tex. App.—Houston [14th Dist.] 1996, pet. denied); *Graco Robotics, Inc.*, 914 S.W.2d at 640.

942. *Bender*, 600 S.W.2d at 260; *accord Crescendo Invs., Inc.*, 61 S.W.3d at 476; *Graco Robotics, Inc.*, 914 S.W.2d at 640; *see also Luna*, 724 S.W.2d at 384 (reconciling jury findings by noting that a railroad company's failure to set speed limits does not prevent a finding of no negligence on the part of its crews); *Lee*, 934 S.W.2d at 160 (recognizing that a jury award of past pain and anguish and lost future earning capacity was inconsistent with a denial of award for future pain and anguish).

943. *Bender*, 600 S.W.2d at 260; *accord Luna*, 724 S.W.2d at 384; *Graco Robotics, Inc.*, 914 S.W.2d at 640.

944. *Bender*, 600 S.W.2d at 260.

945. *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).

946. 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.); *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.).

947. *Galvan*, 933 S.W.2d at 321.

948. 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).

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.[949] If the issue is immaterial, has no support in the evidence, or if the evidence establishes a contrary finding, then the court may disregard an answer and substitute its own finding.[950]

In reviewing the grant of a motion to disregard jury findings, the court must view all testimony in a light most favorable to the verdict, indulging every reasonable inference deductible in its favor.[951] Where some evidence supports the disregarded finding, the reviewing court "must reverse and render judgment on the verdict unless the appellee [asserts] cross-points . . . [showing] grounds for a new trial."[952]

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[953] and 324(c),[954] only when there is no evidence upon which the jury could have made its findings.[955] In other words, a trial court may

---

949. Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 594 (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).

950. TEX. R. CIV. P. 301; City of Keller v. Wilson, 168 S.W.3d 802, 820 (Tex. 2005); 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).

951. *City of Keller*, 168 S.W.3d at 821; 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).

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

953. TEX. R. CIV. P. 301.

954. TEX. R. CIV. P. 324(c).

955. Tiller v. McLure, 121 S.W.3d 709, 713 (Tex. 2003) (citing Brown v. Bank of Galveston, Nat'l Ass'n, 963 S.W.2d 511, 513 (Tex. 1998)); Mancorp, Inc. v. Culpepper, 802

render JNOV if a directed verdict would have been proper.[956] In reviewing the grant of a motion for judgment notwithstanding the verdict, the reviewing court must determine whether there is any evidence upon which the jury could have made the finding.[957] 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.[958] If there is "more than a scintilla of [competent] evidence" to support the jury's finding, the judgment notwithstanding the verdict will be reversed.[959]

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 ver-

---

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).

956. 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).

957. *Tiller*, 121 S.W.3d at 713 (citing Bradford v. Vento, 48 S.W.3d 749, 754 (Tex. 2001)); *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).

958. *Tiller*, 121 S.W.3d at 713 (citing *Bradford*, 48 S.W.3d at 754); *Navarette*, 706 S.W.2d at 309; *Williams*, 610 S.W.2d at 145; *Komet*, 40 S.W.3d at 600; *Chappell Hill Bank*, 38 S.W.3d at 243.

959. Wal-Mart Stores, Inc. v. Miller, 102 S.W.3d 706, 709 (Tex. 2003) (citing Mancorp, Inc. v. Culpepper, 802 S.W.2d 226, 228 (Tex. 1990)); *accord* S. States Transp., Inc. v. State, 774 S.W.2d 639, 640 (Tex. 1989); Navarette v. Temple Indep. Sch. Dist., 706 S.W.2d 308, 309 (Tex. 1986); Wal-Mart Stores, Inc. v. Bolado, 54 S.W.3d 837, 841 (Tex. App.—Corpus Christi 2001, no pet.); Tex. Animal Health Comm'n v. Garza, 27 S.W.3d 54, 62 (Tex. App.—San Antonio 2000, pet. denied).

dict of the jury."[960] The rule does not apply to nonjury cases.[961] In both jury and nonjury trials, the trial court has discretion to reopen the evidence on an uncontested or noncontroversial matter.[962] 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."[963] While a trial court should liberally exercise its discretion to permit both sides 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."[964] The trial court automatically abuses its discretion if it reopens, post-verdict, the evidence on a contested matter in a jury case because to do so is contrary to law.[965]

D. *Newly Discovered Evidence*

To obtain a new trial based upon newly discovered evidence,[966] a movant must show:

> [F]irst, that the evidence has come to his knowledge since the trial; second, that it was not owing to the want of diligence that it did not come sooner; third, that it is not cumulative; fourth, that it is so material that it would likely produce a different result if a new trial were granted.[967]

---

960. TEX. R. CIV. P. 270.

961. *In re* Johnson, 886 S.W.2d 869, 873 (Tex. App.—Beaumont 1994, no writ).

962. TEX. R. CIV. P. 270.

963. Binford v. Snyder, 144 Tex. 134, 189 S.W.2d 471, 476 (1945); *accord* 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).

964. *Lopez*, 55 S.W.3d at 201; *accord Apresa*, 932 S.W.2d at 250 (quoting McNamara v. Fulks, 855 S.W.2d 782, 784 (Tex. App.—El Paso 1993, no writ)).

965. *See* TEX. R. CIV. P. 270 (allowing additional noncontroversial testimony only before the jury verdict is rendered).

966. TEX. R. CIV. P. 324(b)(1).

967. Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983), *overruled on other grounds by* Moritz v. Preiss, 121 S.W.3d 715 (Tex. 2003); *accord 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.—

Furthermore, the newly discovered evidence must be admissible, competent evidence.[968]

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.[969] "When a trial court refuses to grant a new trial based on newly discovered evidence," the appellate court will accept every reasonable inference in favor of affirming the trial court's decision.[970] 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.[971]

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.[972] In addition to the reasons stated in Rule 320,[973] a trial court may, in its discretion,

---

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).

968. Fantasy Ranch, Inc. v. City of Arlington, 193 S.W.3d 605, 615 (Tex. App.—Fort Worth 2006, pet. denied); Nguyen v. Minh Food Co., 744 S.W.2d 620, 621 (Tex. App.—Dallas 1987, writ denied).

969. *Fantasy Ranch, Inc.*, 193 S.W.3d at 615; *accord Jackson*, 660 S.W.2d at 809; *M.A.N.M.*, 75 S.W.3d at 80; *Plunkett*, 27 S.W.3d at 621; *Garcia*, 28 S.W.3d at 602; *Medlock*, 24 S.W.3d at 871; *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); Sw. Inns, Ltd. v. Gen. Elec. Co., 744 S.W.2d 258, 264 (Tex. App.—Houston [14th Dist.] 1987, writ denied).

970. *M.A.N.M.*, 75 S.W.3d at 80; *accord Plunkett*, 27 S.W.3d at 621; *Medlock*, 24 S.W.3d at 871; *Nguyen*, 744 S.W.2d at 622.

971. *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 are disfavored unless the new evidence would cause a different result); *Nguyen*, 744 S.W.2d at 622 (noting that appellate courts should review with careful scrutiny a motion for new trial based upon newly discovered evidence).

972. 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); Jackson v. Van Winkle, 660 S.W.2d 807, 809-10 (Tex. 1983), *overruled on other grounds by* Moritz v. Preiss, 121 S.W.3d 715 (Tex. 2003); Prestige Ford Co. v. Gilmore, 56 S.W.3d 73, 77 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

973. *See* TEX. R. CIV. P. 320 (providing for the grant of a new trial when damages are too small or too large).

grant a new trial "in the interest of justice."[974] 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.[975] The granting of a new trial is never reviewable by direct appeal.[976] However, the order granting a new trial is subject to mandamus review if (1) the trial court's plenary power had expired prior to the grant;[977] or (2) the order was based on the sole ground of "irreconcilably conflicting" jury answers.[978] In either event, mandamus is available in place of traditional appellate review.[979] Because these are questions of law, the standard of review is de novo.[980]

The denial of a motion for new trial is reviewable by appeal.[981] As a general rule, the denial of a motion for new trial that does not contain one of the complaints enumerated in Rule 324(b) is reviewed under an abuse of discretion.[982] A trial court's order on a motion for new trial based upon jury misconduct is reviewed for an

---

974. *Champion Int'l Corp.*, 762 S.W.2d at 899; *accord 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).

975. 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.).

976. Wilkins v. Methodist Health Care Sys., 160 S.W.3d 559, 563 (Tex. 2005); 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).

977. *Wilkins*, 160 S.W.3d at 563; Fulton v. Finch, 162 Tex. 351, 346 S.W.2d 823, 829 (1961).

978. *Wilkins*, 160 S.W.3d at 563; *accord* Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985).

979. *See* Rogers v. Clinton, 794 S.W.2d 9, 11 (Tex. 1990) (finding mandamus to be the proper remedy because judge granted order for a new trial after the party withdrew the motion for new trial).

980. Barber v. Colo. Indep. Sch. Dist., 901 S.W.2d 447, 450 (Tex. 1995) (explaining that Texas appellate courts "are obliged to decide de novo the issues of law"); FFE Transp. Servs., Inc. v. Fulgham, 154 S.W.3d 84, 90 (Tex. 2004).

981. *In re* Marriage of Edwards, 79 S.W.3d 88, 101-02 (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).

982. Champion Int'l Corp. v. Twelfth Court of Appeals, 762 S.W.2d 898, 899 (Tex. 1988) (orig. proceeding); *Marriage of Edwards*, 79 S.W.3d at 102; *M.A.N.M.*, 75 S.W.3d at 80; *Gilmore*, 56 S.W.3d at 77; *Delgado*, 951 S.W.2d at 98; Washington v. McMillan, 898 S.W.2d 392, 394 (Tex. App.—San Antonio 1995, no writ).

abuse of discretion.[983] "The standard of review depends on the [nature of the] complaint preserved by the motion for new trial."[984] Sufficiency of the evidence challenges are, of course, governed by the legal and factual sufficiency standards of review.[985]

F. *Rule 324 Motion for New Trial*

"[A] motion for new trial is not a prerequisite to a complaint on 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.[986] 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 the factual insufficiency of the evidence to support a jury finding;
> (3) [a] complaint that a jury finding is against the overwhelming weight of the evidence;
> (4) [a] complaint of inadequacy or excessiveness of the damages found by the jury; or
> (5) [i]ncurable jury argument if not otherwise ruled on by the trial court.[987]

"An appellate court has no jurisdiction to consider [these] issues" unless a motion for new trial has been "filed with the trial court to preserve [the] issues."[988] The reason for requiring that these matters first be brought to the attention of the trial court is for the opportunity to correct any errors that were not considered

---

983. Pabich v. Kellar, 71 S.W.3d 500, 510 (Tex. App.—Fort Worth 2002, pet. denied). 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.*

984. *Delgado*, 951 S.W.2d at 98; *see also* TEX. R. CIV. P. 324 (presenting prerequisites for motion for new trial).

985. *See infra* Parts VII-VIII.

986. TEX. R. CIV. P. 324(a).

987. TEX. R. CIV. P. 324(b)(1)-(5).

988. Moore v. Kitsmiller, 201 S.W.3d 147, 152 (Tex. App.—Tyler 2006, pet. denied); *accord* Dillard Dep't Stores, Inc. v. Hecht, No. 08-03-00076-CV, 2005 WL 2095075, at *6 (Tex. App.—El Paso Aug. 31, 2005, pet. granted).

prior to the motion.[989] 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.[990]

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.[991] "A clerical error is one which does not result from judicial [decisionmaking]."[992] "A judicial error is [the type of] error which occurs in the *rendering* [of the judgment as distinguished from the mere] *entering* of a judg-

---

989. 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 [i]s signed." Cecil v. Smith, 804 S.W.2d 509, 511 (Tex. 1991).

990. Champion Int'l Corp. v. Twelfth Court of Appeals, 762 S.W.2d 898, 899 (Tex. 1988) (orig. proceeding); Grissom v. Watson, 704 S.W.2d 325, 326 (Tex. 1986); Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983), *overruled on other grounds by* Moritz v. Preiss, 121 S.W.3d 715 (Tex. 2003); Mitchell v. Bass, 26 Tex. 372, 377 (1862); *In re* M.A.N.M., 75 S.W.3d 73, 80 (Tex. App.—San Antonio 2002, no pet.); Cont'l Cas. Co. v. Hartford Ins., 74 S.W.3d 432, 434 (Tex. App.—Houston [1st Dist.] 2002, no pet.); Garcia v. Allen, 28 S.W.3d 587, 602 (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.); 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).

991. 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); LaGoye v. Victoria Wood Condo. Ass'n, 112 S.W.3d 777, 783 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *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).

992. Andrews v. Koch, 702 S.W.2d 584, 585 (Tex. 1986); *accord* 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).

ment."[993] Consequently, a judgment nunc pro tunc cannot correct judicial errors made in rendering the final judgment.[994] 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.[995] 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.[996]

H. *Remittitur*

The remittitur process arises out of the trial court's almost unbridled discretion to grant new trials.[997] 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."[998] 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.[999] The plaintiff has two choices: to remit

---

993. *Escobar*, 711 S.W.2d at 231; *accord* 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); *LaGoye*, 12 S.W.3d at 783; *In re* Fuselier, 56 S.W.3d 265, 267 (Tex. App.—Houston [1st Dist.] 2001, no pet.); Crocker v. Synpol, Inc., 732 S.W.2d 429, 436 (Tex. App.—Beaumont 1987, no writ).

994. *Escobar*, 711 S.W.2d at 231; *LaGoye*, 112 S.W.3d at 783; *Jenkins*, 16 S.W.3d at 482.

995. Coleman v. Zapp, 105 Tex. 491, 151 S.W. 1040, 1041 (1912); *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.

996. Finlay v. Jones, 435 S.W.2d 136, 138 (Tex. 1968); *Dryden*, 52 S.W.2d at 262; Tex. Dep't of Pub. Safety v. Moore, 51 S.W.3d 355, 358 (Tex. App.—Tyler 2001, no pet.); 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. Co.*, 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 that a clerical error was made. Riner v. Briargrove Park Prop. Owners, Inc., 976 S.W.2d 680, 683 (Tex. App.—Houston [1st Dist.] 1997, no writ) (citing Pruet v. Coastal States Trading, Inc., 715 S.W.2d 702, 705 (Tex. App.—Houston [1st Dist.] 1986, no writ)).

997. William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 564 (1991).

998. *Id.*

999. *Id.*

the suggested amount unconditionally or to have a new trial.[1000] Because the trial court "has no authority to change a jury['s] award," the trial court judge "cannot compel a remittitur, but [may only] 'suggest' it."[1001]

Like the trial courts, the "[c]ourts 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."[1002] 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.[1003] Therefore, although the supreme court lacks jurisdiction to review or to order a remittitur,[1004] it does have jurisdiction to determine if the court of appeals applied the proper standard in reviewing the remittitur issue.[1005]

In either ordering a remittitur or in reviewing a trial court's order of remittitur, the proper standard of review is factual sufficiency,[1006] not abuse of discretion.[1007] The court of appeals must "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."[1008] The

---

1000. *Id.; see also* 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).

1001. William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 564 (1991).

1002. *Id.* at 565; *see also* Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 51 (Tex. 1998) (indicating the appellate rules for remittitur on appeal).

1003. *See infra* Part VII for a discussion of the factual insufficiency of the evidence standard of review.

1004. Bentley v. Bunton, 94 S.W.3d 561, 620 (Tex. 2002); *cf. Formosa Plastics Corp. USA*, 960 S.W.2d at 51 (considering a voluntary remittitur).

1005. Pope v. Moore, 711 S.W.2d 622, 623 (Tex. 1986).

1006. *Bentley*, 94 S.W.3d at 620.

1007. *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); Snoke v. Republic Underwriters Ins. Co., 770 S.W.2d 777, 777-78 (Tex. 1989) (applying a factual sufficiency standard to attorney's fees); Larson v. Cactus Util. Co., 730 S.W.2d 640, 641 (Tex. 1987) (applying a factual sufficiency standard to actual damages); *Pope*, 711 S.W.2d at 624 (applying a factual sufficiency review standard to review of remittitur); *see also* TEX. R. APP. P. 46.2 (providing for appellate review of remittitur request); TEX. R. CIV. P. 315 (providing for remittitur generally); TEX. R. CIV. P. 324(b)(2) (discussing factual insufficiency to support jury findings).

1008. *Pope*, 711 S.W.2d at 624.

courts of appeals must also comply with the requirements of the "*Pool* rule"[1009] if they either order or affirm a suggestion of a remittitur of damages.[1010]

I. *Actual Damages*

1. Unliquidated Damages

"In determining [actual] damages, the jury has [the] discretion to award damages within the range of evidence presented at trial."[1011] This general rule becomes more problematic in awarding damages for amorphous, discretionary injuries, such as mental anguish and pain and suffering; such damages are inherently difficult because the injury constitutes a subjective, unliquidated, nonpecuniary loss.[1012] It "is necessarily an arbitrary process," not subject to objective analysis or mathematical calculation.[1013] 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

---

1009. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986), *overruled on other grounds by* Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000). 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.*

1010. *Pope*, 711 S.W.2d at 624; *see infra* Part VII(C) for a discussion of *Pool*.

1011. Gulf States Utils. Co. v. Low, 79 S.W.3d 561, 566 (Tex. 2002).

1012. Roberts v. Williamson, 111 S.W.3d 113, 120 (Tex. 2003) (disapproving of Schindler Elevator Co. v. Anderson, 78 S.W.3d 392, 415 (Tex. App.—Houston [14th Dist.] 2001, pet. granted, judgm't vacated)); Spohn Hosp. v. Mayer, 72 S.W.3d 52, 67 (Tex. App.—Corpus Christi 2001), *rev'd on other grounds*, 104 S.W.3d 878 (Tex. 2003); 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).

1013. Skaggs Alpha Beta, Inc. v. Nabhan, 808 S.W.2d 198, 202 (Tex. App.—El Paso 1991, writ dism'd); *accord Krishnan*, 42 S.W.3d at 218; Sw. Tex. Coors, Inc. v. Morales, 948 S.W.2d 948, 951-52 (Tex. App.—San Antonio 1997, no writ); *Martin*, 942 S.W.2d at 719; Hyundai Motor Co. v. Chandler, 882 S.W.2d 606, 615 (Tex. App.—Corpus Christi 1994, writ denied); Baptist Mem'l Hosp. Sys. v. Smith, 822 S.W.2d 67, 78 (Tex. App.—San Antonio 1991, writ denied); LaCoure v. LaCoure, 820 S.W.2d 228, 234 (Tex. App.—El Paso 1991, writ denied); State Farm Mut. Auto. Ins. Co. v. Zubiate, 808 S.W.2d 590, 601 (Tex. App.—El Paso 1991, writ denied); 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).

amount of damages it determines appropriate.[1014] 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."[1015] 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.'"[1016] The court added that while the damages are clearly reviewable under a sufficiency of the evidence review, there are tremendous difficulties "inherent in an appellate court's review of discretionary damages."[1017] 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)[1018] or

---

1014. Texarkana Mem'l Hosp., Inc. v. Murdock, 946 S.W.2d 836, 841 (Tex. 1997); Healthcare Ctrs. of Tex., Inc. v. Rigby, 97 S.W.3d 610, 623 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); Hous. Auth. v. Guerra, 963 S.W.2d 946, 952 (Tex. App.—El Paso 1998, pet. denied); Dico Tire, Inc. v. Cisneros, 953 S.W.2d 776, 791-92 (Tex. App.—Corpus Christi 1997, writ denied); 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, Inc., 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) (quoting Terry v. Garcia, 800 S.W.2d 854, 859 (Tex. App.—San Antonio 1990, writ denied), *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); Baylor Med. Plaza Servs. v. Kidd, 834 S.W.2d 69, 78 (Tex. App.—Texarkana 1992, writ denied); *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) (holding that award of personal injury damages "is particularly within the discretion of the jury"), *rev'd on other grounds*, 1 S.W.3d 91 (Tex. 1999); 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 v. Merritt, 846 S.W.2d 23, 26 (Tex. App.—Corpus Christi 1992, no writ) (holding that it is within "[t]he jury's province . . . to resolve the speculative matters of pain and suffering, future pain and suffering, future disfigurement, and future physical impairment" and to award damages accordingly); Marshall v. Superior Heat Treating Co., 826 S.W.2d 197, 200 (Tex. App.—Fort Worth 1992, no writ) (holding that damage awards for future physical impairment are "particularly within the province of the jury").

1015. Worsham Steel Co. v. Arias, 831 S.W.2d 81, 85 (Tex. App.—El Paso 1992, no writ); *see also Tex. Dental Plans, Inc.*, 948 S.W.2d at 805-06 (citing the "virtually unreviewable" language in *Arias*).

1016. Saenz v. Fid. & Guar. Ins. Underwriters, 925 S.W.2d 607, 614 (Tex. 1996) (quoting Parkway Co. v. Woodruff, 901 S.W.2d 434, 444 (Tex. 1995)); *accord* Bunton v. Bentley, 153 S.W.3d 50, 53 (Tex. 2004) (per curiam).

1017. *Arias*, 831 S.W.2d at 85 n.2.

1018. *Bunton*, 153 S.W.3d at 52-53; Larson v. Cactus Util. Co., 730 S.W.2d 640, 641 (Tex. 1987); *Garza*, 58 S.W.3d at 234; Colonial County Mut. Ins. Co. v. Valdez, 30 S.W.3d

based upon the factual sufficiency of the evidence where the excessiveness of the damages is challenged.[1019]

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.[1020] Based on the zero-damages rule, some courts have concluded that once the fact of an injury is either established by the evidence or acknowledged by 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.[1021] In contrast, other courts have upheld jury findings and evidence of injury and some resulting damages, by simply concluding that the failure to find damages was not against the great weight and preponderance of the evidence.[1022]

514, 525-26 (Tex. App.—Corpus Christi 2000, no pet.); 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 v. Ford Motor Co.*, 715 S.W.2d 629 (Tex. 1986). 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.*

1019. *Bunton*, 153 S.W.3d at 53; 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).

1020. Raul A. Gonzalez & Rob Gilbreath, *Appellate Review of a Jury's Finding of "Zero Damages,"* 54 TEX. B.J. 418, 418 (1991).

1021. 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"); 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 denying damages when an injury had occurred); *see also* Peterson v. Reyna, 908 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).

1022. Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757, 776 (Tex. 2003); Waltrip v. Bilbon Corp., 38 S.W.3d 873, 880 n.2 (Tex. App.—Beaumont 2001, pet. denied); Oyster

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*.[1023] As a result, the rule has now been expressly rejected by the intermediate appellate courts.[1024] Whether there is (1) objective, uncontroverted evidence of damages; (2) only subjective evidence; or (3) both objective and subjective evidence, the court of appeals should apply the *Pool* standard to the jury's finding of zero damages.[1025] Accordingly, a challenge to an award of zero damages should be reviewed as any other challenge based upon the sufficiency of the evidence; therefore, the award of zero damages should be reversed if it is "so contrary to the great weight and preponderance of the evidence to be manifestly unjust."[1026]

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 1997, writ denied); Jacobs-Cathey Co. v. Cockrum, 947 S.W.2d 288, 299 (Tex. App.—Waco 1997, writ denied) (Vance, J., dissenting); Barrajas v. VIA Metro. Transit Auth., 945 S.W.2d 207, 209-10 (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 v. Nationwide Mut. Fire Ins. Co., 756 S.W.2d 801, 804-06 (Tex. App.—Dallas 1988, no writ) (denying additional damages for pain and suffering).

1023. *Golden Eagle Archery, Inc.*, 116 S.W.3d at 776-77 (O'Neill, J., joined by Schneider, J., concurring) (criticizing the use of the "so-called 'zero damages' rule" as inconsistent with *Pool*); *Davis*, 905 S.W.2d at 792 (Stover, J., concurring) (criticizing strict application of the rule as contrary to *Pool*); Raul A. Gonzalez & Rob Gilbreath, *Appellate Review of a Jury's Finding of "Zero Damages,"* 54 TEX. B.J. 418, 420 (1991).

1024. Dori v. Bondex Int'l, Inc., No. 11-04-001790CV, 2006 WL 1554614, at *3 (Tex. App.—Eastland June 8, 2006, no pet.) (mem. op.) (rejecting zero damages rule); White v. Linton, No. 09-03-569-CV, 2004 WL 2248069, at *4 (Tex. App.—Beaumont Oct. 7, 2004, no pet.) (mem. Op.) (explicitly rejecting strict application of the zero damages rule for "this [c]ourt"); Dunn v. Bank-Tec S., 134 S.W.3d 315, 325-26 (Tex. App.—Amarillo 2003, no pet.) (acknowledging that the zero damages rule has been rejected); *Waltrip*, 38 S.W.3d at 880 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). *But cf.* Hyler v. Boytor, 823 S.W.2d 425, 427 (Tex. App.—Houston [1st Dist.] 1992, no writ) (holding that in challenges to a 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).

1025. *Davis*, 905 S.W.2d at 792-93 (Stover, J., concurring) (discussing cases which have applied the *Pool* standard).

1026. Marshall v. Superior Heat Treating Co., 826 S.W.2d 197, 200 (Tex. App.—Fort Worth 1992, no writ); *accord* 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

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.[1027] Punitive damages are levied against a defendant "to punish the defendant for outrageous, malicious, or otherwise morally culpable conduct."[1028] The legal justification for punitive damages is similar to the justification for criminal punishment. "[L]ike criminal punishment, punitive damages require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment."[1029] "Although punitive damages are [imposed to serve] the public purposes of punishment and deterrence, the proceeds become a private windfall."[1030] In contrast, criminal fines paid to a governmental entity are used for the public's benefit.[1031] Thus, the duty of reviewing courts in civil

---

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:

> 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) (internal citations omitted).

1027. 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), *overruled on other grounds by* Walker v. Packer, 827 S.W.2d 833 (Tex. 1992); Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 555 (Tex. 1985), *overruled on other grounds by* TEX. FIN. CODE ANN. §§ 304.101-.107 (Vernon 2006).

1028. *Moriel*, 879 S.W.2d at 16; *accord* Celanese Ltd. v. Chem. Waste Mgmt., Inc., 75 S.W.3d 593, 600 (Tex. App.—Texarkana 2002, pet. denied); S. Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587, 600-01 (1880); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon Supp. 2005) (defining exemplary damages as "any damages awarded as a penalty or by way of punishment but not for compensatory purposes").

1029. *Moriel*, 879 S.W.2d at 16-17; *accord* Bunton v. Bentley, 153 S.W.3d 50, 53 (Tex. 2004) (per curiam); Burleson State Bank v. Plunkett, 27 S.W.3d 605, 620 (Tex. App.—Waco 2000, pet. denied).

1030. *Moriel*, 879 S.W.2d at 17; *accord* Hall v. Diamond Shamrock Ref. Co., 82 S.W.3d 5, 22 (Tex. App.—San Antonio 2001), *rev'd on other grounds*, 168 S.W.3d 164 (Tex. 2005).

1031. *Moriel*, 879 S.W.2d at 17.

cases, "like the duty of criminal courts, is to ensure that defendants who deserve to be punished in fact receive an appropriate level of punishment, while . . . preventing [the imposition of] excessive or otherwise erroneous" punishment.[1032]

If a plaintiff seeks punitive damages, the defendant may file a motion with the trial court asking it to bifurcate the determination of punitive damages from the remaining issues.[1033] "Under this approach, the jury first hears evidence relevant to liability for actual damages . . . and liability for punitive damages . . . and then returns findings on these issues."[1034] If the jury finds for the plaintiff on the punitive damages liability question, "the same jury is then presented evidence relevant only to the amount of punitive damages, and determines the proper amount of punitive damages, considering [all] of the evidence [from] both phases of the trial."[1035] "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."[1036] To preserve the issue, the complaining party must object to the dissenting jurors' participation in the punitive damages deliberations.[1037] 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 the rendition of an improper judgment."[1038]

1032. *Id.*

1033. *Id.* at 30.

1034. *Id.*

1035. *Id.*; *accord In re* Bradle, 83 S.W.3d 923, 926 (Tex. App.—Austin 2002, orig. proceeding).

1036. Operation Rescue-Nat'l v. Planned Parenthood of Houston & Se. 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, 458 (Tex. App.—Amarillo 1996, no writ) (holding that Texas Rule of Civil Procedure 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 "[Texas Rule of Civil Procedure 292] does not require concurrence between 'separate trials'").

1037. *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).

1038. Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 342 (Tex. 1998) (citing TEX. R. APP. P. 61.1).

Punitive damages are reviewed for legal and factual sufficiency of the evidence or excessiveness.[1039] When reviewing an award of punitive damages, the reviewing court must consider a number of factors to determine the reasonableness of the award.[1040]

> [T]he United States Supreme Court requires courts reviewing exemplary damages to consider three factors: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[1041]

The standard of review for these factors is de novo.[1042] The three factors help ensure a reasonable relationship between punitive damages and actual damages.[1043] Accordingly, 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."[1044] There is no exact formula to measure punitive damages by actual damages.[1045] Rather, this

---

1039. 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 (discussing 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 courts' review of punitive damages awards.

1040. Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 31 (Tex. 1994) (requiring courts to "detail the relevant evidence in . . . opinion[s], explaining why that evidence either supports or does not support the punitive damages in light of the *Kraus* factors"); *see also* Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981) (listing several factors to be considered in awarding exemplary damages).

1041. Bunton v. Bentley, 153 S.W.3d 50, 53 (Tex. 2004) (per curiam) (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003)).

1042. *Bunton*, 153 S.W.3d at 54 (citing *Cooper Indus.*, 532 U.S. at 434-36).

1043. *Id.* at 53-54.

1044. Wright v. Gifford-Hill & Co., 725 S.W.2d 712, 714 (Tex. 1987); *accord Moriel*, 879 S.W.2d at 29 (quoting 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), *rev'd on other grounds*, 121 S.W.3d 709 (Tex. 2003).

1045. *See Bunton*, 153 S.W.3d at 53-54 (stating that mathematical formulas and particular ratios are but one consideration and must be examined in light of the other factors); Tatum v. Preston Carter Co., 702 S.W.2d 186, 188 (Tex. 1986) (stating that no set rule exists

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.[1046] 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 conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant."[1047]

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."[1048] Attorney's fees may not be recov-

---

to measure punitive damages by actual damages); *see also Foley*, 68 S.W.3d at 881 (stating that courts "must make [the] determination [of punitive damages] on a case-by-case basis"); *McLure*, 63 S.W.3d at 86 (discussing the many factors to be considered when determining an appropriate award of punitive damages); 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 Supp. 2006) (providing, in most cases, that exemplary damages may not exceed the greater of $200,000 or two times the amount of actual damages).

1046. *Tatum*, 702 S.W.2d at 188; *Risser*, 739 S.W.2d at 909.

1047. TEX. CIV. PRAC. & REM. CODE ANN. § 41.011(a)(1)-(6) (Vernon 1997); *see Moriel*, 879 S.W.2d at 28 (discussing that many factors have been set forth for evaluation); *Tatum*, 702 S.W.2d at 188 (listing several factors to consider); Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981) (discussing what should be considered when determining reasonableness of punitive damages). In *TXO Product v. Alliance Resource Corp.*, the West Virginia Supreme Court concluded that the post-*Haslip* decisions "fall 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).

1048. Aquila Sw. Pipeline, Inc. v. Harmony Exploration, Inc., 48 S.W.3d 225, 241 (Tex. App.—San Antonio 2001, pet. denied); *accord* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1997); Gulf States Utils. Co. v. Low, 79 S.W.3d 561, 567 (Tex. 2002); 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); De Leon v. Vela, 70 S.W.3d 194, 201 (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. Biotectron-

ered in tort cases.[1049] Generally, "the reasonableness of statutory attorney's fees" is a question for the jury.[1050] In reviewing the reasonableness of an award of attorney's fees, which may include a legal assistant's time under certain conditions,[1051] the reviewing court should consider:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
> (2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.[1052]

"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."[1053]

---

ics, 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).

1049. 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; *see also Low*, 79 S.W.3d at 568 ("No statute provides for the recovery of attorney fees in a negligence action.").

1050. City of Garland v. Dallas Morning News, 22 S.W.3d 351, 367 (Tex. 2000); *accord* 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. 1966).

1051. Gill Sav. Ass'n v. Int'l Supply Co., 759 S.W.2d 697, 702 (Tex. App.—Dallas 1988, writ denied).

1052. Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997) (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app.); *accord Aquila Sw. Pipeline*, 48 S.W.3d at 240-41; *Acad. Corp.*, 21 S.W.3d at 741-42.

1053. *Aquila Sw. Pipeline*, 48 S.W.3d at 241; *accord* 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.). *See*

"[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."[1054] 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.[1055]

When multiple causes of action or multiple parties are involved, the party asserting those causes must separate the hours into those (1) for which fees may be recovered; (2) for which fees cannot be recovered; and (3) for which party they may be recovered.[1056] An 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.'"[1057]

The standard of review for a trial court's award of attorney's fees is sufficiency of the evidence.[1058] However, following a declaratory

---

generally O'Farrill Avila v. Gonzalez, 974 S.W.2d 237, 248-50 (Tex. App.—San Antonio 1998, pet. denied) (discussing a situation in which the judge properly used personal experience and knowledge to determine whether the fees were excessive).

1054. Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 10 (Tex. 1991); *accord Aquila Sw. Pipeline*, 48 S.W.3d at 241; *see* Hagedorn v. Tisdale, 73 S.W.3d 341, 353 (Tex. App.—Amarillo 2002, pet. filed) (discussing how the court arrives at what is "reasonable and necessary").

1055. Pickett v. Keene, 47 S.W.3d 67, 78 (Tex. App.—Corpus Christi 2001, pet. dism'd); *accord* 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).

1056. 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.).

1057. *Sterling*, 822 S.W.2d at 11 (quoting Flint & Assoc. v. Intercontinental Pipe & Steel, Inc., 739 S.W.2d 622, 624-25 (Tex. App.—Dallas 1987, writ denied)); *accord Aiello*, 941 S.W.2d at 73; *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.

1058. *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 Sw. 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

judgment, the standard of review for an award of attorney's fees is abuse of discretion.[1059] 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.[1060]

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.[1061] Using the "'lodestar' method of determining fees, [the court] . . . first determines the number of hours reasonably spent . . . [on the case], and then multipl[ies] those hours by an hourly rate the court deems reasonable for similarly complex, non-contingent work."[1062] 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."[1063] Stated another way, the trial court may adjust the lodestar amount to consider the factors set forth in *Johnson v. Georgia Highway Express, Inc.*:[1064]

> (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

---

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, 21 (Tex. 1998) ("[U]nder [the Declaratory Judgments] Act, the court of appeals must determine whether the trial court abused its discretion by awarding [attorney's] fees when there was insufficient evidence that the fees were reasonable or necessary, or when the award was inequitable or unjust."). 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.

1059. Oake v. Collin County, 692 S.W.2d 454, 455 (Tex. 1985); Union Gas Corp. v. Gisler, 129 S.W.3d 145, 157 (Tex. App.—Corpus Christi 2003, no pet.).

1060. *Snoke*, 770 S.W.2d at 778.

1061. TEX. LAB. CODE ANN. § 21.259(a) (Vernon 2006).

1062. 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.)); *see also* Gen. Motors Corp. v. Bloyed, 916 S.W.2d 949, 960 (Tex. 1996) (discussing the strengths and weaknesses of the "lodestar" method).

1063. *Gonzales*, 72 S.W.3d at 412.

1064. 488 F.2d 714 (5th Cir. 1974).

> limitations imposed by the client or the circumstances[;] . . . (8) [t]he amount involved and the results obtained[;] . . . (9) [t]he experience, reputation, and ability of the attorneys[;] . . . (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.[1065]

The trial court's award of attorney's fees is reviewed for an abuse of discretion.[1066]

L. *Guardian Ad Litem Attorney's Fees*

Rule 173 of the Texas Rules of Civil Procedure requires a trial court to appoint a guardian ad litem when a minor is represented by a guardian or next friend who appears to have an interest adverse to that of the minor.[1067] 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.[1068] As a general rule, ad litem fees are assessed against the losing party.[1069] Generally, the same factors applicable to determine the reasonableness of attorney's fees are controlling.[1070] An

---

1065. Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated by* Blanchard v. Bergeron, 489 U.S. 87 (1989), *and superseded by Statute*, 11 U.S.C. § 330, *as recognized in In re* Meronk, 249 B.R. 208 (B.A.P. 9th Cir. 2000). 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. *Gonzales*, 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 Protective Servs. Corp.*, 955 S.W.2d at 870; Crouch v. Tenneco, Inc., 853 S.W.2d 643, 648 (Tex. App.—Waco 1993, writ denied).

1066. *Gonzales*, 72 S.W.3d at 412; *Crouch*, 853 S.W.2d at 646.

1067. TEX. R. CIV. P. 173.2; Brownsville-Valley Reg'l Med. Ctr., Inc. 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, no writ).

1068. TEX. R. CIV. P. 173.6(c); Roberts v. Williamson, 111 S.W.3d 113, 124 (Tex. 2003); Dover Elevator Co. v. Servellon, 812 S.W.2d 366, 367 (Tex. App.—Dallas 1991, no writ).

1069. *Roberts*, 111 S.W.3d at 124 (citing TEX. R. CIV. P. 131, 141); *Servellon*, 812 S.W.2d at 367 (citing TEX. R. CIV. P. 131, 141).

1070. Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 794 (Tex. 1987); Daimler-Chrysler Corp. v. Brannon, 67 S.W.3d 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).

"ad litem may not recover fees . . . after resolution of the conflict for which [the ad litem has been] appointed."[1071] In applying those considerations, the award of guardian ad litem attorney fees is a matter "within the sound discretion of the trial court."[1072] The trial court's reasons for an award, however, must be substantiated by the record, or the trial court may be found to have abused its discretion.[1073] "When an ad litem's fee is unreasonable or excessive, [the appellate court] may fix the proper amount of the fee."[1074]

M. *Court Costs*

Under Rule 131,[1075] the successful party in a suit is entitled to recover from an adversary all costs incurred in the suit, except where otherwise provided.[1076] Taxing costs against a successful party generally contravenes Rule 131.[1077] "A successful party is 'one who obtains a judgment of a competent court vindicating a claim of right, civil in nature.'"[1078] The purpose of Rule 131 "is to ensure that the prevailing party is freed of the burden of court

---

1071. *Gamez*, 894 S.W.2d at 757.

1072. *Id.* at 756; *accord 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).

1073. *Roberts*, 111 S.W.3d at 124 (citing TEX. R. CIV. P. 141).

1074. Hirczy v. Hirczy, 838 S.W.2d 783, 787 (Tex. App.—Corpus Christi 1992, writ denied); *see also* Celanese Chem. Co. v. Burleson, 821 S.W.2d 257, 262 (Tex. App.—Houston [1st Dist.] 1991, no writ) (setting the ad litem fees on appeal because the amount awarded was excessive).

1075. TEX. R. CIV. P. 131.

1076. *Id.*; Roberts v. Williamson, 111 S.W.3d 113, 124 (Tex. 2003); 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) (per curiam); Rogers v. Walmart Stores, Inc., 686 S.W.2d 599, 601 (Tex. 1985); Price Constr., Inc. v. Castillo, 147 S.W.3d 431, 441-42 (Tex. App.—San Antonio 2004, pet. denied); 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, no writ). *But see Bethune*, 53 S.W.3d at 381 (Baker, J., joined by Hankinson & O'Neill, JJ., 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.

1077. *Bethune*, 53 S.W.3d at 376; *Martinez*, 759 S.W.2d at 114.

1078. Crow v. Burnett, 951 S.W.2d 894, 899 (Tex. App.—Waco 1997, 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.)); *see* Williamson v. Roberts, 52 S.W.3d 354, 356 (Tex. App.—Texarkana 2001) (concluding that a party does not have to prevail on every claim to be considered successful), *aff'd*, 111 S.W.3d 113 (Tex. 2003).

costs and that the losing party pays those costs."[1079] Pursuant to Rule 141, the trial court may assess the costs other than as provided by law or the rules for good cause stated on the record.[1080] Even when the trial court states good cause on the record, the supreme court has admonished the appellate courts to "scrutinize the record" to determine whether it supports the trial court's determination to assess part or all of the costs against the prevailing party.[1081] "'Good cause' is a very elusive concept [to be] determined on a case-by-case basis."[1082] 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.[1083] The trial court's general notion of fairness, without more, does not constitute good cause.[1084] 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.[1085] The trial court's determination of good cause and its assessment of court costs are reviewed for an abuse of discretion.[1086]

1079. *Bethune*, 53 S.W.3d at 378.

1080. TEX. R. CIV. P. 141; Roberts v. Williamson, 111 S.W.3d 113, 124 (Tex. 2003); *Bethune*, 53 S.W.3d at 378 (recognizing the two requirements of Rule 141 to be (1) good cause that is (2) reflected on the record).

1081. *Rogers*, 686 S.W.2d at 601; *Williamson*, 52 S.W.3d at 356.

1082. *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); *accord 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 a party for refusal to enter into settlement negotiations when a party has not been ordered or encouraged to do so).

1083. Furr's Supermarkets, Inc. v. Bethune, 53 S.W.3d 375, 377 (Tex. 2001); Price Constr., Inc. v. Castillo, 147 S.W.3d 431, 442 (Tex. App.—San Antonio 2004, pet. denied).

1084. *Roberts*, 111 S.W.3d at 124 (citing *Bethune*, 53 S.W.3d at 377-78).

1085. Williamson v. Roberts, 52 S.W.3d 354, 355 (Tex. App.—Texarkana 2001), *aff'd* 111 S.W.3d 113 (Tex. 2003); Allen v. Crabtree, 936 S.W.2d 6, 9 (Tex. App.—Texarkana 1996, no writ).

1086. Rogers v. Walmart Stores, Inc., 686 S.W.2d 599, 601 (Tex. 1985); *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); San Antonio Hous. Auth. v. Underwood, 782 S.W.2d 25, 27 (Tex. App.—San Antonio 1989, no writ).

N. *Exercise of Plenary Power*

A trial court has both plenary power and the jurisdiction to reconsider not only its own judgment, but also its interlocutory orders until thirty days after the date a final judgment is signed[1087] 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.[1088] Additionally, a timely filed postjudgment motion that requests a substantive change in the existing judgment constitutes a motion to modify under Rule 329b(g),[1089] thereby extending the trial court's plenary jurisdiction and the appellate timetable.[1090] During this period, plenary power is "'[f]ull, entire, complete, absolute, perfect, [and] unqualified.'"[1091] 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.[1092] "A void judgment . . . 'is good nowhere and bad everywhere.'"[1093] Whether a trial court properly exercised its plenary power is a question of law reviewed de novo by the reviewing court.[1094]

1087. *In re* Burlington Coat Factory Warehouse of McAllen, Inc., 167 S.W.3d 827, 831 (Tex. 2005).

1088. Lane Bank Equip. Co. v. Smith S. Equip., Inc., 10 S.W.3d 308, 310 (Tex. 2000); Fruehauf Corp. v. Carrillo, 848 S.W.2d 83, 84 (Tex. 1993).

1089. TEX. R. CIV. P. 329b(g).

1090. Wilkins v. Methodist Health Care Sys., 160 S.W.3d 559, 563 (Tex. 2005); *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).

1091. 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, 619-20 (Tex. App.—San Antonio 2001, pet. denied).

1092. 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).

1093. 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)).

1094. *See* St. Joseph Hosp. v. Wolff, 999 S.W.2d 579, 586 (Tex. App.—Austin 1999) (stating that questions of law should be reviewed de novo), *rev'd on other grounds*, 94 S.W.3d 513 (Tex. 2002); *see also Lane Bank Equip. Co.*, 10 S.W.3d at 313-14 (affirming lower court's exercise of plenary power by interpreting the statutory language).

O. *Supersedeas Bond*

Generally, if a party loses at the trial court, a writ of supersedeas will stay execution of the judgment pending appeal[1095] and guarantee the appellee the benefits of the judgment if affirmed.[1096] To obtain a writ of supersedeas, a party generally deposits with the clerk a "good and sufficient" supersedeas bond or deposit.[1097] Importantly, the amount of actual damages which must be superseded may be reduced under the Texas Civil Practice and Remedies Code,[1098] and punitive damages no longer must be suspended.[1099] In cases where the judgment is for other than money, property, or foreclosure, the decision of whether and under what circumstances to permit supersedeas is within the discretion of the trial court.[1100]

1095. *See* Cudd Pressure Control, Inc. v. Sonat Exploration Co., 74 S.W.3d 185, 189 (Tex. App.—Texarkana 2002, pet. denied) ("[A] judgment debtor may supersede the judgment by filing a supersedeas bond.").

1096. 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).

1097. TEX. R. APP. P. 24.1(a)(2). A few judgments are stayed without the requirement of posting a supersedeas bond or deposit. Some of those exempt from filing a bond include: the State Bar of Texas, any county in Texas, any state department, any state department head, and water districts. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 6.001 (Vernon 2002) (listing as some of the exempt: the Veterans' Administration, the Federal National Mortgage Association, and "any national mortgage savings and loan insurance incorporation created . . . as a national relief organization"); *Id.* § 6.002 (Vernon 2002) (exempting incorporated cities and towns). Exempt entities supersede the judgment by filing a notice of appeal. 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).

1098. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b) (Vernon Supp. 2006).

1099. *Id.* § 52.006(a) (Vernon Supp. 2006).

1100. 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, interest, and costs in a money judgment (other than in a bond forfeiture proceeding), in "a personal injury or wrongful death action, a claim covered by liability insurance, or a workers' compensation claim," if, after notice and a hearing, the trial court finds that complete security "would cause irreparable harm to the judgment debtor" and that less than complete security "would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies." TEX. CIV. PRAC. & REM. CODE ANN. § 52.002 (Vernon 1997). To the extent Chapter 52 of the Texas Civil Practice and Remedies Code conflicts with the Texas Rules of Appellate Procedure, Chapter 52 controls. *Id.* § 52.005. Under Texas Rule of Appellate Procedure 24.2(a)(3), an appellant may supersede execution on a judgment

The numerous rules for posting an appropriate supersedeas bond depend upon the type of judgment and are beyond the scope of this Article.[1101] 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.[1102]

Texas Rule of Appellate Procedure 29.2 governs the suspension of interlocutory orders pending review by the appellate courts.[1103] 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.[1104] Denial of supersedeas may be reviewed by an appellate court for abuse of discretion.[1105] Similarly, an appellate court may issue any necessary temporary orders to ensure that the rights of the parties are protected, pending disposition of the appeal, and may require such security as it deems appropriate.[1106] However, if the appellant's right may be adequately protected by supersedeas, then the appellate court may not suspend the trial court's order.[1107]

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

---

for other than money, the recovery of property, or foreclosure, by filing a bond in the amount fixed by the trial court that 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 an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted." *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). The trial court's decision is reviewed under an abuse of discretion standard. *See id.* (reviewing under this standard).

1101. *See generally* 5 ROY W. MCDONALD & ELAINE A. CARLSON, TEXAS CIVIL PRACTICE ch. 30 (2d ed. 1999 & Supp. 2006) (discussing rules for posting supersedeas bonds).

1102. Man-Gas Transmission Co. v. Osborne Oil Co., 693 S.W.2d 576, 577 (Tex. App.—San Antonio 1985, no writ) (per curiam); 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).

1103. TEX. R. APP. P. 29.2.

1104. *Id.*; TEX. R. APP. P. 24.2.

1105. TEX. R. APP. P. 29.2.

1106. TEX. R. APP. P. 29.3.

1107. *Id.*

the court of appeals once appellate jurisdiction has attached.[1108] 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.[1109] If the appellate court finds that the bond is insufficient upon review of the bond, the court "may" require an additional bond;[1110] likewise, upon a finding that the bond is excessive, the court "may" reduce the amount of the original bond.[1111]

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.[1112] Any changes ordered by the trial court, however, must be made known to the court of appeals.[1113] The review of security, as well as any changes to the security, also remain with the appellate court.[1114] Thus, in carrying out the review, the appellate court can issue any necessary temporary orders or remand the matter to the trial court for evidentiary determinations.[1115]

1108. TEX. CIV. PRAC. & REM. CODE ANN. § 52.003 (Vernon 1997); TransAm. Natural 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).

1109. 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) (declaring that if a clerk has discretion, an abuse of discretion must be shown to prevail in a mandamus hearing).

1110. TEX. R. APP. P. 24.4(d).

1111. *Id.*; McDill Columbus Corp. v. Univ. Woods Apartment, 7 S.W.3d 923, 925 (Tex. App.—Texarkana 2000, no pet.).

1112. TEX. R. APP. P. 24.3(a); Gullo-Haas Toyota, Inc. v. Davidson Eagleson & Co., 832 S.W.2d 418, 419 (Tex. App.—Houston [1st Dist.] 1992, no writ).

1113. TEX. R. APP. P. 24.3(b).

1114. *Id.*; *Gullo-Haas Toyota, Inc.*, 832 S.W.2d at 419.

1115. TEX. R. APP. P. 24.4(c), (d); *see* 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); 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).

P. *Turnover Orders*

Section 31.002 of the Texas Civil Practice and Remedies Code,[1116] 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 or levy on by [normal] legal process."[1117] Under the statute, a judgment creditor may "apply to a court for an injunction or other means to satisfy a judgment debt through a judgment debtor's property, including present or future property."[1118] 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.[1119] The trial court's decision to grant or deny a turnover order, a final appealable judgment,[1120] is reviewed under an abuse of discretion standard.[1121]

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

In Texas, jury findings have long been the subject of appellate review to determine the sufficiency of the evidence in support of those findings. The standard and scope of review has not remained static, but has slowly evolved. Some commentators are of the opinion that the recent decision by the Texas Supreme Court in *City of*

1116. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a) (Vernon 1997 & Supp. 2002).

1117. Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 224 (Tex. 1991); *accord* Burns v. Miller, Hiersche, Martens & Hayward, P.C., 948 S.W.2d 317, 321 (Tex. App.—Dallas 1997, writ denied).

1118. *Burns*, 948 S.W.2d at 321 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a) (Vernon 1997 & Supp. 2002)).

1119. *Id.* (explaining TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(b) (Vernon 1997 & Supp. 2002)).

1120. *In re* Marriage of Long, 946 S.W.2d 97, 98 (Tex. App.—Texarkana 1997, no writ).

1121. *In re* Smith, 192 S.W.3d 564, 570, (Tex. 2006) (citing Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 226 (Tex. 1991)); *Buller*, 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).

Keller v. Wilson[1122] is a significant change in the way appellate courts review legal, and perhaps factual, sufficiency challenges.[1123]

A. *Legal Insufficiency*

In a jury trial, challenges to the legal insufficiency of the evidence[1124] 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.[1125] Legally insufficient points of error assert "a complete lack of evidence on an issue," and are called "no evidence" points, or "matter of law" points, depending upon whether the complaining party had the burden of proof.[1126] Challenges to the legal sufficiency of the evidence must be sustained if the record reflects one of the following:

> (a) [A] complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to

---

1122. 168 S.W.3d 802 (Tex. 2005).

1123. Given the standard of review articulated in legal sufficiency cases, it is questionable whether there is a distinction between legal and factual sufficiency standards of review, as it may be argued that Texas follows the federal *Boeing Co. v. Shipman* standard for reviewing sufficiency of the evidence challenges. *See* Neely v. Delta & Tie Co., 817 F.2d 1224, 1226 (5th Cir. 1987) (explaining that "it is not necessary that the evidence be no more than a scintilla or amount to a claim that frogs fly or stones levitate"); Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (explaining that, on legal sufficiency challenges, the court should evaluate all of the evidence which a reasonable jury would consider), *overruled on other grounds by* Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997).

1124. *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).

1125. 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).

1126. Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied).

prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of [a] vital fact.[1127]

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."[1128] As the court observed, it is not "simply directed to determine whether evidence exists that has some remote relation to the verdict."[1129] "'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].'"[1130] Whether direct or inferential, there must be a logical connection "between the evidence offered and the fact to be proved."[1131] The court admonished reviewing courts to "bear in mind the difference between materiality of the evidence and the issue of evidentiary sufficiency."[1132] 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.[1133] Quoting Professor McCormick, the supreme court observed, "a brick is not a wall."[1134]

1. No Evidence Before *City of Keller*

If an appellant is attacking the legal sufficiency of the evidence supporting an adverse finding of fact on which he did not have the burden of proof, the appellant must demonstrate on appeal that

---

1127. Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 903 (Tex. 2005); *accord* Marathon v. Pitzner, 106 S.W.3d 724, 727 (Tex. 2003); 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) (citing Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-63 (1960)); Cecil v. Smith, 804 S.W.2d 509, 510 n.2 (Tex. 1991); Juliette Fowler Homes, Inc. v. Welch Assocs., Inc., 793 S.W.2d 660, 666 n.9 (Tex. 1990).

1128. Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 25 (Tex. 1994).

1129. *Id.* at 24.

1130. *Id.* (quoting Lyons v. Millers Cas. Ins. Co., 866 S.W.2d 597, 600 (Tex. 1993)).

1131. *Id.*

1132. *Id.*

1133. *Moriel*, 879 S.W.2d at 25-25 (quoting TEX. R. EVID. 401).

1134. *Id.* at 25 (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 317 § 152 (West ed. 1954)).

there is no evidence to support the adverse finding.[1135] The "traditional statement of the standard of review"[1136] for reviewing no evidence points of error was 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 (the "exclusive" standard).[1137] As Justice Calvert stated in 1960, this rule applies when the evidence offered to prove a vital fact is no "more than a mere scintilla."[1138]

1135. 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).

1136. 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)).

1137. Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 903 (Tex. 2005); Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 254 (Tex. 2004); Lee Lewis Constr., Inc. v. Harrison, 70 S.W.3d 778, 782 (Tex. 2001); Bradford v. Vento, 48 S.W.3d 749, 754 (Tex. 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. Cazarez, 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. 696, 698 (1914); *see* 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, 698 (1914)).

1138. Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 364 (1960).

In 1997, the supreme court appeared to reformulate the standard and scope of review. In a series of cases, the supreme court expanded the scope of review stating 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 evidence is to be indulged in that party's favor.[1139] The post-1997 line of cases cite to the supreme court's opinion in *Harbin v. Seale*,[1140] authored by Chief Justice Calvert, where he 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."[1141] Chief Justice Calvert's statement of the scope of review in *Harbin v. Seale* is consistent with his often-cited law review article *"No Evidence" and "Insufficient Evidence" Points of Error*.[1142]

In 2002, in *Lenz v. Lenz*,[1143] a unanimous supreme court reaffirmed the "exclusive" scope of review in *Bradford v. Vento*[1144] and

---

1139. Harbin v. Seale, 461 S.W.2d 591, 592 (Tex. 1970) (concluding that before a court can render judgment non obstante verdicto based on no evidence, the court must first consider all evidence in a light most favorable to the party in whose favor the verdict was rendered at trial); *accord* Haggar Clothing Co. v. Hernandez, 164 S.W.3d 386, 388 (Tex. 2005) (quoting *Harbin*, 461 S.W.2d at 592); Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 552 (Tex. 2004) (citing Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 48 (Tex. 1998)); City of Arlington v. State Farm Lloyds, 145 S.W.3d 165, 167-68 (Tex. 2004); Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 234 (Tex. 2004); Ford Motor Co. v. Miles, 967 S.W.2d 377, 380 (Tex. 1998); Associated Indem. Corp. v. CAT Contracting, Inc., 964 S.W.2d 276, 285-86 (Tex. 1998); *Formosa Plastics Corp. USA*, 960 S.W.2d at 48.

1140. 461 S.W.2d 591 (Tex. 1970).

1141. 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*, 171 S.W. at 698).

1142. *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).

1143. 79 S.W.3d 10 (Tex. 2002).

1144. 48 S.W.3d 749 (Tex. 2001).

held: "We emphasize . . . that under a legal-sufficiency review, we must disregard all evidence and inferences contrary to the jury's finding."[1145] While the supreme court seemed to have returned to the traditional statement of the scope of review (considering only the evidence and inferences which support the jury's finding or the exclusive standard), it did so without discussing the two lines of supreme court authority.

Under either statement of the scope of review, when the reviewing court sustains a no evidence challenge after a trial on the merits, the court renders judgment on that issue.[1146] However, the court may reverse and remand the case for a new trial in the interest of justice, generally in those instances where the court "overrule[s] existing precedents on which the losing party relied"[1147] "or the applicable law has otherwise changed between the time of trial and the disposition of the appeal."[1148]

a. The Scintilla Rule

In a no evidence challenge, it remains settled that if there is "[a]ny evidence of probative force" to support the jury's finding, the no evidence issue must be overruled and the finding upheld.[1149]

1145. Lenz v. Lenz, 79 S.W.3d 10, 19 (Tex. 2002) (quoting Bradford v. Vento, 48 S.W.3d 749, 754 (Tex. 2001)). *Bradford* is cited repeatedly by numerous cases and appears to be the seminal no evidence scope-of-review case. *See* Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 254 (Tex. 2004) (citing *Bradford*, 48 S.W.3d at 754); Wal-Mart Stores, Inc. v. Canchola, 121 S.W.3d 735, 739 (Tex. 2003) (citing *Bradford*, 48 S.W.3d at 754); Tiller v. McLure, 121 S.W.3d 709, 713 (Tex. 2003) (per curiam) (citing *Bradford*, 48 S.W.3d at 754); Wal-Mart Stores, Inc. v. Miller, 102 S.W.3d 706, 709 (Tex. 2003) (citing *Bradford*, 48 S.W.3d at 754); Latch v. Gratty, 107 S.W.3d 543, 545 (Tex. 2003) (citing *Bradford*, 48 S.W.3d at 754); State v. Gonzalez, 82 S.W.3d 322, 327 (Tex. 2002) (citing *Bradford*, 48 S.W.3d at 754); Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 77 S.W.3d 253, 262 (Tex. 2002) (citing *Bradford*, 48 S.W.3d at 754); Minyard Food Stores, Inc. v. Goodman, 80 S.W.3d 573, 577 (Tex. 2002) (citing *Bradford*, 48 S.W.3d at 754); State *ex rel* State Dep't of Highways & Public Transp. v. Gonzalez, 82 S.W.3d 322, 327 (Tex. 2002) (citing *Bradford*, 48 S.W.3d at 754).

1146. *Kerr-McGee Corp.*, 133 S.W.3d at 254 (quoting Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 86 (Tex. 1992)).

1147. *Id.* (quoting Westgate, Ltd. v. State, 843 S.W.2d 448, 455 (Tex. 1992)).

1148. *Id.* at 258-59 (citing Twyman v. Twyman, 855 S.W.2d 619, 626 (Tex. 1993); Caller-Times Publ'g Co. v. Triad Commc'ns, Inc., 826 S.W.2d 576, 588 (Tex. 1992)).

1149. ACS Investors, Inc. v. McLaughlin, 943 S.W.2d 426, 430 (Tex. 1997); *accord* 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

Stated another way, if more than a scintilla of evidence exists to support the finding, the no evidence challenge fails.[1150] What is a "scintilla" of evidence?[1151] "[W]hen 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."[1152] Stated another way, "some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence."[1153] "More than a scintilla of evidence exists where the evidence supporting the finding, as a whole, 'rises to the level that would enable reasonable and fair-minded people to differ in their conclusions.'"[1154] 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.[1155] In any other situation, the appellate court may not

---

challenge. *See* Weirich v. Weirich, 833 S.W.2d 942, 946 (Tex. 1992) (considering telephone records discovered after the trial).

1150. Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 552 (Tex. 2004); Wal-Mart Stores, Inc. v. Canchola, 121 S.W.3d 735, 739 (Tex. 2003); BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 795 (Tex. 2002); Minyard Food Stores, Inc. v. Goodman, 80 S.W.3d 573, 577 (Tex. 2002); Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41 48 (Tex. 1998); Leitch v. Hornsby, 935 S.W.2d 114, 118 (Tex. 1996); Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 84 (Tex. 1992); Stafford v. Stafford, 726 S.W.2d 14, 16 (Tex. 1987); *see* Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 911 (Tex. 2005) (recognizing that the court must determine if the remaining evidence is more than a scintilla of evidence).

1151. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2033 (1986) (defining "scintilla" as "a barely perceptible manifestation" and "the slightest particle or trace"); BLACK'S LAW DICTIONARY 1207 (5th ed. 1979) (defining "scintilla" as "[a] spark; a remaining particle; a trifle; the least particle").

1152. Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 601 (Tex. 2004) (quoting Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983)); *accord* King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 751 (Tex. 2003); Marathon Corp. v. Pitzner, 106 S.W.3d 724, 728 n.7 (Tex. 2003) (quoting *Kindred*, 650 S.W.2d at 63); *Kindred*, 650 S.W.2d at 63.

1153. *Marathon Corp.*, 106 S.W.3d at 728 (quoting Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 210 (Tex. 2002)).

1154. Haggar Clothing Co. v. Hernandez, 164 S.W.3d. 386, 388 (Tex. 2005) (quoting Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995)); *accord Ramirez*, 159 S.W.3d at 911; *Gragg*, 151 S.W.3d at 552; Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 234 (Tex. 2004) (citing Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 25 (Tex. 1994)); *Ridgway*, 135 S.W.3d at 601; *Chapman*, 118 S.W.3d at 751; Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co., 77 S.W.3d 253, 262 (Tex. 2002); Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997).

1155. *Kindred*, 650 S.W.2d at 63; *see also* Woods v. Townsend, 144 Tex. 594, 192 S.W.2d 884, 886 (1946) (determining that if ordinary minds could not differ that the evidence is insufficient, then it is equivalent to no evidence); Joske v. Irvine, 91 Tex. 574, 44

"second guess the fact finder unless only one inference could be drawn from the evidence."[1156] "Whether other possible inferences may be drawn from the evidence is not [a] relevant inquiry."[1157] 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.[1158]

b. Circumstantial and Inferential Evidence

Any material fact may be proven by circumstantial evidence.[1159] However, the legal equivalent of no evidence exists when "meager circumstantial evidence give[s] rise to inferences . . . equally consistent" with two different propositions.[1160] Furthermore, where circumstances are equally consistent with two distinct facts and nothing suggests that one fact is more probable than the other, neither of such facts can be inferred and the no evidence challenge must be sustained.[1161] The supreme court has stated that

---

S.W. 1059, 1063 (1898) (concluding that if the probative value of the evidence is so weak that it only amounts to a scintilla, it falls short of being any evidence at all); Choate v. San Antonio & Aransas Pass Ry. Co., 90 Tex. 82, 37 S.W. 319, 319 (1896) (holding that the evidence was of the character to preclude a difference of opinion and was insufficient to constitute anything but no evidence at all).

1156. State v. $11,014.00, 820 S.W.2d 783, 785 (Tex. 1991) (per curiam) (citing Ross v. Green, 135 Tex. 103, 139 S.W.2d 565, 572 (1940)).

1157. Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 459 (Tex. 1992).

1158. *Id.*; *see Hernandez*, 164 S.W.3d at 388 (citing Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 48 (Tex. 1998); Harbin v. Seale, 461 S.W.2d 591, 592 (Tex. 1970)) (explaining that where more than a scintilla of evidence exists, a no evidence challenge must fail).

1159. Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 601 (Tex. 2004); 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 drawn from other facts proved in the case." *Cross*, 815 S.W.2d at 279-80.

1160. Fifty-Six Thousand Seven Hundred in U.S. Currency v. State, 730 S.W.2d 659, 662 (Tex. 1987).

1161. Cont'l Coffee Prods. Co. v. Cazarez, 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. Prods., 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).

"[e]vidence that is so slight as to make any inference [nothing more than] a guess is . . . [the equivalent of] no evidence."[1162] In short, for circumstantial evidence "to withstand a no-evidence challenge," it "must consist of more than a scintilla."[1163]

An inference may also support an ultimate fact so long as it is reasonable in light of all the facts and circumstances.[1164] However, under the no evidence standard of review, inference stacking is not permissible.[1165] As the supreme court has noted, "a vital fact may not be established by piling inference upon inference."[1166]

c. The Equal Inference Rule

Inferences may be drawn from circumstantial, as well as direct evidence. "[A]ny ultimate fact may be proven by circumstantial evidence."[1167] Common sense dictates that any conclusion drawn from circumstantial evidence is nothing more than an inference.[1168] "By its very nature, circumstantial evidence often involves linking what may be apparently insignificant and unrelated events to es-

---

1162. *Ridgway*, 135 S.W.3d at 601 (citing Lozano v. Lozano, 52 S.W.3d 141, 148 (Tex. 2001); Browning-Ferris, Inc. v. Reyna, 865 S.W.2d 925, 928 (Tex. 1993)).

1163. Blount v. Bordens, Inc., 910 S.W.2d 931, 933 (Tex. 1995) (per curiam); *accord Gammage*, 668 S.W.2d at 324.

1164. *Ortiz*, 917 S.W.2d at 772 (citing 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 "[f]acts and circumstances in derogation of that inference." *Simmons*, 286 S.W.2d at 418.

1165. 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).

1166. *Schlumberger Well Surveying Corp.*, 435 S.W.2d at 858; *accord Tex. Sling Co.*, 431 S.W.2d at 541 (citing Rounsaville v. Bullard, 154 Tex. 260, 276 S.W.2d 791, 794 (1955)); Lobley v. Gilbert, 149 Tex. 493, 236 S.W.2d 121, 123 (1951); *see* Marathon Corp. v. Pitzner, 106 S.W.3d 724, 728 (Tex. 2003) (reiterating that inferences stacked upon other inferences are insufficient evidence); 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").

1167. Transp. Ins. Co. v. Faircloth, 898 S.W.2d 269, 285 (Tex. 1995); *accord* 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).

1168. *See* BLACK'S LAW DICTIONARY 781 (7th ed. 1999) (defining "inference" as "[a] conclusion reached by considering other facts and deducting a logical consequence from them").

tablish a pattern."[1169] The supreme court has observed "that circumstantial evidence establishes a fact when the fact may be 'inferred from other facts proved in the case.'"[1170] Circumstantial evidence and any inferences drawn from the evidence "still must consist of more than a scintilla to withstand a no-evidence challenge."[1171] This analysis is known as the equal inference rule.[1172]

In the per curiam opinion of *Lozano v. Lozano*,[1173] 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 evidence, something else must be found in the record to corroborate the probability of the fact's existence or non-existence.
>
> . . . .
>
> 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.[1174]

1169. Browning-Ferris, Inc. v. Reyna, 865 S.W.2d 925, 927 (Tex. 1993).

1170. 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 *Cross*, 815 S.W.2d at 279-80)).

1171. Blount v. Bordens, Inc., 910 S.W.2d 931, 933 (Tex. 1995) (per curiam) (citing Litton Indus. Prods., Inc. v. Gammage, 668 S.W.2d 319, 324 (Tex. 1984)).

1172. Lozano v. Lozano, 52 S.W.3d 141, 148-49 (Tex. 2001) (per curiam).

1173. 52 S.W.3d 141 (Tex. 2001) (per curiam).

1174. *Lozano*, 52 S.W.3d at 148-49 (Phillips, C.J., concurring in part and dissenting in part, joined in part by Enoch, Hankinson, Baker, & Abbott, JJ.).

The majority concurrence adopts the supreme court's earlier pronouncement of the rule[1175] stated in *Farley v. M M Cattle Co.*[1176] and *Benoit v. Wilson.*[1177] However, the majority concurrence does not expressly overrule the more recent supreme court pronouncements of the rule that are inconsistent.[1178]

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."[1179] Primarily, Justice Hecht relied upon[1180] *Hammerly Oaks, Inc. v. Edwards*[1181] and *Litton Industrial Products, Inc. v. Gammage.*[1182] The dissent argued that these two more recent cases "expressly require[ ] that an accepted inference not only be reasonable but that it be probable."[1183] Justice Hecht argued that:

> [I]f 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.[1184]

All participating members of the court agreed in *Lozano* that "[t]he equal inference rule provides that a jury may not reasonably infer an ultimate fact from meager circumstantial evidence '[that] could give rise to any number of inferences, none more probable than another.'"[1185] 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 in-

---

1175. *Id.* (Phillips, C.J., concurring in part and dissenting in part, joined in part by Enoch, Hankinson, Baker, & Abbott, JJ.).

1176. 529 S.W.2d 751 (Tex. 1975).

1177. 150 Tex. 273, 239 S.W.2d 792 (1951).

1178. *See* Lozano v. Lozano, 52 S.W.3d 141, 148-49 (Tex. 2001) (per curiam) (Phillips, C.J., concurring in part and dissenting in part, joined in part by Enoch, Hankinson, Baker, & Abbott, JJ.) (failing to address or mention conflicting case law).

1179. *Id.* at 157 (Hecht, J., joined by Owen, J., concurring in part and dissenting in part).

1180. *Id.* (Hecht, J., joined by Owen, J., concurring in part and dissenting in part).

1181. 958 S.W.2d 387 (Tex. 1997).

1182. 668 S.W.2d 319 (Tex. 1984).

1183. *Lozano*, 52 S.W.3d at 158 (Hecht, J., joined by Owen, J., concurring in part and dissenting in part).

1184. *Id.* (Hecht, J., joined by Owen, J., concurring in part and dissenting in part).

1185. *Id.* at 157 (Hecht, J., joined by Owen, J., concurring in part and dissenting in part) (quoting Hammerly Oaks, Inc. v. Edwards, 958 S.W.2d 387, 392 (Tex. 1997)).

ferred.'"[1186] Beyond these two sentences in *Lozano*, the court could not agree.[1187]

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*.[1188] Second, the make-up of the court has changed dramatically since *Lozano* was decided.[1189] It is unclear why the majority concurrence did not overrule inconsistent supreme court cases.[1190] 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 charged facts of a family law case involving the possessory rights to a child,[1191] 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 for the statement of the equal inference rule that favors his position on appeal.

Over the years, the supreme court has noted the following nonexclusive principles or standards for application of the equal

---

1186. *Id.* (Hecht, J., concurring in part and dissenting in part, joined by Owen, J.) (quoting Litton Indus. Prods., 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).

1187. *Lozano*, 52 S.W.3d at 157 (Hecht, J., joined by Owen, J., concurring in part and dissenting in part).

1188. Justice O'Neill was a member of the panel that decided *Lozano* while she was on the court of appeals and therefore did not participate while the case was in the supreme court, 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.

1189. The five members of the court who concurred on the definition of the equal inference rule are no longer on the court: Chief Justice Phillips and Justices Enoch, Hankinson, Baker, and Abbott.

1190. *See Lozano*, 52 S.W.3d at 148-49 (Phillips, C.J., concurring in part and dissenting in part, joined in part by Enoch, Hankinson, Baker, & Abbott, JJ.) (failing to address or mention conflicting case law).

1191. *See id.* at 145-47 (Phillips, C.J., concurring in part and dissenting in part, joined in part by Enoch, Hankinson, Baker, & Abbott, JJ.) (discussing the background facts to the case).

inference rule: circumstantial evidence may be used to establish any material fact, but it must transcend mere suspicion, conjecture or a guess;[1192] circumstantial evidence may establish a fact if "the fact may be fairly and reasonably [drawn] from other facts proved in the case;"[1193] there must be "a logical bridge between the proffered evidence and the . . . fact" sought to be established by inference;[1194] "circumstantial evidence must be viewed not in isolation, but in light of all the known circumstances;"[1195] the material fact must be reasonably inferred from the known circumstances;[1196] under the "no evidence" standard of review, the reviewing court must consider not only facts and circumstances that give rise to an inference, but also facts and circumstances in derogation of that inference;[1197] and the reviewing court is not required to "disregard undisputed evidence that allows of only one logical inference."[1198]

Again, it should be remembered that under the no evidence standard of review, inference stacking is not permissible to establish a vital fact.[1199]

1192. *Id.* at 152 (Phillips, C.J., concurring in part and dissenting in part, joined in part by Enoch, Hankinson, Baker, & Abbott, JJ.) (citing 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 v. Jones, 917 S.W.2d 770, 772 (Tex. 1996) (citing 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).

1193. Dallas County Flood Control Dist. No. 1 v. Cross, 815 S.W.2d 271, 279-80 (Tex. App.—Dallas 1991, writ denied).

1194. Lozano v. Lozano, 52 S.W.3d 141, 152 (Tex. 2001) (per curiam) (Phillips, C.J., concurring in part and dissenting in part, joined in part by Enoch, Hankinson, Baker, & Abbott, JJ.) (citing Joske v. Irvine, 91 Tex. 574, 44 S.W. 1059, 1064 (1898)).

1195. *Id.* at 149 (Phillips, C.J., concurring in part and dissenting in part, joined in part by Enoch, Hankinson, Baker, & Abbott, JJ.).

1196. *See Joske*, 44 S.W. at 1064 (finding that an inference is merely a deduction from proven facts).

1197. 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).

1198. Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 51 n.1 (Tex. 1997).

1199. 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, 794 (1955))); *see also* 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).

2. As a Matter of Law Before *City of Keller*

If an appellant "attacks the legal sufficiency of an adverse finding [to] an issue on which [ ]he [carried] the burden of proof, [ ]he must demonstrate on appeal that the evidence [conclusively] establishes, as a matter of law, all vital facts in support of the issue."[1200] In reviewing a "matter of law" challenge, the reviewing court employs a two prong test.[1201] The court will "first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary."[1202] "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."[1203] "[I]f the contrary proposition is conclusively established," the point of error will be sustained.[1204]

Texas courts have repeatedly held that although a jury is the finder of fact, it may not disregard uncontroverted evidence.[1205] 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]

1200. 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.—Houston [1st Dist.] 1987, no writ); W. Wendell Hall, *Standards of Review in Texas*, 34 ST. MARY'S L.J. 1, 164-65 (2002).

1201. *Dayton*, 958 S.W.2d at 455 (citing *Brady*, 811 S.W.2d at 940).

1202. *Francis*, 46 S.W.3d at 241 (citing *Sterner*, 767 S.W.2d at 690); *accord* Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982); W. Wendell Hall, *Standards of Review in Texas*, 34 ST. MARY'S L.J. 1, 165 (2002).

1203. *Francis*, 46 S.W.3d at 241 (citing *Sterner*, 767 S.W.2d at 690); *accord Holley*, 629 S.W.2d at 696-97; W. Wendell Hall, *Standards of Review in Texas*, 34 ST. MARY'S L.J. 1, 165 (2002).

1204. *Francis*, 46 S.W.3d at 241 (citing Croucher v. Croucher, 660 S.W.2d 55, 58 (Tex. 1983)); *accord* 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, 482 (1998).

1205. 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.).

wishes."[1206] 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.[1207] These two lines of cases are impossible to reconcile. Given the scope of review, which requires the court to disregard all evidence contrary to the verdict,[1208] the latter line of cases is clearly correct when the appellant raises an "as a matter of law" challenge.

3. *City of Keller v. Wilson*: A New Paradigm or Is It Déjà Vu All Over Again?[1209]

In *City of Keller v. Wilson*, the Texas Supreme Court recognized the different scopes of review applicable to no evidence cases, referring to them as exclusive (considering only the evidence favorable to the finding)[1210] and inclusive (considering all of the evidence),[1211] but the court held that whether the legal sufficiency scope of review was all of the evidence or only the evidence favorable to the jury's verdict made no real difference.[1212] Following the United States Supreme Court,[1213] the Texas Supreme Court held that any difference between the inclusive and exclusive standards was "more semantic than real."[1214] The court held that

---

1206. Tex. & N. O. R. Co. v. Burden, 146 Tex. 109, 203 S.W.2d 522, 530 (1947); *see* Cochran v. Wool Growers Cent. Storage Co., 140 Tex. 184, 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").

1207. *See* 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 proof on an issue will be upheld against a no evidence challenge despite the lack of evidence to support its finding).

1208. Dow Chem. Co. v. Francis, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam) (citing Sterner v. Marathon Oil Co., 767 S.W.2d 686, 690 (Tex. 1989)); Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982); W. Wendell Hall, *Standards of Review in Texas*, 34 ST. MARY'S L.J. 1, 165-66 (2002).

1209. "It's like déjà vu all over again." YOGI BERRA, AMERICAN HERITAGE DICTIONARY OF AMERICAN QUOTATIONS 475:9 (1997).

1210. City of Keller v. Wilson, 168 S.W.3d 802, 808-09 (Tex. 2005).

1211. *Id.* at 809.

1212. *Id.* at 821-22.

1213. *Id.* at 825-26 (discussing the holding in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000), that the different scopes of review are "more semantic than real" and that reviewing courts should review all of the evidence in the record).

1214. *Id.* at 827.

whether a reviewing court reviews all of the evidence or only part of the evidence in a legal-sufficiency review, "there can be no disagreement about where that review should end":[1215] "Under either scope of review, appellate courts must view the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not."[1216] The court further explained:

> If the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, then jurors must be allowed to do so. A reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within this zone of reasonable disagreement.
>
> Similarly, there is no disagreement about how a reviewing court should view evidence in the process of that review. Whether a reviewing court starts with all or only part of the record, the court must consider evidence in the light most favorable to the verdict, and indulge every reasonable inference that would support it. But if the evidence allows of only one inference, neither jurors nor the reviewing court may disregard it.[1217]

The court observed that:

> [t]he final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. Whether a reviewing court begins by considering all the evidence or only the evidence supporting the ver-

---

1215. City of Keller v. Wilson, 168 S.W.3d 802, 822 (Tex. 2005).

1216. *Id.* at 807.

1217. *Id.* at 822 (citing Tarrant Reg'l Water Dist. No. 1. v. Gragg, 151 S.W.3d 546, 552 (Tex. 2004)); *accord* Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 234 (Tex. 2004); Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 601 (Tex. 2004); St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 519-20 (Tex. 2002); Sw. Bell Mobile Sys., Inc. v. Franco, 971 S.W.2d 52, 54 (Tex. 1998) (per curiam); Mobil Oil Corp. v. Ellender, 968 S.W.2d 917, 922 (Tex. 1998); Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 48 (Tex. 1998); Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 51 n.1, 75 (Tex. 1997) (Hecht, J., concurring); Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997); Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995); Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 25 (Tex. 1994); Orozco v. Sander, 824 S.W.2d 555, 556 (Tex. 1992); Preferred Heating & Air Conditioning Co. v. Shelby, 778 S.W.2d 67, 68 (Tex. 1989) (per curiam); Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983); Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 297 (Tex. 1983) (per curiam); Burk Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981); Harbin v. Seale, 461 S.W.2d 591, 592 (Tex. 1970); W. Tel. Corp. v. McCann, 128 Tex. 582, 99 S.W.2d 895, 898 (Tex. 1937); William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" & "Insufficient Evidence,"* 69 TEX. L. REV. 515, 517-20 (1991)).

> dict, legal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.[1218]

Contrary evidence that cannot be disregarded. The court stated that Texas has never rejected contrary evidence in all no-evidence cases. The traditional scope of review does not disregard contrary evidence if there is no favorable evidence ("a complete absence of evidence of a vital fact,")[1219] if contrary evidence renders supporting evidence incompetent ("the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact,")[1220] or conclusively establishes the opposite ("the evidence establishes conclusively the opposite of [a] vital fact").[1221]

Contextual evidence. The court stated that in defamation cases, the entire publication must be considered; in contract cases, the entire contract is reviewed, not only parts of the contract; and in intentional infliction of emotional distress cases, the context and the relationship between the parties is considered.[1222]

Thus, if evidence may be legally sufficient in one context but insufficient in another, the context cannot be disregarded even if that means rendering judgment contrary to the jury's verdict. Either "evidence contrary to the verdict" must be defined to exclude material contextual evidence, or it must be an exception to the general rule.[1223]

Competency evidence. Incompetent evidence has always been "insufficient to support a judgment, even if admitted without objection."[1224] The court stated that "evidence showing it to be incompetent evidence cannot be disregarded, even if the result is contrary to the verdict."[1225] The court provided examples: if an eyewitness's location makes a clear view of an accident impossible, "it is no evidence of what occurred," regardless of the witness's testimony to the contrary.[1226] Similarly, when an expert's testi-

---

1218. City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005).
1219. *Id.* at 810.
1220. *Id.*
1221. *Id.* at 810-11.
1222. *Id.* at 811-12.
1223. *City of Keller*, 168 S.W.3d at 812.
1224. *Id.*
1225. *Id.*
1226. *Id.* (citing Tex. & P. Ry. Co. v. Ball, 96 Tex. 622, 75 S.W. 4, 6 (1903)).

mony is required, lay evidence is legally insufficient,[1227] and when an expert's opinion fails to meet the reliability standards, a review of the expert's testimony cannot disregard his testimony which demonstrates that his opinion does not meet the reliability standards.[1228] As the court observed, the evidence might be some evidence in isolation, but it is no evidence when contrary evidence demonstrates that it is incompetent.[1229]

Circumstantial equal evidence. When inferences must be considered in determining a no evidence challenge, the reviewing court must "view each piece of circumstantial evidence, not in isolation, but in light of all the known circumstances."[1230] Again, the court provided examples: a fact-finder "might infer from [grocery] cart tracks in spilled macaroni salad that it had been on the floor for a long time, but" another might conclude that it just occurred.[1231] Similarly, when there is an "injury or death . . . [and no] eyewitnesses and only meager circumstantial evidence suggests . . . [an explanation, the court] cannot disregard other meager evidence of equally likely causes."[1232] Accordingly, "when the circumstantial evidence of a vital fact is meager, [the] reviewing court must . . . [review] all of the circumstantial evidence[ ] and competing inferences," not just favorable evidence.[1233]

Conclusive evidence. The court noted that Justice Calvert observed that in a no-evidence review, "Texas courts . . . do not disregard contrary evidence that conclusively establishes the opposite of a vital fact."[1234] There are several types of conclusive evidence. First, a reviewing court "cannot 'disregard undisputed evidence that allows of only one logical inference,'"[1235] and "[b]y definition,

---

1227. *Id.* (citing Bowles v. Bourdon, 148 Tex. 1, 219 S.W.2d 779, 782-83 (1949)).

1228. City of Keller v. Wilson, 168 S.W.3d 802, 813 (Tex. 2005) (citing Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 254-57 (Tex. 2004); Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 714, 720 (Tex. 1997)).

1229. *City of Keller*, 168 S.W.3d at 813.

1230. *Id.* at 813-14 (quoting Lozano v. Lozano, 52 S.W.3d 141, 167 (Tex. 2000)).

1231. *Id.* at 814 (citing Wal-Mart Stores, Inc. v. Gonzalez, 968 S.W.2d 934, 938 (Tex. 1998)).

1232. *Id.* (citing Marathon Corp. v. Pitzner, 106 S.W.3d 724, 729 (Tex. 2003) (per curiam); W. Tel. v. McCann, 99 S.W.2d 895, 900 (1937)).

1233. *City of Keller*, 168 S.W.3d at 814.

1234. *Id.*

1235. *Id.* (quoting St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 519-20 (Tex. 2002) (plurality op.)).

reasonable jurors can reach only one conclusion from it."[1236] The court provided the following illustrative examples: "no evidence supports an impaired-access claim if it is undisputed that access remains along 90 percent of a tract's frontage";[1237] "[e]vidence that a buyer believed a product had been repaired is conclusively negated by [a] . . . letter to the contrary";[1238] and "an insured's liability has not been determined by an 'actual trial' if the insured did not appear, present evidence, or challenge anything presented by his opponent."[1239] Undisputed conclusive evidence may also be conclusive when a party admits that the evidence of a vital fact is true.[1240]

The court observed that it is not possible "to define precisely when undisputed evidence becomes conclusive."[1241] However, the court stated, "[e]vidence is conclusive only if reasonable people could not differ in their conclusions," a determination that will depend upon the facts of each case.[1242]

The court added that "[t]here is another category of conclusive evidence in which the evidence is disputed."[1243] The court observed that "[u]ndisputed evidence and conclusive evidence are not the same—undisputed evidence may or may not be conclusive, and conclusive evidence may or may not be undisputed."[1244] For example, a mother may testify that she had sex with only one man during the relevant time that she became pregnant, but the purported father's "blood tests conclusively proved he was not the . . . father" of the child.[1245] Because the blood test is conclusive, "there was no evidence to support the paternity verdict" against the purported father.[1246] The court concluded that while reviewing courts cannot

---

1236. *Id.*

1237. *Id.* at 815 (citing County of Bexar v. Santikos, 144 S.W.3d 455, 460-61 (Tex. 2004)).

1238. City of Keller v. Wilson, 168 S.W.3d 802, 815 (Tex. 2005) (citing PPG Indus., Inc. v. JMB/Houston Ctrs., Partners Ltd. P'ship, 146 S.W.3d 79, 97-98 (Tex. 2004)).

1239. *Id.* (citing State Farm Lloyds Ins. Co. v. Maldonado, 963 S.W.2d 38, 40 (Tex. 1998)).

1240. *Id.*

1241. *Id.*

1242. *Id.* at 816.

1243. *City of Keller*, 168 S.W.3d at 816.

1244. *Id.*

1245. *Id.* (citing Murdock v. Murdock, 811 S.W.2d 557, 560 (Tex. 1991)).

1246. *Id.* (citing *Murdock*, 811 S.W.2d at 560).

"substitut[e] their opinions on credibility for those of the jurors, . . . jurors [likewise cannot] substitut[e] their opinions for [the] undisputed truth."[1247]

Clear and convincing evidence. In cases such as "parental termination, defamation, and punitive damages," where there is an elevated standard of proof, the reviewing court must consider all of the evidence, not just the evidence favoring the verdict, in reviewing those judgments.[1248]

Consciousness evidence. In cases where the issue of "what a party knew or why it took a" particular action, such as conscious indifference, insurance bad faith cases, employment discrimination cases, governmental immunity cases, and limitations on the discovery rule, the reviewing court must consider all of the evidence, not just the evidence favoring the verdict, in reviewing those judgments.[1249]

Contrary evidence that must be disregarded. The court noted that more often that not in no evidence review cases, courts will disregard evidence contrary to the verdict far more often than they will consider it.[1250]

Credibility evidence. Because "[j]urors are the sole judges of the credibility of the witnesses and the weight" to be assigned to their testimony, jurors are free "to believe one witness and disbelieve another," and "[r]eviewing courts [may not] impose their own opinions to the contrary."[1251] Accordingly, "reviewing courts must assume [that] jurors decided all [credibility questions] in favor of the verdict if reasonable human beings could do so."[1252] The court emphasized that the jury's credibility determinations must be reasonable.[1253] For example, "[j]urors cannot [disregard] undisputed testimony that is . . . free from contradictions and inconsistencies, and could have been readily controverted, [a]nd . . . they are not free to believe testimony that is conclusively negated by undis-

---

1247. *Id.* at 816-17.

1248. City of Keller v. Wilson, 168 S.W.3d 802, 817 (Tex. 2005).

1249. *Id.* at 817-18.

1250. *Id.* at 818-19.

1251. *Id.* at 819.

1252. *Id.*

1253. *City of Keller*, 168 S.W.3d at 820 (quoting Bentley v. Bunton, 94 S.W.3d 561, 599 (Tex. 2002)).

puted facts."[1254] However, if "reasonable jurors could decide what testimony to [disbelieve, then the] reviewing court must assume they did so in favor of their verdict," and affirm the jury's finding.[1255]

Conflicting evidence. The court noted that it is within the jury's province "to resolve conflicts in the evidence."[1256] Consequently, when "reviewing all evidence in a light favorable to the verdict, [the court] must assume that [the jury] resolved all conflicts" in the evidence consistent with the jury's verdict.[1257] The court concluded that where "reasonable jurors could resolve conflicting evidence either way, [the reviewing court] must presume [that the jury] did so in favor of the [jury verdict,] and disregard the conflicting evidence in their legal sufficiency review."[1258]

Conflicting inferences. The court held that "[e]ven if [the] evidence is undisputed, it is [within the province of the jury] to draw . . . whatever inferences they [choose,] so long as more than one is possible and the jury" is not required to guess.[1259] Therefore, when the court reviews "all the evidence in a light [most] favorable to the [jury's] verdict," the reviewing court "must assume jurors made all inferences in favor of their verdict if reasonable minds could [do so,] and disregard all other inferences in their legal sufficiency review."[1260]

The significance of City of Keller v. Wilson. The court's decision in *City of Keller* is not as remarkable for defining the scope of review in legal sufficiency review as it is for repeatedly reminding the reviewing courts that regardless of the quantity and quality of the evidence presented, the jury's verdict must be *reasonable.*[1261] The standard of review enunciated in *City of Keller* is remarkably similar to the federal sufficiency of the evidence review adopted by the Fifth Circuit in its landmark 1969 en banc decision in *Boeing Co. v.*

1254. *Id.*

1255. *Id.*

1256. *Id.*

1257. *Id.*

1258. City of Keller v. Wilson, 168 S.W.3d 802, 821 (Tex. 2005).

1259. *Id.*

1260. *Id.*

1261. *See generally* City of Keller v. Wilson, 168 S.W.3d 802 (Tex. 2005) (emphasizing the importance of reasonableness throughout the opinion).

Shipman.[1262] There, the Fifth Circuit adopted the review of the whole record (inclusive) approach and held:

> [T]he Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions [for directed verdict or judgment notwithstanding the verdict] is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.[1263]

Accordingly, the key inquiry in *City of Keller v. Wilson* and *Boeing Co. v. Shipman* is whether fair-minded jurors could render a verdict on the evidence presented at trial.[1264] The test is not so much whether there is a scintilla of evidence to support the verdict, but whether the reviewing court believes that the evidence at trial would allow reasonable and fair-minded people to reach the verdict under review.[1265] Under the new standard, as the court says, it really does not matter whether one reviews the entire record or only that evidence that supports the verdict because the reviewing court may set aside the jury's decision if a majority of the reviewing

---

1262. 411 F.2d 365 (5th Cir. 1969) (en banc), *overruled on other grounds by* Guatreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997).

1263. Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc) (noting that a court should only grant a motion for directed verdict when the evidence conclusively establishes that one party should prevail, but where evidence amounting to more than a scintilla exists which contradicts the motioning party's motion, a directed verdict is improper), *overruled on other grounds by* Guatreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997). One panel added that for reversal "it is not necessary that the evidence be no more than a scintilla or amount to a claim that frogs fly or stones levitate." Neely v. Delta Brick & Tile Co., 817 F.2d 1224, 1226 (5th Cir. 1987).

1264. Boeing Co. v, Shipman, 411 F.2d 365, 374 (5th Cir. 1969), *overruled on other grounds by* Guatreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997); City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (supporting the proposition that a key inquiry on appeal is whether fair-minded jurors could render a verdict on the evidence presented at trial).

1265. *Anderson*, 477 U.S. at 252.

court finds that "reasonable and fair-minded people" could not have reached the verdict which is the subject of the appeal.[1266]

4. Origins of the "Reasonable and Fair-Minded Juror" Standard

It appears that the supreme court's movement toward the "reasonable and fair-minded juror standard" gained traction in 1994 in the court's leading punitive damages decision in *Transportation Insurance Co. v. Moriel*.[1267] There, the court held that the reviewing court must consider a number of factors to determine the "reasonableness" of the award when reviewing an award of punitive damages.[1268] Obviously, in considering whether a punitive damages award was supported by legally sufficient evidence, the reviewing court would determine as a matter of law whether the jury's award was in fact "reasonable."[1269]

Eight years later *Bentley v. Bunton*[1270] made its first of three trips to the Texas Supreme Court.[1271] There, the host of a local public access television call-in talk show in a small town repeatedly accused a local district judge, Judge Bentley, of being corrupt.[1272] The jury awarded Judge Bentley $7 million in mental anguish damages, $150,000 for injury to character and reputation, and $1 million in punitive damages.[1273] As to the mental anguish damages, the supreme court reversed the damages award and remanded the

---

1266. *City of Keller*, 168 S.W.3d at 822.

1267. 879 S.W.2d 10 (Tex. 1994).

1268. Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 31 (Tex. 1994).

1269. *See id.* (explaining that the court should use the *Kraus* factors in determining reasonableness); *see also* Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981) (providing a list of factors to be considered in determining reasonableness).

1270. 94 S.W.3d 561 (Tex. 2002).

1271. Bunton v. Bentley, 176 S.W.3d 1 (Tex. App—Tyler 1999), *rev'd and remanded*, 94 S.W.3d 561 (Tex. 2002), *on remand*, 176 S.W.3d 18 (Tex. App.—Tyler 2003), *aff'd in part, rev'd in part, and remanded*, 153 S.W.3d 50 (Tex. 2004), *on remand*, 176 S.W.3d 21 (Tex. App.—Tyler 2005, pet. denied), *cert. denied*, 126 S. Ct. 1476 (2006). In the initial hearing of the case, there was a plurality opinion, but Chief Justice Phillips and Justices Enoch and Hankinson, who opined that the judgment should be reversed and rendered on constitutional grounds, joined in the judgment with the plurality so that the case could be finally decided. *See* Bentley v. Bunton, 94 S.W.3d 561, 624 (Tex. 2002) (Baker, J., dissenting) (noting the unusual disposition of the case and arguing that the case should have no precedential value).

1272. *Id.* at 566-67.

1273. *See Bunton*, 176 S.W.3d at 7 (explaining the break-down of the damages award). The jury also awarded Judge Bentley $95,000 in actual damages and $50,000 in punitive

issue to the court of appeals to reconsider the excessiveness of the jury's award.[1274] The court further observed that the issue might have to be retried, or the court noted, the court of appeals was free to suggest a remittitur.[1275]

In reversing this award of mental anguish damages, the plurality noted that "[n]on-economic damages . . . cannot be determined by mathematical precision," and that "by their [very] nature, they can be determined only by the exercise of sound judgment."[1276] Then came the "but."

The supreme court added, "[b]ut the necessity that a jury have some latitude in awarding such damages does not, of course, give it carte blanche to do whatever it will, and this is especially true in defamation actions brought by public officials."[1277] The court held that "[d]amage awards left largely to a jury's discretion threaten too great an inhibition of speech protected by the First Amendment."[1278] The court said that the jury's broad discretion "unrestrained by meaningful appellate review poses a real threat to all members of the media."[1279] The plurality concluded that "while the record supports . . . some amount of mental anguish damages, it does not support [$7 million in damages as] found by the jury."[1280]

Quoting *Saenz v. Fidelity & Guaranty Insurance Underwriters*,[1281] the court noted that "[n]ot only must there be evidence of the existence of compensable mental anguish, there must also be some evidence to justify the amount awarded."[1282] Again quoting *Saenz*, the court held that "[t]here must be evidence that the

---

damages against the co-host of the call-in talk show. *Id.* These damages against the host were reversed by the court of appeals in the first appeal. *Id.* at 18.

1274. *Bentley*, 94 S.W.3d at 607-08.

1275. *Id.*

1276. *Id.* at 605. Interestingly, three members of the court (Chief Justice Phillips, Justice Enoch, and Justice Hankinson) who voted for *no* liability against Bunton, joined in the judgment (which was contrary to their opinion) remanding the case to the court of appeals. *Id.* at 566.

1277. *Id.*

1278. *Bentley*, 94 S.W.3d at 605.

1279. *Id.*

1280. *Id.* at 605-06.

1281. 925 S.W.2d 607 (Tex. 1996).

1282. Bentley v. Bunton, 94 S.W.3d 561, 606 (Tex. 2002) (quoting Saenz v. Fidelity & Guar. Ins. Underwriters, 925 S.W.2d 607, 614 (Tex. 1996)).

amount found is fair and reasonable compensation, just as there must be evidence to support any other jury finding."[1283]

The court cited the evidence supporting Judge Bentley's mental anguish award: (1) the defamation "had cost him time, deprived him of sleep, caused him embarrassment in the community in which he had spent almost all of his life, disrupted his family, and distressed his children at school";[1284] (2) it was the worst experience of his life; (3) he was depressed; (4) "his honor and integrity had been impugned";[1285] (5) "his family had suffered";[1286] and (6) "he would never be the same."[1287]

In the court of appeals, the court noted that slander had ruined the lives of Judge Bentley and his four children; that other children laughed and joked about it to the Bentley children; that Judge Bentley was "downcast, sad, and depressed"; and that the slander had a severe effect on Judge Bentley and his family.[1288] Bentley agreed "that there had been no disruption in his ability to perform as a judge, teach at community college, and participate in community and social activities."[1289] He also added that he had not incurred "medical, psychiatric, psychological, therapeutic, or counseling expenses as a result of defendants' slander."[1290]

In light of the evidence, a plurality of the supreme court concluded that this evidence constituted no evidence that Bentley suffered $7 million in mental anguish damages.[1291] The court added that "[t]he amount is not merely excessive and unreasonable; it is far beyond any figure the evidence can support."[1292]

Justice Baker dissented and argued that the plurality was improperly conducting "a factual sufficiency review of the mental anguish damages award . . . ."[1293] Justice Baker pointed out that

---

1283. *Id.* (quoting *Saenz*, 925 S.W.2d at 614).

1284. *Id.*

1285. *Id.*

1286. *Id.* at 606-07.

1287. *Bentley*, 94 S.W.3d at 607.

1288. Bunton v. Bentley, 176 S.W.3d 1, 12 (Tex. App.—Tyler 1999), *aff'd in part, rev'd in part*, 153 S.W.3d 50 (Tex. 2004).

1289. *Id.*

1290. *Id.*

1291. Bentley v. Bunton, 94 S.W.3d 561, 607 (Tex. 2002). The plurality included Justices Hecht, Owen, Jefferson, and Rodriguez. *Id.* at 566.

1292. *Id.*

1293. *Id.* at 624 (Baker, J., dissenting).

after the plurality listed "the parade of horribles," remarkably the court held that while this evidence supported "some amount of mental anguish damages," it was no evidence of $7 million in damages.[1294] Justice Baker opined that the plurality assumed the role of fact-finder because it found that the award of damages was excessive—a factual sufficiency challenge that is final in the court of appeals.[1295] Finally, Justice Baker observed that the court was evaluating the "reasonableness" of the mental anguish award as "a proxy for factual sufficiency review."[1296] "Simply put," Justice Baker wrote, "the Court oversteps its constitutional appellate review boundaries to conduct what effectively results in a factual sufficiency review of the mental anguish damages award and issues a wholly advisory opinion to the court of appeals about those damages."[1297] Citing the traditional legal sufficiency review standard in *Bradford v. Vento*,[1298] Justice Baker would have held that there was some evidence to support the jury's damages award and affirmed the judgment.[1299]

On remand to the court of appeals, the court suggested a remittitur, consistent with the supreme court's opinion, that would reduce the mental anguish damages from $7 million to $150,000, and the court of appeals affirmed the $1 million in punitive damages.[1300] On appeal to the Texas Supreme Court challenging the punitive damages award, the court held that even though the punitive damage award had not been challenged in the first appeal, the defendant may claim for the first time in the supreme court that the punitive damages award is grossly disproportionate any time the compensatory damages are significantly adjusted.[1301] Accordingly, the supreme court remanded the case to the court of appeals a second time to reevaluate the punitive damages award consistent with the Due Process Clause of the United States Constitution and the

1294. *Id.* at 623 (Baker, J., dissenting).

1295. *Bentley*, 94 S.W.3d at 624 (Baker, J., dissenting).

1296. *Id.* (Baker, J., dissenting).

1297. *Id.* (Baker, J., dissenting).

1298. 48 S.W.3d 749 (Tex. 2001).

1299. *See* Bentley v. Bunton, 94 S.W.3d 561, 624 (Tex. 2002) (Baker, J., dissenting) (citing Bradford v. Vento, 48 S.W.3d 749, 754 (Tex. 2001)).

1300. Bunton v. Bentley, 176 S.W.3d 18, 21 (Tex. App.—Tyler, 2003), *aff'd in part, rev'd in part*, 153 S.W.3d 50 (Tex. 2004).

1301. Bunton v. Bentley, 153 S.W.3d 50, 54 (Tex. 2004).

State Farm Mutual Automobile Insurance Co. v. Campbell[1302] case.[1303] The court added that "[i]deally, the court of appeals should automatically reevaluate [punitive] damages whenever compensatory damages are reduced."[1304]

On second remand, noting that the conduct complained of had occurred almost 10 years earlier, the court of appeals held that the total compensatory damages awarded to Judge Bentley was $300,000, which was constitutionally acceptable in comparison to a $1 million punitive damages award.[1305] Accordingly, the court of appeals affirmed the punitive damages award, and the supreme court denied the Bunton's petition for review.[1306] After a ten-year journey, Judge Bentley's odyssey through the Texas appellate courts finally ended.[1307]

Next, the court issued its opinion in *St. Joseph Hospital v. Wolff*,[1308] which involved the issue of "whether a teaching hospital that sponsors a medical residency program is vicariously liable for a resident's negligent treatment of a patient, occurring while the resident, as part of the residency training program, was receiving training at another hospital under the immediate supervision of another medical institution's agent."[1309] In *Wolff*, the majority stated the exclusive scope of review in no evidence cases (*i.e.*, disregarding all evidence to the finding in question), but added that it "need not 'disregard undisputed evidence that allows of only one logical inference.'"[1310] In *Wolff*, the majority held that there was "no evidence to support the jury's finding of joint enterprise, joint venture, 'mission' or non-employee respondeat superior, or ratifi-

---

1302. 538 U.S. 408 (2003).

1303. *Bunton*, 153 S.W.3d at 53-54 (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003)).

1304. *Id.* at 54; Springs Window Fashions Div., Inc. v. Blind Maker, Inc, 184 S.W.3d 840, 890 (Tex. App.—Tyler 2006, pet. granted, remanded by agr.) (citing *Bunton*, 153 S.W.3d at 54).

1305. Bunton v. Bentley, 176 S.W.3d 21, 23-24 (Tex. App.—Tyler 2005, pet denied), *cert. denied*, 126 S. Ct. 1476 (2006) (citing *Campbell*, 538 U.S. at 425).

1306. *Id.*

1307. Judge Bentley's odyssey only involved trips between Tyler and Austin. On the other hand, Odysseus's ten-year adventure was far more interesting. Odysseus's travels included Italy, Monaco, France, Corsica, and Sardinia.

1308. 94 S.W.3d 513 (Tex. 2002).

1309. St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 517 (Tex. 2002).

1310. *Id.* at 519-20 (quoting Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 51 n.1 (Tex. 1997)).

cation" and that the evidence established "as a matter of law, that when the resident treated the patient he was acting as the borrowed employee of the medical institution supervising him."[1311] Therefore, the court reversed the judgment and "render[ed] judgment that the plaintiffs take nothing by way of their claims against the teaching hospital."[1312]

The dissenters, Justices Enoch and Hankinson, argued that the majority reached its conclusion by applying the incorrect scope of review.[1313] The dissent opined that the majority had improperly reviewed evidence that was not favorable to the jury's verdict and reached the wrong conclusion as a result.[1314] The dissent not only contended that the jury's conclusion was supported by legally sufficient evidence, but that the evidence established as a matter of law that the physician "was acting in the course and scope of his employment" with the hospital when he treated the plaintiff.[1315]

Finally, the supreme court rendered its decision in *City of Keller* and transitioned from the traditional statement of the standard of review that most practitioners were familiar with to an emphasis on the "reasonable and fair-minded juror" standard of review in legal sufficiency of the evidence cases.[1316] Moreover, *City of Keller* seems to move Texas's sufficiency of the evidence review much closer to the federal standard of review.

B. *Factual Insufficiency*

Before discussing factual insufficiency, it should be noted that *City of Keller v. Wilson* provides that it applies to legal sufficiency issues only.[1317] It does not apply to factual sufficiency challenges.[1318]

It is well understood that only the courts of appeals may review factual sufficiency challenges, and the supreme court may only re-

---

1311. *Id.* at 517.

1312. *Id.*

1313. *Id.* at 547 (Enoch, J., dissenting, joined by Hankinson, J.).

1314. *Wolff,* 94 S.W.3d at 547-50 (Enoch, J., dissenting, joined by Hankinson, J.).

1315. *Id.* at 548 (Enoch, J., dissenting, joined by Hankinson, J.).

1316. City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005).

1317. *See id.* at 827-28 (applying the court's analysis only to legal sufficiency review).

1318. *See id.* (discussing the court's conclusions and not discussing factual sufficiency challenges).

view legal sufficiency challenges.[1319] 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.[1320] However, "a motion for new trial is not required in a nonjury case to attack on appeal the legal or factual sufficiency of the evidence."[1321] When reviewing a challenge to the factual sufficiency of the evidence, the court of appeals must consider all of the evidence.[1322] "Factual sufficiency points of error concede conflicting evidence on an issue, yet maintain that the evidence against the jury's finding is so great as to make the finding erroneous."[1323] "Factual sufficiency points of error are designated as 'insufficient evidence points' or 'great weight and preponderance points', depending upon whether the complaining party had the burden of proof."[1324] Although both points are generally "classified as 'insufficient evidence' points," they are distinct.[1325]

According to *Pool v. Ford Motor Co.*,[1326] 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 sup-

---

1319. *In re* Doe, 19 S.W.3d 249, 253 (Tex. 2000).

1320. TEX. R. CIV. P. 324(b)(2).

1321. Farmer's Mut. Protective Ass'n v. Wright, 702 S.W.2d 295, 296-97 (Tex. App.—Eastland 1985, no writ); *accord* TEX. R. CIV. P. 324(b).

1322. 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).

1323. Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied).

1324. *Id.*; *accord* Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 770 n.2 (Tex. 1987) (Robertson, J., dissenting).

1325. 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." *Ritchey*, 734 S.W.2d at 86-87 n.1. 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. . . ." *Id. 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).

1326. 715 S.W.2d 629 (Tex. 1986), *overruled on other grounds by* Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000).

port of the verdict."[1327] "It is only in this way that [the supreme court] will be able to determine if the requirements of *In re King's Estate* have been satisfied."[1328] 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.[1329]

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 outlined above.[1330] 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.[1331]

1327. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986), *overruled on other grounds by* Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000); *accord* Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757, 761 (Tex. 2003); Dow Chem. Co. v. Francis, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam) (citing *Pool*, 715 S.W.2d at 635); 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).

1328. *Golden Eagle Archery, Inc.*, 116 S.W.3d at 761 (citing *Pool*, 715 S.W.2d at 635).

1329. TEX. CIV. PRAC. & REM. CODE ANN. § 41.013 (Vernon 1997); Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 31 (Tex. 1994). 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); *see also* Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981) (listing several factors for consideration).

1330. *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).

1331. *See generally* TEX. R. APP. P. 47.1 (applying to opinions); TEX. R. APP. P. 47.4 (applying to memorandum opinions); Citizens Nat'l Bank in Waxahachie v. Scott, 195

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.[1332] 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.[1333] Having done so, the court "should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust."[1334]

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."[1335] In reviewing a challenge

---

S.W.3d 94, 96 (Tex. 2004) (per curiam) (interpreting the court's ruling in Gonzalez v. McAllen Med. Ctr., Inc., 195 S.W.3d 680, 681 (Tex. 2006), as "holding that a memorandum opinion merely advising the parties of the court's decision but failing to articulate any reason for that decision does not comply with Texas Rule of Appellate Procedure 47.4").

1332. 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).

1333. Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989); Sosa v. City of Balch Springs, 772 S.W.2d 71, 72 (Tex. 1989); Lofton v. 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).

1334. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam); *accord* 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).

1335. Dow Chem. Co. v. Francis, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam) (citing Croucher v. Croucher, 660 S.W.2d 55, 58 (Tex. 1983)); *accord* 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*, 34 ST. MARY'S L.J. 1, 173 (2002).

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.[1336] 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] if it concludes that the jury's 'failure to find' is against the great weight and preponderance of the evidence."[1337]

In reviewing great weight points, which complain of a jury's failure to find a fact, the supreme court has admonished the courts of appeals to be mindful of the fact that the "jury was not convinced by a preponderance of the evidence."[1338] In such cases, a court of appeals may not reverse simply because it "conclude[s] that the evidence preponderates toward an affirmative answer."[1339] The courts of appeals may only reverse where "the great weight of [the] evidence supports an affirmative answer."[1340] While a court of appeals may "unfind" certain facts, it cannot affirmatively find facts that would be the basis of a rendition.[1341] The court of appeals may only reverse and remand for a new trial.[1342] The following diagram

---

1336. *Francis*, 46 S.W.3d at 241 (citing Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986), *overruled on other grounds by* Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000)); *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); *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; *see also Wilson*, 753 S.W.2d at 448 (explaining that the courts of appeals must consider all the relevant evidence contained in the record in order to determine whether the fact question is too weak to support the jury's finding); W. Wendell Hall, *Standards of Review in Texas*, 34 ST. MARY'S L.J. 1, 172 (2002) (indicating that the courts of appeals must consider and detail the relevant evidence when determining whether a jury's finding is highly against the great weight and preponderance of the evidence).

1337. Ames v. Ames, 776 S.W.2d 154, 158 (Tex. 1989); *accord* Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 651 (Tex. 1988).

1338. Herbert v. Herbert, 754 S.W.2d 141, 144 (Tex. 1988); *accord* Peterson v. Reyna, 908 S.W.2d 472, 476 (Tex. App.—San Antonio 1995), *modified*, 920 S.W.2d 288 (Tex. 1996).

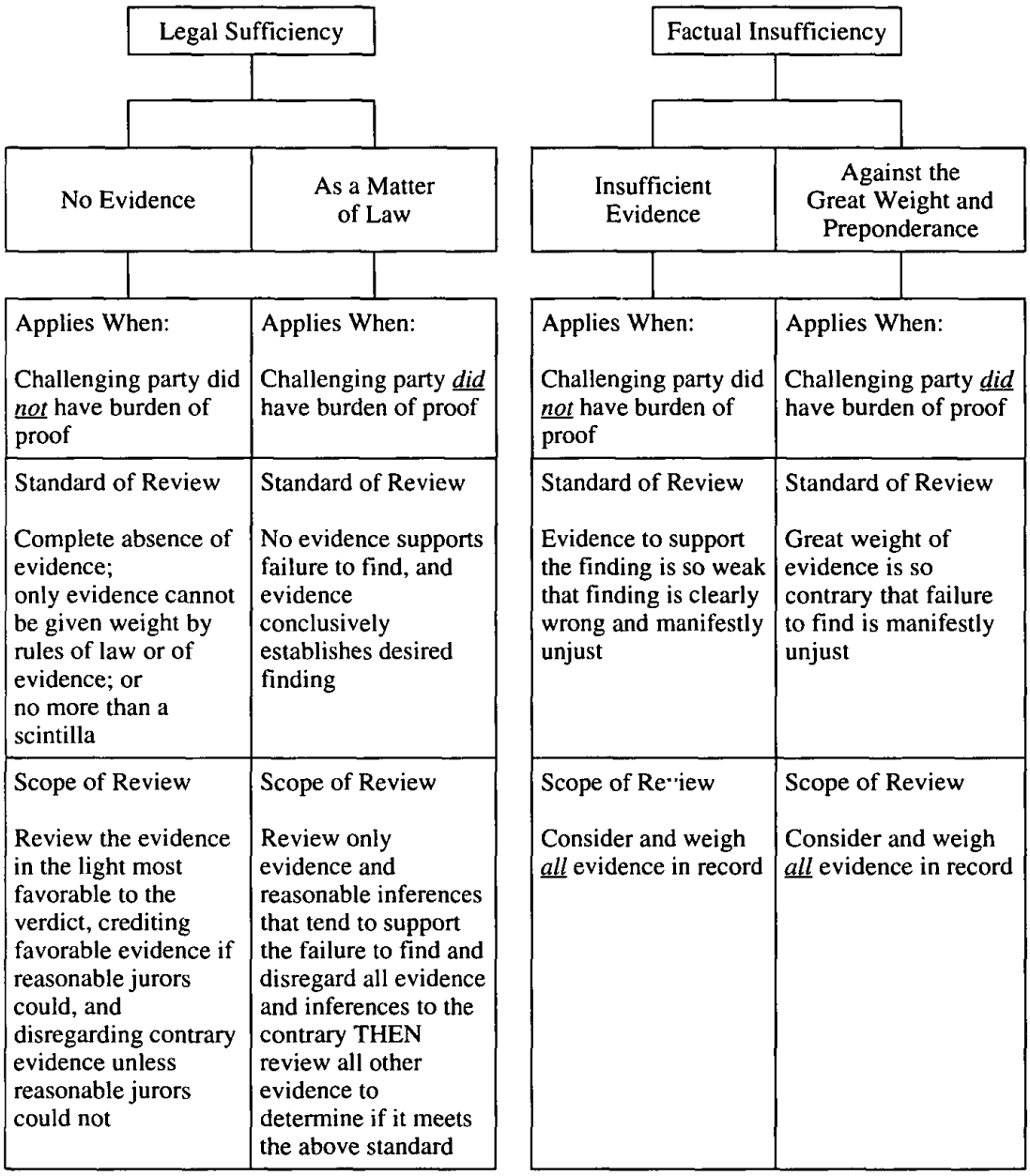
1339. *Herbert*, 754 S.W.2d at 144; *accord Peterson*, 908 S.W.2d at 476.

1340. *Herbert*, 754 S.W.2d at 144; *accord Peterson*, 908 S.W.2d at 476.

1341. 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).

1342. *Id.*

is based on Justice Michol O'Connor's extensive and thorough diagrams analyzing the legal and factual insufficiency standards of review.[1343]



1343. *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. *The Constitutional Conflict Between the Right to Trial by Jury, the Courts of Appeals' Conclusive Jurisdiction over Issues of Fact, and the Supreme Court's Decision in* City of Keller v. Wilson

In 1890, in *Missouri Pacific Railway Co. v. Somers*,[1344] one year before the creation of the intermediate appellate courts in Texas, the Texas Supreme Court observed:

> Although this court has the power to review a case upon the facts, and to set aside a verdict which has evidence to support it, that power has been reluctantly exercised. But it is the right and duty of the court to set aside a verdict, when it is against such a preponderance of the evidence, that it is clearly wrong.[1345]

Because *Somers* was decided before Texas had intermediate appellate courts, it is not surprising that it reviewed factual sufficiency complaints. However, even *Somers* cites questionable authority for the proposition quoted above. The court cites one case that was decided after the Civil War, when Texas was controlled by a Reconstruction-era court,[1346] and another case that was actually a "no evidence" case.[1347] In *Cropper v. Caterpillar Tractor Co.*,[1348] Justice Robertson stated that "[r]eliance upon authority from this era [the Civil War and Reconstruction] should be discouraged. Official matters of the State of Texas were in discord and decisions of this court are generally thought to be less authoritative from that time period."[1349]

1344. 78 Tex. 439, 14 S.W. 779 (1890).

1345. Mo. Pac. Ry. v. Somers, 78 Tex. 439, 14 S.W. 779, 779 (1890); *see* Sw. Bell Tel. Co. v. Garza, 164 S.W.3d 607, 620 (Tex. 2005) (quoting *Somers* and noting power of the supreme court to set aside a jury verdict that is clearly wrong); *see also* Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 649 (Tex. 1988) (quoting *Somers* for authority that supreme court had power to review jury verdicts on factual issues prior to the 1891 constitutional amendment); Dyson v. Olin Corp., 692 S.W.2d 456, 458 (Tex. 1985) (noting that after the constitutional amendment, the supreme court interpreted article V, section 6 as giving to courts of appeals the power to review for sufficiency of the evidence).

1346. *Somers*, 14 S.W. at 779 (citing Willis v. Lewis, 28 Tex. 185 (1866)).

1347. *Id.* (citing Dimitt v. Robbins, 74 Tex. 441, 12 S.W. 94 (1889)).

1348. 754 S.W.2d 646 (Tex. 1988).

1349. Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 654 (Tex. 1988) (Robertson, J., dissenting, joined by Ray, J. & Mauzy, JJ.) (citing MARIAN BONER, A REFERENCE GUIDE TO TEXAS LAW AND LEGAL HISTORY: SOURCES AND DOCUMENTATION 29-32 (1976); James R. Norvell, *Oran M. Roberts & The Semicolon Court*, 37 TEX. L. REV. 279 (1959)).

One year after *Somers*, in 1891, the Texas Constitution was amended to create intermediate appellate courts and provided that "the decision of [the courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error."[1350] This constitutional provision did not enlarge the powers of the courts of appeals, but limited the supreme court's jurisdiction to questions of law.[1351] 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"[1352] and that this right "shall remain inviolate."[1353] In 1951, the supreme court stated:

> The jury, not the court, is the fact finding body. The court is never permitted to substitute its findings and conclusions for that of the jury. The jury is the exclusive judge of the facts proved, the credibility of the witnesses[,] and the weight to be given to their testimony.[1354]

The supreme court has reaffirmed that the right to a jury trial is one of Texas's "most precious rights, holding 'a sacred place in En-

---

1350. TEX. CONST. art. V, § 6; *accord* 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).

1351. *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); *see* City of Keller v. Wilson, 168 S.W.3d 802, 822 (Tex. 2005) (noting that factual sufficiency has been the sole domain of the intermediate appellate courts since 1891); Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757, 761 (Tex. 2003) (stating that the supreme court does not have jurisdiction to conduct a factual sufficiency review); Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 73 (Tex. 1997) (Hecht, J., concurring) (declaring that the courts of appeals have exclusive jurisdiction over the factual question of the weight and preponderance of the evidence).

1352. TEX. CONST. art. V, § 10; *accord City of Keller*, 168 S.W.3d at 819 (citing *Golden Eagle Archery, Inc.*, 116 S.W.3d at 761; Jaffe Aircraft Corp. v. Carr, 867 S.W.2d 27, 28 (Tex. 1993); McGalliard v. Kuhlman, 722 S.W.2d 694, 697 (Tex. 1986); Edrington v. Kiger, 4 Tex. 89, 93 (1849)). However, the supreme court in *City of Keller* added that the jury's decision regarding credibility must be *reasonable*. *City of Keller*, 168 S.W.3d at 820 (citing the plurality opinion in Bentley v. Bunton, 94 S.W.3d 561, 599 (Tex. 2002)).

1353. TEX. CONST. art. I, § 15; *see* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 802, 743, 749 n.15 (Tex. 2006) (explaining that "[t]he right of trial by jury shall remain inviolate"). In *Dyson v. Olin Corp.*, Justice Robertson stated that "[t]he right to trial by jury is a fundamental feature of our system of jurisprudence; it is the best means yet devised for the determination of facts." Dyson v. Olin Corp., 692 S.W.2d 456, 459 (Tex. 1985) (Robertson, J., concurring).

1354. Benoit v. Wilson, 150 Tex. 273, 239 S.W.2d 792, 796 (1951); *accord* Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757, 761 (Tex. 2003).

glish and American history.'"[1355] 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."[1356] The court even noted in the most recent round of public school finance litigation that "'the denial of the right to trial by jury,'" side by side with Mexico's failure to establish a sufficient system of public education, "'was a sufficient cause for war'" and Texas's declaration of independence from Mexico.[1357]

These two constitutional provisions can conflict in cases where a jury decides a fact issue at trial, and the court of appeals later reverses a judgment based on the jury's finding because it concludes 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 of law."[1358] 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."[1359] 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

1355. 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)).

1356. Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 56 (Tex. 1997).

1357. Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 786 n.217 (Tex. 2005) (quoting SETH S. MCKAY, DEBATES IN THE CONSTITUTIONAL CONVENTION OF 1875, at 331 (1930) (statement of Charles S. West)).

1358. Choate v. San Antonio & A.P. Ry. Co., 91 Tex. 406, 44 S.W.2d 69, 69 (1898).

1359. *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).

their finding for a jury's finding[1360] when the record contains evidence of, and gives equal support to, inconsistent inferences in support of the jury's finding.[1361]

Almost seventy-five years later, in *In re King's Estate*,[1362] the supreme court established that it might accept jurisdiction, notwithstanding Texas Constitution article V, section 6, to determine if a correct legal standard had been applied by the courts of appeals.[1363] Since *In re King's Estate*, the supreme court has continued to accept jurisdiction to determine whether the court of appeals utilized an incorrect legal principle in reviewing factual insufficiency points.[1364] In *Dyson v. Olin Corp.*,[1365] the supreme

---

1360. *See* Dyson v. Olin Corp., 692 S.W.2d 456, 458 (Tex. 1985) (Robertson, J., concurring) ("Courts are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more *reasonable*." (emphasis added)).

1361. *See Choate*, 44 S.W.2d at 69 (concluding that a court of appeals may not substitute its finding for that of the jury if there is any conflict in the evidence). 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, 651 (Tex. 1988) (observing that courts of appeals may only "unfind" facts and reverse, but cannot usurp the jury's fact finding function); *In re* Rodriguez, 940 S.W.2d 265, 271 (Tex. App.—San Antonio 1997, writ denied) (explaining 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); Turner v. KTRK Television, Inc., 38 S.W.3d 103, 134 (Tex. 2000) (Baker, J., concurring in part & dissenting in part) (finding 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 a judgment), *overruled on other grounds by* Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000); *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").

1362. 150 Tex. 662, 244 S.W.2d 660 (1951) (per curiam). *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. *Id.* at 661-62.

1363. *In re* King's Estate, 150 Tex. 662, 244 S.W.2d 660, 661-62 (1951) (per curiam).

1364. *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).

1365. 692 S.W.2d 456 (Tex. 1985).

court again concluded that, although it does not have jurisdiction over questions of fact, it does "have jurisdiction to determine whether the court[s] of appeals used the correct rules of law in reaching [their] conclusion[s]."[1366] As the court correctly recognized, the use of the wrong rule of law, a purely legal question, is within the supreme court's jurisdiction.[1367] 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.[1368] Justice Robertson expressed the view that article V, section 6 improperly allows the courts of appeals to usurp the jury's fact-finding function.[1369]

Justice Robertson's challenge to the continued viability of article V, section 6 was subsequently raised in *Pool v. Ford Motor Co.*[1370] 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,[1371] it also held that it had the authority to review courts of appeals' opinions to determine if the appellate court applied the correct standard of review to the facts.[1372] In order to determine whether a court 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

---

1366. Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985).

1367. *See id.* (emphasizing that the supreme court can, as matter of law, review appellate courts' application of rules of law).

1368. *Id.* at 458 (Robertson, J., concurring).

1369. *See id.* (Robertson, J., concurring) (concluding that such an interpretation is antagonistic to constitutional guarantees).

1370. Pool v. Ford Motor Co., 715 S.W.2d 629, 633 (Tex. 1986), *overruled on other grounds by* Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000). 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. *Id.*

1371. *Id.* at 634.

1372. *Id.* at 634-35.

what regard the contrary evidence greatly outweighs the evidence in support of the verdict.[1373]

Pool clearly takes the supreme court's earlier decision in *Dyson* one step further by effectively allowing the supreme court 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.[1374] Therefore, the courts of appeals must do more than simply recite the *Pool* standard of review; they must prove that they actually followed the standard.[1375]

The inherent constitutional conflict between 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.*[1376] In *Cropper*, the supreme court rejected a challenge to the court 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 fifty years, and are thoroughly rooted in our constitution and judicial system."[1377] While the court recognized the "inescapable fact" that it could not amend the constitution to remove the conflict, it concluded that even if the court was empowered to, it was "not prepared to sacrifice either [constitutional provision] for the benefit of the other."[1378]

While the supreme court has continued to recognize the courts of appeals' conclusive jurisdiction over questions of fact,[1379] it appears to have circumvented its own constitutional limitation in several interesting and sharply divided cases over the years. In *Lofton*

1373. *Id.* at 635.

1374. *Pool*, 716 S.W.2d at 635.

1375. Stewart v. Allied Bancshares, Inc., 770 S.W.2d 837, 838 (Tex. App.—Tyler 1989, writ denied).

1376. Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 648 (Tex. 1988).

1377. *Id.* at 652.

1378. *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 the jury's fact finding should be eliminated).

1379. *See* Coulson v. Lake LBJ Mun. Util. Dist., 781 S.W.2d 594, 597 (Tex. 1989) (explaining that "the task of weighing all the evidence and determining its sufficiency is a power confined exclusively to the court[s] of appeals").

v. Texas Brine Corp.,[1380] the supreme court, in a 5-4 decision, reversed the court of appeals' decision for a second time,[1381] holding that the jury's finding was supported by evidence that was factually sufficient.[1382] 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*,[1383] was using *Pool* "to fashion some justification for second-guessing the courts of appeals in the exercise of their constitutional prerogative to judge the factual sufficiency of the evidence in a case."[1384] While the supreme court again recognized its lack of "jurisdiction to determine the factual sufficiency of th[e] evidence,"[1385] it is nevertheless explained in great detail why all of the evidence was sufficient to support the jury's finding.[1386] It is clear from the court's "extensive, and unauthorized, analysis"[1387] that while the court was unwilling to explicitly overrule *Herbert* and *Cropper*, it was now going to review the court of appeals' factual sufficiency analysis.[1388] In his *Lofton* dissent, Justice Hecht observed that the majority was "[s]tymied by the constitution" because the majority could not "decree the result it rather plainly want[ed] to see"; therefore, the majority must "keep reversing the judgment of the court of appeals until it

---

1380. 777 S.W.2d 384 (Tex. 1989).

1381. 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), *rev'd*, 777 S.W.2d 384 (Tex. 1989).

1382. *Lofton*, 777 S.W.2d at 387.

1383. *See* Pool v. Ford Motor Co., 715 S.W.2d 629, 633 (Tex. 1986) (Gonzalez, J., concurring) (expressing 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), *overruled on other grounds by* Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000).

1384. *Lofton*, 777 S.W.2d at 389 (Hecht, J., dissenting) (interpreting the arguments set forth by Justice Gonzalez); *see id.* at 387-88 (Gonzalez, J., dissenting) (implying that the supreme court will continue to reverse the judgment from the court of appeals until that court reaches a satisfactory result).

1385. *Id.* at 387.

1386. *Id.* at 386-87.

1387. *Id.* at 389 (Hecht, J., dissenting).

1388. *See* Lofton v. Tex. Brine Corp., 777 S.W.2d 384, 388-89 (Tex. 1989) (Hecht, J., dissenting) (criticizing the supreme court's review of the court of appeals' factual sufficiency analysis).

reaches a result that the [c]ourt approves."[1389] Subsequently, reiterating Justice Gonzalez's concern in *Lofton*, Justice Hecht noted that the supreme court should avoid "playing ping-pong" with the court of appeals when a majority of the court "keep[s] reversing the judgment of the court of appeals until it reaches a result that the [majority] approves."[1390]

In *Aluminum Co. of America v. Alm*,[1391] 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.[1392] 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.[1393] Ignoring the evidence of care introduced by Alcoa,[1394] 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.[1395] 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."[1396]

Answering a dissent on denial of an application for writ of error (now petition for review) in *Havner v. E-Z Mart Stores, Inc.*,[1397] Justice Gonzalez argued that the denial of the application was proper because to once again take jurisdiction of the case would have been the equivalent of "second-guess[ing] the court of ap-

---

1389. *Id.* at 388 (Hecht, J., dissenting).

1390. *Id.* (Hecht, 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 of which the supreme court approves).

1391. 785 S.W.2d 137 (Tex. 1990).

1392. 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").

1393. *Id.* at 140.

1394. *Id.* at 143 (Gonzalez, J., dissenting).

1395. *Id.* at 141-42 (Gonzalez, J., dissenting).

1396. *Id.* at 143 (Gonzalez, J., dissenting).

1397. 846 S.W.2d 286 (Tex. 1993).

peals' review of the factual sufficiency of the evidence."[1398] Justice Gonzalez added that "[t]his would require us to continue to send the case back to the court of appeals until they 'get it right,' *i.e.*, until the court of appeals reaches a result in accord with our [the supreme court's] view of the evidence."[1399] Because the court of appeals properly reviewed the factual sufficiency challenges, citing the example of *Lofton v. Texas Brine Corp.*, Justice Gonzalez observed that the court must avoid the "yo-yo effect when a majority of the court keeps reversing the judgment of the court of appeals until it reaches a result that the majority approves."[1400]

In recent years, the supreme court has not used *Pool* to remand cases back to the courts of appeals for second and third reviews.[1401] In light of *City of Keller v. Wilson*, the court's decision in *Pool* may become less relevant.[1402] Given the standard of review articulated in legal sufficiency cases, it is questionable whether there is a distinction between legal and factual sufficiency standards of review, as it may be argued that Texas follows the federal *Boeing v. Shipman*[1403] standard for reviewing sufficiency of the evidence challenges.[1404]

In the South Texas College of Law Judge & Jury Symposium, former Chief Justice Phillips described Professor Dorsaneo's article, *Evolving Standards of Evidentiary Review: Revising the Scope of Review*, as follows:

> [In his article, Professor Dorsaneo] explains how the traditional scope of 'no evidence review' in Texas civil appeals (which had been the standard since Robert W. Calvert's landmark law review article

---

1398. Havner v. EZ Mart Stores, Inc., 846 S.W.2d 286, 286 (Tex. 1993) (Gonzalez, J., concurring).

1399. *Id.* (Gonzalez, J., concurring).

1400. *EZ Mart Stores*, 846 S.W.2d at 287 (Gonzalez, J., concurring).

1401. *See generally* Bunton v. Bentley, 176 S.W.3d 1 (Tex. App.—Tyler 1999), *rev'd and remanded*, 94 S.W.3d 561 (Tex. 2002), *on remand*, 176 S.W.3d 18 (Tex. App.—Tyler 2003), *aff'd in part, rev'd in part, and remanded*, 153 S.W.3d 50 (Tex. 2004), *on remand*, 176 S.W.3d 21 (Tex. App.—Tyler 2005, pet. denied), *cert. denied*, 126 S. Ct. 1476 (2006).

1402. *See generally* City of Keller v. Wilson, 168 S.W.3d 802, 825-28 (Tex. 2005) (articulating the details of the legal sufficiency standard of review).

1403. 411 F.2d 365 (5th Cir. 1969).

1404. *See* Boeing v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (explaining that, on legal sufficiency challenges, the court should evaluate all of the evidence which a reasonable jury would consider); Neely v. Delta & Tie Co., 817 F.2d 1224, 1226 (5th Cir. 1987) (explaining that "it is not necessary that the evidence be no more than a scintilla or amount to a claim that frogs fly or stones levitate").

in 1960) has been replaced by the new standard set forth in the Texas Supreme Court's 2005 opinion in *City of Keller v. Wilson.* Although the court defends the new standard as essential to its reviewing obligations, Professor Dorsaneo decries it as an unconstitutional invasion of the jury's province.[1405]

There are legitimate constitutional questions raised by *City of Keller* in light of the Texas Constitution and prior supreme court jurisprudence.[1406] First, is *City of Keller* a new paradigm for reviewing sufficiency of the evidence, or is it déjà vu all over again? A strict application of *City of Keller* would likely avoid the yo-yo effect or ping-pong matches between the Texas Supreme Court and the courts of appeals, as once lamented by Justices Hecht and Gonzalez in *Lofton,*[1407] *Alm,*[1408] and *EZ Mart Stores,*[1409] but later repeated in *Bentley v. Bunton.*[1410] However, one cannot assume that

---

1405. Thomas R. Phillips & Elizabeth A. Dennis, Foreword, *Judge & Jury Symposium*, 47 S. TEX. L. REV. 157, 161-62 (Winter 2005) (addressing Dorsaneo's examination of the evolution of standards of legal and factual sufficiency review of jury verdicts by Texas appellate courts).

1406. Given the somewhat harsh criticism of the dissenters on the court in legal insufficiency review cases before *City of Keller*, such as Justices Enoch, Hankinson, and Baker, one is reminded of Justice Mauzy's surprising candor when he remarked that the supreme court was reversing itself in one case only because the make-up of the court had changed. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 362 (Tex. 1987) (Mauzy, J., concurring). There is no doubt that the make-up of the court has changed since Justice Mauzy's time on the court, and it is likely that as demographics change in Texas, the make-up of the court will change again. What that means for legal insufficiency review in Texas is unclear.

1407. *See* Lofton v. Tex. Brine Corp., 777 S.W.2d 384, 387-88 (Tex. 1989) (Gonzalez, J., dissenting) (implying that the supreme court will continue to reverse the judgment from the court of appeals until that court reaches a satisfactory result); *see id.* at 389 (Tex. 1989) (Hecht, J., dissenting) (interpreting the arguments set forth by Justice Gonzalez).

1408. *See* Aluminum Co. of Am. v. Alm, 785 S.W.2d 137, 143 (Tex. 1990) (Gonzalez, J., dissenting) (summarizing the real meaning of the court's decision as 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").

1409. *See* Havner v. EZ Mart Stores, Inc., 846 S.W.2d 286, 286 (Tex. 1993) (Gonzalez, J., concurring) (arguing that the denial of the application was proper because to once again take jurisdiction of the case would have been the equivalent of "second-guess[ing] the court of appeals' review of the factual sufficiency of the evidence" and that "[t]his would require us to continue to send the case back to the court of appeals until they 'get it right,' *i.e.*, until the court of appeals reaches a result in accord with our [the supreme court's] view of the evidence").

1410. Bunton v. Bentley, 176 S.W.3d 1 (Tex. App—Tyler 1999), *rev'd and remanded*, 94 S.W.3d 561 (Tex. 2002), *on remand*, 176 S.W.3d 18 (Tex. App.—Tyler 2003), *aff'd in part, rev'd in part, and remanded*, 153 S.W.3d 50 (Tex. 2004), *on remand*, 176 S.W.3d 21 (Tex. App.—Tyler 2005, pet. denied), *cert. denied*, 126 S. Ct. 1476 (2006).

the ping-pong matches are over. Second, is there any difference between reviewing the factual and legal sufficiency of the evidence to support a jury's verdict under the supreme court's holding in *City of Keller*? That is a difficult question to answer, but it may be argued that the two standards of review have collapsed into one standard of review – the "reasonable and fair-minded" juror standard articulated in *City of Keller* and *Boeing v. Shipman*.[1411] Third, can *City of Keller* be reconciled with the Texas bill of rights, which guarantees the constitutional right of trial by jury[1412] "shall remain inviolate"?[1413] Fourth, can *City of Keller* be reconciled with the Texas constitutional provision that "the decision of [the courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error"?[1414] If reviews of legal and factual insufficiency have become indistinguishable, what does this constitutional provision mean? It does not appear that these constitutional provisions, which were not addressed in *City of Keller*, can be easily reconciled with the holding of that case. Undoubtedly, these constitutional issues will be raised in future cases in the courts of appeals and the supreme court.

Finally, does *City of Keller* provide predictability and stability in the law? The answer may be found in *City of Keller* where the majority quoted Chief Justice Calvert:

> The rule as generally stated is that if reasonable minds cannot differ from the conclusion that the evidence lacks probative force it will be held to be the legal equivalent of no evidence. The application of the rule can lead to strange results. It is theoretically possible, and sometimes not far from actual fact, that five members of the Supreme Court will conclude that the evidence supporting a finding of a vital fact has no probative force, and in reaching the conclusion through application of the rule will thus hold, in effect, that the trial

---

1411. *See Boeing*, 411 F.2d at 374 (explaining that, on legal sufficiency challenges, the court should evaluate all of the evidence which a reasonable jury would consider); City of Keller v. Wilson, 168 S.W.3d 802, 825-28 (Tex. 2005) (articulating the details of the legal sufficiency standard of review).

1412. TEX. CONST. art. V, § 10; *see* TEX. R. CIV. P. 226(a), approved instructions III (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").

1413. TEX. CONST. art. I, § 15. Black's Law Dictionary defines "inviolate" as "free from violation; not broken, infringed, or impaired." BLACK'S LAW DICTIONARY 846 (8th ed. 2004).

1414. TEX. CONST. art. V, § 6.

> judge who overruled a motion for instructed verdict, the twelve jurors who found the existence of the vital fact, the three justices of the Court of Civil Appeals who overruled a "no evidence" point of error and four dissenting justices of the Supreme Court are not men of "reasonable minds."[1415]

Adding that "[i]t is not hubris that occasionally requires an appellate court to find a jury verdict has no reasonable evidentiary basis," the court noted that it is the duty of the trial courts to take cases from a jury on occasion.[1416] Quoting Justice Felix Frankfurter, the court stated:

> The fact that [one] thinks there was enough [evidence] to leave the case to the jury does not indicate that the other [is] unmindful of the jury's function. The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge.[1417]

The ram's horn has been sounded: trial courts should become more pro-active and act as gatekeepers and not submit cases to a jury when the evidence does not warrant jury consideration.[1418] Whether trial judges in Texas will heed the sound remains to be seen. In any event, appellate practitioners must be aware of the ever-changing standard of review in challenges to the factual and legal sufficiency of the evidence. While the issue may appear settled for now, *City of Keller* does not address the constitutional right of trial by jury "which shall remain inviolate"[1419] or the courts of appeals' conclusive jurisdiction over questions of fact. Although most practitioners and courts assume that the inherent conflict between the courts of appeals' constitutional and conclusive prerogative to review factual insufficiency challenges and a person's constitutional right of trial by jury have been resolved, the ongoing disagreements among members of the supreme court, and the

---

1415. *City of Keller*, 168 S.W.3d at 828 (quoting Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 364 (1960)).

1416. *Id.*

1417. *Id.* (quoting Wilkerson v. McCarthy, 336 U.S. 53, 65 (1949) (Frankfurter, J., concurring)).

1418. Justice Scott Brister, Tex. Supreme Court, The Role of Judge and Jury, Speech at The Univ. of Tex. 16th Annual Conf. on State and Federal Appeals (2006).

1419. TEX. CONST. art. I, § 15.

court's decision in *City of Keller,* indicate that these questions may not be truly resolved.[1420] Given the supreme court's decisions over the past few decades, appellate practitioners should be wary of assuming that the supreme court will not review the courts of appeals' disposition of a factual sufficiency challenge in some manner.[1421] Because of these unresolved issues, appellate practitioners must brief the facts and the appropriate legal standard in detail and with complete accuracy because it is unclear when the next shift, in court personnel or in law, will occur.

VIII. Challenges to the Sufficiency of the Evidence in Nonjury Trials

In any case or issue tried without a jury, a party may request the court to prepare "findings of fact and conclusions of law."[1422] The trial court's findings of fact "shall not be recited in a judgment,"[1423] and oral comments from the bench will "not constitute findings of

---

1420. *See* City of Keller v. Wilson, 168 S.W.3d 802, 830-35 (Tex. 2005) (O'Neill, J., concurring, joined by Medina, J.) (finding that the two standards of "no evidence" review are correct, but the majority misapplied that standard); Havner v. E-Z Mart Stores, Inc., 846 S.W.2d 286, 286-87 (Tex. 1993) (Gonzalez, J., concurring) (accusing the court of overstepping constitutional limitations); *id.* at 287-88 (Doggett, J., dissenting) (illustrating the disagreements amongst the members of the supreme court regarding the issue of factual insufficiency review); Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors Corp., 960 S.W.2d 41, 52 (Tex. 1998) (Baker, J., dissenting) (accusing the majority of undertaking an improper 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").

1421. *See Havner*, 846 S.W.2d at 286 (explaining that to take jurisdiction of this case would require the court to ignore its constitutional limitations); Aluminum Co. of Am. v. Alm, 785 S.W.2d 137, 140 (Tex. 1990) (reviewing the evidence and holding that the jury properly found evidence of gross negligence); Lofton v. Tex. Brine Corp., 777 S.W.2d 384, 387 (Tex. 1989) (reversing and remanding the decision of the court of appeals because it found that the court "substitute[ed] its own judgment for that of the finder of fact"); 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 by evaluating the witnesses' credibility").

1422. Tex. R. Civ. P. 296.

1423. Tex. R. Civ. P. 299a.

fact and conclusions of law."[1424] Although the rules do not require or even authorize a party to request findings of fact and conclusions of law in connection with other trial court rulings, the careful practitioner will request the trial court to prepare findings and conclusions whenever the trial court acts as a factfinder.[1425] When the trial court acts as a factfinder, its findings are reviewed under legal and factual sufficiency standards.[1426]

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;[1427] however, they are not conclusive when a complete reporter's record appears in the record.[1428] The trial court's fact findings are reviewed for

---

1424. Sharp v. Hobart Corp., 957 S.W.2d 650, 652 n.5 (Tex. App.—Austin 1997, no pet.); *accord 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.).

1425. *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, writ denied) (concluding that upon denial of special appearance, defendant should request findings of fact pursuant to Rule 296).

1426. *In re* Doe, 19 S.W.3d 249, 253 (Tex. 2000).

1427. Ashcraft v. Lookadoo, 952 S.W.2d 907, 910 (Tex. App.—Dallas 1997, writ. denied) (en banc); *accord* 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.); Tigner v. City of Angleton, 949 S.W.2d 887, 888 (Tex. App.—Houston [14th Dist.] 1997, no writ); Hitzelberger v. Samedan Oil Corp., 948 S.W.2d 497, 503 (Tex. App.—Waco 1997, writ denied); Schwartz v. Pinnacle Commc'ns, 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 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.).

1428. *Tucker*, 908 S.W.2d at 532; Middleton v. Kawasaki Steel Corp., 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).

legal and factual sufficiency of the evidence,[1429] which is the same standard applied when reviewing evidence supporting jury findings.[1430] 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.[1431]

2. Without Reporter's Record

If no reporter's record "is made part of the record on appeal, the reviewing court presumes that sufficient evidence was introduced to support the trial court's findings of fact" and conclusions of law, and the judgment was based upon those findings and conclusions.[1432]

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

---

1429. 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.).

1430. 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. Samedan Oil Corp., 948 S.W.2d 497, 503 (Tex. App.—Waco 1997, writ denied); Asai v. Vanco Insulation Abatement, Inc., 932 S.W.2d 118, 121 (Tex. App.—El Paso 1996, no writ); *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, 361 (Tex. App.—Tyler 1990, no writ); Zieben v. Platt, 786 S.W.2d 797, 799 (Tex. App.—Houston [14th Dist.] 1990, no writ); Okon v. Levy, 612 S.W.2d 938, 941 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

1431. *Ashcraft*, 952 S.W.2d at 910; Tigner v. City of Angleton, 949 S.W.2d 887, 889 (Tex. App.—Houston [14th Dist.] 1997, no writ); *Hitzelberger*, 948 S.W.2d at 503; Zieba v. Martin, 928 S.W.2d 782, 786 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).

1432. *Nelkin*, 833 S.W.2d at 268 (citing *Mays*, 281 S.W.2d at 82); *accord Tripp Vill. Joint Venture*, 774 S.W.2d at 751; Alexander v. Barlow, 671 S.W.2d 531, 534 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

findings of fact to support it,"[1433] provided the proposition is raised in the pleadings, supported by evidence, and "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."[1434] 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.[1435] 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."[1436] The applicable "standard of review is the same as that applied" in the review of jury findings or "a trial court's findings of fact."[1437] When the implied findings of fact are supported by the

---

1433. Schoeffler v. Denton, 813 S.W.2d 742, 745 (Tex. App.—Houston [14th Dist.] 1991, no writ) (citing *In re* W.E.R., 669 S.W.2d 716, 717 (Tex. 1984)); *accord* IKB Indus. v. Pro-Line Corp., 938 S.W.2d 440, 445 (Tex. 1997) (Baker, J., dissenting); Holt Atherton Indus 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) (per curiam); Burnett v. Motyka, 610 S.W.2d 735, 736 (Tex. 1980) (per curiam); 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); 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).

1434. 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-Nw. 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, 157-58 (Tex. App.—Houston [1st Dist.] 1990, no writ).

1435. *Brodhead*, 824 S.W.2d at 620; *Franklin*, 774 S.W.2d at 311.

1436. *Roberson*, 768 S.W.2d at 281; *accord Holt*, 835 S.W.2d at 84; Las Vegas Pecan & Cattle Co. 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. 1977); *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); *Giangrosso*, 840 S.W.2d at 769; Money of the U.S. 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., 773 S.W.2d 616, 620 (Tex. App.—Corpus Christi 1989, writ denied).

1437. Wade v. Comm'n for Lawyer Discipline, 961 S.W.2d 366, 374 (Tex. App.—Houston [1st Dist.] 1997, no writ) (per curiam).

evidence, "the appellate court must uphold the judgment on any theory of law applicable to the case."[1438] In this determination, the appellate court will "consider only that evidence most favorable to" the implied factual findings and will disregard all opposing or contradictory evidence.[1439]

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."[1440] "Only in an exceptional case, i.e. where fundamental error is presented, is an appellant entitled to a reversal of the trial court's judgment."[1441]

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.[1442] This presumption may be rebutted, however, "if the

1438. Giangrosso v. Crosley, 840 S.W.2d 765, 769 (Tex. App.—Houston [1st Dist.] 1992, no writ); *accord* Point Lookout W., Inc. v. Whorton, 742 S.W.2d 277, 278 (Tex. 1987) (per curiam); Allen v. Allen, 717 S.W.2d 311, 313 (Tex. 1986); *In re* W.E.R., 669 S.W.2d 716, 717 (Tex. 1984); *Lassiter*, 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; 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).

1439. Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S.W.2d 609, 613 (1950) (quoting Austin v. Cochran, 2 S.W.2d 831, 832 (Tex. Comm'n App. 1928)).

1440. Trevino & Gonzalez Co. v. R.F. Muller Co., 949 S.W.2d 39, 41 (Tex. App.—San Antonio 1997, no writ); *accord* 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); 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.—Tyler 1989, writ denied) (per curiam); 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.).

1441. *Ette*, 764 S.W.2d at 595; *accord Trevino & Gonzalez Co.*, 949 S.W.2d at 41; *Carns*, 776 S.W.2d at 604.

1442. TEX. R. CIV. P. 296; TEX. R. CIV. P. 297; 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

record before the appellate court affirmatively shows that" no injury resulted from the trial court's failure to comply with the rules.[1443] The test of whether harm exists "depends on 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.[1444] "'In factually complicated situations in which there are two or more possible grounds for recovery or defense, an undue burden [is] placed upon an appellant.'"[1445] This burden prevents the appellant from making a proper presentation of the case to the appellate court.[1446]

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, to 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.[1447] If the original judge is no longer

---

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); Cherne Indus., Inc. v. Magallanes, 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.).

1443. *Sheldon Pollack Corp.*, 765 S.W.2d at 845; *accord Magallanes*, 763 S.W.2d at 772.

1444. *Sheldon Pollack Corp.*, 765 S.W.2d at 845; *accord* 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).

1445. *Humphrey*, 893 S.W.2d at 61 (quoting Fraser v. Goldberg, 552 S.W.2d 592, 594 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.)); *accord* Guzman v. Guzman, 827 S.W.2d 445, 446-47 (Tex. App.—Corpus Christi 1992, writ denied).

1446. *Humphrey*, 893 S.W.2d at 61; *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).

1447. TEX. R. APP. P. 44.4; *Magallanes*, 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) (per curiam).

available to prepare findings and conclusions, a successor judge may prepare them.[1448]

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."[1449]

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.[1450] In applying the standard, the reviewing court defers to the trial court's factual determinations if supported by the evidence and reviews its legal determinations de novo.[1451] 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."[1452] Accordingly, "the trial court abuses its discretion [if the court] . . . fails to properly apply the law to the undisputed facts . . . [if] it acts

1448. 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).

1449. 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.

1450. *See* El Paso Natural Gas Co. v. Minco Oil & Gas Co., 964 S.W.2d 54, 61 (Tex. App.—Amarillo 1997) (applying the 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) (per curiam) (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).

1451. *Luna*, 966 S.W.2d at 643; *Pony Express Courier Corp.*, 921 S.W.2d at 820.

1452. *El Paso Natural Gas Co.*, 964 S.W.2d at 61 (citing *Pony Express Courier Corp.*, 921 S.W.2d at 820).

arbitrarily or unreasonably, or [if] its ruling is based on factual assertions unsupported by the record."[1453]

IX. CONCLUSIONS OF LAW

"[C]onclusions of law are always reviewable."[1454] In fact, "conclusions of law in a nonjury trial are reviewable . . . [even] without preservation" under Texas Rule of Appellate Procedure 33.1.[1455] "Conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence. . . ."[1456] "Conclusions of law . . . will not be reversed unless they are erroneous as a matter of law."[1457] In addition, a trial court's conclusions of law are reviewed de novo as legal ques-

---

1453. *Luna*, 966 S.W.2d at 643 (citing Microsoft Corp. v. Manning, 914 S.W.2d 602, 607 (Tex. App.—Texarkana 1995, writ dism'd)).

1454. Spiller v. Spiller, 901 S.W.2d 553, 556 (Tex. App.—San Antonio 1995, writ denied); *accord* Tex. Dep't of Transp. v. City of Sunset Valley, 92 S.W.3d 540, 546 (Tex. App.—Austin 2002) *rev'd on other grounds*, 146 S.W.3d 637 (Tex. 2004); ASI Techs., 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, 563 S.W.2d 697, 702 (Tex. Civ. App.—Fort Worth 1978, no writ).

1455. Sammons v. Elder, 940 S.W.2d 276, 279 (Tex. App.—Waco 1997, writ denied); *see* TEX. R. APP. P. 33.1(d) (explaining the requirements for preservation of error). *But see City of Sunset Valley*, 92 S.W.3d at 548; 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 conclusions of law for review).

1456. *Stockton*, 53 S.W.3d at 423; *accord Leighton*, 956 S.W.2d at 671; *Spiller*, 901 S.W.2d at 556; 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).

1457. *Stockton*, 53 S.W.3d at 423; *accord* 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.).

tions,[1458] and the reviewing court affords no deference to the lower court's decision.[1459] Under de novo review, the reviewing court exercises its own judgment and redetermines each legal issue.[1460] Incorrect conclusions of law will not require a reversal if the controlling findings of fact support a correct legal theory.[1461]

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.'"[1462] The clear and convincing standard "is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of

1458. 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)).

1459. Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 227 (Tex. 2002); Quick v. City of Austin, 7 S.W.3d 109, 116 (Tex. 1998); *Heal*, 917 S.W.2d at 9; Tex. Dep't of Transp. v. City of Sunset Valley, 92 S.W.3d 540, 546 (Tex. App.—Austin 2002), *rev'd on other grounds*, 146 S.W.3d 637 (Tex. 2004).

1460. *In re* C.H., 89 S.W.3d 17, 29 (Tex. 2002) (Hecht, J., concurring); *Subaru of Am., Inc.*, 84 S.W.3d at 222; *Quick*, 7 S.W.3d at 116.

1461. BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 794 (Tex. 2002); 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 v. Samedan Oil Corp., 948 S.W.2d 497, 503 (Tex. App.—Waco 1997, writ denied); Piazza v. City of Granger, 909 S.W.2d 529, 532 (Tex. App.—Austin 1995, no writ); Westech Eng'g, Inc. v. Clearwater Constructors, Inc., 835 S.W.2d 190, 196 (Tex. App.—Austin 1992, no writ); Valencia v. Garza, 765 S.W.2d 893, 898 (Tex. App.—San Antonio 1989, no writ).

1462. *C.H.*, 89 S.W.3d at 23 (quoting State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979)); *accord* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 31 (Tex. 1994) (quoting *Addington*, 588 S.W.2d at 570); *see also* Tex. Fam. Code Ann. § 101.007 (Vernon 2002) (defining clear and convincing evidence as "the measure or degree of proof that 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").

criminal proceedings."[1463] The supreme court held in *In re J.F.C.*:[1464]

> In a legal sufficiency review, a court should look at all of the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. This does not mean that a court must disregard *all* evidence that does not support the finding. Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence.
>
> If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter must be proven is true, then that court must conclude that the evidence is legally insufficient.[1465]

The supreme court emphasized that witness credibility issues which necessarily depend upon appearance and demeanor cannot be weighed by the reviewing court.[1466] While the court stated that even when witness credibility issues are reflected in the record on appeal, the appellate court must defer to the jury's determinations

---

1463. *In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980); *accord* Trimble v. Tex. Dep't of Protective & Regulatory Servs., 981 S.W.2d 211, 217 (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 & Regulatory 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).

1464. 96 S.W.3d 256 (Tex. 2002).

1465. *In re* J.F.C., 96 S.W.3d 256, 266 (Tex. 2002). The court has since followed the holding from the *In re J.F.C.* case. Romero v. KPH Consol., Inc., 166 S.W.3d 212, 220 n.27 (Tex. 2005); Diamond Shamrock Ref. Co. v. Hall, 168 S.W.3d 324, 326 (Tex. 2005) (per curiam); *In re* S.A.P., 169 S.W.3d 685, 695 (Tex. App.—Waco 2005, no pet.) (per curiam); Sw. Bell Tel. Co. v. Garza, 164 S.W.3d 607, 627 (Tex. 2004) (quoting *J.F.C.*, 96 S.W.3d at 266); Qwest Int'l Commc'ns, Inc. v. AT&T Corp., 167 S.W.3d 324, 326 (Tex. 2005) (per curiam).

1466. *Garza*, 164 S.W.3d at 625.

"*so long as those determinations are not themselves unreasonable.*"[1467] The court also observed that it must consider undisputed evidence that does not support the jury's finding.[1468] Accordingly, the reviewing court may set aside the jury's determination if it finds the jury's decision to be unreasonable or if it finds undisputed evidence that does not support the jury's decision.[1469]

The clear and convincing evidence standard is only applied in limited situations: to punitive damage awards,[1470] actual malice,[1471] in public-figure defamation cases,[1472] termination of parental rights,[1473] and because they are constitutionally protected,[1474] civil involuntary commitments.[1475]

B. *Administrative Agency Rulings*

A suit for judicial review of an administrative agency's contested-case decision is governed by the Administrative Procedure Act (the "APA").[1476] "Under the APA, a reviewing court acts in an appellate capacity and may not substitute its judgment for that of the agency."[1477] 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.[1478] Review of the administrative orders are

---

1467. *Id.* (emphasis added).

1468. *J.F.C.*, 96 S.W.3d at 266.

1469. *Romero*, 166 S.W.3d at 220 n.27; *Hall*, 168 S.W.3d at 326; *S.A.P.*, 169 S.W.3d at 695; *Garza*, 164 S.W.3d at 627; *J.F.C.*, 96 S.W.3d at 266.

1470. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b) (Vernon 2000 & Supp. 2006); Dillard Dep't Stores, Inc. v. Silva, 148 S.W.3d 370, 374 (Tex. 2004) (per curiam).

1471. Forbes Inc. v. Granada Biosciences, Inc., 124 S.W.3d 167, 172 (Tex. 2003).

1472. 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).

1473. TEX. FAM. CODE ANN. § 161.001(1), (2) (Vernon 2000 & Supp. 2006); *In re* J.P.B., 180 S.W.3d 570, 572 (Tex. 2005) (citing City of Keller v. Wilson, 168 S.W.3d 802, 817 (Tex. 2005)); *In re* J.F.C., 96 S.W.3d 256, 261 (Tex. 2002); *In re* C.H., 89 S.W.3d 17, 23 (Tex. 2002); *In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980).

1474. Ellis County State Bank v. Keever, 888 S.W.2d 790, 792 n.5 (Tex. 1994); *G.M.*, 596 S.W.2d at 847.

1475. TEX. HEALTH & SAFETY CODE ANN. § 574.034 (Vernon 2003).

1476. TEX. GOV'T CODE ANN. §§ 2001.001-.902 (Vernon 2003); Cash Am. Int'l, Inc, v. Bennett, 35 S.W.3d 12, 17 (Tex. 2000). A contested case means "a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." TEX. GOV'T CODE ANN. § 2001.003(1) (Vernon 2003).

1477. *Cash Am. Int'l, Inc.*, 35 S.W.3d at 17.

1478. TEX. GOV'T CODE ANN. § 2001.174 (Vernon 2003). The statute provides:

subject to two separate standards of review: "pure trial de novo" and "pure substantial evidence."[1479] 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.[1480] In limited circumstances, both standards of review will be used in reviewing the same agency decision.[1481]

1. Trial De Novo Review

If the manner of review is by trial de novo, the reviewing court tries "each issue of fact and law in the manner that applies to other

---

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

(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

1479. *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).

1480. 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 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 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 Consol. Indep. Sch. Dist.*, 1997 WL 461912, at *2 (rejecting arguments that the standard of review was governed by the Education Code, as opposed to the APA).

1481. *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).

civil suits."[1482] The appeal is handled "as though there had not been an intervening agency action,"[1483] and in line with this principle, the reviewing court cannot admit the agency's decision into evidence.[1484] The reviewing court is to base its decision on its own determination of the issues of law and fact in the case,[1485] and may consider new evidence which was not presented before the agency.[1486] As in other civil cases, the standard of proof is a preponderance of the evidence.[1487] Finally, a party may request a jury trial on each issue of fact.[1488]

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.[1489] 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 arrived at the same conclusion that the agency reached.[1490] In an

---

1482. TEX. GOV'T CODE ANN. § 2001.173(a) (Vernon 2000).

1483. *Id.*; *see Dickerson-Seely & Assocs., Inc.*, 784 S.W.2d at 575 (characterizing the agency's decision as "a nullity"); *San Benito*, 1997 WL 461912, at *2 (not designated for publication) (explaining that an appeal vacates the agency's decision).

1484. TEX. GOV'T CODE ANN. § 2001.173(a) (Vernon 2000); *Dickerson-Seely & Assocs., Inc.*, 784 S.W.2d at 574. An exception exists: 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 (Vernon 2000).

1485. TEX. GOV'T CODE ANN § 2001.173(a) (Vernon 2000); *Dickerson-Seely & Assocs., Inc.*, 784 S.W.2d at 574; *San Benito*, 1997 WL 461912, at *2-3.

1486. *San Benito*, 1447 WL 461912, at *2 (explaining that the reviewing court is not confined to the record in determining whether the lower court erred).

1487. Dickerson-Seely & Assocs., Inc. v. Tex. Employment Comm'n, 784 S.W.2d 573, 574-75 (Tex. App.—Austin 1990, no writ).

1488. TEX. GOV'T CODE ANN. § 2001.173(b) (Vernon 2000).

1489. *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 decisions in contested cases).

1490. 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:

appeal from an agency order governed by the substantial evidence rule, the agency order is presumed to be valid and the appellant has the burden to overcome that presumption.[1491] The substantial evidence standard of review "requir[es] 'only more than a mere scintilla[ ]' to support an agency's determination."[1492] One endeavoring to reverse administrative findings, conclusions, or decisions because of lack of substantial evidence will face a difficult task.[1493]

"At its core, the substantial evidence rule is a reasonableness test or a rational basis test."[1494] If the agency decision is not "supported by substantial evidence in the record[,] or if the [decision is]

---

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.) (quoting N. Alamo Water Supply Corp. v. Tex. Dep't of Health, 839 S.W.2d 448, 452-53 (Tex. App.—Austin 1992, writ denied)).

1491. 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).

1492. Montgomery Indep. Sch. Dist. v. Davis, 34 S.W.3d 559, 566 (Tex. 2000) (quoting R.R. Comm'n v. Torch Operating Co., 912 S.W.2d 790, 792-93 (Tex. 1995)).

1493. *See Charter Med.*, 665 S.W.2d at 452 (permitting reversal of agency decisions for "absence of substantial evidence only if such absence has prejudiced substantial rights of the litigant"); *Fetchin*, 922 S.W.2d at 552 (requiring the record to show error that warrants reversal).

1494. R.R. Comm'n v. Pend Oreille Oil & Gas Co., 817 S.W.2d 36, 41 (Tex. 1991); *see Charter Med.*, 665 S.W.2d at 452-53 (noting that the "true test" is "whether some reasonable basis exists" for the agency's action and whether "reasonable minds could have reached the conclusion" the agency did); Sw.-Tex. Leasing Co. v. Bomer, 943 S.W.2d 954, 957 (Tex. App.—Austin 1997, no writ) (defining substantial evidence as "that which reasonable minds could have viewed as supporting the finding"); William H. Chamblee, Comment, *Administrative Law: Journey Through the Administrative Process and Judicial Review of Administrative Actions*, 16 ST. MARY'S L.J. 155, 179-82 (1984) (discussing the Texas Supreme Court's decision in *Charter Medical*).

arbitrary, capricious, or an abuse of discretion[,]" the decision must be reversed.[1495] The scope of review is based upon "the reliable and probative evidence in the record as a whole."[1496] 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]."[1497] 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.[1498] Therefore, the reviewing court is only concerned with the *reasonableness* of the agency's order and "not the *correctness* of the order."[1499] In applying this test, the reviewing "court may not substitute its judgment for that of the agency as to the weight of the evidence."[1500] Finally, the question of whether the administrative decision is supported by substantial evidence is a question of law.[1501]

3. Arbitrary and Capricious Standard

"Substantial evidence" and "arbitrary and capricious" may at first appear to be "two sides of the same coin."[1502] If an agency's decision is not supported by substantial evidence, then it is deemed to be arbitrary and capricious.[1503] However, a decision may be supported by substantial evidence, yet still be arbitrary and capricious;

1495. Pub. Util. Comm'n of Tex. v. Gulf States Util. Co., 809 S.W.2d 201, 210-11 (Tex. 1991).

1496. *Id.* at 211; *accord* 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).

1497. Tex. Water Comm'n v. Customers of Combined Water Sys., Inc., 843 S.W.2d 678, 681 (Tex. App.—Austin 1992, no writ).

1498. Tex. Alcoholic Beverage Comm'n v. Mini, Inc., 832 S.W.2d 147, 150 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

1499. *Pend Oreille*, 817 S.W.2d at 41; *accord* Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc., 665 S.W.2d 446, 452 (Tex. 1984).

1500. *Pend Oreille*, 817 S.W.2d at 40; *accord* Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer, 662 S.W.2d 953, 956 (Tex. 1983).

1501. 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).

1502. *Charter Med*, 665 S.W.2d at 454.

1503. *Id.*; Pub. Util. Comm'n v. Gulf States Util. Comm'n, 809 S.W.2d 201, 211 (Tex. 1991).

therefore justifying reversal.[1504] "An agency's decision is arbitrary . . . if 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[s] a completely unreasonable result."[1505]

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.[1506] 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.[1507] "The party seeking judicial review [must] offer, and the reviewing court [must] admit, the . . . agency record into evidence as an exhibit."[1508] The reviewing court reviews the agency decision without a jury and is limited to the agency record.[1509]

1504. *See* 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 was 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 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 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).

1505. City of El Paso v. Pub. Util. Comm'n, 883 S.W.2d 179, 184 (Tex. 1994).

1506. TEX. GOV'T CODE ANN. § 2001.175(a), (b) (Vernon 2000); *see* Nueces Canyon Consol. Ind. Sch. Dist. v. Cent. Educ. Agency, 917 S.W.2d 773, 776 (Tex. 1996) (noting the statutory requirement that the agency send the trial court a certified copy of the administrative record).

1507. TEX. GOV'T CODE ANN. § 2001.175(c) (Vernon 2000).

1508. *Id.* § 2001.175(d); *see* Tex. Dep't of Pub. Safety v. Stacy, 954 S.W.2d 80, 82 (Tex. App.—San Antonio 1997, no writ) (applying the statutory requirement of TEX. GOV'T CODE ANN. § 2001.175 (Vernon 2000)).

1509. TEX. GOV'T CODE ANN. § 2001.175(e) (Vernon 2000).

XI. PRESUMPTIONS FROM AN INCOMPLETE RECORD ON APPEAL

In the absence of a clerk's record, there can be no appeal.[1510] 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.[1511] 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.[1512] This precludes the reviewing court from finding reversible error[1513] 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."[1514] 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.[1515]

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.[1516] The

---

1510. W. Credit Co. v. Olshan Enter., Inc., 714 S.W.2d 137, 138 (Tex. App.—Houston [1st Dist.] 1986, no writ).

1511. Murray v. Devco, Ltd., 731 S.W.2d 555, 557 (Tex. 1987); Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 795 (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).

1512. Enter. Leasing Co. of Houston v. Barrios, 156 S.W.3d 547, 550 (Tex. 2004) (per curiam); 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 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).

1513. TEX. R. APP. P. 44.1 (defining reversible error).

1514. Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990) (per curiam).

1515. *Id.* at 843-44.

1516. *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).

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.[1517] 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.[1518]

There is an exception to the general rule requiring a complete reporter's record on appeal.[1519] 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.[1520] When an appellant complies with this rule, including setting forth the statement of issues to be presented on appeal,[1521] a presumption exists that nothing omitted from the record is relevant to any of the specified points or to the disposition of the case on appeal.[1522] 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.[1523]

1517. 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.); Wal-Mart Stores, Inc. v. McKenzie, 22 S.W.3d 566, 571 (Tex. App.—Eastland 2000, pet. denied); Gardner v. Baker & Botts, L.L.P., 6 S.W.3d 295, 298 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

1518. *See* Smith v. Smith, 544 S.W.2d 121, 123 (Tex. 1976) (granting a new trial to the petitioner based on his "inability to procure a statement of facts").

1519. *See* TEX. R. APP. P. 34.6(c) (allowing an appellant to bring a partial reporter's record if the appellant includes a statement of which points will be relied upon on appeal).

1520. *Id.*

1521. TEX. R. APP. P. 34.6(c)(1); Furr's Supermarkets, Inc. v. Bethune, 53 S.W.3d 375, 377 (Tex. 2001); *see Gardner*, 6 S.W.3d at 296 & n.1 (comparing current Texas Rule of Appellate Procedure 34.6 (c)(1) with its precursor, Texas Rule of Appellate Procedure 53(d) which, according to the reviewing court, "contain[ ] identical language" regarding requests for a partial statement of facts); *see also id.* at 297 (requiring a statement of the limited points of error to be addressed on appeal).

1522. *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).

1523. 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, 742 (Tex. App.—Austin 1992, no writ).

XII. Agreed Factual Statement

A case may be submitted to the trial court upon an agreed stipulation of facts.[1524] This procedure is similar to a special verdict and constitutes a request for judgment in accordance with applicable law.[1525] "[U]nless provided otherwise in the agreed statement," neither the trial court nor the reviewing court may "find any facts not conforming to the agreed statement."[1526] Therefore, the sole issue on appeal is whether the trial court correctly applied the law to the admitted facts.[1527]

XIII. Arbitration Awards

A. *Texas General Arbitration Act*

Texas courts favor arbitration agreements.[1528] Therefore, any doubts concerning the scope of an arbitration agreement are resolved in favor of arbitration.[1529] "Whether arbitration is required is a matter of contract interpretation and a question of law for the court."[1530] 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."[1531] If the court finds that there is a valid agreement, "the burden shifts to the party opposing arbitration to raise an affirmative defense to enforcing arbitration."[1532]

1524. Tex. R. Civ. P. 263.

1525. 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).

1526. *Sherman*, 945 S.W.2d at 228; *accord* State Bar of Tex. v. Faubion, 821 S.W.2d 203, 205 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

1527. *Sherman*, 945 S.W.2d at 228; Port Arthur Indep. Sch. Dist. v. Port Arthur Teachers Ass'n, 990 S.W.2d 955, 957 (Tex. App.—Beaumont 1999, pet. denied).

1528. 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.).

1529. *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).

1530. *Id.*; *accord In re* Dillard Dep't Stores, Inc., 198 S.W.3d 778, 781 (Tex. 2006); J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 227 (Tex. 2003); Kline v. O'Quinn, 874 S.W.2d 776, 782 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

1531. *Wigington*, 945 S.W.2d at 884.

1532. *J.M. Davidson, Inc.*, 128 S.W.3d at 227 (citing *In re* Oakwood Mobile Homes, Inc., 987 S.W.2d 571, 573 (Tex. 1999)).

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.[1533]

Arbitrations may be conducted under the common law[1534] or pursuant to the Texas General Arbitration Act.[1535] "Statutory arbitration is cumulative of the common law."[1536] To set aside an arbitration award, the complaining party "must allege a statutory or common law ground to vacate the . . . award."[1537] 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."[1538] In addition to the common law grounds for setting aside an arbitration award, the statute also authorizes a court to vacate an award if: (1) the arbitrators exceed their powers; (2) the arbitrators refuse to postpone a hearing when a party shows sufficient cause for a postponement; (3) the arbitrators refuse "to hear evidence material to the controversy" or so conduct the hearing as to substantially prejudice the rights of a party; or (4) "there was no [arbitration agreement], 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 objec-

---

1533. TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1)-(2) (Vernon 2005 & Supp. 2006); 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 Assoc., 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).

1534. Riha v. Smulcer, 843 S.W.2d 289, 292 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

1535. TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001-.023 (Vernon 2005 & Supp. 2006).

1536. *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.)).

1537. 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)).

1538. Nuno v. Pulido, 946 S.W.2d 448, 452 (Tex. App.—Corpus Christi 1997, no writ); *accord Anzilotti*, 899 S.W.2d at 266 (quoting Carpenter v. N. River Ins. Co., 436 S.W.2d 549, 551 (Tex. 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").

tion."[1539] 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.[1540]

Because "arbitration awards are favored by the courts as a means of disposing of . . . disputes,"[1541] the "courts indulge every reasonable presumption in favor of upholding the award[s]."[1542] "A mere mistake of fact or law is insufficient to set aside an arbitration award. . . ."[1543] 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.[1544] The scope of review is the entire record.[1545]

1539. TEX. CIV. PRAC. & REM. CODE ANN. § 171.088 (Vernon 2005 & Supp. 2006). 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]) (noting the grounds on which a court may vacate an arbitration award).

1540. TEX. CIV. PRAC. & REM. CODE ANN. § 171.091 (Vernon 2005 & Supp. 2006); Riha v. Smulcer, 843 S.W.2d 289, 292 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

1541. House Grain Co. v. Obst, 659 S.W.2d 903, 905 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); *accord In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 753 (Tex. 2001) (orig. proceeding); *Nuno*, 946 S.W.2d at 452; 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 292-94.

1542. *Id.*; *accord FirstMerit Bank, N.A.*, 52 S.W.3d at 753; *Nuno*, 946 S.W.2d at 452; Raffaelli v. Raffaelli, 946 S.W.2d 139, 142 (Tex. App.—Texarkana 1997, no writ); Anzilotti v. Gene D. Liggin, Inc., 899 S.W.2d 264, 266 (Tex. App.—Houston [14th Dist.] 1995, no writ); *Riha,* 843 S.W.2d at 292-94; 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.

1543. *Nuno*, 946 S.W.2d at 452; *accord Anzilotti*, 899 S.W.2d at 266; Powell v. Gulf Coast Carriers, Inc., 872 S.W.2d 22, 24 (Tex. App.—Houston [14th Dist.] 1994, no writ).

1544. *Holk*, 920 S.W.2d at 806; *accord Nuno*, 946 S.W.2d at 452; 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).

1545. *See Riha*, 843 S.W.2d at 294 (reviewing the record as a whole).

B. *Federal Arbitration Act*

The Federal Arbitration Act (the FAA) applies to contracts affecting interstate commerce,[1546] "as far as the Commerce Clause of the United States Constitution will reach."[1547] "There is a presumption favoring agreements to arbitrate under the federal act,"[1548] and the court should resolve any doubts in favor of arbitration.[1549] However, a party seeking to compel arbitration has the burden of establishing that a valid arbitration agreement existed under the federal act and that the claims raised fall within the agreement.[1550] Under the FAA, unless there is "unmistakable evidence that the parties intended the contrary, it is the courts . . . that must decide 'gateway matters' such as whether a valid arbitration agreement exits"[1551] and whether the agreement is binding on a nonparty.[1552] Pending a clear answer from the United States Supreme Court, under the FAA, the Texas Supreme Court holds that

---

1546. 9 U.S.C. § 2 (2000); 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).

1547. *In re* Nexion Health at Humble, Inc., 173 S.W.3d 67, 69 (Tex. 2005) (quoting *In re* L & L Kempwood Assocs., L.P., 9 S.W.3d 125, 127 (Tex. 1999) (per curiam)).

1548. *Mack*, 945 S.W.2d at 333; *accord* 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).

1549. *In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 737 (Tex. 2005); *In re* FirstMerit Bank, 52 S.W.3d 749, 753 (Tex. 2001); *In re* Am. Homestar of Lancaster, Inc., 50 S.W.3d 480, 484 (Tex. 2001) (orig. proceeding); *Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996); *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).

1550. *In re* Dillard Dep't Stores, Inc., 186 S.W.3d 514, 515 (Tex. 2006) (per curiam) (citing *Kellogg Brown & Root, Inc.*, 166 S.W.3d at 737); *In re* J.D. Edwards World Solutions Co., 87 S.W.3d 546, 549 (Tex. 2002); *Cantella & Co.*, 924 S.W.2d at 944; *Mack*, 945 S.W.2d at 333; *see In re* Vesta Ins. Group. Inc., 192 S.W.3d 759, 762 (Tex. 2006) (per curiam) (noting that a party is required to demonstrate that the arbitration agreement applied to the dispute). 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 of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947-48 (1995)).

1551. *In re* Weekley Homes, L.P., 180 S.W.3d 127, 130 (Tex. 2005) (citing Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003); PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 407 n.2 (2003)).

1552. *Weekley Homes, L.P.*, 180 S.W.3d at 130 (citing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546-47 (1964)).

state law governs whether a nonparty agreed to arbitrate[1553] and federal law governs the scope of the arbitration agreement,[1554] noting that the state courts should try "to keep it as consistent as possible with federal law."[1555]

A party seeking to enforce arbitration under the FAA must show that: (1) there is a valid arbitration agreement, and (2) the claims raised fall within the scope of the agreement.[1556] 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.[1557] A presumption of arbitration only exists if the party seeking to enforce arbitration proves the existence of a valid arbitration agreement.[1558] Under the FAA, state contract law determines the validity of the arbitration agreement.[1559] If the party meets the burden, and the opposing party raises an affirmative defense to arbitration,[1560] the trial court is obligated to compel arbitration.[1561] The trial court's determination of the validity of an arbitration agreement is a legal question re-

---

1553. *Kaplan*, 514 U.S. at 944; Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987)); *Weekley Homes, L.P.*, 180 S.W.3d at 130 (citing Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686-87 (1996).

1554. *Weekley Homes, L.P.*, 180 S.W.3d at 130 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

1555. *Weekley Homes, L.P.*, 180 S.W.3d at 130-31 (citing *In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 739 (Tex. 2005)).

1556. *Kellogg Brown & Root, Inc.*, 166 S.W.3d at 737; *In re* AdvancePCS Health L.P., 172 S.W.3d 603, 605 (Tex. 2005) (per curiam); *In re* FirstMerit Bank, 52 S.W.3d 749, 753 (Tex. 2001) (orig. proceeding); *In re* Am. Homestar of Lancaster, Inc., 50 S.W.3d 480, 484 (Tex. 2001) (orig. proceeding); *In re* Oakwood Mobile Homes, Inc., 987 S.W.2d 571, 573 (Tex. 1999) (per curiam).

1557. Federal Arbitration Act, 9 U.S.C. § 2 (1999); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995); Palm Harbor Homes, Inc. v. McCoy, 944 S.W.2d 716, 719 (Tex. App.—Fort Worth 1997, orig. proceeding); *see In re* McKinney, 167 S.W.3d 833, 835 (Tex. 2005) (per curiam) (explaining that "[a]bsent fraud, misrepresentation, or deceit," parties are bound to the arbitration agreement).

1558. *Kellogg Brown & Root, Inc.*, 166 S.W.3d at 737; J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 227 (Tex. 2003).

1559. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); *Kellogg Brown & Root, Inc.*, 166 S.W.3d at 737; *AdvancePCS Health L.P.*, 172 S.W.3d at 606; *Webster*, 128 S.W.3d at 227-28; *In re* Halliburton Co., 80 S.W.3d 566, 568 (Tex. 2002).

1560. *AdvancePCS Health L.P.*, 172 S.W.3d at 607.

1561. 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); Stewart Title Guar. Co. v. Mack, 945 S.W.2d 330, 333 (Tex. App.—Houston [1st Dist.] 1997, writ dism'd w.o.j.); Palm Harbor Homes, Inc. v. McCoy, 944 S.W.2d 716, 724 (Tex. App.—Fort Worth 1997, orig. proceeding).

viewed de novo,[1562] and the trial courts are instructed not to deny arbitration "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute. . . ."[1563] 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.[1564]

XIV. FRIVOLOUS APPEALS

Because meritless litigation constitutes an unnecessary burden on parties to the litigation and diverts judicial resources from legitimate appeals,[1565] 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,[1566] and Rule 52.11 permits "just sanctions" for filing a frivolous original proceeding.[1567] 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.[1568]

1562. *In re* Dillard Dep't Stores, Inc., 186 S.W.3d 514, 515 (Tex. 2006) (per curiam).

1563. *Id.* at 516.

1564. *In re* Wood, 140 S.W.3d 367, 370 (Tex. 2004) (per curiam) (citing *In re* L & L Kempwood Assocs., L.P., 9 S.W.3d 125, 128 (Tex. 1999) (per curiam)); EZ Pawn Corp. v. Mancias, 934 S.W.2d 87, 91 (Tex. 1996) (orig. proceeding); Prudential Sec. Inc. v. Marshall, 909 S.W.2d 896, 900 (Tex. 1995) (orig. proceeding); Hardin Constr. Group, Inc. v. Strictly Painting, Inc., 945 S.W.2d 308, 312 (Tex. App.—San Antonio 1997, orig. proceeding); *see In re* Nexion Health at Humble, Inc., 173 S.W.3d 67, 69-70 (Tex. 2005) (per curiam) (holding that mandamus was available because the case was governed by the FAA); *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 135-36 (Tex. 2004) (noting that the party was entitled to mandamus relief if it was able to show that (1) the trial court abused its discretion and (2) it has no adequate remedy by appeal); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 272 (Tex. 1992) (noting that parties alleging entitlement to arbitration must pursue a writ of mandamus from denial under the federal act).

1565. Chapman v. Hootman, 999 S.W.2d 118, 125 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

1566. TEX. R. APP. P. 45, 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).

1567. TEX. R. APP. P. 52.11.

1568. TEX. R. DISCIPLINARY P. 3.01, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005); *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

Rules 45 and 62 provide that if the supreme court or the courts of appeals determine that an appeal is "frivolous,"[1569] the courts may award "just damages" to any prevailing party on their own motion or the motion of any party.[1570] The appellate courts are no longer limited to assessing damages against the offending party alone; the attorney may also be sanctioned.[1571] 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.[1572] Whether to grant sanctions is within the reviewing court's discretion.[1573]

There are two competing concerns in awarding damages for frivolous appeals. First, the "right to an appeal is a sacred and valuable right."[1574] As a result, frivolous appeal damages are to be assessed "with prudence, caution, and after careful deliberation."[1575] As long as the argument had a reasonable basis in law,

---

1569. BLACK'S LAW DICTIONARY 692 (8th ed. 2004) (describing "frivolous" as "[l]acking a legal basis or legal merit"); WEBSTER'S THIRD NEW INT'L DICTIONARY 913 (1966) (defining "frivolous" as "having no basis in law or fact").

1570. 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. *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.

1571. TEX. R. APP. P. 45, 62.

1572. TEX. R. APP. P. 45; *accord* TEX. R. APP. P. 62.

1573. 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).

1574. Masterson v. Hogue, 842 S.W.2d 696, 698 (Tex. App.—Tyler 1992, no writ); *accord* 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); *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).

1575. *Jackson*, 937 S.W.2d at 46; *accord* 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; Klein v. Dooley, 933 S.W.2d 255, 261 (Tex. App.—Houston [14th Dist.] 1996), *rev'd in part*, 949 S.W.2d 307 (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.

even if unconvincing, "and constituted an informed, good-faith challenge to the trial court's judgment," frivolous appeal damages are not appropriate.[1576] 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.[1577] In the absence of some evidence showing that the appeal was taken in bad faith or sometimes phrased as a lack of good faith,[1578] "poor lawyering" alone is not a basis for sanctions.[1579] However, the First Court of Appeals has held that "bad faith is not required under Rule 45."[1580] "Whether the matter is groundless and thus without sufficient cause must be decided on the basis of objective legal expectations."[1581] There is not a consensus among the courts of appeals as to the standard applicable for imposing sanctions under

---

1576. Gen. Elec. Credit Corp. v. Midland Cent. Appraisal Dist., 826 S.W.2d 124, 125 (Tex. 1991) (per curiam); *accord In re* Long, 946 S.W.2d 97, 99 (Tex. App.—Texarkana 1997, no writ).

1577. Faddoul, Glasheen & Valles, P.C. v. Oaxaca, 52 S.W.3d 209, 213 (Tex. App.—El Paso 2001, no pet.); *accord 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).

1578. *Campos*, 917 S.W.2d at 356.

1579. 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).

1580. 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 standard. *See* Tex. Dep't of Transp. v. Beckner, 74 S.W.3d 98, 105 (Tex. App.—Waco 2002, no pet.) (listing courts of appeals' decisions that required "good faith"). *But see* Compass Exploration, Inc. v. B-E Drilling Co., 60 S.W.3d 273, 279 (Tex. App.—Waco 2001, no pet.) (stating that bad faith is not required to find a frivolous appeal, but noting its relevance in determining damages).

1581. Goad v. Goad, 768 S.W.2d 356, 360 (Tex. App.—Texarkana 1989, writ denied). 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. *See* Baw v. Baw, 949 S.W.2d 764, 768 (Tex. App.—Dallas 1997, no writ) (listing items considered in determining whether appeal was granted without sufficient cause); *Morriss*, 948 S.W.2d at 872 (enumerating factors which indicate an appeal was filed

Rule 45.[1582] Some of the principles applied include: "the appeal was taken for delay and . . . there was no sufficient cause for the appeal";[1583] "the appellant ha[d] no reasonable expectation of reversal" *and* pursued the appeal in bad faith;[1584] the appellant had no "reasonable expectation of reversal *or* . . . pursued the appeal in bad faith";[1585] the circumstances for taking the appeal "are truly egregious";[1586] or the appeal is "objectively frivolous and injures the appellee."[1587]

---

for delay and without sufficient cause); *Hicks*, 809 S.W.2d at 788 (giving "factors which tend to indicate an appeal was filed for delay and without sufficient cause").

1582. *See Beckner*, 74 S.W.3d at 105 (recognizing lack of uniformity of standard for imposing sanctions); *Compass Exploration*, 60 S.W.3d at 279-80 (giving examples of different standards used to decide whether to impose sanctions). 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 points of error; 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.).

1583. 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).

1584. *Oaxaca*, 52 S.W.3d at 213; *accord* King v. Graham, 47 S.W.3d 595, 612 (Tex. App.—San Antonio 2001) (citing Campos v. Inv. Mgmt. Props., Inc., 917 S.W.2d 351, 356 (Tex. App.—San Antonio 1996, writ denied)), *rev'd on other grounds*, 126 S.W.3d 75 (2003); 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 v. Welborn, 27 S.W.3d 132, 143 (Tex. App.—San Antonio 2000, pet. denied) (suggesting bad faith is a consideration).

1585. Diana Rivera & Assocs., P.C. v. Calvillo, 986 S.W.2d 795, 799 (Tex. App.—Corpus Christi 1999, pet. denied) (emphasis added).

1586. Conseco Fin. Servicing v. Klein Indep. Sch. Dist., 78 S.W.3d 666, 676 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *accord* Jackson v. Gutierrez, 77 S.W.3d 898, 904 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Brazos v. 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).

1587. Mid-Continent Cas. Co. v. Safe Tire Disposal Corp., 2 S.W.3d 393, 397 (Tex. App.—San Antonio 1999, no pet.) ("Under the current rule, 'just damages' are permitted

Second, judicial resources are severely strained, and frivolous appeals seriously harm the orderly administration of justice[1588] and "divert scarce resources away from" cases deserving more attention.[1589] One court has observed that "the decision to appeal 'should not be driven by comparative economics or wishful thinking; rather it should be based on professional judgment made after a careful review of the record for preserved error'" and the standard of review applicable to the error.[1590] The court also noted that a bad result at the trial level is not, by itself, reason enough to appeal.[1591] In addition, the court observed that the decision to appeal "is not a mechanical exercise, but requires the dutiful application of lawyering skills."[1592] While the old rules in effect at the time limited the court's authority to deal with the problem,[1593] the court reaffirmed that the appellate courts "must not be hesitant to use the tools that we have."[1594] "[T]he practice of let's just throw

---

if an appeal is objectively frivolous and injures the appellee. . . . [But, b]ad faith is thus no longer dispositive or necessarily even material.").

1588. Campos v. Inv. Mgmt. Props., Inc., 917 S.W.2d 351, 357 (Tex. App.—San Antonio 1996, writ denied) (Green, J., concurring).

1589. *Id.*; *see also* Lewis v. Deaf Smith Elec. Coop., Inc., 768 S.W.2d 511, 514 (Tex. App.—Amarillo 1989, no writ) (stating that a frivolous appeal "requires judicial time and effort that would be better spent on meritorious cases").

1590. *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* 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, "The mere fact that an . . . appeal is theoretically possible does not mean one should be filed . . . . An appeal must be based upon more than wishful thinking." Elm Creek Villas, 940 S.W.2d at 156.

1591. *Campos*, 917 S.W.2d at 356 (Green, J., concurring) ("A bad result below, by itself, is simply not a reason to appeal—not every case is properly appealable.").

1592. *Id.* at 357.

1593. *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 supreme court to remove that limitation. *Id.* The supreme court did so in Texas Rules of Appellate Procedure 45 and 62. *See* TEX. R. APP. P. 45 (failing to limit the award of damages solely to parties); TEX. R. APP. P. 62 (excluding language that would prevent the awarding of damages against attorneys).

1594. Campos v. Inv. Mgmt. Props., Inc., 917 S.W.2d 351, 357 (Tex. App.—San Antonio 1996, writ denied) (Green, J., concurring); *see* Dolenz v. A__ B__, 742 S.W.2d 82, 86 (Tex. App.—Dallas 1987, writ denied) (emphasizing that "[s]purious litigation, unnecessarily burdening parties and courts alike, should not go unsanctioned").

up as much mud as we can on the wall and see if any of it sticks must be discouraged."[1595] However, where a party's argument on appeal fails to convince the appellate court, but "ha[s] a reasonable basis in law and constitute[s] an informed, good-faith challenge to a trial court judgment," sanctions are not appropriate.[1596]

XV. Restricted Appeals

A restricted appeal (formerly an appeal by writ of error)[1597] "is not an equitable proceeding[,] such as [a] bill of review."[1598] It is simply another method of appeal,[1599] and it "is filed directly in an appellate court."[1600] 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).[1601]

The caselaw interpreting appeals by writ of error applies to restricted appeals.[1602]

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 (4) that the error is apparent on the face of the record.[1603] "The

---

1595. *S.B.C.*, 952 S.W.2d at 20 (quoting *Campos*, 917 S.W.2d at 356-57 (Green, J., concurring)) (internal quotation marks omitted).

1596. Gen. Elec. Credit Corp. v. Midland Cent. Appraisal Dist., 826 S.W.2d 124, 125 (Tex. 1991).

1597. Quaestor Invs., Inc. v. Chiapas, Mex., 997 S.W.2d 226, 227 n.1 (Tex. 1999) (per curiam); Coastal Banc SSB v. Helle, 988 S.W.2d 214, 215 n.1 (Tex. 1999) (per curiam); Carmona v. Bunzl Distrib., 76 S.W.3d 566, 567 (Tex. App.—Corpus Christi 2002, no pet.); Campbell v. Fincher, 72 S.W.3d 723, 724 (Tex. App.—Waco 2002, no pet.).

1598. Texaco, Inc. v. Cent. Power & Light Co., 925 S.W.2d 586, 590 (Tex. 1996).

1599. *Id.* (citing Smith v. Smith, 544 S.W.2d 121, 122 (Tex. 1976)).

1600. Fidelity & Guar. Ins. Co. v. Drewery Constr. Co., 186 S.W.3d 571, 573 (Tex. 2006) (per curiam) (citing Tex. R. App. P. 30).

1601. Tex. R. App. P. 30.

1602. Restricted appeals were formerly known as writs of error. *Quaestor Invs., Inc.*, 997 S.W.2d at 227 n.1; *Coastal Banc SSB*, 988 S.W.2d at 215 n.1; *Carmona*, 76 S.W.3d at 567; *Campbell*, 72 S.W.3d at 724.

1603. Tex. Civ. Prac. & Rem. Code Ann. § 51.013 (Vernon 1997); Gold v. Gold, 145 S.W.3d 212, 213 (Tex. 2004) (per curiam); Alexander v. Lynda's Boutique, 134 S.W.3d 845, 848 (Tex. 2004); *Quaestor Invs., Inc.*, 997 S.W.2d at 227; Norman Commc'ns v. Tex. East-

six-month time limit is mandatory and jurisdictional."[1604] 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.[1605] "Generally, the same standards of review and powers of disposition [which] govern ordinary direct appeals" also govern reviews of default judgments.[1606] 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,[1607] and "there are no presumptions in favor of valid issuance, service, and return of citation."[1608]

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.[1609] "[T]he question is whether the appellant has participated in 'the decisionmaking event'" resulting in the complained of judgment.[1610] "The policy behind the nonparticipation requirement" is to preclude a re-

---

man 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?*, 1 APP. ADVOC. 3 (1988); *see also* TEX. R. APP. P. 30 (applying statutes governing writs of error to restricted appeals).

1604. *Quaestor Invs., Inc.*, 997 S.W.2d at 227 (citing Linton v. Smith 137 Tex. 479, 154 S.W.2d 643, 645 (1941)).

1605. *Norman Commc'ns*, 955 S.W.2d at 270; Gunn v. Cavanaugh, 391 S.W.2d 723, 724 (Tex. 1965) (per curiam); 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); *see* Pace Sports, Inc. v. Davis Bros. Publ'g Co., 514 S.W.2d 247, 247 (Tex. 1974) (per curiam) (criticizing a court of appeals for suggesting that a restricted appeal must meet a stronger burden than a regular appeal).

1606. Lakeside Leasing Corp. v. Kirkwood Atrium Office Park Phase 3, 750 S.W.2d 847, 849 (Tex. App.—Houston [14th Dist.] 1988, no writ).

1607. McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965); *Lakeside Leasing*, 750 S.W.2d at 849.

1608. Fidelity & Guar. Ins. Co. v. Drewery Constr. Co., 186 S.W.3d 571, 573 (Tex. 2006) (per curiam) (citing Primate Constr., Inc. v. Silver, 884 S.W.2d 151, 152 (Tex. 1994)).

1609. *See* Texaco, Inc. v. Cent. Power & Light Co., 925 S.W.2d 586, 589 (Tex. 1996) (explaining that "the nature and extent of participation that precludes appeal by writ of error in any particular case is a matter of degree").

1610. *Id.*; *accord* Clopton v. Pak, 66 S.W.3d 513, 516 (Tex. App.—Fort Worth 2001, pet. denied).

stricted appeal by an appellant who should have "resort[ed] to the quicker method of appeal."[1611]

"As in any other appeal, the appellate court does not take testimony or [otherwise] receive evidence," and "the review is limited to errors apparent on the face of the record."[1612] 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."[1613] On appeal by a restricted appeal (writ of error), the reviewing court is not limited to a review of the clerk's record.[1614] 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,[1615] that is, a restricted appeal affords the appellant the "same scope of review as an ordinary appeal"[1616] (i.e., the legal and factual sufficiency of the evidence to support the judgment).[1617] In the absence of a reporter's record,

---

1611. *Texaco*, 925 S.W.2d at 590 (citing Lawyers Lloyds of Tex. v. Webb, 137 Tex. 107, 152 S.W.2d 1096, 1098 (1941)).

1612. Fidelity & Guar. Ins. Co. v. Drewery Constr. Co., 186 S.W.3d 571, 573 (Tex. 2006) (per curiam) (citing Alexander v. Lynda's Boutique, 134 S.W.3d 845, 848 (Tex. 2004)).

1613. Barnes v. Barnes, 775 S.W.2d 430, 431 (Tex. App.—Houston [1st Dist.] 1989, no writ); *accord* First Dallas Petroleum, Inc. v. Hawkins, 727 S.W.2d 640, 643 (Tex. App.—Dallas 1987, no writ).

1614. 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)).

1615. Norman Commc'ns 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); 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.); *see also* Garcia v. Arbor Green Owner's Ass'n, 838 S.W.2d 800, 803 n.2 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (holding that when extrinsic evidence is necessary to challenge judgment, appropriate remedy is by motion for new trial, under 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).

1616. Texaco, Inc. v. Cent. Power & Light Co., 955 S.W.2d 373, 375 (Tex. App.—San Antonio 1997, pet. denied); *accord* Jackson v. Gutierrez, 77 S.W.2d 898, 902 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (discussing scope of review in a legal insufficiency claim).

1617. *See Jackson*, 77 S.W.3d at 901 (discussing the scope of review in a legal sufficiency claim); Rubalcaba v. Pac./Atl. Crop Exch., Inc., 952 S.W.2d 552, 555 (Tex. App.—El Paso 1997, no writ) (noting legal and factual sufficiency as the proper inquiry for a writ of error).

the reviewing court may assume "that every fact necessary to support the judgment, within the limits of the pleadings, was proved at trial."[1618] 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."[1619]

XVI. BILL OF REVIEW

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 . . . ."[1620] A bill of review "is the proper method to attack a judgment when the trial court had jurisdiction to render judgment on the merits."[1621] It is "an equitable proceeding brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal."[1622] The purpose of the bill of review proceeding is to launch a direct attack, as opposed to a collateral attack,[1623] on the former judgment, and to se-

---

1618. Jaramillo v. Liberty Mut. Fire Ins. Co., 694 S.W.2d 585, 587 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

1619. *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).

1620. TEX. R. CIV. P. 329b(f).

1621. Holloway v. Starnes, 840 S.W.2d 14, 18 (Tex. App.—Dallas 1992, writ denied).

1622. Caldwell v. Barnes, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam) (citing Baker v. Goldsmith, 582 S.W.2d 404, 406 (Tex. 1979)); *accord* King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 751 (Tex. 2003).

1623. *See* Cook v. Cameron, 733 S.W.2d 137, 140 (Tex. 1987) (discussing that void judgments, such as those from courts without jurisdiction, are subject to collateral attack, whereas other errors where jurisdiction was proper must be attacked within statutory time limits). A direct attack differs from a collateral attack in that a collateral attack is only proper if the judgment is void. *Id.* Collateral attacks on final judgments are generally not permitted because it is the policy of the law to give finality to the judgments of the courts. Browning v. Prostok, 165 S.W.3d 336, 345 (Tex. 2005) (citing Tice v. City of Pasadena, 767 S.W.2d 700, 703 (Tex. 1989)). 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 Huff-

cure entry of a correct judgment.[1624] It allows the trial court to rectify its own error, which eliminates the need for appellate review; permits the trial court to consider all of the facts and not only those facts apparent on the face of the record; and "it avoids the need to follow both avenues of appeal seriatim."[1625]

Using a bill of review to attack a judgment is a difficult task.[1626] Generally, a bill of review is available "only if a party has exercised due diligence in pursuing all adequate legal remedies" (appeal or restricted appeal) against a 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 opposing party."[1627] It is an independent proceeding that is only used "to prevent manifest injustice,"[1628] which permits a trial court to "set aside a judgment that is no longer appealable or subject to a motion for new trial,"[1629] or subject to appeal by writ of error.[1630] 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.[1631] If these legal remedies were available but ignored,

---

statler v. Koons, 789 S.W.2d 707, 710 (Tex. App.—Dallas 1990, orig. proceeding) (en banc)); *see Browning*, 165 S.W.3d. at 347 (bringing suit based upon extrinsic fraud is not a collateral attack) (citing State v. Durham, 860 S.W.2d 63, 67 (Tex. 1993)). 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).

1624. Austin Indep. Sch. Dist. v. Sierra Club, 495 S.W.2d 878, 881 (Tex. 1973).

1625. Gold v. Gold, 145 S.W.3d 212, 214 (Tex. 2004).

1626. W. Wendell Hall, *Appeal, Writ of Error or Bill of Review . . . Which Should I Choose?*, 1 APP. ADVOC. 3, 4 (1988).

1627. Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 927 (Tex. 1999) (per curiam) (citing Tice v. City of Pasadena, 767 S.W.2d 700, 702 (Tex. 1989)); *accord* King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 751 (Tex. 2003) (citing Baker v. Goldsmith, 582 S.W.2d 404, 408 (Tex. 1979)); Petro-Chemical Transp., Inc. v. Carroll, 514 S.W.2d 240, 243 (Tex. 1974).

1628. French v. Brown, 424 S.W.2d 893, 895 (Tex. 1967).

1629. Transworld Fin. Servs. Corp. v. Briscoe, 722 S.W.2d 407, 407 (Tex. 1987) (citing *Baker*, 582 S.W.2d at 406); *accord Wembley Inv. Co.*, 11 S.W.3d at 927-28; Caldwell v. Barnes, 975 S.W.2d 535, 537 (Tex. 1998); Ortega v. First Republic Bank, Fort Worth, N.A., 792 S.W.2d 452, 453 (Tex. 1990); State v. 1985 Chevrolet Pickup Truck, 772 S.W.2d 447, 448 (Tex. 1989) (per curiam), *withdrawn*, 778 S.W.2d 463 (Tex. 1989).

1630. *See* Gen. Elec. Co. v. Falcon Ridge Apartments, Joint Venture, 811 S.W.2d 942, 944 n.2 (Tex. 1991) (explaining that where appeal by writ of error is not available, bill of error is allowed).

1631. *Wembley Inv. Co.*, 11 S.W.3d at 927 (citing Alexander v. Hagedorn, 148 Tex. 565, 226 S.W.2d 996, 998 (1950)).

one cannot obtain the equitable remedy of a bill of review.[1632] The burden on the complainant is harsh, but justified by the important public policy requiring judgments to become final at some point.[1633] 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.[1634]

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.[1635] The narrow essentials that must be alleged and proven are the following: "(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 the fault or negligence of the petitioner."[1636] "In relation to attacks on final judgments, fraud [may be] classified as either extrinsic or intrinsic";[1637] only extrinsic fraud will support relief by bill of review.[1638] "Extrinsic fraud . . . denies a losing party

---

1632. *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)). A restricted appeal is not an "adequate legal remedy" that a bill of review plaintiff must pursue. Gold v. Gold, 145 S.W.3d 212, 213-14 (Tex. 2004) (per curiam). Failure to file a restricted appeal is not a bar to a bill of review unless it is relevant to fault or negligence. *Id.* at 214.

1633. King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 751 (Tex. 2003) (citing *Hagedorn*, 226 S.W.2d at 998); *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).

1634. *Chapman*, 118 S.W.3d at 751 (citing *Hagedorn*, 226 S.W.2d at 998); *accord Transworld Fin. Servs.*, 722 S.W.2d at 407; Crouch v. McGaw, 134 Tex. 633, 138 S.W.2d 94, 96 (1940) (noting that a bill of review requires "something more than injustice").

1635. Baker v. Goldsmith, 582 S.W.2d 404, 406 (Tex. 1979).

1636. Beck v. Beck, 771 S.W.2d 141, 141 (Tex. 1989); *accord Caldwell*, 154 S.W.3d at 96 (citing *Baker*, 582 S.W.2d at 406); *Gold*, 145 S.W.3d at 213-14; *Chapman*, 118 S.W.3d at 752; Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 927 (Tex. 1999) (per curiam); Caldwell v. Barnes, 975 S.W.2d 535, 537 (Tex. 2004) (per curiam); *Transworld Fin. Servs.*, 722 S.W.2d at 408; *Baker*, 582 S.W.2d at 406-08; Hanks v. Rosser, 378 S.W.2d 31, 34 (Tex. 1964); *Alexander*, 226 S.W.2d at 998 (1950).

1637. Montgomery v. Kennedy, 669 S.W.2d 309, 312 (Tex. 1984); *accord Chapman*, 118 S.W.3d at 752.

1638. Tice v. City of Pasadena, 767 S.W.2d 700, 702 (Tex. 1989); *Montgomery*, 669 S.W.2d at 312. Extrinsic fraud requires some proof of deception by the adverse party, not directly connected to the issues in the case, that prevented the bill of review plaintiff from fully presenting his claim or defense in the underlying action. *See Tice*, 767 S.W.2d at 702 (noting that extrinsic fraud denies a party the ability to fully present its case at trial); *Montgomery*, 669 S.W.2d at 312-13 (describing extrinsic fraud as "collateral," in that the fraud

the opportunity to fully litigate at trial all the rights or defenses that could have been asserted."[1639] Generally, the fraud involves wrongful conduct "outside of the adversarial proceedings[,] . . . collateral to the matter tried[,] and" something not "actually or potentially in issue."[1640] "[A]llegations of fraud or negligence on the part of a party's attorney[s]" will not support a bill of review.[1641] By contrast, intrinsic fraud "relates to the merits of the issues" presented at trial and were, or should have been, determined in the former suit,[1642] such as "fraudulent instruments, perjured testimony, or any matter which was actually presented to and considered by the trial court in rendering judgment."[1643] In *Browning v. Prostok*,[1644] the supreme court set out the reasons for distinguishing between extrinsic and intrinsic fraud:

> The distinction between extrinsic and intrinsic fraud as grounds for attacking a judgment represents a balance of competing concerns. On one hand, the sound policy of promoting finality in judgments arises from a general level of confidence that the adversarial process leading to judgment is reasonably effective to ascertain the merits of the controversy. While no system is infallible, "[e]ndless litigation, in which nothing was ever determined, would be worse than occasional miscarriages of justice." On the other hand, to fully insulate judgments from attack would give great protections to the most devious parties. As such, an attack upon a judgment based on intrinsic fraud is not allowed because the fraudulent conduct may be property exposed and rectified within the context of the underlying adversarial process itself. In contrast, a collateral attack on a judgment on the basis of extrinsic fraud is allowed because such fraud distorts the judicial process to such an extent that confidence in the ability to dis-

---

was not at issue in the trial). 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.

1639. Browning v. Prostok, 165 S.W.3d 336, 347 (Tex. 2005) (citing *Montgomery*, 669 S.W.2d at 312; Alexander v. Hagedorn, 148 Tex. 565, 226 S.W.2d 996, 1001 (1950)); *accord Chapman*, 118 S.W.3d at 752.

1640. *Browning*, 165 S.W.3d at 347 (citing *Hagedorn*, 226 S.W.2d at 1002; *Montgomery*, 669 S.W.2d at 312).

1641. *Chapman*, 118 S.W.3d at 752.

1642. *Browning*, 165 S.W.3d at 347-48 (quoting *Tice*, 767 S.W.2d at 702); *accord* King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 752 (Tex. 2003).

1643. *Browning*, 165 S.W.3d at 348 (citing *Tice*, 767 S.W.2d at 702); *accord Chapman*, 118 S.W.3d at 752.

1644. 165 S.W.3d 336 (Tex. 2005).

> cover the fraudulent conduct through the regular adversarial process is undermined.[1645]

A complainant must exhaust all available legal remedies before pursuing a bill of review.[1646] 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.[1647] 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.[1648] Accordingly, if a party permits a judgment to become final by neglecting to file a motion for new trial, appeal, or appeal by writ of error, then the party "is precluded from proceeding on petition for bill of review," unless the complainant can show a good excuse for failure to exhaust adequate legal remedies.[1649] 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.[1650]

In *State v. 1985 Chevrolet Pickup Truck*,[1651] the supreme court set forth the steps necessary to be followed in a bill of review proceeding.[1652] First, the equitable powers of the court will be invoked when a bill of review petitioner files a petition (a separate proceeding from the underlying suit)[1653] alleging, factually and with partic-

---

1645. Browning v. Prostok, 165 S.W.3d 336, 348 (Tex. 2005) (quoting *Hagedorn*, 226 S.W.2d at 998) (internal citations omitted).

1646. *See* French v. Brown, 424 S.W.2d 893, 894 (Tex. 1967) (holding that availability of appeal bars consideration for bill of review).

1647. *See* Rizk v. Mayad, 603 S.W.2d 773, 775-76 (Tex. 1980) (stating that availability of appeal bars relief by way of bill of review).

1648. *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); Gold v. Gold, 145 S.W.3d 212, 214 (Tex. 2004) (per curiam) (explaining that failure to file a restricted appeal is not a bar to a bill of review proceeding unless relevant to fault or negligence).

1649. Steward v. Steward, 734 S.W.2d 432, 435 (Tex. App.—Fort Worth 1987, no writ); *accord French*, 424 S.W.2d at 895.

1650. Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 928 (Tex. 1999) (per curiam).

1651. 772 S.W.2d 447 (Tex. 1989).

1652. State v. 1985 Chevrolet Pickup Truck, 772 S.W.2d 447, 448 (Tex. 1989) (per curiam), *withdrawn*, 778 S.W.2d 463 (Tex. 1989).

1653. Ross v. Nat'l Ctr. for the Employment of the Disabled, 197 S.W.3d 795, 798 (Tex. 2006).

ularity, 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"[1654] and unmixed with any of the petitioner's own negligence.[1655] "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."[1656] 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.[1657] 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."[1658] A trial of the issues is required if a prima facie meritorious defense has been shown.[1659] However, "if the trial court determines that a prima facie defense [has] not [been] made out, it may dismiss the case."[1660] The petitioner must open and assume the burden of proof on this issue.[1661]

Second, if the petitioner demonstrates a prima facie defense, the court will conduct a trial.[1662] At this trial, the petitioner must prove, by a preponderance of the evidence, that the judgment was rendered "as the result of fraud, accident or wrongful act of the opposite party[,] or official mistake unmixed with any negligence of his own."[1663] If this burden is met, the fact finder will then de-

---

1654. Levit v. Adams, 841 S.W.2d 478, 481 n.5 (Tex. App.—Houston [1st Dist.] 1992), *rev'd on other grounds*, 850 S.W.2d 469 (Tex. 1993).

1655. *1985 Chevrolet Pickup*, 772 S.W.2d at 448 (citing Baker v. Goldsmith, 582 S.W.2d 404, 408 (Tex. 1979)).

1656. *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.

1657. *Id.*

1658. Beck v. Beck, 771 S.W.2d 141, 142 (Tex. 1989) (citing *Baker*, 582 S.W.2d at 408-09).

1659. *Id.*

1660. *Id.*

1661. *See id.* (noting that the relevant inquiry is whether petitioner presented evidence of a meritorious defense).

1662. State v. 1985 Chevrolet Pickup Truck, 772 S.W.2d 447, 449 (Tex. 1989) (per curiam), *withdrawn*, 778 S.W.2d 463 (Tex. 1989).

1663. *Id.* (citing Baker v. Goldsmith, 582 S.W.2d 404, 409 (Tex. 1979)).

termine "whether the bill of review defendant, the original plaintiff, has proved the elements of his original cause of action."[1664] 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.[1665]

There is an exception to the general rule of requiring (1) a showing of a meritorious defense and (2) a showing that "fraud, accident, wrongful act or official mistake prevented the plaintiff from presenting such a defense."[1666] A meritorious defense is not required if the service of the petition was invalid[1667] 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.[1668] "[S]uch a requirement, in the absence of notice, violates [the] [D]ue [P]rocess" Clause of the Fourteenth Amendment to the United States Constitution.[1669]

1664. *Id.*

1665. 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) (per curiam).

1666. Caldwell v. Barnes, 154 S.W.3d 93, 97-98 (Tex. 2004) (per curiam) (citing Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 86 (1988); Caldwell v. Barnes, 975 S.W.2d 535, 537 (Tex. 1998)).

1667. *Caldwell*, 154 S.W.3d at 96. The testimony of a bill of review plaintiff alone, without corroborating evidence will not overcome the presumption that the plaintiff was served. *See id.* at 97-98 n.3 ("The recitations in the return of service carry so much weight that they cannot be rebutted by the uncorroborated proof of the moving party." (quoting Primate Constr., Inc. v. Silver, 884 S.W.2d 151, 152 (Tex. 1994))).

1668. *Id.* at 96 (citing *Peralta*, 485 U.S. at 86-87); Caldwell v. Barnes, 975 S.W.2d 535, 537 (Tex. 1998); 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).

1669. *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*).

XVII. Conclusion

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 identifying and applying the standard, an appellate brief will not present a coherent or persuasive argument. Although there are certainly no guarantees of success in the appellate process—sometimes it is like another throw of the dice—the appellate advocate will be most effective when he or she 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 party advocates. Equally important to success on appeal is a forceful and persuasive brief that demonstrates the harmfulness or harmlessness of the error—without demonstrating harm or lack of harm, an advocate has not advanced the client's position by simply showing a trial court error. Hopefully, this article will assist practitioners with their brief writing and help sharpen their advocacy skills on appeal.