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CIVIL PROCEDURE: APPELLATE PRACTICE AND PROCEDURE

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I. INTRODUCTION

AS in years past, the Texas Supreme Court's bent continues to be towards preserving appellate rights. In cases decided during the Survey period, the supreme court required a trial court order to be clearly final in order to trigger appellate deadlines,[1] and it liberally construed briefs on appeal in order to reach the merits.[2] The supreme court also refused to find that an appellant waived his right to recoup a paid judgment when he reserved his right to appeal the judgment and equitable restitution required repayment.[3] In addition, the supreme court granted mandamus relief using standards arguably less stringent than historically required for obtaining such relief.[4] In the Survey period, the supreme court also enforced the statutory right to interlocutory appeal in health-care-liability cases.[5]

II. FINALITY OF JUDGMENTS

During the Survey period,[6] the Texas Supreme Court revisited the analysis for determining whether an order is appealable.[7] In *Crites v. Collins*, the plaintiffs in a health-care-liability lawsuit nonsuited their claims against the doctor after they failed to comply with the 120-day deadline for serving a medical-expert report.[8] The trial court entered an order of nonsuit. However, before that order was entered, the doctor filed a motion to dismiss with prejudice and sought attorneys' fees and costs as sanctions. One month after entering the order of nonsuit, the trial court denied the doctor's motion to dismiss and motion for sanc-

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1. *See* Crites v. Collins, 284 S.W.3d 839, 841 (Tex. 2009) (per curiam).
2. *See, e.g.*, Ditta v. Conte, 298 S.W.3d 187, 190 (Tex. 2009).
3. *See* Miga v. Jensen, 299 S.W.3d 98, 101-03, 105 (Tex. 2009).
4. *See In re* Columbia Med. Ctr., 290 S.W.3d 204, 209-10 (Tex. 2009).
5. *See, e.g.*, Badiga v. Lopez, 274 S.W.3d 681, 685 (Tex. 2009).
6. The Survey period runs from November 1, 2008, to October 31, 2009.
7. *See generally* Crites v. Collins, 284 S.W.3d 839 (Tex. 2009) (per curiam).
8. *Id.* at 840; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (Vernon 2005).

tions.[9] Challenging this decision, the doctor filed her notice of appeal more than thirty days after the order of nonsuit but within thirty days of the order denying her motion to dismiss.

To determine whether the court of appeals had jurisdiction over the doctor's appeal, the supreme court analyzed which order—the order of nonsuit or the order denying attorneys' fees and sanctions—triggered the thirty-day filing period for her notice of appeal.[10] The supreme court focused on whether the express language of the order of nonsuit disposed of all claims against all parties.[11] The supreme court held it did not.[12] The order of nonsuit stated only that the cause was dismissed as to the defendant doctor and did not mention the doctor's motion to dismiss, which was pending at the time of the order of nonsuit.[13] The supreme court's holding turned on the absence of language in the order of nonsuit unequivocally expressing an intent for the order to be a final and appealable order, as well as its failure to address all pending claims.[14] Accordingly, the doctor's notice of appeal filed within thirty days of the order denying her motion to dismiss and for sanctions was timely.[15]

Whether a judgment is final for purposes of appeal may be difficult to determine. However, in *Crites*, the supreme court provided further guidance for understanding the proper application of *Lehmann v. Har-Con Corp.*[16] The supreme court's analysis focused on whether the trial court unequivocally expressed an intent to dispose of all claims and all parties in the order on appeal.[17] Accordingly, when drafting a proposed order, practitioners should carefully assess whether an unequivocal statement reflecting such an intent is appropriate.

III. MANDAMUS

During the Survey period, the Texas Supreme Court expounded on the standards for obtaining mandamus relief in the wake of its decision in *In re Prudential Insurance Co. of America.*[18] In *Columbia Medical Center*, the supreme court analyzed whether mandamus relief was available when a trial court granted a new trial "in the interests of justice and fairness" without stating the reasons for doing so.[19] In that case, the trial court granted a new trial without explanation after the jury returned a unanimous verdict in favor of the defendants following a four-week trial.[20] The

9. *Crites*, 284 S.W.3d at 840.
10. *Id.*
11. *Id.* at 841.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 840-41 (citing *Lenmann*, 39 S.W.3d 191, 195, 199-200 (Tex. 2001)).
17. *See id.* at 841.
18. *See generally In re* Columbia Med. Ctr., 290 S.W.3d 204 (Tex. 2009) (citing *Prudential*, 148 S.W.3d 124 (Tex. 2004)).
19. *Id.* at 206.
20. *Id.*

supreme court acknowledged that its prior decisions generally preclude appellate review of orders granting new trials.[21] The supreme court concluded, however, that the circumstances before it were sufficiently exceptional to justify mandamus review.[22] The supreme court focused on the significance of the issue in the case—protecting a party's right to a jury trial—and the absence of any avenue to appeal the trial court's refusal to explain why it set aside the verdict and granted a new trial.[23] Specifically, even if the defendants could obtain appellate review of the new trial order following an unfavorable verdict in a second trial, they "would have lost the benefit of a final judgment based on the first jury verdict without ever knowing why, and would have endured the time, trouble, and expense of the second trial."[24] These circumstances demonstrated no adequate remedy by appeal, warranting mandamus relief.[25]

Columbia Medical Center demonstrates the supreme court's continued willingness to consider the unique circumstances of a case for purposes of determining whether mandamus relief is appropriate.[26] Although such relief is still difficult to obtain, the standards articulated by the supreme court since its opinion in *Prudential*[27] provide greater potential for doing so.

IV. INTERLOCUTORY APPEALS

Under the Medical Liability Insurance Improvement Act (MLIIA), the claimant in a health-care-liability case is required to serve on the defendant an expert report within 120 days of filing suit.[28] If he files a report within that timeframe, but it is deficient, the trial court may grant one thirty-day extension to allow him to cure the deficiency.[29] If the claimant fails to file any report whatsoever within the 120 days, the trial court, on the motion of the defendant, "shall" (i) award the defendant "reasonable attorney's fees and costs of court" and (ii) dismiss the claim against the defendant with prejudice.[30] If the trial court denies "all or part" of this relief, the defendant has the right to an interlocutory appeal.[31] However, there is no interlocutory appeal from a trial court's order granting a thirty-day extension in situations where the claimant files a report but it is deficient.[32]

In 2007, the Texas Supreme Court addressed whether an interlocutory appeal is available from a trial court's denial of a motion to dismiss,

21. *Id.* at 208.
22. *Id.* at 209.
23. *Id.* at 209-10.
24. *Id.*
25. *Id.*
26. *See generally id.* at 208-10.
27. *See generally In re* Prudential Ins. Co. of Am., 148 S.W.3d 124 (Tex. 2004).
28. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon 2005).
29. *Id.* § 74.351(c).
30. *Id.* § 74.351(b).
31. *Id.* § 51.014(a)(9).
32. *Id.*

where the claimant filed a deficient report within the 120-day time period and the trial court granted a thirty-day extension of time to cure the deficiency.[33] The supreme court concluded that no interlocutory appeal was available in those circumstances, because the denial of the motion to dismiss and the grant of a time extension to cure the timely but deficient report were inseparable for purposes of an appeal.[34]

During the Survey period, the Texas Supreme Court further clarified the right to an interlocutory appeal in the health-care-liability context.[35] In *Badiga*, the supreme court analyzed whether an interlocutory appeal from the denial of a motion to dismiss is permitted when the trial court grants an extension to the claimant even though the claimant served no expert report whatsoever within the 120-day period.[36] The supreme court made clear that "a deficient report differs from an absent report" and concluded that interlocutory appeal is permitted in this situation.[37] The supreme court explained that the "purpose of the ban on interlocutory appeals for extensions is to allow plaintiffs the opportunity to cure defects in *existing* reports."[38] Permitting immediate appeal of the denial of a motion to dismiss when a timely but deficient report is served and the trial court has granted an extension makes no sense because "the court of appeals would be reviewing the report's sufficiency while its deficiencies were presumably being cured in the trial court."[39] In contrast, allowing an immediate appeal of the trial court's refusal to dismiss even when the trial court has granted an extension of time makes sense where there is no timely expert report because there is no report for the claimant to cure.[40] "If an interlocutory appeal were not allowed, a claimant who ignores the 120 day deadline could obtain an *unreviewable* thirty day extension plus whatever amount of time it took the trial court to rule on the extension motion."[41] Accordingly, the prohibition on interlocutory appeals from an order granting an extension does not apply when no expert report has been served.[42]

If a defendant in a health-care-liability suit does have a right to an interlocutory appeal but fails to take advantage of it, does he waive the right to challenge the order if the claimant later nonsuits the case and final judgment is entered? In *Hernandez v. Ebrom*,[43] the Texas Supreme Court answered this question "no." In *Hernandez*, the trial court denied the defendant doctor's motion to dismiss that asserted the claimant's expert report was deficient. Six months later, the claimant filed a notice of

33. Ogletree v. Matthews, 262 S.W.3d 316, 317 (Tex. 2007).
34. *Id.* at 321.
35. *See generally* Badiga v. Lopez, 274 S.W.3d 681 (Tex. 2009).
36. *Id.* at 682.
37. *Id.* at 684 (quoting *Ogletree*, 262 S.W.3d at 320).
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* (emphasis added).
42. *Id.* at 685.
43. 289 S.W.3d 316, 317 (Tex. 2009).

nonsuit, and the trial court dismissed the case with prejudice.[44]

The doctor then "appealed the trial court's denial of his earlier motion to dismiss" and "sought his attorney's fees," as provided by the MLIIA.[45] The claimant argued on appeal that the doctor had waived his complaints about the expert report by failing to pursue the interlocutory appeal permitted by statute.[46] The supreme court disagreed, focusing on the permissive language of the interlocutory-appeal statute, which "provides that a person 'may' appeal from an interlocutory order that 'denies all or part of the relief sought by a motion [to dismiss].'"[47] The supreme court concluded that, by this language, the legislature *authorized* interlocutory appeals but did not effectively *mandate* them by providing that waiver would result if no appeal were taken.[48]

By preserving the health-care-liability defendant's right to an interlocutory appeal, these cases reflect the supreme court's continued careful consideration of the legislative purpose behind the health-care-liability statutes—to "deter[ ] claimants from filing meritless suits."[49]

V. PAYMENT OF JUDGMENT

To avoid "the accumulation of post-judgment interest," a judgment "debtor may pay the judgment outright."[50] However, doing so is not without risk—it could preclude the "judgment debtor's ability to recoup the . . . payment when [his] appeal is successful."[51] The Texas Supreme Court analyzed this issue during the Survey period and held that, under the circumstances of the case, the judgment debtor was entitled to restitution of the difference between the money paid and amount of judgment after it was reduced on appeal.[52] In *Miga*, the judgment debtor paid the judgment creditor $23 million to halt accrual of prejudgment interest pending appeal. His successful appeal resulted in the reduction of the judgment to $1.8 million. Thereafter, he sought restitution of $21 million—the difference between the amount paid to the judgment creditor and the amount owed under the modified judgment.[53] The judgment creditor refused to tender that amount, arguing that the parties' agreement relating to the judgment debtor's payment of the judgment precluded restitution, the voluntary-payment rule barred restitution, and the judgment creditor's payment of income taxes on the judgment amount precluded restitution. The supreme court rejected all three arguments.[54]

The supreme court first noted that "[r]estitution after reversal has long

44. *Id.*
45. *Id.; see* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b) (Vernon 2005).
46. *See* § 51.014(a)(9).
47. *Hernandez*, 289 S.W.3d at 318.
48. *Id.* at 319.
49. *Id.*
50. Miga v. Jensen, 299 S.W.3d 98, 100 (Tex. 2009).
51. *Id.*
52. *Id.* at 101, 105.
53. *Id.* at 101.
54. *Id.* at 102-03, 105.

been the rule in Texas and elsewhere."[55] The question was whether the "case present[ed] . . . an exception to that rule."[56] As an initial matter, the supreme court rejected the judgment creditor's argument that the parties' agreement regarding payment of the judgment precluded restitution.[57] The parties entered into an agreed order under which the judgment debtor made "an unconditional tender [to the judgment creditor] . . . of the sum of [$23 million] . . . toward satisfaction of the Judgment in order to terminate the accrual of post-judgment interest on that sum."[58] The supreme court held that the judgment debtor's reservation of his right to appeal in the agreed order implicitly reserved the right to the refund of the money in the event the judgment were reversed.[59]

The supreme court similarly held that the voluntary-payment rule did not preclude restitution, because the judgment debtor "never led [the judgment creditor] . . . to believe the matter was closed"—instead he pursued his appeal and "stated [his] intent to seek restitution if [his] appeal was successful."[60] Finally, the supreme court rejected the argument that the judgment creditor's payment of $5 million in income taxes on the judgment amount precluded restitution.[61] The supreme court reasoned:

> [The judgment creditor's] obligation arose because he exercised control over [the judgment debtor's] [$23 million] tender. Well aware that [the judgment debtor] would continue his appellate fight to reverse the judgment, [the judgment creditor] could have opted to decline the payment and await the appellate outcome. Instead, [the judgment creditor] gambled on the strength of his appeal. [The judgment debtor's] ultimate success meant that the multimillion dollar trial court judgment was, in large part, erroneous. Prohibiting restitution would penalize [the judgment debtor] for the court's mistake and is inimical to the unjust enrichment principles underlying the doctrine. We can no more fault [the judgment debtor] for his dogged pursuit of an appellate remedy than reward [the judgment creditor] for wagering on an affirmation of the judgment.[62]

The supreme court concluded that, as a matter of law, "restitution comports with the equities."[63]

As this case demonstrates, the supreme court continues to protect a party's effort to pursue an appeal. However, practitioners should be careful in structuring any payment of a judgment headed for appeal by expressly reserving the right both to appeal and to a refund of the money; practitioners should not rely on equitable principles to obtain a refund of the judgment after success on appeal.

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55. *Id.* at 101.
56. *Id.* at 102.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 103.
61. *Id.* at 105.
62. *Id.*
63. *Id.*

VI. WAIVER ON APPEAL

In two cases decided during the Survey period, the Texas Supreme Court noted that appellate briefs should be construed "reasonably, yet liberally," so that the right to appellate review is not lost by waiver.[64] In *Perry v. Cohen*, the trial court dismissed all of the plaintiffs' claims with prejudice for failure to comply with a prior special-exceptions order that directed the plaintiffs to replead certain matters.[65] On appeal, the plaintiffs challenged the merits of the special-exceptions order in the body of their appellate brief but did not separately and specifically challenge the order in their notice of appeal or in the "issues presented" section of their appellate brief.[66] Rather, their notice of appeal and issues presented simply challenged the trial court's order of dismissal.[67] The supreme court held that the plaintiffs preserved error with respect to the special-exceptions order, citing Texas Rule of Appellate Procedure 38.1(f), which provides, "The statement of an issue or point will be treated as covering every subsidiary question that is fairly included."[68] The supreme court also noted that "dispos[al] of appeals for harmless procedural defects is disfavored."[69]

The supreme court reached a similar conclusion in *Ditta v. Conte*,[70] where the issue on appeal was whether a statute of limitations should apply to a trustee-removal suit. Although the petitioner's brief did not make the precise argument that no limitations period should apply to the removal action, his brief "assiduously detailed numerous reasons why the statute of limitations should not apply to his action."[71] The supreme court broadly construed the petitioner's issues to encompass the statute of limitations issue, noting that "an appellate court can reach the merits of an appeal whenever it is 'reasonably possible' to do so."[72] The supreme court also stated that "[w]hen . . . the only issue is the law question of which statute of limitations applies, the court of appeals should apply the correct limitations statute even if the appellee does not file any brief."[73]

Generally speaking, in order to preserve a complaint for appellate review, the record must show that the complaint was made to the trial court and that the trial court ruled or refused to rule on the request.[74] However, when the trial court renders judgment non obstante veredicto, and the losing party appeals, the prevailing party may also appeal and present

64. *See* Ditta v. Conte, 298 S.W.3d 187, 190 (Tex. 2009); Perry v. Cohen, 272 S.W.3d 585, 587 (Tex. 2008) (per curiam).
65. 272 S.W.3d at 586.
66. *Id.* at 588.
67. *Id.* at 587.
68. *Id.* (citing TEX. R. APP. P. 38.1(f)).
69. *Id.*
70. 298 S.W.3d 187, 189 (Tex. 2009).
71. *Id.* at 189-90.
72. *Id.* at 190 (quoting *Perry*, 272 S.W.3d at 587).
73. *Id.* (quoting Williams v. Khalaf, 802 S.W.2d 651, 658 (Tex. 1990)).
74. TEX. R. APP. P. at 33.1(a).

points or issues on *any ground* that would either vitiate the verdict or preclude affirming the judgment and reinstating the verdict, including grounds not raised in the motion for judgment notwithstanding the verdict.[75]

Texas Rule of Appellate Procedure 53.4 provides that "to request that the Supreme Court consider [points briefed in the court of appeals but not decided by that court], a party may raise those issues or points in the petition, the response, the reply, any brief, or a motion for rehearing."[76] Thus, in *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, the issue of whether there was legally sufficient evidence to support the intent element of the petitioner's fraud claim was not waived by the respondent's failure to raise this alternative ground for affirmance as a cross-point in its response to the petition for review.[77] The intent element was not considered by the court of appeals; however, the respondent raised that issue before the court of appeals and in its brief on the merits before the Texas Supreme Court. Accordingly, the point was not waived.[78]

In *Gardner v. U.S. Imaging, Inc.*,[79] the Texas Supreme Court confirmed the well-established rule that "[a] party seeking affirmance need not request the lesser included relief of remand."[80] In that case, the defendants objected to the plaintiffs' expert report and moved for dismissal of the lawsuit under the health-care-liability statute.[81] "The trial court, presumably finding that the report complied with the statute, denied the defendants' motions to dismiss."[82] The court of appeals reversed on the ground that the report was deficient and remanded the case for an award of attorneys' fees and costs.[83] In their motion for rehearing to the court of appeals, the plaintiffs argued that, in light of prior supreme court precedent,[84] the court of appeals should have also remanded the case for consideration of whether the plaintiffs were entitled to a thirty-day extension to cure their report.[85] The supreme court noted that the plaintiffs were not required to raise their request for remand earlier than in their motion for rehearing.[86] Rather, the plaintiffs' request for affirmance of the trial court's decision was sufficient to preserve the lesser included relief of remand.[87]

The determination of whether, where, and when an argument must be made in order to preserve it for appeal can be complicated. As indicated

75. TEX. R. APP. P. 38.2(b); Ingram v. Deere, 288 S.W.3d 886, 893 (Tex. 2009).
76. TEX. R. APP. P. 53.4.
77. 297 S.W.3d 768, 774 n.5 (Tex. 2009) (per curiam).
78. *Id.*
79. 274 S.W.3d 669, 671 n.1 (Tex. 2008) (per curiam).
80. Martinez-Partido v. Methodist Specialty & Transplant Hosp., 267 S.W.3d 881, 882 (Tex. 2008) (per curiam).
81. *Gardner*, 274 S.W.3d at 670.
82. *Id.*
83. *Id.*
84. *See* Leland v. Brandal, 257 S.W.3d 204, 208 (Tex. 2008).
85. *Gardner*, 274 S.W.3d at 670-71.
86. *Id.* at 671 n.1.
87. *Id.*

above, the Texas Supreme Court is generally willing to construe appellate briefs in a liberal manner in order to reach the merits of an appeal.[88] Moreover, in certain limited situations, an argument need not have been urged or directly considered below in order for it to be properly considered on appeal.[89] In every case, however, practitioners should take care to ensure that their appellate briefs contain every required argument for appeal in order to avoid waiver. This will necessarily involve a careful review of the Texas Rules of Appellate Procedure and relevant case law.

VII. DISPOSITION ON APPEAL

In *City of Houston v. Trail Enterprises, Inc.*, the Texas Supreme Court reversed the court of appeals' rendition of judgment on a jury verdict "[b]ecause the trial court never entered a final judgment on the jury verdict."[90] In that case, the trial court held a bifurcated trial, finding liability and awarding damages.[91] Before entering final judgment on the jury verdict, though, "the trial court granted the [defendant's] motion for summary judgment on ripeness grounds . . . and ordered the case dismissed without prejudice for lack of jurisdiction."[92] The court of appeals concluded that the action was ripe and rendered judgment on the verdict for the plaintiffs.[93] The supreme court, however, determined that it was error for the court of appeals to render judgment on the verdict "because the trial court relied only on the jurisdictional ripeness issue in disposing of the case."[94] By rendering judgment on the verdict, the supreme court explained, the court of appeals effectively "prevent[ed] the [defendant] from properly challenging the judgment" under the relevant Rules of Civil Procedure.[95] Accordingly, remand to the trial court was necessary.[96]

In *Edwards Aquifer Authority v. Chemical Lime, Ltd.*, the Texas Supreme Court stated that:

> Whether, as a general matter, an appellate court's decision takes effect the moment the court issues its opinion, order, or judgment, or later when rehearing is denied or the time for rehearing expires, or still later when the clerk issues the mandate, is a difficult question under Texas law and procedure.[97]

Importantly, however, the Supreme Court in *Edwards* also confirmed that in the situation where "an appellate court expressly states the time

88. *See, e.g.*, Ditta v. Conte, 298 S.W.3d 187, 190 (Tex. 2009); Perry v. Cohen, 272 S.W.3d 585, 587 (Tex. 2008) (per curiam).
89. *See, e.g.*, TEX. R. APP. P. 38.2(b), 53.4.
90. 300 S.W.3d 736, 736 (Tex. 2009) (per curiam).
91. *Id.* at 737.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 736-37.
96. *Id.* at 737.
97. Edwards Aquifer Auth. v. Chem. Lime, Ltd., 291 S.W.3d 392, 393 (Tex. 2009).

for its decision to take effect, that statement controls."[98]

In *Dolgencorp of Texas, Inc. v. Lerma*, the Texas Supreme Court concluded that when the evidence is legally insufficient to support a postanswer default judgment, the proper disposition is to remand for a new trial, rather than reverse and render.[99] The supreme court recognized that "[g]enerally, if an appellate court holds there is legally insufficient evidence to support a judgment after a trial on the merits, the proper disposition is to reverse and render judgment."[100] Uncontested proceedings, however, present a different situation.[101] Because "uncontested proceedings are often abbreviated and perfunctory" and because an uncontested trial is less likely to result in a fully-developed factual record, the plaintiff should be afforded a second opportunity to present evidence in support of its claim, the supreme court explained.[102]

In *MBM Financial Corp. v. Woodlands Operating Co.*, the trial court awarded the plaintiff $1,000 as "actual damages in the form of nominal damages" on its breach of contract claim.[103] On appeal, the Texas Supreme Court first noted that, although nominal damages are generally available for breach of contract, $1,000 is not a "trifling sum" that would qualify as nominal damages.[104] Rather, the supreme court determined that, based on the appellate record, "the $1,000 damage award . . . [could not] be sustained as either actual or nominal damages."[105] On the issue of appellate disposition, the supreme court stated that "when there is some evidence to support an amount of actual damages," it will ordinarily remand for a new trial.[106] In the case at issue, however, "there was no evidence about the amount of damages at all."[107] Additionally, "where the record shows as a matter of law that the plaintiff is entitled only to nominal damages, the appellate court will not reverse merely to enable him to recover such damages."[108] Therefore, the supreme court "render[ed] judgment that the [plaintiff] take nothing as damages on its breach of contract claim."[109]

When the Texas Supreme Court sustains a no-evidence issue after a

98. *Id.*

99. 288 S.W.3d 922, 930 (Tex. 2009) (per curiam); *see also* Bennett v. McDaniel, 295 S.W.3d 644, 645 (Tex. 2009) (per curiam).

100. *Dolgencorp*, 288 S.W.3d at 929.

101. *Id.*

102. *Id.* at 929, 930. This rule also applies to cases where the plaintiff fails to present legally sufficient evidence at an uncontested hearing on unliquidated damages following a *no-answer* default judgment. *See* Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 86 (Tex. 1992).

103. 292 S.W.3d 660, 663 (Tex. 2009).

104. *Id.* at 664-65.

105. *Id.* at 666.

106. *Id.*

107. *Id.*

108. *Id.* (quoting Travelers Ins. Co. v. Employers Cas. Co., 380 S.W.2d 610, 614-15 (Tex. 1964)).

109. *Id.*

trial on the merits, it ordinarily renders judgment.[110] However, in *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development & Research Corp.*, the Texas Supreme Court confirmed that "when there is some evidence of damages, but not enough to support the full amount [found by the jury], it is inappropriate to render judgment."[111] "In such a situation, [the supreme court] may either remand the case to the court of appeals for a suggestion of remittitur or to the trial court for a new trial."[112]

As the foregoing cases illustrate, knowing the logistics of appellate disposition is crucial for practitioners. After all, there is no benefit to asking for relief that the appellate court cannot permissibly grant or to which the client is not entitled. It is equally important to know when an appellate court's decision takes effect, so that any postjudgment deadlines can be met.

VIII. CONCLUSION

Although the cases seem clear that the Texas Supreme Court will, when possible, preserve a party's effort to appeal—whether on the front end, by looking to see if the order on appeal is clearly final, or on the back end, by finding that the appellant implicitly reserved his right to be repaid the judgment upon success on appeal—the best approach is to use care in drafting orders, calculating appellate deadlines, drafting briefs, and otherwise preserving appellate rights.

110. *See, e.g.*, Guevara v. Ferrer, 247 S.W.3d 662, 670 (Tex. 2007); Texarkana Mem'l Hosp., Inc. v. Murdock, 946 S.W.2d 836, 841 (Tex. 1997).

111. 299 S.W.3d 106, 124 (Tex. 2009).

112. *Id.*