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Standards of Review in Texas

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ARTICLE

STANDARDS OF REVIEW IN TEXAS

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RYAN G. ANDERSON**

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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. It has become a highly specialized practice area now. Appellate lawyers are keenly aware that standards of review are vital to success on appeal. Many years ago, 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 Through the years, the Article continued to evolve as the standards evolved, and interest in the profession likewise grew.²

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 promote efficiency in the judicial system because each standard of review determines the likelihood of success in an appeal.³ The more deferential the standard of review, the less likely the appeal will be successful and, theoretically, the less likely a losing party will appeal. The standard of review also “provides a lens through which the parties on appeal can focus and frame their arguments” for the reviewing court.⁴

Standards of review also distribute power within the judicial branch by defining the relationship between trial and appellate courts.⁵ These standards “frame the issues, define the depth of review, assign power among judicial actors, and declare the proper materials to review.”⁶ Standards of

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); W. Wendell Hall, O. Rey Rodriguez, Rosemarie Kanusky, & Mark Emery, *Hall’s Standards of Review in Texas*, 42 ST. MARY’S L.J. 3, 3 (2010) (Although Mr. Hall had retired and asked that his name be removed as an author, the other authors insisted “[i]n 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 [that] Article for a summary of Mr. Hall’s enduring contributions.”).

3. Jared K. Carter, *Appellate Practice: Tips for Effectively Defining and Using Standards of Review in Appellate Practice*, VT. B.J., Spring 2018, at 28, 28.

4. *Id.*

5. 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”).

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

review are simply the appellate court's "measuring stick"⁷ or "the decibel level at which the appellate advocate must play to catch the judicial ear."⁸ 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."⁹ Therefore, a litigant must measure his factual and legal arguments against the appropriate "measuring stick" to write an effective and persuasive brief.¹⁰ 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."¹¹

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. The standard of review should direct the appellate court to the party's most relevant and important legal arguments. 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.¹² 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 Dante's *Inferno*, 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.¹³ 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

7. See John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 810–11 (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).

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

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

10. See Godbold, *supra* note 7, at 810 (explaining how the standard of review is a measuring stick for the appellate judge).

11. 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, STANDARDS OF REVIEW: FEDERAL CIVIL CASES AND REVIEW PROCESS § 1.3, at 21 (1986).

12. Sullivan, *supra* note 9, at 59, 62.

13. *Id.*

when the 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.¹⁴

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.¹⁵ 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."¹⁶ 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(i), for example, the standard of review must be identified and set forth for each issue of the argument.¹⁷ Those practicing in state appellate courts would be wise to follow the federal rule and the Fifth Circuit's local rule.¹⁸

As one judge observed, "[N]o single concept is more important than the standard of review."¹⁹ 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

14. 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) (emphasis omitted).

15. See generally Sullivan, *supra* note 9, at 61 (noting 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").

16. 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).

17. FED. R. APP. P. 28(a)(8)(B); 5TH CIR. R. 28.3(i).

18. Appellate judges invariably advise that advocates address standards of review. See Leonard I. Garth, *How to Appeal to an Appellate Judge*, LITIG., Fall 1994, at 20, 22 (stating the "[s]tandard of review is the element of appellate advocacy that distinguishes the good appellate advocate"); Godbold, *supra* note 7, at 811 ("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"); Rubin, *supra* note 8, at 872 (indicating an author should "[s]tart the brief by stating briefly the applicable standard of review").

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

the governing standard of review.²⁰ 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.²¹ 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.²² 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.”²³

Identifying the standard of review in most cases is not complicated.²⁴ Like tying a shoe, it is often easier to demonstrate the proper use of the standard of review than it is to explain that use. For example, the abuse of discretion standard is the most common standard of review, but who can define the phrase in a simple way that will be useful in every case in which it is applied? No one has met the challenge of describing the standard so that it may be applied objectively in every appeal. While the words used to describe standards of review may escape a clear and precise definition, “[t]here are no talismanic words that can avoid the process” of applying the standard to the record and explaining in a cogent manner why the reviewing court should reach a certain result.²⁵

Justice Felix Frankfurter described standards of review as “undefined defining terms.”²⁶ 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

20. See *James B. v. Superior Court*, 41 Cal. Rptr. 2d 762, 767 (Ct. App. 1995) (“[C]ounsel’s failure to acknowledge the proper standard of review might . . . be considered a concession of lack of merit.”).

21. 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.”).

22. See *Fox v. Comm’r*, 718 F.2d 251, 253–54 (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).

23. *Id.* at 253.

24. See Nathan L. Hecht, *Foreword: Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY’S L.J. 1041, 1041 (1993) (“The law prescribing the standard of review applicable to a particular ruling is complex but relatively well settled.”).

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

26. *Id.*

find himself trying to run for a touchdown when basketball rules are in effect.”²⁷ 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.²⁸ 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.²⁹ It asks: “Does the appellate court review the entire record or only some portion of the record to determine error?”³⁰ 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.

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.³¹ The availability of de novo review, however, is limited to relatively few trial court rulings and needs no in-depth analysis.³²

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

27. Godbold, *supra* note 7, at 811.

28. See Sullivan, *supra* note 9, at 61 (explaining the purpose of the standard of review).

29. 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).

30. 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 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).

31. See *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 156–57 (Tex. 2004) (stating the court reviews a summary judgment de novo and takes “as true all evidence favorable to the nonmovant” (citing *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002); *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997))); *Kutner v. Russell*, 658 S.W.2d 585, 590 (Tex. Crim. App. 1983) (en banc) (Onion, J., dissenting) (defining “de novo” and providing the constitutional and statutory sources of “trial de novo”).

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

appellate practitioner's point of view.³³ 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.³⁴ Specialized evidentiary review may apply to certain types of cases, as in family matters or administrative agency appeals.³⁵

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.³⁶ Lawyers often wonder how appellate courts can make “abuse of discretion” mean so many different things.³⁷ Indeed, one appellate court judge lamented that the abuse of discretion standard “means everything and nothing at the same time[.]”³⁸ One appellate court panel's view of an abuse of discretion can be another panel's notion of a completely reasonable decision.³⁹ 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[.]”⁴⁰

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

34. 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 in part on other grounds by Brooks v. State*, 323 S.W.3d 893, 911–12 (Tex. Crim. App. 2010).

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

36. See generally Rosenberg, *supra* note 33, at 176–180 (recognizing various degrees of discretion).

37. *Id.* at 173–74.

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

39. See *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. [Comm'n Op.] 1939) (“Naturally appellate courts will differ on the delicate question of whether trial courts have abused their discretion.”).

40. 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”).

Appellate courts have understandable difficulty in applying the abuse of discretion standard consistently.⁴¹ This difficulty is inherent in the standard itself. To suggest that the abuse of discretion standard is a concept “not easily defined”⁴² or “not susceptible to rigid definition”⁴³ 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.”⁴⁴ 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.⁴⁵ 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.⁴⁶ Therefore, as one court observed: “An appeal directed toward demonstrating an abuse of discretion is one of the tougher appellate propositions.”⁴⁷

All too often the primary problem with appellate court application of the abuse of discretion standard of review to trial court rulings is the tendency to assume that the standard is “absolute discretion” rather than “abuse of discretion” and the reviewing court never appears to engage in a thorough and substantial analysis of the trial court’s ruling for an “abuse.”⁴⁸ When that occurs, it constitutes ineffective or no review. Too often, it seems, that

41. 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).

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

43. *Hodson v. Keiser*, 81 S.W.3d 363, 368 (Tex. App.—El Paso 2002, no pet.) (citing *Lindsey v. Lindsey*, 965 S.W.2d 589, 591 (Tex. App.—El Paso 1998, no pet.); *Landon*, 724 S.W.2d at 934).

44. *Landon*, 724 S.W.2d at 934 (citing *Landry v. Traveler’s Ins. Co.*, 458 S.W.2d 649, 651 (Tex. 1970); *Johnson v. City of Richardson*, 206 S.W.2d 98, 100 (Tex. App.—Dallas 1947, no writ); *Cty. Sch. Trs. of Callahan Cty. v. Dist. Trs. of Dist. No. 15 (Hart) Common Sch. Dist. of Callahan Cty.*, 192 S.W.2d 891, 898 (Tex. App.—Eastland 1946, writ ref’d n.r.e.); *Brazos River Conservation & Reclamation Dist. v. Harmon*, 178 S.W.2d 281, 292–93 (Tex. App.—Eastland 1944, writ ref’d w.o.m.); *Bobbit v. Gordon*, 108 S.W.2d 234, 238 (Tex. App.—Beaumont 1937, no writ) (per curiam)).

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

46. See *Pearson v. Dennison*, 353 F.2d 24, 28 (9th Cir. 1965) (reasoning 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”).

47. *Lindsey*, 965 S.W.2d at 592.

48. See, e.g., *Rosenberg*, *supra* note 33, at 184 (“[T]oo much discretion in too many areas is now being accorded to trial judges by appellate courts.”).

the default ruling on appeal is that there is “no abuse of discretion” or “no clear abuse of discretion” and to consistently affirm the trial court’s ruling without substantively analyzing the trial court’s decision other than to conclude that no abuse of discretion occurred.

B. *Abuse of Discretion in Texas*

The development of the abuse of discretion standard varies between jurisdictions and over time.⁴⁹ 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.”⁵⁰ Rather, a trial court abuses its discretion if its decision is “arbitrary, unreasonable, and without reference to [any] guiding [rules and] principles”⁵¹ or is “so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.”⁵²

By requiring the trial court’s conduct to be arbitrary or unreasonable as a condition of reversal, Texas appellate courts acknowledge the discretion trial

49. Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 50–51 (2000). Over 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) (citing *Makzoume v. Makzoume*, 123 P.2d 72, 73 (Cal. Dist. Ct. App. 1942)). 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*, 108 S.W.2d at 238 (quoting *Grayson County v. Harrell*, 202 S.W. 160, 163 (Tex. App.—Amarillo 1918, writ ref’d)).

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

51. *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996) (citing *Downer*, 701 S.W.2d at 241); *accord Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 766 (Tex. 2006) (Medina, J., dissenting, joined by Wainwright & Johnson, JJ.) (“A court abuses its discretion when it renders an arbitrary decision, lacking support in the facts and circumstances of the case.” (citing *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997); *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding), *abrogated in part by In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 207 (Tex. 2009) (orig. proceeding))).

52. *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*, 700 S.W.2d at 917). The abuse of discretion standard in Texas has been compared to “the federal standard of ‘clearly erroneous.’” *See Goode*, 943 S.W.2d at 446 (observing 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 the federal clearly erroneous standard is distinct from the Texas abuse of discretion standard).

courts must have to judge the credibility of witnesses and make decisions within broad legal parameters.⁵³ 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.⁵⁴ 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.⁵⁵ Recently, the Texas Court of Criminal Appeals held that “[t]he trial court abuses its discretion when its decision lies ‘outside the zone of reasonable disagreement.’”⁵⁶

“[T]he abuse of discretion standard is typically applied to procedural or other trial management” decisions, either when challenged on appeal or by original proceeding.⁵⁷ At its core, “discretion” means choice.⁵⁸ 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.’”⁵⁹ 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.⁶⁰ In other words, the reviewing court “may not substitute its own judgment for the trial

53. 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.”).

54. 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.” (citing *Huie v. DeShazo*, 922 S.W.2d 920, 927–28 (Tex. 1996) (orig. proceeding))).

55. See *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 . . .”).

56. *Buntion v. State*, 482 S.W.3d 58, 76 (Tex. Crim. App. 2016) (quoting *Apolinar v. State*, 155 S.W.3d 184, 186 (Tex. Crim. App. 2005)).

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

58. See *Rosenberg*, *supra* note 33, at 175 (“The basic idea that discretion conveys is choice.”).

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

60. See *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991) (“[T]he court of appeals may not reverse for abuse of discretion merely because it disagrees with a decision by the trial court . . .”); *Jones v. Strayhorn*, 321 S.W.2d 290, 295 (Tex. 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.”).

court's judgment."⁶¹ This discretion insulates the trial judge's reasonable choice "from appellate second guessing."⁶² 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?"⁶³

There are at least two instances in which a perceived error does not constitute an abuse of discretion. First, "[a] mere error of judgment is not an abuse of discretion."⁶⁴ Second, a trial court does not "abuse its discretion if it reaches the right result" for the wrong reason.⁶⁵ 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:⁶⁶ (1) a court abuses its discretion if it attempts to exercise a power of discretion that it does not legally possess;⁶⁷ (2) a court abuses its discretion if it declines to exercise a power of discretion vested to

61. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam) (citing *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 41 (Tex. 1989) (orig. proceeding)); *Nitta*, 92 S.W.3d at 422; *see Flores*, 777 S.W.2d at 41 (indicating a lower court's decision should not be altered absent an abuse of discretion).

62. *Brazil v. Khater*, 223 S.W.3d 418, 420 (Tex. App.—Amarillo 2006, pet. denied) (citing *Bowie*, 79 S.W.3d at 52).

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

64. *Loftin v. Martin*, 776 S.W.2d 145, 146 (Tex. 1989) (orig. proceeding, *abrogated in part on other grounds by Walker v. Packer*, 827 S.W.2d 833, 841–42 (Tex. 1992) (orig. proceeding); *see Kolfeldt v. Thoma*, 822 S.W.2d 366, 368 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding [leave denied]) (suggesting "[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 [leave denied]) (per curiam) (noting "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").

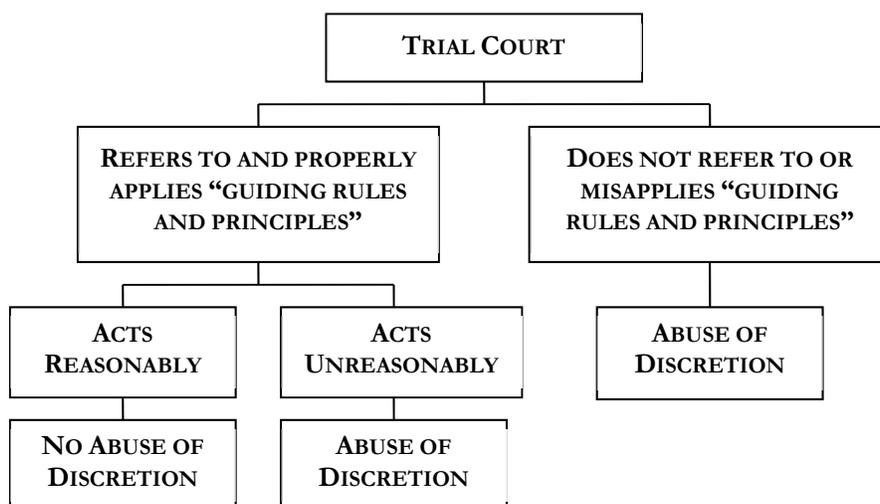
65. *Bruce Terminix Co. v. Carroll*, 953 S.W.2d 537, 540 (Tex. App.—Waco 1997, orig. proceeding) (quoting *Luxenberg v. Marshall*, 835 S.W.2d 136, 142 (Tex. App.—Dallas 1992, orig. proceeding)), *mand. granted In re Bruce Terminix Co.*, 988 S.W.2d 702 (Tex. 1998) (per curiam); *Hawthorne v. Guenther*,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

66. *Landon v. Jean-Paul Budinger, Inc.*, 724 S.W.2d 931, 937–40 (Tex. App.—Austin 1987, no writ); *see 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 in part on other grounds by Van Es v. Frazier*, 230 S.W.3d 770, 776 (Tex. App.—Waco 2007, pet. denied); *Stephens v. Stephens*, 877 S.W.2d 801, 805 (Tex. App.—Waco 1994, writ denied) (applying the *Landon* abuse of discretion analysis).

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

it by law when the circumstances require that the power be exercised;⁶⁸ (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;⁶⁹ 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”;⁷⁰ (ii) by arriving at its choice in violation of an “applicable legal rule, principle, or criterion”;⁷¹ or (iii) by making a choice that is “legally unreasonable in the factual-legal context in which it [is] made.”⁷²

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



C. *Texas Mandamus Proceedings*

A writ of mandamus is an order from a court, usually to an inferior court, commanding the performance of some action.⁷³ To be entitled to a writ of

68. *Id.* at 938.

69. *Id.*

70. *Id.* at 939.

71. *Id.*

72. *Id.*

73. *Mandamus*, BLACK'S LAW DICTIONARY (10th ed. 2014).

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.⁷⁴ The relator has the burden of establishing both requirements of mandamus relief.⁷⁵ 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.”⁷⁶

While writs of mandamus are the most common invocation of original jurisdiction in appellate courts,⁷⁷ mandamus proceedings are not the only writs available to appellate courts.⁷⁸ Of the various forms of extraordinary relief, the writ of prohibition is most like the writ of mandamus.⁷⁹ 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.”⁸⁰ The

74. *In re Frank Kent Motor Co.*, 361 S.W.3d 628, 630 (Tex. 2012) (orig. proceeding); *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003) (orig. proceeding) (per curiam). See generally *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 (quoting *id.* at 506)). Before the 1950s, “the writ of mandamus issued only to compel the performance of a ministerial act or duty.” *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (citing *Wortham v. Walker*, 128 S.W.2d 1138, 1150 (Tex. 1939) (orig. proceeding); *Arberry v. Beavers*, 6 Tex. 457, 463 (1851); Helen A. Cassidy, *The Instant Freeze-Dried Guide to Mandamus Procedure in Texas Courts*, 31 S. TEX. L. REV. 509, 510 (1990); Tim Gavin, Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal Is Available*, 32 SW. L.J. 1283, 1288 (1979)). 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 of Tarrant Cty.*, 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).

75. *In re CSX Corp.*, 124 S.W.3d at 151.

76. *Chambers v. O’Quinn*, 242 S.W.3d 30, 32 (Tex. 2007) (per curiam) (citing *In re AIU Ins. Co.*, 148 S.W.3d 109, 119 (Tex. 2004) (orig. proceeding)).

77. For a thorough and comprehensive discussion of mandamus proceedings in Texas, see Justice Marialyn Barnard, Lorien Whyte, & Emmanuel Garcia, *Is My Case Mandamusable?: A Guide to the Current State of Texas Mandamus Law*, 45 ST. MARY’S L.J. 143 (2014).

78. See TEX. GOV’T CODE ANN. § 22.002 (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) (per curiam) (illustrating a court’s authority to consider applications for the “writ of habeas corpus, . . . writs of prohibition[,] and other extraordinary matters”).

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

80. *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 682 (Tex. 1989) (orig. proceeding) (citing *City of Houston v. City of Palestine*, 267 S.W. 663, 665 (Tex. 1924)). In contrast, an appellate “writ of quo warranto is an extraordinary remedy” used “to determine disputed questions about the

two-step formula for granting mandamus relief also applies to the writ of prohibition.⁸¹

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.⁸² 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.⁸³ Other courts, however, have granted writs of mandamus without any reference as to whether the trial court’s abuse of discretion was “clear.”⁸⁴ On appeal, error is usually couched in terms of abuse of discretion—without any discussion of whether the abuse needs to be “clear.”⁸⁵

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) (citing *State ex rel. R.C. Jennett v. Owens*, 63 Tex. 261, 270 (1885) (orig. proceeding)); *cf.* TEX. CIV. PRAC. & REM. CODE ANN. § 66.001 (providing for a quo warranto cause of action). A writ of procedendo is an 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) (citing *Houston & T.C. Ry. Co. v. Bounds*, 277 S.W. 401, 402 (Tex. App.—Waco 1925, no writ) (explaining the remedy of a writ of procedendo).

81. *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).

82. *See Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997) (noting 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).

83. *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).

84. *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) (per curiam) (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.

85. *E.g., Goode*, 943 S.W.2d at 446 (noting 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

In a mandamus proceeding, it is clear—no pun intended—that the courts do impose upon relators a more rigorous standard.⁸⁶ 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[.]”⁸⁷ 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.⁸⁸ 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.⁸⁹

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.⁹⁰ In a 1992 decision, *Walker v. Packer*,⁹¹ the Texas Supreme Court seemed to narrow the inadequacy requirement by rejecting authorities that glossed over this

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

86. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding), abrogated in part by *Columbia Med. Ctr.*, 290 S.W.3d at 213; *In re Acadia Ins. Co.*, 279 S.W.3d 777, 779 (Tex. App.—Amarillo 2007, orig. proceeding).

87. 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*, CAL. LAW., Aug. 1985, at 55, 55).

88. See *Prudential*, 148 S.W.3d at 137 (reasoning 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).

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

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

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

element.⁹² 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.⁹³

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.*⁹⁴ and *In re Prudential Insurance Co. of America.*⁹⁵ 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.”⁹⁶

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.”⁹⁷ 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 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.⁹⁸

92. *Id.* at 842.

93. *Id.* at 842–44.

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

95. *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) (per curiam) (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).

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

97. *Id.*

98. *Id.*

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.⁹⁹

Four years later, in its 2008 *McAllen* opinion,¹⁰⁰ 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.”¹⁰¹ 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.”¹⁰² According to the court, its balancing analysis “merely recognizes that the adequacy of an appeal depends on the facts involved in each case.”¹⁰³ 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.¹⁰⁴

In *McAllen*, a hospital sought mandamus relief when the trial court denied its motion to dismiss based on the plaintiffs' failure to file expert reports from a qualified expert as required by statute.¹⁰⁵ 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.¹⁰⁶ With this background, the Texas Supreme Court was willing to grant the hospital's mandamus petition despite previously denying similar petitions.¹⁰⁷ The

99. 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 the impact of *Prudential*'s more lenient mandamus standards has been mild despite predictions to the contrary).

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

101. *Id.* at 464 (footnotes omitted) (citing *Prudential*, 148 S.W.3d at 136–37).

102. *Id.* at 469.

103. *Id.*

104. 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).

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

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

107. *Id.* at 470 (Wainwright, J., dissenting, joined by Jefferson, C.J., & O'Neill, J.).

court cautioned against automatic mandamus relief in future cases, noting a number of factors that might defeat mandamus relief.¹⁰⁸

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.¹⁰⁹ In *In re Columbia Medical Center of Las Colinas, Subsidiary, L.P.*,¹¹⁰ a sharply divided court concluded that "trial courts must give more explanation than 'in the interest of justice' for setting aside a jury verdict."¹¹¹ On its face, this ruling seems limited to the rare orders granting a new trial in the interest of justice.¹¹² However, it appears that the number of mandamus proceedings being filed in appellate courts did expand 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.¹¹³

In 2018, the supreme court held that when the trial court's order would "skew the proceedings, potentially affect the outcome of the litigation, and compromise the presentation of [the relator's] defense [or claims] in ways unlikely to be apparent in the appellate record[.]" mandamus is proper.¹¹⁴

108. *Id.* at 467; see *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).

109. *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 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"), *abrogated in part by Columbia Med. Ctr.*, 290 S.W.3d at 213.

110. *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204 (Tex. 2009) (orig. proceeding).

111. *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.).

112. *Id.* at 206.

113. Kurt H. Kuhn, *Mandamus Is Not a Four-Letter Word*, in AUSTIN BAR ASS'N, "A WHOLE NEW WORLD": RECENT DEVELOPMENTS IN TEXAS MANDAMUS PRACTICE, sec III, at 9–10 (2008) (collecting statistics about the number of mandamus filings in Texas appellate courts, which are not publicly 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.

114. *In re Dawson*, 550 S.W.3d 625, 630 (Tex. 2018) (orig. proceeding) (per curiam) (first alteration in original) (quoting *In re Coppola*, 535 S.W.3d 506, 509 (Tex. 2017) (orig. proceeding) (per curiam)).

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.¹¹⁵ Regardless of the type of order challenged in a mandamus proceeding, appellate advocates should explain their rationale for seeking extraordinary relief,¹¹⁶ and appellate courts should likewise articulate their rationale for granting it.¹¹⁷ For example, it is often said that if an order is void, the relator need not show the lack of an adequate appellate remedy.¹¹⁸ 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.¹¹⁹

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,¹²⁰ while others involve construction of rules or statutes and the consideration of facts that may be hotly contested.¹²¹ Because the concept of discretion or choice defies uniform application to all situations, it is not surprising that the appellate courts' review of

115. 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).

116. 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).

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

118. See *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (per curiam) (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).

119. See *Dunn v. Street*, 938 S.W.2d 33, 35 (Tex. 1997) (orig. proceeding) (per curiam) (reasoning 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 relators were entitled to mandamus relief without resorting to "needless retrial and an appeal").

120. 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), *abrogated in part by Columbia Med. Ctr.*, 290 S.W.3d at 213.

121. 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).

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.¹²² Other times, reviewing courts refer to a "clear" or "manifest" abuse of discretion.¹²³ 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 are perpetuated purely 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 or limitations.¹²⁴ 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."¹²⁵

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

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

123. *See* *City of Dallas v. Vanesko*, 189 S.W.3d 769, 771 (Tex. 2006) (holding 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 the trial court's ruling on a motion for new trial will not be revised absent a "manifest abuse of discretion").

124. *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").

125. Rosenberg, *supra* note 33, at 185.

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.¹²⁶

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*,¹²⁷ which re-evaluated the standard for legal sufficiency challenges in civil cases.¹²⁸ After significant debate, the Texas Court of Criminal Appeals recently eliminated the factual sufficiency standard of review “in determining whether the evidence is sufficient to

126. See 10 U.S.C. § 866(c) (2012) (“The [Military] Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings . . . 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).

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

128. 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, 549–52 (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 *Harmar* 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 APPELLATE PRACTICE COURSE, ch. 16, at 1–2 (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, at 2–6 (2007) (interpreting recent Texas Supreme Court decisions regarding the no evidence standard of review).

support each element of a criminal offense that the State is required to prove beyond a reasonable doubt.”¹²⁹

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.¹³⁰ If properly preserved,¹³¹ challenges to the legal sufficiency of the evidence for a jury’s verdict may also be brought as an issue in the courts of appeals and the Texas Supreme Court.¹³²

a. *City of Keller v. Wilson*

In *City of Keller*, the Texas Supreme Court recognized both of the different scopes of review applicable to no evidence cases.¹³³ 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,¹³⁴ and the difference between the inclusive and exclusive standards was “more semantic than real.”¹³⁵ Whether a reviewing court

129. *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). See generally Hall & Emery, *supra* note 128, at 580 (noting the court in *Watson* almost “ended the use of factual sufficiency review in the bulk of cases”).

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

131. 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) (citing *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985)); *Salinas v. Fort Worth Cab & Baggage Co.*, 725 S.W.2d 701, 704 (Tex. 1987); *Aero Energy*, 699 S.W.2d at 822; accord TEX. R. CIV. P. 301 (“The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence.”).

132. See *Choate v. San Antonio & A. P. Ry. Co.*, 44 S.W. 69, 69–70 (1898) (recognizing the courts of appeals and the supreme court have jurisdiction to review challenges to the legal sufficiency of the evidence).

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

134. *Id.* at 821–22.

135. See *id.* at 825–27 (discussing the holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149–51 (2000), and noting the different scopes of review are “more semantic than real” and that reviewing courts should review all of the evidence in the record).

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[.]”¹³⁶

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.¹³⁷

“A reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within this zone of reasonable disagreement.”¹³⁸

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.¹³⁹ The court stated: “[T]he traditional rule in Texas has never been that appellate courts must reject contrary evidence in every no-evidence review.”¹⁴⁰ The traditional scope of review does not disregard contrary evidence if: (1) there is no favorable evidence;¹⁴¹ (2) contrary evidence renders supporting evidence incompetent;¹⁴² or (3) “the evidence establishes conclusively the opposite of [a] vital fact.”¹⁴³

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.¹⁴⁴

136. *Id.* at 822.

137. *Id.* at 827.

138. *Id.* at 822 (citing William Powers, Jr. & Jack Ratliff, *Another Look at “No Evidence” and “Insufficient Evidence,”* 69 TEX. L. REV. 515, 517–20 (1991)).

139. *Id.* at 827–28; see Phillips & Newton, *supra* note 128, at 6 (suggesting 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”).

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

141. See *id.* (noting the court must sustain a no evidence point when there is a “complete absence of evidence of a vital fact” (quoting Robert W. Calvert, “No Evidence” and “Insufficient Evidence” *Points of Error*, 38 TEX. L. REV. 361, 362–63 (1960))).

142. See *id.* (recognizing 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” (quoting Calvert, *supra* note 141, at 362–63)).

143. *Id.* (quoting Calvert, *supra* note 141, at 362–63).

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

Contextual evidence. The court cited the following as examples: defamation cases, where the entire publication must be considered;¹⁴⁵ contract cases, where the entire contract is reviewed;¹⁴⁶ and intentional infliction of emotional distress cases, where “the context and the relationship between the parties” is considered.¹⁴⁷ Accordingly, as noted by the court:

[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.¹⁴⁸

Competency evidence. Incompetent evidence has always been “insufficient to support a judgment, even if admitted without objection.”¹⁴⁹ 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.”¹⁵⁰ 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.¹⁵¹ This rule also applies “[w]hen expert testimony is required[;] lay evidence supporting liability is legally insufficient.”¹⁵² 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.¹⁵³ As the court observed, the evidence at issue might be *some*

145. *Id.* at 811.

146. *Id.*

147. *Id.* at 811 (quoting *Tiller v. McLure*, 121 S.W.3d 709, 714 (Tex. 2003) (per curiam); then citing *Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 610–11 (Tex. 2002); *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 612 (Tex. 1999)).

148. *Id.* at 812.

149. *Id.* at 812 (citing *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 n.1 (Tex. 2004)).

150. *Id.*

151. *Id.* (quoting *Tex. & P. Ry. Co. v. Ball*, 75 S.W. 4, 6 (1903)).

152. *Id.* (citing *Bowles v. Bourdon*, 219 S.W.2d 779, 782–83 (Tex. 1949)).

153. *See id.* at 813 (“[R]eview of an expert’s damage estimates cannot disregard the expert’s admission on cross-examination that none can be verified.” (citing *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 254–57 (Tex. 2004), *abrogated in part by* *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 18–19 (Tex. 2008)); *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)).

evidence in isolation, but it is *no* evidence when contrary evidence demonstrates that it is incompetent.¹⁵⁴

Circumstantial 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.”¹⁵⁵ 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 occurred;¹⁵⁶ 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.”¹⁵⁷ 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.¹⁵⁸

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.”¹⁵⁹ There are many forms of conclusive evidence.¹⁶⁰ 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[.]’”¹⁶¹ and “[b]y definition . . . [leaves] reasonable jurors [to] reach only one conclusion from it.”¹⁶² The court then noted that “undisputed contrary evidence [generally] becomes conclusive . . . when it concerns physical facts that cannot be denied.”¹⁶³ 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”;¹⁶⁴

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

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

156. *Id.* at 814 (citing *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 938 (Tex. 1998)).

157. *Id.* (citing *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 729 (Tex. 2003) (per curiam); *W. Tel. Corp. of Tex. v. McCann*, 99 S.W.2d 895, 900 (Tex. [Comm’n Op.] 1937)).

158. *Id.*

159. *Id.* at 814 (citing Calvert, *supra* note 141, at 363–64).

160. *Id.*

161. *Id.* (quoting *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 519–20 (Tex. 2002) (plurality opinion)).

162. *Id.*

163. *Id.* at 815.

164. *Id.* (citing *County of Bexar v. Santikos*, 144 S.W.3d 455, 460–61 (Tex. 2004)).

(2) “[e]vidence that a buyer believed a product had been repaired is conclusively negated by a[] . . . letter to the contrary”;¹⁶⁵ 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.”¹⁶⁶ Undisputed conclusive evidence may also be conclusive when a party admits that the evidence of a vital fact is true.¹⁶⁷

The second form of conclusive evidence arises when “the evidence *is* disputed.”¹⁶⁸ 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.”¹⁶⁹ 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.¹⁷⁰ Because the blood test is conclusive, “there [would be] no evidence to support the paternity verdict” against the purported father.¹⁷¹ 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.”¹⁷²

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.¹⁷³

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

165. *Id.* (citing PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P’ship, 146 S.W.3d 79, 97–98 (Tex. 2004)).

166. *Id.* (citing State Farm Lloyds Ins. Co. v. Maldonado, 963 S.W.2d 38, 40 (Tex. 1998)).

167. *Id.*

168. *Id.* at 816.

169. *Id.*

170. *Id.* (citing Murdock v. Murdock, 811 S.W.2d 557, 560 (Tex. 1991)).

171. *Id.* (citing Murdock v. Murdock, 811 S.W.2d 557, 560 (Tex. 1991)).

172. *Id.* at 816–17.

173. *Id.* at 817 (footnotes omitted) (first citing *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002); then citing *Bentley v. Bunton (Bentley I)*, 94 S.W.3d 561, 596 (Tex. 2002); *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 120 (Tex. 2000); and then citing *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 627 (Tex. 2004)).

discovery rule, the reviewing court must consider all of the evidence, not just the evidence favoring the verdict, in reviewing those judgments.¹⁷⁴

ii. Types of Evidence that Must Be Disregarded

In *City of Keller*, the court also noted three kinds of evidence that *must* be disregarded:¹⁷⁵

Credibility evidence. Because “[j]urors are the sole judges of the credibility of the witnesses and the weight to give their testimony[.]”¹⁷⁶ jurors are free “to believe one witness and disbelieve another[.]”¹⁷⁷ and “[r]eviewing courts [may not] impose their own opinions to the contrary.”¹⁷⁸ Accordingly, “reviewing courts must assume [that] jurors decided all [credibility questions] in favor of the verdict if reasonable human beings could do so.”¹⁷⁹ The court emphasized “[t]he jury’s decisions regarding credibility must be reasonable.”¹⁸⁰ For example, “[j]urors cannot [disregard] undisputed testimony that is . . . free from contradictions and inconsistencies, and could have been readily controverted.”¹⁸¹ Similarly, jurors “are not free to believe testimony that is conclusively negated by undisputed facts.”¹⁸² 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.¹⁸³

Conflicting evidence. The court noted that it is within the jury’s province “to resolve conflicts in the evidence.”¹⁸⁴ Consequently, when “reviewing all

174. *Id.* at 817–18.

175. *See id.* at 818–21 (describing evidence that should always be disregarded).

176. *Id.* at 819 (citing *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003); *Jaffe Aircraft Corp. v. Carr*, 867 S.W.2d 27, 28 (Tex. 1993); *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986); *Edrington v. Kiger*, 4 Tex. 89, 93 (1849)).

177. *Id.* (citing *McGalliard*, 722 S.W.2d at 697; *Silcott v. Oglesby*, 721 S.W.2d 290, 293 (Tex. 1986); *Ford v. Panhandle & Sante Fe Ry. Co.*, 252 S.W.2d 561, 563 (Tex. 1952); *Houston, E. & W.T. Ry. Co. v. Runnels*, 47 S.W. 971, 972 (Tex. 1898)).

178. *Id.* (citing *Turner*, 38 S.W.3d at 120).

179. *Id.*

180. *See id.* 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).

181. *Id.* (citing TEX. R. CIV. P. 166a(c); *Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 817 (Tex. 2002); *In re Doe 4*, 19 S.W.3d 322, 325 (Tex. 2000); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 574 (Tex. 1998)).

182. *Id.*

183. *Id.*

184. *Id.* (citing *Dresser Indus., Inc. v. Lee*, 880 S.W.2d 750, 754 (Tex. 1993); *Lyons v. Millers Cas. Ins. Co. of Tex.*, 866 S.W.2d 597, 601 (Tex. 1993); *Biggers v. Cont'l Bus Sys., Inc.*, 303 S.W.2d 359, 365 (Tex. 1957); *Howard Oil Co. v. Davis*, 13 S.W. 665, 667 (Tex. 1890)).

the 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.¹⁸⁵ 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.”¹⁸⁶

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.¹⁸⁷ Therefore, when the court reviews “all the evidence in a light [most] favorable to the [jury’s] verdict[,]” the reviewing court “must assume jurors made all inferences in favor of their verdict if reasonable minds could [do so], and disregard all other inferences in their legal sufficiency review.”¹⁸⁸

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*.¹⁸⁹ The impact of *City of Keller*’s reformulation is readily apparent in the manner in which legal sufficiency standards are commonly stated in opinions.¹⁹⁰ Additionally, in its emphasis on the reasonable juror standard,

185. *Id.* (citing *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 592 (Tex. 1999); *Caller-Times Publ’g Co. v. Triad Commc’ns, Inc.*, 826 S.W.2d 576, 580 (Tex. 1992); *Bendalin v. Delgado*, 406 S.W.2d 897, 899 (Tex. 1966)).

186. *Id.* at 821.

187. *Id.*

188. *Id.*

189. *See generally id.* at 807–30 (using the word “reasonable” forty-two times and the phrase “reasonable jurors” fifteen times).

190. 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) (per curiam) (citing *id.* at 822–23). *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

City of Keller appears to bring Texas more closely in line with federal standards for legal sufficiency review.¹⁹¹ The test is not so much whether there is a scintilla of evidence to support the verdict, but whether the reviewing court believes that the evidence at trial would allow reasonable and fair-minded people to reach the verdict under review.¹⁹² 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.¹⁹³

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

review." (citing *id.* at 827)); *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." (citing *id.* at 827)).

191. 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 Gautreaux v. Scarlock 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 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 *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)).

192. 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).

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

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.

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.”¹⁹⁴ Constitutionally, only the intermediate courts of appeals have jurisdiction to review for factual sufficiency.¹⁹⁵

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.”¹⁹⁶ 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.”¹⁹⁷ “[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.”¹⁹⁸

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

195. TEX. CONST. art. V, § 6(a).

196. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam) (citing *Burnett v. Motyka*, 610 S.W.2d 735, 736 (Tex. 1980) (per curiam)); see *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. (Loflon I)*, 720 S.W.2d 804, 805 (Tex. 1986) (per curiam) (holding the courts of appeals “must review all of the evidence” in their decision on a review of factual sufficiency (citing *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965))); *Burnett*, 610 S.W.2d at 736 (remanding the case back to the court of appeals for its failure to “consider and weigh all the evidence” in a factual sufficiency review).

197. *Walker v. Ricks*, 101 S.W.3d 740, 749 (Tex. App.—Corpus Christi 2003, no pet.) (citing *Reyna v. First Nat’l Bank in Edinburg*, 55 S.W.3d 58, 73 (Tex. App.—Corpus Christi 2001, no pet.)); see *Corpus Christi Area Teachers Credit Union v. Hernandez*, 814 S.W.2d 195, 197 (Tex. App.—San Antonio 1991, no writ) (“[I]n 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.))).

198. *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998) (citing *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986)); see *Pool*, 715 S.W.2d at 634–35 (disapproving of decisions by

A court of appeals must “detail the evidence . . . and clearly state why the jury’s finding is factually insufficient” when reversing a jury verdict,¹⁹⁹ but it need not do so when affirming a jury verdict.²⁰⁰ 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[.]”²⁰¹

“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.”²⁰²

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.²⁰³ In reviewing an insufficiency of the evidence challenge, the

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 Insurance 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.). However, *Crown Life* overruled the holding of the Sixth Court of Appeals in *Ford Motor Co. v. Pool*, 688 S.W.2d 879 (Tex. App.—Texarkana 1985), *aff’d in part and rev’d in part on other grounds*, 715 S.W.2d 269 (Tex. 1986), not the Texas 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.” See *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 615 (Tex. 2016) (stating that court of appeals announced the correct standard and citing *Pool*).

199. See *Pool*, 715 S.W.2d at 635 (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) (per curiam) (“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.”).

200. See *Ellis Cty. 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).

201. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b), *as recognized in* *U-Haul Int’l, Inc. v. Waldrip*, 380 S.W.3d 118, 140 (Tex. 2012); see TEX. CIV. PRAC. & REM. CODE ANN. § 41.011 (providing factors that must be considered in reviewing the damages award).

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

203. 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 *id.* at 275–76 (explaining that an insufficient

court of appeals must first consider, weigh, and examine all of the evidence that supports and that is contrary to the jury's determination.²⁰⁴ 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."²⁰⁵ The court sets aside the judgment if the evidence is so weak "as to be clearly wrong and unjust."²⁰⁶

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."²⁰⁷ 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.²⁰⁸ 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."²⁰⁹ 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

evidence point is the appropriate challenge to a jury finding when the attacking party does not have the burden of proof).

204. *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989); *see 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).

205. *Ritchey v. Crawford*, 734 S.W.2d 85, 87 n.1 (Tex. App.—Houston [1st Dist.] 1987, no writ) (citing *Calvert*, *supra* note 141, at 366).

206. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam) (citing *Dyson v. Olin Corp.*, 692 S.W.2d 456, 457 (Tex. 1985); *In re King's Estate*, 244 S.W.2d 660, 661 (Tex. 1951) (per curiam)).

207. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam) (citing *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983)).

208. *Id.* at 241–42.

209. *Castillo v. U.S. Fire Ins. Co.*, 953 S.W.2d 470, 473 (Tex. App.—El Paso 1997, no writ) (citing *Cain*, 709 S.W.2d at 176); *see id.* 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." (citing *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986); *W. Wendell Hall, Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 484 (1998))).

to find' is against the great weight and preponderance of the evidence."²¹⁰

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."²¹¹ 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[.]"²¹² and makes broad use of juries.²¹³ The Texas Constitution provides that "[t]he right of a jury trial shall remain inviolate" and be

210. *Ames v. Ames*, 776 S.W.2d 154, 158 (Tex. 1989) (citing *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 651 (Tex. 1988)).

211. TEX. CONST. art. V, § 6(a).

212. *Watson v. State*, 204 S.W.3d 404, 429 n.47 (Tex. Crim. App. 2006), *overruled in part on other grounds by Brooks v. State*, 323 S.W.3d 893, 911–12 (Tex. Crim. App. 2010); see 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.>").

213. 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 ("The right of trial by jury shall remain inviolate. . . . Provided, that the Legislature may provide for the temporary commitment . . . of mentally ill persons . . . without the necessity of a trial by jury."); *id.* art. I, § 15-a (noting the legislature may allow for a waiver of a jury trial in some cases involving commitment of "persons of unsound mind[.]") but confirming that despite possible waiver, the "person under inquiry [can] . . . demand a trial by jury"); *id.* 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(a) ("The 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 (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").

available in all cases,²¹⁴ 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.”²¹⁵ 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.”²¹⁶

Unlike most jurisdictions, courts of appeals in Texas are granted jurisdiction over questions of fact.²¹⁷ 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.”²¹⁸ 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.”²¹⁹

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.²²⁰ 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.*,²²¹ the supreme court reaffirmed the courts of appeals’ jurisdiction to review cases for factual insufficiency of the evidence,²²² 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.²²³ In effect, *Pool* further clarified the supreme court’s power to review a court of appeals’ application of the

214. TEX. CONST. art. I, §§ 10, 15-a; *id.* art. V, §§ 10, 13, 17.

215. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997) (citing *Young v. Blain*, 245 S.W. 65, 67 (Tex. [Comm’n Op.] 1922)).

216. TEX. R. CIV. P. 226a.

217. TEX. CONST. art. V, § 6(a).

218. *Choate v. San Antonio & A.P. Ry. Co.*, 44 S.W. 69, 69 (Tex. 1898).

219. TEX. GOV’T CODE ANN. § 22.225(a).

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

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

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

223. *See id.* at 634–35 (concluding the supreme court may take jurisdiction over a final judgment of the court of appeals on a fact question to determine if the appropriate standard was applied).

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]."²²⁴

In *Cropper v. Caterpillar Tractor Co.*,²²⁵ the Texas Supreme Court rejected a challenge to the court of appeals' constitutional obligation to review fact questions, reasoning that the constitutional right to a 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."²²⁶ 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 [constitutional provision] for the benefit of the other."²²⁷

In *Lofton v. Texas Brine Corp. (Lofton I)*,²²⁸ the conflict appeared again, when the court was called upon to apply *Pool* to a court of appeals' opinion.²²⁹ In *Lofton v. Texas Brine Corp. (Lofton II)*,²³⁰ a 5–4 decision, the majority "briefly present[ed] a review of why the lower court's [factual sufficiency] analysis [was] incorrect."²³¹ Justice Gonzalez's dissent noted

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

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

226. *Id.* at 652.

227. *Id.*

228. *Lofton v. Tex. Brine Corp. (Lofton I)*, 720 S.W.2d 804 (Tex. 1986) (per curiam). 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 (citing *Pool*, 715 S.W.2d at 635; *Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588, 594–95 (Tex. 1986)). 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, 204 (Tex. App.—Houston [14 Dist.] 1988), *rev'd*, 777 S.W.2d 384, 387 (Tex. 1989). 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).

229. *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" (citing *Pool*, 715 S.W.2d at 635)).

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

231. *Id.* at 386–87.

that the fear he expressed in *Pool* had been realized in *Lofton II*.²³² As the court of appeals had twice found the evidence factually insufficient, Justice Gonzalez concluded “we have no jurisdiction to review it.”²³³ 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.”²³⁴ 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.²³⁵

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.”²³⁶

232. *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*, 715 S.W.2d at 637 (Gonzalez, J., concurring) (noting “the [majority] court 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”).

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

234. *Id.* at 387–88.

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

236. *Id.*; *see Powers & Ratliff, supra* note 138, at 533–34 (discussing the concern expressed by Justices Hecht and Gonzalez that the supreme court should not reverse an appeals court simply to get the lower court to reach a result with which the supreme court approves).

In *Aluminum Co. of America v. Alm*,²³⁷ the supreme court circumvented the court of appeals' conclusion that the jury's finding of gross negligence was supported by factually insufficient evidence.²³⁸ 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.²³⁹ Ignoring the evidence of care introduced by Alcoa,²⁴⁰ 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.²⁴¹ 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.”²⁴²

In *Havner v. E-Z Mart Stores, Inc.*,²⁴³ 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.”²⁴⁴ 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.”²⁴⁵ 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 reversing the judgment of the court of appeals until it reaches a result that the majority approves.”²⁴⁶

In 1994, the Texas Supreme Court's movement toward the reasonable and fair-minded person standard gained traction in *Transportation Insurance*

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

238. *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.”).

239. *Id.* at 140.

240. *Id.* at 143.

241. *Id.* at 141–42.

242. *Id.* at 143.

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

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

245. *Id.* (emphasis omitted).

246. *Id.* at 287 (citing *Lofton v. Tex. Brine Corp. (Lofton I)*, 720 S.W.2d 804, 805 (Tex. 1986) (per curiam); *Lofton v. Tex. Brine Corp. (Lofton II)*, 777 S.W.2d 384, 387 (Tex. 1989); Powers & Ratliff, *supra* note 138, at 533).

Co. v. Moriel,²⁴⁷ 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.²⁴⁸ 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*.²⁴⁹ 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."²⁵⁰ The court was evaluating the "reasonableness" of the mental anguish award as "a proxy for factual sufficiency review."²⁵¹

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."²⁵² Rather than sending a case back to the 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

247. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b), *as recognized in* *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 140 (Tex. 2012).

248. *Id.* at 30.

249. *Bunton v. Bentley (Bentley II)*, 153 S.W.3d 50, 54 (Tex. 2004) (per curiam); *Bentley v. Bunton (Bentley I)*, 94 S.W.3d 561, 607 (Tex. 2002).

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

251. *Id.*

252. Hall & Emery, *supra* note 128, at 562; see W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 276 (2006) (posing the question, "[I]s 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 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").

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. Applications of *City of Keller*

Despite more than ten years of case law to help assess *City of Keller's* effect, the results remain developing and inconclusive, particularly with respect to the effect of the "final" test of whether a reasonable juror could make the challenged finding. 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.*,²⁵³ the supreme court reversed a jury's verdict and rendered judgment for The Coca-Cola Company (Coke) in an anti-trust case.²⁵⁴ Specifically, plaintiff soft drink bottlers sued Coke and several of its distributors for entering into calendar marketing agreements (CMAs) with retailers.²⁵⁵ The plaintiffs claimed that these CMAs unreasonably restrained trade by monopolizing the market in violation of state antitrust laws.²⁵⁶ "The district court rendered judgment on the jury's verdict for the plaintiffs, awarding damages incurred throughout the region and permanently enjoining [Coke], in specified counties in . . . four states, [based on] certain conduct that it determined to be anticompetitive."²⁵⁷ The court of appeals found "sufficient evidence for the jury to find monopolization" based on testimony presented at trial.²⁵⁸ 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[.]"²⁵⁹ The court of appeals stated, "Although any one of the factors set out [in the case] might be insufficient

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

254. *Id.* at 675.

255. *Id.* at 675–76.

256. *Id.* at 678.

257. *Id.* at 674.

258. *See id.* at 679 (detailing the testimony upon which the court of appeals based its finding).

259. *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).

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.”²⁶⁰ The supreme court reversed the court of appeals, with the majority holding that there was no evidence that Coke’s practices restrained trade.²⁶¹

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.²⁶² 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.”²⁶³ 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”²⁶⁴

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.”²⁶⁵ 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

260. *Id.* at 305.

261. *Harmar*, 218 S.W.3d at 689–91.

262. *See id.* at 699–700 (Brister, J., dissenting, joined by Jefferson, C.J., & O’Neill & Medina, JJ.) (noting 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).

263. *Id.* at 699.

264. *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.

265. 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 WASH. POST (May 8, 2007, 8:44 AM), http://blog.washingtonpost.com/benchconference/2007/05/three_degrees_of_separation_an.html (opining “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 and the Ever-Expanding Scope of Legal Sufficiency Review*, 49 S. TEX. L. REV. 611, 612 (2008) (arguing *Harmar* is an “unwelcome attack on the finality of jury verdicts”).

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.²⁶⁶

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.²⁶⁷ 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.”²⁶⁸ 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.”²⁶⁹

Yet in *Tanner v. Nationwide Mutual Fire Insurance Co.*,²⁷⁰ the supreme court reinstated a judgment on a jury’s verdict after the trial court had granted JNOV.²⁷¹ 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.”²⁷² In dispute was whether the driver’s attempts to elude police forfeited coverage under an intentional-injury exclusion in his automobile liability insurance policy.²⁷³ 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.”²⁷⁴

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

267. *Id.* at 10.

268. *Id.* at 11.

269. Phillips & Newton, *supra* note 128, at 6.

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

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

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

273. *Id.*

274. *Id.*

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.²⁷⁵ 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.²⁷⁶ 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.²⁷⁷ 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.²⁷⁸ 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 others.²⁷⁹ 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."²⁸⁰ 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*,²⁸¹ where the court reversed a judgment based on a jury verdict and rendered judgment based on legally insufficient evidence of proximate causation.²⁸² 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

275. 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.").

276. *Id.* at 834–35.

277. *Id.* at 834–35.

278. *Id.* at 835.

279. *Id.*

280. *Id.* at 835 n.4 (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 812 (Tex. 2005)). In *Autogone, Inc. v. Reyes*, 272 S.W.3d 588 (Tex. 2008) (per curiam), 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.

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

282. *Id.* at 330.

because the individual killed himself “thirty-three hours after his release[.]”²⁸³ 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.”²⁸⁴ 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[.]”²⁸⁵ Therefore, the majority concluded that “the defendants’ negligence was too attenuated from the suicide to have been a substantial factor in bringing it about.”²⁸⁶

But three dissenting justices asserted that the majority “misapplie[d] the law” and “disregard[ed] relevant evidence[.]”²⁸⁷ 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.²⁸⁸ 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[.]”²⁸⁹ 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.²⁹⁰ Notable in this case are the sharp splits in the court of appeals²⁹¹ and in the supreme court; however, the supreme court rendered judgment despite disagreeing over what evidence was “undisputed.”²⁹²

283. *Id.* at 325.

284. *Id.* at 330.

285. *Id.* at 329–30.

286. *Id.* at 330.

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

288. *Id.* at 334.

289. *Id.* at 335.

290. *Id.*

291. 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 no evidence was present that defendants were a substantial cause of death), *rev’d*, 262 S.W.3d 324 (Tex. 2008).

292. 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) (per curiam), may have indicated another call to ensure that the lower courts credit

In *Minnesota Life Insurance Co. v. Vasquez*,²⁹³ the supreme court reversed a jury's verdict against an insurance company.²⁹⁴ The issue was whether there was "any evidence that Minnesota Life knowingly committed an unfair settlement practice."²⁹⁵ The court of appeals upheld the jury's finding that Minnesota Life failed to pay a "claim after coverage . . . [became] reasonably clear."²⁹⁶ 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.²⁹⁷ 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.²⁹⁸ 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.²⁹⁹ 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.³⁰⁰

undisputed evidence and do not simply look at the evidence in favor of the non-movant on summary judgment. See *id.* at 756 (stating 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.* 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 "[t]he 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 Central Texas, 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, joined by Hecht, Brister, & Johnson, JJJ).

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

294. *Id.* at 776–77.

295. *Id.* at 776.

296. *Id.* at 776–77.

297. *Id.* at 777.

298. 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).

299. *Minn. Life*, 192 S.W. 3d at 777–78 (holding there was "no evidence that the insurer failed to pay the claim after coverage had become reasonably clear").

300. 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 *City of Keller* means that a reviewing court should look at all of the evidence, including contrary evidence).

In *Jelinek v. Casas*,³⁰¹ the Texas Supreme Court may have inadvertently suggested that courts consider the “credibility” of testimony when reviewing for the legal sufficiency of the evidence.³⁰² 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.³⁰³ Two days following her admission, major abdominal surgery was performed on Casas.³⁰⁴ 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.³⁰⁵ 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.³⁰⁶ 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[.]”³⁰⁷

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.”³⁰⁸ “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.”³⁰⁹ 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.”³¹⁰ 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

301. *Jelinek v. Casas*, 328 S.W.3d 526 (Tex. 2010).

302. *Id.* at 532–38.

303. *Id.* at 530.

304. *Id.*

305. *Id.*

306. *Id.* at 532.

307. *Id.* at 535.

308. *Id.* at 536 (citing *Lenger v. Physician’s Gen. Hosp., Inc.*, 455 S.W.2d 703, 707 (Tex. 1970); *Hart v. Van Zandt*, 399 S.W.2d 791, 792 (Tex. 1965)).

309. *Id.* at 538 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 814 (Tex. 2005)).

310. *Id.*

not supported by *credible* evidence.”³¹¹ Unless the court intended to depart from *City of Keller*’s position that “[j]urors are the sole judges of the credibility of the witnesses and the weight to give their testimony[.]”³¹² the court probably used the term “credible” as short-hand for *City of Keller*’s additional view that “[t]he jury’s decisions regarding credibility must be reasonable[.]”³¹³ that is, “creditabile.”

Two subsequent cases indicate that the supreme court does not intend to require reviewing courts to make further inquiries into credibility. In *Gunn v. McCoy*³¹⁴ and *Thota v. Young*,³¹⁵ the court reaffirmed that “jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony.”³¹⁶ “It is the province of the jury to resolve conflicts in the evidence, and when reasonable jurors could resolve conflicting evidence either way, we presume they did so in accordance with the verdict.”³¹⁷ Both cases involved conflicting expert testimony and the court concluded in both cases that that jury could have reasonably believed one expert over the other.³¹⁸ As a result, the legal sufficiency challenge failed.³¹⁹ Assuming that the experts are both “creditabile,” meaning their opinion testimony is competent and thus admissible, it is left to the jury to determine which expert is more “credible.”

311. *Id.* (emphasis added).

312. *City of Keller*, 168 S.W.3d at 819 (citing *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003); *Jaffe Aircraft Corp. v. Carr*, 867 S.W.2d 27, 28 (Tex. 1993); *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986); *Edrington v. Kiger*, 4 Tex. 89, 93 (1849)).

313. *Id.* at 820 (quoting *Bentley v. Bunton (Bentley I)*, 94 S.W.3d 561, 599 (Tex. 2002)); *see 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.’” (footnote omitted) (first citing *Ford Motor Co. v. Ridgeway*, 135 S.W.3d 598, 601 (Tex. 2004); *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 729 (Tex. 2003) (per curiam); *Hammerly Oaks, Inc., v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997); *W. Tel. Corp. of Tex. v. McCann*, 99 S.W.2d 895, 900 (Tex. [Comm’n Op.] 1937); *Calvert*, *supra* note 141, at 365; then citing *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 324 (Tex. 1984); and then quoting *Tubelite, a Div. of Indal, Inc. v. Risica & Sons, Inc.*, 819 S.W.2d 801, 805 (Tex. 1991)); *Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001) (per curiam) (“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.’” (quoting *Hammerly Oaks*, 958 S.W.2d at 392)).

314. *Gunn v. McCoy*, 554 S.W.3d 645 (Tex. 2018).

315. *Thota v. Young*, 366 S.W.3d 678 (Tex. 2012).

316. *Gunn*, 554 S.W.3d at 665 (citing *City of Keller*, 168 S.W.3d at 819); *Thota*, 366 S.W.3d at 695 (quoting *City of Keller*, 168 S.W.3d at 819).

317. *Gunn*, 554 S.W.3d at 665 (citing *City of Keller*, 168 S.W.3d at 820).

318. *Id.*; *Thota*, 366 S.W.3d at 695–96.

319. *Gunn*, 554 S.W.3d at 665–66; *Thota*, 366 S.W.3d at 695–96.

The court's recent decision in *Alamo Heights Independent School District v. Clark*³²⁰ provides an interesting analysis of contextual evidence and its effect on the inferences that a reasonable juror can draw. In *Clark*, the court reviewed the legal sufficiency of the evidence supporting Clark's claim that she was sexually harassed by another female teacher at the school.³²¹ While the majority and the dissent recited the same standard of review and identified the same acts allegedly giving rise to the harassment claim, their respective analyses demonstrate an apparent lack of consensus as to how the contextual evidence should be employed in conducting the review.³²²

The majority criticizes the dissent for failing to consider the entire context of the alleged harasser's acts in determining whether the alleged harasser's admittedly vulgar conduct was sexually motivated.³²³ While acknowledging that legal sufficiency reviews require the court to "view the evidence and its inferences in the light most favorable to Clark," the majority further notes "we cannot disregard unfavorable evidence and inferences that reasonable jurors could not[,] which "includes evidence showing the context in which events occurred, regardless of whether it is favorable to Clark."³²⁴ The majority accuses the dissent of failing "to credit evidence a reasonable juror could not disregard and by ignoring *City of Keller's* admonitions regarding contextual evidence" because such evidence "winnows the inferences a reasonable juror could credit[.]"³²⁵ "Ignoring context is impermissible because it perverts the legal inquiry, much the same way isolating words and phrases from context contorts the meaning and intent of a statute."³²⁶ Referencing its prior review of mental anguish claims, the majority explains, "[I]n our no-evidence reviews of successful claims, we have invariably reviewed not just evidence showing the conduct was outrageous, but also evidence showing that, in context, it was not."³²⁷ The majority criticizes the dissent's evaluation of the contextual evidence, explaining "[t]hrough purporting to analyze context, the dissent actually distorts it" and that its "focus on raunchy details rather than the full context of Clark's allegations

320. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755 (Tex. 2018).

321. *Id.* at 763–69.

322. *See id.* at 793 ("Though citing the legal-sufficiency standard, the dissent contravenes it by failing to credit evidence a reasonable juror could not disregard and by ignoring *City of Keller's* admonitions regarding contextual evidence.").

323. *Id.* at 794–95.

324. *Id.* at 792–93 (citing *City of Keller*, 168 S.W.3d at 807, 811–12, 822).

325. *Id.* at 793.

326. *Id.*

327. *Id.* (quoting *City of Keller*, 168 S.W.3d at 812).

distorts the legal-sufficiency analysis.”³²⁸ “Myopic focus on select details of offending behavior ignores the reason for it, and the reason is what matters under the TCHRA.”³²⁹ Ultimately, while the majority acknowledges that “[t]he dissent is at least making a limited effort to consider context, but it still fails to consider all the context, and the inferences it attempts to draw from incomplete context are illogical.”³³⁰

In its evaluation of the contextual evidence, the majority appears to place particular emphasis on the evidence that “Monterrubio enjoyed being crass and profane and telling dirty jokes and stories to all the coaches, male and female, not just Clark[,]” as “[t]his treatment of co-workers of both genders provides crucial context that Monterrubio’s motives were based on factors other than gender.”³³¹ Given the context, the majority concludes that no reasonable juror could infer, and thus the evidence is legally insufficient to establish, that Monterrubio’s actions were sexually motivated.³³²

The dissent, for its part, accuses the majority of failing to follow the controlling standard of review, explaining:

To determine whether the record contains some evidence to support the plaintiff’s claims, we must consider the record “in the light most favorable” to the plaintiff, “indulging every reasonable inference” in her favor, and “resolving any doubts against” the defendant. . . . And although a jury can reject her effort to portray true facts in a light that favors her, we must review the record exactly in that light. In short, we must accept these facts as the facts of this case.³³³

After listing the multitude of incidents brought forth by the plaintiff to support her claim, the dissent finds that “the evidence would permit a reasonable juror to find that Monterrubio harassed Clark ‘because of her

328. *Id.* at 793–94.

329. *Id.* at 775.

330. *Id.* at 798.

331. *Id.* at 775–76 (emphasis omitted) (citing *Smith v. Hy-Vee, Inc.*, 622 F.3d 904, 908 (8th Cir. 2010) (per curiam); *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 261 (4th Cir. 2001); *Collins v. TRL, Inc.*, 263 F.Supp.2d 913, 920 (M.D. Pa. 2003)); *see id.* at 798 (“Monterrubio was rude, crass, and hostile towards seemingly everyone at work, male or female. The dissent misanalyzes the significance of this evidence. How she treats not just Clark but everyone else at work provides important context regarding Monterrubio’s motives.”).

332. *Id.* at 778.

333. *Id.* at 803 n.1 (Boyd, J., dissenting, joined by Lehrmann, J.) (internal citation omitted) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005)); *see id.* at 811 (“[T]he [majority] Court distorts the applicable standard of review.”).

gender because (1) Monterrubio was 'motivated by sexual desire' for Clark, or (2) Monterrubio's harassment of Clark focused on Clark's gender-specific anatomy and characteristics."³³⁴ The dissent further notes "[a]lthough the evidence certainly would not require a juror to reach that finding, it is at least sufficient to permit a reasonable juror to reach it[.]"³³⁵

The court's apparent divergent views regarding the role of contextual evidence in legal sufficiency analysis is readily apparent in the discussion regarding one particular incident. During a meeting between Clark and her supervisor, Monterrubio continually entered the office, including one interruption in which she "us[ed] her tongue to lick seductively the cupcake icing off of a cupcake."³³⁶ The dissent identified the incident as capable of being inferred by a reasonable juror as sexually motivated.³³⁷ In contrast, the majority interpreted the incident as incapable of being reasonably inferred as sexual. "[N]otwithstanding Clark's subjective view of its 'seductive[ness],' Monterrubio's licking a cupcake cannot reasonably be equated with a genuine sexual proposition."³³⁸ "Considered in isolation or in the context of Clark's other complaints, these comments do not indicate sexual attraction to Clark but, consistent with her other behavior, a desire to tease Clark and make her feel uncomfortable."³³⁹ Whereas the majority holds that the conduct is incapable of being reasonably interpreted as sexual due to other possible explanations, the dissent argues "'it is the province of the jury to draw from it whatever inferences they wish, so long as more than one is possible and the jury must not simply guess."³⁴⁰ Thus, the majority cites to the context evidence to find alternative motivations for Monterrubio's behavior and holds that the possible alternative explanations preclude the jury from inferring that she was motivated by sexual desire, whereas the dissent holds that it is the jury's prerogative to judge the possible explanations and to choose from any explanation it finds credible.

The two opinions present an interesting demonstration of the respective justices' views of the effect of evidentiary doctrines on a legal sufficiency review. The majority appears to elevate contextual evidence above the

334. *Id.* at 807.

335. *Id.*

336. *Id.* at 777.

337. *Id.* at 808–09.

338. *Id.* at 777 (second alteration in original).

339. *Id.* at 777–78 (citing *Lord v. High Voltage Software, Inc.*, 839 F.3d 556, 560, 562 (7th Cir. 2016)).

340. *Id.* at 812 (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 821 (Tex. 2005)).

requirement that the evidence must be viewed in the light most favorable to the factfinder's decision, insisting that all contextual evidence must be considered and applying that evidence to limit the range of inferences that the factfinder can reasonably derive. The dissent, in contrast, appears to favor considering the entire record of contextual evidence but interpreting it, like other evidence, in the light most favorable to the factfinder. The extent to which the majority's approach becomes a mechanism for removing certain decisions from the factfinder remains to be seen.

The 2006 edition of this Article traced the “[o]rigins of the ‘[r]easonable and [f]air-[m]inded [j]uror [s]tandard’ embraced by *City of Keller*,³⁴¹ 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.³⁴² That 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.³⁴³ 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”³⁴⁴—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.³⁴⁵

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.³⁴⁶ The supreme court's decisions in *Harmar*, *Tanner*, *Dowell*, *Minnesota Life*, *Clark*, and others have turned on such factors as whether

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

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

343. *Id.* at 274–76.

344. *City of Keller*, 168 S.W.3d at 827.

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

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

particular evidence is disputed, what evidence is “relevant,” or what evidentiary “context” was appropriate.³⁴⁷ *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.”³⁴⁸ 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.”³⁴⁹ Thus, the verdict reasonable and fair-minded people could reach involves, like Chinese boxes,³⁵⁰ 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,³⁵¹ the supreme court has not decided a major case that

347. See *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 793 (Tex. 2018) (“[C]ontext is critical in a legal-sufficiency review . . .”); *Tanner v. Nationwide Mut. Fire Ins. Co.*, 289 S.W.3d 828, 831 (Tex. 2009) (holding 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 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 the court of appeals reviewed the evidence in the incorrect context by only looking at the favorable evidence).

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

349. *Id.* at 816 (citing *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 340 (Tex. 1998); *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 644 S.W.2d 443, 446 (Tex. 1982)).

350. A “Chinese box” refers to “a set of boxes graduated in size so that each fits into the next larger one[.]” *Chinese Boxes*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/Chinese%20boxes> [<https://perma.cc/VAU4-4LUV>].

351. See *Elijah Ragira/VIP Lodging Grp., Inc. 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 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 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 the evidence was factually

addressed the line between legal and factual sufficiency standards since 2006, and then only in the specialized context of punitive damage awards.³⁵² 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*³⁵³ eliminated that standard altogether in favor of relying solely on the Federal Constitution's minimum for legal sufficiency.³⁵⁴ It remains to be 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

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).

352. *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.” (internal citations omitted) (citing *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b), *as recognized in* *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 140 (Tex. 2012); TEX. R. APP. P. 46.3)); *see 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).

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

354. *See id.* at 894 (stating 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, joined by Keller, P.J., & Keasler & Hervey, JJ.) (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 in part on other grounds by Brooks*, 323 S.W.3d at 911–12; *Clewis v. State*, 922 S.W.2d 126, 132 (Tex. Crim. App. 1996) (recognizing the Supreme Court sets a minimum standard of review for criminal convictions and that states are free to heighten this standard), *overruled in part on other grounds 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.” (footnote omitted) (internal citation omitted) (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972))).

sufficiency standard by concluding that certain legal sufficiency challenges should be properly brought as factual sufficiency challenges.³⁵⁵ 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."³⁵⁶ The trial court's findings of fact "shall not be recited in a judgment[,]"³⁵⁷ and oral comments from the bench will not constitute findings of fact and conclusions of law.³⁵⁸ 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.³⁵⁹ "The filing of a request for findings of fact, in most circumstances, extends the appellate timetable."³⁶⁰ "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."³⁶¹

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

355. See Hall & Emery, *supra* note 128, at 597–610 (advocating for a return to factual sufficiency review in certain situations).

356. TEX. R. CIV. P. 296.

357. TEX. R. CIV. P. 299a.

358. *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984) (per curiam); *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, 7 n.4 (Tex. App.—El Paso 2000, no pet.); *Sharp v. Hobart Corp.*, 957 S.W.2d 650, 652 n.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.).

359. See *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).

360. *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)).

361. *Id.* at 437–38.

and conclusions whenever the trial court acts as a fact finder.³⁶² “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.”³⁶³ “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.³⁶⁴

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”;³⁶⁵ however, they are not conclusive when a complete reporter’s record appears in the appellate record.³⁶⁶ The trial court’s fact findings are reviewed for legal and factual sufficiency of the evidence,³⁶⁷ which is the same standard applied when reviewing evidence supporting jury findings.³⁶⁸ “When the appellate record

362. *See* *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 33 (Tex. 1994) (emphasizing findings would be helpful with respect to a trial court’s review of punitive damages awards), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b), *as recognized in* *U-Haul Int’l, Inc. v. Waldrip*, 380 S.W.3d 118, 140 (Tex. 2012); *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 919 n.9 (Tex. 1991) (orig. proceeding) (noting 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 upon denial of special appearance, defendant should request findings of fact pursuant to Rule 296).

363. *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 686 (Tex. 2007) (orig. proceeding) (citing *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978); *Seaman v. Seaman*, 425 S.W.2d 339, 341 (Tex. 1968)).

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

365. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991) (citing *L.R. French v. Diamond Hill-Jarvis Civic League*, 724 S.W.2d 921, 922 (Tex. App.—Fort Worth 1987, writ ref’d n.r.e.); *Reyes-Retana v. PTX Food Corp.*, 709 S.W.2d 695, 697 (Tex. App.—San Antonio 1986, writ ref’d n.r.e.); *see Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994) (stating findings by a trial court have the same standards of review as evidence supporting a jury verdict).

366. *See Nipp v. Broumley*, 285 S.W.3d 552, 555 (Tex. App.—Waco 2009, no pet.) (“[F]indings [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. App.—Beaumont 1976, writ ref’d n.r.e.) (“Findings of fact are not conclusive on appeal when . . . a statement of facts appears in the record.” (citing *Swanson v. Swanson*, 228 S.W.2d 156, 158 (Tex. 1950); *Rosetta v. Rosetta*, 525 S.W.2d 255, 260 (Tex. App.—Tyler 1975, no writ))). 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).

367. *Catalina*, 881 S.W.2d at 297.

368. *See Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam) (clarifying 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); *id.* (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 dismissed w.o.j.) (“Findings of fact in a case tried to the court have the same force and dignity as a jury’s verdict

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."³⁶⁹ 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.³⁷⁰

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.³⁷¹

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 finding[s] of fact to support it[.]"³⁷² "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

upon special issues." (citing *City of Clute v. City of Lake Jackson*, 559 S.W.2d 391, 395 (Tex. App.—Houston [14th Dist.] 1977, writ reFd n.r.e.)).

369. *Ramsey v. Davis*, 261 S.W.3d 811, 815 (Tex. App.—Dallas 2008, pet. denied) (citing *Material P'ships, Inc. v. Ventura*, 102 S.W.3d 252, 257 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).

370. *Ashcraft v. Lookadoo*, 952 S.W.2d 907, 910 (Tex. App.—Dallas 1997, writ denied) (en banc); see *Tigner v. City of Angleton*, 949 S.W.2d 887, 889 (Tex. App.—Houston [14th Dist.] 1997, no writ) ("[C]onclusions of law are reviewable when attacked as a matter of law, but not on grounds of factual sufficiency." (citing *Buzbee v. Castlewood Civic Club*, 737 S.W.2d 366, 368 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Mercer v. Bludworth*, 715 S.W.2d 693, 697 (Tex. App.—Houston [1st Dist.] 1986, writ reFd n.r.e.), *abrogated in part by Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 894 (Tex. 1991))).

371. *Nelkin*, 833 S.W.2d at 268 (stressing "[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).

372. *Schoeffler v. Denton*, 813 S.W.2d 742, 745 (Tex. App.—Houston [14th Dist.] 1991, no writ) (citing *Lemons v. EMW Mfg. Co.*, 747 S.W.2d 372, 373 (Tex. 1988) (per curiam); *In re W.E.R.*, 669 S.W.2d 716, 717 (Tex. 1984) (per curiam)); accord *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) ("When a trial court does not issue findings of fact and conclusions of law . . . all facts necessary to support the judgment and supported by the evidence are implied." (citing *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam); *Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 666 (Tex. 1987); *In re W.E.R.*, 669 S.W.2d at 717)).

the applicable law, considering only the evidence favorable to the decision.”³⁷³ 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.”³⁷⁴

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.³⁷⁵ 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.”³⁷⁶ 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.”³⁷⁷ 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.³⁷⁸

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

373. *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 425, 435 (Tex. 2000); see *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*).

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

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

376. *Wade v. Comm’n for Lawyer Discipline*, 961 S.W.2d 366, 374 (Tex. App.—Houston [1st Dist.] 1997, no writ) (per curiam) (citing *Celanese Chem. Co. v. Burleson*, 821 S.W.2d 257, 260 (Tex. App.—Houston [1st Dist.] 1991, no writ)).

377. *Giangrosso v. Crosley*, 840 S.W.2d 765, 769 (Tex. App.—Houston [1st Dist.] 1992, no writ) (citing *In re W.E.R.*, 669 S.W.2d at 717; *M.R.S. Datascope Inc. v. Exchange Data Corp., Inc.*, 745 S.W.2d 542, 544 260 (Tex. App.—Houston [1st Dist.] 1988, no writ), *abrogated on other grounds* by *B.J. Software Sys., Inc. v. Osina*, 827 S.W.2d 543, 545 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Point Lookout W., Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1987) (per curiam); *Allen v. Allen*, 717 S.W.2d 311, 313 (Tex. 1986); *In re W.E.R.*, 669 S.W.2d at 717).

378. *Renfro Drug Co. v. Lewis*, 235 S.W.2d 609, 613 (Tex. 1950) (quoting *Austin v. Cochran*, 2 S.W.2d 831, 832 (Tex. Comm’n App. 1928)).

found.”³⁷⁹ “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.”³⁸⁰

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.³⁸¹ If the trial court fails to do so, harmful error is presumed.³⁸² However, this presumption is rebutted “if the record before the appellate court affirmatively shows that the complaining party suffered no injury[.]”³⁸³ 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.³⁸⁴ “In factually complicated situations in which there are two or more possible grounds for recovery or defense, an undue burden . . . [is]

379. *Trevino & Gonzalez Co. v. R.F. Muller Co.*, 949 S.W.2d 39, 41 (Tex. App.—San Antonio 1997, no writ) (citing *Roberson*, 768 S.W.2d at 281; *Guthrie v. Nat'l Homes Corp.*, 394 S.W.2d 494, 495 (Tex. 1965); *Bard v. Frank B. Hall & Co.*, 767 S.W.2d 839, 845 (Tex. App.—San Antonio 1989, writ denied)); *Guthrie*, 394 S.W.2d at 495; *Commercial Credit Corp. v. Smith*, 187 S.W.2d 363, 365 (Tex. 1945).

380. *Ette v. Arlington Bank of Commerce*, 764 S.W.2d 594, 595 (Tex. App.—Fort Worth 1989, no writ) (citing *Houston Fire & Cas. Ins. Co. v. Walker*, 260 S.W.2d 600, 603–04 (Tex. 1953); *White v. Corpus Christi Little Misses Kickball Ass'n*, 525 S.W.2d 766, 768 (Tex. App.—Corpus Christi 1975, no writ)); *Trevino*, 949 S.W.2d at 41; *Carns v. Carns*, 776 S.W.2d 603, 604 (Tex. App.—Tyler 1989, no writ) (per curiam). See *infra* Part VIII(H)(4) for a discussion of fundamental error.

381. *Nev. Gold & Silver, Inc. v. Andrews Indep. Sch. Dist.*, 225 S.W.3d 68, 77 (Tex. App.—El Paso 2005, no pet.); see 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 the court shall file findings of fact within twenty days of a proper request).

382. See *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989) (noting harmful error is presumed when the complaining party made the proper requests); *Wagner v. Riske*, 178 S.W.2d 117, 119–20 (Tex. 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” (citing *San Antonio Water Works Co v. Maury*, 12 S.W.166, 166–67 (Tex. 1888) (per curiam))).

383. *Wagner*, 178 S.W.2d at 120 (citing *San Antonio Water Works Co v. Maury*, 12 S.W.166, 166–67 (Tex. 1888) (per curiam)); *Sheldon Pollack Corp. v. Pioneer Concrete of Tex., Inc.*, 765 S.W.2d 843, 845 (Tex. App.—Dallas 1989, writ denied).

384. *Sheldon Pollack*, 765 S.W.2d at 845; see *Elizondo v. Gomez*, 957 S.W.2d 862, 865 (Tex. App.—San Antonio 1997, writ denied) (restating the test for harm set forth in *Fraser v. Goldberg*, 552 S.W.2d 592, 594 (Tex. 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).

placed upon an appellant.”³⁸⁵ This burden prevents the appellant from making a proper presentation of the case to the appellate court.³⁸⁶

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.³⁸⁷ 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.”³⁸⁸ If the original judge is no longer available to prepare findings and conclusions, a successor judge may prepare them.³⁸⁹

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

385. *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 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).

386. *See In re O.L.*, 834 S.W.2d 415, 418–19 (Tex. App.—Corpus Christi 1992, no writ) (stating 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 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 an appellant should not have to guess why the court ruled against him).

387. TEX. R. APP. P. 44.4(a).

388. *Id.* 44.4(b); *see Roberts v. Roberts*, 999 S.W.2d 424, 441–42 (Tex. App.—El Paso 1999, no pet.) (stating 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) (per curiam) (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, 704 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

389. TEX. CIV. PRAC. & REM. CODE ANN. § 30.002(b); *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 the remedy of abatement was not available because the original judge was “no longer on the court”).

having timely requested them,³⁹⁰ 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."³⁹¹

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.³⁹² 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."³⁹³ 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."³⁹⁴ Accordingly, "the trial court abuses its discretion [if] it fails to properly apply the law to the undisputed facts, [if] it acts arbitrarily or unreasonably, or [if] its ruling is based on factual assertions

390. 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'").

391. See *Saenz v. Saenz*, 756 S.W.2d 93, 95 (Tex. App.—San Antonio 1988, no writ) (citing *Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793, 795 (Tex. 1987); *Patrick v. Patrick*, 728 S.W.2d 864, 868 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.)) (stating 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 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) (per curiam) (asserting 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).

392. See *El Paso Nat. Gas Co. v. Minco Oil & Gas Co.*, 964 S.W.2d 54, 60–61 (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) (stating because unconscionability involves both questions of law and fact, the abuse of discretion standard is the applicable standard of review); 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).

393. *Remington Arms*, 966 S.W.2d at 643 (citing *Pony Express*, 921 S.W.2d at 820); *Pony Express*, 921 S.W.2d at 820.

394. *El Paso Nat. Gas Co.*, 964 S.W.2d at 61 (emphasis omitted) (citing *Pony Express*, 921 S.W.2d at 820).

unsupported by the record.”³⁹⁵

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.”³⁹⁶ 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.”³⁹⁷ The Texas Supreme Court held in *In re J.F.C.*:³⁹⁸

In a legal sufficiency review, a court should look at all 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

395. *Remington Arms*, 966 S.W.2d at 643 (citing *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 607 (Tex. App.—Texarkana 1995, writ dismissed), *abrogated in part on other grounds by Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 452 (Tex. 2007)).

396. *In re C.H.*, 89 S.W.3d 17, 23 (Tex. 2002) (quoting *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979) (per curiam)); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b), *as recognized in U-Haul Int’l, Inc. v. Waldrip*, 380 S.W.3d 118, 140 (Tex. 2012); *see* TEX. FAM. CODE ANN. § 101.007 (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”).

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

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

conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient.³⁹⁹

The supreme court emphasized that witness credibility issues, which necessarily “depend on appearance and demeanor[,] cannot be weighed by the” reviewing court.⁴⁰⁰ 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.”⁴⁰¹ The court also observed that it must consider undisputed evidence that does not support the jury’s finding.⁴⁰² 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.⁴⁰³

The clear and convincing evidence standard is limited to the following situations: (1) exemplary damages,⁴⁰⁴ (2) actual malice,⁴⁰⁵ (3) public-figure defamation,⁴⁰⁶ (4) termination of parental

399. *Id.* at 266. The supreme court has since followed its holding from the *In re J.F.C.* case. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 866 (Tex. 2017); *Diamond Shamrock Ref. Co., L.P. 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) (per curiam); *Romero v. KPH Consolidation, 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).

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

401. *Id.* (emphasis added).

402. *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”).

403. *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 (quoting *id.*)); *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”).

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

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

406. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 109 (Tex. 2000); *Huckabee v. Time Warner Entm’t Co. L.P.*, 19 S.W.3d 413, 420 (Tex. 2000); *see Fox Entm’t Grp., Inc. 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.” (citing *Huckabee*, 19 S.W.3d at 420–21)).

rights,⁴⁰⁷ and (5) because they are constitutionally protected,⁴⁰⁸ civil involuntary commitments.⁴⁰⁹

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.’”⁴¹⁰ The de novo fact trial standard “is similar to pure trial de novo review except the agency’s decision is admissible at trial.”⁴¹¹ This standard, however, has not been applied outside utility rate cases.⁴¹²

Generally, judicial review of an administrative agency’s decision is governed by the Administrative Procedure Act (APA), which addresses contested cases.⁴¹³ 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.⁴¹⁴ Administrative rulings under the APA are subject to two standards

407. TEX. FAM. CODE ANN. § 161.001(b); *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 In re J.P.B.*, 180 S.W.3d 570, 572 (Tex. 2005) (per curiam) (citing to subsections 161.001(1)–(2) of the Texas Family Code).

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

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

410. *G.E. Am. Comm’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)).

411. *Id.* (citing *Sw. Bell Tel. Co. v. Pub. Util. Comm’n*, 571 S.W.2d 503, 508 (Tex. 1978); *Lone Star Gas Co. v. State*, 153 S.W.2d 681, 695 (Tex. 1941)).

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

413. TEX. GOV’T CODE ANN. §§ 2001.001–.902; *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). 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) (explaining 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).

414. TEX. GOV’T CODE ANN. § 2001.174(2)(A)–(F). The statute provides:

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

of review: pure trial de novo and pure substantial evidence.⁴¹⁵ The standard of review to apply depends upon what law is at issue, as the standard should be spelled out in the governing statute.⁴¹⁶ In limited circumstances, both standards of review will be used in reviewing the same agency decision.⁴¹⁷

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.”⁴¹⁸ The appeal is handled by the

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. § 2001.174.

415. *Id.* §§ 2001.173–.174; *see 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.”).

416. TEX. GOV'T CODE ANN. § 2001.172; *see* TEX. LAB. CODE ANN. § 410.255(b) (stating 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 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 the proper scope of review “is the one provided by the law pursuant to which the action is instituted”), *abrogated 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”).

417. *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).

418. TEX. GOV'T CODE ANN. § 2001.173(a); *G.E. Am. Comm'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 specifically stated in the statute conferring

trial court “as though there had not been an intervening agency action[,]”⁴¹⁹ and in line with this principle, the reviewing court cannot admit the agency’s decision into evidence.⁴²⁰ The reviewing court bases its decision on its own determination of the issues of law and fact in the case,⁴²¹ and it may consider new evidence not presented before the agency.⁴²² As in other civil cases, the standard of proof is a preponderance of the evidence.⁴²³ Finally, a party may request a jury trial on each issue of fact.⁴²⁴

b. Pure Substantial Evidence

“Pure substantial evidence’ review is at the opposite end of the spectrum” from trial de novo.⁴²⁵ “Under this standard, the agency’s decision is not automatically vacated.”⁴²⁶ 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.”⁴²⁷ “The agency’s decision carries a presumption of . . . validity that may” be set aside only if the appellant can demonstrate “that reasonable minds could not have reached the [same] conclusion” as the agency.⁴²⁸ One endeavoring to reverse administrative findings,

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).

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

420. TEX. GOV’T CODE ANN. § 2001.173(a); *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.

421. *See* TEX. GOV’T CODE ANN. § 2001.173(a) (“[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.”).

422. *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.”).

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

424. TEX. GOV’T CODE ANN. § 2001.173(b).

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

426. *Id.* (citing *Gilder*, 926 S.W.2d at 366).

427. *Id.* (citing *Imperial Am. Res. Fund, Inc. v. R.R. Comm’n*, 557 S.W.2d 280, 285 (Tex. 1977)).

428. *Id.* (citing *Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986)); *see City of El Paso v. Pub. Util. Comm’n*, 883 S.W.2d 179, 186 (Tex. 1994) (advising 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,

conclusions, or decisions because of a lack of substantial evidence will face a difficult task.⁴²⁹

“At its core, the substantial evidence rule is a reasonableness test or a rational basis test.”⁴³⁰ If the agency decision is not “supported by substantial evidence in the record[.]”⁴³¹ or if the decision is “arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion[.]” the decision must be reversed.⁴³² The scope of review is based upon “the reliable and probative evidence in the record as a whole.”⁴³³ 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].”⁴³⁴ 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.⁴³⁵ Therefore, the reviewing court is only concerned with the *reasonableness* of the agency’s order and “not the *correctness* of the

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)).

429. *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).

430. *R.R. Comm’n v. Pend Oreille Oil & Gas Co.*, 817 S.W.2d 36, 41 (Tex. 1991) (citing *Charter Med.-Dallas*, 665 S.W.2d at 453); *see Charter Med.-Dallas*, 665 S.W.2d at 452–53 (noting 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*).

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

432. *State v. Pub. Util. Comm’n of Tex.*, 344 S.W.3d 349, 356 (Tex. 2011) (quoting TEX. GOV’T CODE ANN. § 2001.174(2)(F)); *accord Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm’n*, 518 S.W.3d 318, 325 (Tex. 2017) (“The APA provides that cases should be reversed or remanded if the administrative decision is ‘in violation of a constitutional . . . provision’” (quoting TEX. GOV’T CODE ANN. § 2001.174(2)(F))).

433. *Gulf States*, 809 S.W.2d at 211 (citing *Charter Med.-Dallas*, 665 S.W.2d at 452).

434. *Tex. Water Comm’n v. Customers of Combined Water Sys., Inc.*, 843 S.W.2d 678, 681 (Tex. App.—Austin 1992, no writ) (citing *United Res. Recovery, Inc. v. Tex. Water Comm’n*, 815 S.W.2d 797, 801 (Tex. App.—Austin 1991, writ denied)).

435. *Tex. Alcoholic Beverage Comm’n v. Mini, Inc.*, 832 S.W.2d 147, 150 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

order.”⁴³⁶ In applying this test, the reviewing “court may not substitute its judgment for that of the agency as to the weight of the evidence[.]”⁴³⁷ The review is limited in that it requires “only more than a mere scintilla,” to support an agency’s determination.”⁴³⁸ “As such, “the evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence.”⁴³⁹ Finally, the question of whether the administrative decision is supported by substantial evidence is a question of law, “and a trial of the fact issues by a judge or jury is avoided.”⁴⁴⁰

“Substantial evidence” and “arbitrary and capricious” may at first appear to be “two sides of the same coin.”⁴⁴¹ If an agency’s decision is not supported by substantial evidence, then the order is deemed to be arbitrary and capricious.⁴⁴² However, a decision may be supported by substantial evidence yet still be arbitrary and capricious, therefore, justifying reversal.⁴⁴³

436. R.R. Comm’n v. Pend Oreille Oil & Gas Co., 817 S.W.2d 36, 41 (Tex. 1991) (citing Tex. State Bd. of Dental Exam’rs v. Sizemore, 759 S.W.2d 114, 117 (Tex. 1988); Firemen’s & Policemen’s Civil Serv. Comm’n v. Brinkmeyer, 662 S.W.2d 953, 956 (Tex. 1984)); see State v. Pub. Util. Comm’n of Tex., 344 S.W.3d 349, 355–56 (Tex. 2011) (“Under substantial evidence review of fact-based determinations, “[t]he issue for the reviewing court is not whether the agency’s decision was correct, but only whether the record demonstrates some reasonable basis for the agency’s action.” (alteration in original) (quoting Mireles v. Tex. Dep’t of Pub. Safety, 9 S.W.3d 128, 131 (Tex. 1999) (per curiam))); Tex. Health Facilities Comm’n v. Charter Med.-Dallas, Inc., 665 S.W.2d 446, 452 (Tex. 1984) (“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.” (citing Gerst v Nixon, 411 S.W.2d 350, 354 (Tex. 1966))).

437. *Pend Oreille*, 817 S.W.2d at 40 (quoting Administrative Procedure and Texas Register Act, 64th Leg., R.S., ch. 61, § 19(e), 1975 Tex. Gen. Laws 136, 147, *repealed by* Administrative Procedure Act, 73d Leg., R.S., ch. 268, § 1, sec. 2001.174, 1993 Tex. Gen. Laws 583, 749); accord *Brinkmeyer*, 662 S.W.2d at 956 (“[T]he agency itself is the primary fact-finding body, and the question to be determined by the trial court is strictly one of law.” (citing Bd. of Firemen’s Relief & Ret. Fund Trs. of Houston v. Mark, 242 S.W.2d 181, 183 (Tex. 1951))).

438. *City of Dallas v. Stewart*, 361 S.W.3d 562, 566 (Tex. 2012) (quoting *Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 566 (Tex. 2000)).

439. *Id.* (quoting *Charter Med.-Dallas*, 665 S.W.2d at 452).

440. *In re Edwards Aquifer Auth.*, 217 S.W.3d 581, 587 (Tex. App.—San Antonio 2006, no pet.) (citing *Dallas Cty. Civil Serv. Comm’n v. Warren*, 988 S.W.2d 864, 870 (Tex. App.—San Antonio 1999, no pet.); *Bank of N. Am. v. State Banking Bd.*, 492 S.W.2d 458, 459 (Tex. 1973)); *Davis*, 34 S.W.3d at 566; *Brinkmeyer*, 662 S.W.2d at 956.

441. *Charter Med.-Dallas*, 665 S.W.2d at 454 (citing *Benson v. San Antonio Sav. Ass’n*, 374 S.W.2d 423, 427 (Tex. 1963); *City Sav. Ass’n v. Security Sav. & Loan Ass’n of Dickinson*, 560 S.W.2d 930, 932 (Tex. 1978)).

442. *Pub. Util. Comm’n v. Gulf States Utils. Comm’n*, 809 S.W.2d 201, 211 (Tex. 1991); *id.*

443. See *Lewis v. Metro. Sav. & Loan Ass’n*, 550 S.W.2d 11, 12 (Tex. 1977) (holding an order of the Savings and Loan Commission was invalid, despite the fact that “the order may be said to have

“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.”⁴⁴⁴ The arbitrary and capricious test is a permutation of the abuse of discretion standard by focusing on the process of decision making rather than the decision itself.⁴⁴⁵

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.”⁴⁴⁶ Under the substantial evidence de novo rule, “an appealing party has the right to petition the reviewing court to remand the case so that additional evidence may be taken before the administrative body.”⁴⁴⁷ “If the court is satisfied that the additional evidence is material and that there were good reasons for the failure to present it in the proceeding before the state agency, the court may order that the additional evidence be taken before the agency on conditions determined by the court.”⁴⁴⁸ The only instance in which a reviewing court

reasonable factual support under the precepts of the substantial evidence rule”); R.R. Comm’n of Tex. v. Alamo Express, Inc., 308 S.W.2d 843, 846 (Tex. 1958) (stressing 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 Cty. v. Starr Indus. Servs., Inc., 584 S.W.2d 352, 356 (Tex. App.—Austin 1979, writ ref’d n.r.e.) (finding a lack of notice justified a reversal of the agency decision without any consideration of the substantial evidence question).

444. City of El Paso v. Pub. Util. Comm’n, 883 S.W.2d 179, 184 (Tex. 1994) (citing Gerst v. Nixon, 411 S.W.2d 350, 360 n.8 (Tex. 1966)).

445. See *Starr Indus.*, 584 S.W.2d at 355 (explaining 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).

446. G.E. Am. Comm’n v. Galveston Cent. Appraisal Dist., 979 S.W.2d 761, 764 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (emphasis omitted) (citing Bd. of Trs. of Big Spring Firemen’s Relief & Ret. Fund v. Firemen’s Pension Comm’r, 808 S.W.2d 608, 612 (Tex. App.—Austin 1991, no writ)).

447. *In re Edwards Aquifer Auth.*, 217 S.W.3d 581, 589 (Tex. App.—San Antonio 2006, no pet.) (citing TEX. GOV’T CODE ANN. § 2001.175(e)); see TEX. GOV’T CODE ANN. § 2001.175(c) (“A party may apply to the court to present additional evidence. If the court is satisfied that the additional evidence is material and that there were good reasons for the failure to present it in the proceeding before the state agency, the court may order that the additional evidence be taken . . .”).

448. TEX. GOV’T CODE ANN. § 2001.175(c); *Occidental Permian Ltd. v. R.R. Comm’n of Tex.*, 47 S.W.3d 801, 810 (Tex. App.—Austin 2001, no pet.).

may admit new evidence is when the administrative record fails to reflect procedural irregularities alleged to have occurred in the administrative hearing.⁴⁴⁹ “‘Substantial evidence de novo’ review resembles ‘pure substantial evidence’ review in virtually all other respects.”⁴⁵⁰ The administrative order may be set aside only “if it is arbitrary, capricious, unlawful[,] or not reasonably supported by substantial evidence.”⁴⁵¹ Although new evidence is introduced at trial, the review is considered a question of law.⁴⁵²

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.⁴⁵³ There are, however, a number of deviations from this general rule.⁴⁵⁴ See Part II *supra* for a more complete discussion of how the abuse of discretion standard 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.⁴⁵⁵ Perhaps the most common plea involves dominant jurisdiction, which occurs when “two lawsuits concerning the same

449. See TEX. GOV'T CODE ANN. § 2001.175(e) (“[T]he court may receive evidence of procedural irregularities alleged to have occurred before the agency that are not reflected in the record.”).

450. *Galveston Cent.*, 979 S.W.2d at 765.

451. *Id.* (citing *Gilder v. Meno*, 926 S.W.2d 357, 371 (Tex. App.—Austin 1996, writ denied) (Jones, J., dissenting)).

452. *Id.*

453. 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).

454. 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 *Zinc Nacional, S.A. v. Bouche Trucking, Inc.*, 308 S.W.3d 395, 397 (Tex. 2010) (per curiam) (“Whether a court has personal jurisdiction over a nonresident defendant is a question of law, which we review de novo.” (citing *id.*)).

455. *Speer v. Stover*, 685 S.W.2d 22, 23 (Tex. 1985) (per curiam), *abrogated in part on other grounds by Thomas v. Long*, 207 S.W.3d 334, 338–39 (Tex. 2006); *Garcia-Marroquin v. Nueces Cty. Bail Bond Bd.*, 1 S.W.3d 366, 374 (Tex. App.—Corpus Christi 1999, no pet.).

controversy and parties are pending in courts of coordinate jurisdiction[.]”⁴⁵⁶ A motion to abate may also be used to raise a defect in parties.⁴⁵⁷

Typically, if the plea is sustained, the action is suspended until the obstacle is removed.⁴⁵⁸ 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[.]”⁴⁵⁹ The Texas Supreme Court has noted the split in authority but has not resolved it.⁴⁶⁰

A plea in abatement is generally an incidental ruling appealed from a final judgment,⁴⁶¹ but rare exceptions exist.⁴⁶² The appellate court will review the trial court's abatement decision with an abuse of discretion standard.⁴⁶³

456. *Flores v. Peschel*, 927 S.W.2d 209, 212 (Tex. App.—Corpus Christi 1996, orig. proceeding); see *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988) (noting when a lawsuit “is proper in more than one county,” the court in which the lawsuit was first filed obtains dominant jurisdiction), *abrogated in part on other grounds by In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 292 (Tex. 2016).

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

458. *Speer*, 685 S.W.2d at 23; *Life Ass'n of Am. v. Goode*, 8 S.W. 639, 640 (Tex. 1888).

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

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

461. See *Hall v. Lawlis*, 907 S.W.2d 493, 494 (Tex. 1995) (orig. proceeding) (per curiam) (“In the absence of [direct] interference, the refusal to abate can be adequately reviewed on appeal.” (citing *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 59 (Tex. 1991))).

462. See *Curtis v. Gibbs*, 511 S.W.2d 263, 268 (Tex. 1974) (orig. proceeding) (issuing mandamus relief when a second court incorrectly denied a plea in abatement); *Virani v. Cunningham*, No. 14-08-01166-CV, 2009 WL 2568349, 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, Inc. v. Shaar*, No. 14-09-00422-CV, 2009 WL 1796062, at *2 (Tex. App.—Houston [14th Dist.] June 25, 2009, no pet.) (mem. op.) (per curiam) (dismissing an interlocutory appeal from an order denying appellant's plea in abatement); *In re Ayala*, No. 13-07-140-CV, 2007 WL 1238572, at *1 (Tex. App.—Corpus Christi April 27, 2007, orig. proceeding) (mem. op.) (granting mandamus relief from an order denying a plea in abatement based on dominant jurisdiction).

463. *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988), *abrogated in part on other grounds by In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 292 (Tex. 2016); see *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), *abrogated in part on other grounds by In re Houston Specialty Ins. Co.*, No. 17-1060, 2019 WL 321152, at *3 (Tex. January 25, 2019) (orig. proceeding) (per curiam); *Dolenz v. Cont'l Nat'l Bank of Fort Worth*, 620 S.W.2d 572, 575 (Tex. 1981) (holding the trial court “did not act arbitrarily or unreasonably in denying [the] plea in abatement”).

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.⁴⁶⁴ 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]."⁴⁶⁵

B. Arbitration

The parties to a lawsuit might have previously agreed to arbitrate disputes, or the parties may be statutorily required to arbitrate.⁴⁶⁶ 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 the Federal Arbitration Act (FAA) or both. Texas courts favor arbitration agreements.⁴⁶⁷

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

464. See *Vestal v. Jackson*, 598 S.W.2d 724, 725–26 (Tex. 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).

465. *Jenkins v. State*, 570 S.W.2d 175, 177 (Tex. App.—Houston [14th Dist.] 1978, no writ) (citing *Longoria v. Alamia*, 230 S.W.2d 1022, 1022 (Tex. 1950)). 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).

466. See TEX. LOC. GOV'T CODE ANN. § 143.057(d) (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) (orig. proceeding) (per curiam) (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).

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

agreement.”⁴⁶⁸ 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.”⁴⁶⁹ “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.”⁴⁷⁰

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.⁴⁷¹ However, the decision to compel arbitration or not is subject to review for an abuse of discretion.⁴⁷² 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.⁴⁷³ In rare circumstances, mandamus relief is available for an order compelling arbitration.⁴⁷⁴

b. Federal Arbitration Act

The Federal Arbitration Act applies to contracts affecting interstate commerce.⁴⁷⁵ “There is a presumption favoring agreements to arbitrate

468. *See* *Nationwide of Fort Worth, Inc. v. Wigington*, 945 S.W.2d 883, 884 (Tex. App.—Waco 1997, writ dismissed w.o.j.) (citing *Merrill Lynch, Pierce, Fenner & Smith v. Eddings*, 838 S.W.2d 874, 878 (Tex. App.—Waco 1992, writ denied)) (resolving doubts in favor of arbitration).

469. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003) (citing *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999) (orig. proceeding) (per curiam), *abrogated in part on other grounds by In re Halliburton Co.*, 80 S.W.3d 566, 571–72 (Tex. 2002) (orig. proceeding)).

470. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753–54 (Tex. 2001) (orig. proceeding) (footnote omitted) (citing *In re Oakwood*, 987 S.W.2d at 573; *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996) (orig. proceeding) (per curiam)).

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

472. *Tippis*, 842 S.W.2d at 271.

473. TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1)–(2); *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, 49–50 (Tex. App.—Fort Worth 1996, no writ).

474. *In re Gulf Expl., LLC*, 289 S.W.3d 836, 841–43 (Tex. 2009) (orig. proceeding); *In re Poly-Am., L.P.*, 262 S.W.3d 337, 345–46 (Tex. 2008) (orig. proceeding); *see Perry Homes v. Cull*, 258 S.W.3d 580, 586 (Tex. 2008) (noting when an appeal is an adequate remedy for an order compelling arbitration, mandamus must be denied).

475. 9 U.S.C. § 2 (2012); *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) (per curiam).

under the federal act[.]”⁴⁷⁶ and the court should resolve any doubts in favor of arbitration.⁴⁷⁷ 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[.]”⁴⁷⁸ and whether the agreement is binding on a nonparty.⁴⁷⁹ 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 arbitrate⁴⁸⁰ and “federal law governs the scope of an arbitration [agreement][.]”⁴⁸¹ noting that the state courts should try “to keep it as consistent as possible with federal law.”⁴⁸²

“[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.”⁴⁸³ “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.”⁴⁸⁴ If the movant makes this showing, and the opposing party fails to demonstrate an affirmative

476. *Stewart Title Guar. Co. v. Mack*, 945 S.W.2d 330, 333 (Tex. App.—Houston [1st Dist.] 1997, writ dismissed w.o.j.) (citing *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996) (orig. proceeding) (per curiam)); *accord In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding) (affirming the presumption in favor of arbitration); *Cantella*, 924 S.W.2d at 944 (stating both state and federal law favor arbitration).

477. *In re Kellogg*, 166 S.W.3d at 737; *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex. 2001) (orig. proceeding).

478. *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005) (orig. proceeding) (quoting *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003); *PacificCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 n.2 (2003)).

479. *Id.*

480. *Id.* (citing *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Perry*, 482 U.S. at 492 n.9).

481. *Id.* (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

482. *Id.* at 131 (citing *In re Kellogg*, 166 S.W.3d at 739).

483. *In re Kellogg*, 166 S.W.3d at 737 (citing *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex. 2001) (orig. proceeding); *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999) (orig. proceeding) (per curiam), *abrogated in part on other grounds by In re Halliburton Co.*, 80 S.W.3d 566, 571–72 (Tex. 2002) (orig. proceeding)); *accord In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 605 (Tex. 2005) (orig. proceeding) (per curiam) (listing the two requirements a party must establish to compel arbitration).

484. *Emerald Tex., Inc. v. Peel*, 920 S.W.2d 398, 402 (Tex. App.—Houston [1st Dist.] 1996, no writ) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.001); *see* 9 U.S.C. § 2 (2012) (addressing the “[v]alidity, irrevocability, and enforcement of” arbitration agreements); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (detailing the protections 9 U.S.C. § 2 provides consumers against unwanted arbitration provisions); *see also In re McKinney*, 167 S.W.3d 833, 835 (Tex. 2005) (orig. proceeding) (per curiam) (explaining “[a]bsent fraud, misrepresentation, or deceit,” parties are bound to the arbitration agreement).

defense to arbitration,⁴⁸⁵ the trial court is obligated to compel arbitration.⁴⁸⁶

The trial court's determination of the validity of an arbitration agreement is a legal question reviewed de novo.⁴⁸⁷ 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.⁴⁸⁸

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.”⁴⁸⁹ 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.”⁴⁹⁰ 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 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

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

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

487. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding); *In re Dillard Dep't Stores, Inc.*, 186 S.W.3d 514, 515 (Tex. 2006) (orig. proceeding) (per curiam).

488. *See generally* TEX. CIV. PRAC. & REM. CODE § 51.016 (“In a matter subject to the Federal Arbitration Act, a person may take an appeal or writ of error to the court of appeals from the judgment or interlocutory order of a district court, county court at law, or county court” (internal citation omitted)). *But see In re Wood*, 140 S.W.3d 367, 370 (Tex. 2004) (orig. proceeding) (per curiam) (illustrating FAA decisions were formerly not appealable and were subject to mandamus relief).

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

490. *Nuno v. Pulido*, 946 S.W.2d 448, 452 (Tex. App.—Corpus Christi 1997, no writ); *accord Anzilotti*, 899 S.W.2d at 266 (affirming the test outlined in *Nuno* “for determining whether or not an arbitration award must be vacated”); *see Emerald Tex., Inc. v. Peel*, 920 S.W.2d 398, 402 (Tex. App.—Houston [1st Dist.] 1996, no writ) (noting “an agreement to arbitrate is valid unless” legal or equitable grounds exist for its revocation “such as fraud or unconscionability” (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.001)).

in a proceeding” to compel or stay arbitration, “and the party did not participate in the arbitration hearing without raising the objection.”⁴⁹¹ 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.⁴⁹²

Review of a trial court’s decision as to vacatur or confirmation of an arbitration award is de novo.⁴⁹³ Because courts favor arbitration awards to resolve disputes,⁴⁹⁴ the courts “indulge every reasonable presumption” in favor of upholding the awards.⁴⁹⁵ “A mere mistake of fact or law is insufficient to set aside an arbitration award[.]”⁴⁹⁶ 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

491. TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(3)–(4). 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.* § 171.088(a)(1)–(2); 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).

492. TEX. CIV. PRAC. & REM. CODE ANN. § 171.091(a)(1)–(3); accord *Riha v. Smulcer*, 843 S.W.2d 289, 292 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (summarizing when an arbitration award may be modified).

493. See *Forsythe Int’l, S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1020 (5th Cir. 1990) (stating review of a trial court’s decision to vacate an arbitration award is de novo); *Kreit v. Brewer & Pritchard, P.C.*, 530 S.W.3d 231, 237 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (noting a trial court’s decision to affirm or vacate an arbitration award is reviewed under a de novo standard of review); *Statewide Remodeling, Inc. v. Williams*, 244 S.W.3d 564, 567 (Tex. App.—Dallas 2008, no pet.) (noting appellate courts review an arbitration confirmation decision de novo).

494. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex. 2001) (orig. proceeding); *Riha*, 843 S.W.2d at 292–94; *House Grain Co. v. Obst*, 659 S.W.2d 903, 905 (Tex. App.—Corpus Christi 1983, writ re’fd n.r.e.).

495. *Anzilotti*, 899 S.W.2d at 266; see *FirstMerit Bank, N.A.*, 52 S.W.3d at 753 (“[C]ourts must resolve any doubts about an arbitration agreement’s scope in favor of arbitration.” (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex. 1995) (orig. proceeding) (per curiam))); *Nuno*, 946 S.W.2d at 452 (emphasizing any doubts should be resolved in favor of arbitration).

496. *Nuno v. Pulido*, 946 S.W.2d 448, 452 (Tex. App.—Corpus Christi 1997, no writ); *Powell v. Gulf Coast Carriers, Inc.*, 872 S.W.2d 22, 24 (Tex. App.—Houston [14th Dist.] 1994, no writ); see *Anzilotti*, 899 S.W.2d at 266 (affirming a “mere” mistake is insufficient, but implying a “gross” mistake would likely suffice).

[it] would have reached a different” result.⁴⁹⁷ The scope of review is the entire record.⁴⁹⁸

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.””⁴⁹⁹ 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.”⁵⁰⁰ 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.⁵⁰¹ As a result, the supreme court looks to federal decisions and authorities interpreting federal class action requirements.⁵⁰² 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

497. *Holk v. Biard*, 920 S.W.2d 803, 806 (Tex. App.—Texarkana 1996, orig. proceeding [leave denied]) (citing *City of Baytown v. C.L. Winter, Inc.*, 886 S.W.2d 515, 518 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Riba*, 843 S.W.2d at 293–94); accord *City of Baytown*, 886 S.W.2d at 518 (showing deference to the arbitrator’s award); see *Nuno*, 946 S.W.2d at 452 (“Arbitration awards are favored by the courts to dispose of pending disputes; therefore, every reasonable presumption will be indulged to uphold the arbitration proceeding.” (citing *House Grain*, 659 S.W.2d at 905–06))

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

499. *Wood v. Victoria Bank & Trust Co.*, 69 S.W.3d 235, 239 (Tex. App.—Corpus Christi 2001, no pet.) (quoting *Northrup v. Sw. Bell Tel. Co.*, 72 S.W.2d 1, 5 (Tex. App.—Corpus Christi 2001, no pet.)); accord *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 952 (Tex. 1996) (“Class action suits furnish an efficient means for numerous claimants with a common complaint to obtain a remedy ‘[w]here it is not economically feasible to obtain relief within the traditional framework’” (alteration in original) (quoting *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980))); see *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616–18 (1997) (discussing the underlying goals and requirements to qualify as a class action suit under Rule 23 of the Federal Rules of Civil Procedure).

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

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

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

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)].⁵⁰³

In addition to these four requirements, class actions must satisfy one of the four subdivisions of Rule 42(b).⁵⁰⁴

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.”⁵⁰⁵ The court has “rejected the ‘certify now and worry later’ approach to class certification[.]”⁵⁰⁶ 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.”⁵⁰⁷ Accordingly, it is improper for a trial court “to certify a class without knowing how the claims can and will likely be tried.”⁵⁰⁸ 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 42.⁵⁰⁹ “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

503. TEX. R. CIV. P. 42(a); *Schein*, 102 S.W.3d at 692; *accord Bernal*, 22 S.W.3d at 433 (summarizing the threshold requirements for a class action lawsuit).

504. 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 Union Pac. Res. Grp., Inc. v. Hankins*, 111 S.W.3d 69, 73 (Tex. 2003) (quoting the requirements found in TEX. R. CIV. P. 42(b)); *see Compaq Comput. Co. v. Lapray*, 135 S.W.3d 657, 671 (Tex. 2004) (noting the Rule 42(b)(2) requirements must be “rigorously analyze[d]” by the trial court before ruling on class certification).

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

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

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

508. *Peake*, 178 S.W.3d at 777 (quoting *id.*); *accord State Farm Mut. Auto. Ins. Co. v. Lopez*, 156 S.W.3d 550, 555 (Tex. 2004) (restating the standard set forth in *Bernal*).

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

law in order to make a meaningful determination of the certification issues.”⁵¹⁰ If it cannot be determined “from the outset that the individual issues can be considered in a manageable, time-efficient, yet fair manner, then certification is not appropriate.”⁵¹¹

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.⁵¹² 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.”⁵¹³

D. Consolidation

The trial court may consolidate cases pursuant to Rule 174.⁵¹⁴ The express purpose of Rule 174 “is to further convenience and avoid prejudice, and thus promote the ends of justice.”⁵¹⁵ “The trial court may consolidate actions that “relate to substantially the same transaction, occurrence, subject matter, or question.”⁵¹⁶ The actions must “be so related that evidence presented will be material, relevant, and admissible in each case.”⁵¹⁷ “[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

510. *Peake*, 178 S.W.3d at 778 (quoting *State Farm*, 156 S.W.3d at 556).

511. *Bernal*, 22 S.W.3d at 436 (citing *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 959 (Tex. 1996)).

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

513. *Lapray*, 135 S.W.3d at 671 (citing *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 691 (Tex. 2002)).

514. 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) (per curiam) (recognizing a trial court’s broad discretion in determining joinder and consolidation); see *In re Ethyl Corp.*, 975 S.W.2d 606, 614–17 (Tex. 1998) (orig. proceeding) (listing factors for consolidated trials in mass tort litigation).

515. *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956) (orig. proceeding).

516. *Owens-Corning Fiberglas Corp. v. Martin*, 942 S.W.2d 712, 716 (Tex. App.—Dallas 1997, no writ) (citing *Lone Star Ford, Inc. v. McCormick*, 838 S.W.2d 734, 737 (Tex. App.—Houston [1st Dist.] 1992, writ denied)); *Crestway Care Ctr., Inc. v. Berchermann*, 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 [leave denied])).

517. *Crestway Care Ctr.*, 945 S.W.2d at 874 (quoting *Valdez*, 921 S.W.2d at 448); *Martin*, 942 S.W.2d at 716 (citing *Lone Star Ford*, 838 S.W.2d at 737).

jury confusion.”⁵¹⁸ If “the facts and circumstances of the case 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 consolidation.”⁵¹⁹ The trial court’s ruling on a motion to consolidate is reviewed on appeal for an abuse of discretion.⁵²⁰

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.”⁵²¹ Whether the trial court grants or denies a motion for continuance is within its sound discretion.⁵²² Therefore, the trial court’s ruling is reviewed by an appellate court for an abuse of discretion.⁵²³

518. *Crestway Care Ctr.*, 945 S.W.2d at 874 (quoting *Valdez*, 921 S.W.2d at 448); *Martin*, 942 S.W.2d at 716 (citing *Dal-Briar Corp. v. Baskette*, 833 S.W.2d 612, 615 (Tex. App.—El Paso 1992, orig. proceeding), *abrogated in part on other grounds by In re Schmitz*, 285 S.W.3d 451, 453–54 (Tex. 2009) (orig. proceeding)).

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

520. *In re Gulf Coast Bus. Dev. Corp.*, 247 S.W.3d 787, 794 (Tex. App.—Dallas 2008, orig. proceeding); *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 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) (per curiam) (granting mandamus relief from a court’s decision to consolidate several claims).

521. TEX. R. CIV. P. 251; *see* 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 Vickery v. Vickery*, No. 01-94-01004-CV, 1997 WL 751995, at *20 (Tex. App.—Houston [1st Dist.] Dec. 4, 1997, pet. denied) (mem. op., not designated for publication) (explaining 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” (citing *Green v. State*, 589 S.W.2d 160, 163 (Tex. App.—Tyler 1979, no writ); *Erbach v. Donald*, 170 S.W.2d 289, 291-92 (Tex. App.—Fort Worth 1943, no writ))). 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.* (citing *Green*, 589 S.W.2d at 163; *Erbach*, 170 S.W.2d at 291–92).

522. *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).

523. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004); *Tri-Steel Structures, Inc. v. Baptist Found. of Tex.*, 166 S.W.3d 443, 447 (Tex. App.—Fort Worth 2005, pet. denied). In *In re North American 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

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.⁵²⁴ The trial court should consider the following list of nonexclusive factors in ruling on a motion for continuance of a summary judgment hearing to conduct more discovery: “the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the continuance has exercised due diligence to obtain the discovery sought.”⁵²⁵

F. *Default Judgment*

The rules governing a no answer and post-answer default judgment differ greatly.⁵²⁶ “For a no-answer default judgment, the non-answering party is deemed to have admitted all the facts properly pleaded in the petition.”⁵²⁷ On the other hand, in a post-answer default judgment, “non-appearance at trial does not constitute an abandonment of the defendant’s answer and it is not an implied confession of any issues joined by the answer.”⁵²⁸

If a defendant fails to file a timely answer after properly being served, the defendant may suffer a default judgment.⁵²⁹ A post-answer default takes place when a defendant initially answers, but fails to make an appearance at trial.⁵³⁰ “[W]hen 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

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.

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

525. *Joe*, 145 S.W.3d at 161 (citing *BMC Software*, 83 S.W.3d at 800; *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996); *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 521–22 (Tex. 1995); *State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863, 865 (Tex. 1988); *Perrotta v. Farmers Ins. Exch.*, 47 S.W.3d 569, 576 (Tex. App.—Houston [1st Dist.] 2001, no pet.)).

526. *Rouhana v. Ramirez*, 556 S.W.3d 472, 476 (Tex. App.—El Paso 2018, no pet.).

527. *Id.* at 476–77 (citing *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979)).

528. *Id.* at 477 (citing *Sedona Pac. Hous. P’ship v. Ventura*, 408 S.W.3d 507, 512 (Tex. App.—El Paso 2013, no pet.); *Mountain Corp. v. Rose*, 737 S.W.2d 22, 23 (Tex. App.—El Paso 1987, writ denied)).

529. TEX. R. CIV. P. 239; Michael A. Pohl & David Hittner, *Judgments by Default in Texas*, 37 SW. L.J. 421, 422 (1983); see *Aguilar v. Alvarado*, 39 S.W.3d 244, 248 (Tex. App.—Waco 1999, pet. denied) (stating the trial court may not award a default judgment once the defendant files an answer).

530. *Dolgenercorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 925 (Tex. 2009) (per curiam); *Stoner*, 578 S.W.2d at 682.

be set aside.⁵³¹ 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.*⁵³² The purpose of *Craddock* is to “alleviate unduly harsh and unjust results . . . when the defaulting party has no other remedy available.”⁵³³ It “is based upon equitable principles and ‘prevents an injustice to the defendant without working an injustice on the plaintiff.’”⁵³⁴ 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;⁵³⁵ provided the motion for a new trial sets up a meritorious

531. *Fid. & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 573–74 (Tex. 2006) (per curiam) (citing *Gold v. Gold*, 145 S.W.3d 212, 214 (Tex. 2004) (per curiam)). 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).

532. *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. [Comm’n Op.] 1939); see *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 from the conscious indifference element).

533. *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 686 (Tex. 2002) (citing *Craddock*, 133 S.W.2d at 126).

534. *Id.* at 685 (quoting *Craddock*, 133 S.W.2d at 126).

535. *Craddock*, 133 S.W.2d at 126. A valid excuse does not have to be a good excuse to satisfy this burden. *Fid. & Guar. Ins. 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 dismissed); *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 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) (per curiam) (quoting *Fid. & Guar. Ins. Co.*, 186 S.W.3d at 575–76); see *Strackbein v. Prewitt*, 671 S.W.2d 37, 39 (Tex. 1984) (looking to the defendant’s

defense[.]⁵³⁶ and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.⁵³⁷

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 defense.⁵³⁸ 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.⁵³⁹

The *Craddock* test applies to both no-answer and post-answer default judgments.⁵⁴⁰ The *Craddock* test can also apply to summary judgments,⁵⁴¹ unless the “motion for new trial [is] filed after judgment has been granted

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.

536. *Craddock*, 133 S.W.2d at 126; see *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 Cty. Oil Dev. Co.*, 280 S.W. 554, 555–56 (Tex. Comm'n App. 1926, holding approved) (determining 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*, 10 S.W. 690, 692 (Tex. 1889).

537. *Craddock*, 133 S.W.2d at 126; accord *Carpenter*, 98 S.W.3d at 685 (outlining the three-part *Craddock* test); *Angelo v. Champion Rest. Equip. Co.*, 713 S.W.2d 96, 97–98 (Tex. 1986) (expounding upon the delay or injury requirement under the *Craddock* test).

538. *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988) (per curiam); see *Mathis v. Lockwood*, 166 S.W.3d 743, 744 (Tex. 2005) (per curiam) (re-affirming *Lopez*); *Shull v. United Parcel Serv.*, 4 S.W.3d 46, 52 n.1 (Tex. App.—San Antonio 1999, pet. denied) (explaining when a party shows he had no notice of the trial setting, he does not have to prove a meritorious defense).

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

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

541. *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); *Enerational 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).

on a summary-judgment motion to which the nonmovant failed to timely respond when the” nonmovant had the opportunity to do so.⁵⁴²

The trial court’s ruling on a motion for new trial based on *Craddock* is reviewed on appeal with the abuse of discretion standard.⁵⁴³ “The historical trend in default judgment cases is toward the liberal granting of new trials.”⁵⁴⁴ Accordingly, when the guidelines established in *Craddock* have been met, it is an abuse of discretion to deny a new trial.⁵⁴⁵

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.⁵⁴⁶ Personal jurisdiction over a defendant to a suit is “dependent upon citation issued and served in a manner provided for by law.”⁵⁴⁷ “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.⁵⁴⁸

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.⁵⁴⁹ “[I]t is imperative . . . that the record affirmatively show a strict

542. *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 683–84 (emphasis added).

543. *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).

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

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

546. *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”).

547. *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).

548. *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).

549. *Quaestor Invs., Inc. v. Chiapas*, 997 S.W.2d 226, 227 (Tex. 1999); *Stubbs v. Stubbs*, 685 S.W.2d 643, 644 (Tex. 1985).

compliance with the provided mode of service” for a default judgment to withstand attack.⁵⁵⁰ Accordingly, this showing must be made from the record as it existed before the trial court when the default judgment was signed, unless the record is amended pursuant to Rule 118 of the Texas Rules of Civil Procedure.⁵⁵¹

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.⁵⁵² 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.⁵⁵³

G. *Discovery Rulings*

“Under Texas law evidence is presumed discoverable.”⁵⁵⁴ The party seeking to limit discovery has the burden of proving the exemption from discovery.⁵⁵⁵

550. 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)).

551. 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).

552. 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”).

553. *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).

554. *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) (repealed 1999)); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 629 (Tex. App.—Houston [14th Dist.] 1993, no writ) (citing *Lofuin v. Martin*, 776 S.W.2d 145, 147 (Tex. 1989)); TEX. R. CIV. P. 166b(4).

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

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.”⁵⁵⁶ 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;”⁵⁵⁷ (2) it helps prevent trial by ambush;⁵⁵⁸ (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;”⁵⁵⁹ and (4) it provides a mechanism to resolve disputes by the facts rather than by the facts a party fails to reveal.⁵⁶⁰ 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.’”⁵⁶¹

Trial courts tend to liberally construe the discovery rules to achieve these underlying policy goals.⁵⁶² 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.⁵⁶³ Nonetheless, the trial court’s discovery ruling may so alter the fundamental nature of the litigation that review by writ of mandamus is available.⁵⁶⁴

556. *Garcia v. Peebles*, 734 S.W.2d 343, 347 (Tex. 1987) (orig. proceeding); *In re Striegler*, 915 S.W.2d 629, 641 (Tex. App.—Amarillo 1996, writ denied) (citing *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984)); *accord In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999) (orig. proceeding).

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

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

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

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

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

562. *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).

563. *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).

564. *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.

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 [relator] has no adequate remedy by appeal."⁵⁶⁵ 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;⁵⁶⁶ 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";⁵⁶⁷ 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;⁵⁶⁸ the trial court's denial of discovery goes "to the heart of a party's case";⁵⁶⁹ the trial court denies discovery "and the missing discovery cannot be made [a] part of the appellate record";⁵⁷⁰ the trial court denies discovery and "refuses

proceeding) (denying mandamus relief where deemed admissions simplified the trial process and relator had an adequate remedy by appeal).

565. *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).

566. *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).

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

568. *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).

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

570. *Id.*; *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).

to make [the requested discovery] part of the record”⁵⁷¹ or the trial court’s order would “skew the proceedings, potentially affect the outcome of the litigation, and compromise the presentation of [the relator’s] defense [or claims] in ways unlikely to be apparent in the appellate record,” mandamus is proper.⁵⁷²

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.⁵⁷³ 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),⁵⁷⁴ the requests are automatically deemed admitted with no discretion to find otherwise.⁵⁷⁵ “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.”⁵⁷⁶

Under Rule 215.4, “an evasive or incomplete answer may be treated as a failure to answer.”⁵⁷⁷ 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.⁵⁷⁸

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

572. *In re Dawson*, 550 S.W.3d 625, 630 (Tex. 2018) (orig. proceeding) (first alteration in original) (quoting *In re CVR Energy, Inc.*, 500 S.W.3d 67, 81–82 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding)).

573. TEX. R. CIV. P. 198.1.

574. *Id.* R. 198.2(a).

575. *Id.* R. 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).

576. 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.

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

578. *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).

When admissions are deemed against a party, the party should file a motion to withdraw or amend the admissions as soon as possible.⁵⁷⁹ Rule 198.3 permits the trial court to allow a party to withdraw or amend admissions if:

(a) the party shows good cause for the withdrawal or amendment; and (b) the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission.⁵⁸⁰

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.⁵⁸¹ “[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.”⁵⁸² 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.⁵⁸³ 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.⁵⁸⁴

579. 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).

580. 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.

581. *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).

582. *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).

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

584. 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.

In *Employers Insurance of Wausau v. Halton*,⁵⁸⁵ 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.⁵⁸⁶ Thus, a party may establish "good cause" by proving that the party did not act intentionally or with conscious disregard in failing to timely file answers to the requests.⁵⁸⁷ Consequently, even a weak excuse will suffice, particularly when the opposing party suffers no prejudice as a result of the delay.⁵⁸⁸ The decision to allow or deny the withdrawal of deemed admissions lies within the discretion of the trial court.⁵⁸⁹

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."⁵⁹⁰ 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.⁵⁹¹ Accordingly, the trial court enjoys discretion in allowing the withdrawal or amendment of admissions.⁵⁹²

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

586. *See id.* at 466 ("[N]ew trials may be granted and judgment set aside for *good cause*, on motion" (quoting TEX. R. CIV. P. 320)).

587. *Wheeler v. Green*, 157 S.W.3d 439, 452 (Tex. 2005); *Tommy Gio, Inc. v. Dunlop*, 348 S.W.3d 503, 508 (Tex. App.—Dallas 2011, pet. denied); *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).

588. *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.

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

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

591. *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).

592. *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.).

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:

(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.⁵⁹³

The party supplementing discovery must serve the supplemental discovery response “reasonably promptly” after the necessity arises.⁵⁹⁴ 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.⁵⁹⁵ 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 violation⁵⁹⁶ unless the court finds “good cause for the failure” to supplement⁵⁹⁷ or the untimely “response will not unfairly surprise or unfairly prejudice the other parties.”⁵⁹⁸ The supreme court emphasized that “[t]he salutary purpose of Rule 215(5) is to require complete responses to discovery so as to promote responsible assessment of settlement and prevent trial by ambush” and that the “rule is mandatory, and its sole sanction—exclusion of evidence—is automatic, unless there is

593. TEX. R. CIV. P. 193.5(a). 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. *Id.* R. 166b (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 id.* R. 193.5 cmt. 5 (noting that the duty to supplement deposition testimony is governed by Rule 195.6).

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

595. *Id.*

596. *Id.* R. 193.6(a).

597. *Id.* R. 193.6(a)(1); *see also* *Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 687 (Tex. 2002) (defining “good cause” in motions for withdrawal and amendment of deemed admissions).

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

good cause to excuse its imposition.”⁵⁹⁹

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.”⁶⁰⁰ However, the court may decide to grant a continuance or postpone the trial temporarily to allow a supplemental response to be made “[e]ven if the party seeking to introduce the evidence” fails to meet its burden.⁶⁰¹ The useful benefit of Rule 193.6 is that it requires “complete responses to discovery so as to promote responsible assessment of settlement and to prevent trial by ambush.”⁶⁰²

a. Fact Witnesses

In general, a party must disclose the identity of any potential party or person having knowledge of relevant facts.⁶⁰³ 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.⁶⁰⁴ There are two exceptions to this harsh sanction, and the trial court’s ruling under either exception is reviewed for abuse of discretion.⁶⁰⁵

599. *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 915 (Tex. 1992).

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

601. *Id.* R. 193.6(c) (stating that the court has discretion to temporarily delay the trial even if the party seeking to introduce evidence fails to meet the burden set forth in subsection (b) of this rule). However, the exclusion does not apply when the original trial date is continued, and “the date set is more than thirty days from the date of the original trial date.” *H.B. Zachry Co. v. Gonzalez*, 847 S.W.2d 246, 246 (Tex. 1993) (orig. proceeding).

602. *Aetna Cas. & Sur. Co. v. Specia*, 849 S.W.2d 805, 807 (Tex. 1993) (orig. proceeding) (quoting *Alvarado*, 830 S.W.2d at 914) (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 id.* R. 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 id.* R. 215.5 cmt. (noting that Rule 215.5 was superseded by Rule 193.6).

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

604. *Alvarado*, 830 S.W.2d at 915; *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).

605. *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).

Under the first exception, a party must demonstrate good cause on the record to allow testimony of the witness.⁶⁰⁶ Unfortunately, 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.”⁶⁰⁷

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.⁶⁰⁸ Texas Rule of Civil Procedure 193.6, however, does not apply to parties named in the suit.⁶⁰⁹ Thus, named parties may testify as fact witnesses even though those parties failed to supplement the discovery response in a timely manner.⁶¹⁰ 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.”⁶¹¹

606. 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).

607. *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).

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

609. *See id.* R. 193.6(a) (stating that named parties are not included as witnesses whose identities must be disclosed).

610. *Id.*

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

b. Expert Witnesses

Under Rule 192.7, there are two types of expert witnesses: (1) a testifying expert,⁶¹² and (2) a consulting expert.⁶¹³ “A party 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.⁶¹⁴ 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.⁶¹⁵

Pursuant to Rule 195.1, a party may request the disclosure of information regarding testifying expert witnesses.⁶¹⁶ This request must be done via a request for disclosure.⁶¹⁷ 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.”⁶¹⁸

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.”⁶¹⁹ If an amended or supplemental response

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

613. See *id.* R. 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”).

614. *Id.* R. 192.3(e).

615. *Id.*

616. *Id.* R. 195.1.

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

618. *Id.* R. 195.2; see also *id.* R. 191.1 (stating that discovery rules can be modified by party agreement or by the court for good cause).

619. *Id.* R. 193.5(b); accord *id.* R. 195.6. Under former Rule 166b(6)(b), expert witnesses were to be disclosed “as soon as is practical.” *Id.* R. 166b(6)(b) (repealed 1999). In *Mentis v. Barnard*, 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

is made fewer than thirty days before trial, it is presumed to have been made without reasonable promptness.⁶²⁰ 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,⁶²¹ or that the failure to timely respond "will not unfairly surprise or unfairly prejudice the other parties."⁶²² The trial court's ruling to admit or exclude an improperly identified expert is reviewed for an abuse of discretion.⁶²³ 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 pursuant to the

required to communicate the witness designation once it was finally decided that the expert was expected to testify. *Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994). The trial court was to "consider good cause for late identification only if [the court found] that the witness was not designated as soon as was practical." *Id.* at 15. The new rule replaces "as soon as is practical" with "reasonably promptly" after the necessity for the response is discovered, and 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").

620. 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.

621. 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." *Rodríguez 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.).

622. 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)).

623. *Fort Borwon Villas Condo Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879, 881 (Tex 2009) (*per curiam*) ("A trial court's exclusion of an expert who has not been properly designated can be overturned only upon a finding of abuse of discretion.") (quoting *Mentis*, 870 S.W.2d at 16); *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).

duty to supplement discovery.⁶²⁴ 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.⁶²⁵ Good cause may be established when counsel is unable to reasonably anticipate the need for such rebuttal evidence.⁶²⁶ The trial court's decision is reviewed for an abuse of discretion.⁶²⁷

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."⁶²⁸ 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.⁶²⁹ Generally, the denial of a motion to quash a deposition or the denial of a protective order is not a final, appealable

624. 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).

625. 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).

626. 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).

627. *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).

628. 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").

629. See *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 127–28 (Tex. 1995) (defining "apex" deposition); see also *In re Alcatel USA, Inc.* 11 S.W.3d 173, 176 (Tex. 2000) (orig. proceeding) (reaffirming *Crown Central* and setting forth procedure for challenging an apex deposition request); cf. *West v. Solito*, 563 S.W.2d 240, 246 (Tex. 1978) (objecting to depositions of former attorneys based on the attorney-client privilege).

order and must therefore be challenged by writ of mandamus.⁶³⁰ The trial court's ruling is reviewed for an abuse of discretion.⁶³¹

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.⁶³² The trial court's dismissal based on a defect in parties is reviewed for an abuse of discretion.⁶³³

2. Dismissal for Defect in Pleadings

The trial court's decision to dismiss for insufficient pleadings is reviewed under an abuse of discretion standard.⁶³⁴ In general, however, a trial court should not dismiss for defective pleadings unless the pleading party is given an opportunity to amend.⁶³⁵ Accordingly, see Part IV(S)(1) on special exceptions *infra*. If a party pleads facts that affirmatively demonstrate an

630. See *Alcatel*, 11 S.W.3d at 175 (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. 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).

631. *Alcatel*, 11 S.W.3d at 175.

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

633. *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).

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

635. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002); *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).

absence of jurisdiction, such a defect is incurable and immediate dismissal of the case is proper.⁶³⁶

3. Dismissal for Want of Prosecution

The trial court has an obligation to control its docket and demand that parties diligently prosecute their suits.⁶³⁷ 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.⁶³⁸ 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.⁶³⁹ 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.⁶⁴⁰

When resolving the central issue of “whether the plaintiffs exercised reasonable diligence,”⁶⁴¹ the court may consider the entire trial history, and “[n]o single factor is dispositive.”⁶⁴² Whether the plaintiff intended to abandon the litigation is not the inquiry, “[n]or is the existence of a belated

636. *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).

637. *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”).

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

639. *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))).

640. *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).

641. *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).

642. *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.).

trial setting or an asserted eagerness to proceed to trial conclusive.”⁶⁴³ Furthermore, the fact that settlement activity is in progress,⁶⁴⁴ or that the opposing parties have remained passive, does not prevent a case from being dismissed based upon want of diligence.⁶⁴⁵ 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.”⁶⁴⁶ 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.”⁶⁴⁷

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.”⁶⁴⁸ The reinstatement provisions in Rule 165a(3) only apply to dismissals for failure to appear at trial or a hearing,⁶⁴⁹ and they

643. *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.

644. *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).

645. *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”).

646. *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).

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

648. *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 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).

649. *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

share several similarities with the *Craddock* requisites for granting a new trial to set aside a proper default judgment.⁶⁵⁰ 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.⁶⁵¹

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 the Medical Liability and Insurance Improvement Act in response to a perceived crisis in the cost of health care.⁶⁵² 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.”⁶⁵³

of Rule 165a(3) do not apply to dismissal under the court’s inherent powers for failure to prosecute with due diligence).

650. *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.*, 133 S.W.2d 124, 126 (Tex. 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”).

651. *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. *Id.* 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. 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.” *Id.*

652. *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).

653. 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

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.”⁶⁵⁴ To address the continuing and growing concerns, thirty years since the enactment of Article 4590i, 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.”⁶⁵⁵ “The obvious intent of this statutory provision was to stop suits that had no merit from proceeding through the courts.”⁶⁵⁶

In 2003, the legislature expressed concern that “the number of health care liability claims” had still not decreased but had actually increased “inordinately.”⁶⁵⁷ Once again attempting to reduce the cost of health care, the legislature repealed Article 4590i and enacted Chapter 74 of the Civil Practice and Remedies Code.⁶⁵⁸ In enacting the specific provisions of Section 74.351, the legislature made extensive changes to the expert report requirement.⁶⁵⁹

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.⁶⁶⁰ The parties, however, may arrange to extend the deadline for serving an expert report by

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).

654. *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.).

655. *Id.* (citing Act of May 5, 1995, 74th 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. § 74.001)).

656. *Id.*

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

658. *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 (repealing the Medical Liability and Insurance Improvement Act of 1977).

659. *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).

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

a written agreement.⁶⁶¹ 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.”⁶⁶² 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.”⁶⁶³

The statutory criteria of Section 74.351 have been tested extensively for virtually every factual scenario.⁶⁶⁴ 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.⁶⁶⁵ Cases governed by the predecessor statute may warrant mandamus relief.⁶⁶⁶

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.⁶⁶⁷ A trial court’s decision to dismiss a case

661. *Id.* § 74.351(a).

662. *Id.* § 74.351(b).

663. *Id.* § 74.351(c).

664. *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”).

665. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (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 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.”).

666. *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).

667. *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

under Section 74.351(b), like its decision under the predecessor statute (Article 4590i), is reviewed for abuse of discretion.⁶⁶⁸ The trial court's decision to grant an extension to cure a deficient report is also subject to an abuse of discretion review.⁶⁶⁹ However, when an expert report is not timely served, the trial court has no discretion but to dismiss a health care liability claim.⁶⁷⁰ Under this standard, the appellate court defers to a trial court's factual determinations, but reviews de novo questions of law involving statutory interpretation and constitutional challenges.⁶⁷¹

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.”⁶⁷² However, when a party files an affidavit of inability to pay under Rule 145⁶⁷³ (*in forma pauperis*) or under Section 13.001 of the Texas Civil Practice and Remedies Code,⁶⁷⁴ “the trial court has broad discretion to dismiss the suit” if the allegation of poverty is false⁶⁷⁵ or the action is “frivolous or

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). 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).

668. 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).

669. *Ogletree*, 262 S.W.3d at 321.

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

671. *Univ. of Tex. Health Sci. Ctr. at Houston v. Joplin*, 525 S.W.3d 772, 776 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (citing *Univ. of Tex. Health Sci. Center at Houston v. Cheatham*, 357 S.W.3d 747, 748 (Tex. App.—Houston [14th Dist.] 2011, pet. denied)).

672. *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).

673. TEX. R. CIV. P. 145.

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

675. *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)(2)); accord *Felix v. Thaler*, 923 S.W.2d 650, 651 (Tex. App.—Houston [1st Dist.] 1995, no writ).

malicious.”⁶⁷⁶ A trial court’s dismissal of a case under Section 13.001 is reviewed for an abuse of discretion.⁶⁷⁷ 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.⁶⁷⁸ 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.⁶⁷⁹

“In determining whether the action is frivolous, the trial court may consider whether: (1) the action’s realistic chance of ultimate success is slight; (2) the claim has no arguable basis in law or in fact; or (3) it is clear that the party cannot prove a set of facts in support of the claim.”⁶⁸⁰ 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.⁶⁸¹ 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.⁶⁸² “A claim that has no legal basis is one based upon an ‘indisputably meritless legal theory,’”⁶⁸³ and a claim that has

676. TEX. CIV. PRAC. & REM. CODE ANN. § 13.001(a)(2). 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.).

677. *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.); *Bohannon v. Tex. Bd. of Criminal Justice*, 942 S.W.2d 113, 115 (Tex. App.—Austin 1997, writ denied).

678. See TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a)(3) (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).

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

680. TEX. CIV. PRAC. & REM. CODE ANN. § 13.001(b). 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).

681. *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). *Id.*

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

683. *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-

no factual basis is one that arises out of “fantastic or delusional scenarios.”⁶⁸⁴

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.⁶⁸⁵ In determining whether the appeal is frivolous, the trial court may consider “whether the appellant has presented a substantial question for appellate review.”⁶⁸⁶

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.”⁶⁸⁷ However, because disqualification is so severe, courts must be wary of ordering such a remedy.⁶⁸⁸ Disqualification may result in “palpable harm, disrupt trial court proceedings, and deprive a party of the right to have counsel of choice.”⁶⁸⁹ 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.⁶⁹⁰ Further, a motion to disqualify an attorney must be timely filed.⁶⁹¹ Courts have found that a six-month delay

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”).

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

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

686. TEX. CIV. PRAC. & REM. CODE ANN. § 13.003(b).

687. *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).

688. *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).

689. *Id.* at 422.

690. *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).

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

constituted waiver⁶⁹² but that a two-month delay did not.⁶⁹³

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.⁶⁹⁴ The movant must prove that (1) during the existence of a prior attorney-client relationship, or some other relationship giving rise to an implied fiduciary obligation; (2) factual matters were involved that are so related to the facts in the pending litigation; (3) that the prior relationship creates a “genuine threat that confidences revealed to his former counsel will be divulged to his present adversary.”⁶⁹⁵ To satisfy this burden, the movant must offer “evidence of specific similarities capable of being recited in the disqualification order.”⁶⁹⁶

The standard of review used in assessing a trial court’s ruling on a motion to disqualify is the abuse of discretion standard.⁶⁹⁷ In addition, the trial court’s order granting or denying a motion to disqualify may be reviewed by mandamus.⁶⁹⁸

J. *Disqualification of Judges*

1. Disqualification and Recusal

Pursuant to Rule 18a, any party may file a motion to recuse the trial judge if done at least ten days before the date of the trial or other hearing⁶⁹⁹ and a motion to disqualify “should be filed as soon as practicable after the movant knows of the ground stated in the motion.”⁷⁰⁰ A motion to disqualify seeks to prevent a judge from hearing a case based on

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

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

694. *In re Meador*, 968 S.W.2d 346, 350–51 (Tex. 1998); *Ghidoni v. Stone Oak, Inc.*, 966 S.W.2d 573, 579 (Tex. App.—San Antonio 1998, pet. denied); *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; *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.”).

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

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

697. *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 420 (Tex. 2002) (orig. proceeding); *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; *Syntek Fin. Corp.*, 881 S.W.2d at 321; *Coker*, 765 S.W.2d at 400.

698. *In re Sanders*, 153 S.W.3d 54, 57 (Tex. 2004) (orig. proceeding); *In re Nitla S.A.*, 92 S.W.3d at 422; *Nat’l Med. Enters.*, 924 S.W.2d at 128; *Vaughan*, 875 S.W.2d at 691.

699. TEX. R. CIV. P. 18a(b); *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).

700. TEX. R. CIV. P. 18a(b)(2).

constitutional or statutory reasons.⁷⁰¹ A motion to recuse seeks to prevent a judge from hearing a case for nonconstitutional or nonstatutory reasons.⁷⁰²

If a trial judge should have been disqualified but was not, any orders or judgments rendered by that judge are void and without effect.⁷⁰³ Thus, disqualification of a judge based on a constitutional prohibition “can be raised at any point in” a proceeding.⁷⁰⁴ 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.”⁷⁰⁵

Upon the filing of a motion to disqualify or recuse, the trial judge must either recuse himself or request the administrative judicial region’s presiding judge to assign a judge to hear the motion.⁷⁰⁶ Rule 18a(j) provides that if the motion is denied, the order is reviewed for an abuse of discretion.⁷⁰⁷ However, an order granting a motion to recuse is not reviewable.⁷⁰⁸

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

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

703. *O'Connor*, 92 S.W.3d at 449.

704. 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); *Kennedy v. Wortham*, 314 S.W.3d 34, 36 (Tex. App.—Texarkana 2010, pet. denied) (disqualification of judge “cannot be waived and can be raised at any time”) (citing *Buckholts*, 632 S.W.2d at 148); (*McElwee v. McElwee*, 911 S.W.2d 182, 185–86 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (confirming that a party waives an error regarding recusal when he fails to raise the issue by a proper motion).

705. *In re Union Pac. Res. Co.*, 969 S.W.2d 427, 428 (Tex. 1998); *In re E.R.C.*, 496 S.W.3d 270, 276 (Tex. App.—Texarkana 2016, pet. denied), *cert. denied sub nom.*, *Stokes v. Corsbie*, 137 S. Ct. 834 (2017).

706. TEX. R. CIV. P. 18a(f)(1), (g)(1); *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 (“[A] ‘tertiary recusal motion’ means a third or subsequent motion for recusal or disqualification . . .”).

707. TEX. R. CIV. P. 18a(j); *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).

708. TEX. R. CIV. P. 18a(j); *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.).

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.⁷⁰⁹ "If a party to a civil case files a timely objection . . . the judge shall not hear the case."⁷¹⁰ An objection must be filed "not later than the seventh day after the date the party receives actual notice of the assignment or before the date the first hearing or trial, including pretrial hearings, commences, whichever date occurs earlier," although the presiding judge may extend the time to file an objection on written motion and with good cause.⁷¹¹ An objection to this assignment must be the first matter presented to the visiting judge for a ruling.⁷¹² If a party timely objects to the assignment, "the judge shall not hear the case."⁷¹³ 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.⁷¹⁴ The governing statute is mandatory and does not give the trial court any discretion to rule on the objection.⁷¹⁵ The court of appeals will review such a ruling for an abuse of discretion and may do so in a mandamus proceeding.⁷¹⁶

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).⁷¹⁷ The trial court will be afforded a reasonable time in which to perform this ministerial duty after the motion is brought to its

709. TEX. GOV'T CODE ANN. § 74.053(a).

710. *Id.* § 74.053(b).

711. *Id.* § 74.053(c).

712. *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).

713. TEX. GOV'T CODE ANN. § 74.053(b); *In re B.F.B.*, 241 S.W.3d 643, 645–46 (Tex. App.—Texarkana 2007, no pet.); *Flores v. Banner*, 932 S.W.2d 500, 501 (Tex. 1996) (orig. proceeding) (per curiam); *In re Cuban*, 24 S.W.3d 381, 382 (Tex. App.—Dallas 2000, orig. proceeding).

714. TEX. GOV'T CODE ANN. § 74.053(d); *accord Cuban*, 24 S.W.3d at 382; *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).

715. TEX. GOV'T CODE ANN. § 74.053(b); *Mitchell Energy Corp.*, 943 S.W.2d at 441.

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

717. *Safety-Kleen Corp. v. Garcia*, 945 S.W.2d 268, 269 (Tex. App.—San Antonio 1997, orig. proceeding).

attention.⁷¹⁸ What constitutes a reasonable time depends on the facts and circumstances in a particular case.⁷¹⁹ However, the supreme court has admonished the trial courts that while “[t]rial courts are generally granted considerable discretion when it comes to managing their dockets. Such discretion . . . is not absolute. It has long been the case that ‘a delay of an unreasonable duration . . . , if not sufficiently explained, will raise a conclusive presumption of abandonment of the plaintiff’s suit.’”⁷²⁰

Generally, however, a trial court is given wide discretion in managing its docket⁷²¹ to achieve “economy of time and effort for itself, for counsel, and for litigants.”⁷²² 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.⁷²³ 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.⁷²⁴ A trial court’s order relating to the management of its docket is reviewed for a clear abuse of discretion.⁷²⁵

718. *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).

719. *In re Salazar*, 134 S.W.3d 357, 358 (Tex. App.—Waco 2003, orig. proceeding).

720. *In re Conner*, 458 S.W.3d 552, 534 (Tex. 2015) (orig. proceeding) (second alteration in original) (quoting *Callahan v. Staples*, 161 S.W.2d 489, 491 (Tex. [Comm’n Op.] 1942)).

721. *Polaris Inv. Mgmt. Corp. v. Abascal*, 892 S.W.2d 860, 861 (Tex. 1995) (orig. proceeding) (per curiam); *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”).

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

723. *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).

724. *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).

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

L. *Forum Non Conveniens*

Under the doctrine of forum non conveniens, “[t]he doctrine of forum non conveniens, which originated in the common law and is now codified in Texas, ‘comes into play when there are sufficient contacts between the defendant and the forum state to confer personal jurisdiction upon the trial court, but the case itself has no significant connection to the forum.’”⁷²⁶ 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.⁷²⁷ Upon a party’s written 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.⁷²⁸ 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

726. *In re Bridgestone Ams. Tire Operations, LLC*, 459 S.W.3d 565, 568 (Tex. 2015) (orig. proceeding) (quoting *In re Pirelli Tire, LLC*, 247 S.W.3d 670, 675–76 (Tex. 2007) (orig. proceeding)).

727. *Owens-Illinois, Inc. v. Webb*, 809 S.W.2d 899, 901 (Tex. App.—Texarkana 1991, writ dismissed 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), 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 doctrine is not applicable to wrongful death cases was overturned by the legislature in 2003).

728. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b); see also *Pirelli Tire*, 247 S.W.3d at 675–76 (discussing the doctrine’s common-law roots).

(6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.⁷²⁹

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.⁷³⁰ An order denying a motion to dismiss based on forum non conveniens may be reviewed in a mandamus proceeding.⁷³¹ 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.⁷³² Finally, the trial court does not have the discretion to stay or dismiss the case if the plaintiff is a legal resident of Texas.⁷³³

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.⁷³⁴ To withstand this review standard, the court must

729. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b)(1)–(6). *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.* at 686 (citing Act of May 27, 1997, 75th Leg., R.S., ch. 424, § 1, 1997 Tex. Gen. Laws 1680, amended by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 3.04, 2003 Tex. Gen. Laws 847, 854).

730. *Bridgestone*, 459 S.W.3d at 569; *Pirelli Tire*, 247 S.W.3d at 676.

731. *Pirelli Tire*, 247 S.W.3d at 679.

732. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(f). 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 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).

733. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(e); *Bridgestone*, 459 S.W.3d at 569; *In re Ford Motor Co.*, 442 S.W.3d 265, 269 (Tex. 2014) (orig. proceeding); *Owens Corning v. Carter*, 997 S.W.2d 560, 568–71 (Tex. 1999).

734. *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.").

make written findings supported by the evidence.⁷³⁵ 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.⁷³⁶ This two-part constitutional test is a question of law reviewed de novo.⁷³⁷ Gag orders may be challenged by mandamus.⁷³⁸

N. *Injunctive Relief*

Injunctions are a form of equitable relief that may also be authorized by statute.⁷³⁹ “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.’”⁷⁴⁰ The purpose of a temporary injunction “is to preserve the status quo of the litigation’s subject matter pending a trial on the merits.”⁷⁴¹ “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.”⁷⁴² Injunctions are extraordinary remedies, not relief owed to any party.⁷⁴³

735. *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).

736. *Grigsby*, 904 S.W.2d at 620; *Davenport*, 834 S.W.2d at 9.

737. *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 Tr.*, 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).

738. *Markel*, 938 S.W.2d at 79–80.

739. TEX. CIV. PRAC. & REM. CODE ANN. § 65.011(c); *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).

740. *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) (orig. proceeding) (quoting *Janis Films, Inc. v. City of Fort Worth*, 358 S.W.2d 589, 589 (Tex. 1962)).

741. *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).

742. *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.)).

743. *Butnaru*, 84 S.W.3d at 204; *Nolte Irrigation Co. v. Willis*, 180 S.W.2d 451, 455 (Tex. App.—Amarillo 1944, writ ref’d w.o.m.).

While an interlocutory appeal from the grant or denial of a temporary injunction is allowed,⁷⁴⁴ no statutory provision permits an appeal from the grant or denial of a temporary restraining order.⁷⁴⁵ Mandamus relief from a temporary restraining order may nonetheless be available under unusual circumstances.⁷⁴⁶

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.”⁷⁴⁷ An irreparable injury exists if the party injured cannot sufficiently be compensated in damages or the amount of damages is immeasurable by pecuniary standards.⁷⁴⁸ A temporary injunction is subject to equitable principles such as laches or the clean hands doctrine.⁷⁴⁹

744. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4).

745. 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).

746. 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 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 . . .”).

747. *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).

748. *Butnaru*, 84 S.W.3d at 204.

749. 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);

Whether a party is entitled to invoke an equitable defense “is a determination left to the [sound] discretion of the trial court.”⁷⁵⁰

In an interlocutory appeal from a temporary injunction,⁷⁵¹ the merits of the movant’s case are not presented for the appellate court’s review;⁷⁵² therefore, a “trial court may not grant a temporary injunction” that would accomplish the objective of the lawsuit.⁷⁵³ Appellate review is strictly limited to evaluating whether there has been an abuse of discretion.⁷⁵⁴ 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.⁷⁵⁵

All orders that grant a temporary injunction are required to include a date setting the case for trial on the merits.⁷⁵⁶ Failure to include an order setting the matter for a trial on the merits mandates dissolution of the injunction.⁷⁵⁷ Furthermore, the trial court must detail the specific reasons it relied upon in ruling on whether a temporary injunction should be granted or denied.⁷⁵⁸ 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.⁷⁵⁹ If the order fails to meet these requirements,

Keene v. Reed, 340 S.W.2d 858, 860 (Tex. App.—Waco 1960, writ ref’d) (acknowledging that the equitable principle of laches can keep a party from obtaining a temporary injunction).

750. *Francis*, 186 S.W.3d at 551 (Wainwright, J., dissenting, joined by O’Neill & Johnson, JJ.).

751. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4).

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

753. *Tex. Foundries, Inc. v. Int’l Moulders & Foundry Workers’ Union*, 248 S.W.2d 460, 464 (Tex. 1952); *accord Francis*, 186 S.W.3d at 552 (Wainwright, J., dissenting).

754. *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).

755. *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. App.—Houston 1960, writ ref’d n.r.e.).

756. 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).

757. *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.).

758. *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. App.—San Antonio 1981, no writ).

759. *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.*

it is rendered fatally defective and void, requiring reversal regardless of whether the issue was raised by issue or point of error.⁷⁶⁰

In an appeal from a permanent injunction, the standard of review is also an abuse of discretion.⁷⁶¹ A litigant is entitled to a jury trial in an injunction action, but only the ultimate factual issues are submitted for their determination.⁷⁶² The jury is not entitled to “determine the expediency, necessity or propriety of equitable relief.”⁷⁶³ 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.⁷⁶⁴

O. Joinder

Joinder and intervention are distinct.⁷⁶⁵ While intervention is automatic unless challenged,⁷⁶⁶ “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.⁷⁶⁷ “A court’s decision on joinder should be based on practical considerations with a view to what is fair and orderly.”⁷⁶⁸ A trial court has discretion in such matters, and its decisions “will not be disturbed on appeal” absent an abuse of discretion.⁷⁶⁹ A joinder decision may also be reviewed by writ of mandamus.⁷⁷⁰

v. Robertson Transps., Inc., 261 S.W.2d 549, 552–53 (Tex. 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”).

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

761. *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).

762. *Priest*, 780 S.W.2d at 876.

763. *Id.*; *see also* *Alamo Title Co. v. San Antonio Bar Ass’n*, 360 S.W.2d 814, 816 (Tex. App.—Waco 1962, writ re’fd n.r.e.) (acknowledging that a jury in equity should not determine issues related to the “expediency, necessity, or propriety of [the] relief”).

764. *Priest*, 780 S.W.2d at 875–76.

765. *In re Union Carbide Corp.*, 273 S.W.3d 152, 155 (Tex. 2008) (orig. proceeding).

766. *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990).

767. 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).

768. *In re Arthur Andersen LLP*, 121 S.W.3d 471, 483 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

769. *Allison v. Ark. La. Gas Co.*, 624 S.W.2d 566, 568 (Tex. 1981).

770. *Arthur Andersen*, 121 S.W.3d at 483.

When more than one plaintiff joins a case, each plaintiff must establish proper venue independently from all other plaintiffs.⁷⁷¹ 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.⁷⁷² 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.”⁷⁷³

A trial court’s determination under Section 15.003(a) is an appealable interlocutory order.⁷⁷⁴ A trial court’s decision regarding transfer of venue now subject to interlocutory appeal under the exception set forth in Section 15.003(a) and (b).⁷⁷⁵ The standard of review applicable to the trial court’s order based on Section 15.003(a) is, by statute, de novo.⁷⁷⁶

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, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of

771. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a).

772. *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).

773. *O’Quinn*, 77 S.W.3d at 448–49.

774. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(b) (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)”).

775. *Id.* § 15.003(a), (b); *Union Pac. R. Co. v. Stouffer*, 420 S.W.3d 233, 236 (Tex. App.—Dallas 2013, pet. dism’d).

776. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c)(1); *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).

the United States.⁷⁷⁷ 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.⁷⁷⁸ Whether these requirements have been met is left largely to the trial court's discretion.⁷⁷⁹ As one court has noted, "the sufficiency of a motion to take judicial notice is a question best answered by the trial court."⁷⁸⁰ However, "once the law has been invoked by proper motion, the trial court has no discretion—it must acknowledge that law."⁷⁸¹

Pursuant to Texas Rule of Evidence 201, a trial judge may also take judicial notice of a fact if it is "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."⁷⁸² In addition, facts that are notorious and indisputable,⁷⁸³ or "well known and easily ascertainable,"⁷⁸⁴ may be judicially noticed. However, simply because a trial judge has personal knowledge of a fact does not permit the judge to take judicial notice of it.⁷⁸⁵ The test on review is whether the fact to be judicially noticed is "verifiably certain."⁷⁸⁶

777. TEX. R. EVID. 202.

778. *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).

779. 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).

780. *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*, 158 S.W.2d 760, 763 (Tex. 1942); *Birido v. Holbrook*, 775 S.W.2d 411, 412 (Tex. App.—Fort Worth 1989, writ denied).

781. *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).

782. TEX. R. EVID. 201(b); see also *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005) (quoting Rule 201(b)).

783. *Harper v. Killion*, 348 S.W.2d 521, 522 (Tex. 1961).

784. *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).

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

786. *Id.*; *Levit v. Adams*, 841 S.W.2d 478, 485 (Tex. App.—Houston [1st Dist.] 1992, no writ).

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.’”⁷⁸⁷ While a party has a constitutional right to trial by jury,⁷⁸⁸ the right is not absolute.⁷⁸⁹ 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”⁷⁹⁰ and (2) to pay the jury fee.⁷⁹¹ 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.”⁷⁹²

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.⁷⁹³ If the trial court denies a jury trial, it will be considered harmful error if the case involves questions of material fact.⁷⁹⁴ 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.”⁷⁹⁵ The trial court’s decision will be

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

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

789. 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).

790. 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).

791. TEX. R. CIV. P. 216(b); *Huddle v. Huddle*, 696 S.W.2d 895, 895 (Tex. 1985).

792. *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).

793. *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).

794. *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).

795. *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

reviewed for an abuse of discretion.⁷⁹⁶

R. *Personal Jurisdiction*

“[P]ersonal jurisdiction concerns the court’s power to bind a particular person or party.”⁷⁹⁷ “[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.⁷⁹⁸ The nonresident’s contacts with Texas “may give rise to either general or specific jurisdiction.”⁷⁹⁹ If the defendant has “continuous and systematic contacts with the forum,” general jurisdiction is established.⁸⁰⁰ Furthermore, when the defendant’s alleged liability relates to or arises from activity that occurred within the state, specific jurisdiction is established.⁸⁰¹

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.⁸⁰² To make this challenge a success, one must first be

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*, 9 S.W. 672, 673 (Tex. 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).

796. 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”).

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

798. *Commonwealth Gen. Corp. v. York*, 177 S.W.3d 923, 924 (Tex. 2005); see *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 166 (Tex. 2007) (“Personal jurisdiction over nonresident defendants is constitutional when: (1) the defendant has established minimum contacts with the forum state, and (2) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice.” (citing *Int’l Shoe Co. v. Washington*, 325 U.S. 310, 316 (1945))).

799. *Commonwealth*, 177 S.W.3d at 925.

800. *Id.*

801. *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).

802. TEX. R. CIV. P. 120a; GFTA Trendanalysen B.G.A. Herrdum GMBH & Co. v. Varne, 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).

a nonresident of Texas because it is presumed that Texas courts automatically have jurisdiction over Texas residents.⁸⁰³ “The plaintiff bears the initial burden of pleading sufficient allegations to bring a nonresident . . . within the provisions of the long-arm statute.”⁸⁰⁴ To prevail on a special appearance, the nonresident defendant has the burden to negate all forms of personal jurisdiction claimed by the plaintiff.⁸⁰⁵

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.⁸⁰⁶ “[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.”⁸⁰⁷ 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.⁸⁰⁸

If a 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.⁸⁰⁹ 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.⁸¹⁰ 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

803. 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).

804. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 793 (Tex. 2002); see also *Kelly*, 301 S.W.3d at 658 n.4 (“While the pleadings are essential to frame the jurisdictional dispute, they are not dispositive.”).

805. *BMC Software*, 83 S.W.3d at 793; *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996) (orig. proceeding).

806. *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).

807. *Kawasaki*, 699 S.W.2d at 203.

808. 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).

809. *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).

810. *Michiana Easy Livin’ Country, Inc. v. Holten*, 168 S.W.3d 777, 781–82 (Tex. 2005).

of the trial court's ruling.⁸¹¹

A trial court's order granting or denying a special appearance is an appealable interlocutory order.⁸¹² "Whether a court can exercise jurisdiction over nonresident defendants is a question of law."⁸¹³ Generally, a trial court must resolve disputed questions of fact before resolving the jurisdiction issue.⁸¹⁴ If the trial judge enters findings of fact and conclusions of law, the factual determinations are subject to legal and factual sufficiency standards of review.⁸¹⁵ The trial judge's legal conclusions are reviewed de novo.⁸¹⁶ 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.⁸¹⁷ 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.⁸¹⁸

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

811. *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.

812. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7). 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) (orig. proceeding); *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").

813. *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 657 (Tex. 2010) (citing *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex.2007); *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.")).

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

815. *See BMC Software*, 83 S.W.3d at 794 (rejecting the abuse of discretion standard that had been applied by some courts of appeals).

816. *Id.*

817. *Id.*

818. *Id.*

implied.⁸¹⁹ 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.⁸²⁰ 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.⁸²¹ 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.⁸²²

S. *Pleadings*

Technically, "pleadings" are petitions and answers.⁸²³ As a practical matter, practitioners often use the term "pleadings" to include all manner of motions filed in the trial court.⁸²⁴ 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."⁸²⁵ Special exceptions are "used to challenge the sufficiency of a pleading."⁸²⁶ If a pleading fails to give fair

819. *Id.* at 795.

820. *Id.*

821. *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).

822. *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. Conticarrriers & Terminak, Inc.*, 944 S.W.2d 405, 411 (Tex. App.—Houston [14th Dist.] 1997, no writ).

823. *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 dismissed) (holding that a motion is not the functional equivalent of a pleading and does not carry the same legal significance).

824. *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 . . .").

825. *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*, 633 S.W.2d at 810).

826. *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998).

notice,⁸²⁷ the defendant should specially except to the petition pursuant to Texas Rule of Civil Procedure 91.⁸²⁸ If no special exceptions are filed, the pleadings will be construed liberally in the pleading party's favor.⁸²⁹ 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"⁸³⁰ or otherwise require the adverse party to clarify his pleadings "when they are not clear or sufficiently specific."⁸³¹ Special exceptions apply to petitions and answers,⁸³² but may be used in motion practice as well.⁸³³

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.⁸³⁴ If the defect in the pleading is not cured after amendment, the trial court may then dismiss the case.⁸³⁵ 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

827. 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).

828. 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).

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

830. 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).

831. *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).

832. 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).

833. 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).

834. *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998).

835. *Id.*

in the pleadings.⁸³⁶ The trial court's ruling is reviewed for an abuse of discretion.⁸³⁷

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.⁸³⁸ The distinction is “between inadequately pleading a cause of action [(special exception)] and utterly failing to plead a viable cause of action [(summary judgment)].”⁸³⁹ 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.⁸⁴⁰

2. Interpleader

Texas Rule of Civil Procedure 43,⁸⁴¹ providing for interpleader actions, extends and liberalizes the equitable remedy of bill of interpleader.⁸⁴² 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

836. *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 rePd n.r.e.); *Armendariz v. Bill Sears Supermarket No. 1*, 562 S.W.2d 529, 530 (Tex. App.—El Paso 1978, writ rePd n.r.e.).

837. *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”).

838. *Friesenbahn*, 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).

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

840. *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 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).

841. *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.”).

842. *Downing v. Laws*, 419 S.W.2d 217, 220 (Tex. App.—Austin 1967, writ rePd 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).

court's registry.⁸⁴³ The stakeholder need not be completely disinterested in the suit;⁸⁴⁴ 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.⁸⁴⁵

"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."⁸⁴⁶ 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[s or property]; (2) [the party] has not unreasonably delayed filing [an] action for interpleader; and (3) [the party] has unconditionally tendered the fund[s or property] into the registry of the court."⁸⁴⁷ Every reasonable doubt is resolved in favor of allowing the stakeholder to interplead.⁸⁴⁸ The granting of interpleader is considered a final, appealable judgment, which is reviewed on appeal for an abuse of discretion.⁸⁴⁹

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."⁸⁵⁰ The plea in intervention should be filed before the judgment is rendered.⁸⁵¹ A party may not

843. *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).

844. *Downing*, 419 S.W.2d at 219–20.

845. *Davis v. E. Tex. Sav. & Loan Ass'n*, 354 S.W.2d 926, 930 (Tex. 1962) (quoting TEX. R. CIV. P. 43); *Emp'rs' Cas. Co. v. Rockwall Cnty.*, 35 S.W.2d 690, 693 (Tex. 1931).

846. *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* *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 850 (Tex. 2018) ("An interpleader suit is thus authorized by Texas Rule of Civil Procedure 43 when such a stakeholder is 'exposed to double or multiple liability.'" (quoting Tex. R. Civ. P. 43; *Taliaferro v. Tex. Commerce Bank*, 660 S.W.2d 151, 153 (Tex. App.—Fort Worth 1983, no writ))); *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").

847. *Fort Worth Transp.*, 547 S.W.3d at 850; *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).

848. *Bryant*, 984 S.W.2d at 296; *Dallas Bank*, 686 S.W.2d at 230.

849. *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*, 660 S.W.2d at 155.

850. TEX. R. CIV. P. 60.

851. *First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex. 1984) (orig. proceeding); *Comal Cty. Rural High Sch. Dist. No. 705 v. Nelson*, 314 S.W.2d 956, 957 (Tex. 1958); *Highlands Ins. Co. v.*

intervene post-judgment unless and until (1) the trial court sets aside the judgment, (2) the trial court carefully considers any prejudice the prospective intervenor might suffer if intervention is denied, (3) the trial court considers any prejudice the existing parties will suffer as a consequence of untimely intervention, and (4) the trial court considers any other circumstance that may militate for or against intervention.⁸⁵²

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.⁸⁵³ The interest asserted can be legal or equitable.⁸⁵⁴ 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.⁸⁵⁵ Absent a party’s motion to strike, the trial court is not authorized to strike the intervention.⁸⁵⁶

If a motion to strike is filed, the trial court should give the intervenor an opportunity to explain and prove the intervenor’s interest in the suit before ruling on the motion to strike.⁸⁵⁷ 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.”⁸⁵⁸

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).

852. *State v. Naylor*, 466 S.W.3d 783, 788, 791 (Tex. 2015).

853. *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990); *see also King v. Olds*, 12 S.W. 65, 65–66 (Tex. 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).

854. *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, *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]”).

855. *Guar. Fed. Sav. Bank*, 793 S.W.2d at 657.

856. *Id.*

857. *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).

858. *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) (orig. proceeding).

The trial court's order is reviewed for an abuse of discretion.⁸⁵⁹ 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."⁸⁶⁰ 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.⁸⁶¹

4. Frivolous Pleadings

Texas Rule of Civil Procedure 13,⁸⁶² in combination with the Texas Civil Practice and Remedies Code,⁸⁶³ 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."⁸⁶⁴ Generally, courts presume that pleadings and other papers are filed in good faith.⁸⁶⁵

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

860. *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").

861. *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").

862. 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).

863. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.001–.013, 10.001–.006 (providing for the assessment of attorney's fees, costs, and damages for certain frivolous lawsuits and defenses). The essential elements of a claim under Chapter 9 that a pleading is frivolous are that the pleading is (1) groundless and brought in bad faith; (2) groundless and brought for the purpose of harassment; or (3) groundless and brought for an improper purpose, such as unnecessary delay. *Id.* at §§ 9.011, .012. In summary, to prevail on a claim under Chapter 9, a party must plead and prove two elements: (1) that the pleading has no basis in law or fact *and* (2) that it was brought in bad faith, *or* for harassment, *or* for an improper purpose, such as delay. *Hawxhurst v. Austin's Boat Tours*, 550 S.W.3d 220, 230 (Tex. App.—Austin 2018, no pet.).

864. *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.* (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 (emphasis omitted) (quoting *Elkins v. Scotts-Brown* (Tex. App.—Dallas 2003, no pet.)).

865. *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).

The party seeking sanctions bears the burden of overcoming this presumption of good faith.⁸⁶⁶ 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.”⁸⁶⁷ 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.”⁸⁶⁸ 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.”⁸⁶⁹ Rule 13 should not be used as “a weapon . . . to punish those with whose intellect or philosophic viewpoint the trial court finds fault.”⁸⁷⁰

A court may only impose sanctions for good cause,⁸⁷¹ “the particulars of which must be [included] in the sanction order.”⁸⁷² The purposes of the particularity requirement have been described as to:

866. *Tanner*, 856 S.W.2d at 731.

867. *Home Owners Funding Corp. of Am. v. Scheppler*, 815 S.W.2d 884, 889 (Tex. App.—Corpus Christi 1991, no writ) (quoting TEX. R. CIV. P. 13); *accord* TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(2); *In re United Servs. Auto Ass’n*, 76 S.W.3d 112, 116 (Tex. App.—San Antonio 2002, orig. proceeding).

868. *Scheppler*, 815 S.W.2d at 889; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 9.012(b) (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).

869. *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)).

870. *Id.* at 155 (quoting *Dyson*, 861 S.W.2d at 951).

871. *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.

872. TEX. CIV. PRAC. & REM. CODE ANN. § 10.005; 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

(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.⁸⁷³

A trial court's order under Rule 13 or the Texas Civil Practice and Remedies Code is reviewed for an abuse of discretion.⁸⁷⁴

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 or frivolous litigation.⁸⁷⁵ 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.”⁸⁷⁶ After the defendant files this motion, the litigation is stayed until the trial

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).

873. *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.); *see* *Saulnier v. Haase*, No. 02-16-00139-CV, 2017 WL 1428725, at *3 (Tex. App.—Fort Worth Apr. 20, 2017, pet. dismissed) (reaffirming *Houtex Ready Mix*).

874. *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”).

875. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 11.001–.104 (addressing vexatious litigants in trial courts, not appellate courts); 1901 NW 28th St. Tr. v. Lillian Wilson, LLC, 535 S.W.3d 96, 98 (Tex. App.—Fort Worth 2017, no pet.) (“Chapter 11 of the civil practice and remedies code contains the legislature's plan for confronting vexatious litigants—pro se individuals who abuse the legal system by pursuing numerous frivolous lawsuits.” (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 11.001–.104)).

876. TEX. CIV. PRAC. & REM. CODE ANN. § 11.051.

court determines the merits of the motion.⁸⁷⁷ The Code sets forth the criteria for determining whether a plaintiff is a vexatious litigant.⁸⁷⁸

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.⁸⁷⁹ If the plaintiff fails to provide the security before the set time frame ends, the court shall dismiss the litigation.⁸⁸⁰ 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.⁸⁸¹ If the plaintiff violates the order, the plaintiff “is subject to contempt of court.”⁸⁸² The abuse of discretion standard of review applies to a trial court’s order ruling that a plaintiff is a vexatious litigant.⁸⁸³

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.⁸⁸⁴ 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.”⁸⁸⁵ The inherent power

877. *Id.* § 11.052(b).

878. *Id.* § 11.054.

879. *Id.* § 11.055.

880. *Id.* § 11.056.

881. *Id.* § 11.101(a).

882. *Id.* § 11.101(b).

883. 1901 NW 28th St. Tr. v. Lillian Wilson, LLC, 535 S.W.3d 96, 98 (Tex. App.—Fort Worth 2017, no pet.); Harris v. Rose, 204 S.W.3d 903, 905 (Tex. App.—Dallas 2006, no pet.).

884. 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”).

885. *Bennett*, 960 S.W.2d at 40 (quoting *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398–99 (Tex. 1979)); *Westview Drive Invs., LLC v. Landmark Am. Ins. Co.*, 522 S.W.3d 583, 613 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (citing *Bennett*, 960 S.W.2d at 40); *Union Carbide Corp. v. Martin*, 349 S.W.3d 137, 147 (Tex. App.—Dallas 2011, no pet.) (citing *Eichelberger*, 582 S.W.2d at 398–

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.”⁸⁸⁶ The trial court must make findings of fact that the abuse significantly interfered with the core functions of the judiciary,⁸⁸⁷ such as “hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, rendering final judgment, and enforcing [that] judgment.”⁸⁸⁸ “[T]he trial court should attempt to determine if the offensive conduct is attributable to the attorney, the party, or both.”⁸⁸⁹ “[L]esser sanctions must 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.”⁸⁹⁰

“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.”⁸⁹¹ The record must reflect that the court considered the availability of lesser sanctions before

99); *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).

886. *Westview Drive*, 522 S.W.3d at 613 (quoting *White v. Zhou Pei*, 452 S.W.3d 527, 546 (Tex. App.—Houston [14th Dist.] 2014, no pet.)); *Union Carbide*, 349 S.W.3d at 147 (citing *Greiner v. Jameson*, 865 S.W.2d 493, 499 (Tex. App.—Dallas 1993, writ denied); *Lawrence v. Kohl*, 853 S.W.2d 697, 700 (Tex. App.—Houston [1st Dist.] 1993, no writ); *Kutch v. Del Mar Coll.*, 831 S.W.2d 506, 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”).

887. *See Union Carbide*, 349 S.W.3d at 147 (citing *Island Entm’t Inc. v. Castaneda*, 882 S.W.2d 2, 5 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Ezeoke v. Tracy*, 349 S.W.3d 679, 685 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *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).

888. *Westview Drive*, 522 S.W.3d at 613 (citing *White*, 452 S.W.3d at 546); *Union Carbide*, 349 S.W.3d at 147 (citing *Dallas Cnty. Constable Precinct 5 v. KingVision Pay-Per-View, Ltd.*, 219 S.W.3d 602, 610 (Tex. App.—Dallas 2007, no pet.)); *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).

889. *Williams v. Akzo Nobel Chems., Inc.*, 999 S.W.2d 836, 843 (Tex. App.—Tyler 1999, no pet.).

890. *Cire v. Cummings*, 134 S.W.3d 835, 840 (Tex. 2004) (quoting *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992)).

891. *GTE Commc’ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993) (orig. proceeding).

imposing case-determinative or death-penalty sanctions.⁸⁹²

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.⁸⁹³ Sanctions imposed pursuant to the court's inherent power must be just and appropriate.⁸⁹⁴ A trial court abuses its discretion if the sanctions imposed are not just.⁸⁹⁵ In determining whether sanctions are just, appellate courts apply a two-prong test.⁸⁹⁶ First, a direct nexus must exist "among the offensive conduct, the offender, and the sanction imposed."⁸⁹⁷ 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."⁸⁹⁸ Second, the sanction must not be excessive.⁸⁹⁹ 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 sanctioned party's due process rights.⁹⁰⁰

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,⁹⁰¹ unless the judgment or order is void

892. *See Cirv*, 134 S.W.3d at 839–40 (noting that a trial court should consider, and utilize when effective, the imposition of lesser sanctions).

893. *Ezeoke v. Tracy*, 349 S.W.3d 679, 685 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *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).

894. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 916–17 & n.4 (Tex. 1991) (orig. proceeding).

895. *Tanner*, 856 S.W.2d at 731; *Williams v. Akzo Nobel Chems., Inc.*, 999 S.W.2d 836, 843 (Tex. App.—Tyler 1999, no pet.).

896. *Trans.American*, 811 S.W.2d at 917; *Williams*, 999 S.W.2d at 843.

897. *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 882 (Tex. 2003).

898. *Trans.American*, 811 S.W.2d at 917.

899. *Id.*

900. *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).

901. *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding); *Trans.American*, 811 S.W.2d at 919.

when issued.⁹⁰² In *TransAmerican Natural Gas Corp. v. Powell*,⁹⁰³ 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.”⁹⁰⁴ A death-penalty or case-determinative sanction precludes the merits of the case from being presented and is clearly reviewable by mandamus.⁹⁰⁵ 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.”⁹⁰⁶ There is a split among the courts of appeals on the issue of whether the striking of a party’s witnesses may be reviewed

902. 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).

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

904. *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))).

905. 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. *Id.* 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).

906. *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991) (orig. proceeding). In *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.*

by mandamus.⁹⁰⁷ The availability of mandamus, with regard to the striking of a party's witnesses, generally depends on whether the sanction is case-determinative.⁹⁰⁸

2. Power to Sanction for Discovery Abuse

A party may obtain discovery relevant to the subject matter, which is to be "liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial."⁹⁰⁹ A trial 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."⁹¹⁰ A trial court's ruling on a motion for sanctions is reviewed for an abuse of discretion.⁹¹¹

907. Compare *In re Thornton-Johnson*, 65 S.W.3d 137,139–40 (Tex. App.—Amarillo 2001, orig. proceeding) (order striking expert witness in medical malpractice claim against doctors presented an obstacle but did not warrant mandamus), *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 *J.G. v. Murray* 915 S.W.3d 548, 551 (Tex. App.—Corpus Christi 1995, orig. proceeding) (mandamus relief appropriate where trial court erroneously struck defendant's expert witness), *In re Kings Ridge Homeowners Ass'n, Inc.*, 303 S.W.3d 773, 785–86 (Tex. App.—Fort Worth 2009, orig. proceeding) (mandamus relief was appropriate where trial court struck defendant's sole expert witness), *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").

908. 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).

909. *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 664 (Tex. 2009) (orig. proceeding) (quoting *Axelsson, Inc. v. McIlhany*, 798 S.W.2d 550, 553 (Tex. 1990) (orig. proceeding)); *Chapa v. Garcia*, 848 S.W.2d 667, 668 (Tex. 1992) (orig. proceeding) (quoting *Axelsson*, 798 S.W.2d at 553); see also *State v. Lowry*, 802 S.W.2d 669, 671 (Tex. 1991) ("[D]iscovery is . . . the linchpin of the search for truth.").

910. *Cire v. Cummings*, 134 S.W.3d 835, 839 (Tex. 2004).

911. *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006); *Cire*, 134 S.W.3d at 838; *Bodnow Corp. v. City of Hondo*, 721 S.W.2d 839, 840 (Tex. 1986).

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.”⁹¹² Because the legislature has not created an interlocutory appeal regarding discovery sanctions, such sanctions are not appealable until a final judgment is signed.⁹¹³ Nonetheless, a sanctioned party may pursue a writ of mandamus if that party has no adequate remedy by appeal.⁹¹⁴

Rule 215 permits a wide range of sanctions for a variety of purposes:⁹¹⁵ “to secure compliance with discovery rules; . . . to deter other litigants from similar misconduct; . . . to punish violators;”⁹¹⁶ “to insure a fair trial[;] to compensate a party for past prejudice[;] . . . and to deter certain bad faith conduct.”⁹¹⁷ The sanctions, however, must be “just.”⁹¹⁸ A two-pronged analysis has been developed to determine whether a trial court’s sanctions are just.⁹¹⁹

The first prong of this analysis requires that “a direct relationship . . . exist between the offensive conduct and the sanction imposed.”⁹²⁰ Accordingly, the sanction imposed against the offending party “must be directed against the abuse and toward remedying the prejudice caused the innocent

912. TEX. R. CIV. P. 215.3.

913. *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)).

914. *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).

915. *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).

916. *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).

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

918. 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.

919. *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006); *see also* *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).

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

party.”⁹²¹ In other words, the sanctions must be specifically tailored to the abuse found.⁹²²

The second prong of this analysis requires that the sanction not be excessive—the sanction must fit the offensive conduct.⁹²³ The sanction should not be more severe than necessary to satisfy its legitimate purpose.⁹²⁴ Moreover, as a general rule, a trial court should always impose lesser sanctions before imposing a death-penalty sanction.⁹²⁵ The Texas Supreme Court has emphasized “that case-determinative sanctions may only be imposed in ‘exceptional cases’ where they are ‘clearly justified’ and it is ‘fully apparent that no lesser sanctions would promote compliance with the rules.’”⁹²⁶ Trial courts, however, are not required to “test the effectiveness of lesser sanctions by actually implementing and ordering each and every sanction.”⁹²⁷ Instead, trial courts “must analyze the available sanctions and offer a reasoned explanation as to the appropriateness of the sanction imposed.”⁹²⁸

921. *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).

922. *Trans.American*, 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).

923. *Trans.American*, 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).

924. *See Jones*, 192 S.W.3d at 583 (“[T]he court must make certain that less severe sanctions would not have been sufficient to promote compliance.”); *Trans.American*, 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”).

925. *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”).

926. *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).

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

928. *Id.*

In determining whether the sanction imposed is just, the trial court should consider the entire record, not merely the trial court's findings of fact and conclusions of law, in reviewing the sanction order.⁹²⁹ Therefore, the trial court is not restricted to considering only the specific violation committed but is entitled to consider other conduct occurring during discovery.⁹³⁰

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.⁹³¹ However, written findings are not required because they are often unnecessary and constitute an undue burden on the trial court.⁹³² However, the appellate courts are required to review the entire record and to defer to the trial court's written findings.⁹³³

U. *Sealing Court Records*

Rule 76a provides very specific guidelines for a trial court to follow in determining whether to seal court records.⁹³⁴ The trial court must strictly

929. *Jones*, 192 S.W.3d at 583 (citing *Blackmon*, 841 S.W.2d at 852; *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.).

930. *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 *Poullis 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 *Poullis*). 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”).

931. *IKB Indus. v. Pro-Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997); *Blackmon*, 841 S.W.2d at 850; *TransAmerican*, 811 S.W.2d at 919 n.9. The supreme court noted three benefits to making findings: first, such findings are useful in appellate review in that they demonstrate whether the trial judge followed a reasoned analysis pursuant to the *TransAmerican* and *Braden* standards; second, such findings help assure the parties involved that the decision resulted from thoughtful judicial deliberation; and third, written findings increase the likelihood that the sanctions will deter future sanctionable conduct. *Blackmon*, 841 S.W.2d at 852.

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

933. *Jones*, 192 S.W.3d at 583.

934. 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;

adhere to these guidelines because court records “are presumed to be open to the general public.”⁹³⁵ 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.⁹³⁶ Any order relating to the sealing or unsealing of court records is subject to immediate appellate review.⁹³⁷ The abuse of discretion standard of review applies to orders regarding motions to seal records.⁹³⁸

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.⁹³⁹ Rather, a motion to quash is the appropriate procedural device to raise such an objection.⁹⁴⁰ The remedy for defective service in Texas state courts is additional time to answer the suit, not dismissal.⁹⁴¹ The trial court’s ruling on a motion to quash service of process

(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.

935. *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).

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

937. 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 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))); *Clear Channel Commc’ns, Inc. v. U.S. Auto. Ass’n*, 195 S.W.3d 129, 132 (Tex. App.—San Antonio 2006, no pet.) (quoting Rule 76a(8)).

938. *Kepple*, 970 S.W.2d at 526; *BP Prods. N. Am., Inc. v. Houston Chron. Pub’g Co.*, 263 S.W.3d 31, 34 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Clear Channel*, 195 S.W.3d at 134.

939. TEX. R. CIV. P. 120a(1); *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 202–03 (Tex. 1985).

940. *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).

941. *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

is reviewed for an abuse of discretion.⁹⁴²

W. *Severance*

Severance of a claim under Rule 41⁹⁴³ is proper if: “(1) the controversy involves more than one cause of action; (2) the severed claim is one that could be asserted independently in a separate lawsuit; and (3) the severed actions are not so interwoven with the other claims that they involve the same facts and issues.”⁹⁴⁴ The purpose of granting a severance is to ensure justice, deter prejudice, and add convenience.⁹⁴⁵ 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.⁹⁴⁶ Under these circumstances, the failure to order separate trials violates a plain legal duty and is considered an abuse of discretion.⁹⁴⁷ Rule 41 gives the trial court “broad” discretion to grant a severance, which will not be reversed absent an abuse of discretion.⁹⁴⁸

X. *Subject-Matter Jurisdiction*

Subject-matter jurisdiction is essential for a court to decide a case; it is

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).

942. *Alcala*, 908 S.W.2d at 56.

943. 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).

944. *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).

945. *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990).

946. *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956) (orig. proceeding); *In re Progressive Cty Mut. Ins. Co.*, 439 S.W.3d 422, 425 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding) (quoting *Womack*, 291 S.W.2d at 683); *In re Burgett*, 23 S.W.3d 124, 127 (Tex. App.—Texarkana 2000, orig. proceeding).

947. *Burgett*, 23 S.W.3d at 126 n.1.

948. TEX. R. CIV. P. 41; *Guar. Fed. Sav. Bank*, 793 S.W.2d at 658; *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 734 (Tex. 1984); *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”).

never presumed and cannot be waived.⁹⁴⁹ Without subject-matter jurisdiction, a judgment is void rather than voidable.⁹⁵⁰

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.⁹⁵¹ Challenging subject-matter jurisdiction is a dilatory plea "to defeat a cause of action without regard to whether the claims . . . have [any] merit."⁹⁵²

Unless the plaintiff's petition affirmatively demonstrates an absence of jurisdiction, the trial court construes the petition liberally in favor of jurisdiction.⁹⁵³ Absent incurable defects in jurisdiction, the trial court should give the plaintiff an opportunity to amend.⁹⁵⁴ If the pleadings affirmatively negates jurisdiction, the jurisdictional plea may be granted without permitting the plaintiff to amend.⁹⁵⁵ If a trial court lacks subject-matter jurisdiction, it has no choice but to dismiss the case⁹⁵⁶ because subject-matter jurisdiction cannot be conferred upon the trial court by either consent or waiver.⁹⁵⁷

In *Texas Department of Parks & Wildlife v. Miranda*,⁹⁵⁸ the court held:

949. *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).

950. *Engelman Irrigation Dist. V. Shields Bros., Inc.*, 514 S.W.3d 746, 750 (Tex. 2017); *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990) (orig. proceeding).

951. *City of Waco v. Kirwan*, 298 S.W.3d 618, 621 (Tex. 2009); *Harris Cty. 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).

952. *Blue*, 34 S.W.3d at 554.

953. *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.

954. *Miranda*, 133 S.W.3d at 226–27.

955. *Id.*

956. *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))).

957. *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))).

958. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004); *see also City of Waco v. Kirwan*, 298 S.W.3d 618, 621–22 (Tex. 2009) (reaffirming *Miranda*).

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.⁹⁵⁹

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."⁹⁶⁰ 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.⁹⁶¹ If, however, the evidence is undisputed or does not raise a fact issue on the question of jurisdiction, then "the trial court rules on the plea to the jurisdiction as a matter of law."⁹⁶²

Decisions involving the government may be reviewed by interlocutory appeal to determine whether a trial court has subject-matter jurisdiction.⁹⁶³ 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."⁹⁶⁴ The reviewing court "construe[s] the pleadings in favor of the plaintiff and look[s] to the pleader's intent."⁹⁶⁵ Whether a petition alleges facts that affirmatively demonstrate subject-matter jurisdiction is treated as a question of law and is reviewed de novo.⁹⁶⁶ Similarly, whether

959. *Miranda*, 133 S.W.3d at 227.

960. *Id.*

961. *Id.* at 227–28.

962. *Id.* at 228.

963. See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (authorizing an interlocutory appeal of an order that "grants or denies a plea to the jurisdiction by a governmental unit"); *Harris Cty. 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.

964. *Fincher v. City of Texarkana*, 598 S.W.2d 22, 23 (Tex. App.—Texarkana 1980, writ ref'd n.r.e.); *accord Tullios 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*, 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).

965. *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.)).

966. *Miranda*, 133 S.W.3d at 226.

uncontroverted evidence of jurisdictional facts demonstrates subject-matter jurisdiction is also a question of law.⁹⁶⁷

Occasionally, “disputed evidence of jurisdictional facts that also implicate the merits of the case may require resolution by the finder of fact.”⁹⁶⁸ “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.⁹⁶⁹ Only matters presented to the trial court will be reviewed upon appeal from the order dismissing the case for want of jurisdiction.⁹⁷⁰

1. Standing

“Standing is a constitutional prerequisite to [maintaining] suit.”⁹⁷¹ It is also an essential “component of subject matter jurisdiction.”⁹⁷² “In Texas, the standing doctrine requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court.”⁹⁷³ 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.”⁹⁷⁴ “To have standing a party must have suffered a threatened

967. *Id.*

968. *Id.* at 227.

969. *See id.* at 228 (noting that this standard mirrors the summary judgment standard).

970. *Huston*, 663 S.W.2d at 129 (citing *Paradissis v. Royal Indem. Co.*, 496 S.W.2d 146, 148 (Tex. App.—Houston [14th Dist.] 1973), *aff'd*, 507 S.W.2d 526 (Tex. 1974)).

971. *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012) (citing *Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 915 (Tex. 2010)); *Tex. Dep’t of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2004) (citing *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984)).

972. *Sunset Valley*, 146 S.W.3d at 646; *accord M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 708 (Tex. 2001); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000); *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).

973. *Heckman*, 369 S.W.3d at 154 (citing *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304, 307 (Tex. 2008)).

974. *Austin Nursing Ctr.*, 171 S.W.3d at 848–49 (quoting *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996)); *see also Coastal Liquids Transp., L.P. v. Harris Cty. 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).

or actual injury.”⁹⁷⁵ An opinion issued in a lawsuit where there is no standing (or where there is no case or controversy)⁹⁷⁶ is an advisory opinion, which Texas courts are prohibited from issuing.⁹⁷⁷

Standing is determined at the time suit is filed in the trial court.⁹⁷⁸ Except for issues involving mootness, subsequent events do not deprive the court of subject-matter jurisdiction.⁹⁷⁹

To establish standing, a person “must demonstrate a personal stake in the controversy.”⁹⁸⁰ 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.’”⁹⁸¹ 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.”⁹⁸²

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,”⁹⁸³ the “issue of standing may be raised for the first time on

975. *Allstate Indemn. Co. v. Forth*, 204 S.W.3d 795, 796 (Tex. 2006).

976. *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).

977. *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).

978. *Tex. Ass’n of Bus.*, 852 S.W.2d at 446 n.9.

979. *See id.* (explaining the court’s power to retain subject-matter jurisdiction).

980. *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)).

981. *Austin Nursing Ctr.*, 171 S.W.3d at 849 (quoting *Nootsie, Ltd. v. Williamson Cty. 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.

982. *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.

983. *Sunset Valley*, 146 S.W.3d at 646; *accord* *Tex. Ass’n of Bus.*, 852 S.W.2d at 445–46.

appeal.”⁹⁸⁴ When reviewing a trial court’s order regarding standing,⁹⁸⁵ “Texas appellate courts ‘construe the pleadings in favor of the plaintiff and look to the pleader’s intent.’”⁹⁸⁶ 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.”⁹⁸⁷

2. Mootness

Like standing, mootness is a component of subject-matter jurisdiction.⁹⁸⁸ The mootness doctrine limits courts to deciding cases in which an actual controversy exists.⁹⁸⁹ A case becomes moot if a controversy no longer exists or the parties lack a legally cognizable interest in the outcome.⁹⁹⁰

If a case becomes moot, the parties lose standing to maintain their claims.⁹⁹¹ 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.⁹⁹² 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.⁹⁹³

984. *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).

985. 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).

986. *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.)).

987. *Id.*

988. *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).

989. *Camarena v. Tex. Emp’t Comm’n*, 754 S.W.2d 149, 151 (Tex. 1988).

990. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding).

991. *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001).

992. *Gen. Land Office of the State of Tex. v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990).

993. *Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016); *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 149–50 (Tex. 2012); *City of Shoreacres v. Tex. Comm’n on Envtl.*

3. Ripeness

Ripeness “is a threshold issue that implicates subject matter jurisdiction.”⁹⁹⁴ “While standing focuses on the issue of *who* may bring an action, ripeness focuses on *when* that action may be brought.”⁹⁹⁵ As a component of subject-matter jurisdiction, ripeness “cannot be waived and may be raised for the first time on appeal.”⁹⁹⁶

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.”⁹⁹⁷ 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.⁹⁹⁸ “Ripeness, like standing, is a threshold issue that implicates subject matter jurisdiction, . . . and like standing, emphasizes the need for a concrete injury for a justiciable claim to be presented.”⁹⁹⁹

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.”¹⁰⁰⁰ Ripeness may be raised through various procedural vehicles, such as a motion to dismiss or plea to the jurisdiction.¹⁰⁰¹

Ripeness is subject to *de novo* review.¹⁰⁰² 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]

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.).

994. *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998).

995. *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000) (citing *Patterson*, 971 S.W.2d at 442; *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626–27 (Tex.1996)).

996. *Id.*

997. *Patterson*, 971 S.W.2d at 442.

998. *Gibson*, 22 S.W.3d at 852.

999. *Patterson*, 971 S.W.2d at 442 (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998)).

1000. *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004).

1001. *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).

1002. *Mayhew*, 964 S.W.2d at 928–29.

favor.”¹⁰⁰³ Of course, the appellate court is not bound by the trial court’s legal conclusions.¹⁰⁰⁴

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.”¹⁰⁰⁵ There are two separate methods of moving for summary judgment in Texas, each with different standards of review on appeal.¹⁰⁰⁶ Texas law generally considers “summary judgment to be a harsh remedy requiring strict construction.”¹⁰⁰⁷

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.”¹⁰⁰⁸ 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”¹⁰⁰⁹ or establishes all the elements of an affirmative defense as a matter of law.¹⁰¹⁰

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

1003. *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.).

1004. *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).

1005. *Lujan v. Navistar, Inc.* 555 S.W.3d 79, 87 (Tex. 2018) (quoting *Gulbenkian v. Penn.*, 252 S.W.2d 929, 931 (Tex. 1952)) (underlying purpose of Rule 166a is to eliminate patently unmeritorious claims and untenable defenses); *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*, 252 S.W.2d at 931; *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).

1006. *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).

1007. *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996, writ denied).

1008. TEX. R. CIV. P. 166a(c); *Lujan*, 555 S.W.3d at 84; *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).

1009. *Little v. Tex. Dep’t of Criminal Justice*, 148 S.W.3d 374, 381 (Tex. 2004).

1010. *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997).

supporting affidavits.¹⁰¹¹ Once the movant has established the right to a summary judgment, the burden of proof “shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment.”¹⁰¹² The party opposing 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.¹⁰¹³

The trial court may grant the parties a hearing, but it should be nonevidentiary.¹⁰¹⁴ 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.¹⁰¹⁵

A trial court's summary judgment is reviewed by an appellate court de novo.¹⁰¹⁶ An appellate court “examine[s] the entire record in the light most

1011. TEX. R. CIV. P. 166a(c); *Roskey v. Tex. Health Facilities Comm'n*, 639 S.W.2d 302, 303 (Tex. 1982).

1012. *Lujan*, 555 S.W.3d at 84 (citing *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995)); *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.*

1013. TEX. R. CIV. P. 166a(c).

1014. *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).

1015. *Lujan*, 555 S.W.3d at 84 (citing *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995)); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997).

1016. *Lujan*, 555 S.W.3d at 84; *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013) (citing *Buck v. Palmer*, 381 S.W.3d 525, 527 (Tex. 2012)); *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).

favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion.”¹⁰¹⁷ 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.¹⁰¹⁸

On appeal, evidence that favors the movant will not be “considered unless it is uncontradicted.”¹⁰¹⁹ 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.”¹⁰²⁰

When appealing from summary judgment, the grounds of review are also limited.¹⁰²¹ 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.”¹⁰²² “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.¹⁰²³ The appellate court “can consider the record only as it existed at the time

1017. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005).

1018. *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).

1019. *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965).

1020. *Republic Nat’l Leasing Corp. v. Schindler*, 717 S.W.2d 606, 607 (Tex. 1986) (citing TEX. R. CIV. P. 166a(c)).

1021. *Capitol Indem. Corp. v. Kirby Rest. Equip. & Chem. Supply Co.*, 170 S.W.3d 144, 146 (Tex. App.—San Antonio 2005, pet. denied).

1022. *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).

1023. TEX. R. CIV. P. 166a(c); *Progressive Cty. 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).

summary judgment was entered.”¹⁰²⁴ Moreover, an appellate court may not raise grounds for reversing a summary judgment *sua sponte*.¹⁰²⁵ The appellate court should review “all grounds presented to the trial court and preserved on appeal in the interest of judicial economy.”¹⁰²⁶

When the motion for summary judgment is based on several different grounds¹⁰²⁷ 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.”¹⁰²⁸ The summary judgment must be affirmed if any of the theories are meritorious.¹⁰²⁹ 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.¹⁰³⁰ 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.¹⁰³¹

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

1024. *McGee v. Deere & Co.*, No. 03-04-00222-CV, 2005 WL 670505, at *1 (Tex. App.—Austin Mar. 24, 2005, pet. denied) (mem. op.).

1025. *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).

1026. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005).

1027. 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).

1028. *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 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)).

1029. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013); *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).

1030. *Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988); *accord Lubbock Cty. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 584 (Tex. 2002).

1031. *Merriman*, 407 S.W.3d at 248; *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).

summary judgment motion).¹⁰³² “[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.”¹⁰³³ 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.”¹⁰³⁴ The correct resolution under these circumstances, therefore, is to treat the summary judgment as final and appealable.¹⁰³⁵ 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.¹⁰³⁶

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

Since 1997, litigants may seek another basis for summary judgment.¹⁰³⁷ 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.¹⁰³⁸ However, it is inappropriate to file a Rule 166a(i) motion until there has been adequate time for discovery.¹⁰³⁹

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.¹⁰⁴⁰

1032. *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*).

1033. *Lehmann*, 39 S.W.3d at 206.

1034. *Id.* at 205.

1035. *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).

1036. *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).

1037. TEX. R. CIV. P. 166a(i).

1038. *Id.*; *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

1039. TEX. R. CIV. P. 166a(i).

1040. *Id.*

The motion cannot be conclusory or generally allege that there is no evidence to support the claims.¹⁰⁴¹ 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.”¹⁰⁴² Under the Rule, if the nonmovant fails to provide enough evidence, the trial court must grant the motion.¹⁰⁴³

“A no-evidence summary judgment is essentially a pretrial directed verdict,” and the same legal sufficiency or no-evidence standard is applied.¹⁰⁴⁴ No evidence summary judgments are reviewed under the same legal sufficiency standard as directed verdicts.¹⁰⁴⁵ Accordingly, 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,¹⁰⁴⁶ or (d) the evidence conclusively establishes the opposite of the vital fact.¹⁰⁴⁷

1041. *Keszler v. Mem'l Med. Ctr. of E. Tex.*, 105 S.W.3d 122, 127–28 (Tex. App.—Corpus Christi 2003, no pet.).

1042. *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003).

1043. *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 in the light most favorable to the non-movant).

1044. *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.).

1045. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013) (citing *Chapman*, 118 S.W.3d at 750).

1046. 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).

1047. *Merriman*, 407 S.W.3d at 248 (quoting *Chapman*, 118 S.W.3d at 751).

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.”¹⁰⁴⁸

Z. Venue

“Venue, as defined by the common law, is the proper place for a lawsuit to proceed.”¹⁰⁴⁹ Each plaintiff in a multi-plaintiff suit must independently establish proper venue.¹⁰⁵⁰ 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 Procedure.¹⁰⁵¹

Generally, a venue ruling is not a final judgment nor an order subject to appeal.¹⁰⁵² Mandatory venue statutes are enforceable by petition for writ of mandamus¹⁰⁵³ and reviewed for an abuse of discretion.¹⁰⁵⁴ On appeal, a trial court’s order granting or denying a motion to transfer venue is reviewed by the appellate court de novo.¹⁰⁵⁵ On appeal, an appellate court

1048. Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 582 (Tex. 2006); *Merriman*, 407 S.W.3d at 248.

1049. *Ramsay v. Tex. Trading Co.*, 254 S.W.3d 620, 626 (Tex. App.—Texarkana 2006, pet. denied).

1050. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a); *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).

1051. 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).

1052. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a); TEX. R. CIV. P. 87(b); *In re Signorelli Co.*, 446 S.W.3d 470, 473 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding). There are exceptions. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a), (b)(1).

1053. TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642; *In re Lopez*, 372 S.W.3d 174, 176 (Tex. 2012) (orig. proceeding) (per curiam) (citing *In re Cont’l Airlines, Inc.*, 988 S.W.2d 733, 735 (Tex. 1998) (orig. proceeding)); *In re Tex. Dep’t of Transp.*, 218 S.W.3d 74, 76 (Tex. 2007) (orig. proceeding) (per curiam); *see also In re Team Rocket, L.P.*, 256 S.W.3d 257, 262–63 (Tex. 2008) (orig. proceeding) (enforcing a venue ruling on mandamus that was not followed by the transferee court).

1054. *Signorelli*, 446 S.W.3d at 473 (citing *In re Applied Chem. Magnesias Corp.*, 206 S.W.3d 114, 117 (Tex. 2006) (orig. proceeding)).

1055. *Wilson v. Texas Parks & Wildlife Dep’t*, 886 S.W.2d 259, 260 (Tex. 1994); *Union Pac. R.R. Co. v. Stouffer*, 420 S.W.3d 233, 240 (Tex. App.—Dallas 2013, pet. dismissed); *Killeen v. Lighthouse Elec. Contractors, L.P.*, 248 S.W.3d 343, 347 (Tex. App.—San Antonio 2007, pet. denied); *Highland*

cannot review the sufficiency of the evidence supporting the plaintiff's venue choice.¹⁰⁵⁶ "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."¹⁰⁵⁷

On appeal of a venue order, 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 86¹⁰⁵⁸ and 87,¹⁰⁵⁹ and the Texas Civil Practice and Remedies Code Section 15.064(b).¹⁰⁶⁰ Appellate review of the venue determination, thus, differs greatly from the scope of the decision made by the trial judges, who must rule solely on the basis of certain documents without the benefit of live testimony and the entire record.¹⁰⁶¹ 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.¹⁰⁶² This scope of review—the entire record puts—the appellate courts in the position of considering matters that the trial court had no opportunity to assess before making its decision.¹⁰⁶³ Nevertheless, the

Capital Mgmt., L.P. v. Ryder Scott Co., 212 S.W.3d 522, 535 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

1056. Ruiz v. Conoco, Inc., 868 S.W.2d 752, 757–58 (Tex. 1993).

1057. *Id.*

1058. See TEX. R. CIV. P. 86 (pertaining to motions to transfer venue).

1059. See TEX. R. CIV. P. 87 (regarding determination of motions to transfer venue).

1060. See TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (stating that appellate courts consider the entire record, which includes a trial on the merits, in determining whether venue was proper); see also *Wilson*, 886 S.W.2d at 261–62 (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).

1061. 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 *Tex. City Refining*).

1062. *Tex. City Ref.*, 767 S.W.2d at 185.

1063. *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.

appellate courts continue to review the trial court's determination by considering the entire record.¹⁰⁶⁴

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.¹⁰⁶⁵ Reversal is required whether a motion to transfer is erroneously granted or denied.¹⁰⁶⁶

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.¹⁰⁶⁷ A trial court even has the authority to express itself in exercising its discretion.¹⁰⁶⁸ 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."¹⁰⁶⁹ A trial court may permit jurors to submit occasional questions to the witnesses in conjunction with appropriate procedural safeguards.¹⁰⁷⁰ 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."¹⁰⁷¹ The more common trial rulings are discussed here.

1064. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b); 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)).

1065. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b); *Wilson*, 886 S.W.2d at 261; *Ruiz*, 868 S.W.2d at 758.

1066. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b); *In re Masonite Corp.*, 997 S.W.2d 194, 198 (Tex. 1999) (orig. proceeding); *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 382 (Tex. 1998); *Wichita Cty. v. Hart*, 917 S.W.2d 779, 781 (Tex. 1996).

1067. *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 discretion concerning the extent of cross-examination allowed).

1068. *Francis*, 46 S.W.3d at 240–41.

1069. *Id.* at 240 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)); accord *Great Glob. Assurance Co. v. Keltex Props., Inc.*, 904 S.W.2d 771, 777 (Tex. App.—Corpus Christi 1995, no writ).

1070. *Hudson v. Markum*, 948 S.W.2d 1, 2–3 (Tex. App.—Dallas 1997, writ denied).

1071. *Francis*, 46 S.W.3d at 240 (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)).

A. *Invoking the Rule*

Texas Rule of Evidence 614 and Texas Rule of Civil Procedure 267 govern sequestration of witnesses in civil litigation.¹⁰⁷² 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.”¹⁰⁷³ 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.¹⁰⁷⁴ Either the parties or the court, on its own motion, may sequester witnesses.¹⁰⁷⁵ The rule is not discretionary; a court must exclude witnesses upon request of the parties.¹⁰⁷⁶ 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 the case.¹⁰⁷⁷ 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].¹⁰⁷⁸

Although an expert witness is generally found to be exempt under the essential presence exception, experts are not automatically exempt.¹⁰⁷⁹ Instead, Rules 614 and 267 give the trial court “broad discretion to determine whether a witness is essential.”¹⁰⁸⁰ A party has the burden of showing why the presence of its witness is essential to the presentation of its case.¹⁰⁸¹ 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.¹⁰⁸²

1072. *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.).

1073. *Drilex Sys.*, 1 S.W.3d at 116.

1074. *Kennedy v. Eden*, 837 S.W.2d 98, 98 (Tex. 1992).

1075. *Drilex Sys.*, 1 S.W.3d at 116 & n.2.

1076. *Elbar, Inc. v. Claussen*, 774 S.W.2d 45, 51 (Tex. App.—Dallas 1989, writ dismissed).

1077. *Id.*

1078. *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.).

1079. *Drilex Sys.*, 1 S.W.3d at 116–17.

1080. *Id.* at 118–19.

1081. *Id.* at 117.

1082. *Id.* at 117–18.

The exemptions can be limited, however, by other legislation. In *In re M-I L.L.C.*,¹⁰⁸³ the court construed the Texas Uniform Trade Secrets Act as granting the trial court discretion to exclude a party's corporate representative from portions of a temporary injunction hearing involving alleged trade secret information about which he was potentially unaware.¹⁰⁸⁴

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].”¹⁰⁸⁵ The party seeking the exemption from the rule has the burden to establish that the witness's presence is necessary.¹⁰⁸⁶ If the witness is exempt, then the witness is not placed under the rule and “need not be sworn or admonished.”¹⁰⁸⁷ When “the [r]ule is invoked, all nonexempt witnesses must be placed under the [r]ule and excluded from the courtroom.”¹⁰⁸⁸ Generally, “witnesses under the [r]ule . . . may not discuss the case with anyone other than the attorneys in the case.”¹⁰⁸⁹

The rule is violated “when a nonexempt prospective witness remains in the courtroom during the testimony of another witness, or when a nonexempt prospective witness learns about [another witness's] trial testimony through discussions with persons other than the attorneys in the case or by reading reports or comments about the testimony.”¹⁰⁹⁰ When the rule is violated, a party may file a motion to exclude the witness, and the trial court, considering all of the circumstances,¹⁰⁹¹ may “allow the testimony of the potential witness, exclude the testimony, or hold the

1083. *In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016).

1084. *Id.* at 579 (construing Tex. Civ. Prac. & Rem. Code § 134A.006).

1085. *Drilex Sys.*, 1 S.W.3d at 117.

1086. *Id.*

1087. *Id.*

1088. *Id.*

1089. *Id.*

1090. *Id.*

1091. 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. App.—San Antonio 1953, no writ).

violator in contempt.”¹⁰⁹² The trial court’s decision is reviewed for an abuse of discretion.¹⁰⁹³

B. *Motion in Limine*

A motion in limine does not preserve any issue for appellate review.¹⁰⁹⁴ 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.¹⁰⁹⁵ 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.¹⁰⁹⁶ In either event, the standard of review is based on the rule of evidence invoked.¹⁰⁹⁷

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.¹⁰⁹⁸ The demand must be made before voir dire, and only one shuffle may be granted.¹⁰⁹⁹ “Before voir dire” means prior to jury-questionnaire responses

1092. *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. 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.).

1093. *Drilex Sys.*, 1 S.W.3d at 117–18; *K.M.B.*, 91 S.W.3d at 28.

1094. *Zinda v. McCann St., Ltd.*, 178 S.W.3d 883, 894 (Tex. App.—Texarkana 2005, pet. denied).

1095. *Id.*; *Richards v. Comm’n for Lawyer Discipline*, 35 S.W.3d 243, 252 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

1096. *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. App.—Tyler 1979, no writ).

1097. See *infra* Section V(F) (discussing admission of evidence).

1098. 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, judgment vacated w.r.m.); *Martinez v. City of Austin*, 852 S.W.2d 71, 73 (Tex. App.—Austin 1993, writ denied).

1099. 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.

being examined by any of the parties.¹¹⁰⁰ Rule 223 procedures for a jury shuffle are mandatory and failure to comply with them is error.¹¹⁰¹

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.¹¹⁰² Under this analysis, the court requires appellants to show that “violation of Rule 223 probably caused the rendition of an improper judgment.”¹¹⁰³ 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.¹¹⁰⁴

Another court of appeals adopted the “relaxed” harmless error standard used in the jury selection context.¹¹⁰⁵ Under this analysis, a complaining party must show that a “trial was materially unfair, without having to show more.”¹¹⁰⁶ Furthermore, the appellate court must examine the entire record.¹¹⁰⁷ Under this standard, a party does not have to show specific harm or prejudice arising from the inappropriate shuffle; however, it does require “some showing that the randomness of the jury has suffered.”¹¹⁰⁸ Such a showing will result in the granting of a new trial.¹¹⁰⁹ The “relaxed” standard has been subject to sharp criticism.¹¹¹⁰

1100. *Carr*, 22 S.W.3d at 133–34.

1101. *Id.*; *Whiteside*, 12 S.W.3d at 619.

1102. *Whiteside*, 12 S.W.3d at 620.

1103. *Id.*

1104. *Id.*

1105. *Carr*, 22 S.W.3d at 135.

1106. *Id.*

1107. *Id.*

1108. *Id.* at 136.

1109. *Id.*

1110. *See Jackson v. Williams Bros. Constr. Co.*, 364 S.W.3d 317, 328 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (Sharp, J., dissenting) (recognizing that “existing case law imposes a harmless-error analysis on a sitting Texas trial judge’s conscious refusal to abide by a very clearly-worded rule” and criticizing that analysis. “Obviously the appellate court cannot compare the composition of the non-shuffled panel with the shuffled panel when the trial court did not do its job. Instead, harm is analyzed under this so-called ‘relaxed’ standard by which a burden is placed on the party demanding the shuffle to somehow prove a lack of randomness in the jury panel. This begs the question of just how bad does the panel have to be before it crosses over into hypothetical ‘unrandomness.’ Engaging in such esoteric arguments is a valid reason for laypersons to make fun of our jury system. The worst part of this ‘relaxed’ harm analysis, however, is that, absent an egregious ‘unrandom’ initial jury panel, the trial court’s response to the shuffle demand is essentially discretionary.”).

In *BNSF Railway Co. v. Wipff*,¹¹¹¹ the court of appeals presumed harm from the trial court's refusal to shuffle the jury, but did so because BNSF specifically argued to the trial court that two objectionable jurors were seated that it would have otherwise struck.¹¹¹² The court of appeals presumed harm because "we cannot know for certain that [the objectionable jurors'] inclusion did not affect the verdict."¹¹¹³ The court of appeals further explained that it would have found the error harmful even under the "relaxed" standard of review, based on the following factors that rendered the case "hotly contested" and, thus, materially unfair: "(1) the number of special issues, (2) the count of the verdict, (3) the absence of summary-judgment motions or motions for instructed verdict, (4) the pleadings and the jury findings, (5) whether the record shows how the parties used their strikes, and (6) whether there were any double strikes."¹¹¹⁴ "Viewing all these factors in light of the entire record, BNSF has shown that the trial was materially unfair based on the erroneous denial of a jury shuffle arguably resulting in the seating of two objectionable jurors."¹¹¹⁵

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."¹¹¹⁶ Although voir dire examination is left chiefly to the sound discretion of the trial court,¹¹¹⁷ 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."¹¹¹⁸ "[T]o

1111. *BNSF Ry. Co. v. Wipff*, 408 S.W.3d 662 (Tex. App.—Fort Worth 2013, no pet.).

1112. *Id.* at 668.

1113. *Id.* (quoting *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 91 (Tex. 2005)).

1114. *Id.* at 669 (citing *Carr*, 22 S.W.3d at 136).

1115. *Id.*

1116. *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).

1117. *Cortez*, 159 S.W.3d at 92.

1118. *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

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.”¹¹¹⁹ 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.”¹¹²⁰

Whether bias and prejudice exist is ordinarily a fact question.¹¹²¹ However, if the “evidence shows that a prospective juror has a state of mind in favor of or against a litigant [or type of suit] so that the juror is not able to act impartially and without prejudice, the juror is disqualified as a matter of law.”¹¹²² “[T]he relevant inquiry is not where jurors *start* but where they are likely to *end*.”¹¹²³ 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.”¹¹²⁴ Once bias or prejudice is established, it is a legal disqualification and reversible error automatically results if the court overrules a motion to strike.¹¹²⁵ 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.¹¹²⁶ A trial court’s decision regarding challenges for cause is reviewed

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.”).

1119. *Vasquez*, 189 S.W.3d at 758.

1120. TEX. R. APP. P. 44.1; *accord Babcock*, 767 S.W.2d at 709.

1121. 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).

1122. *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.*

1123. *Haji*, 164 S.W.3d at 385 (quoting *Cortez*, 159 S.W.3d at 93).

1124. *Kiefer*, 10 S.W.3d at 39.

1125. 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.”).

1126. *Cortez*, 159 S.W.3d at 90–91.

for an abuse of discretion.¹¹²⁷

It is improper for counsel to question veniremembers about their potential verdict in light of certain evidence.¹¹²⁸ Questions to prospective jurors should address their biases and prejudices, not their opinions about evidence.¹¹²⁹ Questions to prospective jurors cannot isolate one relevant piece of evidence.¹¹³⁰ “[A] trial court does not abuse its discretion in refusing to allow questions that seek to determine the weight to be given (or not to be given) a particular fact or set of relevant facts.”¹¹³¹ Trial courts have discretion to decide whether an inquiry of potential jurors explores external biases, unfair prejudices, or possible verdicts based on evidence.¹¹³²

3. Alignment of Parties and Allocation of Peremptory Strikes

Questions regarding alignment and antagonism of the parties often arise in multiple-party litigation.¹¹³³ 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.¹¹³⁴ 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.”¹¹³⁵ 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.”¹¹³⁶

1127. *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.

1128. *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”).

1129. *Id.* at 751–52.

1130. *See id.* at 752 (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”).

1131. *Id.* at 753.

1132. *Id.* at 754–55.

1133. *Amis v. Ashworth*, 802 S.W.2d 379, 385 (Tex. App.—Tyler 1990, orig. proceeding [leave denied]) (Ramey, C.J., dissenting).

1134. 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.

1135. TEX. R. CIV. P. 233.

1136. *Amis*, 802 S.W.2d at 384.

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.¹¹³⁷ 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.¹¹³⁸ To preserve error in the allocation of jury strikes, the party must lodge the objection after voir dire but before exercising the strikes.¹¹³⁹ The party must clearly state whether it is objecting to the allocation of the preemptory strikes or to the alignment of the parties.¹¹⁴⁰

Whether antagonism exists between parties, per se, is a question of law.¹¹⁴¹ “[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.¹¹⁴² “The existence of antagonism must be finally determined after voir dire and prior to the exercise of the strikes of the parties.”¹¹⁴³ 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.¹¹⁴⁴ “The nature and degree of the antagonism, and its effect on the number of preemptory jury strikes allocated to each litigant or side, [however,] are matters left to the discretion of the trial court.”¹¹⁴⁵

1137. *Id.* at 384 n.7.

1138. *Id.* at 382–83.

1139. *Tex. Commerce Bank Reagan v. Lebcos 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).

1140. *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).

1141. *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).

1142. *Garcia*, 704 S.W.2d at 737; *accord Patterson Dental Co.*, 592 S.W.2d at 919.

1143. *Garcia*, 704 S.W.2d at 737.

1144. *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.).

1145. *Diamond Shamrock Corp. v. Wendt*, 718 S.W.2d 766, 768 (Tex. App.—Corpus Christi 1986, writ ref’d n.r.e.).

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.¹¹⁴⁶ 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.”¹¹⁴⁷

4. *Batson/Edmonson* Challenges

In *Batson v. Kentucky*,¹¹⁴⁸ the Supreme Court of the United States held the Equal Protection Clause of the United States Constitution¹¹⁴⁹ prohibits parties from using peremptory strikes to exclude members of a jury panel solely on the basis of race.¹¹⁵⁰ This proscription applies to both criminal and civil trials.¹¹⁵¹ The United States Supreme Court has explained the three-step process in resolving a *Batson* objection to a peremptory challenge.¹¹⁵² First, “the opponent of the . . . challenge must establish a prima facie case of racial discrimination.”¹¹⁵³ Second, the burden shifts to the party exercising the strike to present a race-neutral explanation.¹¹⁵⁴ “Unless a discriminatory intent is inherent in the” reason offered, the explanation “will be deemed race-neutral.”¹¹⁵⁵ Third, the trial court must then determine whether the challenging party “has proven purposeful racial discrimination.”¹¹⁵⁶ “[T]he issue of whether the race-neutral explanation should be believed is [] a question of fact for the trial court.”¹¹⁵⁷ The

1146. *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).

1147. *Am. Cyanamid Co.*, 732 S.W.2d at 661.

1148. *Batson v. Kentucky*, 476 U.S. 79 (1986).

1149. U.S. CONST. amend. XIV, § 1.

1150. *Batson*, 476 U.S. at 89.

1151. *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).

1152. *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).

1153. *Goode*, 943 S.W.2d at 445.

1154. *Id.*

1155. *Id.*

1156. *Id.*

1157. *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. *Id.*

standard of review of a trial court's decision regarding a *Batson/Edmonson* challenge is abuse of discretion.¹¹⁵⁸ To preserve a *Batson/Edmonson* issue for appellate review, the complaining party must object to the allegedly offensive peremptory strikes before swearing in the jury.¹¹⁵⁹ The exclusion of even one potential juror on the basis of race invalidates the entire jury selection process and requires a new trial.¹¹⁶⁰

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.”¹¹⁶¹ Additionally, the trial court has broad discretion to limit opening statements, subject only to review for abuse of discretion.¹¹⁶²

E. *Trial Amendments of Pleadings*

When a request to amend pleadings is made within seven days of trial or thereafter,¹¹⁶³ 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.”¹¹⁶⁴ If

1158. *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.

1159. *Jones v. Martin K. Eby Constr. Co.*, 841 S.W.2d 426, 429 (Tex. App.—Dallas 1992, writ denied).

1160. *Davis*, 268 S.W.3d at 521.

1161. *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”).

1162. *Guerrero*, 864 S.W.2d at 800; *Ranger Ins. Co. v. Rogers*, 530 S.W.2d 162, 170 (Tex. App.—Austin 1975, writ rePd n.r.e.).

1163. 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 Cty.*, 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).

1164. *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

the amendment is procedural in nature (i.e., merely conforming the pleadings to the evidence at trial), the trial court must grant the amendment.¹¹⁶⁵ 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.¹¹⁶⁶

The standard of review for granting a trial amendment is whether the trial court abused its discretion.¹¹⁶⁷ To establish an abuse of discretion in allowing the amendment, the complaining party must (1) present evidence of surprise or prejudice;¹¹⁶⁸ and (2) request a continuance.¹¹⁶⁹ Mere allegations of surprise or prejudice are not sufficient to establish an abuse of discretion.¹¹⁷⁰

F. *Admission of Evidence*

The admission or exclusion of evidence is a matter within the trial court's discretion.¹¹⁷¹ 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."¹¹⁷² Reversible error does not usually occur in connection with rulings on

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).

1165. *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).

1166. *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.

1167. *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).

1168. *Greenhalgh*, 787 S.W.2d at 940.

1169. *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).

1170. *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).

1171. *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).

1172. TEX. R. APP. P. 44.1; *accord Ramirez*, 159 S.W.3d at 918 (Jefferson, C.J., dissenting). *See infra* Section VIII(H)(3) (discussing reversible error).

questions of evidence unless the appellant can demonstrate that the whole case turns on the particular evidence that was admitted or excluded.¹¹⁷³ Furthermore, error from the improper admission of evidence is usually deemed harmless if (1) the objecting party “opens the door” by “introducing the same evidence or evidence of a similar character,”¹¹⁷⁴ (2) the objecting party “opens the door” by subsequently permitting the same or similar evidence to be introduced without objection,¹¹⁷⁵ or (3) the evidence is merely cumulative of properly admitted evidence.¹¹⁷⁶

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.”¹¹⁷⁷ 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.¹¹⁷⁸ Accordingly, the proponent must establish that the expert’s testimony is based on a reliable foundation.¹¹⁷⁹ Texas Rule of Evidence 702 provides a two-part test to determine the admissibility of an expert’s testimony.¹¹⁸⁰ First, the expert must be

1173. *Interstate Northborough P’ship*, 66 S.W.3d at 220.

1174. *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)).

1175. *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984).

1176. *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).

1177. *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)).

1178. *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).

1179. *Robinson*, 923 S.W.2d at 556.

1180. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001); *see also* TEX. R. EVID. 702 (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”).

qualified.¹¹⁸¹ Second, the expert's opinion must be relevant to the issues in the case and based upon a reliable foundation.¹¹⁸²

Qualified. Under Rule 104(a),¹¹⁸³ 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 702.¹¹⁸⁴ 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.¹¹⁸⁵ 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.¹¹⁸⁶

Relevant. The relevance requirement, which includes the relevancy analysis under Texas Rules of Evidence 401 and 402,¹¹⁸⁷ "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.'"¹¹⁸⁸ If the evidence has no relationship to any issue in the case, the evidence does not satisfy Rule 702 and is, therefore, inadmissible.¹¹⁸⁹ "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,'"¹¹⁹⁰ and such testimony is incompetent evidence that cannot support a judgment.¹¹⁹¹ Similarly, an expert who offers only personal credentials and subjective opinions has offered essentially uncorroborated evidence, which does not

1181. TEX. R. EVID. 702; *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006).

1182. *Cooper Tire*, 204 S.W.3d at 800. "The exacting standards for expert testimony set forth by the United States Supreme Court" and by the Texas Supreme Court "are well-known to Texas litigators." *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 259 (Tex. 2004) (citations omitted), *abrogated on other grounds by* *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008).

1183. TEX. R. EVID. 104(a).

1184. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998).

1185. *Helena Chem. Co.*, 47 S.W.3d at 499; *Gammill*, 972 S.W.2d at 719.

1186. *Gammill*, 972 S.W.2d at 728.

1187. TEX. R. EVID. 401, 402.

1188. *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)).

1189. See TEX. R. EVID. 702 (requiring that the expert's knowledge "help the trier of fact to understand the evidence or to determine a fact in issue").

1190. *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) (quoting TEX. R. EVID. 401).

1191. *Id.* at 232.

assist the jury.¹¹⁹² As the court in *Cooper Tire & Rubber Co. v. Mendez*¹¹⁹³ pointed out, “Rule 702, by its terms, only provides for the admission of expert testimony that actually assists the finder of fact.”¹¹⁹⁴ Justice Gonzalez poignantly observed in *E.I. du Pont de Nemours & Co. v. Robinson*¹¹⁹⁵ 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.”¹¹⁹⁶ Such evidence carries absolutely no weight and is the equivalent of no evidence.¹¹⁹⁷

Reliable. “The reliability requirement focuses on the principles, research, and methodology underlying an expert’s conclusions.”¹¹⁹⁸ 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.’”¹¹⁹⁹ If an expert’s scientific evidence is not reliable, then it is “legally” not evidence.¹²⁰⁰ 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.”¹²⁰¹

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*

1192. *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).

1193. *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797 (Tex. 2006).

1194. *Id.* at 801.

1195. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

1196. *Id.* at 558.

1197. *Havner*, 953 S.W.2d at 712.

1198. *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).

1199. *Robinson*, 923 S.W.2d at 557 (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993)).

1200. *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 801 (Tex. 2006).

1201. *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)).

*Dow Pharmaceuticals, Inc.*¹²⁰²

- (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.¹²⁰³

In *Cooper Tire*, the Texas Supreme Court emphasized that the six factors are not exclusive and “that Rule 702 contemplates a flexible inquiry.”¹²⁰⁴ The supreme court recognized in *Gammill v. Jack Williams Chevrolet, Inc.*,¹²⁰⁵ “that the *Robinson* factors may not apply to certain testimony”;¹²⁰⁶ however, in those cases “there still must be some basis for the opinion offered to [demonstrate] reliability.”¹²⁰⁷ 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.¹²⁰⁸

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.¹²⁰⁹ Under the reliability requirement, the expert testimony “is unreliable if it is not

1202. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995). *See generally Daubert*, 509 U.S. at 587–97 (1993) (addressing factors to be considered).

1203. *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).

1204. *Cooper Tire*, 204 S.W.3d at 801.

1205. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998).

1206. *Helena Chem. Co.*, 47 S.W.3d at 499; *accord Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 39–40 (Tex. 2007).

1207. *Helena Chem. Co.*, 47 S.W.3d at 499.

1208. *Id.* at 499; *Coastal Tankships, Inc. v. Anderson*, 87 S.W.3d 591, 611 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

1209. *Cooper Tire*, 204 S.W.3d at 800.

grounded ‘in the methods and procedures of science’ and amounts to no more than a ‘subjective belief or unsupported speculation.’”¹²¹⁰ Additionally, if the analytical gap between the data the expert relies upon and the opinion offered is too great, the expert testimony is unreliable.¹²¹¹ The reviewing court is “not required . . . to ignore fatal gaps in an expert’s analysis or assertions that are simply incorrect.”¹²¹² Thus, “if an expert relies upon unreliable foundational data,” any opinion based on that data is unreliable.¹²¹³ “When an expert’s opinion is predicated on a particular set of facts, those facts need not be undisputed. An expert’s opinion is only unreliable if it is contrary to actual, undisputed facts.”¹²¹⁴ Similarly, if the underlying data is sound, but the expert’s methodology is flawed, the opinion is also unreliable.¹²¹⁵ 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.”¹²¹⁶ The court stated in *General Motors Corp. v. Iracheta*.¹²¹⁷

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

1210. *Id.* (quoting *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995)); *accord* *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002); *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).

1211. *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.

1212. *Cooper Tire*, 204 S.W.3d at 800–01 (quoting *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 912 (Tex. 2004)).

1213. *Helena Chem. Co.*, 47 S.W.3d at 499.

1214. *Caffe Ribs, Inc. v. State*, 487 S.W.3d 137, 144 (Tex. 2016) (citations omitted) (first citing *Hous. Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 833 (Tex. 2014); then citing *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995)).

1215. *Helena Chem. Co.*, 47 S.W.3d at 499.

1216. *Kerr-McGee Corp.*, 133 S.W.3d at 254; *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 728 (Tex. 1998).

1217. *General Motors Corp. v. Iracheta*, 161 S.W.3d 462 (Tex. 2005).

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].¹²¹⁸

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."¹²¹⁹ The court emphasized, however, that all expert testimony must meet both the relevance and reliability requirements.¹²²⁰

"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."¹²²¹ When reviewing the sufficiency of the scientific evidence supporting a jury finding, unreliable scientific evidence is the legal equivalent of no evidence at all.¹²²² 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."¹²²³

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.¹²²⁴ 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.¹²²⁵ The trial court's determination that

1218. *Id.* at 470–71 (citations omitted) (quoting *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 (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)).

1219. *Cooper Tire*, 204 S.W.3d at 801 (quoting *Gammill*, 972 S.W.2d at 726).

1220. *Id.*

1221. *Id.* (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997)).

1222. *Havner*, 953 S.W.2d at 712.

1223. *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").

1224. *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).

1225. *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 expert conducted his research "for the purpose of litigation").

these requirements have been met is reviewed for an abuse of discretion.¹²²⁶ Both the admissibility and sufficiency of unreliable scientific evidence may be challenged for the first time on appeal.¹²²⁷

The trial court's determination of whether an expert witness is necessary to establish a negligence claim is reviewed de novo.¹²²⁸

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.¹²²⁹ 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.¹²³⁰ 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.¹²³¹ 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.¹²³² The admission of such demonstrative evidence is within the trial court's discretion and is subject to an abuse of discretion review.¹²³³ "[E]xcept in rare circumstances . . . when the admissibility of a video is at issue, the proper exercise of discretion requires the trial court to actually view video evidence before ruling on its admissibility."¹²³⁴

1226. *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).

1227. *Compare Ellis*, 971 S.W.2d at 409 (reviewing the trial court's order excluding scientific evidence), *with Hamner*, 953 S.W.2d at 711 (considering a "no evidence" point of error).

1228. *See, e.g., FFE Transp. Serv., Inc. v. Fulgham*, 154 S.W.3d 84, 89 (Tex. 2004).

1229. 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).

1230. *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.).

1231. *Fort Worth & Denver Ry. Co. v. Williams*, 375 S.W.2d 279, 282 (Tex. 1964).

1232. *Parkway Hosp., Inc. v. Lee*, 946 S.W.2d 580, 585 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

1233. *Id.*

1234. *Diamond Offshore Servs. v. Williams*, 542 S.W.3d 539, 542 (Tex. 2018) (reversing and remanding for new trial where trial court excluded defendant's video of personal injury plaintiff engaged in various activities).

G. *Motion for Mistrial*

An order granting a motion for mistrial is an interlocutory order and is typically not appealable.¹²³⁵ The remedy for review of an order granting a mistrial is by mandamus.¹²³⁶ An order denying a motion for mistrial is reviewed for an abuse of discretion.¹²³⁷

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.¹²³⁸ A trial court’s order of bifurcation is reviewed for an abuse of discretion.¹²³⁹

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.¹²⁴⁰ “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.”¹²⁴¹ 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

1235. *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”).

1236. *Galvan v. Downey*, 933 S.W.2d 316, 321 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

1237. *Schlaflly v. Schlaflly*, 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).

1238. TEX. R. CIV. P. 174(b); *Tarrant Reg’l Water Dist. v. Gragg*, 151 S.W.3d 546, 556 (Tex. 2004).

1239. *Gragg*, 151 S.W.3d at 556.

1240. TEX. CIV. PRAC. & REM. CODE ANN. § 41.009; *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).

1241. *Moriel*, 879 S.W.2d at 30.

the defendant's net worth.¹²⁴² The jury then determines the amount of damages to award after considering all of the evidence presented at both phases of the trial.¹²⁴³ 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."¹²⁴⁴

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.¹²⁴⁵ A defendant may make a motion for directed verdict after a plaintiff rests.¹²⁴⁶ After the defendant rests or both sides close, either party may make a motion for directed verdict.¹²⁴⁷ A court may also grant a motion for directed verdict on its own initiative.¹²⁴⁸ The directed verdict is like a no-evidence motion for summary judgment, except that it is brought during trial.¹²⁴⁹ A court may direct a verdict "if no evidence of probative

1242. 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 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).

1243. *Moriei*, 879 S.W.2d at 30.

1244. TEX. R. CIV. P. 292(b); see also TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(d) (requiring exemplary damages to be based on a unanimous jury finding for both liability and the amount of damages).

1245. TEX. R. CIV. P. 268.

1246. 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).

1247. 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. App.—Tyler 1981, no writ).

1248. 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).

1249. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750–51 (Tex. 2003).

force raises a fact issue” on a material element of the plaintiff’s claim.¹²⁵⁰ A court may also direct a verdict “if the evidence conclusively establishes a defense to the plaintiff’s cause of action.”¹²⁵¹

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.¹²⁵² If the directed verdict is denied, the court of appeals is “limited to the specific grounds stated in the motion.”¹²⁵³ 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.¹²⁵⁴

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.”¹²⁵⁵ In a non-jury trial, a directed verdict is sought by a motion for judgment.¹²⁵⁶ As in a jury trial, the court of appeals reviews the trial court’s judgment under the legal

1250. *Prudential Ins. Co. of Am. v. Fin. Review Servs. Inc.*, 29 S.W.3d 74, 77 (Tex. 2000).

1251. *Id.*

1252. *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).

1253. *Cooper v. Lyon Fin. Servs. Inc.*, 65 S.W.3d 197, 207 (Tex. App.—Houston [14th Dist.] 2001, no pet.). *But see* *Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414, 425–26 (Tex. 2015) (“Despite FPL Farming’s reliance on the wrong burden in its motion for directed verdict, we will consider its contentions because ‘[i]t is our practice to liberally construe the points of error in order to obtain a just, fair and equitable adjudication of the rights of the litigants.’ Thus, liberally construing FPL Farming’s contentions, FPL Farming would have been entitled to a directed verdict if it conclusively established, as a matter of law, that it did not authorize or consent to EPS’s alleged entry.” (citations omitted) (first quoting *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982); then citing *O’Neil v. Mack Trucks, Inc.*, 542 S.W.2d 112, 114 (Tex. 1976); and then citing *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam))).

1254. *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).

1255. *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).

1256. *McKinley Iron Works, Inc. v. Tex. Emp’t Comm’n*, 917 S.W.2d 468, 469–70 (Tex. App.—Fort Worth 1996, no writ).

sufficiency standard.¹²⁵⁷

J. *Charge of the Court*

Due to its ever-developing nature, confusion remains regarding the standard of review applicable to complaints about the court's charge to the jury.¹²⁵⁸ 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.¹²⁵⁹

1257. 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).

1258. 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. *Id.* 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.; see also *Burbage v. Burbage*, 447 S.W.3d 249, 258 (Tex. 2014) (“Our procedural rules are technical, but not trivial. We construe such rules liberally so that the right to appeal is not lost unnecessarily. But when an objection fails to explain the nature of the error, we cannot make assumptions. Preservation of error reflects important prudential considerations recognizing that the judicial process benefits greatly when trial courts have the opportunity to first consider and rule on error. Affording courts this opportunity conserves judicial resources and promotes fairness by ensuring that a party does not neglect a complaint at trial and raise it for the first time on appeal.” (citations omitted) (first citing *Arkoma Basin Expl. Co. v. FMF Assocs. 1990–A, Ltd.*, 249 S.W.3d 380, 388 (Tex. 2008); then citing *In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003)); *id.* (noting that party’s status as pro se did not warrant leniency on preserving error).

1259. 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

1. Time for Objecting and Requesting Instructions

In *King Fisher Marine Serv., L.P. v. Tamez*,¹²⁶⁰ the court reviewed a trial court's decision to deny a requested instruction because the request was not tendered by the trial court's deadline.¹²⁶¹ The trial court refused the requested instruction on the morning the charge was to be read to the jury, based on its setting of a deadline for making all objections and tendering all requests by the close of the formal charge conference the prior afternoon.¹²⁶² The court held Rule 272 affords trial courts the discretion to set a deadline for charge objections that precedes the reading of the charge to the jury as long as a reasonable amount of time is afforded for counsel to examine and object to the charge.¹²⁶³ The court further stated:

Accordingly, while the rule strictly prohibits objections after the charge is read, it affords trial courts latitude in addressing objections made before. And it is not surprising that many trial courts would prefer to avoid the confusion and scheduling difficulties that would arise if objections were allowed up to the moment the court plans to charge the jury.¹²⁶⁴

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); *see also* *Scott v. Atchison, Topeka & Santa Fe Ry. Co.*, 572 S.W.2d 273, 277–78 (Tex. 1978) (addressing a broad-form negligence question with several potential factual bases for finding negligence, some pled and some not). In *Scott v. Atchison, Topeka & Santa Fe Railway Co.*, the court affirmed the court of appeal's reversal of the trial court's judgment, presuming harm from the incorrect submission, and addressed actions that a trial court might take to eliminate such error. *Id.* The court suggested that the charge should list "the relevant acts or omissions" raised by the evidence and warned to do otherwise would allow the jury to return a verdict supported by no evidence. *Id.* The question is whether the failure to take this step or the failure to eliminate theories not supported by the evidence creates a *Casteel/Harris County* problem. The Fort Worth Court of Appeals rejected a *Casteel/Harris County* complaint in *Columbia Medical Center of Las Colinas v. Bush ex. rel. Bush*, holding that there was nothing affirmatively misleading in the charge, which "did not instruct the jury to consider or not to consider any specific act or negligence." *Columbia Med. Ctr. of Las Colinas v. Bush ex. rel. Bush*, 122 S.W.3d 835, 859 (Tex. App.—Fort Worth 2003, pet. denied). The supreme court denied review in *Bush*. The issue remains unresolved. While *Scott* is still good law, if appellate courts required trial courts to load the charge with granulated factual allegations in limiting instructions, broad form might never be "feasible."

1260. *King Fisher Marine Serv., L.P. v. Tamez*, 443 S.W.3d 838 (Tex. 2014).

1261. *Id.* at 842–47.

1262. *Id.* at 847.

1263. *Id.*

1264. *Id.* at 843–44.

It is worth noting that the court cautioned against trial courts rejecting, out of hand, objections or requested instructions and questions solely because they were made after a court-imposed deadline.

An objection that may seem obvious to an appellate court perusing a cold record may occur to battle-weary trial counsel only when the fog of war has lifted after a long day in the courtroom, or simply after a decent night's sleep. Trial courts should therefore make every effort to entertain on the merits a charge objection brought in good faith after conclusion of the formal charge conference but before the charge is read to the jury.¹²⁶⁵

2. Questions

Unless extraordinary circumstances exist, a trial court must submit broad-form questions to the jury.¹²⁶⁶ The broad-form submission requirement was “intended to simplify jury charges for the benefit of the jury, the parties, and the trial court.”¹²⁶⁷ 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.”¹²⁶⁸ 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.”¹²⁶⁹ 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.”¹²⁷⁰ Thus, as “long as matters are timely raised and properly

1265. *Id.* at 847.

1266. *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990); *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.”).

1267. *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 230 (Tex. 2005).

1268. *Harris Cty. v. Smith*, 96 S.W.3d 230, 235 (Tex. 2002); *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.” *Id.*

1269. 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”).

1270. *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992).

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."¹²⁷¹

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.¹²⁷² Likewise, other objections, such as those which claim that the issue in question was "not supported by the pleadings"¹²⁷³ or that the evidence is not legally sufficient to support submission,¹²⁷⁴ should be reviewed de novo because each complaint raises a question of law.¹²⁷⁵ 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.¹²⁷⁶ "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."¹²⁷⁷ In addition, the reversible error analysis applies to complaints about errors in the charge.¹²⁷⁸ However, when the complaint alleges that an element of a theory has been omitted in the questions or instructions—either because

1271. *Exxon Corp. v. Perez*, 842 S.W.2d 629, 631 (Tex. 1992).

1272. *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).

1273. *McLennan Elec. Coop., Inc. v. Sims*, 376 S.W.2d 924, 927 (Tex. App.—Waco 1964, writ ref'd n.r.e.).

1274. *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).

1275. *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).

1276. *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).

1277. *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).

1278. *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.

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.¹²⁷⁹

3. 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.”¹²⁸⁰ The trial court should generally “explain to the jury any legal or technical terms” contained in instructions and definitions.¹²⁸¹ The decision of whether to submit a particular instruction or definition is reviewed for an abuse of discretion,¹²⁸² with the essential inquiry being whether the instruction or definition aids the jury in answering the questions.¹²⁸³ Accordingly, a court is given wide latitude to determine the sufficiency of explanatory instructions and definitions.¹²⁸⁴ “[A] court has considerably more discretion in submitting instructions and definitions than it has in submitting [jury questions].”¹²⁸⁵

1279. 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).

1280. *Harris Cty. 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)).

1281. *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).

1282. *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).

1283. *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).

1284. *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 Inv’rs*, 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).

1285. *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

When instructions or definitions are actually given, the question on review is whether the instruction or definition is “proper.”¹²⁸⁶ An instruction is proper if it assists the jury, is supported by the pleadings or evidence, and accurately states the law.¹²⁸⁷ Examples of “improper” instructions include those that misstate the law or mislead the jury,¹²⁸⁸ those that “comment on the weight of the evidence,”¹²⁸⁹ or those that “nudge’ or ‘tilt’ the jury.”¹²⁹⁰ The test of sufficiency for a definition is its “reasonable clarity in performing [its] function.”¹²⁹¹ Both instructions and definitions are reviewed under the abuse of discretion standard.¹²⁹² However, whether the terms are properly defined or the instruction properly

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.” *Id.* “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 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.

1286. 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.).

1287. *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.).

1288. *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).

1289. *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).

1290. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 724 (Tex. 2003).

1291. *Harris v. Harris*, 765 S.W.2d 798, 801 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

1292. *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).

worded should be a question of law reviewable de novo.¹²⁹³ A de novo standard of review should also be used when the complaint is that an explanatory instruction or definition misstates the law¹²⁹⁴ or directly comments on the weight of the evidence.¹²⁹⁵ If the definition or instruction was improper, the reviewing court must then determine whether the error was harmless.¹²⁹⁶

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."¹²⁹⁷ When "the refusal is based on a determination that the request is unnecessary, the abuse of discretion standard" of review should apply.¹²⁹⁸ In contrast, when the refusal is based upon a determination that the instruction or definition was not raised by the pleadings,¹²⁹⁹ was not supported by at least "some evidence,"¹³⁰⁰ was not tendered in substantially correct form, or was not an element of a ground of recovery or defense in

1293. 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. App.—San Antonio 1951, no writ) (finding an instruction that fails to properly instruct the jury on the burden of proof issue is erroneous).

1294. 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. Bevely*, 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. 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).

1295. *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).

1296. *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).

1297. *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 Cty.*, 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).

1298. *Moran*, 946 S.W.2d at 405.

1299. 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).

1300. *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. App.—El Paso 1966, writ ref'd n.r.e.).

broad-form submission,¹³⁰¹ the complaint presents a legal question reviewable de novo.¹³⁰² 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.¹³⁰³

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."¹³⁰⁴ 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."¹³⁰⁵

1301. *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 dismissed); *see also Ornelas*, 410 S.W.2d at 923 (holding that appellant's requested jury instructions were too vague or erroneously worded to constitute proper instructions).

1302. *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").

1303. *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 Hosp. 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).

1304. *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 dismissed by agr.).

1305. *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 Corp.*, 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." *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997). The court, however, did not engage in a reversible error analysis. *Id.* Conversely, in *State v. Williams*, the supreme court did employ a reversible error analysis to an improper instruction and concluded that the error was not harmful. *State v. Williams*, 940 S.W.2d 583, 585 (Tex. 1996); *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.¹³⁰⁶ 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].¹³⁰⁷

Additionally, if the argument is incurable,¹³⁰⁸ the appellant must also “prove . . . that the argument by its nature, degree, and extent constitute[s] reversibl[e] . . . error.”¹³⁰⁹

Improper jury arguments rarely result in reversible error.¹³¹⁰ Some notable examples of improper jury arguments include appealing to racial or ethnic prejudice,¹³¹¹ accusing a defendant corporation of being a killer of

1306. *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).

1307. *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).

1308. *See* *Tex. Emp’rs Ins. Ass’n v. Haywood*, 266 S.W.2d 856, 858 (Tex. 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).

1309. *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).

1310. *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 Cty.*, 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).

1311. *See* *Living Ctrs. of Tex., Inc. v. Peñalver*, 256 S.W.3d 678, 682 (Tex. 2008) (comparing trial counsel to Nazis was incurable jury argument); *Tex. Emp’rs Ins. Ass’n v. Guerrero*, 800 S.W.2d

families,¹³¹² referring to a party as “cattle,”¹³¹³ and a “party’s personal expression of gratitude to the jury.”¹³¹⁴ In these instances, the appellant must prove that the argument, by its “nature, degree[,] and extent constituted reversibly harmful error”¹³¹⁵ (proper inquiries include: the length of the argument, whether the argument was repeated or abandoned, and whether cumulative error existed),¹³¹⁶ and that “the probability that the [improper] argument caused harm exceeds the probability that the verdict was based upon proper proceedings and evidence.”¹³¹⁷ Finally, the reviewing court must evaluate the improper jury argument in light of the entire case, “[f]rom voir dire . . . [to] closing argument[s].”¹³¹⁸

L. *Jury Deliberations*

The scheduling of jury deliberations, sequestration of jurors, breaks, and the like are all reviewed for an abuse of discretion.¹³¹⁹ Responses to jury notes are reviewed in the same manner as regular charge practices.¹³²⁰ While repeating testimony to the 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.¹³²¹ In the absence of disagreement

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).

1312. *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).

1313. *See Sw. Greyhound Lines v. Dickson*, 236 S.W.2d 115, 120 (Tex. 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).

1314. *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.”).

1315. *Reese*, 584 S.W.2d at 839.

1316. *Id.* at 840.

1317. *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).

1318. *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).

1319. TEX. R. CIV. P. 282.

1320. *See* TEX. R. CIV. P. 286 (expressing the similarity of jury notes to regular charge practices).

1321. *See* TEX. R. CIV. P. 287 (requiring disagreement among jurors as to witness statements before testimony can be read back to them).

between jurors, however, the court is not obligated to have testimony read back.¹³²² Furthermore, the trial court has broad discretion in deciding what portion of testimony is relevant to the point in dispute.¹³²³

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.¹³²⁴ 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].”¹³²⁵ 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].”¹³²⁶ Additionally, the length of time a court allows for jury deliberations is a decision within the sound discretion of the trial court.¹³²⁷ 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.¹³²⁸

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.¹³²⁹ 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

1322. 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).

1323. *Id.* at 225; *Wirtz v. Orr*, 575 S.W.2d 66, 72 (Tex. App.—Texarkana 1978, writ dismissed); *Aetna Cas. & Sur. Co. v. Scott*, 423 S.W.2d 351, 354 (Tex. App.—Houston [14th Dist.] 1968, writ dismissed w.o.j.).

1324. 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.

1325. *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).

1326. *Stevens*, 563 S.W.2d at 229, 232.

1327. *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).

1328. *Shaw*, 791 S.W.2d at 206.

1329. 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).

challenged by mandamus.¹³³⁰

“In reviewing the jury findings for conflict, the threshold [inquiry] is whether the findings [implicate] the same material fact.”¹³³¹ If the conflict can be reasonably reconciled, the reviewing “court may not strike [conflicting] jury answers.”¹³³² 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.”¹³³³ 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.”¹³³⁴

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.”¹³³⁵ 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.¹³³⁶

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.”¹³³⁷ If the amendment is procedural in nature (i.e., merely conforming “the pleadings to the evidence at trial”),

1330. *Indem. Ins. Co. of N. Am. v. Craik*, 346 S.W.2d 830, 831–32 (Tex. 1961).

1331. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 508 (Tex. 2018) (quoting *Bender v. S. Pac. Transp. Co.*, 600 S.W.2d 257, 260 (Tex. 1980)).

1332. *Bender*, 600 S.W.2d at 260; *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).

1333. *Bender*, 600 S.W.2d at 260.

1334. *Id.*

1335. *Id.*

1336. *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).

1337. *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).

the trial court must grant the amendment.¹³³⁸

A trial amendment is prejudicial on its face if “(1) the amendment asserts a new substantive matter that reshapes the nature of the trial itself; (2) the new matter is of such a nature that the opposing party could not have anticipated it in light of the development of the case up to the time the amendment was requested; and (3) the opposing party’s presentation of its case would be detrimentally affected by the amendment.”¹³³⁹ Accordingly, 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.¹³⁴⁰ 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.¹³⁴¹ The trial court’s decision will be reviewed on appeal for an abuse of discretion.¹³⁴²

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.¹³⁴³ “A [jury] question is immaterial when 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

1338. *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).

1339. *Zarate v. Rodriguez*, 542 S.W.3d 26, 37 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (citing *Tanglewood Homes Ass’n v. Feldman*, 436 S.W.3d 48, 64 (Tex. App.—Houston [14th Dist.] 2014, pet. denied)).

1340. *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).

1341. *Boarder to Boarder Trucking, Inc. v. Mondri, 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).

1342. See *Kilpatrick*, 874 S.W.2d at 658 (exercising the right to review the trial court’s decision for an abuse of discretion).

1343. TEX. R. CIV. P. 301; *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994); *River Oaks Place Council of Co-Owners v. Daly*, 172 S.W.3d 314, 321 (Tex. App.—Corpus Christi 2005, no pet.).

rendered immaterial by other findings.”¹³⁴⁴ 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.¹³⁴⁵

A court reviews the denial of a motion to disregard jury findings as a legal sufficiency challenge.¹³⁴⁶ 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.”¹³⁴⁷ The court sustains such a challenge only when no more than a scintilla of evidence supported the jury’s finding.¹³⁴⁸ “More than a scintilla of evidence exists when . . . reasonable and fair-minded people [could] differ in their conclusions.”¹³⁴⁹ 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.¹³⁵⁰ 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 [or issues] . . . [showing] grounds for a new trial.”¹³⁵¹

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 liability or if a directed verdict would have been proper.¹³⁵² Unlike the motion to disregard jury findings (discussed above in Part VI(B)), a motion for JNOV

1344. Se. Pipe Line Co. v. Tichacek, 997 S.W.2d 166, 172 (Tex. 1999).

1345. 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.

1346. Willard Law Firm, L.P. v. Sewell, 464 S.W.3d 747, 751 (Tex. App.—Houston [14th Dist.] 2015, no pet.); Excel Corp. v. McDonald, 223 S.W.3d 506, 508 (Tex. App.—Amarillo 2006, pet. denied).

1347. *Wilson*, 168 S.W.3d at 822, 827.

1348. Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997).

1349. *Id.* (citing Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995)).

1350. *McDonald*, 224 S.W.3d at 508.

1351. Basin Operating Co. v. Valley Steel Prods., 620 S.W.2d 773, 776 (Tex. App.—Dallas 1981, writ ref'd n.r.e.).

1352. TEX. R. CIV. P. 301; Tiller v. McLure, 121 S.W.3d 709, 713 (Tex. 2003); Fort Bend Cty. Drainage Dist. v. Sbrusch, 818 S.W.2d 392, 394 (Tex. 1991); see also *supra* Section VI(I) (explaining standards for directed verdict).

asks the trial court to disregard all of the jury's findings and render judgment contrary to them.¹³⁵³

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.¹³⁵⁴ Generally, where the court of appeals finds error, it will reverse and render the judgment.¹³⁵⁵ 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.¹³⁵⁶ 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 independent issues, if any, that may be grounds for granting a new trial.¹³⁵⁷

D. *Motion to Admit Additional Evidence*

Texas Rule of Civil Procedure 270 allows, but does not require, the court to permit additional evidence.¹³⁵⁸ 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

1353. *Cf.* *Teston v. Miller*, 349 S.W.2d 296, 299 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.c.) (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”).

1354. *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); *Mikob Props., Inc. v. Joachim*, 468 S.W.3d 587, 594 (Tex. App.—Dallas 2015, pet. denied) (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* Section III(A)(1) (discussing legal sufficiency standard of review).

1355. *Wal-Mart Stores, Inc. v. Miller*, 102 S.W.3d 706, 710 (Tex. 2003).

1356. *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).

1357. 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: (A) the appellate court has sustained a point raised by the appellant; and (B) 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).

1358. *Krishnan v. Ramirez*, 42 S.W.3d 205, 223 (Tex. App.—Corpus Christi 2001, no pet.).

of the jury.”¹³⁵⁹ 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.”¹³⁶⁰ 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.¹³⁶¹ In both jury and nonjury trials, the trial court has discretion to reopen the evidence on an uncontested or noncontroversial matter.¹³⁶²

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.¹³⁶³ In making this determination, “[t]he trial court should exercise its discretion liberally ‘in the interest of permitting both sides to fully develop the case in the interest of justice.’”¹³⁶⁴

The trial court’s decision to permit additional evidence will be disturbed on appeal only when it abuses its discretion.¹³⁶⁵ The trial court automatically abuses its discretion if it reopens, post-verdict, the evidence

1359. TEX. R. CIV. P. 270; *accord* Chapman v. Abbot, 251 S.W.3d 612, 620 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

1360. Binford v. Snyder, 189 S.W.2d 471, 476 (Tex. 1945); *accord* Lopez v. Lopez, 55 S.W.3d 194, 201 (Tex. App.—Corpus Christi 2001, no pet.).

1361. See McCarthy v. George, 623 S.W.2d 772, 776 (Tex. 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. 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. 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).

1362. TEX. R. CIV. P. 270.

1363. Rollins v. Tex. Coll., 515 S.W.3d 364, 371 (Tex. App.—Tyler 2016, pet. denied) (citing Poag v. Flories, 317 S.W.3d 820, 828 (Tex. App.—Fort Worth 2010, pet. denied)); Hernandez v. Lautensack, 201 S.W.3d 771, 779 (Tex. App.—Fort Worth 2006, pet. denied).

1364. Hernandez, 201 S.W.3d at 779 (quoting Word of Faith World Outreach Ctr. Church v. Oechsner, 669 S.W.2d 364, 366–67 (Tex. App.—Dallas 1984, no writ)).

1365. Rollins, 515 S.W.3d at 371 (citing Poag v. Flories, 317 S.W.3d at 827); 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.).

on a contested matter in a jury case, because to do so contravenes Rule 270.¹³⁶⁶

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.¹³⁶⁷

The denial of a motion for new trial is reviewable by appeal.¹³⁶⁸ “The standard of review depends on the [nature of the] complaint preserved by the motion for new trial.”¹³⁶⁹ Generally, a trial court's denial of a motion for new trial is reviewed for abuse of discretion.¹³⁷⁰ 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.”¹³⁷¹ A trial court's order on a motion for new trial based upon

1366. See TEX. R. CIV. P. 270 (allowing additional noncontroversial testimony only before the jury verdict is rendered).

1367. TEX. R. CIV. P. 320.

1368. 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).

1369. *Delgado*, 951 S.W.2d at 98; see also TEX. R. CIV. P. 324 (presenting prerequisites for motion for new trial).

1370. *In re R.R.*, 209 S.W.3d 112, 114 (Tex. 2006).

1371. *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

jury misconduct is likewise reviewed for an abuse of discretion.¹³⁷² However, sufficiency of the evidence challenges are governed by the legal and factual sufficiency standards of review.¹³⁷³

“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.”¹³⁷⁴ 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;¹³⁷⁵ or (2) the order was based on the sole ground of “irreconcilably conflicting” jury answers.¹³⁷⁶ But a 2009 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.¹³⁷⁷ 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.”¹³⁷⁸ 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 clearly identified and reasonably specific.”¹³⁷⁹ “Broad statements such as ‘in the interest of justice’ are not sufficiently specific.”¹³⁸⁰ 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

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).

1372. *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.*

1373. See *supra* Part III (explaining sufficiency of the evidence).

1374. *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).

1375. *Wilkins*, 160 S.W.3d at 563.

1376. *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).

1377. *Columbia Med. Ctr.*, 290 S.W.3d at 210.

1378. *Id.*

1379. *Id.* at 215.

1380. *Id.*

understood by the court.”¹³⁸¹ “Generality in motions for new trial must be avoided because objections phrased in general terms shall not be considered by the court.”¹³⁸² It is arbitrary and an abuse of discretion when a trial court fails to give its reasons for disregarding a jury verdict.¹³⁸³

In *In re United Scaffolding, Inc.*,¹³⁸⁴ the Texas Supreme Court noted that an order granting a motion for a new trial will not be held to be an abuse of discretion if “its stated reason for granting a new trial (1) is a reason for which a new trial is legally appropriate . . . ; and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand.”¹³⁸⁵ The court added that it may be an abuse of discretion “if the given reason, specific or not, is not one for which a new trial is legally valid.”¹³⁸⁶ Thus, “[t]he good cause for which [Rule 320] allows trial courts to grant new trials does not mean just any cause.”¹³⁸⁷ Further, mandamus would issue if the trial court’s “articulated reasons plainly state that the trial court merely substituted its own judgment for the jury’s, or that the trial court simply disliked one party’s lawyer, or that the reason is based on invidious discrimination.”¹³⁸⁸ Additionally, mandamus may be granted “if the order, though rubber-stamped with a valid new-trial rationale, provides little or no insight into the trial judge’s reasoning.”¹³⁸⁹ The Texas Supreme Court observed that “the mere recitation of a legal standard, such as a statement that a finding is against the great weight and preponderance of the evidence,” is not sufficient, and that the new trial order “must indicate that the trial judge considered the specific facts and circumstances of the case” and “explain how the evidence (or lack of evidence) undermines the jury’s findings.”¹³⁹⁰ The court finally noted that that “[a] trial court abuses its discretion if its . . . order provides no more

1381. *Id.* at 210 (citing TEX. R. APP. P. 321).

1382. *Id.* (citing TEX. R. CIV. P. 322).

1383. *Id.* at 213.

1384. *In re United Scaffolding, Inc.*, 377 S.W.3d 685 (Tex. 2012) (orig. proceeding).

1385. *Id.* at 688–89.

1386. *Id.* at 689 (citing *Columbia Med. Ctr.*, 290 S.W.3d at 210 n.3).

1387. *Id.* (quoting *Columbia Med. Ctr.*, 290 S.W.3d at 210 n.3).

1388. *Id.* (citations omitted) (first citing *Columbia Med. Ctr.*, 290 S.W.3d at 210; then citing *In re BMW*, 8 S.W.3d 326, 328 (Tex. 2000) (orig. proceeding) (Hecht, J., dissenting from the denial of rehearing of a petition for mandamus)).

1389. *Id.*

1390. *Id.*

than a pro forma template rather than the trial judge's analysis."¹³⁹¹

The Court of Criminal Appeals also observed that a trial court's discretion to grant a new trial in the interest of justice is not "unbounded or unfettered."¹³⁹² 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.¹³⁹³

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]."¹³⁹⁴ "The defendant need not establish reversible error as a matter of law before the trial court may exercise its discretion in granting a motion for new trial."¹³⁹⁵ "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."¹³⁹⁶

Practitioners should carefully note that a motion for new trial is required to preserve several issues on appeal.¹³⁹⁷ Rule 324(b) requires that the following issues be raised by a motion for new trial:

1391. *Id.*

1392. *State v. Herndon*, 215 S.W.3d 901, 906–07 (Tex. Crim. App. 2007).

1393. *Id.* at 907.

1394. *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 judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment").

1395. *Herndon*, 215 S.W.3d at 909.

1396. *Id.*

1397. *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)").

- (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.¹³⁹⁸

“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].”¹³⁹⁹ 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.¹⁴⁰⁰

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 of fact and review under an abuse of discretion standard.¹⁴⁰¹ If there is conflicting evidence on the issue of misconduct, the trial court’s finding must be upheld on appeal.¹⁴⁰²

To obtain a new trial based upon jury misconduct, a party must show: (1) that misconduct occurred; (2) that the misconduct was material; and

1398. TEX. R. CIV. P. 324(b)(1)–(5).

1399. *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, judgment 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).

1400. *Stillman v. Hirsch*, 99 S.W.2d 270, 275 (Tex. 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. App.—Waco 1981, no writ). The motion 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).

1401. *See* *Pharo v. Chambers Cty.*, 922 S.W.2d 945, 948–49 (Tex. 1996) (deferring to the trial court’s determination of whether jury misconduct occurred).

1402. *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000); *Losier v. Ravi*, 362 S.W.3d 639, 647 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

(3) that, based upon the whole record, it probably resulted in harm.¹⁴⁰³ 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.”¹⁴⁰⁴ In addition, “[a] court may, of course, admit competent evidence of juror misconduct from any other source.”¹⁴⁰⁵ 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.¹⁴⁰⁶

There is no probable injury when the jury probably would have rendered the same verdict even if the misconduct had not occurred.¹⁴⁰⁷ “Determining the existence of probable injury is a question of law.”¹⁴⁰⁸

3. Motion for New Trial Based on Newly Discovered Evidence

To obtain a new trial based upon newly discovered evidence,¹⁴⁰⁹ 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 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.¹⁴¹⁰

1403. TEX. R. CIV. P. 327(a); *accord Jackson*, 24 S.W.3d at 372; *Redinger v. Living, Inc.*, 689 S.W.2d 415, 419 (Tex. 1985).

1404. *Jackson*, 24 S.W.3d at 369 (quoting at *Weaver v. Westchester Fire Ins. Co.*, 739 S.W.2d 23, 24 (Tex. 1987)); *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).

1405. *Jackson*, 24 S.W.3d at 369 (citing *Mayo v. State*, 708 S.W.2d 854, 856 (Tex. Crim. App. 1986); *Filling v. Fuller*, 746 S.W.2d 506, 508 (Tex. App.—Texarkana 1988, no writ)).

1406. *See Roy Jones Lumber Co. v. Murphy*, 163 S.W.2d 644, 646 (Tex. 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).

1407. *Redinger*, 689 S.W.2d at 419.

1408. *Pharo*, 922 S.W.2d at 950 (citing *State v. Wair*, 351 S.W.2d 878, 879 (Tex. 1961) (per curiam)); *Losier*, 362 S.W.3d at 647 (citing *id.*).

1409. TEX. R. CIV. P. 324(b)(1).

1410. *Jackson v. Van Winkle*, 660 S.W.2d 807, 809 (Tex. 1983) (citing *New Amsterdam Cas. Co. v. Jordan*, 359 S.W.2d 864, 866 (Tex. 1962); *Tex. Emp’rs Ins. Ass’n v. Moser*, 152 S.W.2d 390, 395 (Tex. App.—San Antonio 1941, no writ); *In re Y.*, 516 S.W.2d 199, 205–06 (Tex. App.—Corpus Christi 1974, writ *re* *fd* n.r.e.), *overruled on other grounds by Moritz v. Preiss*, 121 S.W.3d 715, 720–21 (Tex. 2003); *accord Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010) (listing the factors set out in

Furthermore, the newly discovered evidence must be admissible, competent evidence.¹⁴¹¹ 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.¹⁴¹²

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.¹⁴¹³ "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.¹⁴¹⁴ 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.¹⁴¹⁵

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.¹⁴¹⁶ The court reviews the denial of a motion to modify a judgment for abuse of

Jackson); *Armendariz v. Redcats USA, L.P.*, 390 S.W.3d 463, 471 (Tex. App.—El Paso 2012, no pet.) (reaffirming the *Jackson* factors); *In re A.G.C.*, 279 S.W.3d 441, 453 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing to *Jackson*, 660 S.W.2d at 809).

1411. *Fantasy Ranch, Inc. v. City of Arlington*, 193 S.W.3d 605, 615 (Tex. App.—Fort Worth 2006, pet. denied); *Nguyen v. Minh Food Co.*, 744 S.W.2d 620, 621 (Tex. App.—Dallas 1987, writ denied).

1412. *See Rivera v. Countrywide Home Loans, Inc.*, 262 S.W.3d 834, 844 (Tex. App.—Dallas 2008, no pet.) (recognizing each of the four elements "must be established by an affidavit of the party" (citing *In re Thoma*, 873 S.W.2d 477, 512 (Tex. Rev. Trib. 1994, no appeal))), *abrogated on other grounds by* *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542, 548 (Tex. 2016); *In re Thoma*, 873 S.W.2d at 512 (noting the moving party must show the four factors in an affidavit to win a new trial).

1413. *Waffle House*, 313 S.W.3d at 813; *Jackson*, 660 S.W.2d at 809; *Armendariz*, 390 S.W.3d at 471; *Fantasy Ranch*, 193 S.W.3d at 615.

1414. *In re M.A.N.M.*, 75 S.W.3d 73, 80 (Tex. App.—San Antonio 2002, no pet.); *accord* *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." (citing *Jackson*, 660 S.W.2d at 809)).

1415. *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 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 appellate courts should review with careful scrutiny a motion for new trial based upon newly discovered evidence).

1416. TEX. R. CIV. P. 329b(d)–(e).

discretion.¹⁴¹⁷ “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.”¹⁴¹⁸

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.¹⁴¹⁹ “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.”¹⁴²⁰

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.¹⁴²¹ A judgment *nunc pro tunc* is appropriate only to correct a clerical error; that is, it cannot be used to correct a judicial error.¹⁴²² “A clerical error is one which does not result from judicial reasoning or determination.”¹⁴²³ “A judicial error is [the type

1417. See *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991) (holding 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); *Hodges v. Rajpal*, 459 S.W.3d 237, 250 (Tex. App.—Dallas 2015, no pet.) (noting denial of a motion to modify a final judgment is reviewed for an abuse of discretion); *Wagner v. Edlund*, 229 S.W.3d 870, 879 (Tex. App.—Dallas 2007, pet. denied) (concluding the trial court did not abuse its discretion by denying the modification of judgment).

1418. *Jackson v. State*, 288 S.W.3d 60, 64 (Tex. App.—Houston [1st Dist.] 2009, pet. ref’d) (citing *Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.); TEX. R. APP. P. 43.2(b)); *accord Williams v. State*, 911 S.W.2d 788, 791 (Tex. App.—San Antonio 1995, no writ) (affirming an appellate court has the power to modify a judgment “to make the record speak the truth” (quoting *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref’d))).

1419. TEX. R. CIV. P. 329b.

1420. *Limestone Constr., Inc. v. Summit Commercial Indus. Props., Inc.*, 143 S.W.3d 538, 542 (Tex. App.—Austin 2004, no pet.) (citing *Bank One, Tex., N.A. v. Moody*, 830 S.W.2d 81, 85 (Tex. 1992)).

1421. TEX. R. CIV. P. 316; TEX. R. CIV. P. 329b(f); see *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986) (“After 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).

1422. See *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 a written judgment that precisely reflects the incorrect rendition.” (citing *Escobar*, 711 S.W.2d at 232)).

1423. *Andrews v. Koch*, 702 S.W.2d 584, 585 (Tex. 1986) (per curiam) (citing *Petroleum Equip. Fin. Corp. v. First Nat’l Bank of Fort Worth*, 622 S.W.2d 152, 154 (Tex. App.—Fort Worth 1981, writ ref’d n.r.e.)).

of] error which occurs in the *rendering* as opposed to the *entering* of a judgment.”¹⁴²⁴

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.¹⁴²⁵

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.¹⁴²⁶

“[F]or a judgment *nunc pro tunc* to be properly granted, the evidence must be clear and convincing that a clerical error was made.”¹⁴²⁷ “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.”¹⁴²⁸ 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.¹⁴²⁹ “[W]hether the [trial] court pronounced judgment orally and the terms of [any]

1424. *Escobar*, 711 S.W.2d at 231 (citing *Comet*, 450 S.W.2d at 58; *Knox v. Long*, 257 S.W.2d 289, 292–93 (Tex. 1953), *overruled in part by* *Jackson v. Hernandez*, 285 S.W.2d 184, 191 (Tex. 1955); *Petroleum Equip.*, 622 S.W.2d at 154; *Samples Exterminators v. Samples*, 640 S.W.2d 873, 875 (Tex. 1982) (per curiam)); see *In re Fuselier*, 56 S.W.3d 265, 267 (Tex. App.—Houston [1st Dist.] 2001, orig. proceeding) (holding the trial court judge “rendered judgment when she signed the order” and “[t]hus, the error in the order was a judicial error”); *Crocker v. Synpol, Inc.*, 732 S.W.2d 429, 436 (Tex. App.—Beaumont 1987, no writ) (defining judicial error).

1425. *Barton*, 178 S.W.3d at 126 (internal citations omitted) (citing *Andrews*, 702 S.W.2d at 585; *Butler v. Cont’l Airlines, Inc.*, 31 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2000, pet. denied)).

1426. *Escobar*, 711 S.W.2d at 232; see *Finlay v. Jones*, 435 S.W.2d 136, 138 (Tex. 1968) (orig. proceeding) (noting the trial court’s findings or conclusions “as to the nature of the errors” are not binding on the Texas Supreme Court).

1427. *Barton*, 178 S.W.3d at 127 (emphasis added) (citing *Riner v. Briargrove Park Prop. Owners, Inc.*, 976 S.W.2d 680, 683 (Tex. App.—Houston [1st Dist.] 1997, no writ); *In re Broussard*, 112 S.W.3d 827, 833–34 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding); accord *Riner*, 976 S.W.2d at 683 (reiterating the clear and convincing standard). *But see* *Wittau v. Storie*, 145 S.W.3d 732, 736 n.3 (Tex. App.—Fort Worth 2004, no pet.) (per curiam) (applying traditional legal and factual sufficiency standards).

1428. *Riner*, 976 S.W.2d at 683 (citing *Pruet v. Coastal States Trading, Inc.*, 715 S.W.2d 702, 705 (Tex. App.—Houston [1st Dist.] 1986, no writ)).

1429. *Davis v. Davis*, 647 S.W.2d 781, 783 (Tex. App.—Austin 1983, no writ); see *Pruet*, 715 S.W.2d at 705 (stating a presumption arises that a judge’s personal recollection will support the finding of clerical errors if he corrects the judgment *nunc pro tunc*).

pronouncement are questions of fact” that are reviewed for legal and factual sufficiency.¹⁴³⁰

H. *Remittitur*

The remittitur process arises out of the trial court’s discretion to grant new trials.¹⁴³¹ 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 persuade a “plaintiff to make what amounts to a settlement offer.”¹⁴³² 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.¹⁴³³ The plaintiff has two choices: to remit the suggested amount unconditionally or to have a new trial.¹⁴³⁴ Because the trial court “has no authority to change a jury award[,]” the trial court judge “cannot compel a remittitur, but can ‘suggest’ it.”¹⁴³⁵ Because a trial court cannot grant a new trial for any reason or no reason, its power to use remittitur as a settlement tool is limited somewhat.

In suggesting a remittitur or in reviewing a trial court’s order of remittitur, the proper standard of review is factual sufficiency,¹⁴³⁶ not abuse of discretion.¹⁴³⁷ Because remittitur involves the question of factual sufficiency, the Texas Supreme Court may not order a remittitur, but the

1430. *Escobar*, 711 S.W.2d at 232 (citing *Wood v. Paulus*, 524 S.W.2d 749, 755 (Tex. App.—Corpus Christi 1975, writ ref’d n.r.e.); Thomas M. Reavley & David L. Orr, *Trial Court’s Power to Amend Its Judgments*, 25 BAYLOR L. REV. 191, 203 (1973)).

1431. Powers & Ratliff, *supra* note 138, at 564.

1432. *Id.*

1433. *Id.*

1434. *Id.*; see *Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987) (holding if the plaintiff rejects the court’s “suggestion,” the trial court may grant a new trial).

1435. Powers & Ratliff, *supra* note 138, at 564.

1436. See *Bentley v. Bunton (Bentley I)*, 94 S.W.3d 561, 620 (Tex. 2002) (Baker, J., dissenting) (stating the standard of review in Texas for excessive damages is factual sufficiency of the evidence).

1437. See *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 30–31 (Tex. 1994), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b), *as recognized in U-Haul Int’l, Inc. v. Waldrip*, 380 S.W.3d 118, 140 (Tex. 2012) (explaining the 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) (per curiam) (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) (per curiam) (emphasizing factual sufficiency as the only acceptable standard to review remittitur of actual damages); see also TEX. R. APP. P. 46.2 (allowing appellate review of remittitur requests); TEX. R. CIV. P. 315 (providing for remittitur generally); TEX. R. CIV. P. 324(b)(2) (discussing factual insufficiency to support jury findings).

courts of appeals may.¹⁴³⁸ Although the supreme court lacks jurisdiction to review or order a remittitur because it is a factual sufficiency issue,¹⁴³⁹ the court does have jurisdiction to determine whether the court of appeals applied the proper standard in reviewing the remittitur issue.¹⁴⁴⁰ 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.¹⁴⁴¹

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.”¹⁴⁴² “But the verdict must fall within the range of the evidence presented, and a jury may not ‘pull figures out of a hat’ in assessing damages.”¹⁴⁴³

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.”¹⁴⁴⁴ It “is

1438. 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).

1439. See *Bentley I*, 94 S.W.3d at 620 (explaining 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. 1998) (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).

1440. 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” (citing *Flanigan v. Carswell*, 324 S.W.2d 835, 839 (Tex. 1959), *overruled in part by Larson*, 730 S.W.2d at 641)).

1441. *Guevara v. Ferrer*, 247 S.W.3d 662, 670 (Tex. 2007).

1442. *Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002) (citing *Price Pfister, Inc. v. Moore & Kimmey, Inc.*, 48 S.W.3d 341, 352 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)).

1443. *338 Indus., LLC v. Point Com, LLC*, 530 S.W.3d 729, 735 (Tex. App.—Amarillo 2017, pet. denied) (quoting *CCC Grp., Inc. v. S. Cent. Cement, Ltd.*, 450 S.W.3d 191, 200 (Tex. App.—Houston [1st Dist.] 2014, no pet.)).

1444. *Sanchez v. Balderrama*, 546 S.W.3d 230, 237 (Tex. App.—El Paso 2017, no pet.) (citing *Brookshire Bros., Inc. v. Wagnon*, 979 S.W.2d 343, 354 (Tex. App.—Tyler 1998, pet. denied); *Duron v. Merritt*, 846 S.W.2d 23, 26 (Tex. App.—Corpus Christi 1992, no writ)); see *Roberts v. Williamson*, 111 S.W.3d 113, 120 (Tex. 2003) (referring to the difficulty involved in determining the value of intangible damages).

necessarily an arbitrary process[.]” not subject to objective analysis or mathematical calculation.¹⁴⁴⁵ Because there are no objective guidelines to assess the money equivalent of such injuries, the jury is given a great deal of discretion in awarding an amount of damages it determines appropriate.¹⁴⁴⁶ While the jury has broad discretion, there must be evidence to justify the amount awarded, as the jury “cannot simply pick a number and put it in the blank.”¹⁴⁴⁷ 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.”¹⁴⁴⁸ 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.’”¹⁴⁴⁹ Furthermore, 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.”¹⁴⁵⁰ 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

1445. *Skaggs Alpha Beta, Inc. v. Nabhan*, 808 S.W.2d 198, 202 (Tex. App.—El Paso 1991, writ dismissed).

1446. *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 Hous. Transp. Co. v. Zrubeck*, 850 S.W.2d 579, 589 (Tex. App.—Corpus Christi 1993, writ denied) (holding an award of discretionary damages such as mental anguish “will be shunted to the discretionary domain of the jury” (citing *Kneip v. UnitedBank–Victoria*, 774 S.W.2d 757, 760 (Tex. App.—Corpus Christi 1989, no writ); *Powers & Ratliff*, *supra* note 138, at 566)); *Marshall v. Superior Heat Treating Co.*, 826 S.W.2d 197, 200 (Tex. App.—Fort Worth 1992, no writ) (concluding damage awards for future physical impairment are “particularly within the province of the jury”).

1447. *Turner v. Duggin*, 532 S.W.3d 473, 484–85 (Tex. App.—Texarkana 2017, no pet.) (quoting *Gen. Motors Corp. v. Burry*, 203 S.W.3d 514, 552 (Tex. App.—Fort Worth 2006, pet. denied)).

1448. *Worsham Steel Co. v. Arias*, 831 S.W.2d 81, 85 (Tex. App.—El Paso 1992, no writ) (citing *Brown v. Robinson*, 747 S.W.2d 24 (Tex. App.—El Paso 1988, no writ), *overruled in part by* *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996)); *accord* *Martin v. Tex. Dental Plans, Inc.*, 948 S.W.2d 799, 805–06 (Tex. App.—San Antonio 1997, writ denied) (“We must note the subjective nature of a mental anguish question and the wide discretion given to juries in determining such questions.” (citing *Arias*, 831 S.W.2d at 85)).

1449. *Saenz*, 925 S.W.2d at 614 (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) (“Mental anguish awards will pass a legal sufficiency review if evidence is presented describing ‘the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiffs’ daily routine.’” (citing *Parkway*, 901 S.W.2d at 444)).

1450. *Arias*, 831 S.W.2d at 85 n.2.

(legal and factual)¹⁴⁵¹ or based upon the factual sufficiency of the evidence where the excessiveness of the damages is challenged.¹⁴⁵²

2. Zero Damages

“In reviewing an argument that the jury’s failure to make a finding of damages [or an award of zero damages] is ‘against the great weight and preponderance’ of the evidence,” the appellate court “must consider and weigh all of the evidence, keeping in mind that the jurors are the sole judges of the credibility of witnesses and the weight to be given their testimony, and may choose to believe one witness and disbelieve another.”¹⁴⁵³ Texas courts “have uniformly recognized a distinction between cases in which the plaintiff has presented uncontroverted ‘objective’ evidence of an injury caused by a defendant’s negligence, and cases in which the plaintiff’s injuries are more ‘subjective’ in nature.”¹⁴⁵⁴ For example, when “the plaintiff has objective symptoms of injury . . . and there is [evidence] . . . which the defendant could offer to refute such fact[s], [the] plaintiff’s evidence cannot be disregarded by the jury when the defendant fails to

1451. See *Bunton v. Bentley (Bentley II)*, 153 S.W.3d 50, 52–53 (Tex. 2004) (per curiam) (determining 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 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). Powers & Ratliff, *supra* note 138, at 567. “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.*

1452. *Bentley II*, 153 S.W.3d at 53; *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1998); *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 847–48 (Tex. 1990); *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986) (per curiam).

1453. *Rumzek v. Lucchesi*, 543 S.W.3d 327, 332 (Tex. App.—El Paso 2017, pet. denied) (citing *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003); *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005); *McGuffin v. Terrell*, 732 S.W.2d 425, 428 (Tex. App.—Fort Worth 1987, no writ); *Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 567 (Tex. 2000)).

1454. *Id.* (citing *In re State Farm Mut. Auto. Ins. Co.*, 483 S.W.3d 249, 263 (Tex. App.—Fort Worth 2016, orig. proceeding); *Hammett v. Zimmerman*, 804 S.W.2d 663, 665–66 (Tex. App.—Fort Worth 1991, no writ); *Thompson v. Stolar*, 458 S.W.3d 46, 62 (Tex. App.—El Paso 2014, no pet.); *Lanier v. E. Found., Inc.*, 401 S.W.3d 445, 456 (Tex. App.—Dallas 2013, no pet.); *Horton v. Denny’s Inc.*, 128 S.W.3d 256, 259–62 (Tex. App.—Tyler 2003, pet. denied); *Hylar v. Boytor*, 823 S.W.2d 425, 427–28 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Blizzard v. Nationwide Mut. Fire Ins. Co.*, 756 S.W.2d 801, 805 (Tex. App.—Dallas 1988, no writ); *Davis v. Davison*, 905 S.W.2d 789, 792 (Tex. App.—Beaumont 1995, no writ)).

refute it.”¹⁴⁵⁵ Accordingly, “[w]hen there is uncontroverted, objective evidence of an injury and the causation of the injury[,] . . . appellate courts are more likely to overturn jury findings of [zero] damages for past pain and mental anguish.”¹⁴⁵⁶

Alternatively, if the plaintiff's complaints are subjective in nature and, therefore, incapable of direct proof, the jury may award zero damages. As the Fort Worth Court of Appeals has recognized, where the evidence of pain is conflicting, scant, or more subjective than objective, appellate courts are generally more reluctant to determine a jury finding of [zero] damages is contrary to the great weight and preponderance of the evidence.¹⁴⁵⁷

The Fort Worth Court of Appeals has provided examples of cases in which courts have held that a plaintiff suffered an “objective” injury, which would mandate an award of damages; these examples include fractures, organic brain syndrome and nerve damage, severe electrical burns, cuts, and “lacerations, tendinitis, and torn muscles requiring surgery.” In contrast, courts have generally held that soft tissue injuries are more subjective than objective in nature, and that in such cases, a jury has the discretion to enter a zero damages award.¹⁴⁵⁸

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.”¹⁴⁵⁹

1455. *Id.* (first quoting *Hammitt*, 804 S.W.2d at 666; then citing *Lopez v. Salazar*, 878 S.W.2d 662, 663 (Tex. App.—Corpus Christi 1994, no writ); *Russell v. Hankerson*, 771 S.W.2d 650, 652 (Tex. App.—Corpus Christi 1989, writ denied); *Lovely v. Berry*, 269 S.W.2d 795, 796–97 (Tex. 1954)).

1456. *Id.* at 332–33 (first alteration in original) (quoting *In re State Farm*, 483 S.W.3d at 263; then citing *Blizgard*, 756 S.W.2d at 805).

1457. *Id.* at 333 (citations omitted) (first citing *Stolar*, 458 S.W.3d at 62; *Monroe v. Grider*, 884 S.W.2d 811, 820 (Tex. App.—Dallas 1994, writ denied); then citing *In re State Farm*, 483 S.W.3d at 264; *McGuffin*, 732 S.W.2d at 427; *Blizgard*, 756 S.W.2d at 805).

1458. *Id.* (citations omitted) (footnote omitted) (first quoting *Hammitt*, 804 S.W.2d at 665–66; then citing *Sanchez v. King*, 932 S.W.2d 177, 180–83 (Tex. App.—El Paso 1996, no writ); *Gutierrez v. Martinez*, No. 01-07-00363-CV, 2008 WL 5392023, at *6 (Tex. App.—Houston [1st Dist.] Dec. 19, 2008, no pet.) (mem. op.); *Lamb v. Franklin*, 976 S.W.2d 339, 341–42 (Tex. App.—Amarillo 1998, no pet.); *Crow v. Burnett*, 951 S.W.2d 894, 898–99 (Tex. App.—Waco 1997, pet. denied); *Davison*, 905 S.W.2d at 793; *Hylar*, 823 S.W.2d at 427–28).

1459. *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) (per curiam) (detailing a “proper factual-sufficiency review”).

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.¹⁴⁶⁰ Punitive damages are levied against a defendant “to punish the defendant for outrageous, malicious, or otherwise morally culpable conduct.”¹⁴⁶¹ The legal justification for punitive damages is similar to the justification for criminal punishment. “[L]ike criminal punishment, punitive damages require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment.¹⁴⁶² Although punitive damages are [imposed to serve] the public purpose[s] of punishment and deterrence, the proceeds become a private windfall.”¹⁴⁶³ However, “criminal fines are paid to a governmental entity and [are] used for [the] public[’s] benefit.”¹⁴⁶⁴ 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.¹⁴⁶⁵

Punitive damages are reviewed for legal and factual sufficiency of the evidence and for excessiveness.¹⁴⁶⁶

1460. *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), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b), *as recognized in* *U-Haul Int’l, Inc. v. Waldrip*, 380 S.W.3d 118, 140 (Tex. 2012).

1461. *Moriel*, 879 S.W.2d at 16 (citing *S. Cotton Press & Mfg. Co. v. Bradley*, 52 Tex. 587, 600–601 (1880); TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(3)); *accord Bradley*, 52 Tex. at 599–01 (noting the purpose of punitive damages is to punish the offender); *Celanese Ltd. v. Chem. Waste Mgmt., Inc.*, 75 S.W.3d 593, 600 (Tex. App.—Texarkana 2002, pet. denied) (restating the purpose of punitive damages); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (defining exemplary damages as “any damages awarded as a penalty or by way of punishment but not for compensatory purposes”).

1462. *Moriel*, 879 S.W.2d at 16–17; *accord* *Bunton v. Bentley (Bentley II)*, 153 S.W.3d 50, 53 (Tex. 2004) (per curiam) (noting exemplary damages should be “reasonably proportionate” to the “actual harm suffered”); *Burleson State Bank v. Plunkett*, 27 S.W.3d 605, 620 (Tex. App.—Waco 2000, pet. denied) (detailing the procedure for assessing exemplary damages).

1463. *Moriel*, 879 S.W.2d at 17 (footnote omitted) (citing 26 U.S.C. §§ 104, 104(a)(2) (2012); *Commissioner v. Miller*, 914 F.2d 586, 591 (4th Cir. 1990)); *accord* *Hall v. Diamond Shamrock Ref. Co.*, 82 S.W.3d 5, 22 (Tex. App.—San Antonio 2001) (explaining proceeds from these damages are a windfall, not a right), *rev’d on other grounds*, 168 S.W.3d 164 (Tex. 2005).

1464. *Moriel*, 879 S.W.2d at 17.

1465. *Id.*

1466. *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 to complain of factual sufficiency or excessiveness issues on appeal, these points must be raised in a motion for new trial). The United

Regarding the sufficiency of the evidence to support the punitive damages award, appellees [are] required to prove by clear and convincing evidence that the harm they suffered resulted from fraud, malice, or gross negligence. In reviewing the evidence for legal sufficiency under the clear and convincing standard, we must determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction that its finding was true. We must review all the evidence in the light most favorable to the finding and judgment. We must also disregard all evidence a reasonable factfinder could have disbelieved, but we must consider undisputed evidence even if it does not support the finding.¹⁴⁶⁷

In a factual sufficiency review, the court of appeals must determine “whether, on the entire record, a factfinder could reasonably form a firm conviction or belief that the allegations in the petition were proven.”¹⁴⁶⁸

When reviewing an award of punitive damages, the reviewing court must consider a number of factors to determine the reasonableness of the award.¹⁴⁶⁹

[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

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.

1467. *Bright v. Addison*, 171 S.W.3d 588, 604 (Tex. App.—Dallas 2005, pet. denied) (citations omitted) (first citing TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a)(1)–(3); then citing *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 623–25, 627 (Tex. 2004); *Citizens Nat’l Bank v. Allen Rae Invs., Inc.*, 142 S.W.3d 459, 483 (Tex. App.—Fort Worth 2004, no pet.)).

1468. *Bright v. Addison*, 171 S.W.3d 588, 604 (Tex. App.—Dallas 2005, pet. denied) (citing *Citizens Nat’l Bank*, 142 S.W.3d at 483).

1469. *See 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 (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 of the wrongdoer, (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.” (citing *First Sec. Bank & Trust Co. v. Roach*, 493 S.W.2d 612, 619 (Tex. App.—Dallas 1973, writ ref’d n. r. e.); *Cain v. Fontana*, 423 S.W.2d 134, 139 (Tex. App.—San Antonio 1967, writ ref’d n. r. e.))).

difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.”¹⁴⁷⁰

The standard of review of the constitutionality of punitive damages award is *de novo*.¹⁴⁷¹ The three factors help ensure a reasonable relationship between punitive damages and actual damages.¹⁴⁷² 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.”¹⁴⁷³ There is no exact formula to measure punitive damages by actual damages.¹⁴⁷⁴ 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.¹⁴⁷⁵ In addition to the ratio of punitive to actual damages, the appellate court also considers: “(1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which such conduct

1470. *Bunton v. Bentley (Bentley II)*, 153 S.W.3d 50, 53 (Tex. 2004) (per curiam) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003)); accord *Horizon Health Corp. v. Acadia Healthcare Co., Inc.*, 520 S.W.3d 848, 873–74 (Tex. 2017) (quoting the factors set out in *Campbell*); see *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 *Campbell*).

1471. *Horizon*, 520 S.W.3d at 874; *Bentley II*, 153 S.W.3d at 54.

1472. *Bentley II*, 153 S.W.3d at 54.

1473. *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987); see *Moriele*, 879 S.W.2d at 28–29 (detailing the procedural safeguards Texas courts use in assessing punitive damage awards).

1474. See *Bentley II*, 153 S.W.3d at 54 (stating 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 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 courts “must make [the] determination [of punitive damages] on a case-by-case basis” (citing *Kraus*, 616 S.W.2d at 910)); *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 308–09 (stating 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) (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).

1475. See *Tatum*, 702 S.W.2d at 188 (recognizing 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).

offends a public sense of justice and propriety; and (6) the net worth of the defendant.”¹⁴⁷⁶

K. Attorney's Fees

1. Fees Based on Contract or Statutes Generally

Texas follows the American Rule for the award of attorney's fees, which permits the award of such fees if permitted by statute or contract.¹⁴⁷⁷ For instance, attorney's fees may not be recovered in tort cases without authorization from a statute or contract between the parties.¹⁴⁷⁸ Statutes authorizing attorney's fees may involve issues of reasonableness and necessity (suitable for a jury's factual determination), as well as equity and justice (suitable for a judge's discretion).¹⁴⁷⁹ As a result, the appeal of attorney's fees may combine the corresponding standards of review.¹⁴⁸⁰

In reviewing the reasonableness of an award of attorney's fees (which may include a legal assistant's time under certain conditions)¹⁴⁸¹ the reviewing court should consider:

1476. TEX. CIV. PRAC. & REM. CODE ANN. § 41.011(a)(1)–(6); see *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 28 (Tex. 1994), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b), *as recognized in* *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 140 (Tex. 2012) (discussing many factors have been set forth for evaluation); *Tatum*, 702 S.W.2d at 188 (listing several factors to consider); *Kraus*, 616 S.W.2d at 910 (emphasizing what should be considered when determining reasonableness of punitive damages). In *TXO Production Corp. v. Alliance Resources Corp.*, 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).

1477. *1/2 Price Checks Cashed v. United Auto. Ins. Co.*, 344 S.W.3d 378, 382 (Tex. 2011); *accord* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (permitting the recovery of “reasonable attorney's fees”).

1478. *Knebel v. Capital Nat'l Bank in Austin*, 518 S.W.2d 795, 803–04 (Tex. 1974); see *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.” (citing *Huddleston v. Pace*, 790 S.W.2d 47, 49 (Tex. App.—San Antonio 1990, writ denied))).

1479. *Transcontinental Ins. Co. v. Crump*, 330 S.W.3d 211, 231 (Tex. 2010).

1480. *Id.*; see *Midland W. Bldg. L.L.C. v. First Serv. Air Conditioning Contractors, Inc.*, 300 S.W.3d 738, 739 (Tex. 2009) (per curiam) (stating jury's award of zero attorney's fees was improper because of evidence of party's attorney's fees and value thereof).

1481. 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 1958998, at *3 (N.D. Tex. Apr. 30, 2008) (“Under Texas law, compensation for a paralegal or legal assistant's work may be included in the award for attorneys' fees if the paralegal or legal assistant performed work that has traditionally been done by any attorney.” (citing *Gill*, 759 S.W.2d at 702)).

- (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.¹⁴⁸²

“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.”¹⁴⁸³ “A trial court may not grant . . . an unconditional award of appellate attorney’s fees”; rather,

1482. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) (citing TEX. DISCIPLINARY RULES PROF'L CONDUCT R. *1.04, *reprinted in* TEX. GOV'T CODE ANN., tit. *2, subtit. *G, app. *A (Tex. State Bar R. art. *X, § *9); *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 881 (Tex. 1990) (per curiam); *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 960–961 (Tex. 1996)); *Aquila Sw. Pipeline, Inc. v. Harmony Expl., Inc.*, 48 S.W.3d 225, 240–41 (Tex. App.—San Antonio 2001, pet. denied) (citing *Arthur*, 945 S.W.2d at 818); *accord* *Headington Oil Co., L.P. v. White*, 287 S.W.3d 204, 216 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (restating the factors set out in *Arthur*); *Acad. Corp. v. Interior Buildout & Turnkey Constr., Inc.* 21 S.W.3d 732, 741–42 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (noting the eight factors are not strict “elements of proof[,]” but “guidelines” to consider). 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 (2012). *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”).

1483. *Aquila Sw. Pipeline*, 48 S.W.3d at 241 (citing *City of Fort Worth v. Groves*, 746 S.W.2d 907, 918 (Tex. App.—Fort Worth 1988, no writ)); *accord* *Phillips v. Phillips*, 296 S.W.3d 656, 673 (Tex. App.—El Paso 2009, pet. denied) (reaffirming the proposition that judges may rely on their common knowledge as lawyers in reviewing attorney’s fees); *see* *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).

such an award must be conditioned upon the appellant's unsuccessful appeal.¹⁴⁸⁴

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.¹⁴⁸⁵ In *Stewart Title Guaranty Co. v. Sterling*,¹⁴⁸⁶ 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." 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.¹⁴⁸⁷

1484. *Pickett v. Keene*, 47 S.W.3d 67, 78 (Tex. App.—Corpus Christi 2001, pet. dismissed) (citing *Texas Farmers Ins. Co. v. Cameron*, 24 S.W.3d 386, 400 (Tex. App.—Dallas 2000, pet. denied); *Weynand v. Weynand*, 990 S.W.2d 843, 847 (Tex. App.—Dallas 1999, pet. denied)); accord *Cameron*, 24 S.W.3d at 400–01 ("An unconditional award of appellate attorneys' fees is improper." (citing *Humble Nat'l Bank v. DCV, Inc.*, 933 S.W.2d 224, 236 (Tex. App.—Houston [14th Dist.] 1996, writ denied))).

1485. 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." (citing *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 73 (Tex. 1997); *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991); *Matthews v. Candlewood Builders, Inc.*, 685 S.W.2d 649, 650 (Tex. 1985) (per curiam); *Int'l Sec. Life Ins. Co. v. Finck*, 496 S.W.2d 544, 547 (Tex. 1973)); *Aiello*, 941 S.W.2d at 73 (expressing 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." (citing *Wood v. Component Constr. Corp.*, 722 S.W.2d 439, 444–45 (Tex. App.—Fort Worth 1986, no writ), *overruled in part by Sterling*, 822 S.W.2d at 11; *Verette v. Travelers Indem. Co.*, 645 S.W.2d 562, 568 (Tex. App.—San Antonio 1982, writ refused n.r.e.), *overruled in part by Sterling*, 822 S.W.2d at 11; *Stone v. Lawyers Title Ins. Corp.*, 537 S.W.2d 55, 63–64 (Tex. App.—Corpus Christi 1976), *aff'd in part, rev'd in part*, 554 S.W.2d 183 (Tex. 1977))).

1486. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1 (Tex. 1991).

1487. *Id.* at 11–12 (citation omitted) (first quoting *Flint & Assocs. v. Intercontinental Pipe & Steel, Inc.*, 739 S.W.2d 622, 624–25 (Tex. App.—Dallas 1987, writ denied); then quoting *Gill Sav. Ass'n v. Chair King, Inc.*, 783 S.W.2d 674, 680 (Tex. App.—Houston [14th Dist.] 1989), *aff'd in part, modified in part*, 797 S.W.2d 31 (Tex. 1990) (per curiam)).

In *Tony Gullo Motors I, L.P. v. Chapa*,¹⁴⁸⁸ the Texas Supreme Court stated that this exception “has since threatened to swallow the [general] rule [of segregation]”¹⁴⁸⁹ 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.¹⁴⁹⁰

....

... [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.¹⁴⁹¹

“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.”¹⁴⁹²

2. Fees Under the Texas 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.¹⁴⁹³ “First, the court must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work[,]”¹⁴⁹⁴ and second “the court then multiplies the number of such hours by the applicable rate, the product of which is the base fee or lodestar.”¹⁴⁹⁵ The court then has the option to modify the base lodestar up or down or to apply a multiplier, “if

1488. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006).

1489. *Id.* at 311.

1490. *Id.* at 313.

1491. *Id.* at 313–14; *accord* *CA Partners v. Spears*, 274 S.W.3d 51, 81 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (“When discrete legal services advance both recoverable claims and unrecoverable claims, attorneys are not required to segregate fees to recover the total amount covering all claims.” (citing *Chapa*, 212 S.W.3d at 313)); *Gallagher Headquarters Ranch Dev., Ltd. v. City of San Antonio*, 269 S.W.3d 628, 641 (Tex. App.—San Antonio 2008) (reaffirming the principle stated in *Chapa*), *pet. abated*, 303 S.W.3d 700 (Tex. 2010).

1492. *Gallagher Headquarters*, 269 S.W.3d at 641 (citing *Chapa*, 212 S.W.3d at 314; *Hong Kong Dev., Inc. v. Nguyen*, 229 S.W.3d 415, 455 (Tex. App.—Houston [1st Dist.] 2007, no pet.)).

1493. TEX. LAB. CODE ANN. § 21.259(a).

1494. *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012) (citing *Dillard Dep’t Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 412 (Tex. App.—El Paso 2002, pet. denied)).

1495. *Id.* (citing *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 323–24 (5th Cir. 1995) (per curiam)).

relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case.”¹⁴⁹⁶ The relevant non-exclusive factors include:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, 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.¹⁴⁹⁷

The Texas class action rule “further provides that any adjustment to the base lodestar ‘must be in the range of 25% to 400% of the lodestar figure.’”¹⁴⁹⁸ The trial court’s award of attorney’s fees is reviewed for an abuse of discretion.¹⁴⁹⁹

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.¹⁵⁰⁰ 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

1496. *Id.* (citing *Gonzales*, 72 S.W.3d at 412).

1497. *Id.* at 761 (citing TEX. DISCIPLINARY RULES PROF’L CONDUCT R. *1.04, *reprinted in* TEX. GOV’T CODE ANN., tit. *2, subtit. *G, app. *A (Tex. State Bar R. art. *X, § *9; *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997)).

1498. *Id.* (quoting TEX. R. CIV. P. 42(i)(1)).

1499. *Id.*

1500. TEX. R. CIV. P. 173.2(a)(1); *Land Rover U.K., Ltd. v. Hinojosa*, 210 S.W.3d 604, 606–07 (Tex. 2006) (per curiam); *Brownsville-Valley Reg’l Med. Ctr., Inc. v. Gamez*, 894 S.W.2d 753, 755 (Tex. 1995).

pursuant to Rules 131 and 141.¹⁵⁰¹ As a general rule, ad litem fees are assessed against the losing party.¹⁵⁰² Generally, the same factors for determining the reasonableness of attorney's fees are used to determine the reasonableness of a guardian ad litem fee.¹⁵⁰³ The Texas Supreme Court has held “[a] reasonable hourly rate multiplied by the number of hours spent performing necessary services within the guardian ad litem’s role yields a reasonable fee.”¹⁵⁰⁴ However, “[w]hile necessary services within the proper, limited scope of the Rule 173 guardian ad litem’s role are compensable, including those legal services necessarily performed by a lawyer appointed as guardian ad litem, compensation cannot be awarded for legal or other services outside that role, even if they are performed.”¹⁵⁰⁵ Additionally, an “ad litem may not recover fees . . . after resolution of the conflict for which [the ad litem has been] . . . appointed[.]”¹⁵⁰⁶ In applying these considerations, the award of guardian ad litem attorney fees is a matter “within the sound discretion of the trial court.”¹⁵⁰⁷ 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.¹⁵⁰⁸ “When an ad

1501. 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).

1502. See *Roberts*, 111 S.W.3d at 124 (asserting 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, no writ) (assessing whether good cause exists for imposing guardian ad litem fees against the prevailing party).

1503. *Hinojosa*, 210 S.W.3d at 607; *Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793, 794 (Tex. 1987).

1504. *Hinojosa*, 210 S.W.3d at 608 (citing *Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex. 1999) (per curiam)).

1505. *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 580 (Tex. 2012) (citing TEX. R. CIV. P. 173(4); *id.* at 607).

1506. *Brownsville-Valley Reg’l Med. Ctr., Inc. v. Gamez*, 894 S.W.2d 753, 757 (Tex. 1995); see *Hinojosa*, 210 S.W.3d at 607 (stating “a guardian ad litem is required to participate in the case only to the extent necessary to protect the minor’s interest” and “[i]f a guardian ad litem performs work beyond the scope of this role, such work is non-compensable” (citing *Gamez*, 894 S.W.2d at 756–57)).

1507. *Gamez*, 894 S.W.2d at 756 (citing *Simon*, 739 S.W.2d at 794); accord *Garcia*, 363 S.W.3d at 578 (“The amount a guardian ad litem is awarded as compensation is within the trial court’s discretion and an award will not be set aside except for abuse of that discretion.” (citing *Hinojosa*, 210 S.W.3d at 607)); *Jocson v. Crabb*, 196 S.W.3d 302, 305 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (“Rule 173 authorizes the trial court to award an ad litem a reasonable fee for his services, and the determination of the amount of compensation awarded to an ad litem lies within the sound discretion of the trial court.” (citing *Simon*, 739 S.W.2d at 794)); see *Simon*, 739 S.W.2d at 794 (“The discretion of the trial court in setting an ad litem fee is not unbridled.”).

1508. *Roberts v. Williamson*, 111 S.W.3d 113, 124 (Tex. 2003).

litem's fee is unreasonable or excessive, [the appellate court] may fix the proper amount of the fee."¹⁵⁰⁹

M. *Court Costs*

Under Rule 131,¹⁵¹⁰ the successful party in a suit is entitled to recover from an adversary all costs incurred in the suit, except where otherwise provided.¹⁵¹¹ "Whether a party is the 'successful' party and entitled to costs is determined by the court, and the taxing or tabulation of costs is determined by the clerk."¹⁵¹² Taxing costs against a successful party generally contravenes Rule 131.¹⁵¹³ "A successful party is 'one who obtains a judgment of a competent court vindicating a claim of right, civil in nature.'"¹⁵¹⁴ 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."¹⁵¹⁵ Pursuant to Rule 141, the trial court may assess the costs, other than as provided by law or the rules, for good cause stated on the record.¹⁵¹⁶ Even when the trial court states good cause on the record, the

1509. *Hirczy v. Hirczy*, 838 S.W.2d 783, 787 (Tex. App.—Corpus Christi 1992, writ denied) (citing *Dawson v. Garcia*, 666 S.W.2d 254, 264 (Tex. App.—Dallas 1984, no writ)); see *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).

1510. TEX. R. CIV. P. 131.

1511. *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) (per curiam). But see *Bethune*, 53 S.W.3d at 381 (Baker, J., dissenting, joined by Hankinson & O'Neill, JJ.) (suggesting the majority implicitly overruled *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).

1512. *United Servs. Auto. Ass'n v. Hayes*, 507 S.W.3d 263, 277 (Tex. App.—Houston [1st Dist.] 2016, pet. granted, judgment vacated w.r.m.) (citing *Wood v. Wood*, 320 S.W.2d 807, 812 (Tex. 1959); *Madison v. Williamson*, 241 S.W.3d 145, 158 (Tex. App.—Houston [1st Dist.] 2007, pet. denied)).

1513. *Bethune*, 53 S.W.3d at 376; *Martinez*, 759 S.W.2d at 114; *Sparks v. Booth*, 232 S.W.3d 853, 872 (Tex. App.—Dallas 2007, no pet.); see *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." (citing TEX. R. CIV. P. 31)).

1514. *Crow v. Burnett*, 951 S.W.2d 894, 899 (Tex. App.—Waco 1997, pet. denied) (quoting *Lovato v. Ranger Ins. Co.*, 597 S.W.2d 34, 37 (Tex. App.—Amarillo 1980, writ re'fd n.r.e.)); see *Williamson v. Roberts*, 52 S.W.3d 354, 356 (Tex. App.—Texarkana 2001) (concluding a party does not have to prevail on every claim to be considered successful), *aff'd*, 111 S.W.3d 113 (Tex. 2003).

1515. *Bethune*, 53 S.W.3d at 378.

1516. TEX. R. CIV. P. 141; *Roberts*, 111 S.W.3d at 124; see *Bethune*, 53 S.W.3d at 376 (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 good cause may be stated in a written order or judgment, as well as in an oral hearing).

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.¹⁵¹⁷ “‘Good cause’ is a very elusive concept . . . determined on a case-by-case basis.”¹⁵¹⁸ 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.’”¹⁵¹⁹ 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.¹⁵²⁰ The trial court’s general notion of fairness, without more, does not constitute good cause.¹⁵²¹ 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.¹⁵²² The trial court’s determination of good cause and its assessment of court costs are reviewed for an abuse of discretion.¹⁵²³

1517. *Rogers v. Walmart Stores, Inc.*, 686 S.W.2d 599, 601 (Tex. 1985); accord *Williamson*, 52 S.W.3d at 356 (“‘Good cause is an elusive concept, and appellate courts must scrutinize the record to determine whether the trial court abused its discretion in charging fees to a successful party for good cause.’” (citing *Rogers*, 686 S.W.2d at 601)); see *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.”).

1518. *Rogers*, 686 S.W.2d at 601 (citing *Morrow v. Terrell*, 50 S.W. 734, 736 (Tex. App.—1899, writ reFd)) (holding 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 (reaffirming the elusiveness of “good cause”); *Williamson*, 52 S.W.3d at 356 (restating the proposition set out in *Rogers* and *Sparks*); see *Gleason v. Lawson*, 850 S.W.2d 714, 717 (Tex. App.—Corpus Christi 1993, no writ) (noting 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).

1519. *Bethune*, 53 S.W.3d at 377 (citing *Rogers*, 686 S.W.2d at 601; *Operation Rescue—Nat’l v. Planned Parenthood of Hous. and Se. Tex., Inc.*, 937 S.W.2d 60, 86–87 (Tex. App.—Houston [14th Dist.] 1996), *aff’d as modified*, 975 S.W.2d 546 (Tex. 1998); *Tex. Dep’t of Transp. v. Pirtle*, 977 S.W.2d 657, 658 (Tex. App.—Fort Worth 1998, pet. denied); *State v. Castle Hills Forest, Inc.*, 842 S.W.2d 370, 373 (Tex. App.—San Antonio 1992, writ denied)).

1520. *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).

1521. *Roberts*, 111 S.W.3d at 124; *Rankin*, 266 S.W.3d at 515.

1522. 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.” (citing *Marion v. Davis*, 106 S.W.3d 860, 868 (Tex. App.—Dallas 2003, pet. denied))); *Allen v. Crabtree*, 936 S.W.2d 6, 9 (Tex. App.—Texarkana 1996, no writ) (declaring 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).

1523. 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 of costs is an abuse of discretion).

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 occurs first.¹⁵²⁴ 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),¹⁵²⁵ thereby extending the trial court’s plenary jurisdiction and the appellate timetable.¹⁵²⁶ During this period, plenary power is “[f]ull, entire, complete, absolute, perfect, [and] unqualified.”¹⁵²⁷ 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.¹⁵²⁸ “A void judgment . . .

1524. *Orion Enters., Inc. v. Pope*, 927 S.W.2d 654, 658 (Tex. App.—San Antonio 1996, orig. proceeding) (citing *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993) (orig. proceeding) (per curiam); *Bollard v. Berchermann*, 921 S.W.2d 861, 863–64 (Tex. App.—San Antonio 1996, orig. proceeding); TEX. R. CIV. P. 329b); see 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.” (citing *Carrillo*, 848 S.W.2d at 84)); *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 310 (Tex. 2000) (stating a trial court possesses jurisdiction and plenary power to change its ruling for thirty days after a final judgment is signed); *Carrillo*, 848 S.W.2d at 84 (discussing how Rule 329b(d) allows a trial court thirty days to vacate, modify, correct, or reform its judgment).

1525. TEX. R. CIV. P. 329b(g).

1526. See *Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 562–63 (Tex. 2005) (noting 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 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).

1527. *Pope*, 927 S.W.2d at 658 (quoting *Mesa Agro v. R.C. Dove & Sons*, 584 S.W.2d 506, 508 (Tex. App.—El Paso 1979, writ ref’d n.r.e.)); accord *Callaway v. Martin*, No. 02-16-00181-CV, 2017 WL 2290160, at *3 n.3 (Tex. App.—Fort Worth May 25, 2017, no pet.) (mem. op.) (emphasizing the unqualified nature of the trial court’s plenary power); *Zarate v. Sun Operating Ltd., Inc.*, 40 S.W.3d 617, 619–20 (Tex. App.—San Antonio 2001, pet. denied) (outlining the scope of the trial court’s plenary power).

1528. 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) (per curiam) (concluding the trial court had no jurisdiction or plenary power to consider a motion to unseal after judgment became final); *Commander v. Bryan*, 123 S.W.2d 1008, 1015 (Tex. App.—Fort Worth 1938, no writ) (“A void judgment has been termed mere waste paper, an absolute nullity; and all acts

‘is good nowhere and bad everywhere.’”¹⁵²⁹ Whether a trial court properly exercised its plenary power is a question of law reviewed de novo by the reviewing court.¹⁵³⁰

O. *Supersedeas Bond*

Generally, if a party loses at the trial court, a writ of supersedeas will stay execution of the judgment pending appeal¹⁵³¹ and guarantee the appellee the benefits of the judgment if affirmed.¹⁵³² To obtain a writ of supersedeas, a party generally files with the clerk a “good and sufficient” supersedeas bond or deposit.¹⁵³³ Importantly, the amount of actual damages that must be superseded may be reduced under the Texas Civil Practice and Remedies Code¹⁵³⁴ and implies that punitive damages no

performed under it are also nullities. Again, it has been said to be in law no judgment at all, having no force or effect, conferring no rights, and binding nobody. ‘It is good nowhere and bad everywhere,’ and neither lapse of time nor judicial action can impart validity. It is not susceptible of ratification or confirmation, and its invalidity may not be waived.” (quoting 25 TEX. JUR. § 254 (1935)).

1529. *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. App.—Tyler 1967, no writ)).

1530. *See St. Joseph Hosp. v. Wolff*, 999 S.W.2d 579, 586 (Tex. App.—Austin 1999) (stating 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).

1531. *See Cudd Pressure Control, Inc. v. Sonat Expl. 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)).

1532. *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. App.—San Antonio 1979, no writ) (per curiam) (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).

1533. 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) (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. App.—Dallas 1979, orig. proceeding) (explaining when an exemption exists, “judgment is superseded as a matter of law upon the filing of notice of appeal” (citing *City of West University Place v. Martin*, 123 S.W.2d 638, 638 (Tex. 1939))).

1534. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b)(1)–(2) (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).

longer must be suspended.¹⁵³⁵ In cases where the judgment is for 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.¹⁵³⁶

The numerous rules for posting an appropriate supersedeas bond depend upon the type of judgment and are beyond the scope of this Article.¹⁵³⁷ 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.¹⁵³⁸

1535. *See id.* § 52.006(a)(1)–(3) (mandating a secured amount in the sum of compensatory damages, interest, and costs awarded, but making no mention of punitive damages).

1536. *See* TEX. R. APP. P. 24.2(a)(3) (ordering 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) (per curiam) (holding 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, 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) (citing *Hill v. Fourteenth Court of Appeals*, 695 S.W.2d 554, 555 (Tex. 1985) (orig. proceeding) (per curiam)). 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.” (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding), *abrogated in part by In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 207 (Tex. 2009) (orig. proceeding))); *see also* *LMC Complete Auto., Inc. v. Burke*, 229 S.W.3d 469, 483 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (stating the amount of security set by the trial court is reviewed under an abuse of discretion standard).

1537. *See generally* 5 ROY W. McDONALD & ELAINE A. CARLSON, TEXAS CIVIL PRACTICE § 30:21 (2d ed. 2018) (discussing rules for posting supersedeas bonds).

1538. *See* *Man-Gas Transmission Co. v. Osborne Oil Co.*, 693 S.W.2d 576, 577 (Tex. App.—San Antonio 1985, no writ) (per curiam) (asserting 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

Texas Rule of Appellate Procedure 29.2 governs the suspension of interlocutory orders pending review by the appellate courts.¹⁵³⁹ 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 24.¹⁵⁴⁰ Denial of supersedeas may be reviewed by an appellate court for abuse of discretion.¹⁵⁴¹ 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.¹⁵⁴² However, “if the appellant’s rights would be adequately protected by supersedeas[,]” then the appellate court may not suspend the trial court’s order.¹⁵⁴³

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.¹⁵⁴⁴ 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.¹⁵⁴⁵ If the appellate court finds that the bond is insufficient upon review of the bond, the court “may” require an additional

required.” (citing *Miller v. Kennedy & Minshew, Profl Corp.*, 80 S.W.3d 161, 164 (Tex. App.—Fort Worth 2002, no pet.)).

1539. TEX. R. APP. P. 29.2.

1540. *Id.*; see TEX. R. APP. P. 24.2 (explaining the amount of security needed for various types of judgments).

1541. TEX. R. APP. P. 29.2.

1542. TEX. R. APP. P. 29.3.

1543. *Id.*

1544. See TEX. R. APP. P. 24.4(a)(1)–(5) (listing reasons an appellate court may review securities after a proper motion has been made); *TransAmerican Nat. Gas Corp. v. Finkelstein*, 911 S.W.2d 153, 155 (Tex. App.—San Antonio 1995, no writ) (concluding 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 dismissed w.o.j.) (determining 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) (per curiam) (holding upon motion by appellant, the appellate court had jurisdiction to determine the sufficiency of the bond).

1545. See TEX. R. APP. P. 24.4(a)(1) (stating 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. App.—San Antonio 1934, orig. proceeding) (declaring in the absence of an abuse of discretion, mandamus will be refused).

bond;¹⁵⁴⁶ likewise, upon a finding that the bond is excessive, the court “may” reduce the amount of the original bond.¹⁵⁴⁷

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.¹⁵⁴⁸ Any changes ordered by the trial court, however, must be made known to the court of appeals.¹⁵⁴⁹ The review of the security, as well as any changes to the security, also remain with the appellate court.¹⁵⁵⁰ 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.¹⁵⁵¹

P. Turnover Orders

“The Texas turnover statute provides judgment creditors with a procedural device to assist them in satisfying their judgment

1546. 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 another bond, deposit, or security be provided and approved by the trial court clerk.”).

1547. See *id.* (stating 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).

1548. 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); *Miller v. Kennedy & Minshew, Prof'l Corp.*, 80 S.W.3d 161, 164 (Tex. App.—Fort Worth 2002, no pet.) (“[T]he trial court, during its plenary power or after the expiration of its plenary power, possesses authority to review the sufficiency of the sureties on a supersedeas bond without regard to whether circumstances have changed since the district clerk approved the bond.” (citing TEX. R. APP. P. 24.3(a))); *Gullo-Haas Toyota, Inc. v. Davidson, Eagleson & Co.*, 832 S.W.2d 418, 419 (Tex. App.—Houston [1st Dist.] 1992, no writ) (per curiam) (stating 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).

1549. See TEX. R. APP. P. 24.3(b) (mandating the judgment debtor notify the appellate court of any modifications of the security made by the trial court).

1550. See *id.* 24.4(a), (d) (implying 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 an appellate court has jurisdiction to review a trial court’s orders or modifications of securities upon motion by a party).

1551. TEX. R. APP. P. 24.4(c), (d); see *Lowe v. Monsanto Co.*, 965 S.W.2d 741, 742 (Tex. App.—El Paso 1998, pet. denied) (per curiam) (vacating trial court’s order and remanding 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 post-judgment 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).

debts.”¹⁵⁵² Section 31.002 of the Texas Civil Practice and Remedies Code,¹⁵⁵³ commonly referred to as the “turnover” statute, is a procedural device that allows creditors to reach certain assets of debtors that are usually “difficult to attach or levy on by [normal] legal process.”¹⁵⁵⁴ 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.”¹⁵⁵⁵ 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.”¹⁵⁵⁶ If the trial court’s turnover order is the functional equivalent of a mandatory injunction, then it is a final and appealable order.¹⁵⁵⁷ If the trial court denies a motion for a turnover order, it is a final and appealable judgment.¹⁵⁵⁸ A trial court’s ruling on a motion for a turnover order is reviewed under an abuse of discretion standard.¹⁵⁵⁹

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[.]”¹⁵⁶⁰ A bill of review “is the proper method to attack a judgment when the trial court had jurisdiction to render judgment on the

1552. *Alexander Dubose Jefferson & Townsend LLP v. Chevron Phillips Chem. Co., L.P.*, 540 S.W.3d 577, 581 (Tex. 2018) (per curiam) (citing TEX. CIV. PRAC. & REM. CODE. § 31.002).

1553. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a).

1554. *Alexander Dubose*, 540 S.W.3d at 581 (quoting *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 224 (Tex. 1991)); *Buller*, 806 S.W.2d at 224; *In re C.H.C.*, 290 S.W.3d 929, 931 (Tex. App.—Dallas 2009, no pet.); see *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).

1555. *Burns*, 948 S.W.2d at 321 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a)).

1556. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(b)).

1557. *Alexander Dubose*, 540 S.W.3d at 582.

1558. 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).

1559. See *In re Smith*, 192 S.W.3d 564, 570 (Tex. 2006) (orig. proceeding) (per curiam) (reviewing trial court’s order under the abuse of discretion standard as mandated by *Buller*).

1560. TEX. R. CIV. P. 329b(f).

merits.”¹⁵⁶¹ 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.”¹⁵⁶² The purpose of the bill of review proceeding is to launch a direct attack, as opposed to a collateral attack,¹⁵⁶³ on the former judgment, and to “secure the entry of a correct judgment[.]”¹⁵⁶⁴ 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.”¹⁵⁶⁵

Using a bill of review to attack a judgment is a difficult task.¹⁵⁶⁶ 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.”¹⁵⁶⁷ It is an independent proceeding that is only used “to

1561. *Holloway v. Starnes*, 840 S.W.2d 14, 18 (Tex. App.—Dallas 1992, writ denied) (citing *Gonzalez v. Mann*, 584 S.W.2d 928, 930 (Tex. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.)).

1562. *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam) (citing *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979)); *accord* *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (describing a bill of review as an “equitable proceeding”).

1563. *See* *Cook v. Cameron*, 733 S.W.2d 137, 140 (Tex. 1987) (explaining 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) (citing *Tice v. City of Pasadena*, 767 S.W.2d 700, 703 (Tex. 1989) (orig. proceeding)).

1564. *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).

1565. *See* *Gold v. Gold*, 145 S.W.3d 212, 214 (Tex. 2004) (per curiam) (first citing *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998); *Stankiewicz v. Oca*, 991 S.W.2d 308, 312 (Tex. App.—Fort Worth 1999, no pet.); then citing *Gen. Elec. Co. v. Falcon Ridge Apartments, Joint Venture*, 811 S.W.2d 942, 944 n.2 (Tex. 1991)) (analyzing the purposes and benefits of the bill of review).

1566. W. Wendell Hall, *Appeal, Writ of Error or Bill of Review . . . Which Should I Choose?*, 1 APP. ADVOC. 3, 4 (1988).

1567. *Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 927 (Tex. 1999) (per curiam) (citing *Tice*, 767 S.W.2d at 702; *Petro-Chem. Transp., Inc. v. Carroll*, 514 S.W.2d 240, 243 (Tex. 1974)); *accord* *Chapman*, 118 S.W.3d at 751 (explaining when “a bill of review is proper”); *Carroll*, 514 S.W.2d at 243–44 (outlining a number of factors the defendant must show under a bill of review); *see* *Gold*, 145 S.W.3d at 214 (describing “legal remedies” as a motion to reinstate, motion for new trial, or direct appeal).

prevent manifest injustice[.]”¹⁵⁶⁸ which permits a trial court to “set aside a judgment that is no longer appealable or subject to a motion for new trial[.]”¹⁵⁶⁹ 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.¹⁵⁷⁰ “Although it is an equitable proceeding, the [mere] fact that an injustice [may have] occurred is not sufficient [grounds] to justify relief by bill of review.”¹⁵⁷¹ “If legal remedies were available but ignored, relief by equitable bill of review is unavailable.”¹⁵⁷² 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.¹⁵⁷³ 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

1568. *French v. Brown*, 424 S.W.2d 893, 895 (Tex. 1967); see *Herrera*, 11 S.W.3d at 927–28 (“Although it is an equitable proceeding, the fact that an injustice has occurred is not sufficient to justify relief by bill of review.” (citing *Alexander v. Hagedorn*, 226 S.W.2d 996, 998 (Tex. 1950))).

1569. *Transworld Fin. Servs. Corp. v. Briscoe*, 722 S.W.2d 407, 407 (Tex. 1987) (citing *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979)); see *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 866 (Tex. 2010) (noting a trial court may set aside a judgment by bill of review).

1570. E.g., *Baker*, 582 S.W.2d at 406–07 (identifying the requirements of “sufficient cause” to allow for a bill of review).

1571. *Herrera*, 11 S.W.3d at 927 (citing *Hagedorn*, 226 S.W.2d at 998); accord *Chapman*, 118 S.W.3d at 751 (“The grounds upon which a bill of review can be obtained are narrow because the procedure conflicts with the fundamental policy that judgments must become final at some point.” (citing *Hagedorn*, 226 S.W.2d at 998)); *Crouch v. McGaw*, 138 S.W.2d 94, 96 (Tex. 1940) (orig. proceeding) (noting a successful bill of review requires “more than [an] injustice” being shown).

1572. *Herrera*, 11 S.W.3d at 927 (citing *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998)); accord *Tice*, 767 S.W.2d at 702 (noting a party must have “exercised due diligence” in availing “himself of all adequate legal remedies” prior to pursuing a bill review); *Cannon v. ICO Tubular Servs., Inc.*, 905 S.W.2d 380, 384 (Tex. App.—Houston [1st Dist.] 1995, no writ) (reiterating when a bill of review would not be available to a party), *abrogated in part by Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 313–14 (Tex. 2000)). 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.*

1573. See *Rizk v. Mayad*, 603 S.W.2d 773, 775–76 (Tex. 1980) (stating 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 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 the remedy of a bill of review is only available after a final judgment).

for failure to exhaust adequate legal remedies.¹⁵⁷⁴ 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.¹⁵⁷⁵ 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.¹⁵⁷⁶

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”).¹⁵⁷⁷ The petition must be brought in the same court that rendered the prior judgment.¹⁵⁷⁸ 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.¹⁵⁷⁹ “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.”¹⁵⁸⁰ 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.¹⁵⁸¹ The supreme court has “directed that the petitioner be required to present prima facie proof of a meritorious defense as a pretrial

1574. *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) (determining “[r]espondent permitted the judgment to become final by his failure” to appeal the judgment and “[n]o reason [was] advanced” for his failure to do so, thus, “relief by bill of review” was unavailable).

1575. *Herrera*, 11 S.W.3d at 928.

1576. *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.), *overruled in part by Glassman v. Goodfriend*, 347 S.W.3d 772, 782 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (en banc).

1577. *Ross v. Nat’l Ctr. for the Emp’t of the Disabled*, 197 S.W.3d 795, 798 (Tex. 2006) (per curiam) (citing *Caldwell v. Barnes*, 154 S.W.3d 93, 98 (Tex. 2004) (per curiam)).

1578. *Pursley v. Ussery*, 937 S.W.2d 566, 568 (Tex. App.—San Antonio 1996, no writ).

1579. *Ross*, 197 S.W.3d at 797 (citing *Baker v. Goldsmith*, 582 S.W.2d 404, 407 (Tex. 1979); *Sedgwick v. Kirby Lumber Co.*, 107 S.W.2d 358, 359 (Tex. 1937)).

1580. *State v. 1985 Chevrolet Pickup Truck*, 778 S.W.2d 463, 464 (Tex. 1989) (per curiam) (citing *Baker*, 582 S.W.2d at 464). 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*, 582 S.W.2d at 408–09.

1581. *Baker*, 582 S.W.2d at 408–09.

matter” to “assure that valuable court time is not wasted by conducting a spurious ‘full-blown’ [trial on] the merits[.]”¹⁵⁸² A trial of the issues is required if a prima facie meritorious defense has been shown.¹⁵⁸³ “However, if the trial court determines that a prima facie defense [has] not [been] made out, it may dismiss the case.”¹⁵⁸⁴ The petitioner “must open and assume the burden of” proof on this issue.¹⁵⁸⁵

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.”¹⁵⁸⁶ “In relation to attacks on final judgments, fraud [may be] classified as either extrinsic or intrinsic”;¹⁵⁸⁷ “[o]nly extrinsic fraud will support [relief by] bill of review.”¹⁵⁸⁸ “Extrinsic fraud . . . denies a losing party the opportunity to fully litigate at trial all the rights or defenses that could have been asserted.”¹⁵⁸⁹ Generally, the fraud involves wrongful conduct “outside of the adversarial proceedings[,] . . . collateral to the matter tried[,] and” something not “actually or potentially in issue.”¹⁵⁹⁰ “[A]llegations of fraud or negligence on the part of a party’s attorney[s] [will

1582. *Beck v. Beck*, 771 S.W.2d 141, 142 (Tex. 1989) (citing *Baker*, 582 S.W.2d at 408–09).

1583. *Id.*

1584. *Id.*

1585. *Baker*, 582 S.W.2d at 409; *see id.* (noting the relevant inquiry is whether petitioner presented evidence of a meritorious defense).

1586. *Baker*, 582 S.W.2d at 409 (citing *McEwen v. Harrison*, 345 S.W.2d 706, 710 (Tex. 1961), *overruled in part by* *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 273 (Tex. 2012)).

1587. *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) (explaining in a bill of review, fraud is characterized as “either extrinsic or intrinsic”); *see* *Browning v. Prostok*, 165 S.W.3d 336, 347–48 (Tex. 2005) (setting out reasons for distinguishing between intrinsic and extrinsic fraud).

1588. *Tice v. City of Pasadena*, 767 S.W.2d 700, 702 (Tex. 1989) (orig. proceeding); *accord* *Montgomery*, 669 S.W.2d at 312 (noting only extrinsic fraud will entitle a party to bill of review relief). 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 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).

1589. *Browning*, 165 S.W.3d at 347 (citing *Montgomery*, 669 S.W.2d at 312); *accord* *Chapman*, 118 S.W.3d at 752 (defining extrinsic fraud).

1590. *Browning*, 165 S.W.3d at 347 (first citing *Alexander v. Hagedorn*, 226 S.W.2d 996, 1002 (Tex. 1950); then citing *Montgomery*, 669 S.W.2d at 312); *accord* *Hagedorn*, 226 S.W.2d at 1002 (“[E]xtrinsic fraud is wrongful conduct of the successful party practiced outside of an adversary trial and which is practiced directly and affirmatively upon the defeated party . . .”).

not] . . . support a bill of review.”¹⁵⁹¹ 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,¹⁵⁹² such as “fraudulent instruments, perjured testimony, or any matter which was actually presented to and considered by the trial court in rendering judgment.”¹⁵⁹³

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.”¹⁵⁹⁴ A meritorious defense is not required if the service of the petition was invalid,¹⁵⁹⁵ 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.¹⁵⁹⁶ “[S]uch a requirement, in the absence of notice, violates [the] [D]ue [P]rocess” clause of the Fourteenth Amendment to the United States Constitution.¹⁵⁹⁷

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.¹⁵⁹⁸ And if the bill of

1591. *Chapman*, 118 S.W.3d at 752 (citing *Transworld Fin. Servs. Corp. v. Briscoe*, 722 S.W.2d 407, 408 (Tex. 1987); *Gracey v. West*, 422 S.W.2d 913, 918–19 (Tex. 1968)).

1592. *Browning*, 165 S.W.3d at 347–48 (quoting *Tice*, 767 S.W.2d at 702); *accord Chapman*, 118 S.W.3d at 752 (defining intrinsic fraud).

1593. *Browning*, 165 S.W.3d at 348 (citing *Tice*, 767 S.W.2d at 702; *Montgomery*, 669 S.W.2d at 313); *accord Chapman*, 118 S.W.3d at 752 (providing examples of intrinsic fraud).

1594. *Caldwell v. Barnes*, 154 S.W.3d 93, 97–98 (Tex. 2004) (per curiam) (citing *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998); *Tex. Indus., Inc. v. Sanchez*, 525 S.W.2d 870, 871 (Tex. 1975) (per curiam)); *accord Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998) (providing an exception to the bill of review requirements).

1595. *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.” *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam) (citing *Ward v. Nava*, 488 S.W.2d 736, 738 (Tex. 1972); *Sanders v. Harder*, 227 S.W.2d 206, 209 (Tex. 1950); *Gatlin v. Dibrell*, 11 S.W. 908, 909 (Tex. 1889); *Pierce-Fordyce Oil Ass’n v. Staley*, 190 S.W. 814, 815 (Tex. App.—Amarillo 1916, no writ)).

1596. *Caldwell*, 154 S.W.3d at 96; *Caldwell*, 975 S.W.2d at 537; *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988) (per curiam); *Bronze & Beautiful, Inc. v. Mahone*, 750 S.W.2d 28, 29–30 (Tex. App.—Texarkana 1988, no writ).

1597. *Lopez*, 757 S.W.2d at 723; *see Richmond Mfg. Co. v. Fluit*, 754 S.W.2d 359, 360 (Tex. App.—San Antonio 1988, no writ) (holding 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*).

1598. *See State v. 1985 Chevrolet Pickup Truck*, 778 S.W.2d 463, 465 (Tex. 1989) (per curiam) (affirming a trial on a bill of review necessarily includes a determination of the original cause of action).

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”¹⁵⁹⁹ 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.¹⁶⁰⁰ The denial of a bill of review is reviewed for abuse of discretion.¹⁶⁰¹ 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.”¹⁶⁰² There was a split in authority as to whether an interlocutory grant of a bill of review itself is reviewable for abuse of discretion by mandamus¹⁶⁰³ or whether the proper remedy is “appeal from the entire reinstated cause, when that judgment becomes appealable.”¹⁶⁰⁴ “In reviewing the grant or 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.”¹⁶⁰⁵

1599. *In re J.B.A.*, 127 S.W.3d 850, 851 (Tex. App.—Fort Worth 2004, no pet.) (citing *Tex. Emp’rs Ins. Ass’n v. Arnold*, 88 S.W.2d 473, 474 (Tex. 1935); *Shahbaz v. Feizy Import & Export Co.*, 827 S.W.2d 63, 64 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Crabtree v. Crabtree*, 627 S.W.2d 486, 487 (Tex. App.—Corpus Christi 1981, no writ)).

1600. *See In re L.N.M.*, 182 S.W.3d 470, 474 (Tex. App.—Dallas 2006, no pet.) (holding appellate court jurisdiction with respect to the appeal of the denial of a bill of review seeking to set aside termination order is to be determined under general rules of appellate procedure).

1601. *Nguyen v. Intertex, Inc.*, 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.), *overruled in part by* *Glassman v. Goodfriend*, 347 S.W.3d 772, 782 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (en banc).

1602. *Jordan v. Jordan*, 907 S.W.2d 471, 472 (Tex. 1995) (per curiam) (citing *Tesoro Petroleum v. Smith*, 796 S.W.2d 705, 705 (Tex. 1990) (per curiam); *Warren v. Walter*, 414 S.W.2d 423, 423 (Tex. 1967) (per curiam)).

1603. *See In re Nat’l Unity Ins. Co.*, 963 S.W.2d 876, 877 (Tex. App.—San Antonio 1998, orig. proceeding) (finding “[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 (citing *Thursby v. Stovall*, 647 S.W.2d 953, 954 (Tex. 1983) (orig. proceeding) (per curiam))); *Schnitzius v. Koons*, 813 S.W.2d 213, 218 (Tex. App.—Dallas 1991, orig. proceeding) (asserting mandamus is available if a trial court improperly grants a petition for bill of review).

1604. *Compare In re Estrada*, 492 S.W.3d 42, 48–49 (Tex. App.—Corpus Christi 2016, orig. proceeding) (“[M]andamus may be available to review an order granting a bill of review.”), *with* *Tex. Mexican Ry. Co. v. Hunter*, 726 S.W.2d 616, 618 (Tex. App.—Corpus Christi 1987, orig. proceeding) (asserting mandamus was not a proper remedy), *abrogated in part by In re Estrada*, 492 S.W.3d at 48–49.

1605. *Nguyen*, 93 S.W.3d at 293 (citing *Interaction, Inc./State v. State/Interaction, Inc.*, 17 S.W.3d 775, 778 (Tex. App.—Austin 2000, pet. denied)); *accord* *Ramsey v. Davis*, 261 S.W.3d 811,

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.¹⁶⁰⁶ 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.¹⁶⁰⁷ 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.¹⁶⁰⁸ This precludes the reviewing court from finding reversible error¹⁶⁰⁹ because "[a] reviewing court must examine the entire record . . . to determine whether an error was reasonably calculated to cause[,] and probably did cause[,] the rendition of an improper judgment."¹⁶¹⁰ 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.¹⁶¹¹

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

815 (Tex. App.—Dallas 2008, pet. denied) (noting the granting or denying of a bill of review is reviewed for an abuse of discretion).

1606. See *W. Credit Co. v. Olshan Enters., 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).

1607. *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).

1608. *Enter. Leasing Co. of Hous. v. Barrios*, 156 S.W.3d 547, 549–50 (Tex. 2004) (per curiam); *Guthrie v. Nat'l Homes Corp.*, 394 S.W.2d 494, 495 (Tex. 1965).

1609. See TEX. R. APP. P. 44.1(a)(1)–(2) (stating 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").

1610. *Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990) (per curiam) (citing *Gomez Leon v. State*, 426 S.W.2d 562, 565 (Tex. 1968)).

1611. *Id.*

judgments, and fundamental error.¹⁶¹² The reviewing court cannot review the legal or factual sufficiency of the evidence in the absence of a complete record.¹⁶¹³ When the appellant, through no fault of his own, is unable to obtain a reporter's record, the appellate court may reverse the judgment.¹⁶¹⁴

There is an exception to the general rule requiring a complete reporter's record on appeal.¹⁶¹⁵ 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.¹⁶¹⁶ When an appellant complies with this rule, including setting forth the statement of issues to be presented on appeal,¹⁶¹⁷ a presumption on appeal exists that nothing omitted from the record is relevant to any of the specified points or to the disposition of the case on appeal.¹⁶¹⁸ 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.¹⁶¹⁹

B. *Agreed Factual Statement*

A case may be submitted to the trial court upon an agreed stipulation of facts.¹⁶²⁰ This procedure is similar to a special verdict and constitutes a

1612. *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 *Bexar Cty. Criminal Dist. Attorney's Office v. Mayo*, 773 S.W.2d 642, 643 (Tex. App.—San Antonio 1989, no writ) (declaring conclusions of law will not bind the appellate court if erroneous).

1613. *Englander Co. v. Kennedy*, 428 S.W.2d 806, 807 (Tex. 1968) (per curiam); *Andrews v. Sullivan*, 76 S.W.3d 702, 705 (Tex. App.—Corpus Christi 2002, no pet.).

1614. 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).

1615. 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).

1616. *Id.*

1617. *Id.*; *Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 377 (Tex. 2001); *Gardner v. Baker & Botts*, 6 S.W.3d 295, 297 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). See generally *id.* at 296 n.1 (comparing current Texas Rule of Appellate Procedure 34.6(c)(1) with its precursor, Texas Rule of Appellate Procedure 53(d), which according to the reviewing court, “contains . . . identical language” regarding requests for a partial reporter's record).

1618. *Bethune*, 53 S.W.3d at 377; *Producer's Constr. Co. v. Muegge*, 669 S.W.2d 717, 718 (Tex. 1984) (per curiam).

1619. *Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990) (per curiam); *Sandoval v. Comm'n for Lawyer Discipline*, 25 S.W.3d 720, 722 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Kwik Wash Laundries, Inc. v. McIntyre*, 840 S.W.2d 739, 742 (Tex. App.—Austin 1992, no writ).

1620. TEX. R. CIV. P. 263.

request for judgment in accordance with applicable law.¹⁶²¹ “[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.”¹⁶²² Therefore, the sole issue on appeal is whether “the trial court correctly appl[ie]d the law to the admitted facts[.]”¹⁶²³

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).¹⁶²⁴

The notice of appeal must be filed within six months after the judgment or order is signed.¹⁶²⁵ A restricted appeal (formerly an appeal by writ of error)¹⁶²⁶ “is not an equitable proceeding[,] such as [a] bill of review[.]”¹⁶²⁷

1621. *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).

1622. *Sherman*, 945 S.W.2d at 228 (citing *State Bar of Tex. v. Faubion*, 821 S.W.2d 203, 205 (Tex. App.—Houston [14th Dist.] 1991, writ denied)).

1623. *Id.* (citing *Faubion*, 821 S.W.2d at 205); *Port Arthur Indep. Sch. Dist. v. Port Arthur Teachers Ass’n*, 990 S.W.2d 955, 957 (Tex. App.—Beaumont 1999, pet. denied) (per curiam) (“In a trial to the trial court under an agreed statement of facts . . . the only issue on appeal is whether the trial court correctly applied the law to the stipulated facts.” (citing *Stewart v. Hardie*, 978 S.W.2d 203, 206 (Tex. App.—Fort Worth 1998, pet. denied))).

1624. TEX. R. APP. P. 30.

1625. TEX. R. APP. P. 26.1(c).

1626. The cases interpreting appeals by writ of error apply to restricted appeals. *See* TEX. R. APP. P. 30 (“Restricted 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) (per curiam) (“[W]rit of error procedure has been replaced by the restricted appeal.” (citing TEX. R. APP. P. 30)). 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. 586 (Tex. 1986, amended 1997) (current version at TEX. R. APP. P. 53).

1627. *Texaco, Inc. v. Cent. Power & Light Co.*, 925 S.W.2d 586, 590 (Tex. 1996); *see supra* Part VII (discussing bill of review).

It is simply another method of appeal,¹⁶²⁸ and it “is filed directly in an appellate court.”¹⁶²⁹

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.¹⁶³⁰

“The six-month time limit is mandatory and jurisdictional.”¹⁶³¹ 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.¹⁶³² “[T]he question is whether the appellant has participated in ‘the decision-making event’” resulting in the complained of judgment.¹⁶³³ “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.”¹⁶³⁴

“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.”¹⁶³⁵ The “face of the record” means “the entire record of a case in court up to the point at which reference is made to

1628. *Texaco*, 925 S.W.2d at 590.

1629. *Fid. & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 573 (Tex. 2006) (per curiam) (citing TEX. R. APP. P. 30).

1630. *Alexander v. Lynda’s Boutique*, 134 S.W.3d 845, 848 (Tex. 2004) (citing TEX. R. APP. P. 26.1(c); *Quaestor Invs., Inc. v. State of Chiapas*, 997 S.W.2d 226, 227 (Tex. 1999) (per curiam)); see TEX. CIV. PRAC. & REM. CODE ANN. § 51.013 (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).

1631. *Quaestor*, 997 S.W.2d at 227 (citing *Linton v. Smith*, 154 S.W.2d 643, 645 (Tex. [Comm’n Op.] 1941)).

1632. See *Texaco*, 925 S.W.2d at 589 (“The nature and extent of participation . . . in any particular case is a matter of degree . . .”).

1633. *Id.*

1634. *Id.* at 590 (citing *Lawyers Lloyds of Tex. v. Webb*, 152 S.W.2d 1096, 1098 (Tex. 1941)).

1635. *Fid. & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 573 (Tex. 2006) (per curiam) (citing *Lynda’s Boutique*, 134 S.W.3d at 848); accord *Ginn v. Forrester*, 282 S.W.3d 430, 432–33 (Tex. 2009) (per curiam) (noting a party must show error on the face of the record in a restricted appeal); *Wachovia Bank of Del. v. Gilliam*, 215 S.W.3d 848, 849 (Tex. 2007) (per curiam) (“As the restricted appeal was filed within six months by a party that did not participate in the default hearing, the only question was whether error was apparent on the face of the record.” (citing TEX. R. APP. P. 30; *Lynda’s Boutique*, 134 S.W.3d at 848)).

it.”¹⁶³⁶ The reviewing court is not limited to a review of the clerk’s record (transcript).¹⁶³⁷ 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).¹⁶³⁸

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.”¹⁶³⁹ 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.”¹⁶⁴⁰ The supreme court has “clearly said that silence is not enough.”¹⁶⁴¹ For example, the rules do not impose upon the clerk an affirmative duty to record the mailing of the required notices.¹⁶⁴²

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.¹⁶⁴³ “Generally, the same standards of review and powers

1636. *Barnes v. Barnes*, 775 S.W.2d 430, 431 (Tex. App.—Houston [1st Dist.] 1989, no writ) (quoting *First Dallas Petroleum, Inc. v. Hawkins*, 727 S.W.2d 640, 643 (Tex. App.—Dallas 1987, no writ)).

1637. *Morales v. Dalworth Oil Co.*, 698 S.W.2d 772, 774 (Tex. App.—Fort Worth 1985, writ re’f’d n.r.e.).

1638. *Norman Comm’ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (per curiam); *DSC Fin. Corp. v. Moffitt*, 815 S.W.2d 551, 551 (Tex. 1991) (per curiam). Extrinsic evidence is not admissible to challenge a judgment on appeal. *Gen. Elec. Co. v. Falcon Ridge Apartments, Joint Venture*, 811 S.W.2d 942, 944 (Tex. 1991); see *García v. Arbor Green Owner’s Ass’n, Inc.*, 838 S.W.2d 800, 803 n.2 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (holding 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).

1639. *Jaramillo v. Liberty Mut. Fire Ins. Co.*, 694 S.W.2d 585, 587 (Tex. App.—Corpus Christi 1985, writ re’f’d n.r.e.) (citing *Tex. Emp’t Comm’n v. Bell Helicopter Int’l, Inc.*, 627 S.W.2d 524, 526 (Tex. App.—Fort Worth 1982, writ re’f’d n.r.e.); *Novak v. DeWied*, 574 S.W.2d 204, 207 (Tex. App.—San Antonio 1978, writ re’f’d n.r.e.)).

1640. *Id.*; see *Salazar v. Tower*, 683 S.W.2d 797, 799–800 (Tex. App.—Corpus Christi 1984, no writ) (holding 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).

1641. *Ginn v. Forrester*, 282 S.W.3d 430, 433 (Tex. 2009) (per curiam).

1642. *Id.*

1643. *Norman Comm’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.); see *Pace Sports, Inc. v. Davis Bros. Publ’g Co.*, 514 S.W.2d 247, 247 (Tex. 1974)

of disposition [that] govern ordinary direct appeals” also govern review of default judgments.¹⁶⁴⁴ 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,¹⁶⁴⁵ and “[t]here are no presumptions in favor of valid issuance, service, and return of citation.”¹⁶⁴⁶

“No-answer and post-answer default judgments differ in the issues a plaintiff is required to prove.”¹⁶⁴⁷ 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.¹⁶⁴⁸ Thus, the plaintiff is only required to prove its claim for unliquidated damages.¹⁶⁴⁹ 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.¹⁶⁵⁰ 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.¹⁶⁵¹

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.¹⁶⁵² If a party files a timely objection to the assignment of the judge or justice, the assigned judge may not hear the case.¹⁶⁵³ The

(per curiam) (criticizing a court of appeals for suggesting that a restricted appeal requires a higher burden than a regular appeal).

1644. *Lakeside Leasing Corp. v. Kirkwood Atrium Office Park Phase 3*, 750 S.W.2d 847, 849 (Tex. App.—Houston [14th Dist.] 1988, no writ).

1645. *McKanna v. Edgar*, 388 S.W.2d 927, 929 (Tex. 1965); *Lakeside Leasing*, 750 S.W.2d at 849.

1646. *Fid. & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 573 (Tex. 2006) (per curiam) (alteration in original) (quoting *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam)); *acord Wachovia Bank of Del. v. Gilliam*, 215 S.W.3d 848, 850 (Tex. 2007) (per curiam) (asserting “the face of the record must reflect” valid service).

1647. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 930 (Tex. 2009) (per curiam).

1648. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992).

1649. *Id.*; see TEX. R. CIV. P. 243 (stating in an unliquidated damages cause of action, the court will render judgment after hearing evidence as to damages).

1650. *Lerma*, 288 S.W.3d at 930.

1651. *Id.*; see *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).

1652. TEX. GOV’T CODE ANN. § 75.551.

1653. *Id.* § 75.551(b).

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.”¹⁶⁵⁴ In addition, each party is only entitled to one objection for the case in the appellate court.¹⁶⁵⁵ 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.¹⁶⁵⁶

E. *Frivolous Appeals*

Because meritless litigation constitutes an unnecessary burden on parties to the litigation and diverts judicial resources from legitimate appeals,¹⁶⁵⁷ 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.¹⁶⁵⁸ Additionally, Rule 52.11 permits “just sanctions” for filing a frivolous original proceeding.¹⁶⁵⁹ 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.¹⁶⁶⁰

Texas Rules of Appellate Procedure 45 and 62 provide that if the supreme court or the courts of appeals determine that an appeal is “frivolous,”¹⁶⁶¹ the courts may award “just damages” to any prevailing party on their own

1654. *Id.* § 75.551(c).

1655. *Id.* § 75.551(b).

1656. *Id.* § 75.551(d).

1657. *Chapman v. Hootman*, 999 S.W.2d 118, 125 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

1658. *See 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) (quoting in full former Texas Rule of Appellate Procedure 84); *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).

1659. TEX. R. APP. P. 52.11; *see 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).

1660. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.01, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9); *see 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).

1661. *See generally 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); *Frivolous*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining “frivolous” as “[l]acking a legal basis or legal merit”); *Frivolous*, WEBSTER'S THIRD NEW INT'L DICTIONARY 913 (2002).

motion or the motion of any party.¹⁶⁶² The appellate courts are no longer limited to assessing damages against the offending party alone; the attorney may also be sanctioned.¹⁶⁶³ “[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.”¹⁶⁶⁴ The decision to grant sanctions is within the reviewing court’s discretion.¹⁶⁶⁵ 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.¹⁶⁶⁶

There are two competing concerns in awarding damages for frivolous appeals. First, the “right to an appeal is a sacred and valuable right.”¹⁶⁶⁷ As a result, frivolous appeal damages are to be assessed “with prudence, caution, and after careful deliberation.”¹⁶⁶⁸ As long as the argument had a reasonable basis in law, even if unconvincing, “and constituted an informed, good-faith challenge to the trial court[’s] judgment[,]” frivolous appeal

1662. 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, 513–14 (Tex. App.—Amarillo 1989, no writ); *see Ramirez v. Pecan Deluxe Candy Co.*, 839 S.W.2d 101, 108 (Tex. App.—Dallas 1992, writ denied) (recognizing the court must make two findings before assessing damages: that the appeal was brought “for delay *and* without sufficient cause” (emphasis added) (citing *Mid-Continent Cas. Co. v. Whatley*, 742 S.W.2d 475, 479 (Tex. App.—Dallas 1987, no writ))). 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.

1663. TEX. R. APP. P. 45, 62.

1664. *Smith v. Brown*, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (citing *Bradt v. West*, 892 S.W.2d 56, 78 (Tex. App.—Houston [1st Dist.] 1994, writ denied)).

1665. *Goss v. Hous. Cmty. Newspapers*, 252 S.W.3d 652, 657 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

1666. TEX. R. APP. P. 45, 62.

1667. *Masterson v. Hogue*, 842 S.W.2d 696, 698 (Tex. App.—Tyler 1992, no writ) (citing *Loyd Elec. Co., Inc. v. Millett*, 767 S.W.2d 476, 484 (Tex. App.—San Antonio 1989, no writ); *Trinity Universal Ins. Co. v. Farley*, 408 S.W.2d 776, 780 (Tex. App.—Tyler 1966, no writ)); *Smith*, 51 S.W.3d at 381; *Bradt*, 892 S.W.2d at 78; *Millett*, 767 S.W.2d at 484.

1668. *Tate v. E.I. Du Pont de Nemours & Co.*, 954 S.W.2d 872, 875 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (citing *Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302, 306 (Tex. App.—Houston [14th Dist.] 1995, no writ)); *accord City of Houston v. Precast Structures, Inc.*, 60 S.W.3d 331, 340 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (“Whether to grant sanctions is a matter of discretion, which we exercise with prudence and caution, and only after careful deliberation.” (citing *Angelou v. African Overseas Union*, 33 S.W.3d 269, 282 (Tex. App.—Houston [14th Dist.] 2000, no pet.))).

damages are not appropriate.¹⁶⁶⁹ 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.¹⁶⁷⁰ In the absence of some evidence showing that the appeal was taken in bad faith, or, for some courts, a lack of good faith,¹⁶⁷¹ "poor lawyering" alone is not a basis for sanctions.¹⁶⁷² However, the First Court of Appeals has held that "bad faith is not required under Rule 45[.]"¹⁶⁷³ "[W]hether the matter is groundless and thus without sufficient cause must be decided on the basis of objective legal expectations"¹⁶⁷⁴ There is not a consensus among the courts of appeals as to the standard applicable for imposing sanctions under Rule 45.¹⁶⁷⁵ Some of the principles applied include: "the appeal was taken

1669. *Gen. Elec. Credit Corp. v. Midland Cent. Appraisal Dist.*, 826 S.W.2d 124, 125 (Tex. 1991) (per curiam); *In re Marriage of Long*, 946 S.W.2d 97, 99 (Tex. App.—Texarkana 1997, no writ).

1670. *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).

1671. *See Campos v. Inv. Mgmt. Props., Inc.*, 917 S.W.2d 351, 356 (Tex. App.—San Antonio 1996, writ denied) (noting damages will be imposed for appeals not pursued in good faith).

1672. *See Morriss v. Enron Oil & Gas Co.*, 948 S.W.2d 858, 873 (Tex. App.—San Antonio 1997, no writ) (reasoning sanctions for "poor lawyering" would only punish the client). *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).

1673. *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' decisions that required good faith). *But see* *Compass Expl., Inc. v. B-E Drilling Co.*, 60 S.W.3d 273, 279 (Tex. App.—Waco 2001, no pet.) (stating bad faith is not required to find a frivolous appeal, but noting its relevance in determining damages).

1674. *Goad v. Goad*, 768 S.W.2d 356, 360 (Tex. App.—Texarkana 1989, writ denied) (per curiam). 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 "factors which tend to indicate an appeal was filed for delay and without sufficient cause").

1675. *See Beckner*, 74 S.W.3d at 105 (recognizing lack of uniformity of standard for imposing sanctions); *Compass Expl.*, 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

for delay and . . . there was no sufficient cause for appeal”;¹⁶⁷⁶ “the appellant ha[d] no reasonable expectation of reversal” *and* pursued the appeal in bad faith;¹⁶⁷⁷ the appellant had no “reasonable expectation of reversal *or* . . . pursued the appeal in bad faith”;¹⁶⁷⁸ the circumstances for taking the appeal “are truly egregious”;¹⁶⁷⁹ or the appeal is “objectively frivolous and injures the appellee.”¹⁶⁸⁰

Second, judicial resources are severely strained, and frivolous appeals seriously harm the orderly administration of justice by “divert[ing] scarce resources away from” cases deserving more attention.¹⁶⁸¹ One court has

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 (citing *In re S.R.M.*, 888 S.W.2d 267, 269 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Baw*, 949 S.W.2d at 687; *James v. Hudgins*, 876 S.W.2d 418, 424 (Tex. App.—El Paso 1994, writ denied)).

1676. See *Keever v. Finlan*, 988 S.W.2d 300, 315 (Tex. App.—Dallas 1999, pet. dism’d) (citing *Hudgins*, 876 S.W.2d at 424) (adopting old Rule 84 standards for new Rule 45).

1677. *Oaxaca*, 52 S.W.3d at 213; *Guajardo v. Conwell*, 30 S.W.3d 15, 18 (Tex. App.—Houston [14th Dist.] 2000) (per curiam), *aff’d*, 46 S.W.3d 862 (Tex. 2002) (per curiam); *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) (per curiam); *Herring v. Welborn*, 27 S.W.3d 132, 143 (Tex. App.—San Antonio 2000, pet. denied) (stating bad faith is a consideration in determining whether an appeal is frivolous).

1678. *Diana Rivera & Assocs., P.C. v. Calvillo*, 986 S.W.2d 795, 799 (Tex. App.—Corpus Christi 1999, pet. denied) (emphasis added) (citing *Tate*, 954 S.W.2d at 875).

1679. *Conseco Fin. Servicing v. Klein Indep. Sch. Dist.*, 78 S.W.3d 666, 676 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (citing *Angelou v. African Overseas Union*, 33 S.W.3d 269, 282 (Tex. App.—Houston [14th Dist.] 2000, no pet.)); see *Brazos Transit Dist. v. Lozano*, 72 S.W.3d 442, 445 (Tex. App.—Beaumont 2002, no pet.) (holding circumstances were not so egregious as to warrant sanctions).

1680. See *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) (first citing David Lopez, *Why Texas Courts Are Defenseless Against Frivolous Appeals: A Historical Analysis with Proposals for Reform*, 48 BAYLOR L. REV. 51, 147 (1996); then citing *Calvillo*, 986 S.W.2d at 799)); 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).

1681. *Campos v. Inv. Mgmt. Props., Inc.*, 917 S.W.2d 351, 357 (Tex. App.—San Antonio 1996, writ denied) (Green, J., concurring); see *Lewis v. Deaf Smith Elec. Coop., Inc.*, 768 S.W.2d 511, 514 (Tex. App.—Amarillo 1989, no writ) (stating a frivolous appeal “requires judicial time and effort that

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.¹⁶⁸² The court also noted that a bad result at the trial level is not, by itself, reason enough to appeal.¹⁶⁸³ In addition, the court observed that the decision to appeal “is not a mechanical exercise, but requires the dutiful application of lawyering skills.”¹⁶⁸⁴ While the old rules in effect at the time limited the court’s authority to deal with the problem,¹⁶⁸⁵ the court reaffirmed that the appellate courts “must not be hesitant to use the tools that we have.”¹⁶⁸⁶ “[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.”¹⁶⁸⁷ However, where a party’s argument on appeal fails to convince the appellate court, but “ha[s] a reasonable basis in law and constitute[s] an informed, good-faith challenge to a trial court judgment[,]” sanctions are not appropriate.¹⁶⁸⁸

would be better spent on meritorious cases” (quoting *Bainbridge v. Bainbridge*, 662 S.W.2d 655, 657–58 (Tex. App.—Dallas 1983, no writ)).

1682. *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, no pet.) (reiterating a decision to appeal should be based on professional judgment); *see* *Elm Creek Villas Homeowner Ass’n, Inc. 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.” *Id.*

1683. *See 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.”).

1684. *Id.* at 357.

1685. *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”); *id.* 62 (excluding language that would prevent the awarding of damages against attorneys).

1686. *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) (“Spurious litigation, unnecessarily burdening parties and courts alike, should not go unsanctioned.”).

1687. *In re S.B.C.*, 952 S.W.2d at 20 (quoting *Campos*, 917 S.W.2d at 356–57 (Green, J., concurring)).

1688. *Gen. Elec. Credit Corp. v. Midland Cent. Appraisal Dist.*, 826 S.W.2d 124, 125 (Tex. 1991) (per curiam).

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.¹⁶⁸⁹ In *Johnson v. Johnson*,¹⁶⁹⁰ 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.¹⁶⁹¹ 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.¹⁶⁹² Subsequently, in *In re Maloney*,¹⁶⁹³ an attorney was ordered to answer a show cause order of the Fourth 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[.]"¹⁶⁹⁴ The court held:

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.¹⁶⁹⁵

1689. 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" (first quoting *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979); then citing *Kutch v. Del Mar College*, 831 S.W.2d 506, 509–10 (Tex. App.—Corpus Christi 1992, no writ)); *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. App.—Galveston 1915, no writ))).

1690. *Johnson v. Johnson*, 948 S.W.2d 835 (Tex. App.—San Antonio 1997, writ denied).

1691. *Id.* at 840 n.1.

1692. *Id.* at 841.

1693. *In re Maloney*, 949 S.W.2d 385 (Tex. App.—San Antonio 1997, orig. proceeding) (en banc) (per curiam).

1694. *Id.* at 386 (first alteration in original).

1695. *Id.* at 388.

The court held the attorney's comments in her "original motion for rehearing and 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.¹⁶⁹⁶

In *Merrell Dow Pharmaceuticals, Inc. v. Havner*,¹⁶⁹⁷ the Texas Supreme Court was confronted with a similar attack on the integrity of the court.¹⁶⁹⁸ 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."¹⁶⁹⁹ The court added: "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process."¹⁷⁰⁰ 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

1696. *Id.* (citing TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.02(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9)).

1697. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997).

1698. *See 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* 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").

1699. *Havner*, 953 S.W.2d 706, 732 (first quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); then citing *Pub. Util. Comm'n of Tex. v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988); *Johnson*, 948 S.W.2d at 840–41).

1700. *Id.* at 733 (quoting TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 1, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9)).

Grievance Committee.¹⁷⁰¹

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.¹⁷⁰² 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.”¹⁷⁰³ In fact, “conclusions of law in a nonjury trial are reviewable . . . [even] without preservation” under Texas Rule of Appellate Procedure 33.1.¹⁷⁰⁴ “Conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence”¹⁷⁰⁵ “Conclusions of law . . . will not be reversed unless they are erroneous as a matter of law.”¹⁷⁰⁶ In addition, a trial court’s conclusions of law are reviewed de novo as legal questions,¹⁷⁰⁷ and the reviewing court affords no deference to the lower court’s

1701. *Id.* at 732–33.

1702. *See id.* (acknowledging 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).

1703. *Spiller v. Spiller*, 901 S.W.2d 553, 556 (Tex. App.—San Antonio 1995, writ denied) (citing *Westech Eng’g, Inc. v. Clearwater Constructors, Inc., a Div. of Phelps, Inc.*, 835 S.W.2d 190, 196 (Tex. App.—Austin 1992, no writ)); *Alan Reuber Chevrolet, Inc. v. Grady Chevrolet, Ltd.*, 287 S.W.3d 877, 883 (Tex. App.—Dallas 2009, no pet.) (citing *Spiller*, 901 S.W.2d at 556).

1704. *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), *rev’d*, 146 S.W.3d 637 (Tex. 2004); *Regan v. Lee*, 879 S.W.2d 133, 136 (Tex. App.—Houston [14th Dist.] 1994, no writ) (per curiam) (noting 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).

1705. *Tex. Dep’t of Pub. Safety v. Stockton*, 53 S.W.3d 421, 423 (Tex. App.—San Antonio 2001, pet. denied); *accord Charette v. Fitzgerald*, 213 S.W.3d 505, 511 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (stating when an appellate court will uphold conclusions of law).

1706. *Stockton*, 53 S.W.3d at 423 (citing *Spiller*, 901 S.W.2d at 556); *accord State v. Harrell Ranch, Ltd.*, 268 S.W.3d 247, 253 (Tex. App.—Austin 2008, no pet.) (explaining when an appellate court will reverse a trial court’s conclusions of law).

1707. *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002); *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996); *Alan Reuber Chevrolet*, 287 S.W.3d at 883.

decision.¹⁷⁰⁸ Under de novo review, the reviewing court exercises its own judgment and redetermines each legal issue.¹⁷⁰⁹ Incorrect conclusions of law will not require a reversal if the controlling finding of facts support a correct legal theory.¹⁷¹⁰

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.¹⁷¹¹ 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.¹⁷¹² Appellate advocates and courts should be careful to 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.¹⁷¹³ The doctrine makes sense. It would be a waste of judicial

1708. *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.

1709. *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.

1710. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).

1711. 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).

1712. 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) (illustrating the complexity of error preservation).

1713. *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) (per curiam); *McInnes v. Yamaha Motor Corp., U.S.A.*, 673 S.W.2d 185, 188 (Tex. 1984).

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.¹⁷¹⁴

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 reversible error.¹⁷¹⁵ 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.¹⁷¹⁶ As the Fifth Circuit explained:

1714. *Tiltizer*, 171 S.W.3d at 862.

1715. *See* TEX. R. APP. P. 44.1(a)(1)–(2) (stating 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”); *id.* 61.1 (providing the same language for reversible error as Texas Rule of Appellate Procedure 44.1, but applicable to the supreme court).

1716. *See* *Miles v. M/V Miss. Queen*, 753 F.2d 1349, 1352 (5th Cir. 1985) (recognizing error to be present and properly preserved, but not affecting the substantial rights of the parties so as to warrant reversal).

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.¹⁷¹⁷

Stated another way, litigants are “entitled to a fair trial[,] . . . not a perfect one[.]”¹⁷¹⁸

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].”¹⁷¹⁹

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.¹⁷²⁰ 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?¹⁷²¹ If the reviewing court answers in the affirmative, then the error is reversible; if not, the error is harmless.

1717. *Id.*

1718. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) (quoting *Brown v. United States*, 411 U.S. 223, 231–232 (1973)).

1719. 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 “[t]he harmless error standard [was] . . . recodified without substantive change as [Texas Rule of Appellate Procedure 44.1]” (citing TEX. R. APP. P. 44.1, 61.1)); *Franco v. Franco*, 81 S.W.3d 319, 343 (Tex. App.—El Paso 2002, no pet.) (stating 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 cumulative.” *Id.* at 344 (citing *Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994)). *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).

1720. *See* TEX. R. APP. P. 44.1 (using the word “probably”); *see also* *Tex. Power & Light Co. v. Hering*, 224 S.W.2d 191, 192 (Tex. 1949) (recognizing the complaining party must show at least that the error “probably resulted” in prejudice instead of a “but for the erroneous ruling” query).

1721. *E.g.*, *King v. Skelly*, 452 S.W.2d 691, 696 (Tex. 1970) (declaring reversal should not occur unless the erroneous admission “was calculated to and probably did cause the rendition of an improper

The harmless error rule applies to all errors.¹⁷²² 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.¹⁷²³ 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[.]"¹⁷²⁴ This determination is a judgment call delegated to the reviewing court's "sound discretion and good sense" upon evaluation of the entire case.¹⁷²⁵

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

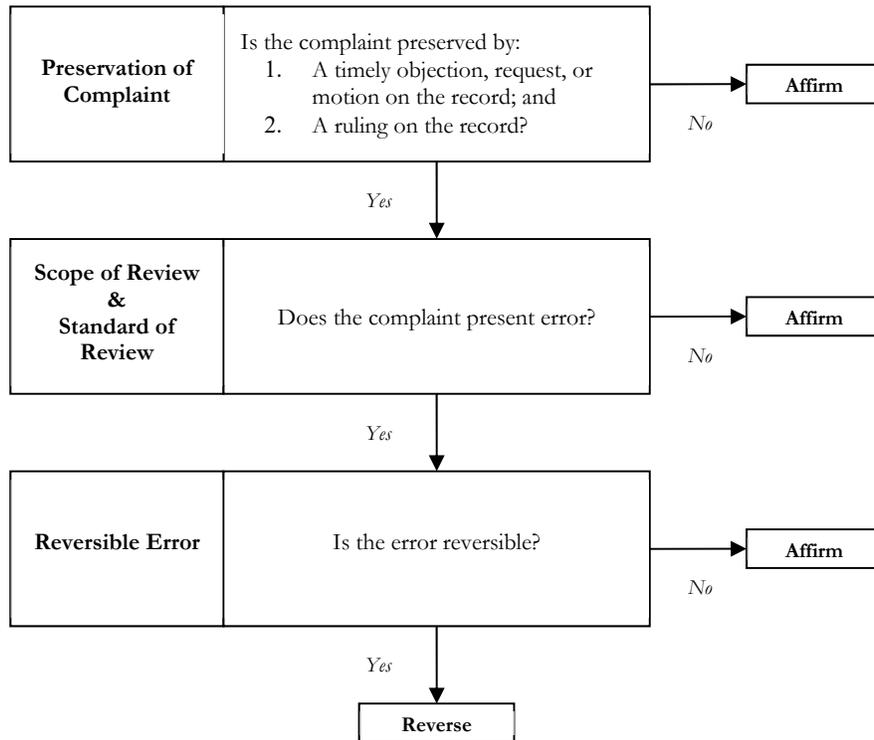
judgment"); *Aultman v. Dallas Ry. & Terminal Co.*, 260 S.W.2d 596, 599 (Tex. 1953) (reiterating the "probably did cause" standard).

1722. *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).

1723. *Lorusso*, 603 S.W.2d at 820–21.

1724. *Id.* at 820 (quoting *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914 (Tex. 1979)).

1725. *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.¹⁷²⁶ 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.”¹⁷²⁷ 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.”¹⁷²⁸ While a party may raise fundamental error for the first time

1726. *Jones v. Black*, 1 Tex. 527, 530 (1846); see *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).

1727. *Jones*, 1 Tex. at 530.

1728. *In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003) (citing *McCauley v. Consol. Underwriters*, 304 S.W.2d 265, 266 (Tex. 1957) (per curiam)); see *Cent. Educ. Agency v. Burke*, 711 S.W.2d 7, 8–9 (Tex. 1986) (per curiam) (discussing the applicability of the fundamental error principle). *But see Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam) (reasoning error preservation avoids surprising the opponent and decrying the ability of appellate courts to consider unassigned errors).

on appeal,¹⁷²⁹ it is used very infrequently¹⁷³⁰ and has been called “a discredited doctrine.”¹⁷³¹ Fundamental error survives only in those rare situations in which the appellate record shows on its face that the court lacked jurisdiction¹⁷³² or that public policy or public interest would be directly and adversely affected.¹⁷³³

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.¹⁷³⁴ The doctrine is seldom used to reverse a case.¹⁷³⁵ Generally, appellants make the mistake of simply restating their complaints in one final issue.¹⁷³⁶

1729. *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, judgment vacated w.r.m.) (requiring error preservation).

1730. *See Am. Gen. Fire & Cas. Co. v. Weinberg*, 639 S.W.2d 688, 689 (Tex. 1982) (“Fundamental error has become a rarity.”).

1731. *In re B.L.D.*, 113 S.W.3d at 350 (quoting *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982) (per curiam)).

1732. *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); *McCaughey*, 304 S.W.2d at 266 (holding a lack of jurisdiction as fundamental error can be considered by the court without preservation of error).

1733. *See In re J.F.C.*, 96 S.W.3d 256, 293 (Tex. 2002) (Hankinson, J., dissenting) (arguing the doctrine should apply to involuntary termination of parental rights cases as a matter of public policy); *In re C.O.S.*, 988 S.W.2d 760, 767 (Tex. 1999) (concluding the fundamental error standard is to be used in matters of public policy); *Ramsey v. Dunlop*, 205 S.W.2d 979, 985 (Tex. 1947) (Alexander, J., concurring) (stating the court is authorized to reverse a judgment of fundamental error if it involves a “matter of public interest”).

1734. *See Scoggins v. Curtiss & Taylor*, 219 S.W.2d 451, 453–54 (Tex. 1949) (stating acts of misconduct, when taken together, probably caused the rendition of an improper verdict); *Smerke v. Office Equip. Co.*, 158 S.W.2d 302, 305 (Tex. 1941) (expressing the errors, taken in the aggregate, probably caused the rendition of an improper verdict).

1735. *See Strange v. Treasure City*, 608 S.W.2d 604, 609 (Tex. 1980) (concluding 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).

1736. *See Crescendo Invs., Inc. v. Brice*, 61 S.W.3d 465, 481 n.16 (Tex. App.—San Antonio 2001, pet. denied) (expressing that some cases refuse to discuss cumulative error points as redundant); *Sanchez ex rel. Estate of Galvan v. Brownsville Sports Ctr., Inc.*, 51 S.W.3d 643, 667 (Tex. App.—Corpus Christi 2001, pet. granted) (declining to address each point of error because appellant simply restated the issues in raising cumulative error).

Reversal based upon cumulative error is predicated upon meeting the standards of reversible error in Rule 44.1.¹⁷³⁷ 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.”¹⁷³⁸ The cumulative error doctrine “infrequently finds favor with appellate courts[,]”¹⁷³⁹ and it “has evolved almost exclusively in cases involving [improper] jury argument or jury misconduct.”¹⁷⁴⁰

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 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

1737. 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).

1738. *McCormick*, 751 S.W.2d at 892.

1739. *Ramirez*, 79 S.W.3d at 125 (citing *Brice*, 61 S.W.3d at 481 n.16).

1740. *Town E. Ford Sales, Inc. v. Gray*, 730 S.W.2d 796, 809–10 (Tex. App.—Dallas 1987, no writ).

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.