St. Mary's Law Journal

Volume 42 | Number 1 Article 2

1-1-2010

Hall's Standards of Review in Texas.

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ARTICLE

HALL'S STANDARDS OF REVIEW IN TEXAS[†]

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I. INTRODUCTION

This Article began many years ago, during a time when appellate practice as a special area of the law was emerging in the nation and Texas in particular. As a relatively young lawyer in this emerging field, I quickly learned that standards of review were vital to success on appeal. I started to gather these standards in outlines, notebooks, in the margins of important opinions, etc. Soon, the collection of notes began to take the shape of a comprehensive outline and then grew into a law review article.[1]

† In light of W. Wendell Hall's exceptional contributions to Texas law, and to his firm, colleagues, and community, Mr. Hall's co-authors have insisted that the title of this Article bear his name. They respectfully refer the reader to the Foreword of this Article for a summary of Mr. Hall's enduring contributions.

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Through the years, the Article continued to evolve as the standards evolved, and interest in the profession likewise grew.[2]

When it was time for me to retire from practice, the Article itself refused to retire, and my colleagues at Fulbright & Jaworski bravely stepped forward to breathe new life into what has become an old standby for appellate practitioners and appellate judges in Texas. I am grateful to my partner, O. Rey Rodriguez, who agreed to take the project under his wing. Likewise, I am grateful to the many young lawyers at Fulbright who helped Rey update this new edition with passion and dedication, and who share my passion for the practice of civil appeals, especially Mark Emery and Rosemarie Kanusky.

In this revised Article, you will find an in-depth discussion of the most common standards of review seen in Texas civil appeals. Once again, the Article presents a substantial and comprehensive update of standards of review for reviewing various trial court rulings, whether they are made during pre-trial, trial, or post-trial proceedings. Finally, the Article describes some aspects of appellate practice that put the standards of review in context.

A. *Standards of Review Generally*

Standards of review distribute power within the judicial branch by defining the relationship between trial and appellate courts.[3] These standards "frame the issues, define the depth of review, assign power among judicial actors, and declare the proper materials to review."[4] Standards of review are simply the appellate

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1. The first edition of W. Wendell Hall's article was published in 1998. W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351 (1998).

2. *See generally* W. Wendell Hall, *Standards of Review in Texas*, 34 ST. MARY'S L.J. 1 (2002) (providing an update to the 1998 article); W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47 (2006) (amending previous versions of the Article to reflect changes in the law since it was last published).

3. *See* Patrick W. Brennan, *Standards of Appellate Review*, 33 DEF. L.J. 377, 378–79 (1984) (describing the functions of appellate courts, including the basic functions of "error-correcting and rule-making").

4. Steven Alan Childress, *Standards of Review Primer: Federal Civil Appeals*, 229 F.R.D. 267, 269 (2005).

court's "measuring stick"[5] or "the decibel level at which the appellate advocate must play to catch the judicial ear."[6] They are a "powerful organizing principle," and even when "hopelessly imprecise, they do provide a language ... we can use to good advantage in giving logical form and focus to our arguments."[7] Therefore, a litigant must measure his factual and legal arguments against the appropriate "measuring stick" to write an effective and persuasive brief.[8] As two leading scholars have observed, "[S]tandards of review were never meant to be the end of the inquiry but rather a frame and limit on the substantive law."[9]

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 that 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 they fail 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

5. *See* John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 810 (1976) (examining the role of the standard of review and the importance of determining the applicable standard of review on a case-by-case basis).

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

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

8. *See* John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 810 (1976) (explaining how the standard of review is a measuring stick for the appellate judge).

9. 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, STANDARDS OF REVIEW: FEDERAL CIVIL CASES AND REVIEW PROCESS § 1.3, at 21 (1986).

> slogans have no real internal meaning, in many cases it is clear that the issue framing or assignment of power *behind* the words is the turning point of the decision.[10]

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.[11] While it is important to accurately discuss the facts 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."[12] 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)(9)(B) and Fifth Circuit Rule 28.3(j), for example, the standard of review must be identified and set forth for each issue of the argument.[13] Those practicing in state appellate courts would be wise to follow the federal rule and the Fifth Circuit's local rule.[14]

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10. 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW: CIVIL CASES AND GENERAL REVIEW PRINCIPLES § 1.01, at 1-2 (4th ed. 2010) (footnote omitted).

11. *See generally* Barry Sullivan, *Standards of Review, in* APPELLATE ADVOCACY 59, 61 (Peter J. Carre et al. eds., 1981) (noting that many lawyers recognize the need "to say *something* about the standard of review, but think that they need not develop the concept as part of their argument").

12. 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW: CIVIL CASES AND GENERAL REVIEW PRINCIPLES § 1.02, at 1-16 (4th ed. 2010).

13. FED. R. APP. P. 28(a)(9)(B); 5TH CIR. R. 28.3(j).

14. Appellate judges invariably advise that advocates address standards of review. *See* Leonard I. Garth, *How to Appeal to an Appellate Judge*, 21 LITIG. 20, 22 (1994) (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").

As one judge observed, "[N]o single concept is more important than the standard of review."[15] 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.[16] If a party does not identify the relevant standard and vigorously approach that standard in briefing, the party leaves a void that may be filled by his adversary or the reviewing court, and perhaps filled incorrectly with the wrong standard.[17] Because the reviewing court will undoubtedly determine the relevant standard on its own and review the appeal accordingly, litigants who do not meaningfully address the standard of review risk failing to persuade the reviewing court that the standard, as applied to the facts and the law, requires reversal.[18] 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."[19]

Identifying the standard of review in most cases is not complicated.[20] 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

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

16. *See* James B. v. Superior Court, 41 Cal. Rptr. 2d 762, 767 (Cal. Ct. App. 1995) (observing that "counsel's failure to acknowledge the proper standard of review might . . . be considered a concession of lack of merit").

17. *See* United States v. Vontsteen, 950 F.2d 1086, 1091 (5th Cir. 1992) (en banc) ("The parties' failure to brief and argue properly the appropriate standard may lead the court to choose the wrong standard.").

18. *See* Fox v. Comm'r, 718 F.2d 251, 253 (7th Cir. 1983) (noting the parties failed to address the standard of review, and ultimately affirming the lower court under the abuse of discretion standard).

19. *Id.*

20. *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").

cogent manner why the reviewing court should reach a certain result.[21]

Justice Felix Frankfurter described standards of review as "undefined defining terms."[22] While standards of review often escape precise definition, it is incumbent upon 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."[23] Woe to that lawyer when the final score is tabulated.

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

Standards of review must be carefully distinguished from the scope of review. The standard of review is the framework by which a reviewing court determines whether the trial court erred.[24] 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.[25] It asks: "Does the appellate court review the entire record or only some portion of the record to determine error?"[26] 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.

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21. Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951).

22. *Id.*

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

24. *See* Barry Sullivan, *Standards of Review*, *in* APPELLATE ADVOCACY 59, 61 (Peter J. Carre et al. eds., 1981) (explaining the purpose of the standard of review).

25. STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW: CIVIL CASES AND GENERAL REVIEW PRINCIPLES § 1.03, at 1-18 to 1-19 (4th ed. 2010).

26. *See* Furr's Supermarkets, Inc. v. Bethune, 53 S.W.3d 375, 380 (Tex. 2001) (Baker, J., dissenting, joined by Hankinson & O'Neill, JJ.) (noting that abuse of discretion was traditionally reviewed based on the entire record, but observing that a rule change now expressly allows review based on a partial record when factual sufficiency or legal sufficiency is the issue).

C. *Typical Standards of Review in Texas*

There are three major standards of review described in this Article: de novo, abuse of discretion, and sufficiency of the evidence. Of these main standards, de novo is the most helpful for the appellate practitioner because it permits the court of appeals to take a completely fresh look at the trial court's rulings.[27] The availability of de novo review, however, is limited to relatively few trial court rulings and needs no in-depth analysis.[28]

On the other hand, the second standard—abuse of discretion—is the most frequently used; yet its application may be the most onerous from an appellate practitioner's point of view.[29] Accordingly, an entire section of this Article is devoted to its explication.

Likewise, this Article focuses extensively on the history and scope of the third major standard of review: sufficiency of the evidence. This standard typically applies following either a jury trial or bench trial.[30] Specialized evidentiary review may apply to certain types of cases, as in family matters or administrative agency appeals.[31]

II. ABUSE OF DISCRETION

A. *Abuse of Discretion Generally*

Perhaps no standard of review is subject to more misuse than the most common standard: abuse of discretion.[32] Lawyers often

27. *See* Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 156–57 (Tex. 2004) (stating that the court reviews a summary judgment de novo and takes "as true all evidence favorable to the nonmovant"); Kutner v. Russell, 658 S.W.2d 585, 590 (Tex. Crim. App. 1983) (en banc) (defining "de novo" and providing the constitutional and statutory sources of "trial de novo").

28. *See infra* Part IV(O) (discussing joinder) and Part IV(R) (discussing personal jurisdiction).

29. *See* Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 173 (1978) ("Discretion is a pervasive yet elusive concept . . . .").

30. *See* Young v. State, 283 S.W.3d 854, 860 (Tex. Crim. App. 2009) (reviewing a jury verdict for sufficiency of the evidence); Watson v. State, 204 S.W.3d 404, 414–17 (Tex. Crim. App. 2006) (describing the history of sufficiency of the evidence in an appeal of a jury verdict), *overruled by* Brooks v. State, 323 S.W.3d 893 (Tex. Crim. App. 2010).

31. *See infra* Part III(C)(1) (discussing the clear and convincing evidence standard) and Part III(C)(2) (discussing administrative agency appeals).

32. *See generally* Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173 (1978) (recognizing various degrees of discretion).

wonder how appellate courts can make "abuse of discretion" mean so many different things.[33] Indeed, one appellate court judge lamented that the abuse of discretion standard "means everything and nothing at the same time."[34] One appellate court panel's view of an abuse of discretion can be another panel's notion of a completely reasonable decision.[35] Similar to identifying hard-core 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."[36]

Appellate courts have understandable difficulty in applying the abuse of discretion standard consistently.[37] This difficulty is inherent in the standard itself. To suggest that the abuse of discretion standard is a concept "'not easily defined'"[38] or "not susceptible to rigid definition"[39] is an understatement. "[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."[40] 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.[41] As a result, the amorphous concept of abuse of discretion often fails to assist either appellate courts or trial courts in deciding cases, and it also makes briefing difficult for appellate lawyers.[42] Therefore, as

33. *Id.* at 173–74.

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

35. *See* Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124, 126 (1939) ("Naturally appellate courts will differ on the delicate question of whether trial courts have abused their discretion.").

36. *Cf.* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (noting the difficulty to "define what may be indefinable" as to the kinds of material that fall within the description of "hard-core pornography").

37. *See, e.g.*, Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 62–77 (2000) (elaborating on different appellate cases and approaches to abuse of discretion).

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

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

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

41. *See id.* at 936 (describing a hypothetical example of when a court has not abused its discretion).

42. *See* Pearson v. Dennison, 353 F.2d 24, 28 (9th Cir. 1965) (reasoning that an abuse of discretion "must necessarily depend upon the peculiar facts of the case"); *In re* Josephson, 218 F.2d 174, 182 (1st Cir. 1954) (attempting to define "abuse of discretion" without making it "sound[] worse than it really is").

Justice McClure[43] correctly observed: "An appeal directed toward demonstrating an abuse of discretion is one of the tougher appellate propositions."[44]

B. *Abuse of Discretion in Texas*

The development of the abuse of discretion standard varies between jurisdictions and over time.[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 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]

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43. 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.

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

45. Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 50–51 (2000). 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). Early Texas 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 Cnty. v. Harrell, 202 S.W. 160, 163 (Tex. Civ. App.—Amarillo 1918, writ ref'd)).

46. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241 (Tex. 1985); *accord* Cire v. Cummings, 134 S.W.3d 835, 838–39 (Tex. 2004).

47. Mercedes-Benz Credit Corp. v. Rhyne, 925 S.W.2d 664, 666 (Tex. 1996); *accord* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 766 (Tex. 2006) (Medina, J., dissenting, joined by Wainwright & Johnson, JJ.)

48. *In re* Bass, 113 S.W.3d 735, 738 (Tex. 2003) (orig. proceeding) (quoting Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding)); 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. 1985) (orig. proceeding)). The abuse of discretion standard in Texas has been compared to "the federal standard of 'clearly erroneous.'" *See* Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex. 1997) (observing that the two standards are "similar, although not identical"). In *Goode*, one supreme court justice observed in a concurring opinion that it is debatable whether any real difference exists between the two standards. *Id.* at 454 (Gonzalez, J., concurring). *But see* Davis v. Fisk Elec. Co., 268 S.W.3d 508, 515 (Tex. 2008) (suggesting that the federal clearly erroneous standard is distinct from the Texas abuse of discretion standard).

By requiring the trial court's conduct to be arbitrary or unreasonable as a condition of reversal, Texas appellate courts acknowledge the discretion trial courts must have to judge the credibility of witnesses and make decisions within broad legal parameters.[49] 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 decision making.[50] 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.[51]

The abuse of discretion standard is "typically applied to procedural or other trial management" decisions, either when challenged on appeal or by original proceeding.[52] At its core, "discretion" means choice.[53] To find an abuse of discretion, the reviewing court "must determine that the facts and circumstances presented 'extinguish any discretion [or choice] in the matter.'"[54] Therefore, simply because a trial court has exercised its discretion to decide a matter differently than a reviewing court under similar circumstances does not establish an abuse of discretion.[55] In other words, the reviewing court "may not substitute its own judgment

49. *See* Bocquet v. Herring, 972 S.W.2d 19, 22 (Tex. 1998) (Baker, J., dissenting, joined by Enoch, J.) ("The abuse of discretion standard of review recognizes that these functions rest with the trial court and not the appellate court.").

50. *See In re* R.R., 26 S.W.3d 569, 573 (Tex. App.—Dallas 2000, orig. proceeding) ("A trial court's wrong decision in applying or analyzing the law, even in an unsettled area of the law, is an abuse of discretion.").

51. *Walker*, 827 S.W.2d at 840 ("[A] clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion . . . .").

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

53. *See* Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 175 (1978) ("The basic idea that discretion conveys is choice.").

54. Kaiser Found. Health Plan of Tex. v. Bridewell, 946 S.W.2d 642, 646 (Tex. App.—Waco 1997, orig. proceeding [leave denied]) (quoting F.A. Richard & Assoc. v. Millard, 856 S.W.2d 765, 767 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding)); *see also In re* Nitla S.A. de C.V., 92 S.W.3d 419, 422 (Tex. 2002) (orig. proceeding) (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).

55. *See* Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 226 (Tex. 1991) (stating "the court of appeals may not reverse for abuse of discretion merely because it disagrees with a decision by the trial court"); Jones v. Strayhorn, 159 Tex. 421, 321 S.W.2d 290, 295 (1959) ("The mere fact or circumstance that a trial judge may decide a matter within his discretionary authority in a manner different from what an appellate judge would decide if placed in a similar circumstance does not demonstrate that an abuse of discretion has occurred.").

for the trial court's judgment."[56] This discretion insulates the trial judge's reasonable choice "from appellate second guessing."[57] Where a party challenges the sufficiency of the evidence to support a discretionary decision, courts often employ a two-pronged analysis: "(1) Did the trial court have sufficient information upon which to exercise its discretion; and (2) Did the trial court err in its application of discretion?"[58]

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."[59] Second, a trial court does not "'abuse its discretion if it reaches the right result'" for the wrong reason.[60] These exceptions demonstrate that appellate court standards permit a trial judge a limited right to be wrong without being reversed.

One appellate court described four ways in which a trial court commits an abuse of discretion:[61] (1) a court abuses its discretion

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56. Bowie Mem'l Hosp. v. Wright, 79 S.W.3d 48, 52 (Tex. 2002); *accord Nitla*, 92 S.W.3d at 422; *see also* 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).

57. Brazil v. Khater, 223 S.W.3d 418, 420 (Tex. App.—Amarillo 2006, pet. denied).

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

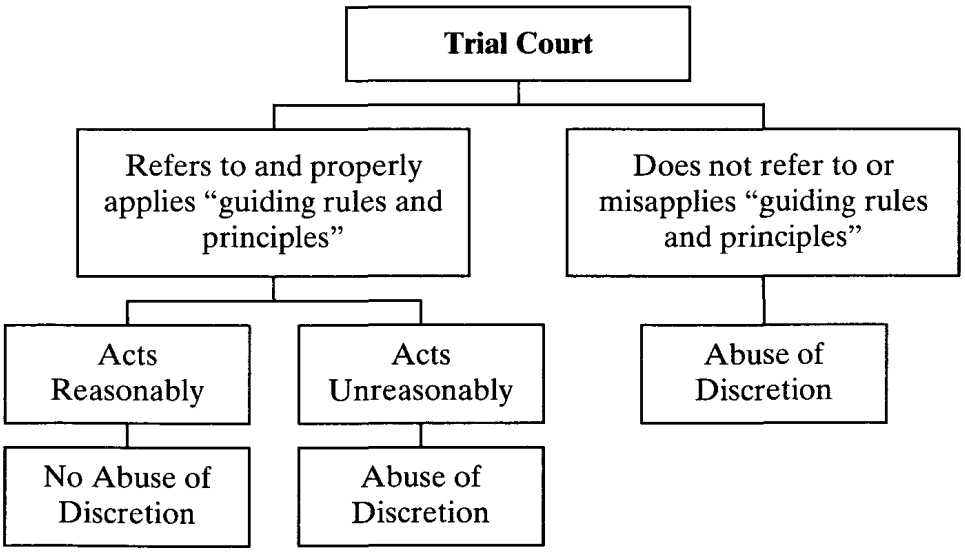
59. Loftin v. Martin, 776 S.W.2d 145, 146 (Tex. 1989) (orig. proceeding), *overruled on other grounds by* Walker v. Packer, 827 S.W.2d 833, 841–42 (Tex. 1992) (disapproving of cases that did not engage in "adequate appellate remedy" analysis when granting "mandamus to correct discovery errors"); *see also* Kolfeldt v. Thoma, 822 S.W.2d 366, 368 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding) (suggesting that "[a] mere error in judgment" still has some basis in reason and law); Air Prods. & Chems., Inc. v. Sanderson, 789 S.W.2d 651, 653 (Tex. App.—Beaumont 1990, orig. proceeding) (noting that "a mere error in judgment" becomes abusive when the order is "so unreasonable, so arbitrary, or based upon so gross and prejudicial an error of law as to have no basis in reason or in law").

60. Bruce Terminix Co. v. Carroll, 953 S.W.2d 537, 540 (Tex. App.—Waco 1997, orig. proceeding) (quoting Luxenberg v. Marshall, 835 S.W.2d 136, 142 (Tex. App.—Dallas 1992, orig. proceeding)), *mand. granted, In re* Bruce Terminix Co., 988 S.W.2d 702 (Tex. 1998); *accord* Hawthorne v. Guenther, 917 S.W.2d 924, 931 (Tex. App.—Beaumont 1996, writ denied); *Luxenberg*, 835 S.W.2d at 142.

61. 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, writ denied) (referring to the abuse of discretion analysis applied in *Landon*), *overruled on other grounds by* Van Es v. Frazier, 230 S.W.3d 770, 776 (Tex. App.—Waco 2007, pet. denied) ("[W]e conclude that this Court's holding in *Minns* that 'an identifiable evidentiary hearing' is required before the imposition of death penalty sanctions has been effectively overruled."); Stephens v. Stephens, 877 S.W.2d 801, 805 (Tex. App.—Waco 1994, writ denied) (applying the *Landon* abuse of discretion analysis).

if it attempts to exercise a power of discretion that it does not legally possess;[62] (2) 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;[63] (3) 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;[64] and, (4) 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";[65] (ii) by arriving at its choice in violation of an "applicable legal rule, principle, or criterion";[66] or (iii) by making a choice that is "legally unreasonable in the factual-legal context in which it [is] made."[67]

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



62. *Landon*, 724 S.W.2d at 937.
63. *Id.* at 938.
64. *Id.*
65. *Id.* at 939.
66. *Id.*
67. *Landon*, 724 S.W.2d at 939–40.

C. *Texas Mandamus Proceedings*

A writ of mandamus is an order from a court, usually to an inferior court, commanding the performance of some action.[68] To be entitled to a writ of mandamus in a Texas civil suit, the relator or party seeking relief must establish: (1) that the ruling of the trial court constitutes a clear abuse of discretion, and (2) that there is no adequate remedy at law.[69] Because the writ of mandamus is discretionary, "its denial, without comment on the merits, cannot deprive another appellate court from considering the matter in a subsequent appeal."[70]

While writs of mandamus are the most common invocation of original jurisdiction in appellate courts, mandamus proceedings are not the only writs available to appellate courts.[71] Of the various forms of extraordinary relief, the writ of prohibition is most like the writ of mandamus.[72] A writ of prohibition "operates like an injunction issued by a superior court to control, limit[,] or prevent action in a court of inferior jurisdiction."[73] The two-step

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68. *See* BLACK'S LAW DICTIONARY 1046 (9th ed. 2009) (defining mandamus).

69. *See* Walker v. Packer, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding) (outlining the two elements required for a writ of mandamus to issue); *see also In re* McAllen Med. Ctr., Inc., 275 S.W.3d 458, 467–68 (Tex. 2008) (orig. proceeding) (describing *Bradley v. McCrabb*, Dallam 504 (Tex. 1843), as the seminal mandamus decision in Texas allowing for mandamus to issue when "other modes of redress are inadequate or tedious" or when mandamus is simply the better remedy). Before the 1950s, "the writ of mandamus issued only to compel the performance of a ministerial act or duty." *Walker*, 827 S.W.2d at 839. That rule is still followed in criminal cases, where "[m]andamus relief may be granted if the relator shows . . . (1) that the act sought to be compelled is purely ministerial and (2) that there is no adequate remedy at law." Winters v. Presiding Judge of Criminal Dist. Court No. Three, 118 S.W.3d 773, 775 (Tex. Crim. App. 2003), *superseded by statute on other grounds by* TEX. CODE CRIM. PROC. ANN. art. 64.01(c) (West Supp. 2010) (addressing indigency and court-appointed counsel).

70. Chambers v. O'Quinn, 242 S.W.3d 30, 32 (Tex. 2007).

71. *See* TEX. GOV'T CODE ANN. § 22.002 (West 2004) (describing numerous writs available to justices of the Texas Supreme Court); *id.* § 22.221 (explaining the writ power of courts of appeals); *Ex parte* Jones, 97 S.W.3d 586, 588 (Tex. Crim. App. 2003) (illustrating a court's authority to consider applications for the "writ of habeas corpus, . . . writs of prohibition[,] and other extraordinary matters").

72. *E.g.*, Tilton v. Marshall, 925 S.W.2d 672, 676 n.4 (Tex. 1996) (orig. proceeding) (noting that a writ of mandamus compels an action while a writ of prohibition blocks one).

73. Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 682 (Tex. 1989) (orig. proceeding). In contrast, an appellate "writ of quo warranto is an extraordinary remedy" used "to determine disputed questions about the proper person entitled to hold a public office and exercise its functions." State *ex rel.* Angelini v. Hardberger, 932 S.W.2d 489, 490 (Tex. 1996) (orig. proceeding). *Cf.* TEX. CIV. PRAC. & REM. CODE ANN. § 66.001 (West 2008) (providing for a quo warranto cause of action). A writ of procedendo is an

formula for granting mandamus relief also applies to the writ of prohibition.[74]

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 relief.[75] Many courts have observed, with regard to whether "error" has in fact occurred for purposes of mandamus, that writs of mandamus issue generally only for a "clear" abuse of discretion.[76] Other courts, however, have granted writs of mandamus without any reference as to whether the trial court's abuse of discretion was "clear."[77] On appeal, error is usually couched in terms of abuse of discretion—without any discussion of whether the abuse needs to be "clear."[78]

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appellate "court's order to an inferior court to execute judgment." *See* Cavazos v. Hancock, 686 S.W.2d 284, 285 n.1 (Tex. App.—Amarillo 1985, orig. proceeding) (explaining the remedy of a writ of procedendo).

74. *See Tilton*, 925 S.W.2d at 676 n.4 (noting that the "same principles" control the use of writs of mandamus and prohibition); *see also Ex parte* Chi, 256 S.W.3d 702, 703 (Tex. Crim. App. 2008) (applying a two-part test for the writ of prohibition); *In re* Lewis, 223 S.W.3d 756, 761 (Tex. App.—Texarkana 2007, orig. proceeding) (recognizing the two-part test for the writ of prohibition).

75. *See* Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex. 1997) (noting that Texas appellate courts use the "abuse of discretion" standard to review many trial court decisions); Walker v. Packer, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding) (distinguishing the "abuse of discretion" standard under different circumstances).

76. *In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P., 290 S.W.3d 204, 207 (Tex. 2009) (orig. proceeding); *In re* Labatt Food Serv., L.P., 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding); *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding).

77. *See In re* E.I. Du Pont De Nemours & Co., 289 S.W.3d 861, 861–62 (Tex. 2009) (orig. proceeding) (holding trial court abused its discretion without discussing whether the abuse was clear); *In re* Van Waters & Rogers, Inc., 145 S.W.3d 203, 210 (Tex. 2004) (orig. proceeding) (concluding there was an abuse of discretion without finding clear error). Of note, the court in *Van Waters* granted mandamus relief in a per curiam opinion, 145 S.W.3d at 206, while the court in *Du Pont* granted mandamus relief without oral argument, 289 S.W.3d at 862. The court may not have described the trial court's abuse of discretion as "clear," but the procedural posture and relief granted suggest a contrary position.

78. *E.g.*, *Goode*, 943 S.W.2d at 446 (noting that Texas has used the "abuse of discretion" standard in reviewing various trial court decisions without any mention of the abuse being "clear"). Many courts, however, will describe the trial court's discretion as "broad," which raises many of the same concerns as those raised here regarding the necessity and usefulness of any adjective describing a court's discretion. *See Columbia*, 290 S.W.3d at 210 (observing a trial court's historically broad discretion to grant a new trial); Perry Homes v. Cull, 258 S.W.3d 580, 598 (Tex. 2008) (describing a trial court's

In a mandamus proceeding, it is clear—no pun intended—that the courts do impose upon relators a more rigorous standard.[79] 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.'"[80] Under this standard, it is not the trial court's error that compels the reviewing court to grant mandamus relief; rather, the extraordinary circumstances of the case compel mandamus relief.[81] This statement of an abuse of discretion seems to blend into the Texas Supreme Court's most recent test for determining whether an adequate remedy at law precludes mandamus relief.[82]

2. Adequate Remedy at Law

Texas courts and commentators alike have struggled to define when an appeal is not adequate for purposes of mandamus relief.[83] In a 1992 decision, *Walker v. Packer*,[84] the Texas

discretion to award fees under the Declaratory Judgment Act as broad).

79. Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding), *overruled in part by Columbia Med. Ctr.*, 290 S.W.3d at 213 (overruling *Johnson*'s holding "that a trial court may, in its discretion, grant a new trial 'in the interest of justice'" because such a "vague explanation ... does not enhance respect for the judiciary or the rule of law, detracts from transparency we strive to achieve in our legal system, and does not sufficiently respect the reasonable expectations of parties and the public"); *In re* Acadia Ins. Co., 279 S.W.3d 777, 779 (Tex. App.—Amarillo 2007, orig. proceeding).

80. 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., Aug. 1985, at 55, 55).

81. *See Prudential*, 148 S.W.3d at 137 (reasoning that whether there is an adequate remedy at law such that mandamus relief is precluded depends upon the particular circumstances of each case); *see also In re* McAllen Med. Ctr., Inc., 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding) (discussing how a cost-benefit analysis of interlocutory review is dependent upon the circumstances of the case rather than the type of case).

82. *See, e.g.*, *McAllen*, 275 S.W.3d at 469 (noting that public and private interests inherent in each case inform whether appeal is adequate).

83. *See id.* at 465, 468 (setting out specific cases where appeal was found to be inadequate for mandamus relief); Richard E. Flint, *The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More "Mile Marker Down the Road of No Return,"* 39 ST. MARY'S L.J. 3, 5–6, 96 n.359 (2007) (describing when an appeal is an inadequate remedy in the context of discovery disputes); William E. Barker, Comment, *The Only Guarantee Is There Are No Guarantees: The Texas Supreme Court's Inability to Establish a Mandamus Standard*, 44 HOUS. L. REV. 703, 709 (2007) (discussing when

Supreme Court seemed to narrow the inadequacy requirement by rejecting authorities that glossed over this element.[85] The court held that appeal was not "inadequate merely because it might involve more delay or cost than mandamus," and it outlined several specific categories in the discovery context where mandamus relief would be appropriate.[86]

The standard announced by *Walker* seemed to work well for two decades until a sharply divided court issued two substantively related cases on the same day in 2004: *In re AIU Insurance Co.*[87] and *In re Prudential Insurance Co. of America*.[88] In *Prudential*, the court appeared to broaden the inadequacy requirement by stating 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."[89]

The court observed that "adequate" defies "comprehensive definition; 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 lower courts."[90] The court noted that mandamus should be reserved for:

> [S]ignificant rulings in exceptional cases [when review] may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed

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appeal is an inadequate remedy entitling parties to mandamus relief).

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

85. *Id.* at 842.

86. *Id.* at 842–44.

87. *In re* AIU Ins. Co., 148 S.W.3d 109 (Tex. 2004) (orig. proceeding).

88. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124 (Tex. 2004) (orig. proceeding). 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. A third, unsigned opinion that issued on September 3, 2004, also suggests that adequacy of appeal is a flexible concept. *See In re* Van Waters & Rogers, Inc., 145 S.W.3d 203, 211 (Tex. 2004) (orig. proceeding) (holding in a per curiam opinion that mandamus relief is not typically available for a trial court's consolidation order, but nonetheless granting relief from one given the extraordinary circumstances present in the case). *See generally* Pamela Stanton Baron, *Texas Supreme Court Docket Analysis: September 1, 2010*, *in* STATE BAR OF TEX., 24TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE, ch. 3, at 8 (2010) (explaining that per curiam opinions require at least six votes).

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

90. *Id.*

> 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.[91]

In the wake of this broad language, some commentators expressed a concern the courts would be flooded with mandamus proceedings, which did not materialize at that time.[92]

Four years later, in its 2008 *McAllen* opinion,[93] the supreme court instructed that "[w]hether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of interlocutory review. As this balance depends heavily on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories."[94] The court insisted *Prudential*'s balancing test should not "entangle appellate courts in incidental trial court rulings any more than *Walker*'s *ad hoc* categorical approach."[95] According to the court, its balancing analysis "merely recognizes that the adequacy of an appeal depends on the facts involved in each case."[96] Similarly, whether the legislature has determined that a type of order is subject to interlocutory appeal is not dispositive in a case-by-case analysis.[97]

In *McAllen*, a hospital sought mandamus relief when the trial court denied its motion to dismiss based on the plaintiffs' failure to

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91. *Id.*

92. *See* Jerry D. Bullard, *Mandamus in a Post*-Prudential *World*, *in* S. TEX. COLL. OF LAW: CIVIL APPEALS FOR TRIAL LAWYERS, tab H, at H-9 (2006) ("[A]lthough the analysis is still continuing, it does not appear that *Prudential* has had a significant effect on mandamus jurisprudence"); Richard E. Flint, *The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More "Mile Marker Down the Road of No Return,"* 39 ST. MARY'S L.J. 3, 143–45 (2007) (predicting a significant impact flowing from *Prudential*); Reagan W. Simpson & Aditi R. Dravid, *Mandamus Update: The Aftermath of* Prudential*: Much Ado About Nothing?*, *in* STATE BAR OF TEX., 21ST ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE, ch. 22, at 1 (2007) (explaining that the impact of *Prudential*'s more lenient mandamus standards has been mild despite predictions to the contrary).

93. *In re* McAllen Med. Ctr., Inc., 275 S.W.3d 458 (Tex. 2008) (orig. proceeding).

94. *Id.* at 464 (internal citations omitted).

95. *Id.* at 469.

96. *Id.*

97. *See In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P., 290 S.W.3d 204, 209 (Tex. 2009) (orig. proceeding) (granting mandamus relief to set aside motion for new trial despite the fact the legislature had repealed a law allowing appeal of these orders).

file expert reports from a qualified expert as required by statute.[98] The failure to dismiss was contrary to the legislative findings about a crisis in healthcare that could be addressed by requiring expert reports shortly after filing suit.[99] With this background, the Texas Supreme Court was willing to grant the hospital's mandamus petition despite previously denying similar petitions.[100] The court cautioned against automatic mandamus relief in future cases, noting a number of factors that might defeat mandamus relief.[101]

One year after *McAllen*, the court revisited another category of cases where it had previously held a trial court's use of discretion was not reviewable.[102] In *In re Columbia Medical Center of Las Colinas, L.P.*,[103] a sharply divided court concluded that "trial courts must give more explanation than 'in the interest of justice' for setting aside a jury verdict."[104] On its face, this ruling seems limited to the rare orders granting a new trial in the interest of justice.[105] However, it appears that the number of mandamus proceedings being filed in appellate courts has expanded in light of *Columbia, McAllen,* and the supreme court's willingness to find appeal inadequate to categories of cases not previously subject to mandamus review.[106] The flood of mandamus cases that was

98. *McAllen*, 275 S.W.3d at 462. See Part IV(H)(4) for more information about this form of dismissal.

99. *McAllen*, 275 S.W.3d at 461, 469.

100. *Id.* at 470 (Wainwright, J., dissenting).

101. *Id.* at 467; *see also In re* Gladewater Healthcare Ctr., 279 S.W.3d 850, 852–53 (Tex. App.—Texarkana 2009, orig. proceeding) (denying mandamus relief from an order denying a motion to dismiss because, on the facts of the case, appeal would be an adequate remedy).

102. *Columbia Med. Ctr.*, 290 S.W.3d at 213. *But see* Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 916 (Tex. 1985) (orig. proceeding) (holding that a trial court does not abuse its discretion by granting a motion for new trial without explication of its finding when doing so is "in the interest of justice"), *overruled in part by Columbia Med. Ctr.*, 290 S.W.3d at 213 (noting that a trial court's granting of a new trial "in the interests of justice" does not further confidence, transparency, and the goals of the judiciary).

103. *Columbia Med. Ctr.*, 290 S.W.3d 204 (Tex. 2009) (orig. proceeding) (5–4 decision).

104. *Id.* at 206. The dissent seemed to agree with the basic idea that explanations for granting new trials in the interest of justice were preferable to no explanations, but the dissent rejected adopting such "a rule by judicial fiat on interlocutory review." *Id.* at 215 (O'Neill, J., dissenting, joined by Jefferson, C.J., & Medina & Green, JJ.).

105. *Id.* at 206.

106. Kurt H. Kuhn, *Mandamus Is Not a Four-Letter Word, in* UNIV. OF TEX. SCH. OF LAW, 18TH ANNUAL CONFERENCE ON STATE & FEDERAL APPEALS, at 1, 8–10 (2008) (collecting statistics about the number of mandamus filings in Texas appellate courts,

anticipated with *Prudential* has apparently arrived.[107]

The history of mandamus proceedings in Texas shows that categorizing orders for purposes of mandamus relief may make it easier to dispose of these cases, but such categorization oversimplifies the role of the appellate advocate and ignores the reality that each case is different.[108] Regardless of the type of order challenged in a mandamus proceeding, appellate advocates should explain their rationale for seeking extraordinary relief,[109] and appellate courts should likewise articulate their rationale for granting it.[110] For example, it is often said that if an order is void, the relator need not show the lack of an adequate appellate remedy.[111] It is probably more accurate in light of recent precedent to say that when an order is void, appeal is inadequate because the potential waste of party and judicial resources weighs in favor of mandamus relief.[112]

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which are not publically available from the Texas Office of Court Administration). At the very least, we now know that orders granting new trials in the interest of justice should provide detailed explanations. *Columbia*, 290 S.W.3d at 206. It remains to be seen whether orders containing detailed explanations may be subject to mandamus relief and, if so, whether such orders will be subject to an abuse of discretion standard of review or a sufficiency standard.

107. Statistics from the Fourth Court of Appeals indicate there were ninety mandamus filings in fiscal year 2008 and 126 in fiscal year 2009. Similarly, the Thirteenth Court of Appeals reported 103 mandamus filings in fiscal year 2008 and 125 in fiscal year 2009. Yet during the last several years, the overall number of civil appeals filed has decreased. Phylis J. Speedlin, Justice, Fourth Court of Appeals, Address at the San Antonio Bar Appellate Section Luncheon (Sept. 17, 2010) (handouts on file with the St. Mary's Law Journal).

108. *See In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136–37 (Tex. 2004) (orig. proceeding) (explaining why categorization must give way to relevant circumstances in each case).

109. *See In re* Acadia Ins. Co., 279 S.W.3d 777, 779 (Tex. App.—Amarillo 2007, orig. proceeding) (recognizing it is complainant's burden to establish how the trial court was unreasonable or arbitrary in its decision).

110. *See Columbia Med. Ctr.*, 290 S.W.3d at 206 (acknowledging that appellate courts should explain their rulings).

111. *See In re* Sw. Bell Tel. Co., 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (holding it unnecessary for relator to show inadequate remedy on appeal when court's order was void); *In re* Union Pac. Res. Co., 969 S.W.2d 427, 428 (Tex. 1998) (orig. proceeding) (pointing out that an order issued by a judge who refused to recuse himself when he was constitutionally prohibited from presiding over the trial entitled relator to mandamus without necessity of showing there was no adequate appellate remedy).

112. *See* Dunn v. Street, 938 S.W.2d 33, 35 (Tex. 1997) (orig. proceeding) (reasoning that a visiting judge's void order could result in unnecessary incarceration for the relator); Buttery v. Betts, 422 S.W.2d 149, 151 (Tex. 1967) (orig. proceeding) (holding that relators were entitled to mandamus relief without resorting to "needless retrial and an appeal").

D. *The Sliding Scale of Abuse of Discretion*

As this Article illustrates, a trial judge's discretion may be applied to scores of situations and in many different ways. Some trial court decisions are inherently discretionary,[113] while others involve construction of rules or statutes and the consideration of facts that may be hotly contested.[114] 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.[115] Other times, reviewing courts refer to a "clear" or "manifest" abuse of discretion.[116] 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 one hundred times zero equals zero. In either situation, the trial court abused its discretion—whether a "clear" or "manifest" abuse or just an "abuse."

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 by 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

113. *See* Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985) (orig. proceeding) (reiterating that matters of true discretion lie solely with the trial court), *overruled in part by Columbia Med. Ctr.*, 290 S.W.3d at 213 (recognizing a trial court's discretion, but holding that a trial court must give a more informative reason for granting a new trial than simply "in the interest of justice").

114. *See In re* McAllen Med. Ctr., Inc., 275 S.W.3d 458, 467 (Tex. 2008) (orig. proceeding) (holding mandamus proper where trial court abused its discretion for failing to follow a statute).

115. *E.g.*, Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex. 1997) (utilizing the traditional abuse of discretion standard in an appeal).

116. *See* City of Dallas v. Vanesko, 189 S.W.3d 769, 771 (Tex. 2006) (holding that the standard of review in a zoning case requires a "clear" abuse of discretion before reversing a zoning board's decision); Equitable Gen. Ins. Co. of Tex. v. Yates, 684 S.W.2d 669, 670 (Tex. 1984) (observing that the trial court's ruling on a motion for new trial will not be revised absent a "manifest abuse of discretion").

or limitations.[117] As Professor Rosenberg once observed, "To 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."[118]

III. SUFFICIENCY OF THE EVIDENCE

The standard of review for sufficiency of the evidence is typically considered to apply following a trial on the merits to the ultimate trier of fact, whether that is the jury or the judge. This standard may also apply to pretrial rulings and may have specialized applications, as in family law matters. The standard has a long, rich history in Texas jurisprudence, on both sides of the civil and criminal dockets, which should be considered by an appellate advocate crafting a sufficiency challenge.

A. *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. In addition to the "legal sufficiency" standard employed in most jurisdictions, Texas is one of only three jurisdictions (in addition to New York and the U.S. military courts) that also utilizes the less deferential "factual sufficiency" standard, which permits the court to consider the weight of the evidence.[119]

The standards and scope of legal and factual sufficiency review have not remained static, but have slowly evolved. In particular, commentators continue to assess the impact of the Texas Supreme Court's 2005 decision in *City of Keller v. Wilson*,[120] which re-

117. *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").

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

119. *See* 10 U.S.C. § 866 (c) (2006) ("The [Military] Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority . . . as it finds correct in law and fact . . . . In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."); People v. Bleakley, 508 N.E.2d 672, 673 (N.Y. 1987) (noting the lower court's error in failing to conduct statutorily required factual sufficiency review).

120. City of Keller v. Wilson, 168 S.W.3d 802 (Tex. 2005).

evaluated the standard for legal sufficiency challenges in civil cases.[121] After significant debate, the Court of Criminal Appeals recently eliminated the factual sufficiency standard of review "in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt."[122]

1. Legal Insufficiency

As discussed throughout this Article, at various stages before, during, or after a trial, a trial court may be asked to rule on the legal sufficiency of the evidence.[123] If properly preserved,[124] challenges to the legal sufficiency of the evidence for a jury's verdict may also be brought as a point of error or issue in the

121. *See generally* William V. Dorsaneo, III, *Evolving Standards of Evidentiary Review: Revising the Scope of Review*, 47 S. TEX. L. REV. 225, 240–41 (2005) (illustrating differences between inclusive and exclusive standards of review); W. Wendell Hall & Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539 (2008) (describing the standards of review in Texas as they pertain to the roles of the judge and jury in both civil and criminal trials); W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 234–47 (2006) (discussing legal sufficiency challenges in light of the Texas Supreme Court decision in *City of Keller*); W. Wendell Hall, *Standards of Review in Texas*, 34 ST. MARY'S L.J. 1, 165–66 (2002) (suggesting contradictions in Texas case law with regard to the jury's role in determining sufficiency of the evidence); Lonny S. Hoffman, Harmar *and the Ever-Expanding Scope of Legal Sufficiency Review*, 49 S. TEX. L. REV. 611, 612 (2008) (arguing the court's *Harmer* decision "is an unwelcome attack on the finality of jury verdicts"); David E. Keltner et al., *No Evidence Review: The Scope and Standard of Legal Sufficiency Review After* City of Keller, *in* STATE BAR OF TEX., 22ND ANNUAL ADVANCED CIVIL APP. PRACTICE COURSE, ch. 16 (2008) (discussing how *City of Keller* defined exclusive and inclusive standards of review); Thomas R. Phillips & Martha G. Newton, *Evolving Notions of "No Evidence," in* STATE BAR OF TEX., PRACTICE BEFORE THE TEXAS SUPREME COURT, ch. 12.3 (2007) (interpreting recent Texas Supreme Court decisions regarding the no evidence standard of review).

122. Brooks v. State, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). *See generally* W. Wendell Hall & Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539, 580 (2008) (noting the court in *Watson* almost "ended the use of factual sufficiency review in the bulk of cases").

123. *See infra* Part IV(Y) (summary judgment); Part V(I) (directed verdict); Part VI(B) (motion to disregard); Part VI(C) (JNOV).

124. In a jury trial, challenges to the legal insufficiency of the evidence are preserved by: "(1) a motion for instructed verdict, (2) a motion for judgment notwithstanding the verdict, (3) an objection to the submission of the issue to the jury, (4) a motion to disregard the jury's answer to a vital fact issue, or (5) a motion for new trial" specifically raising the complaint. 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).

courts of appeals and the Texas Supreme Court.[125]

a. Pre-*City of Keller* Standards

Under the "traditional" statement of the standard of review, challenges to the legal sufficiency of the evidence must be sustained if the record reflects one of the following:

> "(a) there 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 a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence establishes conclusively the opposite of [a] vital fact."[126]

The "scintilla rule" is often referred to as a "no evidence" challenge.[127] The reviewing court considers only the evidence and inferences that tend to support the finding and disregards all contrary evidence and inferences (the "exclusive" standard).[128] If the evidence "'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.'"[129] "More than a scintilla of evidence exists where the evidence supporting the finding, as a whole, 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'"[130]

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125. *See* Choate v. San Antonio & A. P. Ry. Co., 91 Tex. 406, 44 S.W. 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).

126. Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 903 (Tex. 2004) (quoting Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997)); *see* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 366 (1960) (declaring the classic formulation of the test for legal sufficiency).

127. *See* Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 601 (Tex. 2004) (holding that when evidence is little more than a scintilla, it is effectively no evidence); Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995) (concluding expert's testimony was no evidence of a causal connection between Polysporin spray and plaintiff's injury because there was less than a scintilla of evidence to support that causal connection).

128. *Volkswagen*, 159 S.W.3d at 903; Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 254 (Tex. 2004), *abrogated by* Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008); Bradford v. Vento, 48 S.W.3d 749, 754 (Tex. 2001).

129. *Ford Motor Co.*, 135 S.W.3d at 601 (quoting Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983)).

130. *Volkswagen*, 159 S.W.3d at 911 (quoting Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 234 (Tex. 2004)); *Burroughs Wellcome*, 907 S.W.2d at 499 (quoting Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 25 (Tex. 1994)); *cf.* BLACK'S LAW DICTIONARY 1345 (6th ed. 1990) (defining "scintilla" as "[a] spark; a remaining particle; a

"When a party attacks the legal sufficiency of an adverse finding on an issue on which she has the burden of proof, she must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue."[131] According to the court in *Dow Chemical Co. v. Francis*:[132]

> In reviewing a "matter of law" challenge, the reviewing court must first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary. 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. The point of error should be sustained only if the contrary proposition is conclusively established.[133]

Historically, in both scintilla rule and matter of law cases, one of the steps involved is reviewing the record by disregarding contrary evidence.[134] In the late nineties, however, the Texas Supreme Court appeared to reformulate the standard and scope of review to depart from the traditional "exclusive" standard for legal sufficiency review.[135] In a series of cases, the court appeared to adopt instead an "inclusive" standard, which required a reviewing court to consider *all of the record* 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."[136] But, in 2002, a unanimous supreme court

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trifle; the least particle"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2033 (1966) (defining "scintilla" as "a barely perceptible manifestation" and "the slightest particle or trace").

131. Dow Chem. Co. v. Francis, 46 S.W.3d 237, 241 (Tex. 2001).

132. *Dow Chem. Co.*, 46 S.W.3d 237 (Tex. 2001).

133. *Id.* at 241 (citations omitted).

134. *E.g.*, St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 519–20 (Tex. 2002) (plurality opinion) (confirming that an appellate court should disregard evidence contrary to the finding at issue).

135. *Compare* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 366 (1960) (setting out the classic formulation for testing for legal sufficiency), *with* William V. Dorsaneo, III, *Evolving Standards of Evidentiary Review: Revising the Scope of Review*, 47 S. TEX. L. REV. 225, 240–41 (2005) (discussing a possible reformulation under *City of Keller*).

136. *See* Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997) (proclaiming the requirement for reviewing all of the evidence for a no evidence challenge on appeal); *accord St. Joseph Hosp.*, 94 S.W.3d at 519; Assoc. Indem. Corp. v. CAT Contracting, Inc., 964 S.W.2d 276, 285–86 (Tex. 1998); State Farm Lloyds Ins. Co. v. Maldonado, 963 S.W.2d 38, 40 (Tex. 1998); Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 48 (Tex. 1998).

reaffirmed the "exclusive" scope of review and held: "We emphasize, however, that under a legal-sufficiency review, we must disregard all evidence and inferences contrary to the jury's finding."[137] While the supreme court seemed to have returned to the traditional statement of the scope of review (considering only the evidence and inferences that support the jury's finding, or the exclusive standard), it did so without discussing the two lines of supreme court authority.

b. *City of Keller v. Wilson*: A New Paradigm?

In *City of Keller*, the Texas Supreme Court recognized both of the different scopes of review applicable to no evidence cases.[138] The court held, however, 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,[139] and the difference between the inclusive and exclusive standards was "more semantic than real."[140] 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:"[141]

> The 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 verdict, legal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.[142]

"A reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within this zone of

137. Lenz v. Lenz, 79 S.W.3d 10, 19 (Tex. 2002).

138. *See* City of Keller v. Wilson, 168 S.W.3d 802, 809 (Tex. 2005) (acknowledging that both "exclusive" and "inclusive" standards for review of legal sufficiency have been used).

139. *Id.* at 821–22.

140. *See id.* at 825–27 (discussing the holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150–51 (2000), and noting that the different scopes of review are "more semantic than real" and that reviewing courts should review all of the evidence in the record).

141. *Id.* at 822.

142. *Id.* at 827.

reasonable disagreement."[143]

The supreme court did not appear to view *City of Keller* as a sharp change in doctrine, but rather an incremental change that reflected the standards of review in practice.[144] The court stated: "[T]he traditional rule in Texas has never been that appellate courts must reject contrary evidence in every no-evidence review."[145] The traditional scope of review does not disregard contrary evidence if: (1) there is no favorable evidence;[146] (2) contrary evidence renders supporting evidence incompetent;[147] or (3) "the evidence establishes conclusively the opposite of [a] vital fact."[148]

i. Types of Evidence that Cannot Be Disregarded

In *City of Keller*, the court outlined several kinds of evidence that cannot be disregarded when reviewing the legal sufficiency of the evidence:[149]

Contextual evidence. The court cited the following as examples: defamation cases, where the entire publication must be considered;[150] contract cases, where the entire contract is reviewed;[151] and intentional infliction of emotional distress cases, where "'the context and the relationship between the parties'" is considered.[152] Accordingly, as noted by the court:

143. *City of Keller*, 168 S.W.3d at 822 (citing William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 517–20 (1991)).

144. *Id.* at 827–28; *see also* Thomas R. Phillips & Martha G. Newton, *Evolving Notions of "No Evidence," in* STATE BAR OF TEX., PRACTICE BEFORE THE TEXAS SUPREME COURT, ch. 12.3, at 6 (2007) (suggesting that the "[t]he uproar over the . . . *City of Keller* decision[] has been disproportional to the incremental nature of [the] opinion[]," as *City of Keller* was "more about clarifying existing law than inventing new law").

145. *City of Keller*, 168 S.W.3d at 810.

146. *See id.* (noting the court must sustain a no evidence point when there is a "complete absence of evidence of a vital fact").

147. *See id.* (recognizing that the court must also sustain a no evidence point when "the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact").

148. City of Keller v. Wilson, 168 S.W.3d 802, 810–11 (Tex. 2005).

149. *See id.* at 811–12 (describing when courts may not disregard contrary evidence).

150. *Id.* at 811.

151. *Id.*

152. *Id.* at 811–12 (quoting Tiller v. McLure, 121 S.W.3d 709, 714 (Tex. 2003)).

> [I]f 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.[153]

Competency evidence. Incompetent evidence has always been "insufficient to support a judgment, even if admitted without objection."[154] The court in *City of Keller* stated that "evidence showing it to be incompetent evidence cannot be disregarded, even if the result is contrary to the verdict."[155] For instance, "if an eyewitness's location renders a clear view of an accident 'physically impossible,' it is no evidence of what occurred," regardless of the witness's testimony to the contrary.[156] This rule also applies "when expert testimony is required[;] lay evidence supporting liability is legally insufficient."[157] Additionally, when an expert's opinion fails to meet the reliability standards, a review of the expert's testimony cannot disregard his testimony that demonstrates that his opinion does not meet the reliability standards.[158] As the court observed, the evidence at issue might be *some* evidence in isolation, but it is *no* evidence when contrary evidence demonstrates that it is incompetent.[159]

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.'"[160] Again, the court provided examples: (1) one fact-finder "might infer from [grocery] cart tracks in spilled macaroni salad that it had been on the floor a long time, but" another might conclude that it just

153. *City of Keller*, 168 S.W.3d at 812.

154. *Id.* at 812.

155. *Id.*

156. *Id.* (quoting Tex. & Pac. Ry. Co. v. Ball, 96 Tex. 622, 75 S.W. 4, 6 (1903)).

157. *Id.*

158. *See* City of Keller v. Wilson, 168 S.W.3d 802, 813 (Tex. 2005) (explaining that "review of an expert's damage estimates cannot disregard the expert's admission on cross-examination that none can be verified"); *see also* Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 714, 720 (Tex. 1997) (adhering to the notion that courts should examine more than an expert's bare opinion to determine if the evidence is reliable).

159. *See City of Keller*, 168 S.W.3d at 813 (recognizing that evidence may seem to be competent when viewed alone, but not when viewed in light of other evidence).

160. *Id.* at 813–14 (quoting Lozano v. Lozano, 52 S.W.3d 141, 167 (Tex. 2000)).

occurred;[161] and (2) when there is an "injury or death[,] ... [no eyewitnesses,] and only meager circumstantial evidence" suggesting an explanation, the court "cannot disregard other meager evidence of equally likely causes."[162] Therefore, "when the circumstantial evidence of a vital fact is meager, [the] reviewing court must ... [review] all the circumstantial evidence[] and competing inferences," not just the favorable evidence.[163]

Conclusive evidence. The court noted Justice Calvert's observation that, in a no evidence review, "Texas courts ... do not disregard contrary evidence that conclusively establishes the opposite of a vital fact."[164] There are many forms of conclusive evidence.[165] One form of conclusive evidence is found when the evidence is undisputed. As the court explained, a reviewing court "cannot 'disregard undisputed evidence that allows of only one logical inference,'"[166] and "[b]y definition ... [leaves] reasonable jurors [to] reach only one conclusion from it."[167] The court then noted that "undisputed contrary evidence [generally] becomes conclusive ... when it concerns physical facts that cannot be denied."[168] The court provided the following examples: (1) "no evidence supports an impaired-access claim if it is undisputed that access remains along 90 percent of a tract's frontage";[169] (2) "[e]vidence that a buyer believed a product had been repaired is conclusively negated by a[] ... letter to the contrary";[170] and (3) "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."[171] Undisputed conclusive evidence may also be conclusive when a party admits that the evidence of a vital fact is true.[172]

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161. *Id.* at 814.
162. *Id.*
163. *Id.*
164. *City of Keller*, 168 S.W.3d at 814 (citing Robert W. Calvert, *"No Evidence" & "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 363–64 (1960)).
165. *See id.* (noting that there is more than one type of conclusive evidence).
166. *Id.* (quoting St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 519–20 (Tex. 2002) (plurality opinion)).
167. *Id.*
168. City of Keller v. Wilson, 168 S.W.3d 802, 815 (Tex. 2005).
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*

The second form of conclusive evidence arises when "the evidence *is* disputed."[173] 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."[174] For example, a mother may testify that she had sex with only one man during the relevant time that she became pregnant, even though the purported father's "blood test[] conclusively proved he was not the . . . father" of the child.[175] Because the blood test is conclusive, "there [would be] no evidence to support the paternity verdict" against the purported father.[176] The court concluded that while "reviewing courts [cannot] substitut[e] their opinions on credibility for those of the jurors, . . . jurors [likewise cannot] substitut[e] their opinions for [the] undisputed truth."[177]

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.[178]

Consciousness evidence. In cases involving an issue of "what a party knew or why it took a" particular action, such as assessing conscious indifference, bad faith denial of insurance coverage, employment discrimination, the right to governmental immunity, and the running of limitations under the discovery rule, the reviewing court must consider all of the evidence, not just the evidence favoring the verdict, in reviewing those judgments.[179]

ii. Types of Evidence that Must Be Disregarded

In *City of Keller*, the court also noted three kinds of evidence that *must* be disregarded:[180]

Credibility evidence. Because "[j]urors are the sole judges of the credibility of the witnesses and the weight to give their

173. *City of Keller*, 168 S.W.3d at 816.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 816–17.
178. City of Keller v. Wilson, 168 S.W.3d 802, 817 (Tex. 2005).
179. *Id.* at 817–18.
180. *See id.* at 818–21 (describing evidence that should always be disregarded).

testimony," jurors are free "to believe one witness and disbelieve another," and "[r]eviewing courts [may not] impose their own opinions to the contrary."[181] Accordingly, "reviewing courts must assume [that] jurors decided all [credibility questions] in favor of the verdict if reasonable human beings could do so."[182] The court emphasized "'[t]he jury's decisions regarding credibility must be reasonable.'"[183] For example, "[j]urors cannot [disregard] undisputed testimony that is ... free from contradictions and inconsistencies, and could have been readily controverted."[184] Similarly, jurors "are not free to believe testimony that is conclusively negated by undisputed facts."[185] However, if "reasonable jurors could decide what testimony to [disbelieve, the] reviewing court must assume they did so in favor of their verdict," and affirm the jury's finding.[186]

Conflicting evidence. The court noted that it is within the jury's province "to resolve conflicts in the evidence."[187] 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.[188] 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."[189]

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.[190] Therefore, when the court reviews "all the evidence in a light [most] favorable to the [jury's] verdict," the reviewing court "must

181. *Id.* at 819.
182. *Id.*
183. *See City of Keller*, 168 S.W.3d at 820 (quoting Bentley v. Bunton (*Bentley I*), 94 S.W.3d 561, 599 (Tex. 2002)) (reiterating the reasonableness standard for jury decisions regarding credibility).
184. *Id.*
185. *Id.* at 820.
186. *Id.*
187. *Id.*
188. City of Keller v. Wilson, 168 S.W.3d 802, 820 (Tex. 2005).
189. *Id.*
190. *Id.*

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."[191]

iii. The Reasonable Verdict Standard

Despite the court's detailed tour of evidence that cannot be disregarded and evidence that must be disregarded, 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.*[192] The impact of *City of Keller*'s reformulation is readily apparent in the manner in which legal sufficiency standards are commonly stated in opinions.[193] Additionally, in its emphasis on the reasonable juror standard, *City of Keller* appears to bring Texas more closely in line with federal standards for legal sufficiency review.[194] The test is not so much whether there is a

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191. *Id.*

192. *See generally id.* at 807–30 (Tex. 2005) (using the word "reasonable" forty-two times and the phrase "reasonable jurors" fifteen times).

193. For example, in one case the Texas Supreme Court stated the standard of review simply as "[w]e review a summary judgment for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions." Wal-Mart Stores, Inc. v. Spates, 186 S.W.3d 566, 568 (Tex. 2006). *City of Keller*'s influence is also apparent in the many appellate court opinions citing to it. *See* Envtl. Procedures, Inc. v. Guidry, 282 S.W.3d 602, 626 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (applying the reasonable and fair-minded juror standard established in *City of Keller*); Canal Ins. Co. v. Hopkins, 238 S.W.3d 549, 557 (Tex. App.—Tyler 2007, pet. denied) ("When reviewing a finding of fact for legal sufficiency, we may set aside a finding of fact only if the evidence at trial would not enable a reasonable and fair minded finder of fact to make the finding under review."); Rosenblatt v. Freedom Life Ins. Co. of Am., 240 S.W.3d 315, 319 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("In applying the legal-sufficiency standard, we must credit evidence that supports the judgment if reasonable jurors could credit that evidence, and we must disregard contrary evidence unless reasonable jurors could not disregard that evidence.").

194. *See* W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 253–55 (2006) (comparing the comprehensive standard of review adopted by the Fifth Circuit and the standard of review in Texas). In the Fifth Circuit's 1969 decision in *Boeing Co. v. Shipman*, 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), the court adopted the inclusive, whole record approach to review of jury verdicts:

> [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

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.[195] 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 court finds that "reasonable and fair-minded people" could not have reached the verdict which is the subject of the appeal.[196]

While the Texas Supreme Court has not yet repudiated the traditional "scintilla rule" or the "matter of law" rule, *City of Keller*'s use of the reasonable and fair-minded juror standard seems likely over time to erode those standards and the frame of reference through which a judge is required to consider the record evidence. This raises the continuing possibility that the appellate courts may not as rigorously separate out evidence and may simply ask more generally whether a verdict is "reasonable." This poses the problem that the appellate courts may weigh conflicting evidence and inferences on legal sufficiency review. But, unlike most jurisdictions, Texas has a separate standard of review that permits the courts of appeal to engage in just such weighing of the evidence.

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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.

Id. at 374. The key inquiry in both *City of Keller* and *Shipman* was whether fair-minded jurors could render a verdict on the evidence presented at trial. *See* William V. Dorsaneo, III, *Judges, Juries and Reviewing Courts*, 53 SMU L. REV. 1497, 1504 (2000) (noting that *Shipman* does not explain how the analytical process of reviewing all of the evidence "'in the light and with all reasonable inferences most favorable to the party'" works (quoting *Shipman*, 411 F.2d at 374)).

195. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (affirming the notion that the true inquiry is whether a fair-minded jury could find for a party by utilizing the evidence presented).

196. *City of Keller*, 168 S.W.3d at 822.

2. Factual Insufficiency

A "[f]actual sufficiency [challenge] concede[s] conflicting evidence on an issue" (which made it appropriate for the jury to consider), "yet maintain[s] that the evidence against the jury's finding is so great," or the evidence for the jury's finding is so weak, "as to make the finding erroneous."[197] Constitutionally, only the intermediate courts of appeals have jurisdiction to review for factual sufficiency.[198]

When reviewing a challenge to the factual sufficiency of the evidence in a civil case, "the court of appeals must weigh *all* of the evidence in the record."[199] The court "must keep[] in mind that it is the jury's role, not [the court's], to judge the credibility of the evidence, to assign the weight to be given to testimony, and to resolve inconsistencies within or conflicts among the witnesses' testimony."[200] "[T]he court may not pass upon the witnesses' credibility or substitute its judgment for that of the jury [or fact finder], even if the evidence would clearly support a different result."[201] A court of appeals must "detail the evidence and

197. *See* Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied) (explaining the factual sufficiency standard).

198. TEX. CONST. art. V, § 6.

199. Ortiz v. Jones, 917 S.W.2d 770, 772 (Tex. 1996); *see also* Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989) (emphasizing that in a factual sufficiency review the court of appeals is required to consider all evidence in the record, not just evidence contrary to the verdict); Lofton v. Tex. Brine Corp. (*Lofton I*), 720 S.W.2d 804, 805 (Tex. 1986) (holding that the courts of appeals "must review all of the evidence" in their decision on a review of factual sufficiency); Burnett v. Motyka, 610 S.W.2d 735, 736 (Tex. 1980) (remanding the case back to the court of appeals for its failure to "consider and weigh all the evidence" in a factual sufficiency review).

200. Walker v. Ricks, 101 S.W.3d 740, 749 (Tex. App.—Corpus Christi 2003, no pet.); *see also* Corpus Christi Area Teachers Credit Union v. Hernandez, 814 S.W.2d 195, 197 (Tex. App.—San Antonio 1991, no writ) ("'In considering an "insufficient evidence" point, we must remain cognizant of the fact that it is for the jury, as the trier of fact, to judge the credibility of the witnesses, to assign the weight to be given their testimony, and to resolve any conflicts or inconsistencies in the testimony.'" (quoting Tex. Emp'rs' Ins. Ass'n v. Jackson, 719 S.W.2d 245, 249–50 (Tex. App.—El Paso 1986, writ ref'd n.r.e.))).

201. Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 407 (Tex. 1998); *see also* Pool v. Ford Motor Co., 715 S.W.2d 629, 634 (Tex. 1986) (disapproving of decisions by appellate courts that merely substituted their own judgment for that of the jury without detailing the courts' mental processes in arriving at their opinions). Confusion has arisen regarding the validity of *Pool*. The Eighth Court of Appeals has stated that the Texas Supreme Court's decision in *Pool* was overruled on other grounds by *Crown Life Ins. Co. v. Casteel*. Rusty's Weigh Scales & Serv., Inc. v. N. Tex. Scales, Inc., 314 S.W.3d 105, 110 (Tex. App.—El Paso 2010, no pet.) (citing Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986)). However, *Crown Life* overruled the holding of the Sixth Court of Appeals in *Ford*

clearly state why the jury's finding is factually insufficient" when reversing a jury verdict,[202] but it need not do so when affirming a jury verdict.[203] However, 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."[204]

"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."[205]

a. 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.[206] In reviewing an insufficiency of the evidence challenge, the court of appeals must first consider, weigh, and examine all of the evidence

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Motor Co. v. Pool, 688 S.W.2d 879 (Tex. App.—Texarkana 1985), not the Supreme Court's holding in *Ford Motor Co. v. Pool*, 715 S.W.2d 629 (Tex. 1986). Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 389 (Tex. 2000). Therefore, the Texas Supreme Court's holding in *Pool* is still "good law."

202. *See* Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986) (requiring the court of appeals to explain its reasons for reversing a trial court's judgment if the reversal is based on factual insufficiency); *see also* Citizens Nat'l Bank in Waxahachie v. Scott, 195 S.W.3d 94, 96 (Tex. 2006) ("When a court of appeals disturbs the judgment of a lower tribunal, merely saying that the court has reviewed all the evidence and reaching a conclusion contrary to that of the trier of fact is not enough. Instead, the court should explain, with specificity, why it has substituted its judgment for that of the trial court.").

203. *See* Ellis Cnty. State Bank v. Keever, 888 S.W.2d 790, 794 (Tex. 1994) (declining to extend the requirement in *Pool* to cases where the appellate court affirms the trial court's judgment).

204. Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 31 (Tex. 1994); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.011 (West 2008) (providing factors that must be considered in reviewing the damages award).

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

206. *See* Hickey v. Couchman, 797 S.W.2d 103, 109 (Tex. App.—Corpus Christi 1990, writ denied) (indicating that a showing of insufficient evidence is appropriate when the party challenging a finding of fact does not have the burden of proof); *see also Raw Hide*, 766 S.W.2d at 275–76 (explaining that an insufficient evidence point is the appropriate challenge to a jury finding when the attacking party does not have the burden of proof).

that supports and that is contrary to the jury's determination.[207] A court must sustain an insufficient evidence point when 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."[208] The court sets aside the judgment if the evidence is so weak "as to be clearly wrong and unjust."[209]

b. 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 complaining party must demonstrate that "the adverse finding is against the great weight and preponderance of the evidence."[210] In reviewing a challenge that the jury finding is against the "great weight and preponderance of the evidence," the court of appeals must first examine the record to determine if there is some evidence to support the finding.[211] 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 if the great preponderance of the evidence supports its non-existence."[212] Whether the great weight challenge is to a finding or a nonfinding, "[a] court of appeals may reverse and remand a case for new trial [only] if it concludes that the jury's 'failure to find' is against the great weight and preponderance of the evidence."[213]

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207. Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989); *see also* Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 648–49 (Tex. 1988) (detailing the history of the appellate courts' power to review jury verdicts on factual issues); Herbert v. Herbert, 754 S.W.2d 141, 144 (Tex. 1988) (promoting the conclusive ability of appellate courts to make factual sufficiency determinations so long as the correct test is applied in evidentiary review).

208. 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)).

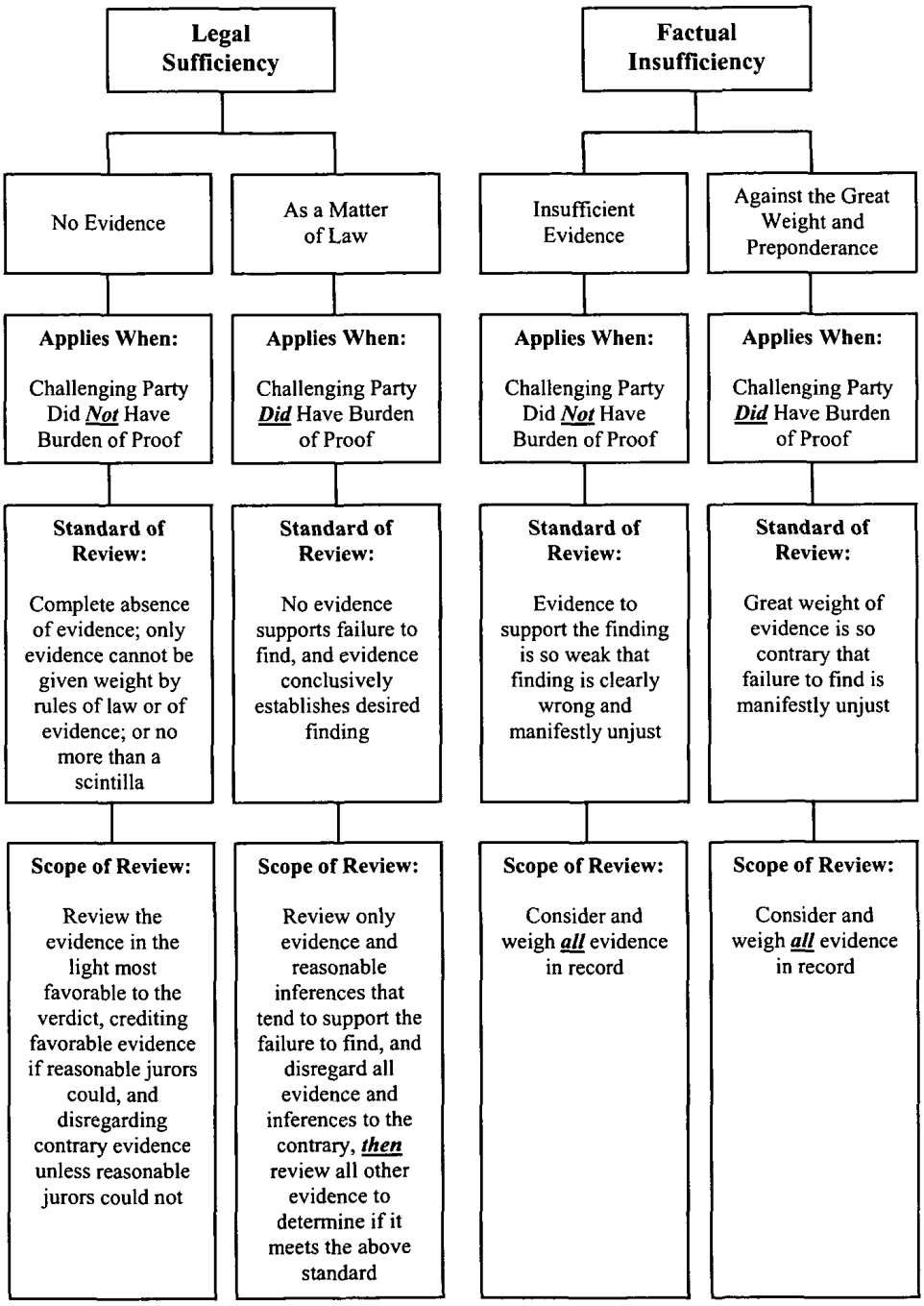
209. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

210. Dow Chem. Co. v. Francis, 46 S.W.3d 237, 242 (Tex. 2001).

211. *Id.* at 241–42.

212. Castillo v. U.S. Fire Ins. Co., 953 S.W.2d 470, 473 (Tex. App.—El Paso 1997, no writ); *see also Dow Chem.*, 46 S.W.3d at 242 ("The court of appeals must consider and weigh all of the evidence, and can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust.").

213. Ames v. Ames, 776 S.W.2d 154, 158 (Tex. 1989).


Legal Sufficiency
Factual Insufficiency
No Evidence
As a Matter of Law
Insufficient Evidence
Against the Great Weight and Preponderance
Applies When:
Challenging Party Did Not Have Burden of Proof
Applies When:
Challenging Party Did Have Burden of Proof
Applies When:
Challenging Party Did Not Have Burden of Proof
Applies When:
Challenging Party Did Have Burden of Proof
Standard of Review:
Complete absence of evidence; only evidence cannot be given weight by rules of law or of evidence; or no more than a scintilla
Standard of Review:
No evidence supports failure to find, and evidence conclusively establishes desired finding
Standard of Review:
Evidence to support the finding is so weak that finding is clearly wrong and manifestly unjust
Standard of Review:
Great weight of evidence is so contrary that failure to find is manifestly unjust
Scope of Review:
Review 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
Scope of Review:
Review only evidence and reasonable inferences that tend to support the failure to find, and disregard all evidence and inferences to the contrary, then review all other evidence to determine if it meets the above standard
Scope of Review:
Consider and weigh all evidence in record
Scope of Review:
Consider and weigh all evidence in record

3. The Development of the Legal and Factual Sufficiency Standards

While *City of Keller* established the standards for legal sufficiency review in Texas, it did not address 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."[214] An ongoing question in the development of legal and factual sufficiency review in Texas is whether these two standards will be applied separately and consistently, or whether *City of Keller*'s "reasonable and fair-minded person" standard will, little by little, subsume factual sufficiency in practice, even if not in doctrine.

a. An Overview of the Constitutional Conflict Between the Right to Trial by Jury and the Court of Appeals' Jurisdiction over Issues of Fact

"Texas is still one of the most jury-deferential states in the United States,"[215] and makes broad use of juries.[216] The Texas

214. TEX. CONST. art. V, § 6.

215. Watson v. State, 204 S.W.3d 404, 429 n.47 (Tex. Crim. App. 2006), *overruled on other grounds by* Brooks v. State, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010); *see also* William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1699 n.3 (1997) ("A hallmark of this entire body of law [regarding legal and factual sufficiency], however, is extraordinary deference to juries.").

216. Texas makes wider uses of jury trials than most jurisdictions. Texas has always permitted a right to a jury trial for cases in equity (which the Seventh Amendment does not require), commitment proceedings for the mentally ill, and disbarment for lawyers. *See* TEX. CONST. art. I, § 15 (stating that "[t]he right of trial by jury shall remain inviolate," but the "[l]egislature may provide for the temporary commitment[] ... of mentally ill persons ... without the necessity of a trial by jury"); TEX. CONST. art. I, § 15-a (noting that the legislature may allow for a waiver of a jury trial in some cases involving commitment of "person[s] of unsound mind," but confirming that despite possible waiver, the "person under inquiry [can] ... demand a trial by jury"); TEX. CONST. art. V, § 10 ("In the trial of *all* causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury ...." (emphasis added)); TEX. GOV'T CODE ANN. § 81.077 (West 2004) (mandating that "[t]he supreme court may not adopt or promulgate any rule abrogating the right of trial by jury of an accused attorney in a disbarment action ...."). Texas also permits sentencing by jury in all criminal trials and forbids the trial judge from commenting on the weight of the evidence. *See* TEX CONST. art. I, § 10 ("In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury."); TEX. CODE CRIM. PROC. ANN. art. 38.05 (West 2006) (forbidding judges from commenting upon the weight of the evidence, and prohibiting a judge from "mak[ing] any remark calculated to convey to the jury his opinion of the case").

Constitution provides that "[t]he right of a jury trial shall remain inviolate" and be available in all cases,[217] and the Texas Supreme Court has cautioned that the "courts must not lightly deprive our people of this right by taking an issue away from the jury."[218] There are express directives in the statutes and rules regarding the roles of judge and jury, requiring trial judges to admonish the jury that they "are the sole judges of the credibility of the witnesses and the weight to be given their testimony."[219]

Unlike most jurisdictions, courts of appeals in Texas are granted jurisdiction over questions of fact.[220] The purpose of this power, as the Texas Supreme Court held more than 100 years ago, "was not to enlarge [the courts of appeals'] 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."[221] The Texas Government Code provides that "[a] judgment of a court of appeals is conclusive on the facts of the case in all civil cases."[222]

In 1951, the Texas Supreme Court established that it might accept jurisdiction, notwithstanding the factual conclusivity clause, to determine if a correct legal standard had been applied by the courts of appeals.[223] Since then, members of the supreme court in several decisions have expressed concern that the court has assumed overly broad power to review fact issues, even though it is constitutionally restricted to legal issues.

In *Pool v. Ford Motor Co.*,[224] the supreme court reaffirmed the courts of appeals' jurisdiction to review cases for factual insufficiency of the evidence,[225] but also held that the supreme court had the authority to review courts of appeals' opinions to determine if the appellate court applied the correct standard of review to the facts.[226] In effect, *Pool* further clarified the supreme

217. TEX. CONST. art. I, §§ 10, 15-a; TEX. CONST. art. V, §§ 10, 13, 17.

218. Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 56 (Tex. 1997).

219. TEX. R. CIV. P. 226a.

220. TEX. CONST. art. V, § 6.

221. Choate v. San Antonio & A.P. Ry. Co., 91 Tex. 406, 44 S.W. 69, 69 (1898).

222. TEX. GOV'T CODE ANN. § 22.225(a) (West 2004).

223. *See In re* King's Estate, 150 Tex. 662, 244 S.W.2d 660, 661–62 (1951) (setting forth the circumstances in which the supreme court may accept jurisdiction to review an appellate order regarding weight of the evidence).

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

225. *See id.* at 633 (determining the correct standard of review and remanding to the court of appeals for application of the proper standard).

226. *See id.* at 634–35 (concluding that the supreme court may take jurisdiction over

court's power 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. Notably, Justice Gonzalez's concurrence expressed a fear that this holding may "be used to allow this court to second guess the courts of appeal[s]."[227]

In *Cropper v. Caterpillar Tractor Co.*,[228] the Texas Supreme Court rejected a challenge to the court of appeals' constitutional obligation to review fact questions, reasoning that the constitutional right to jury trial and the appellate courts' constitutional authority to review fact questions "have peacefully co-existed for almost one hundred and fifty years, and are thoroughly rooted in our constitution and judicial system."[229] 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 so empowered, it was "not prepared to sacrifice either [Constitution provision] for the benefit of the other."[230]

In *Lofton v. Texas Brine Corp.* (*Lofton I*),[231] the conflict appeared again, when the court was called upon to apply *Pool* to a court of appeals' opinion.[232] In *Lofton v. Texas Brine Corp.* (*Lofton II*),[233] a 5–4 decision, the majority "briefly present[ed] a review of why the lower court's [factual sufficiency] analysis [was]

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a final judgment of the court of appeals on a fact question to determine if the appropriate standard was applied).

227. *Id.* at 637 (Gonzalez, J., concurring).

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

229. *Id.* at 652.

230. *Id.*

231. Lofton v. Tex. Brine Corp. (*Lofton I*), 720 S.W.2d 804 (Tex. 1986). In *Lofton I*, the Texas Supreme Court found that the court of appeals failed to apply the proper standard for factual sufficiency by failing to "fully consider" all of the evidence and failing to "clearly state . . . in what regard the contrary evidence greatly outweighs the evidence supporting the jury's verdict." *Id.* at 805. On remand, a divided Fourteenth Court of Appeals again held that the evidence was factually insufficient to support the proximate cause finding. Tex. Brine Corp. v. Lofton, 751 S.W.2d 197 (Tex. App.—Houston [14 Dist.] 1988). However, the Texas Supreme Court again reversed, ruling that the court could permit interested witness testimony to establish the lack of proximate cause as a matter of law, and that the court of appeals was not permitted to "substitute its own judgment for that of the finder of fact" by holding the evidence factually insufficient. Lofton v. Tex. Brine Corp. (*Lofton II*), 777 S.W.2d 384, 387 (Tex. 1989).

232. *See Lofton I*, 720 S.W.2d at 805 (recognizing the standard established in *Pool* that "when reversing a trial court's judgment after concluding the supporting evidence is insufficient, the court of appeals must detail the relevant evidence introduced at trial and clearly state why the jury's finding is factually insufficient").

233. *Lofton II*, 777 S.W.2d 384 (Tex. 1989).

incorrect."[234] Justice Gonzalez's dissent noted that the fear he expressed in *Pool* had been realized in *Lofton II*.[235] As the court of appeals had twice found the evidence factually insufficient, Justice Gonzalez concluded "we have no jurisdiction to review it."[236] He added that the court was "now swamped with requests to second guess the courts of appeals ... to make rulings on sufficiency grounds," as "[t]he losing party will always allege that the court of appeals erred in reversing a jury verdict or[,] if it refuse[d] to reverse on sufficiency grounds, that the court of appeals used the wrong standard."[237] In a separate dissent, Justice Hecht echoed Justice Gonzalez's concern, concluding that the *Lofton II* decision was an unconstitutional review by the supreme court of the factual sufficiency of the evidence, and an affront to the courts of appeals' constitutional prerogative to judge the factual sufficiency of the evidence in a case. He explained:

> Stymied by the constitution, the Court cannot decree the result it rather plainly wants to see in this case. To accomplish the desired end, the Court must keep reversing the judgment of the court of appeals until it reaches a result that the Court approves. Always the ground for reversal is that the appeals court either cannot or will not follow the law. For this Court to hold that an appeals court has not conducted its factual insufficiency analysis in a lawful manner, simply to coerce that court into changing its conclusion, is to usurp the constitutional prerogative of the court of appeals. That is what I believe is happening in this case.[238]

Justice Hecht further noted that the 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."[239]

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234. *Id.* at 386–87.

235. *See id.* at 387 (Gonzalez, J., dissenting) ("The court of appeals has twice found the evidence factually insufficient; we have no jurisdiction to review it."); *cf.* Pool v. Ford Motor Co., 715 S.W.2d 629, 637 (Tex. 1986) (Gonzalez, J., concurring) (noting that "the [majority] is implicitly trying to prevent the court of appeals from second guessing the jury," and expressing fear "that this opinion may in turn be used to allow this court to second guess the courts of appeal").

236. *Lofton II*, 777 S.W.2d at 387 (Gonzalez, J., dissenting).

237. *Id.* at 387–88 (Gonzalez, J., dissenting).

238. *Id.* at 388 (Hecht, J., dissenting).

239. *Id.*; *see also* William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 533–34 (1991) (discussing the concern expressed by Justices Hecht and Gonzalez that the supreme court should not reverse an

In *Aluminum Co. of America v. Alm*,[240] the supreme court circumvented the court of appeals' conclusion that the jury's finding of gross negligence was supported by factually insufficient evidence.[241] In another 5–4 decision, a deeply divided court reversed and held that defendant Aluminum Co. of America (Alcoa) was grossly negligent as a matter of law.[242] Ignoring the evidence of care introduced by Alcoa,[243] the supreme court refused to accept the court of appeals' analysis of the factual sufficiency of the evidence and concluded that gross negligence as a matter of law is a legal issue over which the supreme court has jurisdiction.[244] The dissenters 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."[245]

In *Havner v. E-Z Mart Stores, Inc.*,[246] Justice Gonzalez, in a concurring opinion, reasoned that the denial of supreme court review was proper because "to take jurisdiction of this case *again*" would have been the equivalent of "second-guess[ing] the court of appeals' review of the factual sufficiency of the evidence."[247] He added that to otherwise take jurisdiction "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 [the supreme court's] view of the evidence."[248] Because the court of appeals properly reviewed the factual sufficiency challenges, Justice Gonzalez observed that the court must avoid the "yo-yo effect when a majority of the court keeps

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appeals court simply to get the lower court to reach a result with which the supreme court approves).

240. Aluminum Co. of Am. v. Alm, 785 S.W.2d 137 (Tex. 1990).

241. *Id.* at 140–41 (Gonzalez, J., dissenting) ("[T]his is the first time in the history of American jurisprudence that a court has held 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").

242. *Id.* at 140.

243. *Id.* at 143.

244. *Id.* at 141–42.

245. *Aluminum Co. of Am.*, 785 S.W.2d at 143 (Gonzalez, J., dissenting).

246. Havner v. E-Z Mart Stores, Inc., 846 S.W.2d 286 (Tex. 1993).

247. *Id.* at 286 (Gonzalez, J., concurring).

248. *Id.*

reversing the judgment of the court of appeals until it reaches a result that the majority approves."[249]

In 1994, the Texas Supreme Court's movement toward the reasonable and fair-minded person standard gained traction in *Transportation Insurance Co. v. Moriel*,[250] the court's seminal punitive damages decision. In *Moriel*, the court took the significant step of permitting the review of the evidence supporting the punitive damages award itself, rather than reviewing the jury's gross negligence finding.[251] Years later, in a notable use of its power to reverse factual sufficiency determinations, the supreme court twice reversed the damages awarded in *Bunton v. Bentley*.[252] Justice Baker, dissenting in the 2002 decision, argued that the supreme court had "overstep[ped] its constitutional appellate review boundaries to conduct what effectively results in a factual sufficiency review of the mental anguish damages award and issue[d] a wholly advisory opinion to the court of appeals about those damages."[253] The court was evaluating the "reasonableness" of the mental anguish award as "a proxy for factual sufficiency review."[254]

When the supreme court decided *City of Keller* in 2005, many debated whether the court's embrace of the reasonable and fair-minded person standard might once and for all "collapse [the] distinction between factual sufficiency review and the high court's review of whether courts of appeals applied the correct factual sufficiency standard."[255] Rather than sending a case back to the

249. *Id.* at 287.

250. Transp. Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994).

251. *Id.* at 30.

252. Bunton v. Bentley (*Bentley II*), 153 S.W.3d 50, 54 (Tex. 2004); Bentley v. Bunton (*Bentley I*), 94 S.W.3d 561 (Tex. 2002).

253. *Bentley I*, 94 S.W.3d at 624 (Baker, J., dissenting).

254. *Id.*

255. W. Wendell Hall & Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539, 562 (2008); *see also* W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 52, 276 (2006) (posing the question, "[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*," and suggesting that "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*"). *See generally* William V. Dorsaneo, III, *Evolving Standards of Evidentiary Review: Revising the Scope of Review*, 47 S. TEX. L. REV. 225, 233–36 (2005) (discussing the effect of *City of Keller* on "the scope of legal sufficiency review for civil cases"); David E. Keltner et al., *No Evidence Review: The Scope and*

court of appeals for factual sufficiency review, the reasonable and fair-minded person standard might obviate the need to reverse and remand to the court of appeals for further consideration of the facts, consistent with the supreme court's opinion. Instead, the court could simply review the evidence in issue, and if five members of the court agree, it may conclude that no reasonable and fair-minded juror could reach a certain verdict and render judgment accordingly.

b. Recent Applications of *City of Keller*

When the 2006 edition of this Article was written, *City of Keller* was a new decision, and, therefore, much of the analysis was an effort to predict the trajectory of legal sufficiency review based on *City of Keller*'s application of that standard.[256] We now have a few years of case law to help assess *City of Keller*'s effect. The results are inconclusive. The supreme court has upheld jury verdicts, but it has also shown no reluctance in reversing them even where there were sharp differences of opinion in the court of appeals and in the supreme court itself. We will examine a few of these cases.

In a 5–4 decision in *Coca-Cola Co. v. Harmar Bottling Co.*,[257] the supreme court reversed a jury's verdict and rendered judgment for The Coca-Cola Company (Coke) in an anti-trust case.[258] Specifically, plaintiff soft drink bottlers sued Coke and several of its distributors for entering into calendar marketing agreements (CMAs) with retailers.[259] The plaintiffs claimed that these CMAs unreasonably restrained trade by monopolizing the market in violation of state antitrust laws.[260] "The district court rendered judgment on the jury's verdict for the plaintiffs, awarding damages incurred throughout the region and permanently enjoining [Coke],

Standard of Legal Sufficiency Review After City of Keller, *in* STATE BAR OF TEX., 22ND ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE, ch. 16, at 10–12 (2008) (discussing whether "*City of Keller*'s reasonable juror standard departs from traditional legal sufficiency standards, and allows the [Texas] Supreme Court (and other appellate courts) to supplant their own decision for that of the jury in a legal sufficiency review").

256. W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 247–60, 266–77 (2006).

257. Coca-Cola Co. v. Harmar Bottling Co., 218 S.W.3d 671 (Tex. 2006).

258. *Id.* at 675.

259. *Id.* at 675–76.

260. *Id.* at 678.

in specified counties in . . . four states, [based on] certain conduct that it determined to be anticompetitive."[261] The court of appeals found "sufficient evidence for the jury to find monopolization" based on testimony presented at trial.[262] With respect to liability issues, the court of appeals rejected Coke's argument that there was no evidence showing a foreclosure of competition in any relevant market. Liability, the court of appeals reasoned, could be based on evidence that enforcement of several CMA provisions could be read to "restrict trade and impact competition."[263] The court of appeals stated, "Although any one of the factors set out [in the case] might be insufficient to allow the jury to conclude Coke had acted to restrain trade, due to the numerous factors presented in evidence, it is not appropriate to take this determination out of the hands of the jury."[264] The supreme court reversed the court of appeals, with the majority holding that there was no evidence that Coke's practices restrained trade.[265]

Justice Brister dissented, joined by Chief Justice Jefferson, and Justices O'Neill and Medina. Justice Brister opined that, in holding there was no evidence to support the jury's finding that Coke harmed competition, the majority had drawn an inference contrary to the finding that the jury was entitled to draw.[266] He stated that "several of Coke's activities in the Ark-La-Tex market were so anticompetitive that federal courts would not require such proof, and we should not either."[267] Justice Brister asserted, "There is a line between competing and bullying, and the jury found that Coke crossed it. As evidence in the record would allow reasonable jurors to reach that conclusion, I would not render judgment to the contrary . . . ."[268]

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261. *Id.* at 674.

262. *See Harmar*, 218 S.W.3d at 679 (detailing the testimony upon which the court of appeals based its finding).

263. Coca-Cola Co. v. Harmar Bottling Co., 111 S.W.3d 287, 304 (Tex. App.—Texarkana 2003), *rev'd*, 218 S.W.3d 671 (Tex. 2006).

264. *Id.* at 305.

265. *Harmar*, 218 S.W.3d at 689–91.

266. *See id.* at 699–700 (Brister, J., dissenting) (noting that the court cannot ignore what a jury could reasonably conclude from the evidence supporting a verdict under a per-se or rule-of-reason analysis).

267. *Id.* at 699.

268. *Id.* at 693. Notably, Justice Brister's dissenting opinion did not cite the court's opinion in *City of Keller*, which he authored. *Id.* at 693–706.

In an amicus brief submitted to the supreme court on motion for rehearing, a group of seven prominent Texas law professors urged the court "to consider seriously the impact that allowing its decision to stand will have in the future with respect to how courts, litigants, and the public in general regard the legitimacy of jury verdicts rendered in this state."[269] The professors argued:

> Our central concern, stated plainly and emphatically, is that it is troubling to see the Court reject a verdict in which the jury found it to be (at least) more likely than not that Petitioners had violated the antitrust laws when the Court does not declare the evidence on which this verdict was based to be legally inadmissible. In the absence of a more searching inquiry, the majority's opinion seems merely to have substituted its judgment for that of the jury.[270]

They further contended that the judgment against the bottling companies was concerning for two reasons: "(i) the standard for review for legal sufficiency has traditionally been—appropriately so—far more respectful of the jury's verdict than is the majority's opinion; and (ii) even on the majority's reading of the factual evidence adduced, it appears that a reasonable jury could have" found for the bottling companies.[271] The amici further stated, "We believe the majority's decision in this case portends troubling consequences in terms of the legitimacy of verdicts rendered by juries in this state."[272] Following the *Harmar* decision, one article noted that the opinion, while not rendering the *City of Keller* decision incorrect, demonstrated that the standards articulated in *City of Keller* "carry the potential for abuse."[273]

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269. Brief for Texas Law Professors as Amici Curiae Supporting Respondents at 5, Coca-Cola Co. v. Harmar Bottling Co., 218 S.W.3d 671 (Tex. 2006) (No. 03-0737). In addition, commentators outside of Texas noticed *Harmar*'s anti-jury effect. *See* Andrew Cohen, *Texas Supreme Court to Juries: Get Bent*, THE WASHINGTON POST (May 8, 2007, 8:44 AM), http://blog.washingtonpost.com/benchconference/2007/05/three_degrees_of_separation_an.html (opining that "anti-jury rulings" from the supreme court in Texas are becoming more common, especially as compared to other states that typically give much more respect to jury verdicts); *see also* Lonny S. Hoffman, Harmar *& The Ever-Expanding Scope of Legal Sufficiency Review*, 49 S. TEX. L. REV. 611, 611 (2008) (arguing that *Harmar* is an "unwelcome attack on the finality of jury verdicts").

270. Brief for Texas Law Professors as Amici Curiae Supporting Respondents at 1, *Harmar*, 218 S.W.3d 671 (No. 03-0737).

271. *Id.* at 10.

272. *Id.* at 11.

273. Thomas R. Phillips & Martha G. Newton, *Evolving Notions of "No Evidence,"* *in* STATE BAR OF TEX., PRACTICE BEFORE THE TEXAS SUPREME COURT, ch. 12.3, at 6

Yet in *Tanner v. Nationwide Mutual Fire Insurance Co.*,[274] the supreme court reinstated a judgment on a jury's verdict after the trial court had granted JNOV.[275] The case involved "[a] high-speed police chase resulting in a traffic accident [that] sparked a personal-injury lawsuit against the fleeing driver by the family injured in the crash."[276] In dispute was whether the driver's attempts to elude police forfeited coverage under an intentional-injury exclusion in his automobile liability insurance policy.[277] The court held "that the insurer did not establish as a matter of law that its insured intentionally caused the family's injuries," and therefore reversed the district court's JNOV and "render[ed] judgment on the jury's verdict in favor of the injured family."[278]

Justice Brister dissented, challenging the majority's conclusion that a reasonable juror could not find that the driver's conduct caused intentional damage to the family.[279] Insisting that "[t]here will never be a more extreme case than this," Justice Brister found it difficult to understand how reasonable jurors could fail to conclude that the driver could not have intended the damage to the family resulting from his conduct.[280] Accordingly, he rejected the majority's conclusion that the driver could have believed the chase would end with the driver "rolling his vehicle" or "hitting a fixed object," or with the police "discontinu[ing] the pursuit" rather than risk him injuring someone.[281] Justice Brister suggested that the majority avoided the policy exclusion by focusing narrowly on what the driver knew split seconds before the crash, rather than on what the driver might have known about his conduct during the course of the entire chase.[282] As Justice Brister surmised, a driver "ought to know" that driving a large truck at high speeds while chased by police would result in harm to

(2007).

274. Tanner v. Nationwide Mut. Fire Ins. Co., 289 S.W.3d 828 (Tex. 2009).

275. *Id.* at 829; *cf.* Jackson v. Axelrad, 221 S.W.3d 650, 652–53 (Tex. 2007) (upholding jury verdict in favor of defense).

276. *Tanner*, 289 S.W.3d at 829.

277. *Id.*

278. *Id.*

279. *See id.* at 834 (Brister, J., dissenting) ("Anyone who drives a huge 4-ton pickup at 100 miles an hour through city streets during rush hour 'ought to know' that someone is going to get hurt.").

280. *Id.* at 834–35.

281. *Tanner*, 289 S.W.3d at 834–35 (Brister, J., dissenting).

282. *Id.* at 835.

others.[283] He also pointed to *City of Keller* for the principle that "'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.'"[284] Essentially, *Tanner* demonstrates the importance of the factual "context" that the court chooses to include in its legal sufficiency review. The majority and dissent differed, in effect, on how wide the camera lens of the court should be when reviewing for sufficiency of the evidence.

The supreme court was also divided in *Providence Health Center v. Dowell*,[285] where the court reversed a judgment based on a jury verdict and rendered judgment based on legally insufficient evidence of proximate causation.[286] Plaintiffs alleged an emergency room physician and nurse acted negligently by releasing Lance, a suicidal twenty-one year old, into the care of his family because the individual killed himself "thirty-three hours after his release."[287] The majority reasoned, "[T]he evidence is undisputed that if Lance had stayed with his family as instructed, he would not have hanged himself when he did. But there is no evidence that" the hospital, physician and nurse "caused [his] suicide to occur when it did."[288] The majority further noted that there was "no evidence that Lance could have been hospitalized involuntarily, that he would have consented to hospitalization, that a short-term hospitalization would have made his suicide unlikely, that he exhibited any unusual conduct following his discharge, or that any of his family or friends believed further treatment was required."[289] Therefore, the majority concluded that "the defendants' negligence was too attenuated from the suicide to have been a substantial factor in bringing it about."[290]

283. *Id.*

284. Tanner v. Nationwide Mut. Fire Ins. Co., 289 S.W.3d 828, 830 n.4 (Tex. 2009) (quoting City of Keller v. Wilson, 168 S.W.3d 802, 812 (Tex. 2005)). In *Autozone, Inc. v. Reyes*, 272 S.W.3d 588 (Tex. 2008), the court also addressed the "context" issue, stating that "[e]ven though the evidence is viewed in the light most favorable to the verdict, it cannot be considered in isolated bits and pieces divorced from its surroundings; it must be viewed in its proper context with other evidence." *Id.* at 592.

285. Providence Health Ctr. v. Dowell, 262 S.W.3d 324 (Tex. 2008).

286. *Id.* at 330.

287. *Id.* at 325.

288. *Id.* at 330.

289. *Id.* at 329–30.

290. *Providence Health Ctr.*, 262 S.W.3d at 330.

But three dissenting justices asserted that the majority "misapplie[d] the law" and "disregard[ed] relevant evidence."[291] In particular, the dissent objected that the majority required proof that Lance "would have voluntarily submitted to hospitalization or could have been involuntarily retained," evidence that (in the opinion of the dissent) would have been inadmissible as it was speculative.[292] The dissent reasoned, "Because Lance was never properly advised" regarding post-release care, there was no evidence as to "whether he would have consented to treatment."[293] Additionally, the dissent referred to expert testimony indicating that hospitalization would have lowered the risk of suicide, which constituted "some evidence" that the healthcare provider's negligence caused the suicide.[294] Notable in this case are the sharp splits in the court of appeals[295] and in the supreme court; however, the supreme court rendered judgment despite disagreeing over what evidence was "undisputed."[296]

In *Minnesota Life Insurance Co. v. Vasquez*,[297] the supreme court reversed a jury's verdict against an insurance company.[298]

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291. *Id.* at 333 (O'Neill, J., dissenting, joined by Jefferson, C.J. & Medina, J.).

292. *Id.* at 334.

293. *Id.* at 335.

294. *Id.*

295. *Compare* Providence Health Ctr. v. Dowell, 167 S.W.3d 48, 54 (Tex. App.—Waco 2005) (determining that "some evidence" was contained in the record proving proximate cause), *rev'd*, 262 S.W.3d 324 (Tex. 2008), *with id.* at 60–61 (Gray, C.J., dissenting) (stating that no evidence was present that defendants were a substantial cause of death), *rev'd*, 262 S.W.3d 324 (Tex. 2008).

296. Other supreme court decisions have also turned on the characterization of undisputed evidence. The supreme court's per curiam decision in *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754 (Tex. 2007), may have indicated another call to ensure that the lower courts credit undisputed evidence and do not simply look at the evidence in favor of the non-movant on summary judgment. *See id.* at 756 (stating that the First Court of Appeals "failed to apply the proper standard of review"). In *Goodyear*, while off-duty, a Goodyear employee drove a company tire delivery truck to a store at 3:00 a.m. to buy cigarettes. *Id.* at 756. While en route, the driver fell asleep at the wheel, crossed the centerline and collided with another vehicle, injuring the driver. *Id.* The supreme court reversed and rendered judgment for Goodyear, holding that "the court of appeals erred in considering only the evidence favorable" to the plaintiff, and "ignoring undisputed evidence in the record" that the driver was on a "personal errand" at the time of the accident. *Id.* at 757. In *Trammell Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9 (Tex. 2008), a block of concurring justices found a threat to *City of Keller*'s framework in the court of appeals' refusal to credit undisputed evidence. *Id.* at 19 (Jefferson, C.J., concurring).

297. Minn. Life Ins. Co. v. Vasquez, 192 S.W. 3d 774 (Tex. 2006).

298. *Id.* at 776–77.

The issue was whether there was "any evidence that Minnesota Life knowingly committed an unfair settlement practice."[299] The court of appeals upheld the jury's finding that Minnesota Life failed to pay a "claim after coverage [became] reasonably clear."[300] In an opinion by Justice Brister, the supreme court held that the court of appeals considered only the evidence in support of the jury's finding.[301] In effect, the court of appeals had found *some* evidence of an unfair settlement practice in the fact that Minnesota Life failed to pay a claim for six months after it learned of the cause of death even though it had a policy of paying within ten days.[302] The supreme court, however, concluded that the court of appeals failed to follow *City of Keller*'s requirement that a court review *all* of the evidence, which the supreme court found to contain "undisputed" documentary evidence that coverage was not reasonably clear.[303] This case presents an unusually transparent instance of the differences between two courts attempting to apply the same standard (*City of Keller*), but reaching different results.[304]

In *Jelinek v. Casas*,[305] the Texas Supreme Court may have inadvertently suggested that courts consider the "credibility" of testimony when reviewing for the legal sufficiency of the evidence.[306] In this case, decedent Casas, a cancer patient, was admitted to the hospital for abdominal pain and placed on antibiotics used for the prevention and treatment of intra-abdominal infections.[307] Two days following her admission, major

299. *Id.* at 776.

300. *Id.* at 776–77.

301. *Id.* at 777.

302. *See* Minn. Life Ins. Co. v. Vasquez, 133 S.W.3d 320, 328–29 (Tex. App.—Corpus Christi 2004) (sustaining the jury's finding that the insurance company failed to pay the claim after learning the cause of death), *rev'd*, 192 S.W.3d 774 (Tex. 2006).

303. Minn. Life Ins. Co. v. Vasquez, 192 S.W. 3d 774, 777–78 (Tex. 2006) (holding that there was "no evidence that the insurer failed to pay the claim after coverage had become reasonably clear").

304. *Compare* Minn. Life Ins. Co. v. Vasquez, 133 S.W.3d 320, 324 (Tex. App.—Corpus Christi 2004) (interpreting *City of Keller* to mean that the reviewing court should disregard all contrary evidence), *with* Minn. Life Ins. Co. v. Vasquez, 192 S.W. 3d 774, 777 (Tex. 2006) (asserting that *City of Keller* means that a reviewing court should look at all of the evidence, including contrary evidence).

305. Jelinek v. Casas, No. 08-1066, 2010 WL 4910172 (Tex. Dec. 3, 2010).

306. *Id.* at *9–11.

307. *Id.* at *1.

abdominal surgery was performed on Casas.[308] She continued the antibiotic regimen for an additional five days, but the hospital mistakenly permitted a four-and-a-half day lapse of antibiotic treatment.[309] The hospital subsequently admitted that the antibiotic treatment should have been continued; however, the hospital refused to admit that the lapse in treatment was the cause of additional abdominal pain to Casas.[310] The court noted that "Casas' expert admitted there was no direct evidence of an anaerobic infection, leaving the jury to consider the circumstantial evidence" of infection, such as fever and changed heart rate, but also admitted on cross examination that those signs "were equally consistent with two other infections cultured from Casas's incision and blood."[311]

The *Jelinek* court held that "when the facts support several possible conclusions, only some of which establish that the defendant's negligence caused the plaintiff's injury, the expert must explain to the fact finder why those conclusions are superior based on verifiable medical evidence, not simply the expert's opinion."[312] "Because there [was] no direct evidence of the infection and the circumstantial evidence [was] meager," the court held that it "must consider not just favorable but all the circumstantial evidence, and competing inferences as well."[313] The court wrote that "[c]ourts should not usurp the jury's role as fact finder, nor should they question the jury's right to believe one witness over another."[314] The court then stated that "when reviewing a verdict for sufficiency of the evidence, courts need not—indeed, must not—defer to the jury's findings when those findings are not supported by *credible* evidence."[315] Unless the court intended to depart from *City of Keller*'s position that "jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony,"[316] the court probably used the

308. *Id.*
309. *Id.*
310. *Jelinek*, 2010 WL 4910172, at *1.
311. *Id.* at *4.
312. *Id.* at *7.
313. *Id.* at *9 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 814 (Tex. 2005)).
314. *Id.* at *9.
315. Jelinek v. Casas, No. 08-1066, 2010 WL 4910172, at *9 (Tex. Dec. 3, 2010) (emphasis added).
316. *See City of Keller*, 168 S.W.3d at 820.

term "credible" as short-hand for *City of Keller*'s additional view that "[t]he jury's decisions regarding credibility must be reasonable,"[317] that is, "credit-able." Subsequent decisions may indicate whether the court intends to require reviewing courts to make further inquiries into credibility.

The 2006 edition of this Article traced the "origins of the 'reasonable and fair-minded juror' standard" embraced by *City of Keller*,[318] and raised the question of whether *City of Keller*'s articulation of that standard might exacerbate the longstanding conflict in Texas law between the right to trial by jury and the power of the courts of appeals and the supreme court to review for the sufficiency of the evidence.[319] The previous version noted that, even though only the courts of appeals have jurisdiction over factual disputes and the power to review for factual sufficiency, the supreme court had arguably blurred the lines between legal and factual sufficiency in reversing and rendering judgments for "no evidence" where there may have been legally sufficient evidence but the supreme court sought a different result.[320] It was suggested that *City of Keller*'s "final test" for legal sufficiency—"whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review"[321]—might further such blurring of the lines by encouraging the courts to simply review a verdict's reasonableness, rather than employing clear and consistent rules to determine legal and factual sufficiency.[322]

317. *Id.*; *see also id.* at 813–14 ("In claims or defenses supported only by meager circumstantial evidence, the evidence does not rise above a scintilla (and thus is legally insufficient) if jurors would have to guess whether a vital fact exists. When the circumstances are equally consistent with either of two facts, neither fact may be inferred." (internal citations and quotation marks omitted)); Lozano v. Lozano, 52 S.W.3d 141, 148 (Tex. 2001) ("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." (internal citations and quotation marks omitted)).

318. W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 255–60 (2006).

319. *See id.* at 266–78 (showing various supreme court opinions that feature strong dissents that question the majority's scope of review).

320. *Id.* at 274–76.

321. City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005).

322. W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 274–76 (2006).

On this point, the verdict is still out. Generally, it can be said that *City of Keller* has not unleashed a firestorm of reversals of jury verdicts. But neither has doubt been dispelled about whether the reasonable and fair-minded person standard has developed into a predictable and stable standard in Texas law.[323] The supreme court's decisions in *Harmar*, *Tanner*, *Dowell*, *Minnesota Life*, and others have turned on such factors as whether particular evidence is disputed, what evidence is "relevant," or what evidentiary "context" was appropriate.[324] *City of Keller* does not appear to have sufficiently resolved such underlying questions. For example, *City of Keller* stated that it was not possible "to define precisely when undisputed evidence becomes conclusive."[325] And "[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."[326] Thus, the verdict reasonable and fair-minded people could reach involves, like Chinese boxes,[327] additional reasonableness determinations about specific pieces of evidence. At what point do disagreements between members of the court over the disputed nature, the proper context, or relevancy of particular facts overtake the jury's task of reweighing the evidence?

One question notably left open by *City of Keller*, and not recently addressed by the supreme court, is the status of factual sufficiency review in civil cases. While the courts of appeals continue on occasion to reverse for factual sufficiency,[328] the

323. *See id.* at 276–78 (warning that practitioners should be wary of the finality of the *City of Keller* standard).

324. *See* Tanner v. Nationwide Mut. Fire Ins. Co., 289 S.W.3d 828, 831 (Tex. 2009) (holding that the context of the evidence—an insurance contract—allowed for a reasonable jury to find for the petitioner); Providence Health Ctr. v. Dowell, 262 S.W.3d 324, 330 (Tex. 2008) (explaining that the majority and dissenting opinions turn on undisputed evidence); Coca-Cola Co. v. Harmar Bottling Co., 218 S.W.3d 671, 689–91 (Tex. 2006) (dismissing the claim based on no evidence of harm in any relevant market); Minn. Life Ins. Co. v. Vasquez, 192 S.W.3d 774, 777 (Tex. 2006) (finding that the court of appeals reviewed the evidence in the incorrect context by only looking at the favorable evidence).

325. *City of Keller*, 168 S.W.3d at 815.

326. *Id.* at 816.

327. A "Chinese box" refers to "a set of boxes graduated in size so that each fits into the next larger one." Merriam Webster's Online Dictionary, Chinese Boxes, http://www.merriam-webster.com/dictionary/chinese%20boxes (last visited Dec. 22, 2010).

328. *See* Ragira v. VIP Lodging Grp., Inc., 301 S.W.3d 747, 759 (Tex. App.—El Paso 2009, pet. denied) (finding jury's determination of no slander of title against the great

supreme court has not decided a major case that addressed the line between legal and factual sufficiency standards since 2006, and then only in the specialized context of punitive damage awards.[329] On the other hand, over the past decade, the Court of Criminal Appeals has engaged in a series of reversals and adjustments of its factual sufficiency standard, and in *Brooks v. State*[330] eliminated that standard altogether in favor of relying solely on the Federal Constitution's minimum for legal sufficiency.[331] It remains to be

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weight of the evidence); Fluor Enters., Inc. v. Conex Int'l Corp., 273 S.W.3d 426, 432 (Tex. App.—Beaumont 2008, pet. denied) (determining the evidence was factually insufficient to establish that criticisms of contractor's welds by consultant's engineer were made maliciously or fraudulently, as required for contractor to prevail on business disparagement claim against consultant); Ayala v. Valderas, No. 02-07-134-CV, 2008 WL 4661846, at *5 (Tex. App.—Fort Worth Oct. 23, 2008, no pet.) (mem. op.) (holding evidence in a conversion case was factually insufficient where jury award reflected replacement value of property, but legal standard in such cases was fair market value); RePipe, Inc. v. Turpin, 275 S.W.3d 39, 48 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (finding that some evidence of damage rendered evidence legally sufficient, but where evidence clearly showed damages were $49,360.86 less than the jury's award, evidence was factually insufficient); Hawkins v. Walker, 238 S.W.3d 517, 525–27 (Tex. App.—Beaumont 2007, no pet.) (concluding that the evidence was factually insufficient to support either the jury's award of $1 million in damages to the mother for past and future loss of society and companionship or the jury's award of $700,000 in damages to the mother for past and future mental anguish damages); Bay, Inc. v. Ramos, 139 S.W.3d 322, 330–31 (Tex. App.—San Antonio 2004, pet. denied) (holding evidence was factually insufficient to support jury's finding that the mother bore zero responsibility for an eighteen-month-old child's injuries caused by deployment of an air bag where the mother, despite her knowledge that the backseat was the safest place for a young child, placed the child in the front passenger seat).

329. Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 307 (Tex. 2006); *id.* at 319 (O'Neill, J., dissenting) ("Our courts of appeals in Texas have long been empowered to suggest a remittitur of excessive awards when the evidence is factually insufficient to support them. The court of appeals assiduously exercised that power in this case. It is, of course, appropriate for this Court to intervene if the appeals court allows a constitutionally offensive award to stand. But when the Court chooses a marginal case like this in which to intervene, it risks intruding upon an area that has traditionally been the well-patrolled province of our courts of appeals." (citations omitted)); *see also* Bentley v. Bunton (*Bentley I*), 94 S.W.3d 561, 624 (Tex. 2002) (Baker, J., dissenting) (indicating that the court oversteps its boundaries when conducting a factual sufficiency review on mental anguish).

330. Brooks v. State, 323 S.W.3d 893 (Tex. Crim. App. 2010).

331. *See id.* at 894 (stating that there was "no meaningful distinction" between Texas's criminal factual sufficiency standard and the *Jackson v. Virginia*, 443 U.S. 307 (1979), legal sufficiency standard); *cf.* Watson v. State, 204 S.W.3d 404, 421 (Tex. Crim. App. 2006) (Cochran, J., dissenting) (suggesting a "return to the single standard of review for sufficiency of the evidence in a criminal case as set out by the United States Supreme Court"), *overruled by Brooks*, 323 S.W.3d at 911–12; Clewis v. State, 922 S.W.2d 126, 132 (Tex. Crim. App. 1996) (recognizing that the Supreme Court sets a minimum standard of

seen whether the Texas Supreme Court will revitalize factual sufficiency review in the civil context as a way to restore the power of juries and to discipline the use of the powerful legal sufficiency standard by concluding that certain legal sufficiency challenges should be properly brought as factual sufficiency challenges.[332] But doing so would involve curtailing the court's own jurisdiction to hear such cases. The differences in potential appellate relief are considerable: when deciding a case under the legal sufficiency challenge, a court may reverse and render judgment, effectively negating a jury's verdict, whereas a reversal for factual sufficiency keeps the issue in the jury's hands for a new trial.

B. *Sufficiency of the Evidence in Nonjury Trials*

In any case or issue tried without a jury, a "party may request [that] the court" prepare "findings of fact and conclusions of law."[333] The trial court's findings of fact "shall not be recited in a judgment,"[334] and oral comments from the bench will not constitute findings of fact and conclusions of law.[335] It is, however, permissible for a trial court to list its findings in a letter to the respective attorneys, as long as the letter is filed of record.[336]

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review for criminal convictions and that states are free to heighten this standard), *overruled by Brooks*, 323 S.W.3d at 904, 911–12. *See generally Jackson*, 443 U.S. at 316–20 (1979) ("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.... Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." (citations omitted)).

332. *See* W. Wendell Hall & Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539, 597-610 (2008) (advocating for a return to factual sufficiency review in certain situations).

333. TEX. R. CIV. P. 296.

334. TEX. R. CIV. P. 299a.

335. *In re* W.E.R., 669 S.W.2d 716, 716 (Tex. 1984); G.T. Mgmt., Inc. v. Gonzalez, 106 S.W.3d 880, 883 (Tex. App.—Dallas 2003, no pet.); Tate v. Tate, 55 S.W.3d 1, 8 n.4 (Tex. App.—El Paso 2000, no pet.); Sharp v. Hobart Corp., 957 S.W.2d 650, 652 n.4–5 (Tex. App.—Austin 1997, no pet.). Also, a court's oral statements may not be prepared as a reporter's record and filed as findings of fact and conclusions of law. Nagy v. First Nat'l Gun Banque Corp., 684 S.W.2d 114, 115–16 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

336. Villa Nova Resort, Inc. v. State, 711 S.W.2d 120, 124 (Tex. App.—Corpus Christi 1986, no writ) (affirming the ability of judges to include findings of fact and conclusions of law in a letter filed with the clerk as part of the record).

"The filing of a request for findings of fact, in most circumstances, extends the appellate timetable."[337] "The time frame for filing the findings envisions that a party will receive the findings before the deadline for perfecting appeal," allowing "a potential appellant the opportunity to review the findings so as to make an intelligent decision as to the likelihood of success on appeal prior to investing in an expensive reporter's record."[338]

Although the rules do not require, or even authorize, a party to request findings of facts and conclusions of law in connection with other trial court rulings, the careful practitioner will ask the trial court to prepare findings and conclusions whenever the trial court acts as a fact finder.[339] "When no findings of fact or conclusions of law are filed, the trial court judgment [will] be upheld on any legal theory supported by the record."[340] "When the trial court acts" as a fact finder, its findings are reviewed under the same legal and factual sufficiency standards as those in a jury trial.[341]

1. Findings of Fact Filed

a. 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";[342] however, they are not conclusive when a complete reporter's record appears in the appellate record.[343] The trial court's fact findings are re-

337. Roberts v. Roberts, 999 S.W.2d 424, 437 (Tex. App.—El Paso 1999, no pet.) (citing TEX. R. APP. P. 26.1(a)(4)).

338. *Id.* at 437–38.

339. *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) (orig. proceeding) (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).

340. *In re* Pirelli Tire, L.L.C., 247 S.W.3d 670, 686 (Tex. 2007) (orig. proceeding).

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

342. Anderson v. City of Seven Points, 806 S.W.2d 791, 794 (Tex. 1991); *see also* Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex. 1994) (stating that findings by a trial court have the same standards of review as evidence supporting a jury verdict).

343. *See* Nipp v. Broumley, 285 S.W.3d 552, 555 (Tex. App.—Waco 2009, no pet.) (noting that "findings [of fact] are not conclusive on the appellate court if there is a complete reporter's record"); Stephenson v. Perlitz, 537 S.W.2d 287, 289 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.) ("Findings of fact are not conclusive on appeal when . . .

viewed for legal and factual sufficiency of the evidence,[344] which is the same standard applied when reviewing evidence supporting jury findings.[345] "When the appellate record contains a reporter's record[,] ... findings of fact are not conclusive on appeal if the contrary is established as a matter of law or if there is no evidence to support the findings."[346] 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.[347]

b. 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.[348]

2. Findings of Fact Not Requested and Not Filed

a. 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

a statement of facts appears in the record."). When a trial court is late in filing its findings of fact, 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).

344. *See* Mays v. Pierce, 154 Tex. 487, 281 S.W.2d 79, 82 (1955) (reviewing the findings of fact on both legal and factual sufficiency).

345. *See* Ortiz v. Jones, 917 S.W.2d 770, 772 (Tex. 1996) (clarifying that the same legal standards are used to review for factual sufficiency whether it is a trial court's finding or a jury's verdict at issue); *Catalina*, 881 S.W.2d at 297 (recognizing the same standard is used whether reviewing jury verdicts or trial court findings); Nelkin v. Panzer, 833 S.W.2d 267, 268 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.) (declaring that "[f]indings of fact in a case tried to the court have the same force and dignity as a jury's verdict upon special issues").

346. Ramsey v. Davis, 261 S.W.3d 811, 815 (Tex. App.—Dallas 2008, pet. denied).

347. Ashcraft v. Lookadoo, 952 S.W.2d 907, 910 (Tex. App.—Dallas 1997, writ denied) (en banc); *see also* Tigner v. City of Angleton, 949 S.W.2d 887, 889 (Tex. App.—Houston [14th Dist.] 1997, no writ) (holding that "conclusions of law are reviewable when attacked as a matter of law, but not on grounds of factual sufficiency").

348. *Nelkin*, 833 S.W.2d at 268 (stressing that "[i]f no statement of facts [or reporter's record] is made a part of the record on appeal" then the court will assume the evidence was sufficient to sustain the trial court's judgment).

finding[s] of fact to support it,"[349] "*provided:* (1) the proposition is one raised by the pleadings and supported by the evidence; and (2) the trial judge's decision can be sustained on any reasonable theory that is consistent with the evidence and the applicable law, considering only the evidence favorable to the decision."[350] To prevail, "'the appellant may show that the undisputed evidence'" negates at least one of the essential elements of the decision, or the appellant "'may show that the appellee's pleadings omit one or more of the essential elements . . . [to the decision] and that the trial was confined to the pleadings.'"[351]

However, when a reporter's record is included as part of the record, the legal and factual sufficiency of the implied findings may be challenged on appeal.[352] 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."[353] Therefore, when the implied findings of fact are supported by the evidence, "the appellate court must uphold the judgment on any theory of law applicable to the case."[354] To determine whether the evidence supports the implied factual findings, the appellate court will "'consider only that evidence most favorable to'" the implied factual findings and will disregard all opposing or contradictory evidence.[355]

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349. Schoeffler v. Denton, 813 S.W.2d 742, 745 (Tex. App.—Houston [14th Dist.] 1991, no writ); *accord* BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 795 (Tex. 2002).

350. Franklin v. Donoho, 774 S.W.2d 308, 311 (Tex. App.—Austin 1989, no writ), *overruled on other grounds by* Sw. Ref. Co. v. Bernal, 22 S.W.3d 435 (Tex. 2000); *see also* 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) (applying the two-part test from *Franklin*).

351. Brodhead v. Dodgin, 824 S.W.2d 616, 620 (Tex. App.—Austin 1991, writ denied) (quoting *Franklin*, 774 S.W.2d at 311).

352. Roberson v. Robinson, 768 S.W.2d 280, 281 (Tex. 1989); *accord* Holt Atherton Indus., Inc., v. Heine, 835 S.W.2d 80, 84 (Tex. 1992); *see also* Las Vegas Pecan & Cattle Co. v. Zavala Cnty., 682 S.W.2d 254, 256 (Tex. 1984) (stating that reviewing courts may imply factual findings, which would sustain the judgment when "the judgment is supported by evidence in the record").

353. Wade v. Comm'n for Lawyer Discipline, 961 S.W.2d 366, 374 (Tex. App.—Houston [1st Dist.] 1997, no writ).

354. 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); Allen v. Allen, 717 S.W.2d 311, 313 (Tex. 1986); *In re* W.E.R., 669 S.W.2d 716, 717 (Tex. 1984).

355. 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)).

b. Without Reporter's Record

When there are "no findings of fact or 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."[356] "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."[357]

3. Findings of Fact Properly Requested but Not Filed

a. With Reporter's Record

When properly requested, the trial court has a mandatory duty to file findings of fact.[358] If the trial court fails to do so, harmful error is presumed.[359] However, this presumption is rebutted "if the record before the appellate court affirmatively shows that the complaining party suffered no injury."[360] 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.[361] "'In factually complicated situations in which there

356. 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).

357. Ette v. Arlington Bank of Commerce, 764 S.W.2d 594, 595 (Tex. App.—Fort Worth 1989, no writ); *accord Trevino*, 949 S.W.2d at 41; Carns v. Carns, 776 S.W.2d 603, 604 (Tex. App.—Tyler 1989, no writ). See *supra* Part VIII(H)(4) for a discussion of fundamental error.

358. Nev. Gold & Silver, Inc. v. Andrews Indep. Sch. Dist., 225 S.W.3d 68, 77 (Tex. App.—El Paso 2005, no pet.); *see also* TEX. R. CIV. P. 296 (providing the procedure for a proper request of the trial court to file findings of fact); TEX. R. CIV. P. 297 (providing that the court shall file findings of fact within twenty days of a proper request).

359. *See* Cherne Indus., Inc. v. Magallanes, 763 S.W.2d 768, 772 (Tex. 1989) (noting that harmful error is presumed when the complaining party made the proper requests); Wagner v. Riske, 142 Tex. 337, 178 S.W.2d 117, 119–20 (1944) (interpreting Texas Rule of Civil Procedure 296 to mean that a court's failure to comply constitutes reversible error "where the party complaining complied with statutory requirements" unless "the record before the appellate court affirmatively shows that the complaining party has suffered no injury"); *see also* TEX. R. CIV. P. 296 (providing the procedure for a proper request of the trial court to file findings of fact); TEX. R. CIV. P. 297 (requiring that the court shall file findings of fact within twenty days of a proper request).

360. *Wagner*, 142 Tex. 337, 178 S.W.2d at 120; Sheldon Pollack Corp. v. Pioneer Concrete of Tex. Inc., 765 S.W.2d 843, 845 (Tex. App.—Dallas 1989, writ denied).

361. *Sheldon Pollack*, 765 S.W.2d at 845; *see also* Elizondo v. Gomez, 957 S.W.2d 862, 865 (Tex. App.—San Antonio 1997, writ denied) (restating the test for harm set forth

are two or more possible grounds for recovery or defense, an undue burden [is] placed upon an appellant.'"[362] This burden prevents the appellant from making a proper presentation of the case to the appellate court.[363]

If an appellant is harmed by the trial court's failure to file findings of fact, the appellate court should not reverse the case if the trial court can correct the failure to act.[364] If the trial court can correct its failure to act, the appellate court should abate the appeal, order the trial court to make the appropriate findings and certify those findings to the appellate court, and "then proceed as if the . . . failure to act had not occurred."[365] If the original judge is no longer available to prepare findings and conclusions, a successor judge may prepare them.[366]

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in *Fraser v. Goldberg*, 552 S.W.2d 592, 594 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.), and noting that no harm exists where the trial court makes a statement that gives the appellant notice of why he was ruled against).

362. Humphrey v. Camelot Ret. Cmty., 893 S.W.2d 55, 61 (Tex. App.—Corpus Christi 1994, no writ) (quoting *Fraser*, 552 S.W.2d at 594); *see* Guzman v. Guzman, 827 S.W.2d 445, 446–47 (Tex. App.—Corpus Christi 1992, writ denied) (holding that the appellant was not harmed because the trial court's failure to file findings of fact did not deprive appellant of "the opportunity to properly present her case" to the appellate court when only one issue was disputed).

363. *See In re* O.L., 834 S.W.2d 415, 418–19 (Tex. App.—Corpus Christi 1992, no writ) (stating that a question to consider in determining whether harm exists is whether the appellant was prevented from making a proper presentation of the issues in the case); Anzaldua v. Anzaldua, 742 S.W.2d 782, 784 (Tex. App.—Corpus Christi 1987, writ denied) (holding that the trial court's error was harmful because it prevented the appellant "from making a proper presentation of the issues in this case on appeal"); *see also Humphrey*, 893 S.W.2d at 61 (noting that an appellant should not have to guess why the court ruled against him).

364. TEX. R. APP. P. 44.4.

365. TEX. R. APP. P. 44.4; *see also* Roberts v. Roberts, 999 S.W.2d 424, 441–42 (Tex. App.—El Paso 1999, no pet.) (stating that abatement is appropriate where the trial court's failure to file findings of fact is remedial, but reversing and remanding the case because the trial judge was unable to make the findings); Los Fresnos v. Gonzalez, 830 S.W.2d 627, 630 (Tex. App.—Corpus Christi 1992, no writ) (abating the appeal and ordering the trial court to "enter findings of fact and conclusions of law" where the appellate court was "unable to say whether error was committed and whether appellant has been deprived the opportunity to effectively assert his case on appeal"); Elec. Power Design, Inc. v. R.A. Hanson Co., 821 S.W.2d 170, 171–72 (Tex. App.—Houston [14th Dist.] 1991, no writ) (ordering the trial court to enter findings of fact "within 30 days of the date of this opinion" where the trial judge still served on the court), *overruled on other grounds by In re* Gillespie, 124 S.W.3d 699 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

366. TEX. CIV. PRAC. & REM. CODE ANN. § 30.002 (West 2008); 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) (holding that the remedy of abatement was not available because the original judge was "no longer on the court").

b. Without Reporter's Record

When a party fails to properly request the trial court to file findings of fact and conclusions of law, or call the court's attention to the omission after having timely requested them,[367] 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 prove[n] at trial."[368]

4. 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.[369] 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."[370] 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."[371] Accordingly, "the trial court abuses its discretion [if] it fails to properly apply the law to the undisputed facts, [if] it

367. *See* TEX. R. CIV. P. 297 ("If the court fails to file timely findings of fact and conclusions of law, the party making the [timely] request shall, within thirty days after filing the original request, file with the clerk and serve on all other parties . . . a 'Notice of Past Due Findings of Fact and Conclusions of Law . . . .'").

368. *See* Saenz v. Saenz, 756 S.W.2d 93, 95 (Tex. App.—San Antonio 1988, no writ) (stating that the appellant has the burden of presenting a sufficient record to the appellate court to determine whether there was an error requiring reversal). Without a reporter's record or findings of fact filed, the appellate court will presume that the evidence at trial was sufficient to support the trial court's judgment. *See id.* (holding that a trial court's judgment will be upheld in the absence of a record). Similarly, if only a partial reporter's record is properly before an appellate court, the presumption of sufficient evidence to support the trial court's judgment will apply. *See* Bennett v. Cochran, 96 S.W.3d 227, 229–30 (Tex. 2002) (asserting that although a judgment on the merits is sought, an appellate court will presume the trial court's findings were supported by facts if the record is insufficient to establish otherwise).

369. *See* El Paso Natural Gas Co. v. Minco Oil & Gas Co., 964 S.W.2d 54, 63 (Tex. App.—Amarillo 1997) (applying abuse of discretion standard to a finding of unconscionability), *rev'd on other grounds*, 8 S.W.3d 309 (Tex. 1999); Pony Express Courier Corp. v. Morris, 921 S.W.2d 817, 820 (Tex. App.—San Antonio 1996, no writ) (applying abuse of discretion standard to a finding of unconscionability); *see also* Remington Arms Co. v. Luna, 966 S.W.2d 641, 643 (Tex. App.—San Antonio 1998, pet. denied) (applying abuse of discretion standard to class certification findings).

370. *Remington Arms*, 966 S.W.2d at 643; *Pony Express*, 921 S.W.2d at 820.

371. *El Paso Natural Gas Co.*, 964 S.W.2d at 61 (emphasis omitted).

acts arbitrarily or unreasonably, or [if] its ruling is based on factual assertions unsupported by the record."[372]

C. *Other Evidentiary Standards*

1. 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.'"[373] The clear and convincing standard "is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings."[374] The Texas Supreme Court held in *In re J.F.C.*:[375]

> 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 that must be proven is true, then that court must conclude that the evidence is legally

372. *Remington Arms*, 966 S.W.2d at 643.

373. *In re* C.H., 89 S.W.3d 17, 23 (Tex. 2002) (quoting State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979)); Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 31 (Tex. 1994); *see also* TEX. FAM. CODE ANN. § 101.007 (West 2008) (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").

374. *In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980).

375. *In re* J.F.C., 96 S.W.3d 256 (Tex. 2002).

insufficient.[376]

The supreme court emphasized that witness credibility issues, which necessarily "depend on appearance and demeanor[,] cannot be weighed by the" reviewing court.[377] 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 . . . *so long as those determinations are not themselves unreasonable.*"[378] The court also observed that it must consider undisputed evidence that does not support the jury's finding.[379] Accordingly, the reviewing court may set aside the jury's determination if it finds either that the jury's decision is unreasonable or that the undisputed evidence does not support the jury's decision.[380]

The clear and convincing evidence standard is limited to the following situations: (1) exemplary damages,[381] (2) actual malice,[382] (3) public-figure defamation,[383] (4) termination of parental

376. *Id.* at 266. The supreme court has since followed its holding from the *In re J.F.C.* case. Diamond Shamrock Ref. Co. v. Hall, 168 S.W.3d 164, 170 (Tex. 2005); Qwest Int'l Commc'ns, Inc. v. AT&T Corp., 167 S.W.3d 324, 326 (Tex. 2005); Romero v. KPH Consol., Inc., 166 S.W.3d 212, 220 n.27 (Tex. 2005); Sw. Bell Tel. Co. v. Garza, 164 S.W.3d 607, 627 (Tex. 2004).

377. *Garza*, 164 S.W.3d at 625.

378. *Id.* (emphasis added).

379. *See In re J.F.C.*, 96 S.W.3d at 266 (distinguishing evidence a reasonable person could disbelieve from undisputed facts that do not support the jury's findings, and stating that disregarding this evidence "could skew the analysis of whether there is clear and convincing evidence").

380. *See Diamond Shamrock*, 168 S.W.3d at 170 (applying the elevated standard of review where the court determines whether a reasonable person "could . . . form[] a firm belief or conviction" that a matter is true); *Garza*, 164 S.W.3d at 628–29 (holding that where some evidence indicates termination with malice and other evidence is contradictory, the evidence as a whole does produce a clear conviction); *In re J.F.C.*, 96 S.W.3d at 266 (describing the elevated standard of review as one where a "court must conclude that the evidence is legally insufficient" when "no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true").

381. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b) (West 2008); Dillard Dep't Stores, Inc. v. Silva, 148 S.W.3d 370, 372–73 (Tex. 2004); Lundy v. Masson, 260 S.W.3d 482, 496 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

382. Forbes Inc. v. Granada Biosciences, Inc., 124 S.W.3d 167, 172 (Tex. 2003).

383. Turner v. KTRK Television, Inc., 38 S.W.3d 103, 109 (Tex. 2000); Huckabee v. Time Warner Entm't Co., 19 S.W.3d 413, 420 (Tex. 2000); *see also* Fox Entm't v. Abdel-Hafiz, 240 S.W.3d 524, 532 (Tex. App.—Fort Worth 2007, pet. denied) ("To prevail at trial, a public figure plaintiff must establish actual malice by clear and convincing evidence, but the Texas Supreme Court has declined to adopt the clear-and-convincing standard at the summary judgment stage.").

rights,[384] and (5) because they are constitutionally protected,[385] civil involuntary commitments.[386]

2. Administrative Agency Rulings

"Texas has recognized four types of review for an administrative agency decision: (1) pure trial de novo; (2) pure substantial evidence; (3) substantial evidence de novo; and (4) . . . 'de novo fact trial.'"[387] The de novo fact trial standard "is similar to pure trial de novo except the agency's decision is admissible at trial."[388] This standard, however, has not been applied outside utility rate cases.[389]

Generally, judicial review of an administrative agency's decision is governed by the Administrative Procedure Act (APA), which addresses contested cases.[390] 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.[391] Administrative rulings under the

384. TEX. FAM. CODE ANN. § 161.001 (West Supp. 2010); *In re J.F.C.*, 96 S.W.3d at 261; *In re* C.H., 89 S.W.3d 17, 23 (Tex. 2002); *In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980); *see also In re* J.P.B., 180 S.W.3d 570, 572 (Tex. 2005) (citing to subsections 161.001(1)–(2) of the Texas Family Code).

385. Ellis Cnty. State Bank v. Keever, 888 S.W.2d 790, 792 n.5 (Tex. 1994); *In re G.M.*, 596 S.W.2d at 847.

386. TEX. HEALTH & SAFETY CODE ANN. § 574.034 (West 2010); *see also* Geeslin v. State Farm Lloyds, 255 S.W.3d 786, 796 n.3 (Tex. App.—Austin 2008, no pet.) (emphasizing that a clear and convincing evidentiary standard applies in civil matters involving extraordinary circumstances such as civil involuntary commitments).

387. G.E. Am. Commc'n v. Galveston Cent. Appraisal Dist., 979 S.W.2d 761, 764 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (citing James R. Eissinger, *Judicial Review of Findings of Fact in Contested Cases Under APTRA*, 42 BAYLOR L. REV. 1, 11 (1990)).

388. *Id.*

389. *See id.* (discussing the usage of de novo fact trial in rate-making decisions).

390. TEX. GOV'T CODE ANN. §§ 2001.001–.902 (West 2008); 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) (West 2008). It is not always clear, however, which standard applies when an administrative procedure is not a contested case. *See* TEX. TAX CODE ANN. § 11.31(e) (West 2008) (explaining that an appeal from an agency decision that certain property is not a "facility, device, or method for the control of . . . pollution," and therefore not entitled to an ad valorem property tax exemption, is not considered a contested case under chapter 2001 of the Government Code).

391. TEX. GOV'T CODE ANN. § 2001.174 (West 2008). The statute provides:

> If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may

APA are subject to two standards of review: pure trial de novo and pure substantial evidence.[392] The standard of review to apply depends upon what law is at issue, as the standard should be spelled out in the governing statute.[393] In limited circumstances, both standards of review will be used in reviewing the same agency decision.[394]

a. Pure Trial De Novo

"If the manner of review . . . is by trial de novo," the agency decision is vacated and "the reviewing court shall try each issue of fact and law in the manner that applies to other civil suits."[395]

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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 a 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.

392. *Id.* §§ 2001.173–.174; Sw. Bell Tel. Co. v. Pub. Util. Comm'n, 571 S.W.2d 503, 508 (Tex. 1978) ("A complete reading of the [relevant] section [of the APA] reveals that in contested cases there are now provided only two types of review[:] pure trial de novo or review confined to the agency record.").

393. TEX. GOV'T CODE ANN § 2001.172 (West 2008); *see also* TEX. LAB. CODE ANN. § 410.255 (West 2006) (stating that the Workers' Compensation Act provides for substantial evidence review under the APA); Tex. Emp't 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); Dickerson-Seely & Assocs., Inc. v. Tex. Emp't Comm'n, 784 S.W.2d 573, 574 (Tex. App.—Austin 1990, no writ) (explaining that the proper scope of review "is the one provided by the law pursuant to which the action is instituted"), *overruled on other grounds by* Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 531 & n.28 (Tex. 1995) (disapproving the holding in *Dickerson-Seely* that the Texas Workers' Compensation Act "establish[ed] an impermissible hybrid system of judicial review").

394. *See Garcia*, 893 S.W.2d at 530–31 (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).

395. TEX. GOV'T CODE ANN. § 2001.173(a) (West 2008); G.E. Am. Commc'n v. Galveston Cent. Appraisal Dist., 979 S.W.2d 761, 764 (Tex. App.—Houston [14th Dist.] 1998, no pet.). The Third Court of Appeals has held that the right to trial de novo must be

The appeal is handled by the trial court "as though there had not been an intervening agency action,"[396] and in line with this principle, the reviewing court cannot admit the agency's decision into evidence.[397] The reviewing court bases its decision on its own determination of the issues of law and fact in the case,[398] and it may consider new evidence not presented before the agency.[399] As in other civil cases, the standard of proof is a preponderance of the evidence.[400] Finally, a party may request a jury trial on each issue of fact.[401]

b. Pure Substantial Evidence

"'Pure substantial evidence' review is at the opposite end of the spectrum" from trial de novo.[402] "Under this standard, the agency's decision is not automatically vacated."[403] Instead, the reviewing court considers only the factual "record made before the [administrative body] ... and determines whether the agency's findings are reasonably supported by substantial evidence."[404] "The agency's decision carries a presumption of ... validity that may" be set aside only if the appellant can demonstrate "that

specifically stated in the statute conferring jurisdiction in the trial court. Pretzer v. Motor Vehicle Bd., 125 S.W.3d 23, 40 (Tex. App.—Austin 2003), *aff'd in part, rev'd in part*, 138 S.W.3d 908 (Tex. 2004).

396. TEX. GOV'T. CODE ANN. § 2001.173(a) (West 2008); *see also Dickerson-Seely*, 784 S.W.2d at 575 (noting that filing a petition for trial de novo vacates the agency's decision).

397. TEX. GOV'T CODE ANN. § 2001.173(a) (West 2008); *Dickerson-Seely*, 784 S.W.2d at 574. The fact that the decision has been made, however, 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 (West 2008).

398. *See* TEX. GOV'T CODE ANN. § 2001.173(a) (West 2008) ("[T]he reviewing court shall try each issue of fact and law in the manner that applies to other civil suits in this state"); *see also Dickerson-Seely*, 784 S.W.2d at 575 ("Our courts have long held that the power to try a case de novo vests the court with full power to determine the facts anew and to decide all matters in issue.").

399. *See* Gilder v. Meno, 926 S.W.2d 357, 365 (Tex. App.—Austin 1996, writ denied) ("Under a pure trial de novo review, the decision of the lower agency or board is automatically vacated upon the taking of an appeal, and the reviewing tribunal not only hears new evidence, but also substitutes its discretion and judgment for that of the lower body." (internal quotation marks omitted)).

400. *Dickerson-Seely*, 784 S.W.2d at 574–75.

401. TEX. GOV'T CODE ANN. § 2001.173(b) (West 2008).

402. G.E. Am. Commc'n v. Galveston Cent. Appraisal Dist., 979 S.W.2d 761, 764 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

403. *Id.*

404. *Id.*

reasonable minds could not have reached the [same] conclusion" as the agency.[405] One endeavoring to reverse administrative findings, conclusions, or decisions because of a lack of substantial evidence will face a difficult task.[406]

"At its core, the substantial evidence rule is a reasonableness test or a rational basis test."[407] If the agency decision is not "supported by substantial evidence in the record," or if the decision is "arbitrary, capricious, or an abuse of discretion," the decision must be reversed.[408] The scope of review is based upon "the reliable and probative evidence in the record as a whole."[409] 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]."[410] 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.[411]

405. *Id.*; *see also* City of El Paso v. Pub. Util. Comm'n, 883 S.W.2d 179, 186 (Tex. 1994) (advising that the court's role in a substantial evidence review is to determine whether the evidence, when viewed in its entirety, would lead reasonable minds to agree in their conclusions concerning the disputed action). "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)).

406. *See* Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc., 665 S.W.2d 446, 452 (Tex. 1984) (permitting reversal of agency decisions for "absence of substantial evidence only if such absence has prejudiced substantial rights of the litigant"); Fetchin v. Meno, 922 S.W.2d 549, 552 (Tex. App.—Austin 1995) (requiring the record to show error that warrants reversal), *rev'd on other grounds*, 916 S.W.2d 961 (Tex. 1996).

407. R.R. Comm'n v. Pend Oreille Oil & Gas Co., 817 S.W.2d 36, 41 (Tex. 1991); *see also Charter Med.-Dallas*, 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); Tex. Health Enters., Inc. v. Tex. Dep't of Health, 954 S.W.2d 168, 171 (Tex. App.—Austin 1997, no pet.) (summarizing the various articulations of the substantial evidence rule); 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 Med.–Dallas*).

408. Pub. Util. Comm'n of Tex. v. Gulf States Util. Co., 809 S.W.2d 201, 210–11 (Tex. 1991).

409. *Id.* at 211.

410. Tex. Water Comm'n v. Customers of Combined Water Sys., Inc., 843 S.W.2d 678, 681 (Tex. App.—Austin 1992, no writ).

411. Tex. Alcoholic Beverage Comm'n v. Mini, Inc., 832 S.W.2d 147, 150 (Tex.

Therefore, the reviewing court is only concerned with the *reasonableness* of the agency's order and "not the *correctness* of the order."[412] In applying this test, the reviewing "court may not substitute its judgment for that of the agency as to the weight of the evidence."[413] Finally, the question of whether the administrative decision is supported by substantial evidence is a question of law.[414]

"Substantial evidence" and "arbitrary and capricious" may at first appear to be "two sides of the same coin."[415] If an agency's decision is not supported by substantial evidence, then the order is deemed to be arbitrary and capricious.[416] However, a decision may be supported by substantial evidence yet still be arbitrary and capricious, therefore, justifying reversal.[417] "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 reaches a completely unreasonable result."[418] The arbitrary and capricious test is a permutation of the abuse of discretion standard by focusing on the process of

App.—Houston [14th Dist.] 1992, writ denied).

412. *Pend Oreille*, 817 S.W.2d at 41; *see also Charter Med.-Dallas*, 665 S.W.2d at 452 ("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.").

413. *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).

414. Montgomery Indep. Sch. Dist. v. Davis, 34 S.W.3d 559, 566 (Tex. 2000); *Brinkmeyer*, 662 S.W.2d at 956.

415. *Charter Med.-Dallas*, 665 S.W.2d at 454.

416. Pub. Util. Comm'n v. Gulf States Util. Comm'n, 809 S.W.2d 201, 211 (Tex. 1991); *Charter Med.-Dallas*, 665 S.W.2d at 454.

417. *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 the question of whether substantial evidence existed because improper standards were used by the agency in making its determination); Starr Cnty. v. Starr Indus. Servs., Inc., 584 S.W.2d 352, 356 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (finding that a lack of notice justified a reversal of the agency decision without any consideration of the substantial evidence question).

418. City of El Paso v. Pub. Util. Comm'n, 883 S.W.2d 179, 184 (Tex. 1994).

decision making rather than the decision itself.[419]

c. Substantial Evidence De Novo

Substantial evidence de novo review, a hybrid standard, allows the reviewing court to hear additional "evidence in existence at the time of the administrative hearing[,] regardless of whether it was [actually] introduced at the administrative hearing."[420] The trial court examines the evidence presented to it, rather than the evidence presented to the administrative agency.[421] "Substantial evidence de novo review resembles pure substantial evidence review in virtually all other respects."[422] The administrative order may be set aside only "if it is arbitrary, capricious, unlawful, or not reasonably supported by substantial evidence."[423] Although new evidence is introduced at trial, the review is considered a question of law.[424]

IV. PRETRIAL RULINGS

The bulk of pretrial rulings listed below in alphabetical order by topic are reviewed for an abuse of discretion, either on appeal or by writ of mandamus.[425] There are, however, a number of deviations from this general rule.[426] See Part II *supra* for a more complete discussion of how the abuse of discretion standard

419. *See Starr Indus.*, 584 S.W.2d at 355 (explaining that an arbitrary decision-making process by an agency that denies a person due process of the law is an abuse of discretion and cannot stand).

420. G.E. Am. Commc'n v. Galveston Cent. Appraisal Dist., 979 S.W.2d 761, 764 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (emphasis omitted).

421. *Id.* at 764–65.

422. *Id.* (internal quotations omitted).

423. *Id.*

424. *Id.*

425. For example, the trial court's order granting or denying discovery is reviewed for an abuse of discretion. Tex. Tech. Univ. Health Scis. Ctr. v. Schild, 828 S.W.2d 502, 503 (Tex. App.—El Paso 1992, orig. proceeding).

426. An example of this deviation from the general rule is that an appellate court reviews a trial court's denial of a motion to transfer venue de novo. Wilson v. Tex. Parks & Wildlife Dep't, 886 S.W.2d 259, 260–62 (Tex. 1994). In reviewing a special appearance, an appellate court may review the fact findings for both legal and factual sufficiency, although the ultimate question of whether the court has personal jurisdiction over a defendant is a question of law reviewed de novo. BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 794 (Tex. 2002); *see also* Zinc Nacional, S.A. v. Bouche Trucking, Inc., 308 S.W.3d 395, 397 (Tex. 2010) ("Whether a court has personal jurisdiction over a nonresident defendant is a question of law, which we review de novo.").

operates as a standard of review in appeals and original proceedings.

A. *Abatement*

A motion or plea in abatement alleges that there is some obstacle to prosecuting the case.[427] 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."[428] A motion to abate may also be used to raise a defect in parties.[429]

Typically, if the plea is sustained, the action is suspended until the obstacle is removed.[430] There are cases, however, holding that if a party calls the trial court's attention to the pendency of a prior suit involving the same parties and same controversy, the subsequent case "must be dismissed."[431] The Texas Supreme Court has noted the split in authority but has not resolved it.[432]

A plea in abatement is generally an incidental ruling appealed from a final judgment,[433] but rare exceptions exist.[434] The

427. Speer v. Stover, 685 S.W.2d 22, 23 (Tex. 1985) (per curiam), *overruled on other grounds by* Thomas v. Long, 207 S.W.3d 334, 338–39 (Tex. 2010) (overruling a line of cases that required a trial court "to deny an otherwise meritorious plea to the jurisdiction or a motion for summary judgment based on a jurisdictional challenge concerning some claims because the trial court has jurisdiction over other claims"); Garcia-Marroquin v. Nueces Cnty. Bail Bond Bd., 1 S.W.3d 366, 374 (Tex. App.—Corpus Christi 1999, no pet.).

428. 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).

429. Truong v. City of Houston, 99 S.W.3d 204, 216 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

430. *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)).

431. Mower v. Boyer, 811 S.W.2d 560, 563 n.2 (Tex. 1991).

432. *See* Miles v. Ford Motor Co., 914 S.W.2d 135, 139 (Tex. 1995) (indicating that, at the trial court level, some courts have dismissed the second suits while others have merely abated them).

433. Hall v. Lawlis, 907 S.W.2d 493, 494 (Tex. 1995) (orig. proceeding) ("In the absence of [direct] interference, the refusal to abate can be adequately reviewed on appeal.").

434. *See* Curtis v. Gibbs, 511 S.W.2d 263, 268 (Tex. 1974) (issuing mandamus relief when a second court incorrectly denied a plea in abatement); Virani v. Cunningham, No. 14-08-01166-CV, 2009 Tex. App. LEXIS 6557, at *1 (Tex. App.—Houston [14th Dist.] Aug. 20, 2009, pet. denied) (mem. op.) (affirming an order denying a plea in abatement that was combined with an appealable motion to compel arbitration); Epernay Cmty. Ass'n v. Shaar, No. 14-09-00422-CV, 2009 Tex. App. LEXIS 4749, at *2 (Tex. App.—Houston [14th Dist.] June 25, 2009, no pet.) (mem. op.) (dismissing an interlocutory appeal from an order denying appellant's plea in abatement); *In re* Ayala, No. 13-07-140-

appellate court will review the trial court's abatement decision with an abuse of discretion standard.[435] Whether the trial court properly sustained or overruled a plea in abatement depends upon the evidence offered at the hearing on the plea; a reporter's record is required to attack the trial court's actions following the hearing.[436] 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]."[437]

B. *Arbitration*

The parties to a lawsuit might have previously agreed to arbitrate disputes, or the parties may be statutorily required to arbitrate.[438] The first step to engage this method of alternative dispute resolution is to file a motion to compel arbitration. Once the arbitration is complete, the trial court may confirm the award.

1. Motion to Compel Arbitration

A motion to compel arbitration should specify whether the arbitration is sought under the Texas Arbitration Act (TAA) or

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CV, 2007 WL 1238572, at *1 (Tex. App.—Corpus Christi April 27, 2007, orig. proceeding) (granting mandamus relief from an order denying a plea in abatement based on dominant jurisdiction).

435. Wyatt v. Shaw Plumbing Co., 760 S.W.2d 245, 248 (Tex. 1998); *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 and the relator had an adequate remedy by appeal); Dolenz v. Cont'l Nat'l Bank of Fort 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").

436. *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 reporter's record, then known as a statement of facts).

437. Jenkins v. State, 570 S.W.2d 175, 177 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ). The supreme court subsequently disapproved of the *Jenkins* court'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) (disapproving of the appellate court's inclusion of a patient's medical records as tangible personal property).

438. *See* TEX. LOC. GOV'T CODE ANN. § 143.057 (West 2008) (illustrating statutory arbitration for certain matters affecting firefighters and police officers); *In re* Kaplan Higher Educ. Corp., 235 S.W.3d 206, 206–08 (Tex. 2007) (illustrating a contractual agreement to arbitrate); *see also* L.H. Lacy Co. v. City of Lubbock, 559 S.W.2d 348, 352 (Tex. 1977) (noting common law arbitration is an alternative to statutory arbitration); Riha v. Smulcer, 843 S.W.2d 289, 292 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (recognizing common law arbitration).

the Federal Arbitration Act (FAA) or both. Texas courts favor arbitration agreements.[439]

a. Texas Arbitration Act

In determining whether to compel an arbitration agreement under the TAA, 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."[440] If the court determines that a valid agreement exists, "the burden shifts to the party opposing arbitration to raise an affirmative defense to enforcing arbitration."[441] "Once the trial court concludes that the arbitration agreement encompasses the claims, and that the party opposing arbitration has failed to prove its defenses, the trial court has no discretion but to compel arbitration and stay its own proceedings."[442]

Whether arbitration is required is a matter of contract interpretation, and the enforceability of an arbitration provision is a question of law for the court.[443] However, the decision to compel arbitration or not is subject to review for an abuse of discretion.[444] 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 relief from an order compelling arbitration is generally only available on final appeal.[445] In rare circumstances, mandamus relief is available for an order

439. Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 268 (Tex. 1992) (orig. proceeding); Brazoria Cnty. v. Knutson, 142 Tex. 172, 176 S.W.2d 740, 743 (1943).

440. Nationwide of Fort Worth, Inc. v. Wigington, 945 S.W.2d 883, 884 (Tex. App.—Waco 1997, writ dism'd w.o.j.) (resolving doubts in favor of arbitration).

441. J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 227 (Tex. 2003) (orig. proceeding).

442. *In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 753–54 (Tex. 2001) (orig. proceeding).

443. *See In re* Dillard Dep't Stores, Inc., 198 S.W.3d 778, 781 (Tex. 2006) (orig. proceeding) (holding that enforceability is a "question of law"); *J.M. Davidson, Inc.*, 128 S.W.3d at 227 (interpreting arbitration agreements under "traditional contract principles").

444. *Tipps*, 842 S.W.2d at 271.

445. TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.098(a)(1)–(2) (West 2005); Materials Evolution Dev. USA, Inc. v. Jablonowski, 949 S.W.2d 31, 33 (Tex. App.—San Antonio 1997, no writ); Lipshy Motorcars, Inc. v. Sovereign Assocs., 944 S.W.2d 68, 69 (Tex. App.—Dallas 1997, no writ); Burlington N. R.R. Co. v. Akpan, 943 S.W.2d 48, 49 (Tex. App.—Fort Worth 1996, no writ).

compelling arbitration.[446]

b. Federal Arbitration Act

The Federal Arbitration Act applies to contracts affecting interstate commerce.[447] "There is a presumption favoring agreements to arbitrate under the federal act,"[448] and the court should resolve any doubts in favor of arbitration.[449] 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 exists,"[450] and whether the agreement is binding on a nonparty.[451] Pending a clear answer from the United States Supreme Court, under the FAA, the Texas Supreme Court holds that state law governs whether a nonparty agreed to arbitrate[452] and "federal law governs the scope of an arbitration [agreement],"[453] noting that the state courts should try "to keep it as consistent as possible with federal law."[454]

"[A] party seeking to compel arbitration under the FAA must establish that: (1) there is a valid arbitration agreement, and (2) the claims raised fall within that agreement's scope."[455] "An agreement to arbitrate is valid [and enforceable] unless grounds exist at law or in equity for the revocation of any contract, such as fraud or unconscionability."[456] If the movant makes this showing,

446. *In re* Gulf Exploration, LLC, 289 S.W.3d 836, 841–43 (Tex. 2009); *In re* Poly-Am., 262 S.W.3d 337, 345 (Tex. 2008) (orig. proceeding); Perry Homes v. Cull, 258 S.W.3d 580, 587 (Tex. 2008).

447. 9 U.S.C. § 2 (2006); Perry v. Thomas, 482 U.S. 483, 489 (1987); *In re* Nexion Health at Humble, Inc., 173 S.W.3d 67, 69 (Tex. 2005) (orig. proceeding).

448. Stewart Title Guar. Co. v. Mack, 945 S.W.2d 330, 333 (Tex. App.—Houston [1st Dist.] 1997, writ dism'd w.o.j.); *accord* Cantella & Co. v. Goodwin, 924 S.W.2d 943, 944 (Tex. 1996) (orig. proceeding).

449. *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).

450. *In re* Weekley Homes, L.P., 180 S.W.3d 127, 130 (Tex. 2005) (orig. proceeding) (quoting PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 407 n.2 (2003)).

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.* at 131.

455. *In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding); *accord In re* AdvancePCS Health L.P., 172 S.W.3d 603, 605 (Tex. 2005) (orig. proceeding).

456. Emerald Tex., Inc. v. Peel, 920 S.W.2d 398, 402 (Tex. App.—Houston [1st Dist.]

and the opposing party fails to demonstrate an affirmative defense to arbitration,[457] the trial court is obligated to compel arbitration.[458]

The trial court's determination of the validity of an arbitration agreement is a legal question reviewed de novo.[459] A trial court's order denying a motion to compel arbitration under the federal act is reviewable by appeal for an abuse of discretion, while a trial court's order granting a motion to compel arbitration under the federal act is reviewable by mandamus for abuse of discretion.[460]

2. Motion to Confirm or Vacate an Arbitration Award

To set aside an arbitration award, the complaining party "must allege a statutory or common law ground to vacate the . . . award."[461] 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."[462] In addition to the common law grounds for setting aside an arbitration award, the TAA 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 the postponement"; (3) the arbitrators "refuse[] to hear evidence

1996, no writ); *see* 9 U.S.C. § 2 (2006) (addressing the "[v]alidity, irrevocability, and enforcement of arbitration agreements); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995) (detailing the protection 9 U.S.C. § 2 provides consumers against unwanted arbitration provisions); *see also In re* McKinney, 167 S.W.3d 833, 835 (Tex. 2005) (explaining that "[a]bsent fraud, misrepresentation, or deceit," parties are bound to the arbitration agreement).

457. *AdvancePCS*, 172 S.W.3d at 607.

458. Cantella & Co. v. Goodwin, 924 S.W.2d 943, 944 (Tex. 1996) (orig. proceeding) (per curiam).

459. *In re* Dillard Dep't Stores, Inc., 186 S.W.3d 514, 515 (Tex. 2006) (orig. proceeding).

460. TEX. CIV. PRAC. & REM. CODE § 51.016 (West 2008). *But see In re* Wood, 140 S.W.3d 367, 370 (Tex. 2004) (orig. proceeding) (illustrating that FAA decisions were formerly not appealable and were subject to mandamus relief).

461. HISAW & Assocs. Gen. Contractors, Inc. v. Cornerstone Concrete Sys., Inc., 115 S.W.3d 16, 18–19 (Tex. App.—Ft. Worth 2003, pet. denied); Anzilotti v. Gene D. Liggin, Inc., 899 S.W.2d 264, 266 (Tex. App.—Houston [14th Dist.] 1995, no writ).

462. Nuno v. Pulido, 946 S.W.2d 448, 452 (Tex. App.—Corpus Christi 1997, no writ); *accord Anzilotti*, 899 S.W.2d at 266; *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").

material to the controversy" or conduct the hearing in a manner that "substantially prejudice[s] 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 objection."[463] Under the TAA, an award shall be modified by a court if there was: (1) a miscalculation of figures; (2) a mistaken "description of a 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.[464]

Review of a trial court's decision as to vacatur or confirmation of an arbitration award is de novo.[465] Because courts favor arbitration awards to resolve disputes,[466] the courts "indulge every reasonable presumption" in favor of upholding the awards.[467] "A mere mistake of fact or law is insufficient to set aside an arbitration award."[468] 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.[469] The scope

463. TEX. CIV. PRAC. & REM. CODE ANN. § 171.088 (West 2005). Like the common law, subsection (a)(1) provides that an award may be vacated if "obtained by corruption, fraud, or other undue means," and subsection (a)(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]) (identifying the grounds on which a court may vacate an arbitration award).

464. TEX. CIV. PRAC. & REM. CODE ANN. § 171.091 (West 2005); Riha v. Smulcer, 843 S.W.2d 289, 292 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

465. *See* Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex., 915 F.2d 1017, 1020 (5th Cir. 1990) (stating that review of a trial court's decision to vacate an arbitration award is de novo); Statewide Remodeling, Inc. v. Williams, 244 S.W.3d 564, 567 (Tex. App.—Dallas 2008, no pet.) (noting that appellate courts review an arbitration confirmation decision de novo).

466. 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); *Riha*, 843 S.W.2d at 292–94.

467. *Anzilotti*, 899 S.W.2d at 266; *see also FirstMerit Bank, N.A.*, 52 S.W.3d at 753 (stating "courts must resolve any doubts about an arbitration agreement's scope in favor of arbitration"); *Nuno*, 946 S.W.2d at 452 (emphasizing that any doubts should be resolved in favor of arbitration).

468. *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).

469. Holk v. Biard, 920 S.W.2d 803, 806 (Tex. App.—Texarkana 1996, orig.

of review is the entire record.[470]

C. *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."[471] 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."[472] 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.[473] As a result, the supreme court looks to federal decisions and authorities interpreting federal class action requirements.[474] 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 parties will fairly and adequately protect the interests of the class [(adequacy of representation)].[475]

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proceeding [leave denied]); *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).

470. *See Riha*, 843 S.W.2d at 294 (reviewing the record as a whole).

471. Wood v. Victoria Bank & Trust Co., 69 S.W.3d 235, 239 (Tex. App.—Corpus Christi 2001, no pet.); *accord* Gen. Motors Corp. v. Bloyed, 916 S.W.2d 949, 952 (Tex. 1996); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (discussing the underlying goals and requirements to qualify as a class action suit under Rule 23 of the Federal Rules of Civil Procedure).

472. Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 701 (Tex. 2002) (O'Neill, J., dissenting). Not surprisingly, a trial court's ruling certifying or refusing to certify a class is subject to interlocutory appeal. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(3) (West 2008).

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

474. *See id.* (explaining that such authority is persuasive to Texas class action certification).

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

In addition to these four requirements, class actions must satisfy one of the four subdivisions of Rule 42(b).[476]

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."[477] The court has "rejected the 'certify now and worry later' approach to class certification."[478] While it "may not be an abuse of discretion to certify a class that could later fail," the court stated that a "cautious approach to class certification is essential."[479] Accordingly, it is improper for a trial court "to certify a class without knowing how the claims can and will likely be tried."[480] 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.[481] "The formulation of a trial plan assures that a trial court has fulfilled its obligation to rigorously analyze all certification prerequisites and 'understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'"[482] If it cannot be determined "from the outset that the individual issues can be considered in a manageable, time-efficient,

476. 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"; or (3) "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, 73 (Tex. 2003).

477. BMG Direct Mktg., Inc. v. Peake, 178 S.W.3d 763, 777 (Tex. 2005); *see also* 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).

478. *Peake*, 178 S.W.3d at 776–77.

479. *Bernal*, 22 S.W.3d at 435.

480. *Peake*, 178 S.W.3d at 777; *accord* State Farm Mut. Auto. Ins. Co. v. Lopez, 156 S.W.3d 550, 555 (Tex. 2004).

481. *Peake*, 178 S.W.3d at 777; N. Am. Mortg. Co. v. O'Hara, 153 S.W.3d 43, 44 (Tex. 2004).

482. *Peake*, 178 S.W.3d at 778.

yet fair manner, then certification is not appropriate."[483]

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.[484] 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."[485]

D. *Consolidation*

The trial court may consolidate cases pursuant to Rule 174.[486] The express purpose of Rule 174 "is to further convenience and avoid prejudice, and thus promote the ends of justice."[487] The trial court may consolidate actions that "'relate to substantially the same transaction, occurrence, subject matter, or question.'"[488] The actions must "'be so related that evidence presented will be material, relevant, and admissible in each case.'"[489] "'[T]he trial court must balance the judicial economy and convenience . . . gained by consolidation against the risk of an unfair outcome because of prejudice or jury confusion.'"[490] If "'the facts and circumstances unquestionably require ... separate trial[s] to prevent a manifest injustice, and there [are] no fact[s] or circumstance[s] supporting or tending to support a contrary conclusion,' the trial court does not have any discretion to order

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483. *Bernal*, 22 S.W.3d at 436.

484. Compaq Computer Corp. v. Lapray, 135 S.W.3d 657, 671 (Tex. 2004); *see also* Nat'l W. Life Ins. Co. v. Rowe, 164 S.W.3d 389, 392 (Tex. 2005) (discussing the deference given to courts in class action certifications).

485. *Lapray*, 135 S.W.3d at 671.

486. *See* TEX. R. CIV. P. 174(a) (allowing a court to "order a joint hearing or trial of any or all the matters in issue[,] ... order all the actions consolidated[,] and ... make such orders ... as may tend to avoid unnecessary costs or delay"); Allison v. Ark. La. Gas Co., 624 S.W.2d 566, 568 (Tex. 1981) (recognizing a trial court's broad discretion in determining joinder and consolidation); *see also In re* Ethyl Corp., 975 S.W.2d 606, 614–17 (Tex. 1998) (orig. proceeding) (listing factors for consolidated trials in mass tort litigation).

487. Womack v. Berry, 156 Tex. 44, 291 S.W.2d 677, 683 (1956) (orig. proceeding).

488. Crestway Care Ctr., Inc. v. Berchelmann, 945 S.W.2d 872, 873–74 (Tex. App.—San Antonio 1997, orig. proceeding [leave denied]) (en banc) (quoting Excel Corp. v. Valdez, 921 S.W.2d 444, 448 (Tex. App.—Corpus Christi 1996, orig. proceeding)); Owens-Corning Fiberglas Corp. v. Martin, 942 S.W.2d 712, 716 (Tex. App.—Dallas 1997, no writ).

489. *Crestway Care Ctr.*, 945 S.W.2d at 874 (quoting *Valdez*, 921 S.W.2d at 448); *Martin*, 942 S.W.2d at 716.

490. *Crestway Care Ctr.*, 945 S.W.2d at 874 (quoting *Valdez*, 921 S.W.2d at 448); *Martin*, 942 S.W.2d at 716.

consolidation."[491] The trial court's ruling on a motion to consolidate is reviewed on appeal for an abuse of discretion.[492]

E. *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."[493] Whether the trial court grants or denies a motion for continuance is within its sound discretion.[494] Therefore, the trial court's ruling is reviewed by an appellate court for an abuse of discretion.[495]

A trial court may grant a continuance if the affidavits of the party seeking the continuance show that the party seeking the continuance cannot present necessary facts in response to a summary judgment motion.[496] The trial court should consider the following list of nonexclusive factors in ruling on a motion for

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

492. *See, e.g.*, Pilgrim Enters., Inc. v. Md. Cas. Co., 24 S.W.3d 488, 491 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (indicating that the trial court has discretion in deciding whether to consolidate an action). Mandamus review may also be available. *See, e.g., In re* Van Waters & Rogers, Inc., 145 S.W.3d 203, 206 (Tex. 2004) (orig. proceeding) (granting mandamus relief from a court's decision to consolidate several claims).

493. 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, no pet.) (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.*

494. 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).

495. Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 161 (Tex. 2004). In *In re N. Am. Refractories Co.*, the Ninth 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. *In re* N. Am. Refractories Co., 71 S.W.3d 391, 394 (Tex. App.—Beaumont 2001, orig. proceeding). 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 393–94. In practical terms, appellate courts only review orders denying continuances, perhaps because it would be impossible to show harm from an order granting a continuance.

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

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."[497]

F. *Default Judgment*

If a defendant fails to file a timely answer after properly being served, the defendant may suffer a default judgment.[498] A post-answer default takes place when a defendant initially answers, but fails to make an appearance at trial.[499] "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.[500] Different rules apply to set aside a default judgment depending on whether the judgment was proper (secured in accordance with the statutes and rules for issuance, service, and return of citation) or defective (not secured in accordance with the statutes and rules for issuance, service, and return of citation).

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.*[501] The purpose of *Craddock* is to "alleviate unduly harsh and

497. *Joe*, 145 S.W.3d at 161.

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

499. Dolgencorp of Tex., Inc. v. Lerma, 288 S.W.3d 922, 925 (Tex. 2009); Stoner v. Thompson, 578 S.W.2d 679, 682 (Tex. 1979).

500. Fid. & Guar. Ins. Co. v. Drewery Constr. Co., 186 S.W.3d 571, 573–74 (Tex. 2006). If it is too late to file a motion for new trial, other options for challenging a default judgment include a regular appeal, restricted appeal (formerly known as a writ of error), and bill of review. *See generally* Jordan v. Jordan, 36 S.W.3d 259, 263–65 (Tex. App.—Beaumont 2001, pet. denied) (delineating alternative legal remedies available after a default judgment has been entered).

501. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124, 126 (1939); *see also* Holt Atherton Indus. v. Heine, 835 S.W.2d 80, 82 (Tex. 1992) (reaffirming the three-part *Craddock* test). *But see* 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 by separating the mistake or accident element

unjust results . . . when the defaulting party has no other remedy available."[502] It "is based upon equitable principles and 'prevents an injustice to the defendant without working an injustice on the plaintiff.'"[503] Under this test, a trial court may set aside a default judgment and order a new trial in any case in which:

> 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;[504] provided the motion for a new trial sets up a meritorious defense[,][505] and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.[506]

When the first element is established with proof that the defaulted party did not receive notice of a trial setting or other dispositive hearing, due process alleviates the burden of proving the second element of the *Craddock* test regarding a meritorious

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from the conscious indifference element).

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

503. *Id.* at 685.

504. *Craddock*, 133 S.W.2d at 126. A valid excuse does not have to be a good excuse to satisfy this burden. *Drewery Constr. Co.*, 186 S.W.3d 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); *cf.* Coastal Banc SSB v. Helle, 48 S.W.3d 796, 800–01 (Tex. App.—Corpus Christi 2001, pet. denied) (determining that not being advised of the hearing date is a sufficient excuse for failure to appear). The standard, however, is not negligence but "'is one of intentional or conscious indifference—that the defendant *knew* it was sued but did not care.'" Levine v. Shackelford, Melton & McKinley, L.L.P., 248 S.W.3d 166, 168 (Tex. 2008) (quoting *Fid. & Guar. Ins. Co.*, 186 S.W.3d at 575–76); *see also* Strackbein v. Prewitt, 671 S.W.2d 37, 39 (Tex. 1984) (looking to the defendant's knowledge and acts to determine intent); Konkel v. Otwell, 65 S.W.3d 183, 186 (Tex. App.—Eastland 2001, no pet.) (distinguishing an intentional action from a mistake). 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.

505. *Craddock*, 133 S.W.2d at 126; *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); Cragin v. Henderson Cnty. Oil Dev. Co., 280 S.W. 554, 555–56 (Tex. Comm'n App. 1926, holding approved) (determining that allegations of meritorious defense are to be taken as true if properly supported, but that allegations of excuse for failure to appear may be controverted and determined by the trial court). 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).

506. *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).

defense.[507] It is likely that the third element regarding prejudice to plaintiff would not have to be proved in the same circumstances for the same due process reasons.[508]

The *Craddock* test applies to both no-answer and post-answer default judgments.[509] The *Craddock* test can also apply to summary judgments,[510] unless the "motion for new trial [is] filed after judgment has been granted on a summary-judgment motion to which the nonmovant failed to timely respond when the" nonmovant had the opportunity to do so.[511]

The trial court's ruling on a motion for new trial based on *Craddock* is reviewed on appeal with the abuse of discretion standard.[512] "The historical trend in default judgment cases is toward the liberal granting of new trials."[513] Accordingly, when the guidelines established in *Craddock* have been met, it is an

507. Lopez v. Lopez, 757 S.W.2d 721, 723 (Tex. 1988); *see* Mathis v. Lockwood, 166 S.W.3d 743, 744 (Tex. 2005) (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).

508. *Mathis*, 166 S.W.3d at 744; Mahand v. Delaney, 60 S.W.3d 371, 375 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

509. *See* LeBlanc v. LeBlanc, 778 S.W.2d 865, 865 (Tex. 1989) (providing that *Craddock* has "general application to all judgments of default").

510. Huffine v. Tomball Hosp. Auth., 979 S.W.2d 795, 798–99 (Tex. App.—Houston [14th Dist.] 1998, no pet.), *overruled in part by Carpenter*, 98 S.W.3d at 686 ("[W]e disapprove of . . . court of appeals decisions to the extent that they can be read to hold that all of the *Craddock* factors must be met when a nonmovant is aware of its mistake at or before the summary-judgment hearing and thus has an opportunity to apply for relief under our rules."); Washington v. McMillan, 898 S.W.2d 392, 396 (Tex. App.—San Antonio 1995, no writ), *overruled in part by Carpenter*, 98 S.W.3d at 686. *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).

511. *Carpenter*, 98 S.W.3d at 685–86. The Texas Supreme Court in *Carpenter* did not expressly hold that *Craddock* does apply to summary judgments; however, the court stated that "*Craddock does not* apply to a motion for new trial filed after summary judgment is granted on a motion to which the nonmovant failed to timely respond when the respondent had notice of the hearing and an opportunity to employ the means" provided by the Texas Rules of Civil Procedure. *Id.* at 686 (Tex. 2002) (emphasis added).

512. Dolgencorp of Tex., Inc. v. Lerma, 288 S.W.3d 922, 926 (Tex. 2009); Cliff v. Huggins, 724 S.W.2d 778, 778 (Tex. 1987); Grissom v. Watson, 704 S.W.2d 325, 326 (Tex. 1986).

513. Norton v. Martinez, 935 S.W.2d 898, 901 (Tex. App.—San Antonio 1996, no writ).

abuse of discretion to deny a new trial.[514]

2. Defective Default Judgment

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.[515] Personal jurisdiction over a defendant to a suit is "dependent upon citation issued and served in a manner provided for by law."[516] "If a default judgment is not rendered in compliance with the statutes and rules[,] . . . the default judgment may be set aside by a motion to set aside, a motion for new trial, an appeal, or" a restricted appeal.[517]

In reviewing a default judgment under these remedies, both trial and reviewing courts may only consider errors that appear on the face of the record.[518] "It is imperative . . . that the record affirmatively show a strict compliance with the provided mode of service" for a default judgment to withstand attack.[519] Accordingly, this showing must be made from the record as it existed before the trial court when the default judgment was

514. *Dolgencorp*, 288 S.W.3d at 926.

515. *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").

516. *See* Wilson v. Dunn, 800 S.W.2d 833, 836 (Tex. 1990) (noting that a default judgment against a defendant that was never properly served cannot stand because jurisdiction is dependent on proper service).

517. Bagel v. Mason Rd. Bank, N.A., No. B14-91-00548-CV, 1992 WL 43953, at *1 (Tex. App.—Houston [14th Dist.] Feb. 27, 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).

518. 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).

519. 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*, 800 S.W.2d at 836; 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) (concluding that courts must consider sufficiency of process when determining whether to grant a default judgment); Seib v. Bekker, 964 S.W.2d 25, 27–28 (Tex. App.—Tyler 1997, no writ) ("The 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)).

signed, unless the record is amended pursuant to Rule 118 of the Texas Rules of Civil Procedure.[520]

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.[521] Absent a need for evidence, on appeal, the default judgment is reviewed de novo to determine whether it was rendered in compliance with the statutes and rules.[522]

G. *Discovery Rulings*

"Under Texas law, evidence is presumed discoverable."[523] The party seeking to limit discovery has the burden of proving the exemption from discovery.[524]

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."[525] 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;"[526] (2) it helps

520. *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 a 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, 73–75 (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).

521. *See* 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); Bronze & Beautiful, Inc. v. Mahone, 750 S.W.2d 28, 29 (Tex. App.—Texarkana 1988, no writ) (asserting 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").

522. Furst v. Smith, 176 S.W.3d 864, 868–69 (Tex. App.—Houston [1st Dist.] 2005, no pet.); Coronado v. Norman, 111 S.W.3d 838, 841–42 (Tex. App.—Eastland 2003, pet. denied); *see* also *Bronze & Beautiful*, 750 S.W.2d at 29 (requiring strict compliance with the rules for a default judgment to be upheld).

523. Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc., 957 S.W.2d 640, 645 (Tex. App.—Amarillo 1997, pet. denied) (citing TEX. R. CIV. P. 166b(2)(a) (West 1998, repealed 1999)).

524. *In re* E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 223 (Tex. 2004).

525. Garcia v. Peeples, 734 S.W.2d 343, 347 (Tex. 1987) (orig. proceeding); *accord In re* Alford Chevrolet-Geo, 997 S.W.2d 173, 180 (Tex. 1999) (orig. proceeding).

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

prevent trial by ambush;[527] (3) it insures that a trial is based upon "the parties' claims and defenses rather than on an advantage obtained by one side through a surprise attack;"[528] and (4) it provides a mechanism to resolve disputes by the facts rather than by the facts a party fails to reveal.[529] 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.'"[530]

Trial courts tend to liberally construe the discovery rules to achieve these underlying policy goals.[531] In turn, trial courts enjoy discretion in ruling on the discovery disputes outlined in this Article, and those rulings are usually reviewed on appeal only after final judgment, subject to the usual rules of error preservation and harm analysis.[532] Nonetheless, the trial court's discovery ruling may so alter the fundamental nature of the litigation that review by writ of mandamus is available.[533]

In a mandamus proceeding challenging a trial court's ruling on discovery, the relator or complaining party may obtain mandamus relief if "(1) the trial court clearly abused its discretion and (2) the

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

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

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

530. *Garcia*, 734 S.W.2d at 347.

531. *See* TEX. R. CIV. P. 1 (requiring rules to be liberally construed); Jordan v. Fourth Court of Appeals, 701 S.W.2d 644, 647 (Tex. 1985) (orig. proceeding) (observing the liberal nature of the rules).

532. *See* Stelly v. Papania, 927 S.W.2d 620, 622 (Tex. 1996) (recognizing a trial court's discretion over discovery rulings and explaining the purposes of the discovery rules applied by the trial court); *see also* Ford Motor Co. v. Castillo, 279 S.W.3d 656, 667 (Tex. 2009) (holding that a party complaining about a discovery ruling on appeal must still show harm to obtain reversal); Garcia v. Allen, 751 S.W.2d 236, 237 (Tex. App.—San Antonio 1988, writ denied) (ruling that a complaint that interrogatories were too broad cannot be raised for the first time on appeal). *See generally* TEX. R. CIV. P. 193.2 (setting forth provisions dealing with the scope of discovery).

533. *Compare* Wheeler v. Green, 157 S.W.3d 439, 443 (Tex. 2005) ("[W]e have held for all other forms of discovery [depositions, interrogatories, requests for production, and requests for disclosure] that absent flagrant bad faith or callous disregard for the rules, due process bars merits-preclusive sanctions . . . ." (citations omitted)), *and In re* Rozells, 229 S.W.3d 757, 764 (Tex. App.—San Antonio 2007, orig. proceeding) (granting mandamus relief where deemed admissions had "merits-preclusive effect"), *with* Sutherland v. Moore, 716 S.W.2d 119, 120–21 (Tex. App.—El Paso 1986, orig. proceeding) (denying mandamus relief where deemed admissions simplified the trial process and relator had an adequate remedy by appeal).

[relator] has no adequate remedy by appeal."[534] The degree to which an abuse of discretion may be "clear" or not is discussed in Part II *supra*. Likewise, as detailed in Part II, the degree to which an appeal is inadequate is highly fact specific. In general, discovery rulings may be the proper subject of mandamus review when: a trial court wrongly orders discovery of privileged, confidential, or otherwise protected information that will have a material effect on the aggrieved party's rights;[535] a trial court "compels the production of patently irrelevant or duplicative documents, such that it clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party";[536] 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;[537] the trial court's denial of discovery goes "to the heart of a party's case";[538] the trial court denies discovery "and the missing discovery cannot be made [a] part of the appellate record";[539] or the trial court denies discovery and "refuses to make [the requested discovery] part of the record."[540]

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534. *In re* Living Ctrs. of Tex., Inc., 175 S.W.3d 253, 255–56 (Tex. 2005) (orig. proceeding); *In re* Kuntz, 124 S.W.3d 179, 180 (Tex. 2003) (orig. proceeding); Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding).

535. *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).

536. *Walker*, 827 S.W.2d at 843; *accord* Tex. Water Comm'n v. Dellana, 849 S.W.2d 808, 810 (Tex. 1993) (orig. proceeding).

537. *See Walker*, 827 S.W.2d at 843 (reiterating the court's 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 In re* Family Hospice, Ltd., 62 S.W.3d 313, 317 (Tex. App.—El Paso 2001, orig. proceeding) (restating that if a trial court invalidates a party's capability to pursue a practicable cause of action or defense, an appellate remedy may be deficient).

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

539. *Walker*, 827 S.W.2d at 843; *accord Ford Motor Co.*, 988 S.W.2d at 721; *Family Hospice*, 62 S.W.3d at 316; *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); *In re* Valero Energy Corp., 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding); *see also* Barnes v. Whittington, 751 S.W.2d 493, 496 (Tex. 1988) (orig. proceeding) (holding that the trial court committed an abuse of discretion by issuing a protective order for discoverable documents).

540. *See Walker*, 827 S.W.2d at 843–44 ("'Because the evidence exempted from discovery would not appear in the record, the appellate courts would find it impossible to

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 198 of the Texas Rules of Civil Procedure.[541] 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),[542] the requests are automatically deemed admitted with no discretion to find otherwise.[543] "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."[544]

Under Rule 215.4, "an evasive or incomplete answer may be treated as a failure to answer."[545] 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 deem the matter admitted or order an amended answer to be served.[546]

When admissions are deemed against a party, the party should file a motion to withdraw or amend the admissions as soon as possible.[547] Rule 198.3 permits the trial court to allow a party to withdraw or amend admissions if:

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determine whether denying the discovery was harmful.'" (quoting Jampole v. Touchy, 673 S.W.2d 569, 576 (Tex. 1984))).

541. TEX. R. CIV. P. 198.1.

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

543. 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); Ruiz v. Nicolas Trevino Forwarding Agency, Inc., 888 S.W.2d 86, 88 (Tex. App.—San Antonio 1994, no writ).

544. TEX. R. CIV. P. 198.3; *accord* Cont'l Carbon Co. v. Sea-Land Serv., Inc., 27 S.W.3d 184, 190 (Tex. App.—Dallas 2000, pet. denied); *Beasley*, 7 S.W.3d at 769.

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

546. *Id.*; *see* State v. Carrillo, 885 S.W.2d 212, 214–16 (Tex. App.—San Antonio 1994, no writ) (affirming trial court's order to deem answers admitted when respondent failed to make a good faith effort to answer and instead ignored documents in its own file that would have provided a sufficient basis to admit or deny the admission); U.S. Fire Ins. Co. v. Maness, 775 S.W.2d 748, 749 (Tex. App.—Houston [1st Dist.] 1989, writ ref'd) (approving the trial court's decision to deem matters admitted when respondent lacked any evidence that it had made a diligent inquiry into the matters covered by the requested admissions).

547. *See* Emp'rs 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).

> (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.[548]

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.[549] "[T]he 'good cause' requirement is a threshold issue which must be determined before the trial judge can even consider the remaining requirements set forth in the rule."[550] 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.[551] 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.[552]

In *Employers Insurance of Wausau v. Halton*,[553] 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.[554] Thus, a party may establish "good cause" by proving that the party did not act

548. 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.

549. *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) (noting that withdrawing deemed admissions is proper upon a showing of good cause and no undue prejudice).

550. Boone v. Tex. Emp'rs' 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).

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

552. *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. 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.

553. Emp'rs Ins. of Wausau v. Halton, 792 S.W.2d 462, 462 (Tex. App.—Dallas 1990, writ denied).

554. *See Id.* at 465–66 ("[N]ew trials may be granted and judgment set aside for *good cause*, on motion . . . ." (quoting TEX. R. CIV. P. 320)).

intentionally or with conscious disregard in failing to timely file answers to the requests.[555] Consequently, even a weak excuse will suffice, particularly when the opposing party suffers no prejudice as a result of the delay.[556] The decision to allow or deny the withdrawal of deemed admissions lies within the discretion of the trial court.[557]

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."[558] The same considerations applicable to a motion to withdraw deemed admissions apply to a party who seeks to withdraw its original response and substitute it with a new response.[559] Accordingly, the trial court enjoys discretion in allowing the withdrawal or amendment of admissions.[560]

3. Supplementing Discovery Responses

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

555. *In re* Kellogg-Brown & Root, Inc., 45 S.W.3d 772, 775 (Tex. App.—Tyler 2001, no pet.); Steffan v. Steffan, 29 S.W.3d 627, 631 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

556. *See* Ramsey v. Criswell, 850 S.W.2d 258, 259 (Tex. App.—Texarkana 1993, no writ) (admitting that, while slight, a party'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) (emphasizing lack of prejudice to the 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.

557. Wheeler v. Green, 157 S.W.3d 439, 443 (Tex. 2005).

558. Stelly v. Papania, 927 S.W.2d 620, 622 (Tex. 1996) (quoting TEX. R. CIV. P. 169(2)) (internal quotation marks omitted); *accord* TEX. R. CIV. P. 198.3.

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

560. *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 S.W.3d 772, 775 (Tex. App.—Tyler 2001, no pet.).

> (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.[561]

The party supplementing discovery must serve the supplemental discovery response "reasonably promptly" after the necessity arises.[562] 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.[563] Pursuant to Rule 193.6, the sanction for a party's failure to comply with the duty to supplement is the exclusion of the evidence affected by the violation[564] unless the court finds "good cause for the failure" to supplement[565] or the untimely "response will not unfairly surprise or unfairly prejudice the other parties."[566] The party seeking to introduce the evidence has the "burden of establishing good cause or the lack of unfair surprise or unfair prejudice," which "must be supported by the record."[567] 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.[568] The useful benefit of Rule 193.6 is that it requires

561. TEX. R. CIV. P. 193.5. 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 (West 1998, repealed 1999). Prior to January 1, 1999, the duty to supplement arose only when imposed by court order or 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).

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

563. *Id.*

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

565. TEX. R. CIV. P. 193.6(a)(1); *see also* 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).

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

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

568. 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

"complete responses to discovery so as to promote responsible assessment of settlement and to prevent trial by ambush."[569]

a. Fact Witnesses

In general, a party must disclose the identity of any potential party or person having knowledge of relevant facts.[570] 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 be subject to a motion to strike or exclude.[571] There are two exceptions to this harsh sanction, and the trial court's ruling under either exception is reviewed for abuse of discretion.[572]

Under the first exception, a party must demonstrate good cause on the record to allow testimony of the witness.[573] Unfortunately,

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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).

569. Aetna Cas. & Sur. Co. v. Specia, 849 S.W.2d 805, 807 (Tex. 1993) (orig. proceeding) (internal quotation marks omitted) (referring to former Rule 215(5)); *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.); *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). *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) (West 1998, superseded 1999) (illustrating the addition of unfair surprise or prejudice as an exception to evidence exclusion in Rule 193.6), *and* TEX. R. CIV. P. 215.5 cmt. (noting that Rule 215.5 was superseded by Rule 193.6).

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

571. Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 915 (Tex. 1992); Yeldell v. Holiday Hills Ret. & Nursing Ctr., Inc., 701 S.W.2d 243, 246 (Tex. 1985); *see also* TEX. R. CIV. P. 193.5(b) (requiring that all "amended or supplemental response[s] must be made reasonably promptly after the party discovers the necessity for such a response" and stating that amendments made less than thirty days before trial are not considered reasonably prompt).

572. *Alvarado*, 830 S.W.2d at 914; *see also* Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 43 (Tex. 1998) (indicating that a ruling with no legitimate basis or guiding principle is an abuse of discretion).

573. TEX. R. CIV. P. 193.6(a)(1), (b); *see also* Fort Brown Villas III Condo. Ass'n v. Gillenwater, 285 S.W.3d 879, 881 (Tex. 2009) (citing TEX. R. CIV. P. 193.6(b)). Former Rule 215(5) also required that the party show good cause for admission of the testimony. TEX. R. CIV. P. 215(5) (West 1998, superseded 1999); Smith v. Sw. Feed Yards 835 S.W.2d 89, 90 (Tex. 1992); Mayes v. Stewart, 11 S.W.3d 440, 456 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Before Rule 193.6 superseded 215(5), however, it was held that the offering party must show good cause for its failure to properly respond to the discovery request. Clark v. Trailways, Inc., 774 S.W.2d 644, 646 (Tex. 1989).

trying to define "good cause" is like trying to define "abuse of discretion." It is usually easier to define what is not considered "good cause."[574]

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.[575] Texas Rule of Civil Procedure 193.6, however, does not apply to parties named in the suit.[576] Thus, named parties may testify as fact witnesses even though those parties failed to supplement the discovery response in a timely manner.[577] A named party to the suit may testify at trial "'when [the] identity [of the party] is certain and when his or her personal knowledge of relevant facts has been communicated to all other parties, through pleadings by name and response to other discovery at least thirty . . . days in advance of trial.'"[578]

b. Expert Witnesses

Under Rule 192.7, there are two types of expert witnesses: (1) a testifying expert,[579] and (2) a consulting expert.[580] "A party may

574. *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 that "inadvertent failure to supplement responses was insufficient to establish good cause"); Remington Arms Co. v. Canales, 837 S.W.2d 624, 625 (Tex. 1992) (orig. proceeding) (stating that inadvertence of counsel is not enough to satisfy the good cause exception); *Alvarado*, 830 S.W.2d at 914 (observing that defining the good cause rule is very problematic and that the importance of the witness should not be considered); Sharp v. Broadway Nat. Bank, 784 S.W.2d 669, 671 (Tex. 1990) (providing that the fact that a witness's identity is known to the other party does not establish good cause for the failure to supplement); Rainbo Baking Co. v. Stafford, 787 S.W.2d 41, 41 (Tex. 1990) (holding that failure to contact a witness until the day of trial when the party expected to settle the case was not good cause); *Clark*, 774 S.W.2d at 647 (explaining that mere failure to locate the witness until the last minute will not suffice absent sufficient efforts to locate the witness); Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989) (concluding a claim of "great harm" from the denial of the testimony will not establish good cause); Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395 n.2 (Tex. 1989) (suggesting that lack of surprise may be considered as a factor); Morrow v. H.E.B., Inc., 714 S.W.2d 297, 298 (Tex. 1986) (holding that lack of surprise is not enough to establish good cause).

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

576. *See* TEX. R. CIV. P. 193.6(a) (stating that named parties are not included as witnesses whose identities must be disclosed).

577. *Id.*

578. Henry S. Miller Co. v. Bynum, 836 S.W.2d 160, 162 (Tex. 1992) (quoting Smith v. Sw. Feed Yards, 835 S.W.2d 89, 91 (Tex. 1992)); *accord* Rogers v. Stell, 835 S.W.2d 100, 100–01 (Tex. 1992).

579. *See* TEX. R. CIV. P. 192.7(c) (defining a testifying expert as "an expert who may

discover [a list of] information regarding a testifying expert or . . . a consulting expert whose mental impressions and opinions have been reviewed by a testifying expert," including: the expert's identity, contact information, testimonial subject matter, relevant facts known, relevant mental impressions and opinions, bias, and "documents, tangible things, reports, models, or data compilations" that were provided, reviewed, or prepared for the testifying expert's testimony.[581] However, if a consulting expert's conclusions have not been reviewed by a testifying expert, neither the consulting expert's identity nor his conclusions are discoverable.[582]

Pursuant to Rule 195.1, a party may request the disclosure of information regarding testifying expert witnesses.[583] This request must be done via a request for disclosure.[584] 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 period; . . . with regard to all other experts, [sixty] days before the end of the discovery period."[585]

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."[586] If an

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be called to testify as an expert witness at trial").

580. *See* 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").

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

582. *Id.*

583. TEX. R. CIV. P. 195.1.

584. TEX. R. CIV. P. 194.1 (indicating how a party may obtain certain information listed in Rule 194.2 from an opposing party); TEX. R. CIV. P. 194.2(f) (identifying the information that can be obtained about a testifying expert through disclosure); TEX. R. CIV. P. 195.1 (stating expert witness information can be obtained by a disclosure request pursuant to Rule 194).

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

586. TEX. R. CIV. P. 193.5(b); *accord* TEX. R. CIV. P. 195.6. Under former Rule 166b(6)(b), expert witnesses were to be disclosed "as soon as is practical." TEX. R. CIV. P. 166b(6)(b) (West 1998, repealed 1999). In *Mentis v. Barnard*, 870 S.W.2d 14 (Tex. 1994), the Texas Supreme Court observed that since Rule 166b(6)(b) did not provide a time period by which a party must actually decide to retain its testifying experts, "as soon as 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*, 870 S.W.2d at

amended or supplemental response is made fewer than thirty days before trial, it is presumed to have been made without reasonable promptness.[587] 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,[588] or that the failure to timely respond "will not unfairly surprise or unfairly prejudice the other parties."[589] The trial court's ruling to admit or exclude an improperly identified expert is reviewed for an abuse of discretion.[590] Expert witness testimony may be limited or excluded for other reasons, as discussed in Part V.

c. Rebuttal Witnesses

The fact that a witness will be used only as a rebuttal witness does not eliminate the obligation to disclose the witness's identity

16. 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 it 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). 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").

587. TEX. R. CIV. P. 193.5(b). One appellate court concluded that supplemental responses submitted prior to the onset of the presumption of unreasonableness did 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 almost 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. *Id.* at 716.

588. TEX. R. CIV. P. 193.6(a)(1). Factors that alone do not show good cause, but may in combination, 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 which 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 Corp., 47 S.W.3d 1, 14 (Tex. App.—Amarillo 2000, no pet.).

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

590. *See Gutierrez*, 86 S.W.3d at 736 (finding no abuse of discretion to permit expert testimony regarding attorney's fees where a witness was not identified as an expert in response to discovery, but was identified as a fact witness).

pursuant to the duty to supplement discovery.[591] Thus, for a late disclosure, the party offering a rebuttal witness's testimony must still demonstrate good cause or the lack of unfair surprise to the other parties for the late disclosure.[592] Good cause may be established when counsel is unable to reasonably anticipate the need for such rebuttal evidence.[593] The trial court's decision is reviewed for an abuse of discretion.[594]

4. Quashing Depositions

A party "may object to the time and place designated for an oral deposition by motion for protective order or by motion to quash the notice of deposition."[595] There are numerous other grounds for objecting to the substance of a proposed deposition, the most common of which may be the "apex" objection asserted by a high level corporate official denying knowledge of relevant facts.[596] Generally, the denial of a motion to quash a deposition or the denial of a protective order is not a final, appealable order and

591. *See* TEX. R. CIV. P. 193.5(a)(1) (obligating the responding party to amend his response "to the extent that the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses"); *see also* 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).

592. TEX. R. CIV. P. 193.6(a)(1), (2); *see also* Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 916–17 (Tex. 1992) (explaining that Alvarado failed to assert good cause for failing to disclose a rebuttal witness).

593. TEX. R. CIV. P. 192.3(d); *see also* 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), *superseded by rule*, TEX. R. CIV. P. 193.6, *as recognized in* Lopez v. La Madeleine of Tex., Inc., 200 S.W.3d 854, 861 (Tex. App.—Dallas 2006, no pet.) (stating that the *Gannett Outdoor* holding was decided prior to January 1, 1999 and, therefore, the "argument that previously undisclosed evidence may be admitted solely for impeachment purposes" has been superseded by Rule 193.6).

594. *Alvarado*, 830 S.W.2d at 914, 916–17 (stating that the trial court abused its discretion by allowing testimony of an undisclosed rebuttal witness).

595. TEX. R. CIV. P. 199.4; *see also* Vega v. Davila, 31 S.W.3d 376, 380 (Tex. App.—Corpus Christi 2000, no pet.) (noting that an appealing party had attempted to quash a deposition notice on the grounds that the time and place for the deposition were unreasonable, but holding that "a nonresident may be required to attend a deposition in the county in which he is served with a subpoena").

596. *See* Crown Cent. Petroleum Corp. v. Garcia, 904 S.W.2d 125, 127–28 (Tex. 1995) (defining "apex" deposition); *cf.* West v. Solito, 563 S.W.2d 240, 246 (Tex. 1978) (objecting to depositions of former attorneys based on the attorney-client privilege).

must therefore be challenged by writ of mandamus.[597] The trial court's ruling is reviewed for an abuse of discretion.[598]

H. *Dismissal*

A motion to dismiss a case can be based on any number of legal theories. The most representative reasons are discussed here.

1. Dismissal for Defect of Parties

If a party's capacity to sue is contested, Rule 93 requires the filing of a verified plea whenever the record does not affirmatively show the party's right to file suit in the capacity in which the party is suing.[599] The trial court's dismissal based on a defect in parties is reviewed for an abuse of discretion.[600]

2. Dismissal for Defect in Pleadings

The trial court's decision to dismiss for insufficient pleadings is reviewed under an abuse of discretion standard.[601] In general, however, a trial court should not dismiss for defective pleadings unless the pleading party is given an opportunity to amend.[602]

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597. *See In re* Alcatel USA, Inc., 11 S.W.3d 173, 175 (Tex. 2000) (orig. proceeding) (granting mandamus relief when trial court wrongly denied a motion to quash deposition notices); Borden, Inc. v. Valdez, 773 S.W.2d 718, 720 (Tex. App.—Corpus Christi 1989, orig. proceeding) (denying mandamus relief from a trial court's denial of a motion to quash a deposition). *But see Vega*, 31 S.W.3d at 378 (permitting appeal when an order denying a motion to quash addressed witnesses who were not parties to the suit); Transceiver Corp. of Am. v. Ring Around Prods., Inc., 581 S.W.2d 712, 712–13 (Tex. Civ. App.— Dallas 1979, no writ) (permitting an appeal when an order denying a motion to quash addressed a post-judgment deposition); *cf.* Pub. Citizen v. Ins. Servs. Office, Inc., 824 S.W.2d 811, 812 (Tex. App.—Austin 1992, no writ) (allowing an appeal of an order denying a motion to vacate a protective order).

598. *Alcatel USA*, 11 S.W.3d at 175.

599. TEX. R. CIV. P. 93; Pledger v. Schoellkopf, 762 S.W.2d 145, 146 (Tex. 1988).

600. Dahl v. Hartman, 14 S.W.3d 434, 436 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Miller v. Gann, 822 S.W.2d 283, 286 (Tex. App.—Houston [1st Dist.] 1991, writ denied). For more information about proper parties, *See infra* Part IV(O) (discussing proper parties and joinder).

601. Humphreys v. Meadows, 938 S.W.2d 750, 753–54 (Tex. App.—Fort Worth 1996, writ denied).

602. Gallien v. Wash. Mut. Home Loans, Inc., 209 S.W.3d 856, 864–65 (Tex. App.—Texarkana 2006, no pet.); *see also* Sherman v. Triton Energy Corp., 124 S.W.3d 272, 279–80 (Tex. App.—Dallas 2003, pet. denied) (holding that the trial court had authority to strike the plaintiffs' petition and dismiss the case when the plaintiffs failed to amend the petition pursuant to the court's orders sustaining the defendant's special exceptions). *See infra* Part IV(S)(1) (addressing special exceptions).

Accordingly, see Part IV(S)(1) on special exceptions *infra*. If a party pleads facts that affirmatively demonstrate an absence of jurisdiction, such a defect is incurable and immediate dismissal of the case is proper.[603]

3. Dismissal for Want of Prosecution

The trial court has an obligation to control its docket and demand that parties diligently prosecute their suits.[604] Thus, a trial court has the authority to dismiss a case for want of prosecution pursuant to either its inherent powers or Texas Rule of Civil Procedure 165a.[605] The trial court's powers 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.[606] If the trial court's order dismissing for want of prosecution does not specify the basis for dismissal, then the order must be affirmed if any valid basis is supported by the record.[607]

When resolving the central issue of "whether the plaintiffs exercised reasonable diligence,"[608] the court may consider the

603. Peek v. Equip. Serv. Co. of San Antonio, 779 S.W.2d 802, 804 (Tex. 1989); *see also infra* Part IV(S)(1) (discussing subject-matter jurisdiction).

604. 3V, Inc. v. JTS Enters., Inc., 40 S.W.3d 533, 540 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *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"), *superseded by rule*, TEX. R. CIV. P. 3a, *as recognized in* Seigle v. Hollech, 892 S.W.2d 201, 202 (Tex. App.—Houston [14th Dist.] 1994, no writ) (recognizing that "*Rotello* was decided before approval of local rules by the supreme court was required").

605. TEX. R. CIV. P. 165a(1), (4); Alexander v. Lynda's Boutique, 134 S.W.3d 845, 850 (Tex. 2004).

606. *See* 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); Veterans' Land Bd. v. Williams, 543 S.W.2d 89, 90 (Tex. 1976) ("Rule 165a is not the exclusive authority by which the trial court derives its authority or discretion to dismiss a cause for want of prosecution." (quoting TEX. R. CIV. P. 165a(4))).

607. City of Houston v. Thomas, 838 S.W.2d 296, 297 (Tex. App.—Houston [1st Dist.] 1992, no writ); *accord* Fox v. Wardy, 225 S.W.3d 198, 199–200 (Tex. App.—El Paso 2005, pet. denied).

608. MacGregor v. Rich, 941 S.W.2d 74, 75 (Tex. 1997); *accord* Pedraza v. Crossroads Sec. Sys., 960 S.W.2d 339, 342 (Tex. App.—Corpus Christi 1997, no pet.); *see also* Christian v. Christian, 985 S.W.2d 513, 515 (Tex. App.—San Antonio 1998, no pet.) (discussing various reasons given by the plaintiff to determine if reasonable diligence was exercised).

entire trial history, and "[n]o single factor is dispositive."[609] 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."[610] Furthermore, the fact that settlement activity is in progress,[611] or that the opposing parties have remained passive, does not prevent a case from being dismissed based upon want of diligence.[612] 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 include "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."[613] 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."[614]

If the dismissal is pursuant to Rule 165a, as opposed to the trial court's inherent powers, then Rule 165a(3) requires the trial court to reinstate the case "upon finding after a hearing that the failure of the party or his attorney [to appear] was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained."[615] The reinstatement provisions in Rule 165a(3) only

609. 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.).

610. Ozuna v. Sw. Bio-Clinical Labs, 766 S.W.2d 900, 902 (Tex. App.—San Antonio 1989, writ denied), *overruled in part by* Villarreal v. San Antonio Truck & Equip., 994 S.W.2d 628, 633 (overruling *Ozuna* to the extent it "can be read to hold that the Bexar County notice of dismissal apprises parties of the court's intent to dismiss on a ground other than the failure to appear under Rule 165a"); *accord Scoville*, 9 S.W.3d at 204.

611. *See* FDIC v. Kendrick, 897 S.W.2d 476, 481 (Tex. App.—Amarillo 1995, no writ) (explaining how settlement efforts do not constitute an excuse for failing to diligently prosecute a case).

612. *See* 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) (noting that the attitude of the opposing party "does not excuse want of diligence").

613. Bard v. Frank B. Hall & Co., 767 S.W.2d 839, 843 (Tex. App.—San Antonio 1989, writ denied); Villarreal v. San Antonio Truck & Equip., Inc., 974 S.W.2d 275, 278 (Tex. App.—San Antonio 1998), *rev'd on other grounds*, 994 S.W.2d 628 (Tex. 1999).

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

615. TEX. R. CIV. P. 165a(3); *accord* Stolz v. Honeycutt, 42 S.W.3d 305, 309 (Tex. App.—Houston [14th Dist.] 2001, 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

apply to dismissals for failure to appear at trial or a hearing,[616] and they share several similarities with the *Craddock* requisites for granting a new trial to set aside a proper default judgment.[617] The standard of review applied to a dismissal for want of prosecution, or the overruling of a motion to reinstate, is an abuse of discretion.[618]

4. Dismissal of Health Care Liability Claims for Lack of Expert Reports

In Texas, traditional "medical malpractice" litigation was fundamentally altered in 1977 when the Texas legislature enacted

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S.W.2d 119, 122 (Tex. App.—Houston [1st Dist.] 1989, no writ) (stating 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).

616. *Clark*, 900 S.W.2d at 408–09; *Ozuna*, 766 S.W.2d at 903; *see also* Moore v. Armour & Co., 748 S.W.2d 327, 331 (Tex. App.—Amarillo 1988, no writ) (asserting that 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).

617. *Compare* 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"), *with* 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").

618. MacGregor v. Rich, 941 S.W.2d 74, 75 (Tex. 1997); State v. Rotello, 671 S.W.2d 507, 509 (Tex. 1984), *superseded by rule*, TEX. R. CIV. P. 3a, *as recognized in* Seigle v. Hollech, 892 S.W.2d 201, 202 (Tex. App.—Houston [14th Dist.] 1994, 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."); *see also* Reed v. City of Dallas, 774 S.W.2d 384, 385 (Tex. App.—Dallas 1989, writ denied) (reversing the trial court and ordering it to conduct a hearing). The dissent in *Reed v. City of Dallas*, 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 also* 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 is not 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." *Melton*, 727 S.W.2d at 303.

the Medical Liability and Insurance Improvement Act in response to a perceived crisis in the cost of health care.[619] Article 4590i of the Revised Civil Statutes provided a notice of suit provision and capped recoverable damages in those cases described as a "health care liability claim."[620]

Almost twenty years later, despite the enactment of Article 4590i, the Texas legislature still faced what was considered "a medical malpractice crisis in this state."[621] To address the continuing and growing concerns, the legislature responded by adding the requirement of an expert report, which required "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."[622] "The obvious intent of this statutory provision was to stop suits that had no merit from proceeding through the courts."[623]

In 2003, the legislature expressed concern that "the number of health care liability claims" had still not decreased but had actually increased "inordinately."[624] Once again attempting to reduce the cost of health care, the legislature repealed Article 4590i and

619. McGlothlin v. Cullington, 989 S.W.2d 449, 451 (Tex. App.—Austin 1999, pet. denied) (discussing the history of the Medical Liability and Insurance Improvement Act).

620. Medical Liability and Insurance Improvement Act of Texas, 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 2, 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 result[ed] in injury to or death of the patient, whether the patient's claim or cause of action [was based] in tort or contract." *Id.* § 1.03(4).

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

622. *Id.* (citing Act of May 30, 1977, 65th Leg., R.S., ch. 140, § 1, 1995 Tex. Gen. Laws 985, 986 (former TEX. REV. CIV. STAT. art. 4590i, § 13.01), *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884 (current version at TEX. CIV. PRAC. & REM. CODE ANN. ch. 74.001 (West 2005)).

623. *Id.*

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

enacted Chapter 74 of the Civil Practice and Remedies Code.[625] In enacting the specific provisions of section 74.351, the legislature made extensive changes to the expert report requirement.[626]

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, including a curriculum vitae for each reporting expert.[627] The parties, however, may arrange to extend the deadline for serving an expert report by a written agreement.[628] 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."[629] 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."[630]

The statutory criteria of section 74.351 have been tested extensively for virtually every factual scenario.[631] Appellate review has aided this experimentation by both interlocutory appeal and mandamus proceeding. Section 51.014(a) provides that the trial court's failure to dismiss under section 74.351 is subject to interlocutory appeal.[632] Cases governed by the predecessor

625. Mokkala v. Mead, 178 S.W.3d 66, 74 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 74 (West 2005) (repealing the Medical Liability and Insurance Improvement Act of 1977).

626. *Mokkala*, 178 S.W.3d at 75–76; *see* McGahey v. Daughters of Charity Health Servs. of Waco, No. 10-02-00288-CV, 2004 WL 1903300, at *2 & n.4 (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).

627. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (West Supp. 2010); *see also id.* § 74.351(r)(6) (defining "expert report" and providing the requirements necessary to meet this definition).

628. *Id.* § 74.351(a).

629. *Id.* § 74.351(b).

630. *Id.* § 74.351(c).

631. *Cf.* Leland v. Brandal, 257 S.W.3d 204, 210 (Tex. 2008) (Brister, J., dissenting) (noting that "a substantial part of the state's appellate resources are already being expended reviewing preliminary expert reports").

632. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (West 2008) (providing interlocutory appeal of an order that "denies all or part of the relief sought by a motion under section 74.351(b), except that an appeal may not be taken from an order granting an extension under section 74.351"); Ogletree v. Matthews, 262 S.W.3d 316, 321 (Tex. 2007) ("[T]he trial court retains discretion to grant a thirty day extension, and the Legislature

statute may warrant mandamus relief.[633]

Regardless of the procedural vehicle used in obtaining appellate review, the threshold decision regarding the statute's applicability is a question of law subject to de novo review.[634] A trial court's decision to dismiss a case under section 74.351(b), like its decision under the predecessor statute (Article 4590i), is reviewed for abuse of discretion.[635] The trial court's decision to grant an extension to cure a deficient report is also subject to an abuse of discretion review.[636] However, when an expert report is not timely served, the trial court has no discretion but to dismiss a health care liability claim.[637]

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explicitly stated that such orders are not appealable."). "A provider may pursue an interlocutory appeal of the denial of a motion to dismiss when no expert report has been timely served, whether or not the trial court grants an extension of time." Badiga v. Lopez, 274 S.W.3d 681, 685 (Tex. 2009). *But see* Emeritus Corp. v. Highsmith, 211 S.W.3d 321, 326 (Tex. App.—San Antonio 2006, pet. denied) ("[W]e hold that 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 section 74.351(c) to cure the deficiencies in a timely-served report.").

633. *See, e.g.*, *In re* Collum & Carney Clinic Ass'n, 62 S.W.3d 924, 927 (Tex. App.—Texarkana 2001, orig. proceeding) (granting mandamus relief because the trial court failed to dismiss the claim after the defendant complained that the expert report did not meet the statutory requirements).

634. Wickware v. Sullivan, 70 S.W.3d 214, 218 (Tex. App.—San Antonio 2001, no pet.). A "health care liability claim" is defined as:

> [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) (West 2005). The definition of "health care provider" is also broader than the predecessor statute. *See id.* § 74.001(a)(12)(B) (defining "health care provider" to include any "officer, director, shareholder, member, partner, manager, owner, or affiliate of a health care provider or physician," as well as their employees when acting within the scope of their employment).

635. *Compare* McIntyre v. Ramirez, 109 S.W.3d 741, 749 (Tex. 2003) (stating the standard under chapter 74 of the Texas Civil Practice and Remedies Code), *with* Bowie Mem'l Hosp. v. Wright, 79 S.W.3d 48, 52 (Tex. 2002) (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).

636. Ogletree v. Matthews, 262 S.W.3d 316, 321 (Tex. 2007).

637. *Badiga*, 274 S.W.3d at 683.

5. Dismissal of *In Forma Pauperis* and Inmate Proceedings

The Texas Constitution and rules of procedure recognize that "courts must be open to all with legitimate disputes, not just [to] those who can afford to pay the fees to get in."[638] However, when a party files an affidavit of inability to pay under Rule 145[639] (*in forma pauperis*) or under section 13.001 of the Texas Civil Practice and Remedies Code,[640] "the trial court has broad discretion to dismiss the suit" if the allegation of poverty is false[641] or the action is "frivolous or malicious."[642] A trial court's dismissal of a case under section 13.001 is reviewed for an abuse of discretion.[643] Similar abuse of discretion review is extended to the trial court's dismissal of inmate litigation under section 14.003 of the Texas Civil Practice and Remedies Code.[644] In 2005, Rule 145 was amended to prohibit the contest of an affidavit that is accompanied by an attorney's IOLTA certificate that confirms the party's inability to pay.[645]

"In determining whether the action is frivolous, the trial court may consider whether (1) the action's realistic chance of ultimate

638. Griffin Indus., Inc. v. Thirteenth Court of Appeals, 934 S.W.2d 349, 353 (Tex. 1996) (orig. proceeding) (citing TEX. CONST. art. I, § 13; TEX. R. CIV. P. 145; TEX. R. APP. P. 20.1).

639. TEX. R. CIV. P. 145.

640. TEX. CIV. PRAC. & REM. CODE ANN. § 13.001 (West 2002) (allowing for dismissal of cases upon finding that the allegation of poverty is false or that the action is frivolous or malicious).

641. 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) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 13.001(a)(1) (West 2002)); *accord* Felix v. Thaler, 923 S.W.2d 650, 651 (Tex. App.—Houston [1st Dist.] 1995, no writ).

642. TEX. CIV. PRAC. & REM. CODE ANN. § 13.001(a)(2) (West 2002). Dismissal may be made on motion or by the trial court sua sponte. Black v. Jackson, 82 S.W.3d 44, 53 (Tex. App.—Tyler 2002, no pet.).

643. Williams v. Tex. Dep't of Criminal Justice, 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).

644. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a)(3) (West 2002) (permitting dismissal upon a finding that the inmate made a filing "that the inmate knew was false"); Johnson v. Tex. Dep't of Criminal Justice, 71 S.W.3d 492, 493 (Tex. App.—El Paso 2002, no pet.) (reviewing a trial court's dismissal under section 14.003 for abuse of discretion). Inmate litigation may also be dismissed if the inmate filed an affidavit or unsworn declaration required by statute that the inmate knew was false. TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a)(3) (West 2002).

645. TEX. R. CIV. P. 145(c).

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."[646] Of the three factors set forth in section 13.001 (or the four factors of section 14.003), the supreme court has essentially approved as constitutionally sound only the factor that questions whether the claim has an arguable basis in law or fact.[647] Therefore, before dismissing a petition under section 13.001(b)(2), the judge must examine the petition to ensure that the claim has no basis in law and in fact.[648] "A claim that has no legal basis is one based upon an 'indisputably meritless legal theory,'"[649] and a claim that has no factual basis is one that arises out of "fantastic or delusional scenarios."[650]

If the plaintiff desires to appeal without paying for the reporter's record, based on an affidavit of inability to pay, 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.[651] In determining whether the appeal is frivolous, the trial court may consider "whether the appellant has presented a substantial question for appellate review."[652]

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646. TEX. CIV. PRAC. & REM. CODE ANN. § 13.001(b) (West 2008). In *De La Vega v. Taco Cabana, Inc.*, 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.). Inmate litigation may also be frivolous or malicious if the claim is substantially similar to a prior claim filed by the inmate arising from the same operative facts. TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(b)(4) (West 2002).

647. Johnson v. Lynaugh, 796 S.W.2d 705, 706 (Tex. 1990) (citing 28 U.S.C. § 1915(d) (1990)). 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.* 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). *Johnson*, 796 S.W.2d at 706.

648. Carson v. Gomez, 841 S.W.2d 491, 494 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding).

649. Black v. Jackson, 82 S.W.3d 44, 53 (Tex. App.—Tyler 2002, no pet.); *accord* Thomas v. Holder, 836 S.W.2d 351, 352 (Tex. App.—Tyler 1992, 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").

650. *Thomas*, 836 S.W.2d at 352.

651. TEX. CIV. PRAC. & REM. CODE ANN. § 13.003(a) (West 2002); TEX. R. APP. P. 20.1.

652. TEX. CIV. PRAC. & REM. CODE ANN. § 13.003(b) (West 2002).

I. *Disqualification of Counsel*

"A motion to disqualify counsel is the proper procedural vehicle to challenge an attorney's representation whenever an attorney seeks to represent an interest adverse to that of a former client."[653] However, because disqualification is so severe, courts must be wary of ordering such a remedy.[654] Disqualification may result in "palpable harm, disrupt trial court proceedings, and deprive a party of the right to have counsel of choice."[655] In considering a disqualification motion, "the court must strictly adhere to an exacting standard" to ensure that disqualification is not used as a dilatory trial tactic.[656] Further, a motion to disqualify an attorney must be timely filed.[657] Courts have found that a six-month delay constituted waiver[658] but that a two-month delay did not.[659]

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.[660] 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;

653. NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 399 (Tex. 1989) (orig. proceeding). "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).

654. *See In re* Nitla S.A. de C.V., 92 S.W.3d 419, 423 (Tex. 2002) (orig. proceeding) (noting that disqualification is a severe measure that can result in immediate harm).

655. *Id.* at 422.

656. *Id.*; *see also* 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 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).

657. *In re* George, 28 S.W.3d 511, 513 (Tex. 2000) (orig. proceeding).

658. Vaughan v. Walther, 875 S.W.2d 690, 691 (Tex. 1994) (orig. proceeding).

659. *In re* Am. Home Prods. Corp., 985 S.W.2d 68, 73 (Tex. 1998) (orig. proceeding).

660. *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; *Coker*, 765 S.W.2d at 400; Ghidoni v. Stone Oak, Inc., 966 S.W.2d 573, 579 (Tex. App.—San Antonio 1998, pet. denied); *see also Vaughan*, 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.").

(3) that the prior relationship creates a "genuine threat that confidences revealed to his former counsel will be divulged to his present adversary."[661] To satisfy this burden, the movant must offer "evidence of specific similarities capable of being recited in the disqualification order."[662]

The standard of review used in assessing a trial court's ruling on a motion to disqualify is the abuse of discretion standard.[663] In addition, the trial court's order granting or denying a motion to disqualify may be reviewed by mandamus.[664]

J. *Disqualification of Judges*

1. Disqualification and Recusal

Pursuant to Rule 18a, any party may file a motion to recuse or disqualify the trial judge if done at least ten days before the date of the trial or other hearing.[665] While the terms "recusal" and "disqualification" are used interchangeably in the rule, they embody separate concepts.[666] A motion to disqualify seeks to prevent a judge from hearing a case based on constitutional or statutory reasons.[667] A motion to recuse seeks to prevent a judge from hearing a case for nonconstitutional or nonstatutory reasons.[668]

If a trial judge should have been disqualified but was not, any orders or judgments rendered by that judge are void and without

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

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

663. *In re* Nitla S.A. de C.V., 92 S.W.3d 419, 420 (Tex. 2002) (orig. proceeding); *Syntek Fin. Corp.*, 881 S.W.2d at 321; *Coker*, 765 S.W.2d at 400; Walton v. Canon, Short & Gaston, 23 S.W.3d 143, 151 (Tex. App.—El Paso 2000, no pet.); *Ghidoni*, 966 S.W.2d at 579.

664. *Nat'l Med. Enters.*, 924 S.W.2d at 128; *Vaughan*, 875 S.W.2d at 691.

665. TEX. R. CIV. P. 18a(a); *see also In re* O'Connor, 92 S.W.3d 446, 448 (Tex. 2002) (demonstrating that in certain situations the ten-day rule may not apply). If a judge is assigned to a case within the ten-day period, 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).

666. *See* TEX. R. CIV. P. 18b (providing different grounds for disqualification and recusal).

667. TEX. CONST. art. V, § 11; TEX. GOV'T CODE ANN. § 21.005 (West 2004), §§ 74.053, 74.059(c)(3) (West 2005), §§ 573.022–.025 (West 2004); TEX. R. CIV. P. 18b(1).

668. *See* TEX. R. CIV. P. 18b(2) (delineating when a judge shall recuse himself).

effect.[669] Thus, disqualification of a judge based on a constitutional prohibition "can be raised at any point in" a proceeding.[670] In contrast, the existence of grounds for recusal of a judge "does not void or nullify" subsequent proceedings before that judge and "can be waived if not raised by proper motion."[671]

Upon the filing of a motion to disqualify or recuse, the trial judge must "either recuse himself or request the" administrative judicial district's presiding judge "to assign a judge to hear" the motion.[672] Rule 18a(f) provides that if the motion is denied, the order is reviewed for an abuse of discretion.[673] However, an order granting a motion to recuse is not reviewable.[674]

2. Objection to Visiting Trial 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.[675] "If a party to a civil case files a timely objection . . . the judge shall not hear the case."[676] 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

669. *O'Connor*, 92 S.W.3d at 449.

670. *See* Buckholts Indep. Sch. Dist. v. Glaser, 632 S.W.2d 146, 148 (Tex. 1982) (holding that an error regarding disqualification may be raised during the proceeding while an error regarding recusal may be waived); McElwee v. McElwee, 911 S.W.2d 182, 185–86 (Tex. App.—Houston [1st Dist.] 1995, no writ) (confirming that a party waives an error regarding recusal when he fails to raise the issue by a proper motion).

671. *In re* Union Pac. Res. Co., 969 S.W.2d 427, 428 (Tex. 1998).

672. TEX. R. CIV. P. 18a(c), (d); Rosas v. State, 76 S.W.3d 771, 773 (Tex. App.—Houston [1st Dist.] 2002, no pet.). A different procedure applies to tertiary motions. TEX. CIV. PRAC. & REM. CODE ANN. § 30.016 (West 2008) ("[A] 'tertiary' recusal motion means a third or subsequent motion for recusal or disqualification . . . .").

673. 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); *cf.* 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).

674. TEX. R. CIV. P. 18a(f); Dist. Judges of Collin Cnty. v. Comm'rs Court of Collin Cnty., 677 S.W.2d 743, 745 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

675. TEX. GOV'T CODE ANN. § 74.053(a) (West 2005).

676. *Id.* § 74.053(b).

and with good cause.[677] An objection to this assignment must be the first matter presented to the visiting judge for a ruling.[678] If a party timely objects to the assignment, "the judge shall not hear the case."[679] In addition, a former judge or justice who was not a retired judge when she left office "may not sit in a case if either party objects to the" assignment.[680] The governing statute is mandatory and does not give the trial court any discretion to rule on the objection.[681] The court of appeals will review such a ruling for an abuse of discretion and may do so in a mandamus proceeding.[682]

K. *Docket Management*

A trial court has a ministerial duty to consider and rule on motions "properly filed and pending before" the court, "and mandamus may issue to compel the" judge to act (although not to take a given action).[683] The trial court will be afforded a reasonable time in which to perform this ministerial duty after the motion is brought to its attention.[684] What constitutes a reasonable time depends on the facts and circumstances in a particular case.[685]

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677. *Id.* § 74.053(c).

678. 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).

679. TEX. GOV'T CODE ANN. § 74.053(b) (West 2005); *In re* M.A.S., No. 05-03-00401-CV, 2005 WL 1039967, at *2 (Tex. App.—Dallas May 5, 2005, no pet.) (mem. op.); *Cuban*, 24 S.W.3d at 382.

680. TEX. GOV'T CODE ANN. § 74.053(d) (West 2005); *accord In re* Cuban, 24 S.W.3d 381, 382 (Tex. App.—Dallas 2000, orig. proceeding); *see also* Mitchell Energy Corp. v. Ashworth, 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).

681. TEX. GOV'T CODE ANN. § 74.053(b) (West 2005); *Mitchell Energy Corp.*, 943 S.W.2d at 441.

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

683. Safety-Kleen Corp. v. Garcia, 945 S.W.2d 268, 269 (Tex. App.—San Antonio 1997, orig. proceeding).

684. Barnes v. State, 832 S.W.2d 424, 426 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding); *see also* Metzger v. Sebek, 892 S.W.2d 20, 49 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (stating that a trial court cannot consider a motion unless the motion has been brought to the court's attention).

685. *In re* Salazar, 134 S.W.3d 357, 358 (Tex. App.—Waco 2003, orig. proceeding).

A trial court is given wide discretion in managing its docket[686] to achieve "'economy of time and effort for itself, for counsel, and for litigants.'"[687] 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 may be resolved.[688] Although a trial court is given wide "latitude in managing discovery and preparing a case for trial," that latitude is not unlimited, particularly in the mass tort context.[689] A trial court's order relating to the management of its docket is reviewed for an abuse of discretion.[690]

L. *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.[691] Upon a party's written

686. 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. 09-03-00586-CV, 2005 WL 66570, at *2 (Tex. App.—Beaumont Jan. 13, 2005, no pet.) (mem. op.); *In re* Carter, 958 S.W.2d 919, 924 (Tex. App.—Amarillo 1997, orig. proceeding); *Metzger*, 892 S.W.2d at 38; Emp'rs 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").

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

688. 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).

689. *See In re* Allied Chem. Corp., 227 S.W.3d 652, 658–59 (Tex. 2007) (orig. proceeding) (determining that the setting of a trial in a mass tort case without requiring certain discovery responses was an abuse of discretion); *In re* Van Waters & Rogers, Inc., 62 S.W.3d 197, 200 (Tex. 2001) (orig. proceeding) (holding that a blanket abatement of discovery in a mass tort case is an abuse of discretion).

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

691. Owens-Illinois, Inc. v. Webb, 809 S.W.2d 899, 901 (Tex. App.—Texarkana 1991, writ dism'd w.o.j.); *see also* Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 695–96 (Tex. 1990) (explaining the process courts must go through before declining jurisdiction under the doctrine of forum non conveniens), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(i) (West 2008), *as recognized in* Jones v. Raytheon Aircraft Servs., Inc., 120 S.W.3d 40, 44 & n.2 (Tex. App.—San Antonio 2003, pet. denied) (recognizing that the supreme court's finding in *Dow Chemical* that the forum non conveniens doctrined is not applicable to wrongful death cases was overturned by the legislature in 2003).

motion to stay or dismiss, the trial court may refuse to impose its jurisdiction over the case even though venue is proper in the instant forum.[692] When a party seeks to stay or dismiss a claim, the court will consider the following factors:

> (1) an alternate 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.[693]

An appellate court reviews a trial court's decision about whether to dismiss a case on forum non conveniens grounds for an abuse of discretion.[694] An order denying a motion to dismiss based on forum non conveniens may be reviewed in a mandamus proceeding.[695] If a trial court "grants a motion to stay or dismiss an action under the doctrine forum non conveniens," it must issue "findings of fact and conclusions of law," although the effect of such findings and conclusions is questionable.[696] Finally, the trial

692. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b) (West 2008); *see also In re* Pirelli Tire, L.L.C., 247 S.W.3d 670, 675–76 (Tex. 2007) (orig. proceeding) (discussing the doctrine's common-law roots).

693. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b)(1)–(6) (West 2008). *See generally In re* Gen. Elec. Co., 271 S.W.3d 681 (Tex. 2008) (discussing how section 71.051(b) has been amended and no longer places the burden of proof on a particular party in regard to the factors enumerated in the statute). Prior to 2003, the statutory language provided that a case "'may' be stayed or dismissed under the doctrine of forum non conveniens." *Id.* (citing Act of May 27, 1997, 75th Leg., R.S., ch. 424, § 1, 1997 Tex. Gen. Laws 1680, *amended by* Act of June 2003, 78th Leg., R.S., ch. 204, § 3.04, 2003 Tex. Gen. Laws 847, 854).

694. *Pirelli Tire*, 247 S.W.3d at 676.

695. *Id.* at 679.

696. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(f) (West 2008). The supreme court's recognition of a trial court's discretion to stay or dismiss on forum non conveniens grounds predates this statutory requirement. *Pirelli Tire*, 247 S.W.3d at 676–77. It would

court does not have the discretion to stay or dismiss the case if the plaintiff is a legal resident of Texas.[697]

M. *Gag Orders*

When a trial court issues a gag order prohibiting discussion of a case outside of the courtroom (prior restraint), the order is reviewed for its constitutionality.[698] To withstand this review standard, the court must make written findings supported by the evidence.[699] 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, depriving the "litigants of a just resolution of their dispute, and" (2) that the order "represents the least restrictive means" available to prevent the harm.[700] This two-part constitutional test is a question of law reviewed de novo.[701] Gag orders may be challenged by mandamus.[702]

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be theoretically possible to review the trial court's facts for sufficiency of the evidence while reviewing its legal conclusions de novo. *Compare* Lonza AG v. Blum, 70 S.W.3d 184, 188 (Tex. App.—San Antonio 2001, pet. denied) (arguing that the "proper standard of review of a plea to the jurisdiction ... is abuse of discretion"), *with* BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 794 (Tex. 2002) (stating that a trial court's order denying a special appearance should be reviewed for legal and factual sufficiency in its findings of fact and reviewed de novo in its findings of law).

697. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(e) (West 2008); Owens Corning v. Carter, 997 S.W.2d 560, 568–71 (Tex. 1999).

698. Grigsby v. Coker, 904 S.W.2d 619, 620–21 (Tex. 1995) (orig. proceeding); *see also* Davenport v. Garcia, 834 S.W.2d 4, 10 (Tex. 1992) (orig. proceeding) (recognizing that some aspects of free speech under the Texas Constitution are broader than the federal counterpart). *But see* Operation Rescue-Nat'l v. Planned Parenthood of Houston & Se. Tex., Inc., 975 S.W.2d 546, 559 (Tex. 1998) ("We know of nothing to suggest that injunctions restricting speech should be judged by a different standard under the state constitution than the First Amendment.").

699. *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) (orig. proceeding).

700. *Grigsby*, 904 S.W.2d at 620.

701. 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); *see also* Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp., 283 S.W.3d 838, 842 (Tex. 2009) (requiring de novo review of constitutional issues).

702. *Markel*, 938 S.W.2d at 79–80.

N. *Injunctive Relief*

Injunctions are a form of equitable relief that may also be authorized by statute.[703] "The purpose of a TRO [(temporary restraining order)] is to preserve the status quo, which . . . [is] 'the last, actual, peaceable, non-contested status [that] preceded the pending controversy.'"[704] The purpose of a temporary injunction "is to preserve the status quo of the litigation's subject matter pending a trial on the merits."[705] "'The purpose of a permanent injunction is to grant the injunctive relief to which the applicant [or movant] is entitled as part of the final judgment after a trial on the merits.'"[706] Injunctions are extraordinary remedies, not relief owed to any party.[707]

While an interlocutory appeal from the grant or denial of a temporary injunction is allowed,[708] no statutory provision permits an appeal from the grant or denial of a temporary restraining order.[709] Mandamus relief from a temporary restraining order may nonetheless be available under unusual circumstances.[710]

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703. TEX. CIV. PRAC. & REM. CODE ANN. § 65.011(c) (West 2008); *see, e.g., In re* Gamble, 71 S.W.3d 313, 317 (Tex. 2002) (orig. proceeding) (discussing a provision for injunctive relief provided by the Texas Election Code).

704. *In re* Newton, 146 S.W.3d 648, 651 (Tex. 2004) (orig. proceeding) (quoting Janis Films, Inc. v. City of Fort Worth, 163 Tex. 616, 358 S.W.2d 589, 589 (1962)).

705. Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002); *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."); Walling v. Metcalfe, 863 S.W.2d 56, 57 (Tex. 1993) (explaining that a court may grant a temporary writ of injunction to preserve the status quo of a pending trial).

706. Rapid Settlements, Ltd. v. SSC Settlements, LLC, 251 S.W.3d 129, 147 (Tex. App.—Tyler 2008, pet. denied) (quoting NMTC Corp. v. Conarroe, 99 S.W.3d 865, 868 (Tex. App.—Beaumont 2003, no pet.)).

707. *Butnaru*, 84 S.W.3d at 204; Nolte Irrigation Co. v. Willis, 180 S.W.2d 451, 455 (Tex. Civ. App.—Amarillo 1944, writ ref'd w.o.m.).

708. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4) (West 2008).

709. *See* Lesikar v. Rappeport, 899 S.W.2d 654, 655 (Tex. 1995) (holding that whether an order is a non-appealable temporary restraining order or an appealable temporary injunction depends on the order's characteristics and function, not its title).

710. *See In re* Office of the Att'y Gen., 257 S.W.3d 695, 698 (Tex. 2008) (orig. proceeding) (addressing a temporary restraining order that did not state a basis and was extended without setting a trial date); *Newton*, 146 S.W.3d at 652–53 (involving a temporary restraining order affecting a party's rights to participate in an election that would be over before the order expired); *In re* Tex. Natural Res. Conservation Comm'n, 85 S.W.3d 201, 207 (Tex. 2002) (orig. proceeding) (holding that "mandamus is available to remedy a temporary restraining order that violates Rule 680's time limitations"). These cases involve highly unusual circumstances. Most courts are likely to find an adequate remedy by appeal should the temporary restraining order be converted to a temporary

To be entitled to a temporary injunction, the movant must show: "(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim."[711] An irreparable injury exists if the party injured cannot sufficiently be compensated in damages or the amount of damages is immeasurable by pecuniary standards.[712] A temporary injunction is subject to equitable principles such as laches or the clean hands doctrine.[713] Whether a party is entitled to invoke an equitable defense "is a determination left to the [sound] discretion of the trial court."[714]

In an interlocutory appeal from a temporary injunction,[715] the merits of the movant's case are not presented for the appellate court's review;[716] therefore, a "trial court may not grant a temporary injunction" that would accomplish the objective of the lawsuit.[717] Appellate review is strictly limited to evaluating

injunction. *See In re* Benkiser, No. 01-08-00451-CV, 2008 WL 2388044, at *1 (Tex. App.—Houston [1st Dist.] June 9, 2008, orig. proceeding) (mem. op.) (concluding that, although an appeal was set after the election in question and kept relators from participating in the election, relators failed to establish a lack of remedy by appeal); *see also In re* Francis, 186 S.W.3d 534, 538 (Tex. 2006) (orig. proceeding) ("This Court may review a temporary injunction from a petition for writ of mandamus when an expedited appeal would be inadequate . . . .").

711. *Butnaru*, 84 S.W.3d at 204; *see also* 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 issuing injunctive relief). Statutory bases of injunctive relief may or may not dispense with these common-law requirements. *Compare* David Jasen West & Pydia, Inc. v. State, 212 S.W.3d 513, 519 (Tex. App.—Austin 2006, no pet.) (holding that the injunction authorized by the Deceptive Trade Practices-Consumer Protection Act supersedes the common law elements), *with* Town of Palm Valley v. Johnson, 87 S.W.3d 110, 110–11 (Tex. 2001) (construing section 65.011(1) of the Civil Practice and Remedies Code as requiring proof of irreparable harm, despite language suggesting the contrary).

712. *Butnaru*, 84 S.W.3d at 204.

713. *See In re* Gamble, 71 S.W.3d 313, 317 (Tex. 2002) (orig. proceeding) (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., dissenting, joined by O'Neill & Johnson, JJ.) (recognizing that the clean hands doctrine can prevent a party from obtaining a temporary injunction); Keene v. Reed, 340 S.W.2d 858, 860 (Tex. Civ. App.—Waco 1960, writ ref'd) (acknowledging that the equitable principle of laches can keep a party from obtaining a temporary injunction).

714. *Francis*, 186 S.W.3d at 551 (Wainwright, J., dissenting, joined by O'Neill & Johnson, JJ.).

715. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4) (West 2008).

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

717. Tex. Foundries, Inc. v. Int'l Moulders & Foundry Workers' Union, 151 Tex. 239, 248 S.W.2d 460, 464 (1952); *accord Francis*, 186 S.W.3d at 552 (Wainwright, J., dissenting).

whether there has been an abuse of discretion.[718] 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.[719]

All orders that grant a temporary injunction are required to include a date setting the case for trial on the merits.[720] Failure to include an order setting the matter for a trial on the merits mandates dissolution of the injunction.[721] Furthermore, the trial court must detail the specific reasons it relied upon in ruling on whether a temporary injunction should be granted or denied.[722] The trial court is not required to explain why it believes an applicant 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.[723] 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 issue or point of error.[724]

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718. *In re* Nitla S.A. de C.V., 92 S.W.3d 419, 422 (Tex. 2002) (orig. proceeding); Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002); Walling v. Metcalfe, 863 S.W.2d 56, 58 (Tex. 1993).

719. 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.).

720. TEX. R. CIV. P. 683; Qwest Commc'ns Corp. v. AT&T Corp., 24 S.W.3d 334, 337 (Tex. 2000); *see also* EOG Res., Inc. v. Gutierrez, 75 S.W.3d 50, 52 (Tex. App.—San Antonio 2002, no pet.) (explaining that the trial court's order did not set the case for trial and thus violated Rule 683).

721. *Qwest*, 24 S.W.3d at 337; InterFirst Bank San Felipe, N.A. v. Paz Constr. Co., 715 S.W.2d 640, 641 (Tex. 1986); *EOG Res.*, 75 S.W.3d at 52; Ebony Lake Healthcare Ctr. v. Tex. Dep't of Human Servs., 62 S.W.3d 867, 870 (Tex. App.—Austin 2001, no pet.).

722. 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); Univ. Interscholastic League v. Torres, 616 S.W.2d 355, 357–58 (Tex. Civ. App.—San Antonio 1981, no writ).

723. 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 as modified*, 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 also* TEX. R. CIV. P. 683 (requiring every order that grants an injunction or restraining order to "set forth the reasons for its issuance").

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

In an appeal from a permanent injunction, the standard of review is also an abuse of discretion.[725] A litigant is entitled to a jury trial in an injunction action, but only the ultimate factual issues are submitted for their determination.[726] The jury is not entitled to "determine the expediency, necessity or propriety of equitable relief."[727] Thus, the trial court's order granting or denying a permanent injunction based upon the ultimate facts is reviewed the same as an order regarding a temporary injunction.[728]

O. *Joinder*

Joinder and intervention are distinct.[729] While intervention is automatic unless challenged,[730] "permissive joinder relates to 'proper parties to an action who may be joined or omitted at the pleader's election'" under various rules of pleading and procedure.[731] "A court's decision on joinder should be based on practical considerations with a view to what is fair and orderly."[732] A trial court has discretion in such matters, and its decisions "will not be disturbed on appeal" absent an abuse of discretion.[733] A joinder decision may also be reviewed by writ of mandamus.[734]

When more than one plaintiff joins a case, each plaintiff must establish proper venue independently from all other plaintiffs.[735]

725. 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. Cnty. Mut. Ins. Co., 8 S.W.3d 394, 401 (Tex. App.—Texarkana 1999, no pet.); SRS Prods. Co., Inc. v. LG Eng'g Co., 994 S.W.2d 380, 383 (Tex. App.—Houston [14th Dist.] 1999, no pet.); Priest v. Tex. Animal Health Comm'n, 780 S.W.2d 874, 875 (Tex. App.—Dallas 1989, no writ).

726. *Priest*, 780 S.W.2d at 876.

727. *Id.*; *see also* 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.) (acknowledging that a jury in equity should not determine issues related to the "expediency, necessity, or propriety of [the] relief").

728. *Priest*, 780 S.W.2d at 875–76.

729. *In re* Union Carbide Corp., 273 S.W.3d 152, 155 (Tex. 2008) (orig. proceeding).

730. Guar. Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 657 (Tex. 1990).

731. TEX. R. CIV. P. 37–40, 51(a), 97(f); *see also Union Carbide*, 273 S.W.3d at 155 (describing permissive joinder and noting that the joinder standard is distinct from the intervention standard).

732. *In re* Arthur Andersen LLP, 121 S.W.3d 471, 483 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

733. Allison v. Ark. La. Gas Co., 624 S.W.2d 566, 568 (Tex. 1981).

734. *Arthur Andersen*, 121 S.W.3d at 483.

735. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a) (West Supp. 2010).

If a plaintiff cannot independently demonstrate "proper venue" under a mandatory or permissive venue statute, the case must be transferred to a county of proper venue or dismissed unless the plaintiff can establish the four joinder requirements of section 15.003(a) of the Civil Practice and Remedies Code.[736] In determining proper venue, "[p]roperly pleaded venue facts are taken as true unless specifically denied," in which case prima facie proof of the denied facts must be made, including "affidavits and duly proved attachments."[737]

A trial court's determination under section 15.003(a) is an appealable interlocutory order.[738] However, a trial court's decision regarding transfer of venue is not subject to interlocutory appeal.[739] The standard of review applicable to the trial court's order based on section 15.003(a) is, by statute, de novo.[740]

P. *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,

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736. Surgitek v. Abel, 997 S.W.2d 598, 602 (Tex. 1999); 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) (West Supp. 2010).

737. *O'Quinn*, 77 S.W.3d at 448–49.

738. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(b) (West Supp. 2010) (permitting interlocutory appeal when a trial court determines that: "(1) a plaintiff did or did not independently establish proper venue; or (2) a plaintiff that did not independently establish proper venue did or did not establish the items prescribed by Subsections (a)(1)–(4)").

739. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a); *see also* Am. Home Prods. Corp. v. Clark, 38 S.W.3d 92, 96 (Tex. 2000) (stating that neither a court of appeals nor the supreme court "can review the propriety of" a trial court's venue determination by way of interlocutory appeal). 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.*

740. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c)(1) (West Supp. 2010); *Surgitek*, 997 S.W.2d at 603. An appeal is accelerated and stays trial of the case. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c)(2), (d) (West Supp. 2010).

regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States."[741] 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.[742] Whether these requirements have been met is left largely to the trial court's discretion.[743] As one court has noted, "the sufficiency of a motion to take judicial notice is a question best answered by the trial court."[744] However, "once the law has been invoked by proper motion, the trial court has no discretion—it must acknowledge that law."[745]

Pursuant to Texas Rule of Evidence 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."[746] In addition, facts that are notorious and indisputable,[747] or "well known and easily ascertainable,"[748] may be judicially noticed. However, simply because a trial judge

741. TEX. R. EVID. 202.

742. *Id.*; Burlington N. & Santa Fe Ry. Co. v. Gunderson, Inc., 235 S.W.3d 287, 290 (Tex. App.—Fort Worth 2007, pet. withdrawn); *see also In re* Gonzales, No. 07-06-00324-CV, 2006 WL 2588696, at *1 (Tex. App.—Amarillo Sept. 6, 2006, orig. proceeding) (mem. op.) (explaining that while the movant is entitled to a hearing, the trial court is entitled to a reasonable time to rule on the motion).

743. *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).

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

745. *Keller*, 699 S.W.2d at 212; *see also* Eppenauer v. Eppenauer, 831 S.W.2d 30, 31 n.1 (Tex. App.—El Paso 1992, no writ) (indicating that a court must take judicial notice of any fact whenever the court is given the proper information).

746. TEX. R. EVID. 201(b); *see also In re* J.L., 163 S.W.3d 79, 84 (Tex. 2005) (quoting Rule 201(b)).

747. Harper v. Killion, 162 Tex. 481, 348 S.W.2d 521, 522 (1961).

748. 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); *see also* City of Houston v. Todd, 41 S.W.3d 289, 301 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (reiterating that if a fact is "notorious, well-known, or easily ascertainable," then judicial notice may be taken of that fact).

has personal knowledge of a fact does not permit the judge to take judicial notice of it.[749] The test on review is whether the fact to be judicially noticed is "verifiably certain."[750]

Q. *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.'"[751] While a party has a constitutional right to trial by jury,[752] the right is not absolute.[753] If a party desires a jury trial, Texas Rule of Civil Procedure 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"[754] and (2) to pay the jury fee.[755] 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."[756]

The trial court has no discretion to refuse a jury trial if the fee is paid and request is made on or before the appearance date.[757] If the trial court denies a jury trial, it will be considered harmful

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

750. *Id.*; Levit v. Adams, 841 S.W.2d 478, 485 (Tex. App.—Houston [1st Dist.] 1992, no writ).

751. 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)).

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

753. TEX. CONST. art. V, § 10; *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 132 (Tex. 2004) (orig. proceeding) (holding that the constitutional right to trial by jury may be waived via contract so long as the waiver is made knowingly, voluntarily, and intelligently with sufficient awareness of the relevant circumstances and likely consequences).

754. TEX. R. CIV. P. 216(a); *see also* 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 a jury trial request when the litigant demands a jury trial and pays the necessary fee).

755. TEX. R. CIV. P. 216(b); Huddle v. Huddle, 696 S.W.2d 895, 895 (Tex. 1985).

756. Halsell v. Dehoyos, 810 S.W.2d 371, 371 (Tex. 1991); *cf. 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).

757. Caldwell v. Barnes, 154 S.W.3d 93, 98 (Tex. 2004) (citing TEX. R. CIV. P. 216, 220); Squires v. Squires, 673 S.W.2d 681, 684 (Tex. App.—Corpus Christi 1984, no writ). *But see Prudential*, 148 S.W.3d at 140–41 (directing the trial court to quash a jury demand and set the case on the nonjury docket when the parties had contractually waived their right to jury trial).

error if the case involves questions of material fact.[758] 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."[759] The trial court's decision will be reviewed for an abuse of discretion.[760]

R. *Personal Jurisdiction*

"[P]ersonal jurisdiction concerns the court's power to bind a particular person or party."[761] "[F]or a court to exercise personal jurisdiction over a nonresident defendant, due process requires [that the defendant] have purposefully established such minimum contacts with the forum state that it could reasonably anticipate being sued in the courts" of Texas.[762] The nonresident's contacts with Texas "may give rise to either general or specific jurisdiction."[763] If the defendant has "continuous and systematic contacts with the forum," general jurisdiction is established.[764] Furthermore, when the defendant's alleged liability relates to or

758. *Caldwell*, 154 S.W.3d at 98. "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).

759. 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.) (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 *General Motors Corporation v. 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 (alteration in original) (quoting Allen v. Plummer, 71 Tex. 546, 9 S.W. 672, 673 (1888)); *see also In re* D.R., 177 S.W.3d 574, 580 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (upholding denial of jury request when trial court record revealed opposing side had been preparing their case and submitting evidence based on the understanding there would not be a jury).

760. *See In re* Fallis, No. 04-08-00781-CV, 2009 WL 262119, at *3 (Tex. App.—San Antonio Feb. 4, 2009, orig. proceeding) (mem. op.) (illustrating error raised in a petition for writ of mandamus); Taylor v. Taylor, 63 S.W.3d 93, 101 (Tex. App.—Waco 2001, no pet.) (illustrating error raised in an appeal from a final judgment); *In re* V.R.W., 41 S.W.3d 183, 194 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (discussing that a trial court's denial of a jury trial "is reviewed under the abuse of discretion standard").

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

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

763. *Id.* at 925.

764. *Id.*

arises from activity that occurred within the state, specific jurisdiction is established.[765]

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.[766] 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.[767] "The plaintiff bears the initial burden of pleading sufficient allegations to bring a nonresident . . . within the provisions of the long-arm statute."[768] To prevail on a special appearance, the nonresident defendant has the burden to negate all forms of personal jurisdiction claimed by the plaintiff.[769]

A trial court considering a special appearance should address arguments concerning the forum's jurisdiction over the defendant and should not hear any arguments regarding defects in service.[770] "[D]efective jurisdictional allegations in the petition, defective service of process, and defects in the citation must be challenged by a motion to quash, not a special appearance."[771] A special appearance motion that appropriately challenges personal jurisdiction is not converted into a general appearance merely because it also challenges the method of service.[772]

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765. *Id.*; *see also* Moki Mac River Expeditions v. Drugg, 221 S.W.3d 569, 585 (Tex. 2007) (requiring substantial connection between defendant's contacts with the forum and the operative facts of the litigation).

766. TEX. R. CIV. P. 120a; GFTA Trendanalysen B.G.A. Herrdum GMBH & Co. v. Varme, 991 S.W.2d 785, 786 (Tex. 1999). For a history of this procedural vehicle in Texas, see *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 658 (Tex. 2010).

767. *See* Kawasaki Steel Corp. v. Middleton, 699 S.W.2d 199, 201, 203 (Tex. 1985) (observing that Rule 120a permits only a nonresident defendant to challenge jurisdiction of the court over one's person or property).

768. BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 793 (Tex. 2002); *see also Kelly*, 301 S.W.3d at 658 ("While the pleadings are essential to frame the jurisdictional dispute, they are not dispositive.").

769. *BMC Software*, 83 S.W.3d at 793; CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996) (orig. proceeding).

770. 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).

771. *Kawasaki*, 699 S.W.2d at 203.

772. *See* GFTA v. Varme, 991 S.W.2d 785, 786 (Tex. 1999) (noting that a defendant does not waive a jurisdictional challenge when contesting the method of service in a special appearance).

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.[773] 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.[774] 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.[775]

A trial court's order granting or denying a special appearance is an appealable interlocutory order.[776] "Whether a court can exercise jurisdiction over nonresident defendants is a question of law."[777] Generally, a trial court must resolve disputed questions of fact before resolving the jurisdiction issue.[778] If the trial judge enters findings of fact and conclusions of law, the factual determinations are subject to legal and factual sufficiency

773. 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 v. Tandy Corp., 948 S.W.2d 886, 891–92 (Tex. App.—Fort Worth 1997, writ denied).

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

775. Texana Cmty. MHMR Ctr. v. Silvas, 62 S.W.3d 317, 323 (Tex. App.—Corpus Christi 2001, no pet.); Silva v. Ysleta Del Sur Pueblo, 28 S.W.3d 122, 124 (Tex. App.—El Paso 2000, pet. denied); *Fish*, 948 S.W.2d at 892.

776. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (West 2008). 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 an order granting or denying a special appearance). The availability of this interlocutory appeal eliminates the need to seek mandamus relief on review of an order denying a special appearance. *See* CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996) (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").

777. Kelly v. Gen. Interior Constr., Inc., 301 S.W.3d 653, 657 (Tex. 2010); *see also* Am. Type Culture Collection, Inc. v. Coleman, 83 S.W.3d 801, 805–06 (Tex. 2002) (reviewing legal conclusions relating to the grant or denial of a special appearance de novo); BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 794 (Tex. 2002) ("Whether a court has personal jurisdiction over a defendant is a question of law").

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

standards of review.[779] The trial judge's legal conclusions are reviewed de novo.[780] 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.[781] 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.[782]

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.[783] 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.[784] 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.[785] 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.[786]

S. *Pleadings*

Technically, "pleadings" are petitions and answers.[787] As a

779. *See BMC Software*, 83 S.W.3d at 794 (rejecting the abuse of discretion standard that had been applied by some courts of appeals).

780. *Id.*

781. *Id.*

782. *Id.*

783. *Id.* at 795.

784. *BMC Software*, 83 S.W.3d at 795.

785. Am. Type Culture Collection, Inc. v. Coleman, 83 S.W.3d 801, 806 (Tex. 2002); *see BMC Software*, 83 S.W.3d at 795 (noting that simply more than a scintilla of evidence will defeat the evidence challenge).

786. 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, 791–92 (Tex. 2005) ("[W]e disapprove of those opinions holding that ... specific jurisdiction is necessarily established by allegations or evidence that a nonresident committed a tort in a telephone call from a Texas number ...."); Conner v. Conticarriers & Terminak, Inc., 944 S.W.2d 405, 411 (Tex. App.—Houston [14th Dist.] 1997, no writ).

787. *See* TEX. R. CIV. P. 45 (defining pleadings); *see also* TEX. R. CIV. P. 13, 21, 21b (distinguishing motions from pleadings); Crain v. San Jacinto Sav. Ass'n, 781 S.W.2d 638, 639 (Tex. App.—Houston [14th Dist.] 1989, writ dism'd) (holding that a motion is not the functional equivalent of a pleading and does not carry the same legal significance).

practical matter, practitioners often use the term "pleadings" to include all manner of motions filed in the trial court.[788] For purposes of this subsection, the term is broadly construed because the concepts discussed may apply to motions and other pleas for affirmative relief in addition to answers and petitions.

1. Special Exceptions

A petition is sufficient if it gives "'fair and adequate notice of the facts upon which the pleader bases his claim."'[789] Special exceptions are "used to challenge the sufficiency of a pleading."[790] If a pleading fails to give fair notice,[791] the defendant should specially except to the petition pursuant to Texas Rule of Civil Procedure 91.[792] If no special exceptions are filed, the pleadings will be construed liberally in the pleading party's favor.[793] 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"[794] or otherwise require the adverse party to clarify his pleadings "when they are not clear or sufficiently specific."[795] Special exceptions apply to petitions

788. *See* Lindley v. Flores, 672 S.W.2d 612, 614 (Tex. App.—Corpus Christi 1984, no writ) ("[W]e hold that motions are in the nature of pleadings . . . .").

789. 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) (quoting Roark v. Allen, 633 S.W.2d 804, 810 (Tex. 1982)).

790. Friesenhahn v. Ryan, 960 S.W.2d 656, 658 (Tex. 1998).

791. *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).

792. TEX. R. CIV. P. 91. The State is not precluded from challenging pleadings in a plea to the jurisdiction or motion for summary judgment. State v. Lueck, 290 S.W.3d 876, 884 (Tex. 2009).

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

794. TEX. R. CIV. P. 91; *see also* State *ex rel.* White v. Bradley, 956 S.W.2d 725, 744 (Tex. App.—Fort Worth 1997) (affirming the broad discretion of the court when ruling on special exceptions), *rev'd on other grounds*, 990 S.W.2d 245 (Tex. 1999).

795. Villarreal v. Martinez, 834 S.W.2d 450, 451 (Tex. App.—Corpus Christi 1992, no writ); *see also* Clayton v. Richards, 47 S.W.3d 149, 152 (Tex. App.—Texarkana 2001, pet. denied) (noting that if the pleading party refuses to amend or if the amended pleading fails to state a cause of action, summary judgment may be granted); San Benito Bank & Trust Co. v. Landair Travels, 31 S.W.3d 312, 317 (Tex. App.—Corpus Christi 2000, no pet.) (stating that the court must allow an opportunity to amend, but that failure to amend a pleading or to state a cause of action may result in the dismissal of a case).

and answers,[796] but may be used in motion practice as well.[797]

Generally, if a trial court sustains a party's special exceptions, the other party must be afforded the opportunity to make amendments to the pleadings before the case is dismissed.[798] If the defect in the pleading is not cured after amendment, the trial court may then dismiss the case.[799] 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.[800] The trial court's ruling is reviewed for an abuse of discretion.[801]

If the pleading deficiency is so severe that it cannot be remedied by an amendment, there is no need to specially except and summary judgment should be granted.[802] The distinction is "between inadequately pleading a cause of action [(special exception)] and utterly failing to plead a viable cause of action [(summary judgment)]."[803] 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.[804]

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796. *Compare* TEX. R. CIV. P. 91 (acknowledging that the primary purpose of the special exception is to point out with particularity an omission, obscurity, or insufficiency of a pleading), *with* TEX. R. CIV. P. 45 (explaining that pleadings shall be by petition and answer and consist of a statement in plain and concise language).

797. *See* Franco v. Slavonic Mut. Fire Ins. Ass'n, 154 S.W.3d 777, 784 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (emphasizing that when summary judgment is attacked on specificity grounds, a special exception is required).

798. Friesenhahn v. Ryan, 960 S.W.2d 656, 658 (Tex. 1998).

799. *Id.*

800. 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.).

801. 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); *see also* 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").

802. *Friesenhahn*, 960 S.W.2d at 658; *see also* Hidalgo v. Sur. Sav. & Loan Ass'n, 462 S.W.2d 540, 543 n.1 (Tex. 1971) (recognizing 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).

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

804. *See* 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

2. Interpleader

Texas Rule of Civil Procedure 43,[805] providing for interpleader actions, extends and liberalizes the equitable remedy of bill of interpleader.[806] Under Rule 43, a stakeholder subject to multiple claims to a fund or property may join all claimants in a lawsuit and deposit the property or fund into the court's registry.[807] The stakeholder need not be completely disinterested in the suit;[808] instead, the stakeholder must 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.[809]

"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."[810] 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; 2) the party has not unreasonably delayed filing an action for interpleader; and 3) the party has unconditionally tendered the fund or property into the court's registry."[811] Every reasonable doubt is resolved in favor of allowing the stakeholder

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).

805. *See* TEX. R. CIV. P. 43 ("Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability.").

806. Downing v. Laws, 419 S.W.2d 217, 220 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.); *see also* Sav. & Profit Sharing Fund of Sears Emps. v. Stubbs, 734 S.W.2d 76, 79 (Tex. App.—Austin 1987, no writ) (discussing early and current interpleader practice).

807. Bryant v. United Shortline Inc. Assurance Servs., N.A., 984 S.W.2d 292, 296 (Tex. App.—Fort Worth 1998, no pet.); *see also* United States v. Ray Thomas Gravel Co., 380 S.W.2d 576, 580 (Tex. 1964) (identifying when a party who files an interpleader action may receive attorney's fees).

808. *Downing*, 419 S.W.2d at 219–20.

809. Davis v. E. Tex. Sav. & Loan Ass'n, 163 Tex. 361, 354 S.W.2d 926, 930 (1962) (quoting TEX. R. CIV. P. 43) (internal quotation marks omitted); Emp'rs' Cas. Co. v. Rockwall Cnty., 120 Tex. 441, 35 S.W.2d 690, 693 (1931).

810. Dallas Bank & Trust Co. v. Commonwealth Dev. Corp., 686 S.W.2d 226, 230 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); *see also* Tri-State Pipe & Equip. Inc. v. S. Cnty. 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 its own peril when faced with conflicting claims").

811. *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).

to interplead.[812] The granting of interpleader is considered a final, appealable judgment, which is reviewed on appeal for an abuse of discretion.[813]

3. Intervention

Texas Rule of Civil Procedure 60 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."[814] The plea in intervention should be filed before the judgment is rendered.[815] Under Rule 60, persons or entities have the right to intervene if they "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.[816] The interest asserted can be legal or equitable.[817] Significantly, an intervenor does not have the burden of seeking permission from the court to intervene; rather, the party opposing the intervention bears the burden of challenging the plea in intervention with a motion to strike.[818] Absent a party's motion to strike, the trial court is not authorized to strike the intervention.[819]

If a motion to strike is filed, the trial court should give the intervenor an opportunity to explain and prove the intervenor's

812. *Bryant*, 984 S.W.2d at 296; *Dallas Bank*, 686 S.W.2d at 230.

813. *Bryant*, 984 S.W.2d at 296; K & S Interests, Inc. v. Tex. Am. Bank/Dallas, 749 S.W.2d 887, 889 (Tex. App.—Dallas 1988, writ denied); Taliaferro v. Tex. Commerce Bank, 660 S.W.2d 151, 155 (Tex. App.—Fort Worth 1983, no writ).

814. TEX. R. CIV. P. 60.

815. First Alief Bank v. White, 682 S.W.2d 251, 252 (Tex. 1984) (orig. proceeding); Comal Cnty. Rural High Sch. Dist. No. 705 v. Nelson, 158 Tex. 564, 314 S.W.2d 956, 957 (1958); Highlands Ins. Co. v. Lumbermen's Mut. Cas. Co., 794 S.W.2d 600, 602–04 (Tex. App.—Austin 1990, no writ) (explaining that *Comal County* is still viable under the modern rules of procedure).

816. Guar. Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 657 (Tex. 1990); *see also* King v. Olds, 71 Tex. 729, 12 S.W. 65, 65–66 (1888) (quoting JOHN N. POMEROY, REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION § 430 (2d ed. 1883)) (explaining when a person has a right to intervene).

817. *Guar. Fed. Sav. Bank*, 793 S.W.2d at 657; Mendez v. Brewer, 626 S.W.2d 498, 499 (Tex. 1982), *superseded by statute*, TEX. FAM. CODE ANN. § 102.004 (West 2008), *as recognized in In re* N.L.G., 238 S.W.3d 828, 830 (Tex. App.—Fort Worth 2007, no pet.) (recognizing that the Texas legislature established a "new, more relaxed substantial past contact test for establishing intervenor standing in a [suit affecting the parent-child relationship]").

818. *Guar. Fed. Sav. Bank*, 793 S.W.2d at 657.

819. *Id.*

interest in the suit before ruling on the motion to strike.[820] 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."[821]

The trial court's order is reviewed for an abuse of discretion.[822] 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."[823] While the trial court's ruling on intervention is typically considered on appeal from a final judgment, interlocutory review may be made by petition for writ of mandamus.[824]

4. Frivolous Pleadings

Texas Rule of Civil Procedure 13,[825] in combination with the Texas Civil Practice and Remedies Code,[826] instructs the trial court to impose appropriate sanctions available under Texas Rule of Civil Procedure 215(2)(b) if "a pleading, motion or other paper is [signed], 'groundless and brought in bad faith[,] or . . . for the purpose of harassment.'"[827] Generally, courts presume that

820. 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).

821. Saldana v. Saldana, 791 S.W.2d 316, 320 (Tex. App.—Corpus Christi 1990, no writ). The trial court should rule on a motion to strike an intervention before considering other matters, such as severance. *In re* Union Carbide, 273 S.W.3d 152, 156 (Tex. 2008).

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

823. *Guar. Fed. Sav. Bank*, 793 S.W.2d at 657; *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").

824. *See, e.g.*, *In re* Helena Chem. Co., 286 S.W.3d 492, 496 (Tex. App.—Corpus Christi 2009, orig. proceeding) (noting mandamus review may be appropriate in "exceptional" cases where "time and money" would be "utterly wasted").

825. 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).

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

827. Keith v. Solls, 256 S.W.3d 912, 916 (Tex. App.—Dallas 2008, no pet.) (quoting TEX. R. CIV. P. 13). "'Groundless' means no basis in law or fact and not warranted by a good faith argument for the extension, modification, or reversal of existing law." *Id.*

pleadings and other papers are filed in good faith.[828] The party seeking sanctions bears the burden of overcoming this presumption of good faith.[829] 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."[830] The court may also consider the amount of time available to prepare the pleading (e.g., only a few days before the statute of limitations expires), and "examine the signer's credibility taking into consideration all [of] the facts and circumstances available to him at the time of the filing."[831] 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.'"[832] Rule 13 should not be used as "'a weapon . . . to punish those with whose intellect or philosophic viewpoint the trial court finds fault.'"[833]

(quoting TEX. R. CIV. P. 13). "Bad faith is not simply bad judgment or negligence, but means the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose." *Id.* "'Harass is used in a variety of legal contexts to describe words, gestures, and actions that tend to annoy, alarm, and verbally abuse another person.'" *Id.* at 916–17 (internal emphasis omitted) (quoting Elkins v. Scotts-Brown (Tex. App.—Dallas 2003, no pet.)).

828. Low v. Henry, 221 S.W.3d 609, 614 (Tex. 2007); GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 730 (Tex. 1993).

829. *Tanner*, 856 S.W.2d at 731.

830. 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) (internal quotation marks omitted); *accord* TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(2) (West 2002); *In re* United Servs. Auto Ass'n, 76 S.W.3d 112, 116 (Tex. App.—San Antonio 2002, orig. proceeding).

831. *Scheppler*, 815 S.W.2d at 889 (Tex. App.—Corpus Christi 1991, no writ); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 9.012(b) (West 2002) (listing factors that the court must consider). Rule 13 imposes a duty on the trial court to point out with particularity the act or omission on which the sanctions are based. Tarrant Cnty. 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 also* 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).

832. *See 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)).

833. *Id.* at 155 (quoting *Dyson*, 861 S.W.2d at 951).

A court may only impose sanctions for good cause,[834] "the particulars of which must be [included] in the sanction order."[835] The purposes of the particularity requirement have been described as to:

> (1) ensure that the trial court is held accountable and adheres to the standard of the rule; (2) require the trial court to reflect carefully on its order before imposing sanctions; (3) inform the offending party of the particular conduct warranting sanction, for the purpose of deterring similar conduct in the future; and (4) enable the appellate court to review the order in light of the particular findings made by the trial court.[836]

A trial court's order under Rule 13 or the Texas Civil Practice and Remedies Code is reviewed for an abuse of discretion.[837]

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834. *See* TEX. R. CIV. P. 13 ("No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order."); *Tanner*, 856 S.W.2d at 730 (quoting TEX. R. CIV. P. 13). In addition to monetary sanctions or dismissal of the frivolous pleading or motion under Texas Rule of Civil Procedure 13 and Texas Civil Practice and Remedies Code section 10.004, the trial court may report the offending attorney to the grievance committee if the attorney "consistently engage[s] in activity that results in sanctions under Section 9.012." TEX. CIV. PRAC. & REM. CODE ANN. § 9.013 (West 2002).

835. TEX. CIV. PRAC. & REM. CODE ANN. § 10.005 (West 2002); TEX. R. CIV. P. 13; *see also* Murphy v. Friendswood Dev. Co., 965 S.W.2d 708, 710 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (reversing a sanction order that merely incorporated by reference a motion for sanctions); 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 in 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 Offices of G. David Westfall, P.C., 120 S.W.3d 470, 475–76 (Tex. App.—Dallas 2003, pet. denied) (refusing to address the validity of 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 requiring an objection to the lack of particularity to properly preserve a complaint for appellate review). Unlike Rule 13, Rule 215 does not require a trial court to state any reasons for good cause. *See* TEX. R. CIV. P. 215 (imposing a standard that does not require the trial court to specify reasons creating good cause); Kahn v. Garcia, 816 S.W.2d 131, 133 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding) (noting the distinction between Rule 13 and Rule 215).

836. Houtex Ready Mix Concrete & Materials v. Eagle Constr. & Envtl. Servs., L.P., 226 S.W.3d 514, 522 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

837. *See* Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios, 46 S.W.3d 873, 877 (Tex. 2001) ("Sanctions are generally reviewed under an abuse-of-discretion standard."); *Tanner*, 856 S.W.2d at 730 (reviewing the district court's imposition of sanctions under an abuse of discretion standard); Koslow's v. Mackie, 796 S.W.2d 700, 704 (Tex. 1990) (commenting that an appellate court will only set aside the imposition of sanctions upon the "showing of a clear abuse of discretion").

5. Vexatious Litigation for Repeat Pleadings

The Texas Civil Practice and Remedies Code was amended to include chapter 11 in an attempt to deter non-meritorious litigation.[838] 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."[839] After the defendant files this motion, the litigation is stayed until the trial court determines the merits of the motion.[840] The Code sets forth the criteria for determining whether a plaintiff is a vexatious litigant.[841]

If the trial court finds that the plaintiff is a vexatious litigant, the trial court must "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.[842] If the plaintiff fails to provide the security before the set time frame ends, the court shall dismiss the litigation.[843] After notice and a hearing, the trial court may also "enter an order prohibiting [the plaintiff] from filing . . . new litigation . . . if the court finds . . . : (1) the [plaintiff] is a vexatious litigant; and (2) the local administrative [court] judge . . . has not" given the plaintiff permission to file the litigation.[844] If the plaintiff violates the order, the plaintiff "is subject to contempt of court."[845] 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.[846]

838. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 11.001–.104 (West 2002) (addressing vexatious litigants in trial courts, not appellate courts).

839. *Id.* § 11.051.

840. *Id.* § 11.052(b).

841. *Id.* § 11.054(a), (c).

842. *Id.* § 11.055.

843. TEX. CIV. PRAC. & REM. CODE ANN. § 11.056 (West 2002).

844. *Id.* § 11.101(a).

845. *Id.* § 11.101(b).

846. *Compare id.* § 11.101 (giving the trial court the ability to ban a vexatious litigant from the Texas court system), *with id.* § 13.001 (establishing the requirement that an action or argument be nonfrivolous), *and* Jones v. CGU Ins. Co., 78 S.W.3d 626, 628 (Tex. App.—Austin 2002, no pet.) (reviewing a trial court's dismissal of an appellant's lawsuit pursuant to section 13.001 for an abuse of discretion).

T. *Sanctions*

1. Inherent Power to Sanction

Trial courts have the inherent power to impose sanctions for bad faith abuse of the judicial process, even when that conduct may not be covered by rule or statute.[847] The inherent powers of a trial court are those that "'aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity.'"[848] The inherent power exists only "to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process, such as any significant interference with the traditional core functions of Texas courts."[849] The trial court must make findings of fact that the abuse significantly interfered with the core functions of the judiciary,[850] such as "hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, entering final judgment[,] and enforcing that judgment."[851] "[T]he trial court should attempt to determine if the offensive conduct is attributable to the attorney, the party, or both."[852] "'[L]esser sanctions must

847. *See In re* Sheshtawy, 154 S.W.3d 114, 124 (Tex. 2004) (orig. proceeding) (explaining that contempt power "is an essential element of judicial independence and authority"); *In re* Bennett, 960 S.W.2d 35, 40 (Tex. 1997) (orig. proceeding) (recognizing a court's "inherent power to impose sanctions"); Remington Arms Co. v. Caldwell, 850 S.W.2d 167, 172 (Tex. 1993) (orig. proceeding) (holding the trial court has "inherent and statutory power to discipline errant counsel for improper trial conduct in the exercise of its contempt powers").

848. *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. 1988); *In re* K.A.R., 171 S.W.3d 705, 721 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (Guzman, J., dissenting).

849. Kutch v. Del Mar Coll., 831 S.W.2d 506, 510 (Tex. App.—Corpus Christi 1992, no writ); *see also In re* Martin, No. 05-06-00072-CV, 2006 WL 234411, at *2 (Tex. App.—Dallas Feb. 1, 2006, orig. proceeding) (mem. op.) (explaining that a trial court may use its inherent sanction power to remedy any "significant interference with the legitimate exercise of the traditional core functions of the court").

850. *See* Howell v. Tex. Workers' Comp. Comm'n, 143 S.W.3d 416, 447 (Tex. App.—Austin 2004, pet. denied) (illustrating specific findings); McWhorter v. Sheller, 993 S.W.2d 781, 789 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (noting that findings did not address interference with core functions); *Kutch*, 831 S.W.2d at 510 (requiring some evidence showing the complained-of conduct obstructed the court's legitimate exercise of power).

851. *Kutch*, 831 S.W.2d at 510; *see also* Trevino v. Ortega, 969 S.W.2d 950, 958 (Tex. 1998) (delineating the core functions of the judiciary).

852. Williams v. Akzo Nobel Chems., Inc., 999 S.W.2d 836, 843 (Tex. App.—Tyler

first be tested to determine whether they are adequate' before a sanction that [precludes a judgment] on the merits of a case [can] be justified."[853]

"Case[-]determinative sanctions may be imposed ... only in exceptional cases when they are clearly justified and it is fully apparent that no lesser sanctions would promote compliance with the rules."[854] The record must reflect that the court considered the availability of lesser sanctions before imposing case-determinative or death-penalty sanctions.[855]

The court of appeals reviews a trial court's use of its inherent sanction power for abuse of discretion, which necessitates review of the entire record.[856] Sanctions imposed pursuant to the court's inherent power must be just and appropriate.[857] A trial court abuses its discretion if the sanctions imposed are not just.[858] In determining whether sanctions are just, appellate courts apply a two-prong test.[859] First, a direct nexus must exist "among the offensive conduct, the offender, and the sanction imposed."[860] Accordingly, the "sanction must be directed against the abuse and toward remedying the prejudice caused [to] the innocent party," and "should be visited upon the offender."[861] Second, the sanction must not be excessive.[862] Due to the amorphous nature of this inherent power and its potency, the courts of appeals have admonished trial courts to use it sparingly and to be mindful of the

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1999, no pet.).

853. Cire v. Cummings, 134 S.W.3d 835, 840 (Tex. 2004) (quoting Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 849 (Tex. 1992)).

854. GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 729 (Tex. 1993) (orig. proceeding).

855. *See Cire*, 134 S.W.3d at 839–40 (noting that a trial court should consider, and utilize when effective, the imposition of lesser sanctions).

856. *Kutch*, 831 S.W.2d at 512; *see also In re* K.A.R., 171 S.W.3d 705, 722 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (Guzman, J., dissenting) (noting the abuse of discretion standard for reviewing the imposition of sanctions at the trial level); *In re* N.R.C., 94 S.W.3d 799, 809 n.7 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (recounting the abuse of discretion standard of review of sanctions imposed by the trial court).

857. TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 916–17 & n.4 (Tex. 1991) (orig. proceeding).

858. Williams v. Akzo Nobel Chems., Inc., 999 S.W.2d 836, 843 (Tex. App.—Tyler 1999, no pet.).

859. *TransAmerican*, 811 S.W.2d at 917; *Williams*, 999 S.W.2d at 843.

860. Spohn Hosp. v. Mayer, 104 S.W.3d 878, 882 (Tex. 2003).

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

862. *Id.*

sanctioned party's due process rights.[863]

Whether a trial court's sanction is reviewable by mandamus or by appeal is not clear in every case. If a sanctioned party has an adequate remedy at law, then mandamus is not available,[864] unless the judgment or order is void when issued.[865] In *TransAmerican Natural Gas Corp. v. Powell*,[866] the Texas 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."[867] A death-penalty or case-determinative sanction precludes the merits of the case from being presented and is clearly reviewable by mandamus.[868] 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."[869] There is a split among

863. *See In re* Bennett, 960 S.W.2d 35, 40 (Tex. 1997) (orig. proceeding) (reminding that "[t]he power to sanction is of course limited by the due process clause"); Kutch v. Del Mar Coll., 831 S.W.2d 506, 510–11 (Tex. App.—Corpus Christi 1992, no writ) (reiterating the due process limitations on a court's power to sanction); *see also In re K.A.R.*, 171 S.W.3d 705, 721 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (Guzman, J., dissenting) (recognizing the need to use the inherent sanction power sparingly).

864. *In re* Sw. Bell Tel. Co., 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding); *TransAmerican*, 811 S.W.2d at 919.

865. *See, e.g.*, *In re* Suarez, 261 S.W.3d 880, 882 (Tex. App.—Dallas 2008, orig. proceeding) (presuming no adequate appellate relief at law when an order is void).

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

867. *Id.* at 919; *see also* Spohn Hosp. v. Mayer, 104 S.W.3d 878, 882 (Tex. 2003) (reiterating that "'[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 sanctions would promote compliance with the rules'" (quoting GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 729 (Tex. 1993) (orig. proceeding))).

868. *See Tanner*, 856 S.W.2d at 729 (reviewing death-penalty sanctions in an original mandamus proceeding); *TransAmerican*, 811 S.W.2d at 920 (holding that a discovery sanction, which precludes a decision on the merits, is reviewable by mandamus). Death-penalty sanctions are also limited by constitutional due process. *TransAmerican*, 811 S.W.2d at 917; *see also* U.S. CONST. amend. XIV, § 1 (stating "nor shall any State deprive any person of life, liberty, or property, without due process of law"); TEX. CONST. art. I, § 19 ("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."). Consequently, courts have strictly applied the requirements to impose sanctions, especially death-penalty sanctions. *See* Hamill v. Level, 917 S.W.2d 15, 16 (Tex. 1996) (stating that courts may not use death-penalty sanctions unless the sanctioned party's conduct justifies the presumption of a meritless claim).

869. Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991) (orig. proceeding). In

the courts of appeals on the issue of whether the striking of a party's witnesses may be reviewed by mandamus.[870] The availability of mandamus, with regard to the striking of a party's witnesses, generally depends on whether the sanction is case-determinative.[871]

2. Power to Sanction for Discovery Abuse

The purpose of discovery is "'to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial.'"[872] A trial

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Braden, the court found the large monetary sanction, which had to be paid before an appeal would be allowed, was reviewable by mandamus. *Id.* at 929–30. *But cf.* Stringer v. Eleventh Court of Appeals, 720 S.W.2d 801, 802 (Tex. 1986) (orig. proceeding) (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) (declaring that a sanction of $1,050 was not reviewable by mandamus). If the court's imposition of monetary sanctions jeopardizes a party's ability to continue the litigation, appeal is a sufficient remedy only if the court defers payment of the sanction until the court renders final judgment and the party has an opportunity to appeal the judgment. *Braden*, 811 S.W.2d at 929. To preserve the issue, the sanctioned party must complain that the monetary sanction prevents the party's access to the court. *Id.* If the sanctioned party complains, the trial court must either defer payment of the sanction until the final judgment is rendered or make express written findings explaining why the sanction does not preclude the complaining litigant's access to the court. *Id.*

870. *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 a bill of exceptions), *with* Buyers Prods. Co. v. Clark, 847 S.W.2d 270, 273 (Tex. App.—Beaumont 1992, orig. proceeding) (determining it was inappropriate for the trial court to strike the defendant's witnesses because of the attorney's violations and conditionally issuing a writ of mandamus), Mother Frances Hosp. v. Coats, 796 S.W.2d 566, 571–72 (Tex. App.—Tyler 1990, orig. proceeding) (finding that an appeal is not an adequate remedy and mandamus is appropriate when an order striking witnesses amounts to an emasculation of a party's defense), *and* Williams v. Crier, 734 S.W.2d 190, 193 (Tex. App.—Dallas 1987, orig. proceeding) (holding that the facts of the instant case justified mandamus because the trial court's order striking three witnesses "was a clear abuse of discretion").

871. *See* State Farm Fire & Cas. Co. v. Rodriguez, 88 S.W.3d 313, 325–26 (Tex. App.—San Antonio 2002, pet. denied) (stating that as long as exclusion of testimony impairs only the party's presentation of its case and does not prohibit a trial on the 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).

872. Chapa v. Garcia, 848 S.W.2d 667, 668 (Tex. 1992) (orig. proceeding) (quoting Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 553 (Tex. 1990) (orig. proceeding)); *see also*

court may impose sanctions "to assure compliance with discovery and deter those who might be tempted to abuse discovery in the absence of a deterrent."[873] An abuse of discretion standard is used when reviewing a trial court's ruling on a motion for sanctions.[874]

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."[875] Because the legislature has not created an interlocutory appeal regarding discovery sanctions, such sanctions are not appealable until a final judgment is signed.[876] Nonetheless, a sanctioned party may pursue a writ of mandamus if that party has no adequate remedy by appeal.[877]

Rule 215 permits a wide range of sanctions for a variety of purposes:[878] "to secure compliance with discovery rules; ... to deter other litigants from similar misconduct; ... to punish violators;"[879] "to insure a fair trial[;] to compensate a party for past prejudice[;] ... and to deter certain bad faith conduct."[880] The sanctions, however, must be "just."[881] A two-pronged analysis has been developed to determine whether a trial court's

State v. Lowry, 802 S.W.2d 669, 671 (Tex. 1991) ("[D]iscovery is ... the linchpin of the search for truth.").

873. Cire v. Cummings, 134 S.W.3d 835, 839 (Tex. 2004).

874. *Id.* at 838; Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986).

875. TEX. R. CIV. P. 215.3.

876. *In re* Smith, 192 S.W.3d 564, 569 (Tex. 2006) ("A sanction[] order is appealable when the judgment is signed."); *see also* Braden v. Downey, 811 S.W.2d 922, 928 (Tex. 1991) (orig. proceeding) ("'[D]iscovery sanctions are not appealable until the district court renders a final judgment.'" (quoting *Bodnow Corp.*, 721 S.W.2d at 840)).

877. *See* TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 920 (Tex. 1991) (orig. proceeding) (holding discovery sanctions that result in preventing a judgment on the merits and that are not immediately appealable may be reviewed by mandamus because an ordinary appeal would be inadequate).

878. *See* TEX. R. CIV. P. 215.2(b) (identifying the various sanctions a trial court has at its disposal to correct discovery violations for a pending action).

879. Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 849 (Tex. 1992) (orig. proceeding); *see also* Spohn Hosp. v. Mayer, 104 S.W.3d 878, 882 (Tex. 2003) (discussing the legitimate purposes of sanctions).

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

881. 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*, 811 S.W.2d at 917.

sanctions are just.[882]

The first prong of this analysis requires that "a direct relationship ... exist between the offensive conduct and the sanction imposed."[883] Accordingly, the sanction imposed against the offending party "must be directed against the abuse and toward remedying the prejudice caused the innocent party."[884] In other words, the sanctions must be specifically tailored to the abuse found.[885]

The second prong of this analysis requires that the sanction not be excessive—the sanction must fit the offensive conduct.[886] The sanction should not be more severe than necessary to satisfy its legitimate purpose.[887] Moreover, as a general rule, a trial court should always impose lesser sanctions before imposing a death-penalty sanction.[888] The Texas Supreme Court has emphasized "that case-determinative sanctions may only be imposed in

882. *See Spohn*, 104 S.W.3d at 882 (Tex. 2003) (using the two-part test established in *TransAmerican* for determining whether a trial court abused its discretion when imposing sanctions).

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

884. *Id.* at 917; *accord* Paradigm Oil, Inc. v. Retamco Operating, Inc., 161 S.W.3d 531, 538 (Tex. App.—San Antonio 2004, pet. denied); *In re* Adkins, 70 S.W.3d 384, 390 (Tex. App.—Fort Worth 2002, orig. proceeding); *In re* Polaris Indus., Inc., 65 S.W.3d 746, 751 (Tex. App.—Beaumont 2001, orig. proceeding).

885. *TransAmerican*, 811 S.W.2d at 917; *Paradigm*, 161 S.W.3d at 537; *see also* Vela v. Wagner & Brown, Ltd., 203 S.W.3d 37, 61 (Tex. App.—San Antonio 2006, no pet.) (finding a direct relationship between the abuse and misconduct documented by the trial court and the sanctions imposed).

886. *TransAmerican*, 811 S.W.2d at 917 ("The punishment should fit the crime."); *Polaris*, 65 S.W.3d at 751; *see also* State Farm Fire & Cas. Co. v. Rodriguez, 88 S.W.3d 313, 326–27 (Tex. App.—San Antonio 2002, pet. denied) (finding the trial court's discovery sanction was not a death-penalty sanction and, even if it were, the trial court did not abuse its discretion because the sanction was justified and not excessive); *Adkins*, 70 S.W.3d at 391 (reversing a death-penalty sanction because it was excessive and therefore unjust).

887. *See* Am. Flood Research, Inc. v. Jones, 192 S.W.3d 581, 583 (Tex. 2006) ("[T]he court must make certain that less severe sanctions would not have been sufficient to promote compliance."); *TransAmerican*, 811 S.W.2d at 917 ("[C]ourts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance."); *Adkins*, 70 S.W.3d at 390 (stating the record must "reflect that the court considered the availability of lesser sanctions").

888. Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 849 (Tex. 1992) (orig. proceeding) (holding that lesser sanctions will suffice if they "promote compliance, deterrence, and discourage further abuse"); *see also* Hamill v. Level, 917 S.W.2d 15, 16 (Tex. 1996) (disapproving of the death-penalty sanction imposed by the trial court because lesser sanctions were available to serve the immediate purpose); *Polaris*, 65 S.W.3d at 751 (noting a trial court should "first test the effectiveness of lesser sanctions before entering death penalty sanctions").

'exceptional cases' where they are 'clearly justified' and it is 'fully apparent that no lesser sanctions would promote compliance with the rules.'"[889] Trial courts, however, are not required to "test the effectiveness of lesser sanctions by actually implementing and ordering each and every sanction."[890] Instead, trial courts "must analyze the available sanctions and offer a reasoned explanation as to the appropriateness of the sanction imposed."[891]

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."[892] Therefore, the trial court is not restricted to considering only the specific violation committed but is entitled to consider other conduct occurring during discovery.[893]

In appropriate cases, the Texas Supreme Court has encouraged trial judges to prepare written findings that set forth the trial court's reasons for imposing severe sanctions.[894] However,

889. 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 (Tex. 1993) (orig. proceeding)); *see also* Spohn Hosp. v. Mayer, 104 S.W.3d 878, 882 (Tex. 2003) (requiring courts to first consider less preclusive sanctions).

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

891. *Id.*

892. 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.).

893. Hernandez v. Mid-Loop, Inc., 170 S.W.3d 138, 143 (Tex. App.—San Antonio 2005, no pet.); Paradigm Oil, Inc. v. Retamco Operating, Inc., 161 S.W.3d 531, 536 (Tex. App.—San Antonio 2004, pet. denied). In *TransAmerican Natural Gas Corp. v. Powell*, 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). Two Texas courts of appeals have adopted the approach used by the United States Court of Appeals for the Third Circuit to determine whether the conduct by the sanctioned party warranted the particular sanction imposed. Pelt v. Johnson, 818 S.W.2d 212, 216 (Tex. App.—Waco 1991, orig. proceeding) (implementing the six-factor test of *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868–70 (3d Cir. 1984)); Hanley v. Hanley, 813 S.W.2d 511, 517–18 (Tex. App.—Dallas 1991, no writ) (utilizing the six-factor test of *Poulis*). *But see* Lisa Ann Mokry, Note, *Discovery Sanctions Must Be "Just," Consistent with Due Process, and Are Subject to Mandamus Review:* TransAmerican Natural Gas Corp. v. Powell, *811 S.W.2d 913 (Tex. 1991)*, 23 TEX. TECH L. REV. 617, 640 (1992) (criticizing *TransAmerican* for failing "to provide guiding rules and principles for the trial courts to follow").

894. IKB Indus. v. Pro-Line Corp., 938 S.W.2d 440, 442 (Tex. 1997); Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 850 (Tex. 1992) (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;

written findings are not required because they are often unnecessary and constitute an undue burden on the trial court.[895] Moreover, appellate courts are not required to defer to the trial court's written findings.[896] 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.[897]

U. *Sealing Court Records*

Rule 76a provides very specific guidelines for a trial court to follow in determining whether to seal court records.[898] The trial court must strictly adhere to these guidelines because court records "are presumed to be open to the general public."[899] Any order on a motion to seal or unseal public records must be supported by specific findings of fact that state the requirements of Rule 76a(1) have been met.[900] Any order relating to the sealing or unsealing of court records is subject to immediate appellate review.[901] The abuse of discretion standard of review applies to

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second, such findings help assure the parties involved that the decision resulted from thoughtful judicial deliberation; and third, written findings increase the likelihood that the sanctions will deter future sanctionable conduct. *Blackmon*, 841 S.W.2d at 852.

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

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

897. *Blackmon*, 841 S.W.2d at 852; *see also TransAmerican*, 811 S.W.2d at 919 n.9 (noting that a trial court's written findings in support of sanctions assist the appellate court in reviewing the trial court's determination). The supreme court has expressly rejected applying the same legal presumptions favoring a nonjury trial judgment when reviewing sanctions on mandamus. *Blackmon*, 841 S.W.2d at 852 (overruling the sanctions review adopted by *Hartford Accident & Indemnity Co. v. Abascal*, 831 S.W.2d 559 (Tex. App.—San Antonio 1992, orig. proceeding)); *see also* Vela v. Wagner & Brown, Ltd., 203 S.W.3d 37, 56 (Tex. App.—San Antonio 2006, pet. denied) (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").

898. TEX. R. CIV. P. 76a(1). 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 . . . [that] will adequately and effectively protect the specific interest asserted." *Id.*

899. *Id.*; Davenport v. Garcia, 834 S.W.2d 4, 23–24 (Tex. 1992) (orig. proceeding); *see also* Gen. Tire, Inc. v. Kepple, 970 S.W.2d 520, 524 (Tex. 1998) (mandating that the standards set forth in Rule 76a be strictly followed).

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

901. TEX. R. CIV. P. 76a(8); *see also* Chandler v. Hyundai Motor Co., 829 S.W.2d 774, 775 (Tex. 1992) ("Any party aggrieved by the trial court's decision, finding, or failure

orders regarding motions to seal records.[902]

V. *Service of Process*

A complaint regarding a curable defect in the service of process does not defeat amenability to the court's process; thus, it should not be brought via a special appearance.[903] Rather, a motion to quash is the appropriate procedural device to raise such an objection.[904] The remedy for defective service in Texas state courts is additional time to answer the suit, not dismissal.[905] The trial court's ruling on a motion to quash service of process is reviewed for an abuse of discretion.[906]

W. *Severance*

Severance of a claim under Rule 41[907] 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

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to find made pursuant to Rule 76a, including the decision whether the document is a 'court record,' as that term is defined by the rule, may seek review by interlocutory appeal." (quoting Eli Lilly & Co. v. Marshall, 829 S.W.2d 157, 158 (Tex. 1992))).

902. *Kepple*, 970 S.W.2d at 526; BP Prods. N. Am., Inc. v. Houston Chron. Publ'g Co., 263 S.W.3d 31, 34 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

903. TEX. R. CIV. P. 120a(1); Kawasaki Steel Corp. v. Middleton, 699 S.W.2d 199, 202–03 (Tex. 1985).

904. *See* Wheat v. Toone, 700 S.W.2d 915, 915 (Tex. 1985) (expounding that "'defective jurisdictional allegations in the petition, defective service of process, and defects in the citation must be challenged by a motion to quash, not a special appearance'" (quoting *Kawasaki*, 699 S.W.2d at 203)); Tex. Dep't of Pub. Safety v. Kreipe, 29 S.W.3d 334, 336 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (affirming a motion to quash is the proper vehicle to address defective service).

905. *See Kawasaki*, 699 S.W.2d at 202 (stating "a non-resident defendant, like any other defendant, may move to quash [a] citation for defects in the process, but his only relief is additional time to answer rather than dismissal of the cause"); Alcala v. Williams, 908 S.W.2d 54, 56 (Tex. App.—San Antonio 1995, no writ) (construing a motion to abate as a motion to quash). Although Federal Rules of Civil Procedure 12(b)(4) and 12(b)(5) provide for dismissal of a suit for failure to serve process or for insufficient service of process, the Texas Rules of Civil Procedure do not contain analogous provisions. *Compare* FED. R. CIV. P. 12(b)(4)–(5) (permitting a party to move for dismissal on grounds of insufficient process or insufficient service of process), *with* TEX. R. CIV. P. 120a (recognizing no grounds for dismissal for improper service other than lack of jurisdiction).

906. *Alcala*, 908 S.W.2d at 56.

907. TEX. R. CIV. P. 41 (addressing misjoinder and non-joinder of parties); *see also In re* B.L.D., 113 S.W.3d 340, 345 n.3 (Tex. 2003) (explaining that a party seeking to sever under Texas Rule of Civil Procedure 41 "may seek separate trials as an alternative form of relief" under Texas Rule of Civil Procedure 174).

with the other claims that they involve the same facts and issues."[908] The purpose of granting a severance is to ensure justice, deter prejudice, and add convenience.[909] 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.[910] Under these circumstances, the failure to order separate trials violates a plain legal duty and is considered an abuse of discretion.[911] Rule 41 gives the trial court discretion to grant a severance, which will not be reversed absent an abuse of discretion.[912]

X. *Subject-Matter Jurisdiction*

Subject-matter jurisdiction is essential for a court to decide a case; it is never presumed and cannot be waived.[913] Without subject-matter jurisdiction, a judgment is void rather than voidable.[914]

A trial court's subject-matter jurisdiction is typically challenged by a plea to the jurisdiction, although other procedural vehicles may be used as well.[915] Challenging subject-matter jurisdiction is a dilatory plea "to defeat a cause of action without regard to whether the claims . . . have [any] merit."[916]

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908. Liberty Nat'l Fire Ins. Co. v. Akin, 927 S.W.2d 627, 629 (Tex. 1996) (orig. proceeding); *accord* Coal. of Cities for Affordable Util. Rates v. Pub. Util. Comm'n of Tex., 798 S.W.2d 560, 564 (Tex. 1990).

909. Guar. Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 658 (Tex. 1990).

910. *In re* Burgett, 23 S.W.3d 124, 127 (Tex. App.—Texarkana 2000, orig. proceeding).

911. *Id.* at 126 n.1.

912. 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); *see also* State Farm Mut. Auto. Ins. Co. v. Wilborn, 835 S.W.2d 260, 261 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding) (noting a "trial court has wide discretion to order or not order separate trials when judicial convenience is served and prejudice avoided").

913. Carroll v. Carroll, 304 S.W.3d 366, 367 (Tex. 2010); Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443–44 (Tex. 1993).

914. Mapco, Inc. v. Forrest, 795 S.W.2d 700, 703 (Tex. 1990) (orig. proceeding).

915. Harris Cnty. v. Sykes, 136 S.W.3d 635, 638 (Tex. 2004); *see also* Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 554 (Tex. 2000) (naming a motion for summary judgment as another procedural vehicle for challenging lack of subject-matter jurisdiction).

916. *Blue*, 34 S.W.3d at 554.

Unless the plaintiff's petition affirmatively demonstrates an absence of jurisdiction, the trial court construes the petition liberally in favor of jurisdiction.[917] Absent incurable defects in jurisdiction, the trial court should give the plaintiff an opportunity to amend.[918] If the pleadings affirmatively negates jurisdiction, the jurisdictional plea may be granted without permitting the plaintiff to amend.[919] If a trial court lacks subject-matter jurisdiction, it has no choice but to dismiss the case[920] because subject-matter jurisdiction cannot be conferred upon the trial court by either consent or waiver.[921]

In *Texas Department of Parks and Wildlife v. Miranda*,[922] the court held:

> 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.[923]

Where the jurisdictional challenge involves the merits of the plaintiff's claim "and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists."[924] If the evidence raises a question of fact regarding jurisdiction, "the trial court cannot grant the plea to the jurisdiction," and the fact-finder will resolve the fact issue.[925] If, however, the evidence is undisputed or does not raise a fact issue

917. 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.

918. *Miranda*, 133 S.W.3d at 226–27.

919. *Id.*

920. 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; *see also* Taiwan Shrimp Farm Vill. Ass'n 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) (West 1988))).

921. *See* City of Desoto v. White, 288 S.W.3d 389, 393 (Tex. 2009) ("'The failure of a jurisdictional requirement deprives the court of the power to act (other than to determine that it has no jurisdiction), and ever to have acted, as a matter of law.'" (quoting Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser, 140 S.W.3d 351, 359 (Tex. 2004))).

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

923. *Id.* at 227.

924. *Id.*

925. *Id.* at 227–28.

on the question of jurisdiction, then "the trial court rules on the plea to the jurisdiction as a matter of law."[926]

Decisions involving the government may be reviewed by interlocutory appeal to determine whether a trial court has subject-matter jurisdiction.[927] A trial court's lack of subject-matter jurisdiction "is fundamental error and must be noted and reviewed by the appellate court at any time it appears."[928] The reviewing court "'construe[s] the pleadings in favor of the plaintiff and look[s] to the pleader's intent.'"[929] Whether a petition alleges facts that affirmatively demonstrate subject-matter jurisdiction is treated as a question of law and is reviewed de novo.[930] Similarly, whether uncontroverted evidence of jurisdictional facts demonstrates subject-matter jurisdiction is also a question of law.[931]

Occasionally, "disputed evidence of jurisdictional facts that also implicate the merits of the case may require resolution by the finder of fact."[932] "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," indulges every logical inference, and resolves any doubts in favor of the nonmovant.[933] Only matters

926. *Id.* at 228.

927. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West 2008) (authorizing an interlocutory appeal of an order that "grants or denies a plea to the jurisdiction by a governmental unit"); Harris Cnty. v. Sykes, 136 S.W.3d 635, 638 (Tex. 2004) (explaining that "when a trial court denies the governmental entity's claim of no jurisdiction, whether it has been asserted by a plea to the jurisdiction, a motion for summary judgment, or otherwise . . . an interlocutory appeal may be brought"). "If a plaintiff has been provided a reasonable opportunity to amend after a governmental entity files its plea to the jurisdiction," any subsequent dismissal is with prejudice. *Id.* at 639.

928. 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); Tex. Emp't Comm'n v. Int'l Union of Elec., Radio & Mach. Workers, Local Union No. 782, at 352 S.W.2d 252, 253 (Tex. 1961); *see also* Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 928 (Tex. 1998) (indicating that lack of subject-matter jurisdiction can be raised sua sponte by the appellate court).

929. 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.)).

930. *Miranda*, 133 S.W.3d at 226.

931. *Id.*

932. *Id.* at 227.

933. *See id.* at 228 (noting that this standard mirrors the summary judgment

presented to the trial court will be reviewed upon appeal from the order dismissing the case for want of jurisdiction.[934]

1. Standing

"Standing is a constitutional prerequisite to maintaining suit."[935] It is also an essential "component of subject matter jurisdiction."[936] 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.'"[937] "To have standing a party must have suffered a threatened or actual injury."[938] An opinion issued in a lawsuit where there is no standing (or where there is no case or controversy)[939] is an advisory opinion, which Texas courts are prohibited from issuing.[940]

Standing is determined at the time suit is filed in the trial court.[941] Except for issues involving mootness, subsequent events

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standard).

934. *Huston*, 663 S.W.2d at 129 (citing 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)).

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

936. *Id.* 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); *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."); Munters Corp. v. Locher, 936 S.W.2d 494, 496 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (observing that the absence of subject-matter jurisdiction makes the judgment void).

937. *Austin Nursing Ctr.*, 171 S.W.3d at 848–49 (quoting Nootsie, Ltd. v. Williamson Cnty. Appraisal Dist., 925 S.W.2d 659, 661 (Tex. 1996)); *see also* Coastal Liquids Transp., L.P. v. Harris Cnty. Appraisal Dist., 46 S.W.3d 880, 884 (Tex. 2001) (explaining that both standing and capacity are required for a party to bring a lawsuit).

938. Allstate Indemn. Co. v. Forth, 204 S.W.3d 795, 796 (Tex. 2006).

939. *See* Brooks v. Northglen Ass'n, 141 S.W.3d 158, 164 (Tex. 2004) (stating that a justiciable controversy must be before the court to warrant adjudication). "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).

940. McAllen Med. Ctr., Inc. v. Cortez, 66 S.W.3d 227, 232 (Tex. 2001); Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 444 (Tex. 1993). 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." *Id.*; *see also* TEX. CONST. art. II, § 1 (describing Texas's separation of powers).

941. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446 n.9.

do not deprive the court of subject-matter jurisdiction.[942]

To establish standing, a person "must demonstrate a personal stake in the controversy."[943] A court determines if 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.'"[944] For example, whether an association has standing to sue on behalf of its members is determined by reviewing whether "'its members would otherwise have standing to sue in their own right,'" whether "'the interests it seeks to protect are germane to the organization's purpose,'" and whether "'the claim asserted [or] the relief requested requires the participation of individual members in the lawsuit.'"[945]

The de novo standard of review applicable to subject-matter jurisdiction applies to standing as well, and, "[a]s a component of subject matter jurisdiction,"[946] the "issue of standing may be raised for the first time on appeal."[947] When reviewing a trial court's order regarding standing,[948] "Texas appellate courts 'construe the pleadings in favor of the plaintiff and look to the

942. *See id.* (explaining the court's power to retain subject-matter jurisdiction).

943. Libhart v. Copeland, 949 S.W.2d 783, 795 (Tex. App.—Waco 1997, no writ); *accord* Austin Nursing Ctr., Inc. v. Lovato, 171 S.W.3d 845, 849 (Tex. 2005); Hunt v. Bass, 664 S.W.2d 323, 324 (Tex. 1984); *see also* 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 persons individually and not as members of the general public.'" (quoting *Hunt*, 664 S.W.2d at 324)).

944. *Austin Nursing Ctr.*, 171 S.W.3d at 849 (quoting Nootsie, Ltd. v. Williamson Cnty. Appraisal Dist., 925 S.W.2d 659, 662 (Tex. 1996)); *accord* Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 517–18 (Tex. 1995); *Tex. Ass'n of Bus.*, 852 S.W.2d at 446.

945. *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)); *accord Garcia*, 893 S.W.2d at 518.

946. *Sunset Valley*, 146 S.W.3d at 646; *accord Tex. Ass'n of Bus.*, 852 S.W.2d at 445–46.

947. *Austin Nursing Ctr.*, 171 S.W.3d at 849; *accord Garcia*, 893 S.W.2d at 517 n.15; *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).

948. The typical challenge to standing is made in the trial court by a motion to dismiss, but it may take other forms as well. *See* Waco Indep. Sch. Dist. v. Gibson, 22 S.W.3d 849, 851 (Tex. 2000) (challenging with a motion to dismiss); *In re* A.M.S., 277 S.W.3d 92, 95 n.3 (Tex. App.—Texarkana 2009, orig. proceeding) (utilizing a motion for new trial). While standing may be further challenged by appeal, in certain situations, standing may be raised in an original proceeding. *See In re* K.K.C., 292 S.W.3d 788, 790 (Tex. App.—Beaumont 2009, orig. proceeding) (granting mandamus relief in a suit affecting the parent-child relationship when the petitioner lacked standing to file suit).

pleader's intent.'"[949] When standing is raised for the first time on appeal, Texas appellate courts "construe the petition in favor of the party, and if necessary, review the entire record to determine if any evidence supports standing."[950]

2. Mootness

Like standing, mootness is a component of subject-matter jurisdiction.[951] The mootness doctrine limits courts to deciding cases in which an actual controversy exists.[952] A case becomes moot if a controversy no longer exists or the parties lack a legally cognizable interest in the outcome.[953]

If a case becomes moot, the parties lose standing to maintain their claims.[954] There are two exceptions that confer jurisdiction regardless of mootness: (1) if the issue is "[capable] of repetition yet evading review"; and (2) if the collateral consequences doctrine is applicable.[955] "Because the issue of mootness implicates a court's subject-matter jurisdiction," appellate courts review the trial court's dismissal based on mootness with the de novo standard of review.[956]

3. Ripeness

Ripeness "is a threshold issue that implicates subject matter jurisdiction."[957] "While standing focuses on the issue of *who* may bring an action, ripeness focuses on *when* that action may be brought."[958] As a component of subject-matter jurisdiction, ripeness "cannot be waived and may be raised for the first time on

949. *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.).

950. *Id.* at 446.

951. *See* Black v. Jackson, 82 S.W.3d 44, 51–52 (Tex. App.—Tyler 2002, no pet.) (stating once a case becomes moot, the court lacks subject-matter jurisdiction).

952. Camarena v. Tex. Emp't Comm'n, 754 S.W.2d 149, 151 (Tex. 1988).

953. *In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 737 (Tex. 2005).

954. Williams v. Lara, 52 S.W.3d 171, 184 (Tex. 2001).

955. Gen. Land Office of the State of Tex. v. OXY U.S.A., Inc., 789 S.W.2d 569, 571 (Tex. 1990).

956. City of Shoreacres v. Tex. Comm'n on Envtl. Quality, 166 S.W.3d 825, 830 (Tex. App.—Austin 2005, no pet.); Pantera Energy Co. v. R.R. Comm'n of Tex., 150 S.W.3d 466, 471 (Tex. App.—Austin 2004, no pet.).

957. Patterson v. Planned Parenthood of Houston & Se. Tex., Inc., 971 S.W.2d 439, 442 (Tex. 1998).

958. Waco Indep. Sch. Dist. v. Gibson, 22 S.W.3d 849, 851 (Tex. 2000).

appeal."[959]

Ripeness concerns whether, at the time a lawsuit is brought, "the facts have developed sufficiently so that an injury has occurred or is likely to occur, rather than being contingent or remote."[960] To establish that a claim is ripe based on an injury that is likely to occur, the plaintiff must demonstrate that the injury is imminent, direct, and immediate, and not merely remote, conjectural, or hypothetical.[961] If the pleadings are insufficient, the trial court should afford an opportunity to replead if the defects are potentially curable, but it may dismiss "if the pleadings affirmatively negate the existence of jurisdiction."[962] Ripeness may be raised through various procedural vehicles, such as a motion to dismiss or plea to the jurisdiction.[963]

Ripeness is subject to de novo review.[964] The appellate court will accept as true all evidence favorable to the plaintiff and "indulge every reasonable inference and resolve any doubts in the [plaintiff's] favor."[965] Conversely, the appellate court is not bound by the trial court's legal conclusions.[966]

Y. *Summary Judgment*

The underlying purpose of Texas's summary judgment rules is a narrow one—the elimination of "'patently unmeritorious claims and untenable defenses.'"[967] There are two separate methods of moving for summary judgment in Texas, each with different

959. *Id.*

960. *Patterson*, 971 S.W.2d at 442.

961. *Gibson*, 22 S.W.3d at 852.

962. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226–27 (Tex. 2004).

963. *See Gibson*, 22 S.W.3d at 851 (using a motion to dismiss to raise ripeness); Combs v. Entm't Publ'ns, Inc., 292 S.W.3d 712, 719 (Tex. App.—Austin 2009, no pet.) (reviewing a plea to the jurisdiction via interlocutory appeal).

964. Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 928–29 (Tex. 1998).

965. *Miranda*, 133 S.W.3d at 228; Tex. Parks & Wildlife Dep't v. Garrett Place, Inc., 972 S.W.2d 140, 143 (Tex. App.—Dallas 1998, no pet.).

966. *See* Salazar v. Morales, 900 S.W.2d 929, 932 n.6 (Tex. App.—Austin 1995, no writ) (asserting that an appellate court accepts as true a trial court's factual determinations, but it is not required to accept the trial court's blanket legal conclusions).

967. 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, 252 S.W.2d 929, 931 (Tex. 1952); Breceda v. Whi, 187 S.W.3d 148, 151–52 (Tex. App.—El Paso 2006, no pet.); Valores Corporativos v. McLane Co., 945 S.W.2d 160, 169 (Tex. App.—San Antonio 1997, writ denied).

standards of review on appeal.[968] Texas law generally considers "summary judgment to be a harsh remedy requiring strict construction."[969]

1. Traditional Summary Judgment: Rule 166a(c)

Pursuant to Rule 166a(c), a summary judgment is proper only when a movant establishes there is no genuine issue of material fact, and the movant is therefore "entitled to judgment as a matter of law."[970] A defendant may be entitled to summary judgment if the defendant disproves "at least one of the essential elements of the plaintiff's cause of action"[971] or establishes all the elements of an affirmative defense as a matter of law.[972]

In a summary judgment proceeding, the burden of proof is on the movant who, unless the movant 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.[973] Once the movant has established the right to a summary judgment, the burden of proof shifts to the nonmovant.[974] The party opposing

968. *See generally* David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 54 BAYLOR L. REV. 1 (2002) (examining summary-judgment practice in Texas and federal courts).

969. Torres v. Caterpillar, Inc., 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996, writ denied).

970. TEX. R. CIV. P. 166a(c); *accord* Browning v. Prostok, 165 S.W.3d 336, 344 (Tex. 2005); W. Invs., Inc. v. Urena, 162 S.W.3d 547, 550 (Tex. 2005).

971. Little v. Tex. Dep't of Criminal Justice, 148 S.W.3d 374, 381 (Tex. 2004).

972. Velsicol Chem. Corp. v. Winograd, 956 S.W.2d 529, 530 (Tex. 1997).

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

974. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979). A summary judgment cannot be granted simply because the nonmovant fails to respond when the movant's summary-judgment evidence is not legally sufficient. *Id.* 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 because the nonmovant failed 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).

> [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.*

the motion must file and serve his response and opposing affidavits no later than seven days before the hearing, unless the court grants an extension.[975]

The trial court may grant the parties a hearing, but it should be nonevidentiary.[976] To determine whether a disputed issue of material fact precludes summary judgment, the court construes all competent evidence in favor of the nonmovant as true, indulging every reasonable inference and resolving any doubts in favor of the nonmovant.[977]

A trial court's summary judgment is reviewed by an appellate court de novo.[978] An appellate court "examine[s] the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion."[979] Because a reviewing court views all evidence in favor of the nonmovant, the usual presumption that the judgment is correct does not apply to a summary judgment.[980]

On appeal, evidence that favors the movant will not be "considered unless it is uncontradicted."[981] 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."[982]

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

976. *See In re* Am. Media Consol., 121 S.W.3d 70, 74 (Tex. App.—San Antonio 2003, orig. proceeding) ("Parties are not entitled to a hearing on a motion for summary judgment." (citing TIMOTHY PATTON, SUMMARY JUDGMENTS IN TEXAS § 7.01 (3d ed. 2002))); *see also* TEX. R. CIV. P. 166a(c)–(d) (stating that oral testimony is not permitted and that summary judgment shall be rendered based on documents filed with the court at the time of the hearing or filed after the hearing with leave of the court).

977. Am. Tobacco Co. v. Grinnell, 951 S.W.2d 420, 425 (Tex. 1997).

978. Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 661 (Tex. 2005); Enter. Leasing Co. of Houston v. Barrios, 156 S.W.3d 547, 549 (Tex. 2004).

979. City of Keller v. Wilson, 168 S.W.3d 802, 824 (Tex. 2005).

980. *See* Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842, 846 (Tex. 2005) (stating all evidence favorable to the nonmovant is reviewed in the interest of judicial economy); IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason, 143 S.W.3d 794, 798 (Tex. 2004) (affirming that the court reviews all evidence favorable to the nonmovant when reaching its conclusion); *see also* Carter v. Allstate Ins. Co., 962 S.W.2d 268, 270 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (declaring the standard of review and presumptions in an appeal from summary judgment favor reversal of the judgment).

981. Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co., 391 S.W.2d 41, 47 (Tex. 1965).

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

When appealing from summary judgment, the grounds of review are also limited.[983] 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."[984] "Issues not expressly presented to the trial court by written motion" for summary judgment or response to the motion cannot be considered by an appellate court as grounds for reversal.[985] The appellate court "can consider the record only as it existed at the time summary judgment was entered."[986] Moreover, an appellate court may not raise grounds for reversing a summary judgment *sua sponte*.[987] The appellate court should review "all grounds presented to the trial court and preserved on appeal in the interest of judicial economy."[988]

When the motion for summary judgment is based on several different grounds[989] 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 the summary judgment granted."[990] The summary judgment must

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

984. Sci. Spectrum Inc. v. Martinez, 941 S.W.2d 910, 912 (Tex. 1997), *superseded by rule*, TEX. R. CIV. P. 166a(i), *as recognized in* Landers v. State Farm Lloyds, 257 S.W.3d 740, 746 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (asserting that the prohibition against summary judgment by default is inapplicable to motions filed under Rule 166a(i)); *accord* Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 204 (Tex. 2002) (noting a traditional summary judgment cannot be granted on grounds not presented in the motion); *see also* TEX. R. CIV. P. 166a(c) (requiring the movant's motion to explicitly state the specific grounds for the summary judgment).

985. TEX. R. CIV. P. 166a(c); Progressive Cnty. Mut. Ins. Co. v. Boyd, 177 S.W.3d 919, 921 (Tex. 2005); *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 v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 339 (Tex. 1993); City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 674–75 (Tex. 1979).

986. McGee v. Deere & Co., No. 03-04-00222-CV, 2005 WL 670505, at *1 (Tex. App.—Austin Mar. 24, 2005, pet. denied) (mem. op.).

987. San Jacinto River Auth. v. Duke, 783 S.W.2d 209, 210 (Tex. 1990); *see also* Jacobs v. Satterwhite, 65 S.W.3d 653, 655 (Tex. 2001) (stating the appellate court erred in reversing a summary judgment on a claim that the movant never pled in the trial court).

988. Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842, 846 (Tex. 2005).

989. The reviewing court should "affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious." Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 157 (Tex. 2004).

990. Skiles v. Jack in the Box, Inc., 170 S.W.3d 173, 178 (Tex. App.—Dallas 2005), *rev'd on other grounds*, 221 S.W.3d 566 (Tex. 2007); *see also* State Farm Fire & Cas. Co. v. S.S., 858 S.W.2d 374, 380 (Tex. 1993) (noting "[w]hen reviewing a summary judgment

be affirmed if any of the theories are meritorious.[991] If the reviewing court determines that summary judgment was improperly granted, the reviewing court will reverse the judgment and remand the cause for a trial on the merits.[992] However, if a motion for summary judgment is filed by both parties, and one is granted by the trial court and one is denied, the reviewing court should determine all presented questions and render the judgment that should have been rendered by the trial court.[993]

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).[994] "[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."[995] 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 claims in the case, or that the case is dismissed, shows finality if there are no other claims by other parties."[996] The correct resolution under these circumstances, therefore, is to

granted on general grounds, [an appellate] [c]ourt considers whether any theories asserted by the summary judgment movant will support the summary judgment" (emphasis omitted)).

991. 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); Malooly Bros., Inc. v. Napier, 461 S.W.2d 119, 121 (Tex. 1970).

992. Jones v. Strauss, 745 S.W.2d 898, 900 (Tex. 1988); *accord* Lubbock Cnty. v. Trammel's Lubbock Bail Bonds, 80 S.W.3d 580, 584 (Tex. 2002).

993. *Patient Advocates of Tex.*, 136 S.W.3d at 648; *accord* SAS Inst., Inc. v. Breitenfeld, 167 S.W.3d 840, 841 (Tex. 2005); Argonaut Ins. Co. v. Baker, 87 S.W.3d 526, 529 (Tex. 2002).

994. Lehmann v. Har-Con Corp., 39 S.W.3d 191, 204 (Tex. 2001); *see also* Sultan v. Mathew, 178 S.W.3d 747, 751 (Tex. 2005) (requiring that a judgment dispose of each issue and party before becoming final and appealable); *cf. In re* Lynd Co., 195 S.W.3d 682, 685 (Tex. 2006) (orig. proceeding) (noting that 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 finality of summary judgments); William J. Boyce, *Is* Lehmann *the Final Word on Summary Judgment Finality?*, XIV APP. ADVOC. 4 (2001) (analyzing the finality of summary judgments after *Lehmann*).

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

996. *Id.* at 205.

treat the summary judgment as final and appealable.[997] 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.[998]

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

Since 1997, litigants may seek another basis for summary judgment.[999] 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.[1000] However, it is inappropriate to file a Rule 166a(i) motion until there has been adequate time for discovery.[1001]

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.[1002] The motion cannot be conclusory or generally allege that there is no evidence to support the claims.[1003] With the filing of 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."[1004] Under the Rule, if the nonmovant fails to provide enough evidence, the trial court must grant the motion.[1005]

997. *See* Ritzell v. Espeche, 87 S.W.3d 536, 538 (Tex. 2002) (explaining that the trial court's summary judgment order was unmistakably clear that all claims were adjudicated, thus making the summary judgment final).

998. *See id.* (holding that the summary judgment was final because "the trial court was unequivocally clear that [all] claims were adjudicated, and therefore the summary judgment was" appealable).

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

1000. *Id.*; W. Invs., Inc. v. Urena, 162 S.W.3d 547, 550 (Tex. 2005).

1001. TEX. R. CIV. P. 166a(i).

1002. *Id.*

1003. Keszler v. Mem'l Med. Ctr. of E. Tex., 105 S.W.3d 122, 127–28 (Tex. App.—Corpus Christi 2003, no pet.).

1004. Forbes Inc. v. Granada Biosciences, Inc., 124 S.W.3d 167, 172 (Tex. 2003).

1005. Wyndham Int'l, Inc. v. Ace Am. Ins. Co., 186 S.W.3d 682, 686 (Tex. App.—Dallas 2006, no pet.); *see also* Jackson v. Fiesta Mart, Inc., 979 S.W.2d 68, 70–71 (Tex. App.—Austin 1998, no pet.) (requiring courts to grant summary judgment unless respondent "raise[s] a genuine issue of material fact"). *But see* Hight v. Dublin Veterinary Clinic, 22 S.W.3d 614, 618 (Tex. App.—Eastland 2003, pet. denied) (articulating that "the better approach is to review no-evidence motions for summary judgments in the same manner any other Rule 166a summary judgment is reviewed," by indulging in "every reasonable inference and resolv[ing] all doubts in favor of the nonmovant" rather than disregarding all contrary evidence when considering the evidence

"A no-evidence summary judgment is essentially a pretrial directed verdict," and the same legal sufficiency or no-evidence standard is applied.[1006] The trial court should grant a summary judgment, sustaining a no-evidence point, when:

> (a) there 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 a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla,[1007] or (d) the evidence conclusively establishes the opposite of the vital fact.[1008]

Again, appellate review is de novo. When reviewing a no-evidence summary judgment on appeal, the appellate court will "review the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not."[1009]

Z. *Venue*

"Venue, as defined by the common law, is the proper place for a lawsuit to proceed."[1010] Each plaintiff in a multi-plaintiff suit must independently establish proper venue.[1011] Complaints about improper venue must be raised in the trial court with a motion to transfer venue pursuant to Rule 86 of the Texas Rules of Civil

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in the light most favorable to the non-movant).

1006. *Wyndham*, 186 S.W.3d at 686; King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 750–51 (Tex. 2003); Haas v. George, 71 S.W.3d 904, 911 (Tex. App.—Texarkana 2002, no pet.); Maguire Oil Co. v. City of Houston, 69 S.W.3d 350, 357 (Tex. App.—Texarkana 2002, pet. denied); Rocha v. Faltys, 69 S.W.3d 315, 320 (Tex. App.—Austin 2002, no pet.); Kelly v. Demoss Owners Ass'n, 71 S.W.3d 419, 423 (Tex. App.—Amarillo 2002, no pet.).

1007. More than a scintilla of evidence is found when the evidence would allow "reasonable and fair-minded people to differ in their conclusions." *Forbes*, 124 S.W.3d at 172; Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995).

1008. *Chapman*, 118 S.W.3d at 751 (quoting Merrell Dow Pharm., Inc., v. Havner, 953 S.W.2d 706, 711 (Tex. 1997)).

1009. Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 582 (Tex. 2006).

1010. Ramsay v. Tex. Trading Co., 254 S.W.3d 620, 626 (Tex. App.—Texarkana 2006, pet. denied).

1011. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a) (West Supp. 2009); Shell Oil Co. v. Baran, 258 S.W.3d 719, 721 (Tex. App.—Beaumont 2008, pet. abated). A party may file an interlocutory appeal of a trial court's determination that "a plaintiff did or did not independently establish proper venue." TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(b) (West Supp. 2010).

Procedure.[1012]

Mandatory venue statutes are enforceable by petition for writ of mandamus.[1013] Additionally, ordinary venue determinations are not subject to interlocutory appeal.[1014] A trial court's order granting or denying a motion to transfer venue is reviewed by an appellate court de novo.[1015] An appellate court cannot review the sufficiency of the evidence supporting the plaintiff's venue choice.[1016] "If there is probative evidence to support the trial court's determination, even if the preponderance of the evidence is to the contrary ... the appellate court should defer to the trial court."[1017]

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[1018] and 87,[1019] and the Texas Civil Practice and Remedies Code section 15.064(b).[1020] 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

1012. TEX. R. CIV. P. 86(1); *see also* Gordon v. Jones, 196 S.W.3d 376, 383–84 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (explaining that venue is not jurisdictional and a party waives any objection to improper venue if its objection is not made by a timely filed written motion).

1013. TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (West 2002); *In re* Tex. Dep't of Transp., 218 S.W.3d 74, 76 (Tex. 2007); *see also In re* Team Rocket, L.P., 256 S.W.3d 257, 262–63 (Tex. 2008) (enforcing a venue ruling on mandamus that was not followed by the transferee court).

1014. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a) (West 2002); Elec. Data Sys. Corp. v. Pioneer Elecs. (USA) Inc., 68 S.W.3d 254, 257 (Tex. App.—Fort Worth 2002, no pet.).

1015. Killeen v. Lighthouse Elec. Contractors, L.P., 248 S.W.3d 343, 347 (Tex. App.—San Antonio 2007, pet. denied); Highland Capital Mgmt., L.P. v. Ryder Scott Co., 212 S.W.3d 522, 535 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

1016. Ruiz v. Conoco, Inc., 868 S.W.2d 752, 757–58 (Tex. 1993).

1017. *Id.*

1018. *See* TEX. R. CIV. P. 86 (pertaining to motions to transfer venue).

1019. *See* TEX. R. CIV. P. 87 (regarding determination of motions to transfer venue).

1020. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (West 2002) (stating that appellate courts 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, 261–62 (Tex. 1994) (addressing the appellate court's consideration of the entire record during review of a transfer of venue (citing Dan R. Price, *New Texas Venue Statute: Legislative History*, 15 ST. MARY'S L.J. 855, 878–79 (1984))). *See generally* TEX. R. CIV. P. 255, 257–259 (setting forth provisions regarding change of venue based on allegations of prejudice).

entire record.[1021] 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.[1022] This scope of review puts the appellate courts in the position of considering matters that the trial court had no opportunity to assess before making its decision.[1023] Nevertheless, the appellate courts continue to review the trial court's determination by considering the entire record.[1024]

If venue was improper, the case must be reversed, even if the county of transfer would have been proper if originally chosen by the plaintiff.[1025] Reversal is required whether a motion to transfer is erroneously granted or denied.[1026]

V. TRIAL RULINGS

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 an abuse of discretion.[1027] A trial court even has

1021. *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 review, which must reverse if any evidence destroys the prima facie proof); Kansas City S. Ry. Co. v. Carter, 778 S.W.2d 911, 915 (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 in part by Ruiz*, 868 S.W.2d at 758 (abrogating the preponderance of the evidence standard of review adopted by *Texas City Refining*).

1022. *Tex. City Ref.*, 767 S.W.2d at 185.

1023. Bristol v. Placid Oil Co., 74 S.W.3d 156, 158 (Tex. App.—Amarillo 2002, no pet.) (mem. op.); *Kansas City S. Ry.*, 778 S.W.2d at 915; *Tex. City Ref.*, 767 S.W.2d at 185.

1024. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (West 2002); *see Ruiz*, 868 S.W.2d at 757–58 (rejecting a preponderance of the evidence review and noting the confusion in interpreting, applying, and harmonizing Rule 87 with section 15.064(b)).

1025. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (West 2002); *Wilson*, 886 S.W.2d at 261; *Ruiz*, 868 S.W.2d at 758.

1026. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (West 2002); *In re* Masonite Corp., 997 S.W.2d 194, 198 (Tex. 1999); Ford Motor Co. v. Miles, 967 S.W.2d 377, 382 (Tex. 1998); Wichita Cnty. v. Hart, 917 S.W.2d 779, 781 (Tex. 1996).

1027. Dow Chem. Co. v. Francis, 46 S.W.3d 237, 240–41 (Tex. 2001); Schroeder v. Brandon, 172 S.W.2d 488, 491 (Tex. 1943); *see also* Metzger v. Sebek, 892 S.W.2d 20, 38 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (declaring the trial court is responsible for the management of his or her docket); Kreymer v. N. Tex. Mun. Water Dist., 842 S.W.2d 750, 752 (Tex. App.—Dallas 1992, no writ) (emphasizing the trial court has broad

the authority to express itself in exercising its discretion.[1028] A trial court may intervene to maintain control in the courtroom, to expedite the trial, to prevent a waste of time, and may make remarks that are "'critical or disapproving of, or even hostile to, counsel, the parties, or their cases.'"[1029] A trial court may permit jurors to submit occasional questions to the witnesses in conjunction with appropriate procedural safeguards.[1030] 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.'"[1031] The more common trial rulings are discussed below.

A. *Invoking the Rule*

Texas Rule of Evidence 614 and Texas Rule of Civil Procedure 267 govern sequestration of witnesses in civil litigation.[1032] 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."[1033] However, invoking the rule does not prevent a witness from talking about the case before trial, especially when the witness's speech is directed toward persons not involved in the pertinent case.[1034] Either the parties or the court, on its own motion, may sequester witnesses.[1035] The rule is not discretionary; a court must exclude witnesses upon request of the parties.[1036] The rule provides 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

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discretion concerning the extent of cross-examination allowed).

1028. *Francis*, 46 S.W.3d at 240–41.

1029. *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).

1030. Hudson v. Markum, 948 S.W.2d 1, 2–3 (Tex. App.—Dallas 1997, writ denied).

1031. *Francis*, 46 S.W.3d at 240 (quoting Landis v. N. Am. Co., 299 U.S. 248, 254 (1936)).

1032. 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.).

1033. *Drilex Sys.*, 1 S.W.3d at 116.

1034. Kennedy v. Eden, 837 S.W.2d 98, 98 (Tex. 1992).

1035. *Drilex Sys.*, 1 S.W.3d at 116 & n.2.

1036. Elbar, Inc. v. Claussen, 774 S.W.2d 45, 51 (Tex. App.—Dallas 1989, writ dism'd).

the case.[1037] 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 presence is shown by a party to be essential to the presentation of the [case].[1038]

Although an expert witness is generally found to be exempt under the essential presence exception, experts are not automatically exempt.[1039] Instead, Rules 614 and 267 give the trial court "broad discretion to determine whether a witness is essential."[1040] A party has the burden of showing why the presence of its witness is essential to the presentation of its case.[1041] A trial court's refusal to grant a party's request for a witness to remain during trial is reviewed for an abuse of discretion.[1042]

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]."[1043] The party seeking the exemption from the rule has the burden to establish that the witness's presence is necessary.[1044] If the witness is exempt, then the witness is not placed under the rule and "need not be sworn or admonished."[1045] When "the Rule is invoked, all nonexempt witnesses must be placed under the Rule and excluded from the courtroom."[1046] Generally, "witnesses under the Rule ... may not discuss the case with anyone other than the attorneys in the case."[1047]

The rule is violated "when a nonexempt prospective witness remains in the courtroom during the testimony of another witness,

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1037. *Id.*

1038. *Drilex Sys.*, 1 S.W.3d at 116–17; *In re* K.M.B., 91 S.W.3d 18, 28 (Tex. App.—Fort Worth 2002, no pet.).

1039. *Drilex Sys.*, 1 S.W.3d at 116–17.

1040. *Id.* at 118–19.

1041. *Id.* at 117.

1042. *Id.* at 117–18.

1043. *Id.* at 117.

1044. *Drilex Sys.*, 1 S.W.3d at 117.

1045. Drilex Sys., Inc. v. Flores, 1 S.W.3d 112, 117 (Tex. 1999).

1046. *Id.*

1047. *Id.*

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 the testimony."[1048] When the rule is violated, a party may file a motion to exclude the witness, and the trial court, considering all of the circumstances,[1049] may "allow the testimony of the potential witness, exclude the testimony, or hold the violator in contempt."[1050] The trial court's decision is reviewed for an abuse of discretion.[1051]

B. *Motion in Limine*

A motion in limine does not preserve any issue for appellate review.[1052] 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.[1053] If a party complains of the wrongful admission of evidence, the record must reflect that the party seeking to exclude the evidence made a proper objection when the evidence was actually offered during the trial on the merits.[1054] In either event, the standard of review is based on the rule of evidence invoked.[1055]

1048. *Id.*

1049. 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; *accord* 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).

1050. *Drilex Sys.*, 1 S.W.3d at 117 (citing TEX. R. CIV. P. 267(e)); Triton Oil & Gas Corp. v. E.W. Moran Drilling Co., 509 S.W.2d 678, 684 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.); *accord In re K.M.B.*, 91 S.W.3d 18, 28 (Tex. App.—Fort Worth 2002, no pet.).

1051. *Drilex Sys.*, 1 S.W.3d at 117–18; *K.M.B.*, 91 S.W.3d at 28.

1052. Zinda v. McCann St., Ltd., 178 S.W.3d 883, 894 (Tex. App.—Texarkana 2005, pet. denied).

1053. *Id.*; Richards v. Comm'n for Lawyer Discipline, 35 S.W.3d 243, 252 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

1054. *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).

1055. *See infra* Part V(F) (discussing admission of evidence).

C. *Empanelling a Jury*

1. 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.[1056] The demand must be made before voir dire, and only one shuffle may be granted.[1057] "Before voir dire" means prior to jury-questionnaire responses being examined by any of the parties.[1058] Rule 223 procedures for a jury shuffle are mandatory and failure to comply with them is error.[1059]

Whether that error results in reversal depends on the court. In deciding whether to grant a new trial for failing to conduct a requested jury shuffle, one court of appeals used a traditional harmless error analysis.[1060] Under this analysis, the court requires appellants to show that "violation of Rule 223 probably caused the rendition of an improper judgment."[1061] 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.[1062]

Another court of appeals adopted the "relaxed" harmless error standard used in the jury selection context.[1063] Under this analysis, a complaining party must show that a "trial was materially unfair, without having to show more."[1064] Furthermore, the appellate court must examine the entire record.[1065] 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

1056. 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. granted, judgm't vacated w.r.m.); Martinez v. City of Austin, 852 S.W.2d 71, 73 (Tex. App.—Austin 1993, writ denied).

1057. 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.

1058. *Carr*, 22 S.W.3d at 133–34.

1059. *Id.*; *Whiteside*, 12 S.W.3d at 619.

1060. *Whiteside*, 12 S.W .3d at 620.

1061. *Id.*

1062. *Id.*

1063. *Carr*, 22 S.W.3d at 135.

1064. *Id.*

1065. *Id.*

suffered."[1066] Such a showing will result in the granting of a new trial.[1067]

2. Voir Dire and Challenges for Cause

The Texas 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.'"[1068] Although voir dire examination is left chiefly to the sound discretion of the trial court,[1069] 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."[1070] "[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."[1071] To obtain a reversal, the complaining party must show the trial court abused its discretion and the error was reasonably calculated to cause, and "probably [did] cause[], the rendition of an improper judgment."[1072]

Whether bias and prejudice exist is ordinarily a fact question.[1073] However, if the "evidence shows that a prospective

1066. *Id.* at 136.

1067. *Id.*

1068. Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 749 (Tex. 2006) (quoting 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) (West 2005).

1069. Cortez *ex rel.* Estate of Puentes v. HCCI-San Antonio, Inc., 159 S.W.3d 87, 92 (Tex. 2005).

1070. *Babcock*, 767 S.W.2d at 709; *see also* TEX. R. CIV. P. 228 (defining "challenge for cause"); *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 ("[T]rial judges must not be too hasty in cutting off examination that may yet prove fruitful.").

1071. *Vasquez*, 189 S.W.3d at 758.

1072. TEX. R. APP. P. 44.1; *accord Babcock*, 767 S.W.2d at 709.

1073. *See* Malone v. Foster, 977 S.W.2d 562, 564 (Tex. 1998) (stating that "[i]f prejudice is not established as a matter of law, the trial court makes a factual determination as to whether the venire member should be disqualified"); Swap Shop v. Fortune, 365 S.W.2d 151, 154 (Tex. 1963) (suggesting that a juror's bias or prejudice may be a factual determination left to the trial court's discretion).

juror has a state of mind in favor of or against a litigant [or type of suit] so that the juror is not able to act impartially and without prejudice, the juror is disqualified as a matter of law."[1074] "'[T]he relevant inquiry is not where jurors *start* but where they are likely to *end*.'"[1075] 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."[1076] Once bias or prejudice is established, it is a legal disqualification and reversible error automatically results if the court overrules a motion to strike.[1077] To preserve error "when a challenge for cause is denied, 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.[1078] A trial court's decision regarding challenges for cause is reviewed for an abuse of discretion.[1079]

It is improper for counsel to question veniremembers about their potential verdict in light of certain evidence.[1080] Questions to prospective jurors should address their biases and prejudices, not their opinions about evidence.[1081] Questions to prospective jurors cannot isolate one relevant piece of evidence.[1082] "[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

1074. Kiefer v. Cont'l Airlines, Inc., 10 S.W.3d 34, 39 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *see also* Hafi v. Baker, 164 S.W.3d 383, 385 (Tex. 2005) (labeling a bias "disqualifying if 'it appears that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality'" (quoting Compton v. Henrie, 364 S.W.2d 179, 182 (Tex. 1963))). Bias is an indication toward one side or another, and prejudice means prejudgment and includes bias. *Id.* at 385.

1075. *Hafi*, 164 S.W.3d at 385 (quoting *Cortez*, 159 S.W.3d at 93).

1076. *Kiefer*, 10 S.W.3d at 39.

1077. *See Compton*, 364 S.W.2d at 182 ("It 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.").

1078. *Cortez*, 159 S.W.3d at 90–91.

1079. *Id.* at 93; State v. Dick, 69 S.W.3d 612, 618 (Tex. App.—Tyler 2001, no pet.); *Kiefer*, 10 S.W.3d at 39.

1080. *See* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 751 (Tex. 2006) (stating that the court in *Cortez* "adopted the general rule that it is improper to ask prospective jurors what their verdict would be if certain facts were proved").

1081. *Id.* at 751–52.

1082. *See id.* (asserting that asking whether a "juror can be fair after isolating a relevant fact" is just as confusing "as an inquiry that previews all the facts").

particular fact or set of relevant facts."[1083] Trial courts have discretion to decide whether an inquiry of potential jurors explores external biases, unfair prejudices, or possible verdicts based on evidence.[1084]

3. Alignment of Parties and Allocation of Peremptory Strikes

Questions regarding alignment and antagonism of the parties often arise in multiple-party litigation.[1085] 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.[1086] 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."[1087] 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."[1088]

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.[1089] 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.[1090] To preserve error in the allocation of jury strikes, the party must lodge the objection after voir dire but before exercising the strikes.[1091] The party must

1083. *Id.* at 753.

1084. *Id.* at 754–55.

1085. Amis v. Ashworth, 802 S.W.2d 379, 385 (Tex. App.—Tyler 1990, orig. proceeding [leave denied]) (Ramey, C.J., dissenting).

1086. 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.

1087. TEX. R. CIV. P. 233.

1088. *Amis*, 802 S.W.2d at 384.

1089. *Id.* at 384 n.7.

1090. *Id.* at 382–83.

1091. Tex. Commerce Bank Reagan v. Lebco Constructors, Inc., 865 S.W.2d 68, 77 (Tex. App.—Corpus Christi 1993, writ denied); *see also In re* T.E.T., 603 S.W.2d 793, 798 (Tex. 1980) (illustrating that error is not preserved when a party fails to lodge objections to the allocation of strikes at the proper time).

clearly state whether it is objecting to the allocation of the peremptory strikes or to the alignment of the parties.[1092]

Whether antagonism exists between parties, per se, is a question of law.[1093] "[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 other information brought to the attention of the trial court before the" parties exercise their strikes.[1094] "The existence of antagonism must be finally determined after voir dire and prior to the exercise of the strikes of the parties."[1095] 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.[1096] "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."[1097]

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 occurred.[1098] 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."[1099]

1092. *See* Pojar v. Cifre, 199 S.W.3d 317, 327–28 (Tex. App.—Corpus Christi 2006, pet. denied) (holding that error was preserved only on the issue of alignment of sides and not on the allocation of strikes because defendant only argued for realignment of sides at trial).

1093. 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).

1094. *Garcia*, 704 S.W.2d at 737; *accord Patterson Dental Co.*, 592 S.W.2d at 919.

1095. *Garcia*, 704 S.W.2d at 737.

1096. *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.).

1097. Diamond Shamrock Corp. v. Wendt, 718 S.W.2d 766, 768 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

1098. *Am. Cyanamid Co.*, 732 S.W.2d at 661; *see also* Pojar v. Cifre, 199 S.W.3d 317, 329–30 (Tex. App.—Corpus Christi 2006, pet. denied) (holding that a trial court's allocation of peremptory challenges is reviewed for abuse of discretion).

1099. *Am. Cyanamid Co.*, 732 S.W.2d at 661.

4. *Batson/Edmonson* Challenges

In *Batson v. Kentucky*,[1100] the Supreme Court of the United States held the Equal Protection Clause of the United States Constitution[1101] prohibits parties from using peremptory strikes to exclude members of a jury panel solely on the basis of race.[1102] This proscription applies to both criminal and civil trials.[1103] The United States Supreme Court has explained the three-step process in resolving a *Batson* objection to a peremptory challenge.[1104] First, "the opponent of the . . . challenge must establish a prima facie case of racial discrimination."[1105] Second, the burden shifts to the party exercising the strike to present a race-neutral explanation.[1106] "Unless a discriminatory intent is inherent in the" reason offered, the explanation "will be deemed race-neutral."[1107] Third, the trial court must then determine whether the challenging party "has proven purposeful racial discrimination."[1108] "[T]he issue of whether the race-neutral explanation should be believed is [] a question of fact for the trial court."[1109] The standard of review of a trial court's decision regarding a *Batson/Edmonson* challenge is abuse of discretion.[1110] To preserve a *Batson/Edmonson* issue for appellate review, the complaining party must object to the allegedly offensive

1100. Batson v. Kentucky, 476 U.S. 79 (1986).

1101. U.S. CONST. amend. XIV, § 1.

1102. *Batson*, 476 U.S. at 89.

1103. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 629 (1991); *see also* Goode v. Shoukfeh, 943 S.W.2d 441, 444 (Tex. 1997) (noting that the United States 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).

1104. *Goode*, 943 S.W.2d at 445; *see* Davis v. Fisk Elec. Co., 268 S.W.3d 508, 514–15 (Tex. 2008) (noting that a *Batson* challenge involves a three-step process).

1105. *Goode*, 943 S.W.2d at 445.

1106. *Id.*

1107. *Id.*

1108. *Id.*

1109. *Id.* at 446. Unless the explanation offered is too incredible to be believed, the reviewing court cannot reweigh the evidence and reach a different conclusion. *Goode*, 943 S.W.2d at 446.

1110. *See id.* (asserting the Texas Supreme Court reviews a trial court's *Batson* ruling for abuse of discretion); *accord* Davis v. Fisk Elec. Co., 268 S.W.3d 508, 515 (Tex. 2008). However, "[t]he Texas Court of Criminal Appeals has . . . adopted the clearly erroneous standard of review for *Batson* issues." *Goode*, 943 S.W.2d at 446 (citing Whitsey v. State, 796 S.W.2d 707, 720–26 (Tex. Crim. App. 1989)). The federal system also "employs a 'clearly erroneous' standard of review." *Davis*, 268 S.W.3d at 515.

peremptory strikes before swearing in the jury.[1111]

D. *Opening Statements*

Rule 265(a) does not allow counsel to describe to the jury the evidence that counsel plans to offer, "nor to read or display the documents and photographs he proposes to offer."[1112] Additionally, the trial court has broad discretion to limit opening statements, subject only to review for abuse of discretion.[1113]

E. *Trial Amendments of Pleadings*

When a request to amend pleadings is made within seven days of trial or thereafter,[1114] 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."[1115] If the amendment is procedural in nature (i.e., merely conforming the pleadings to the evidence at trial), the trial court must grant the amendment.[1116] However, if the amendment is substantive in nature (i.e., changing the basis of

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1111. Jones v. Martin K. Eby Constr. Co., 841 S.W.2d 426, 429 (Tex. App.—Dallas 1992, writ denied).

1112. Guerrero v. Smith, 864 S.W.2d 797, 799 (Tex. App.—Houston [14th Dist.] 1993, no writ); *see also* TEX. R. CIV. P. 265(a) (allowing counsel to only "state to the jury briefly the nature of his claim or defense and what said party expects to prove, and the relief sought").

1113. *Guerrero*, 864 S.W.2d at 800; Ranger Ins. Co. v. Rogers, 530 S.W.2d 162, 170 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

1114. TEX. R. CIV. P. 63, 66. The "date 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 of Brazoria Cnty., 796 S.W.2d 482, 490 (Tex. App.—Houston [14th Dist.] 1990, writ denied). 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).

1115. State Bar of Tex. v. Kilpatrick, 874 S.W.2d 656, 658 (Tex. 1994). "The burden of showing surprise or prejudice rests on the party resisting the amendment." *Id.*; *accord* Chapin & Chapin, Inc. v. Tex. Sand & Gravel Co., 844 S.W.2d 664, 665 (Tex. 1992); Greenhalgh v. Serv. Lloyds Ins. Co., 787 S.W.2d 938, 939 (Tex. 1990). "Surprise may be shown as a matter of law if the pleading asserts a new and independent cause of action or defense." Bell v. Moores, 832 S.W.2d 749, 757 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

1116. *Chapin & Chapin*, 844 S.W.2d at 665. "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).

a party's causes of action), the trial court has discretion to grant or deny the amendment.[1117]

The standard of review for granting a trial amendment is whether the trial court abused its discretion.[1118] To establish an abuse of discretion in allowing the amendment, the complaining party must (1) present evidence of surprise or prejudice;[1119] and (2) request a continuance.[1120] Mere allegations of surprise or prejudice are not sufficient to establish an abuse of discretion.[1121]

F. *Admission of Evidence*

The admission or exclusion of evidence is a matter within the trial court's discretion.[1122] To obtain reversal of a judgment based on error in the admission or exclusion of evidence, an appellant must show that the trial court's ruling was in error and that the error was calculated to cause and probably did cause "the rendition of an improper judgment."[1123] Reversible error does not usually occur in connection with rulings on questions of evidence unless the appellant can demonstrate that the whole case turns on the particular evidence that was admitted or excluded.[1124] 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

1117. Smith v. Heard, 980 S.W.2d 693, 698 (Tex. App.—San Antonio 1998, pet. denied); *Libhart*, 949 S.W.2d at 797; *Taiwan Shrimp Farm*, 915 S.W.2d at 70.

1118. *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).

1119. *Greenhalgh*, 787 S.W.2d at 940.

1120. 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).

1121. *Greenhalgh*, 787 S.W.2d at 941; *see also* Weidner v. Sanchez, 14 S.W.3d 353, 377 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (finding no error where the court allowed an amended pleading post-verdict when opposing party presented no evidence of either surprise or prejudice).

1122. *In re* J.P.B., 180 S.W.3d 570, 575 (Tex. 2005); Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 918 (Tex. 2004) (Jefferson, C.J., dissenting); Interstate Northborough P'ship v. State, 66 S.W.3d 213, 220 (Tex. 2001); *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).

1123. TEX. R. APP. P. 44.1; *accord Ramirez*, 159 S.W.3d at 918 (Jefferson, C.J., dissenting). *See infra* Part VIII(H)(3) (discussing reversible error).

1124. *Interstate Northborough P'ship*, 66 S.W.3d at 220.

of a similar character,'"[1125] (2) the objecting party "opens the door" by subsequently permitting the same or similar evidence to be introduced without objection,[1126] or (3) the evidence is merely cumulative of properly admitted evidence.[1127]

1. 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.'"[1128] 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.[1129] Accordingly, the proponent must establish that the expert's testimony is based on a reliable foundation.[1130] Texas Rule of Evidence 702 provides a two-part test to determine the admissibility of an expert's testimony.[1131] First, the expert must be qualified.[1132] Second, the expert's opinion must be relevant to the issues in the case and based upon a reliable foundation.[1133]

1125. Sw. Elec. Power Co. v. Burlington N. R.R., Co., 966 S.W.2d 467, 473 (Tex. 1998) (quoting McInnes v. Yamaha Motor Corp., 673 S.W.2d 185, 188 (Tex. 1984)).

1126. Richardson v. Green, 677 S.W.2d 497, 501 (Tex. 1984).

1127. *Ramirez*, 159 S.W.3d at 919; City of Austin v. Houston Lighting & Power Co., 844 S.W.2d 773, 791 (Tex. App.—Dallas 1992, writ denied).

1128. 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)).

1129. 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.*, the supreme court held that the *Robinson* factors apply to all expert testimony offered under Texas Rule of Evidence 702. Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726 (Tex. 1998). 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).

1130. *Robinson*, 923 S.W.2d at 556.

1131. Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 499 (Tex. 2001); *see also* 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.").

1132. TEX. R. EVID. 702; Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797, 800 (Tex. 2006).

1133. *Cooper Tire*, 204 S.W.3d at 800. "The exacting standards for expert testimony

Qualified. Under Rule 104(a),[1134] 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 of establishing the witness is qualified under Rule 702.[1135] 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 the expert is offering an opinion.[1136] 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.[1137]

Relevant. The relevance requirement, which includes the relevancy analysis under Texas Rules of Evidence 401 and 402,[1138] "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.'"[1139] If the evidence has no relationship to any issue in the case, the evidence does not satisfy Rule 702 and is, therefore, inadmissible.[1140] "Opinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact 'more or less probable,'"[1141] and such testimony is incompetent evidence that cannot support a judgment.[1142] Similarly, an expert who offers only personal credentials and subjective opinions has offered essentially uncorroborated evidence, which does not assist the jury.[1143] As

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) (citations omitted), *abrogated on other grounds by* Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008).

1134. TEX. R. EVID. 104(a).

1135. Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 718 (Tex. 1998).

1136. *Helena Chem. Co.*, 47 S.W.3d at 499; *Gammill*, 972 S.W.2d at 719.

1137. *Gammill*, 972 S.W.2d at 728.

1138. TEX. R. EVID. 401, 402.

1139. Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 629 (Tex. 2002) (quoting E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995)).

1140. *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").

1141. Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 232 (Tex. 2004) (quoting TEX. R. EVID. 410).

1142. *Id.* at 232.

1143. Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797, 801 (Tex. 2006); *Coastal Transp. Co.*, 136 S.W.3d at 232; Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 712 (Tex. 1997).

the court in *Cooper Tire & Rubber Co. v. Mendez*[1144] pointed out, "Rule 702, by its terms, only provides for the admission of expert testimony that actually assists the finder of fact."[1145] Justice Gonzalez poignantly observed in *E.I. du Pont de Nemours & Co. v. Robinson*[1146] that 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."[1147] Such evidence carries absolutely no weight and is the equivalent of no evidence.[1148]

Reliable. "The reliability requirement focuses on the principles, research, and methodology underlying an expert's conclusions."[1149] 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.'"[1150] If an expert's scientific evidence is not reliable, then it is "legally" not evidence.[1151] To determine reliability, the supreme court observed:

> *Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it "will have a reliable basis in the knowledge and experience of [the] discipline."[1152]

In *Robinson*, the Texas Supreme Court adopted the following six nonexclusive factors for admissibility of scientific evidence, of which four were first stated by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1153]

1144. Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797 (Tex. 2006).

1145. *Id.* at 801.

1146. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995).

1147. *Id.* at 558.

1148. *Havner*, 953 S.W.2d at 712.

1149. Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 254 (Tex. 2004), *abrogated on other grounds by* Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008).

1150. *Robinson*, 923 S.W.2d at 557 (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 (1993)).

1151. Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797, 801 (Tex. 2006).

1152. Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 725–26 (Tex. 1998) (quoting Watkins v. Telsmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997)).

1153. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995).

> (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.[1154]

In *Cooper Tire*, the Texas Supreme Court emphasized that the six factors are not exclusive and "that Rule 702 contemplates a flexible inquiry."[1155] The supreme court recognized in *Gammill v. Jack Williams Chevrolet, Inc.*,[1156] "that the *Robinson* factors may not apply to certain testimony";[1157] however, in those cases "there still must be some basis for the opinion offered to [demonstrate] reliability."[1158] The courts have emphasized that it is ultimately up to the trial court, in exercising its duty as evidentiary gatekeeper, to assess the reliability of particular expert testimony.[1159]

The Texas Supreme Court has developed several principles for determining reliability. The trial court is required to ensure that purported experts do in fact have expertise regarding the subject matter of their offered opinion when deciding whether an expert is qualified.[1160] Under the reliability requirement, the expert testimony "is unreliable if it is not grounded 'in the methods and procedures of science' and amounts to no more than a 'subjective belief or unsupported speculation.'"[1161] Additionally, if the

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See generally Daubert, 509 U.S. at 587–97 (1993) (addressing factors to be considered).

1154. *Robinson*, 923 S.W.2d at 557; *accord Cooper Tire*, 204 S.W.3d at 801; 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).

1155. *Cooper Tire*, 204 S.W.3d at 801.

1156. Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713 (Tex. 1998).

1157. *Helena Chem. Co.*, 47 S.W.3d at 499; *accord* Ford Motor Co. v. Ledesma, 242 S.W.3d 32, 39–40 (Tex. 2007).

1158. *Helena Chem. Co.*, 47 S.W.3d at 499.

1159. *Id.* at 499; Coastal Tankships, Inc. v. Anderson, 87 S.W.3d 591, 611 (Tex. App.— Houston [1st Dist.] 2002, pet. denied).

1160. *Cooper Tire*, 204 S.W.3d at 800.

1161. *Id.* (quoting E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557

analytical gap between the data the expert relies upon and the opinion offered is too great, the expert testimony is unreliable.[1162] The reviewing court is "'not required . . . to ignore fatal gaps in an expert's analysis or assertions that are simply incorrect.'"[1163] Thus, "if an expert relies upon unreliable foundational data," any opinion based on that data is unreliable.[1164] Similarly, if the underlying data is sound, but the expert's methodology is flawed, the opinion is also unreliable.[1165] 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."[1166] The court stated in *General Motors Corp. v. Iracheta*:[1167]

> We [previously] noted . . . that, although expert opinion testimony often provides valuable evidence in a case, "it is the basis of the witness's opinion, and not 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 make the existence of a material fact "more probable or less probable." This [c]ourt has labeled such testimony as "incompetent evidence," and has often held that such conclusory testimony cannot support a judgment. Furthermore, this [c]ourt has held that such conclusory statements cannot support a judgment even when no objection was made to the [testimony].[1168]

(Tex. 1995)); *accord* Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 629 (Tex. 2002); *see also Ledesma*, 242 S.W.3d at 40–41 (determining the expert's testimony "amounted to . . . more than a recitation of his credentials and a subjective opinion" and, thus, was properly admitted).

1162. *Ledesma*, 242 S.W.3d at 40; *Cooper Tire*, 204 S.W.3d at 800; Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 254 (Tex. 2004), *abrogated on other grounds by* Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008); *Zwahr*, 88 S.W.3d at 629.

1163. *Cooper Tire*, 204 S.W.3d at 800–01 (quoting Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 912 (Tex. 2004)).

1164. Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 499 (Tex. 2001).

1165. *Id.*

1166. *Kerr-McGee Corp.*, 133 S.W.3d at 254; Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 728 (Tex. 1998).

1167. General Motors Corp. v. Iracheta, 161 S.W.3d 462 (Tex. 2005).

1168. *Id.* at 470–71 (citations omitted); *accord* Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 232 (Tex. 2004); *see also Cooper Tire*, 204 S.W.3d at 801

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.'"[1169] The court emphasized, however, that all expert testimony must meet both the relevance and reliability requirements.[1170]

"'A flaw in the expert's reasoning from the data 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.'"[1171] When reviewing the sufficiency of the scientific evidence supporting a jury finding, unreliable scientific evidence is the legal equivalent of no evidence at all.[1172] Thus, "[i]f the foundational data underlying [the scientific] opinion testimony are unreliable," or the expert used a flawed methodology or flawed reasoning, the scientific evidence—even if admitted without objection—is legally "no evidence."[1173]

In *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.[1174] Even though the trial court functions as an "evidentiary gatekeeper" by screening for irrelevant and unreliable expert evidence, it ultimately has broad discretion in determining the admissibility of the evidence.[1175] The trial court's determination that these

(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*, 972 S.W.2d at 727)).

1169. *Cooper Tire*, 204 S.W.3d at 801 (quoting *Gammill*, 972 S.W.2d at 726).

1170. *Id.*

1171. *Id.* (quoting Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 714 (Tex. 1997)).

1172. *Havner*, 953 S.W.2d at 712.

1173. *Id.*; *see also Iracheta*, 161 S.W.3d at 471 (concluding that the expert testimony was unreliable and did not "rise to the level of competent evidence").

1174. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995); *accord* 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); Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998).

1175. Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 629 (Tex. 2002); *Helena Chem. Co.*, 47 S.W.3d at 499; Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726 (Tex. 1998); *see also 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 a reliable foundation," the expert used methodology that "follow[ed] no scientific principles," the expert's opinion had not been subjected to peer review, and the

requirements have been met is reviewed for an abuse of discretion.[1176] Both the admissibility and sufficiency of unreliable scientific evidence may be challenged on appeal.[1177]

2. Demonstrative Evidence

Visual, real, or demonstrative evidence is admissible where it tends to resolve some issue at trial and is relevant, so long as its probative value outweighs its prejudicial effect.[1178] 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.[1179] However, the conditions do not have to be identical; the experiment may be admitted if the trial court, in exercising its discretion, finds the difference in condition to be minor.[1180] 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.[1181] The admission of such demonstrative evidence is within the trial court's discretion and is subject to an abuse of discretion review.[1182]

G. *Motion for Mistrial*

An order granting a motion for mistrial is an interlocutory order

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expert conducted his research "for the purpose of litigation").

1176. *Cooper Tire*, 204 S.W.3d at 800; Larson v. Downing, 197 S.W.3d 303, 304–05 (Tex. 2006); Guadalupe-Blanco River Auth. v. Kraft, 77 S.W.3d 805, 807 (Tex. 2002); *Gammill*, 972 S.W.2d at 718–19; Broders v. Heise, 924 S.W.2d 148, 151 (Tex. 1996).

1177. *Compare Ellis*, 971 S.W.2d at 409 (reviewing the trial court's order excluding scientific evidence), *with Havner*, 953 S.W.2d at 711 (considering a "no evidence" point of error).

1178. TEX. R. EVID. 403; *In re* C.J.F., 134 S.W.3d 343, 356 (Tex. App.—Amarillo 2003, pet. denied); *see also* Ford Motor Co. v. Miles, 967 S.W.2d 377, 389 (Tex. 1998) (plurality opinion) (observing that admission of videotapes of sled tests was harmful error because the conditions present at the time of the accident were not shown to be similar to those during the test).

1179. Gen. Motors Corp. v. Gayle, 951 S.W.2d 469, 475 (Tex. 1997); *accord* Horn v. Hefner, 115 S.W.3d 255, 256 (Tex. App.—Texarkana 2003, no pet.).

1180. Fort Worth & Denver Ry. Co. v. Williams, 375 S.W.2d 279, 282 (Tex. 1964).

1181. Parkway Hosp., Inc. v. Lee, 946 S.W.2d 580, 585 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

1182. *Id.*

and is typically not appealable.[1183] The remedy for review of an order granting a mistrial is by mandamus.[1184] An order denying a motion for mistrial is reviewed for an abuse of discretion.[1185]

H. *Bifurcation*

Under Rule 174(b), a trial court may order a separate trial on any issue in the interest "of convenience or to avoid prejudice" to a party.[1186] A trial court's order of bifurcation is reviewed for an abuse of discretion.[1187]

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.[1188] "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."[1189] If the jury finds in favor of the plaintiff on the issue of punitive damages liability, the same jury is presented with evidence relevant to punitive damages, such as evidence of the defendant's net worth.[1190] The jury then

1183. *See* Cummins v. Paisan Constr. Co., 682 S.W.2d 235, 236 (Tex. 1984) (noting an interlocutory order granting a motion for new trial is not reviewable on appeal); Otis Spunkmeyer, Inc. v. Blakely, 30 S.W.3d 678, 683 (Tex. App.—Dallas 2000, no pet.) (reiterating that a grant of a motion for new trial is not appealable directly or after final judgment from further proceedings in the trial). *But see* Wilkins v. Methodist Health Care Sys., 160 S.W.3d 559, 563 (Tex. 2005) (recognizing that there are "two instances when a Texas appellate court has overturned the trial court's grant of a new trial: when the trial court's order was wholly void, and where the trial court specified in the written order that the sole ground for granting the motion was that the jury's answers to special issues were irreconcilably conflicting").

1184. Galvan v. Downey, 933 S.W.2d 316, 321 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

1185. 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).

1186. TEX. R. CIV. P. 174(b); Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 556 (Tex. 2004).

1187. *Gragg*, 151 S.W.3d at 556.

1188. TEX. CIV. PRAC. & REM. CODE ANN. § 41.009 (West 2008); Sw. Ref. Co. v. Bernal, 22 S.W.3d 425, 430 (Tex. 2000); Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 30 (Tex. 1994); *see also* 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).

1189. *Moriel*, 879 S.W.2d at 30.

1190. *See* Lunsford v. Morris, 746 S.W.2d 471, 472 (Tex. 1988) (orig. proceeding) (noting that "forty-three states now allow evidence of net worth to be discovered and

determines the amount of damages to award after considering all of the evidence presented at both phases of the trial.[1191] Significantly, a "verdict may be rendered awarding exemplary damages only if the jury was unanimous in finding liability for and the amount of exemplary damages."[1192]

I. *Motion for Directed or Instructed Verdict*

1. Jury Trial

A directed verdict is a procedural device that authorizes a court to "direct" or "instruct" the jury to render a verdict because there is nothing to decide.[1193] A defendant may make a motion for directed verdict after a plaintiff rests.[1194] After the defendant rests or both sides close, either party may make a motion for directed verdict.[1195] A court may also grant a motion for directed verdict on its own initiative.[1196] The directed verdict is like a no-evidence motion for summary judgment, except that it is brought during trial.[1197] A court may direct a verdict "if no evidence of

admitted for the limited purpose of assessing punitive damages"), *rev'd on other grounds*, 827 S.W.2d 833, 841–42 (Tex. 1992). In holding a defendant's net worth was relevant to the issue of punitive damages and, thus, discoverable, the *Lunsford* court noted "two of the purposes of punitive damages: punishing the wrongdoer and deterring the same or similar future conduct." Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172, 184 (Tex. App.—Fort Worth 2004, pet. denied).

1191. *Moriel*, 879 S.W.2d at 30.

1192. TEX. R. CIV. P. 292(b); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(d) (West Supp. 2010) (requiring exemplary damages to be based on a unanimous jury finding for both liability and the amount of damages).

1193. TEX. R. CIV. P. 268.

1194. *See* Wedgeworth v. Kirskey, 985 S.W.2d 115, 116–17 (Tex. App.—San Antonio 1998, pet. denied) (asserting the proper time to grant a motion for directed verdict is after the plaintiff has had an opportunity to present his case).

1195. *See* Cecil Pond Constr. Co. v. Ed Bell Invs., Inc., 864 S.W.2d 211, 214 (Tex. App.—Tyler 1993, no writ) (holding a motion for directed verdict was premature because both parties had not yet rested). Note that if a court overrules a directed verdict during trial (jury or non-jury), the movant can either test the ruling on appeal or introduce more evidence. However, if more evidence is introduced, the motion must be re-urged at the close of all evidence to avoid waiver. 1986 Dodge 150 Pickup VIN # 1B7FD14T1GS006316 v. State, 129 S.W.3d 180, 183 (Tex. App.—Texarkana 2004, no pet.); Wenk v. City Nat'l Bank, 613 S.W.2d 345, 348 (Tex. Civ. App.—Tyler 1981, no writ).

1196. *See* Encina P'ship v. Corenergy, L.L.C., 50 S.W.3d 66, 69 (Tex. App.—Corpus Christi 2001, pet. denied) (asserting that when a jury does not come back with a verdict, but there is not yet an order for mistrial, the court may reconsider and grant a previous motion for instructed verdict).

1197. King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 750–51 (Tex. 2003).

probative force raises a fact issue" on a material element of the plaintiff's claim.[1198] A court may also direct a verdict "if the evidence conclusively establishes a defense to the plaintiff's cause of action."[1199]

Whether as a "no evidence" point or "matter of law" point, the court of appeals reviews a trial court's directed verdict under a legal sufficiency standard.[1200] If the directed verdict is denied, the court of appeals is "limited to the specific grounds stated in the motion."[1201] But, in reviewing a trial court's grant of a directed verdict, the reviewing court may consider any reason the directed verdict should have been granted, even if not stated in the court's order or the party's motion.[1202]

2. Non-Jury Trial

A motion for directed verdict may also be made in a non-jury trial, though there is technically no jury to "direct."[1203] In a non-jury trial, a directed verdict is sought by a motion for judgment.[1204] As in a jury trial, the court of appeals reviews the trial court's judgment under the legal sufficiency standard.[1205]

1198. Prudential Ins. Co. of Am. v. Fin. Review Servs. Inc., 29 S.W.3d 74, 77 (Tex. 2000).

1199. *Id.*

1200. *See* City of Keller v. Wilson, 168 S.W.3d 802, 823 (Tex. 2005) (applying the same legal sufficiency standard to directed verdicts as well as summary judgments, judgments notwithstanding the verdict, and appellate no-evidence review). *See generally supra* Part III (discussing the legal sufficiency standard of review).

1201. Cooper v. Lyon Fin. Servs. Inc., 65 S.W.3d 197, 207 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

1202. *See* Reyna v. First Nat'l Bank, 55 S.W.3d 58, 69 (Tex. App.—Corpus Christi 2001, no pet.) (explaining that a reviewing court may affirm the lower court's directed verdict, even if it was on erroneous grounds, as long as there is other support for the motion).

1203. *See* Carrasco v. Tex. Transp. Inst., 908 S.W.2d 575, 576 (Tex. App.—Waco 1995, no writ) (identifying the different standards of review for a motion for directed verdict in a jury trial and a bench trial).

1204. McKinley Iron Works, Inc. v. Tex. Emp't Comm'n, 917 S.W.2d 468, 469–70 (Tex. App.—Fort Worth 1996, no writ).

1205. *See City of Keller*, 168 S.W.3d at 823 (concluding that the standard of review should be uniform for directed verdicts "without or against a jury verdict" as well as other motions). *See generally supra* Part III (discussing the legal sufficiency standard of review).

J. *Charge of the Court*

Confusion remains regarding the standard of review applicable to complaints about the court's charge to the jury.[1206] 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.[1207]

1. Questions

Unless extraordinary circumstances exist, a trial court must

1206. *See* First Valley Bank v. Martin, 144 S.W.3d 466, 474 (Tex. 2004) (explaining that "in some cases a request can serve as an objection sufficient to preserve error in a jury charge"); *see also* State Dep't of Pub. Highways v. Payne, 838 S.W.2d 235, 240 (Tex. 1992) ("The 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. *Payne*, 838 S.W.2d 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.

1207. *See* 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"); Tex. Dep't of Human Servs. v. E.B., 802 S.W.2d 647, 649 (Tex. 1990) (noting that "[t]he standard for review of the charge is abuse of discretion, [which] occurs only when the trial court acts without reference to any guiding principle"). However, "when a trial court submits a single broad-form liability question incorporating multiple theories of liability," one of which is an invalid theory, and the reviewing court cannot determine whether the jury based its verdict on the invalid theory, the error is harmful and a new trial must be granted. Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 388 (Tex. 2000); *see also* Columbia Rio Grande Healthcare v. Hawley, 284 S.W.3d 851, 864 (Tex. 2009) (reiterating the holding in *Casteel* that an appellate court must presume harmful error when it cannot determine whether the jury verdict was based on an invalid theory); Romero v. KPH Consol., 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 encourages nor 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).

submit broad-form questions to the jury.[1208] The broad-form submission requirement was "intended to simplify jury charges for the benefit of the jury, the parties, and the trial court."[1209] 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."[1210] 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."[1211] 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."[1212] Thus, as "long as matters are timely raised and properly requested as 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."[1213]

The submission of controlling issues in the case—in terms of theories of recovery or defenses—appears to be a question of law and is reviewable de novo.[1214] Likewise, other objections, such as those which claim that the issue in question was "not supported by the pleadings"[1215] or that the evidence is not legally sufficient to

1208. *E.B.*, 802 S.W. 2d at 649; *see also* TEX. R. CIV. P. 277 ("In all jury cases the court shall, whenever feasible, submit the cause upon broad-form [submissions]."); Keetch v. Kroger Co., 845 S.W.2d 262, 266 (Tex. 1992) (reiterating that Rule 277 requires broad-form submission "whenever feasible"); Crawford v. Deets, 828 S.W.2d 795, 800 (Tex. App.—Fort Worth 1992, writ denied) ("Unless extraordinary circumstances exist, a court must submit such broad-form questions.").

1209. *Romero*, 166 S.W.3d at 230.

1210. *Smith*, 96 S.W.3d at 235; *see also Romero*, 166 S.W.3d at 230 (following the holding in *Smith* and recognizing that broad-form submission can simplify charges and allow questions to be more comprehensible). 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." *Romero*, 166 S.W.3d at 230.

1211. TEX. R. CIV. P. 278; *see also Romero*, 166 S.W.3d at 215 (explaining that questions should be submitted to the jury in broad form as required by Texas Rule of Civil Procedure 277 "whenever feasible"; however, "broad-form submission cannot be used to put before the jury issues that have no basis in the law or the evidence").

1212. Elbaor v. Smith, 845 S.W.2d 240, 243 (Tex. 1992).

1213. Exxon Corp. v. Perez, 842 S.W.2d 629, 631 (Tex. 1992).

1214. *See* Cont'l Cas. Co. v. Street, 379 S.W.2d 648, 651 (Tex. 1964) (declining to review a controlling issue because the parties had not objected to submission of the issue to the jury and, therefore, waived any objection to its form).

1215. McLennan Elec. Coop., Inc. v. Sims, 376 S.W.2d 924, 927 (Tex. Civ. App.—

support submission,[1216] should be reviewed de novo because each complaint raises a question of law.[1217] Whether a trial court should have submitted a theory by questions or instructions is reviewed under an abuse of discretion test, recognizing, however, that there is a presumption in favor of broad-form submission of questions.[1218] "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."[1219] In addition, the reversible error analysis applies to complaints about errors in the charge.[1220] 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 because an element of the theory of recovery was omitted—the appropriate standard of review should be de novo.[1221]

Waco 1964, writ ref'd n.r.e.).

1216. *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).

1217. *See, e.g.*, St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 525 (Tex. 2002) (plurality opinion) (holding whether a submitted definition misstates the law is a legal question and affirming that the court of appeals properly applied the de novo standard of review).

1218. Tex. Dep't of Human Servs. v. E.B., 802 S.W.2d 647, 649 (Tex. 1990); Niemeyer v. Tana Oil & Gas Corp., 39 S.W.3d 380, 387 (Tex. App.—Austin 2001, no pet.); McReynolds v. First Office Mgmt., 948 S.W.2d 342, 344 (Tex. App.—Dallas 1997, no writ); *see also* TEX. R. CIV. P. 277 (explaining that the court shall submit those instructions and definitions necessary for the jury's deliberations in broad-form questions, whenever feasible).

1219. 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 where "the trial court affirmatively charged the jury on the wrong standard of causation," nor would the court consider overruling it).

1220. Lee Lewis Constr., Inc. v. Harrison, 70 S.W.3d 778, 786–87 (Tex. 2001) (citing TEX. R. APP. P. 61.1); *Island Recreational*, 710 S.W.2d at 555.

1221. *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. Adderley, 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 the plaintiff's refusal to submit the proximate cause issue in an informed consent action, after the defendant properly objected to the omission, waived the issue and the plaintiff could not recover).

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.'"[1222] The trial court should generally "explain to the jury any legal or technical terms" contained in instructions and definitions.[1223] The decision of whether to submit a particular instruction or definition is reviewed for an abuse of discretion,[1224] with the essential inquiry being whether the instruction or definition aids the jury in answering the questions.[1225] Accordingly, a court is given wide latitude to determine the sufficiency of explanatory instructions and definitions.[1226] "[A] court has considerably more discretion in submitting instructions and definitions than it has in submitting [jury questions]."[1227]

1222. Harris Cnty. v. Smith, 96 S.W.3d 230, 234 (Tex. 2002) (quoting Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 389 (Tex. 2000)).

1223. 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.); *see also* TEX. R. CIV. P. 277 (requiring courts to "submit such instructions and definitions as shall be proper to enable the jury to render a verdict"); Union Pac. R.R. Co. v. Williams, 85 S.W.3d 162, 166 (Tex. 2002) (affirming that courts "must submit 'such instructions and definitions as shall be proper to enable the jury to render a verdict'" (quoting TEX. R. CIV. P. 277)); *Niemeyer*, 39 S.W.3d at 387 (stating a trial judge "has wide discretion in submitting jury questions, as well as instructions, and definitions"); Lumbermens Mut. Cas. Co. v. Garcia, 758 S.W.2d 893, 894 (Tex. App.—Corpus Christi 1988, writ denied) (reiterating that Rule 277 requires courts to submit any instructions and definitions that the jury may need to render a proper verdict).

1224. Shupe v. Lingafelter, 192 S.W.3d 577, 579 (Tex. 2006); State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 451–52 (Tex. 1997); Magro v. Ragsdale Bros., Inc., 721 S.W.2d 832, 836 (Tex. 1986).

1225. Sterling Trust Co. v. Adderley, 168 S.W.3d 835, 842–43 (Tex. 2005); McReynolds v. First Office Mgmt., 948 S.W.2d 342, 344 (Tex. App.—Dallas 1997, no writ).

1226. 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 v. Weingarten Realty Investors, 881 S.W.2d 490, 496 (Tex. App.—San Antonio 1994, writ denied); M.N. Dannenbaum, Inc. v. Brummerhop, 840 S.W.2d 624, 631 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

1227. Harris v. Harris, 765 S.W.2d 798, 801 (Tex. App.—Houston [14th Dist.] 1989, 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 aim of the jury charge is to present "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 so 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 speak to a single injury. *Id.* at 668. In those cases, the trial judge should structure the charge so as to "allow the plaintiff to elect a basis of recovery, and [allow] the defendant to assert defenses that may not be available" under all theories. *Id.* The *Rodriguez* court further stated, "Our holding today does not hamper the trial court from

When instructions or definitions are actually given, the question on review is whether the instruction or definition is "proper."[1228] An instruction is proper if it assists the jury, is supported by the pleadings or evidence, and accurately states the law.[1229] Examples of "improper" instructions include those that misstate the law or mislead the jury,[1230] those that "comment on the weight of the evidence,"[1231] or those that "'nudge' or 'tilt' the jury."[1232] The test of sufficiency for a definition is its "reasonable clarity in performing [its] function."[1233] Both instructions and definitions are reviewed under the abuse of discretion standard.[1234] However, whether the terms are properly defined or the instruction properly worded should be a question of law reviewable de novo.[1235] A de novo standard of review should also be used when the complaint is that an explanatory instruction or

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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.

1228. TEX. R. CIV. P. 277; *Plainsman Trading*, 898 S.W.2d at 791; *M.N. Dannenbaum*, 840 S.W.2d at 631; Atl. Mut. Ins. Co. v. Middleman, 661 S.W.2d 182, 187 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

1229. Union Pac. R.R. Co. 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, no pet.).

1230. 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*, 948 S.W.2d at 344; Owens-Corning Fiberglas Corp. v. Martin, 942 S.W.2d 712, 721–22 (Tex. App.—Dallas 1997, no writ).

1231. 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).

1232. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 724 (Tex. 2003).

1233. Harris v. Harris, 765 S.W.2d 798, 801 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

1234. *Torres*, 928 S.W.2d at 242; *see also* Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 791 (Tex. 1995) (recognizing that an incidental comment on the 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).

1235. *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).

definition misstates the law[1236] or directly comments on the weight of the evidence.[1237] If the definition or instruction was improper, the reviewing court must then determine whether the error was harmless.[1238]

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."[1239] When "the refusal is based on a determination that the request is unnecessary, the abuse of discretion standard" of review should apply.[1240] In contrast, when the refusal is based upon a determination that the instruction or definition was not raised by the pleadings,[1241] was not supported by at least "some evidence,"[1242] was not tendered in substantially correct form, or was not an element of a ground of recovery or defense in broad-form submission,[1243] the complaint presents a

1236. *See Harris*, 765 S.W.2d at 801 (holding that a definition given by the trial court was legally correct, aided the understanding of the jury, and was not demonstrably a source of harmful error); Wakefield v. Bevly, 704 S.W.2d 339, 350 (Tex. App.—Corpus Christi 1985, no writ) (refusing to rule before the trial occurs on what instructions a trial court may properly submit to the jury in a case on remand); Bennett v. Bailey, 597 S.W.2d 532, 533 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.) (declining to find error in the trial court's submission of broadly worded issues to the jury).

1237. 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).

1238. Quantum Chem. Corp. v. Toennies, 47 S.W.3d 473, 480 (Tex. 2001); *see also* Owens-Corning Fiberglas Corp. v. Martin, 942 S.W.2d 712, 722 (Tex. App.—Dallas 1997, no writ) (holding the court's discretion is not abused unless an instruction caused an improper judgment to be rendered); *M.N. Dannenbaum*, 840 S.W.2d at 631 (restating that an error must have caused the rendering of an improper verdict to constitute reversible error).

1239. Vinson & Elkins v. Moran, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.); *accord Plainsman Trading*, 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 Cnty., 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).

1240. *Moran*, 946 S.W.2d at 405.

1241. *See* St. Joseph Hosp. v. Wolff, 999 S.W.2d 579, 594 (Tex. App.—Austin 1999) (holding the trial court did not err in excluding a negligence instruction from the jury charge because it was not alleged in the pleadings), *rev'd on other grounds*, 94 S.W.3d 513 (Tex. 2002).

1242. Elbaor v. Smith, 845 S.W.2d 240, 243–44 (Tex. 1992); *accord* Ornelas v. Moore Serv. Bus Lines, 410 S.W.2d 919, 923 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.).

1243. Union Pac. R.R. Co. 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); *see also Ornelas*, 410

legal question reviewable de novo.[1244] Except (perhaps) for a refusal to submit instructions concerning otherwise nonsubmitted elements of a party's cause of action or defense, which implicates the constitutional right of trial by jury, the harmless error rule applies when determining whether the improper refusal to submit a requested instruction or definition requires reversal.[1245]

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."[1246] 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."[1247]

S.W.2d at 923 (holding that appellant's requested jury instructions were too vague or erroneously worded to constitute proper instructions).

1244. *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").

1245. Shupe v. Lingafelter, 192 S.W.3d 577, 579 (Tex. 2006) (citing TEX. R. APP. P. 61.1(a), 44.1(a)); Wal-Mart Stores, Inc., v. Johnson, 106 S.W.3d 718, 723 (Tex. 2003); Vingcard A.S. v. Merrimac Hospitality Sys., Inc., 59 S.W.3d 847, 865 (Tex. App.—Fort Worth 2001, pet. denied); St. James Transp. Co. v. Porter, 840 S.W.2d 658, 664 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *cf. Williams*, 85 S.W.3d at 170 (referring to Texas Rule of Appellate Procedure 61.1(a) and an earlier erroneous admonition by the trial court to the jury).

1246. 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.).

1247. *Island Recreational Dev. Corp.*, 710 S.W.2d at 555; *accord* TEX. R. APP. P. 44.1; Bed, Bath & Beyond v. Urista, 211 S.W.3d 753, 757 (Tex. 2006); *Moran*, 946 S.W.2d at 406; *cf.* Ford Motor Co. v. Miles, 967 S.W.2d 377, 387 (Tex. 1998) (plurality opinion) (stating that an "erroneous instruction . . . infect[s] the entire charge"). In *Arthur Andersen & Co. v. Perry Equipment Corporation*, 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), 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).

K. *Closing Statements*

As with opening statements, the trial court has discretion to limit and control closing remarks to the jury.[1248] 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].[1249]

Additionally, if the argument is incurable,[1250] the appellant must also "prove . . . that the argument by its nature, degree, and extent constitute[s] reversibl[e] . . . error."[1251]

Improper jury arguments rarely result in reversible error.[1252] Some notable examples of improper jury arguments include appealing to racial or ethnic prejudice,[1253] accusing a defendant

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1248. *See* Dang v. State, 202 S.W.3d 278, 281 n.2 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (noting that Texas courts have yet to answer which harm analysis should be applied when reviewing whether a trial court abused its discretion regarding the time length of a closing argument).

1249. Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 839 (Tex. 1979); *see also* TEX. R. CIV. P. 269 (discussing rules for jury arguments).

1250. *See* Tex. Emp'rs 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 [that flows] from the argument—whether the argument, considered in its proper setting, was reasonably calculated to cause such prejudice to the opposing litigant that a withdrawal by counsel or an instruction by the court, or both, could not eliminate the probability that it resulted in an improper verdict."); *see also* Austin v. Shampine, 948 S.W.2d 900, 906–07 (Tex. App.—Texarkana 1997, writ withdrawn) (applying *Haywood* to determine that the word "corrupt" did not affect the outcome of the case).

1251. *Reese*, 584 S.W.2d at 839; *accord Shampine*, 948 S.W.2d at 906; Lone Star Ford, Inc. v. Carter, 848 S.W.2d 850, 853 (Tex. App.—Houston [14th Dist.] 1993, no writ). Only in the rare instance of incurable jury argument is error preserved without an objection. *See* Rodriguez v. Hyundai Motor Co., 944 S.W.2d 757, 774 (Tex. App.—Corpus Christi 1997) (stressing the requirement that error must be preserved on most claims of improper argument), *rev'd on other grounds*, 995 S.W.2d 661 (Tex. 1999).

1252. *Reese*, 584 S.W.2d at 839 (illustrating that improper jury arguments rarely result in reversible error); *Shampine*, 948 S.W.2d at 907 (applying *Reese* to decide that use of the word "corrupt" was not incurably improper); Isern v. Watson, 942 S.W.2d 186, 198 (Tex. App.—Beaumont 1997, writ denied) (stressing that jury arguments causing incurable harm are rare and therefore reversible error is rare); Boone v. Panola Cnty., 880 S.W.2d 195, 198 (Tex. App.—Tyler 1994, no writ) (indicating that improper jury arguments rarely result in reversible error because most errors can be cured by instructing the jury to disregard it).

1253. *See* Living Ctrs. of Tex., Inc. v. Peñalver, 256 S.W.3d 678, 682 (Tex. 2008)

corporation of being a killer of families,[1254] referring to a party as "cattle,"[1255] and a "party's personal expression of gratitude to the jury."[1256] In these instances, the appellant must prove that the argument, by its "nature, degree[,] and extent constituted reversibly harmful error"[1257] (proper inquiries include: the length of the argument, whether the argument was repeated or abandoned, and whether cumulative error existed),[1258] and that "the probability that the [improper] argument caused harm exceeds the probability that the verdict was based upon proper proceedings and evidence."[1259] Finally, the reviewing court must evaluate the improper jury argument in light of the entire case, "[f]rom voir dire . . . [to] closing argument[s]."[1260]

L. *Jury Deliberations*

The scheduling of jury deliberations, sequestration of jurors, breaks, and the like are all reviewed for an abuse of discretion.[1261] Responses to jury notes are reviewed in the same manner as regular charge practices.[1262] While repeating testimony to the

(comparing trial counsel to Nazis was incurable jury argument); Tex. Emp'rs Ins. Ass'n v. Guerrero, 800 S.W.2d 859, 866–67 (Tex. App.—San Antonio 1990, writ denied) (holding "incurable reversible error" occurred when counsel appealed to ethnic unity in his closing argument to the jury).

1254. *Carter*, 848 S.W.2d at 854 (finding reversible error present in attorney's statement which suggested that Ford Motor Company knowingly manufactured cars that killed people and valued greater profits over human life).

1255. 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).

1256. 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.").

1257. *Reese*, 584 S.W.2d at 839.

1258. *Id.* at 840.

1259. 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 v. Panola Cnty., 880 S.W.2d 195, 198 (Tex. App.—Tyler 1994, no writ).

1260. Luna v. N. Star Dodge Sales, Inc., 667 S.W.2d 115, 120 (Tex. 1984); *Reese*, 584 S.W.2d at 840; Jones v. Republic Waste Servs. of Tex., Ltd., 236 S.W.3d 390, 405 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Boone*, 880 S.W.2d at 198; La. & Ark. Ry. Co. v. Capps, 766 S.W.2d 291, 294 (Tex. App.—Texarkana 1989, writ denied).

1261. TEX. R. CIV. P. 282.

1262. *See* TEX. R. CIV. P. 286 (expressing the similarity of jury notes to regular

jury and the extent of the repetition is discretionary, testimony must be reread if the requirements of Texas Rule of Civil Procedure 287 are met.[1263] In the absence of disagreement between jurors, however, the court is not obligated to have testimony read back.[1264] Furthermore, the trial court has broad discretion in deciding what portion of testimony is relevant to the point in dispute.[1265]

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.[1266] 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]."[1267] 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]."[1268] Additionally, the length of time a court allows for jury deliberations is a decision within the sound discretion of the trial court.[1269] 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.[1270]

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charge practices).

1263. *See* TEX. R. CIV. P. 287 (requiring disagreement among jurors as to witness statements before testimony can be read back to them).

1264. *See* Krishnan v. Ramirez, 42 S.W.3d 205, 225–26 (Tex. App.—Corpus Christi 2001, pet. denied) (stressing that the jury is only entitled to hear the testimony in dispute).

1265. *Id.* at 225; 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 w.o.j.).

1266. *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.

1267. 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).

1268. *Stevens*, 563 S.W.2d at 229, 232.

1269. *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).

1270. *Shaw*, 791 S.W.2d at 206.

M. *Conflicting Jury Findings*

In reviewing the legal question of whether jury findings irreconcilably conflict, the appellate court applies a de novo standard of review.[1271] 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.[1272]

"In reviewing the jury findings for conflict, the threshold [inquiry] is whether the findings [implicate] the same material fact."[1273] If the conflict can be reasonably reconciled, the reviewing "court may not strike [conflicting] jury answers."[1274] 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."[1275] 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."[1276]

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."[1277] 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.[1278]

1271. *See* FFE Transp. Servs., Inc. v. Fulgham, 154 S.W.3d 84, 89–90 (Tex. 2004) (stating that issues of law are decided de novo).

1272. Indem. Ins. Co. of N. Am. v. Craik, 162 Tex. 260, 346 S.W.2d 830, 831–32 (1961).

1273. Bender v. S. Pac. Transp. Co., 600 S.W.2d 257, 260 (Tex. 1980).

1274. *Id.*; *see also* Lee v. Huntsville Livestock Servs., 934 S.W.2d 158, 160 (Tex. App.—Houston [14th Dist.] 1996, pet. denied) (asserting that jury answers must result in different judgments before one will be stricken).

1275. *Bender*, 600 S.W.2d at 260.

1276. *Id.*

1277. *Id.*

1278. *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).

VI. POST-TRIAL RULINGS

A. *Post-Verdict & Post-Judgment Pleading Amendments*

When a request to amend pleadings is made after trial, 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."[1279] If the amendment is procedural in nature (i.e., merely conforming "the pleadings to the evidence at trial"), the trial court must grant the amendment.[1280] 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.[1281] While "the trend is to give the trial court[s] wide latitude in allowing amendments," post-verdict or post-judgment trial amendments may not be permitted.[1282] The trial court's decision will be reviewed on appeal for an abuse of discretion.[1283]

B. *Motion to Disregard Jury Findings*

A trial court may disregard a jury's answer to a question in the charge only when the answer has no support in evidence, or the question is immaterial.[1284] "A [jury] question is immaterial when

1279. State Bar of Tex. v. Kilpatrick, 874 S.W.2d 656, 658 (Tex. 1994); *accord* TEX. R. CIV. P. 63, 66. "The burden of showing surprise or prejudice rests on the party resisting the amendment." *Kilpatrick*, 874 S.W.2d at 658. "Surprise may be shown as a matter of law if the pleading asserts a new and independent cause of action or defense." Bell v. Moores, 832 S.W.2d 749, 757 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

1280. Chapin & Chapin, Inc. v. Tex. Sand & Gravel Co., 844 S.W.2d 664, 665 (Tex. 1992); 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).

1281. Rusk v. Rusk, 5 S.W.3d 299, 309 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); Smith v. Heard, 980 S.W.2d 693, 698 (Tex. App.—San Antonio 1998, pet. denied); *Libhart*, 949 S.W.2d at 797; Taiwan Shrimp Farm Vill. Ass'n v. U.S.A. Shrimp Farm Dev., 915 S.W.2d 61, 70 (Tex. App.—Corpus Christi 1996, writ denied).

1282. Boarder to Boarder Trucking, Inc. v. Mondi, Inc., 831 S.W.2d 495, 499 (Tex. App.—Corpus Christi 1992, no writ); *see also* Mayhew v. Dealey, 143 S.W.3d 356, 371 (Tex. App.—Dallas 2004, pet. denied) (affirming trial court's grant of motion for leave to amend petition the same day it rendered judgment).

1283. *See Kilpatrick*, 874 S.W.2d at 658 (exercising the right to review the trial court's decision for an abuse of discretion).

1284. TEX. R. CIV. P. 301; Spencer v. Eagle Star Ins. Co. of Am., 876 S.W.2d 154, 157

it should not have been submitted, it calls for a finding beyond the province of the jury (e.g., such as a question of law), or when it was properly submitted but has been rendered immaterial by other findings."[1285] 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.[1286]

A court reviews the denial of a motion to disregard jury findings as a legal sufficiency challenge.[1287] Therefore, the court views the "evidence in the light most favorable to the verdict," "credit[ing] favorable evidence if reasonable jurors could, and disregard[ing] contrary evidence unless reasonable jurors could not."[1288] The court sustains such a challenge only when no more than a scintilla of evidence supported the jury's finding.[1289] "More than a scintilla of evidence exists when . . . reasonable and fair-minded people [could] differ in their conclusions."[1290] The court must "view the evidence in a light that tends to support the jury's finding and disregard all evidence and inferences to the contrary" unless doing so would be unreasonable.[1291] Where some evidence supports the disregarded finding, the reviewing court "must reverse and render [a] judgment on the verdict unless the appellee [asserts] cross-points . . . [showing] grounds for a new trial."[1292]

C. *Motion for Judgment Notwithstanding the Verdict (JNOV)*

A trial court may disregard a jury verdict and render a JNOV if no evidence supports the jury finding on an issue necessary to

(Tex. 1994).

1285. Se. Pipe Line Co. v. Tichacek, 997 S.W.2d 166, 172 (Tex. 1999).

1286. 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); *see also* TEX. R. CIV. P. 301 ("[T]he court may, upon like motion and notice, disregard any jury finding or a question that has no support in the evidence."). 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*, 876 S.W.2d at 157.

1287. Excel Corp. v. McDonald, 223 S.W.3d 506, 508 (Tex. App.—Amarillo 2006, pet. denied).

1288. *Wilson*, 168 S.W.3d at 822, 827.

1289. Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997).

1290. *Id.*

1291. *McDonald*, 224 S.W.3d at 508.

1292. Basin Operating Co. v. Valley Steel Prods., 620 S.W.2d 773, 776 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

liability or if a directed verdict would have been proper.[1293] Unlike the motion to disregard jury findings (discussed above in Part VI(B)), a motion for JNOV asks the trial court to disregard all of the jury's findings and render judgment contrary to them.[1294]

A court of appeals reviews an appellant's challenge to the trial court's grant or denial of a motion for JNOV under the legal sufficiency standard.[1295] Generally, where the court of appeals finds error, it will reverse and render the judgment.[1296] But in some instances, such as where the law on which the case was tried has changed between the time of trial and appeal, the court of appeals will remand for a new trial.[1297] An appellee that received negative jury findings but had its motion for JNOV granted by the trial court should argue that the trial court did not err in granting a motion for JNOV, and also raise cross-points, if any, that may be grounds for granting a new trial.[1298]

1293. TEX. R. CIV. P. 301; Tiller v. McLure, 121 S.W.3d 709, 713 (Tex. 2003); Fort Bend Cnty. Drainage Dist. v. Sbrusch, 818 S.W.2d 392, 394 (Tex. 1991); *see also supra* Part VI(I) (explaining standards for directed verdict).

1294. *Cf.* Teston v. Miller, 349 S.W.2d 296, 299 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.) (referencing Texas Rule of Civil Procedure 301, but stating "[t]his is not a case involving a motion for judgment notwithstanding the verdict but one to disregard the findings").

1295. *See* City of Keller v. Wilson, 168 S.W.3d 802, 823 (Tex. 2005) (stating that the standard of review for JNOV is legal sufficiency); *see also* Tanner v. Nationwide Mut. Fire Ins., 289 S.W.3d 828, 830 (Tex. 2009) (asserting that the test for legal sufficiency must involve the determination of whether the evidence would enable a reasonable person to reach the verdict under review). *See generally supra* Part III(A)(2) (discussing legal sufficiency standard of review).

1296. Wal-Mart Stores, Inc. v. Miller, 102 S.W.3d 706, 710 (Tex. 2003).

1297. Scott v. Liebman, 404 S.W.2d 288, 294 (Tex. 1966), *abrogated on other grounds by* Parker v. Highland Park, Inc., 565 S.W.2d 512 (Tex. 1978).

1298. TEX. R. CIV. P. 324(c) ("[T]he appellee may bring forward by cross-point contained in his brief filed in the Court of Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict . . . ."); *see also* TEX. R. APP. P. 38.2(b)(2) ("[T]he appellate court must remand a case to the trial court to take evidence if: the appellate court has sustained a point raised by the appellant; and the appellee has raised a cross-point that requires the taking of additional evidence."); N.N. v. Inst. for Rehab., 234 S.W.3d 1, 5–6 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (noting that appellee defends the JNOV as correct and asserts two cross-points, but only if appellant's issue is sustained in the court of appeals).

D. *Motion to Admit Additional Evidence*

Texas Rule of Civil Procedure 270 allows, but does not require, the court to permit additional evidence.[1299] Rule 270 states that "[w]hen it clearly appears to be necessary to the due administration of justice, the court may permit additional evidence to be offered at any time; provided that in a jury case no evidence on a controversial matter shall be received after the verdict of the jury."[1300] 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."[1301] In a bench trial, the trial court may permit the introduction of additional evidence even after judgment has been entered if it does so within the court's plenary power.[1302] In both jury and nonjury trials, the trial court has discretion to reopen the evidence on an uncontested or noncontroversial matter.[1303]

Factors the trial court considers in determining whether to allow additional evidence include whether the party seeking to introduce the evidence showed due diligence in obtaining that evidence, whether the evidence is decisive, whether the trial court's reception of the evidence would cause undue delay, and whether allowing the additional evidence would cause an injustice.[1304] In making this determination, "[t]he trial court should exercise its discretion liberally 'in the interest of permitting both sides to fully

1299. Krishnan v. Ramirez, 42 S.W.3d 205, 223 (Tex. App.—Corpus Christi 2001, no pet.).

1300. TEX. R. CIV. P. 270; *accord* Chapman v. Abbot, 251 S.W.3d 612, 620 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

1301. 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.).

1302. *See* McCarthy v. George, 623 S.W.2d 772, 776 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.) (holding that trial court did not abuse its discretion by allowing plaintiffs to reopen the evidence thirty-three days after trial even though plaintiffs did not argue that failure to submit evidence at trial was not due to a lack of diligence; under the facts of the case, "development of this case was clearly in the interest of justice"); Priddy v. Tabor, 189 S.W. 111, 116 (Tex. Civ. App.—Fort Worth 1916, writ ref'd) (concluding that trial court did not abuse its discretion by hearing additional testimony after entering judgment in bench trial when additional testimony was heard during same term as original judgment); *see also* Harrison v. Bailey, 260 S.W.2d 702, 704–05 (Tex. Civ. App.—Eastland 1953, no writ) (holding trial court did not err by allowing appellees to introduce evidence at hearing on opposing party's motion to reform judgment).

1303. TEX. R. CIV. P. 270.

1304. Hernandez v. Lautensack, 201 S.W.3d 771, 779 (Tex. App.—Fort Worth 2006, pet. denied).

develop the case in the interest of justice.'"[1305]

The trial court's decision to permit additional evidence will be disturbed on appeal only when it abuses its discretion.[1306] 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 contravenes Rule 270.[1307]

E. *Motion for New Trial*

1. Motion for New Trial Generally

Texas Rule of Civil Procedure 320 provides that:

> New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct. New trials may be granted when the damages are manifestly too small or too large. When it appears to the court that a new trial should be granted on a point or points that affect only a part of the matters in controversy and that such part is clearly separable without unfairness to the parties, the court may grant a new trial as to that part only, provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested. Each motion for new trial shall be in writing and signed by the party or his attorney.[1308]

The denial of a motion for new trial is reviewable by appeal.[1309] "The standard of review depends on the [nature of the] complaint preserved by the motion for new trial."[1310] Generally, a trial court's denial of a motion for new trial is reviewed for abuse of

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1305. *Id.*

1306. *Lopez*, 55 S.W.3d at 201; Guerrero v. Standard Alloys Mfg. Co., 598 S.W.2d 656, 658 (Tex. App.—Beaumont 1980, writ ref'd n.r.e.).

1307. *See* TEX. R. CIV. P. 270 (allowing additional noncontroversial testimony only before the jury verdict is rendered).

1308. TEX. R. CIV. P. 320.

1309. *See In re* Marriage of Edwards, 79 S.W.3d 88, 101–02 (Tex. App.—Texarkana 2002, no pet.) (affirming, on appeal, the trial court's denial of a motion for new trial); *In re* M.A.N.M., 75 S.W.3d 73,.80 (Tex. App.—San Antonio 2002, no pet.) (enforcing the trial court's discretion in denying a motion for new trial); Prestige Ford Co. v. Gilmore, 56 S.W.3d 73, 77 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (finding, on appeal, that the trial court did not err in granting the motion for new trial); Delgado v. Hernandez, 951 S.W.2d 97, 98 (Tex. App.—Corpus Christi 1997, no writ) (affirming the trial court's decision to deny a motion for new trial and stating the standard of review on appeal).

1310. *Delgado*, 951 S.W.2d at 98; *see also* TEX. R. CIV. P. 324 (presenting prerequisites for motion for new trial).

discretion.[1311] For example, "the denial of a motion for new trial that does not contain one of the complaints enumerated in Rule 324(b) [*see infra*], is reviewed under an abuse of discretion."[1312] A trial court's order on a motion for new trial based upon jury misconduct is likewise reviewed for an abuse of discretion.[1313] However, sufficiency of the evidence challenges are governed by the legal and factual sufficiency standards of review.[1314]

"Except in very limited circumstances, an order granting a motion for new trial rendered within the period of the trial court's plenary power is not reviewable on appeal."[1315] The longstanding rule was that the granting of a new trial may only be subject to appellate review if: (1) the trial court's plenary power had expired prior to the grant;[1316] or (2) the order was based on the sole ground of "irreconcilably conflicting" jury answers.[1317] But a recent decision of the Texas Supreme Court indicates both that mandamus review is available to review grants of new trials and that lower courts need to recognize the limits of that power.[1318] The supreme court emphasized that "Texas trial courts have historically been afforded broad discretion in granting new trials[,] [b]ut that discretion is not limitless."[1319] While the trial court has significant discretion to grant a new trial, it is required to specify the reasons it is ordering a new trial, and the "reasons should be

1311. *In re* R.R., 209 S.W.3d 112, 114 (Tex. 2006).

1312. 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).

1313. 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; and (3) based on the record as a whole, the misconduct resulted in harm" to the movant. *Id.*

1314. *See supra* Part III (explaining sufficiency of the evidence).

1315. Wilkins v. Methodist Health Care Sys., 160 S.W.3d 559, 563 (Tex. 2005); *accord* Cummins v. Paisan Constr. Co., 682 S.W.2d 235, 235–36 (Tex. 1984).

1316. *Wilkins*, 160 S.W.3d at 563.

1317. *Id.*; *accord* Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985) (orig. proceeding), *overruled in part by In re Columbia Med. Ctr. of Las Colinas, L.P.*, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding); *see also* 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).

1318. *In re* Columbia Med. Ctr. of Las Colinas, L.P., 290 S.W.3d 204, 210 (Tex. 2009) (orig. proceeding).

1319. *Id.*

clearly identified and reasonably specific."[1320] "Broad statements such as 'in the interest of justice' are not sufficiently specific."[1321] Each point relied upon in a motion for new trial "shall briefly refer to that part of the ruling of the court, charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designated to be complained of, in such a way that the objection can be clearly identified and understood by the court."[1322] "Generality in motions for new trial must be avoided because objections phrased in general terms shall not be considered by the court."[1323] It is arbitrary and an abuse of discretion when a trial court fails to give its reasons for disregarding a jury verdict.[1324]

The court of criminal appeals also recently observed that a trial court's discretion to grant a new trial in the interest of justice is not "unbounded or unfettered."[1325] The court specified that:

> A trial judge does not have authority to grant a new trial unless the first proceeding was not in accordance with the law. He cannot grant a new trial on mere sympathy, an inarticulate hunch, or simply because he personally believes that the defendant is innocent or "received a raw deal . . . ." [Additionally,] [a]lthough not all of the grounds for which a trial court may grant a motion for new trial need be listed in [a] statute or rule, the trial court does not have discretion to grant a new trial unless the defendant shows that he is entitled to one under the law. To grant a new trial for a non-legal or legally invalid reason is an abuse of discretion.[1326]

As a general rule, it is not an abuse of discretion for the trial court to grant a motion for new trial if the defendant: "(1) articulated a valid legal claim in [the] motion for new trial; (2) produced evidence or pointed to evidence in the trial record that substantiated [the asserted] legal claim; and (3) showed prejudice to [the defendant's] substantial rights under the [rules of appellate procedure]."[1327] "The defendant need not establish

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1320. *Id.* at 215.

1321. *Id.*

1322. *Id.* at 210 (citing TEX. R. APP. P. 321).

1323. *Columbia Med. Ctr.*, 290 S.W.3d at 210 (citing TEX. R. CIV. P. 322).

1324. *Id.* at 213.

1325. State v. Herndon, 215 S.W.3d 901, 906–07 (Tex. Crim. App. 2007).

1326. *Id.* at 907.

1327. *Id.* at 909; *see* TEX. R. APP. P. 44.2(a) (stating that when the appellate record indicates constitutional error in a criminal case, "the court of appeals must reverse a

reversible error as a matter of law before the trial court may exercise its discretion in granting a motion for new trial."[1328] "On the other hand, trial courts do not have the discretion to grant a new trial unless the defendant demonstrates that [the] first trial was seriously flawed and that the flaws adversely affected [the defendant's] substantial rights to a fair trial."[1329]

Practitioners should carefully note that a motion for new trial is required to preserve several issues on appeal.[1330] Rule 324(b) requires that the following issues be raised by a motion for new trial:

> (1) A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;
> (2) A complaint of factual insufficiency of the evidence to support a jury finding;
> (3) A complaint that a jury finding is against the overwhelming weight of the evidence;
> (4) A complaint of inadequacy or excessiveness of the damages found by the jury; or
> (5) Incurable jury argument if not otherwise ruled on by the trial court.[1331]

"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] issue[s]."[1332] The reason for requiring that these matters first be brought to the attention of the trial court is to allow it the opportunity to correct any errors that were not considered prior to the motion.[1333]

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judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment").

1328. *Herndon*, 215 S.W.3d at 909.

1329. *Id.*

1330. *See* TEX. R. CIV. P. 324(a) (providing that "a motion for new trial is a prerequisite to a complaint on appeal in either a jury or a nonjury case, except as provided in subdivision (b)").

1331. TEX. R. CIV. P. 324(b)(1)–(5).

1332. Moore v. Kitsmiller, 201 S.W.3d 147, 152 (Tex. App.—Tyler 2006, pet. denied); *accord* Dillard Dep't Stores, Inc. v. Hecht, 225 S.W.3d 109, 116 (Tex. App.—El Paso 2009, pet. granted, judgm't vacated w.r.m.) (concluding that since a motion for new trial was not filed, appellant failed to preserve its factual sufficiency issue on appeal).

1333. Stillman v. Hirsch, 128 Tex. 359, 99 S.W.2d 270, 275 (1936); *accord 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

2. Motion for New Trial Based on Jury Misconduct

When the evidence on the question of alleged jury misconduct is conflicting, the appellate court will generally defer to the trial court's findings and review under an abuse of discretion standard.[1334] To obtain a new trial based upon jury misconduct, 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.[1335] In considering a motion for new trial premised on jury misconduct, a court will review a "juror's affidavit alleging [that] outside influences were brought to bear upon the jury."[1336] In addition, "[a] court may, of course, admit competent evidence of juror misconduct from any other source."[1337] 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.[1338]

3. Motion for New Trial Based on Newly Discovered Evidence

To obtain a new trial based upon newly discovered evidence,[1339] 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 due diligence that it did

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for new trial may be overruled by signed order or otherwise by operation of law if not ruled upon "within seventy-five days after the judgment [is] signed." Cecil v. Smith, 804 S.W.2d 509, 511 (Tex. 1991).

1334. *See* Pharo v. Chambers Cnty., 922 S.W.2d 945, 948–49 (Tex. 1996) (deferring to the trial court's determination of whether jury misconduct occurred).

1335. TEX. R. CIV. P. 327(a); *accord* 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).

1336. *Jackson*, 24 S.W.3d at 369 (internal quotation marks omitted); *see also* 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).

1337. *Jackson*, 24 S.W.3d at 369; *accord* Mayo v. State, 708 S.W.2d 854, 856 (Tex. Crim. App. 1986); Fillinger v. Fuller, 746 S.W.2d 506, 508 (Tex. App.—Texarkana 1988, no writ).

1338. *See* Roy Jones Lumber Co. v. Murphy, 139 Tex. 478, 163 S.W.2d 644, 646 (1942) (noting that it is reversible error to decline testimony on the motion of material jury misconduct if the lack of affidavits is supported by reasonable explanation and excuse); Ramsey v. Lucky Stores, Inc., 853 S.W.2d 623, 636 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (requiring "a reasonable explanation and excuse as to why affidavits cannot be secured" and specific allegations of jury misconduct).

1339. TEX. R. CIV. P. 324(b)(1).

> not come sooner; third, that it is not cumulative; fourth, that it is so material that it would probably produce a different result if a new trial were granted.[1340]

Furthermore, the newly discovered evidence must be admissible, competent evidence.[1341] Because this information is generally outside of the court's knowledge, each of the above elements should be supported by an affidavit of the party.[1342]

"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 an abuse of discretion.[1343] "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.[1344] 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.[1345]

1340. 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* A.G.C., 279 S.W.3d 441, 453 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

1341. Fantasy Ranch, Inc. v. City of Arlington, 193 S.W.3d 605, 615 (Tex. App.—Fort Worth 2006, pet. denied); *accord* Nguyen v. Minh Food Co., 744 S.W.2d 620, 621 (Tex. App.—Dallas 1987, writ denied).

1342. *See* Rivera v. Countrywide Home Loans, Inc., 262 S.W.3d 834, 844 (Tex. App.—Dallas 2008, no pet.) (recognizing that each of the four elements "must be established by an affidavit of the party"); *In re* Thoma, 873 S.W.2d 477, 512 (Tex. Rev. Trib. 1994, no appeal) (noting that the moving party must prove the four factors to win a new trial).

1343. *Fantasy Ranch*, 193 S.W.3d at 615; *accord Van Winkle*, 660 S.W.2d at 809.

1344. *In re* M.A.N.M., 75 S.W.3d 73, 80 (Tex. App.—San Antonio 2002, no pet.); *see also* Burleson State Bank v. Plunkett, 27 S.W.3d 605, 621 (Tex. App.—Waco 2000, pet. denied) ("Every reasonable presumption will be made on review in favor of orders of the trial court refusing new trials.").

1345. *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 v. Mem'l Hosp. of Garland, 862 S.W.2d 762, 775 (Tex. App.—Dallas 1993, writ denied) (holding that motions for 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).

F. *Motion to Modify, Reform or Correct the Judgment*

In addition to motions for new trial, a trial court, during its period of plenary power, may modify, correct, or reform a judgment.[1346] The court reviews the denial of a motion to modify a judgment for abuse of discretion.[1347] "An appellate court [also] has the power to correct and reform a trial court judgment to make the record speak the truth when it has the necessary data and information to do so."[1348]

Rule 329b provides that motions for new trial and motions to modify, correct, or reform a judgment are overruled by operation of law after certain periods of time.[1349] "When a motion for new trial is overruled by operation of law," the court of appeals reviews "whether the trial court abused its discretion by allowing the motion to be overruled."[1350]

G. *Motion for Judgment* Nunc Pro Tunc *or Clarification Orders*

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* or through a clarification order.[1351] A judgment *nunc pro tunc* is appropriate only to correct a clerical error; that is, it cannot be used to correct a judicial error.[1352] "A clerical error is one which does not result

1346. TEX. R. CIV. P. 329b(d)–(e).

1347. *See* Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 226 (Tex. 1991) (holding that when confronted with the issuance of a turnover order, the court of appeals should review under an abuse of discretion, rather than a no evidence, standard); Wagner v. Edlund, 229 S.W.3d 870, 879 (Tex. App.—Dallas 2007, pet. denied) (concluding that the trial court did not abuse its discretion by denying the modification of judgment).

1348. Jackson v. State, 288 S.W.3d 60, 64 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd); *accord* Williams v. State, 911 S.W.2d 788, 791 (Tex. App.—San Antonio 1995, no writ).

1349. TEX. R. CIV. P. 329b.

1350. Limestone Constr., Inc. v. Summit Commercial Indus. Props., Inc., 143 S.W.3d 538, 542 (Tex. App.—Austin 2004, no pet.).

1351. TEX. R. CIV. P. 316; TEX. R. CIV. P. 329b(f); *see also* Escobar v. Escobar, 711 S.W.2d 230, 231 (Tex. 1986) (noting that "[a]fter the trial court loses its jurisdiction over a judgment, it can correct only clerical errors in the judgment by judgment *nunc pro tunc*" (emphasis added)); Comet Aluminum Co. v. Dibrell, 450 S.W.2d 56, 58 (Tex. 1970) (recognizing the well-settled law that clerical errors, but not judicial errors in the rendition of judgment, may be corrected after the trial court loses jurisdiction).

1352. Barton v. Gillespie, 178 S.W.3d 121, 126 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("Even if the trial court incorrectly renders judgment, the trial court cannot alter

from judicial reasoning or determination."[1353] "A judicial error is [the type of] error which occurs in the *rendering* as opposed to the *entering* of a judgment."[1354]

> A clerical error is a discrepancy between the entry of a judgment in the record and the judgment that was actually rendered. A clerical error does not result from judicial reasoning, evidence[,] or determination. Conversely, a judicial error arises from a mistake of law or fact that requires judicial reasoning to correct.[1355]

Whether an error in a judgment is judicial or clerical is a question of law that is reviewable de novo and not binding on the appellate court.[1356]

For a judgment *nunc pro tunc* to be properly granted, the evidence must be "clear and convincing that a clerical error was made."[1357] "Evidence may be in the form of oral testimony of witnesses, written documents, previous judgments, the court's docket[,] or the [trial] judge's personal recollection."[1358] To the extent the trial judge relied upon his personal recollection of the facts at the time the original judgment was entered and then entered the judgment *nunc pro tunc*, a court may presume that his personal recollection supports the finding of clerical error.[1359] "[W]hether the [trial] court pronounced judgment orally and the terms of [any] pronouncement are questions of fact" that are reviewed for legal and factual sufficiency.[1360]

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a written judgment that precisely reflects the incorrect rendition.").

1353. Andrews v. Koch, 702 S.W.2d 584, 585 (Tex. 1986).

1354. *Escobar*, 711 S.W.2d at 231; *accord 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).

1355. *Barton*, 178 S.W.3d at 126 (internal citations omitted).

1356. *See* Finlay v. Jones, 435 S.W.2d 136, 138 (Tex. 1968) (noting that the trial court's findings or conclusions are not binding on the Texas Supreme Court).

1357. Riner v. Briargrove Park Prop. Owners, Inc., 976 S.W.2d 680, 683 (Tex. App.—Houston [1st Dist.] 1997, no writ). *But see* Wittau v. Storie, 145 S.W.3d 732, 736 n.3 (Tex. App.—Fort Worth 2004, no pet.) (applying traditional legal and factual sufficiency standards).

1358. *Riner*, 976 S.W.2d at 683.

1359. Davis v. Davis, 647 S.W.2d 781, 783 (Tex. App.—Austin 1983, no writ); *see also* Pruet v. Coastal States Trading, Inc., 715 S.W.2d 702, 705 (Tex. App.—Houston [1st Dist.] 1986, no writ.) (stating that a presumption arises that a judge's personal recollection will support the finding of clerical errors if he corrects the judgment *nunc pro tunc*).

1360. Escobar v. Escobar, 711 S.W.2d 230, 232 (Tex. 1986).

H. *Remittitur*

The remittitur process arises out of the trial court's almost unbridled discretion to grant new trials.[1361] 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."[1362] 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.[1363] The plaintiff has two choices: to remit the suggested amount unconditionally or to have a new trial.[1364] Because the trial court "has no authority to change a jury award," the trial court judge "cannot compel a remittitur, but can 'suggest' it."[1365]

In suggesting a remittitur or in reviewing a trial court's order of remittitur, the proper standard of review is factual sufficiency,[1366] not abuse of discretion.[1367] Because remittitur involves the question of factual sufficiency, the Texas Supreme Court may not order a remittitur, but the courts of appeals may.[1368] Although the supreme court lacks jurisdiction to review or order a remittitur

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1361. William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 564 (1991).

1362. *Id.*

1363. *Id.*

1364. *Id.*; *see also* Larson v. Cactus Util. Co., 730 S.W.2d 640, 641 (Tex. 1987) (holding that if the plaintiff rejects the court's "suggestion," the trial court may grant a new trial).

1365. William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 564 (1991).

1366. *See* Bentley v. Bunton (*Bentley I*), 94 S.W.3d 561, 620 (Tex. 2002) (stating that the standard of review in Texas for excessive damages is factual sufficiency of the evidence).

1367. *See* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 30–31 (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) (using a factual sufficiency standard for attorney's fees); *Larson*, 730 S.W.2d at 641 (applying a factual sufficiency standard to actual damages); Pope v. Moore, 711 S.W.2d 622, 624 (Tex. 1986) (emphasizing that factual sufficiency is the only acceptable standard to review remittitur of actual damages); *see also* TEX. R. APP. P. 46.2 (allowing 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).

1368. *See* TEX. R. APP. P. 46.3 ("The court of appeals may suggest a remittitur."); Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 310 (Tex. 2006) (discussing how the Texas Rules of Appellate Procedure allow courts of appeals to provide remittitur orders).

because it is a factual sufficiency issue,[1369] the court does have jurisdiction to determine whether the court of appeals applied the proper standard in reviewing the remittitur issue.[1370] Where the Texas Supreme Court has found error, the court has either remanded to the court of appeals for a suggestion of remittitur, or reversed and remanded to the trial court for a new trial when there was evidence to support some damages but no evidence to support the amount awarded by the jury.[1371] The respective powers of the courts of appeals and the supreme court in this regard present some "line-drawing" problems.[1372]

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."[1373] This general rule becomes more problematic when 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.[1374] It "is necessarily an arbitrary process," not subject to objective analysis or mathematical calculation.[1375] Because there are no objective guidelines to assess the money equivalent of such injuries, the jury is given a great deal of discretion in awarding an amount of damages it

1369. *See Bentley I*, 94 S.W.3d at 620 (explaining that since the determination of whether a remittitur is excessive is factual, it is final in the court of appeals, and the supreme court does not have jurisdiction to review the findings); *cf.* Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 51 (Tex. 1996) (overruling a motion for voluntary remittitur for failure to present a question of law). *See supra* Part III(A)(2) (addressing the factual insufficiency of the evidence standard of review).

1370. *See Pope*, 711 S.W.2d at 623 (recognizing the jurisdiction of the Texas Supreme Court because "determining the proper remittitur standard is a question of law").

1371. Guevara v. Ferrer, 247 S.W.3d 662, 670 (Tex. 2007).

1372. *See supra* Part III(A)(2) (addressing factual sufficiency and the role of the courts).

1373. Gulf States Utils. Co. v. Low, 79 S.W.3d 561, 566 (Tex. 2002).

1374. *See* Roberts v. Williamson, 111 S.W.3d 113, 120 (Tex. 2003) (referring to the difficulty involved in determining the value of intangible damages).

1375. Skaggs Alpha Beta, Inc. v. Nabhan, 808 S.W.2d 198, 202 (Tex. App.—El Paso 1991, writ dism'd).

determines appropriate.[1376] The Eighth Court of Appeals 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."[1377] However, a jury's discretion to compensate 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.'"[1378] 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."[1379] 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)[1380] or based upon the factual sufficiency of the evidence where the excessiveness of the damages is challenged.[1381]

1376. *See* Texarkana Mem'l Hosp., Inc. v. Murdock, 946 S.W.2d 836, 841 (Tex. 1997) (recognizing the broad discretion of the jury in determining damages for pain and suffering); *see also* 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"); Marshall v. Superior Heat Treating Co., 826 S.W.2d 197, 200 (Tex. App.—Fort Worth 1992, no writ) (concluding that damage awards for future physical impairment are "particularly within the province of the jury").

1377. Worsham Steel Co. v. Arias, 831 S.W.2d 81, 85 (Tex. App.—El Paso 1992, no writ); *accord* Martin v. Tex. Dental Plans, Inc., 948 S.W.2d 795, 805–06 (Tex. App.—San Antonio 1997, writ denied).

1378. 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* Fifth Club, Inc. v. Ramirez, 196 S.W.3d 788, 797 (Tex. 2006).

1379. *Arias*, 831 S.W.2d at 85 n.2.

1380. *See* Bunton v. Bentley (*Bentley II*), 153 S.W.3d 50, 52–53 (Tex. 2004) (determining that an award for mental anguish was supported by legally sufficient evidence); Larson v. Cactus Util. Co., 730 S.W.2d 640, 641 (Tex. 1987) (concluding that the evidence must be factually insufficient to support the damages verdict before the court will order remittitur). Two authors have noted 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). William 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.*

1381. Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 406 (Tex. 1998); *accord Bentley*, 153 S.W.3d at 53; Rose v. Doctors Hosp., 801 S.W.2d 841, 847–48 (Tex. 1990); Pope v. Moore, 711 S.W.2d 622, 624 (Tex. 1986).

2. Zero Damages

The zero-damages rule provides that "in cases involving unliquidated damages, the jury *must* award something for every element of damage 'proved,' or else the case will be remanded for a new trial."[1382] 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.[1383] 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.[1384]

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 v. Ford Motor Company*.[1385] As a result, the rule has now been expressly rejected by the intermediate appellate courts.[1386] The court of

1382. Raul A. Gonzalez & Rob Gilbreath, *Appellate Review of a Jury's Finding of "Zero Damages,"* 54 TEX. B.J. 418, 418 (1991).

1383. *See* 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 the evidence"); Hammond v. Estate of Rimmer, 643 S.W.2d 222, 223–24 (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, 543–44 (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).

1384. Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757, 776 (Tex. 2003); Medistar v. Schmidt, 267 S.W.3d 150, 162 (Tex. App.—San Antonio 2008, pet. denied); Waltrip v. Bilbon Corp., 38 S.W.3d 873, 880 n.2 (Tex. App.—Beaumont 2001, pet. denied).

1385. *See Jackson*, 116 S.W.3d at 776–77 (O'Neill, 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) (opining that the zero-damages rule interferes with the jury's fact-finding function, and should therefore be discarded). *See generally* Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986) (discussing requirements for evidentiary review).

1386. *See* Dori v. Bondex Int'l, Inc., No. 11-04-00179-CV, 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 Court"); 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). *But cf.*

appeals should apply the *Pool* standard to the jury's finding of zero damages when there is: (1) objective, uncontroverted evidence of damages; (2) only subjective evidence; or (3) both objective and subjective evidence.[1387] 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."[1388]

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.[1389] Punitive damages are levied against a defendant "to punish the defendant for outrageous, malicious, or otherwise morally culpable conduct."[1390] The legal justification for punitive damages is similar to the justification for

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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 v. Nationwide Mut. Fire Ins. Co., 756 S.W.2d 801, 805 (Tex. App.—Dallas 1988, no writ) (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").

1387. *Davis*, 905 S.W.2d at 792–93 (Stover, J., concurring) (discussing cases which have applied the *Pool* standard).

1388. Marshall v. Superior Heat Treating Co., 826 S.W.2d 197, 200 (Tex. App.—Fort Worth 1992, no writ); *accord* Dow Chem. Co. v. Francis, 46 S.W.3d 237, 242 (Tex. 2001). 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 footnotes omitted).

1389. 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).

1390. *Moriel*, 879 S.W.2d at 16; *accord* S. Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587, 600–01 (1880); Celanese Ltd. v. Chem. Waste Mgmt., Inc., 75 S.W.3d 593, 600 (Tex. App.—Texarkana 2002, pet. denied); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (West 2008) (defining exemplary damages as "any damages awarded as a penalty or by way of punishment but not for compensatory purposes").

criminal punishment. "[L]ike criminal punishment, punitive damages require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment.[1391] Although punitive damages are [imposed to serve] the public purposes of punishment and deterrence, the proceeds become a private windfall."[1392] "In contrast, criminal fines paid to a governmental entity [are] used for [the] public['s] benefit."[1393] Thus, the duty of reviewing courts in civil 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.[1394]

Punitive damages are reviewed for legal and factual sufficiency of the evidence and for excessiveness.[1395] When reviewing an award of punitive damages, the reviewing court must consider a number of factors to determine the reasonableness of the award.[1396]

1391. *Moriel*, 879 S.W.2d at 16–17; *accord* Bunton v. Bentley (*Bentley II*), 153 S.W.3d 50, 53 (Tex. 2004); Burleson State Bank v. Plunkett, 27 S.W.3d 605, 620 (Tex. App.—Waco 2000, pet. denied).

1392. *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) (explaining that proceeds from these damages are a windfall, not a right), *rev'd on other grounds*, 168 S.W.3d 164 (Tex. 2005).

1393. *Moriel*, 879 S.W.2d at 17.

1394. *Id.*

1395. *See* Myers v. Walker, 61 S.W.3d 722, 731–32 (Tex. App.—Eastland 2001, pet. denied) (holding that the award must be carefully reviewed "to ensure that the award is supported by the evidence"); *see also* TEX. R. CIV. P. 301 (discussing legal insufficiency raised in a motion for judgment notwithstanding the verdict); TEX. R. CIV. P. 324(b)(2), (4) (stating that, to complain of factual sufficiency or excessiveness issues on appeal, these points must be raised in a motion for new trial). The United States Supreme Court has held that the standard of review of punitive damages is de novo review. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 431 (2001). It is doubtful, however, that the United States Supreme Court's decision in that case will have an impact on Texas courts' review of punitive damages awards.

1396. *Moriel*, 879 S.W.2d at 31 (requiring courts to "detail the relevant evidence in . . . opinion[s], explaining why that evidence either supports or does not support the punitive damages award in light of the *Kraus* factors"); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.013 (West 2008) (ordering any court reviewing exemplary damages to state the "reasons for upholding or disturbing the finding," and to address the evidence or lack thereof "with specificity[] as it relates to the liability for or amount of exemplary damages"); Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981) ("Factors to consider in determining whether an award of exemplary damages is reasonable include (1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability, (4) the situation and sensibilities of the parties concerned, and (5) the extent to which the conduct offends a public sense of justice and propriety.").

> [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."[1397]

The standard of review for these factors is de novo.[1398] The three factors help ensure a reasonable relationship between punitive damages and actual damages.[1399] 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."[1400] There is no exact formula to measure punitive damages by actual damages.[1401] Rather, this ratio is merely one tool to assist the courts in determining whether a punitive damage award is the product of a jury's passion rather than reason.[1402] 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

1397. Bunton v. Bentley (*Bentley II*), 153 S.W.3d 50, 53 (Tex. 2004) (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003)); *see also* Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 308–09 (Tex. 2006) (elaborating on the Texas law formulation of the test outlined in *State Farm*).

1398. *Bentley II*, 153 S.W.3d at 54.

1399. *Id.* at 53–54.

1400. Wright v. Gifford-Hill & Co., 725 S.W.2d 712, 714 (Tex. 1987); *accord Moriel*, 879 S.W.2d at 29.

1401. *See Bentley II*, 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) (noting that no set rule exists to measure punitive damages by actual damages); *see also* Foley v. Parlier, 68 S.W.3d 870, 881 (Tex. App.—Fort Worth 2002, no pet.) (declaring that courts "must make [the] determination [of punitive damages] on a case-by-case basis"); 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). *But cf. Chapa*, 212 S.W.3d at 308 (stating that an award that is four times the amount of compensatory damages might be constitutionally impermissible). The ratio of actual damages to punitive damages has been substantially reduced by the Texas Tort Reform Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (West 2008) (providing, in most cases, that exemplary damages may not exceed the greater of $200,000 or "two times the amount of economic damages; plus [] an amount equal to any noneconomic damages found by the jury," not exceeding $750,000).

1402. *See Tatum*, 702 S.W.2d at 188 (recognizing that the reasonable proportion rule will help to determine whether the jury's award was reasonable); *Risser*, 739 S.W.2d at 909 (examining the factors to consider when determining whether an award was reasonable).

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."[1403]

K. *Attorney's Fees*

1. Fees Based on Contract or Statutes Generally

"Texas law does not permit the recovery of attorney's fees unless authorized by statute or contract."[1404] For instance, attorney's fees may not be recovered in tort cases without authorization from a statute or contract between the parties.[1405] Statutes authorizing attorney's fees may involve issues of reasonablenss and necessity (suitable for a jury's factual determination), as well as equity and justice (suitable for a judge's discretion).[1406] As a result, the appeal of attorney's fees may combine the corresponding standards of review.[1407]

In reviewing the reasonableness of an award of attorney's fees (which may include a legal assistant's time under certain conditions)[1408] the reviewing court should consider:

1403. TEX. CIV. PRAC. & REM. CODE ANN. § 41.011(a)(1)–(6); *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) (emphasizing what should be considered when determining reasonableness of punitive damages). In *TXO Production Corporation v. Alliance Resources Corporation*, the West Virginia Supreme Court concluded that decisions post-*Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), "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).

1404. Gallagher Headquarters Ranch Dev., Ltd. v. City of San Antonio, 269 S.W.3d 628, 641 (Tex. App.—San Antonio 2008), *pet. abated*, 303 S.W.3d 700 (Tex. 2010); *accord* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2008); *Chapa*, 212 S.W.3d at 310.

1405. Knebel v. Capital Nat'l Bank in Austin, 518 S.W.2d 795, 803–04 (Tex. 1974); Brosseau v. Ranzau, 81 S.W.3d 381, 398 (Tex. App.—Beaumont 2002, pet. denied) ("Generally, attorney's fees are not recoverable in tort actions unless provided by statute.").

1406. Transcontinental Ins. Co. v. Crump, No. 09-0005, 2010 WL 3365339, at *17 (Tex. Aug. 27, 2010).

1407. *Id.*

1408. *See* Gill Sav. Ass'n v. Int'l Supply Co., 759 S.W.2d 697, 702 (Tex. App.—Dallas 1988, writ denied) (discussing the evidence required to award legal assistant's fees); *accord* Kimberly-Clark Corp. v. Factory Mut. Ins. Co., No. 3:05-CV-2097-B ECF, 2008 WL

> (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.[1409]

"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."[1410] "A trial court may not grant . . . an unconditional award of appellate attorney's fees"; rather, such an award must be conditioned upon the appellant's unsuccessful appeal.[1411]

1958998, at *3 (N.D. Tex. Apr. 30, 2008).

1409. Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997); Aquila Sw. Pipeline, Inc. v. Harmony Exploration, Inc., 48 S.W.3d 225, 240–41 (Tex. App.—San Antonio 2001, pet. denied); *accord* Headington Oil Co. v. White, 287 S.W.3d 204, 216 (Tex. App.—Houston [14th Dist.] 2009, no pet.); Acad. Corp. v. Interior Buildout & Turnkey Constr., Inc. 21 S.W.3d 732, 741–42 (Tex. App.—Houston [14th Dist.] 2000, no pet.). The preceding cases use the language found in Texas Disciplinary Rules of Professional Conduct Rule 1.04 in arriving at their respective holdings; however, in the federal system, a bankruptcy court for the Eastern District of Texas has held that Rule 1.04(f) has been preempted by 11 U.S.C. § 504 (2005). *See In re* Smith, 397 B.R. 810, 816 (Bankr. E.D. Tex. 2008) (explaining 11 U.S.C. § 504 "imposes a prohibition against fee-splitting or the sharing of compensation in virtually all circumstances arising in a bankruptcy case").

1410. *Aquila Sw. Pipeline*, 48 S.W.3d at 241; *accord* Phillips v. Phillips, 296 S.W.3d 656, 673 (Tex. App.—El Paso 2009, pet. denied). *See generally* O'Farrill Avila v. Gonzalez, 974 S.W.2d 237, 248–49 (Tex. App.—San Antonio 1998, pet. denied) (discussing a situation in which the judge properly used personal experience and knowledge of attorneys to determine whether the fees were excessive).

1411. Pickett v. Keene, 47 S.W.3d 67, 78 (Tex. App.—Corpus Christi 2001, pet. dism'd); *accord* Tex. Farmers Ins. Co. v. Cameron, 24 S.W.3d 386, 400–01 (Tex. App.—Dallas 2000, pet. denied).

When multiple causes of action or multiple parties are involved, the party asserting those causes must segregate 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.[1412] In *Stewart Title Guaranty Company v. Sterling*,[1413] the Texas Supreme Court explained an exception to the duty to segregate:

> A recognized exception to this duty to segregate arises when the attorney's fees rendered are in connection with claims arising out of the same transaction and are so interrelated that their "prosecution or defense entails proof or denial of essentially the same facts."[1414] Therefore, when the causes of action involved in the suit are dependent upon the same set of facts or circumstances and thus are "inter[t]wined to the point of being inseparable," the party suing for attorney's fees may recover the entire amount covering all claims.[1415]

In *Tony Gullo Motors I, L.P. v. Chapa*,[1416] the Texas Supreme Court stated that this exception "has since threatened to swallow the [general] rule [of segregation]"[1417] and proceeded to hold that:

> To the extent *Sterling* suggested that a common set of underlying facts necessarily made all claims arising therefrom 'inseparable' and all legal fees recoverable, it went too far.[1418]
>
> . . . .

1412. *See* Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 311 (Tex. 2006) ("[F]ee claimants have always been required to segregate fees between claims for which they are recoverable and claims for which they are not."); Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 73 (Tex. 1997) (expressing that a party must show that the claim allows recovery of attorney's fees and that allowable fees have been segregated); *Sterling*, 822 S.W.2d at 10–11 ("When a plaintiff seeks to recover attorney's fees in cases where there are multiple defendants, and one or more of those defendants have made settlements, the plaintiff must segregate the fees owed by the remaining defendants from those owed by the settling defendants so that the remaining defendants are not charged fees for which they are not responsible.").

1413. Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1 (Tex. 1991).

1414. *Id.* at 11 (quoting Flint & Ass'n v. Intercontinental Pipe & Steel, Inc., 739 S.W.2d 622, 624–25 (Tex. App.—Dallas 1987, writ denied)).

1415. *Id.* at 11 (quoting Gill Sav. Assn. v. Chair King, Inc., 783 S.W.2d 674, 680 (Tex. App.—Houston [14th Dist.] 1989, writ granted), *modified*, 797 S.W.2d 31 (Tex. 1990)).

1416. Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299 (Tex. 2006).

1417. *Id.* at 311.

1418. *Id.* at 313.

> [Rather,] [i]ntertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. We modify *Sterling* to that extent.[1419]

"Thus, the general duty to segregate fees applies, unless a party meets its burden of establishing that the same discrete legal services were rendered with respect to both a recoverable and unrecoverable claim."[1420]

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.[1421] Using the "lodestar method" of determining fees, the court "first determines the number of hours reasonably spent by counsel on the matter, and then multipl[ies] those hours by an hourly rate the court deems reasonable for similarly complex, non-contingent work."[1422] 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."[1423] Stated another way, the trial court may adjust the lodestar amount to consider the factors set forth in *Johnson v. Georgia Highway Express, Inc.*,[1424] which include: "(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 the acceptance of the case"; "(5) [t]he customary fee; (6) [w]hether the fee is fixed or contingent"; "(7) [t]ime limitations imposed by the client or the circumstances"; "(8) [t]he amount involved and

1419. *Id.* at 313–14; *accord* CA Partners v. Spears, 274 S.W.3d 51, 81 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); Gallagher Headquarters Ranch Dev., Ltd. v. City of San Antonio, 269 S.W.3d 628, 641 (Tex. App.—San Antonio 2008), *pet. abated*, 303 S.W.3d 700 (Tex. 2010).

1420. *Gallagher Headquarters Ranch Dev.*, 269 S.W.3d at 641.

1421. TEX. LAB. CODE ANN. § 21.259(a) (West 2006).

1422. Dillard Dep't Stores, Inc. v. Gonzales, 72 S.W.3d 398, 412 (Tex. App.—El Paso 2002, pet. denied); *see also* Gen. Motors Corp. v. Bloyed, 916 S.W.2d 949, 960 (Tex. 1996) (discussing the strengths and weaknesses of the "lodestar method").

1423. *Gonzales*, 72 S.W.3d at 412.

1424. 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).

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."[1425] The trial court's award of attorney's fees is reviewed for an abuse of discretion.[1426]

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 of friend who appears to have an interest adverse to that of the minor.[1427] 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.[1428] As a general rule, *ad litem* fees are assessed against the losing party.[1429] Generally, the same factors for determining the reasonableness of attorney's fees are used to determine the reasonableness of a guardian *ad litem* fee.[1430] An "*ad litem* may not recover fees . . . after resolution of the conflict for which [the *ad litem* has been] appointed."[1431] In applying these

1425. *Id.* at 717–19. "Texas courts consistently allow the use of a multiplier based upon the contingent nature of a fee under Texas statutes allowing recovery of attorney's fees." *Gonzales*, 72 S.W.3d at 413; *see also* Guity v. C.C.I. Enter., Co., 54 S.W.3d 526, 528–29 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (concluding that the district court may adjust the amount based on the *Johnson* factors); Borg-Warner Protective Servs. Corp. v. Flores, 955 S.W.2d 861, 870 (Tex. App.—Corpus Christi 1997, no pet.) (noting that the lodestar figure may be adjusted upward or downward based on multipliers).

1426. *Gonzales*, 72 S.W.3d at 412; Crouch v. Tenneco, Inc., 853 S.W.2d 643, 647–48 (Tex. App.—Waco 1993, writ denied).

1427. TEX. R. CIV. P. 173.2(a)(1); Land Rover U.K., Ltd. v. Hinojosa, 210 S.W.3d 604, 606–07 (Tex. 2006); Brownsville-Valley Reg'l Med. Ctr., Inc. v. Gamez, 894 S.W.2d 753, 755 (Tex. 1995).

1428. TEX. R. CIV. P. 173.6(c); *Hinojosa*, 210 S.W.3d at 606–07; *see* Roberts v. Williamson, 111 S.W.3d 113, 124 (Tex. 2003) (explaining how a fee may be taxed as costs under Rules 131 and 141).

1429. *See Roberts*, 111 S.W.3d at 124 (citing TEX. R. CIV. P. 131, 141) (asserting that there must be good cause on the record for splitting the guardian ad litem fees among the parties); Dover Elevator Co. v. Servellon, 812 S.W.2d 366, 367 (Tex. App.—Dallas 1991) (citing TEX. R. CIV. P. 141, 173) (assessing whether good cause exists for imposing guardian *ad litem* fees), *rev'd in part*, 876 S.W.2d 166 (Tex. 1993).

1430. *Hinojosa*, 210 S.W.3d at 607; Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 794 (Tex. 1987).

1431. *Gamez*, 894 S.W.2d at 757 (emphasis added); *see also Hinojosa*, 210 S.W.3d at 607 (stating that "a guardian *ad litem* is required to participate in the case only to the

considerations, the award of guardian ad litem attorney fees is a matter "within the sound discretion of the trial court."[1432] 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.[1433] "When an ad litem's fee is unreasonable or excessive, [the appellate court] may fix the proper amount of the fee."[1434]

M. *Court Costs*

Under Rule 131,[1435] the successful party in a suit is entitled to recover from an adversary all costs incurred in the suit, except where otherwise provided.[1436] Taxing costs against a successful party generally contravenes Rule 131.[1437] "A successful party is 'one who obtains a judgment of a competent court vindicating a claim of right, civil in nature.'"[1438] The purpose of Rule 131 "is to ensure that the prevailing party is freed of the burden of court costs and that the losing party pays those costs."[1439] Pursuant to Rule 141, the trial court may assess the costs, other than as

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extent necessary to protect the minor's interest" and that "[i]f a guardian *ad litem* performs work beyond the scope of this role, such work is non-compensable" (emphasis added)).

1432. *Gamez*, 894 S.W.2d at 756; *accord Simon*, 739 S.W.2d at 794; Jocson v. Crabb, 196 S.W.3d 302, 305 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

1433. *Roberts*, 111 S.W.3d at 124 (citing TEX. R. CIV. P. 141).

1434. 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 aside the *ad litem* fees on appeal because the amount awarded was excessive).

1435. TEX. R. CIV. P. 131.

1436. *Id.*; *Roberts*, 111 S.W.3d at 124; Furr's Supermarkets, Inc. v. Bethune, 53 S.W.3d 375, 376 (Tex. 2001); Martinez v. Pierce, 759 S.W.2d 114, 114 (Tex. 1988). *But see Bethune*, 53 S.W.3d at 381 (Baker, J., dissenting, joined by Hankinson & O'Neill, JJ.) (suggesting that the majority implicitly overrules *Rogers v. Walmart Stores, Inc.*, 686 S.W.2d 599 (Tex. 1985)). The Texas Civil Practice and Remedies Code specifies items recoverable as costs. TEX. CIV. PRAC. & REM. CODE ANN. § 31.007(b) (West 2009).

1437. *Bethune*, 53 S.W.3d at 376; *Martinez*, 759 S.W.2d at 114; *accord* Sparks v. Booth, 232 S.W.3d 853, 872 (Tex. App.—Dallas 2007, no pet.); *see also* Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 515 (Tex. App.—Eastland 2008, pet. denied) ("Trial courts are generally required to tax costs against the unsuccessful party.").

1438. 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* also 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).

1439. *Bethune*, 53 S.W.3d at 378.

provided by law or the rules, for good cause stated on the record.[1440] 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] decision" to assess part or all of the costs against the prevailing party.[1441] "'Good cause' is a very elusive concept . . . determined on a case-by-case basis."[1442] 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."[1443] However, potential harm caused to a losing party, or an inability to pay court costs, does not constitute good cause as a matter of law.[1444] The trial court's general notion of fairness, without more, does not constitute good cause.[1445] 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.[1446] The trial court's determination of good cause and its assessment of court costs are reviewed for an abuse of discretion.[1447]

1440. TEX. R. CIV. P. 141; *Roberts*, 111 S.W.3d at 124; *see 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); *Sparks*, 232 S.W.3d at 872 (recognizing that good cause may be stated in a written order or judgment, as well as in an oral hearing).

1441. *Rogers*, 686 S.W.2d at 601; *Williamson*, 52 S.W.3d at 356; *see also Rankin*, 266 S.W.3d at 515 ("To determine if the trial court properly exercised its discretion, we have been instructed to scrutinize the record to determine if it supports the trial court's decision to tax some or all costs against the prevailing party.").

1442. *Rogers*, 686 S.W.2d at 601 (holding that the unnecessary lengthening of trial is sufficient as good cause to assess costs against a successful defendant); *accord Sparks*, 232 S.W.3d at 872; *Williamson*, 52 S.W.3d at 356; *see also* 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).

1443. *Bethune*, 53 S.W.3d at 377.

1444. *Rankin*, 266 S.W.3d at 515; Price Constr., Inc. v. Castillo, 147 S.W.3d 431, 442 (Tex. App.—San Antonio 2004, pet. denied).

1445. *Roberts*, 111 S.W.3d at 124; *Rankin*, 266 S.W.3d at 515.

1446. *See Sparks*, 232 S.W.3d at 872 ("A trial court's failure to state on the record a finding of good cause to vary from [R]ule 131 constitutes an abuse of discretion."); Allen v. Crabtree, 936 S.W.2d 6, 9 (Tex. App.—Texarkana 1996, no writ) (declaring that appeals courts generally find it an abuse of discretion for trial courts to assess costs inconsistent with the general rule without stating good cause on the record).

1447. *See Rogers*, 686 S.W.2d at 601 (stating that a judge's determination of costs should not be disturbed on appeal unless abuse of discretion is shown on the record); *Sparks*, 232 S.W.3d at 872 (indicating the standard of review for a trial court's assessment

N. *Exercise of Plenary Power*

A trial court has both the plenary power and the jurisdiction "to reconsider, not only its judgment but also its interlocutory orders until thirty days after the date a final judgment is signed or, if a motion for new trial or its equivalent is filed, until thirty days after the motion is overruled by signed, written order or operation of law, whichever first occurs."[1448] Additionally, a timely filed post-judgment motion that requests a substantive change in the existing judgment constitutes a motion to modify under Rule 329b(g),[1449] thereby extending the trial court's plenary jurisdiction and the appellate timetable.[1450] During this period, plenary power is "'[f]ull, entire, complete, absolute, perfect, [and] unqualified.'"[1451] 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.[1452] "A void judgment . . . 'is good

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of costs is an abuse of discretion).

1448. Orion Enters., Inc. v. Pope, 927 S.W.2d 654, 658 (Tex. App.—San Antonio 1996, orig. proceeding); *see also* TEX. R. CIV. P. 329b(e) (establishing trial courts' plenary power to grant a new trial or change its judgment until thirty days after a motion for new trial is overruled by written, signed order, or operation of law); *In re* Burlington Coat Factory Warehouse of McAllen, Inc., 167 S.W.3d 827, 831 (Tex. 2005) (orig. proceeding) ("Because the default judgment was interlocutory, the trial court retained jurisdiction to set the judgment aside and order a new trial."); Lane Bank Equip. Co. v. Smith S. Equip., Inc., 10 S.W.3d 308, 310 (Tex. 2000) (citing TEX. R. CIV. P. 329b(d)) (stating that a trial court possesses jurisdiction and plenary power to change its ruling for thirty days after a final judgment is signed); Fruehauf Corp. v. Carrillo, 848 S.W.2d 83, 84 (Tex. 1993) (discussing how Rule 329b(d) allows a trial court thirty days to vacate, modify, correct, or reform its judgment).

1449. TEX. R. CIV. P. 329b(g).

1450. *See* Wilkins v. Methodist Health Care Sys., 160 S.W.3d 559, 562–63 (Tex. 2005) (noting that a motion for new trial extended the appellate timetable for reviewing the original judgment, but that such motion did not interfere with court's power to make subsequent judgments); *Lane Bank Equip. Co.*, 10 S.W.3d at 313–14 (holding that a post-judgment 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).

1451. *Pope*, 927 S.W.2d at 658 (quoting Mesa Agro v. R.C. Dove & Sons, 584 S.W.2d 506, 508 (Tex. Civ. 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).

1452. *See* Graham Nat'l Bank v. Fifth Court of Appeals, 747 S.W.2d 370, 370 (Tex. 1987) (orig. proceeding) (holding a court order void after the order was issued beyond expiration of the court's plenary power); Times Herald Printing Co. v. Jones, 730 S.W.2d 648, 649 (Tex. 1987) (concluding the trial court had no jurisdiction or plenary power to consider a motion to unseal after judgment became final).

nowhere and bad everywhere.'"[1453] Whether a trial court properly exercised its plenary power is a question of law reviewed de novo by the reviewing court.[1454]

O. *Supersedeas Bond*

Generally, if a party loses at the trial court, a writ of supersedeas will stay execution of the judgment pending appeal[1455] and guarantee the appellee the benefits of the judgment if affirmed.[1456] To obtain a writ of supersedeas, a party generally files with the clerk a "good and sufficient" supersedeas bond or deposit.[1457] Importantly, the amount of actual damages that must be superseded may be reduced under the Texas Civil Practice and Remedies Code[1458] and implies that punitive damages no longer must be suspended.[1459] In cases where the judgment is for

1453. 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)).

1454. *See* St. Joseph Hosp. v. Wolff, 999 S.W.2d 579, 586 (Tex. App.—Austin 1999) (stating that legal conclusions 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 (discussing how to determine if the exercise of plenary power was proper).

1455. *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." (citing TEX. R. APP. P. 24.1)).

1456. *See* Edlund v. Bounds, 842 S.W.2d 719, 732 (Tex. App.—Dallas 1992, writ denied) (recognizing the intent of such bond is to fulfill judgment for appellee if trial court ruling is affirmed); Cooper v. Bowser, 583 S.W.2d 805, 807 (Tex. Civ. App.—San Antonio 1979, no writ) (holding supersedeas bond amount must be adequate to secure appellee's collection of "judgment against appellant and his sureties" if the trial court judgment is affirmed).

1457. TEX. R. APP. P. 24.1(a)(2). A few judgments are stayed without the requirement of posting a supersedeas bond or deposit. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 6.001(b) (West 2002) (listing as some of those exempt: the Veterans' Administration, and the Federal National Mortgage Association); *id.* § 6.002(a) (exempting incorporated cities and towns). Exempt entities supersede the judgment by filing a notice of appeal. *See* Ammex Warehouse Co. v. Archer, 381 S.W.2d 478, 481–82 (Tex. 1964) (providing exemption from paying bond after notice of appeal was filed by Texas Liquor Control Board); Weber v. Walker, 591 S.W.2d 559, 562 (Tex. Civ. App.—Dallas 1979, no writ) (explaining that when an exemption exists, "judgment is superseded as a matter of law upon the filing of notice of appeal").

1458. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b) (West 2008) (requiring the amount secured not to exceed one-half of the judgment debtor's worth or $25 million, whichever is less); *id.* § 52.006(c) (allowing a trial court to reduce the security amount if the debtor would otherwise suffer economic harm).

1459. *See id.* § 52.006(a) (mandating a secured amount in the sum of compensatory damages, interest, and costs awarded, but making no mention of punitive damages).

something other than money, property, or foreclosure, the decision of whether and under what circumstances to permit supersedeas lies within the discretion of the trial court.[1460]

The numerous rules for posting an appropriate supersedeas bond depend upon the type of judgment and are beyond the scope of this Article.[1461] 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.[1462]

Texas Rule of Appellate Procedure 29.2 governs the suspension of interlocutory orders pending review by the appellate courts.[1463]

1460. *See* TEX. R. APP. P. 24.2(a)(3) (ordering that the trial judge determine whether and what security must be posted by the judgment debtor when the judgment is not for money or property); Isern v. Ninth Court of Appeals, 925 S.W.2d 604, 606 (Tex. 1996) (orig. proceeding) (holding that the trial court had discretion "to set alternate security in the present case"). Texas Rule of Appellate Procedure 24.2 sets forth the applicable rules for the following: superseding a judgment involving money, land, or 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). To the extent chapter 52 of the Texas Civil Practice and Remedies Code conflicts with the Texas Rules of Appellate Procedure, chapter 52 controls. TEX. CIV. PRAC. & REM. CODE ANN. § 52.005(a). Under Texas Rule of Appellate Procedure 24.2(a)(3), an appellant may supersede execution on a judgment 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 upon 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) (orig. proceeding). The trial court's decision is reviewed under an abuse of discretion standard. *See id.* at 87 ("The sole issue before this court is whether the trial court abused its discretion in refusing to allow [an electric company] to supersede the injunctive portion of its judgment."); *see also* LMC Complete Auto, Inc. v. Burke, 229 S.W.3d 469, 483 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (stating that the amount of security set by the trial court is reviewed under an abuse of discretion standard).

1461. *See generally* 5 ROY W. MCDONALD & ELAINE A. CARLSON, TEXAS CIVIL PRACTICE ch. 30 (2d ed. 1999 & Supp. 2009) (discussing rules for posting supersedeas bonds).

1462. *See* Man-Gas Transmission Co. v. Osborne Oil Co., 693 S.W.2d 576, 577 (Tex. App.—San Antonio 1985, no writ) (asserting that a "trial judge's discretion extends only to the amount of the supersedeas bond and not to whether the bond should be granted"); *see also* Solar Soccer Club v. Prince of Peace Lutheran Church of Carrollton, 234 S.W.3d 814, 831 (Tex. App.—Dallas 2007, pet. denied) ("A trial judge is given broad discretion in determining the amount and type of security required.").

1463. TEX. R. APP. P. 29.2.

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.[1464] Denial of supersedeas may be reviewed by an appellate court for abuse of discretion.[1465] 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.[1466] However, "if the appellant's rights may be adequately protected by supersedeas," then the appellate court may not suspend the trial court's order.[1467]

If the trial court improperly sets the amount of the bond, the clerk improperly approves it, or if it is believed that an initially sufficient bond has become insufficient, the remedy is by motion in the court of appeals once appellate jurisdiction has attached.[1468] 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.[1469] If the appellate court finds that the bond is insufficient upon review of the bond, the court "may" require an additional bond;[1470] likewise, upon a

1464. *Id.*; *see also* TEX. R. APP. P. 24.2 (explaining the amount of security needed for various types of judgments).

1465. TEX. R. APP. P. 29.2.

1466. TEX. R. APP. P. 29.3.

1467. *Id.*

1468. *See* TEX. R. APP. P. 24.4 (listing reasons an appellate court may review securities after a proper motion has been made); TransAmerican Natural Gas Corp. v. Finkelstein, 911 S.W.2d 153, 155 (Tex. App.—San Antonio 1995, no writ) (concluding that the appellate court is the appropriate court to determine the sufficiency of appellant's bond on motion by appellee); Culbertson v. Brodsky, 775 S.W.2d 451, 455 (Tex. App.—Fort Worth 1989, writ dism'd w.o.j.) (determining that the trial court ordered an excessive amount of bond); Bank of E. Tex. v. Jones, 758 S.W.2d 293, 294 (Tex. App.—Tyler 1988, orig. proceeding) (holding that upon motion by appellant, the appellate court had jurisdiction to determine the sufficiency of the bond).

1469. *See* TEX. R. APP. P. 24.4(a)(1) (stating that an appellate court may review the amount of a bond, but "must not modify the amount" if the "judgment is for money"). 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 in the absence of an abuse of discretion, mandamus will be refused).

1470. *See* TEX. R. APP. P. 24.4(d) ("The appellate court may require that the amount of a bond, deposit, or other security be increased or decreased, and that other bond, deposit, or security be provided and approved by the trial court clerk.").

finding that the bond is excessive, the court "may" reduce the amount of the original bond.[1471]

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.[1472] Any changes ordered by the trial court, however, must be made known to the court of appeals.[1473] The review of the security, as well as any changes to the security, also remain with the appellate court.[1474] Thus, in carrying out the review, "the appellate court may issue any temporary orders necessary" or remand the matter to the trial court for evidentiary determinations.[1475]

P. *Turnover Orders*

Section 31.002 of the Texas Civil Practice and Remedies Code,[1476] 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]

1471. *See id.* (stating that an appellate court has authority to decrease a security amount); McDill Columbus Corp. v. Univ. Woods Apartments, Inc., 7 S.W.3d 923, 925 (Tex. App.—Texarkana 2000, no pet.) (adhering to the supreme court's reasoning that under some circumstances it is appropriate to reduce the bond to protect both parties).

1472. *See* TEX. R. APP. P. 24.3(a) (authorizing continuing jurisdiction of a trial court to decide sufficiency of sureties and to modify a security upon a change of circumstances); Gullo-Haas Toyota, Inc. v. Davidson, Eagleson & Co., 832 S.W.2d 418, 419 (Tex. App.—Houston [1st Dist.] 1992, no writ) (stating that despite the loss of plenary power the trial court has continuing jurisdiction to order or modify a security and continue suspension of the judgment pending appeal).

1473. *See* TEX. R. APP. P. 24.3(b) (mandating that the judgment debtor notify the appellate court of any modifications of the security made by the trial court).

1474. *See* TEX. R. APP. P. 24.4(a), (d) (implying that once the court of appeals gains jurisdiction, the ability of the trial court to modify a security does not affect appellate court jurisdiction over the case); *Gullo-Haas Toyota*, 832 S.W.2d at 419 (finding that an appellate court has jurisdiction to review a trial court's orders or modifications of securities upon motion by a party).

1475. 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) (vacating trial court's order and remanding the issue to the trial court for entry of "findings of fact and for the taking of evidence as to the estimated duration of the appeal and for a 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 an evidentiary hearing on the sufficiency of supersedeas bond).

1476. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a) (West 2008).

legal process."[1477] 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 rights."[1478] 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."[1479] The trial court's decision to grant or deny a turnover order, a final appealable judgment,[1480] is reviewed under an abuse of discretion standard.[1481]

VII. RULINGS ON BILL OF REVIEW

A bill of review is a procedural vehicle closely related to the other weapons in an appellate lawyer's arsenal. The bill of review is also an interesting application of the abuse of discretion standard of review.

Texas Rule of Civil Procedure 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."[1482] A bill of review "is the proper method to attack a judgment when the trial court had jurisdiction to render judgment on the merits."[1483] Unlike the restricted appeal, which is authorized by the Texas Rules of Appellate Procedure, the bill of review 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."[1484] The purpose of the bill of review proceeding is to

1477. Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 224 (Tex. 1991); *accord In re* C.H.C., 290 S.W.3d 929, 931 (Tex. App.—Dallas 2009, no pet.); Burns v. Miller, Hiersche, Martens & Hayward, P.C., 948 S.W.2d 317, 321 (Tex. App.—Dallas 1997, writ denied) (discussing whether appellant's property is exempt from turnover order).

1478. *Burns*, 948 S.W.2d at 321 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a)).

1479. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(b)).

1480. *See In re* Marriage of Long, 946 S.W.2d 97, 98 (Tex. App.—Texarkana 1997, no writ) (announcing the nature of a turnover order).

1481. *See In re* Smith, 192 S.W.3d 564, 570 (Tex. 2006) (orig. proceeding) (reviewing trial court's order under the abuse of discretion standard as mandated by *Buller*).

1482. TEX. R. CIV. P. 329b(f).

1483. Holloway v. Starnes, 840 S.W.2d 14, 18 (Tex. App.—Dallas 1992, writ denied).

1484. Caldwell v. Barnes, 154 S.W.2d 93, 96 (Tex. 2004); *accord* King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 751 (Tex. 2003).

launch a direct attack, as opposed to a collateral attack,[1485] on the former judgment, and to "secure the entry of a correct judgment."[1486] 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 rather than only those facts apparent "on the face of the record," and "it avoids the need to follow both avenues of appeal seriatim."[1487]

Using a bill of review to attack a judgment is a difficult task.[1488] Generally, a bill of review is available "only if a party has exercised due diligence in pursuing all adequate legal remedies against a former judgment and, through no fault of its own, has been prevented from making a meritorious claim or defense by the fraud, accident, or wrongful act of the opposing party."[1489] It is an independent proceeding that is only used "to prevent manifest injustice,"[1490] which permits a trial court to "set aside a judgment that is no longer appealable or subject to a motion for new trial,"[1491] within the regular time frames.

The rules fail to define what "sufficient cause" means in Rule 329b(f), but the courts have established several requirements that must be satisfied before a complainant is entitled to relief by bill of review.[1492] "Although it is an equitable proceeding, the [mere] fact that an injustice [may have] occurred is not sufficient

1485. *See* Cook v. Cameron, 733 S.W.2d 137, 140 (Tex. 1987) (explaining that void judgments, such as those from courts without jurisdiction, are subject to collateral attack, whereas non-jurisdictional errors must be attacked within statutory time limits). "Collateral attacks on final judgments are generally disallowed 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).

1486. *See* Austin Indep. Sch. Dist. v. Sierra Club, 495 S.W.2d 878, 881 (Tex. 1973) (distinguishing between a direct attack and a collateral attack).

1487. *See* Gold v. Gold, 145 S.W.3d 212, 214 (Tex. 2004) (analyzing the purposes and benefits of the bill of review).

1488. W. Wendell Hall, *Appeal, Writ of Error or Bill of Review . . . Which Should I Choose?*, 1 APP. ADVOC. 3, 4 (1988).

1489. Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 927 (Tex. 1999); *accord Chapman*, 118 S.W.3d at 751; Petro-Chem. Transp., Inc. v. Carroll, 514 S.W.2d 240, 243 (Tex. 1974); *see also Gold*, 145 S.W.3d at 214 (describing "legal remedies" as a motion to reinstate, motion for new trial, or direct appeal).

1490. French v. Brown, 424 S.W.2d 893, 895 (Tex. 1967); *accord Herrera*, 11 S.W.3d at 927–28; Caldwell v. Barnes, 975 S.W.2d 535, 537 (Tex. 1998).

1491. Transworld Fin. Servs. Corp. v. Briscoe, 722 S.W.2d 407, 407 (Tex. 1987); *accord* Travelers Ins. Co. v. Joachim, 315 S.W.3d 860, 866 (Tex. 2010).

1492. *E.g.*, Baker v. Goldsmith, 582 S.W.2d 404, 406–07 (Tex. 1979) (identifying the requirements of "sufficient cause" to allow for a bill of review).

[grounds] to justify relief by bill of review."[1493] "If legal remedies were available but ignored, relief by equitable bill of review is unavailable."[1494] 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.[1495] Accordingly, if a party permits a judgment to become final by neglecting to file a motion for new trial or appeal, then the party "is precluded from proceeding on petition for bill of review" unless the complainant can show a good excuse for failure to exhaust adequate legal remedies.[1496] 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.[1497] The burden on the complainant is harsh, but the fundamental policy that finality must be accorded to judgments makes the grounds upon which a bill of review will be granted narrow and restricted.[1498]

A bill of review proceeding contains a series of steps. The equitable powers of the court are invoked when a bill of review petitioner files a petition ("a separate proceeding from the underlying suit").[1499] The petition must be brought in the same

1493. *Herrera*, 11 S.W.3d at 927; *accord Chapman*, 118 S.W.3d at 751; Crouch v. McGaw, 134 Tex. 633, 138 S.W.2d 94, 96 (1940) (orig. proceeding).

1494. *Herrera*, 11 S.W.3d at 927; *accord* Tice v. City of Pasadena, 767 S.W.2d 700, 702 (Tex. 1989); Cannon v. ICO Tubular Servs., Inc., 905 S.W.2d 380, 384 (Tex. App.—Houston [1st Dist.] 1995, no writ). A restricted appeal is not an "adequate legal remedy" that a bill of review plaintiff must pursue. *Gold*, 145 S.W.3d at 214. Failure to file a restricted appeal is not a bar to a bill of review unless it is relevant to fault or negligence. *Id.*

1495. *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). 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. *See Gold*, 145 S.W.3d at 214 (explaining that failure to file a restricted appeal is not a bar to a bill of review proceeding unless relevant to fault or negligence); Law v. Law, 792 S.W.2d 150, 153 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (stressing that the remedy of a bill of review is only available after a final judgment).

1496. Steward v. Steward, 734 S.W.2d 432, 435 (Tex. App.—Fort Worth 1987, no writ); *accord* French v. Brown, 424 S.W.2d 893, 895 (Tex. 1967).

1497. *Herrera*, 11 S.W.3d at 928.

1498. *Chapman*, 118 S.W.3d at 751; Nguyen v. Intertex, Inc., 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

1499. Ross v. Nat'l Ctr. for the Emp't of the Disabled, 197 S.W.3d 795, 798 (Tex. 2006).

court that rendered the prior judgment.[1500] To be entitled to relief on a bill of review, the bill of review plaintiff must plead and prove (1) a meritorious defense; (2) that he or she was prevented from making "due to [the] fraud, accident, or wrongful act of" his or her opponent; and (3) that the failure to appear was "unmixed with any fault or negligence" of his or her own.[1501] "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."[1502] 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.[1503] 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."[1504] A trial of the issues is required if a prima facie meritorious defense has been shown.[1505] "However, if the trial court determines that a prima facie defense [has] not [been] made out, it may dismiss the case."[1506] The petitioner "must open and assume the burden of proof on this issue."[1507]

At 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."[1508] "In relation to attacks on final judgments, fraud [may be] classified as either extrinsic or intrinsic";[1509] "only extrinsic fraud will support

1500. Pursley v. Ussery, 937 S.W.2d 566, 568 (Tex. App.—San Antonio 1996, no writ).

1501. *Ross*, 197 S.W.3d at 797.

1502. State v. 1985 Chevrolet Pickup Truck, 778 S.W.2d 463, 464 (Tex. 1989). 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 offered." Baker v. Goldsmith, 582 S.W.2d 404, 408–09 (Tex. 1979).

1503. *Baker*, 582 S.W.2d at 408–09.

1504. Beck v. Beck, 771 S.W.2d 141, 142 (Tex. 1989).

1505. *Id.*

1506. *Id.*

1507. *Baker*, 582 S.W.2d at 409; *see also Beck*, 771 S.W.2d at 142 (noting that the relevant inquiry is whether petitioner presented evidence of a meritorious defense).

1508. *Baker*, 582 S.W.2d at 409.

1509. Montgomery v. Kennedy, 669 S.W.2d 309, 312 (Tex. 1984); *accord* King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 752 (Tex. 2003); *see also* Browning v. Prostok, 165

[relief by] bill of review."[1510] "Extrinsic fraud . . . denies a losing party the opportunity to fully litigate at trial all the rights or defenses that could have been asserted."[1511] Generally, the fraud involves wrongful conduct "outside of the adversarial proceedings[,] . . . collateral to the matter tried[,] and" something not "actually or potentially in issue."[1512] "[A]llegations of fraud or negligence on the part of a party's attorney[s] [will not] support a bill of review."[1513] By contrast, intrinsic fraud "relates to the merits of the issues" presented at trial that were, or should have been, determined in the former suit,[1514] such as "fraudulent instruments, perjured testimony, or any matter which was actually presented to and considered by the trial court in rendering judgment."[1515]

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."[1516] A meritorious defense is not required if the service of the petition was invalid,[1517] 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.[1518] "[S]uch a requirement, in the

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S.W.3d 336, 347–48 (Tex. 2005) (setting out reasons for distinguishing between intrinsic and extrinsic fraud).

1510. Tice v. City of Pasadena, 767 S.W.2d 700, 702 (Tex. 1989) (orig. proceeding); *accord 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 was not at issue in the trial).

1511. *Browning*, 165 S.W.3d at 347; *accord Chapman*, 118 S.W.3d at 752.

1512. *Browning*, 165 S.W.3d at 347; Alexander v. Hagedorn, 148 Tex. 545, 226 S.W.2d 996, 1002 (1950).

1513. *Chapman*, 118 S.W.3d at 752.

1514. *Browning*, 165 S.W.3d at 347–48; *accord Chapman*, 118 S.W.3d at 752.

1515. *Browning*, 165 S.W.3d at 348; *accord Chapman*, 118 S.W.3d at 752.

1516. Caldwell v. Barnes, 154 S.W.3d 93, 97–98 (Tex. 2004); Caldwell v. Barnes, 975 S.W.2d 535, 537 (Tex. 1998).

1517. *Caldwell*, 154 S.W.3d at 96. "[T]he testimony of a bill of review plaintiff alone, without corroborating evidence, [will not] overcome the presumption that the plaintiff was served." *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." *Id.*

1518. *Id.* at 96; *Caldwell*, 975 S.W.2d at 537; Lopez v. Lopez, 757 S.W.2d 721, 723 (Tex. 1988); Bronze & Beautiful, Inc. v. Mahone, 750 S.W.2d 28, 30 (Tex. App.—

absence of notice, violates [the] [D]ue [P]rocess" clause of the Fourteenth Amendment to the United States Constitution.[1519]

When the trial court grants a bill of review and sets aside a judgment in a prior case, the subsequent trial on the merits of the prior case occurs in the same proceeding as the trial on the bill of review.[1520] And if the bill of review defendant (the plaintiff in the original proceeding) proves his original case, the trial court may "substitute a new judgment which properly adjudicates the entire controversy"[1521] that is reviewable according to those standards that would normally apply after a trial.

When reviewing the grant or denial of a bill of review, a court of appeals must evaluate its jurisdiction over the appeal with respect to the bill of review itself, rather than the underlying suit.[1522] The denial of a bill of review is reviewed for abuse of discretion.[1523] The grant of "[a] bill of review [that] sets aside a prior judgment but does not dispose of the case on the merits is interlocutory and not appealable."[1524] But there is a split in authority as to whether an interlocutory grant of a bill of review itself is reviewable for abuse of discretion by mandamus[1525] or whether the proper remedy is "appeal from the entire reinstated cause, when that judgment becomes appealable."[1526] "In reviewing the grant or

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Texarkana 1988, no writ).

1519. *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*).

1520. *See* State v. 1985 Chevrolet Pickup Truck, 778 S.W.2d 463, 465 (Tex. 1989) (affirming that a trial on a bill of review necessarily includes a determination of the original cause of action).

1521. *In re* J.B.A., 127 S.W.3d 850, 851 (Tex. App.—Fort Worth 2004, no pet.).

1522. *See In re* L.N.M., 182 S.W.3d 470, 474 (Tex. App.—Dallas 2006, no pet.) (holding that appellate court jurisdiction with respect to appeal of denial of bill of review seeking to set aside termination order is to be determined under general rules of appellate procedure).

1523. Nguyen v. Intertex, Inc., 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

1524. Jordan v. Jordan, 907 S.W.2d 471, 472 (Tex. 1995).

1525. *See In re* Nat'l Unity Ins. Co., 963 S.W.2d 876, 877 (Tex. App.—San Antonio 1998, orig. proceeding) (finding that "[a]n erroneously granted bill of review is effectively a void order granting a new trial and is an abuse of discretion that affords no adequate remedy at law," and therefore reviewable by mandamus); Schnitzius v. Koons, 813 S.W.2d 213, 218 (Tex. App.—Dallas 1991, orig. proceeding) (asserting that mandamus is available if a trial court improperly grants a petition for bill of review).

1526. Tex. Mexican Ry. Co. v. Hunter, 726 S.W.2d 616, 618 (Tex. App.—Corpus

denial of a bill of review, every presumption is indulged in favor of the court's ruling, which will not be disturbed unless it is affirmatively shown that there was an abuse of judicial discretion."[1527]

VIII. APPELLATE RULINGS AND CONSIDERATIONS

The proper application of any given standard of review is impacted by a number of issues related to the procedural posture of the case. An incomplete record, for example, may severely limit the scope of review and hence the types of errors that might be challenged. The following section outlines some of these considerations that may impact the advocate's briefing and consideration of applicable standards.

A. *Presumptions from an Incomplete Record*

In the absence of a clerk's record, there can be no appeal.[1528] 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.[1529] 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.[1530] This precludes the reviewing court from finding reversible error[1531] because "[a] reviewing court must examine the entire record . . . to determine whether an error was reasonably calculated to cause[,] and probably did cause[,] the

Christi 1987, orig. proceeding); *see In re* Moreno, 4 S.W.3d 278, 280–81 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding) (noting that one court of appeals "has held that an interlocutory order granting a bill of review may not be reviewed by mandamus, but by appeal of the eventual final judgment in the underlying case").

1527. *Nguyen*, 93 S.W.3d at 293; *accord* Ramsey v. Davis, 261 S.W.3d 811, 815 (Tex. App.—Dallas 2008, pet. denied).

1528. *See* W. Credit Co. v. Olshan Enter., Inc., 714 S.W.2d 137, 138 (Tex. App.—Houston [1st Dist.] 1986, no writ) (dismissing an appeal for failing to file a transcript or what is now referred to as the clerk's record).

1529. Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 795 (Tex. 1987); Murray v. Devco, Ltd., 731 S.W.2d 555, 557 (Tex. 1987).

1530. Enter. Leasing Co. of Houston v. Barrios, 156 S.W.3d 547, 549–50 (Tex. 2004); Guthrie v. Nat'l Homes Corp., 394 S.W.2d 494, 495 (Tex. 1965).

1531. *See* TEX. R. APP. P. 44.1 (stating that reversible error is precluded unless the court of appeals "concludes that the error complained of: (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").

rendition of an improper judgment."[1532] 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.[1533]

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.[1534] The reviewing court cannot review the legal or factual sufficiency of the evidence in the absence of a complete record.[1535] When the appellant, through no fault of his own, is unable to obtain a reporter's record, the appellate court may reverse the judgment.[1536]

There is an exception to the general rule requiring a complete reporter's record on appeal.[1537] 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 issues or points of error to be relied upon on appeal.[1538] When an appellant complies with this rule, including setting forth the statement of issues to be presented on appeal,[1539] a presumption on appeal exists that nothing omitted from the record is relevant to any of the specified

1532. Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990).

1533. *Id.*

1534. Protechnics Int'l, Inc. v. Tru-Tag Sys., Inc., 843 S.W.2d 734, 735 (Tex. App.—Houston [14th Dist.] 1992, no writ); Collins v. Williamson Printing Corp., 746 S.W.2d 489, 491 (Tex. App.—Dallas 1988, no writ); *see also* Bexar Cnty. 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).

1535. Englander Co. v. Kennedy, 428 S.W.2d 806, 807 (Tex. 1968); Andrews v. Sullivan, 76 S.W.3d 702, 705 (Tex. App.—Corpus Christi 2002, no pet.).

1536. *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" or reporter's record).

1537. *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).

1538. *Id.*

1539. TEX. R. APP. P. 34.6(c)(1); Furr's Supermarkets, Inc. v. Bethune, 53 S.W.3d 375, 377 (Tex. 2001); Gardner v. Baker & Botts, 6 S.W.3d 295, 296 n.1 (Tex. App—Houston [1st Dist.] 1999, pet. denied) (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, "contains identical language" regarding requests for a partial reporter's record); *see also Gardner*, 6 S.W.3d at 297 (requiring a statement of the limited points of error to be addressed on appeal).

points or to the disposition of the case on appeal.[1540] 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.[1541]

B. *Agreed Factual Statement*

A case may be submitted to the trial court upon an agreed stipulation of facts.[1542] This procedure is similar to a special verdict and constitutes a request for judgment in accordance with applicable law.[1543] "[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."[1544] Therefore, the sole issue on appeal is whether "the trial court correctly appl[ied] the law to the admitted facts."[1545]

C. *Restricted Appeals*

Under Texas Rule of Appellate Procedure 30:

> 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), may file a notice of appeal within the time permitted by Rule 26.1(c).[1546]

The notice of appeal must be filed within six months after the judgment or order is signed.[1547] A restricted appeal (formerly an appeal by writ of error)[1548] "is not an equitable proceeding[,] such

1540. *Bethune*, 53 S.W.3d at 377; Producer's Constr. Co. v. Muegge, 669 S.W.2d 717, 718 (Tex. 1984).

1541. Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990); 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).

1542. TEX. R. CIV. P. 263.

1543. Comm'n for Lawyer Discipline v. Sherman, 945 S.W.2d 227, 228 (Tex. App.—Houston [1st Dist.] 1997, no writ); City of Galveston v. Giles, 902 S.W.2d 167, 170 (Tex. App.—Houston [1st Dist.] 1995, no writ).

1544. *Sherman*, 945 S.W.2d at 228.

1545. *Id.*; Port Arthur Indep. Sch. Dist. v. Port Arthur Teachers Ass'n, 990 S.W.2d 955, 957 (Tex. App.—Beaumont 1999, pet. denied).

1546. TEX. R. APP. P. 30.

1547. TEX. R. APP. P. 26.1(c).

1548. The cases interpreting appeals by writ of error apply to restricted appeals. *See*

as [a] bill of review."[1549] It is simply another method of appeal,[1550] and it "is filed directly in an appellate court."[1551]

To bring a restricted appeal, a party must show that:

> (1) [I]t filed notice of the restricted appeal within six months after the judgment was signed; (2) it was a party to the underlying lawsuit; (3) it did not participate in the hearing that resulted in the judgment complained of and did not timely file any postjudgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent on the face of the record.[1552]

"The six-month time limit is mandatory and jurisdictional."[1553] 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.[1554] "[T]he question is whether the appellant has participated in 'the decision-making event'" resulting in the complained of judgment.[1555] "The policy behind the nonparticipation requirement" is to preclude a restricted appeal by an appellant who should have "resort[ed] to the quicker method of appeal."[1556]

"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."[1557] The

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TEX. R. APP. P. 30 (explaining that "[r]estricted appeals replace writ of error appeals to the court of appeals"); Coastal Banc SSB v. Helle, 988 S.W.2d 214, 215 n.1 (Tex. 1999). The former appeal by writ of error should not be confused with the application for writ of error, which was the briefing mechanism to invoke the appellate jurisdiction of the Texas Supreme Court. TEX. R. APP. P. 130, 49 TEX. B.J. 556 (Tex. Crim. App. 1986, amended 1997) (current version at TEX. R. APP. P. 53).

1549. Texaco, Inc. v. Cent. Power & Light Co., 925 S.W.2d 586, 590 (Tex. 1996); *see infra* Part VII (discussing bill of review).

1550. *Texaco*, 925 S.W.2d at 590.

1551. Fid. & Guar. Ins. Co. v. Drewery Constr. Co., 186 S.W.3d 571, 573 (Tex. 2006) (citing TEX. R. APP. P. 30).

1552. Alexander v. Lynda's Boutique, 134 S.W.3d 845, 848 (Tex. 2004); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.013 (West 2008) (providing the time for taking a restricted appeal to the court of appeals); TEX. R. APP. P. 26.1(c) (designating the time to file a restricted notice of appeal).

1553. Quaestor Invs., Inc. v. Chiapas, Mex., 997 S.W.2d 226, 227 (Tex. 1999).

1554. *See Texaco*, 925 S.W.2d at 589 (explaining that "[t]he nature and extent of participation is necessarily a matter of degree").

1555. *Id.* (quoting Stubbs v. Stubbs, 685 S.W.2d 643, 645 (Tex. 1985)).

1556. *Id.* at 590.

1557. Fid. & Guar. Ins. Co. v. Drewery Constr. Co., 186 S.W.3d 571, 573 (Tex. 2006); *accord* Ginn v. Forrester, 282 S.W.3d 430, 432–33 (Tex. 2009); Wachovia Bank of Del. v. Gilliam, 215 S.W.3d 848, 849 (Tex. 2007).

"face of the record" means "the entire record of a case in court up to the point at which reference is made to it."[1558] The reviewing court is not limited to a review of the clerk's record (transcript).[1559] 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 (statement of facts).[1560]

In the absence of a reporter's record, the reviewing court may assume "that every fact necessary to support the judgment, within the limits of the pleadings, was proved at trial."[1561] 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."[1562] The supreme court has "clearly said that silence is not enough."[1563] For example, the rules do not impose upon the clerk an affirmative duty to record the mailing of the required notices.[1564]

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.[1565] "Generally, the same

1558. Barnes v. Barnes, 775 S.W.2d 430, 431 (Tex. App.—Houston [1st Dist.] 1989, no writ).

1559. Morales v. Dalworth Oil Co., 698 S.W.2d 772, 774 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

1560. Norman Commc'ns v. Tex. Eastman Co., 955 S.W.2d 269, 270 (Tex. 1997); DSC Fin. Corp. v. Moffitt, 815 S.W.2d 551, 551 (Tex. 1991). Extrinsic evidence is not admissible to challenge a judgment on appeal. Gen. Elec. Co. v. Falcon Ridge Apartments, Joint Venture, 811 S.W.2d 942, 944 (Tex. 1991); *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 a judgment, the 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).

1561. Jaramillo v. Liberty Mut. Fire Ins. Co., 694 S.W.2d 585, 587 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

1562. *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).

1563. Ginn v. Forrester, 282 S.W.3d 430, 433 (Tex. 2009).

1564. *Id.*

1565. *Norman Commc'ns*, 955 S.W.2d at 270; Gunn v. Cavanaugh, 391 S.W.2d 723, 724 (Tex. 1965); Autozone, Inc. v. Duenes, 108 S.W.3d 917, 919 (Tex. App.—Corpus Christi 2003, no pet.); Conseco Fin. Servicing v. Klein Indep. Sch. Dist., 78 S.W.3d 666, 670 (Tex. App.—Houston [14th Dist.] 2002, no pet.); s*ee also* Pace Sports, Inc. v. Davis Bros.

standards of review and powers of disposition [that] govern ordinary direct appeals" also govern review of default judgments.[1566] 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,[1567] and "there are no presumptions in favor of valid issuance, service, and return of citation."[1568]

"No-answer and post-answer default judgments differ in the issues a plaintiff is required to prove."[1569] In cases of no-answer default, a defaulting defendant admits all facts properly pled in the plaintiff's petition except for the amount of unliquidated damages.[1570] Thus, the plaintiff is only required to prove its claim for unliquidated damages.[1571] But if the defendant files an answer, a trial court may not render judgment on the pleadings, and the plaintiff is required to offer evidence and prove all aspects of its claim.[1572] When the evidence is legally insufficient to support either a no-answer or post-answer default judgment, the proper disposition is to remand for a new trial.[1573]

D. *Objections to Appellate Judges*

A party may object to a judge or justice who is assigned to hear that party's case on appeal.[1574] If a party files a timely objection to the assignment of the judge or justice, the assigned judge may

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Publ'g Co., 514 S.W.2d 247, 247 (Tex. 1974) (criticizing a court of appeals for suggesting that a restricted appeal requires a higher burden than a regular appeal).

1566. Lakeside Leasing Corp. v. Kirkwood Atrium Office Park Phase 3, 750 S.W.2d 847, 849 (Tex. App.—Houston [14th Dist.] 1988, no writ).

1567. McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965); *Lakeside Leasing*, 750 S.W.2d at 849.

1568. Fid. & Guar. Ins. Co. v. Drewery Constr. Co., 186 S.W.3d 571, 573 (Tex. 2006); *accord* Wachovia Bank of Del. v. Gilliam, 215 S.W.3d 848, 850 (Tex. 2007).

1569. Dolgencorp of Tex., Inc. v. Lerma, 288 S.W.3d 922, 930 (Tex. 2009).

1570. Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 83 (Tex. 1992).

1571. *Id.*; *see also* TEX. R. CIV. P. 243 (stating that in an unliquidated damages cause of action, the court will render judgment after hearing evidence as to damages).

1572. *Lerma*, 288 S.W.3d at 930.

1573. *Id.*; *see also* SACMD Acquisition Corp. v. Trevino, No. 13-07-00509-CV, 2009 WL 2541840, at *4 (Tex. App.—Corpus Christi Aug. 20, 2009, no pet.) (mem. op.) (reversing a default judgment on restricted appeal based on legally insufficient evidence to support damages); Jackson v. Gutierrez, 77 S.W.3d 898, 902 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (discussing the scope of review in a legal insufficiency claim).

1574. TEX. GOV'T CODE ANN. § 75.551 (West 2005).

not hear the case.[1575] 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 court, whichever date occurs earlier."[1576] In addition, each party is only entitled to one objection for the case in the appellate court.[1577] 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.[1578]

E. *Frivolous Appeals*

Because meritless litigation constitutes an unnecessary burden on parties to the litigation and diverts judicial resources from legitimate appeals,[1579] 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.[1580] Additionally, Rule 52.11 permits "just sanctions" for filing a frivolous original proceeding.[1581] 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.[1582]

Texas Rules of Appellate Procedure 45 and 62 provide that if the supreme court or the courts of appeals determine that an

1575. *Id.* § 75.551(b).

1576. *Id.* § 75.551(c).

1577. *Id.* § 75.551(b).

1578. *Id.* § 75.551(d).

1579. Chapman v. Hootman, 999 S.W.2d 118, 125 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

1580. Starcrest Trust v. Berry, 926 S.W.2d 343, 356 (Tex. App.—Austin 1996, no writ) (explaining the purpose of former Texas Rule of Appellate Procedure 84, which is currently codified as Texas Rules of Appellate Procedure 45 and 62); Roever v. Roever, 824 S.W.2d 674, 677 (Tex. App.—Dallas 1992, no writ); *see also* TEX. R. APP. P. 45 (giving appellate courts the authority to award damages if an appeal is determined to be frivolous in a civil case); TEX. R. APP. P. 62 (reiterating the ability of an appellate court to award damages for frivolous appeals).

1581. TEX. R. APP. P. 52.11; *see also* Campos v. Inv. Mgmt. Props., Inc., 917 S.W.2d 351, 357 (Tex. App.—San Antonio 1996, writ denied) (Green, J., concurring) (recommending sanctions be applied to lawyers and parties who file frivolous appeals).

1582. TEX. RULES DISCIPLINARY P. R. 3.01, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A-1 (West 2005); *see also Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999) (detailing a lawyer's duty to the court to pursue only warranted issues for appeal).

appeal is "frivolous,"[1583] the courts may award "just damages" to any prevailing party on their own motion or the motion of any party.[1584] The appellate courts are no longer limited to assessing damages against the offending party alone; the attorney may also be sanctioned.[1585] "[T]o objectively determine whether an appeal is frivolous, [the court] look[s] at the record from the viewpoint of the advocate and decide[s] whether he had reasonable grounds to believe that the case could be reversed."[1586] The decision to grant sanctions is within the reviewing court's discretion.[1587] 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.[1588]

There are two competing concerns in awarding damages for frivolous appeals. First, the "right to an appeal is a sacred and valuable right."[1589] As a result, frivolous appeal damages are to be assessed "with prudence, caution, and after careful deliberation."[1590] As long as the argument had a reasonable basis

1583. Villanueva v. State, 209 S.W.3d 239, 243 (Tex. App.—Waco 2006, no pet.) (defining "frivolous" as not arguable on the merits or as lacking basis in law or fact); *accord* BLACK'S LAW DICTIONARY 692 (8th ed. 2004); WEBSTER'S THIRD NEW INT'L DICTIONARY 913 (2002).

1584. 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. Lewis v. Deaf Smith Elec. Coop., Inc., 768 S.W.2d 511, 514 (Tex. App.—Amarillo 1989, no writ); *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" (emphasis added)). 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.

1585. TEX. R. APP. P. 45, 62.

1586. Smith v. Brown, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

1587. Goss v. Houston Cnty. Newspapers, 252 S.W.3d 652, 657 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

1588. TEX. R. APP. P. 45; *accord* TEX. R. APP. P. 62.

1589. Masterson v. Hogue, 842 S.W.2d 696, 698 (Tex. App.—Tyler 1992, no writ); *accord Smith*, 51 S.W.3d at 381; Bradt v. West, 892 S.W.2d 56, 78 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Loyd Elec. Co. v. Millett, 767 S.W.2d 476, 484 (Tex. App.—San Antonio 1989, no writ).

1590. Tate v. E.I. Du Pont de Nemours & Co., 954 S.W.2d 872, 875 (Tex. App.—Houston [14th Dist.] 1997, no pet.); *accord* City of Houston v. Precast Structures, Inc., 60 S.W.3d 331, 340 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

in law, even if unconvincing, "and constituted an informed, good-faith challenge to the trial court[']s judgment," frivolous appeal damages are not appropriate.[1591] 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.[1592] In the absence of some evidence showing that the appeal was taken in bad faith, or, for some courts, a lack of good faith,[1593] "poor lawyering" alone is not a basis for sanctions.[1594] However, the First Court of Appeals has held that "bad faith is not required under Rule 45."[1595] "[W]hether the matter is groundless and thus without sufficient cause must be decided on the basis of objective legal expectations . . . ."[1596] There is not a consensus

1591. Gen. Elec. Credit Corp. v. Midland Cent. Appraisal Dist., 826 S.W.2d 124, 125 (Tex. 1991); *accord In re* Marriage of Long, 946 S.W.2d 97, 99 (Tex. App.—Texarkana 1997, no writ).

1592. Faddoul, Glasheen & Valles, P.C. v. Oaxaca, 52 S.W.3d 209, 213 (Tex. App.—El Paso 2001, no pet.). 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).

1593. *See* Campos v. Inv. Mgmt. Props., Inc., 917 S.W.2d 351, 356 (Tex. App.—San Antonio 1996, writ denied) (noting that damages will be imposed for appeals not pursued in good faith).

1594. 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).

1595. 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).

1596. 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* Tate v. E.I. Du Pont de Nemours & Co., 954 S.W.2d 872, 875 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (outlining factors to consider when determining if a penalty should be imposed); 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 for delay and without sufficient cause); Hicks v. W. Funding, Inc., 809 S.W.2d 787, 788 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (stating

among the courts of appeals as to the standard applicable for imposing sanctions under Rule 45.[1597] Some of the principles applied include: "the appeal was taken for delay and . . . there was no sufficient cause for appeal";[1598] "the appellant ha[d] no reasonable expectation of reversal" *and* pursued the appeal in bad faith;[1599] the appellant had no "reasonable expectation of reversal *or* . . . pursued the appeal in bad faith";[1600] the circumstances for taking the appeal "are truly egregious";[1601] or the appeal is "objectively frivolous and injures the appellee."[1602]

Second, judicial resources are severely strained, and frivolous

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"factors which tend to indicate an appeal was filed for delay and without sufficient cause").

1597. *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 Eighth 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 [(reporter's record)]; (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." *Oaxaca*, 52 S.W.3d at 213.

1598. 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).

1599. *Oaxaca*, 52 S.W.3d at 213; *accord* Guajardo v. Conwell, 30 S.W.3d 15, 18 (Tex. App.—Houston [14th Dist.] 2000), *aff'd*, 46 S.W.3d 862 (Tex. 2002); Easter v. Providence Lloyds Ins. Co., 17 S.W.3d 788, 792 (Tex. App.—Austin 2000, pet. denied); Bridges v. Robinson, 20 S.W.3d 104, 115 (Tex. App.—Houston [14th Dist.] 2000, no pet.). The Fourth 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 with the intent to delay); King v. Graham, 47 S.W.3d 595, 612 (Tex. App.—San Antonio 2000) (suggesting lack of good faith is a consideration), *rev'd*, 126 S.W.3d 75 (Tex. 2003); *Herring*, 27 S.W.3d at 143 (stating that bad faith is a consideration in determining whether an appeal is frivolous).

1600. Diana Rivera & Assocs., P.C. v. Calvillo, 986 S.W.2d 795, 799 (Tex. App.—Corpus Christi 1999, pet. denied) (emphasis added).

1601. Conseco Fin. Servicing v. Klein Indep. Sch. Dist., 78 S.W.3d 666, 676 (Tex. App.—Houston [14th Dist.] 2002, 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).

1602. 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 if an appeal is objectively frivolous and injures the appellee . . . . [But, b]ad faith is thus no longer dispositive or necessarily even material." (citation omitted)); *see also* Mallios v. Standard Ins. Co., 237 S.W.3d 778, 783 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (concluding that, not only was appeal not frivolous, but the filed briefs were in response to appellee's request for sanctions), *cert. denied*, 129 S. Ct. 56 (2008).

appeals seriously harm the orderly administration of justice by "divert[ing] scarce resources away from" cases deserving more attention.[1603] 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 careful review of the record for preserved error'" and the standard of review applicable to the error.[1604] The court also noted that a bad result at the trial level is not, by itself, reason enough to appeal.[1605] In addition, the court observed that the decision to appeal "is not a mechanical exercise, but requires the dutiful application of lawyering skills."[1606] While the old rules in effect at the time limited the court's authority to deal with the problem,[1607] the court reaffirmed that the appellate courts "must not be hesitant to use the tools that we have."[1608] "[T]he practice of 'let's just throw as much mud as we can up on the wall and see if any of it sticks' must be discouraged."[1609] However, where a party's argument on appeal fails to convince the appellate court,

1603. Campos v. Inv. Mgmt. Props., Inc., 917 S.W.2d 351, 357 (Tex. App.—San Antonio 1996, writ denied) (Green, J., concurring); *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").

1604. *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); *see also* Elm Creek Villas Homeowner Ass'n v. Beldon Roofing & Remodeling Co., 940 S.W.2d 150, 156 (Tex. App.—San Antonio 1996, no writ) (rendering judgment for sanctions against appellants for filing a frivolous appeal). Justice Green, writing for the court, stated, "[T]he 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.

1605. *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.").

1606. *Id.* at 357.

1607. *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 (awarding "each prevailing party just damages"); TEX. R. APP. P. 62 (excluding language that would prevent the awarding of damages against attorneys).

1608. *Campos*, 917 S.W.2d at 357 (Green, J., concurring); *see* Dolenz v. A__ B__, 742 S.W.2d 82, 86 (Tex. App.—Dallas 1987, writ denied) ("[S]purious litigation, unnecessarily burdening parties and courts alike, should not go unsanctioned.").

1609. *In re S.B.C.*, 952 S.W.2d at 20 (quoting Campos v. Inv. Mgmt. Props., Inc., 917 S.W.2d 351, 356–357 (Tex. App.—San Antonio 1996, writ denied)).

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.[1610]

F. *Power to Sanction*

Like trial courts, appellate courts retain an inherent power to discipline misconduct before the court when reasonably necessary and to the extent deemed appropriate.[1611] In *Johnson v. Johnson*,[1612] the appellant's attorney insulted the trial judge by questioning both his ability to understand the complexities of the case and his decision to uphold the law.[1613] 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.[1614] Subsequently, in *In re Maloney*,[1615] 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."[1616] The court held:

1610. Gen. Elec. Credit Corp. v. Midland Cent. Appraisal Dist., 826 S.W.2d 124, 125 (Tex. 1991).

1611. *See 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 v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979))); Johnson v. Johnson, 948 S.W.2d 835, 840 (Tex. App.—San Antonio 1997, writ denied) ("[W]hen attorneys speak disrespectfully of the trial court, they 'exceed their rights and evidence a want of proper respect for the court . . . .'" (quoting Mossop v. Zapp, 179 S.W. 685 (Tex. Civ. App.—Galveston 1915, no writ))).

1612. Johnson v. Johnson, 948 S.W.2d 835, 840 (Tex. App.—San Antonio 1997, writ denied).

1613. *Id.* at 840 n.1.

1614. *Id.* at 841.

1615. *In re* Maloney, 949 S.W.2d 385 (Tex. App.—San Antonio 1997, orig. proceeding) (en banc).

1616. *Id.* at 386.

> 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.[1617]

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.[1618]

In *Merrell Dow Pharmaceuticals, Inc. v. Havner*,[1619] the Texas Supreme Court was confronted with a similar attack on the integrity of the court.[1620] In its order overruling the petitioner's motion for 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.'"[1621] The court added: "A lawyer

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1617. *Id.* at 388.

1618. *Id.*

1619. Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997).

1620. *Id.* at 732 (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 Court 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, *Havner*, 953 S.W.2d 706 (No. 95-1036); *see also* Vincent R. Johnson, *Ethical Campaigning for the Judiciary*, 29 TEX. TECH. L. REV. 811, 811–12 (1998) (quoting the colorful language used by the respondents' attorney, and arguing that "efforts to personalize, rather than professionalize, the process of judicial criticism suggest the development of an unfortunate trend of abusing judges for personal or political advantage").

1621. *Havner*, 953 S.W.2d 706, 732 (Spector, J., concurring) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991)).

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."[1622] Following the reasoning of the Fourth Court of Appeals' decisions in *Johnson* and *In re Maloney*, the Texas Supreme Court referred the offending attorneys to the State Bar Grievance Committee.[1623]

It is likely that the standards applicable to the trial courts apply 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.[1624] 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 appeal's sanction would be abuse of discretion.

G. *Conclusions of Law*

"[C]onclusions of law are always reviewable."[1625] In fact, "conclusions of law in a nonjury trial are reviewable . . . [even] without preservation" under Texas Rule of Appellate Procedure 33.1.[1626] "Conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the

1622. *Id.* at 733 (quoting TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 4, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West Supp. 1997) (TEX. STATE BAR R. art. X, § 9)).

1623. *Havner*, 953 S.W.2d at 732–33 (Spector, J., concurring).

1624. *See id.* (acknowledging that courts possess the power to discipline an attorney's behavior and impose respect and decorum in their presence); *see also supra* Part IV(Q) (explaining jury demands in Texas).

1625. Spiller v. Spiller, 901 S.W.2d 553, 556 (Tex. App.—San Antonio 1995, writ denied); *accord* Alan Reuber Chevrolet, Inc. v. Grady Chevrolet, Ltd., 287 S.W.3d 877, 883 (Tex. App.—Dallas 2009, no pet.).

1626. 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* Tex. Dep't of Transp. v. City of Sunset Valley, 92 S.W.3d 540, 548 (Tex. App.—Austin 2002) (rejecting an argument because it was raised for the first time on appeal and indicating that it therefore cannot serve as the basis of the party's complaint); 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).

evidence . . . ."[1627] "Conclusions of law . . . will not be reversed unless they are erroneous as a matter of law."[1628] In addition, a trial court's conclusions of law are reviewed de novo as legal questions,[1629] and the reviewing court affords no deference to the lower court's decision.[1630] Under de novo review, the reviewing court exercises its own judgment and redetermines each legal issue.[1631] Incorrect conclusions of law will not require a reversal if the controlling finding of facts support a correct legal theory.[1632]

H. *Error*

The standards of review define the parameters of a reviewing court's authority in determining whether a trial court erred. But the existence of error does not necessarily result in appellate relief. Before the appellate court addresses error, it will look to see if the complaint has been preserved.[1633] Even carefully preserved error will be subjected to an evaluation of harm.

1. 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, unpreserved complaints generally cannot be reviewed on appeal, regardless of any harmful effects.[1634] Appellate advocates and courts should be careful to

1627. Tex. Dep't of Pub. Safety v. Stockton, 53 S.W.3d 421, 423 (Tex. App.—San Antonio 2001, no pet.); *accord* Charette v. Fitzgerald, 213 S.W.3d 505, 511 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

1628. *Stockton*, 53 S.W.3d at 423; *accord* State v. Harrell Ranch, Ltd., 268 S.W.3d 247, 253 (Tex. App.—Austin 2008, no pet.).

1629. State v. Heal, 917 S.W.2d 6, 9 (Tex. 1996); *accord* Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 222 (Tex. 2002); *Alan Reuber Chevrolet*, 287 S.W.3d at 883.

1630. Quick v. City of Austin, 7 S.W.3d 109, 116 (Tex. 1998); *Heal*, 917 S.W.2d at 9; *Alan Reuber Chevrolet*, 287 S.W.3d at 883.

1631. *In re* C.H., 89 S.W.3d 17, 29 (Tex. 2002) (Hecht, J., concurring); *Subaru of Am.*, 84 S.W.3d at 222; *Quick*, 7 S.W.3d at 116; *Alan Reuber Chevrolet*, 287 S.W.3d at 883.

1632. BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 794 (Tex. 2002).

1633. For a more detailed look at how to preserve error in the trial court, see generally Polly J. Estes, *Preservation of Error: From Filing the Lawsuit Through Presentation of Evidence*, 30 ST. MARY'S L.J. 997 (1999).

1634. *See* TEX. R. APP. P. 33.1 (requiring preservation of a complaint before it can be presented on appeal); Ford Motor Co. v. Castillo, 279 S.W.3d 656, 662–63 (Tex. 2009)

analyze an argument first in terms of waiver, rather than harmless error.

2. Invited Error

The doctrine of invited error provides that a party cannot complain on appeal about an action or ruling which the party requested the trial court to take.[1635] 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.[1636]

3. 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 decision making, 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 decision making 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. Once found, however, the harmless error doctrine serves as a further check upon the reviewing court's authority to tamper with the trial court's rulings. If no error exists under the applicable standard of review, the court can stop its inquiry unless it wishes to make alternative holdings. Only if the court finds error under the applicable standard of review must the court confront the concept of

(illustrating the complexity of error preservation).

1635. *In re* Dep't of Family & Protective Servs., 273 S.W.3d 637, 646 (Tex. 2009); 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).

1636. *Tittizer*, 171 S.W.3d at 862.

reversible error.[1637] 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.[1638] 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.[1639]

Stated another way, litigants are "entitled to a fair trial, . . . not a perfect one."[1640]

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 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]."[1641]

1637. *See* TEX. R. APP. P. 44.1 (stating that a judgment will not be reversed by a court of appeals 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"); TEX. R. APP. P. 61.1 (providing the same language for reversible error as Texas Rule of Appellate Procedure 44.1, but applicable to the supreme court).

1638. *See* Miles v. M/V Miss. Queen, 753 F.2d 1349, 1352 (5th Cir. 1985) (citing 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).

1639. *Id.*

1640. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553 (1984).

1641. TEX. R. APP. P. 44.1, 61.1. The supreme court has observed that the harmless error rule "ebbs and flows" in Texas practice. Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 839 (Tex. 1979). A careful practitioner should keep this in mind when considering the harm analysis of any given case. *See* Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 388 n.7 (Tex. 2000) (observing that "[t]he harmless error standard [was] recodified without substantive change as [Texas Rule of Appellate Procedure 44.1]"); 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 Rule 81(b)(1)). Under the former rule, harmful error is shown "when the evidence is controlling on a material issue and is not

In determining 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.[1642] 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?[1643] 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.[1644] 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.[1645] 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."[1646] This determination is a judgment call delegated to the reviewing court's "sound discretion and good sense" upon evaluation of the entire case.[1647]

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

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cumulative." *Franco*, 81 S.W.3d at 344. *See generally* Robert W. Calvert, *The Development of the Doctrine of Harmless Error in Texas*, 31 TEX. L. REV. 1, 3 (1952) (explaining the development of the harmless error doctrine in Texas); Robert W. Calvert & Susan G. Perin, *Is the Castle Crumbling? Harmless Error Revisited*, 20 S. TEX. L.J. 1, 3 (1979) (detailing the harmless error doctrine); Jack Kenneth Dahlberg, Jr., *Analysis of Cumulative Error in the Harmless Error Doctrine*, 12 TEX. TECH L. REV. 561, 568 (1981) (analyzing cumulative error in the harmless error doctrine).

1642. *See* TEX. R. APP. P. 44.1 (using the word "probably"); *see also* 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 prejudice instead of a "but for the erroneous ruling" query).

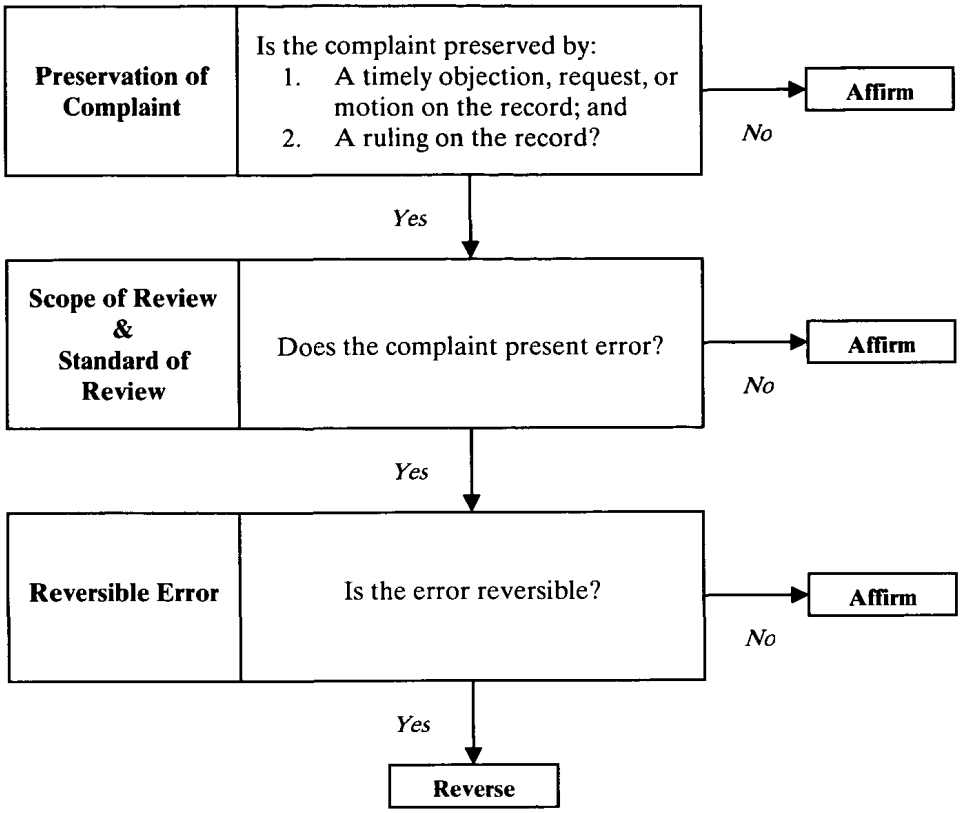
1643. *E.g.*, King v. Skelly, 452 S.W.2d 691, 696 (Tex. 1970) (declaring that reversal should not occur unless the erroneous admission "was calculated to and probably did cause the rendition of an improper judgment"); Aultman v. Dallas Ry. & Terminal Co., 152 Tex. 509, 260 S.W.2d 596, 599 (1953) (reiterating the "probably did cause" standard).

1644. Lorusso v. Members Mut. Ins. Co., 603 S.W.2d 818, 820 (Tex. 1980). Ironically, *Lorusso* is also credited as applying a "relaxed" harmless error rule to cases involving peremptory challenges. *See, e.g.*, Wells v. Barrow, 153 S.W.3d 514, 518 (Tex. App.—Amarillo 2004, no pet.) (describing the "materially unfair" harm analysis as a "relaxed" harmless error standard).

1645. *Lorusso*, 603 S.W.2d at 820–21.

1646. *Id.*

1647. First Emps. Ins. Co. v. Skinner, 646 S.W.2d 170, 172 (Tex. 1983).



4. Fundamental Error

The Texas Supreme Court first recognized fundamental error in 1846 as a principle rooted in the common law.[1648] 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."[1649] Fundamental error describes those situations in which a reviewing court reviews sua sponte "error that was neither raised in the trial court nor assigned on appeal."[1650]

1648. Jones v. Black, 1 Tex. 527, 530 (1846); *see also In re* J.F.C., 96 S.W.3d 256, 288–93 (Tex. 2002) (Hankinson, J., dissenting, joined by Enoch, J.) (recounting the history of fundamental error in Texas).

1649. *Jones*, 1 Tex. at 530.

1650. *In re* B.L.D., 113 S.W.3d 340, 350 (Tex. 2003); *see also* Cent. Educ. Agency v. Burke, 711 S.W.2d 7, 8–9 (Tex. 1986) (discussing the applicability of the fundamental error principle). *But see* Pirtle v. Gregory, 629 S.W.2d 919, 920 (Tex. 1982) (reasoning that error preservation avoids surprising the opponent and decrying the ability of appellate courts to consider unassigned errors).

While a party may raise fundamental error for the first time on appeal,[1651] it is used very infrequently[1652] and has been called "a discredited doctrine."[1653] Fundamental error survives only in those rare situations in which the appellate record shows on its face that the court lacked jurisdiction[1654] or that public policy or public interest would be directly and adversely affected.[1655]

5. 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.[1656] The doctrine is seldom used to reverse a case.[1657] Generally, appellants make the mistake of simply restating their complaints in one final issue.[1658] Reversal

1651. Nuchia v. Woodruff, 956 S.W.2d 612, 616 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). *But see* Country Vill. Homes, Inc. v. Patterson, 236 S.W.3d 413, 449 (Tex. App.—Houston [1st Dist.] 2007, pet. granted, judgm't vacated by agr.) (requiring error preservation).

1652. *See* Am. Gen. Fire & Cas. Co. v. Weinberg, 639 S.W.2d 688, 689 (Tex. 1982) (noting "[f]undamental error has become a rarity").

1653. *In re B.L.D.*, 113 S.W.3d at 350.

1654. *See* Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 445–46 (Tex. 1993) (stating lack of jurisdiction may be raised for the first time on appeal by the parties or by the court); McCauley v. Consol. Underwriters, 157 Tex. 475, 304 S.W.2d 265, 266 (1957) (holding that a lack of jurisdiction as fundamental error can be considered by the court without preservation of error).

1655. *See In re* C.O.S., 988 S.W.2d 760, 767 (Tex. 1999) (concluding that fundamental error standard is to be used in matters of public policy); Ramsey v. Dunlop, 146 Tex. 196, 205 S.W.2d 979, 985 (1947) (Alexander, J., concurring) (stating the court is authorized to reverse a judgment of fundamental error if it involves a "matter of public interest"). *But see In re* J.F.C., 96 S.W.3d 256, 293 (Tex. 2002) (Hankinson, J., dissenting) (arguing that the doctrine should apply to involuntary termination of parental rights cases as a matter of public policy).

1656. Scoggins v. Curtiss & Taylor, 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).

1657. Strange v. Treasure City, 608 S.W.2d 604, 609 (Tex. 1980) (concluding that cumulative effects did not result in probable harm); 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); 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).

1658. *See* Crescendo Invs., Inc. v. Brice, 61 S.W.3d 465, 481 n.16 (Tex. App.—San

based upon cumulative error is predicated upon meeting the standards of reversible error in Rule 44.1.[1659] 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."[1660] The cumulative error doctrine "infrequently finds favor with appellate courts,"[1661] and it "has evolved almost exclusively in cases involving [improper] jury argument or jury misconduct."[1662]

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.

IX. 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

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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).

1659. TEX. R. APP. P. 44.1; *see* Mercy Hosp. of Laredo 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 the trial was materially unfair); McCormick v. Tex. Commerce Bank Nat'l Ass'n, 751 S.W.2d 887, 892 (Tex. App.—Houston [14th Dist.] 1988, writ denied) ("Reversal based upon cumulative error is predicated upon meeting the standards of Texas Rule of Appellate Procedure 81(b)."). Texas Rule of Appellate Procedure 81(b)(1) has been recodified as Rule 44.1. Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 388 n.7 (Tex. 2000).

1660. *McCormick*, 751 S.W.2d at 892.

1661. *Ramirez*, 79 S.W.3d at 125.

1662. Town E. Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 809–10 (Tex. App.—Dallas 1987, no writ).

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 through 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.